

**Protect your business against IR35 while
keeping your freelancer relationships with:**



Created by:

Silke Becker, former Head of Legal at Hays AG

Content

1.	Vicoland vs. IR 35 & false self-employment	
a.	Summary	3
b.	Sufficient description of services	5
c.	Taking over work packages	7
d.	General contractor model and personnel authority	9
2.	Vicoland vs. covert supply of temporary workers	10
3.	Excursus: Duration / activity for only one client	11
4.	Excursus: Additional safeguards through standardised external audit (CMS)	12
5.	Appendix: legal sources - case law and literature	13

1.a. Summary: Vicoland vs. IR 35 & false self-employment (i/ii)

- **Vicoland minimises the risk of "false self-employment" by clearly distinguishing between a contractual relationship and an employment relationship.**
 - false self-employment: Self-employed people provide services but are classified as employees by the courts or public authorities. The work or service contract is subsequently classified as an employment relationship.
- **The main differences between the services provided via Vicoland and services in an employment relationship are**
 - When contracts are awarded via Vicoland, customers and the freelancer network (Virtual Company = Vico), which offers services via a general contractor, must
 - Define exactly the service to be ordered, whereby the system is designed for SOW contracts, but can also map T&M contracts if desired.
 - adhere to and document the classic steps of a contract for work and services (e.g. calculation; negotiation of offers, acceptance or rejection of an order, changes, extensions, acceptances)
 - The customer commissions the general contractor of the Vico, who requests the contract performance divided into individual tasks from freelancers from his Vico and awards the contract to a selection of them after a precise description of the tasks.
 - The freelancers and the general contractor each define which services they offer, how and under which conditions and - after acceptance of the offer - provide them to meet the customer's requirements (briefing).
 - Payment for a service is only made after acceptance by the customer.
 - All of the above-mentioned circumstances are continuously documented in a comprehensible manner via the Vicoland platform.

1.a. Summary: Vicoland vs. IR 35 & false self-employment (ii/ii)

- **Vicoland thus offers effective methods of distinguishing contracts for work and services from employment contracts and temporary employment**
 - The focus on precise performance specifications, broken down into individual tasks, and the general contractor model mean that Vicos is commissioned with assignments that are fundamentally different from employment contracts (as well as temporary employment).
 - Vicoland guides its users through a process that maps and supports these demarcation features and documents their compliance.
 - The Vico-side preparation of the service description as well as payment after acceptance of the service further strengthens the separation of contractual relationships entered into via Vicoland from employment contracts.
 - The overall result is a level of protection against false self-employment that goes well beyond that offered by other commonly practised forms of freelance employment, which also seek to reduce the risks of false self-employment.

1.b. Adequate description of services (i/ii)

- **The service description, i.e. the object of performance formulated in the contract, plays a significant role in distinguishing between "self-employed contracts" (contracts for work and services) and employment contracts.**
 - An undefined subject matter of the contract leads the courts to assume that the concretisation is carried out by labour law instructions, so that they assume an employment relationship.
(see no. 5 "Appendix: legal sources", page 13, point a.)
- **Using the Vicoland platform requires (and facilitates) the definition of the service to be contracted.**
 - This results in a significant difference to common business practice:
 - In many cases, freelancers are only commissioned with consulting and/or support services on a flat-rate basis.
 - Even if the customer and the freelancer know at the time of conclusion of the contract which service is actually required, this description is often not included in the contract. Often the contracting parties leave this aspect open not only in the written contract but also in the negotiations. They trust that they will come to an agreement in the course of the project.

The Vicoland system avoids such shortcomings with regard to the distinction between "self-employed contracts" and employment contracts.

- .../...

1.b. Adequate specification (ii/ii)

- **(cont'd) Use of the Vicoland platform requires (and facilitates) the definition of the service to be contracted**
 - Vicoland's workflow (the mode of operation specified by Vicoland's IT system) requires users to provide a description of services prior to concluding a contract. At the same time, the workflow makes this working method simple and efficient and documents it comprehensively and comprehensibly.
 - At the beginning of the offer phase, the requirements are defined, either by the customer alone or together with the freelancer. This means that there is already an initial service description (which is already missing in many other freelancer assignments today).
 - The general contractor then supplements the initial performance specification in such a way that it is broken down into individual tasks ("shares").
 - These individual tasks are then further defined and priced by freelancers from the Vico of the general contractor (i.e. from his network).
 - The workflow is followed by the negotiation and agreement of the individual tasks, so that work packages are agreed between the general contractor and the freelancers in advance, which become part of the service description and the offer to the customer and thus an integral part of the contract.
 - The Vicoland platform offers specific technical functionalities and process options that make it easier for the Vico to describe the service to be provided in a precise and detailed manner.
- **Interim conclusion: Freelancer assignments via Vicoland thus meet the requirements of the case law for a specific subject matter of the contract and a sufficient description of the service.**

1.c. Adoption of work packages (i/ii)

- **Vicoland is also suitable for agile projects in which the concrete services to be provided are only defined in the course of the project and awarded via work packages, as Vicoland maps positive demarcation criteria. As positive criteria in connection with work packages, the case law evaluates the following:**
 - If the freelancer is free to **accept or reject** individual **work packages**.
(see no. 5 "Annex: legal sources", page 14, point b.)
 - If the freelancer is even able to **help shape** the individual **work packages**, this is another positive aspect
(see no. 5 "Annex: legal sources", page 15, point c.)
- **Use of the Vicoland platform requires (and supports) the participation of freelancers**
 - The customer can set a requirement definition both in the form of the desired overall performance and in the form of successive, comprehensive work packages. These are then divided into further individual work packages by the general contractor and Vico and distributed to the Vico freelancers participating in the project.
 - Even the setting of the requirement definition can be done in cooperation with the general contractor. The general contractor passes on the requirements definition and the resulting individual work packages in his Vico.
 - A freelancer must actively report to the general contractor if he is interested in working on a Vico project.
 - .../...

1.c. Adoption of work packages (ii/ii)

- **(cont. :) Use of the Vicoland platform requires (and supports) the participation of freelancers**
 - Regardless of the form of requirements definition, work packages can always be defined or adapted even more precisely by Vico's freelancers, including pricing (part of the "bid negotiation" workflow).
 - No freelancer is obliged to accept a work package assigned to him. If there is agreement, a contract for the work package is concluded.
 - The Vicoland workflow maps this procedure in the interface and the functionalities of the system and allows its extension to other systems through the possibility of data export to project management systems.
- **The actions of the freelancers to help shape and independently determine the work content and -The Vicoland system tracks and documents the entire organisation.**
- **Interim conclusion: When awarding work packages, Vicoland reflects the requirements of the case law for a consensual agreement of work packages. The other positive feature of the freelancer's involvement is also covered by the Vicoland workflow. This results in an independent definition of work content and organisation by the Vicos or their freelancers, which contradicts a false self-employment.**

1.d. General contractor model and personnel authority

- **The provision of services by a general contractor and by Vicos fulfils further delimitation criteria to the employment contract:**
 - On the one hand, the general contractor can **have** the service which he contractually owes to the customer **provided by third parties**. This distinguishes the contractual relationship considerably from an employment contract. *(see no. 5 "Appendix: legal sources", page 16, point d.)*
 - Secondly, it is decided within the Vico who provides what services. The client does not prescribe this. So he has **no "personnel sovereignty"** and therefore the client cannot be considered as an employer.
 - This criterion is decisive, first of all, with regard to the delimitation of contracts for work or services from the provision of temporary workers, but also for the avoidance of false self-employment, because the customer's lack of personnel sovereignty means that he is not regarded as the freelancer's employer. *(see no. 5 "Appendix: legal sources", pages 17 and 18, point e.)*
 - To ensure the lack of personnel sovereignty, some companies are trying to introduce a so-called "bridgehead or representative model". In many cases this does not succeed convincingly. At Vicoland it is an elementary part of the workflow and can therefore be easily mapped and documented.
 - For the general contractor itself, Vicoland also minimises the risk of being classified as an employer through the process described under 1.b. and 1.c.
- **Interim conclusion: By commissioning Vicos, which presupposes the provision of services by third parties and prevents personnel sovereignty of the customer, "Vicoland orders" can be distinguished from employment contracts.**

2. Vicoland vs. covert supply of temporary workers

- **The above-mentioned aspects also protect the customer from entering into or living in a covert or unrecognised temporary employment contract**
 - In contrast to a contract for work and services, **only the selection and provision of employees is owed** in a temporary employment contract.
 - Vicoland urges the contracting parties to specify the specific performance. This means that more is owed than just selection and provision. A concrete subject matter of performance therefore also speaks against hiring out employees. The definition of a concrete subject matter of performance is secured by the process described under No. 1.b. and 1.c.
(see no. 5 "Appendix: legal sources", page 13, point a., 1st judgement)
 - The characteristic of **lack of personnel sovereignty** described in no. 1.d. is also a decisive criterion in the delimitation of contracts for work or services to the provision of temporary workers. As long as the customer has no personnel sovereignty, the contract cannot be classified as a temporary employment contract either.
(see No. 5 "Appendix: legal sources", pages 17 and 18, point e.).
- **Interim conclusion: The mechanisms by which Vicoland protects against false self-employment also protect against the risk of covert hiring**

3. excursus: duration / activity for only one client

- **The self-employed are not limited by law or case law in the length of time they may work for a single client.**
 - In **social law**, this is made clear, for example, by the provision in **§ 2 no. 9 SGB VI**. This paragraph recognises self-employed persons who are active on a permanent basis and essentially only for one client ("**employee-like self-employed persons**"). It does not call their self-employment into question, but provides for an insurance obligation for this group of persons. Unlike employees, however, the self-employed person bears this insurance obligation alone . *(see no. 5 "Appendix: legal sources", page 19, point f.)*
 - The **labour law** does not provide for any limitation either. For example, courts have upheld the existence of a "free service contract" even after 20 years, even though the self-employed had no other clients. This characteristic is also not considered relevant in the literature.
(see no. 5 "Appendix: legal sources", page 20, point g.)
 - Nevertheless, contracts with a very long duration can bring with them the danger of creeping integration - the freelancer becomes virtually an "inventory", the demarcation to internal employees becomes blurred. Vicoland also provides a remedy here, as the consistent use of the platform means that the demarcation criteria described above are still met even with longer terms.
- **Interim conclusion: A freelancer can also work on the basis of a contract for work and services on a permanent basis and essentially for only one client. The Vicoland workflow helps to comply with the demarcation criteria even for longer contract periods.**

4. Excursus: Additional assurance through standardised external audit

- **The effectiveness of the protection against false self-employment, which Vicoland offers as an advantage over other commonly practised forms of freelance employment, depends on the Vicoland platform being used in accordance with the functionally supported approach envisaged there.**
 - If Vicoland is used in the way the software system basically dictates, the protection described above against false self-employment (and thus also against covert hiring of employees) arises. However, this does not exclude a deviating application, which in the extreme case could lead to a loss of protection.
 - In order to rule out this case as well, a legal audit can be added to any project in Vicoland, which serves to ensure the correct use of Vicoland to achieve the protection against false self-employment and/or illegal hiring of workers outlined above.
 - This audit is carried out in a standardised and therefore efficient form by a leading law firm in Germany and internationally, CMS Hasche Sigle. For this purpose, CMS receives dedicated system access to the audited project on Vicoland.
 - The audit is optional and can be booked in a basic and a complete version:
 - Basic version: Review of a quotation received by the customer, including framework contract and service description.
 - Complete version: In addition to the basic version, all changes to the framework agreement or service description that arise during the course of the project are checked (recommended for agile projects).

5. Appendix: legal sources - case law and literature

a. Undetermined subject matter of the contract leads to the establishment of an employment relationship

- **LSG Baden-Württemberg, judgment of 14 February 2012 - L 11 KR 3007/11 (recital 59, juris):**

...An indication that speaks in favour of dependent employment is the fact that the subject matter of the contract is so undefined that it is only concretised by further specifications of the plaintiff or by integration into the plaintiff's project business... The BAG also bases its differentiation between a contract for work and services and an activity as an employee in the law on the provision of temporary workers on whether the contractually defined subject matter is sufficiently defined. If this is not the case and if the performance owed is so undefined that it is only concretised by the client's instructions, the work is deemed to be work as an employee.

- **LSG Baden-Württemberg, judgment of 30 July 2014 - L 5 R 3157/13 (recital 80, juris):**

...Typical for the commissioning of a self-employed person to take on a consultancy and service contract would be a detailed description of the scope of services, on the one hand for reasons of calculability of the range of services offered to the self-employed person, on the other hand also in order to enable the completeness of the service provided to be checked upon completion of the service... For this purpose a considerably more detailed description is required. If such a detailed description is not available, there is every reason to believe that this more detailed information on the details of the order was given to the persons invited to 1) within the framework of project processing in the form of individual instructions.

5. Appendix: legal sources - case law and literature

b. Acceptance of work packages - possibility of rejection

- **LSG Baden-Württemberg, judgment of 18 May 2015 - L 11 R 4586/12 (recital 57, juris)**
Confirmation of self-employment for the following reasons, among others

In contrast to the cases decided by the Senate up to now ... in the specific case, it cannot be established that the first-instance summoned persons were integrated into the plaintiff's work organisation and that the first-instance summoned persons were dependent on instructions in order to convince the Senate. The first respondent was not assigned work packages by a project manager, but was able to decide for herself whether and which of the work packages offered she accepted. Thus, the first person invited could control the scope of their activities and the time frame themselves. In this respect, she was not involved in the applicant's work organisation. In the context of such a work package, the first person invited to the hearing was largely self-sufficient.

5. Appendix: legal sources - case law and literature

c. Taking over work packages - co-designing

- **BSG, judgment of 14 March 2018 - B 12 KR 12/17 R (recital 35)**

Referral back to the LSG for reasons including

Within the framework of the overall assessment, the LSG must, on the basis of corresponding investigations and findings, in particular also take into account how the project management was organised. For this results in conclusions with regard to the integration of the invited person and his or her submission to instructions on 1... Thus, there is no clear information about who defined the project... It will also have to be clarified whether the person invited to 1. cooperated with the project management "at eye level" and co-determined the content of the work packages to be worked on by him/her as an external specialist with creative freedom, or whether he/she had to make contributions to the project under the direction of the project management according to its hierarchical guidelines.

5. Appendix: legal sources - case law and literature

d. Provision of services by third parties

- **Landessozialgericht Sachsen-Anhalt, judgment of 10 April 2019 - L 1 BA 20/18 (recital 55, juris)**

The assumption of self-employment also corresponds to the fact that the auditors have been given the contractual option of having work done by third parties, i.e. not in person. In contrast, employees must as a rule perform their work personally and may not use third parties as vicarious agents... According to the plaintiff and the 21, 39, 40 persons invited to the hearing, this possibility has been regularly used... This shows that the contractual provisions were not only made out of appearance but were actually put into practice.

- **BAG, ruling of 21 May 2019 - 9 AZR 295/18 (marginal 18, juris)**

The fact that the plaintiff is not obliged to provide the service owed in person also speaks against the assumption that the "fee contract" has a contractual content. According to § 3 No. 4 of the contract, the plaintiff is rather entitled to have the orders processed by his own personnel under the conditions specified in more detail therein. If one party to the contract grants the other party to the contract the right to involve third parties in the provision of services, this indicates that the contract party is acting independently.

5. Appendix: legal sources - case law and literature

e. Personnel sovereignty

- **Prof. Volker Rieble in ZfA 44th edition 2/13 "Industry-related services between free contract for work and regulated supply of temporary workers**

In this essay, Prof. Rieble examines in particular the delimitation criteria on the basis of numerous judgements cited there and comes to the conclusion, among other things, that the lack of personnel sovereignty of the client is a decisive characteristic for the negation of a temporary employment contract:

Page 148: So here too it is important that the employees are integrated into the work organisation of the host company; in particular, the client exercises the right to issue instructions ("personnel sovereignty") under labour law. This means that as soon as a genuine service or work contract is concluded between the receiving company and the commissioned company and no temporary employment contract is concluded, the fact of integration within the meaning of § 99 BetrVG is fundamentally excluded. And this is because the work/service contractor brings its own work organisation into the operation of the assignment company.

Page 153: An example is passenger control: the security needs of air traffic require strict control of the controllers. Nevertheless, this does not lead to the hiring of temporary staff - because *this "penetration" of the assignment company on the personal work actions of the service provider's employees* is "immanently" linked to the type and manner of the service contract. For the BAG it is therefore sufficient to deny any supply of temporary workers if the contractor *merely controls the organisation of passenger screening* by means of work organisation.

5. Appendix: legal sources - case law and literature

e. Personnel sovereignty (cont'd)

- **Cologne Regional Labour Court, judgment of 14 June 2017 - 11 Sa 816/16 (margin 38, juris)**

The LAG Köln denies the existence of a temporary employment agency on the following grounds, among others:

According to the wording of the employment contract, the defendant was not merely obliged to select employees and make them available to the A. Furthermore, it had the task of coordinating the deployment of the employees deployed by it, providing technical guidance and supervising them. For this purpose, the defendant had to take organisational measures. The defendant did not contractually confer any rights of instruction on A with regard to the workers it made available. The personnel sovereignty over the decisions typical of an employment relationship remained with the defendant.

5. Appendix: legal sources - case law and literature

f. Duration of the contractual relationship - social law

- **Extract from § 2 SGB No. 9 VI**

Self-employed persons are subject to compulsory insurance...

...No. 9) Persons who a) in connection with their self-employed activity regularly do not employ any employee subject to compulsory insurance and b) are permanently and essentially working for only one principal; in the case of partners, the principals of the company are deemed to be principals.

- **Bayerisches LSG, judgment of 17 December 2015 - L 14 R 579/14 (recitals 45 to 47, juris)**

This judgment concerned a period of 2 years and 4 months, although the decision could have been taken for a longer or shorter period.

The plaintiff was self-employed during the period in dispute and worked essentially and permanently for only one client... The plaintiff was self-employed during the relevant period. The group of persons listed in § 2 SGB VI has the characteristic of self-employment in common...

5. Appendix: legal sources - case law and literature

g. Duration of the contractual relationship - labour law

- **LAG Düsseldorf, judgment of 29 September 2014 - 9 Sa 31/14**
The judgment rules that in the case of a service contract in the field of computer services and software design, the contractual relationship, which has been in existence for 21 years, is not an employment relationship but a freelance service contract.
- **Prof. Martin Henssler in "Arbeitnehmerüberlassung und Werkverträge", DeutscherAnwaltVerlag 2017, p. 59**
(with further references)

In the legislative process, far too little attention has been paid to those criteria which are not considered to be decisive by case law. If, in accordance with the concept of the first draft bill from the BMAS of November 2015, a detailed regulation had been decided upon, then in the interest of balance and legal certainty, these features would also have had to be included in the "restatement" of the case law. They are to be taken into account both in the distinction between the employee and the self-employed person and in the demarcation between the use of external staff on the basis of a contract for work or services and the supply of temporary workers. These non-decisive characteristics include

-the duration of the activity in the employing company

-• ...