Fundamental Values and Interests in Social Security Law in Consideration of Changing Employment

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I. Introduction - The development and basic principles of the Austrian social security system

Austrian social security system has been historically grown and partly reserved the traditional feature of its system. Traditional differences between the different professions still play a very important role but the social security system faces quite similar changes and difficulties as in other European countries. The major common challenge is to guarantee the long-term sustainability of the social security system and at the same time cover all those people by the statutory insurance who need to be protected. To serve this latter goal the protection of statutory insurance has been extended to always new groups of people and self-employed have been gradually integrated into this system.

In Austria does not exist a uniform social security system for all those performing work. Social security and particularly statutory insurance are linked to a gainful activity.[1] There are differences between the content and the organisation of social security provisions based on the kind of the gainful activity concerned. An exception constitutes the occupational accident insurance, which is basically uniformly regulated for all groups. In contrary, in the health and pension systems there are major differences based on the traditional differentiation of the activity performed. Different groups have separated fundings. Main idea is that every group shall care for the social security of its members.[2]

The main legal statute in the field of social security, the ASVG (General Social Security Statute, Allgemeines Sozialversicherungsgesetz) entered into force in 1956. It regulates the statutory health insurance and occupational accident insurance as well as public pension scheme for employees. In 1957 the statutory public pension scheme has been extended to the self-employed (possessing a license).[3] In 1965 farmers and in 1966 the self-employed with licence have been covered by health insurance.[4]

Major step in the extension of a comprehensive social security system has been the introduction of the Trade Social Security Statute (Gewerbliches Sozialversicherungsgesetz, abbr.: GSVG) in 1978.[5] This regulates the health insurance and and pension insurance for the self-employed.

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[1] Protection by social security is extended in certain cases beyond the group of people performing a gainful activity. People receiving statutory pension are partly insured. The same rule applies to people serving military service or instead of it community service and to those receiving childcare allowance. Art. 8. (1) ASVG

[2] Konrad Grillberger, *Österreichisches Sozialrecht,* 8. Aufl. Springer Verlag, p. 10.

[3] The statutory pension scheme applies to farmers since 1970.

[4] Grillberger, p. 3-5.

[5] A separate statute applies to certain special types of self-employed, like pharmacists, patent experts and doctors in 1979 (Social Security Statute of the Free Professions, Sozialversicherungsgesetz der freiberuflich selbstständig Erwerbstätigen, abbr.: FSVG).

II. Different categories of insured people

II.1. Employees

II.1.1. The term

The term "employee" (Dienstnehmer) has slightly different meanings in the Austrian labour law, social security and tax law. Recent tendencies show the intention of the legislator to unify the meaning of this term in the different fields of law. Sign of this tencency is that since 1998 the ASVG refers to the statute on income tax and extends slightly the scope of this term in social security law in this way.

Legal basis for the statutory health, accident and pension insurance of employees is ASVG. Unemployment insurance is regulated in another statute. For all insurances the term of employee is regulated in § 4 (2) ASVG. It lays down that employee is a person, who is employed for remuneration in a personal and economical dependency. The statute emphasises that prevelance of these criteria is decisive, i.e. the features of personal and economic dependency shall dominate against the characteristics of an independent activity carried out by self-employed. The term employee serves the goal to make a difference between dependent and independent performance of a gainful activity. This determines, whether the person falls under the scope of ASVG or GSVG.

II.1.2. Personal and economic dependency

Personal dependency (determination by an external) follows from the circumstances of performing work. Most important characteristic of personal dependency is that the employee is bound to the instructions of the employee. It means less technical or subject-specific instructions, but rather instructions regarding the behaviour of the employee. Main condition of personal dependency is the performance of work in person. Duty of personal performance is not fulfilled, if the person can regularly represent itself, or can assign the task a third person, or if he can refuse a job without fearing a sanction.[6] Other features shall be assessed as well. The employee cannot determine free his work, but activity is determined by the employer. Case law and literature selected some further criteria for personal dependency: integration into the corporate structure, which means predetermined working time and place of work; integration into a working process; bound to instructions or directives of the principal; supervision and control by the principal; the employee owes a certain endeavour, but not a success in work; personal obligation to work; working appliance are provided by the employer; the work's output benefits the employer.[7] Not all of these criteria have to be fulfilled, but there has to be a qualitative majority of the mentioned criteria in order to qualify someone as an employee and apply labour law with its safeguarding provisions (paid vacation, sick-pay of the employer, maternity protection, etc).

The statute mentions also economic dependency. According to the prevailing opinion economic dependency does not mean that the employee needs

[6] Theodor Tomandl, *Wesensmerkmale des Arbeitsvertrages in rechtsvergleichender und rechtspolitischer Sicht*, Springer Verlag, 1971. p. 40.
[7] Ibid.

the remuneration to make ends meet. This criterion covers that the employee has no power of disposition of the significant facilities and equipments.[8] In this sense economic dependency is rather the consequence of personal dependency and has no own significance.

Contrary to the term of employee in employment law, remuneration is an important part of the definition of employee in the sense of social security. Decisive is the right to remuneration, whether the employee actually receives the remuneration does not affects the person's social security.

II.1.3. Blue-collar workers (Arbeiter) and white-collar workers (Angestellte)

A special feature of the Austrian labour law system is that the distinction between blue-collar workers and white-collar workers still exists. While white-collar workers are characterised by accomplishing merely intellectual services, blue-collar workers render physically work. This is a historical grown distinction dating back to the time of the Austro-Hungarian monarchy, based on different applicable labour acts still in force.

While the most significant law for blue-collar workers is the Austrian Civil Code and the Trade Act (Gewerbeordnung), white-collar workers are subjected to the Employees Act (Angestelltengesetz). White-collar workers are privileged in certain fields of labour relationship, for instance in regard to payment, sick-pay of the employer, regulations about giving notice, etc. Collective agreements make regularly a difference between the two categories of persons. This distinction raises serious concerns, as it might be unconstitutional and probably harm the right on equal treatment.

This distinction plays a role in social security law as well. The notion of white-collar workers is basically linked to the term in labour law and slightly extends this group.[9] The earlier differences between the two groups have been mainly abolished. In public pension scheme there are left some differing provisions regarding the incapability of the person to work. The pension funds of the two groups have been united and the contribution rate in the health system has been unified, as well.

II.2. Intermediary category (dienstnehmerähnliche Personen)

The Austrian social security law knows an intermediary category between employees and self-employed, which are called people with a similar status to the employee (dienstnehmerähnliche Personen).[10] These people are personally and legally independent, but economically dependent on one or a few clients. Main characteristic of this group is that not all criteria of an employment relationship are fulfilled, however, to a certain extent the work is determined by an external.

The term used in social security law is not the same like the one used in labour law. Particularly those persons called "free employees" or "freie

[8] Ibid. p. 39. Grillberger, p. 16-17.
[9] Art. 14. ASVG.
[10] See in detail: Gustav Wachter, *Wesensmerkmale der arbeitnehmerähnlichen Person,* Duncker & Humblot, 1980.

Dienstnehmer" can be regarded as persons belonging to the intermediary category. However, free employees can be also self-employed.[11]

II.3. Self-employed (Selbstständig Erwerbstätige)

Self-employed have been gradually included in the statutory insurance, but there is no uniform social security system for them. To most of them the GSVG applies, which regulates the health and pension insurance. Self-employment in a social security sense includes several groups and consequently different statutes apply to the different groups.

The national labour law refers to the subject matter of contract itself to figure out the appropriate type of relationship. § 1151 Civil Rights Code (ABGB) is the legal basis both for the contract of work and contract of service. There are several characteristics to make a distinction to an employment. In contrast to employment, the self-employed person owes the successful completion of the project. Self-employed is free of personal directives in view of the fulfilment of the assignment and has a legal obligation to warrant for the correctness of his/her works.

The obligatory insurance of self-employed differs from that of the employees due to the different way of performing work. In case of self-employed it is not possible to bound the insurance to a certain type of contract, like in case of employees, but only to the profession. Therefore the insurance was bound to the membership in the chamber and to the entitlement to practise a certain profession. As self-employed can have very volatile income, start and end of the insurance depended earlier exclusively on the membership and not on the income. These are structural differences between self-employed and employees.[12]

Self-employed have been gradually covered by statutory insurance. However, there is not a uniform social security statute applying to them. Most of the self-employed fall under the scope of GSVG, which regulates the health insurance and pension scheme. Occupational accident insurance is regulated by ASVG. Statutory insurance applies automatically to the members of the Chamber for Commercial Economy (Kammer der gewerbliche Wirtschaft) by the acquisition of a trading license.[13]

Since 1997 the statutory insurance has been extended also to those self-employed, who either do not need to possess a license (e.g. writer, artists) or the required license has not been required or not received. They are called "new self-employed". Prior to 1997 in such cases people have not been covered by statutory insurance. Recently, according to Art. 2 (1) point 4 GSVG all self-employed are covered by the GSVG independently from the existence of a license.

Different rules apply to independent pharmacists, doctors and notaries and a separate statute applies to farmers.[14]

III. Values and interests in the early social security system

[11] To the distinction between employee, free employee and self-employed in the social security and tax law see: Hans Blasina, *Dienstnehmer – Freier Dienstnehmer – Selbständiger, Begriffe und Abgrenzungen im Sozialversicherungs- und Steuerrecht*, Facultas AG, Wien, 2007.

[12] See: Theodor Tomandl, Rechtsprobleme einer umfassenden Sozialversicherung, *ZAS*, 1998, 9, 11.

[13] Art. 2 (1) GSVG.

[14] Sozialversicherungsgesetz der freiberuflich selbständig Erwerbstätigen (FSVG), BGBl 1978/624 idF.

The Austrian social security system has been based for a long time on the principle that persons exercising different occupations have different needs as far as social security protection is regarded. Consequently, social security provisions made a difference based on the kind of activity and particularly on the kind of performing this activity.

The Constitutional Court declared in a decision in 1969 that the principle of equal treatment does not require a uniform federal regulation of health insurance.[15] Territorial differences can be justified due to the actual historical, geographic and economic differences between different areas.[16] Similarly, the principle of equal treatment does not prevent from differentiating between the groups of insured persons. The Court pointed out that the factual features of the various categories of persons are so different that distinct regulations are not only allowed, but under circumstances even necessary. Such objective conditions are particularly different regarding the fact, whether the person concerned performs the work dependently or independently and also due to the large variety of professions. Therefore it is acceptable, if for a certain profession special provisions apply. It is reasonable and thus justified that to different categories of persons performing work different social security provisons apply and consequently, their contributions and thus also their social benefits are different. Based on this reasoning the Court resulted that employee and self-employed persons have different life and financial situation and follow different interests regarding the social security and therefore it is allowed to make a difference in contributions and social benefits between these groups.[17]

The Constitutional Court confirmed this reasoning and explained it in more detail in a decision in 1983.[18] Major question of this decision was, whether the regulation of statutory health insurance complies with the principle of equal treatment. The applicant contested the constitutionality of the different provisions of statutory health insurance on employees and self-employed. The applicant[19] was employed as assistant professor at the university and lecturer in the ministry for science and research at the same time. According to the respective provisions (Art. 4. (1) point 1 ASVG and B-KUVG [Public Servants Health and Occupational Accident Insurance, Beamten-Kranken- und Unfallversicherungsgesetz]) he was subject to double statutory health insurance, namely as an assistant professor and as a lecturer. The applicant criticised that self-employed with a trade license, members of a free profession and farmers have been excluded from the statutory health insurance, if they are already insured according to the B-KUVG. The applicant assumed that a similar analog exception should be applied to dependent employees, who already are insured in B-KUVG. Art. 4 (1) point 1 ASVG violates the principle of equal treatment of Art. 7. (1) B-VG as it prescribes a double statutory health insurance without having any

[15] VfGH Erk. v. 27. Juni 1969, B 157/68. Erk. Slg. Nr. 6004/1969. Band Nr. 34. S. 478-482. [Decision of the Constitutional Court of 27 June 1969, published in Collection of Verdicts Nr. 6004/1969. Nr. 34. issue, p. 478-482.]

[16] VfGH Erk. v. 4. März 1961, B 193/60. Erk. Slg. Nr. 3897/1961. Band Nr. 26. S. 66-69. [Decision of the Constitutional Court of 4 March 1961. published in Collection of Verdicts Nr. 3897/1961. Nr. 26. issue, p. 66-69.] This case questioned the different provisions applied to the master health insurance fund in East-Tyrol compared with the health insurance fund in the rest of Tyrol.

[17] P. 481. of the Decision Nr. 6004/1969.

[18] VfGH Erk. v. 1. Juli 1983. Erk. Slg. Nr. 9753/1983. *ZAS* 1985/146-151.

[19] The applicant in this case was coincidentally the author of this article.

objective justification for this differentiation. In case of employees the statute used the principle of multiple insurance, but in case of self-employed, members of free professions and farmers it used the principle of subsidiarity. According to the latter those persons, who are already insured based on a certain relationship, are not obliged to be insured in their second quality, as self-employed. Contrary to this rule employees were obliged to be insured double.[20] For self-employed the principle of subsidiarity and for dependently employed the principle of multiple insurance had to be applied. The Constitutional Court declared this difference being justified by the different situations of the insured persons.

The Court basically adopted the arguments of the government. The government argued that the subsidiarity of the health insurance of self-employed is with historical reasons explicable. Creation of the statutory insurance for self-employed had the goal to create a protection for those persons who have not been insured until then. Therefore only subsidiarity could follow this aim. In case of the determination of double insurances or in the exclusion of it decisive should be the life situation of the profession concerned. Self-employed and farmers would have been less interested in cash benefits, than in measures serving the continuation of their trades. Therefore the double insurance of these groups is not desirable. Completely different is the life situation of a public servant, who has another second work, as self-employed. For him constitute the high cash benefits essential financial aid in case of illness or maternity.[21]

The Constitutional Court adopted the arguments of the governments and ruled that the different regulations have been developed historically and they can be justified by the different opinions of the participating groups of professions who have different living conditions. Different living conditions indicate different opinions about the necessity of a statutory insurance. The Court takes a historical view and explains that the health insurance has been constituted first only for the people performing a gainful activity in dependency. People working independently can become member of the so-called master health insurance fund (Meisterkrankenkasse). They have been later entirely integrated in the statutory health insurance system (in 1965 the farmers, in 1966 the self-employed having a trade license and in 1978 people with a free profession). Their social prestige required that they should cover their social risks by private provisions (e.g. by savings or private insurance). According to the Court even recently – in the time of the delivery of the decision – a resistance of the self-employed can be noticed against their integration in the system of social security and particularly against the organisation of their social security system based on the model of blue-collar workers. Self-employed persons support rather the limitation of social security to a basic level. The Court points out that this group of persons has another economic risks and chances.[22] Therefore it is reasonable to provide a statutory health insurance only, if they are not protected at all. These ideas are not only acceptable, but even necessary in order to accept the significant differences in the social security system. The legislator has a free margin in social policy to take such decisions.

To sum it up, the early social security system was based on the idea that within persons performing a gainful activity it is justified to make differences in contributions and thus in benefits, as they have different interests and needs. Self-

[20] VfGH Erk. v. 1. Juli 1983. Erk. Slg. Nr. 9753/1983. *ZAS* 1985/146-151. p. 146.
[21] Ibid., p. 147.
[22] Ibid. p. 148.

employed are in another life situation, than employees and therefore they do not need the same social security protection like employees.

IV. Shift in approach

IV.1. Theoretical and financial objectives

In the last decades a shift in approach of the statutory insurance of self-employed and persons belonging to the intermediary category can be noticed. The tendency is clear and shows towards the inclusion of these groups into the statutory insurance system. This change of tendency means also a shift in the basic idea of statutory insurance. Starting point in the Austrian social security law has been the insurance differentiated according to the different professions based on the idea of Bismarck. The tendency is clear and it shows towards a system closely connected to income. Instead of linking the statutory insurance to the professions, it is linked to the income. Nearly exclusively the income became decisive in the existence of a statutory insurance.

Ideological background of this change is the assumption that self-employeds need the protection of statutory insurance. In the European labour law literature the opinion has been prevailed that great part of self-employed persons is socially and economically weak and requires special protection from the state. Particularly sensitive is the situation of self-employed due to the tendency that employers try to push persons into the self-employment instead of employing them. Quasi self-employed are especially worth protecting in line with the European tendencies. The worthiness of protection of self-employed is a change of approach in the Austrian law which is empirically not proved. This brings about a major shift of values in the social security system.

However, this ideologically backed system has – also – a significant financial objective, namely to guarantee the financial feasibility of the social security system. A tax-financed social security system can better follow this aim, than one based on professions. The shift of values has brought about the extension of the basis of contributions.

A clear sign of the adjustment of the legal situation of self-employed persons to that of the employees is the uniformisation and simplification of the contributions. Recently, all categories of persons performing a gainful activity pay – with small exceptions – the same percentages to the insurance funds independently of the fact, whether they are dependently or independently employed.

Important to note that the Austrian social security system has a special feature, as far the extension of statutory insurance to new groups is concerned. Major principle is that the more independently someone works, the higher his own contributions to the social security system are. Basically it means that all persons, who perform work enjoy protection of the social security, but those, who work independently should pay more. The difference between employees and self-employed is basically not the different level of protection, but the amount of contribution, which a person has to pay for the social security. In case of employees the employer pays a significant part of the total contribution. In case of self-employed, the whole sum has to be paid by the self-employed. Therefore the health, pension and occupational accident insurance companies receive basically the same percentage of contribution from all categories of persons performing

work.[23] That means that employees (white-collar and blue-collar workers), self-employed and persons having an intermediary status pay overall the same percentage to the funds, but in case of employees and those persons of the intermediary category, who have been treated equally, the employers take over the duty to pay in general for half of the contribution. In case of self-employed the state still pays a small percentage of the contribution, but this is continuously abolishing. Another difference is in the unemployment insurance, which is not compulsory for self-employed, but they can opt-in paying the same contribution as the employees.

V. Reforms for the extension of social security protection

V.1. First wave in 1996

V.1.1. Intermediary category (dienstnehmerähnliche Personen)

In 1996 the government started an attempt to cover the intermediary group of workers by the ASVG and inserted a new definition of this group into the ASVG.[24] This was the first regulation which aimed to include also those persons in the statutory social security protection, who earn their income in the framework of contract for services (Werkvertrag). This amendment has been heavily criticized[25] as it intended to involve all persons performing a free profession, also those who run a business and for the performation of assignments employ other employees. Major criticism was that the situation of these persons is more similar to the situation of self-employed than to employees and therefore it is not appropriate to involve them into the ASVG which is tailored to the needs of employees with dependency.

The Constitutional Court declared that the rule violated the Constitution.[26] The original provision set formal criteria of regularly employment for the qualification of certain persons as belonging to this group. It was assumed that someone is regularly employed, if the client concluded with him more than three agreements in the last six months or the activity lasted longer than two months. In these cases it should have been assumed that the employment was regular and the person had a status similar to that of an employee.

The Constitutional Court criticised that the law does not give any indication, whether next to the mentioned regular activity which other criteria shall be included in the assessment of the decision on the existence of this status. The Court pointed out that usually several circumstances should be taken into consideration, like the regular employment, the economic dependency, the structure of the establishment, where work is performed and the number of the principals, with whom he has a contact. It should have been decided on a case-by-case basis, whether the person performing the activity has a similar status to the employee. The result of the case-by-case decision is complicated as it is a term of a type, which means that all criteria of the case should be assessed and an overall

[23] To self-employed a special rule applies regarding occupational accident system, as instead of a certain percentage of their income they have to pay a fix amount monthly.
[24] §. 4 (5) ASVG. Introduced by the statute BGBl 1996/441 and suspended by BGBl I 1997/39. after the decision of the Constitutional Court.
[25] Heinz Krejci, Das Werkvertragserkenntnis, *VR* 1997, 81 ff.
[26] Decision of the Constitutional Court, VfGH G 392, 398, 399/96, 14. 3. 1997.

impact will decide on the real status of the person. The considering criteria are not covered in the statute. Therefore it was controversial, how the term economic dependency shall be assessed and whether the personal dependency shall be considered as well. Consequently, it would have been extremely difficult to apply this rule and decide, whether the person should be assigned for falling under the scope of this rule. The rule provided a firm possibility to random application or exclusion of the obligation of social security coverage. The rule missed an appropriate determination and clarity. This uncertainity was strengthened by controversial and unclear formulation of the obligation of insurance, which led to the decision on the violation of the Constitution. The Court further criticised that the introduction of this obligation to insurance was not successful, as it was about the introduction of obligations constituted for the achieving of a certain goal and the social security scheme is constituted for obligations for a certain length. The new approach has not fit into the existing system.[27]

After the decision of the Constitutional Court the term has been changed. Certain part of this intermediary group has been put on an equal footing with the employees by Art. 4. (4) ASVG. This group is however very limited and not all of them in a labour law sense belonging to this group are covered by ASVG. Only those people are covered by the statutory insurance who receive remuneration (above the level of the marginal work), perform their work in person, do not possess significant own equipment and are not compulsory insured by other regulation. Aim of this regulation was to exclude those persons from the scope of ASVG, who perform the work basically not in person and possess an own entrepreneurial structure (significant working tools, personal etc). Another condition is that these people shall be employed based on a free contract of service, which is an obligation for time and not for a goal. Differentiation between contract of service and contract for service is made based on the real content of the relationship.

The regulation is problematic regarding persons who due to their high professional expertise in the framework of free contract of services perform mainly intellectual activities, like consultation. In such situations do not work the disposal of significant own work instruments as a criterion for distinction. In case of intellectual work is the significance of own work equipment relatively low. The lack of own equipment follows from the characteristics of the activity and is not a sign for economic dependency.[28]

Important is to note that those people who possess a trade license, are excluded from the scope of ASVG. This rule provides an excellent possibility for the employer to exclude the person from the scope of ASVG. These conditions reduce radically the scope of people of this intermediary category insured by ASVG. The borderline between the so-called "free employees" belonging to this intermediary category and the "new self-employed" is floating and so many clients could urge the people to become self-employed in order to avoid the high contributions.[29]

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[27] For the background of this decision see: Theodor Tomandl / Wolfgang Aigner, Verfassungsprobleme bei der Sozialversicherung dienstnehmerähnlicher Beschäftigungsverhältnisse, *ZAS* 1997, 1 and Wolfgang Aigner, Das VfGH-Erkenntnis zur sog. „Werkvertragsregelung", *ZAS* 1997, 129.

[28] Ulrich Runggaldier, Probleme der Einführung einer alle Erwerbseinkommen umfassenden Sozialversicherungspflicht, *ÖJZ* 1998, 494, 496.

[29] Ibid. 497. f.

All of those persons, who perform work personally independent, but economically dependent and do not fulfil the conditions described above – e.g. they possess a trade license - are insured by the GSVG. Therefore to people performing work under a contract for service and to those working under a contract of service, but possessing a trade license, the GSVG has to apply.

V.1.2. Real economic content of the relationship

The Supreme Administrative Court inclined to assess the legal nature of the person as an employee based on formal criteria, mainly on the expressed agreement of the parties instead of taking account of the actual performance of activities. This provided the possibility to avoid the qualification as an employee by a rule in the contact about the possibility of substitution of the person or other formal freedoms.

In 1996 legislation reacted to this tendency and introduced the principle of economic consideration (§ 539a ASVG).[30] This provision requires that in the evaluation of a relationship the economic consideration of the real actual economic content of the relationship shall prevail and not the formal aspects of the case shall be decisive, like the form of the contract. Abuse of forms of contract and scope for creating of a relationship may not be used to evade the obligations from this statute. Recent case law of the Supreme Administrative Court has taken into account the emphasised criteria of assessment. This principle is important to guarantee that the relationship will be assessed based on its real features and not on its formal appearance. Introduction of this principle shall exclude the possibility of evasion of the obligation of insurance. Abuse of the form of the contract or taken advantage of the different forms of civil contract shall not be used to reduce or evade the duty to insurance.

V.2. Further extension - ASRÄG 1997

V.2.1. Goals of the reform

Landmark regulation in the extension of the social security system to self-employed was the Arbeits- und Sozialrechts-Änderungsgesetz 1997 – ASRÄG 1997 which entered into force in 1998. This statute was clearly the crucial point of shift in approach.

The National Council passed a resolution to formulate the main objectives of the future development in 2 October 1996. Major goal of the resolution was to include a possible broad group of all those people who perform gainful activity into the social security system and create a uniform social security system. This brings about the decline of the traditional breakdown by occupations and leds to the increase of uniformisation in the three big statutes of insurances of ASVG, GSVG and BSVG. In the reasoning the resolution emphasises the development of different employment relationships and the intensification of the abuse of the possibilities of evasion. According to the resolution employer, respectively clients push more and more the persons into relationships without statutory insurance. Also persons being co-insured tend to create relationships without the obligation of paying dues. These tendencies have two negative effects, namely first that substantial resources are deprived from the community of statutory insured

[30] BGBl 1996/201.

persons based on solidarity and second, financial guarantee is not guaranteed for many persons any more. [31] The reform included a set of amendments of the law.

The notion of employee in Art. 4 (2) ASVG has been extended and clarified that persons who are obliged to pay income tax in line with the statute on income tax (Einkommensteuergesetz 1988) are in any case employees in sense of social security. The traditional notion of employee (Dienstnehmer) has not been changed, but it was extended. Consequently, persons performing a gainful activity in a relationship of dependency who are obliged to pay income tax, are considered as being employees (Dienstnehmer) in sense of social security. It was a reconciliation of distortions between the regulation of social security and tax law.

Another tool of the reform was to reformulate the term of "free contract of services" (freier Dienstvertrag) of Art. 4 (4) ASVG after the decision of the Constitutional Court. Goal of the regulation was to include only those persons who have a similar situation to that of the employee.

V.2.2. Inclusion of the "new self-employed" into the statutory insurance

Centerpiece of the amendments of ASRÄG 1997 was the inclusion of the so-called "new self-employed" into the statutory health and pension insurance according to the GSVG and into the occupational accident insurance according to the ASVG.[32]

The GSVG was extended also to those self-employed persons, who have no trade license and thus are not member of the competent economic chamber. This group shall be covered by the GSVG, if they reach a certain amount of turnover.

Main goal of this rule was to reduce the possibility to evade the obligation of social security. This is a great risk for the social security and the legislator wanted to finish the escape from the social security.

Before this reform GSVG covered basicall only those persons who were affiliated to a chamber. The statute introduced that also those self-employed persons are in the health and pension insurance statutory insured who – on the basis of company activity (aufgrund einer betrieblichen Tätigkeit) in a free occupation or in self-employment –generate income in the sense of Art. 22 line 1 to 3 and 5 or Art. 23 Statute on Income Tax (Einkommenssteuergesetz, EstG 1988). The term „on the basis of company activity" is linked to the notion "company" in tax law. Linkage of the insurance to the term in tax law has not brought about great changes, as the term employees has basically the same meaning in both fields of law with insignificant differences.[33] The statutory insurance becomes effective only, if the person concerned has not been already insured according to the GSVG or other statutes and the income exceeds a certain amount set im GSVG.

Due to this law certain professions, like lawyers, vets, architects, independent journalist etc., have been involved under the health and pension insurance of GSVG, like other self-employed. The statute provided the possibility that a chamber could make an application to the competent minister to opt-out from this statutory insurance, if the members of the chamber have their own compulsory self-insurance in health and pension insurance, which is nearly

[31] Stenographisches Protokoll, 40. Sitzung des Nationalrates der Republik Österreich, XX. Gesetzgebungsperiode Mittwoch, 2. October 1996. p. 46. ff.
[32] 22. Novelle zum GSVG – Art. 8 ASRÄG 1997 and 54. Novelle zum ASVG – Art. 7 ASRÄG 1997.
[33] Tomandl, Rechtsprobleme einer umfassenden Sozialversicherung, p. 9, 12.

equivalent with the benefits of the GSVG.[34] Most of the chambers took advantage of this possibility and opted out from the health insurance of GSVG. Chamber of the lawyers and engineers opted out also from the pension system of GSVG.

V.2.3. Marginal part-time employees

Marginal part-time workers (geringfügig Beschäftigte) are those employees whose annual income does not exceed the monthly amount of EUR 376,26 (in 2012; amount changing annually).[35] They enjoy only limited social protection, reduced to the occupational accident insurance. Statutory health insurance and public pension scheme do not apply to them.

In practice marginal employment could be used to evade regular employment. Employers inclined to employ several marginal part-time employees instead of employees with a normal employment. Therefore in the ASRÄG 1997 the legislator tried to bring this practice to an end. It changed the law in order to reduce the use of this form of employment and made it less attractive both for the employer and the employee. For this reason first it introduced that if the overall remuneration given by the employer to all of his marginal part-time employees overceeds the 1.5-fold of the maximum amount of one marginal employed person, then the employer has to pay a lump sum contribution amounted based on the entire wages of all marginal part-time employed. Second, in case of cumulating more marginal part-time jobs and earn altogether more than the current minimum in all those jobs together, a duty has been introduced to be insured for health and pension insurance and to pay based on the entire sum of the part-time incomes.[36] In this way minimum income workers gain full coverage in the health insurance.[37]

In 2006 the government introduced a new, simplified method for marginal part-time workers the so-called "household service voucher" (Dienstleistungsscheck). According to the law persons paid by this voucher are always qualified as employee. Private household workers can be paid for their work with this voucher, if the service is marginal part-time and fixed-term up to one month - recurrence possible. This voucher includes occupational accident insurance and a small amount of administrative costs, which the employer has to bear. The employee has the option to participate in health and pension insurance on a voluntary basis. Since the vast majority of household workers are illegally engaged foreign nationals who are explicitly and deliberately excluded by the model, there is a very low demand for the household service cheque. Private

[34] Art. 5 (1) GSVG.

[35] Art. 5 (2) ASVG in the context of Verordung über veränderliche Werte (Regulation on variable values).

[36] Critical to this Schrammel: He critisised that the employer's obligation to pay the contribution is independent from the insurance of the employee. In these cases contribution do not lead to parallel entitlements and so there is no functional connection between contribution and entitlement. Such contributions serve exclusively the financement of other insured persons and this regulation is consequently not a rule of the social security in the sense of the distribution of competences. See: Walter Schrammel, Vom "Werkvertragserkenntnis" zur umfassenden Sozialversicherungspflicht, *ASoK* 1997, 333, 336. Same opinion represents Karl: Beatrix Karl, Die Einbeziehung geringfügig Beschäftigter in die Sozialversicherung, *ASoK* 1997, 383, 385.

[37] Runggaldier referred to the judgments of the Constitutional Court in 1964 and 1969 (VfGH 13.6.1964, VfSlg 4714; and 26.9.1969, VfSlg. 6015.), in which the Court stated that although there should be a functional connection between social contributions and entitlements to benefit, however, in certain cases this principle does not apply. The idea of maintenance has sometimes priority over the principle of insurance. Runggaldier, 498.

household workers are not covered by a collective bargaining agreement, but there are regional minimum wage rates covering them.

VI. Recent tendencies

VI.1. Kind of severance pay

Since 2008 self-employed get involved in the system of severance pay.[38] They have to pay also self-provision in the framework of the new system of severance pay.[39] This is compulsory for all self-employed, but persons performing a free profession and farmers can opt-in into this system. In the time of the introduction of this kind of benefit the contribution of self-employed to the health insurance has been reduced and thus self-employed does not have additional burden. The person can possess the paid contributions after three years of payment in case of two years long break in the exercise of the trade or after two years termination of the trade or in retirement; in the last case independently of the length of the duration of payment.

VI.2. Voluntary unemployment insurance

Since 2009 self-employed persons have the possibility to enter the unemployment insurance. The accession has the consequence that the person enjoys a full protection and receives an entitlement to all benefits of the unemployment insurance system. Entry into the voluntary insurance and exit of it is limited and is possible only in every ninth year in order to avoid abuses.[40]

VI.3. Sickness benefits for self-employed and alternatives

Currently a brand-new draft of a statute has been submitted which would introduce the health insurance of small enterprises. They should receive a small amount of sickness benefit from the seventh weeks of their sickness.

Self-employed persons have various kinds of benefits which they can receive in case of illness. These constitute an alternative of the traditional health insurance. One of the alternative instruments is the so-called "enterprise aid" (Betriebshilfe) which can be provided for self-employed in case of illness, accident or pregnancy. Goal of this kind of assistance is to maintain the operation of small enterprises in such situations. In case of maternity this "enterprise aid" is provided eight weeks before and eight weeks after the birth. Only members of the Economic Chamber enjoy this aid. Conditions of entitlement are that the incapability to work has to exist for more than 14 days, the annual income of the insured person may not overceed € 18.370,56 (value for 2012) and the aid has to be essential to the maintenance of the enterprise. Important feature of the "enterprise aid" is that generally it is an allowance in kind; i.e. for the duration of the incapability to work – for the maximum duration of 70 days – a person is provided free who performs the work instead of the ill self-employed. In certain

[38] This instrument shows similarities to the German so-called „Riester-Rente", which is a voluntary, additional, private pension for self-employed.

[39] Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz, (BMSVG) § 49 – 61. for self-employed and § 62-67. for persons performing a free profession and farmers.

[40] See in detail: Jasmin Pacic, Arbeitslosenversicherung für Selbständige, *ZAS*, 2008, 156.

cases the social security authority provides real cash benefit, in form of a subsidy. „Enterprise aid" is an excellent example for the statement that self-employed persons have different interests than employees. Continuation of the activity of their small enterprise is more important than getting financial support.

VII. Distortions in the system

The reforms and the established system of social security are in several points inconsistent. The major rule of income as the basis of statutory insurance does not apply uniformly. Most noticeable exception from this rule is the case of old self-employed, who have to pay for statutory health and pension insurance based on their affiliation to a chamber, even if they do not have income.

Funding of the statutory social security system is also not consistent. Statutory insurance of the employees is co-financed by the employer. However, we have to emphasise that turnover tax is also a kind of co-financement in case of self-employed.

Another distortion still exists regarding the incapacity to work. Self-employed persons are still treated worse in case of incapacity to work than employees. Protection of self-employed is significantly narrower in this sense.

VIII. Conclusions

The traditional, professionally structured Austrian social security system is abolishing. It is replaced by a more and more income oriented social security. This reflects a change of values and assumed interests of self-employed persons, whose legal situation has been brought more into line with the regulation of employees. The statement of the Constitutional Court more than fifty years ago emphasised that social security is characterised by a continuous development regarding both the scope of persons covered and the extent of insurance. Social security legislation illustrates the shift in the idea about the tasks of the state in the field of the social order.[41]

The idea presented by the Austrian Constitutional Court in the 80's – according to which self-employed have different interests and they should be treated differently – has been vanished completely. Recent legislator does not show any respect more for the different interests of self-employed.

The original idea, which based the insurance on a certain activity, as a profession has been gradually replaced by the idea to link the insurance to the person with all of her/his income.[42] Instead of linking the insurance of a profession, recently the insurance is more and more linked to the person and the income.

[41] Nr. 3670. Erk. v. 16. Jänner 1960, G 4/59. p. 6.
[42] Tomandl, Rechtsprobleme einer umfassenden Sozialversicherung, p. 12.