



Independent Professionals: Legal Issues and Challenges

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Abstract. Although Independent Professionals (IPros) have until recently been generally neglected by the academic community, including by specialists in both management and entrepreneurship, IPros cannot avoid being subject to key areas of regulation. This sometimes impacts upon them in a complex, controversial and unfair way. The regulatory framework contains key areas of fiscal policy, especially personal taxation, unfortunately often dominated by allegations of ‘sham’ relationships, the law relating to business associations, employment law and social protections. Some IPros are also subject to regulation by professional bodies. Virtually all of these areas of regulation present challenges, not least as IPros are hard to define and are not unambiguously a part of the business community or the labour market

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1. Independent Professionals: Legal Issues and Challenges

This contribution deals with an often neglected topic in literature, that of the regulatory framework within which Independent Professionals (IPros) work. IPros are self-employed knowledge professionals ranging from engineers, consultants, writers and IT specialists through to members of liberal professions, such as lawyers and accountants. They are also variously referred to as freelancers, sole traders and contractors. Data on this group is necessarily limited as they are only rarely disaggregated from data on self-employment generally (Rapelli, 2012). More usually they are combined with groups such as those in retail, agriculture and construction (Hatfield, 2015).

In the entrepreneurship literature, where IPros are seen by some as nano/micro businesses, the emphasis has traditionally been on start-ups, survival, growth and job creation, although there is an important literature on the characteristics of this group and their contribution to innovative developments in client organizations (Kitching and Smallbone, 2011; Morgan, 2009; PCG, 2010; Cowling, 2003). Some doubt whether IPros are properly part of the

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entrepreneurship discourse at all. (Compare Kitching and Smallbone, 2012 with Heinonen et al, 2013). But this neglect pales into insignificance if IPros are seen as a specialized part of labour markets, where literature, both academic and practitioner, that *does* deal with employment, its management and regulatory issues, focuses exclusively on employees (Leighton et al, 2007). The self-employed, it appears, including the typically highly skilled IPros, are simply a default category or totally ignored (Leighton, 2014; Burke, 2012; GEM National Reports; ComRes, 2012). However, the one person/sole-trader business (the IPro), who does not want to grow through employing others, has attracted little attention as regards regulatory matters.

The aim of this article is primarily to reflect on the regulatory framework for IPros, in the context of contemporary controversies around the nature and impact of regulation itself. Some key features of IPro working is noted, not least the problem of defining them, but also the limitations in our understanding of the relationship between regulation and practice.

The article explores in outline some of these issues surrounding regulation and then considers the application of aspects of regulation to IPros themselves. This includes the highly contentious issue of alleged ‘sham’, ‘false’, ‘bogus’ relationships that have not only generated confusions and tensions but have also diverted attention from efforts to find an appropriate and supportive regulatory framework for IPros. This also includes the extent which IPros, though self-employment, should have access to a ‘floor of protective rights’ in terms of matters such as sickness or injury, maternity and family benefits and provision for pensions. The article draws on a number of research projects covering the UK and the EU more generally and it notes research from other jurisdictions (Leighton, 2013).

2. Regulatory Frameworks

Attitudes to regulation have tended recently to become very negative, including within the EU, with constant calls for the removal of ‘red tape’ and the lifting of ‘burdens on business’, especially in order to emerge from the recent recession (EC, 2010; EC, 2013). Calls for deregulation have also intensified so as to support free competition, including for service provision, often re-enforced by notions of responding to consumer interests. These have particular relevance for many IPros, who work in knowledge-based service sectors, especially those in liberal professions. For this group, the various attempts to ‘liberalize’ professions, whether in France, Italy or other states have met with stiff resistance (for example, see Macron, 2014). At the same time, some commentators express concerns that without regulation professional and other standards fall and there are risks of corruption, abuse and market distortion. Thus, today, the issues around regulation are not only topical but also highly contested, which makes the

analysis of the regulatory framework within which IPros work especially complex.

3. Some Preliminary Issues

Before exploring the nature and role of the regulatory framework a number of points need to be made. The first concerns the emerging evidence on the changes in the composition of the workforce in many developed economies, along with changes in the ways that people are working (Mandl, 2014; Delloit, 2014; Phillips, 2008). Traditional analyses, seeing people who work other than as full-time employees on permanent contracts as ‘non-standard’, ‘atypical’, ‘marginal’, ‘peripheral’, or increasingly as ‘vulnerable’, appears to be subject to some revision. Workforces which are more diverse and susceptible to different forms of classification and motivations for working in particular ways are undergoing significant change. Many people are opting for ways of working that provide greater choice and autonomy. IPros are clearly a part of this change (D’Arcy and Gardiner, 2014).

The implications are that policy and law-makers need to respond to labour market changes other than by measures that aim simply to address ‘vulnerability’. Vulnerability is clearly an issue for some, such as fixed term, casual and zero-hours workers, but it is only one aspect of change and virtually no IPros self-define as vulnerable (Leighton, 2013). There needs to be more recognition that ‘standard employees’ are only part of labour markets and economies. Indeed, some predict that the non-standard workers will form the majority in the next few decades (Callehan, 2011). These major changes generate important practical, societal questions about, say, skills recruitment, rewards systems, financial and other risks, people management, the balance between different working groups in economies and responses to the rise of ‘individualism’ (Brown et al, 1998; Gratton, 2011).

The second is the lack of an agreed definition of this group (IPros) in the workforce, re-enforced by a number of anomalies and tensions (Leighton, 2011 and 2012). IPros are by no means a homogeneous group and they range from those whose primary self-identification is as a member of a liberal profession, such as lawyers, health care professionals (Sommerlad, 2007) through to the so-called ‘new’ professionals (Pedeserini and Coletto, 2009), who are typically more business focused, such as designers, IT contractors and consultants/advisors with a variety of specialisms. Although it appears that few self-define as ‘entrepreneurs’ (Leighton, 2013), they do recognize the need for both business skills and sustaining their core skills and knowledge.

Regulatory traditions in most jurisdictions make both the variety but also the tension as to whether IPros are, indeed, ‘in business’ important and problematic. Governments tend to have separate ministries for, say, trade and business and for

employment and social protections. This complexity applies equally to the EU with the key policy and law-makers having relevance for IPros in the DG Single Market, Industry, Entrepreneurship, SMEs, DG Employment, Equality and Human Rights, each having a distinctive culture and working methods.

The third preliminary issue is that despite the debates and policy development around regulation, the reality is that relatively little is known about the actual impact of specific regulations, especially on matters of choice and decision-making (McCann, 2008; Deakin, 2011; Biffle and Isaac, 2005). The evidence for the assertion is, for example, that regulation makes businesses reluctant to recruit staff; that high taxation leads to a 'hidden economy', or that providing protective rights for part-timers leads to fewer part-timers, is limited or countervailing. Indeed, the numbers working part-time across the EU have remained stable, despite the rights and additional labour costs involved (Eurofound, 2011). Let us take a specific example: IPros often use agencies to access clients and work. A recent report on agencies working generally from within the EU is instructive on the impact of regulation. The 2008 Temporary Agency Work Directive provides protective rights for 'temps', not only so as to improve their working conditions but so as to prevent 'temps' being employed to drive down wages or generally destabilize workplaces. Many commentators at the time predicted a decline or even the demise of agency working. The report shows that, in reality, little has changed. Agency working continues to grow, albeit with variable use across the EU and varying use by IPros (EC, 2013a).

Similarly, does providing grants and other financial support ensure *increased* numbers of, say, entrepreneurs/business start-ups? Evidence is again, at best weak. Indeed, research sometimes indicates that responses to a particular policy agenda can be counter-intuitive, with little or no correlation between, say, a supportive government framework for, say, self-employed workers and their growth, and vice versa (Rapelli, 2012; Leighton, 2013). For example, Finland has seen a 56% growth in IPro working between 2004 and 2014 with relatively little state encouragement. It appears that people, and maybe, especially IPros, can respond to regulation in individualized and often unexpected ways. Nonetheless, it will often be argued that if IPros are provided with a more protective regulatory framework this will inevitably make costs higher and make clients increasingly reluctant to use them. We shall have to see, but experience from other regulations providing increased protections clearly indicate that the case is not going to be clear-cut.

4. How Are IPros Regulated?

It is important to differentiate between 'hard' and 'soft law'. 'Hard law', is where breaches of regulation can be enforced through courts and remedies be sought by either an enforcement body or the IPros themselves or their clients. The law of

contract is an obvious example, but in most jurisdictions there are also regulations that can impose criminal penalties on individuals, such as health and safety and tax law. ‘Hard law’ is drawn from national legislation and, for people working within the EU, also from EU legislation and the case-law of the EU’s Court of Justice.

‘Soft law’ cannot be enforced in this way, as its role is to set standards through codes, guidance, recommendations etc. The content of ‘soft law’, for example, from the International Labour Organisation (ILO) and the Organisation for Economic Co-operation and Development (OECD), that have developed codes on, say, corporate social responsibility, can sometimes be cited in ‘hard law’ litigation, but generally the consequences for breaking ‘soft law’ are very limited (Weiss, 2013).

Regulation is also drawn from professional bodies, which is sometimes re-enforced by national legislation and especially those IPros who are liberal professionals. Regulations cover matters such as qualification, level of fees, ethical issues, whether or not professionals can advertise and compete for clients and in most cases provides some sort of monopoly for these IPros (Koumenta et al, 2014). These protections have given rise to concerns, especially in the EU, regarding the extent to which such protections counteract the notion of both a single market for services and free competition (EC, DG Single Market Industry, Entrepreneurship and SMEs).

Clearly such regulation does not apply to all IPros, especially those in the newer knowledge-based areas of work. Indeed, it is possible to classify IPros into four groups for regulatory purposes;

- Those, such as lawyers, doctors, engineers, architects who are typically covered by both legislation and professional rules and regulations.
- Those that are covered by legislation that impacts on at least some of their work, such as interpreters in law courts who are subject to, for example, security screening and bans on providing a substitute.
- Those that are subject to ‘soft law’ provisions by a professional body.
- Those who are not subject to any mandatory provisions and who can work freely, such as designers, IT specialists, and consultants of various sorts.

Of course, IPros may choose to join regulatory bodies for a range of reasons, such as their provision of training, the value of a network and for marketing or credibility purposes.

5. What Are the Key Regulatory Provisions?

Clearly, it is not possible to cover all areas of regulation, and some regulatory topics have relevance only to some types of IPro working. For example, designers, journalists, and writers of other sorts are covered by regulation relating to intellectual property rights, especially copyright and design copyright. Brokers and financial advisors have specific legislation applying to them, including, say, to combat market distortion and money laundering.

Many IPros are also covered by regulations covering business associations, such as limited companies, partnerships and co-operatives that sometime carry with them significant bureaucratic demands. The topic of business associations and business relationships can become very controversial. This is especially so in complex supply chain arrangements. For example, a hypothetical IPro, Robert, sets up a limited company (Rob Ltd) in the UK whereby he is the sole shareholder and director. Technically, he is an employee of the company. He is approached to undertake work for X plc that has set up a separate company (Y Ltd) to undertake a particular project for which they want to use Robert. A contract is made between Y Ltd and Rob Ltd that sends Robert to do the work. There may even be other parties, for example, Robert may use an agency and Y Ltd use a separate company to organize payment to Robert.

In the UK this type of arrangement with four or more parties is common, but it does make the application of regulations regarding responsibilities, protections and liabilities when things go wrong especially difficult to unravel (perhaps Robert accesses highly confidential data at Y Ltd and passes it to a rival of Y Ltd or Robert feels he has suffered unlawful discrimination, or simply that the quality of Robert's work is poor). In reality, it is a simple arrangement whereby Robert is working on a self-employed basis to undertake a project for X plc. But for tactical reasons, possibly fiscal or headcount reasons, a complex structure was created (See *Halawi v. WDF*, 2014).

However, it is fiscal and employment regulatory matters that have caused most controversy and for a number of reasons. These range from allegations that the self-employed status of an IPro is a 'sham', through to whether IPros should be able to access, any, some or even all social protective rights that are available to employees, given that IPros, typically, pay significant social costs to governments. Both of these issues are topical and global ones, and the former has tended to obscure or even dominate the whole IPro discourse.

6. 'Sham' Relationships

If evidence is limited for many of the issues considered here, especially the impact, if any, of regulation on practice, there is a considerable literature on 'sham' employment. Other 'labels' are used to convey the same issue, such as

'disguised', 'bogus' and 'false' (Casale, 2012). One concern is that people are forced into self-employment by employers who wish to reduce labour costs, especially as a consequence of the worker then having few if any legal protections. This approach to the employment relationship could be called the 'exploitation model'.

However, where IPros are concerned the issue is more likely to be whether the self-employed relationship was set up so as to reduce fiscal liabilities for both the employer/client and the IPro. There are particular concerns where a contract is long, regularly renewed or the IPro is so strongly integrated into the client organization that it is hard or impossible to differentiate them in practical terms from an employee. This can be called the 'collusion model'. Where an IPro works for only one client, does not use substitutes and works on a series of, say, one year contracts, the argument that they are truly self-employed can be hard to sustain. Some commentators refer to this (along with the 'exploitation model') as 'dependent self-employment' (Muehlberger, 2007). The concerns are not just because the arrangement can easily create vulnerable employment in the first situation and losses for fiscal authorities in the second, but because self-employment can often carry with it other disadvantages, such as problems in accessing loans, insurances and pensions (D'Arcy and Gardiner, 2014; Leighton, 2013).

But at the heart of this topic is the long-running and apparently unsolved question of '*how do you differentiate the genuine IPro from an employee*'? If the key defining features of genuine self-employment are opportunity, investment and risk many employees are also exposed to opportunity and risk and are largely paid through commission or bonuses. Indeed, many now speak of the importance of the 'entrepreneurial employee' (GEM, 2013). At the same time, job security is increasingly an illusion for many employees.

So, what *are* the agreed key features of IPro working which makes it clear that an individual is truly self-employed? Is it having a website, an accountant, a limited company, paying VAT and other economic and business indicators, such as time limited work or having a number of clients contemporaneously? Or, is it more psycho-social? Do genuine IPros exhibit a set of attitudes and behaviors, perhaps in terms of attitudes to risk, or notions of 'professionalism' or a rejection of working in hierarchies and subject to HRM? There is, indeed, a literature that would suggest the strength of the psych-social approach (McKeown, 2000 and 2003; Lange, 2012; Frazer and Gold, 2001). But would this satisfy fiscal authorities and law courts? One suspects not.

The legal consequences of being an employee or being self-employed are considerable and by no means limited to fiscal matters and the so-called 'wage-work bargain' (D'Arcy and Gardiner, 2014). The contractual obligations, especially those on the employee have become more burdensome in the last few decades, with HRM increasingly seeing the employee relationship as one of inter-dependency, through notions of, for example, engagement and the mutuality of

obligations derived from the psychological contract, all set within hierarchical structures.

7. The Legal Tests

Most legal systems differentiate between the employee and the self-employed by applying legal tests. The most commonly used is that of 'subordination', which asks whether an individual is subject to the instructions and control of the employer/client. This, in turn requires exploration of the extent to which the IPro can be flexible, send a substitute and whether they bear some of the risk of a project (Razzolini, 2011), or whether they simply obey the instructions of their employer. The UK has no fewer than four tests it variously applies to the problem, each focusing on very different aspects of the relationship between an IPro and their client/employer. The first explores notions of control and supervision (*Yewens v. Noakes, 1880*), the second, the extent to which the individual is integrated into the organization (*Stevenson and others v. MacDonald and Evans, 1952*), the third, whether people are 'in business on their own account' (*Ready Mixed Concrete v. MPNI 1968*) and the last whether there is sufficient 'mutuality of obligation' to offer and then undertake work between the parties (*O'Kelly v. THF, 1983*), so as to indicate employee status. Unfortunately, the complexity and inconsistency in the application of the UK tests can mean many IPros might be wrongly classified as employees. Put succinctly, applying one test might lead to the conclusion that an IPro was correctly classified as self-employed but using another test might lead to the opposite conclusion!

Another way to look at the tests is locate the tests within different academic disciplines. So, the first is linked to HRM, the second to organizational behavior, the third to economics and the fourth to psychology! Whatever the discipline, the approaches are clearly very different, and depending on which test is applied, likely, as suggested above, to achieve different outcomes.

Recently, the UK's Supreme Court in an effort to bring some sort of order to the topic, has simply asked tribunals to state the 'employment realities' of the relationship, but, unfortunately, with no guidance as to how they should do it (*Autoclenz v. Belcher, 2011*). Clearly, in the context of notions of entrepreneurship, it is only the economic test that resonates, by focusing on investment, risk and business practices. It is also the case in the UK that if there is a suspicion of a 'sham' the courts are often unwilling to expose it or to intervene, preferring to maintain support for the integrity of the rules of freedom to contract. For example, in *Kalwak v. Consistent Group 2007*, a Polish worker with limited English was required to sign a document declaring her to be self-employed, despite her working long and regular hours, being provided with accommodation and forbidden from working for anyone else. By contrast, in most other EU states the

definition of employee and self-employed is enshrined in legislation or social agreement, leaving the courts with less discretion.

Despite this, in most developed economies the question of differentiating the employee from the self-employed has proved both controversial and unsatisfactory (Leighton and Wynn, 2011). As referred to above, this is especially so in common law states such as USA and Australia, where rules are taken predominately from case-law, therefore leaving much to the discretion (or whim) of judges. The issue of alleged 'sham' relationships remains in the forefront of debate, though data confirming or denying the incidence and scale of such 'sham' relationships remains scanty. The best that can be said is that the topic is crying out for rigorous, objective and comprehensive research to clarify the nature and extent of any problem and, further, whether there can be any consensus on what, precisely, is the defining feature of being an employee or being self-employed.

8. IPros and Fiscal Regulation

It is tempting, especially in the UK to see the fiscal regime as a key driver of IPro development. The Finance Act, 2000 in the UK, with its transparent strategy of challenging shams and other assumed ways of IPros' minimizing tax liability was, indeed, a key motivator for IPros to organize and challenge. The legislation also spawned the 'umbrella' company which has counterparts in other EU states which provides fixed term contracts of employment for IPros while they are on specific projects. 'Umbrellas' still retain some fiscal advantages for IPros, which again has prompted the UK authorities, at least, to seek ways to question them (HM Treasury, 2010; HM Treasury and Revenue and Customs, 2014; OTS, 2014). Although, there has been something of a campaign waged by these authorities to challenge employment relationships, in reality they have a poor record of success.

Research involving IPros themselves seems to suggest that resentment is not so much fuelled by the level of taxation and contribution but that IPros often contribute similarly as employees do, but do not have access to the equivalent benefits or support (Leighton, 2013 Chap. 3). The picture is variable across EU states and other states, but within the EU in states that subscribe to the co-ordinated market economy model, IPros do tend to receive some benefits, whereas in states that subscribe to the liberal market economy model, benefits tend to be very limited. Where there is provision, benefits such as relating to disability and illness, maternity, and family rights are the most likely to be available (Leighton, 2013 Annex 1).

The picture generally as regards accessing social and protective rights is therefore varied across the EU, sometimes with difficulties in qualifying for them. For example, the self-employed in the UK can generally only access rights such as equality rights, rights to paid holidays, and security of earnings if they have

‘worker’ status (Employment Rights Act, 1996, S.230 [3]). To have this, the IPro needs to be ‘personally executing work’, i.e. must do it themselves and generally not send a substitute. Through this formula, many IPros have been able to claim some of these basic protections. However, recently, the courts have been applying strictly the wording of legislation, in that it excludes IPros who work personally but on a ‘business to business/client’ basis. Currently, the UK government is seeking evidence on the whole question of ‘worker’ rights (BIS, 2014), but the whole issue highlights what this article raised at the outset. This is the question of whom, precisely, IPros are and where do they fit into policy-making and regulation? Do they want or need employment rights? Do they want to join and enjoy protective trade union rights? If they do want rights, what are the priorities and what is the policy basis upon which rights are made available?

9. Concluding Thoughts

There can be no doubt that the issues raised here will be of increasing prominence, if only through the seemingly relentless growth in IPro working. There is a sense in which policy makers are recognizing change but, currently, seem unable or unwilling to engage sufficiently with it. They do appreciate the tensions around reconciling supporting or enhancing the quality of a working life with the need to retain or enhance competitiveness. This is the backdrop to the EU’s Green Paper, *Modernising Labour Law, 2006* (EC. 2006) which raised the issue of a ‘floor of rights’ for all at work but has made little progress (De Stefano, V, 2014). Having noted the continuing tensions and anomalies that IPros present, it has to be admitted that they are indeed a challenging group to respond to and not just in terms of regulation.

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