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Fraudulent Contracting of Work: Bogus Self-Employment (Czech Republic, Spain and UK)

Abstract

[Excerpt] When direct subordinated employment is disguised as self-employment, it is termed ‘bogus’. Work can be contracted in several different ways. The main distinction remains the one between ‘employment’ and ‘self-employment’: this is a prominent feature in all European legal systems, built around the concepts of ‘subordination’ and ‘autonomy’. Contracting work can therefore be done in one of two ways:

- through a commercial relationship/contract, between one client and a self-employed person or entrepreneur
- through a labour contract, between an employer and a worker/employee.

No definition of bogus self-employment has yet been agreed at European level. Various definitions have been proposed in several forums. Bogus self-employment refers to self-employed people ‘who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers’ responsibilities’ (OECD, 2000, p. 156). Generally speaking, a person is considered to be in bogus self-employment when the characteristics and activities of self-employment (autonomy, tendering for different clients and so on) are limited or non-existent. Thus, bogus self-employment contains features of subordinate employment relationships such as:

- long-term engagement with a single contractor/work donor/employer
- lack of control or autonomy over the organisation of work (working time, for example)
- lack of own resources and equipment.

However, the person concerned is bound by a commercial contract instead of a labour contract and therefore does not enjoy the protection and social rights provided by labour laws.

Bogus self-employment results in a situation of factual subordination and dependence, which is not recognised legally or institutionally recognised in terms of employment and social rights, nor in terms of employers’ liability and responsibility towards their employees. Thus, workers must comply with employers’ working methods, but are deprived of the various rights associated with employee status (such as severance pay in the case of dismissal, access to unemployment benefits, and health and safety protection) and therefore suffer negative consequences.

Keywords

fraudulent contracting, bogus self-employment, Czech Republic, Spain, United Kingdom

Comments

Suggested Citation

European Foundation for the Improvement of Living and Working Conditions. (2017). *Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)*. Dublin: Author.

Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)

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When citing this report, please use the following wording: Eurofound (2017), *Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)*, Eurofound, Dublin.

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The European Foundation for the Improvement of Living and Working Conditions (Eurofound) is a tripartite European Union Agency, whose role is to provide knowledge in the area of social, employment and work-related policies. Eurofound was established in 1975 by Council Regulation (EEC) No. 1365/75 to contribute to the planning and design of better living and working conditions in Europe.

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Introduction

When direct subordinated employment is disguised as self-employment, it is termed ‘bogus’. Work can be contracted in several different ways. The main distinction remains the one between ‘employment’ and ‘self-employment’: this is a prominent feature in all European legal systems, built around the concepts of ‘subordination’ and ‘autonomy’. Contracting work can therefore be done in one of two ways:

- through a commercial relationship/contract, between one client and a self-employed person or entrepreneur
- through a labour contract, between an employer and a worker/employee.

The distinction is fundamental, relating as it does to the different regulations, principles and rights that apply to employees and self-employed individuals.

Across European countries, the ‘employment contract’ has been, and still is, the point of reference for determining the rights and obligations of both workers and employers. This status and its regulation address several features of employment, such as organisation of work, social contributions and protection, and individual and collective action and rights. All other statuses are devised and determined against this background. As research underlines, in most EU countries self-employed workers are not entitled to many of the benefits and rights that employees enjoy (although regulation differs between countries). These usually include holiday pay, sick pay, paid parental leave, severance pay, unemployment benefits, access to training, and entitlement to join or be represented by a trade union organisation. Moreover, self-employment can be considered more precarious because the terms of the contract can be changed much more easily than in the case of a proper employment contract.

Beyond this clear-cut distinction, ambiguous situations nevertheless emerge. This is mostly in cases where individuals who are ‘contracted’ to perform an activity and deliver a product/service (in a self-employed capacity) find themselves in a situation of factual subordination and dependence (the same *de facto* position as an employee). Two designations cover these situations, each stressing different aspects: ‘bogus self-employment’ and ‘economically dependent worker’. While the former designation underlines the intention to circumvent regulations, the latter corresponds more to a factual description of a situation than a deliberate construction (Eurofound, 2017, forthcoming).

No definition of bogus self-employment has yet been agreed at European level. Various definitions have been proposed in several forums. Bogus self-employment refers to self-employed people ‘who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers’ responsibilities’ (OECD, 2000, p. 156). Generally speaking, a person is considered to be in bogus self-employment when the characteristics and activities of self-employment (autonomy, tendering for different clients and so on) are limited or non-existent. Thus, bogus self-employment contains features of subordinate employment relationships such as:

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However, the person concerned is bound by a commercial contract instead of a labour contract and therefore does not enjoy the protection and social rights provided by labour laws.

Bogus self-employment results in a situation of factual subordination and dependence, which is not recognised legally or institutionally recognised in terms of employment and social rights, nor in terms of employers’ liability and responsibility towards their employees. Thus, workers must comply with employers’ working methods, but are deprived of the various rights associated with employee status (such as severance pay in the case of dismissal, access to unemployment benefits, and health and safety protection) and therefore suffer negative consequences.

Genuine and bogus self-employment: national definitions

Different regulatory situations exist in the three countries studied in this information sheet (Table 1). The distinction between employment and self-employment is devised by law in the **Czech Republic** and **Spain**, while in the **UK**, no statutory definition exists. Furthermore, in **Spain**, the status of ‘economically dependent self-employed’ has been legally recognised.

In the **Czech Republic**, the Labour Code (section 4, paragraph 2, Act no. 262/2006 Coll.) defines ‘employment’ as ‘a working activity that is performed in the framework of a relationship of superiority and subordination between an employer and an employee’.

Employment consists of the personal performance of a working activity by an employee ‘in favour of an employer, in compliance with the latter’s instructions, on the latter’s behalf, and in exchange for a wage, pay, or remuneration’; moreover, the working activity shall be carried out during specific working hours or a period of time otherwise specified or agreed upon, at the employer’s premises or possibly at another workplace agreed upon, as well as at the employer’s expense and under the latter’s responsibility. Besides this, section 3 of the Labour Code provides that employment-related working activities can only be performed in the framework of a labour law relationship.

By detailing the criteria that qualify a relationship as employment, the Czech Labour Code provides a guide for determining what should be regarded as a labour law relationship and what should not, and consequently what could be characterised as ‘false’ or ‘bogus’ self-employment. Accordingly, if a person carries out an activity with features that are typical of a working relationship, this must be organised using an employment contract. If the person performs the working activity in the framework of a trade licence but works at the employer’s workplace, and their work displays characteristics of an employment relationship, this would be considered a form of ‘bogus self-employment’ (Průša et al, 2009).

In the **UK**, despite the absence of a statutory definition of employment or self-employment as such, a legal distinction between a contract of service (direct employment) and a contract for services (self-employment) exists; each of these comes with a different set of rights and obligations, for both employers and workers. Nevertheless, the main characteristic of the situation in the UK is the absence of certainty regarding the status, as the qualification of a relationship for contracting work can only be fully established by a court decision, which remains approximate given the complexity of the ‘four-test’ process that includes the following criteria:

- control (duty to obey orders, discretion on hours of work and so on)
- integration (disciplinary or grievance procedures, inclusion in occupational benefit schemes and so on)
- economic reality (method of payment, freedom to hire others, providing own equipment)
- mutuality of obligation (duration of employment, regularity of employment and so on) (Deakin and Morris, 2005).

In **Spain**, a statutory distinction exists between direct employment and self-employment. The two statuses are regulated by distinct rules: the Workers’ Legal Statute (1980) and the Self-employed Workers’ Statute (2007). These respectively demarcate their own scope of action, establishing different sets of rights, and using dependence and subordination (*ajenidad*) as the most relevant criteria to distinguish between the two.

The Self-employed Workers’ Statute also introduced and legally recognised the status of the ‘economically dependent self-employed worker’ (*trabajador autónomo económicamente dependiente*, TRADE). The most important criterion used to establish whether a worker falls into the TRADE category is an economic one. A self-employed worker is considered to be economically dependent if the income from a single client accounts for at least 75% of their total income (Article 11, paragraph 1 of the Self-employed Workers’ Statute). In addition, Article 11, paragraph 2 sets out other conditions that also must be fulfilled to qualify workers as TRADE: a prohibition on hiring or subcontracting work to third parties; owning their own

production infrastructure and equipment; and organising their own working activities (Pérez Rey, 2016).

It is interesting to note that in Spain, since the creation of this specific status, fraud associated with bogus self-employment could therefore cover two categories of workers: firstly, those who are declared as self-employed, but whose factual circumstances are typical of proper employment and secondly workers who are declared as self-employed, but whose factual circumstances are those of the TRADE category.

Table 1: Regulation of employment and self-employment in Czech Republic, Spain and UK

	Definition of employment status: existence and nature	Implementation challenges
Czech Republic	<ul style="list-style-type: none"> • Legal definitions of employment • Criteria to distinguish between employment and bogus self-employment 	In practice, the labour inspectorate recognises difficulties in identifying the distinction.
Spain	<ul style="list-style-type: none"> • Legal definitions of employment and self-employment • Introduction of a third category: the 'economically dependent self-employed' 	Category created to encompass as much as possible, all situations and to avoid distortion of the other two statuses. Nevertheless, this last category is barely used.
UK	<ul style="list-style-type: none"> • No statutory definition for either employment or self-employment 	<ul style="list-style-type: none"> • Court decisions for implementing the distinction apply a four-criteria test. • Definition is on a case-by-case and based on the facts. • Poor visibility: no security or guarantee that a chosen status will be agreed upon and recognised by the court.

Prevalence of phenomenon

Bogus self-employment is a widespread and recognised problem in all three countries, with persistent difficulties in precisely identifying it. An expansion to ‘new’ sectors is equally reported in all three countries.

In the **Czech Republic**, a survey carried out in 2008 on bogus self-employment by the Research Institute for Labour and Social Affairs (VÚPSV) underlines the difficulty of identifying this phenomenon, which is estimated as being very prevalent: in 2007, between 13% and 26% of those describing themselves as self-employed should have been classified as employees (cited in Eurofound, 2012). In terms of its sectoral coverage, according to labour inspectors, bogus self-employment is mainly found in the manufacturing sector, with evidence of expansion to new sectors and professions. All sectors of the economy can therefore be substantially affected by fraudulent forms of employment; moreover, while the primary use of fraudulent forms of employment can still be found in low-income and in unskilled or low-skilled jobs, bogus self-employment is even growing in categories previously seen as being less exposed to it – for example, among high-income and qualified workers.

In the **UK**, the Citizens Advice service has estimated that 460,000 people are likely to be in bogus self-employment. Self-employment has grown not only in its extent but also in terms of the sectors involved, having expanded towards occupations where, historically, there have been few self-employed people such as carers, cleaners or cooks (Citizens’ Advice, 2015). It has also expanded into the creative industries, delivery driving and the care sector.

However, this problem is particularly important in the construction sector, where, according to practitioners and academics (Behling and Harvey, 2015), bogus self-employment has become endemic, especially in big companies. Indeed, the situation is unique in the European context because self-employment is more prevalent in the **UK** construction industry than in the other major European construction economies. The trade union, Unite, noted that workers in bogus self-employment appear to be more widespread in the craft segment of the construction industry rather than among those operating large machinery.

In **Spain**, no common assessment seems to exist on the prevalence of the phenomenon, as unions and employer organisations disagree on the relevance of these practices and even on the existence of fraud.

According to the trade unions, the phenomenon remains underestimated. The Union of Professionals and Self-employed Workers (UPTA) considers that TRADE status is not fully used and recognised. It is mainly used in the transport sector (for instance, for truck drivers who do not have their own vehicle), but it should be applied by many others who are self-employed in different professions (for example, trade agents). According to data from the National Social Security Institute (INSS), TRADE status applied to only 10,071 workers in 2016. The Trade Union Confederation of Workers’ Commissions (CCOO) stresses that fraud is mostly linked to commonly used bogus self-employment practices, where direct employment is replaced by fraudulent self-employment: around 25% of the 1.5 million self-employed workers without employees are estimated to be workers in bogus self-employment. While details on how the trade unions estimate this rate were not provided, it is worth noting that since 2009, the Spanish Labour Force Survey has included a question targeted at the self-employed on the extent to which they ‘exclusively or almost exclusively’ work for a single client. Based on this, around 250,000 self-employed people fell into this category, of which 90,000 said they worked exclusively for one client. These figures were included in the so-called ‘non-law proposition’ (*Proposición no de ley*)¹ submitted by the Socialist Party (PSOE)

¹ *Proposición no de ley* In Spain, a non-law proposition is a proposal that a political party presents to parliament aiming to encourage the government to take political initiatives in a particular field, or to show or prove the existence of a ‘majority opinion’ in the parliament.

to the Spanish Parliament on 11 November 2016, justifying the need for regulation on measures to protect the self-employed and prevent fraud. According to PSOE, those figures are an indication of the fraudulent practices associated with both types of bogus self-employment.

On the other hand, the Spanish Confederation of Employers' Organisations (CEOE), which represents large companies, considers that fraud is 'irrelevant'. The employer organisation's point of view relies on a strictly judicial perspective and presumption of legal principle: all the existing self-employed workers are considered to be in a regular position; only the fraudulent cases, reported and ascertained by labour inspecting authorities and labour courts, can be taken as an indication of fraud.

As far as sectoral prevalence is concerned, both trade unions (CCOO and UPTA) noted that bogus self-employment is a cross-sector phenomenon. Representatives from the Labour and Social Security Inspectorate (ITSS) also recognised that bogus self-employment is currently widespread in most sectors. According to the representative from the Catalan employer organisation for small- and medium-sized enterprises (SMEs) (PIMEC), bogus self-employment is especially widespread among SMEs in professional service activities, including journalists and consultants.

Drivers and enablers of fraudulent practice

Lack of other choices and various institutional factors are among the main explanations for the spread in the use of fraudulent self-employment.

Economic drivers

Economic reasons are the main driver for businesses and workers, as the **Czech** stakeholders underline. Employers use bogus self-employment to exploit the favourable tax regime applying to the self-employed status, to save labour and social costs, and to extend the degree of flexibility – favouring, for instance, ‘dismissals’ (end of contract) at no cost, if the employer so decides. In addition, it should also be noted that some employees accept this status in some particular cases: lower income taxation may encourage employees to agree to perform the working activity under trade licence agreements instead of direct employment, in order to increase their short-term income, to the detriment of their social rights relating to pension benefits or sickness payments.

Data from all three countries indicate, in line with previous research (Böheim and Mühlberger, 2009), that bogus self-employment is rarely the outcome of an entrepreneurial choice. Most stressed that the responsibility for the decision rests with employers. In **Spain** and the **UK**, recent studies have also proved the non-voluntary nature of both genuine and bogus self-employment (Citizens Advice Bureau, 2015; Adecco, 2016).

Enabling factors

Institutional factors that enable this type of fraud are present in all three countries:

- Legal uncertainty in existing regulation
- Difficulties in monitoring the situation
- Over-representation of migrant workers affected by fraud

Legal uncertainty

The **UK** is a good example of legal uncertainty rooted in the lack of clarity of existing regulation. Each employment situation is concluded against a regulatory framework of great uncertainty. Several features exacerbate the blurred situation in which employers and employees can find themselves; as mentioned in the national definitions section above, the UK lacks statutory definitions, while proposing a ‘four-criteria test’ to assess the situation and leaving therefore room for interpretation to the Courts, without ensuring any certainty regarding the outcomes. This creates space, for instance, for fiscal incentives to have a powerful effect.

The Citizens Advice Bureau found evidence of business owners who intentionally exploit the vagueness of the rules in order to take people on as self-employed when they should be employed (Citizens Advice Bureau, 2015). Employers may do this to exploit the tax advantages of not having to pay National Insurance contributions or because they save costs by not having to pay absence leave benefits or the national minimum wage. In this context, unions note the existence of payroll companies that support construction companies (in exchange for economic compensation) in moving workers from direct employment into self-employment – in some cases without the workers involved being aware of this – with a view to exploiting tax and wage advantages. This situation was denounced by the Union of Construction, Allied Trades and Technicians (UCATT), which organised a campaign on this issue in 2012.

Moreover, in the UK regulatory framework, legal decisions – made on a case-by-case basis – are highly unpredictable, as no conclusive single test exists; indeed, the first three criteria

(control, integration and economic reality) may point in one direction, whereas the fourth (mutuality of obligation) may point in another. Thus, the courts have to look at different factors when analysing a case and, as a consequence of this complexity, they can ‘only approximate the employment status’ (Behling and Harvey, 2015).

Nevertheless, legal uncertainty also exists in countries where, despite legal definitions, implementation represents a challenge. The **Czech Republic** and **Spain** show how difficult it is to identify this kind of fraud using the existing tests and legal criteria, and how this affects the capacity of inspecting authorities and enforcement bodies to detect fraud.

For instance, in **Spain**, the criteria used to distinguish statuses seem clear enough. However, their abstract nature has led courts to develop different approaches to identify both ‘dependence’ and ‘subordination’ (Hernández, 2010). Various approaches are also used and tested by labour inspectors to determine the existence of bogus self-employment. Similarly, **Czech** labour inspectors stress the difficulties faced in making the legal distinction in practice. Generally speaking, the spectrum of bogus self-employment encompasses clear breaches of the rules (for instance, a cashier in a supermarket working under a trade licence), as well as an extensive grey area of disputable cases (Průša et al, 2009).

Moreover, the unintended effects of policies contribute to increasing legal uncertainty; greater attention should be paid to these unintended effects, especially of measures aiming to promote (genuine) self-employment and entrepreneurship among young people (developed in **Spain** since 2013) or to minimise tax evasion (developed in the **UK** for the construction sector) through fiscal or social security advantages. According to trade unions in Spain and the UK, these policies have led to more widespread self-employment, achieving the original aim of boosting employment and hence public revenues. However, in the absence of additional controls and monitoring activities, such aims have been achieved through an increase in bogus self-employment as well as genuine self-employment.

Voluntary policies to support businesses and employment in specific sectors can also be counterproductive. The **UK** Construction Industry Scheme (CIS) is one illustration of the complexity generated by targeted policies. This was a scheme created by Her Majesty’s Revenue and Customs (HMRC) and designed to minimise tax evasion in the construction industry. Under the CIS, contractors deduct money from a subcontractor’s payments and pass it to HMRC. The CIS was intended to support the sector and maximise tax collection, but it has led to more widespread self-employment, genuine and bogus alike. Unite and UCATT currently argue that the CIS should be abolished as they consider that it undermines direct employment.

Moreover, outsourcing practices in the public sector could also be an enabling factor for the expansion of fraudulent practices. In the **UK**, it has been argued that outsourcing from the public sector has increased bogus self-employment, particularly in respect of workers engaged in social housing maintenance. These jobs within local authorities were previously held by employees, whereas they are now outsourced and covered on a self-employed basis.

Monitoring difficulties

Control bodies seem to be particularly challenged in all three countries by these fraudulent practices.

In the **UK**, the role played by enforcement bodies is systematically mentioned when discussing measures to prevent and/or tackle bogus self-employment. Nevertheless, questions are raised about their real power and efficiency, especially regarding HMRC, which is considered the most important control body. HMRC is responsible for detecting, preventing and penalising fraudulent work, as well as ensuring compliance with national minimum wage legislation. According to Unite, this body is not effectively enforcing employment status legislation and is not properly funded either. In 2009–2010, some 1,205 inspections were carried out on employment status, whereas this number fell to 454 in 2010–2011 and to 433 in 2011–2012 (UCATT data). Data provided by HMRC show, however, increasing activity and

a much higher level of successful outcomes over the latest year for which data are available (from 1,545 cases closed in 2014 to 2,667 in 2016), as well as an increase in the budget allocated – from GBP 8.3 million (€9.4 million as of 15 June 2017) in 2014 to GBP 9.2 million (€10.4 million) in 2016. However, there are no details indicating how many of these are cases of bogus self-employment.

The situation in **Spain** mirrors that in the UK in terms of criticisms and lack of specific figures on bogus self-employment. The role and limitations of the labour inspectorate (ITSS) are extensively discussed and criticised by trade unions, but the ITSS representatives interviewed feel that the institution has adequate human and economic resources to detect fraud. Moreover, they highlighted that the comprehensive structure of ITSS makes it one of the most effective inspectorates in Europe.

Furthermore, unions underline the limitations of the control bodies, which must make ‘targeted checks’, allocating resources to combating particular fraudulent practices. Unions believe that combating fraud associated with bogus self-employment has not been a priority in recent years. They maintain that a large proportion of available resources has been allocated to combat other forms of fraud related to bogus companies or fraudulent uses of unemployment benefits, which they consider less significant. The ITSS representatives recognise that these new fraudulent cases should receive more attention, but they justify their decision on the basis of the extent of the phenomenon. In addition, they did not agree that focusing on these cases implied a decrease in the resources allocated to combating bogus self-employment. Owing to the lack of disaggregated data on this issue, it is not possible to fully assess the trends in inspection activities of bogus self-employment.

Over-representation of migrant workers affected by fraud

The nature of the work relationship and the workers’ profiles complicate both the identification of fraud and the collective protection of workers.

Both domestic and migrant workers are affected by bogus self-employment practices. For a variety of reasons, however, migrant workers are more likely to be affected. According to the **Czech** labour inspectorate, this is often the result of migrant workers’ limited knowledge of the language, of legislation and of workers’ rights. Bogus self-employment may also be seen by migrants as an opportunity to immediately benefit from a higher direct income, at the expense of fewer social rights potentially applicable at a later time. In the **UK**, the Trades Union Congress (TUC) has argued that new migrants are at a greater risk of being in bogus self-employment, particularly where they are low-skilled or have poor spoken and written English. These migrant workers are less aware of employment law, have lower rates of union membership and have greater difficulty in accessing legal assistance.

Accordingly, given the workers’ profiles, trade unions face various challenges in representing and organising them, which in turn hinders the enforcement of workers’ rights. As noted in the **UK**, bogus self-employment makes it more difficult for workers to organise, and it is therefore more difficult for unions to support them in accessing their rights. Moreover, as the situation in **Spain** illustrates, this fraudulent practice is widespread among SMEs, especially in those establishments where there are no employee representation structures or where union representation is weak. A higher incidence of fraud is also noted, according to UPTA, in those activities in which the worker operates without a fixed location (trade agents, for example) and according to CCOO, in sectors that are not covered by sectoral collective bargaining agreements (some care services, for instance). Owing to the fact that in these sectors they can apply the national minimum wage, employers can encourage or push employees into bogus self-employment by offering them a higher direct remuneration; this, however, implies lower wage costs for employers themselves, as well as more limited social and labour rights for the workers.

Consequences of fraudulent practices

The negative impacts of fraudulent self-employment contracting can be seen for all stakeholders involved, as well as society, businesses and workers.

Impacts on society

Broader consequences have been emphasised by those interviewed for this study. For instance, in the **UK**, undercutting affects society at large. It undermines investment in skills, training and apprenticeships. It has consequences for the state: where employers are not providing sick leave and pension benefits for workers in bogus self-employment, the state must pay these costs. Moreover, the state loses tax revenue: according to the Citizens Advice Bureau (2015), in 2015 the government lost around GBP 314 million (around €357 million) tax revenue due to bogus self-employment. In **Spain**, the labour inspectorate stressed the detrimental effects for society of employers' avoiding paying social security contributions.

Impacts on business competition

While the negative effects on business competition appear to be much discussed, employer organisations frequently fail to recognise them.

Some contextual features should be noted. For this research, national experts conducted interviews with key stakeholders – representatives of trade unions, employer organisations, labour inspectorates and, when necessary, independent experts. In a few countries, such as the **Czech Republic** and the **UK**, there were difficulties in interviewing representatives of employer organisations. This certainly contributes to the absence of any identified negative consequences on business competition.

Moreover, some employer organisations (in **Spain**, for example) downplayed the fraudulent aspects of bogus self-employment and therefore its consequences.

Nevertheless, several stakeholders – trade unions, experts and labour inspectors – argued that there is a degree of undercutting in the use of bogus self-employment: For instance, in the **UK**, 'good employers' that employ staff, offer training or apprenticeships and recognise trade unions, are undercut by 'bad employers' that are not willing to do the same.

Impacts on working conditions and workers' rights

The situation in regard to working conditions and workers' rights is similar in the three countries. Formally considered self-employed, workers in bogus self-employment have more limited social protection and benefits – if any. Stressing the differences between self-employment and direct employment statuses, in terms of social and employment rights in **Spain**, PIMEC quoted a recent study by Adecco (2016), which estimates that 41% of self-employed workers would prefer to be employees. Again, bogus self-employed workers appear to be in an even worse situation.

The **Spanish** labour inspectorate, ITSS, notes that people in bogus self-employment are forced into a status with less access to social security rights (pension benefits, unemployment benefits and sickness benefits) and lacking employment and labour rights (protection from dismissal, regulation of working time, and collective bargaining coverage).

In the **Czech Republic**, workers in bogus self-employment are not protected by the Labour Code and so lose out on both sides: they are supposedly independent and therefore not entitled to some basic labour rights, while they do not benefit from autonomy as they are subordinated to the employers' instructions regarding working methods and the content of their work. For instance, the working time limit set out in the Labour Code does not apply to such workers and actual working hours frequently exceed the legal daily or monthly working time limit. In contrast, genuinely self-employed workers, in principle, can freely and autonomously decide the amount of time to work.

Access to social rights is also reduced due to the absence of statutory social security and health insurance schemes to which employers and employees both contribute. Workers under a trade licence agreement pay into their insurance schemes voluntarily, as some of these schemes are not compulsory. (For instance, sickness absence insurance is not mandatory for the self-employed.) As a consequence, if they do not contribute to a scheme voluntarily, they are not entitled to sickness benefits, including maternity leave benefits, and are therefore not adequately protected.

In the **UK**, self-employed people do not benefit from sick pay, holiday pay, pension benefits or access to employment rights – all features that are linked to the employment relationship. As these features depend on the nature of the relationship, their absence equally applies to workers in both genuine and bogus self-employment. However, the effects are worse for bogus self-employed workers, this mostly being an involuntary working situation into which people are forced. A study by the Citizens Advice Bureau (2015) estimated that each worker in bogus self-employment may lose on average GBP 1,288 (€1,464) a year in holiday pay, paying an extra GBP 61 (€69) per year into the National Insurance scheme, which they would not pay if rightly classified as an employee.

When considering the revenue from their work, workers not recognised as employees are not covered by minimum wage regulation: their remuneration is not a wage or salary, but a payment for a service provided in the framework of a trade licence. On the other hand, as formally self-employed persons, they must put up with potential delays in payment, while enjoying neither the autonomy of the genuine self-employed nor the possibility of looking for more clients. Moreover, as stressed by the **Spanish** Labour Inspectorate, there is a lack of formal protection in the case of wage debts, since the Wage Insolvency Fund (*Fondo de Garantía Salarial*, FOGASA) does not cover them. Generally speaking, Spanish stakeholders recognised some improvements for the self-employed in terms of social protection, stemming from the Self-employed Workers' Statute; however, they stressed that major differences still persist. For instance, representatives from ITSS and trade unions pointed out that only around 35% of 'applications for benefit' are accepted. These were conceived of as functioning as an unemployment benefit submitted by self-employed workers who experience the involuntary cessation of their working activities.

Looking at health and safety, since the employer does not abide by the obligation to provide the worker with protective equipment (which the law requires for regular employees), health and safety protection at the workplace does not exist or is very limited. Workers in bogus self-employment are also deprived of compensation in the case of accidents at work or work-related illness.

Linking fatalities, health and safety breaches, and poor employment practices to bogus self-employment is not straightforward. Nevertheless, unions stress that bogus self-employment has a corrosive effect on health and safety. A report ordered by UCATT into the 2012 London Olympics clearly illustrates this link. It demonstrates that accident rates present a considerable disparity depending on the construction site: the Olympic park site (covered by collective agreements requiring direct employment) saw 0.11 accidents per million staff hours, while the Olympic village site, where workers were not covered by any such agreement, saw 0.24 accidents per million staff hours (SHP Online, 2011). Evidence supports the view that directly employed workers have lower accident rates than workers who are falsely self-employed.

This evidence is corroborated by the **Spanish** labour inspectorate, ITSS, which noted that bogus self-employment entails a higher risk of work-related accidents. One significant feature is the civil law regulation implying that the self-employed worker – and not the company – is solely responsible for developing a strategy to prevent work-related risks.

The difficulty faced in protecting these workers and supporting them by collective action and negotiation is almost the same in all three countries. One major feature is underlined: the involuntary situation the majority of bogus self-employed workers are in.

Measures to address issue

Several measures have been taken to address the complexity of monitoring and preventing fraudulent self-employment contracting.

Clarifying existing regulation

Clarification has been sought through various routes. Nevertheless, at this stage, no approach appears to be without challenges.

Sectoral clarification: This point has been particularly highlighted in the **UK**, given the absence of statutory definitions and the use of criteria to assess each situation individually. Debates on how to clarify existing regulation to combat bogus self-employment took place in the **UK** in 2009, focused on the construction sector; however, the proposals tabled by the former Labour government were not ultimately enacted. The Conservative government that next came into office also acknowledged the complexity of the current employment status tests and, in March 2015, the Office of Tax Simplification (2015) published a review setting out a number of options for the reform of employment status. However, the Conservative government has not provided any response as yet.

Creation of a specific status: The creation in **Spain** of the dependent autonomous worker (TRADE) status has been described as a response to the legal uncertainty existing in the relations between self-employed workers and their clients, covering a regulatory lack. The main purpose was to qualify specific work relations that formerly had been solved on a case-by-case by the jurisprudence, giving rise to many court disputes. The Self-employed Workers' Statute grants TRADE status higher social protection than genuine self-employment, in relation to such aspects as working time, rest periods, extra work, interruption of activity, contract termination and collective bargaining, thus recognising a specific form of collective agreement that is exclusively targeted at the TRADE category, the so-called 'professional interest agreements' (*acuerdo de interés profesional*), though this type of agreement is barely used.

Nevertheless, some criticism has been voiced, as the number of registered TRADE workers remains low. Organisations that represent self-employed workers suggest that the existing legal regulation does not respond to the needs of this specific collective, despite the fact that this regulation was introduced to protect workers in bogus self-employment. Others, more partisan, explain this 'lack of success' mainly as a result of the 'fear' and 'ignorance' of both the self-employed and companies (ABC, 2013).

Presumption of employment relations: When considering measures to address bogus self-employment and combat fraudulent forms of work, discussions in the **Czech Republic** have reflected on the introduction into labour legislation of a presumption of existence of an employment relationship and the reduction of the bureaucratic burden on employers and employees.

Improving monitoring

In the three countries, nearly all stakeholders have called for significant improvements in monitoring and legal powers. Social partners, especially trade unions, are aware of the limitations of the labour inspectorate and enforcement bodies in dealing with all potential fraudulent activities associated with bogus self-employment. Accordingly, the three countries reported that trade unions try to cooperate with labour inspectorates by enforcing rights in the workplace and cooperating in denouncing or identifying cases.

Interestingly, similarities emerge with the initiatives to combat illegal work. For instance, in the **Czech Republic**, the most important actions referred to in relation to the State Labour Inspection Office (SÚIP) concern illegal work. Since 1 January 2016, special monitoring units on illegal employment have been included in the SÚIP system. Trade unions combat fraudulent forms of employment by reporting them to SÚIP and by filing complaints about

cases of bogus self-employment. The Association of Independent Trade Unions (ASO), moreover, cooperates with other labour organisations in the Czech Republic, and exchanges information and best practice with labour organisations in EU countries. According to trade unions, a thorough monitoring system and the adoption of stringent corrective measures represent the solution to bogus self-employment and to fraudulent forms of employment in general.

Preventive measures

Measures and initiatives that aim to develop prevention and avoid fraudulent practices have also been devised by public authorities and social partners.

In **Spain**, awareness-raising campaigns have been conducted to combat the social acceptance of fraud. And a so-called ‘fraud post-box’ has been developed to allow workers subject to fraudulent forms of contracting work to report their situation anonymously. Labour and social security inspectors are using this information to identify those companies that should be monitored.

Public procurement procedures have also been used to address fraud. In the **UK**, some local authorities are introducing labour clauses into their public procurement procedures, while all public bodies in Wales have been provided with guidance on responsible public procurement, fostering direct employment and so preventing bogus self-employment. Moreover, it has been noted that reversing the trend of bogus self-employment would require employers to consider socially responsible procurement practices that make it compulsory for subcontractors engaged on public contracts to directly employ workers.

Social partners also consider that collective bargaining can indeed play a role in preventing bogus self-employment. In the **UK**, trade unions note that collective negotiations explicitly requiring direct employment have proved beneficial also in terms of safety (as discussed earlier in the case of construction of the 2012 London Olympic facilities). In **Spain**, trade unions are trying to prevent bogus self-employment through collective bargaining in a context characterised by reservations on the part of employer organisations about including these topics in labour negotiations. According to CEOE, general collective bargaining could not be used to prevent this sort of fraud: by definition, collective bargaining can only develop legal aspects applicable to employees. If, for instance, a collective agreement established restrictions on the possibility of companies using services provided by self-employed workers, this would imply obligations towards a third party (self-employed workers), as well as restrictions on companies’ freedom to hire.

Union themselves have developed different views and strategies on how to use collective bargaining to combat bogus self-employment. CCOO stresses the need to include self-employment issues in regular collective bargaining. Meanwhile, UPTA calls for specific agreements targeted at self-employment. UPTA also puts more emphasis on the direct affiliation of self-employed workers by offering different services such as entrepreneurship counselling. These divergent approaches are partly rooted in ideological differences (Pulignano et al, 2016): the self-employment federation CCOO was specifically created as a secretariat tasked with representing economically dependent self-employed workers and those in bogus self-employment, while UPTA (although formally associated with a workers’ trade union) was established as an independent organisation with the aim of representing “genuine self-employed” workers.

Policy pointer

Jointly monitoring direct employment and supporting genuine self-employment: In addition to well-known measures, such as running preventive awareness-raising campaigns and increasing systematic fines, there should be a greater focus on jointly devising measures and initiatives to monitor *the employment status*.

Support negotiation at company level: At company level, systematic support is required for collective negotiation regarding employment status. In addition, managers and workers' representatives trade unions are key agents in contributing to the detection and prevention of fraud, and hence enforcing obligations and rights.

Promote role of public procurement: Responsible public procurement, including labour clauses or requirements for direct employment, can be used as a means of reducing bogus self-employment, especially in sectors such as construction. This initiative involves not only public authorities but also employers in considering socially responsible procurement practices in respect of subcontractors, and unions in monitoring their implementation.

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EF/17/17-1