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The Regulation of Economically Dependent Self-employed Work in Spain: A Critical Analysis and a Comparison with Italy

Carmen Agut García and Cayetano Núñez González *

Introduction

On 29 April 2012, the Plenary Session of the European Economic and Social Committee (EESC) passed an own-initiative opinion on “New trends in self-employed work: the case of financially dependent self-employed work”.¹ This opinion recognises for the first time the existence of the financially dependent self-employed workers” (*TRADEs* in Spanish, used hereafter) and provides the opportunity to establish a set of rights for all European workers, be they salaried or self-employed. For this reason, it was considered that there should be future communication from the European Commission on the matter in a more detailed fashion. To date, the EU countries have maintained different positions with regard to this category of workers and, according to the foregoing opinion, only a few national governments have regulated or acknowledged their status, namely Austria, Germany, Italy, Portugal, the United Kingdom, and, starting from 2007, Spain. Act No. 20 of 11 July 2007 (hereafter simply as *LETA*)² introduced the concept of financially dependent self-employed workers within the Spanish legal system (Art. 11 to 18). This notion

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¹ SOC/344—CESE 639/2010. The opinion was put forward by the Spanish committee member José María Zufiaur Narvaiza.

² BOE 12-7-2007. The *LETA* passed on 12 October 2007 and entered into force by means of Royal Decree No. 197 of 23 February 2009.

presents some similarities with that regulated in the Italian legal system by Legislative Decree No. 276 of 10 September 2003, which draws on the proposals put forward by labour law scholar Marco Biagi. Legislative Decree No. 276/2003—the so-called Biagi Law—redesigned some already existing employment contracts—such as coordinated and continuous collaboration (quasi-subordinate work)—while making provisions for new contractual arrangements, e.g. a contract for the completion of a certain project (project work).³ There are, however, a number of distinctions that can be observed between the two legislative measures implemented in Italy and Spain.⁴ In Spain, *TRADEs* are defined as “[...] those who, in return for remuneration, carry out an economic activity or a profession, personally, directly and predominantly for an individual or an organisation—known as the client—on whom they are financially dependent, as granting them at least 75 percent of their income” (Art. 11 of LETA). In conceptual terms, and as it happens for instance in Germany,⁵ it is the quantitative criterion that plays a role at the time of identifying the contractual scheme adopted.⁶ In a similar vein, pursuant to Art. No. 61 of Legislative Decree 276/2003, an Italian worker employed to carry out a project is also considered to be self-employed. In Italy, the activity must be undertaken on an individual basis, without any kind of relationship of subordination. A project or work plan must be provided, and the worker must be able to perform it autonomously, that is without being subject to the close supervision of the employer and regardless of the time needed to carry out the task. Further, workers must operate considering the business production cycle and even coordinate their activities with the client’s working schedule and requirements (Circular 1/2004 of the Ministry of Labour).⁷ It is submitted that the

³ See T. Treu, *Uno Statuto per un lavoro autonomo* in *Diritto delle relazioni industriali*, 2010, vol. 20, n. 3, 2010, 603, a text that provides a major contribution to the new reform. See also F. Martelloni, *La zona grigia tra subordinazione e autonomia e il dilemma del lavoro coordinato nel diritto vivente*, in *Diritto delle relazioni industriali*, 2010, vol. 20, n. 3, 635-636.

⁴ On the different regulation techniques, see A. Perulli, *Per uno Statuto del lavoro autonomo*, in *Diritto delle Relazioni Industriali*, 2010, vol. 20, n. 3, 635-636.

⁵ In Germany they are called *arbeitnehmerähnliche Person*. See Opinion CESE 639/2010, *op. cit.*, 9.

⁶ A critical reflection on the identification criteria can be seen in T. Treu, *op. cit.*, 615.

⁷ For more information on this contractual scheme, see, among others, IRPET, *Il lavoro flessibile: opportunità o vincolo?*, Franco Angeli, Milano, 2005; M. Lai, *Flessibilità e sicurezza del lavoro*, Giappichelli, Torino, 2006; P. Olivelli and M. Tiraboschi, *Il diritto del mercato del lavoro dopo la riforma Biagi*, Giuffrè, Milano, 2005; M. Tiraboschi, *Il lavoro a progetto: profili teorico ricostruttivi*, in *Studi in onore di Mattia Persiani*, Cedam, Padova 2005; *Diritto delle relazioni industriali*, n. 3/2010.

“exclusivity” of the task is not associated with the individual nature of the work,⁸ and workers under these contractual schemes might work for more than one client, pursuant to Art. 64 of Legislative Decree 276/2003. The reason for this was to stem the increasing fraudulent practice of “pseudo self-employment” (Art. 61 to 69),⁹ and to make a clear distinction between salaried employment and self-employment. The same occurs in Spain¹⁰ through Royal Decree No. 1 of 24 March 1995, that reformed the Workers’ Statute (ET). The LETA was the result of an ongoing process that began in the mid-2004s, when the Ministry of Employment and Social Affairs commissioned a pool of experts to draft a report on the matter.¹¹ Meanwhile, a great deal of dialogue took place involving representatives from the government, employers’ associations and trade union representatives, as well as associations of self-employed workers. At last, at the time of being presented before the Parliament, the LETA was accompanied by increasing support on the part of political parties.

1. An Overview on Statistics

Consistent with the information provided by the Ministry of Employment and Immigration, and in considering the rate of affiliation to social security, statistics on self-employed workers¹² reveal the importance of

⁸ On the concept of “exclusivity” in Italy, A Valdés Alonso, *La regulación del trabajo autónomo económicamente dependiente en la Ley 20/2007: apuntes para un debate*, in *REVESCO* 2008, n. 97, 141-142.

⁹ See M. Barturen Martínez, *Nuevo Estatuto del Trabajo Autónomo. Comentarios a la Ley 20/2007, de 11 de julio*, Quantor, Madrid, 2007, 8; J. García Murcia, *Estatuto del trabajo autónomo: algunos puntos críticos*, in *Actualidad Laboral*, 2007, n. 18, 3; F. Trillo Párraga, *Derechos colectivos del trabajador autónomo dependiente económicamente*, in *Documentación Laboral*, 2009, n. 85, 92.

¹⁰ See G. Barrios Baudor, and A. V. Sempere Navarro, *Régimen profesional del trabajador autónomo económicamente dependiente*, in *Tratado del Trabajo Autónomo*, Thomson-Aranzadi, Navarra, 2009, 191; M. García Jiménez and C. Molina Navarrete, *El estatuto profesional del trabajador autónomo: diferenciando lo verdadero de lo falso*, TECNOS, Madrid, 2008, 45; J. L. Monereo Pérez, *El trabajo autónomo, entre autonomía y subordinación*, in *Aranzadi Social*, 2009, n. 5, 15; L. E. De La Villa De La Serna, *Algunas consideraciones críticas sobre la Ley 20/2007, de Estatuto del Trabajo Autónomo*, in *RGDTSS*, 2007, n. 15, www.iustel.com, 3; M. J. Rodríguez Ramos, *El Estatuto del Trabajador Autónomo: aplausos y críticas*, in *RGDTSS*, 2008, n. 18, www.iustel.com, 21.

¹¹ This Ministry is now called “Ministry of Employment and Immigration”.

¹² See www.mtin.es. Sub-directorate General of Social Economics, Self-Employed Work and Corporate Social Responsibility.

this contractual arrangement in Spain, as well as across the European Union,¹³ although it is difficult to compare figures due to a lack of a universally-accepted definition.¹⁴

In June 2007, when the LETA was approved, there were 2,236,522 “true” self-employed workers¹⁵ enrolled in different social security schemes for self-employed workers. 79.4% of the self-employed—amounting to 1,775,510—did not hire employees. Of the remaining 20.6%, 461,012 had paid employees, and 232,404 of them had a worker under their supervision. Further, 87% of the self-employed were paying only minimum contributions. On 30 September 2010, because of the economic crisis, there were only 1,989,917 “genuine” self-employed workers who were affiliated to the social security system. 79.9% of them—that is 1,590,507—had no paid employees. Of the remainder, 20.1% of self-employed workers—that is 399,410—had paid employees and, of these, 210,253 were responsible for the work of another worker. 83.7% of the self-employed workers paid minimum contributions.

Collecting data on *TRADES* is far more difficult, and this problem was also addressed by the European Union through the CESE opinion mentioned above. In Spain, *TRADES* are included in the statistics on self-employed workers and, so far, a breakdown has not been reported. In fact, the record of *TRADE* contracts kept by the State Public Employment Service (SPEE) is merely informative and is not publicly disclosed (Art. 12 LETA and Art. 6 of Royal Decree 197/2009)¹⁶. Despite this, some associations of self-employed workers, such as ATA,¹⁷ provided figures revealing an increase in the number of *TRADES*, from 208,414 in 2000 to 394,742 in 2005. In October 2009, a fall was reported and the number of workers in this contractual scheme decreased to

¹³ Here, there are 23 million self-employed workers, according to Opinion CESE 639/2010, *op. cit.*, 6.

¹⁴ See J. M. Zufiaur and S. Reyna, *Trabajo autónomo dependiente en la UE* in *El País Negocios* 25-4-2010.

¹⁵ “True” self-employed workers are workers affiliated to one of the social security systems for in place for the self-employed, and not forming part of companies, cooperatives or other business organisations. Workers in family-run businesses and those belonging to special categories are also excluded.

¹⁶ Art. 6 of Royal Decree 197/2009 only specifies that the SPEE will inform the Self-Employed Work Council on the statistical details resulting from the *TRADE* contracts that have been registered. So far, this Council has not been set up yet.

¹⁷ National Federation of Associations of Self-Employed Workers, *Dependent Self-Employed Worker Report*, 2005.

300,000.¹⁸ Accordingly, one might say that today, there are around 200,000 and 300,000 TRADEs.

What is controversial about these figures is that they are not even close to those recorded at SPEE in July 2009, that is around 3,240.¹⁹ Equally low is the number of Agreements of Professional Interest (AIP)²⁰ that had been concluded as of the same month.²¹ These figures call into question the positive assumption accompanying the establishment and regulation of TRADEs in the LETA:²² if the effectiveness of a regulation depends on the acceptance of their beneficiaries, the way these new contractual arrangements have been disregarded is arguably worrying.²³ Evidently, the client may attempt to disrupt recognition of the new type of employment relationship because it carries some additional obligations, but this type of conflict has not yet been raised before tribunals dealing with aspects of social security.

2. The (Hypothetical) Independence of Self-employed Workers

Despite the current difficulties, the right to work continues to provide a legal framework that puts salaried workers in a position of advantage with respect to self-employed workers. This calls for equality of treatment: self-

¹⁸ ATA figures given in the financial newspaper *Cinco Días*.

¹⁹ See <http://www.mtin.es/es/empleo/economia-soc/autonomos/noticias.html> and <http://www.mtin.es/es/empleo/economia-soc/cuerpo.html>

²⁰ AIPs are regarded a legal source at the time of making provision for the for TRADEs (Art. 3 LETA). These are agreements concluded under the Civil Code (CC) between associations of self-employed workers or trade unions representing TRADEs and the companies for which they perform their tasks to establish conditions on the way, the duration and the place this activity is carried out and other general terms (Art. 13 LETA).

²¹ It is particularly significant that the first AIP was concluded in April 2009 between the PANRICO S.L.U.—a company operating in the biscuit market - and its self-employed lorry drivers. It must be pointed out that the lorry drivers gained the status of self-employed workers in 1994 (Art. 1.3.g of the ET). Consequently, by signing the AIP, lorry drivers working at PANRICO S.L.U. were regarded as TRADEs, and their rights were consequently clarified, See AIP PANRICO, S.L.U. at <http://www.ugt.es/actualidad/2009/abril/PANRICO.pdf>.

²² See S. Del Rey Guanter, *Introducción: Trascendencia, función y características esenciales de la Ley del Estatuto del Trabajo Autónomo*, in *Comentarios al Estatuto del Trabajo Autónomo*, ed. S. Del Rey Guanter, Lex Nova, Valladolid, 2007, 26.

²³ ASNEPA specifically maintains that: “The National Association of Self-Employed Workers (ASNEPA) considers that there is reason to celebrate on the second anniversary of the Statute. Two years have passed by and there have been no significant developments. Self-employed workers remain at the back of the queue with regard to workers’ rights”. (14 October 2009), see: <http://autonomos-asnepa.com/index.php?incluir=noticias/muestranoticia.php&modo=normal&id=481>

employed workers want to have the same rights as employees,²⁴ and it does not matter how they are classified,²⁵ as long as they are safeguarded. This claim for equal treatment, which is also present in Italian labour legislation,²⁶ has in no case been dealt with by the LETA in terms of “identity” between the two categories of workers. And also in Spain, the trend of the legislator is towards a statutory distinction that considers TRADEs as a form of self-employment.

This aspect seems to be undisputed. In the Preamble of the LETA, it is clearly stated that: “the intention of the legislator is to eliminate the blurring of boundaries between these three categories. Accordingly, Art. 11 of the LETA is very restrictive in defining the financially dependent self-employed worker, limiting, in accordance with objective criteria, the circumstances under which the activity is carried out outside the sphere of the organisation and management of the client that contracts the self-employed workers”. It is also clarified that the “financial dependence statutorily recognised to this category of workers must not be the cause of misinterpretations: this is a self-employed worker and such financial dependence must, under no circumstances, involve organisational dependence or direct employment”.²⁷ This is why Art. 2.d of the LETA states that TRADEs are “expressly included in the sphere of application of this law” regulating self-employed work.²⁸ On the basis of these considerations, one might wonder which improvements have been introduced into the individual TRADE-client relationships by the LETA.²⁹ An assessment of this kind must be made considering the

²⁴ See J. M. Goerlich Peset, *La noción de trabajo autónomo económicamente dependiente: puntos críticos*, in *Justicia laboral*, 2008, n. 33, 15.

²⁵ As Prof. Marco Biagi notes: “[...] a major overhaul of the right to work is required to recognise minimum levels of supervision whenever services are provided [...]”, see M. Biagi, C. Agut García and M. Tiraboschi, *Italia: un Derecho en evolución (El Libro Blanco del Gobierno sobre el mercado de trabajo. El Proyecto de Ley de Delegación para la reforma del mercado de Trabajo)*, in *Justicia Laboral*, 2003, n. 2003, 59.

²⁶ According to A. Perulli, *op. cit.*, 630-631, it must be understood from the legal system that these workers are not in pseudo self-employment, even when there are some “hybrid features” that make them difficult to classify.

²⁷ See A. Montoya Melgar, and R. Martín Jiménez, *Estatuto del Trabajo Autónomo. Comentario a la ley 20/2007, de 11 de julio*, Thomson-Civitas, Navarra, 2007, 103.

²⁸ See, in this sense, V. García Alarcón, *Trabajo asalariado, trabajo autónomo y trabajo autónomo económicamente dependiente*, in *Trabajadores Autónomos, Estudios de Derecho Judicial*, 2007, n. 146 (CGPJ), page 55; J. M. Goerlich Peset, *op. cit.*, 20; M. L. Segoviano Astaburuaga, *Trabajadores autónomos económicamente dependientes*, in *Documentación Laboral*, 2008, n. 81, 33.

²⁹ In the context of this paper, we are not going to treat social security (the self-employed workers have access to unemployment benefits—according to Law No. 32 of 5 August

conditions on which TRADEs provide their services, which are governed by the LETA and can be imposed, whereas an individual employment contract contravenes them.³⁰

Said conditions relate to working time and breaks in working activity (Art. 14 of the LETA), expiration of the contract (Art. 15 of the LETA), justified interruptions of working activity (Art. 16 of LETA), and scope of competence (Art. 17 LETA). According to the Preamble of the LETA, all of these aspects constitute “regulations which safeguard the financially dependent autonomous worker.

3. Aspects Concerning Remuneration

Before going into details with regard to the foregoing issues, it must be pointed out that Art. 11 of the LETA concerning the concept of TRADE requires that they should receive “financial remuneration depending on the result of their activities, and in line with what has been set in the contract with the client, bearing responsibilities arising from its non-compliance” (Art. 11.2.e of the LETA). Something similar occurs in Italy, where remuneration must be provided on the basis of the quantity and quality of the work performed, regardless of the statutory minimum wage (Art. 63 of Legislative Decree 276/2003). The meaning of this regulation is clear; in terms of “remuneration” (a broader concept than “wage”),³¹ the LETA by no means favours the TRADEs. This is despite the fact that the Group of Experts who drafted the report pointed out the need to oversee the remuneration system of the self-employed workers. This request was justified by “[...] a simple reality: the income of self-employed workers generally constitutes their basic means of economic subsistence”.³² However, this benevolent concern is not translated into a guarantee of minimum remuneration along the lines of the minimum

2010 which was drafted considering Royal Decree 1541 of 31 October 2011—in the form of a special system of protection for termination of activity of the self-employed), health and safety at work and employment policy regulations.

³⁰ See J. L. Monero Pérez, *El trabajo autónomo, entre autonomía y subordinación*, in *Aranzadi Social*, 2009, n. 5, 28.

³¹ Ruling RJ/546 of 19 February 2010 of the Asturias High Court of Justice covering Administrative Disputes held that TRADE’s remuneration cannot be considered as wage in a strict sense.

³² See J. Cruz Villalón, S. Del Rey Guanter, J. A. Maroto Acín, C. Saez Lara, and F. Valdes Dal Ré, *Un Estatuto para la Promoción y Tutela del Trabajador Autónomo*, Madrid (MTAS), 2006, 162.

wage for salaried workers, or the application to this minimum of that 75% that implies the presence of a client and, hence of the *TRADES*.³³ The survey also indicated the need to widen access to credit facilities for the self-employed, which should not be limited merely to situations of bankruptcy. In case of insolvency, a set of rules should be envisaged which would exclude personal goods from financial liability for debts (e.g. non-luxury movable and immovable goods used for domestic needs of the self-employed workers and their family).³⁴ However, concerning the right to be remunerated for their work, the LETA simply refers to existing provisions of Civil and Commercial Law concerning privileges and preferences, and to the Bankruptcy Act No. 22 of 9 July 2003. This means that self-employed workers are covered under Art. 91.3 of the Act, which provides “credits for non-dependent personal work [...] accruing during six months prior to the declaration of bankruptcy” (Art. 10.3 of the LETA). The reverse occurs in the event of autonomous workers facing insolvency (the LETA recalls that self-employed workers will be answerable for their obligations with all their present and future assets, without prejudice to the protection of some goods from seizure generally established in Art. 605, 606 and 607 of the Civil Proceedings Act No. 1 of 7 January 2000 (Art. 10.4 of LETA). Thus, the only improvement provided by the LETA on this issue is a more benevolent-than-usual treatment concerning seizures, which is limited to administrative seizure of self-employed worker’s habitual residence for the payment of debts involving taxes and social security contributions (Art. 10.5 of the LETA). As for the *TRADES*, whose main defining element is their financial reliance on a single client, the LETA does not include guarantees or special forms of protection in cases of financial difficulties, insolvency on the part of the client, or the self-employed workers. Nor is there any legal measure safeguarding their income which can be compared to the Wage Guarantee Fund for employees established in Italy.

4. Working Time and Rest Periods

Art. 14 of the LETA sets forth that *TRADES* are entitled to “an interruption of their working activity of 18 working days per year”, which is much shorter than the 30-day rest period granted to salaried workers by

³³ See M. García Jiménez and C. Molina Navarrete *op. cit.*, 151 and ff.

³⁴ See J. Cruz Villalón, S. Del Rey Guanter, J. A. Maroto Acín, C. Saez Lara, and F. Valdes Dal Ré, *op. cit.*, 164 and ff.

the ET,³⁵ yet an increase in this connection can be envisaged in the individual employment contract or the AIP. Significantly, “interruption” has been interpreted as “holiday”,³⁶ despite the fact that the LETA never makes use of this term. Indeed, most of the debate concerning its denomination concerns its content. Aside from the wording adopted, another important question should be raised. Art. 16 of the LETA—to which we will later refer—makes provision for “justified interruptions of working activity”, somehow questioning the right to a rest period. Clearly, the enjoyment of this right would be significantly reduced if it was understood that this interruption of 18 days referred to the specific causes laid down in Art. 16. Apparently, a limited meaning of the combination of these two precepts would not be welcome. Further, as increasing difficulties resulting from the effectiveness of this right arise, it must be recalled that it is the TRADEs who bear the full risk of the activity performed (Art. 11.2.e of the LETA). In this sense, the LETA does not make any reference to remuneration for these days on which the working activity is interrupted. However, TRADEs perform and organise their tasks using their own judgment. The LETA insists that, although they may receive technical instructions from their client (Art. 11.2.d of the LETA), “under no circumstances does financial dependence imply dependence in ‘organizational terms’” (Preamble of the LETA).

Accordingly, since the TRADE who is in charge of successfully fulfilling the task assigned by the client, the opportunity to enjoy time off is significantly reduced in practice. As far as remuneration is concerned, there is no regulation concerning the TRADE’s maximum working day, minimum rest periods between working days or weekly time off. As a consequence, minimum and maximum conditions with regard to remuneration are usually set out in the individual employment contract or the AIP (Art. 14.2 LETA). Indeed, the LETA lays down two provisions concerning the reconciliation of work and family life for TRADEs,

³⁵ The Confederation of Workers’ Commissions (CC.OO). “(...) disagrees with the insufficient protection and safeguards for TRADEs concerning the right to holidays—18 unpaid days is unfair compared to that provided to other workers—see <http://www.ccoo.es/cscceo/menu.do?Areas:Empleo:Actualidad:6493>.

³⁶ See CC.OO. statements providing the same arguments in the aftermath of the approval of the LETA, see <http://www.ccoo.es/cscceo/menu.do?Areas:Empleo:Actualidad:6493>.

See also M. Luque Parra, and D. Martínez Fons, *Régimen profesional del trabajador autónomo económicamente dependiente*, in S. Del Rey Guanter, op. cit., 189; V. A. Martínez Abascal, *El Estatuto del Trabajo Autónomo: alcance protector y límites del Derecho del Trabajo*, in *Aranzadi Social*, 2008, n. 2, 28; A. Montoya Melgar, and R. Martín Jiménez, op. cit., 159.

particularly to prevent mistreatment of working women. Concerning the first aspect, the law provides that working hours should be adapted to better balance personal and professional life. As for female workers who are vulnerable to abuse, they will have the right to adapt their working hours in order to receive adequate protection and full assistance (Art. 14.4 and 5 of LETA). Once again, it is difficult to assess who the real right-holder is. If TRADEs plan their activities according to working and personal needs, they need not justify themselves to clients. This will be the only interpretation that can be given to their lack of “organisational” dependence or direct employment. Apparently, this is not a right in a strict sense. It is more like asking TRADEs to find a way to ease work-life balance and prevent gender discrimination, with this aspect that is further evidence of the problematic nature of the LETA. Despite the narrow scope³⁷ of the foregoing provisions, Art. 14 of the LETA sets certain limits on overtime work. More specifically, it states that it is up to the TRADE to perform a task for longer hours than what agreed upon in the employment contract. Overtime should not exceed the maximum envisaged in the AIP or—whereas not applicable—30% of normal working hours agreed upon in the employment contract (Art. 14.3 of LETA). As it is, it seems difficult to implement this provision.

5. Termination of the Employment Contract

In Italy, the contract for the completion of a certain project must necessarily be a temporary one, as its duration depends on the time needed to carry out the task assigned, although its renewal is allowed in order to perform the same job (Circular of the Ministry of Employment No. 1/2004). In the Spanish legal system, these conditions are not expressly mentioned and issues relating to their duration depend entirely on the will of the signatories, being the employment contracts for TRADEs governed by the Civil Code. Moreover, the provisions contained in the LETA concerning the expiration of the employment contract seem to be oriented in the opposite direction of what is laid down for open-ended contracts. According to Art. 15 of the LETA, the system envisaged that to terminate a contract involving the TRADEs

³⁷ Concerning the narrow scope of the rights recognised for TRADEs in terms of working hours see M. García Jiménez and C. Molina Navarrete, *op. cit.*, 145 and ff. See on this matter J. I. García Ninet, ed., *Comentarios a la Ley del Estatuto del Trabajo Autónomo, Artículo. 14*, CISS, Bilbao, 2007, 300 and ff.

confirms that they are self-employed workers. Consequently, notwithstanding the great deal of criticism that this system has attracted with regard to the many technical issues that ensue,³⁸ the thread running through is that the extinction of the labour relationship is governed by the principle of freedom of the contracting parties as though they were contracts concluded under Civil Law, thus putting TRADEs and clients on equal footing. The same occurs in Italy, where the contract may be terminated before it expires only if there is good cause or under the circumstances established by the parties in the contract, even though breach of this provision entitles to compensation only in cases of damages and loss (Art. 67 of Legislative Decree No. 276/2003).

Leaving aside any other form of compensation that may be envisaged in the individual employment contracts and the AIPs, the point around which the termination of the employment relationship for TRADEs revolve is the freedom of the two parties to practically terminate the contract at any time. This right also includes compensation for damages facing the worker, which is awarded only if the loss is proven. In particular, “those who, in complying with their obligations, show malice, negligence or provide late payment, and those who contravene the terms of the obligations in any way, will be subject to compensation for the damages and losses caused” (Art. 1101 CC).³⁹ In this respect, it is important to highlight that, following the AIP concluded at PANRICO S.L.U., the consequences of the termination of the employment contract of the self-employed lorry drivers are substantially different for the clients and the TRADEs. So, if the lorry driver ends the contract, he/she has no right to compensation and will be subject to compensation for any damages or losses caused to the employer, which in the case of failure to execute a transport order for a considerable amount of perishable goods can be particularly high. On the other hand, if it is the employer who terminates the contract, the TRADE will be entitled to fixed compensation, along the lines of what is laid down by the ET for salaried workers⁴⁰. In Italy, Art. 66 of Legislative Decree No. 276/2003 lists

³⁸ See I. Beltrán de Heredia Ruiz, *La extinción del contrato del autónomo dependiente: análisis (crítico) de su regulación jurídica (y propuestas de reforma)*, in *Aranzadi Social*, 2008, N. 4.

³⁹ In this sense, Decision RJ/546 of 19 February of 2010 of the Asturias High Court of Justice concerning Administrative Disputes, expressly indicates that compensation for unfair dismissal established by the ET does not apply by analogy.

⁴⁰ Cf. AIP PANRICO, S.L.U., “18. Consequences of the termination of the contract:
1.- If the contract is terminated for the reasons established in the previous article, the self-employed lorry driver shall have no right to any compensation, and, in such a case,

pregnancy, illness and injury among the reasons for suspending the contact, for which no remuneration is granted. In a similar vein, Art. 16 of Spanish LETA includes various circumstances considered as justified reasons for interrupting the TRADEs activity without providing any form of remuneration. In general, termination of the contract on the part of the client cannot be grounded on these reasons, yet this is not the case. Pursuant to the LETA, and without prejudicing what is laid down in the individual contract of employment or the AIP, the following are justified reasons for terminating the employment relationship:

- a) mutual agreement between the parties;
- b) the need to attend to sudden, urgent and unforeseeable family responsibilities;
- c) a serious and incumbent risk to the self-employed worker's life and health, as set forth in section 7 of 8 of the LETA;
- d) temporary incapacity, maternity, or paternity.
- e) A situation of violence against women employed under this contractual arrangement, so she can receive protection and full assistance.
- f) Force majeure.

In principle, the existence of a reason justifying the interruption of the employment relationship prevents the termination of the contract if agreed upon by clients (Art. 15.1 par. f of the LETA). However, the following exception leaves the good intentions of the client devoid of content. Whereas the causes of the interruption are those established in sections d) and f) and produce “a considerable loss to the client , affecting the activities routinely performed”—which, one would expect, happens in most cases—then the termination is justified. Assessing the feasibility of this exception is beyond the scope of this paper. What is relevant here is that an issue is raised concerning their incompatibility with the task the self-employed perform, as well as with family responsibilities or protection of their health and safety. In this sense, interruptions of the

the employer shall have the right to claim any damages and losses that may have affected him as a result of the breach of the contract.

2.- If the self-employed lorry driver decides to challenge the Company's decision before a competent legal body and, as a result of this, a judgment is given demonstrating the absence of a justified reason for terminating the contract, the employer is obliged to pay the lorry driver compensation that will be calculated under the following terms:

- the amount of compensation established by law applicable at the time for the unjustified dismissal of employees under the common system. [...]"

employment relationships are usually very limited, as they refer to urgent family commitments or a serious and incumbent risk to the TRADEs' life or health, while it might be extended in cases of women workers who have been victims of abuse.

6. The Juridical Competence of the Social Security System

As occurs in Italy for coordinated and continuous collaboration (quasi-subordinate work), some special bodies operating in the field of social security have jurisdiction over all the claims arising from the employment contract concluded between the TRADE and the client, as laid down by Art. 17 of the LETA. This move has been hailed with enthusiasm, as it is believed that the traditional protective stance towards workers would also be extended to TRADEs,⁴¹ although it seems that its implementation fell into oblivion.⁴² To date, there has been little time to assess the impact of this measure and, if anything, the favourable expectations have been dashed by ruling RJ/6391 of 11 July 2011 of the Supreme Court.⁴³ Indeed, this judgment upholds what has been pointed out so far in the resolutions issued by High Courts of Justice of Autonomous Communities. They refer to the nature and the type of formal requirements to be met in order to conclude a contract between the TRADEs and their clients, e.g. its written form.⁴⁴

⁴¹ In this respect, the CC.OO argued that “We value the fact that some of the claims maintained by CO.OO for TRADEs have been upheld, including the guarantee that their employment disputes will fall under the remit of the social system”. See <http://www.ccoo.es/cscceo/menu.do?Areas:Empleo:Actualidad:6493>.

⁴² See, in this respect, C. Chacartegui Jávega, *Tutela judicial y extrajudicial de los autónomos. Asunción por la Jurisdicción Social de los litigios entre autónomos económicamente dependientes y sus clientes*, in *Trabajadores Autónomos, Estudios de Derecho Judicial* 2007, n. 146 (CGPJ), 239 and ff.; J. M. Goerlich Peset, A. Moreno and T. Sala Franco, *Trabajo autónomo: nueva regulación*, Tirant lo Blanch, Valencia, 2007, 119 and ff.

⁴³ Doctrine in the rulings of 12 July 2011 (RJ 2011/6397) and 24 November 2011 (RJ 2012/544).

⁴⁴ See judgments from the Valencian Community of 27 January 2009 (JUR 2009\226017); Asturias of 20 February 2009 (JUR 2009\322984); Andalusia of 4 March 2009 (JUR 2009\285307) and Andalusia dated 25 March 2009 (JUR 2009\1593). Along these lines, there is also the pronouncement of A. Martín Valverde, *La Ley y el Reglamento del Estatuto del Trabajo Autónomo: puntos críticos*, in *Actualidad Laboral*, 2009, n. 11. In the opposite direction, there are the decisions of the High Courts of Justice, Administrative Disputes sections, of Castilla and León-Valladolid of 29 October 2008 (AS 2008\2799); Aragon of 4 February 2009 (AS 2009\943); Cantabria of 26 June 2009 (JUR 2009\308480).

In this respect, the Supreme Court has ruled that the written form is an essential prerequisite to conclude an employment contract concerning TRADEs. This means overlooking that, pursuant to Art. 8.1. of the ET, the form of the contract is not a form *ad solemnitatem*—that is a condition of validity—an aspect that is also recalled by Art. 12 of the LETA. In a similar vein, the fact that according to Art. 1258, 1278, and 1279 of the Civil Code the observance of written form is not required seems to be neglected: “contracts come into force through mere consent and, from then on, they are binding, not only in terms of compliance with what is expressly agreed but also with all consequences which, depending on their nature, follow in accordance with good faith, custom and the law” (Art. 1258 CC). Nonetheless, the arguments put forward by the Supreme Court have convinced the legislator to reform Art. 11bis and 12 of LETA, with the written form of the employment contract that is now a mandatory requirement.⁴⁵ In Italy, where the law also specifies that contracts for the completion of a certain projects must be concluded in writing, the form is by no means *ad solemnitatem* (Art. 62 of Legislative Decree 276/2003). Whereas finalised orally, a *iuris tantum* presumption is assumed and that the contract is open-ended and refers to salaried workers. As a result, what should be demonstrated in Italy’s case is the condition of subordination, which becomes the determining factor of the employment relationship (Circular No. 1/2004 of the Ministry of Employment).

7. Supporting Self-employed Workers

On the basis of what has been argued so far, the attempt to safeguard the rights of TRADEs on the part of the LETA and to regard them as individual workers has not been as effective as it might have appeared initially.⁴⁶ However, the recognition of rights of collective bodies representing the interests of self-employed workers, and hence TRADEs, deserves special mention. In this concluding section, the reasons why the LETA was usually favourably received by these bodies will be clarified. Title III of the provision protects the collective rights of all self-employed

⁴⁵ In this respect, J. López Gandía, *La difícil existencia de la figura del TRADE tras la jurisprudencia del Tribunal Supremo y la nueva Ley de Jurisdicción Social*, in *Revista de Derecho Social*, 2012, n. 56, 171, ff.

⁴⁶ See M. L. Martín Hernández, *La tutela de los trabajadores autónomos en el ordenamiento jurídico español: análisis crítico de la Ley 20/2007, de 11 de julio, del Estatuto del Trabajo Autónomo*, in *RGDTSS*, 2008, n. 17, www.iustel.com, 56 and ff.

workers, while Art. 13 concerning TRADEs lays down rules for the conclusion of the AIPs for this category of workers on an exclusive basis. On close inspection, Title III of the LETA recalls already existing collective rights, while extending some others to self-employed workers and their professional organisations, as well as trade unions the members of which are self-employed.

In this manner, more strictly technical considerations are pushed into the background, particularly those concerning the way legislation is developed, and the scope that should be given to the fundamental right of trade union freedom, as well as the fact that the LETA remained silent on the issue of recognition of the right to adopt a system of collective dispute.⁴⁷ One might note that in this connection, by law, professional associations of self-employed workers are eligible. These associations will be established according to Act No. 1 of 22 March 2002 concerning the right of association. They must register and keep their articles of association in an official list held in public offices and purposely set by the Ministry of Employment or a corresponding Autonomous Community where the association carries out its own activity. Trade unions, businesses, and other organisations will be enrolled in a separate register within the same public office.⁴⁸

These professional associations are entitled:

- a) to form federations, confederations or unions and to make connections with trade union organisations and business associations;
- b) to give their consent on the conclusion of AIPs for TRADEs;⁴⁹

⁴⁷ On this matter, see A. Ojeda Avilés, *La sinéresis de lo colectivo como rasgo sustancial del Estatuto del Autónomo*, in *Aranzadi Social*, 2009, n. 4; F. Lousada Arochena, *Los derechos colectivos del trabajador autónomo*, in *Aranzadi Social* 2007, n. 21; V. A. Martínez Abascal, *op. cit.*, 21 and ff.; N. Mendoza Navas, *Los derechos colectivos de los trabajadores autónomos: derecho de asociación y libertad sindical, negociación de Acuerdos de Interés Profesional y adopción de medidas de conflicto para la defensa de los intereses profesionales*, in *Trabajadores Autónomos, Estudios de Derecho Judicial*, 2007, n. 146 (CGPJ), 167 and ff.; F. Trillo Párraga, *op. cit.*, 89 and ff.

⁴⁸ RD 197/2009 makes reference to the creation of a state registry of professional associations of self-employed workers (Art. 20 LETA).

⁴⁹ On this matter, see C. Bermúdez Rodríguez, *Los acuerdos de interés profesional de los trabajadores autónomos económicamente dependientes*, in *Actualidad Laboral* 2008 n. 22; J. A. Fernández Avilés, *La regulación colectiva de las condiciones de trabajo de los trabajadores autónomos económicamente dependientes*, in *Actualidad Laboral*, 2009, n. 3; N. Sirvent Hernández, *Los Acuerdos de Interés Profesional como fuente reguladora de la relación profesional de los trabajadores autónomos económicamente dependientes*, in *RGDTSS*, 2007, n. 15, www.iustel.com.

- c) to collectively protect and oversee the professional interests of self-employed workers;
- d) to join non-judicial systems for resolving collective disputes involving self-employed workers when this is done in agreement with their professional interests (Art. 19 LETA).

Art. 21 LETA makes provision for associations representing self-employed workers. In addition, pursuant to Art. 6 and 7 of Act No. 11 of 2 August 1985 on Trade Union Freedom, these associations and most representative trade unions are assigned certain powers concerning:

- a) the representation of self-employed workers before public bodies and other State or Autonomous institutions or organisations;⁵⁰
- b) their consultation when questions arise regarding public policies that might affect this category of workers;
- c) the management of public programmes addressing self-employed workers, in accordance with statutory requirements (Art. 21 LETA);
- d) any other function to be carried out in accordance with existing laws or regulations (Art. 21 of LETA).

Taking account of this institutional participation, and considering associations of self-employed workers as valid interlocutors to conclude social agreements, the council of self-employed work is instituted, pursuant to Art. 22 of the LETA.

Set up by the government, this is a consultative body on socio-economic and professional matters concerning self-employed work, which issues various reports on several issues—among others the regulation of this form of work— which might become binding whereas amending the LETA. These are measures that strengthen the role of associations of the self-employed. They are given new rights as interlocutors with public authorities, thus take on a leading role. Perhaps this is the reason why the passing of the LETA was hailed with enthusiasm by them, yet the powers assigned to this council should be used to benefit the TRADEs. This category of workers faces high levels of vulnerability in the labour market. This is particularly true if one considers that they are caught in the middle, in the sense that they face the risks of their status without being given the opportunity to compete in the market, *de facto* regarded as salaried

⁵⁰ On this matter, see H. Ysàs Molinero, *El derecho de participación institucional en el Estatuto del Trabajo Autónomo: especial referencia al Consejo Estatal del Trabajo Autónomo*, in *Relaciones Laborales*, 2008, n. 18.

workers—at least in financial terms—and lacking the necessary protection. As result, it would be desirable that the EU's future action be addressed in this direction.

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