

Monika Tomaszewska  <https://orcid.org/0000-0001-5271-9998>

University of Gdansk

SELF-EMPLOYMENT AND LABOUR MARKET DECENTRALIZATION: LEGAL FRAMEWORKS AND CHALLENGES IN THE EUROPEAN UNION

Abstract

This article examines the stimuli and implications of the employment decentralization trend within the European Union, highlighting the spiral in self-employment. The demarcation between traditional dependent employment and self-employment has culminated in the evolution of distinct legal frameworks and protective measures. These frameworks traverse substantive labour laws, social security provisions, health insurance, and tax structures, each meticulously designed to cater to the specific needs and attributes of workers within these separate employment categories. Given the escalating prominence of the self-employment domain, there's an emerging imperative for a re-defined labour legislation strategy. This strategy aims to harmoniously combine freedoms and self-employment with the EU's foundational principles, including solidarity, equitable treatment, and robust social protection.

Słowa kluczowe: prawo do pracy, decentralizacja rynku pracy, nietypowa organizacja pracy, samozatrudnienie, zasada równości, ochrona zatrudnienia, dyrektywy, zakres stosowania dyrektyw

Keywords: right to work, decentralization of labour market, atypical work arrangements self-employment principle of equality, employment protection, scope of application of directives

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Introduction

The decentralization of employment, marked notably by the rise of self-employment, has emerged as a significant trend within the European Union (EU) countries.¹ This shift is

¹ EU laws and regulations provide a framework for self-employment and labour market decentralization. Key EU documents include the Small Business Act (COM/2008/0394 final) and the European Employment Strategy. The Small Business Act is based on 10 principles, which include access to finance, access to markets, and entrepreneurship.

propelled by a myriad of compelling factors. Among these, the promotion of policies aimed at enhancing flexibility, deregulation, and the expansion of various forms of non-standard employment over the years stands out. Notably, these policies have spurred entrepreneurialism, often viewed as evidence of resourcefulness and independence.

In dissecting the factors contributing to the decentralization of the labour market, the role of self-employment as a tool for mitigating unemployment cannot be overlooked. Self-employment enables individuals to carve out their own income-generating avenues, thereby playing a part in reducing unemployment rates. This facet highlights the multi-dimensional nature of self-employment as both an economic and social phenomenon. It plays a crucial role in steering policy direction at the EU level and reshaping the employment landscape within member states.

One challenge is striking a balance between promoting self-employment and ensuring adequate social protection and rights for self-employed workers. Further, the heterogeneous nature of self-employment across EU countries presents a challenge in harmonizing policies. This applies especially to the latest EU directives, which also cover persons with non-employee status.

1. The right to work in European Union legal frameworks

It is essential to emphasize the ongoing trend towards the decentralization of employment, which simultaneously poses a risk of segmenting the labour market. This trend persists despite the existence of a common legal framework within the European Union, deeply rooted in international human rights law and conventions aimed at ensuring the right to decent working conditions.

Such rights are universally recognized as fundamental human rights and have garnered widespread acknowledgment in the realm of international human rights law (Tomaszewska 2003). The United Nations' 1948 Universal Declaration of Human Rights provides explicit recognition, not only of the right to work but also the freedom to choose one's occupation. While the declaration itself isn't legally binding in the traditional sense, its principles are regarded as foundational for international human rights protection due to their inclusion in the 1966 Human Rights Covenants. Furthermore, the 1966 International Covenant on Economic, Social, and Cultural Rights reaffirms these rights, emphasizing the importance of promoting economic, social, and cultural development for society's sustainable progress. Collectively, these documents establish the foundation for the second generation of human rights that focus on labour and social rights, creating a comprehensive framework for work and social welfare rights.

Within the European Union, given the shared principles and values binding its member states, these rights assume even greater importance. The Court of Justice of the European Union (CJEU) has consistently emphasized the commitment of the EU's legal order to uphold human dignity as a foundational principle. In the Omega case, CJEU declared: "the Community legal order undeniably strives to ensure respect for human dignity as a general

principle of law.”² The general principles of EU law, as noted in landmark judgments in cases such as *Internationale Handelsgesellschaft* (11/70),³ *Nold v. Commission* (4/73),⁴ and *Hauer v. Land Rheinland-Pfalz* (44/79),⁵ derive from diverse sources, including global human rights standards that encompass rights related to the workplace. These principles are further grounded in the constitutional traditions and laws of the Member States.⁶

The European Union’s commitment to upholding labour rights is vividly demonstrated through its Charter of Fundamental Rights. The Charter, which has the same legal effect as the EU treaties, not only recognizes the right to work and the freedom to choose employment within the entirety of the EU but also places significant emphasis on the freedom to conduct business in accordance with both Union law and national laws and practices. Art. 15 of the Charter explicitly states that “Everyone has the right to work and to pursue a freely chosen or accepted occupation.”⁷ This provision draws inspiration from Art. 1, section 2 of the European Social Charter of the Council of Europe, a document ratified by every EU member state. In the case of *Association de médiation sociale v. Union locale des syndicats CGT and Others* (C-176/12),⁸ the CJEU explored the scope of the right to work, emphasizing the significance of this provision in the Charter. The judgment highlights the balance that must be struck between upholding fundamental rights and ensuring the smooth functioning of the internal market and other principles of EU law.

Further, Art. 16 of the Charter emphasizes the acknowledgement of the freedom to conduct business in line with Union law and national laws and practices. This provision is

² Judgment of the Court (First Chamber) of 14 October 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-09609, para. 91; Stefanicki 2011, pp. 23–37.

³ The CJEU held that fundamental rights form an integral part of the general principles of law, the protection of which the Court ensures. In safeguarding these rights, the Court draws inspiration from the constitutional traditions common to the Member States.

⁴ In this case CJEU elaborated on the principle outlined in the *Internationale Handelsgesellschaft* case, stating that in protecting fundamental rights, the Court would also be inspired by the guidelines provided by international instruments, especially the European Convention on Human Rights.

⁵ The CJEU reemphasized that the protection of fundamental rights is a principle of Community law, and in defining the content of those rights, the Court draws from the constitutional traditions of the Member States.

⁶ See case 44/76, *Hauer v. Land Rheinland-Pfalz*.

⁷ The European Union contributes to improving access to work by promoting a high level of employment, which is one of its objectives (Art. 3 of the Treaty on European Union) and one of the tasks entrusted to the EU (Art. 9 of the Treaty on the Functioning of the European Union). The Common Employment Strategy, launched in 1993 as a result of the Delors Report and enriched by the European Council meetings started from 1994, now manifests itself in the dialogue between the European Union and the Member States through the Commission, which evaluates national action plans (Committee for the Study of Economic and Monetary Union, *Report on Economic and Monetary Union in the European Community*, Luxembourg 1989, p. 18).

⁸ Judgment of the Court (Grand Chamber) of 15 January 2014, ECLI:EU:C:2014:2. The Court clarified that while the right to work is fundamental, it does not have an unlimited scope. The application of this right should be in coherence with other general principles of EU law, including the principle of freedom of contract and freedom of establishment.

distinct, differentiating the EU's approach from other international standards. In the case *Sky Österreich GmbH v. Österreichischer Rundfunk* (C-283/11), the CJEU examined the balance between the freedom to conduct a business and other fundamental right, thereby highlighting the complex interplay among them and the importance of Art. 16 in EU law system. Such a stance underlines the EU's commitment to promoting both individual labour rights and the economic liberties of businesses, presenting a unique EU approach to rights associated with labour and business within the global legal framework.⁹

In the European Union, the intersection of the internal market's functioning with fundamental rights has evolved to embody a distinct cross-border dimension. This interplay greatly aids the free movement of workers and services, acting as a driving force in abolishing employment-related discrimination within the single market. Situations that come within the substantive scope of EU law often revolve around the exercise of the fundamental freedoms enshrined in the Treaty, especially the right to move and reside freely across Member States.¹⁰

Building on the aforementioned rights from the Charter of Fundamental Rights, Art. 45 of the Treaty on the Functioning of the European Union (TFEU) solidifies the foundation of these principles. It ensures that EU citizens can freely choose where to work and live within the Union. With its direct effect,¹¹ Art. 45 grants individuals the substantive rights and strengthens the free movement of workers. It achieves this by dismantling barriers within the single market, thereby promoting equal employment opportunities and staunchly opposing all forms of employment-related discrimination. In light of the above mentioned case of *Association de médiation sociale v. Union locale des syndicats CGT and Others* (C-176/12), it becomes evident how the CJEU interprets and applies these provisions, striking a balance between upholding fundamental rights and ensuring the seamless functioning of the internal market.

The European Union, thus, crafts a *sui generis* legal framework, marked by its identity as an independent and supranational legal order. Yet, within this comprehensive system, a "community of law" emerges, intertwining with its Member States. A hallmark of this community of EU law is the assimilation of values derived from the constitutional tradition of the individual Member States, ensuring they are harmoniously integrated into the overarching EU legal structure. What worth emphasis at this point is the EU's unique approach to labour and economic rights.

⁹ Freedom of establishment is not included in many other international conventions. It is notably absent from the European Convention on Human Rights and the Social Charter of the Council of Europe. However, this right can be inferred from Art. 6 of the International Covenant on Economic, Social and Cultural Rights, which recognizes the right to obtain a means of subsistence through work that is freely chosen or accepted (see Miąsik 2019, p. 611).

¹⁰ As exemplified in judgment of the Court of 20 September 2001, C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECR 2001, I-06193, point 33; judgment of the Court of 11 July 2002, C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, ECR 2002, I-06191, point 29; judgment of the Court of 2 October 2003, C-148/02, *Carlos Garcia Avello v. Belgian State*, ECR 2003, I-11613, point 24.

¹¹ In many of its judgments, the ECJ has emphasized the direct effect of freedom of work. See judgment of the Court of 21 June 1974, 2/74, *Jean Reyners v. Belgian State*, ECR 1974, 00631.

These factors collectively highlight the intricate interplay of various legal orders, encompassing both international EU law and national law, in shaping working conditions within the European Union. The decentralization of employment, exemplified by self-employment, is expanding across EU countries within the context of a well-established legal framework rooted in human rights law. Despite the evolving nature of employment and the challenges posed by decentralization, these fundamental rights should remain unwavering, as they serve to establish a level playing field and promote fairness and equality in workplaces throughout the European Union.

Striking this balance is a nuanced endeavour. It necessitates a continuous reference to the evolving regulatory landscape and the prevailing socio-economic conditions. A notable illustration of these challenges is the much-discussed case of *Viking Line ABP v. International Transport Workers' Federation* (C-438/05). In this landmark ruling, the CJEU grappled with reconciling the right to collective action, which serves to safeguard workers' rights, with the principle of freedom of establishment. The Court emphasized the imperative to uphold all fundamental rights, encompassing both workers' and economic rights, even in the face of the multifaceted intricacies of the internal market.

2. Constitutional frameworks: analysis of selected EU countries

Within the constitutional frameworks of a majority of European Union (EU) member states, the fundamental rights pertaining to the right to work and the liberty to choose a profession are firmly enshrined.¹² An illustrative example of this can be found within the Belgian Constitution, specifically Art. 23. To this end, the laws, federate laws and rules referred to in Art. 134 of Belgian Constitution guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them. These constitutional provisions explicitly acknowledge the right to work and the freedom to select an occupation, emphasizing their role as integral components of a broader employment policy aimed at maintaining a stable and robust level of employment.¹³

The German constitutional principles of human dignity, human rights, and the welfare state are safeguarded by the so-called eternity guarantee, as outlined in Art. 79 section 3 of the Basic Law (*Grundgesetz*, GG). This guarantee ensures the permanent exclusion of their abolishment through legislative amendment. Within the framework of the German

¹² Comparative analysis was conducted as part of the research project: *Working Yet Poor*, <https://www.eapn.eu/working-yet-poor/>

¹³ These rights include among others: 1° the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation. See <http://fra.europa.eu/en/law-reference/belgian-constitution> (access: 31 January 2024) and NR (National Report) Belgium, p. 16.

Constitution, the concept of the welfare state encompasses various aspects, including the right to work. However, in the case of the right to work Constitution places a strong emphasis on the freedom aspect of this legal right. Art. 12 of the Basic Law explicitly guarantees that all Germans have the right to freely choose their occupation or profession, select their place of work, and determine their place of training and no person may be required to perform work.¹⁴

Among these EU countries, the Italian Constitution offers the most comprehensive protection for all forms of employment. Art. 35 of the Italian Constitution indicates the Republic of Italy's commitment to safeguarding work in all its manifestations, along with providing for the education, training, and professional advancement of workers.¹⁵ Significantly, this principle extends its protective umbrella not solely over employees but also encompasses self-employed workers. Furthermore, Art. 36 reinforces this commitment, establishing the right of workers to receive fair wages commensurate with the quality and quantity of their labour.¹⁶

The Luxembourg Constitution, similar to the aforementioned constitutions, enshrines the right to work in Art. 11 section 4, mandating that the State must ensure every citizen's exercise of this fundamental right. This constitutional provision's primary objective is to secure the right to work and prevent its restriction without the authority of a formal law (Constitutional Court, 4 June 1953).

The Dutch Constitution, of paramount importance for our analysis, places great emphasis on the issue at hand. Art. 20 section 1 underscores the responsibility of authorities to ensure the population's subsistence and equitable wealth distribution. Art. 19 section 1 explicitly obliges authorities to promote adequate employment opportunities. Additionally, Art. 19 section 2 mandates the Dutch Government to establish regulations regarding the legal status, social protection of workers, and co-determination. Furthermore, Art. 19 section 3 recognizes the right of every Dutch national to freely choose their occupation, subject to limitations set by or pursuant to Acts of Parliament.¹⁷

Within the context of our analysis, Art. 24 and Art. 65 of the Constitution of the Republic of Poland holds fundamental significance. It stipulates that work shall be protected by the state,

¹⁴ NR German [in:] C. Hiessl, *Working, Yet Poor. Comparative Analytical Report*, 15 May 2022, <https://workingyetpoor.eu/wp-content/uploads/2023/09/D3.5-Comparative-Analytical-Report.pdf> (access: 31 January 2024).

¹⁵ Art. 35 stipulates that the Republic protects work in all its forms and practices. It provides for the training and professional advancement of workers. See https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (access: 31 January 2024).

¹⁶ NR Italy [in:] C. Hiessl, *Working, Yet Poor. Comparative Analytical Report*, 15 May 2022, <https://workingyetpoor.eu/wp-content/uploads/2023/09/D3.5-Comparative-Analytical-Report.pdf> (access: 31 January 2024).

¹⁷ NR the Netherland [in:] C. Hiessl, *Working, Yet Poor. Comparative Analytical Report*, 15 May 2022, <https://workingyetpoor.eu/wp-content/uploads/2023/09/D3.5-Comparative-Analytical-Report.pdf> (access: 31 January 2024).

notwithstanding of normative character of employment. This constitutional norm implies that protection extends to the terms, conditions, scope, and substance of work under all legal bases. However, the extent and oversight of this protection may vary, as determined by legal ground (see Judgment of the Supreme Court of 7 October 2004, II PK 29/04, OSNP 2005, No. 7, item 97). Art. 65, sections 1–3, further accentuate the freedom of work within the Polish Constitution, delineating various aspects of this right, including the right to select and engage in an occupation and the right to choose a workplace. Here, the Constitution underscores the role of authorities as facilitators in creating an environment where the exercise of this right is both feasible and realized.

Notably, Sweden's constitutional system introduces innovative solutions that are highly effective in combating labour market decentralization and segmentation. Sweden's Constitution encompasses four distinct laws: The Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on the Freedom of Expression. In addition to these, there is the Riksdag Act, which governs the operation of the Parliament, although it is not classified as a Fundamental Law. Among these Fundamental Laws Art. 2 section 1 embodies the overarching principle that public power must be wielded with reverence for the equal value, freedom, and dignity of all individuals. This provision also imposes an obligation on public authorities to safeguard the right to work, housing, education, and promote social welfare and security.

The right to work, as articulated within the constitutional frameworks of EU Member States, serves as a guiding principle for ordinary legislators. Their duty is to guarantee both the quantity and quality of work, along with the fair distribution of work and income among the population. It is important to note that there is no explicit constitutional prohibition on employment in forms other than traditional employment relationships. As a result, the effectiveness of the right to work relies on statutory provisions and the orientation of employment policies.

In general, the national legislator should protect work, regardless of the normative nature of employment. This protection should encompass various aspects of work, including its terms, conditions, scope, and, most importantly, health and safety. However, the scope and oversight of this protection may vary, depending on the legal framework governing the performance of work. Consequently, a dual system of labour protection is established, compliant with legal provisions: one within the traditional employment relationship, and the other within non-employee forms, such as self-employment.

3. Dichotomy between dependent work and self-employment in the European Union: legal perspectives and future directions

The European Union, mirroring global market trends, has undergone significant shifts in labour dynamics, characterized chiefly by the decentralization of labour markets and the emergent prominence of self-employment. This paradigm shift, propelled by technological innovation, the allure of flexible work paradigms, and modern economic exigencies, underscores

a fundamental dichotomy in the contemporary labour market: the distinction between dependent employment and self-employment.

This dichotomy has engendered dualistic structures in labour protection, each tailored to the exigencies and characteristics of its respective employment form. Consequently, we witness the emergence of divergent protection regimes within the legal frameworks of EU Member States, manifesting across substantive labour law, social security, health insurance, and tax law.

In the sphere of dependent work, legal protections create a comprehensive safety net, encompassing labour rights, minimum wage stipulations, health insurance, and unemployment safeguards, ensuring employers uphold stringent labour standards and provide secure, salubrious working environments. In stark contrast, self-employment, marked by heightened autonomy and flexibility, necessitates a different regulatory approach. While self-employed professionals enjoy the freedom to orchestrate their work schedules and business strategies, they grapple with unique challenges, including securing their own health and social insurance and navigating labyrinthine tax landscapes.

The burgeoning self-employment in many economic sectors not only presents operational hurdles but also instigates critical discourse on equitable treatment within the labour market. The absence of a protective legal umbrella akin to those sheltering dependent employees precipitates a bifurcated labour market, potentially fostering disparities in benefits, work-life equilibrium, and job security.

Given the burgeoning prevalence of self-employment in the EU landscape, the imperative for parity in treatment across diverse employment classifications becomes increasingly evident. Legal scholars and jurisprudence have posited that protective measures extended to self-employed individuals often lack the robustness characterizing those afforded to dependent employees. The CJEU, in its judgment in the case *FNV Kunsten Informatie en Media v. Staat der Nederlanden* (C-413/13)¹⁸, affirmed that inequitable treatment of workers, bereft of objective justification, contravenes the EU's "sacrosanct" principle of equal treatment. Further nuance was added in the case of *Betriebsrat der Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH* (C-216/15),¹⁹ where the Court delineated the demarcation between genuinely self-employed individuals and traditional employees, acknowledging the disparate realities each group faces. In recent jurisprudence, a nuanced differentiation emerges, distinguishing between individuals genuinely engaged in entrepreneurial or business activities and those who opt for self-employment primarily driven by advantageous financial and tax conditions. If the modus operandi of these self-employed individuals closely mirrors that of traditional employees, they are often categorized—both in scholarly literature and legal precedents—as "pseudo-self-employed" or "bogus self-employed."²⁰

¹⁸ Judgment of the Court (First Chamber) of 4 December 2014, ECLI:EU:C:2014:2411.

¹⁹ Judgment of the Court (Fifth Chamber) of 17 November 2016, ECLI:EU:C:2016:883. This case delves into the distinction between workers and self-employed persons, especially in the context of their rights under EU law.

²⁰ Bogus or false self-employed persons, defined as formally self-employed workers who perform the same tasks in the same way as those employees employed by the same firm or principal. See case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*.

In response to these evolving challenges, the EU has promulgated several directives aimed at bridging these disparities, including the Working Time Directive,²¹ the Transparent and Predictable Working Conditions Directive,²² and the Work-Life Balance Directive.²³ These legislative instruments are evidence of the EU's commitment to fostering an equitable labour ecosystem, adaptable to the fluidities of modern economic structures.

Conclusions

The modern world of work and employment is undergoing a transformative evolution, as evidenced by the increasing prominence of non-traditional employment forms. Such a shift underscores the dynamic interplay between the fundamental right to work and the adaptability of statutory laws and employment policies to address these changing paradigms.

It is essential for national legislators to ensure comprehensive protection across all employment forms, irrespective of their conventional or non-conventional nature. This protective mandate extends beyond mere contractual fairness; it encompasses the holistic well-being of workers, emphasizing stringent health and safety standards. While the depth and breadth of such protection may vary based on legal statutes, it invariably results in a dualistic labour protection system. Traditional employment, with its established norms, stands juxtaposed against the emergent realm of non-traditional employment, characterized by self-employment and gig economy roles. This dichotomy, although challenging, exemplifies the legal system's agility in adapting to shifting labour market dynamics.

A general assessment underscores the EU's unwavering commitment to embedding fundamental rights within its legal framework, reflecting its dedication to fostering a fair and inclusive European labour market. In response to the proliferation of decentralized employment, the ambit of rights championing equal treatment and eradicating employment discrimination has expanded. It now encapsulates not just traditional employment relationships but also embraces diverse work forms, including self-employment. Yet, this expansive approach does not obliterate the nuanced distinctions between protection mechanisms for traditional employment and self-employment.

Audibly the European Union finds itself at a pivotal juncture. The rise of the self-employment sector necessitates a new approach to labour legislation. This approach should seamlessly integrate the inherent freedoms of self-employment with the EU's cornerstone principles of

²¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 2003/299, pp. 9–19.

²² Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 2019/186, pp. 105–121.

²³ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 2019/188, pp. 79–93.

solidarity, equitable treatment, and social protection. As the EU charts its future course, the harmonious melding of these principles within its evolving labour market will be instrumental in sculpting a robust and equitable socio-economic system.

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