



European Platform Undeclared Work

**Second plenary meeting of the
European Platform tackling
undeclared work
9-10 March 2017**

**Report of the plenary and
workshops relating to bogus self-
employment**

1 Introduction

A plenary meeting of the European Platform tackling undeclared work was held in Brussels on 9-10 March 2017. The first day of this meeting was dedicated to the topic of bogus self-employment (BSE). This report summarises the discussions at the meeting which drew on the forthcoming study on this topic¹ developed as part of the Platform's work.

2 Bogus self-employment: definitions and scope

There is no definition of BSE at European level. The OECD² has described BSE or 'false' self-employment as consisting of *'people whose conditions of employment are similar to those of employees, who have no employees themselves, and who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers' responsibilities'*.

According to the ILO³, BSE therefore sits in a 'grey area' between employment and self-employment. This 'grey area' includes 'disguised employment relationships' and 'dependent self-employment'.

There are few estimates of the scale and extent of BSE – where these exist they have been carried out by NGOs and social partners in relation to their particular areas of interest. The main source of information is Eurofound which presented to the plenary a recently conducted statistical analysis of the 2015 European Working Conditions Survey (EWCS) of its scale and who is engaged in bogus self-employment. This distinguishes five groups of self-employed:

- Stable own-account workers: 26% (e.g. shopkeepers, hairdressers, plumbers)
- Small traders and farmers: 25%
- Employers: 23%
- Vulnerable: 17% (these tend to work with co-workers, have only one client, the majority are in the lowest income quintile, 40% became self-employed out of necessity; they are over-represented in agriculture, Eastern Europe and Baltic States)
- Concealed: 8% (most strongly resemble work status of employees, tend to be paid weekly or monthly, to work regular hours, with co-workers, only a third are self-employed out of choice, e.g. cleaners, helpers, taxi drivers, also musicians, singers, composers).

Eurofound estimates the number of economically dependent workers to amount to 1% of all workers in the EU-28 (13% of all self-employed could not be considered independent).

'Bogus self-employment' is often used as the equivalent of 'economically dependent workers' and vice versa. However, each concept emphasises a different feature. The 'bogus' denomination underlines the intention to circumvent labour, tax, social security rights and regulations, to reduce costs and avoid payments and obligations. For the 'economically dependent' status, the economic dependence of a worker to one contractor/employer could be an outcome more than a deliberate construction.

¹ Heyes, J. and Hastings, T. (2017) *The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment*.

² OECD (2000) *Employment Outlook 2000*. Paris: OECD.

³ ILO (2016) *Non-Standard Employment Around the World: Understanding, Challenges, Shaping Prospects*. Geneva: ILO.

There are certain sectors where BSE is considered more prevalent, including construction, transportation and distribution, and domestic services. Although BSE has long been widespread in manual occupations and sectors such as construction, it has recently spread to non-manual occupations and other sectors. Examples include undeclared software developers working at home, call centres that operate in private households, and parking lots where workers respond to supervisors and have defined hours of work, yet are not regarded as employees⁴. Some participants at the plenary meeting referred to the fact that BSE has become 'segmented' and that it is no longer confined to low-skill manual occupations. Instead, two tiers can be identified:

- An upper tier: e.g., medical locums, academics, 'umbrella' companies (e.g. pilots)
- A lower tier: e.g., domestic and care workers, delivery drivers.

It was also reported that BSE is not just found amongst private sector employers, but is also evident in the public sector.

For enforcement agencies, identifying BSE is difficult because if there is, in legal terms, a grey area, enforcers cannot turn their judgement of what they find in practice into clear 'black or white' distinctions. The plenary discussion revealed that enforcement agencies need to look at each case individually and from a legal point of view, which is labour intensive. In response, in the **Netherlands**, a new system has been introduced from April 2016 to try to make the binary divide between employment and self-employment much clearer in the tax system.

This has in part been introduced because the experience from the **Netherlands** has shown that sometimes BSE is one of the legal structures that companies use to economise on labour costs.

Table 1. Netherlands

The NL case of the cleaning industry

BSE was identified as being one of the legal structures used in the cleaning industry in the Netherlands. Cleaning is a budget item that companies want to economize on as much as possible. As a result, prices and margins of cleaning companies are under constant pressure. Cleaning companies that engage in BSE can undercut other companies.

The labour inspectorate decided to try to tackle this in relation to fast food restaurants, by approaching senior managers in national chains and asking them if they knew how cleaning was carried out in their establishments. Most did not and the Inspectorate's approach raised awareness. Some of the chains subsequently brought their cleaning back in house while others paid greater attention to the quality and certification of their contractors.

In mid-2016, data were available for 398 fast-food outlets. 144 outlets had shunned at least 32 cleaning companies. 69 outlets had replaced their cleaning companies (22 cleaning companies were involved). 76 outlets started to organise the cleaning themselves. 14 companies ceased to operate, of which eight went bankrupt. Two cleaning companies will most likely face criminal prosecution (cases conducted by investigators of the labour inspectorate and the tax office).

Cooperation with the senior management of fast food chains therefore proved to be productive. Cleaning companies with sub-standard working conditions are finding it much harder to secure contracts from fast food chains.

However, the sector remains vulnerable, notably because of the combination of

⁴ ILO (2013) *Labour Inspection and Undeclared Work in the EU. EC Project GLO/12/24/EEC, Labour Inspection Strategies for combating undeclared work in Europe*. Working Document No. 29. Geneva: ILO.

franchising and chain outlets. The chains have been advised of the legal liability they have for working conditions of the cleaning companies that they hire. In addition, employers' associations have barred members where abuses became evident.

Source: Rits de Boer, UDW Platform member for the Netherlands

3 Why do we need to tackle bogus self-employment?

BSE can be considered 'falsely-declared' employment relations or misclassified dependent employment. This has consequences for the bogus self-employed, employers and economy:

- The bogus self-employed do not receive the same level of protection as employees. This includes protections and entitlements relating to holidays, sick pay, pensions, rest breaks, termination of work and unemployment benefits.
- The bogus self-employed are affected by low job quality. This might be in relation to, for example, working hours, work-life-balance, access to training opportunities and predictability of workloads and incomes. It should be noted that job quality can be an issue for many self-employed, not just those in BSE.
- There is unfair competition for legitimate employers. BSE is a way of cutting costs, which means that employers who operate legitimately are unable to compete on a level playing field with those who employ workers through BSE.
- Employers may use BSE as a way of avoiding health and safety responsibilities.
- BSE leads to tax and social security revenues being lower than they could be.
- BSE might serve as a means for EU mobile workers to apply for and obtain residence. In the **Netherlands** for example, there are companies / lawyers which provide a service to people in another country to set themselves up as self-employed in the Netherlands in order to enable them to apply for a residence permit. These workers actually find themselves in a BSE situation. In Austria, trade licences have been issued to workers in elementary occupations, yet many of these workers are in BSE. Again, EU mobile workers may be involved. BSE is, therefore, a cross-border issue.
- Some cases of BSE also involve undeclared work or illegal work.
- In some cases, BSE is linked to organised crime.
- As noted, BSE is spreading beyond manual occupations and industries. The scale of the problem appears to be increasing, partly as a result of the advent of the 'collaborative'/'sharing' economy.
- Increasingly precarious education-to-work transitions may have led to young people facing a greater risk of becoming involved in BSE. Although some young people might wish to work on a self-employed basis, for many others it is the only available alternative to unemployment.

4 Existing efforts to tackle bogus self-employment

The Platform plenary received information from the aforementioned study prepared on behalf of the Platform reporting case studies from Greece, Ireland, Italy, Latvia, Netherlands, Romania, Spain and the UK. The overall finding is that Member States rarely have legislation relating specifically to BSE, and BSE tends to be addressed as part of general enforcement activities.

The issue of fraud in relation to self-employment is predominantly a domestic issue, because regulations are defined nationally. A number of examples were presented during the seminar of how Member States are working to combat BSE, through

different types of measure. The most important measures are those that seek to deal with the misclassification of dependent employees as self-employed, not least by providing clarity regarding the criteria of what is self-employment and dependent employment. Such criteria, however, do not exist in all Member States.

These criteria, furthermore, differ across Member States, reflecting national labour law and case law. Enforcement bodies therefore use a range of criteria when attempting to distinguish between employment, self-employment and BSE. Commonly used criteria include: the number of clients for which the worker provides services; whether the client provides tools and machines; and whether the worker is permitted to determine how their work should be organised. In **Ireland**, there is a long-standing code of practice which sets out detailed criteria for determining employment or self-employment status of individuals.

Some countries have attempted to improve the clarity of distinctions through changes to their labour laws. In **Austria**, there has been a proposal for a new law to enable workers to determine if they are in a BSE situation. When workers register for social security, a questionnaire will help them to tell in advance whether they are going to be in BSE.

In the **Netherlands**, recent legislative change means that there is now a set of standard contracts for self-employed persons and their clients and it is the clients who are liable for BSE.

Some countries, moreover, have 'hybrid' categories of employment status beyond purely self-employment and dependent employment. For example, in the **UK**, the category of 'worker' exists for employment rights, and in **Austria** the categories of 'dependent self-employed', 'new self-employed' and 'one-person company'. However, workers in these categories have fewer employment rights and weaker social protection than employees. For example, although dependent self-employed workers in Austria are included in social insurance and have maternity protection, they are not covered by labour law. Experience from Austria and **Spain** suggests that creating a third category of workers, in between employed and self-employed, does not necessarily solve the problem of BSE. The category introduced in Spain of 'dependent autonomous workers' is now also being abused and as shown in the box below, a similar situation can be found in Austria.

Table 2. Austria

Different forms of self-employment

There are a number of different types of self-employment in Austria, as follows:

- Dependent self-employed,
- New self-employed,
- One-person companies.

However, it is quite difficult to distinguish between these three categories and all three can be used to circumvent the labour law.

Dependent self-employed contractors, working on a 'free service contract' provide ongoing service on a freelance basis, often for a fixed term, completely dependent on their quasi employer but formally not subject to the instruction of their client and free to schedule their own working time. They are insured in the same way as employees, under the General Social Insurance Act (i.e. covered by health, accident, pension and unemployment insurance). However, labour law does not apply, which means that there are no collective agreements for wages, there is no holiday entitlement and no protection from dismissal.

New self-employed workers tend to provide an ongoing service of a rather well-defined task and can be subcontracted. They are insured in the same way as other

self-employed persons. When registering for this social insurance, a check is carried out to find out if it is really self-employment or rather dependent contractors or employees.

Most researchers and trade unions consider both of the above to be economically dependent self-employed workers, i.e. BSE. Often the real working situation resembles largely that of a dependent worker. This is because the majority do not employ other people and mostly work for one (main) client.

In addition, one-person companies with a trade licence are often in the same situation. They are used in place of dependent employees or freelance contractors, to save on labour law and costs.

Between 2008 and 2013 there was a decline in the number of free service contract workers (dependent self-employed) of 28% (18,700). This is because these contract workers were given better protection.

There are however high numbers today of one-person companies. Although there is in general little data on these, the estimate in 2015 was that there are around 300,000. Their median income is only EUR 9,000 per year and in reality, many of these workers are in BSE. This increase is in part due to the issuing of trade licenses for simple tasks such as carrying heavy goods.

Source: Presentation given by Dr. Eva Fehringer, UDW Platform alternate member for Austria

In **Italy**, a reform has been introduced to try to convert contracts which were BSE into open-ended contracts. This reform is described in the box below.

Table 3. Italy

Transforming BSE into open-ended contracts

In 2015, 'occasional and project-based collaborations', which were forms of employment arrangement which encouraged bogus self-employment, were abolished in Italy (only specific and limited kinds of collaboration are now allowed). Instead, open-ended and subordinate labour contracts are now seen as the common standard form of employment.

Occasional and project-based collaboration contracts were used by employers as subordinate labour contracts – the work was carried out by an individual for the same employer over a continuous period of time, with the employer governing the entirety of the employment relationship. Employers who use these contracts in this way are fined.

The 2015 reform also introduced a way for employers to choose whether or not to hire the workers who were previously employed using these contractual arrangements, on open-ended contracts, as of 1 January 2017. The advantage for employers of doing so is that any previous violations (administrative, contributive and fiscal omissions) are disregarded. There are however conditions attached to this arrangement: the worker has to sign a settlement agreement waiving any claims related to the previous employment relationship, and the employer has to commit to retain the newly hired employee (i.e. not dismiss him / her) for 12 months.

There is also a certification system, through which employers and workers can receive a formal statement (issued by authorised bodies) certifying the regularity of the contracts concluded. Certification confirms regulatory compliance and prevents future legal disputes and labour inspections.

Following the reform, the number of new collaboration contracts fell by 171,986 in 2015, followed by a limited increase of 2,978 in 2016.

Source: Presentation given by Romolo de Camillis, UDW Platform member for Italy

Detection of BSE takes place through various means. In the **UK**, an online portal enables workers and engagers (i.e. employers or contractors) to determine the status for tax purposes of workers and avoid BSE. A similar online tool exists in the **Netherlands**. The 'Entrepreneur check' (OndernemersCheck) presents workers with a series of questions and by answering them they are able to determine if they can be considered an entrepreneur for income tax purposes⁵.

Advanced data analysis techniques can also aid in the process of detecting BSE and make the actions of enforcement agencies more effective, as shown in the example below from **Spain**.

Table 4. Spain

A database tool to support effective inspections

Spain introduced a national plan to tackle UDW and social security fraud in 2012. This national plan included awareness-raising and new reporting mechanisms, as well as increased sanctions. In addition, a new predictive tool was developed to deal with social security fraud and UDW in 2015. The tool aims to enable the Labour and Social Security Inspectorate (LSSI) to identify and select different companies/workers in a possible non-compliance situation, including BSE. It allows for the cross-checking of data from a number of bodies, because the LSSI has data sharing agreements with several organisations, including for example the Tax Agency and the Social Security Treasury. These agreements are updated each year. The Law obliges other public bodies to cooperate with the LSSI, taking into account guarantees laid down in Spanish Data Protection Law.

Source: Presentation given by Begoña Bucos Gogenola, UDW Platform member for Spain

Several types of collaboration were discussed at the Platform plenary meeting. Some countries have brought together different enforcement bodies to discuss ways of tackling BSE. There are also examples of countries establishing advisory bodies that bring together different enforcement agencies and other stakeholders. Table 5 presents an example from **Ireland**.

Table 5. Ireland

A discussion forum to find solutions to the shadow economy

The Hidden Economy Monitoring Group (HEMG) is a non-statutory group comprising Government agencies, employers (the Irish Business and Employers Confederation, Retail Ireland, Small Firms Association, Construction Industry Federation) and trade unions (ICTU). It provides a discussion forum for businesses and unions to develop solutions to problems associated with the shadow economy. The HEMG helped to produce a 'Code of Practice for Determining Employment or Self-Employment Status of Individuals'. The HEMG also established new procedures to sharpen the distinction between employment and self-employment in the construction, forestry and meat processing sectors.

Source: Heyes and Hastings, 2017

Collaboration by enforcement bodies also extends to inspection activity. In **Ireland**, joint inspections by teams from a number of agencies have taken place, targeting all properties in a specific location at the same time or specific sectors across different locations. The forthcoming comparative study of BSE⁶ mentions other examples. For example, since 2014, inspections at enterprises and work sites in **Greece** have been carried out by joint units composed of EYPEA (Special Insurance Control Service of the

⁵ Heyes and Hastings, 2017

⁶ Heyes and Hastings 2017

IKA) and SEPE (Labour Inspectorate) inspectors operating on the basis of common definitions, criteria and penalty systems⁷.

Social partners are involved in tackling BSE in a number of countries. For example, in **Germany**, social partners are involved in sectoral 'associations' formed to tackle UDW in nine key sectors. In **Slovenia**, the inspectorate and trade unions worked together to deliver an awareness-raising campaign to address dependent self-employment in a public sector broadcasting organisation. In other countries (Belgium, Italy, Finland, Sweden and Austria) the social partners have been involved in the development of 'social identity cards', which create 'smart data' that can be shared across borders.

5 Obstacles to progress in this area

Key barriers to identifying BSE include: the lack of a common definition of self-employment; its low visibility; a lack of reliable data; and the limited sharing of information between authorities.

Complex subcontracting chains can make it difficult to detect BSE practices and create uncertainty on the part of workers. Labour market intermediaries (employment agencies) sometimes add to the complexity.

Budgetary cuts in many countries mean that enforcement agencies have been pursuing more effective ways of working. The resources available to enforcement agencies may be insufficient to enable them to tackle BSE effectively since it often requires assessment of each individual case. BSE in low-risk sectors may also go undetected.

Enforcement agencies sometimes find it difficult to cope with the speed and scale of change in the labour market and wider economy. In addition, some Member States also identified BSE being a low priority and BSE falling outside the remit of key authorities as additional factors.

Finally, workers often fear contacting enforcement bodies and raising issues, and for those that do, labour court procedures can be very slow.

6 What more can be done to tackle BSE?

The Platform plenary meeting provided an opportunity to propose and debate how Member States and social partners can try to tackle BSE. The role of the Platform itself was also discussed. Some of the key suggestions and recommendations are presented below.

General

- The legislative framework should provide a clear basis for distinguishing between self-employment, employment and dependent self-employment.
- There is a need for collaborative working to tackle this issue, both amongst public organisations and the social partners.
- Enforcement bodies should share data and make use of a variety of data sources so as to better understand and target BSE.
- Enforcement bodies should share data across borders.
- Consideration should be given to ways of restricting supply chains and ensuring that all organisations involved in supply chains have responsibility for avoiding BSE.

⁷ Heyes and Hastings 2017

- Companies could be encouraged to strengthen their vigilance in relation to BSE practices on the part of suppliers and subcontractors. The responsibilities of businesses involved in subcontracting arrangements should be clarified and clearly communicated.
- Governments could review national legislation relating to employment rights, tax and social insurance in order to determine whether it creates incentives for BSE. Governments could examine ways of reducing any such incentives and possibilities for extending employment and social protection to self-employed and dependent self-employed workers.
- Employers and the self-employed workers with whom they enter into contracts should be provided with easily accessible tools for determining the nature of their relationship. They should have access to information about the potential penalties associated with BSE.
- The principle of social protection for self-employed workers could be enshrined in the European Pillar of Fundamental Social Rights

Platform-specific

- Identify and discuss the obstacles to tackling BSE at both national and European levels, in particular rules for the exchange of data between national and European level, implications of rulings of the European Court of Justice, etc. and how they might be overcome.
- Exchange data and information.
- Share good practice examples, particularly those that have had a clear positive impact.
- Mapping of national situations
- Look at associated new forms of work and find out how platforms and the sharing economy (i.e., the 'collaborative economy') have altered relationships between organisations and workers, and whether these have increased the prevalence of undeclared work.
- Find out why some countries have developed hybrid categories in their employment legislation and the consequences for BSE and protection of workers.
- Further examine the ways in which the social partners can be involved in improving detection and compliance.

7 Key learning outcomes

The following list summarises the key learning outcomes from this event.

- BSE results from an often intentional misclassification of the employment relationship of declared work and therefore can be considered 'falsely-declared' employment relations or misclassified dependent employment. However, it is also the case that some BSE is undeclared.
- To identify and tackle BSE, clear Member State criteria are required to determine what is dependent employment and self-employment.
- Hybrid legal forms should not serve to legitimise fraudulent practices or undermine employment and social protection rights.
- It is important to make sure in responding to BSE that governments do not create rules and regulations that discourage or prevent people from working on a genuinely self-employed basis.

- However, policies that encourage entrepreneurship should not inadvertently contribute to BSE.
- Developing effective enforcement activity is vital if BSE is to be successfully tackled.
- Data sharing by enforcement bodies within (but also across) borders is extremely important.
- Enforcement bodies require adequate resources. Budgetary cuts have encouraged enforcement agencies to adopt more efficient ways of working, for example identifying and targeting the most high-risk sectors. However, BSE needs to be determined on an individual case-by-case basis and this is resource intensive.
