The ‘personal work relationship’ in Austria

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Abstract
When assessing the personal work relationship in Austria, first the contractual relationship needs to be scrutinised. Following the differentiation between employees, semi-dependent workers (with the sub-category of employee-like working persons) and businesspersons, all, only some, or none, of the statutes and laws falling under the category of ‘individual labour law’ (e.g. Working Hours Act, Holidays Act etc) apply. Collective bargaining agreements, providing, amongst others, for minimum wages (N.B. there is no statutory minimum wage in Austria), can be concluded for employees only, though (with very few and specific exceptions for persons in the media sector). This paper analyses the legal situations of the different categories of working persons and critically assesses the non-application of most labour laws, including collective bargaining agreements, to employee-like working persons. It questions whether, from a teleological point of view, a different assessment would be necessary.

Keywords
Semi-dependent worker, employee-like working person, means of production, freelancer, journalist, collective bargaining agreements, maternity protection act, social security law, tax law, uber, taxi driver, purposive approach, teleological interpretation

The main concept of ‘working person’

Under Austrian (labour) law, generally speaking three categories of working persons exist: employees, semi-dependent workers and businesspersons. However, as regards the application of some specific labour laws, a further differentiation needs to be made within the category of semi-dependent workers. The categorisation made by individual labour law is crucial since it extends to collective labour law and – with some marginal deviations – to social security law.

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Employees vs. businesspersons/entrepreneurs

The basic definition of the ‘Dienstnehmer/Arbeitnehmer’ (employee) – being understood as the person that benefits from the whole range of labour (protection) legislation, and to whom collective bargaining agreements apply – can be found to some extent in § 1151 ABGB. According to § 1151 para 1 ABGB, a so-called ‘Dienstvertrag’ (employment contract) is a contract under which two parties agree that one (the employee) provides his/her services to the other (the employer) for a certain amount of time. § 1151 para 1 ABGB juxtaposes this concept of the ‘Dienstvertrag’ with the concept of the so-called ‘Werkvertrag’ (service contract), under which the parties agree that one party provides a certain success (delivering a specific outcome/completing a designated task) to the other in exchange for payment. Those working under a service contract can be classed as businesspersons or entrepreneurs. Therefore, in contrast to employees, businesspersons can be described as persons who perform a service contract, who owe a certain success and who bear the full risk of the success/failure of their work. These persons are not obliged to provide their services in person but can use substitutes. To the underlying contract, contract and commercial law apply (e.g. the rules on liability for defects).

Based on the definition in § 1151 ABGB, doctrine and courts in their case law have developed several key criteria that have to be fulfilled in order to tell whether a contract is actually an employment contract or a service contract. Note, though, that a contractual relationship does not have to fulfil all of the following criteria in order to be classed as employment contract, but in an overall assessment these criteria have to prevail over others that would favour a service contract or any other form of contractual relationship. As soon as the following criteria prevail, a situation of personal dependency is established, which leads to the classification of a contractual relationship as employment contract. The main criterion is the personal subordination, meaning that the person works under the command of the employer, who has the authority to decide on where, when, and under which circumstances (i.e. that the employer is in control of the employee’s behaviour) the person provides her time and services. Any success that follows from the time and services provided by the employee is the employer’s success, not the employee’s. In exchange, any failure falls back on the employer as well. Thus, the employer bears the risk of success/failure, not the employee. Therefore, the employee provides her time and services and is obliged to work diligently, but with the means provided by the employer. More generally speaking, the employee is integrated into the employer’s organisation. The employer has the disciplinary authority, meaning in particular that she can ultimately terminate the employment relationship. Last but not least, the employee is obliged to provide the services in person according to § 1153 ABGB; according to

1. Allgemeines bürgerliches Gesetzbuch (Civil Code) originally from 1811, but § 1151 was introduced in its current version in 1916 only, as part of the so-called third partial-amendment.
2. Note that for the employment contract, § 1152 ABGB also establishes that – unless agreed otherwise – the employee is entitled to adequate wages in exchange for his/her services.
3. Note that although the provision of the services in person is one crucial element of an employment contract, the use of substitutes in extraordinary circumstances, especially when such a right is established in the contract, does not necessarily prevent the contract from being classed as employment contract as long as all other decisive criteria are met (Rebhahn, Robert in Neumayr/Reissner, ZellKomm § 1151 ABGB (1.1.2018, rdb.at) para 90).
4. Similar definitions can be found in § 6 para 1 AngG (Angestelltengesetz, White Collar Workers Act 1921), and § 72 GewO (Gewerbeordnung, Industry Trade Act 1859) which apply to white- and blue-collar workers, respectively. However, when it comes to the scope of this contribution, the differentiation between white- and blue-collar workers is of no importance, since both categories are only sub-categories of the employee/employment status.
doctrine and the courts’ case law, any general possibility to delegate the provision of time and services to another person, apart from exceptional circumstances, leads to the conclusion that there is no personal dependency, i.e. that the key-element of the employment relationship is missing.

**Semi-dependent workers and employee-like working persons**

Yet, the Austrian system also provides for an intermediate category of working persons, namely those providing their services for a certain amount of time under a so-called ‘freier Dienstvertrag’ (N.B. in private law terminology, this is also a continuous obligation, like the employment contract, and, contrary to the service contract, which ends with the completion of the designated task). To these working persons [in German freie Dienstnehmer; hereafter: semi-dependent workers (SDW)], only some of the rights employees are entitled to apply. There is no legal definition of this category of working persons in the Civil Code. However, over the years, the courts in their case law developed criteria that allow differentiating between employees and these SDW. Apart from the fact that these persons provide their services as a continuous obligation, the focus lies on the parties’ ability to arrange the work relationship as ‘free’ as possibly, i.e. with as little constraints as regards working time or the way the services are delivered. Thus, the contracting partner’s ability to give orders/commands is limited. Furthermore, an SDW is just or barely integrated into the contracting partner’s organisation. In conclusion, the personal dependence of these SDW is reduced. Examples of SDW are: an MD who, besides working independently in his own doctor’s office, also provides his services to a company (in this respect, he was under no authority of anyone from the company, and he could decide independently about his working hours); a freelance journalist who was not bound to any working hours and who was completely free in deciding when and where to work (no obligation to attend any meetings etc); an attorney at law who advised a company as external adviser for a monthly fee.

It is of the utmost importance, though, to bear in mind that all these cases were single-case decisions. The answer to the question whether the services are provided under an employment contract or under a ‘freier Dienstvertrag’, thus as SDW, depends on the facts of the single case. Thus, not every MD, freelance journalist or external attorney providing their services is an SDW. As soon as the criteria of personal dependence prevail, they might as well perform their services as employees. The mere fact that the contract is called a ‘Dienstvertrag’ (employment contract) or

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5. The parties to the employment contract may agree that the employee can delegate her obligation to work in exceptional circumstances to a third person. If such an agreement for example allows for the delegation to a specific person only or if the employer has to agree to any delegation, or if only minor tasks can be delegated, the contract can still be classed as employment contract. Cf. Rebhahn, Robert in Neumayr/Reissner, ZellKomm3 § 1151 ABGB (1.1.2018, rdb.at) paras 90 et seq.
6. For all that with many examples Rebhahn in Neumayr/Reissner, ZellKomm3 § 1151 ABGB (1.1.2018, rdb.at) para 56 et seq; Marhold, Franz/Friedrich, Michael, Österreichisches Arbeitsrecht (3 rd edn 2016) 32 et seq.
8. Rebhahn in Neumayr/Reissner, ZellKomm3 § 1151 ABGB (1.1.2018, rdb.at) paras 127 et seq.
9. See for further references Marhold/Friedrich, Österreichisches Arbeitsrecht (3 rd edn 2016) 42.
10. Supreme Court of Justice (OGH) 3 July 1956, 4 Ob 67/56, Arb 6487.
freier Dienstvertrag’, is of no importance at all if the actual performance of the contract does not follow the form.\textsuperscript{13}

As regards the application of labour law or of some specific provisions of labour law to these persons, a further differentiation needs to be made between SDW who are, as just described, rather free in carrying out their services, and persons who are regarded as employee-like persons. The characteristics of the latter group (employee-like working persons) are that they, without being employees, provide their services on behalf of and at the expense of another person and that they are to be regarded as employee-like because of their economic dependence.\textsuperscript{14} However, this is not a specific type of contract, but rather a typological concept. Thus, from a contract law point of view, these employee-like working persons might be SDW who provide their services as a continuous obligation, but they might occasionally also provide their services under a services contract.\textsuperscript{15} Therefore, the typological concept of ‘employee-likeliness’ is added to the underlying contract. The main criterion to which also some statutes refer to when extending their personal scope of application to these employee-like working persons is the economic dependence. However, this does not only refer to economic dependence stricto sensu, meaning that the person is dependent on the earnings she makes from working for one or very few persons, but the courts in their case law follow an overall-assessment, i.e. that in every single case, several elements/criteria are assessed.\textsuperscript{16} The most important one is that the employee-like working person does not offer her services on the market, but rather works for one or very few persons only. Further criteria taken into account are that the economic success of the work done belongs to the contractual partner and not the working person, that the working person is economically subordinated and therefore works for the economic purposes of the contractual partner (i.e. that she is not an undertaking/businessperson). In some cases, the courts also referred to a stronger integration into the contractual partner’s organisation.\textsuperscript{17}

Excursus. The (non-)importance of ‘means of production’. When it comes to deciding about the personal dependence of a working person, above all the criteria referred to under ‘Employees vs. businessespersons/entrepreneurs’ are to be considered. Thus, as soon as the working person works under the command and authority of another person and this other person can assign the working time and working place (and how the work should be performed), the question as to whether the working person owns some of the means of production is of hardly any/no importance. Yet, if these criteria (personal dependence because of authority of the ‘employer’) are given to a minor extent, the question whether the working person owns some means of production can be, but it does not necessarily have to be decisive. Furthermore, it has to be taken into account that even an employee

\textsuperscript{13} Rebhahn in Neumayr/Reissner, ZellKomm\textsuperscript{3} § 1151 ABGB (1.1.2018, rdb.at) para 65.
\textsuperscript{14} Cf. for example the description in § 1 para 1 DHG (Employees’ Liability Act): Die Vorschriften dieses Bundesgesetzes gelten für Dienstnehmer... in einem privatrechtlichen oder in einem öffentlich-rechtlichen Dienst(Lehr)verhältnis (im folgenden als Dienstnehmer bezeichnet). Sie sind auf Heinarbeiter und Personen, die gemäß § 3 des Heimarbeitsgesetzes 1960 den Entgeltsschutz für Heimarbeiten genießen, ferner auf sonstige Personen, die, ohne in einem Dienstverhältnis zu stehen, im Auftrag und für Rechnung bestimmter anderer Personen Arbeit leisten und wegen wirtschaftlicher Unselbstständig als arbeitnehmerähnlich anzusehen sind, im Verhältnis zu ihren Auftraggebern sinngemäß anzuwenden.
\textsuperscript{15} Rebhahn in Neumayr/Reissner, ZellKomm\textsuperscript{3} § 1151 ABGB (1.1.2018, rdb.at) para 123.
\textsuperscript{16} Cf. OGH, 8 February 1996, 8 ObS 1, 10/96.
\textsuperscript{17} Rebhahn in Neumayr/Reissner, ZellKomm\textsuperscript{3} § 1151 ABGB (1.1.2018, rdb.at) para 125.
can own some ‘means of production’ (mobile phone, car, e.g.). Although the use of only marginal or ancillary means of production owned by the employee would not automatically lead to disqualifying the employment relationship, employers might nevertheless try to convince employees to make use of means of production that the employees own in order to disqualify them as employees. Furthermore, there are cases where it is rather difficult to decide whether the means of production are marginal or ancillary. Such cases involve training and teaching especially, where often the intangible assets (know-how, above all) are neither marginal nor ancillary, but essential to the provision of the services. From an Austrian law point of view, in such cases it would be necessary to focus on the other, more decisive criteria in order to assess whether the person providing the services is personally dependent or not.\(^{18}\)

Despite all that, in a broader sense, the criterion ‘means of production’ is decisive under Austrian law as well, namely in terms of social security law. In case a working person provides time-related services in economic dependence substantially in person and without substantial (‘wendliche’) ‘means of production’ that she owns, and in case the contract is concluded with a businessperson, social security follows basically the same rules as social security for employees, unless some exceptions in place apply.\(^{19}\) Yet, as soon as the working person performs the work/provides the time-related services with their own substantial ‘means of production’, she is classified as an ‘independent’ businessperson to whom another social security regime applies (which basically means that she alone has to pay all contributions).\(^{20}\) However, it is highly contentious what ‘substantial’ means of production are. To give three case law examples (note that all the facts of the case have to be taken into account), the Supreme Administrative Court held that an aerobics trainer who provided her own gymnastic balls, CDs, CD player and rubber bands did not own substantial means of production,\(^{21}\) whereas this was answered in the affirmative in the case of office equipment, laser scales and the car used by an agent,\(^{22}\) and also in the case of a bike of a courier used for business purposes only.\(^{23}\) Furthermore, it has to be taken into account that social security law strongly relies on tax law notions. In the first case, the means of production were not used as economic goods under tax law whereas the office equipment of the agent and the courier’s bike were used as economic goods under tax law. It could be deducted from the Supreme Administrative Court’s case law to use the similar tax law notion of ‘substantial’ means of production (goods that are economically used that are worth more than EUR 400) also for the purposes of social security law.\(^{24}\)

18. Cf. for Austrian social security law and the Supreme Administrative Court that had to deal with this question VwGH (Supreme Administrative Court) 21 September 2015, Ra 2015/08/0045.
24. Cf. the case of a bike courier who owned a bike worth more than EUR 400 for business purposes only VwGH 11 December 2013, 2013/08/0030.
Legal presumptions for particular non-standard employment relationships

When it comes to legal presumptions for ‘particular non-standard employment relationships’, the ORF-Gesetz (Law on the Austrian Broadcasting Corporation) has to be mentioned. According to its § 32 para 4, all persons in charge of the programme/who are journalists are either employees or so-called ‘freie Mitarbeiter’ (freelancers). Yet, the ORF-Gesetz does not provide for any specific labour relationship related norms regarding freelance journalists.

Furthermore, the Law for Journalists (Journalistengesetz) provides that for permanent freelance journalists who work mainly in person for a media corporation (except the ORF) and who have no business structure of their own, collective bargaining agreements can be concluded. Nevertheless, these are labelled as so-called ‘Gesamtverträge’, in contrast to ‘regular’ collective bargaining agreements according to the ArbVG, which are called ‘Kollektivreträge’. The concluding partners can be any collective bargaining partners that have been lawfully awarded that right.

Another legal presumption is made for some specific working persons who perform their work at home (so-called ‘Heimarbeiter’). To these persons, the ‘Heimarbeitsgesetz’ (Act on work performed at home) applies. Yet, due to a lack of personal dependence, these Heimarbeiter are not classed as employees. Furthermore, it is commonly acknowledged that the Heimarbeitsgesetz does not apply to ‘modern’ forms of work at home (i.e. to persons working remotely on their laptop or to ‘classic’ platform workers who perform a task for a platform on their computer, usually from home), since it applies to persons performing manual work only. Thus, the possibility to conclude so-called ‘Gesamtverträge’, which are agreements similar to collective bargaining agreements, for these persons, is of limited relevance. Academics have advocated for an extension of the scope of application of the Heimarbeitsgesetz to crowdworkers, de lege ferenda, and not de lege lata, though.

Applicable labour law provisions for semi-dependent workers and employee-like working persons

The whole range of labour law provisions applies to employees only. As regards other working persons, when it comes to individual labour law, a differentiation needs to be made between SDW on the one hand and employee-like working persons on the other hand. Yet, it has to be borne in mind that also SDW might be employee-like working persons, as long as they additionally are, after an overall-assessment of the situation, also economically dependent from their contractual partner.

One exception in place worth mentioning regarding the personal scope of application of specific statutes exists in respect of the Act on Specific Retirement Provisions for Employees and Self-Employed Persons. This Act (Betriebliches Mitarbeiter- und Selbständigen-Vorsorgegesetz, BMSVG) applies not only to employees and SDW, but also to businesspersons, thus to any person

25. §§ 16 et seq. Journalistengesetz.
generating income from work. Since 2008, also businesspersons mandatorily have to pay 1.83% of their monthly income to a ‘retirement fund’ (Vorsorgekasse). The latest when retiring, they are entitled to the payment of a lump-sum or of monthly payments related to their contributions. As the distinguished reader might have noted, though, this system can be compared to a second pillar of pension insurance. Hence, it is only partially true that the BMSVG grants labour rights to businesspersons.

Preliminary observation: Collective bargaining agreements for employees only

As regards collective labour law, the assessment is quite easy: according to prevailing opinion, collective bargaining agreements can be concluded for employees only. Although the respective norms in the Labour Constitution Act apply to ‘any employment relationship’ based on a private law contract (§ 1 para 1), collective bargaining agreements are defined as agreements between collective bargaining partners for the employer’s side on the one hand and for the employee’s side on the other. Furthermore, collective bargaining agreements regulate rights and obligations between employers and employees. In addition, in order to conclude a collective bargaining agreement, any association has to fulfil certain criteria, amongst others the representation of the interests of ‘employees’ or ‘employers’. It is most doubtful whether the respective legal body (the so-called ‘Bundeseinigungsamt’ which is an administrative body established within the Ministry for Social Affairs) that decides on whether an association – apart from the Austrian Economic Chambers and the Chambers of Labour who enjoy that right ex lege – can conclude collective bargaining agreements, would allow [and therefore extend the meaning of the term

31. Cf. the references at Mosler, Rudolf, Ist das ArbVG noch aktuell? - Kollektive Rechtsgestaltung, DRdA 2014, 511 (514). However, de lege ferenda, Mosler and Risak, for example, argue that the scope of application of collective bargaining agreements and the possibility to conclude collective bargaining agreements, respectively, should be extended to employee-like working persons; Mosler, DRdA 2014, 514; Risak, ZAS 2002, 169 et seq.
32. ArbVG – Arbeitsverfassungsgesetz.
33. ‘Die Bestimmungen des I. Teiles gelten – soweit im folgenden nicht anderes bestimmt ist – für Arbeitsverhältnisse aller Art, die auf einem privatrechtlichen Vertrag beruhen.’ A broad interpretation might allow for subsuming SDW under that provision as well (Mosler, Rudolf, Ist das ArbVG noch aktuell? - Kollektive Rechtsgestaltung, DRdA 2014, 511). However, all following norms in the Labour Constitution Act are based on the binary approach.
34. § 2 para 1 ArbVG: Kollektivverträge sind Vereinbarungen, die zwischen kollektivvertragsfähigen Körperschaften der Arbeitgeber einerseits und der Arbeitnehmer andererseits schriftlich abgeschlossen werden.
35. § 2 para 2 (2) ArbVG: Durch Kollektivverträge können geregelt werden: die gegenseitigen aus dem Arbeitsverhältnis entspringenden Rechte und Pflichten der Arbeitgeber und der Arbeitnehmer.
36. § 4 ArbVG: (1) Kollektivvertragsfähig sind gesetzliche Interessenvetretungen der Arbeitgeber und der Arbeitnehmer, denen unmittelbar oder mittelbar die Aufgabe obliegt, auf die Regelung von Arbeitsbedingungen hinzuwirken und deren Willensbildung in der Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gegenüber der anderen Seite unabhängig ist.
   (2) Kollektivvertragsfähig sind die auf freiwilliger Mitgliedschaft beruhenden Berufsvereinigungen der Arbeitgeber und der Arbeitnehmer, welche

1. sich nach ihren Statuten zur Aufgabe stellen, die Arbeitsbedingungen innerhalb ihres Wirkungsbereiches zu regeln;
2. in ihrer auf Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gerichteten Zielsetzung in einem größeren fachlichen und räumlichen Wirkungsbereich tätig werden;
3. vermöge der Zahl der Mitglieder und des Umfanges der Tätigkeit eine maßgebende wirtschaftliche Bedeutung haben;
4. in der Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gegenüber der anderen Seite unabhängig sind.
‘employee’ (in analogy) to SDW] for an association that represents SDW to conclude collective bargaining agreements. As regards the Austrian Economic Chambers’ and the Chambers’ of Labour competence to conclude collective bargaining agreements (note that the Chambers of Labour do not conclude agreements in practice),37 no trend towards bargaining for persons being neither employers nor employees can be detected.

It can be assumed that the non-applicability of collective bargaining agreements to SDW relationships is one major driving factor for the existence of (still) around 14,000 SDW relationships. By not being obliged to apply a collective bargaining agreement, contractual partners of SDW are, for example, exempt from the obligation to pay a thirteenth and fourteenth salary – rights that in Austria every collective bargaining agreement provides for employees. Furthermore, works council representation at all levels (firm, company, etc.) is restricted to employees as well. Thus, collective labour law still follows the very strict binary divide between employees and businesspersons. Exceptions, though not within the context of the Labour Constitution Act, exist in the media sector.38

**Individual labour law statutes applicable to SDW**

The Civil Code does not regulate the contract underlying the working relationship between an SDW and her contractual partner (‘freier Dienstvertrag’). Thus, the provisions regulating the employment contract (§§ 1151 et seq.) do not apply directly. However, those provisions that are not based on the assumption of personal dependence apply analogously. In other words, those employment rights provided for in the Civil Code apply to SDW that are not necessarily – or at least to a very low degree only – based on the person’s status of personal dependence. These are § 1152 regarding wages (entitlement to reasonable, adequate wages, i.e. that wages should reflect collectively bargained wages for employees performing similar activities),39 §§ 1159-1159b regarding termination periods and modalities of termination in case of termination by giving notice, and §§ 1162-1162d regarding general grounds for premature termination for substantive reasons.40 The absolute prohibition to work eight weeks before and after giving birth, provided for by the Mutterschutzgesetz (Maternity Protection Act, MSchG; §§ 3, 5 paras 1 and 3)41 applies to those SDW who fall under the definition of SDW in social security law. The latter definition follows – in the grand scheme of things – the criteria established in contract law (above all, reduced personal dependence).

**Individual labour law statutes applicable to employee-like working persons**

In addition to the aforementioned provisions of the MSchG and to those provisions of the Civil Code that apply analogously to SDW, further statutes apply to employee-like working persons because of their economic dependence. These are the Employees’ Liability Act, the Equal

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38. Cf. already under ‘Legal presumptions for particular non-standard employment relationships’ and infra under ‘Individual labour law statutes applicable to employee-like working persons’.


41. § 1 para 5 MSchG: «Auf freie Dienstnehmerinnen im Sinne des § 4 Abs. 4 des Allgemeinen Sozialversicherungsgesetzes (ASVG), BGBl. Nr. 189/1955 sind § 3 sowie § 5 Abs. 1 und 3 anzuwenden."
Treatment Act, the Temporary Agency Work Act, the Act regarding Employment of Foreigners, and a few provisions of the Insolvency Act. Furthermore, the specialised Employment and Social Security Courts decide upon legal disputes between employee-like working persons and their contractual partners.\(^{42}\) Yet, other typically employment related statutes, e.g. the Working Time Act or the Holidays Act, do not apply to employee-like persons, not even analogously.

**Collectively agreed employment conditions for freelancers in the media sector**

The situation at the Austrian Broadcasting Corporation (Österreichischer Rundfunk – ORF) is peculiar. First, the Law on the ORF (ORF-Gesetz) which regulates, amongst others, the independence of those persons working for the ORF as journalists or who are involved in creating the programmes, applies to employees and freelancers. There are only few rules governing the employment/freelance relationship, namely on compensation payments, specific rules on fixed-term contracts and on payments to be made according to the BMSGV. However, the rules on compensation payments in case of termination of long-term fixed-term working relationships or in case of unjustified dismissal apply to employees only. The current collective bargaining agreement applicable to the ORF applies to employees only, too. For freelance journalists, the ORF has internal guidelines that are applied when determining how the specific tasks delivered by journalists should be paid. Yet, these internal guidelines have no formal legal basis and can be adapted unilaterally by the ORF as ‘employer’ at any time.

For journalists working for a company that is member of the (free) association of Austrian papers and media (Österreichischer Zeitschriften- und Fachmedienverband, ÖZV),\(^ {43}\) there exists a real collective bargaining agreement, concluded according to the Labour Constitution Act, between the ÖZV and the Austrian Trade Union Federation. However, the collective bargaining agreement itself limits its personal scope of application regarding permanent freelancers, i.e. that only some very specific rules regarding their wages apply. Any other norms (on working time, holidays, etc.) of the collective agreement apply to employees only. It can be concluded that this is due to the fact that the Labour Constitution Act allows for the regulation of employment rights and obligations in collective bargaining agreements for employees only.

**New strategies for non-employees?**

Recent developments such as the creation of a ‘club’/association for an – admittedly – very heterogeneous group of working persons under the roof of the Austrian Trade Union Federation\(^ {44}\) led to some discussion as to whether it was lawful to establish such a ‘club’/association for working persons. The main point of interest in that discussion is that for many services to be offered as an

\(^{42}\) Cf. § 51 para 3 sect. 2 Arbeits- und Sozialgerichtsgesetz (ASGG, Act on Courts for Labour and Social Security Law Matters).

\(^{43}\) Cf. in more detail on how the collective bargaining system works in Austria, especially on who the parties to the agreements are and on the scope of application of the agreements, *Brameshuber*, The Importance of Sectoral Collective Bargaining in Austria, in Laulom (ed.), Collective Bargaining Developments in Times of Crisis, Alphen aan den Rijn: Kluwer Law International, 89-104.

\(^{44}\) Vidaflex; an initiative under the wings of vida, the traditional union, but who focuses on one-person-companies/solopreneurs, small enterprises with up to four employees, and freelancers. For a membership fee of EUR 25 per month, they offer, amongst others, legal support, support regarding taxes etc, but also want to represent that quite heterogeneous group of persons (https://www.vidaflex.at/, 19 June 2019).
‘independent contractor’ (driving a taxi, e.g.), Austrian law requires the registration of the business. The registration, though, leads ipso iure to automatic and mandatory membership of the Economic Chambers. The Act on Economic Chambers further provides for automatic membership of one of the seven industry sectors within the Federal Chamber, as well as for automatic membership of one of the trade groups, according to the respective business licence. Thus, these registered working persons are already members of one association, namely the one concluding the collective bargaining agreements on the employers’ side in practice.45

Taxi drivers are also subject to specific Acts in the nine Austrian regions providing for standardised, fixed fees for services. To date, these acts have not applied to Uber drivers, since they fall under the legal regime for rental cars. However, Parliament is currently debating on whether to subject Uber to the taxi regulations, which would lead to the application of the taxi regime, including standardised, fixed fees for the services provided.46

(Critical) Assessment of the situation (of employee-like working persons especially)

It can be assumed that due to the existence of the intermediate category of SDW and more in particular of SDW who are also economically dependent and therefore considered employee-like, resulting in the application of at least some employment rights, hardly any discussion of ‘flexibility’ of the criteria defining the employment relationship has emerged so far. Another highly probable reason is that social security law, which is very closely linked to the status of a working person, provides for mandatory social security (health, accident and pension insurance; for employees and SDW unemployment insurance as well)47 for any work-related activity, irrespective of whether the income created is gained by dependent/subordinate, semi-dependent or self-employed/independent work as businessperson. Furthermore, not only is the employer responsible for paying the social security contributions for employees, but also for SDW. Thus, at least from a social security law point of view, economically speaking it has become less attractive over the years for employers to employ a working person as SDW. This is reflected by recent data, according to which the numbers of SDW dropped from nearly 20,000 in 2012 to around 14,000 in 2018.48

From a teleological point of view, the analogous application of only some employment related statutes to employee-like working persons can (and should) be challenged, though. The most obvious example is the Holidays Act which applies neither to SDW in analogy nor to employee-like working persons (either in analogy or by broadening its personal scope of application). When considering why, for example, the Equal Treatment Act or the Employees’ Liability Act apply to employee-like working persons too – namely particularly because of their economic dependence – it might as well be questioned why the Holidays Act does not apply. This is particularly true when taking into account that the provision of services to only one or only very few other persons is one main criterion to be taken into account when assessing whether a working person is to be considered employee-like.46

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47. Note that since 2009, even businesspersons can voluntarily opt-in into unemployment insurance. Cf. in detail Pfalz, Thomas, Selbstaendige in der Arbeitslosenversicherung (Verlag Österreich 2018).
person is employee-like or not. If this is the case, it is highly questionable why such a person should not be entitled to paid holidays. The German Holidays Act (Bundesurlaubsgesetz, BUrlG), e.g. applies to employee-like working persons who are economically dependent (and in need of social protection), too.49 Thus, when taking labour law and one of its main goals, the social protection of the economically weaker party, seriously, it can and should be questioned which labour laws or which concrete provisions of some statutes should apply to employee-like working persons as well.50 The same argument is valid as regards the narrow scope of application of the Labour Constitution Act. If one of the main purposes of collective bargaining agreements is to be taken seriously – mitigating the unequal bargaining powers between the contractual partners that exist due to the economic dependence of the employee(-like working person) – a possibility to conclude collective bargaining agreements also for employee-like working persons should exist. However, to date, the prevailing opinion has been quite clear on the Labour Constitution Act’s narrow scope of application.

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50. Cf. for a more general assessment on that point Benecke, Martina, Der Citoyen als Travailleur - Recht als Schutzzone, EuZA 2018, 3 (15 et seq.); Rebhahn, Robert, Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsper- spektive, RdA 2009, 236 (242 et seq.).