

NOTES, DEBATES AND COMMUNICATIONS

The status of self-employed workers in Spain

By Jaime CABEZA PEREIRO*

Spain's long-awaited Self-Employed Workers' Statute came into force in July 2007.¹ It is a very interesting piece of legislation in terms of the new light in which it views a category of workers who have traditionally been excluded from the scope of labour law. It is interesting not only from the standpoint of Spanish domestic law, but also, and especially, as an innovative experiment from the standpoint of comparative law. In fact, as the law itself points out in its preliminary statement of grounds, the countries neighbouring Spain all lack such a regulation applying specifically to self-employed workers.

The law aims to address a crucial dilemma of contemporary labour law: should labour law remain confined within its traditional limits, or extend explicitly to self-employment? The answer given here obviously favours inclusion, though with several nuances that will be briefly mentioned in this note.

In recent times, there has been a tendency towards sidelining labour legislation, often through resort to simulation and dissimulation mechanisms or by means of practices definable as outright evasions of the law.² Such behaviour, however, only partly explains the steep growth in the number of work relationships governed by common law or commercial law. Admittedly, today's markets are conducive to the emergence of relationships between natural persons and corporate entities based on service contracts which do not meet the traditional

* Professor of Labour Law and Social Security, Vigo University. Email: jcabeza@uvigo.es.

Responsibility for opinions expressed in signed articles rests solely with their authors and publication does not constitute an endorsement by the ILO.

¹ Law No. 20/2007, *Official Gazette*, No. 166, 12 July 2007, pp. 29964–29978. Also available at <http://www.boe.es/boe/dias/2007/07/12/pdfs/A29964-29978.pdf> [accessed 25 Jan. 2008].

² On this issue, see the following ILO instruments: Resolution concerning the Employment Relationship, adopted at the 91st Session of the International Labour Conference, 2003; and the Employment Relationship Recommendation, 2006 (No. 198), available on ILOLEX (the ILO's international labour standards database) at <http://www.ilo.org/ilolex/english/recdisp1.htm>.

criteria used in deciding whether or not they are covered by labour law. Generally speaking, the number of workers who organize their job autonomously has grown considerably.

The problem may stem from the need to redefine the concepts of employment and (economically) dependent work – which are different – and adapt them to a situation where employment, work and service relationships do not appear to be as homogeneous as they were in the past.³ Ultimately, both concepts admit of degrees and shades. Law No. 20/2007 addresses some of these problems, albeit from new perspectives. Some of the criticism levelled at the law is concerned precisely with its effects on traditional employment relationships. For instance, it has been argued – with manifest exaggeration – that it broadens the scope of wage employment beyond the admissible and creates a legal framework hardly compatible with contractual relationships in which the free will of the parties should remain the fundamental guiding principle.⁴ But it has also been said that it merely establishes a second-rate legal regime providing few guarantees to self-employed workers, but with the added risk of making the courts less inclined to regard doubtful work relationships as employment relationships because of jurisdictional considerations, as will be discussed below. The grounds for these and other concerns will have to be assessed. As a law defining distinct legal categories, it is true that it will have a direct effect not only on relations between large contracting companies and small-scale contractors, but also on the scope of wage employment.

Demands and rights of self-employed workers

There is no space here for describing the vicissitudes of the legislative process up to July 2007. Suffice it to recall, on the one hand, that demands from organizations of self-employed workers, especially in the area of social security, had been piling up and, on the other hand, that prior to the parliamentary debates, a committee of experts had drawn up, on behalf of the Ministry of Labour Social Affairs, a report accompanied by a Self-Employed Workers' Statute proposal. This document, tabled in October 2005, served as the basis for the bill that was later put before Parliament. The law was eventually promulgated against a background of resolute government efforts to modernize Spain's social and labour legislation, with Parliament having approved quite a few significant laws concerning inter-generational dependency, gender equality, the status of public servants, and other important matters. This context is particularly relevant if one considers the concomitant pursuit of other, more progres-

³ See two of ILO's global overviews on the issue: *The scope of the employment relationship*, Report V, International Labour Conference, 91st Session, 2003, Geneva (available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf>), and *The employment relationship*, Report V(1), International Labour Conference, 95th Session, 2006 (available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>).

⁴ See Mark Freedland: "Application of labour and employment law beyond the contract of employment", in *International Labour Review*, Vol. 146 (2007), No. 1–2, pp. 3–20.

sive and long-term reforms in the field of labour law and social protection. Indeed, this network of new standards is bound to generate important synergies and reciprocal influences.⁵

The principles spelled out in the first two articles of the law define its scope of application. In fact, there is symmetry between this and article 1 of the Workers' Statute of 1995⁶ since both statutes deal with natural persons providing services in a personal capacity. The Self-Employed Workers' Statute, however, deals with own-account work "not subject to the authority or organization of another person", regardless of whether it involves hiring staff.

The remaining principles set out in these opening articles address certain doubtful situations and specific issues arising under the Spanish legal system, such as the case of domestic work done for an employer who is a natural person living with the worker and a relative of his/hers. The Workers' Statute does not consider this as constituting a wage employment relationship – a position confirmed by the fact that the Self-Employed Workers' Statute does include such relationships within its scope. An exception is made for persons under 30 years of age, who can be hired as wage employees under a special provision to promote employment, set forth in the tenth additional provision of Law No. 20/2007. Another doubtful situation addressed by the law is the case of directors of incorporated enterprises, depending on whether or not they exercise effective control over the company. Incidentally, this distinction stems more from the scope of social security law than from the Workers' Statute. To give yet another example, the law, in its eleventh additional provision, includes licensed road transport operators who own their vehicle, which is consistent with their exclusion from the scope of the Workers' Statute under its article 1.3, sub-paragraph e). Both provisions are very difficult to harmonize with European law, specifically with Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons performing mobile road transport activities.⁷

Economically dependent self-employed workers

Beyond the statement of basic rights and duties of self-employed workers – vaguely reminiscent of those of employees, albeit without equivalent guarantees or legal status – there is no doubt that the law's most significant feature is that it defines a special category of beneficiaries upon whom it confers special "status", namely, economically dependent self-employed workers. In other words, the

⁵ See María Emilia Casas Baamonde, Jesús Cruz Villalón and Federico Durán López (eds): *Las transformaciones del derecho del trabajo en el marco de la Constitución española: Estudios en homenaje al profesor Miguel Rodríguez-Piñero y Bravo-Ferrer*, Madrid, La Ley, 2006.

⁶ Royal legislative decree No. 1/1995 of 24 March, through which is approved the recast text of the law on the Statute of Workers, *Official Gazette*, No. 75, dated 29 March 1995, pp.9654–9688. Available in the Iberlex database at: http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1995/07730.

⁷ See *Official Journal of the European Communities*, No. L80, 23 March 2002, pp. 35–39. Also accessible at <http://eur-lex.europa.eu>.

Self-Employed Workers' Statute undertakes to define and regulate – with whatever attendant shortcomings – a situation sometimes known in legal parlance as “parasubordination”, which typically refers to economic dependence. The criterion used to establish such dependence is the proportion of income earned from work-related or economic or professional activities for a single client. A self-employed worker is deemed to be economically dependent if a single client accounts for at least 75 per cent of his/her income.

Based on this fundamental criterion, supplemented by other criteria and requirements, the new law establishes a legal regime for economically dependent self-employed workers that is somewhat more protective than that applicable to other self-employed workers and approaches the provisions of the Workers' Statute, albeit with some important and marked differences. The provisions approximating those protecting wage employment include a presumption of the existence of a contract of indefinite duration, provisions governing working time and some protection against contract termination by the client company without just cause.

One of the most awkward issues raised by the law is perhaps that of transition from the status of ordinary self-employment to that of economically dependent self-employment. This point is sure to give rise to legal disputes of uncertain outcome and, more importantly, to many cases of comparative prejudice due to differential treatment of similar situations and equal treatment of different situations.

Professional interest agreements

One of the law's most original features is that it introduces a new source of contractual obligations between the client company and economically dependent self-employed workers, namely, “professional interest agreements”, a form of collective agreement specially designed for these workers. Article 3 of the Statute lists such agreements among the sources underpinning their occupational status, while article 13 establishes a basic legal regime that can be summed up as follows:

1. The applicability of the agreements is restricted to economically dependent self-employed workers who belong to the trade unions or professional organizations having signed the agreements and who have expressly accepted their terms.
2. Once these requirements are fulfilled, there can be no opt-out from any part of the agreement; any clause of an individual contract at variance with a provision of the agreement is null and void.
3. The content of the agreements is outlined in article 13(1): “they can establish the terms – mode, time and place – on which specified work is to be performed, as well as other general conditions of the contract”. But the scope of these agreements does not match that of collective agreements as defined in the Workers' Statute, which go considerably beyond the mere regulation of working conditions.

4. Of course, professional interest agreements are subject to the general provisions of applicable mandatory law, in accordance with the principle of hierarchy among sources of law, especially in regard to legislation on defence of competition. Such explicit reference seems designed to rule out the applicability of the case law of the European Court of Justice, which has, to some extent, excluded collective agreements from the EU's regulatory framework on competition since the ruling in the *Albany* case.⁸
5. Since the other party to a professional interest agreement must necessarily be the company for which the economically dependent self-employed worker performs his/her work, it must be concluded that the application of the agreement is *confined to the company itself, or to the group it controls, which means that the scope of these agreements is unlikely to extend to a sector or sub-sector*. Obviously, whether or not this conclusion proves correct will have to be verified over the medium term.

It is important to stress that the Statute does not make the professional interest agreements binding upon non-signatory parties, unlike collective agreements concluded under the Workers' Statute in accordance with article 37 of the Constitution. The latter agreements are binding upon all enterprises and workers falling within their scope, regardless of how they are represented for collective bargaining and of applicable common law rules. However legitimate, this provision of the Statute raises doubts about the underlying legal approach – e.g. in regard to accession to the agreement, partial applicability to economically dependent self-employed workers who are not covered, the possibility of competing agreements in the same field, etc. – and about the legislative decision to treat these agreements differently from collective agreements (a point on which the law's preliminary statement of grounds should have been more explicit). Admittedly, the agreements' limited applicability is consistent with the spirit of the law which does not require any kind of quorum or majority for their adoption. Indeed, the negotiation of such agreements is not subject to any particular affiliation, organizational or representativeness criterion. In fact, apart from the requirement that they be concluded in writing, these agreements are not subject to any formal procedures such as administrative registration, publicity or verification of their legality.

Jurisdictional issues

Another innovative feature of the law is to give the labour tribunals jurisdiction over such individual or collective disputes as may arise between economically dependent self-employed workers and their client companies. Under the Statute, the labour tribunals are competent to deal not only with claims grounded in

⁸ Case C-67/96, “*Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*” (The Netherlands), judgement of 21 September 1999, *European Court Reports: 1999*, pp. 05751 et seq. Available at http://eur-lex.europa.eu/Result.do?T1=1999&T2=05751&T3=V1&RechType=RECH_recueil&Submit=Search.

the written contract between the parties, but also with the interpretation of professional interest agreements – again, without prejudice to the provisions of legislation on defence of competition. The fact that disputes between companies and economically dependent self-employed workers are to be resolved by labour jurisdictions – as opposed to ordinary courts – suggests a shift, both substantive and procedural, towards enforcing the protective principles specific to labour law. Conversely, however, as a result of this attribution of jurisdiction, doubtful cases (e.g. ambiguous or disguised employment relationships) may well end up being settled on the basis of the law applicable to economically dependent self-employed workers, rather than that governing wage employment, with the effect of lessening the protection that plaintiffs may otherwise have been entitled to had their work relationship been recognized as constituting a standard contract of employment. Furthermore, since disputes involving self-employed workers who are not economically dependent fall within the jurisdiction of ordinary courts, the question of the difference in treatment between them and economically dependent self-employed workers is bound to come up repeatedly, as a matter of public policy, in terms of the objective jurisdiction of the courts, with important procedural implications.

The broader jurisdiction assigned to the labour tribunals will obviously raise awkward problems in the application of the Code of Labour Litigation Procedure in addition to other complex issues in determining within which jurisdiction cases should be tried. But that is another matter, as is the insufficient regulation of out-of-court conflict-resolution, which ought to have been elaborated upon further in order to make this means of dispute settlement credible and practicable.

The collective rights of self-employed workers

Another section of the law worthy of commentary is the one pertaining to the collective rights of self-employed workers, whether economically dependent or not. Under the Law on the Right to Organize,⁹ self-employed workers enjoy the fundamental right to freedom of association but not the right to establish trade unions of their own in defence of their rights. Organizations of entrepreneurs, for their part, fall outside the scope of trade union law and within that of the more general law of “associations” (in accordance with judgement 75/1992 of the Constitutional Court, dated 14 May 1992). Law No. 20/2007 regulates the right of self-employed workers to set up professional organizations and establishes criteria whereby their representativeness may be determined. Among other interesting provisions, it guarantees a range of collective rights that are aligned as closely as can be on those enjoyed by trade unions under article 2 of the above-mentioned Law on the Right to Organize – a pro-

⁹ Law No. 11/1985 of 2 August 1985, *Official Gazette*, No. 189, dated 8 August 1985, pp. 25119–25123. Also available on the Iberlex database at: <http://www.boe.es/boe/dias/1985/08/08/pdfs/A25119-25123.pdf>.

vision clearly indebted to the ILO's Conventions Nos. 87 and 98.¹⁰ Specifically, these collective rights are to conclude professional interest agreements, to pursue the collective defence and protection of the professional interests of self-employed workers, and to resort to extra-judicial procedures for settling collective disputes. Just as those available to trade unions, these procedures fall within the scope of relationships based on collective bargaining and conflict resolution, though "conflict externalization" is ruled out, as could be expected. Obviously, self-employed workers are denied the right to strike, and it is highly debatable whether they could take any other form of action to defend their professional interests aside from having recourse to dispute-settlement procedures which, as has been said, the law fails to provide for in sufficient detail.

The capacity of the self-employed to defend their interests is thus developing alongside that of the trade unions, which can avail themselves of the full range of rights and options inherent in freedom of association, in support of those very same workers. This suggests something like competition between two types of organization: on the one hand, professional organizations exclusively dedicated to the protection of self-employed workers, but which do not have the same rights as trade unions; and on the other hand, trade union organizations that have greater scope and means of action, but which are not specifically concerned with defence of the self-employed.

The status of professional organizations also approximates that of trade unions with respect to more formal aspects such as the submission and registration of their articles of incorporation with the Ministry of Labour and Social Affairs, which is reminiscent of the procedure for acquiring legal personality under article 4 of the Law on the Right to Organize. A more important issue is determination of the representativeness of professional organizations. To that end, the law applies the criterion of "organizational presence", measured through membership, number of associations with which representation agreements and arrangements have been concluded, human and material resources, participation in professional interest agreements, etc. Formal recognition of representativeness is given by a council made up of central government civil servants and recognized experts. Such recognition entails certain rights to representation to/participation in institutional public bodies, without prejudice to the other rights that representativeness may confer.

This regime differs from that governing trade unions, as provided for in articles 6 and 7 of the Law on the Right to Organize, whereby their representativeness is determined on the basis of trade union elections restricted to wage employees subject to the Workers' Statute and to public servants covered by the Public Servants' Statute. Thus, paradoxically, the rights of trade unions to institutional participation and representation in defending the legal status of

¹⁰ The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Available in ILOLEX, the ILO's database of international labour standards, at: <http://www.ilo.org/ilolex/english/index.htm>.

self-employed do not depend at all on their organizational presence or level of representation among this category of worker.

Social welfare and unemployment

Another issue addressed by the Statute is social protection for self-employed workers. The coverage provided to self-employed workers under Spain's social security system, while still more limited than that afforded by the general scheme, has tended to approach the latter in recent years. Nonetheless, the improvement of benefits has always been the main demand of the professional organizations. In 2002, self-employed workers were granted specific coverage for occupational accidents, and their temporary and permanent disability benefits were upgraded. Other adjustments to their social security coverage have been geared towards putting them on a par with wage workers. In this context, the main demand of self-employed workers is that they too be granted unemployment benefits. Although the new Statute is part of an ongoing reform process, it does not contain any spectacular innovations on this point. Among other lower profile reforms, the Statute introduces some interesting changes in temporary disability insurance, which has become compulsory for economically dependent self-employed workers, while it used to be voluntary.

As far as unemployment is concerned, the Statute does mention "end-of-activity benefits" but merely as a statement of intent for some future regulation. In other words, the Statute maintains the status quo ante, with self-employed workers still excluded from unemployment benefits, while making a political commitment to extend such benefits to them eventually. The law thus simply puts off a complex problem of legal coherence whose solution would imply either changing the conceptual foundations of insurance against involuntary unemployment, or designing specific benefits for self-employed workers. Similarly complex is the challenge of funding for this unemployment insurance, as indeed the fourth additional provision of the law recognizes, by making the implementation of any such scheme conditional upon the fact that principles of contribution, solidarity and financial sustainability be guaranteed.

Other provisions of the Statute aim to generate and promote self-employment with a view to rationalizing a wide range of measures that the Government and autonomous authorities have introduced without any coordination. Also worth noting is the establishment of a tripartite Council on Self-employment, which is expected to come up with policy and regulatory proposals concerning the self-employed.

Concluding comments

Law No. 20/2007 takes Spanish legislation in a new, experimental direction. The regulation of self-employment had so far been fragmented, at least in terms of employment status. On occasion, some of the rights and obligations of the self-employed had come to approximate those of wage employees – e.g. on very spe-

cific aspects of the prevention of occupational hazards or on the protection of workers' claims, and certain guarantees provided for in the legislation concerning contracting and subcontracting in the construction sector. Local authorities had also acted to promote self-employment. By contrast, the new law is original and daring in that it takes a cross-cutting approach to the regulation of self-employment.

Of course, this does not in any way imply that the legal regime of self-employment has been equated with that governing wage employment, or that the new Statute is a piece of labour legislation. On the contrary, in framing this occupational status in line with the first final provision of the Workers' Statute, article 3(3) of Law No. 20/2007 provides that "work performed in a self-employed capacity shall not be subject to labour law, except in such cases as will have been expressly provided for by virtue of a principle of law". Even though it uses labour law concepts, the new Statute is a piece of civil or commercial law. This is particularly obvious from the scant minimum standards the law actually guarantees – and even these are upheld, quite timidly, only for *economically dependent* self-employed workers.

Despite all the vastly exaggerated praise it has received from the Government, a few trade unions and many self-employed workers' organizations, the Law thus calls for a more balanced judgement. In fact, if the term "statute" is to be understood as a legal occupational regime granting rights, then Law No. 20/2007 is little more than an illusion.

However, it has set Spain on a track that will have to be assessed after some distance has been covered, as several implementing regulations still have to be adopted. Indeed, the new law will have to be assessed primarily in the light of its application and the involvement of the different actors concerned – e.g. professional and trade union organizations, client companies, government agencies and local authorities. Evaluation criteria should also include the number and quality of the professional interest agreements that will be approved, and how they will be interpreted and applied, and the future case law of the labour and civil jurisdictions. Another point that will have to be considered is the quantitative impact of this law in terms of the number of people it applies to, if only to check whether the market position of self-employed workers is enhanced or undermined by positive law. Above all, however, the main question will be whether the Statute improves the legal position of self-employed workers, i.e. whether it strengthens their rights.

The real impact of the law will have to be evaluated on the basis of the above considerations. For now, suffice it to say that this legislative experiment is legally innovative and interesting. Labour law experts would do well to pay attention to what happens next.