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MINIMUM FEES FOR SOLO SELF-EMPLOYED WORKERS

Policy approaches and legal framework[1]

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Introduction

The situation of solo self-employed workers is often precarious. Low net incomes and insufficient social security are not only an individual burden but also a challenge for the welfare state. Politicians and trade unions have therefore put forward different proposals to enable minimum fees, collective agreements for solo self-employed workers and their better access to social security. This article outlines the current state of the debate, presents a proposal for regulating minimum fees for solo self-employed workers and evaluates the legal framework.

The working conditions of the self-employed are increasingly becoming the focus of public attention. Individual groups such as bicycle couriers and contract workers in the meat industry often receive media attention. Most of the self-employed workers do not benefit from the achievements of labour law, although some of them – especially those without employees (so-called solo self-employed workers) – are often in need of protection similar to that of employees. The lack of protection for the self-employed compared to employees, who are entitled to short-time work and unemployment benefits, was highlighted by the Corona crisis. In many places, therefore, there are calls for better protection for the (solo) self-employed (see recently Schulze-Buschoff et al. 2021: 18-26). One aspect of this is the securing of a (reasonably) adequate income. While the German Minimum Wage Act (Mindestlohngesetz) has set a legal minimum wage for employees since 2015 and more far-reaching wage solutions have been found through collective agreements, there is a lack of comparable regulations for the self-employed.

The following gives an insight into the empirical situation of the self-employed, the reform proposals currently under discussion and the constitutional and European legal framework in which they are embedded.

The situation of solo self-employed: A look at the figures

Employment forms and biographies are becoming increasingly diverse. It is not uncommon for dependent employment and self-employment to alternate in colourful succession. The boundaries between service/work contracts and employment contracts are becoming more fluid, especially in times of digitalisation, as shown not least by the decision of the German Federal Labour Court (Bundesarbeitsgericht – BAG) of 1 December 2020 on the employee status of a crowdworker (Neue Zeitschrift für Arbeitsrecht 2021: 552ff.). In the following, however, we will only deal with employees who are actually self-employed, who can thus only make rudimentary use of the protection of labour and social law. In Germany, these were a total of 4.01 million people in 2018, 2.23 million of them without employees, i.e.

so-called solo self-employed. Their share corresponded to 5.3 per cent of the total workforce (Bonin et al. 2020: 9, 11). This rate fell to 4.6 per cent in 2019 (cf. Statistisches Bundesamt). Compared to other countries, it is rather low in Germany. In the United Kingdom, for example, it is 15 per cent, in the Netherlands 16 per cent and in Italy 22 per cent. In the EU, the average is 12.5 per cent (Statistisches Bundesamt 2021; Wirtschaftskammer Österreich 2020). The figures clearly show the weight of the sector.

The job profiles, qualifications and employment opportunities of the self-employed are very differentiated. There are specialists who have high incomes, such as successful writers or IT experts. But there are also many who have very poor and insecure employment opportunities. The average weekly working time of full-time self-employed is 45.3 hours, for self-employed with employees 50.5 and for employees 40.2. However, the proportion of solo self-employed who work part-time is very high at 33.1 per cent (Bonin et al. 2020: 33, 36). Despite the longer working hours, the net income of solo self-employed persons is lower than that of self-employed persons with employees or of employees, with a considerable spread. The median monthly net income in 2018 was 1,177 EUR, the net hourly wage was 9.40 EUR. For the self-employed with employees, the median was 2,500 EUR/month or 13.80 EUR/hour, for employees 1,675 EUR/month or 10.40 EUR/hour (Bonin et al. 2020: 38). The spread is particularly severe in the comparison of the first and second quintile to the fifth. While the median of the lowest 20 per cent of net incomes for the solo self-employed is 225 EUR per month, it amounts to 600 EUR in the second quintile and 3,500 EUR for the top 20 per cent of net incomes. It is therefore quite understandable that, according to estimates, a very large proportion of solo self-employed people are currently below the statutory minimum wage of 9.60 EUR gross, and in some cases very significantly so. According to earlier studies, approximately every fourth self-employed person had less than the statutory minimum wage (Brenke 2013: 7). Finally, the expansion of the platform economy should be addressed at this point, which now also provides the main job for a number of people comparable to temporary work in Germany (Pesole et al. 2018: 19).

It is obvious that the situation described above means a challenge for the welfare state – in terms of the earnings of the solo self-employed as well as in questions of social security. Other states have already taken action here and have set minimum wages for certain solo self-employed workers. The Polish "Minimum Wage Act" of 22 July 2016 covers solo self-employed workers who provide orders or services for companies, e.g. lorry drivers, couriers or cleaning services. The Dutch "Act amending the minimum wage and the minimum supplement in connection with the application of this Act to certain fixed employment contracts" of 29 March 2017 (Staatsblad [2017] 290 of 4 July 2017) sets a minimum fee for self-employed persons with up to two employees for certain services, albeit with some exceptions.

Better social security for the solo self-employed: demands and proposals

In Germany, the debate on social security for solo self-employed workers has also clearly gained momentum. In November 2020, the Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales – BMAS) published the key points "Fair Work in the Platform Economy", which only concern this area, but can be generalised in terms of social protection (BMAS 2020; Der Spiegel 2020). For example, the Ministry wants to include solo self-employed platform workers in the statutory pension insurance and provide for a financial participation of the platform operators in the contributions. Platform contributions for other social insurance branches such as accident and health insurance are also to be examined. At the same time, the Ministry wants to find ways to enable a collective-law organisation for solo self-employed platform workers, i.e. joint action, e.g. with regard to collective agreements, without coming into conflict with anti-trust law. In addition, the Ministry is discussing minimum notice periods depending on the duration of the activity, continued payment of wages in case of illness as well as rules on maternity protection and leave – issues that were also part of the agenda at the meeting of labour and social affairs ministers on 3 December 2020 at EU level (Arbeit und Recht 2021: 69). A motion by the Bündnis 90/Die Grünen parliamentary group in the German Bundestag (Bundestags-Drucksache 19/27212) goes in the same direction. There, a general minimum fee is demanded as an absolute lower limit for time-based services, as well as sector-specific minimum fees and a reform of European antitrust law (Art. 101 para. 1 TFEU) in order not to bring collectively agreed minimum fees into conflict with the law. Similar considerations on antitrust law are also being made by the European Commission (European Commission 2021). The parliamentary group SPD has called for a minimum fee of 25 EUR/hour, and the parliamentary group “Die Linke” is also pushing for minimum fees (Wirtschaftswoche 2018; Linksfraktion 2017).

At the Hugo Sinzheimer Institute for Labour and Social Security Law (HSI), we have drafted a law on minimum wage conditions for solo self-employed persons. The HSI has proposed an amendment to the Minimum Wage Act to include solo self-employed workers through a new Section 25. According to Section 26, the amount of the minimum wage should be determined for each hour of work according to the respective amount of the general minimum wage plus a flat-rate social security surcharge of 25 per cent. In the event of a dispute, it is to be presumed "that the temporal scope of the activity presented by the persons entitled to claim under section 25 and based on objectively comprehensible information is correct, unless the principal can present and prove a deviating scope. In case of doubt, a reasonable duration shall be deemed to have been agreed". Reimbursements from the client for expenses incurred cannot be taken into account (Hugo Sinzheimer Institut 2018). It is important to note in this context that this is a proposal for a minimum fee and not an upper limit of any kind.

Because of the heterogeneity of the employment of solo self-employed, other proposals go in the direction of the Bündnis 90/Die Grünen parliamentary group. This is the case, for example, with the trade union ver.di (2021), which has a long experience in representing the self-employed, or also with the German Trade Union Confederation (DGB 2021). Both demand sector-specific minimum fees. In this respect, the discussion about the respective expediency of a regulation is not over and it should be considered whether a combination of both approaches would not make sense.

In addition to the minimum fee, the debate on better social security for the self-employed revolves around inclusion in the social security system. Here, for example, an obligation to provide for retirement is being discussed. Not least, the OECD had clearly criticised the German regulations. Unlike in most other OECD states, the vast majority of self-employed are not obliged to take out pension insurance. Many are therefore dependent on other income, assets or social assistance in old age (Handelsblatt 2019: 9; FAZ 2019: 15). Agreements in the coalition agreement of the CDU/CSU and SPD in the 2017-2021 legislative period also went in this direction, according to which self-employed persons who are not covered by professional pension schemes would have to choose between the statutory pension and a private pension in future. As is well known, they were unfortunately not realised. The comments of the self-employed organisations were sceptical to negative. This even applied to the increase in the minimum wage, which did not affect their clientele, and even more so to minimum fees (cf. e.g. Verband der Gründer und Selbstständigen e.V. 2018; Bund der Selbständigen e.V.). In the case of social security, there was quickly talk of a bureaucratic monster. Unfortunately, it is forgotten that self-employed people are often in the famous poverty trap in old age and then the general public has to pay for them. In other European states the self-employed are often integrated into the social security systems, too.

The legal framework for a minimum fee

Both national regulations and European law must be taken into account here. Within the framework of this article, however, it is not possible to plumb every depth. For Germany, first of all, a corresponding regulation would fall under the concurrent legislation of Article 74 para. 1 no. 11 of the Constitution (Grundgesetz – GG). The regulation of a minimum fee would have to be measured against Article 12 and Article 2 GG. According to the case law of the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), the legislature is entitled to legally limit the exercise of the profession protected by Article 12 para. 1 of the Constitution, which also includes the agreement of fees, in order to counteract social or economic imbalances (disturbed contractual parity) and to balance the freedoms affected (BVerfGE 81, 242; 134, 204). This is precisely the aim of a corresponding regulation on a minimum fee, whether sector-specific or general, which is intended to compensate for the de facto imbalance between solo self-

employed workers and their clients in determining a living wage. The conflicting fundamental rights of contractors and clients are to be balanced as far as possible by means of practical concordance[2] and taking into account the principle of the welfare state (BVerfGE 134, 204). A regulation on a minimum fee would take into account the following aspects:

- Securing the subsistence minimum through an adequate income;
- long-term relief for taxpayers;
- stabilising social security systems by reducing the need for supplementary social benefits;
- combating social and economic imbalances, e.g. social dumping and undercutting competition;
- other reasons of general interest (Hugo Sinzheimer Institut 2018: 5).

In this regard, according to the Federal Constitutional Court, the legislature has a wide scope of assessment and design to react to a disturbed contractual parity with a statutory regulation of contractual freedom (BVerfGE 81, 242). The regulation of a minimum fee is, at least in the case of a proposal that is oriented towards the minimum wage, proportionate and does not lead to an excessive impairment of the professional freedom of principals. Finally, an encroachment on the general freedom of contract from Article 2 para. 1 of the Constitution, which is subordinate to professional freedom, is also unobjectionable. The provision is subject to a legal reservation, and the regulation would be proportionate for the aforementioned reasons.

However, the discussion on the establishment of a minimum fee for solo self-employed professionals almost received a damper from Luxembourg. In 2019, the Court of Justice of the European Union (CJEU) ruled that the fee schedule for architects and engineers (Honorarordnung für Architekten und Ingenieure – HOAI), which is binding in Germany, violates the freedom to provide services for entrepreneurs guaranteed by EU law in Article 56 of the TFEU (CJEU, ruling of 4 July 2019 – C-377/17). Until its amendment in 2021, the HOAI set both minimum and maximum rates for the remuneration of architectural and engineering services (Section 7 paras. 2-4 HOAI old version). The CJEU criticised the regulation not because of its objectives, namely ensuring the quality of construction services and consumer protection, but because these objectives were not pursued by the HOAI in a coherent and systematic manner. For example, planning services can also be provided by other, non-regulated professions, so that the intended consumer protection is not achieved. The CJEU thus set requirements for the justification of minimum fee rates, but only refers to the aforementioned objectives of the HOAI. A generally applicable minimum fee serves to improve the working conditions of solo self-employed workers, to avoid social dumping and to protect social systems – the decision says nothing about this (Hlava et al. 2019: 1691). In addition, the minimum standards are not directed at individual professions, but at all solo self-employed workers equally. The restriction on the freedom to provide services, which lies in the fact that self-employed persons cannot negotiate their prices completely

[2] If two constitutionally equivalent fundamental rights collide with each other (e.g. the trade unions' right to strike with the right to property and the entrepreneurial freedom of the employer subject to a strike), a balancing of interests must be carried out with the aim that both fundamental rights can be realised to the greatest possible extent. This process is called "practical concordance" (cf. e.g. BVerfG, decision of 9 July 2020 – 1 BvR 719/19).

freely, but must at least achieve a certain hourly rate, is justified by the aforementioned compelling reasons in the general interest. A minimum wage is not only suitable to achieve these objectives. It is also necessary to mitigate the undesirable developments of the markets which they are unable to remedy themselves (Hugo Sinzheimer Institut 2018: 7). For the rest, these are merely minimum wages. These are intended to benefit the self-employed, who often receive only very low remuneration and are therefore particularly in need of protection. In this respect, a minimum fee would also not violate EU law (on this differentiation, cf. Bayreuther 2018: 34). The fact that the CJEU is not per se opposed to minimum fees for self-employed persons – albeit in relation to specific professional groups – is shown, for example, by a ruling from 2006, in which the Court of Justice accepted an Italian scale of fees for lawyers (CJEU, ruling of 5 December 2006 – C-94/04 and C-202/04).

The question of whether solo self-employed workers can negotiate their working conditions and thus also a minimum fee through collective agreements is even more difficult. The discussion on this is particularly sparked by anti-trust law. If companies agree on a minimum remuneration or coordinate their behaviour, this constitutes a cartel prohibited under Article 101 para. 1 TFEU, at least if there is a noticeable impairment of interstate competition (on this topic cf. Schubert 2021: 1212). This ban on cartels does not apply to collective agreements for employees (CJEU, judgment of 21 September 1999 – C-67/96 (Albany)). However, whether collective agreements for solo self-employed workers are also permissible is more difficult to answer. In the FNV case, which dealt with collective agreements for formally self-employed temporary musicians, the CJEU had ruled that they can in any case be concluded for self-employed persons who are "in fact ‘false self-employed’, that is to say, service providers in a situation comparable to that of employees" (CJEU, judgment of 4 December 2014 – C-413/13, para. 31). Whether the CJEU really only meant "false self-employed" (i.e. in reality employees), persons similar to employees, who are essentially defined by their economic dependence on a client, or generally workers who are in need of protection comparable to that of employees, is controversially discussed (on the state of the discussion cf. Schubert 2021: 1214). In general, however, against the backdrop of the constitutionally guaranteed autonomy of collective bargaining (Article 28 EU Charter of Fundamental Rights) and the prohibition of discrimination against self-employed workers who are in need of comparable protection, it can be assumed that the ban on cartels does not apply at least to quasi-employees (cf. Schubert 2021: 1.218; Bayreuther 2018: 93ff.). Going further, we are of the opinion that the comparable need for protection must be the decisive criterion, i.e. that beyond the circle of persons similar to employees, who are only a category of employees in some European states, the exception to the ban on cartels can also apply to other solo self-employed persons.

Conclusion

The situation in which many self-employed people find themselves is often precarious. On average, they earn less than employees and, due to their structural inferiority, they usually cannot set their own prices. This makes it almost impossible for them to provide for their old age above the basic social security level. A first step to counteract this undesirable development of the market could be the introduction of general minimum fees, which are supplemented by sector-specific collective agreements. In addition, there are numerous other regulatory proposals. All this must be within the legally permissible framework. We assume that minimum fees and collective agreements are in any case permissible for self-employed workers in need of social protection. What measures German politicians will take will become clear in the new legislative period, but important impulses can also be expected from Europe.

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