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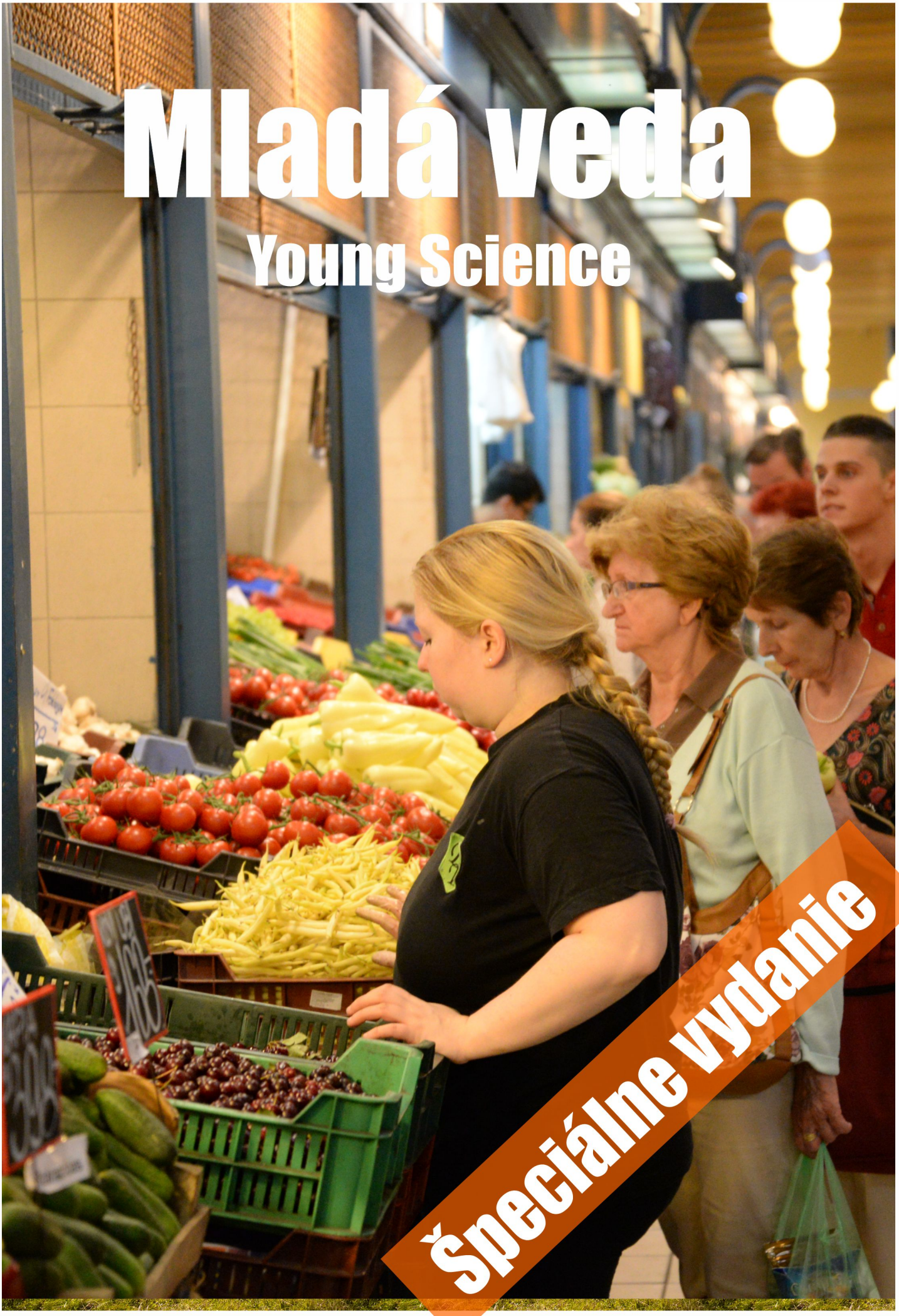

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Predslov k špeciálnemu číslu

Špeciálne číslo časopisu Mladá veda prezentuje vybrané výsledky výskumu, ktorý realizoval tím odborníkov z Ekonomickej fakulty UMB v Banskej Bystrici v rámci projektu VEGA 1/0366/21 "Závislé podnikanie na Slovensku - reflexia, meranie a perspektívy".

Projekt sa venoval analýze ekonomických a mimoekonomických (právnych, sociologických a etických) aspektov závislého podnikania, identifikácii kľúčových kritérií pre vymedzenie tohto typu podnikania a spracovaniu metodiky merania a evidencie závislého podnikania na Slovensku. Hlavným cieľom projektu bolo na základe analýzy determinantov podnikania identifikovať skupinu ekonomicky závislých podnikateľov na Slovensku, navrhnúť kritériá, na základe ktorých bude možné identifikovať (a následne evidovať) ekonomicky závislých podnikateľov a vymedziť oblasti, v rámci ktorých je potrebná zmena legislatívy za účelom sociálnej ochrany a zlepšenia postavenia ekonomicky závislých podnikateľov na Slovensku.

Jedným z parciálnych cieľov projektu bolo uskutočniť primárny výskum zameraný na zistenie rozsahu závislého podnikania na Slovensku, faktorov ovplyvňujúcich rozhodnutie jednotlivcov uskutočňovať závislé podnikanie, bariér závislého podnikania, postojov samotných podnikateľov k ich statusu, ako aj dopadov ekonomických výkyvov/kríz na takýto druh podnikania.

Zaradené výstupy ponúkajú analýzu teoretických východísk problematiky závislého podnikania domácich a zahraničných expertov, komparáciu kvantitatívnych (najmä spôsob merania, evidencia a štatistické vykazovanie) a kvalitatívnych aspektov (najmä spoločenský status, daňové a odvodové zaťaženie, sociálna ochrana) závislého podnikania vo vybraných štátoch Európskej únie a zároveň prinášajú spracované a interpretované vybrané výsledky uskutočneného originálneho empirického prieskumu v prostredí slovenských podnikateľov.

Riešiteľský projektový tím

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GENUINE, FALSE AND DEPENDENT SELF-EMPLOYMENT - REVIEW

PRAVÁ, FALOŠNÁ A ZÁVISLÁ SAMOSTATNÁ ZÁROBKOVÁ ČINNOSŤ – PREHĽAD

Miroslava Knapková[1]

Miroslava Knapková is an associate professor at the Department of Economics, Faculty of Economics, Matej Bel University in Banská Bystrica. In her research activities she deals with the economic and legal aspects of entrepreneurship and employment, the issue of false/fake self-employment, work engagement as well as the interrelation of paid and unpaid work.

Miroslava Knapková pôsobí ako docentka na Katedre ekonómie Ekonomickej fakulty Univerzity Mateja Bela v Banskej Bystrici. Vo svojej výskumnej činnosti sa venuje ekonomicko-právnym aspektom podnikania a zamestnania, problematike nepravého/falošného podnikania, pracovnej angažovanosti ako aj vzájomnému vzťahu platenej a neplatenej práce.

Abstrakt
Samostatná zárobková činnosť je jednou z najrozšírenejších aktivít, na základe ktorej môžu fyzické osoby získať príjem, a to nielen na Slovensku, ale aj naprieč celou Európskou úniou. Samostatná zárobková činnosť je vo svojej podstate považovaná za ekonomicky nezávislú činnosť, často súvisiacu s s podnikateľskou činnosťou (nie každá samostatná zárobková činnosť je ale podnikaním). Realita však ukazuje, že status samostatnej zárobkovej činnosti je často len formálny a samostatne zárobkovo činné osoby sú z rôznych dôvodov v pozícii podobnej zamestnaniu, prípadne až v pozícii ekonomickej závislosti. Cieľom príspevku je na základe dostupných dokumentov, štúdií, a právnych predpisov v členských štátoch Európskej únie vymedziť znaky, na základe ktorých je možné rozlíšiť pravú samostatnú zárobkovú činnosť, falošnú samostatnú zárobkovú činnosť a ekonomicky závislú samostatnú zárobkovú činnosť.
Kľúčové slová: samostatná zárobková činnosť, falošná samostatná zárobková činnosť, závislá samostatná zárobková činnosť

Abstract
Self-employment is one of the most widespread activities through which individuals can earn an income, not only in Slovakia but also across the European Union. Self-employment is by its nature regarded as an economically independent activity, often related to entrepreneurial activity (but not all self-employment is an entrepreneurship). However, reality shows that the status of self-employment is often only formal and self-employed persons are for various

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reasons in a position like employment, or even in a position of economic dependence. The aim of this paper is to define, based on available documents, studies, and legislation in the Member States of the European Union, the features that distinguish between genuine self-employment, false self-employment and economically dependent self-employment.
Key words: self-employment, false self-employment, dependent self-employment

Introduction

The decision to engage in dependent work (employment) or independent activity (self-employment, entrepreneurship) should be linked to the free will of each individual. Article 35(1) of the Constitution of the Slovak Republic defines that everyone has the right to freely choose a profession and to prepare for it, as well as the right to engage in business and other gainful activity. Such a right should allow not only the possibility to make a free choice, but also the possibility to enjoy all the benefits associated with a particular choice (including legal and social protection), both on the part of the employee and on the part of the self-employed. In recent years, however, the European Union and its individual Member States have been confronted with a phenomenon that leads to forced self-employment, which often takes on the character of false or even economically dependent self-employment.

The aim of this paper is to define the characteristics of false self-employment and economically dependent self-employment based on several studies and the legislative arrangements of some European Union countries. The paper is not based on the results of primary research, but on the study and analysis of the existing approaches of the EU Member States to the practical definition of false and dependent self-employment.

Desk research method was used in the preparation of the paper. The paper is divided into three parts: genuine self-employment, false self-employment and its features, dependent self-employment and its features.

Genuine self-employment

The International Labour Organisation defines bogus self-employment (bogus self-employment, or false self-employment) as a form of non-standard employment that falls between the categories of employment and self-employment. It can be in the form of "disguised employment", in which "‘an employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee", and "dependent self-employment", in which "workers perform services for an enterprise under a contract that is distinct from a contract of employment, but depend on one or a small number of clients for their income, and receive direct instructions as to how the work is to be carried out" (Williams and Lapeyre, 2017, p. 36). This definition encompasses two variants, namely false self-employment (which is not tied to the necessity of being income-dependent on one person) and dependent self-employment (which is tied to the necessity of being income-dependent on one person or a small group of persons). This limits the basic independence/freedom of the self-employed.

The fundamental question remains what constitutes genuine self-employment (meaning independent self-employment). In 1999, Supiot (1999) argued that dependency is an essential defining characteristic of employment and should not be conflated with entrepreneurship and self-employment. Supiot also defined that economic dependency is defined by working "upon

a single client or prime contractor or upon a very small number of clients". According to the Eurofound report (2012) the main characteristic of self-employment is an entrepreneurial way of working. An entrepreneur is characterised by specific powers, such as autonomy of decision-making in organising work and hiring people, financial independence and related responsibility and constraints. 'Genuine' self-employed people are expected to possess these competencies. According to Benz and Frey (2008), independence mainly means procedural independence, i.e. the fact that the self-employed person stands outside any hierarchy. However, in their study they state that this procedural independence does not necessarily imply but not associated with economic necessity. Lange (2012) adds that it is also essential for the independence of the self-employed to perceive autonomy and independence of decision-making. Dawson and Henley (2009) developed a typology of different dimensions of entrepreneurship based on what factors motivate individuals to become entrepreneurs. One of the categories is independence-seeking entrepreneurship. This category includes those self-employed individuals who are driven to entrepreneurship by a desire for independence (but not associated with economic necessity).

False self-employment

In this part of the article, we will try to define the features of false self-employment. Given that this status is only recognised in some EU Member States, we focus on the definition of false self-employment precisely based on the approaches of these States (in particular, based on a comparison between an employee and a false self-employed person).

In the Irish setting, a document has been issued which attempts to identify the key differences between genuine self-employment and bogus/false self-employment (https://connectunion.ie). Genuine self-employed is characterised by having control over what is done, how it is done, when and where the activity is carried out and whether it is carried out personally. He may also hire other people to carry out the activity, on his own terms. On the other hand, a typical feature of false self-employment is that the person acts as a subcontractor but has no control over costs, materials or working practices. He cannot make a profit on the basis that he is responsible for his own efficiency of work. In fact, he makes no real profit from the business. He receives an agreed remuneration based on attendance (hours worked) and performance, which is managed by a supervisor (just as it is for salaried employees).

Another document, the Code of Practice on Determining Employment Status (2021), seeks to extend the definitional frameworks set out in the Competition Act to all occupations in the Irish context, thus clearly distinguishing between employment and self-employment. In the following text, we provide main features distinguishing employee and genuine self-employed persons according to five areas of interest.

1. **Reciprocity of obligations**

Employee:

- is obliged to carry out the work that must be assigned to him by his employer on a regular basis,
- works during fixed hours or for a fixed number of hours per week or month.

Self-employed person:

- is not obliged to accept a particular job that has been offered to him,

- determines his own working hours in the performance of his duties.

Supporting questions to answer:

- Is there a contractual obligation to assign work and an obligation to perform the work?
- Can the worker determine the days and times when the work is to be performed?

2. Possibility of substitution

Employee:

- is obliged to carry out the work that must be assigned to him by his employer on a regular basis.

Self-employed person:

- he can hire other people to do the agreed work on his terms.

Supporting questions to answer:

- whether and to what extent the worker may employ helpers or assistants,
- whether and to what extent the worker must carry out the work personally,
- whether and to what extent the payer has the right to decide who the worker hires,
- whether and to what extent the substitute is controlled by the payer or the worker,
- whether and to what extent the substitute is paid by the payer or the worker.

3. Existence of own enterprise

Employee:

- supplies labour only,
- is not exposed to personal financial risk in carrying out the work,
- takes no responsibility for the investment and management of the business,
- does not have the opportunity to benefit from proper management in the planning or execution of the tasks arising from the contract,
- receives funding to cover allowances and/or travel expenses,
- is entitled to sickness benefits or overtime supplements,
- has tax deducted from his/her wages through the PAYE system.

Self-employed person:

- owns his own enterprise,
- is exposed to financial risk because he must bear the cost of correcting defective or substandard products or defective performance of work under the contract,
- takes responsibility for investment and management of the business,
- has the opportunity to benefit from good management in planning and implementation of contracts and task,
- has a permanent place of business where materials, equipment, etc. can be stored,
- provides his own insurance, e.g. liability insurance,
- is registered for the VAT deduction or self-taxation.

Supporting questions to answer:

- whether and to what extent the worker is exposed to financial risk,
- whether and to what extent the worker has the opportunity to make a profit through his own efforts,
- whether and to what extent the worker is also an employer,

- whether and to what extent the payer supplies most of the tools and equipment used by the worker,
- whether and to what extent the payer is responsible for the repair of the plant or equipment, and maintenance and insurance costs, and whether he retains the right to use the tools and equipment provided to the worker,
- whether and to what extent the worker is responsible for any operating costs,
- whether and to what extent the worker is financially liable if he fails to fulfil his obligations under the contract,
- whether and to what extent the payer chooses and controls the method and amount of payment,
- whether and to what extent the worker is paid in a lump sum for work done or is paid on a regular basis interval,
- whether and to what extent the worker is free to make business decisions that affect his profit or loss,
- whether and to what extent the worker has invested capital.

4. Integration into the enterprise of the contracting party

Employee:
- does not supply the materials needed to carry out the work,
- does not provide equipment other than small work tools.

Self-employed persons:
- provides the material necessary to carry out the work,
- provides the equipment and machinery necessary to carry out the work.

Supporting questions to answer:
- whether and to what extent the worker has other employees reporting to him,
- whether and to what extent the worker is listed in the employer's internal telephone directory, or has an e-mail address associated with the employer,
- whether and to what extent the worker uses company facilities such as a uniform, letterhead paper, creche, tools and equipment,
- whether and to what extent the worker participates in systems of performance management, corporate training programmes or may participate in internal promotions.

5. Control

Employee:
- works for one person or one company,
- is under the control of another person who tells him how, when and where to do the work,
- receives a fixed hourly/weekly/monthly wage.

Self-employed person:
- may provide the same service to several persons or businesses at the same time,
- has control over what is done, how it is done, when and where it is done and whether the work is done personally,
- he calculates the cost of the work himself and freely negotiates the price for the work.

Supporting questions to answer:

- whether and to what extent there is a contractually agreed notice period,
- whether and to what extent the relationship is subordinate,
- whether and to what extent the payer controls the method and amount of pay,
- whether and to what extent the payer decides what work the worker will do
- whether and to what extent the worker needs permission when he wants to work for other payers, ("restrictive arrangements"),
- whether and to what extent the payer controls the worker's working hours,
- whether and to what extent the worker receives training from the payer on how to do the work.

The German online portal on false self-employment https://www.scheinselbststaendigkeitstest.de/ has defined four criteria that can be used to identify false/bogus self-employment. A self-employment is a false self-employment if the following criteria are met:

1. dependency: if the self-employed person is economically dependent on the client and receives more than 5/6 of his income (approximately 84%) from only one client/company,
2. obligation to follow instructions: if the self-employed person has to follow the company's instructions and is treated similarly to an employee,
3. external control: if the self-employed person cannot determine his own working methods, but is integrated into the internal processes of the client,
4. no entrepreneur status: if the self-employed person does not act as an entrepreneur himself (e.g. with his own website, independent pricing and possibly his own employees).

The portal has also developed a set of subsidiary questions, which specify the answers to the above criteria in more detail. If the answer to most of the questions is 'no', there is a small risk that the self-employed person is in a dependent status and that the activity is false self-employment. Conversely, if the answer to most of the questions is 'yes', the risk of false self-employment is high. These are the following set of questions:

1. Is the worker carrying out the activity a sole trader and not a legal person (GmbH, UG, etc.)?
2. Does the worker work on the company's premises?
3. Does the worker have access to the client's premises by means of keys, code cards or similar?
4. Does the worker use the company's facilities and not his own facilities?
5. Has the client/company set precise working hours for the worker?
6. Does the worker perform the same tasks as paid employees?
7. Is the worker an integral part of a team that otherwise consists only of paid staff?
8. Does the worker receive instructions that go beyond the necessary coordination?
9. Does the worker have to excuse himself/herself when he/she cannot work (e.g. in case of illness)?
10. Is the worker included in vacation scheduling and required to coordinate absences?

11. Can the external worker take on other tasks, or do they have to be approved by the client/company first?
12. Is the worker so intensely busy that he has no time for other tasks?
13. Does the worker attend company meetings or events that have nothing to do with his tasks?
14. Does the worker have company business cards?
15. Does the worker use a company email address without any mention of his external status?
16. Does the worker receive a fixed monthly salary?
17. Does the worker receive sick or vacation benefits?
18. Does the worker work on a permanent basis instead of on a project-by-project basis?
19. Does the worker wear company work clothes?
20. Does the worker receive benefits that otherwise only employees receive?

Dependent self-employment

Economically dependent self-employment is a relatively new concept that European Union countries have only encountered in recent years, defining the intersection between dependent work carried out by an employee for an employer under an employment relationship and independent work carried out by an entrepreneur (in this case, a natural person) in his or her own name and on his or her own responsibility in a commercial or civil law relationship. This institution therefore covers situations where the activity appears to be self-employed but at the same time meets the characteristics of dependent work (but is performed outside the employment relationship). The study 'Economically dependent self-employed workers' (2014) defined the essential characteristics of an individual who is economically dependent self-employed. Such a person can be considered as one who works for another under a contract other than an employment contract, works predominantly as a sole proprietor and does not employ any employees, works for the same 'employer' (or principal) more than 70% of the time, maintains a long-term relationship with the same 'employer', and works on behalf of and under the terms and conditions set by the 'employer'.

In the case of economically dependent self-employment, different approaches to defining the indicators by which dependent self-employed persons can be identified are found in different countries. In the Table 1, we present the main quantifiable characteristics that are applied in the different EU Member States. We rely on studies or legislative definitions that determine, among other things, the quantifiable aspects of false or dependent self-employment.

Feature	Characteristics	Source / Country
Number of persons/companies for which the self-employed person works	The main income comes from no more than two persons	Competition Act, Ireland
	Predominantly one	Status of self-employed persons, Spain
Duration of the contractual relationship	More than 8 months of the year	Fornero Law No 92/2012, Italy
Working time	More than 70% of the time for the same entity	Economically dependent self-employed workers

Income	At least 75% of the income from a single entity	Status of self-employed persons, Spain
	More than 5/6 of income (approximately 84%) from only one entity	www.scheinselbststaendigkeitstest.de
	More than 50% of income from a single entity	Decent Work Agenda in Portugal…, 2023
	More than 80% of income from one entity	Fornero Law No 92/2012, Italy
Number of employees or subcontractors	Without employees	www.scheinselbststaendigkeitstest.de Economically dependent self-employed workers

Table 1 – Quantifiable aspects of dependent self-employment
Source: Own elaboration

Based on the data in Table 1, income is the most controversial in terms of identifying an economically dependent self-employed person. This varies from more than 50% from a single entity (applied in Portugal) to more than 5/6 of the income, which is approximately 84% of the income (applied in Germany). As income is a key factor in determining economic dependence, we consider it essential that this area is defined as a priority also in the Slovak context (we recommend an approach like that defined in Status of self-employed persons (Spain) or in Economically dependent self-employed workers (that is, income dependence from 70 or 75 % of income, respectively).

Conclusion

Self-employment should be carried out as an economically independent activity aimed at obtaining the income necessary to ensure the livelihood of the individual. Economic independence is reflected not only in the freedom to choose to pursue this activity, but also in the freedom to decide when, where and how to pursue it. However, reality shows that the self-employed person is often in a subordinate relationship to the entity for which he carries out his activity. The intent of this paper was to present three categories of self-employment, namely genuine self-employment, false self-employment, and dependent self-employment. Problematically, not all EU countries distinguish between these three categories (the Slovak Republic is an example). For this reason, we have focused on the available studies and legislation that attempt to define the features that can be used to distinguish the three categories from each other. In view of the growing efforts of the European Union to clearly separate genuine self-employment from its alternatives (which are closer in nature to employment), one can expect that this issue will also require attention in Slovakia in the future. Therefore, we consider the identification of the basic features of these three forms of self-employment to be crucial for further investigation of this phenomenon, as well as for the identification of possible policies to influence this phenomenon.

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