European Platform
tackling undeclared work

# Tackling undeclared work in the collaborative economy and bogus self-employment

# Working Paper

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# EXECUTIVE SUMMARY

In recent reports of the European Platform tackling undeclared work, it has been recognised that bogus self-employment is not solely or even largely a product of the advent of the collaborative economy, and that undeclared work in the collaborative economy is not solely or even principally composed of bogus self-employment[1]. Reflecting these advances in understanding, this report is not simply about bogus self-employment in the collaborative economy. Instead, it evaluates separately firstly, the prevalence of undeclared work in the collaborative economy and secondly, bogus self-employment, using the currently available datasets, and following this, examines how Member States are currently tackling these forms of work, and considers what further initiatives could be undertaken. The intention is to enable enforcement authorities to engage in mutual learning around policy solutions, as well as to identify areas of activity where collective action at EU or EU regional level might be a more appropriate way forward.

## Recent trends in undeclared work in the collaborative economy

A current concern is that participation in undeclared work is common on collaborative platforms and therefore, that the growth of platforms is leading to an expansion of such work.

To evaluate the level of participation in the collaborative economy, the 2018 Flash Eurobarometer 467 survey finds that **6% of Europeans have offered services via collaborative platforms**, with 3% having offered them once or a few times, 2% offering them occasionally and only 1% offering them regularly. Only 10% of these (0.6% of all Europeans) state that providing services via collaborative platforms represent their main source of income.

Examining the impacts of the collaborative economy on undeclared work, no evidence exists that employers operating on collaborative platforms are more likely to use **undeclared waged employees** or to pay **envelope wages** than employers operating in the non-collaborative economy. However, collaborative platforms may have an impact on **undeclared (genuine) self-employment**. By breaking down previously larger tasks into multiple smaller jobs, collaborative platforms appear to make it easier for those genuine self-employed who would anyway be intentionally non-compliant, to find markets for their services.

There is also empirical evidence of **unintentional** non-compliance among the genuine self-employed on collaborative platforms. The 2018 Flash Eurobarometer 467 survey reveals that in the EU, the most common problems witnessed by service providers operating in the collaborative economy are:

- the lack of clarity around how to provide the service legally (stated by 22% of service providers);
- the complicated systems for paying tax (19%);
- the perception that it is complicated or difficult to provide the service legally (13%), and
- the lack of clarity about their employment status (9%).

This strongly suggests the existence of unintentional non-compliance due to insufficient advice and information on providing services legally, and a belief among service providers that compliance is complicated.

Collaborative platforms have an impact on not only the prevalence of undeclared genuine self-employment but also bogus self-employment. As platforms are

[1] Heyes, J., Hastings, T., *The Practices of Enforcement Bodies in Detecting an Preventing Bogus Self-Employment*, European Platform Undeclared Work, Brussels, 2017. Heyes, J., Newsome, K., *New Developments and Trends in Undeclared Work within the Sharing/Collaborative Economy*, European Platform Undeclared Work, Brussels, 2018.

intermediaries between service providers and service users, it is not always clear if a worker is self-employed or an employee of the platform, and some service providers might well be falsely classified as self-employed by platforms.

However, bogus self-employment is not limited to the collaborative economy, and its growth is not solely the result of collaborative platforms

### Recent trends in the prevalence and distribution of bogus self-employment

There is a concern that many dependent employees are misclassified as self-employed in order to circumvent collective agreements, labour laws (e.g., minimum wages, working time legislation, protection in case of redundancy), employment tax and other employer liabilities attached to the standard contract of employment.

Bogus self-employment refers to an employment relationship in which a worker formally registered as self-employed works under the same working conditions as direct employees and/or they depend on a single employer for a main part of their income. Although the precise legal definition varies across countries, there is consensus that bogus self-employment is where workers are self-employed but have a *de facto* employment relationship, *economic dependence* (where a worker generates their income from one or mainly from one employer) and *personal dependence* (i.e., subordination and lack of authority on working methods, content of work, time and place). However, no consensus exists on whether both forms of dependence need to be present, or only one, or the criteria used to define economic and personal dependence.

Depending on whether narrow or wider criteria are used, the **prevalence of bogus self-employment varies from 0.5% - 4.3% of total employment in the EU**.

The EU Labour Force Survey (EU LFS) uses a narrow definition of the bogus self-employed as those in self-employment without employees working for only one client or for a dominant client and whose one or main client decides their working hours. It finds that in 2017, bogus self-employment is 0.5% of total employment in the EU-28.

Using wider criteria, the 2015 European Working Conditions Survey (EWCS) finds that 1.4% of total employment is 'pure' bogus self-employment complying with fewer than two of the following three criteria: (a) have more than one client, (b) have the authority to hire staff, and/or (c) have the authority to make important strategic decisions. An additional 2.9% of total employment in the EU-28 is 'grey' bogus self-employment, namely complying with only two of the three criteria. The result is that 4.3% of total employment in the EU-28 is ('pure' and 'grey') bogus self-employment.

If the criterion of having authority to make important strategic decisions is replaced with the criterion of whether they receive an agreed fee on a weekly or monthly basis, bogus self-employment is 2.4% of total employment.

Analysing the **cross-national variations**, using the 2015 EWCS criteria that identifies 4.3% of total employment as bogus self-employment, such employment is highest in Portugal (9.3% of total employment), Romania (8.2%), Italy (7.8%) and Greece (7.5%) and lowest in Sweden (0.8%) and Denmark (0.6%). This clearly indicates a **North-South divide** in the EU in the prevalence of bogus self-employment.

Comparing these cross-national variations in its prevalence with structural conditions in European countries, bogus self-employment is significantly higher in countries with lower levels of state expenditure on social protection, lower governance quality, greater inequality and higher poverty levels.

Across **socio-demographic groups**, bogus self-employment is more prevalent among men, older age groups, those with fewer years in education and migrants. Examining their **occupations**, 19% of the bogus self-employed are professionals and 19.8% are skilled agricultural, forestry and fishery workers. Indeed, 29.6% of all skilled agricultural, forestry and fishery workers are bogus self-employed.

Examining the **sectors** where bogus self-employment is concentrated, 22.3% of the bogus self-employed work in the agriculture, forestry and fishing sector, 10.0% in wholesale and retail and motor repairs, and 8.9% in the construction sector. These are not sectors conventionally associated with the collaborative economy, suggesting that bogus self-employment is not purely a product of the collaborative economy.

### Tackling undeclared work in the collaborative economy

Given the above evidence that service providers commonly receive insufficient information on how to provide the service legally, perceive the system for paying tax as difficult or unclear and consider providing services legally on platforms as complicated or difficult, **advisory services** are needed as well as a **simplification of compliance mechanisms** (e.g., platforms deducting taxes owed). These initiatives would help prevent undeclared work and bogus self-employment on collaborative platforms.

The service providers stating a **lack of clarity about how to provide the service legally**, and therefore the target for advisory services, are men, younger groups aged 15-24, the unemployed and those operating on food and professional services platforms.

Those considering it a **complicated system for paying tax** are more likely to be men, manual workers and those in the professional service, food and accommodation sectors. This suggests that the simplification of compliance mechanisms could adopt a sectoral approach, targeting platforms providing professional services, followed by platforms providing food and accommodation services.

Those who find it **complicated or difficult to provide the service legally** are more likely to be men, older age groups, the self-employed and manual workers and those operating on platforms providing food services and collaborative finance. Education and advice, therefore, should be targeted more at these service provider groups and at platforms providing these services.

The 2018 Flash Eurobarometer 467 survey on the Use of the Collaborative Economy also reveals that developing such advisory services and simplifying compliance would potentially result in **collaborative platforms gaining more service providers**. Some 19% of EU citizens who have not provided services via a collaborative platform would consider doing so if there was greater clarity over how to provide the service legally, the systems for paying tax were simpler and there was greater clarity over their employment status as service providers.

What types of advisory service and forms of simplified compliance, therefore, could tackle undeclared work in the collaborative economy and facilitate the growth of the collaborative economy?

- State enforcement authorities could:
  - provide advice and guidance to service providers on the tax, social security and/or labour law obligations of their platform activity via information websites and hotlines;
  - directly contact platform service providers advising them that they need to declare income received; demanding that collaborative platforms disclose data on service providers, such as their names, contracts and/or transactions;
  - license service providers, and
  - simplify tax and labour laws for service providers on collaborative platforms.
- Platforms could:
  - inform service providers of their tax, social security and/or labour law obligations;
  - ensure that the service providers are licensed/authorised; impose limits on the number of registered service providers;

- collect tax revenues owed from service providers and forward them directly to the tax authority; and
- clearly define and communicate to service providers the difference between commercial and non-commercial activities.

At present, the adoption of such policy measures is limited in EU Member States. Although 82% of enforcement authorities in the 28 countries responding to the 2019 annual European Platform Tackling Undeclared Work survey provide advice and guidance to service providers, and enforcement in 68% of the countries responding have the power to demand that collaborative platforms disclose data on service providers, the other initiatives suggested above are used by well under **half** of the countries responding.

Implementing more widely these policy initiatives, and Member States learning from each other about what works and is potentially transferable to their Member State, could therefore reduce the prevalence of undeclared work in the collaborative economy. It could also facilitate the growth of the platform economy by addressing the barriers that prevent many from participating as service providers on platforms.

If collaborative platforms do not recognise that voluntary collaboration with enforcement authorities to implement these initiatives is in their self-interest, legislation at national- and/or collective action at EU-level might be necessary in the future to ensure that collaborative platforms act to reduce the level of undeclared work in the EU.

### Tackling bogus self-employment

To identify the misclassification of employment relationships, **clear legal definitions** are required of dependent employment, self-employment and bogus self-employment. This is not currently always the case. Of the 28 countries responding to the annual Platform survey (26 EU Member States, excluding Luxembourg and Romania, plus the EEA countries of Iceland and Norway), only 85% of the responding countries have a legal definition of self-employment, 50% have a legal definition of dependent employment and 25% have a legal definition of bogus self-employment. Unless there are clear legal definitions, proving worker misclassification is often a challenge.

Furthermore, not all enforcement authorities possess the **legal competence** to tackle bogus self-employment. Tax/revenue authorities have this competence in 81% of countries responding, labour inspectorates in 78% of responding countries, and social security/insurance authorities in 52% of responding countries.

Once clear legal definitions are established, and enforcement authorities have legal competence, policy initiatives are required to tackle bogus self-employment. These need to address its causes. Two broad reasons exist for bogus self-employment. On the one hand, there is **unintentional bogus self-employment**. This arises due to a lack of knowledge of the rules or due to complex legal rulings being difficult to understand. On the other hand, there is **intentional bogus self-employment**, driven by the pursuit of financial gain.

Where **financial gain** is the driving force, enforcement authorities need to implement policy initiatives to **make the costs of misclassifying workers outweigh the benefits**. To achieve this, firstly, enforcement authorities could **increase the costs** of misclassifying workers. This requires improvements in both the sanctions for misclassification (i.e., requalification of the employment relationship into the correct contractual relationship to criminal penalties, with various civil and economic sanctions in between) as well as improved risk assessment systems for identifying bogus self-employment via data mining and analysis.

Enforcement authorities can also pursue policy initiatives to **incentivise** the correct classification of employment relationships by:

- making the financial costs of employers outsourcing to the self-employed equal to using dependent employment;
- making it easier for employers to legitimise their employment relationships, and
- extending social protection to the self-employed (or even bogus self-employed) so that there are fewer advantages associated with misclassifying employment relationships.

Bogus self-employment, however, is not always intentional. It can be also unintentional due to a lack of knowledge of the rules and complex legal rulings being difficult to understand, or due to a lack trust in the state and/or the benefits of compliance. **Education and awareness-raising campaigns** can therefore play a key role in tackling bogus self-employment and social partners can play a lead role in such initiatives. The provision of education campaigns and online tools by enforcement authorities and social partners to help workers understand their rights and come forward are important. So too are campaigns which inform users and potential service providers of whether an individual collaborative platform offers decent work conditions, such as the FairWork initiative which seeks to set and measure decent work standards in the platform economy.

In Member States where a hybrid category of employment exists that covers bogus self-employment, there is also a role for social partners in forging **collective agreements** specifically aimed at bogus self-employment.

# 1 INTRODUCTION

## 1.1 Rationale

Undeclared work refers to paid activities that are lawful as regards their nature but not declared to public authorities in order to evade either labour, tax and/or social security legislation or regulations, taking account of differences in the regulatory systems of the Member States[2]. The types of undeclared work that exist are not fixed. New forms of evasion continuously emerge which require innovative responses from enforcement authorities. Two prominent new types that have recently arisen are bogus self-employment and undeclared work in the collaborative economy.

In early studies of these new phenomena, the focus was upon bogus self-employment within the collaborative economy. The perception was that bogus self-employment (BSE) was largely a product of the advent of the collaborative economy, and that undeclared work in the collaborative economy was principally composed of bogus self-employment. In recent years, however, a more nuanced understanding has emerged. Firstly, there is recognition that bogus self-employment is not only or even mainly a product of the advent of the collaborative economy. Secondly, there is recognition that undeclared work in the collaborative economy takes forms other than purely bogus self-employment. These emergent understandings are the starting point of this report.

Reflecting these advances, this report does not solely focus upon the issue of bogus self-employment in the collaborative economy. Instead, it separately evaluates firstly, the prevalence and distribution of undeclared work in the collaborative economy and how to tackle it and secondly, the prevalence and distribution of bogus self-employment and how it can be tackled.

Indeed, recent reports of the European Platform tackling undeclared work (henceforth 'the Platform') have helped develop this advanced understanding of both undeclared work in the collaborative economy and bogus self-employment, but only examined a limited number of countries[3]. This report therefore builds upon these previous reports by evaluating across European Union (EU) Member States and two European Economic Area (EEA) countries (Iceland and Norway) the prevalence of bogus self-employment and undeclared work in the collaborative economy, and how they might be tackled.

To achieve this, a comprehensive review of the contemporary literature is undertaken and the following surveys are analysed:

- The 2016 and 2018 Flash Eurobarometer 438 and 467 Surveys and the 2017 COLLaborative Economy and EMployment (COLLEEM) survey to evaluate the prevalence and character of undeclared work in the collaborative economy.
- The 2015 European Working Conditions Surveys (EWCS) and the 2017 EU Labour Force Survey to evaluate the prevalence and character of bogus self-employment.
- The 2019 annual survey of the European Platform tackling undeclared work, a desk-based review of the contemporary literature on policy interventions and a study of case law, to evaluate the policy and legal interventions in use across EU Member States and these two EEA countries.

## 1.2 Aim and objectives

The aim of this report is to increase understanding of new trends in (i) undeclared work in the collaborative economy and (ii) bogus self-employment, and to provide a

[2] https://ec.europa.eu/social/main.jsp?catId=1323&langId=en

[3] Heyes, J., Hastings, T., *The Practices of Enforcement Bodies in Detecting an Preventing Bogus Self-Employment*, European Platform Undeclared Work, Brussels, 2017. Heyes, J., Newsome, K., *New Developments and Trends in Undeclared Work within the Sharing/Collaborative Economy*, European Platform Undeclared Work, Brussels, 2018.

'state-of-the-art' review of how Member States are addressing these challenges, including in case law. This knowledge is collated so that Member States can engage in mutual learning around what can be done and what works in practice, as well as to identify areas where collective action at EU or EU regional level might be appropriate.

To achieve this, the objectives of this report are to answer the following questions:

- What are the new trends in the collaborative economy relevant to the growth of undeclared work?
- What are the trends in bogus self-employment?
- What are the current interventions used to tackle undeclared work in the collaborative economy in Member States?
- What are the current interventions used to tackle bogus self-employment in Member States?

### 1.3 Structure of the report

Section 2 provides a review of recent trends in undeclared work in the collaborative economy and section 3 reviews recent trends in bogus self-employment. Turning to the existing policy and legal interventions, Section 4 then evaluates the recent developments in tackling undeclared work in the collaborative economy and section 5 outlines the recent developments in tackling bogus self-employment. The outcome in Section 6 is a set of policy recommendations to tackle undeclared work in the collaborative economy and bogus self-employment at national and EU level.

## 2 RECENT TRENDS IN THE COLLABORATIVE ECONOMY

***Key Questions***

- How big is the collaborative economy?
- Are there cross-national variations in its prevalence?
- Who engages in the collaborative economy and why?
- In which sectors is the collaborative economy more prominent?
- What are the working conditions in the collaborative economy?
- What are the implications for the growth of undeclared work?

### 2.1 Prevalence of the collaborative economy

The European Commission (2016a, p. 3) has defined the collaborative economy as:

> 'business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) **service providers** who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis ("peers") or service providers acting in their professional capacity ("professional services providers"); (ii) **users** of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them ("**collaborative platforms**"). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit'.

But how many collaborative platforms exist in the EU? In the transport, accommodation, finance and online skills sectors (but excluding others sectors such as baby-sitting), Technopolis et al. (2018) identify:

- 651 platforms originating in the EU and operating in single Member States;
- 42 internationally operating platforms originating from outside the EU (mainly from the United States) and operating in international markets; and
- 51 (less than 1% of all collaborative platforms) EU-origin collaborative platforms operating in more than one Member State (15 in transport, 10 in accommodation, 13 in online skills, and 13 in the finance sector).

Most collaborative platforms therefore operate in single Member States. However, the large international platforms (e.g., Uber, Airbnb, UberEats, Kickstarter) dominate in terms of turnover, receiving some 40% (c. EUR 10 billion) of the total EU collaborative economy revenue. Indeed, Airbnb alone generated EUR 4.5 billion in the EU in 2016.

To evaluate the magnitude of undeclared work in the collaborative economy, as well as the magnitude of the collaborative economy, three types of data can be potentially used:

- **Administrative data**: undeclared work on collaborative platforms is potentially less hidden than undeclared work that is not conducted on platforms. This is because many collaborative platforms hold data on the activity conducted by service providers. If made available, this could enable estimations of the scale of undeclared work on collaborative platforms. The problem, however, is that platforms are generally hesitant to share such data with statistical offices and governments (ONS, 2017).
- **Big data**: National statistical offices are beginning to use firstly, web scraping, which extracts data from the source code of platforms, and secondly, application programming interfaces (APIs) to obtain data on activity on collaborative platforms. Both methods have the disadvantage that they only include the data platforms are willing to provide or display, which vary from one platform to another (ONS, 2017).
- **Surveys**: labour force surveys can in theory measure participation in the collaborative economy. Respondents are asked to indicate all their jobs and the time spent. However, although collaborative economy workers earn money from their platform activities, they do not always consider this and report it as an additional job, which results in under-reporting of collaborative economy work in labour force surveys (Bean, 2016; Coyle, 2016; Wile, 2015). Besides unintentional under-reporting, there may also be intentional under-reporting because some or all the work might be undeclared, so is deliberately not reported by respondents during labour force surveys (ONS, 2017). Until now, the share of work on collaborative platforms that is undeclared has been unknown (Kässi and Lehdonvirta, 2016). However, there are some statistical clues in the 2016 and 2018 Flash Eurobarometer 438 and 467 Surveys, as well as the 2017 COLLaborative Economy and EMployment (COLLEEM) survey.

All three types of data have been used to estimate the size of the collaborative economy and/or the prevalence of undeclared work in the collaborative economy.

**Administrative data** from platforms or other sources have been used to estimate the size and growth of the collaborative economy (De Groen and Maselli, 2016; Kuek et al., 2015; Lehdonvirta and Ernkvist, 2011). Farrel and Greig (2016), for example, use financial transaction data from a large US bank to estimate activity in the platform economy. Using similar data, De Groen and Maselli (2016) estimate that at the end of 2015, the EU platform economy equates to some 100 000 or 0.05% of employees. Technopolis et al. (2018) estimate that the collaborative economy in 2016 equates to 0.17% of EU-28 GDP and that 394 000 people are employed within the collaborative

economy in the EU-28 (0.15% of EU-28 employment). No known studies until now, however, have used administrative data to estimate the level of undeclared work in the EU collaborative economy.

**Big data** have been used to estimate the size of the collaborative economy. Kässi and Lehdonvirta (2016) use APIs of the largest UK online platforms. Using big data, the Online Labour Index (OLI), developed by the Oxford Internet Institute (OII), provides an online labour market equivalent to conventional labour market statistics by tracking the tasks posted on the largest English-language online platforms, and the status of these tasks (open, in progress, closed). The index is normalized so that 100 represents the daily average number of new projects in May 2016. By 24 May 2019, the OLI was 122.9, signifying a 22.9% growth over three years. As Figure 1 displays, there is not a continuous (exponential) growth curve in the growth of the collaborative economy, as is sometimes assumed. Again, big data has not so far been used to estimate undeclared work in the collaborative economy.

Online and offline **surveys** have estimated the size of the collaborative economy, usually in terms of participation rates. Huws and Joyce (2016) report an online survey of 8 500 adults in four European countries (Austria, Netherlands, Sweden and the UK). In early 2016, between 11 and 23% of the non-representative citizens surveyed in the four countries provided services via online platforms, largely selling on Amazon and eBay. Huws et al. (2017) report a larger online survey of the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy. This reveals that the share of the working age population who had ever provided (paid) services via platforms ranged from 9% in the Netherlands and UK to 22% in Italy.

**Figure 1.** The Online Labour Index


*Source: https://ilabour.oii.ox.ac.uk/online-labour-index/*

The 2017 COLLaborative Economy and EMployment (COLLEEM) survey (Pesole et al., 2018) is an online panel survey on digital labour platforms in 14 Member States (Croatia, Finland, France, Germany, Hungary, Italy, Lithuania, Netherlands, Portugal, Romania, Slovakia, Spain, Sweden, UK) and aims to represent a sample of all internet users 16-74 years old in these countries. The COLLEEM survey finds that **10%** of the adult population had ever used online platforms to provide some type of labour service.

The 2018 Flash Eurobarometer 467 survey, meanwhile, is an offline survey of the perceptions, attitudes and practices of a representative sample of 26 544 citizens in the EU28 about the collaborative economy. This was a follow-up to the 2016 Flash Eurobarometer 438 survey. In 2018, 23% of Europeans had ever been **users** of services offered via collaborative platforms (17% in 2016), and 6% of Europeans had ever been **service providers** on collaborative platforms (no data for 2016). As will be shown below, this survey also provides some statistical clues of the propensity towards undeclared work among service providers on collaborative platforms.

## 2.2 Cross-national variations in the collaborative economy

The prevalence of the collaborative economy varies across Member States. Using administrative data, Technopolis et al. (2018) estimate that the collaborative economy in the EU is highly concentrated in seven countries (France, UK, Poland, Spain, Germany, Italy and Denmark) which between them have 80% of total EU collaborative economy revenue.

Using big data, the Oxford Internet Institute (OII) produce similar findings, revealing that the prevalence and growth of the platform economy is much higher in the UK and Germany.

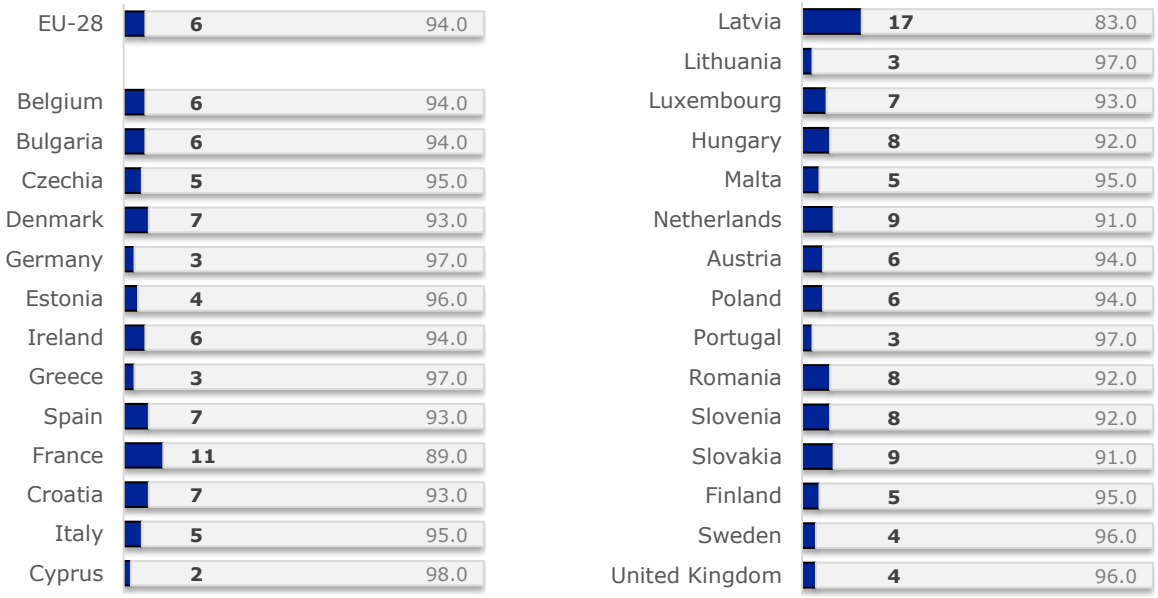
Online and offline surveys again provide similar findings. Examining the share of the working age population who have ever provided (paid) services via platforms (either as a main or secondary activity), Huws et al. (2017) report that 9% have done so in the Netherlands and UK, 10% in Sweden, 12% in Germany, 18% in Switzerland, 19% in Austria and 22% in Italy.

Similarly, the COLLEEM survey reveals that although 10% of the adult population has been a service provider on an online platform, there are significant differences across countries. The UK (12%) has the highest incidence, followed by Germany (11.6%), Spain (11.6%), Portugal (10.6%), the Netherlands (10.4%), and Italy (8.9%). By contrast, Sweden (7.2%), France (7%), Slovakia (6.9%), Hungary (6.7%) and Finland (6%), show low participation rates (Pesole et al., 2018).

The 2018 Flash Eurobarometer 467 survey, meanwhile, details the significant variation between Member States in whether citizens had been users of platforms, ranging from 40% of citizens in Latvia, 35% in Malta and 34% in Ireland, to 17% in Bulgaria and Portugal. It also reveals significant variation between Member States in the share of the population who have ever been a service provider on a platform, ranging from 17% in Latvia and 11% in France, to 2% in Cyprus (see Figure 2).

In sum, there are significant cross-national variations in the prevalence of the collaborative economy. The consequence is that tackling undeclared work on collaborative platforms will be of greater importance in Member States where platform work is more prevalent (e.g., France, Germany, Latvia, Spain, UK) and less important in Member States where platform work is less common (e.g., Cyprus, Finland, Hungary, Slovakia).

**Figure 2.** % of citizens who are service providers on collaborative platforms, by country




*Source:* authors' own work based on 2018 Flash Eurobarometer 467 survey

## 2.3 Who engages in the collaborative economy?

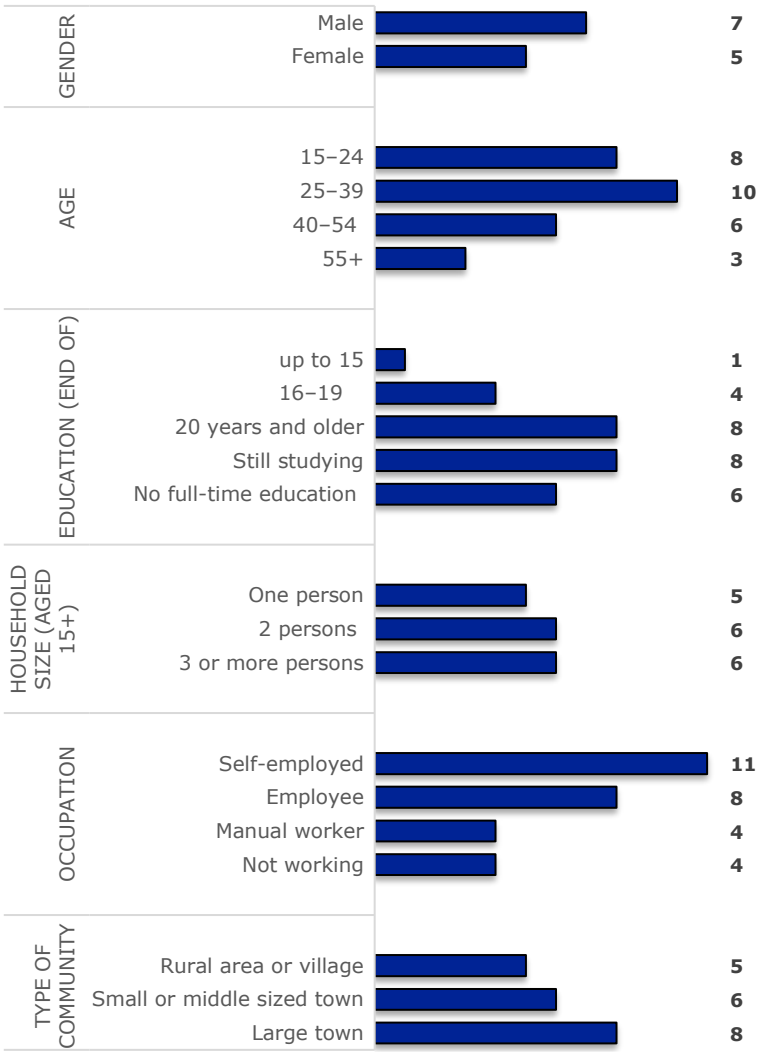
The COLLEEM survey reveals that a typical European platform worker is a young male, educated to degree level. Despite conventional assumptions, a typical platform worker is likely to have a family and children (Pesole et al., 2018).

These are also the findings in the 2018 Flash Eurobarometer 467 survey. Younger respondents, and those with the highest levels of education, are the most likely to be service providers on platforms. They are also more likely to live in large towns (see Figure 3).

Both surveys also reveal that the self-employed are more likely to offer services via collaborative platforms. Indeed, 11% of all self-employed people have offered their services via collaborative platforms according to the 2018 Flash Eurobarometer 467 survey.

Moreover, when the COLLEEM survey asked platform workers whether they were working as self-employed or employees on platforms, the platform workers declared themselves to be self-employed (as a main or side job) in 54% of cases, while 38% claim to be an employee (Pesole et al., 2018).

**Figure 3.** Service providers on collaborative platforms, by socio-demographic characteristics




*Source:* authors' own work based on 2018 Flash Eurobarometer 467 survey

## 2.4 Work in the collaborative economy: main or secondary activity?

Are those providing services via platforms doing this as their main job or as a secondary activity? The COLLEEM survey finds that less than 6% of service providers spend at least 10 hours per week, or earn at least 25% of their total income, from this work. This means that 94% of service providers therefore work less than 10 hours or earn less than 25% of their total income from platform work. If people are defined as 'mainly platform workers' if they earn 50% or more of their income via platforms and/or work via platforms more than 20 hours a week, then 2% of the surveyed population are mainly platform workers (Pesole et al., 2018). For the vast majority of service providers in the collaborative economy, in consequence, their platform work is a secondary activity rather than their main source of income.

Huws et al. (2017) in their seven-country study (the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy) also find that only half of service providers provide platform services frequently (i.e. at least weekly), and that in most cases, income from platform work constitutes less than 10% of personal income. It is the

sole source of income for only a small minority (from 3% in the Netherlands to 12% in Switzerland).

Moreover, of the 6% of Europeans providing services via collaborative platforms identified in the 2018 Flash Eurobarometer 467 survey, 3% have offered them once or a few times, 2% have offered them occasionally and only 1% offered them regularly. Just 10% of these service providers say that providing services via collaborative platforms represents their main source of income (i.e., 0.6% of all Europeans).

Platform work, therefore, is the main source of income for only a very small minority of service providers (10%) and EU citizens (0.6%). For 90% of those providing services via platforms, it is a secondary source of income.

## 2.5 Work in the collaborative economy: choice or necessity?

Are those providing services via collaborative platforms doing so out of choice or necessity? And what are the motives of the users of collaborative platforms?

Starting with service providers, an assumption might be that many platform workers do so out of necessity due to an inability to find more stable employment. The COLLEEM survey finds that both necessity and choice are co-present as motives. Flexibility and autonomy are frequently mentioned motivations for platform work, but so too is the **lack of alternatives** commonly mentioned as an important motive for platform work (Pesole et al., 2018). This is also the finding of the Chartered Institute of Personnel and Development study in the UK (CIPD, 2017). Platform workers are not solely necessity-driven or opportunity-driven but display both sets of motives.

Among users, the 2018 Flash Eurobarometer 467 survey reveals that the most frequently mentioned advantage of collaborative platforms is convenient access to services (mentioned by 73% of users), followed by the availability of user ratings and reviews (60%), cheaper or free services (59%), and the wider choice of services (56%). Financial gain, therefore, is not the sole or even primary reason for users turning to the collaborative economy. Rather, it is convenience, ease of access, and the availability of quality assurance ratings. The main disadvantage is a lack of clarity about who is responsible in case of problems (mentioned by 49%), followed by misleading ratings and reviews from other users (38%), misuse of personal data (37%) and poor trust in the service providers (34%).

## 2.6 In which sectors is the collaborative economy more common?

In a sectoral analysis, Vaughan and Daverio (2016) find that the largest collaborative economy sector by revenue is the peer-to-peer **transportation** sector, which includes ride-sharing, car sharing networks and driveway sharing models. However, the largest sector by total transaction value is the peer-to-peer **accommodation** sector, which includes peer-to-peer rental and vacation rental platforms, as well as home swapping platforms.

The 2018 Flash Eurobarometer 467 survey reinforces this when measuring the largest sectors by the proportion of citizens using platform services. Of the 23% of EU citizens using services offered via collaborative platforms in 2018 (17% in 2016), the accommodation and transport sectors were the most frequently mentioned. This is also the case when measuring the sectors in which service providers state that they work; 44% of service providers report that they provide services in the transport sector and 35% in the accommodation sector.

## 2.7 Working conditions in the collaborative economy

A study examining the current literature on the working conditions of platform workers concludes that the number of studies investigating this issue is rather limited and even the literature that does so, focuses on a limited number of working condition dimensions (Eurofound, 2018a). The main results, obtained by analysing 52 studies

published between 2010 and 2018, can be summarised as follows (see Eurofound, 2018a, pp. 79-93):

- **Health and safety issues**: higher risks determined by a lack of knowledge on the regulations and necessary equipment and by work intensity (e.g., EU-OSHA, 2017; Huws, 2016; Tran and Sokas, 2017).
- **Working time and work-life balance**: often long hours, irregular patterns, anti-social working time, perception of being required to be always available and difficulty of having a boundary between working time and personal time (e.g., European Commission, 2015; Huws, 2016; Huws et al., 2017).
- **Work intensity and stress**: short deadlines and high work intensity which increase stress (e.g., EU-OSHA, 2017; Huws, 2016; Maselli et al., 2016).
- **Flexibility, autonomy and control**: high perceived freedom yet rather high control from the platform due to rating systems and algorithmic assignments (e.g., Balaram et al., 2017; Lee et al., 2015).
- **Social and professional isolation** (e.g., Durward et al., 2016).
- **Income**: high variability, mostly lower rates than national minimum wages but with good rates and income for qualified work (e.g., Berg, 2016; Codagnone et al., 2016).
- **Low job security** (e.g., Huws et al., 2017; Smith and Leberstein, 2015).
- **Skills development**: heterogeneous results, underlining the opportunity of learning by doing on one hand and the risk of deskilling on the other hand, depending on the type of platform and service provider (e.g., Barnes et al, 2014; Blohm et al., 2016; Graham et al., 2017).

## 2.8 Implications for the growth of undeclared work

What are the implications of collaborative platforms for participation in undeclared work? There is a concern that undeclared work and bogus self-employment are prevalent on collaborative platforms and therefore, that the growth of such platforms is leading to an expansion of such work practices. However, there is so far little evidence to support this assertion. Few studies have evaluated the extent to which service providers on collaborative platforms declare their work. One of the only known studies by TNS Sofres in France reports that only 15% of those working in the platform economy declared their earnings (De Groen and Maselli, 2016).

Until now, therefore, most discussion on the implications of the collaborative economy for undeclared work has been assumption rather than evidence. Starting with **undeclared and under-declared waged employment**, a view is that collaborative platforms do not lead to the growth of this type of undeclared work. This is because there is no reason to believe that employers operating through collaborative platforms are more likely to use undeclared waged employees or to pay envelope wages than employers operating in the non-collaborative economy. Until now, however, no evidence exists to either support or refute this assertion.

Turning to **undeclared (genuine) self-employment**, collaborative platforms might have some impact. Collaborative platforms appear to breakdown previously larger jobs into multiple smaller jobs, which might provide conducive conditions for undeclared (genuine) self-employment. By providing the self-employed with easier access to markets for their services, and creating a multitude of smaller jobs, collaborative platforms therefore make it easier for the genuine self-employed who would anyway be non-compliant to find markets for their services.

There is also empirical evidence that collaborative platforms might lead to greater unintentional non-compliance among the genuine self-employed in specific circumstances. First, service providers can engage in unintentional non-compliance if they mistakenly classify their activities as non-commercial services when they are in

fact engaged in the provision of commercial services. Second, if self-employed service providers are not aware that they need to declare their activities in order to comply with tax, social security or labour law, unintentional non-compliance can be the outcome. Third and finally, if the procedures for declaring services provided via platforms are complex, unknown or difficult, then collaborative platforms can increase participation in unintentional undeclared work among self-employed service providers.

The 2018 Flash Eurobarometer 467 survey provides empirical evidence of the extent of these problems that lead to unintentional non-compliance by self-employed service providers.

**Table 1.** What are the main problems you encountered when providing services via a collaborative platform, if any? (multiple answers possible): % of service providers on collaborative platforms, EU

| | Lack of clarity about how to provide the service legally | Complicated system for paying tax | Difficulties with consumers using your services | Complicated or difficult to provide the service legally | Unclear impact on your employment status | Other | None | Don't know |
|---|---|---|---|---|---|---|---|---|
| *EU-28* | 22 | 19 | 19 | 13 | 9 | 4 | 46 | 2 |
| *Gender* | | | | | | | | |
| Men | 24 | 20 | 19 | 16 | 10 | 5 | 43 | 2 |
| Women | 20 | 18 | 19 | 9 | 9 | 3 | 50 | 3 |
| *Age* | | | | | | | | |
| 15-24 | 26 | 20 | 19 | 8 | 10 | 2 | 44 | 1 |
| 25-39 | 22 | 21 | 24 | 16 | 11 | 3 | 42 | 2 |
| 40-54 | 21 | 14 | 15 | 11 | 7 | 6 | 54 | 3 |
| 55+ | 21 | 20 | 15 | 15 | 8 | 5 | 48 | 4 |
| *Occupation* | | | | | | | | |
| Self-employed | 26 | 17 | 21 | 21 | 6 | 8 | 40 | 1 |
| Employee | 17 | 19 | 18 | 9 | 8 | 4 | 51 | 3 |
| Manual workers | 27 | 24 | 28 | 20 | 11 | 2 | 50 | 1 |
| Not working | 28 | 19 | 19 | 13 | 13 | 2 | 42 | 2 |
| *Sector services provided* | | | | | | | | |
| Transport | 23 | 20 | 19 | 14 | 11 | 2 | 48 | 2 |
| Accommodation | 25 | 23 | 22 | 16 | 12 | 4 | 40 | 3 |
| Food | 29 | 27 | 33 | 21 | 18 | 7 | 25 | 2 |
| Household services | 26 | 19 | 23 | 14 | 18 | 6 | 34 | 2 |
| Professional services | 29 | 31 | 28 | 17 | 17 | 5 | 26 | 2 |
| Collaborative finance | 18 | 24 | 14 | 20 | 17 | 6 | 46 | 0 |

*Source: 2018 Flash Eurobarometer 467 survey*

As Table 1 shows, the problem most frequently cited by service providers when providing services on collaborative platforms is the lack of clarity about **how to provide the service legally (22%).** The second most cited problem is the **complicated systems for paying tax (19%),** followed thirdly by the difficulties they encounter with customers using their services (19%). The fourth most commonly cited problem for service providers is that it is **complicated or difficult to provide the service legally (13%)** and fifth and finally, there is the problem that **the impact on their employment status is unclear (9%)**.

Table 1 indicates the service providers who state there is a lack of clarity about how to provide the service legally, and who therefore require greater information and advice on how to do so legally. The service providers most commonly stating this are men, younger groups aged 15-24, the unemployed and those operating in the food and professional services sectors.

Meanwhile, those believing it is a complicated system for paying tax are more likely to be men, manual workers and those in the professional service, food and accommodation sectors. This suggests that the simplification of the tax payment system can adopt a sector-specific approach targeted at platforms providing professional services, followed by platforms providing food services.

Those considering it complicated or difficult to provide the service legally are more likely to be men, older age groups, the self-employed and manual workers, and those operating on platforms providing food services and collaborative finance. Education and advice, therefore, needs targeting at these groups, and to target platforms providing these services.

The 2018 Flash Eurobarometer 467 survey also suggests that **if these barriers to participation are resolved, not only would undeclared work be reduced, but collaborative platforms would themselves benefit by gaining more service providers**. As Table 2 reveals, 19% of those who have not provided services via a collaborative platform would consider doing so. Among those who have never offered services via collaborative platforms, **22% state it is because of a lack of clarity about how to provide the service legally**, **16% that the systems for paying tax are complicated** and **13% that the impact on their employment status is unclear**.

However, the policy initiatives required to increase the number of service providers on collaborative platforms and reduce undeclared work varies across Member States. As Table 2 reveals, high proportions of non-participants in Spain (36%), Portugal (33%) and Austria (30%) state that **it is unclear or complicated to provide such services legally**, but only low proportions in Estonia, Lithuania (both 5%), Italy (4%) and Malta (3%) state the same.

The barrier to participation of a **complicated tax system** is stated by high proportions of non-participants in Portugal (25%), Austria (23%), Spain (23%) and Slovenia (23%) but low proportions in Cyprus, Italy and Malta (all 2%).

The obstacle of **the unclear impact of doing so on their employment status** is stated by high proportions in Portugal (26%) Spain (23%) and Austria (21%), but lower proportions in Italy (4%), Estonia (3%) and Malta (1%) have this concern.

If these obstacles are overcome, work that might have been previously conducted as undeclared work (either intentionally or unintentionally) could be moved into the declared realm. If platforms collaborated with enforcement authorities to achieve this, not only could undeclared work decrease, they could also grow the number of service providers operating on them.

**Table 2.** For which of the following reasons have you never offered a service via a collaborative platform? (multiple answers possible): % EU

| | No time or interest | Lack of technical knowledge about how to use collaborative platforms | Lack of trust in the online booking process or payments | Lack of trust in consumers using your services | Unclear or complicated to provide the service legally | Complicated system for paying tax | Unclear impact on your employment status | Poor internet access | Other |
|---|---|---|---|---|---|---|---|---|---|
| *EU-28* | *64* | *31* | *25* | *24* | *22* | *16* | *13* | *10* | *10* |
| BE | 76 | 37 | 31 | 32 | 25 | 19 | 14 | 15 | 7 |
| BG | 52 | 37 | 26 | 29 | 21 | 15 | 15 | 12 | 8 |
| CZ | 75 | 35 | 24 | 27 | 25 | 22 | 8 | 11 | 12 |
| DK | 65 | 16 | 9 | 21 | 13 | 11 | 6 | 3 | 17 |
| DE | 75 | 29 | 33 | 30 | 28 | 21 | 15 | 9 | 6 |
| EE | 64 | 17 | 4 | 5 | 5 | 4 | 3 | 3 | 22 |
| IE | 62 | 39 | 27 | 27 | 26 | 21 | 17 | 16 | 9 |
| EL | 42 | 37 | 21 | 17 | 23 | 18 | 17 | 12 | 9 |
| ES | 61 | 42 | 35 | 35 | 36 | 23 | 23 | 15 | 10 |
| FR | 83 | 32 | 34 | 34 | 28 | 20 | 13 | 14 | 9 |
| HR | 43 | 25 | 14 | 10 | 8 | 7 | 5 | 7 | 21 |
| IT | 52 | 21 | 8 | 8 | 4 | 2 | 4 | 6 | 16 |
| CY | 29 | 26 | 13 | 11 | 6 | 2 | 6 | 5 | 20 |
| LV | 60 | 26 | 16 | 14 | 13 | 16 | 15 | 14 | 16 |
| LT | 60 | 17 | 8 | 7 | 5 | 6 | 6 | 6 | 16 |

| | No time or interest | Lack of technical knowledge about how to use collaborative platforms | Lack of trust in the online booking process or payments | Lack of trust in consumers using your services | Unclear or complicated to provide the service legally | Complicated system for paying tax | Unclear impact on your employment status | Poor internet access | Other |
|---|---|---|---|---|---|---|---|---|---|
| LU | 76 | 28 | 30 | 25 | 26 | 18 | 16 | 14 | 7 |
| HU | 51 | 17 | 13 | 13 | 11 | 8 | 6 | 8 | 15 |
| MT | 42 | 20 | 3 | 2 | 3 | 2 | 1 | 11 | 21 |
| NL | 61 | 20 | 15 | 17 | 18 | 11 | 11 | 3 | 16 |
| AT | 75 | 37 | 35 | 35 | 30 | 23 | 21 | 12 | 6 |
| PL | 51 | 31 | 24 | 20 | 21 | 13 | 13 | 12 | 7 |
| PT | 64 | 44 | 34 | 29 | 33 | 25 | 26 | 13 | 13 |
| RO | 42 | 28 | 21 | 21 | 14 | 12 | 10 | 13 | 16 |
| SI | 66 | 39 | 25 | 18 | 23 | 23 | 12 | 6 | 19 |
| SK | 48 | 34 | 17 | 20 | 14 | 13 | 7 | 8 | 10 |
| FI | 56 | 25 | 14 | 15 | 15 | 10 | 5 | 7 | 20 |
| SE | 66 | 21 | 12 | 13 | 18 | 6 | 6 | 4 | 7 |
| UK | 62 | 37 | 26 | 25 | 21 | 16 | 14 | 12 | 7 |

*Source: 2018 Flash Eurobarometer 467 survey*

It is not solely undeclared work in the form of undeclared waged employment and undeclared self-employment which may grow due to collaborative platforms under the conditions specified above.

## 2.9 Implications for the growth of bogus self-employment

Collaborative platforms also appear to increase the prevalence of **bogus self-employment**, especially when there are ambiguities around the relationship between platforms and the service providers who may rely on them for work (Eurofound, 2016a; Heyes and Hastings, 2017). As platforms are intermediaries between service providers and service users, it is not always clear if a worker is self-employed or an employee of the platform, and some service providers might well be falsely classified as self-employed by platforms.

Although the COLLEEM survey identifies that 54% of platform workers declared themselves to be self-employed (as a main or side job), while 38% claim to be an employee (Pesole et al., 2018), the share of these who are bogus self-employed is not evaluated. Indeed, no EU-wide survey has evaluated the prevalence of bogus self-employment in the collaborative economy. Any future survey conducted on bogus self-employment (e.g., EU-LFS, Eurobarometer, EWCS), therefore, should include questions on whether the work is provided through collaborative platforms

Nevertheless, previous studies closely associate the growth of bogus self-employment with the growth of the collaborative platform economy (Heyes and Hastings, 2017; ILO, 2016; Taylor, 2017). As a study involving eight countries (Greece, Ireland, Italy, Latvia, the Netherlands, Romania, Spain and the UK) concludes, the rise of the collaborative economy represents a driver for bogus self-employment in three of the eight countries, namely Greece, Ireland and the UK (Heyes and Hastings, 2017). However, the growth of bogus self-employment is not entirely, or even primarily, due to the growth of the collaborative economy. As the next section will reveal, bogus self-employment is not limited to the collaborative economy, and its growth is not solely the result of collaborative platforms.

# 3 RECENT TRENDS IN THE PREVALENCE AND DISTRIBUTION OF BOGUS SELF-EMPLOYMENT

***Key questions***

- What is the prevalence of bogus self-employment?
- Are there cross-national variations in its prevalence and how can these variations be explained?
- Who engages in bogus self-employment?
- In which businesses and sectors is bogus self-employment more common?
- Is it concentrated in activities associated with the collaborative economy?
- What are the working conditions of the bogus self-employed?

The 'standard employment relationship' (SER) of formal, full-time and permanent waged employment is increasingly being replaced by non-standard forms of employment (NSE), such as part-time, fixed-term and agency employment (Eichhorst et al., 2013; Hatfield, 2015; Pedersini and Coletto, 2010) and participation in undeclared work and self-employment. Given that workers' rights and social protection have focused on those in a SER, its demise raises concerns about working conditions, rights and benefits.

Although protective rights in many Member States are gradually extending to employees in NSE (ILO, 2016), this has not been so much the case for the 'self-employed'. The self-employed, namely people who pursue a gainful activity for their own account (European Commission, 2017a), have been treated as a residual group existing largely outside the scope of labour standards and regulation, mainly because they are not seen as having an employment relationship with their clients. Rather, they have a contract for services or civil contract with those to whom they supply their labour. In many countries, labour law has traditionally applied to dependent employment, while self-employment has been covered by civil law.

A small but growing literature has raised concerns that employers are falsely classifying employees as self-employed, despite these workers possessing many of the characteristics of dependent employees. It has argued that this misclassification is deliberate. Workers are falsely classified as self-employed to circumvent collective agreements, labour laws (e.g., minimum wages, working time legislation, protection in case of redundancy), employment tax and other employer liabilities implied in the standard contract of employment (Conaty et al., 2016; Cremers, 2010; Eichhorst et al., 2013; Eurofound, 2013, 2016a, 2016b; Gialis et al., 2017; Giraud and Lechevalier, 2018; Hatfield, 2015; ILO, 2013; Marín, 2013; OECD, 2000; Westerveld, 2012; Williams and Horodnic, 2019).

A continuum of employment relationships exists, ranging from pure dependent employment at one end of the spectrum to genuine self-employment at the other. To denote employment relationships in the 'grey zone', various terms have been used including 'bogus', 'fake', 'false', 'sham', 'involuntary' or 'misclassified' self-employment, or 'disguised employment' (Ana, 2009; Böheim and Mühlberger, 2006; Eichhorst et al., 2013; Harvey and Behling, 2008; Jorens, 2009; Kautonen et al., 2009, 2010; Mandrone et al., 2014; Parliamentary Committees, 2018; Pedersini and Coletto, 2010; Stan et al., 2007; Thörnquist, 2013). Towards the self-employment end of the continuum is 'dependent self-employment' where 'workers perform service for a business under a contract different from a contract of employment but depend on one or a small number of clients for the incomes and receive direct guidelines regarding how the work is done'. Towards the dependent employment end of the continuum is 'disguised employment' where 'an employer treats an individual as other than an

employee in a manner that hides his or her true legal status as an employee' (ILO, 2016, p. 36).

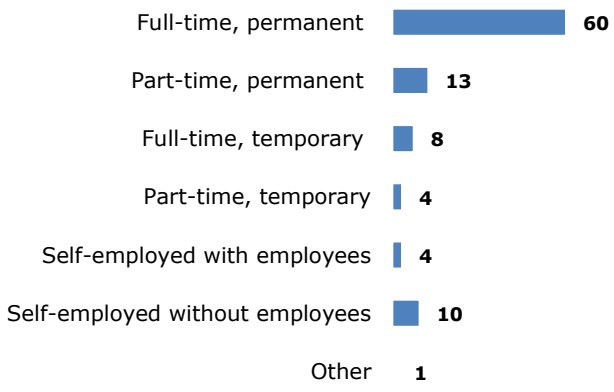
Here, all employment relationships in this 'grey zone' between pure dependent employment and genuine self-employment are referred to as 'bogus self-employment'. This is an employment relationship where a worker is formally registered as self-employed but works under the same working conditions as those of direct employees and/or they depend on a single employer for a main part of their income (Burton-Jones, 1999; Eichhorst et al., 2013; Jansen, 2017; Pedersini and Coletto, 2010). Although there is no universally accepted definition of bogus self-employment (Mühlberger and Bertolini, 2008), and the definition in legislation varies across different countries (ILO, 2015), there is some consensus.

Firstly, there is a consensus that bogus self-employment is an employment relationship where workers are self-employed but have a *de facto* employment relationship. Secondly, there is a consensus in both the academic literature and legislation that two types of dependence are important, namely *economic dependence* and *personal dependence* (Böheim and Mühlberger, 2006; Eichhorst et al., 2013; ILO, 2015, 2016; Mühlberger, 2007). Economic dependence exists where a worker generates their income from one or mainly from one employer, while personal dependence refers to subordination and lack of authority on working methods, content of work, time and place (Böheim and Mühlberger, 2006; Eichhorst et al., 2013). However, there is a lack of universal consensus on whether both forms of dependence need to be present, or only one, and the indicators used to define economic and personal dependence. Below, therefore, we report datasets based on different indicators of bogus self-employment.

## 3.1 Prevalence of bogus self-employment

In 2016, 14% of the 219 million employed within the EU were self-employed, 8% were full-time temporary employees, 4% were part-time temporary employees, 13% were part-time permanent employees and 60% were employees with a full-time permanent contract (see Figure 4). Altogether, people in all categories of non-standard employment and self-employment constitute around 39% of the employed population (European Commission, 2017a).

**Figure 4.** Percentage of workers in different types of employment in EU-28, 2016 (%)

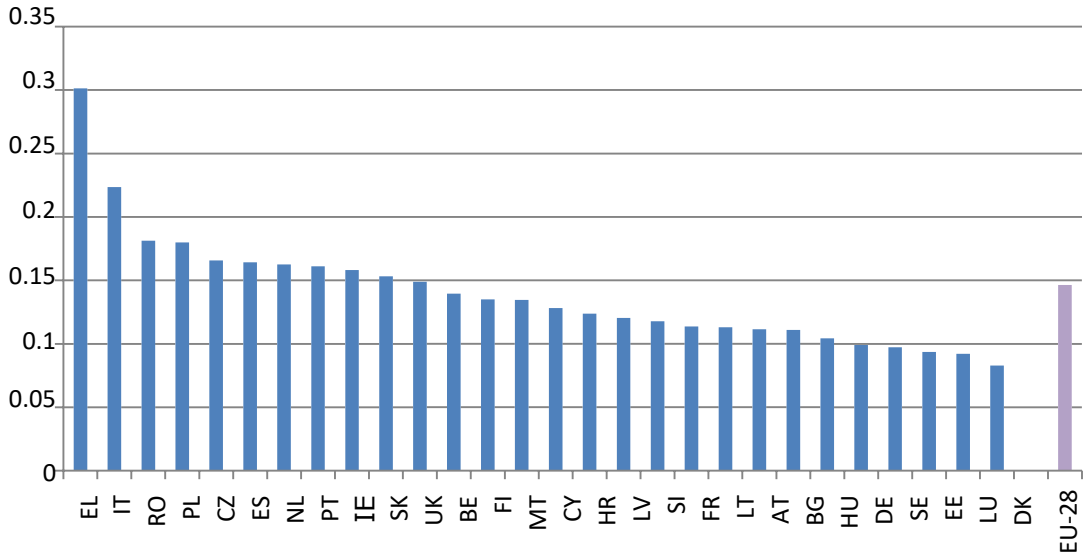



*Source: Eurostat*

As Figure 5 reveals, the proportion of the working population in self-employment is not equal across Member States. Southern and East-Central European countries have the

greatest percentage of self-employed, with Greece the highest (30%). Two Nordic and Western European countries have the lowest proportion of self-employed, namely Denmark (8.3%) and Luxembourg (9%).

**Figure 5.** Share of self-employed in total employment, by countries, 2016 (%)




*Source: European Commission (2017a, Figure 2)*

The share of self-employment in total employment has been relatively stable for the past decade in the EU. However, there is concern that bogus self-employment has increased (Frade and Darmon, 2005; Muller, 2014; Pedersini and Coletto, 2010; Thörnquist, 2013), not least because it is cheaper for employers to hire self-employed workers than employees. A UK report estimates that hiring self-employed workers through outsourcing and sub-contracting arrangements is at least 13.8% cheaper than hiring dependent employees because employers do not need to pay social insurance contributions for these workers (Taylor, 2017). This, however, is not the only benefit of hiring people as self-employed, or firing employees and re-hiring them as self-employed. It also allows employers to evade minimum wage rates, compensation in case of dismissal, higher wages based on seniority, holiday pay and the right to sick pay. These are therefore the benefits of hiring people as self-employed rather than dependent employees. Here, in consequence, the prevalence of bogus self-employment is evaluated.

## Methodology

To evaluate whether the self-employed without employees are genuinely self-employed or bogus self-employed, the issues of their economic and personal dependency will be here evaluated by analysing whether they are dependent on one or a main client and/or whether they have full economic and personal autonomy.

Two extensive datasets can be used to do so, namely the 2015 European Working Conditions Survey (EWCS-2015) and the European Union Labour Force Survey ad-hoc module on 'self-employment' (EU LFS data, AHM-2017 - Eurostat). At the outset, however, it is important to state that caution is required when interpreting the results because the number of bogus self-employed identified by these surveys is relatively small.

Table 3 describes the criteria used in each survey to identify bogus self-employment. Eurostat uses the most restrictive criteria (Method A). In the Eurostat survey, the self-employed without employees are classified as bogus self-employed if they meet two

criteria simultaneously: (i) economic dependency on a client or a dominant client who provides at least 75% of their self-employed income (Eurostat, 2017), and (ii) personal dependency measured by their lack of organisational autonomy in deciding their working hours (European Commission/Eurostat, 2017; Eurostat, 2017). This might underestimate the number of bogus self-employed. It does not include the self-employed without employees with one or a dominant client who lack autonomy around the method and content of their work and who are controlled by consumer rating systems, even if they have autonomy in deciding their working hours (e.g. taxi drivers working for collaborative platforms).

**Table 3.** Measuring bogus self-employment (BSE): estimation methods

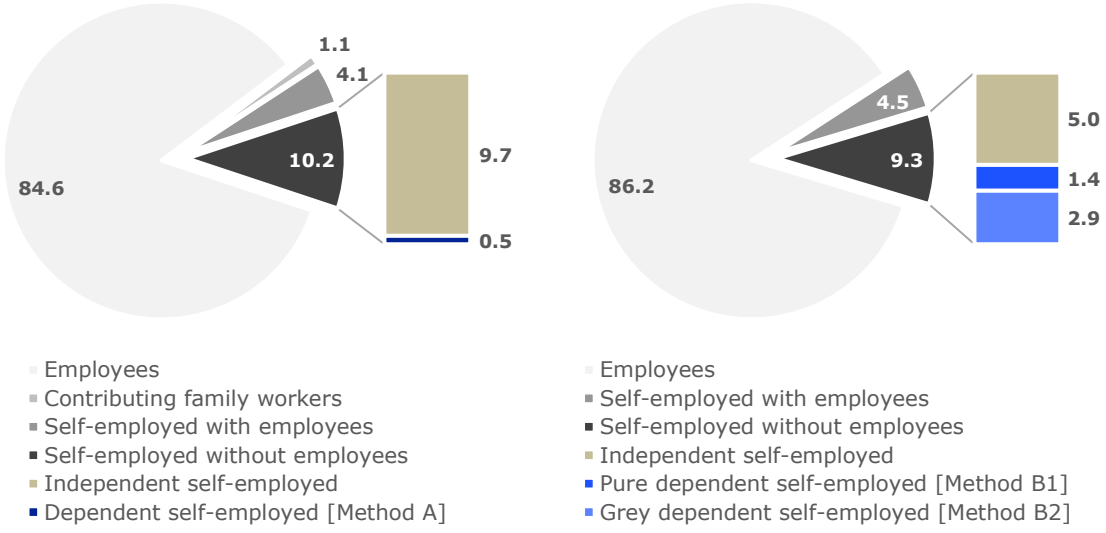
| Method | Description | Source of data |
|---|---|---|
| **Method A** | Bogus self-employed = self-employed without employees who worked for only one client or for a dominant client and whose (one or main) client decides about his/her working hours (European Commission/ Eurostat, 2017; Eurostat, 2017). | EU LFS data (AHM-2017, Eurostat) |
| **Method B** | Criteria used = self-employed without employees: (a) who have more than one client, (b) have the authority to hire staff, and/or (c) have the authority to make important strategic decisions (Eurofound, 2013; Williams and Lapeyre, 2017). | |
| ***Method B1*** | Pure bogus self-employed = self-employed without employees who comply with fewer than two out of the three criteria (Williams and Lapeyre, 2017). | EWCS data (2015) |
| ***Method B2*** | Grey bogus self-employed = self-employed without employees who comply only with two out of the three criteria (Williams and Lapeyre, 2017). | |
| ***Method B3*** | Pure and Grey bogus self-employed (Williams and Horodnic, 2018; Williams and Lapeyre, 2017). | |
| **Method C** | Criteria used = self-employed without employees: (a) who have more than one client, (b) have the authority to hire staff, (c) not get paid an agreed fee on a weekly or monthly basis. Those not meeting 2 or 3 criteria were classified as bogus self-employed (Eurofound, 2018b). | EWCS data (2015) |

Analyses of the 2015 EWCS use a different approach (Eurofound, 2018b; Williams and Horodnic, 2018; Williams and Lapeyre, 2017). As Methods B and C in Table 3 display, three criteria are used to evaluate whether the self-employed without employees are genuine self-employed: (a) they have more than one client, (b) they have the authority to hire staff, and/or (c) they have the authority to make important strategic decisions. Those self-employed without employees who comply with fewer than two out of these three criteria are defined as 'pure' bogus self-employed (Method B1) and those who comply with only two of the three criteria are defined as 'grey' self-employed (Method B2) (Eurofound, 2013, 2016a). In 2018, however, Eurofound (2018b) changed one of its criteria - that of having the authority to make important strategic decisions was replaced by the criterion of not being paid an agreed fee on a weekly or monthly basis (Method C).

Figure 6 reports the estimated prevalence of bogus self-employment when these different measurement methods and criteria are used. Starting with the EU LFS data, and using Method A, Figure 6a estimates that in 2017, **0.5%** of total employment in the EU-28 was bogus self-employment (i.e., self-employed without employees working for only one client or for a dominant client and whose one or main client decides their working hours). Analysing EWCS 2015 data and using Method B1, Figure 4b estimates

that 1.4% of total employment in the EU was 'pure' bogus self-employment complying with fewer than two of the following three criteria: (a) have more than one client, (b) have the authority to hire staff, and/or (c) have the authority to make important strategic decisions. An additional 2.9% of total employment in the EU was 'grey' bogus self-employment, namely complying with only two of the three criteria (Method B2). The result is that **4.3%** of total employment in the EU is (pure and grey) bogus self-employment (Method B3). Replacing the criterion of having authority to make important strategic decisions with whether the self-employed are paid an agreed fee on a weekly or monthly basis, the bogus self-employed were found to comprise 2.4% of total employment (Method C). Overall, therefore, and depending on the criteria used, **the estimated prevalence of bogus self-employment varies from a lower bound estimate of 0.5% to a higher bound estimate of 4.3% of total employment**.

**Figure 6.** Types of employment relationship in EU by various estimation method (%, 2015 and 2017)




**A.** (EU LFS data (AHM-2017, Eurostat)) – *Method A*

**B.** (EWCS data (2015)) – *Method B (B1, B2, B3)*; For Method C, the share of bogus self-employed is 2.4% (Eurofound, 2018b).

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015)*

This difference in the estimates is because Method A, which produces the 0.5% figure, uses much narrower criteria for personal dependency based on whether the client decides working hours. Meanwhile, Methods B and C adopt criteria for measuring personal dependency that identify as bogus self-employed a wider range of self-employed without employees (e.g. the self-employed who do not have the authority to hire staff, make strategic decisions, or are paid a weekly or monthly fee).

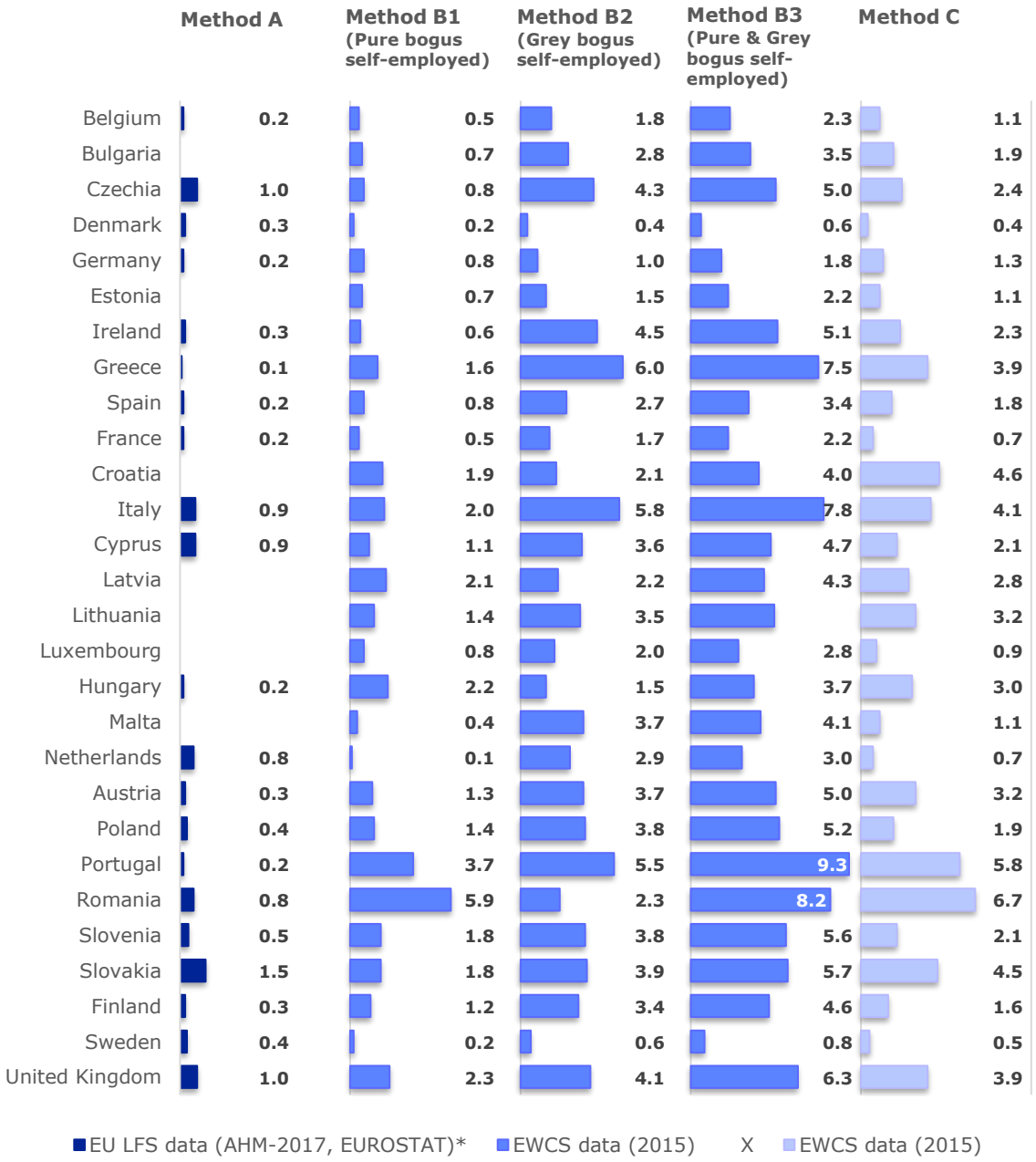
How, therefore, does the prevalence of bogus self-employment vary cross-nationally in the EU, who engages in bogus self-employment in the EU and in which sectors, organisations and occupations is it concentrated?

## 3.2 Cross-national variations in the prevalence of bogus self-employment

Figure 7 displays the cross-national variations in the prevalence of bogus self-employment as a share of total employment.

Using the narrow EU LFS method (Method A), bogus self-employment is overall 0.5% of total EU employment, but there are marked cross-national variations. It is most common in Slovakia (1.5% of total employment), the Czech Republic and the UK (1%), Cyprus and Italy (0.9%) and the Netherlands and Romania (0.8%).

**Figure 7.** Cross-national variations in the prevalence of bogus self-employment in EU-28, by various estimation methods (% of all employed 15 years or over, 2015 and 2017)




*Notes: *EU LFS data on bogus self-employment for Bulgaria, Croatia, Estonia, Latvia, Lithuania, Luxembourg and Malta not available due to low reliability or confidentiality reasons.*

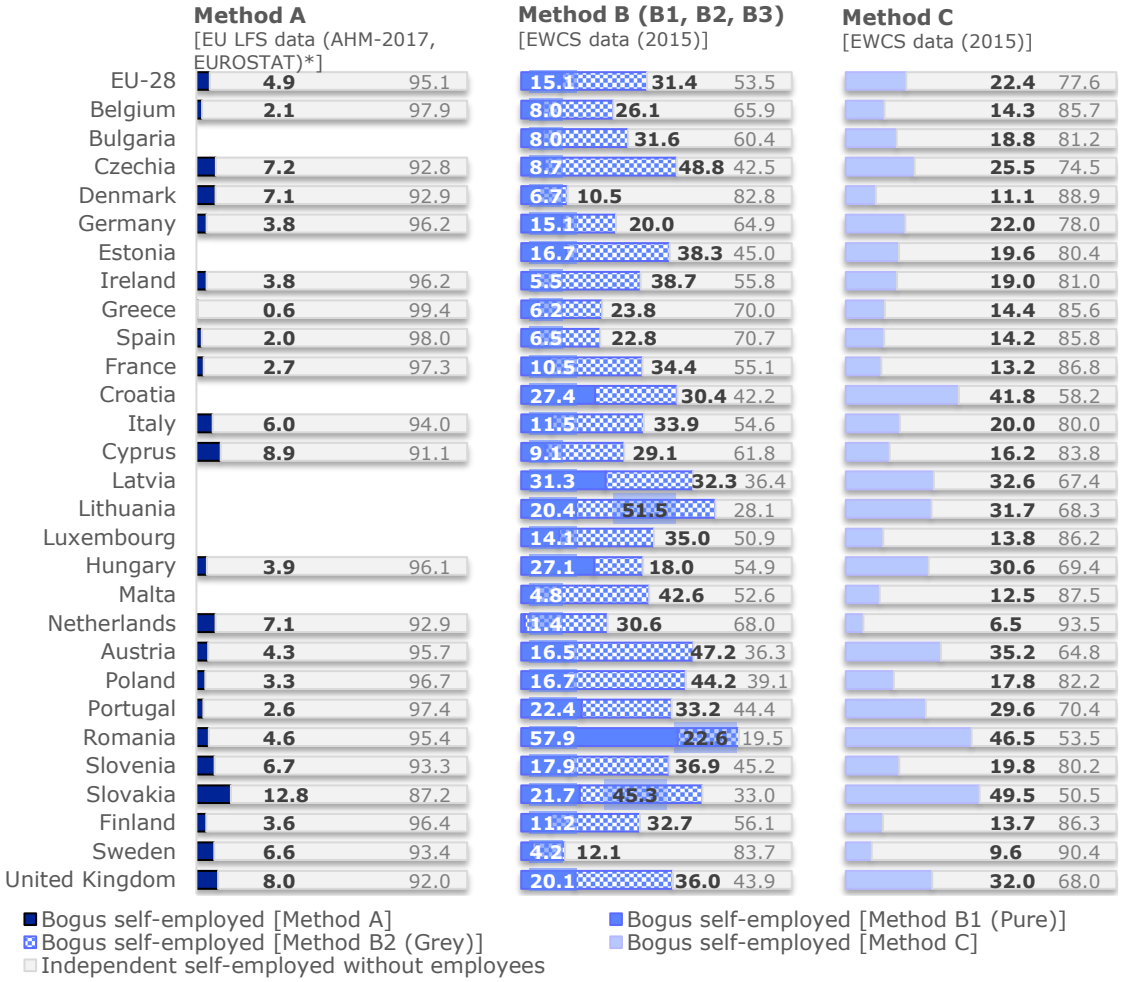
*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015); Eurofound (2018b), Williams and Lapeyre (2017)*

Meanwhile, using 2015 EWCS data and Method B3, the prevalence of (pure and grey) bogus self-employment as a share of total employment is greatest in Portugal (9.3% of total employment), Romania (8.2%), Italy (7.8%) and Greece (7.5%) and lowest in Sweden (0.8%) and Denmark (0.6%), indicating a North-South divide in the EU in the prevalence of bogus self-employment. When Method C is used, which replaces the criterion of the authority to make important strategic decisions with payment based on an agreed fee on a weekly or monthly basis, a clear North-South divide again results. Bogus self-employment is most prevalent in Romania (6.7%), Portugal (5.8%), Croatia (4.6%), Italy (4.1%), Greece and the UK (3.9%) and again lowest in Sweden (0.5%) and Denmark (0.4%).

Therefore, even when different methods are used (Methods B and C), a **North-South divide** in the EU persists with bogus self-employment more prevalent in southern European member states and lower in northern European member states.

Figure 8 examines the proportion of the self-employed without employees who are bogus self-employed.

**Figure 8.** Bogus self-employment as share of all self-employed without employees in EU-28, by country and various estimation methods (15 years or over, 2015 and 2017)




*Notes: *EU LFS data on bogus self-employed for Bulgaria, Croatia, Estonia, Latvia, Lithuania, Luxembourg and Malta not available due to low reliability or confidentiality reasons.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015); Eurofound (2018b)*

The EU LFS, using the narrow Method A, reveals that 4.9% of all self-employed without employees are bogus self-employed in the EU, but this is higher in Slovakia (12.8%), Cyprus (8.9%), and the UK (8%) and lower in Greece (0.6%) and Spain (2%). Using Method B and 2015 EWCS survey data, 46.5% of the self-employed without employees are bogus self-employed in the EU, highest in Romania (where the bogus self-employed are 80.5% of all self-employed without employees), Lithuania (71.9%), Slovakia (67%), Latvia (63.6%) and Austria (63.7%) and lowest in Sweden (16.3%) and Denmark (17.2%). Method C reveals similar patterns. The share of the self-employed without employees who are bogus self-employed is 22.4% in the EU, but highest in Slovakia (49.5%) and lowest in the Netherlands (6.5%). The estimates of the share of self-employed without employees, therefore, varies from 4.9% to 46.5% depending on the narrowness of the criteria used to measure personal dependency.

To explain these variations in the estimates of bogus self-employment, it is important to report the proportion of the self-employed who meet each of the criteria used to determine whether they are bogus self-employed or not. Table 4 reports the results.

**Table 4.** Criteria used to assess the bogus self-employed status, by country (% of self-employed, 15 years or over, 2015 and 2017)

| Country | Share of self-employed: | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Number and importance of clients: | | | Control over working hours: the client | Not having: | | | Get paid an agreed weekly/ monthly fee |
| | One or one clearly dominant client* | Of which: | | | More than one client | The authority to hire staff | The authority to make important strategic decision | |
| | | One client | More than one client, one client is dominant* | | | | | |
| | 2017** | 2017** | 2017** | 2017** | 2015*** | 2015*** | 2015*** | 2015*** |
| *EU-28* | *18.2* | *9.4* | *8.8* | *11.5* | *13.7* | *26.8* | *4.8* | *36.4* |
| Belgium | 13.3 | 6.6 | 6.7 | 8.1 | 9.3 | 17.8 | 3.7 | 55.0 |
| Bulgaria | 25.6 | 14.0 | 11.6 | 6.2 | 6.2 | 25.1 | 2.7 | 29.7 |
| Czech Republic | 19.0 | 6.9 | 12.1 | 19.2 | 5.7 | 40.7 | 3.4 | 37.3 |
| Denmark | 17.7 | 3.2 | 14.4 | 27.7 | 4.2 | 12.2 | 2.1 | 34.0 |
| Germany | 15.0 | 7.7 | 7.3 | 9.0 | 7.1 | 16.1 | 3.4 | 34.2 |
| Estonia | 16.6 | 6.5 | 10.1 | 6.7 | 10.8 | 21.3 | 4.3 | 65.2 |
| Ireland | 23.1 | 12.2 | 10.9 | 9.7 | 18.3 | 16.9 | 3.8 | 50.1 |
| Greece | 15.3 | 7.1 | 8.2 | 8.2 | 14.7 | 11.4 | 4.3 | 24.0 |
| Spain | 12.7 | 6.5 | 6.2 | 10.7 | 8.8 | 14.0 | 5.4 | 45.7 |
| France | 18.1 | 5.5 | 12.6 | 9.1 | 5.9 | 25.3 | 2.2 | 39.6 |
| Croatia | 7.2 | 3.2 | 4.1 | 7.9 | 26.9 | 34.7 | 1.0 | 37.9 |
| Italy | 16.8 | 13.7 | 3.1 | 8.8 | 11.7 | 27.6 | 4.1 | 28.6 |
| Cyprus | 14.3 | 11.4 | 2.9 | 23.4 | 16.3 | 17.4 | 3.1 | 42.3 |
| Latvia | 17.8 | 10.7 | 7.2 | 5.8 | 17.0 | 31.3 | 12.7 | 45.1 |
| Lithuania | 17.9 | 5.1 | 12.8 | 3.5 | 23.3 | 33.4 | 8.3 | 42.2 |
| Luxembourg | 15.4 | 15.4 | -- | 17.2 | 7.6 | 33.9 | 4.2 | 40.7 |
| Hungary | 32.9 | 4.7 | 28.2 | 6.8 | 24.1 | 23.2 | 8.6 | 44.6 |
| Malta | 20.8 | 6.5 | 14.3 | 10.6 | 9.8 | 29.3 | 0.3 | 26.2 |
| Netherlands | 16.6 | 5.7 | 10.9 | 31.3 | 3.7 | 18.7 | 2.6 | 32.2 |
| Austria | 19.6 | 7.7 | 11.9 | 22.3 | 18.9 | 37.4 | 8.0 | 34.5 |
| Poland | 19.4 | 9.6 | 9.8 | 6.9 | 26.6 | 27.6 | 4.8 | 23.9 |
| Portugal | 14.2 | 7.1 | 7.1 | 8.1 | 30.8 | 28.5 | 2.9 | 23.8 |
| Romania | 12.4 | 9.6 | 2.8 | 11.6 | 48.2 | 65.5 | 4.2 | 17.2 |
| Slovenia | 21.1 | 9.8 | 11.3 | 17.0 | 27.8 | 23.1 | 8.7 | 42.1 |
| Slovakia | 31.9 | 23.4 | 8.5 | 18.6 | 17.0 | 55.6 | 7.3 | 56.2 |
| Finland | 25.7 | 7.7 | 18.0 | 7.7 | 20.8 | 16.9 | 2.3 | 30.2 |
| Sweden | 29.1 | 7.2 | 21.9 | 11.7 | 6.3 | 4.9 | 3.3 | 55.0 |
| United Kingdom | 24.5 | 12.7 | 11.9 | 15.0 | 12.8 | 40.8 | 9.0 | 50.1 |

*Notes: *Dominant client = if provided at least 75% of the self-employed income (Eurostat, 2017); **EU LFS data (AHM-2017, Eurostat); ***EWCS data (2015);*

*--: data not available due to low reliability*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015)*

The first important finding is that in 2017 (EU LFS data), 18% of the self-employed (5.76 million of the 31.7 million self-employed) were economically dependent on one or one major client, with 9.4% (2.97 million) of all self-employed having only one client. The share of self-employed having one or one clearly dominant client ranges from 7.2% in Croatia to 31.9% in Slovakia and 32.9% in Hungary. 11.5% of the self-employed in the EU further stated that the client(s) had control over their working time, with the largest share in Netherlands (31.3%) and lowest share in Lithuania (3.5%). Analysing the 2015 EWCS data, and the criteria of method B, the finding is that 13.7% of the self-employed in the EU stated that they did not have more than one client, 26.8% that they did not have the authority to hire staff, 4.8% that they did not have the authority to make strategic decisions on their business and 36.4% that they get paid an agreed weekly or monthly fee.

In sum, a high share of the self-employed in the EU witnesses economic dependency and a lack of personal autonomy, measured either by a lack of control over their working hours, lack of control over hiring or dismissing staff, lack of control on how their business is run and or by whether they are paid a weekly or monthly fixed income.

## 3.3 Explaining the cross-national variations in bogus self-employment

There are two competing explanations for the cross-national variations in the level of bogus self-employment. Higher levels of bogus self-employment are viewed to result from either high taxes and state interference in the free market ('too much state intervention'), or inadequate state intervention to protect workers from poverty ('too little state intervention').

From the 'too much state intervention' perspective, high levels of bogus self-employment are a rational economic decision to evade the costs associated with genuine dependent employment. The solution is therefore to pursue tax reductions, deregulation and minimal state intervention.

From the 'too little state intervention' perspective, in contrast, high levels of bogus self-employment are a direct by-product of the emergence of a deregulated open world economy, where subcontracting and outsourcing have been used to reduce production costs., Bogus self-employment thus results from low-quality governance and a resultant largely unregulated realm composed of low-paid and insecure work, which marginalised populations excluded from genuine dependent employment, rely on to survive. Bogus self-employment is therefore necessity-driven and participants forced into this realm due to the lack of dependent employment.

To evaluate the validity of both perspectives, we analyse the relationship between cross-national variations in the level of bogus self-employment and the structural conditions that each perspective views as associated, using bivariate correlation analyses. Here, Spearman's rank correlation coefficient ($r_s$) is used due to the non-parametric nature of the data.

Evaluating the validity of the 'too much state interference' perspective, Table 5 reveals no statistically significant association between the share of bogus self-employment and taxation levels, whatever indicator of taxation is used, meaning there is no evidence to validate the view that higher tax rates are associated with bogus self-employment.

To evaluate the argument that state interference generates higher levels of bogus self-employment, as well as the contrary argument that the scale of bogus self-employment reduces with greater state intervention, the relationship between expenditure on social protection (in purchasing power standards per inhabitant) and both the share of bogus self-employment in all employment and in self-employment are analysed. The finding is a significant decline in the scale of bogus self-employment as a percentage of all employment or self-employment as expenditure on social protection as a proportion of GDP increases. Similarly, the share of bogus self-employment as a share of all employment or self-employment is significantly lower in

countries with high expenditure on social protection benefits in PPS per inhabitant and as a percentage of GDP. Moreover, bogus self-employment is significantly lower in countries with a higher impact of social transfers on reducing poverty, a larger share of public expenditure on labour market interventions (as per cent of GDP) and in countries where restrictive labour regulations are often listed among problematic factors when doing business. However, no association was identified in respect to the level of government regulations.

In consequence, more state intervention is associated with a decline, not increase, in the prevalence of bogus self-employment. As such, the 'too much state interference' perspective is not validated. Instead, support is found for the view that bogus self-employment is associated with too little state intervention.

Table 5 also reveals a statistically significant relationship between severe material deprivation and the scale of bogus self-employment. The greater the deprivation, the greater the level of bogus self-employment. Similar results are obtained when considering the relationship between bogus self-employment as a percentage of all employment and the income quintile share ratio (S80/S20) and GINI coefficient. The greater the poverty or income inequalities, the higher is the scale of bogus self-employment as a percentage of all employment. However, the association between bogus self-employment as a percentage of self-employment and the income quintile share ratio (S80/S20) and GINI coefficient is not statistically significant.

**Table 5.** Structural conditions associated with bogus self-employment (using Method B3) in European countries

| Macro-level indicators | Year | No. of countries | Bogus self-employment | |
|---|---|---|---|---|
| | | | % of all employment | % of self-employment |
| *State over-interference thesis* | | | | |
| High taxes | | | | |
| Total tax rate (% of profits) | 2015 | 35 | -0.114 | -0.179 |
| Gross salary – real tax rate | 2015 | 28 | -0.020 | -0.081 |
| Employer tax burden | 2015 | 28 | 0.003 | 0.036 |
| Problematic factors[1)]: Tax rates (%) | 2014/15 | 35 | -0.209 | -0.224 |
| Labour Cost Index | 2015 | 29 | -0.143 | 0.363* |
| Implicit tax rate (ITR) on labour | 2012 | 29 | -0.252 | -0.320* |
| *State under-intervention thesis* | | | | |
| Level of poverty | | | | |
| Severe material deprivation | 2015 | 32 | 0.648*** | 0.454*** |
| Income quintile share ratio (S80/S20) | 2015 | 33 | 0.404** | 0.242 |
| GINI coefficient | 2015 | 33 | 0.381** | 0.225 |
| Governance quality | | | | |
| Government Effectiveness | 2015 | 35 | -0.708*** | -0.608*** |
| Rule of Law | 2015 | 35 | -0.671*** | -0.569*** |
| Regulatory Quality | 2015 | 35 | -0.652*** | -0.559*** |
| Impartiality Index | 2015 | 33 | -0.647*** | -0.499*** |
| Trust in: Regional/ local authorities (%) | 2015 | 33 | -0.630*** | -0.431** |
| Trust in: Justice/ the legal system (%) | 2015 | 33 | -0.416** | -0.395** |
| Reliability of police services | 2015 | 35 | -0.591*** | -0.575*** |
| Trust in public authorities - The police (%) | 2015 | 33 | -0.597*** | -0.614*** |
| *State under- and over-intervention theses* | | | | |
| State intervention | | | | |
| Expenditure on social protection (PPS/inhabitant) | 2015[5)] | 32 | -0.543*** | -0.521*** |
| Expenditure on social protection (% GDP) | 2015[5)] | 32 | -0.396** | -0.485*** |
| Expenditure on social benefits[2)] (PPS/inhabitant) | 2015[5)] | 32 | -0.546*** | -0.522*** |
| Expenditure on social benefits[2)] (% GDP) | 2015[5)] | 32 | -0.389** | -0.474*** |
| Impact of social transfers on reducing poverty | 2015 | 33 | -0.491*** | -0.344** |

| Macro-level indicators | Year | No. of countries | Bogus self-employment | |
|---|---|---|---|---|
| | | | % of all employment | % of self-employment |
| Labour market interventions[3] (% of GDP) | 2015[6] | 29 | -0.395** | -0.556*** |
| Problematic factors[1]: labour regulations[4] (%) | 2014/15 | 35 | -0.504*** | -0.368** |
| Burden of government regulation | 2015 | 35 | -0.234 | -0.174 |

*Notes: Significant at *** p<0.01, ** p<0.05, * p<0.1; 2015 data on structural conditions are used to reflect the year the bogus self-employment data was collected. Up to 35 European countries are analysed where data is available to improve the robustness of the results. [1] Problematic factors for doing business; [2] social protection benefits; [3] Public expenditure on labour market interventions; [4] Restrictive labour regulations; [5] for Poland: 2014; [6] for Malta: 2014, UK: 2010.*

*Source: abridged from Williams and Horodnic (2019) – calculations based on data from EWCS (Eurofound, 2015) and European Commission (2013), Eurostat (2015a,b,c,d,e,f,g,h), Rogers and Philippe (2016), World Bank (2015, 2016), World Economic Forum (2014)*

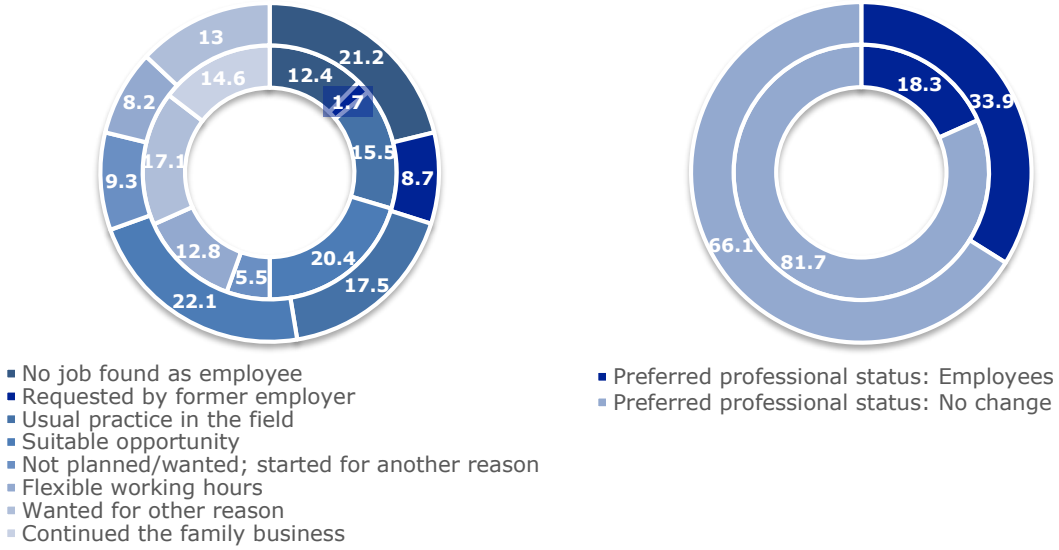
The perspective that bogus self-employment is negatively correlated with governance quality is also supported. Countries with a high Government Effectiveness index have lower rates of bogus self-employment as both a percentage of all employment and percentage of self-employment. There is also a significant association between the level of bogus self-employment (as a percentage of all employment or self-employment) and the Rule of Law index, Regulatory Quality index and Impartiality index. The same statistically significant relationship exists between the level of bogus self-employment and trust in regional/local authorities, the legal system or police services. The higher the governance quality and trust in public authorities, the significantly lower is the scale of bogus self-employment.

In short, there is insufficient evidence to validate the state over-interference thesis, while there is support for the view that bogus self-employment is associated with too little state intervention in the form of social protection, higher governance quality, greater equality and reduced poverty levels.

## 3.4 Bogus self-employment: a choice or necessity?

Investigating whether participation in bogus self-employment is a matter of choice or due to a lack of choice of workers, Figure 9 displays the reasons for becoming self-employed of the genuine and bogus self-employed, and their preferred employment status. As Figure 9a reveals, 8.7% of the bogus self-employed became self-employed on the request of their formal employer (compared with 1.7% of the genuine self-employed). Moreover, and as Figure 9b displays, 33.9% of the bogus self-employed would prefer to be an employee rather than self-employed, compared with just 18.3% of the genuine self-employed. The strong intimation, therefore, is that bogus self-employment is more frequently undertaken out of necessity than is genuine self-employment. However, necessity is not the universal reason stated. Bogus self-employed workers often cite rationales associated with it being a voluntary choice, such as the desire for flexible working hours.

**Figure 9.** Reason for becoming self-employed and preferred employment status: bogus vs. genuine self-employed without employees (%, 15 years or over, 2017)




**A.** Main reason for becoming self-employed **B.** Preferred employment status

***Inner pie:*** Genuine self-employed (without employees)

***Outer pie:*** Bogus self-employed

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat)*

## 3.5 Who engages in bogus self-employment?

To analyse which socio-demographic groups are more likely to engage in bogus self-employment, Figure 10 examines how participation in bogus self-employment varies by gender, age, education and country of birth, using various estimation methods. This reveals that, regardless of the estimation method, bogus self-employment is more prevalent among men than women. With respect to age, small variations exist when the EU LFS and Method A is analysed, while using Methods B and C and the 2015 EWCS data, the finding is that engagement in bogus self-employment is more common for those aged 45 or older. Turning to education, variations exist only when analysing 2015 EWCS data, with bogus self-employment being more common among those who have fewer years of education. As for country of birth, the general finding is that migrants are slightly more likely to be bogus self-employed.

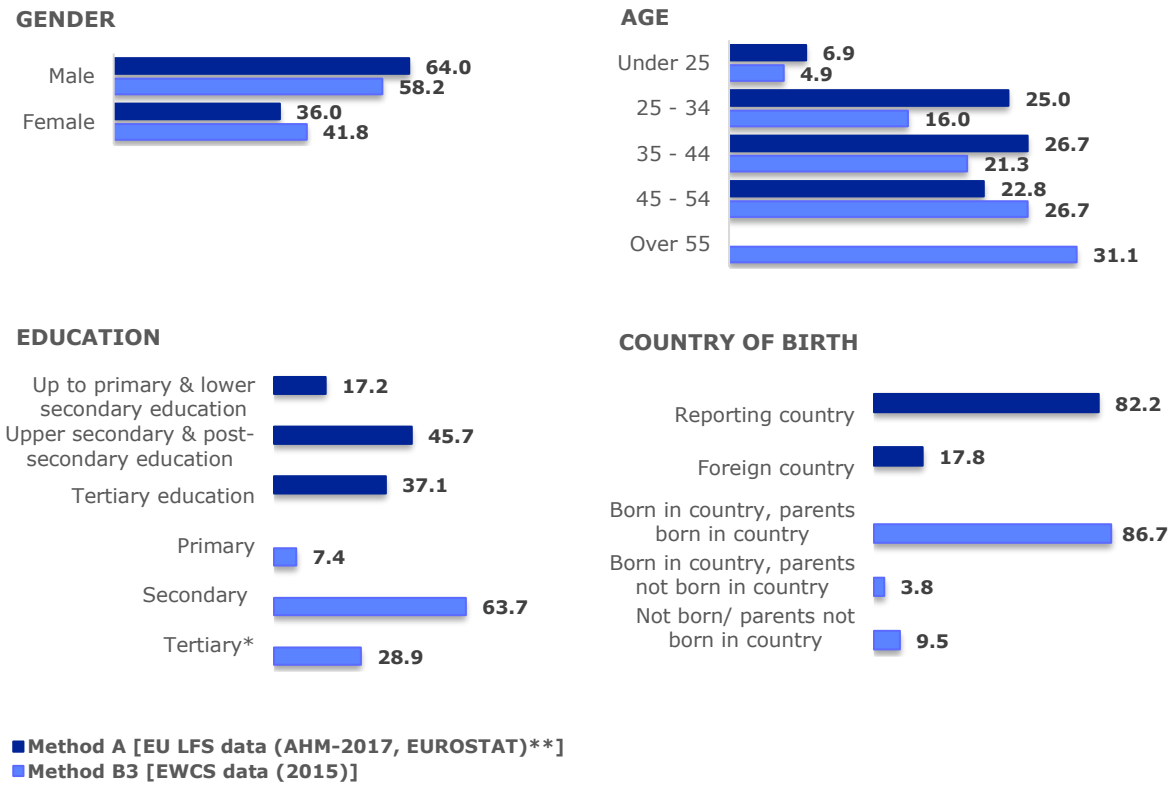
**Figure 10.** Participation in bogus self-employment: by socio-demographic characteristics and various estimation method in EU-28 (%, 2015 and 2017)


*Notes: *Tertiary education in the case of Method C does not include Master, Doctorate or equivalent; **EU LFS data for bogus self-employed over 55 years old not available due to low reliability.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015); Eurofound (2018b)*

Figure 11 examines the proportion of the bogus self-employed from these socio-demographic groups who are more likely to participate. Regardless of the dataset and method used, at least 58.2% of the bogus self-employed are men. Analysing age, the finding is that those under 25 years old are only a small share of the bogus self-employed. The majority of the bogus self-employed are in older age groups. Turning to education, despite bogus self-employment being more common among those with fewer years in education, those educated only up to primary and lower secondary education level represent just 17.2% of all bogus self-employed. The largest share of the bogus self-employed are those educated up to secondary and post-secondary education level. Similarly, although bogus self-employment is slightly more common among migrants, they represent less than 18% of the bogus self-employed.

**Figure 11.** Bogus self-employed distribution by gender, age, education and country of birth, using various estimation method in EU-28 (%, 2015 and 2017)




*Notes: *Tertiary education in the case of Method C does not include Master, Doctorate or equivalent; **EU LFS data for bogus self-employed over 55 years old not available due to low reliability.*

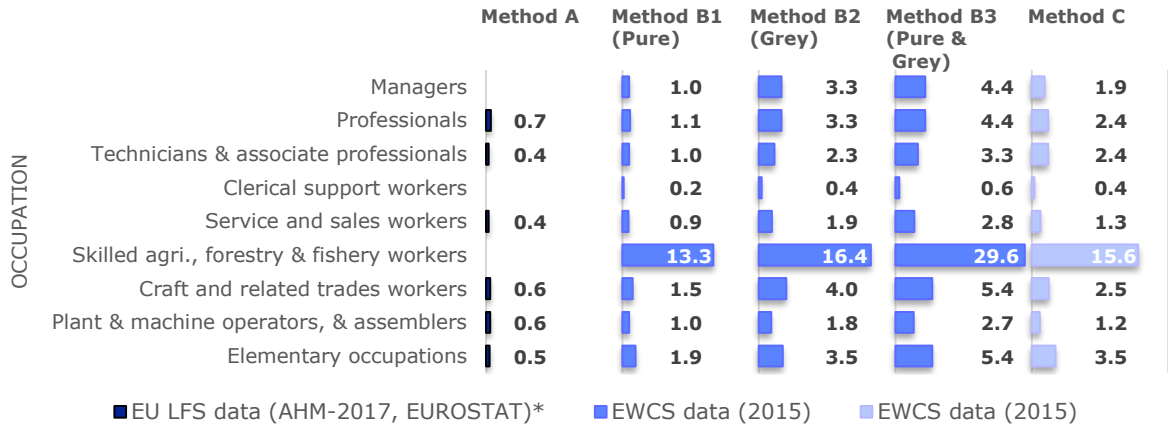
*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015)*

## 3.6 In which occupations is bogus self-employment more common?

To analyse whether bogus self-employment is particularly prevalent in businesses and economic activities associated with online platforms and mobile device applications (Heyes and Hastings, 2017; ILO, 2016; Taylor, 2017), the literature is not conclusive. A study of eight countries (Greece, Ireland, Italy, Latvia, the Netherlands, Romania, Spain and the UK) concludes that the rise of the platform economy is a driver for bogus self-employment in three of the eight countries, namely Greece, Ireland and the UK (Heyes and Hastings, 2017). If this is the case, then bogus self-employment should be prevalent in occupations (and sectors) associated with the collaborative economy.

Figure 12 examines the prevalence of bogus self-employment by occupation. Depending on the criteria used, the occupations where this employment relationship prevails differs. When economic dependency and the control of working hours are used (Method A), this employment relationship is more common among professionals (0.7% of all professionals in 2017) than other occupations. On the other hand, when alongside economic dependency, the personal dependency criteria of Method B are introduced, bogus self-employment is very prevalent among skilled agricultural, forestry and fishery workers (29.6% are bogus self-employed). This is not an occupation conventionally associated with the collaborative economy.

**Figure 12.** Participation in bogus self-employment in EU-28: by occupation, various estimation methods (%, 2015 and 2017)

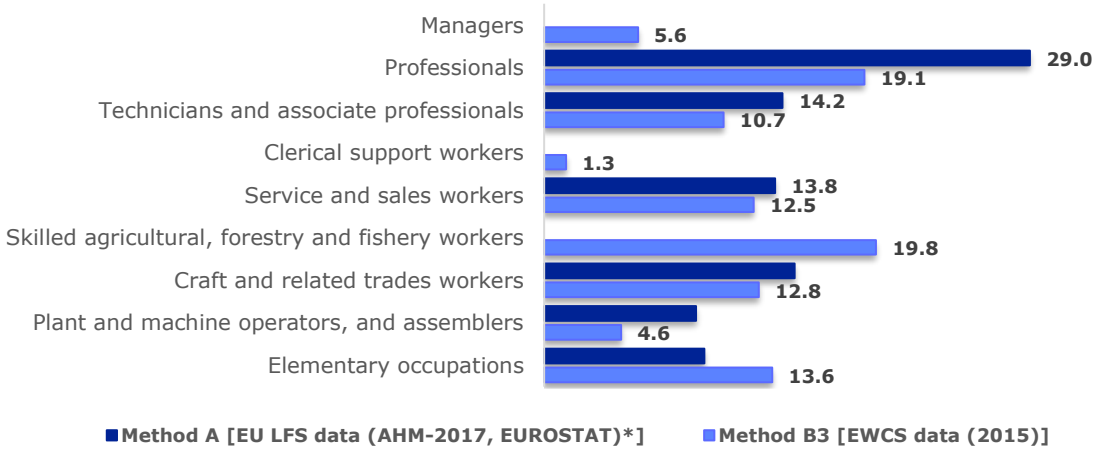



*Notes: *EU LFS data for managers, clerical support workers and skilled agricultural, forestry and fishery workers not available due to low reliability.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015); Eurofound (2018b)*

Examining the proportion of the bogus self-employed in various occupations, Figure 13 shows that at least 19.1% of all self-employed are professionals and 19.8% are skilled agricultural, forestry and fishery workers. Again, therefore, these are not occupations associated with the collaborative economy.

**Figure 13.** Bogus self-employed distribution by occupation using various estimation method in EU-28 (%, 2015 and 2017)




*Notes: *EU LFS data for managers, clerical support workers and skilled agricultural, forestry and fishery workers not available due to low reliability.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015)*

The EU-LFS does not breakdown the occupations beyond the ISCO 1 digit level (9 occupations), and did not even provide data for *managers, clerical support workers and skilled agricultural, forestry and fishery workers* (i.e., 3 of the 9 ISCO 1 digit occupations) because of what they called '**low reliability'.** Therefore, it is not possible to breakdown bogus self-employment into ISCO 2 digit occupational data.

The EWCS data on 503 pure bogus self-employed and 1 122 grey bogus self-employed suffers from the same problem of low reliability. Breaking it down into further occupations is not statistically robust due to the low number of bogus self-employed. However, purely for information, Table 6 reports the results. The utmost caution is required when interpreting this ISCO 2 digit data.

**Table 6.** Participation in bogus self-employment in EU-28: by occupation (ISCO 2 digit)

| | Method B1 | Method B2 | Method B3 |
|---|---|---|---|
| | Pure bogus self-employed | Grey bogus self-employed | Pure & Grey bogus self-employed |
| Commissioned armed forces officers | 0.0 | 0.0 | 0.0 |
| Non-commissioned armed forces officers | 0.0 | 0.0 | 0.0 |
| Armed forces occupations, other ranks | 0.0 | 0.0 | 0.0 |
| Chief executives, senior officials and legislators | 0.3 | 1.1 | 1.4 |
| Administrative and commercial managers | 2.1 | 2.2 | 4.3 |
| Production and specialised services managers | 0.8 | 4.0 | 4.8 |
| Hospitality, retail and other services managers | 0.5 | 4.5 | 5.0 |
| Science and engineering professionals | 1.5 | 3.2 | 4.8 |
| Health professionals | 0.5 | 2.2 | 2.7 |
| Teaching professionals | 0.4 | 2.1 | 2.5 |
| Business and administration professionals | 0.3 | 3.1 | 3.4 |
| Information and communications technology professionals | 0.0 | 2.6 | 2.6 |
| Legal, social and cultural professionals | 4.4 | 9.1 | 13.5 |
| Science and engineering associate professionals | 1.0 | 1.0 | 2.0 |
| Health associate professionals | 0.4 | 1.3 | 1.7 |
| Business and administration associate professionals | 1.1 | 2.6 | 3.7 |
| Legal, social, cultural and related associate professionals | 2.1 | 4.5 | 6.6 |
| Information and communications technicians | 0.0 | 2.5 | 2.5 |
| General and keyboard clerks | 0.0 | 0.4 | 0.4 |
| Customer services clerks | 0.4 | 0.5 | 0.9 |
| Numerical and material recording clerks | 0.1 | 0.5 | 0.6 |
| Other clerical support workers | 0.3 | 0.2 | 0.5 |
| Personal service workers | 0.8 | 3.4 | 4.2 |
| Sales workers | 0.5 | 1.6 | 2.1 |
| Personal care workers | 1.6 | 1.5 | 3.1 |
| Protective services workers | 1.9 | 0.0 | 1.9 |
| Market-oriented skilled agricultural workers | 12.0 | 14.0 | 26.0 |
| Market-oriented skilled forestry, fishery and hunting workers | 1.6 | 3.6 | 5.2 |
| Subsistence farmers, fishers, hunters and gatherers | 20.1 | 26.3 | 46.5 |
| Building and related trades workers, excluding electricians | 2.9 | 6.4 | 9.4 |
| Metal, machinery and related trades workers | 0.3 | 1.1 | 1.4 |
| Handicraft and printing workers | 1.3 | 6.9 | 8.1 |
| Electrical and electronic trades workers | 0.6 | 2.6 | 3.2 |
| Food processing, wood working, garment and other craft and related trades workers | 1.3 | 4.1 | 5.4 |
| Stationary plant and machine operators | 0.0 | 0.4 | 0.4 |
| Assemblers | 0.4 | 0.0 | 0.4 |
| Drivers and mobile plant operators | 1.6 | 2.9 | 4.5 |
| Cleaners and helpers | 1.3 | 4.2 | 5.5 |
| Agricultural, forestry and fishery labourers | 6.2 | 12.4 | 18.5 |
| Labourers in mining, construction, manufacturing and transport | 1.6 | 0.7 | 2.3 |
| Food preparation assistants | 0.1 | 0.1 | 0.2 |
| Street and related sales and service workers | 9.1 | 12.1 | 21.2 |
| Refuse workers and other elementary workers | 1.7 | 2.3 | 4.0 |
| EU-28 | 1.4 | 2.9 | 4.3 |

*Note: very low reliability of data due to low number of cases*

*Source: authors' own work based on EWCS data (2015)*

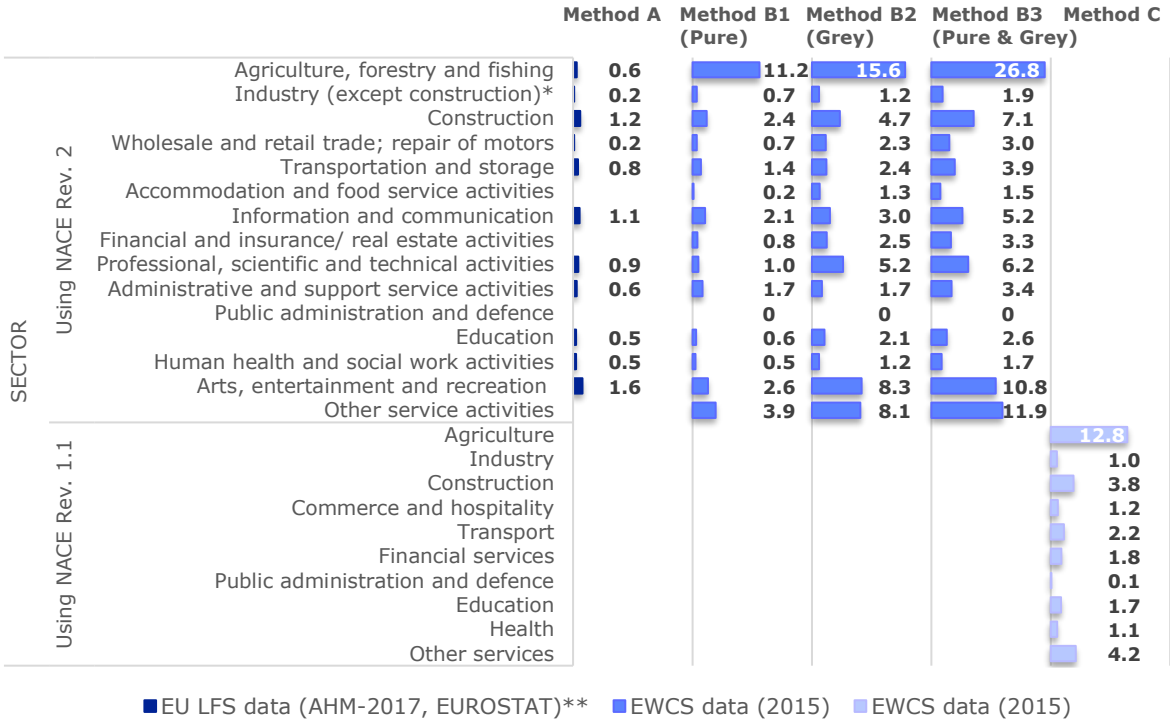
Nevertheless, it reinforces the point made above. The occupations in which bogus self-employment is most concentrated are not those associated with collaborative platforms, namely an array of agricultural, forestry and fishing occupations. The only occupations associated with collaborative platforms displaying a relatively high level of bogus self-employment in total employment are street and related sales and service workers (where 21.2 % of total employment is bogus self-employment) and professionals in legal, social and cultural occupations (13.5 % of total employment is bogus self-employment).

## 3.7 In which sectors is bogus self-employment more common?

The tentative assertion from the above analysis of occupations is that bogus self-employment is not as closely associated with the collaborative economy as has perhaps been sometimes assumed. Is this also the case when the sectors in which bogus self-employment is concentrated are analysed? Eichhorst et al. (2013), in a previous study, concludes that the qualitative empirical literature identifies that the sectors where bogus self-employment is most prevalent are construction, transport, accountancy, insurance, architecture and the creative industries. Meanwhile, in Spain, in the third quarter of 2017, the sectors in rank order where bogus self-employment is most prevalent were: transport and storage; wholesale, retail and motor repairs; financial and insurance activities, and construction (European Commission, 2018). Pulignano et al. (2016) similarly identify the transport sector, as does a qualitative study in the UK on the parcel delivery industry (Moore and Newsome, 2018). Meanwhile, Suárez Corujo (2017) underline the presence of bogus self-employment among platform workers in Spain.

Figure 14 reveals that the sectors in which bogus self-employment is more prevalent varies according to the estimation method.

**Figure 14.** Participation in bogus self-employment: by sector and various estimation method in EU-28 (%, 2015 and 2017)



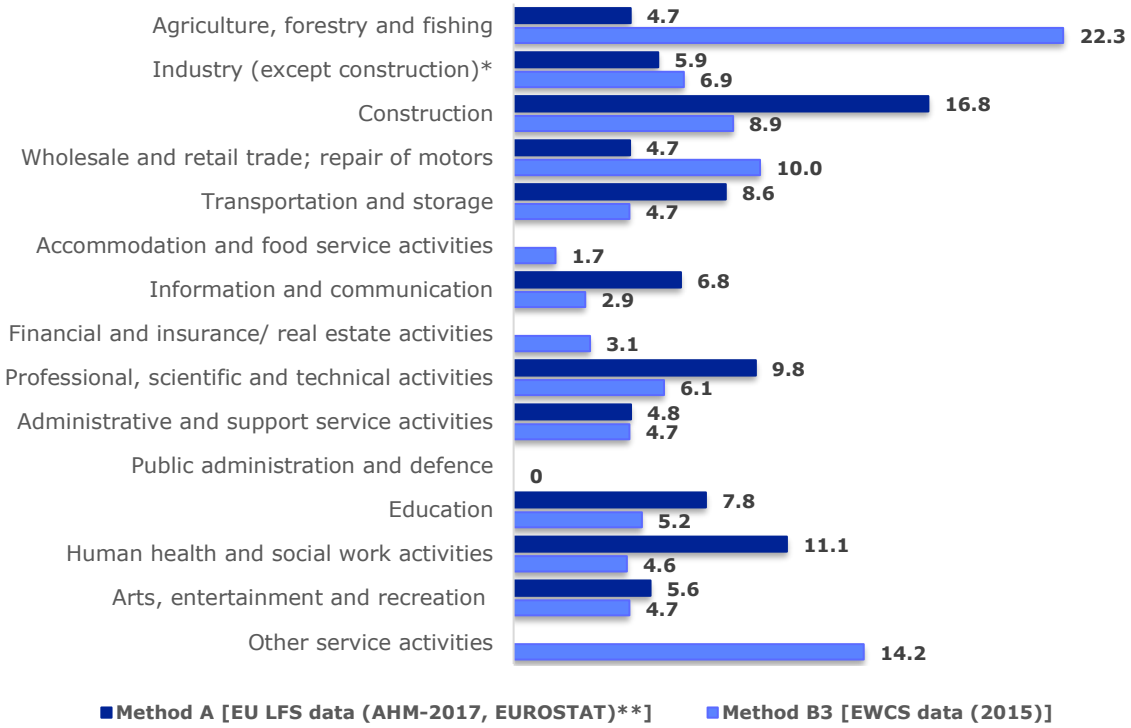

*Notes: *EU LFS data on Industry include only manufacturing sector; **EU LFS data for Accommodation and food service activities, Financial and insurance / real estate activities, Public administration and defence and Other service activities not available due to low reliability.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015); Eurofound (2018b)*

When the EU LFS data and Method A is used, the finding is that 1.6% of employment in arts, entertainment and recreation is bogus self-employment. Relatively high percentages are also reported in the construction sector (1.2% of all employment in the sector) and information and communications sector (1.1% of all employment in the sector). When the EWCS dataset and Methods B and C are used, bogus self-employment is more common in: agriculture, forestry and fishing; arts, entertainment and recreation; construction; professional, scientific and technical activities, and information and communication. This holds regardless of the criteria used in Methods B and C to evaluate personal dependency (i.e., having more than one client, having control of hiring or dismissing staff, control on how the business is run or whether not paid on a weekly or monthly basis fee).

Figure 15 presents the distribution of bogus self-employed across sectors in the EU-28 in 2015 and 2017. The EU LFS dataset which considers the bogus self-employed as those having one or one mainly dominant client who has control over their working time, finds that in 2017, 16.8% of the bogus self-employed were in the construction sector, 11.1% in human health and social work activities, and 9.8% in professional, scientific and technical activities. When the 2015 EWCS data are analysed using less narrow personal dependency criteria, 22.3% of the bogus self-employed were in the agriculture, forestry and fishing sector, 10.0% in wholesale and retail and motor repairs and 8.9% in the construction sector. These are not sectors conventionally associated with the collaborative economy, suggesting that bogus self-employment exists in wider sectors than solely those associated with the collaborative platform economy.

**Figure 15.** Distribution of bogus self-employed across sectors in EU-28, using various estimation methods (%, 2015 and 2017)




*Notes: *EU LFS data on Industry include only manufacturing sector; **EU LFS data for Accommodation and food service activities, Financial and insurance / real estate activities, Public administration and defence and Other service activities not available due to low reliability.*

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat) and EWCS data (2015)*

## 3.8 Working conditions of the bogus self-employed

Based on the view that bogus self-employment allows employers to evade the protective rights tied to dependent employment, one might assume that the working conditions of the bogus self-employed are worse than the rest of the population in employment.

To evaluate this, Table 7 examines six main job quality indices derived from Eurofound (2016a). These indices relate to: physical working environment; work intensity; working time quality; social environment; skills and discretion, and career prospects. The job quality indices are rescaled on a scale from 0 to 100, with value 0 for the the worst working conditions for the worker gradually increasing to 100 for the best working conditions for the worker. The work intensity index is the exception, values being set in the opposite direction.

**Table 7.** Working conditions in EU-28 by employment status (0-100, 2015)

| Index/ Index dimension | Self-employed without employees | | | | Self-employed with employees | Employees |
|---|---|---|---|---|---|---|
| | Bogus self-employed | | | Genuine self-employed | | |
| | Pure | Grey | Pure + Grey | | | |
| *Mean index score:* | *(0-100)* | *(0-100)* | *(0-100)* | *(0-100)* | *(0-100)* | *(0-100)* |
| *Physical environment index* | 81 | 83 | 82 | 84 | 84 | 84 |
| *Work intensity index* | 29 | 27 | 28 | 30 | 36 | 36 |
| Quantitative demands | 34 | 31 | 32 | 33 | 41 | 39 |
| Pace determinants and interdependency | 26 | 26 | 26 | 27 | 36 | 40 |
| Emotional demands | 27 | 25 | 25 | 29 | 32 | 30 |
| *Working time quality index* | 76 | 75 | 75 | 71 | 66 | 77 |
| Duration | 74 | 66 | 69 | 56 | 45 | 79 |
| Atypical working time | 68 | 67 | 67 | 65 | 62 | 73 |
| Working time arrangements | 90 | 91 | 91 | 92 | 91 | 87 |
| Flexibility | 73 | 74 | 74 | 71 | 66 | 70 |
| *Social environment index* | 83 | 86 | 85 | 90 | 91 | 85 |
| Adverse social behaviour | 95 | 97 | 96 | 98 | 98 | 95 |
| Social support | 56 | 51 | 53 | 56 | 81 | 70 |
| *Skills and discretion index* | 50 | 59 | 56 | 67 | 69 | 53 |
| Cognitive dimension | 55 | 65 | 62 | 74 | 76 | 63 |
| Decision latitude | 68 | 83 | 78 | 91 | 91 | 58 |
| Organisational participation | 64 | 78 | 73 | 87 | 89 | 52 |
| Training | 13 | 13 | 13 | 17 | 23 | 39 |
| *Prospects index* | 52 | 55 | 54 | 57 | 63 | 56 |
| Career prospects | 42 | 47 | 45 | 52 | 61 | 48 |
| Job security | 65 | 72 | 70 | 77 | 82 | 74 |
| Downsizing | 50 | 49 | 49 | 48 | 51 | 50 |

*Source: authors' own work based on EWCS data (2015); Williams and Lapeyre (2017)*

Starting with the physical work environment, which measures, for example, exposure to low/high temperatures, fumes dust and vapours, smoke, chemical substances etc., as well as whether the job involves tiring or painful positions, lifting or moving loads and/or people, the finding is that the bogus self-employed have slightly worse working conditions than the genuine self-employed and employees. Examining the work intensity index, this is not the case. In terms of quantitative demands (i.e., frequent disruptive interruptions, working with tight deadlines, having enough time to get the job done etc.), those in bogus self-employment experience broadly similar working conditions to the genuine self-employed without employees but better working conditions than the self-employed with employees and employees. Turning to whether the pace of work is dependent on colleagues, control of their boss, direct demands from people such as customers, passengers, pupils, patients and their level of interdependency, dependency on performance targets and automatic machines, the finding is that the bogus self-employed enjoy better working conditions (i.e., less

dependency on others) than the self-employed with employees and employees. Similarly with emotional demands, those in bogus self-employment face fewer emotionally disturbing situations, fewer cases involving handling angry clients, patients, pupils, etc. or situations which require hiding their feelings compared with the self-employed with employees and employees.

In terms of working time quality, the working conditions of the bogus self-employed lie somewhere between the genuine self-employed and employees. Indeed, in terms of the duration of work (long working hours, no recovery period, long working days) and instances of atypical working time (night work, weekend work, shift work), those in bogus self-employment score better than the genuine self-employed but lower than employees. The opposite is the case in terms of working time arrangements (i.e., control and change of working time arrangements) where the bogus self-employed and genuine self-employed enjoy better working conditions than employees, and in terms of flexibility (i.e., ease of arranging time off during working hours for personal matters), where the bogus self-employed enjoy better working conditions compared with the rest of the working population.

Looking at the social environment index, those in bogus self-employment enjoy similar working conditions to employees and worse working conditions than the genuine self-employed (with and without employees). The gap is rather small in terms of adverse social behaviour (i.e., exposure to verbal abuse, unwanted sexual attention, violence, bullying/harassment) and wider in terms of social support (i.e., help and support from colleagues).

Analysing the skills and discretion index, Table 7 shows that the bogus self-employed have worse working conditions than the genuine self-employed. The cognitive dimension of their work (i.e., solving unforeseen problems, carrying out complex tasks, learning new things) is poorer compared with the genuine self-employed (with and without employees), and so too is their latitude for making decisions (i.e., ability to choose or change order of tasks and/or methods of work), organisational participation (i.e., consulted before objectives are set for own work) and participation in training. Their opportunities for training are also poorer than employees. Finally, and in terms of the job prospects index, the bogus self-employed perceive themselves as having poorer career prospects for advancement and lower job security. In terms of downsizing in the organisation in which they work, the differences between the bogus self-employed and individuals having other working arrangements are rather small.

The EU LFS data in 2017 also includes data on the job quality of the bogus self-employed. Table 8 displays the level of job autonomy and job satisfaction of the bogus self-employed compared with the genuine self-employed and employees.

**Table 8.** Job autonomy and job satisfaction in EU-28 by employment status (%, 2017)

| | Self-employed without employees | | Self-employed with employees | Employees |
|---|---|---|---|---|
| | Bogus self-employed | Genuine self-employed | | |
| | *(%)* | *(%)* | *(%)* | *(%)* |
| *Level of influence over content and order of tasks (Job autonomy)* | | | | |
| Content and order of tasks | 39.3 | 82.0 | 85.6 | 40.2 |
| Content of tasks | 10.0 | 3.5 | 3.7 | 5.1 |
| Order of tasks | 14.0 | 6.6 | 5.4 | 16.4 |
| None | 36.7 | 7.9 | 5.3 | 38.3 |
| *Job satisfaction* | | | | |
| High | 41.9 | 47.4 | 54.2 | 43.3 |
| Medium | 49.5 | 44.5 | 41.7 | 49.0 |
| Low | 8.6 | 8.1 | 4.1 | 7.7 |

*Source: authors' own work based on EU LFS data (Ad-hoc module Self-employment – 2017, Eurostat)*

The finding is that the bogus self-employed have much lower autonomy around their level of influence over the content and order of their tasks, compared with the genuine self-employed with and without employees (39.3% compared with 85.6% and 82.0% respectively). The difference is lower when compared with employees. It is also worth noting that 36.7% of the bogus self-employed declare that they cannot influence the content or the order of their tasks, compared with less than 8% of the genuine self-employed. Moreover, their job satisfaction is lower compared with the genuine self-employed and employees. Only 41.9% of the bogus self-employed are highly satisfied with their job compared with 47.4% of the genuine self-employed, and 43.3% of employees.

In sum, it is not always the case that the bogus self-employed have poorer working conditions than the genuine self-employed and employees. A more nuanced understanding is required than has until now perhaps been the case.

## 3.9 Bogus self-employment in the collaborative economy

Section 3 has revealed that bogus self-employment is not limited to work on collaborative platforms and its growth is not purely driven by the advent of such platforms. It is a much wider phenomenon.

Bogus self-employment on collaborative platforms is therefore just one type of bogus self-employment in contemporary European economies. To evaluate its prevalence on collaborative platforms, however, a major problem exists. In the European Union Labour Force Survey ad-hoc module on 'self-employment' (EU LFS data, AHM-2017 - Eurostat), no questions were asked about the participation of the self-employed on collaborative platforms. Similarly, in the European Working Conditions Survey (EWCS), there were no questions asked about participation in the collaborative economy. Indeed, no known extensive survey has been conducted in the EU that includes both bogus self-employed and platform work, and examines the prevalence of bogus self-employment on collaborative platforms. This, therefore, is a significant gap in the evidence-base that will need to be resolved in the future if there is to be greater understanding of the prevalence of bogus self-employment on collaborative platforms.

Such a study will also need to evaluate the type of platforms (e.g., by industry) where bogus self-employment is more prevalent, the occupations on platforms where bogus self-employment prevails, who engages in such work, and why they do so, along with their working conditions. Until such an extensive survey is conducted, the prevalence and distribution of bogus self-employment in the collaborative economy will remain unknown.

In sum, sections 2 and 3 have uncovered for the first time the EU-wide evidence on the broader issues of the prevalence and distribution of undeclared work in the collaborative economy and bogus self-employment. Having provided this EU-wide evaluation of the evidence on firstly, undeclared work in the collaborative economy, and secondly, bogus self-employment, attention now turns towards how these new forms of undeclared work can be tackled.

# 4 TACKLING UNDECLARED WORK IN THE COLLABORATIVE ECONOMY: RECENT DEVELOPMENTS

***Key Question***

- What are the current interventions used to tackle undeclared work in the collaborative economy in Member States?

## 4.1 Background context

At EU level, the European Commission assessed online platforms in a May 2016 communication[4], focusing on both the innovation opportunities and the regulatory challenges they represent. In June 2016, the Commission also adopted its European agenda for the collaborative economy[5], which clarified the concept and provided some guidance on the employment status of platform workers and the EU definition of worker. The European Pillar of Social Rights aims to address some of the policy challenges associated with new forms of employment, including platform work[6]. As accompanying initiatives, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, updates EU rules on employment contracts. It considers new forms of employment including platform workers.[7] In addition, the EPSCO Council has agreed a recommendation[8], aiming to provide access to adequate social protection to all workers and the self-employed in Member States. Other initiatives such as the New Skills Agenda for Europe[9] include measures to tackle the implications of on-going changes in the world of work for education and skills.

Here, the focus is on the implications of the collaborative economy for undeclared work and bogus self-employment. This section builds on the October 2017 European Platform Tackling Undeclared Work plenary thematic discussion on tackling undeclared work in the collaborative economy (European Platform Tackling Undeclared Work, 2017). The resultant report advocated that one approach would be to introduce a binding EU legal instrument that would: (i) require all platforms to report all transactions to the tax authorities in the countries in which they operate; (ii) compel platforms to supply tax authorities with information they might require in attempting to ensure compliance with tax laws; (iii) require platforms to inform service providers of their earnings and tax obligations, and (iv) protect workers from being falsely classified as self-employed.

In the absence of such an EU legal instrument, the October 2017 Platform plenary thematic discussion concluded that Member States can:

- Ensure that the difference between commercial and non-commercial activities in the collaborative economy is clearly defined and communicated to platform service providers;
- Require that online platforms take more responsibility for ensuring compliance with labour and tax laws, such as supplying information to enforcement bodies about collaborative economy service providers;
- Investigate the potential for platforms to collect tax revenues and forward them directly to the tax authority; require platforms to provide essential information

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN

[5] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A356%3AFIN

[6] Following a proposal from the Commission in April 2017, the European Pillar of Social Rights was jointly proclaimed by the European Commission, the European Parliament and the Council in November 2017. For more information see: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152

[8] https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52018DC0132

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0381&from=EN

to users, particularly in relation to their tax obligations; introduce new rights for self-employed persons who obtain work via platforms, and

- Use both deterrence-oriented and incentive-oriented approaches, including information campaigns about the risks of taking part in the collaborative economy and the obligations, and provide additional advice and guidance and proactive efforts to inform platform users that they need to declare the income they receive via platforms.

To achieve this, the Platform Plenary discussion called for a **mapping exercise** to identify the current interventions to tackle undeclared work in the collaborative economy in EU Member States, in order to promote mutual learning and the wider adoption of good practices. In 2019, the annual survey of Platform members analysed the current 'state of play' regarding the interventions recommended at the October 2017 Plenary thematic discussion. In this report, these findings are reported and analysed.

## 4.2 Policy initiatives in Member States

The European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)) calls on Member States to **conduct sufficient labour inspections** around online platforms and to impose sanctions where rules have been breached, particularly involving working and employment conditions and specific requirements regarding qualifications. It also asks them to provide **sufficient resources for inspections**.

To tackle undeclared work in the collaborative economy, however, inspections need to be combined with other initiatives, as recommended at the October 2017 Plenary thematic discussion. Table 9 reports the extent to which Member States have implemented these initiatives.

**Table 9.** Policy initiatives used to tackle undeclared work in the collaborative economy, by European region: % of countries

| Initiative | EU | Western Europe | Eastern & Central Europe | Southern Europe | Northern Europe |
|---|---|---|---|---|---|
| *Number of responses* | *28* | *7* | *10* | *6* | *5* |
| State authorities provide advice and guidance to service providers on the tax, social security and/or labour law obligations of their platform activity | 82% | 71% | 80% | 83% | 100% |
| State authorities directly contact platform service providers advising them that they need to declare income received | 36 % | 29 % | 50 % | 17 % | 40 % |
| State authorities have the power to demand that collaborative platforms disclose data on service providers | 68 % | 86 % | 70 % | 67 % | 40 % |
| Platforms are required to inform service providers of their tax, social security and/or labour law obligations | 21 % | 29 % | 20 % | 17 % | 20 % |
| Platforms are required to ensure that the service providers are licensed/authorised | 25 % | 29 % | 30 % | 33 % | 0 % |
| Platforms required to ensure that any limits on the number of registered service providers are respected | 4 % | 14 % | 0 % | 0 % | 0 % |
| Platforms required to collect tax revenues owed from service providers and forward them directly to the tax authority | 14 % | 14 % | 0 % | 17 % | 40 % |
| There is a clear differentiation between commercial and non-commercial activities in the collaborative economy | 39 % | 57 % | 20 % | 33 % | 60 % |

| Initiative | EU | Western Europe | Eastern & Central Europe | Southern Europe | Northern Europe |
|---|---|---|---|---|---|
| Platforms are required to clearly define and communicate to service providers the difference between commercial and non-commercial activities | 14 % | 29 % | 10 % | 17 % | 0 % |
| A simplification of tax laws has been introduced for service providers on collaborative platforms | 32 % | 43 % | 10 % | 50 % | 40 % |
| Limits have been imposed on the duration of activities (e.g., rentals) on collaborative platforms | 18 % | 29 % | 0 % | 17 % | 40 % |
| Licensing/official authorisation has been introduced for service providers on collaborative platforms | 43 % | 86 % | 30 % | 33 % | 20 % |
| Awareness campaigns targeted at users | 14 % | 14 % | 20 % | 0 % | 20 % |
| Awareness campaigns targeted at service providers | 14 % | 14 % | 20 % | 0 % | 20 % |
| Awareness campaigns targeted at platforms | 4 % | 0 % | 10 % | 0 % | 0 % |
| Information websites | 36 % | 29 % | 20 % | 33 % | 80 % |
| Information hotlines | 18 % | 14 % | 20 % | 33 % | 0 % |

Western Europe (Belgium, Germany, Ireland, France, Luxembourg, Netherlands, Austria, United Kingdom), Eastern and Central Europe (Bulgaria, Czechia, Estonia, Croatia, Latvia, Lithuania, Hungary, Poland, Romania, Slovenia, Slovakia), Southern Europe (Greece, Spain, Italy, Cyprus, Malta, Portugal) and Northern Europe (Denmark, Finland, Iceland, Norway, Sweden).

*28 of the 30 countries responded (non-respondents: LU, RO)*

*Source: 2019 Annual Platform Survey*

The following sections report the progress in implementing these policy initiatives for tackling undeclared work in the collaborative economy, along with interesting practices from individual countries that are potentially transferable to other countries.

### 4.2.1 Authorities providing advice and guidance to service providers

The 2018 Flash Eurobarometer survey highlights that the problem most frequently mentioned by service providers is lack of clarity around how to provide the service legally (22%). This clearly illustrates that many service providers receive insufficient advice and guidance on their tax, social security and/or labour law obligations.

The 2019 annual Platform survey, nevertheless, finds that enforcement authorities in 82% of countries responding provide advice and guidance to service providers on the tax, social security and/or labour law obligations related to their platform activity. This varies across the EU regions, occurring in all Northern European nations, 83% of Southern European Member States, 80% of East-Central European Member States, but only 71% of West European Member States, responding.

Most often, it is the tax/revenue administration that provides advice and guidance (12 of 23 responses), closely followed by Labour Inspectorates (11 out of 23 responses). Social security/insurance departments, immigration offices, police, cross-governmental bodies and ministries of labour are mentioned by four respondents.

Advice and guidance is predominantly through websites (16 out of 23 responses). Other relevant communication channels are phone hotlines (six responses), emails (six responses), workshops (three responses), during inspections, and social media campaigns (two responses each).

Among the responses are several interesting practices:

- In **Estonia**, potential and current service providers can access advice and information on their obligations at the official websites of the Labour

Inspectorate and Estonian Tax and Customs Board (ETCB). These websites also have the facility for service providers to directly contact the authority for further information, and face-to-face consulting sessions are organised in five locations, as well as consulting sessions to businesses, which can include legal advice if necessary;

- In **Greece**, the tax/revenue administration, namely the Independent Authority for Public Revenue (AADE), is currently working together with accommodation platforms to develop and implement an agreement improving access to information. Greek National Law 4446/2016 and relative Decision POL: 1187/23.11.2017 provides a legal framework for short-term rental/accommodation activities in the collaborative economy, whereby platforms must place specific links on their websites to government websites that provide guidance and information to service providers on the relevant labour and tax laws and obligations, and on the obligation for service providers to register their activity via the AADE website[10];
- In **Sweden**, the tax administration's website explains how to declare income and informs users why income should be declared, and
- In **Iceland**, the District Commissioners office provides detailed information on the tax and legal framework that applies to people wanting to rent out their properties via accommodation platforms. The information is comprehensive and outlines both the legal requirements, the registration process and tax implications of such activities. This information is available on the commissioner's website[11]. Electronic registration is available via the authority's registration portal.

### 4.2.2 Authorities directly contacting service providers

The 2019 annual Platform survey finds that enforcement authorities in only 36% of responding countries directly contact service providers to advise them to declare the income they receive from platform activity. This varies across EU regions, with 29% of Western European Member States, 50% of East-Central European Member States, 17% of Southern European Member States and 40% of Northern European countries directly contacting service providers.

Moreover, this communication is not universal. Most countries pointed out that this is only the case for workers at risk of non-compliance, where there is a suspicion of non-compliance, or for workers that are non-compliant. Among others:

- In **Estonia**, the Estonian Tax and Customs Board (ETCB) contacts service providers identified as 'risky persons' to offer counselling. These service providers, therefore, are alerted to the risks identified by the ETCB and can react accordingly before a control procedure is set in motion. The authority also has the right to request data to check the correct fulfilment of tax liability;
- In **Iceland**, the District Commissioner is also the regulatory authority for platform activities and if service providers are discovered providing rentals without prior registration with the commissioner, the authority may contact the service provider directly to ensure compliance and completion of the required registration.

### 4.2.3 Authorities requiring platforms to disclose data on service providers

A major advantage of collaborative platforms is that previously hidden undeclared work is potentially visible since platforms record the economic activities of service providers. This only applies if the platform gives enforcement authorities the transaction data of service providers to crosscheck it with individual tax returns for

[10] Available at: https://www.aade.gr/polites/eisodima/brahyhronia-misthosi-akiniton
[11] Available at: https://www.syslumenn.is/thjonusta/leyfi-og-loggildingar/heimagisting/

example, and to ensure the transactions are declared. How many enforcement authorities, therefore, request disclosure of such data, including the name of the service provider, their contracts and/or transactions?

Enforcement authorities in 68% of countries responding to the 2019 survey have the power to demand collaborative platforms provide this data. This varies across EU regions. 86% of West European Member States have this power, 70% of East-Central European Member States responding, 67% of Southern European Member States do so, but only 40% of Northern European nations.

It is tax/revenue authorities which usually possess this power (in all but one country responding). In Southern and Western European countries, Labour Inspectorates also often possess this power (67% and 57% respectively compared with 39% overall). Furthermore, social security/insurance authorities in Western European countries often possess this power (57% compared with 25% overall):

- In **Estonia**, ride-sharing platforms cooperate with the tax authority (ETCB). The aim is to simplify the tax declaration process for drivers. Transactions between the driver and the customer are registered by the collaborative platform, which then sends the relevant tax data to the ETCB, who then pre-fill individual tax forms. The aim is to help taxpayers fulfil their tax obligations effectively and with minimum effort (see European Commission, 2016b; OECD, 2019), and
- In **France**, a 2016 amendment to the French Finance Act stipulates that from 2019 all online platforms (whether based in France or abroad and regardless of the type of business) are obliged to notify the earnings of the service providers directly to the tax authorities (OECD 2019). In addition, the social security authority can demand from platforms the list of service providers who received payment through the platform. The fiscal administration provides personal information on activities over the past year to the social security authority. This enables the social security authority to determine whether social contributions are due, depending on the level of income received by that person. Only income above EUR 3 000 and more than 20 transactions per year are deemed liable;
- In **Germany**, if a platform has employer status, it must provide information as an employer pursuant to paragraph 28p Fourth Book of the Social Code (SGB IV). If they do not have employer status, specific enquiries about individual cases are directed to the platforms as third parties, in accordance with paragraph 93 of the Tax Code (AO), if a request to the actual service provider does not generate the required data on their platform transactions.

### 4.2.4 Platforms informing service providers of their obligations

Platforms can be given responsibility to inform service providers of their tax, social security and labour law obligations. The European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2002(INI)) states that 'platforms should play a pro-active role in providing information to users and workers regarding the applicable regulatory framework with a view to fulfilling legal requirements'.

However, according to the 2019 annual Platform survey, in only 21% of countries responding are collaborative platforms required to inform service providers of their tax, social security and labour law obligations. This varies across EU regions, occurring in 29% of West European Member States, 20% of Northern European nations, 17% of Southern European Member States and 20% of East-Central European Member States responding.

Interesting practices potentially transferable to other countries include the following:

- In **Estonia**, the Estonia Tax and Customs Board (ETCB) signed an agreement with an accommodation platform in 2018 whereby the platform informs service providers of their tax obligations.[12] All the necessary information is available to service providers via information posted on their homepage and by linking to the ETCB homepage, which contains clear instructions of their obligations. The agreement also allows the Airbnb service providers to voluntarily report their earnings via Airbnb to the tax authorities
- In **Greece**, service providers are redirected via the platforms to the relevant state authority website and registration application portal, which contain the necessary information about tax legislation and other practical obligations.

### 4.2.5 Platforms adopting responsibility for service provider compliance

The European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)) in paragraph 22 notes that 'digital platforms and other intermediaries should have an obligation to report all work undertaken through them to the competent authorities for the purpose of ensuring adequate contributions and protection through social and health insurance for all workers'.

The 2019 annual Platform survey examined whether platforms are required to adopt responsibilities for service provider compliance. This already occurs outside the collaborative economy, such as in the construction industry where supply chain responsibility is used (see Cremers et al., 2017). Applying a similar responsibility for regulatory functions to the collaborative economy, platforms could be required to:

- Ensure that service providers are licensed/authorised;
- Ensuring that any limits on the number of registered service providers are respected; and
- Collect tax revenues owed from service providers and forward them directly to the tax authority.

The 2019 annual Platform survey finds that enforcement authorities in only 25% of countries responding **require platforms to ensure that service providers are licensed/authorised**. This varies across the EU regions, occurring in 29% of West European Member States, no Northern European countries, 33% of Southern European Member States and 30% of East-Central European Member States.

Again, this licensing is not universal across all platforms in many countries. Licensing may only be required for specific services, such as taxi services (Austria, Czech Republic and Latvia) or rental activities including car, boat and home rental (Denmark).

- In **Greece**, service providers require a unique registration number, accessed via an online application to the state tax authority, to participate as service providers on platforms.
- In **Lithuania**, collaborative platforms are required to prove that service providers work with an individual activity certificate or business certificate.

The 2019 annual Platform survey finds that authorities in only 4% of countries responding require **platforms to ensure that any limits on the number of registered service providers** are respected. This varies across the EU regions, occurring in 14% of West European Member States but not at all in other EU regions.

The 2019 annual Platform survey finds that authorities in only 14% of countries responding **require platforms to collect tax revenues** owed from service providers and forward them directly to the tax authority. This occurs in 14% of West European

[12] See: https://news.err.ee/882386/tax-authority-signs-unique-agreement-with-airbnb

Member States, 40% of Northern European countries, 17% of Southern European Member States but no East-Central European Member States responding.

Again, this is often not universal across the whole platform economy. This may also only apply when there is an employment relationship (e.g., Finland and UK), when payments are over a certain amount (e.g., Ireland) or in specific industries (e.g. accommodation rental platforms collect tourist tax in Italy).

Interesting practices potentially transferable to other countries are the following:

- In Paris, for example, peer-to-peer rental platforms are required to collect tourist taxes owed. From October 2015, these platforms began collecting 'tourist tax' of EUR 0.83 per room per night (Vaughan and Daverio, 2016).
- In Amsterdam, an agreement was signed with a peer-to-peer rental platform to explicitly allow renting accommodation via an online platform. In return, since February 2015, the collaborative platform has collected the relevant tourist tax (Vaughan and Daverio, 2016).
- In **Belgium**, the Programme Law of 1 July 2016 introduces tax withholding at source by the platform. The law adds a new type of income in the category of 'miscellaneous income' to be taxed at 20% following deduction of a 50% allowance. This corresponds to an effective income tax rate of 10%. It applies to income up to EUR 5 000 per year. The 10% tax will be withheld at source by the collaborative platform and paid to the tax authorities. The types of activity are somewhat limited. For example, the supply of goods, such as delivery services, falls outside the scope of this legislation, as does the letting of property (De Broeck, Van Laere and Partners, 2017).
- In **Germany**, the German platform content.de collects and contributes the 5.2% of earnings to the KSK (Künstlersozialkasse) on behalf of its service providers (Sigge, 2014). This arrangement works since content.de largely performs creative writing tasks and the KSK is designed to support self-employed writers, publishers and artists. The platform uses this feature to attract both service providers and clients.

A potential problem is that if taxes owed are collected by platforms, then those service providers may decide to continue providing services to the user/client outside the platform. No evidence exists to support this. It is also unlikely to apply if the social contributions of the service providers are paid by the platform. Another solution is that because most payments are routed via national payment systems and banks, they can be tracked so that payments directly between the user and service providers can be identified. This payment information via banks could be used to determine the income of service providers.

### 4.2.6 Authorities differentiating commercial from non-commercial activity

To tackle undeclared work, it is important to distinguish between non-commercial activity undertaken via platforms (e.g., acts of small-scale mutual aid) and commercial activity. The 2019 annual Platform survey finds that enforcement authorities in 39% of countries responding state that authorities make a clear differentiation between commercial and non-commercial activities in the collaborative economy. This is more often the case in the Northern European nations (60%) and Western Europe (59%), and less so in Eastern and Central European countries (20%).

Member States distinguish commercial from non-commercial activities in different ways. In Spain, any service delivered for a price is a commercial activity and the income must be declared. In the Netherlands, collaborative economy activities must be declared if the fee received exceeds the cost of providing the service and if the activity is regular. In Poland, the differentiation is made on the basis of a definition included in the Act of 6 March 2018 Entrepreneurs' Law. The provision of Article 3 of

that Act says that 'economic activity is an organised earning activity carried out on one's own behalf and on a continuous basis'.

**Income thresholds** are used in France, Belgium, Iceland, Germany and the UKIn Iceland, non-commercial activity for property rental is limited to 90 days and/or total revenue of ISK 2m whichever comes first. If activities exceed either of those limits, the service provider is engaged in commercial activities. In many Member States, however, clarity can be lacking. In Germany, the distinction between for-profit rentals and accommodation offered by private individuals has yet to be clearly defined (Peuckert et al., 2017, p. 26; Vogelpohl and Simons, 2015, pp. 18-20).

The explicit and clear establishment of fiscal thresholds can be beneficial, since it is likely to encourage small providers to engage in the collaborative economy. At present, though, this remains ill-defined in many Member States.

### 4.2.7 Platforms differentiate commercial and non-commercial activities

The 2019 annual Platform survey finds that in only 14% of countries surveyed are platforms operating in their country required to clearly define and communicate to service providers the difference between commercial and non-commercial activities. Slightly more Western European countries indicated that platforms are required to do this (29%), and none of the Northern European countries.

Examples of good practice need to be shared about how platforms do this in particular Member States. The feasibility of transferring this to other contexts can then be considered. In **Greece**, platforms are obliged to provide guidance and links to the relevant state authority website and to the registration application form for the potential or actual service providers regarding all the provisions of the specific legislative framework for the collaborative economy for short time rentals/accommodation.

### 4.2.8 Simplifying tax compliance for service providers

The 2019 annual Platform survey finds that authorities in only 32% of countries surveyed have simplified compliance for service providers on collaborative platforms. This is more common in Southern European countries (50%) and less common in Eastern and Central European countries (10%).

This often takes the form of allowing service providers to generate small amounts of income on platforms without paying tax, which instantly legitimises small-scale trading on platforms:

- In the **UK**, the March 2016 Budget introduced two GBP 1 000 tax-free allowances for property and trading income for any sole trader. This measure was noted as the 'world's first sharing economy tax break' by the collaborative economy sector. HM Treasury estimates that this could benefit more than 700 000 taxpayers. This move was in addition to the extension of the 'Rent a Room' tax allowance on the first £7 500 of rental income from a room in a primary residence in 2015 (Vaughan and Daverio, 2016).
- In **France**, activities under EUR 3 000 and 20 transactions a year are not taxed but must be declared, as must higher levels of activity. In the home rental furnished sector, income under EUR 8 000 a year is not taxed.
- In **Austria**, self-employed persons performing platform activities 'on the side' not exceeding EUR 720 monthly or a total of EUR 12 000 per annum do not need to declare this income
- In **Belgium**, the Programme Law of 1 July 2016 adds a new type of income from platforms in the category of 'miscellaneous income' to be taxed at 20% following deduction of a 50% allowance (i.e., an effective income tax rate of 10%) which applies to income up to EUR 6 130 annually. That income must have been earned by way of services by an individual to another individual and

not be professional activity. The law requires that the service provider registers with the tax administration. All transactions are to be paid electronically and so be traceable. The law envisages that the person will not be required to pay social security contributions or fulfil registration with the Enterprises' Database. The income is exempt from value-added tax (VAT), since the VAT threshold is EUR 25 000. These rules applied from 1 July 2016, and for 2016 the limit was set at EUR 2 500 (De Broeck, Van Laere and Partners, 2017). Above this threshold, the service provider must be registered as self-employed. However, the scope of this new regime is not entirely clear as some platforms argue that service providers would not be subject to the new tax reporting obligations because the drivers are considered self-employed. Overall, discussion continues around these reforms, which have been criticised as lacking clarity and ease of understanding (Kilhoffer and Lenaerts, 2017).

- In **Denmark**, a tax deduction of DKK 28 000 is given in accordance with Danish tax legislation if the amount is reported voluntarily to the tax authorities. This concerns car, boat and housing rental.

### 4.2.9 Licensing/authorisation of service providers

The 2019 annual Platform survey finds that enforcement authorities in 43% of countries responding have introduced licensing/authorisation of service providers. This occurs in 86% of West European Member States, 20% of Northern European nations, 33% of Southern European Member States and 30% of East-Central European Member States.

In most cases, licensing or official authorisation for platform service providers apply only in specific industries. The most commonly mentioned is taxi services or ride sharing (e.g., Austria, Czech Republic, France, Latvia, Netherlands, Portugal).

Rentals are also licensed in Ireland (short-term home rentals must be registered), Iceland (where short-term home rentals surpass the maximum duration) and Austria (car rentals). In Latvia, this also applies to credit services. Meanwhile, in Greece, all service providers need to be registered and as such, licensed to perform platform activities.

Interesting practices potentially transferable to other countries are the following:

- In **Lithuania**, a legal framework exists for 'ride-sharing type' services. The new amendments to the Road Transport Code came into force in January 2017. Individuals wanting to provide passenger transport services must register a declaration that they meet insurance, roadworthiness and tax payment requirements (OECD, 2019);
- In the **Netherlands**, Uber has introduced new rules for licensing for service providers. All service providers must undergo driving training;
- In **Portugal**, legislation came into force in November 2018 addressing employment conditions around platforms operating in the passenger transport sector. The law states that drivers must have an employment relationship with the platform, since these platforms were judged transportation operators, not just intermediation services. This legislation provides a legal framework for them to operate in, but also imposes restrictions, including an obligation for drivers to acquire a special road training certificate valid for five years and a 5% tax on platforms' net profit to cover administrative and regulatory costs;
- In **Latvia** in 2018, the government similarly approved regulations for providing passenger transport services, including via platforms. This requires service providers to register for a special permit. Currently only professional service providers (legal persons or firms) can provide passenger transport services, including via platforms. However, the Ministry of Economy is considering whether to allow non-professional service providers (peers) to register for the

special permit and provide passenger transport services via platforms (OECD, 2019);

- In **Greece**, as already mentioned, all service providers are obliged to register through the state authority web-page of AADE and get a single/unique registration number in order to participate in economic activities on collaborative platforms;
- In **Iceland**, those wanting to use a collaborative platform to rent out their properties for longer than 90 days or exceed the total income of ISK 2m are required to undergo registration and licencing[13].

There have been European Court of Justice (ECJ) rulings on **whether such national legislation adopted to restrict market access is suitable and proportionate** for the purposes of preventing practices involving undeclared work. The ECJ judgment of 10 April 2018 on the case of Uber in France makes clear that collaborative platforms can be subject to obligations and prohibitions established in national law that restrict market access, and it is for Member States to regulate the conditions under which services such as the Uber booking-app can operate (see Appendix, Box A1).

### 4.2.10 Other preventative activities

44% of countries responding to the 2019 annual Platform survey have introduced a range of additional preventative initiatives, mostly involving information websites (36%), which have been commonly used in Northern European countries (80%). Figure 15 illustrates the types of preventative initiatives used. Aside from information websites, other preventative initiatives are not commonly used.

**Figure 16**. Types of preventative initiatives used across the EU and by European region

| | EU | Western Europe | Eastern and Central Europe | Southern Europe | Northern Europe |
|---|---|---|---|---|---|
| **Awareness campaigns targeted at:** | | | | | |
| users | 14% | 14% | 20% | 0% | 20% |
| service providers | 14% | 14% | 20% | 0% | 20% |
| platforms | 4% | 0% | 10% | 0% | 0% |
| **Information:** | | | | | |
| websites | 36% | 29% | 20% | 33% | 80% |
| hotlines | 18% | 14% | 20% | 33% | 0% |

*Source: 2019 Annual Platform Survey, based on 27 responses*

An example of an education and awareness campaign that addresses undeclared work and bogus self-employment in the collaborative economy is the FairWork initiative which informs users and potential service providers of whether an individual collaborative platform offers decent work conditions (see Box 1).

***Box 1. Fairwork: a decent work rating system for collaborative platforms***

Many platform workers, lacking protection from employment law or collective bodies, face low pay, precarious, poor and dangerous working conditions. Fairwork, is a project that seeks to set and measure decent work standards in the platform economy. In a partnership with the International Labour Organisation (ILO), it brings together platforms, workers, trade unions, regulators, and academics to set global principles for fair work in the platform economy. The principles, developed in tripartite workshops in

[13] See: https://www.syslumenn.is/thjonusta/leyfi-og-loggildingar/heimagisting/

South Africa, India, and Germany, are:

**1. Fair Pay -** Workers, irrespective of their employment classification, should earn a decent income in their home jurisdiction after taking account of work-related costs.

**2. Fair Conditions -** Platforms should have policies in place to protect workers from foundational risks arising from the processes of work, and should take proactive measures to protect and promote the health and safety of workers.

**3. Fair Contracts-** Terms and conditions should be transparent, concise, and provided to workers in an accessible form. The party contracting with the worker must be subject to local law and must be identified in the contract. If workers are genuinely self-employed, terms of service are free of clauses which unreasonably exclude liability on the part of the platform.

**4. Fair Management -** There should be a documented process through which workers can be heard, can appeal decisions affecting them, and be informed of the reasons behind those decisions. There must be a clear channel of communication to workers involving the ability to appeal management decisions or deactivation. The use of algorithms is transparent and results in equitable outcomes for workers. There should be an identifiable and documented policy that ensures equity in the way workers are managed on a platform (for example, in the hiring, disciplining, or firing of workers). Data collection should be documented with a clear purpose and explicit informed consent.

**5. Fair Representation -** Platforms should provide a documented process through which worker voice can be expressed. Irrespective of their employment classification, workers should have the right to organise in collective bodies, and platforms should be prepared to cooperate and negotiate with them.

Using these principles, every platform will be given a 'fairness' score. For each of the five Fairwork Principles, a basic point and an advanced point can be awarded to platforms, leading to a total fairness score out of ten.

Fairwork in 2019 piloted this rating scheme on 22 platforms in South Africa and India. While 88% of South African platforms scored 5/10 or more, only 9% of Indian platforms achieved the same score range. For 2020, there has been a call for companies wishing to be certified and the project's scope broadened to include platforms in Chile, Ecuador, Germany, Indonesia and the UK.

*Source: https://fair.work*

# 5 TACKLING BOGUS SELF-EMPLOYMENT: RECENT DEVELOPMENTS

***Key Questions:***

- Do Member States define self-employment and dependent employment in national legislation? If so, how? Is bogus self-employment clearly defined in law and if so, how?
- What legal decisions have been taken that are important for tackling bogus self-employment?
- Which enforcement authorities have legislative competences to tackle bogus self-employment (e.g. labour inspectorates, tax authorities, social security) and what tools do they use to tackle it?

## 5.1 Introduction

To evaluate how bogus self-employment can be tackled, this section first reviews whether Member States have legal definitions of dependent employment, self-employment and bogus self-employment, which are a prerequisite to identify the misclassification of employment relationships, plus important legal decisions to clarify this. Second, the authorities with competence to tackle bogus self-employment are identified in each Member State. Attention then turn to evaluating policy initiatives that used to tackle bogus self-employment.

Two broad drivers for bogus self-employment can be identified. On the one hand, unintentional bogus self-employment arises due to a lack of knowledge of the rules or due to complex legal rulings being difficult to understand. On the other hand, intentional bogus self-employment is closely related to **financial gain**. Where this is the driving force, then enforcement authorities need to **make the costs of misclassifying workers outweigh the benefits**. To achieve this, firstly, enforcement authorities can increase the costs of misclassifying workers and/or secondly, incentivise the appropriate classification of workers. To evaluate the policy initiatives pursued to make the costs of misclassifying workers outweigh the benefits, the third section reviews how Member States have sought to **raise the costs**, by increasing sanctions for misclassification (i.e., requalification of the employment relationship into the correct contractual relationship to criminal penalties, with various civil and economic sanctions in between) and/or the likelihood of detection. This will highlight that identifying such contractual violations is difficult. This is not only because whistle-blowers are deterred by fear dismissal and the lack of appropriate information available to workers on their rights, but also because the time, costs and uncertainty involved regarding the outcome of administrative or judicial authorities currently prevents this type of initiative.

The fourth section, therefore, reviews the option of **incentivising** employment relationships to be classified appropriately. Such incentives can include: making the financial costs of employers outsourcing to the self-employed equal to those of using dependent employment; making it easier for employers to legitimise their employment relationships with their workers, and extending social protection to the self-employed generating fewer advantages to misclassifying workers as self-employed.

All these policy initiatives, however, assume that bogus self-employment is purely a rational economic calculation (taken by employers or even potentially sometimes workers). This is not always the case. Bogus self-employment can be also either **unintentional** due to a lack of knowledge of the rules and due to complex legal rulings being difficult to understand, or it can result from a lack trust in the state and/or the benefits of compliance (Williams, 2019). The fifth section therefore reviews education and awareness-raising campaigns.

## 5.2 Using legal definitions to tackle worker misclassification

Within most legal systems, a 'binary divide' exists between dependent employment and self-employment, with dependent employment serving as the basis for labour regulation and protection. The regulatory and tax gaps that exist between dependent employment and self-employment in many Member States are what entice employers to misclassify workers as self-employed. These workers then fall outside the scope of labour law protections (dismissal, holiday pay, sick leave) and collective bargaining coverage, and are subject to different fiscal and tax regulations.

This is why a pre-requisite for tackling bogus self-employment is that Member States must be able to differentiate between dependent employment, self-employment and bogus self-employment. This requires legal definitions. The Employment Relationship Recommendation No 198 adopted at the 2006 International Labour Conference has been useful here. This sets out a series of principles to help countries tackle employment misclassification. Recommendation No 198 establishes the principle of the 'primacy of facts', whereby determining the existence of an employment relationship should be guided by the facts relating to the actual performance of work, rather than on how the parties describe the relationship. Many jurisdictions use this principle either statutorily or via case law, such as Bulgaria, Ireland, Italy, Poland and the UK (see ILO, 2006, 2016).

A second principle is that workers possessing certain characteristics should be deemed to be employed or self-employed. Bogus self-employment in most EU Member States legally falls within a grey zone and as such, a need has been identified for criteria to be established to more effectively define if a worker is employed or self-employed. This is an on-going process and is being addressed in different ways in different European countries.

### 5.2.1 ECJ judgements

The European Court of Justice (ECJ) has declared that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker under EU law if their independence is merely notional, thereby disguising an employment relationship. Thus, to evaluate if a relationship of subordination exists, it is necessary to consider: the nature of the duties entrusted to that person; the context in which those duties were performed; how far they were supervised within the business; and the circumstances under which the person could be removed.

Important in this regard is the ECJ Judgment of 13 January 2004 in the **Allonby case**, C-256/01, EU:C:2004:18. In this legal case, the concept of a worker is interpreted comprehensively, including a person who is 'formally' considered self-employed. Thus, the formal classification of a person as self-employed under national law does not exclude the possibility that a person must be classified as a worker under gender equality rules if their independence is merely notional, thereby disguising an employment relationship. This ruling therefore has the effect of extending pension rights and gender protection to bogus self-employment (see Appendix, Box A2).

A further ECJ ruling is the **Donosa case** which states that one can evaluate whether a relationship of subordination exists by considering: (a) the nature of the duties entrusted to that person; (b) the context in which those duties were performed; (c) how far they were supervised within the company; and (d) the circumstances under which the person could be removed. This can lead to a clear distinction between genuine self-employment and dependent employment. This case is set in the context of related case law such as: Petersen, C-544/11, EU:C:2013:124, pa. 30; Haralambidis, C-270/13, EU:C:2014:2185, pa. 29-30; Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, pa. 28; N., C-46/12, EU:C:2013:97, paragraph 40; Lawrie-Blum, 66/85, EU:C:1986:284 (see Appendix, Box A3).

A further ECJ Judgment of 4 December 2014 in FNV Kunsten Informatie en Media, C-413/13, EU:C:2014:2411 establishes that the right to collective bargaining of the bogus self-employed is not against EU competition law. This ruling is studied in the context of related case law, such as the Judgment of the ECJ in Agegate, C-3/87, EU:C:1989:650, pa. 36 and Becu and Others, C-22/98, EU:C:1999:419, pa. 26. This judgement provides legal grounds to extend the right of collective bargaining to bogus self-employment. The criteria developed in this judgment allow for the classification of self-employed covered by collective agreements not as 'undertakings' but as 'false self-employed', thus rendering inapplicable the prohibition contained in Article 101(1) TFEU. This extension of collective bargaining to bogus self-employment directly contributes to the improvement of the employment and working conditions of the 'bogus self-employed'. It allows the minimum fees scheme put in place by the collective labour agreement to apply to bogus self-employment. In addition, it also enables contributions to be made to pension insurance corresponding to participation in the pension scheme for dependent employees, thereby guaranteeing them the means necessary to be eligible in the future for a certain level of pension benefits (see Appendix, Box A4).

Furthermore, in the ECJ Judgment of 30 March 2000, in **Barry Banks** and Others, C-178/97, ECLI:EU:C:2000:169, those cases are analysed wherein workers are channelled through letterbox arrangements and not declared to social security offices and/or tax departments. This type of undeclared work involves non-declaration of the real employer, using fraudulent subsidiaries for registering bogus self-employment. The solution offered by the ECJ focuses on the promotion of cross-border cooperation between Member States. This ruling is studied in the context of related case law, such as ECJ Judgments of 6 February 2018 Altun and Others, C-359/16, EU:C:2018:63, pa. 17-20, 54, 55, 60 and 61; Alpenrind, Case C-527/16, ECLI:EU:C:2018:669; Herbosch Kiere, C-2/05, EU:C:2006:69, pa. 30; A-Rosa Flusschiff, C-620/15, EU:C:2017:309, pa. 47. During the proceedings before the ECJ in the *Banks* case, German and Dutch governments expressed concern that allowing such workers to retain their condition of self-employed in another country would have social dumping effects. In their view, this would enable any person to become affiliated to the social security scheme for self-employed persons of a Member State where contributions are modest, with the sole purpose of going to another Member State to work as an employed person, without paying the higher contributions of the latter state. To address such concerns, in this ruling, the ECJ emphasises the requirement that the posted self-employed worker habitually performs significant activities in the territory of the Member State where they are established (the 'substance test'). For that reason, this case law acts as an important deterrent to cross-border bogus self-employment (see Appendix, Box A5).

### 5.2.2 Legal definitions in Member States

Worker classification fundamentally determines a worker's access to rights, benefits and protections. To identify whether workers are misclassified as self-employed rather than dependent employed, a pre-requisite is that definitions of dependent employment and self-employment are required in national law and, ideally, a definition of bogus self-employment.

Analysing the 2019 annual Platform survey, national legislation provides a legal definition of:

- Self-employment in 85% of countries responding (i.e., 26 EU Member States, excluding Luxembourg and Romania, plus Norway and Iceland). Croatia, Estonia, Finland and the UK indicated they did not have a definition. Austria did not respond.
- Dependent employment in 50% of countries responding. Most Southern European Member States indicated they had such a legal definition (83%), 43% of Western European Member States, 50% of East-central European Member

States, whereas only 20% (one) of Northern European countries have such a definition.

- Bogus self-employment in 25% of countries responding, namely Belgium, Czech Republic, Greece, Ireland, Malta, Portugal and Slovakia.

Some 25% of countries surveyed have therefore introduced a hybrid legal category which, in most cases, is intended to provide dependent self-employed workers with legal rights that would not exist under the legal status of self-employment (e.g., Austria, Germany, Italy, Portugal and Spain). Further, in Ireland, the Competition (Amendment) Act 2017 introduced two new categories of worker, namely the 'false self-employed worker' and the 'fully dependent self-employed worker' (EU-OSHA, 2017).

Other Member States have maintained the binary divide between employment and self-employment and their approach towards dependent self-employment has included (ILO, 2016):

(i) Presumptions that these are employees who fall within the scope of employment protection legislation (France, Greece, Luxembourg, Malta, the Netherlands);

(ii) Reversal of the burden of proving employee status (Belgium); and

(iii) Listing criteria that enable the classification of workers as either employees or self-employed (Austria, Belgium, Germany, Ireland).

The presumption that workers fall within the scope of a dependent employment relationship might either use certain criteria as, for example, in Malta (see Box 2), protect certain occupations or use as a benchmark a certain period of time. In Greece, when work is performed for the same client for more than nine consecutive months (particularly for home working, tele-working, piecework), the agreement is considered to conceal a subordinate employment relationship (Heyes and Hasting, 2017; ILO, 2015). In the Netherlands, the law presumes that an employment relationship exists when an employee regularly works for an employer (i.e., weekly or minimum 20 hours per month) for a period of three months (ILO, 2016). In Austria, a presumption of subordination is applicable to certain occupations such as sales representatives, pharmacists in dispensaries and sports people (Eichhorst et al., 2013). This is also the case in France where the work of professional journalists, some artists, fashion models and sales representatives falls under the protection of employment contracts regardless of the type of agreements with their employers (ILO, 2016).

**Box 2. Indicators for presuming an employment relationship in Malta**

When at least five of the following criteria are met, a presumption of employment relationship is applied (ILO, 2016, p. 265):

(a) '[they depend] on one single person for whom the service is provided for at least 75% of their income for one year;

(b) [they depend] on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;

(c) [they perform] the work using equipment, tools or materials provided by the person for whom the service is provided;

(d) [they are] subject to a working time schedule or minimum work periods established by the person for whom the service is provided;

(e) [they] cannot sub-contract [their] work to other individuals to substitute [themselves] when carrying out work;

(f) [they are] integrated in the structure of the production process, the work organisation or the company's or other organisation's hierarchy;

(g) [the persons'] activity is a core element in the organisation and pursuit of the objectives of the person for whom the service is provided; and

(h) [they carry out] similar tasks to existing employees, or, when work is outsourced, [they perform] tasks similar to those formerly undertaken by employees.'

*Source: Employment Status National Standard Order, LN 44/2012*

The criteria used to classify workers as either employees or self-employed vary across Member States. Box 3 highlights the code of practice for determining the employment or self-employment status of a worker in Ireland, while Box 4 outlines the criteria used in Romania.

**Box 3. Criteria used to differentiate the employment status of individuals in Ireland**

*Code of Practice for Determining the Employment or Self-Employment Status of Individuals* (Ireland's Code of Practice for Determining Employment or Self-Employment Status of Individuals, 2018):

- 'While all the following factors may not apply, an individual would normally be an *employee* if he or she:
  - Is under the control of another person who directs as to how, when and where the work is to be carried out.
  - Supplies labour only.
  - Receives a fixed hourly/weekly/monthly wage.
  - Cannot subcontract the work. If the work can be subcontracted and paid for by the person subcontracting the work, the employer/employee relationship may simply be transferred.
  - Does not supply materials for the job.
  - Does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on concluding that employment status may be appropriate considering all the circumstances of a particular case.
  - Is not exposed to personal financial risk in performing the work.
  - Does not assume any responsibility for investment and management in the business.
  - Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.
  - Works set hours or a given number of hours per week or month.
  - Works for one person or for one business.
  - Receives expense payments to cover subsistence and/or travel expenses.
  - Is entitled to extra pay or time off for overtime.
- While all the following factors may not apply to the job, someone would normally be *self-employed* if they:
  - Own their own business.
  - Are exposed to financial risk by having to bear the cost of making good faulty or substandard work performed under the contract.
  - Assume responsibility for investment and management in the enterprise.
  - Can profit from sound management in the scheduling and performance of

engagements and tasks.

- Have control over what is done, how it is done, when and where it is done and whether they do it personally.
- Are free to hire other people, on their terms, to do the work which has been agreed.
- Can provide the same services to more than one person or business at the same time.
- Provide the materials for the job.
- Provide equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account.
- Have a fixed place of business where materials, equipment etc. can be stored.
- Cost and agree a price for the job.
- Provide their own insurance cover e.g. public liability cover etc.
- Control the hours of work in fulfilling the job obligations.'

*Source: Ireland's Code of Practice for Determining Employment or Self-Employment Status of Individuals (2018)*

**Box 4. Criteria used to differentiate the employment status of individuals in Romania**

Although bogus self-employment is not specifically stipulated in the Romanian Fiscal Code, it provides the definition of 'dependent activity' and various criteria for defining the 'independent activity', under the Law No 227/2015[14]. 'Dependent activity' is defined as 'any activity undertaken by a natural person in an employment relationship which generates income'. 'Independent activity' meanwhile, is defined as 'any activity conducted by a natural person in order to obtain income, which meets at least four out of following criteria'[25]:

- The individual has the freedom of choice of where and how to work, as well as the freedom to choose the working programme;
- The individual has the freedom to have more customers (more than one customer);
- Inherent risks of the business are assumed by the individual;
- Work is performed by using individual's assets;
- Work is performed by the individual via intellectual and/or physical skills, depending on the particularities of each activity;
- The individual is member of a professional body, with the role of representation, regulation and supervision of profession carried out, according to special normative acts regulating the organisation and how the profession in question it is conducted; and,
- The individual has the freedom to conduct directly the activity, with employees or in collaboration with third parties according to the law.

[14] Romanian Fiscal Code - 2015, 'Law no. 227/2015 updated', available at: https://static.anaf.ro/static/10/Anaf/legislatie/Cod_fiscal_norme_27122018.htm.

However, the ILO (2016) argues that when the nature of a working relationship is tested based on 'economic reality', the criteria could be flexible, particularly when the control criterion is investigated, in order to keep pace with the technological developments and practices in the collaborative economy, where control over the workers is not expressed directly by the employer but rather expressed by using the platform customers reviews and rating system. The status of platform workers raise concerns considering that they are not independent of the platform they work for (Eurofound, 2018a). As a result, the European Commission's Agenda for the Collaborative Economy provides three criteria for the courts to use to determine the employment relationship of platform workers, namely the existence of a **subordination link, the nature of work and the presence of remuneration** (Eurofound, 2018a; European Commission, 2016c).

In most Member States, the criteria used to determine the employment status of a platform worker include:

- the agreement (e.g., whether the employer is paid via fixed remuneration or invoice, whether there is a guaranteed pay for holiday, sickness etc., whether there is any training clause included);
- the organisation of work (e.g. whether the work is organised freely or under precise control, whether the tools used by the worker belong to the worker or to the platform, whether there is an exclusivity clause);
- the working time organisation (e.g., whether the working hours are imposed by the platform, whether the holiday time is imposed by the platform), and
- the possibility of exercising hierarchical supervision (e.g., disciplinary sanctions in place, the possibility to apply precise instructions by the platform) (for a complete list of criteria, see Nerinckx, 2016).

Case law has been used in many Member States to establish precedents on who is a self-employed and who is in dependent employment:

- In the **UK**, for example, a key case is Supreme Court of the United Kingdom Judgment of 13 June 2018, in the Pimlico Plumbers Ltd & Anor v Smith case[15]. The tribunal analysed whether Mr Smith is ruled an independent contractor even though his contract referred to 'wages', 'gross misconduct' and 'dismissal'. The ruling set out legal criteria for distinguishing bogus self-employment from genuine self-employment (see Appendix, Box A6).
- In **Spain**, an important legal case in the Spanish Supreme Court (Tribunal Supremo) was the judgment of 20 November 2015, in the Bimbo SAU case, in relation with Juzgado de lo Social No 39 de Madrid Judgment of 3 September 2018. These rulings provide a specific analysis of 'para-subordinate work', also known as 'economically dependent self-employed work'. According to the national court, certain workers cannot be described as employees, and yet are economically dependent on a single client, entitled to the social rights warranted by this dependence, including collective bargaining (see Appendix, Box A7).
- In **Italy**, an important case was the Corte di Appello di Torino (Italy) Judgment of 11 January 2019 in the Foodora case[16]. Although the riders are by contract 'independent contractors', the Court analyses whether they can be classified as

[15] The Court of Appeal Judgment (United Kingdom) of 19 December 2018, in the Uber v Aslam & Others case has been left out, as the Uber platform and UK legislation are dealt with in the case law boxes devoted to the Uber and Pimlico cases.

[16] The Cour de Cassation Judgment of 28 November 2018, in Take Eat Easy case and the Cour d'appel de Paris Judgment of 10 January 2019, in the Uber case, have been left out as it mode of operation is dealt with in the boxes devoted to the Glovo and Foodora cases, and French laws are dealt with in the box devoted to the Uber case.

para-subordinated workers ('etero-organizzazione'). Thus, riders would be self-employed but offered some specific protection regarding safety and hygiene, remuneration, working time and social security rights (see Appendix, Box A8).

- In **Germany**, the Beigeladene legal case on whether a nurse is an independent contractor has been important in establishing how to identify misclassification of employment relationships in Germany. German case law on bogus self-employment applies the 'primacy of facts' rule and a presumption on the existence of an employment relationship, meaning that the burden of proof is placed on the employer in a dispute concerning employment status (see Appendix, Box A9).
- In the **Netherlands**, the Rechtbank Amsterdam Judgment of 15 January 2019 in the Deliveroo case was important in determining employment misclassification. The Court analyses whether riders are independent contractors and if Deliveroo falls under the scope of the professional goods transport collective bargaining agreement (see Appendix, Box A10).

### 5.2.3 Towards a common definition for dependent contractors

To introduce a hybrid legal category of employment relationship that sits between dependent employment and self-employment, a recent proposal in the UK has been to create a 'dependent contractor' employment status (Taylor, 2017). Discussed at the 2017 European Platform tackling undeclared work plenary thematic discussion on bogus self-employment (Heyes and Hastings, 2017), this has since been taken forward by the ILO (2018a,b).

To better define the bogus self-employed, the ILO proposes that they should be labelled as 'dependent contractors' who they define as follows:

> 'Dependent contractors are workers who have contractual arrangements of a commercial nature to provide goods or services for or on behalf of another economic unit, are not employees of that economic unit, but are dependent on that unit for organisation and execution of the work or for access to the market' (ILO, 2018a,b).

To facilitate the correct classification of dependent contractors, the ILO (2018a,b) provides an extended definition of dependent contractors. These characteristics of dependent contractors are (ILO, 2018b, p. 50):

- 'their work is organised or supervised by another economic unit as a client, or as an entity that mediates access to clients;
- the mode of payment is by way of a commercial transaction;
- the price paid for the goods produced or services provided is determined by the client or an intermediary;
- access to raw materials, equipment or capital items is controlled by the client or an intermediary;
- their actual working arrangements or conditions may closely resemble those of employees;
- the entity on which the worker is dependent does not withhold income tax for the worker;
- the worker is responsible for arranging their own social insurance and other social contributions.'

According to the ILO (2018a), this proposed definition enables clear boundaries to be established between dependent contractors, dependent employees and self-employed people. This, therefore, is a potential way forward to avoid the misclassification of a worker.

## 5.3 Enforcement authority competencies

The 2019 annual survey of the European Platform tackling undeclared work establishes that tax/revenue authorities in 81% of countries responding have the competence to tackle bogus self-employment. All Northern European countries stated this was the case.

Labour Inspectorates in 78% of responding countries, have the competence to tackle bogus self-employment. However, although Labour Inspectorates are involved in all Eastern and Central European countries, only just over half (57% and 60%) of respondents from Western and Northern European countries respectively assign their Labour Inspectorates with this legislative competence.

In the case of assigning competence to social security/insurance authorities, 52% of all countries said these authorities had competence to tackle bogus self-employment. A large majority of Western European countries answered that social security/insurance authorities have this competence (86%) compared with just 20% in Eastern and Central Europe.

As Heyes and Hastings (2017) find, however, enforcement authorities rarely have performance measures related specifically to bogus self-employment in that specific key performance indicators (KPIs) or specific targets are rarely found in this area.

One exception is Italy where the performance of the labour inspectorate is rated annually, and issues related to the detection of bogus self-employment are included when awarding points (Heyes and Hastings, 2017). Daugareilh et al. (2019) also report that labour inspectors in Italy are evaluated and paid using a scoring system. However, they also reveal that the highest score is for discovering instances of undeclared work. The score is much lower for reclassifying a self-employed worker as an employee. When it is also realised that platform workers are not in one workplace, but are geographically dispersed, making it difficult for labour inspectors to do inspections, it becomes understandable why in Italy very few inspections have targeted platform activities.

The introduction of KPIs related to bogus self-employment, therefore, might encourage enforcement bodies to focus on this rather than other issues (such as undeclared work), which are easier to detect and prosecute. However, the lesson from Italy is that even if KPIs are established for bogus self-employment, attention needs to be paid to ensuring that inspectors are as equally motivated to achieve this KPI as others associated with conventional undeclared work.

This is similarly the case when it comes to tackling **cross-border bogus self-employment**. The finding in the 2019 annual Platform survey is that 26% of the countries responding assert that they have conducted cross-border inspections focused upon bogus self-employment. There are regional variations. 71% of Western European Member States assert that they have conducted cross-border inspections focused upon bogus self-employment, compared with 20% of Northern European countries, 10% of East-Central European Member States, and no Southern European Member States.

Over the past two years, Germany has undertaken 11 trans-nationally prepared audits based on the Franco-German agreement on cooperation in the fight against undeclared work and cross-border abuse of social benefits and employment in cross-border agency work. The Labour Inspectorate of the Netherlands and Belgium have also conducted a joint inspection, as part of an investigation into bogus self-employment.

Examining the major obstacles to tackling cross-border bogus self-employment (and how they could be overcome), several issues were raised by the respondents in the 2019 annual Platform survey.

Firstly, the enforcement authorities in 32% of the countries responding stated that **data sharing could be more efficient and timelier**. There was a perception that the IMI could be more effectively used, such as the user informing the authorities of the country of origin of the worker about any non-compliance, as well as any consequences (e.g. sanctions).

Secondly, enforcement authorities in 29% of the countries responding stated that **different legal definitions of (bogus) self-employment across countries** makes tackling this a difficult task. The French respondent pointed out a singular example where a worker was classified as an independent self-employed in Belgium, but as salaried in France. Clearer and harmonised definitions would better facilitate tackling cross-border bogus self-employment.

Thirdly, enforcement authorities in 18% of the countries responding stated the need for **better cooperation** between Labour Inspectorates and the need for joint inspections and controls.

However, the fundamental difficulty in tackling this issue seems to come from the **nature of bogus self-employment**. Bogus self-employment is often associated with smaller scale activities and is widely dispersed. This makes detection difficult. Even if detection has occurred, proving the nature of the employment relationship may be difficult legally. The complexity of this situation may be exacerbated by a lack of resources dedicated to tackling cross-border bogus self-employment. This might be because there is often **a perception that tackling national-level bogus self-employment (and undeclared work) is more of a priority than tackling cross-border bogus self-employment (and undeclared work)**.

Finally, **language difficulties** are asserted to exists when investigating cross-border cases of bogus self-employment.

## 5.4 Deterrence initiatives

In this section, the measures that enforcement authorities can pursue to increase the costs of misclassifying workers are analysed. The next section will then analyse the measures that enforcement authorities can use to incentivise the appropriate classification of workers, and section 5.6 the measures that enforcement authorities can pursue to reduce unintentional bogus self-employment.

To **increase the costs** of misclassifying workers as self-employed, enforcement authorities with responsibility for addressing this employment relationship can increase the sanctions and/or the risks of detection.

### 5.4.1 Sanctions for misclassifying workers

**Sanctions** for misclassification are not limited to criminal penalties imposed on businesses who misclassify workers. Sanctions range from the requalification of the employment relationship into the correct contractual relationship to criminal penalties, with various civil and economic sanctions in between.

In many Member States, the usual sanction is a requalification of the employment relationship. As such, labour courts do not declare the employment relationship void, but change it to a dependent employment relationship, often applied from the original start-date of the employment relationship. Further, all rights (e.g., minimum wage, pension contributions) associated with the real contractual relationship are also applied and the costs must be paid by the employer, as if the relationship had been correctly qualified since the beginning of the employment relationship. This applies in countries such as the Czech Republic, Finland, France, Germany, Ireland, Luxembourg, Portugal, Sweden, the UK and the Netherlands (Eurofound, 2016b). Many countries also apply fines (e.g., Spain, the Netherlands, UK) in addition to the above costs associated with requalifying the employment relationship. In the Netherlands, for example, the fine can be up to 100% of the amount of money recovered due to the misclassification of worker (Heyes and Hastings, 2017).

In other Member States, the requalification of the employment relationship is limited to certain aspects. In Romanian law, the requalification of self-employment as waged employment is relevant only for fiscal matters (Eurofound, 2016b). The fiscal authority (National Agency for Fiscal Administration – ANAF) recalculates the taxes due as for a dependent activity and can apply additional penalties (Heyes and Hastings, 2017). In Italy and Greece, the law excludes the possibility of requalifying the employment relationship when the employer is a public administration body. In such cases, only economic compensation is provided. In Norway, requalification of the employment relationship is seen as an alternative to economic compensation and the worker is given a choice between which of the two they wish to receive. It is an either/or choice rather than the worker receiving both the reclassification of their employment relationship as well as compensation. In Ireland, Poland and the UK, only judges, not labour inspectorates or equivalent control bodies, can reclassify the employment relationship, meaning that the employee must sue the employer. However, the length and costs of trials, and fear of being viewed as a 'difficult worker' by prospective future employers, often discourages workers from taking such action. Sweden has addressed this problem by allowing trade unions to sue the employer on behalf of the worker. The sanctions are usually applied to the employer rather than to the worker because of the difference of power between the two in deciding the type of contract (Eurofound, 2016b).

Although sanctions to deter bogus self-employment are common, the problem remains that detecting such violations is difficult. This weakens the actual effectiveness of penalties as a deterrent. This is due to the difficulties facing inspectorates in detecting such practices, judges in proving such a practice, and the obstacles confronting workers who might wish to take action against an employer (i.e., the time, cost and lack of appropriate information on workers' rights), including that the outcome of such an action is uncertain.

Until now, there has been little, if any, evidence-based evaluation of which type of sanction-system is most effective in terms of tackling bogus self-employment. Indeed, any such cross-national comparative evaluation of sanctions systems will need to address is what these sanctions are seeking to achieve. For example, if the goal is reclassifying the employment relationship, then the most effective sanction system is likely to differ to the sanction system that is most effective if the goal is to maximise the penalties imposed on employers.

As such, the lessons learned from studying sanction systems with regard to undeclared work can be applied to the sanction systems required to tackle bogus self-employment. In relation to undeclared work, the sanctions applied to undeclared work differ if the goal is to transform undeclared work into declared work (see Williams, 2019b). In Greece, for example, sanctions have been used that provide incentives for employers to transform undeclared work into declared work. The fine for undeclared work is set at EUR 10 500 for each undeclared employee. However, the employer can hire within 10 days the undeclared employee to decrease the fine by the following amounts: EUR 7 000 if they hire the employee for 3 months; EUR 5 000 if they hire the employee for 6 months; and EUR 3 000 if they hire the employee for 12 months. The net outcome of preliminary evaluations is that this is more effective at transforming undeclared work into declared work, with a greater proportion of detected undeclared workers now hired on a declared full-time basis.

A similar sanctions approach could be applied to the misclassification of employment relationships. The fine for misclassification could be reduced if the employer takes on the worker as a dependent employee for similar time-periods. One way forward, therefore, is to conduct a pilot study to evaluate the effectiveness of such a sanctions system. This pilot study could be conducted in relation to a particular sector or occupation where bogus self-employment is prevalent (e.g., skilled agricultural, forestry and fishing). It is not only sanctions, however, that can increase the costs of misclassifying workers.

### 5.4.2 Improving the risks of detection

Another means of increasing the costs of misclassifying workers is to increase the perceived or actual risks of employers being caught who employ bogus self-employed workers. This requires enforcement authorities to improve the risks of detection. **Inspections** are one way of achieving this. Identifying bogus self-employment during inspections, however, is potentially problematic, not least due to workers perhaps being unwilling to highlight their employment misclassification. There has been until now little mutual learning between Member States on how to conduct effective inspections to tackle bogus self-employment. Examples of effective national inspection practices in identifying bogus self-employment, therefore, are required so as to explore the feasibility of their transfer to other Member States.

In this regard, there is also a need to improve **risk assessment** to identify instances of bogus self-employment. The 2019 annual Platform survey reveals that few Member States have well-developed risk assessment systems that are used to interrogate databases to identify potential instances of bogus self-employment. Just under half (43%) of country responses indicated that their competent authorities apply risk assessment to identify bogus self-employment. In Southern European countries this is more commonly applied (60% indicated risk assessments are being used). In Spain, there has been some data crossing (SS Treasury and Tax Agency) to detect cases of bogus self-employment. In Portugal, meanwhile, economic dependence is assumed if more than 80% of the income of a self-employed person derives from a single entity. In Estonia, the primary risk criteria are: the company conducts transactions between companies that are managed under members of its management body and/or (former) employees; transactions are regular; the content of the transactions is the provision of the service. This suggests a need for Member States to consider more fully the criteria used in data mining to identify instances of bogus self-employment. So far as is reported by Member States to the 2019 annual Platform survey, this currently appears to be very undeveloped.

Asking respondents about the major barriers to tackling bogus self-employment in their Member State, the following issues were raised:

- The lack of comparable tax and social contributions levels between employees and the self-employed;
- The lack of awareness raising activity to inform people engaged in bogus self-employment that employers only use this to circumvent labour law provisions and reduce costs, and their consequent unwillingness to cooperate with state authorities;
- The lack of training and education of labour inspectors who have the competence to file lawsuits with courts on this issue;
- Lack of data availability and analytical capacity to identify such a relationship;
- The cost of pursuing investigations which are case-by-case, and time-consuming;
- The lack of an inter-agency approach that joins-up data and grounds risk-analysis in uniform indicators; and
- The lack of a clear definition and uniform definitions across countries.

These obstacles may be the reason for the relatively low success rates of tackling bogus self-employment. When asked in the 2019 annual Platform survey for their success rates in tackling this issue, few enforcement authorities provided solid figures. The Czech Republic saw 510 cases of bogus self-employment in 2018, and 308 in 2017. In Slovenia, between January and the end of November 2018, the Labour Inspectorate found 95 infringements in the area of bogus self-employment. Some infringements established relate to a large number of workers and for each worker, it

is necessary to establish and prove the misclassification of their employment relationship.

## 5.5 Incentivising the appropriate classification of workers

An alternative to the deterrence approach that raises the perceived and/or actual costs of misclassifying workers so that they outweigh the benefits is to incentivise the appropriate classification of workers. A first option in this regard is to equalise the financial costs to employers of using dependent employment and self-employment. A second option is to make it easier and cost-free for employers to legitimise their bogus self-employment and convert them into dependent employees. A third and final option is to extend social protection to the self-employed. Each is considered in turn.

### 5.5.1 Equalising the costs of employment relationships

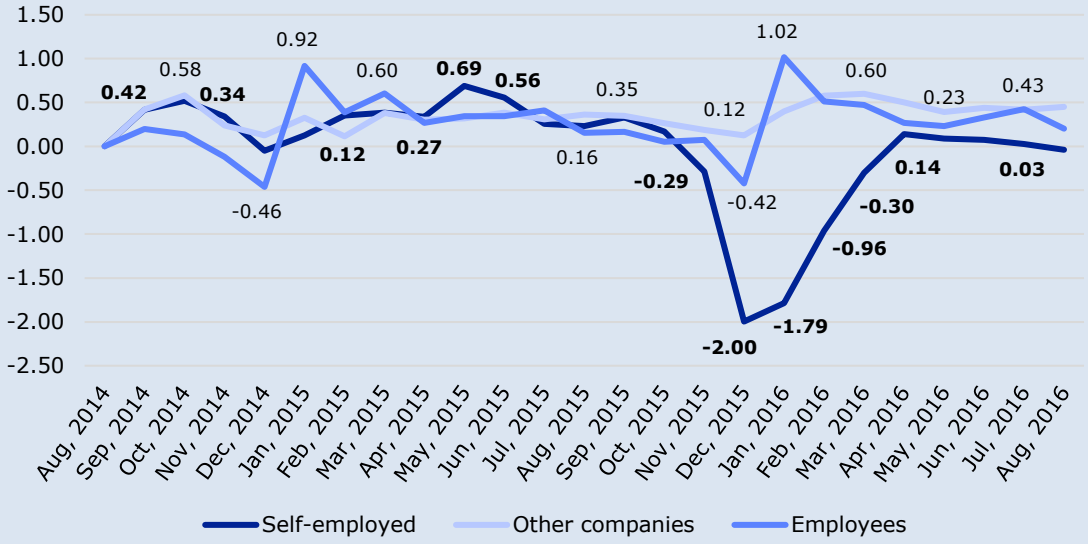
A first option is to equalise the financial costs to employers of using dependent employment and outsourcing to the self-employed through a contract for services. This was implemented in Romania in 2016 (Williams and Horodnic, 2017), Italy and Slovenia (Eurofound, 2016b) and has been proposed in the UK (Taylor, 2017). The Work and Pensions Committee (2017) in the UK recommends equalising the national insurance contributions of employees and the self-employed. Box 5 reviews the case of Romania so far as the impacts of equalising the costs to employers is concerned.

**Box 5. Impacts of equalising the financial costs to employers of outsourcing to the self-employed and using dependent employment: lessons from Romania**

In January 2016, changes to the Romanian Fiscal Code not only introduced criteria for defining whether an activity was self-employment but also equalised the costs to employers of employing a dependent employee and a self-employed person on a contract for services by altering the tax and social contribution levels of self-employment, which meant that the benefit for employers of using bogus self-employment disappeared (for more detail, see Horodnic and Williams, 2017). This change was announced in October 2015.

To understand the trends in self-employment before and after the announcement of this policy initiative, Figure 17 reports the monthly growth rate of self-employment between August 2014 and August 2016, alongside the monthly growth rate of all other companies (e.g. limited liability companies, joint stock companies) and the total number of employees. This reveals that the number of self-employed in Romania registered a positive monthly growth rate between August 2014 and October 2015, with the highest value (0.59%) in May 2015. However, immediately after the new taxation level was announced, the monthly growth rate of self-employed began a downward path. The number of self-employed decreased by 0.29% in November 2015, 2% in December 2015, 1.79% in January 2016, 0.96% in February 2016 and 0.3% in March 2016. The upward path was resumed in April 2016, but growth rates are very low (e.g. 0.14% in April, 0.03% in July 2016).

**Figure 17.** Monthly growth rate of self-employed, other companies and the total number of employees, in % (August 2014-August, 2016)




After announcing the new taxation level, the number of all other companies increased (e.g. 0.6% in March 2016). Moreover, the number of employees decreased less in December 2015 than in the same period in 2014 (0.42% compared with 0.46%) and in January 2016 increased more than in the same period in 2014 (1.025% compared with 0.92%). Thus, there are reasonable grounds to assume the closed self-employed (some of them bogus self-employed considering their quick decision not to operate under the new legislation) became either employees, migrated to another legal form for carrying out their economic activities or entered the undeclared economy. This decline in self-employment also applies when a regression analysis is undertaken, and one controls for other variables that influence the level of self-employment.

This provides tentative evidence that the new legislation helped to reduce the level of bogus self-employment in Romania. It suggests that countries that introduce criteria for defining whether an employment relationship is bogus self-employment and move towards equalising the tax and social contributions of employing somebody as a dependent employee or self-employed on a 'contract for services', can reduce the level of bogus self-employment. In Romania, however, a caveat is required. Some of those previously employed on a contract for services by employers might have left the declared economy altogether. This requires further investigation.

*Source: Williams and Horodnic (2017)*

Beyond this, little research has been conducted on whether equalising the financial costs to employers of employing dependent employees or self-employed people, or equalising the costs to workers of operating as an employee or self-employed, incentivises a shift away from bogus self-employment. However, the OECD (2018) reports that studies for assessing the effects of decreasing the tax gap between dependent employment and self-employment and increasing the social security coverage for self-employment versus decreasing the social security coverage for dependent employment are underway.

The OECD (2019) reports a forthcoming study of how far the taxation of self-employed workers differs from that of standard employees. It models the labour income taxation, inclusive of social contributions, of standard employees and of self-employed workers according to 2017 tax rules. It currently covers eight countries: Argentina, Australia, Hungary, Italy, the Netherlands, Sweden, the UK and the US. For both types of worker, the analysis calculates the total labour cost to the firm and the worker's net

take-home pay. The difference between these two quantities is the payment wedge, a measure of the net amount that government receives as a result of taxing labour income, inclusive of social contributions. The difference in total labour costs between each type of worker provides a measure of the incentive a firm may have to hire one type of worker as opposed to the other. Similarly, the difference in net take-home pay (held constant in this analysis) would provide a measure of the incentive workers face to be hired as a standard employee or as a contractor. The finding is that the tax system in the Netherlands provides an incentive for a firm to hire an unincorporated self-employed worker, as by doing so it pays a total employment cost of EUR 40 911 (with a payment wedge of 22%) instead of EUR 64 960 for a standard employee (with a payment wedge of 51%). This represents a total labour cost savings, for the firm, of 37%. Other countries (such as Hungary, Italy and Sweden) show little difference in payment wedges between different employment forms, suggesting low potential for tax treatment to drive preferences over work arrangements. The Netherlands and the UK display greater differences in payment wedges, intimating greater potential for tax arbitrage opportunities across employment forms (OECD, 2019). This study therefore reveals that decreasing the tax gap between dependent employment and self-employment will be a solution to bogus self-employment in some Member States where there is a large gap, but not in countries where this is smaller and less significant.

Many Member States, nevertheless, are investigating this equalisation process, with Slovenia, the Netherlands and Sweden being prominent examples. As the OECD (2019) report, as part of a wider effort to address tax evasion and avoidance, the Swedish government has appointed a committee of inquiry to review the tax system for the self-employed. One of the objectives is to assess whether the system is being abused to circumvent employment protection legislation and occupational health and safety rules in the labour market and leading to false self-employment.

Meanwhile, the Slovenian Ministry of Labour, Family, Social Affairs and Equal Opportunities has been taking action since 2013 to address the tax wedge between employment and other forms of work by increasing social contributions, as part of wider efforts to include self-employed workers and those performing work under civil contracts in the social security system.

Equalising the costs for employers of employing an employee and self-employed person, nevertheless, is not the only incentive that can be offered for reducing bogus self-employment.

### 5.5.2 Facilitating the legitimisation of bogus self-employment

A second option is to **make it easier and cost-free for employers to legitimise their bogus self-employment and convert them into dependent employees**. For example, the Italian labour market reform approved in 2015 (Decree No 81/2015), held an amnesty regarding possible fines if the employer transformed self-employed contracts (including those suspected as being false self-employment) into open-ended subordinate employment contracts by the end of 2015 (Eurofound, 2016a,b). Such an amnesty could be complemented by awareness raising campaigns targeted at employers and workers about the benefits of the standard employment relationship and the costs of dependent self-employment.

Another option for reducing bogus self-employment is to extend social protection to the self-employed or even the bogus self-employed, to reduce the benefits of employing a worker on a bogus self-employed basis.

### 5.5.3 Extending social protection coverage

In many Member States, there remain large differences between the social protection attached to dependent employment and self-employment (Borghi et al., 2018). A reduction in these differences by extending social protection to the self-employed would curtail the benefits of employing a worker on a bogus self-employed basis.

Analysing the social protection coverage of the self-employed compared with the coverage of dependent employees, Eurofound (2017) identifies four categories of countries:

- countries that offer a very similar coverage for self-employment as for dependent employment;
- countries where the self-employed enjoy same social protection coverage but enjoy lower benefits;
- countries where self-employed persons can voluntarily opt in for social protection coverage, and
- countries where the self-employed are excluded from part of the social protection benefits.

Spasova et al. (2017) come to the same conclusions when examining the social protection coverage for non-standard employees and self-employed workers in EU Member States. Those in non-standard employment (e.g., temporary or fixed-term contracts, temporary agency or dispatched work, part-time work, marginal part-time work) enjoy a higher level of social protection compared with those in self-employment.

Similarly, the **legal rights attached to the bogus self-employed (or 'dependent contractors')** remain lower compared with the rights of dependent employees, even if they enjoy better protection than the self-employed. Under this hybrid employment relationship category, their legal protection covers (ILO, 2016; Pedersini and Coletto, 2010):

- Access to labour courts (Austria, Germany, Italy);
- Annual leave (Germany, Spain);
- Collective bargaining (Germany, Italy, Spain);
- Coverage for occupational safety and health regulations (Austria – based on court decisions, Italy, Portugal);
- Entitlements for unfair termination (Spain) or restriction in case of contracts early termination (Italy);
- Limited social security rights and limited maternity and sickness protection (Italy);
- Personal rights (Portugal);
- Protection against discrimination (Austria, Germany, Portugal);
- Right to suspend work for health or family issues (Spain).

However, they do not enjoy (ILO, 2016; Pedersini and Coletto, 2010):

- Protection against unfair dismissal (Germany, Italy);
- Maximum working hours and paid holidays (Italy);
- Unemployment insurance (Austria).

Table 10 provides an overview of the **social protection coverage of the bogus self-employed**, which can be similar to existing coverage for dependent employment (i.e., universal), or for self-employment, or have specific regulations for bogus self-employment.

**Table 10.** Social protection for the bogus self-employed in selected European countries, by country

| Country | Sickness and Maternity | Old age and Survivors | Unemployment | Invalidity | Accidents at work | Family benefits |
|---|---|---|---|---|---|---|
| Denmark | Universal | Self-employed | Self-employed | Universal | Self-employed | Universal |
| Germany | Self-employed | Self-employed | Self-employed | Self-employed | Self-employed | Universal |
| France | Self-employed | Self-employed/ employee | Self-employed | Self-employed | Self-employed/ employee | Universal |
| Italy | Own rules | Own rules | Own rules | Self-employed | Employees | Employees |
| Austria | Own rules | (semi-) Universal | Self-employed | (semi-) Universal | (semi-) Universal | Universal |
| Slovakia | Self-employed | Self-employed | Self-employed (voluntary) | Self-employed | Self-employed | Universal |
| United Kingdom | (semi-) Universal/self-employed | Self-employed | Self-employed | (semi-) Universal | Self-employed | Universal |

*Source: Williams and Horodnic (2019) – abridged from Eichhorst et al. (2013), based on Missoc (Mutual Information System on Social Protection) data of 2011 and 2012*

Denmark provides a more universal social protection coverage, regardless of employment status, while countries such as the UK and Slovakia provide the bogus self-employed with the same social protection as the self-employed. Some Member States have sought to ensure equal treatment of the bogus self-employed. For example, that bogus self-employed women do not benefit from equal social protection as the women in dependent employment, including maternity leave benefits, raises issues regarding the principle of equity among working women (Eichhorst et al., 2013). Austria, Germany and Italy have sought to close protection gaps to ensure equal treatment with waged employees, such as by extending access to social security. In Italy, a social security fund was separately created for the bogus self-employed to prevent this form of contractual relationship being used to circumvent regulations on the payment of social security contributions (Eichhorst et al., 2013; Frade and Darmon, 2005).

Generally, those in bogus self-employment enjoy more social protection than those in self-employment, particularly in countries where a hybrid form of employment exists. In Germany only the own-account self-employed dependent on a single client are mandatory covered for pensions, unlike other categories of self-employed persons. In Italy and Portugal, the bogus self-employed enjoy unemployment benefits and in Spain they are mandatory covered by occupational and work injuries protection schemes (Spasova and Wilkens, 2018). Even when this hybrid form of employment is not recognised, those in bogus self-employment enjoy more social protection in some countries. In the Netherlands, only the self-employed working on the premises or under the supervision of an employer receive mandatory cover on occupational and work injuries insurance schemes, in Romania self-employed workers with only one client (deemed bogus self-employed) must pay compulsory pension and health insurance at the level of a dependent employee, which is not the case for the self-employed carrying out activities deemed independent (Spasova et al., 2017).

In sum, extending social protection to the self-employed would provide an incentive to not misclassify workers, and for workers not to misclassify themselves.

## 5.6 Education and awareness raising campaigns

Thus far, it has been demonstrated that the misclassification of employment can be tackled either by raising costs to make the costs of misclassifying workers outweigh

the benefits, or by incentivising employment relationships to be classified appropriately. Incentives can include: making the financial costs of employers outsourcing to the self-employed equal to those of using dependent employment; making it easier for employers to legitimise their employment relationships with their workers, and extending social protection to the self-employed, creating fewer advantages to misclassifying workers as self-employed. Such policy initiatives, however, assume that bogus self-employment is always purely a rational economic calculation.

This is not always the case. Bogus self-employment can be also either unintentional due to a lack of knowledge of the rules and due to complex legal rulings being difficult to understand or it can result from a lack trust in the state and/or the benefits of compliance (Williams, 2019). Education and awareness-raising campaigns can therefore play a key role in tackling bogus self-employment and social partners can be key in leading such initiatives.

The most common initiative pursued by state authorities under this heading is providing guidance and information to businesses and workers that enable them to classify working relationships correctly. Many Member States provide documentation online (sometimes in multiple languages) that contains information about the characteristics that would classify a worker as a dependent employee or self-employed. In the UK, there is an online tool for workers to check whether they are a dependent employee or self-employed[17]. The Netherlands also provide an online tool for helping workers to check whether their status should be in the form of a dependent employment relationship rather than self-employment (Heyes and Hastings, 2017). Many Member States also have a specialised team within the labour inspectorate or ministry for labour that offers verbal or written advice to queries from firms or workers.

Until now, however, dedicated awareness-raising campaigns targeting either employers of the bogus self-employed, or bogus self-employed workers, have been rare. Although this might sometimes form part of a wider campaign on undeclared work, marketing campaigns dedicated to tackling bogus self-employment are less common. On exception is the Irish Department of Employment and Social Protection who in May 2018 ran a campaign through online and radio adverts, lasting one month. It reached out to bogus self-employed workers and explained the implications to their social welfare benefits and employment rights.

These initiatives can be targeted at employers and workers about the benefits of the standard employment relationship and the costs of bogus self-employment. They have the potential to modify norms and values and help misclassifying employment relationships to become unacceptable. Until now, these have been rare. One of the few examples is the communication campaign by the Ministry of Social Affairs that accompanied the Action Combating Spurious Labour Contracts (WAS) in the Netherlands, and the meetings between the labour inspectors and labour market stakeholders aimed to promote compliance and to combat bogus self-employment (Heyes and Hastings, 2017).

This is also a realm where social partners can be involved. While enforcement authorities can increase the costs of misclassification and incentivise the appropriate classification of employment relationships, social partners are key to increasing employer and employee commitment to compliance and to not misclassify work (Eurofound, 2016b). In the eight countries included in Heyes and Hastings (2017) study, it was identified that the Unite trade union in the UK has established a unit dedicated to persuading employers to avoid classifying their workforce as self-employed, which followed the tribunal decision against Uber.

[17] See: https://www.gov.uk/guidance/check-employment-status-for-tax

In countries where a hybrid category of employment has been introduced to cover bogus self-employment, there is also a role for social partners in forging collective agreements specifically aimed at bogus self-employment. Examples of where this has occurred include the national Federation of German Newspaper Publishers (BDZV), regional publisher associations and two trade unions in Germany and the main three trade unions in Italy with special structures for non-standard workers, including the bogus self-employed (ILO, 2016; Pedersini and Coletto, 2010). In Spain, CCOO-Catalunya started to represent the bogus self-employed in 2000, although because of recession, it later suffered budget restrictions (Pulignano et al., 2016). There is also concern around working conditions and rights of platform workers, meaning trade unions such as IG Metall began to organise platform workers, including the bogus self-employed (Haake, 2017).

# 6 POLICY RECOMMENDATIONS AT NATIONAL AND EU LEVEL

## 6.1 Tackling undeclared work in the collaborative economy

***National level recommendations***

The 2018 Flash Eurobarometer 467 survey reveals that in the European Union, the most common problems confronted by service providers operating in the collaborative economy are:

- the lack of clarity around how to provide the service legally (stated by 22% of service providers);
- complicated systems for paying tax (19%);
- difficulty to provide the service legally (13%), and
- the impact on their employment status is unclear (9%).

This strongly suggests that more **advisory services** as well as a **simplification of compliance** (e.g., platforms deducting taxes owed) would help prevent undeclared work and bogus self-employment on collaborative platforms. Developing advisory services and simplifying compliance would also potentially result in **collaborative platforms gaining more service providers** since some of the main barriers to participation would be overcome.

What types of advisory service and forms of simplified compliance might therefore be pursued?

- State enforcement authorities could:
  - provide advice and guidance to service providers on the tax, social security and/or labour law obligations of their platform activity via information websites and hotlines;
  - directly contact platform service providers advising them they need to declare income received;
  - demand that collaborative platforms disclose data on service providers, such as their names, contracts and/or transactions;
  - license service providers, and
  - simplify tax and labour laws for service providers on collaborative platforms.
- Platforms could:
  - inform service providers of their tax, social security and/or labour law obligations;
  - ensure that the service providers are licensed/authorised;
  - impose limits on the number of registered service providers;
  - collect tax revenues owed from service providers and forward them directly to the tax authority; and
  - clearly define and communicate to service providers the difference between commercial and non-commercial activities.

At present, however, the adoption of such policy measures is limited. Although 82% of enforcement authorities in the 28 countries responding to the 2019 annual Platform survey provide advice and guidance to service providers and enforcement authorities and 68% of the responding countries have the power to demand that collaborative platforms disclose data on service providers, the remaining initiatives above are usually used by less than **one-third** of the countries responding.

Implementing more widely these policy initiatives, through Member States learning from each other about what is effective and potentially transferable, will reduce the prevalence of undeclared work in the collaborative economy and increase the number of service providers and therefore facilitate the growth of the collaborative economy.

***EU-level recommendations***

- A Platform plenary thematic discussion is required to share best practices on providing advisory services and simplifying compliance. This will enable mutual learning and knowledge exchange on how to tackle undeclared work in the collaborative economy.
- Enhanced cooperation with social partners can play a vital role in providing information on what is happening on the ground and informing the strategies of enforcement authorities.
- Grounded in the new legal basis provided by the European Labour Authority, greater cross-border cooperation in tackling undeclared work in the collaborative economy could be pursued by: facilitating greater cross-border joint actions, and providing common training modules for inspectors on how to tackle undeclared work in the collaborative economy (e.g., knowledge exchanges on data mining and analysis, and risk assessment).
- If collaborative platforms do not recognise that voluntarily collaborating with national enforcement authorities to implement the above initiatives are in their self-interest, collective action through legislation at EU-level may be required to ensure that collaborative platforms introduce such initiatives to reduce the level of undeclared work in the EU.
- This might (i) require all platforms to report all transactions to the tax authorities in the countries in which they operate, (ii) compel platforms to supply authorities with information they might require in attempting to ensure compliance with tax laws, (iii) require platforms to inform service providers of their earnings and tax obligations, or collect taxes owed by service providers and (iv) protect workers from being falsely classified as self-employed.

## 6.2 Tackling bogus self-employment

***National-level recommendations***

- To enable the correct classification of workers, **clear legal definitions** of dependent employment, self-employment and bogus self-employment would be useful in Member States. Currently, of the 28 countries responding (26 EU Member States, excluding Luxembourg and Romania, plus Iceland and Norway), only 85% of the countries responding have a legal definition of self-employment, 50% a legal definition of dependent employment and 25% a legal definition of bogus self-employment. Unless clear legal definitions exist, proving worker misclassification is a challenge.
- Not all enforcement authorities possess the **legal competence** to tackle bogus employment. There is a need, therefore, for more enforcement authorities where appropriate to seek legislative competence for tackling bogus self-employment.
- Even those enforcement authorities assigned legal competence rarely have **performance measures** related specifically to tackling bogus self-

employment. In the rare cases this happens, as exemplified by labour inspectors in Italy, the score for detecting bogus self-employment is lower than for detecting undeclared work. When it is also realised that platform workers are not in one workplace, but are geographically dispersed, making it difficult for labour inspectors to do inspections, and that labour inspectors are evaluated and paid based on the scoring system, it becomes understandable why in Italy very few inspections have targeted platform activities.

- The introduction of key performance indicators (**KPIs**) related to bogus self-employment are therefore required to encourage enforcement bodies to focus on this rather than other issues (such as undeclared work), which are easier to detect and prosecute. However, the lesson from Italy is that even if KPIs are established for bogus self-employment, attention needs to be paid to ensuring that inspectors are as equally motivated to achieve this KPI as others associated with conventional undeclared work.
- Where **financial gain** is the driving force for bogus self-employment, enforcement authorities should **make the costs of misclassifying workers outweigh the benefits**. To achieve this, firstly, enforcement authorities can increase the costs of misclassifying workers and/or secondly, incentivise the appropriate classification of workers. To **increase the costs** of misclassifying workers as self-employed, enforcement authorities with responsibility for addressing this employment relationship can increase the sanctions and/or the risks of detection.
- **Sanctions** for misclassification range from criminal penalties to the requalification of the employment relationship into the correct contractual relationship, with various civil and economic sanctions in between. Until now, there has been little, if any, evidence-based evaluation of which type of sanction-system is most effective. If the goal is reclassifying the employment relationship, rather than maximising the penalties imposed on employers, then lessons can be learned from tackling undeclared work. In Greece, for example, sanctions have provided incentives for employers to transform undeclared work into declared work by reducing the fine the longer the employer hires the undeclared employee on a declared basis. This sanctions approach could be applied to the misclassification of employment relationships, reducing the fine the longer the employer hires the worker as a dependent employee. A **pilot study** to evaluate the effectiveness of such a sanctions system is one way forward. It is not only sanctions, however, that can increase the costs of misclassifying workers.
- Another means of increasing the costs of misclassifying workers is to **increase the perceived or actual risks of employers being caught** who employ bogus self-employed workers. **Inspections** are one way of achieving this. There has been until now little mutual learning between Member States on how to conduct effective inspections to tackle bogus self-employment. This would be useful to help identify effective national inspection practices in identifying bogus self-employment. Another way forward is to improve data mining and **risk assessment** processes. Less than half (43%) of country responses indicate their competent authorities apply risk assessment to identify bogus self-employment, and few enforcement authorities have well-developed risk assessment systems to identify potential instances of bogus self-employment. This suggests a need for Member States to consider more fully the criteria used in data mining to identify instances of bogus self-employment.
- Member States also should **incentivise** employment relationships to be classified appropriately. These might include:
    - Making **the financial costs of employers outsourcing to the self-employed equal to those of using dependent employment**. This will be

particularly effective in countries where the current tax gap between dependent employment and self-employment is relatively large;

- Making it **easier for employers to legitimise their employment relationships**. Italy, for example, held an amnesty regarding possible fines if the employer transformed self-employed contracts (including those suspected as being false self-employment) into open-ended subordinate employment contracts; and
- **Extending social protection to the self-employed (or even the bogus self-employed)** so that there are fewer advantages associated with misclassifying employment relationships.

- Bogus self-employment, however, is not always intentional. It can be also either unintentional due to a lack of knowledge of the rules and due to complex legal rulings being difficult to understand or it can result from a lack trust in the state and/or the benefits of compliance. **Education and awareness-raising campaigns** can therefore play a key role in tackling bogus self-employment and social partners can play a lead role in such initiatives. The provision of education campaigns and online tools to encourage workers to understand their rights and come forward are important.
- There is also a role for social partners in forging **collective agreements** specifically aimed at bogus self-employment in countries where a hybrid category of employment has been introduced.

***EU-level recommendations***

- A European Platform Tackling Undeclared Work plenary thematic discussion to share good practice on tackling bogus self-employment could enable mutual learning and knowledge exchange on interesting national practices in relation to the above-stated policy initiatives.
- Facilitating enhanced cooperation of enforcement authorities with social partners can play a vital role in providing information on what is happening on the ground and inform the strategies of enforcement authorities.
- Given the lack of EU-wide data on the prevalence and distribution of bogus self-employment in the collaborative economy, future surveys on bogus self-employment (e.g., EU-LFS, Eurobarometer, EWCS) could include questions on whether the work is provided through collaborative platforms.
- The Platform could facilitate greater cross-border cooperation on tackling bogus self-employment by, for example, facilitating greater cross-border joint actions, and providing common training modules for inspectors on how to tackle bogus self-employment (e.g., knowledge exchange on data mining and analysis and risk assessment techniques).

## 6.3 Tackling bogus self-employment in the collaborative economy

***National-level recommendations***

- To enable the correct classification of service providers on collaborative platforms, **clear legal definitions** would be useful of whether service providers on platforms are engaged in dependent employment, self-employment or some hybrid form of employment such as a 'dependent contractor'. Unless this clear legal definition exists, proving worker misclassification on platforms will be a challenge. Once clarity exists about the employment status, enforcement authorities could tackle bogus self-employment within the collaborative economy.

***EU-level recommendations***

- A European Platform Tackling Undeclared Work plenary thematic discussion to share good practice on defining the work of service providers on collaborative platforms could enable mutual learning and knowledge exchange on interesting national practices in relation to the legal definition of the employment relationship of service providers.

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# APPENDIX 1: LEGAL JUDGEMENTS

**Box A1. ECJ case law on market access requirements: the Uber France case**

[ECJ Judgment of 10 April 2018, in the Uber case, C-320/16, ECLI:EU:C:2018:221; French Conseil d'État Judgement no 388213 of 9 March 2016 in the Uber France case, ECJ Judgment of 20 December 2017, in the Asociación Profesional Elite Taxi (Uber Spain) case, C-434/15, ECLI:EU:C:2017:981]

***Problem addressed***

***1. The Court, the dispute and the parties***

The Tribunal de Grande Instance de Lille (Regional Court, Lille, France) raised a preliminary ruling to the ECJ, in proceedings before a criminal court against Uber France SAS, in relation to the illegal organisation of a system for putting non-professional drivers using their own vehicle, in contact with persons who wish to make urban journeys.

***2. EU and national regulation assessed in the case***

This request for a preliminary ruling concerns the interpretation of Article 1 and Article 8(1) of Directive 98/34/EC on Information Society services[18] ('the Directive 98/34'), and of Article 2(2)(d) of Directive 2006/123/EC on services in the internal market[19] (the 'Services Directive').

French law assessed concerns related to Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles and Article L. 3124-13 of the Transport Code, which establishes fines of EUR 300 000 and up to five years imprisonment for people incurring criminal liability in the transport sector.

***3. Outline of the legal question discussed***

In 2014, France passed comprehensive rules (the Thévenoud law) which required Uber drivers to comply with the same regulations as taxi drivers. Drivers could be fined and serve a year in prison for picking up passengers in an UberPop.

While the Conseil Constitutionnel held that the Thévenoud law was constitutional, Uber's challenge succeeded in another court: the Conseil d'Etat. This is France's highest court on administrative laws. Since France had not notified the European Union in accordance with Article 8(1) of Directive 98/34, the Conseil d'Etat established that the French government had violated EU law and the application of the law was suspended.

While these cases were pending, Uber continued to operate. Therefore, the French government searched Uber's Paris headquarters and seized documents, emails and cell phones. A few months later, Paris police arrested Uber Europe's General Managers, charging them with running an illegal taxi company and concealing digital documents. The executives faced up to five years' imprisonment and personal fines of EUR 300 000. Uber faced a fine off EUR 1.5 million[20].

In other French cities, parallel proceedings took place, such as the main proceedings of the Uber France case in Lille, the fourth largest urban area in France. By judgment of 17 March 2016, the Regional Court of Lille found Uber: (a) guilty of misleading

[18] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').

[19] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[20] Martini, J.D., 'International Regulatory Entrepreneurship: Uber's battle with regulators in France', *San Diego International Law Journal*, Vol. 19, 2017, pp. 127-160.

commercial practices and (b) not guilty of the offence of aiding and abetting the unlawful exercise of the profession of taxi driver.

As regards the offence of the 'unlawful organisation of a system for putting customers in contact with non-professional drivers', the Regional Court of Lille was uncertain as to whether that provision should be regarded as establishing a 'rule on information society services' – the non-notification of which in accordance with Article 8(1) of Directive 98/34 means that it is unenforceable against individuals, or as a rule on 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123.

Contrary to the Conseil d'Etat position, the ECJ in the Uber France case establishes that the challenged provision of French criminal law cannot be classified as a rule on information society services, but as transportation services, in line with the Uber Spain case[21]. Therefore, this provision was not subject to the notification requirement and it was enforceable against individuals.

Classifying Uber services as transportation services also means they are covered by Article 58(1) of the Treaty on the Functioning of the European Union (TFEU) and are excluded from the EU Services Directive 2006/123. Considering that there is no EU law relating to the provision of non-public urban transport, it is for Member States to regulate the conditions under which services such as the Uber booking-app can operate[22].

***Description of the case and platform mode of operation***

Uber France provides, via means of a smartphone application, a service called 'UberPop', through which it puts non-professional drivers using their own vehicle in contact with people who want to make urban journeys. Providing that service via the application, the company, in the order for reference, fixes the rates, collects the fare for each journey from the customer before paying part of it to the non-professional driver of the vehicle, and prepares the invoices. Two applications licensed by Uber are used for the booking and billing process: the 'Customer App' and the 'Driver App'. For a client to register on the Uber platform, they must provide credit card information. The journey price is not calculated on the basis of time, as with other taxi services. Uber's fare calculation model is a software-based algorithm.

***Implications for tackling undeclared work***

This ruling sets criteria to differentiate an 'information society service' and transport services. In this later case, collaborative platforms can be subject to national sector-specific regulation, including business authorisation and licensing requirements.

Considering the ECJ position in these cases, Uber, and all similar platforms offering passenger transport, can be regulated in a similar way as a taxi business.

***Key learning points***

- The Uber France and Uber Spain's cases make clear that similar platforms cannot claim rights Directive 98/34/EC on Information Society services under EU law.
- Platforms can be subjected to different obligations and prohibitions established in different national laws.

[21] ECJ Judgment of 20 December 2017, in the Asociación Profesional Elite Taxi case, C-434/15, ECLI:EU:C:2017:981.

[22] Schaub, M.Y., 'Why Uber is an Information Society Service. Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)', *Journal of European Consumer and Market Law*, Vol. 3, 2018, pp. 109-114.

**Box A2. Pension rights and gender equality for bogus self-employed workers**
*[ECJ Judgment of 13 January 2004 in the Allonby case, C-256/01, EU:C:2004:18]*

***Problem addressed***

***1. The Court, the dispute and the parties***

The Court of Appeal (England and Wales) raised a preliminary ruling to the ECJ, in proceedings brought by Ms Allonby, who works as a lecturer, against Accrington & Rossendale College (the College), Education Lecturing Services (ELS), trading as Protocol Professional and the Secretary of State for Education and Employment (the Secretary of State) concerning pension rights and equal pay for men and women.

***2. Outline of the legal question discussed***

In this case, the ECJ must ascertain whether the requirement of being hired under a contract of employment, as a precondition for membership of a state pension scheme, is non-applicable where it is shown that, among workers **–** including specifically bogus self-employed workers **–** who fulfil the conditions for membership, a clear lower percentage of women than men are able to satisfy that condition.

***3. Rules assessed***

Ms Allonby based her claim on Article 141.2 EC (presently 157 TFUE); Directive 75/117/EEC and Directive 86/378/EEC (presently, Chapters 1 and 2 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation); and UK Equal Pay Act 1970, and the Pensions Act 1995, which contains provisions that the UK has been required to adopt as a result of the Court's decision in Case C-262/88 Barber.

***Description of case and relevance for bogus self-employment***

Ms Allonby was originally employed by the College as a part-time lecturer in office technology. She was employed from 1990-96 under a succession of one-year contracts under which she was paid by the hour at a rate determined by the level at which she was teaching.

By 1996, the College's financial obligations had become increasingly more onerous because of legislative changes which required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers, particularly regarding retirement pensions. The College employed 341 part-time lecturers. It decided that to reduce its overheads, it would terminate or not renew part-time lecturers' contracts, and instead would retain their services as sub-contractors.

In Ms Allonby's case, her employment contract was terminated, effective from 29 August 1996, and she was offered re-engagement through ELS. ELS operated as an agency, which maintained a database of available lecturers. Colleges could call on ELS to provide contract lecturers, mentioning the person by name if they so wished. Ms Allonby and others like her had to register with ELS if they wanted to continue to work as part-time lecturers, and thereby would become self-employed.

Their pay became a proportion of the fee agreed between ELS and the College. Their income decreased and they lost a series of benefits linked to their employment, ranging from sick pay and pension rights to a reliable career structure.

The Secretary of State administers an occupational pension scheme for teachers (the Teachers Superannuation Scheme, TSS) that is governed by national regulations. The terms confine membership to work under a contract of employment, whether full-time or part-time, thereby restricting membership of the occupational pension scheme to teachers with a contract of employment. ELS is not an employer that contributes to the TSS, as it only operates with self-employed workers.

***Implications of the case for tackling bogus self-employment***

As a case that sets precedence, there are many chances that this situation will be reviewed again, specifically in cases where workers have moved involuntarily into self-employment to keep their jobs or even to get a job. These workers are being forced into bogus self-employment and thus also exposed to poor legal and social protection. Employers in these cases transfer costs, risks and responsibilities to the employees, still within the employment relationship.

There is no contradiction in a chain of related case law, which includes: Bilka, 170/84, pa. 22; Beune, C-7/93, pa. 46; Fisscher, C-128/93, pa. 12; Lawrie-Blum, 66/85, pa. 17; Bettray, 344/87, pa. 16; Raulin, C-357/89, pa. 10.

This ruling actually has vast potential for transferability of legal concepts to case law and regulations of other Member States, as it provides invaluable guidance in the following issues:

***1. Scope of Article 157 TFUE***

The term 'worker', for the purposes of equal pay rights, cannot be defined by reference to the legislation of the Member States but has an EU meaning. Moreover, it cannot be interpreted restrictively.

A pension scheme, which essentially relates to the employment of the person concerned, forms part of the pay received by that person, also if they are bogus self-employed, and thus comes within the scope of 157 TFUE.

Moreover, Article 157 TFUE covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme.

The authors of the Treaty did not intend for the term 'worker', within the meaning of Article 157 TFUE, to include independent providers of services who are not in a relationship of subordination with the person who receives the services.

However, the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, so long as that person acts under the direction of their employer and thus cannot freely choose the time, place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.

***2. Category of persons who may be included in the comparison***

To demonstrate that the requirement of being employed under a contract of employment is a precondition for membership of a pension scheme (being such a condition deriving from state rules) constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women. A woman worker may rely on statistics that reveal that among workers within the meaning of Article 157 TFUE that fulfil all the conditions for membership of the pension scheme, except for being employed under a contract of employment as defined by national law, there is a much higher percentage of women than men. If that is the case, the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. In that regard, no justification can be inferred from the formal classification of a self-employed person under national law.

***Key learning points***

The ECJ:

- Interprets Article 157 TFUE on equal pay, which includes pension rights, to include in its scope bogus self-employed workers.
- Also considers bogus self-employed persons as a category of persons who can be included for the determination of the existence of indirect discrimination on the basis of gender.

**Box A3. The expansive 'subordination test' in the Danosa case: a useful tool to reclassify bogus self-employment**

*[ECJ Judgment of 11 November 2010, Danosa, C-232/09, EU:C:2010:674]*

***Problem addressed***

***1. The court, the dispute and the parties***

The Augstākās Tiesas Senāts (Latvia) raised a preliminary ruling to the ECJ in proceedings between Ms Danosa and LKB Līzings SIA ('LKB'), a limited liability company. Ms Danosa claimed that she was removed from her post as a member of LKB's Board of Directors because of her pregnancy. She had signed an agency agreement with LKB.

***2. National and EU regulation assessed in the case***

Several national and EU regulations are assessed in this Judgement. However, the most relevant provisions here are Article 23 of the Charter of Fundamental Rights of the European Union on the principle of equality between men and women; Article 2(a) and 10 of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers (Directive 92/85)[23]; and Article 3 of the Latvian Labour Code which defines a worker as any natural person who performs a particular job pursuant to an employment contract, under the direction of an employer and in return for an agreed wage.

***3. Outline of the legal question discussed***

Clearly, where an agency agreement contract is unilaterally terminated by the principal, before the agreed-upon expiry date on account of her pregnancy, only women can be affected. Therefore, the ECJ must ascertain if Ms Danosa removal from the Board of Directors can be considered direct discrimination on the grounds of sex, in a case where the existence of subordination between the company and the worker is unclear.

***Description of case and relevance for bogus self-employment***

In the process of reclassifying the bogus self-employed as dependent employed, the notion of legal subordination plays a pivotal role. In *Danosa*, the ECJ went beyond the formal concept of dependence, providing a very expansive subordination test. Such a test is thus particularly useful:

***1. The essential feature of an employment relationship***

The essential feature of an employment relationship is established when, for a certain period, a person performs services for and under the direction of another person in return for which he/she receives remuneration (N., C-46/12, pa. 40 and Haralambidis, C-270/13, pa. 28). Hence, a labour relationship exists when the employee is under the direction and supervision of his/her contractual partner.

***2. The sui generis nature of the labour contract is irrelevant***

The *sui generis* nature of the employment relationship under national law is of no consequence with regards to whether a person is a worker for the purposes of EU law (Kiiski, C-116/06, pa. 26; Levin, 53/81, pa. 16; Bettray, 344/87, pa. 15 and 16; Kurz, C-188/00, pa. 32).

In the Danosa case, neither the way in which Latvian law categorises the relationship between a capital company and the members of its Board of Directors, nor the fact that there is no employment contract between the company and the Board Members

[23] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1-7.

can determine how that relationship is to be treated for the purposes of applying Directive 92/85.

***3. Applicable criteria***

Accordingly, when establishing the degree of subordination required under the case law of the ECJ relating to the concept of 'worker' within the meaning of EU law in general and Directive 92/85, a thorough analysis must be conducted in each case. Thus, there must be a conclusion reached regarding the basis of all factors and circumstances characterising the relationship between the parties.

Therefore, it is necessary to consider the circumstances in which the worker is recruited and the nature of the duties entrusted to that person; the context in which those duties are performed; the scope of the person's powers and how far he or she was supervised within the company; and the circumstances under which the person can be removed.

In this case, even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report to the supervisory board and to cooperate with that board. The dismissal decision in Ms Danosa's case was also adopted by a body which, by definition, she did not control and which was able at any time to make decisions contrary to her wishes. Consequently, it could not be ruled out the possibility that she was in a relationship of subordination to that company.

***Implications of the case for tackling bogus self-employment***

This ruling has potential for transferability of legal concepts to case law and regulations of other Member States as it sets precedence as to the criteria that must be used to reclassify individuals as working under an employment contract. But it should be noted that the concept of worker can vary depending on the area of law. For example, recent ECJ judgement of 11 April 2019, C-603/17, in the Bosworth and Hurley case in the area of jurisdiction over international contracts of employment, has shown a narrower subordination test.

The subordination test provided in *Danosa* can be regarded as a tool to extend specific EU rights to the bogus self-employed. Moreover, in this ruling, criteria contained in the existing EU case law identifying a 'worker' is also usefully summarised. The principles used for reclassification include the following:

***1. The employee status is defined according to objective criteria***

In investigating whether a specific case involves effective and genuine employment, the national court must base itself on objective criteria and make a comprehensive assessment of all the circumstances of the case that have to do with the activities and the employment relationship concerned.

***2. Classification under national law is not relevant***

The classification of a 'self-employed person' under national law does not prevent that person from being classified as an employee within the meaning of EU law if their independence is merely notional, thereby disguising an employment relationship. In particular, the concept of 'worker' within the meaning of Article 45 TFEU has an autonomous meaning specific to European Union law and must not be interpreted narrowly (Lawrie-Blum, 66/85, pa. 16; Brown 197/86, pa. 21; Bernini C-3/90, pa. 14; Ninni-Orasche, C-413/01, pa. 23).

***3. Specific conditions of employment are not to be taken into account***

The conditions of employment **–** such as a low level of remuneration, the rather low productivity of the person concerned, or the fact that he/she works only a few hours per week **–** do not preclude that person from being recognised as a 'worker' within the meaning of Article 45 TFEU (Lawrie-Blum, 66/85, pa. 21; Bettray, 344/87, pa. 15).

***Key learning points***

In line with ILO Recommendation concerning the employment relationship, 2006 (No 198), the *Danosa* case:

- Provides guidance on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers.
- Notes that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection owed.
- Endeavours to ensure that standards of labour and social protection are applicable to all forms of contractual arrangements.
- In particular, the definition of the concept of 'worker' within the meaning the equality principle and of Article 45 TFEU expresses the requirement, that the advantages conferred by European Union law may be relied upon by people genuinely pursuing employment activities.
- The equality principle that informs EU law could not be achieved if the protection against dismissal granted to pregnant women under EU law were to depend on the formal categorisation of their employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another.

**Box A4. Collective bargaining rights of bogus self-employed workers: the FNV case**

*[ECJ Judgment of 4 December 2014 in FNV Kunsten Informatie en Media, C-413/13, EU:C:2014:2411]*

***Problem addressed***

***1. The Court, the dispute and the parties***

The Gerechtshof te's-Gravenhage (Court of Appeal, The Hague) raised a preliminary ruling to the ECJ, in proceedings between FNV Kunsten Informatie en Media ('FNV'), a trade union, and the Staat der Nederlanden concerning the validity of a reflection document from the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority) that found that the setting of minimum fees for self-employed in a collective labour agreement is prohibited under national rules on competition and under Article 101(1) TFEU.

The FNV raised a single ground of appeal regarding the question of whether the prohibition of agreements restricting competition laid down in Article 101(1) TFEU applies to a provision of a collective labour agreement setting minimum fees for self-employed service providers performing the same activity for an employer as that employer's employed workers.

***2. Rules assessed***

Several national and EU regulations are assessed in this Judgement. First, Article 1 of Dutch Law on collective labour agreements (Wet op de collectieve arbeidsovereenkomst) and Article 6(1) of Dutch Law on competition (Mededingingswet, Mw), the wording of which corresponds to that in Article 101(1) TFEU: 'Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or on part of it, shall be prohibited.'

Second, Article 16(a) of the Dutch Law on competition that stated that: 'Article 6(1) shall not apply to: (a) a collective labour agreement within the terms of Article 1(1) of the Law on collective labour agreements'.

The Netherlands legislature expressly meant to harmonise national competition law with EU law, intending Article 6(1) of the Mw to be given an interpretation strictly in accordance with that of Article 101(1) TFEU.

***3. Outline of the legal question discussed***

The self-employed in the Netherlands have the right to join any trade union or employers' or professional association. Therefore, according to the Law on collective labour agreements, employers' federations and organisations representing employees may conclude a collective labour agreement in the name of and on behalf of not only employees, but also independent service providers who are members of those organisations.

However, the Netherlands Competition Authority (NMa) published a reflection document in which it stated that a provision of a collective labour agreement that establishes minimum fees for self-employed was prohibited under national competition rules and Article 101(1) TFEU, for the purpose of the ECJ judgment in Albany, C-67/96. According to the NMa, a collective labour agreement which governs contracts for professional services is altered in its legal nature and acquires the characteristics of an inter-professional agreement in that it is negotiated on the trade union side by an organisation which acts not as an employees' association, but as an association for self-employed workers.

Following the adoption of this position by the NMa, the employers' association, Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten, and the employees' association, Nederlandse toonkunstenaarsbond, terminated the collective labour agreement and refused to conclude a fresh agreement containing a provision on minimum fees for the self-employed.

Thus, in this case, the ECJ Court had to ascertain whether Article 101 TFEU precludes a provision in a collective labour agreement setting minimum fees for self-employed service providers who perform the same work for an employer as the employees who come within the scope of that collective labour agreement.

***Description of the case and relevance for bogus self-employment***

***1. Legal nature of the agreement***

Regarding the nature of this agreement, it is clear from the findings of the referring court that the agreement was concluded in the form of a collective labour agreement. However, this agreement, specifically regarding the provision on minimum fees, is the result of negotiations between an employers' organisation and employees' organisations which also represent the interests of self-employed substitutes who provide services under a work or service contract.

***2. Bogus self-employed formal 'undertakings'***

Although they perform the same activities as employees, service providers such as the substitutes at issue are formal 'undertakings' within the meaning of Article 101(1) TFEU, as they offer their services for remuneration on a given market.

For the ECJ, this finding cannot, however, prevent such a provision of a collective labour agreement from being regarded as the result of dialogue between management and labour if the service providers, in the name of and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees.

***3. A 'service provider' can lose their status as an independent trader***

According to settled case law, a service provider can lose their status as an

independent trader, and hence of an undertaking, if it does not determine independently its own conduct on the market, but is entirely dependent on its principal, because it does not bear any of the financial or commercial risks arising from the latter's activity and operates as an auxiliary within the principal's undertaking.

***Implications of the case for tackling bogus self-employment***

This ruling has vast potential for transferability of legal concepts to case law and regulations of other Member States. It provides invaluable legal grounds to extend the right of collective bargaining to bogus self-employment. Criteria developed in this judgment allow for the classification of self-employed covered by collective agreements not as 'undertakings' but as 'bogus self-employed', thus, rendering inapplicable the prohibition contained in Article 101(1) TFEU.

Such extension of the right of collective bargaining to bogus self-employment directly contributes to the improvement of the employment and working conditions of the 'bogus self-employed'. That is particularly the case here since it allows the minimum fees scheme put in place by the collective labour agreement to apply to bogus self-employment.

In addition, such a scheme not only guarantees those 'bogus self-employed' a pay higher than they would have received were it not for case law, but also enables contributions to be made to pension insurance corresponding to participation in the pension scheme for workers, thereby guaranteeing them the means necessary to be eligible in the future for a certain level of pension benefits.

There is no contradiction in a chain of related case law, which includes ECJ judgment in Empresarios de Estaciones de Servicio, C-217/05, pa. 43 and 44, and Allonby, C-256/01, pa. 71.

***Key learning points***

- A provision of a collective labour agreement, insofar as it sets minimum fees for service providers who are 'bogus self-employed', cannot, by reason of its nature and purpose, be prohibited on the basis of Article 101(1) TFEU.
- Self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's dependent workers are to be considered 'bogus self-employed' if they fulfil the conditions established in the case law on the definition of 'employee'. It is for the national court to ascertain whether that is so.

**Box A5. Cross-border supply of bogus self-employed workers: the Banks case**

[ECJ Judgment of 30 March 2000, in Barry Banks and Others, C-178/97, ECLI:EU:C:2000:169]

***Problem addressed***

***1. The Court, the dispute and the parties***

The Tribunal du Travail de Bruxelles (Brussels Labour Court) raised a preliminary ruling to the ECJ in proceedings brought by Mr Banks and other performing artists of British nationality (the 'artists') against the Théâtre Royal de la Monnaie de Bruxelles (the 'TRM'). The artists resided in the UK, where they normally worked and were subject to the British social security system as self-employed persons.

However, they were requested by the TRM to perform in Belgium between 1992 and 1995. The engagements for each artist lasted on average four months. The

proceedings concerned contributions deducted from the artists' fees by the TRM under the general system of Belgian social security for employed persons. Under applicable Belgian legislation, they were classified as dependent workers. Thus, their contracts expressly provided that this deduction would be made.

***2. Rules assessed***

That deduction of contributions was made pursuant to Article 3(2) of the Belgian Royal Decree of 28 November 1969 on social security for persons subject to the scheme for employed persons, which extended the scheme to performing artists. Additionally, several EU law provisions were assessed, in particular, Article 14a(1)(a) and 14c of Regulation (EEC) No 1408/71[24] and Articles 5, 11a and 12a(7) of Regulation (EEC) No 574/72[25].

These EU rules have currently been replaced by Articles 12(2) and 13(3) of Regulation (EC) No 883/2004 on the coordination of social security systems[26] and Articles 5 and 14(3) of Regulation (EC) No 987/2009[27].

***3. Outline of the legal question discussed***

The ECJ had to decide whether EU rules on the coordination of social security systems allowed the artists to remain subject, as self-employed, to UK social security legislation so did not have to pay contributions in Belgium. The ECJ also had to ascertain whether A1 forms issued by the British authorities – certifying that they were self-employed in the UK – were binding for a Member State (Belgium) where such artists, in the circumstances of the case, qualified as salaried workers.

Actually, the artists produced an E101 certificate (presently known as A1 form), issued by the UK Department of Social Security certifying that (a) they were self-employed, (b) that they would be self-employed during their engagement with the TRM, and (c) that, during that period, they remained subject to UK social security legislation.

***Description of case and relevance for bogus self-employment***

During the proceedings before the ECJ in the *Banks* case, German and Dutch governments expressed concern that allowing such workers to retain their condition of self-employment in another country would have social dumping effects. In their view, this would enable any person to become affiliated to the social security scheme for self-employed persons of a Member State where contributions are modest, with the sole purpose of going to another Member State to work as an employed person, without paying the higher contributions of the latter state.

To address such concerns, in this ruling, the ECJ emphasises the requirement that the posted self-employed worker habitually performs significant activities in the territory of the Member State where they are established (the 'substance test'). For that reason, this case law acts as an important deterrent to cross-border bogus self-employment.

Consequently, this ruling has important potential for transferability of legal concepts to case law and regulations of other Member States. It sets a turning point on this topic, providing a detailed interpretation of Article 12(2) of Regulation 883/2004. The

[24] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, pp. 2-50.

[25] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27.3.1972, pp. 1-83.

[26] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

[27] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, pp. 1-42.

specific requisites to fulfil the ECJ 'substance test' are:

***1. Previous self-employment in the country of origin***

The self-employed person must have already been performing their activity for some time at the moment they want to take advantage of EU rules.

***2. Maintenance of business infrastructure***

Similarly, while they work in the territory of another Member State, they must maintain, in their state of origin, the means to perform their activity to be able to pursue it on their return.

***3. Legal requisites fulfilled in the country of origin***

The maintenance of such an infrastructure in the state of origin includes the use of offices, payment of social security contributions, payment of taxes, possession of a work permit and VAT number, or registration with chambers of commerce and professional organisations.

***4. Proof of genuineness of services assignment***

The ECJ also assumes that the person who is self-employed in the territory of a Member State performs work in the territory of another Member State, i.e., a defined task, the content and duration of which are determined in advance and must have the relevant contracts to prove is genuine.

***Implications of the case for cross-border bogus self-employed workers***

Currently, the supply of cross-border bogus self-employed workers is competing with cross-border sub-contracting of posted workers. Cross-border bogus self-employment has become cheaper than posting, involving flagrant violation of labour, social security and tax rules. Posted bogus self-employed workers are used to circumvent wages applicable under Directive 96/71/CE[28] and contributions due under Regulation 883/2004, often through organised labour supply chains[29].

Similar to what happens at national level, cross-border bogus self-employment also involves undeclared employment, under-declared wage or working time, undeclared or under-declared social security contributions and non-declaration of employer status. In this context, ensuring that A1 forms do not provide legal coverage to bogus self-employment is particularly important.

There is no contradiction in a chain of case law on this topic including *Altun*, C-359/16, pa. 17-20, 54-55, 60-61; *Alpenrind*, C-527/16; *Herbosch Kiere*, C-2/05, pa. 30 and *A-Rosa Flusschiff*, C-620/15, pa. 47.

This case law on the binding effect of A1 forms is important to tackle cross-border bogus self-employment since it involves the clarification of the following legal issues:

***1. Mutual recognition of A1 forms***

In line with the EU principle of mutual recognition recognised in EU law, A1 forms are binding for receiving institutions, which cannot therefore subject self-employed people holding an A1 to its own social security system. An A1 form is a statement of applicable legislation. It allows workers to pay social security contributions in their country of origin during a provision of services in another Member State.

***2. Particular focus on cooperation between Member States***

The ECJ establishes the disavowal of legal advantages when there is a lack of the substance requisite established in social security rules. In particular, the ECJ has

[28] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, pp. 1-6.

[29] Eurofound, *Exploring the Fraudulent Contracting of Work in the European Union*, Publications Office of the European Union, Luxembourg, 2016, p. 12.

established that the issuing institution should reconsider whether the A1 form was properly issued and, if appropriate, to withdraw the certificate if another Member State suspects the facts on which the certificate is based.

Where the institutions concerned cannot agree, it is open to them to refer the matter to the Administrative Commission for the Coordination of Social Security Systems ('the Administrative Commission'). The ECJ's approach is mainly focused on the promotion of cross-border cooperation between Member States. However, if the Administrative Commission does not succeed in reconciling the points of view of the competent institutions, the receiving Member State – without prejudice to any legal remedies existing in the issuing Member – can initiate infringement proceedings under Article 259 TFEU.

***3. Member States' action is allowed in the case of fraud***

As a last resort, in the case of fraud, a national court may disregard A1 forms when a receiving Member State applies for a withdrawal of those certificates and the issuing institution fails to consider the evidence provided. This is only possible in light of evidence collected in the course of a judicial investigation, which supports the conclusion that those certificates are fraudulently obtained. This principle was established in the *Altun* case, which analysed fraudulent practices to take undue advantage of Article 14(2) of Regulation 987/2009. By analogy, this decision also applies to Article 14(3) in the case of bogus self-employment, as both articles establish a substance test, the first, to salaried workers and the second, to self-employed workers.

***Key learning points***

Clarification of the following legal issues:

- Case law on the binding effect of A1 forms has important implications for the national legal framework and practice to tackle cross-border undeclared work and bogus self-employment.
- The self-employed person providing services in another Member State must maintain in their state of origin the necessary means to be able to pursue that activity on return as previously developed.
- A1 forms are binding for receiving institutions, who cannot therefore subject self-employed people holding an A1 to its own social security system.
- The ECJ establishes the disavowal of legal advantages when there is a lack of the substance requisite established in social security rules. However, the ECJ's approach is mainly focused on the promotion of cross-border cooperation between Member States.

**Box A6. The Supreme Court of the United Kingdom's case law on bogus self-employment: the Pimlico Plumbers case**
*[Judgment of the Supreme Court of 13 June 2018, heard on 20 and 21 February 2018]*

***Problem addressed***

*1. The Court, the dispute and the parties*

On its judgment dated 16 April 2012, the Employment Judge Corrigan ('the judge') decided that Mr Smith (the 'plumbing engineer') was not an 'employee' of Pimlico Plumbers Ltd ('Pimlico' or 'the company') within the meaning of Section 230(1) of the Employment Rights Act 1996 ('the Act'). Instead, the judge recognised that Mr Smith was a 'worker' within the meaning of Section 230(3) of the Act.

Pimlico brought the judge's decision to the appeal tribunal, which dismissed it on

21 November 2014. Pimlico therefore brought the case to the Court of Appeal, which also dismissed it on 10 February 2017. Finally, Pimlico further appealed to the United Kingdom's Supreme Court, which had to take a final decision.

*2. Legal question discussed and national legislation assessed*

Article 230(1) of the Employment Rights Act 1996 states that an 'employee' is an individual who works under a contract of employment. In contrast, Article 230(3) of the said Act defines a 'worker' as an individual who works under any other contract, whereby the individual undertakes to perform personally any work or services for another party, whose status is not that of a client or customer.

Thus, in the UK, the notion of 'employee' is different from the notion of 'worker'. This new category was introduced in the mid-1990s, extending the scope of some labour protections to individuals performing any work or service, irrespective of the existence of an employment relationship between the parties. Classification as a 'worker' excludes work or services carried out in a professional or independent business capacity; and 'workers' are covered, inter alia, by minimum wage legislation and working time regulation. However, they are excluded from several statutory protections such as regulation against unfair dismissal and redundancy[30].

***Description of case and relevance for bogus self-employment***

The UK has developed legal criteria for distinguishing bogus self-employment from genuine self-employment. These criteria are used in the Pimlico Plumbers case to reclassify the plumbing engineer as a 'worker', though the existing written agreement stated that he was an 'independent contractor' for the company, in business on his own account.

***Implications of the case for tackling bogus self-employment***

This ruling has potential for transferability of legal concepts to case law and regulations of other Member States since it sets precedence as to the criteria that must be used to reclassify individuals as 'workers' under British law, particularly regarding bogus self-employment.

*1. Personal performance*

For the Supreme Court, the dominant feature of Mr Smith's contract with Pimlico was the obligation of 'personal performance'. This was not contradicted by the fact that he could appoint a substitute, as this facility was subject to strict limits.

The substitute had to come from the ranks of Pimlico operatives, i.e. from those employees bound to Pimlico by an identical suite of obligations. Thus, it was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work is done.

The plumbing engineer was also obliged to comply with the 'manual while providing the services' which, in the view of the Supreme Court, governed all aspects of Mr Smith's operations in relation to Pimlico. In addition, the company could terminate the agreement immediately in case of 'gross misconduct'.

Consequently, the Supreme Court concludes that Mr Smith could be considered as a 'worker', unless the status of Pimlico was that of a client or customer of his.

*2. Status of customer or client*

In determining whether Pimlico should be regarded as a client or customer of Mr Smith, it was relevant to discern: (a) the extent of Pimlico's contractual obligation to offer him work, and (b) the extent of his obligation to accept such work.

[30] ILO, *Non-standard Employment around the World. Understanding Challenges, Shaping Prospects*, ILO, Geneva, 2016, p. 60.

The tribunal found that Pimlico's contractual obligation was to offer work to Mr Smith but only if it was available. Mr Smith's contractual obligation, by contrast, was in principle to keep himself available to work up to 40 hours per day, five days per week, for any assignments that Pimlico might offer. However, his contractual obligation was without prejudice to his entitlement to decline a particular assignment in light of certain factors, such as the location of the work. Clearly, this did not preclude Pimlico from not insisting on his going to work in any event, which seems to have occurred.

*3. Financial risks*

In support of its contention that it was a client or customer of Mr Smith, Pimlico makes an additional point, stating that there were financial risks, as well as advantages, consequent upon Mr Smith's work for Pimlico.

Pimlico did not pay him, not even for any materials that he had supplied, until the client had paid: (a) if a client paid more than one month late, the payment to him was halved; and (b) if a client failed to pay within six months, it paid him nothing, not even for his materials, and irrespective of whether the client made payment thereafter.

For the Supreme Court, the severe terms as to when and how much Pimlico was obliged to pay Mr Smith, on which it relied, betrayed a grip on his work inconsistent with his being a truly independent contractor. The contract also made references to 'wages', 'gross misconduct' and 'dismissal', which shed light on its true nature.

In the view of the Court, the drafting of the agreement strongly militated against recognition of Pimlico as a client or customer of Mr Smith. Its tight control over him was reflected in its requirements that he should wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room. Besides, there was a suite of covenants restrictive of his working activities following termination.

In conclusion, Pimlico could not be regarded as a client or customer of Mr Smith. On the contrary, Mr Smith fit in the definition of 'worker' provided in Hashwani v Jivraj[31], where the Supreme Court applied the concepts of direction and subordination identified in the Allonby case[32] in cases where: 'the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration'.

***Key learning points***

- The legislator considered that defining employment status tests only based on subordination limits the scope of the courts in dealing with novel situations that do not fit non-standard work. Thus, a new category was introduced, extending the scope of some labour protections to individuals performing any work or service, irrespective of the existence of an employment relationship between the parties.
- In common law, tests used to define 'worker' status are often complex, circumstantial and subject to continuous development in line with economic demand, as occurs in the Pimlico Plumbers case[33].
- The 'Taylor Review' admits that the distinction between 'workers' and 'employees' is confusing. However, it notes that amending the term 'worker' would create unnecessary complication; particularly considering that a dependent contractor can be classified as a 'worker' under British laws.

[31] UK Supreme Court, Hashwani v Jivraj case [2011] UKSC 40, [2011] 1 WLR 1872.

[32] ECJ Judgment of 13 January 2004 in the Allonby case, C-256/01, EU:C:2004:18.

[33] Bales, K., Bogg, A., Novitz, T., '"Voice" and "Choice" in modern working practices: problems with the Taylor Review', *Industrial Law Journal*, Vol. 47, No 1, 2018, pp. 46-75.

Consequently, in the review, existing classifications are considered fit for embracing new forms of work[34].

**Box A7. Para-subordinated work under organisational autonomy in the collaborative economy: the Spanish Glovo case**

*[Judgment of Juzgado de lo Social No 39 de Madrid, 3 September 2018].*

***Problem addressed***

***1. The Court, the dispute and the parties***

This case was brought to the Juzgado de lo Social No 39 de Madrid, ('Madrid Social Court' or 'the Court'), by a worker ('rider') who had signed a dependent self-employment contract with the GLOVO platform (the 'company'). The rider claimed that the system of work imposed by GLOVO on the 'distributors' or 'riders' meets the characteristics of the labour relationship and does not qualify as 'economically dependent self-employed work'.

***2. Outline of the legal question discussed***

In the context of that system of work, GLOVO puts the 'riders' in direct contact with customers who order takeaway meals through a mobile application (APP). Using this APP, customers order meals from restaurants that are registered in GLOVO's application. The worker picks up the ordered meal from the restaurant and travels via bicycle or motorbike to the address provided by the customer.

***3. National regulation assessed in the case***

The Madrid Social Court applies Articles 11 to 18 of Law 20/2007, of 11 July, on the Spanish Statute of Self-employment (Estatuto del Trabajador Autónomo) which regulates the working conditions of 'economically dependent self-employed workers' (trabajador autónomo económicamente dependiente, TRADE) and Article 1.1 of Royal Legislative Decree 2/2015, of 23 de October, which defines the concept on 'worker' under Spanish Law.

***Description of case and relevance for bogus self-employment***

Some concerns were raised that such recognition of para-subordinate work might lead bogus self-employed people who qualify as 'workers' to be transferred to the category of economically dependent self-employed work, as a part of companies' outsourcing strategies[35].

This ruling provides a specific analysis of national recent trends affecting 'para-subordinate work' in collaborative platforms, thus providing some legal parameters to assess if the concerns may be justified.

In this particular ruling, GLOVO 'riders' are not classified as employees, but as economically dependent (TRADEs) on a single client, thus entitled to a more limited range of social rights. The reasons for such classification by the Madrid Social Court are the following:

[34] This independent review considers the implications of new forms of work on worker rights and responsibilities, as well as on employer freedoms and obligations. It sets out principles to address the challenges facing the UK labour market. Taylor, M., *Good Work: The Taylor Review of Modern Working Practices*, Department for Business, Energy & Industrial Strategy, London, 2017, accessed 10 August 2018 at: https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices.

[35] European Economic and Social Committee, Opinion on 'New trends in self-employed work: the specific case of economically dependent self-employed work' (own-initiative opinion), OJ C 18, 19.1.2011, pp. 44-52.

***1. Subordination test: how 'riders' organise their work***

First, the Madrid Social Court considered the rider was a TRADE because the worker (a) did not have a working day or timetable, (b) decided the time zone in which they wanted to work, (c) chose the orders in which they were interested, (d) decided the route to follow to each destination and they had no obligation to start or end the day at a certain time.

Second, as the company did not impose sanctions for the non-acceptance of orders, the Court considered that GLOVO had no disciplinary power over the rider beyond the withdrawal of the contract itself if services were not performed.

***2. Instruments of control: GPS geolocation and the scoring system***

The Madrid Social Court considered that the GPS geolocation is not an instrument of control of the company but the way to keep track of mileage for subsequent payment on the next invoice. Similarly, the scoring system is not considered by the Court as an instrument of control or sanction but serving to regulate the preference of access to orders. For the Court, that more points are accumulated for providing services during peak hours ('diamond hours') is not a sanction but an incentive.

***3. Market risks and means of production***

Next, the Madrid Social Court considered that the rider assumes the risk and responsibility of each order and responds to the customer, who also scores their work. Thus, the rider is not subjected to an internal organisational structure of the company, which only decides (a) the rates with which they will be paid for the services and (b) the tool through which they manage the 'messages' (APP), following a computer programme that seeks to minimise the sum of costs. For the Court, these characteristics are compatible with the provision of freelance work (TRADE) wherein the client is able to provide certain technical indications to the contracted professional and indicate the price of the services.

***4. Rest periods and exclusivity***

Finally, the Madrid Social Court observed that the worker did not have to justify their absences, only communicate them to the company and that their 'score' was not lowered for that reason. The worker could also interrupt their activity for 18 working days a year to rest (though not paid), in accordance with Spanish provisions on TRADE. Finally, the Court notes that there is no exclusivity pact between the parties, as the worker could simultaneously provide services for other companies (including the company's competitors) provided that the parameters of economic dependence are respected in order to continue to hold the status of TRADE.

***5. Para-subordinated work defined***

Consequently, for the Madrid Social Court all the foregoing elements that concur in the contractual relationship were clearly contrary to the notes of subordination, dependence and absence of market risk that characterise the labour relationship[36].

On the contrary, the description of tasks of the GLOVO rider fits the characteristic notes of the TRADE self-employed contract defined in Spanish law since 'the rider' (a) did not have workers at their service, (b) did not carry out their activity in an undifferentiated manner with other employees of the company, (c) had the infrastructure and material necessary for carrying out their activity (motorbike and mobile phone), (d) relied on GLOVO for at least 75% of their income. The Madrid Social Court decided that they also perform their activity with their own organisational criteria (choosing the time slot, the services to be carried out, the route to follow and the rest periods, without having to justify their absences).

[36] Same conclusion was reached in Judgment of Juzgado de lo Social de Madrid No 17 of 11 January 2019.

***Implications of the case for tackling bogus self-employment***

Accordingly, a GLOVO rider, as a dependant self-employed worker, has the rights and obligations that derive from the different sources of regulation of self-employment and, in particular, from agreements of professional interest (API).

APIs are similar to collective agreements. Thus, APIs are subject to the judicial doctrine on the interpretation of collective agreements applicable to ordinary workers, as per the doctrine established in the Judgment of the Spanish Supreme Court (Tribunal Supremo), 20 November 2015.

However, other Spanish Social Courts – like the Juzgado de lo Social No 1 Gijón ('Gijón Social Court') in its Judgement of 20 February 2019 – have analysed the same collaborative platform (GLOVO) and have considered 'riders' to be ordinary workers[37].

***1. Existence of work orders and standardised processes***

Despite careful drafting of the contract and the persistent intention of the company to avoid the qualification of labour employment, there are numerous notes for the Gijón Social Court that show true dependence between the rider and the company. In its ruling, the existence of work orders and standardised processes to carry out the tasks means that the worker does not have the same freedoms as a self-employed worker.

***2. Working time under strict conditions***

The Court found it shocking that the company alleged that the riders had 'freedom of choice' around their working time. For the Gijón Social Court, this choice depends on a scoring system that requires the worker to bend to the demands of business if they want to set a schedule that is profitable, which means that the labour flexibility the company intends to assert becomes a way of making the errand workers compete for the best hours that are no longer the most compatible with their personal lives, rather those that the company considers to be the most profitable or in high demand.

***3. Control of the performance of the work and disciplinary regime***

For the Gijón Social Court, the company also essentially controls the performance of the work through the APP itself and GPS geolocation systems, as this control serves to fix the remuneration and to distribute the services among the different distributors based on business efficiency criteria. Another clear indication of dependence is the existence of a disciplinary regime. For the Gijón Social Court, provisions that the rider must sign in mean the contract cannot be called otherwise, as such causes of termination of the contractual relationship go parallel with the generic causes of termination of the employment contract for serious breaches on the part of the employee.

***4. Risks connected to this new legal category***

Such vast differences in approaches between the two Spanish Courts prove that the dividing line between independent and para-subordinate work is very thin and difficult to draw. Spain has the most recent, and the most complete, definition of an 'economically dependent worker'. Therefore, evaluation of Spanish case law enables the identification of some risks connected with the recognition of this new legal category.

While social protection is granted, their labour law rights are recognised only to a very limited extent. Although regulations differ from one country to another, case law examples from Spain may reveal that the risk of transferral of bogus self-employment to the category of 'economically dependent self-employment' exists, particularly as far as non-qualified workers are concerned.

[37] Decisions like Judgment of Juzgado de lo Social No 33 of 11 February 2019; Juzgado de lo Social No 1 de Madrid, 4 April 2019 and of 3 April 2019.

***Key learning points***

- Para-subordinate work might lead bogus self-employed people who qualify as 'workers' to be transferred to the category of 'economically dependent self-employed' workers, as a part of companies' outsourcing strategies, particularly where non-qualified workers are concerned.
- Platform workers (as in GLOVO platform) can qualify as 'economically dependent workers' for a single client, entitled to some social rights warranted by this dependence, including collective bargaining.
- However, for the time being, Spanish first-level Courts do not agree on the existence of subordinated work in (a) how 'riders' organise their work or (b) instruments of control such as GPS geolocation and the scoring system. They also do not agree on the assumption of market risks and means of production, nor the relevance of free choices concerning rest periods and exclusivity. Such vast differences in approaches prove that the dividing line between independent and para-subordinate work is very thin and difficult to draw.

**Box A8. Para-subordinated workers under the organisational control of the company: the Foodora case in Italy**

*[Corte di Appello di Torino (Italy) Judgment of 11 January 2019 in the Foodora case]*

***Problem addressed***

***1. The Court, the dispute and the parties***

This case was brought before the Corte d'Appello di Torino (the 'Court of Appeal of Turin' or 'the Court') by several bicycle riders who had signed a collaboration contract with the Foodora platform (the 'company'). The workers asked for the review of the judgement of the Tribunale Ordinario di Torino (the Court of first instance of Turin), of 7 May 2018, in which they were considered self-employed contractors. On the contrary, they claim employment status.

***2. Outline of the legal question discussed***

'Riders' work during shifts established by the company, which communicates with them via a mobile application. The company organises the working system and workers perform their activities for the company regularly (almost every week) throughout the period of the contract.

***3. National regulation assessed in the case***

The Court of Appeal of Turin had to choose from one of three types of relationships:

- A subordinate employment relationship regulated by Article 2094 of the Italian Civil Code.
- A para-subordinated relationship regulated by Article 2 of Legislative Decree 81 of the 2015 Jobs Act. This Act was reformed in 2016, extending particular employment rights to certain vulnerable para-subordinate workers.
- A collaboration relationship, pursuant to Article 409, paragraph 3, of the Italian Code of Civil Procedure, wherein the worker is self-employed and autonomously organises his own work. 'Coordination' methods are defined by mutual consent.

***Description of the case and platform mode of operation***

The company provides workers with a bicycle helmet, a vest and a trunk with the clear sign and logo of the company, all for a deposit of EUR 50. The relationship

between the company and the workers is managed through the multimedia platform 'Shyftplan', and an application for smartphones (at the beginning 'Urban Ninjia', and then 'Hurrier'). Foodora provides instructions for the use of these platforms. The company publishes weekly slots on Shyftplan, indicating the number of riders that are needed to cover each shift.

Each rider can communicate their availability for the existing slots according to personal choice, but are not obliged to do so. Once the availability is collected, the head of the 'fleet' confirms through 'Shyftplan' whether the slot is assigned.

If the shift is confirmed, the worker must go to one of the three pre-defined departure zones at the start of the shift, activate the Hurrier application by entering the credentials (username and password) and start geolocation (GPS). The rider then receives the order notification on the app with the address of the restaurant. The rider must deliver the food to the customer, whose address has been communicated via the app. The worker, once given an assignment, is obliged to make the delivery within 30 minutes, otherwise they are penalised EUR 15.

Finally, the rider must confirm that he/she has completed the assignment properly. The rider's fee is set at EUR 5.60 gross per hour.

***Implications of the case for tackling misclassified employment***

Ensuring the correct classification is one way of tackling bogus self-employment. Another solution adopted by some Member States is to extend the application of certain labour laws to para-subordinate workers (*lavoratori parasubordinati*). The Foodora case is one of the most recent rulings having applied the rules adopted in 2016 (which extended some employment rights to para-subordinate workers).

In this case, the Court of Appeal of Turin does not classify 'riders' as employees, considering (a) that the work is developed on an occasional basis, and (b) that the rider could withdraw from the work assignment at any time.

***1. Occasional work is not subordinated employment***

The riders worked between 68.5-44/45 hours per month. As the average working week was less than 20 hours, it was classified as 'occasional work' which, under Italian law, cannot be qualified as subordinated employment.

***2. If there is no obligation to go to work, it is not an employment relationship***

In addition, the Court of Appeal decided that subordination did not exist because 'riders' had no obligation to be available to work. Workers could even decide not to work after having accepted a shift (slot) by revoking their consent in the app, or simply not showing up. It was not proven during the proceedings that in such circumstances the company applied any sanctions. Thus, because the Court of Appeal considered the 'the obligation to work' as an essential part of subordination, it did not recognise the existence of an employment relationship.

***3. Para-subordinated work under the organisational control of the company***

Instead, for the Court of Appeal 'riders' are para-subordinated workers who continually 'collaborate' by providing exclusively personal work to a main client, who can 'organise the activity also with respect to the time and the place of work'. This organisational subordination is the main difference to regulations of para-subordinated work in other Member States as, for example, in Spain.

***4. Same wages as employees***

Foodora riders are granted equal wages to employees in the same industry. Such recognition is based on Article 2 of Legislative Decree 81 of the 2015 Jobs Act, which extended employment protection to para-subordinated workers.

Since 1 January 2016, said provision establishes that the regulation applicable to the subordinate employment relationship applies also to 'hetero-organised' para-subordinated workers, specifically with regards to: safety and hygiene; direct and deferred remuneration; professional classification; working time; holidays; and social security. Therefore, in Italy the differences in social treatment between different types of workers has diminished. This is relevant for non-standard 'platform workers' and for undeclared work, as it facilitates the formalisation of under-declared and/or undeclared work.

Therefore, the Court of Appeal of Turin finds that riders should be granted remuneration established in the national collective bargaining agreement for logistics, transport and goods. But since there is no recognition of subordination, no dismissal rights are recognised.

***Key learning points***

- The Court of Appeal of Turin classifies 'platform work' carried out by 'riders' as para-subordinated work under rules that are meant to guarantee greater protection to non-standard workers.
- Para-subordinated work is developed under the formula of 'hetero-organisation', whereby the company can determine the manner of execution of the work and establishes the times and places of work.
- A 'collaboration relationship' can be qualified as 'hetero-organised' when workers' activities are integrated in the productive organisation of the company, beyond 'mere coordination'.
- The company can determine the methods of work carried out by the worker. This is the main difference compared to other para-subordinated workers in other countries. In Spain, for example, para-subordinated workers develop their activity under their own organisational criteria.

**Box A9. A nurse is not an independent contractor: the Beigeladene case in Germany**

*[German Sozialgericht Heilbronn Judgment of 1 February 2017]*

***Problem addressed***

***1. The Court, the dispute and the parties***

This case was brought before the Sozialgericht Heilbronn ('Social Court of Heilbronn' or 'the Court') by a nurse specialising in anaesthetics and intensive care ('the worker' or 'the nurse') against Beigeladene, a non-profit limited liability company (GmbH) that manages the clinic where the nurse provided her services. She concluded a 'freelance' contract with Beigeladene as a self-employed worker. However, she claims employment status, which requires social security contributions to be paid by her employer.

***2. Outline of the legal question discussed***

This case provides a comprehensive overview of German laws' approach to self-employed workers who perform dependent work.

German case law includes most characteristics and presumptions present in European national laws for the prevention of bogus self-employment, including the 'primacy of facts' rule and indicators that may trigger a reclassification under an employment

relationship[38].

In this case, the nurse had to follow instructions from the on-duty doctors, and the hospital's management controlled her work. She also worked with permanent nurses at the hospital. She did not hire or manage any employees and she maintained an 'office' at home. She also bore no entrepreneurial risk.

Thus, the Social Court of Heilbronn had to apply a presumption on the existence of an employment relationship, meaning that the burden of proof is placed on the employer in this dispute concerning employment status.

***3. National regulation assessed in the case***

In this case, the Court issues a decision regarding the existence of dependent employment and the compulsory pension insurance under paragraph 1 Sentence 1 No 1 Social Code Sixth Book – Statutory Pension Insurance – (SGB VI) and according to the law of employment promotion in accordance with no. 25 Paragraph 1 Sentence 1 of the Social Security Code Third Book – Employment Promotion (SGB III).

***Description of case and relevance for bogus self-employment***

***1. Classification criteria***

In Germany, the difference between employment and self-employment has been established by case law. A person is generally considered an employee by the social insurance administration if they fulfil at least three of the following criteria: (a) do not have employees, (b) have one employer only, (c) perform the same type of work repeatedly, (d) have a relationship of organisational subordination, (e) are not exposed to entrepreneurial risk, or (f) perform work similar to that they performed previously within the same company. The notion of employee for social security purposes is typically broader than for labour law or collective bargaining purposes[39].

***2. Artificial arrangements hiding an employment relationship***

Here, the Beigeladene case can be considered a paradigm of national case law aimed at tackling bogus self-employment ('Scheinselbstständigkeit'). The Social Court of Heilbronn determined that 'freelance' contract which considered the nurse as a self-employed worker should be annulled for incurring in fraud. In this case, fraud exists because such bogus self-employment is a fictitious transaction within the scope of paragraph 117 of the Civil Code.

In contrast, genuine self-employment involves (a) entrepreneurial risk, (b) the existence of a permanent establishment, (c) the possibility to dispose of one's own workforce, and essentially to freely organise one's own activity and working time.

***Implications of the case for tackling employment misclassification***

In the Beigeladene case, the Social Court of Heilbronn examined the 'true' nature of the agreement to determine the existence of an employment relationship as per the criteria established by the Supreme Court.

***1. Entrepreneurial risk***

First, the Court notes that in this case the nurse is not exposed to entrepreneurial risk. In this regard, the decisive criterion for the existence of entrepreneurial risk is whether her own capital and/or her work is used under a possible risk of loss. For the Court, the nurse was exposed only to an 'income risk' that could affect any employee who only receives temporary contracts and works on call.

[38] International Labour Organization (ILO), *Non-standard forms of employment. Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment*, Geneva, 16-19 February 2015, Conditions of Work and Equality Department.

[39] Schoukens, P., Barrio, A., Montebovi, S., 'The EU social pillar: an answer to the challenge of the social protection of platform workers?', *European Journal of Social Security*, Vol. 20, No 3, 2018, pp. 219-241.

However, entrepreneurial risk is just an indication of self-employment since it must be accompanied by free determination of the use of one's own labour force. In contrast, a 'worker' must be personally subordinated to the employer.

***2. Relationship of subordination***

In this case, according to her 'freelance' contract, she was free to determine when she was available to work. As an independent contractor, she could be offered more than 10 hours per day and could decide which services she accepted or rejected. However, the Social Court of Heilbronn did not contemplate such circumstances as relevant, considering that the nurse was fully integrated into the company's organisation. In fact, she was subject to comprehensive instructions from the employer regarding duration, location and type of execution of her work. Here, the Court noted that employers' instructions in the case of qualified services can be limited to 'functional' participation in the work processes, as in this case.

Consequently, the nurse fulfilled the criteria to be considered an employee: (a) she did not have employees, (b) she performed the same type of work repeatedly, (c) she had a relationship of organisational subordination, and (d) she was not exposed to entrepreneurial risk.

***Key learning points***

- German case law on bogus self-employment applies the 'primacy of facts' rule and a presumption on the existence of an employment relationship, meaning that the burden of proof is placed on the employer in a dispute concerning employment status.
- The Beigeladene case can be considered a paradigm of national case law aimed at tackling bogus self-employment ('Scheinselbstständigkeit'). The Social Court of Heilbronn determined that a 'freelance' contract which considered the nurse as a self-employed worker should be annulled for incurring in fraud within the scope of paragraph 117 of the Civil Code.
- In contrast, genuine self-employment involves (a) entrepreneurial risk, (b) the existence of a permanent establishment (c) the possibility to dispose of one's own workforce and essentially to freely organise one's own activity and working time.
- For the Court, the nurse was exposed only to an 'income risk' that could affect any employee who only receives temporary contracts and works on call.
- Entrepreneurial risk is just an indication of self-employment since it must be accompanied by free determination of the use of one's own labour force. In contrast, a 'worker' must be personally subordinated to the employer.
- The Beigeladene case proves that courts are looking into the factors that currently contribute to the increase of bogus self-employment to adjust their criteria to those types of work on the borderline between dependent employment and self-employment.

**Box A10. The Deliveroo case in the Netherlands: bogus self-employment in the collaborative economy**

*[Rechtbank Amsterdam Judgment of 15 January 2019, in the Deliveroo case]*

***Problem addressed***

***1. The Court, the dispute and the parties***

This case was brought to the Rechtbank Amsterdam ('Amsterdam District Court' or

'the Court') by the Federatie Nederlandse Vakbeweging ('FNV' or the Federation of Dutch Trade Unions) for the recognition of the employment status of 'riders' working for the Deliveroo platform (the 'company').

***2. Outline of the legal question discussed***

Since September 2015, Deliveroo offered riders fixed-term employment contracts. Such contracts were 'call contracts' with a minimum of 1 hour and a maximum of 160 hours per month. Payment was made in accordance with the statutory (youth) minimum wage.

The employee was obliged to work at least one shift during the weekend and one evening shift per week. If the shift is assigned to them, they were obliged to respond the calls. Not responding to a call three times would result in immediate dismissal under the employment contract.

On February 2018, Deliveroo decided not to extend employment contracts but instead retain the services of workers as contractors, based on so-called 'partner agreements'.

The Amsterdam District Court must therefore assess whether the nature of the legal relationship between Deliveroo and its riders has changed to the extent that the elements of the employment contract are no longer met. In particular, the Court must assess whether (a) the greater freedom to perform the work, (b) the possibility of being replaced and (c) the right to refuse an order preclude the existence of an employment contract and, specifically, the existence of subordination.

***3. National regulation assessed in the case***

The core of the dispute is whether the legal relationship between the workers of Deliveroo can be regarded as an employment contract within the meaning of Section 7: 610 (1) or (2) of the Dutch Civil Code (FNV position) or as an assignment agreement as referred to in Article 7: 400 of the Dutch Civil Code (Deliveroo position).

***Description of the case and platform mode of operation***

Workers use an app (the 'Rider app') to receive orders on their telephone. Workers can log in via this app and choose whether, when, where and for how long they want to work. Part of that app is the self-service booking tool (SSB). Since 2018, the worker can reserve sessions or cancel reserved sessions using the SSB. They can also log in at any time without having reserved in advance. They can also decide not to log in at all during a reserved session (a 'no-show'), log in later (a 'late log in') or log out early during a session (an 'early log out'). An order can be refused, specifying one of the following in the system: restaurant too far away, restaurant waiting time, or roads closed.

There is a bonus depending on the number of deliveries over a 14-day period. The amount of the bonus varies per period and per delivery area, but always means that the higher the number of deliveries in a given period, the higher the bonus.

***Implications of the case for tackling bogus self-employment***

This ruling has potential for transferability of legal concepts to case law and regulations of other Member States since it sets precedence as to the criteria to be used to reclassify bogus self-employed platform workers as employees. The Amsterdam District Court accepts that companies need flexibility and that certain workers appreciate such flexibility, specifically where there is a higher compensation in the absence of social security benefits. However, the Court highlights that, given the mandatory nature of labour law – and the notion of social protection behind it – it is not up to the parties to decide whether they want to deviate from it.

First, the Court notes that the decisive factor here is not how the parties qualify the agreement. In the case, a 'standard contract' is unilaterally drawn up by Deliveroo

and is not negotiable. Thus, the worker willing to continue (or obtain) this work has to meet the conditions of the company (such as registering as a self-employed person at the Chamber of Commerce, or purchasing a meal box).

Second, the Court considered that the worker's situation under the current 'partner agreements' does not substantially differ from the situation under the employment contracts, with regards to the existence of subordination and remuneration. Particularly for the following reasons:

***1. Alleged 'freedom' to work, subject to strong limitations***

For the Court, the SBB is essentially a scheduling system that allows the availability of workers to be adjusted in the direction desired by Deliveroo, by increasing their possibilities of generating income in the schedule/hours desired by the company. Alleged 'freedom' to work is thus subject to strong limitations. Unless the worker is available to suit the companies' needs, they will not be able to generate sufficient income. In addition, considering the performance criteria used by the company, there are limited chances to refuse orders.

***2. Dismissals***

Though repeated refusal of orders is no longer subject to immediate dismissal, the easy way to terminate the contract and the possibility to stop assigning orders means that there is no material change at this point.

***3. Retribution***

Compensation due for the stipulated work is considered by the Amsterdam District Court as 'variable wage per specific performance', as there is little or no room in the system for negotiating the tariff.

***4. Instructions and organisation of the work***

Regarding how the worker must behave during the delivery, several obligations are included in the contract, including: (a) perform the service within a reasonable time and via a route that the delivery person deems safe and efficient; (b) if they foresee they cannot deliver the order, they will inform Deliveroo; (c) they must be professional in dealing with (the staff of) Deliveroo, other riders, staff of the partners and passers-by; and (d) perform the service with due care, skill and competence.

The Court takes the view that subordination standards other than those described are difficult to imagine, particularly considering that the work is unskilled.

***5. No relevant differences***

In conclusion, the Amsterdam District Court finds no relevant differences within the period in which work was carried out based on an employment contract, apart from the regulations regarding clothing and the meal box. Deliveroo no longer requires the use of printed material from the company, which the Court considers immaterial. Overall, the court concludes that the nature of the work has not changed significantly. Subordination exists, though there are few indications due to technological possibilities, and even if work is done at times chosen by the employee.

***Key learning points***

- This judgment establishes a useful standard in cases where workers have moved involuntarily into self-employment to keep their jobs or even to get a job. It effectively tackles the issue of misclassification and the challenge of classifying workers that fall in between dependent employment and self-employment.
- Whether a platform worker should be classified as an employee or self-employed depends on the specific circumstances in each particular case, such as (a) the relationship established with the platform (b) the place where the work is carried out and (c) the conditions of performance of the

different tasks.

- This must be understood in a context of absence of consensus as to the legal qualification of riders in similar platforms in the EU.
- Cases involving platforms with identical modes of operation are addressed differently by different Courts. In Spain, Glovo riders have been considered as ordinary workers by some Courts and as para-subordinated workers, with full autonomy in their work, in other cases. In Italy, platform workers have been classified both as self-employed and as 'hetero-organised' para-subordinated workers, whereas the company 'organises the activity also with respect to the time and the place of work'.
- Similarly, in the Netherlands there is not a common position regarding the same types of platforms. On a decision dated 23 July 2018, the Amsterdam District Court analysed the same collaborative platform (Deliveroo). It ruled out the existence of an employment contract and considered riders to be self-employed.

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