

**Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed'
(own-initiative opinion)**

(2013/C 161/03)

Rapporteur: **Mr SIECKER**

On 19 January 2012, the European Economic and Social Committee decided to draw up an own-initiative opinion under Rule 29(2) of its Rules of Procedure on

Abuse of the status of self-employed

(own-initiative opinion).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 7 March 2013.

At its 488th plenary session, held on 20 and 21 March 2013 (meeting of 21 March), the European Economic and Social Committee adopted the following opinion by 157 votes to 17 with 35 abstentions.

1. Conclusions and recommendations

1.1 There is currently no unambiguous, EU-wide definition making a clear distinction between *bona fide* self-employed people working on their own account and sham self-employed. Each competent authority and each individual body uses its own legal or regulatory framework, which can differ according to their jurisdiction and policy field (tax legislation, social security, business law, labour market, insurance). These abuses range from evasion of social security contributions, through tax evasion and undermining labour rights to undeclared work. This is a serious distortion of competition for the genuinely self-employed, micro businesses and SMEs.

1.2 In its 2006 Green Paper on *Modernising labour law to meet the challenges of the 21st century*, the European Commission raised the question of whether the Member States' legal definitions of salaried work and self-employed work should be made clearer, to ease *bona fide* transitions from salaried to self-employed work and *vice versa*. In the consultation that followed the Green Paper, it was acknowledged that the absence of an EU-wide definition could lead to problems, particularly in situations involving cross-border work (and supply of services).

1.3 The 2006 ILO recommendation takes a broad approach to the notion of "employment relationship" to allow action against sham self-employment. In determining whether or not there is an employment relationship, the primary focus should be on the facts concerning the activities and the remuneration of the employee, irrespective of how the relationship is characterised in, for example, contractual terms. A hidden employment relationship exists where the employer treats a worker in such a way as to conceal his or her true legal status as an employee, and where contractual terms can have the effect of taking away the protection to which employees are entitled.

1.4 Several Member States have already attempted to come up with a precise definition of the difference between employees and self-employed people, based on a set of criteria laid down in advance. The complex variety of people's actual situations means that, in practice, it has often proven difficult to produce such a definition. The EESC is aware of this issue, and therefore suggests evaluating the different experiences of the Member States with a view to drawing conclusions and making recommendations for a more effective approach.

1.5 Reliable regulation, and a definition of sham self-employment, would help *bona fide* self-employed and micro businesses. Sham self-employment should be combated through better registration and monitoring of the real position in the labour market. Economic dependence on a client (often the former employer) points to the continuation of an employment relationship.

1.6 Developing a good social security system for the self-employed in all Member States, taking account of the specific features of self-employed status, will help to combat and prevent possible abuses.

1.7 Employees who become genuinely self-employed are a normal part of the labour market and the economy. Therefore, consideration should be given to how they can benefit from joint facilities like integration into existing SME organisations, business organisations, chambers and labour market organisations, as well as inclusion in different parts of the social security systems and pension schemes. Also health and safety in the workplace should apply in full, and vocational training institutions should be made accessible.

1.8 The EESC emphasises the societal and socio-economic value and importance of self-employment. It is, however, important for individuals to be able to make a free, informed choice as to whether or not they wish to be self-employed.

1.9 Some schemes set up in Member States to develop entrepreneurship may create distortion of competition for genuine self-employed, micro businesses and SMEs. It is important to have a study of impact on all these categories. The EESC proposes that a suggestion would be made to Member States to identify especially problematic sectors and to set through social dialogue minimum hourly rates that may vary even within the same Member State within regions.

It is essential that public procurement at Member State level would respect such a move in order to set an example and further tackle unfair situations.

2. Development of the labour market

2.1 Self-employment is a legitimate status on the labour market and everyone has the right to be self-employed. The EESC took this position in several opinions it produced on the self-employed. But there also is a reverse side to this phenomenon that has not yet been addressed by the Committee. The last opinion stated explicitly: "We shall not try to address the subject of undeclared work or that of so-called bogus self-employment, even though both may have, or appear to have, a link with economically dependent self-employed workers" ⁽¹⁾. The current opinion finally addresses these topics.

2.2 In recent decades, major shifts have taken place in the composition of the category of self-employed people, next to the "classical" type of independents and small entrepreneurs. In the present period, it has become necessary to assess whether the operating environment offers sufficient protection to self-employed. The EESC recalls its previous opinion ⁽²⁾ in which it recommended:

— data gathering on so-called "economically dependent self-employed work" in the EU;

— identifying aspects common to definitions of employed persons in different EU Member States; and

— promoting studies permitting a detailed analysis of national experiences particularly in cross-border areas.

2.3 Self-employment differs from one Member State to another. In some countries (Netherlands) it is defined as a person working on his/her own account, mainly as a subcontractor to another company. In other Member States (France) the self-employed status is reserved for an entrepreneur who is not an employee of his company; he may have or not employees. Self-employment is not limited to subcontracting because it can also have consumers as customers. Different definitions of employment and self-employment are of great significance not only for labour law, but also for social security and tax legislation.

2.4 The establishment of the single market and the related introduction of free movement have contributed to the development referred to in 2.2 and have introduced the use of self-employment in the most vulnerable parts of our labour markets. A number of workers nowadays are hired (through all kinds of agencies) not as workers but as "self-employed service providers". The person engaged is not contracted because he/she delivers with his/her independent work a special service for his/her own account. Cheap labour can be provided with an invoice without compliance to the national labour standards ⁽³⁾. It is legitimate to ask whether this new type of self-employed status is genuine.

⁽³⁾ In a recent publication evidence is given that the self-employed status is also used to circumvent the restrictions on the labour market related to the enlargement process. According to Béla Galgóczi "One of the most controversial issues in the EU labour mobility debate, not least in the context of transitional measures imposed by some Member States, has been the possible substitution of employees by self-employed workers, making use of the freedom of service provision to circumvent restrictions imposed as transitional measures on waged employment." (p. 23). There is no excessive recourse at the aggregate level to (bogus) self-employment, but in countries with restrictions by transitional measures "it clearly is an adjustment strategy that is used" (p. 25). The rate of self-employed workers from EU2 countries increased since 2008 and differed in 2011 stark in Germany, Belgium and Austria, compared to native and EU8 self-employed workers. With UK restrictions still applying for Romanian workers, a high percentage enters through the use of the self-employed status (almost 45 %). Workers from the EU8 countries that no longer need authorisation on average have nowadays a percentage of self-employed that has decreased to the national UK average. Evidence for this bypass can be derived from the Italian case; with no restrictions for the care taking sector and construction the E2 migrant workers, mainly from Romania, that predominantly work in these sectors have on average lower figures of self-employment than natives or other EU and non-EU migrants (*EU Labour Migration in Troubled Times - Skills Mismatch, Return and Policy Responses* by Béla Galgóczi, Janine Leschke, Andrew Watt (Eds.), Ashgate, 2012).

⁽¹⁾ OJ C 18, 19.1.2011, p. 44.

⁽²⁾ Ibid.

2.5 There are a lot of identifiable problems with labour relations, particularly in cross-border cases ⁽⁴⁾. There are similarities between such relationships and the position of the traditional casual or day labourer, a type of work with the use of gangmasters that everyone thought had been consigned to the past ⁽⁵⁾. Thus, in some countries, self-employed operating on their own account can take up activities overnight that usually requires years of occupational training for people with a permanent job. Special gangmasters and recruitment agencies arose, offering the services of self-employed. These allow businesses to switch easily to contracts under which self-employed do the same work that was previously done by employees. There is a need for more reliable evidence to assess the number of affected workers and the most critical borders. Therefore more professional research is necessary.

2.6 As well as private contractors, more and more large businesses and the public sector also make regular use of self-employed. One quarter of the businesses that hire self-employed people identify the knowledge and experience as the most important reason for hiring them. They are used to deal with peaks in the production process and shortages of qualified staff. Another important reason, according to employers, is flexibility in staffing arrangements.

2.7 To the extent that self-employed choose of their own free will to run businesses on their own account, there is no issue. However, if the change is not based on a genuinely free choice of self-employed status, social risks are in practice transferred from the firm to the individual workers. This leads to abuses ranging from evasion of social security contributions, through tax evasion and abuse of labour rights, to undeclared

work ⁽⁶⁾. This is a serious distortion of competition for the genuinely self-employed, micro businesses and SMEs. Moreover, some schemes set up in Member States to develop entrepreneurship (the case of auto-entrepreneurs in France) may create distortion of competition between genuine self-employed and this new category of self-employed.

2.7.1 The EESC proposes that a suggestion would be made to Member States to identify especially problematic sectors and to set through social dialogue minimum hourly rates that might vary even within the same Member State within different regions.

It is essential that public procurement at Member State level would respect such a move in order to set an example and further tackle unfair situations.

2.8 The proportion of self-employed increased throughout Europe in the 1980s, before falling slightly in the 1990s. In recent decades, the picture has differed between Member States. In some countries, self-employment has again increased, while in others the proportion has remained stable or shown a downward trend (OECD Employment Outlook 2005 and OECD Factbook 2006). Since the start of the financial crisis, the proportion of self-employed has not increased overall. Part of the self-employed now belongs to what is known as the "flexible layer" of the workforce: employment relationships that have little stability and can be quickly dissolved at times of economic downturn, to be called on again when growth prospects cautiously reappear.

2.9 The self-employed meet lower health and safety at work and environmental protection standards than employees. One of the ways to overcome this deficit would be to create service centres for the self-employed that would perform these tasks and operations for them.

⁽⁴⁾ The 1999 Supiot Report observed already the emergence of the "new" self-employed in various EU Member States and called this problematic for two reasons: self-employment can function as a means to evade employer obligations; and, by choosing for entrepreneurship, younger, well-educated workers do not participate in the solidarity of employee social security schemes. At the same time, there is also a positive side to the "new" self-employed phenomenon. Self-employment can offer more room for the capabilities of genuinely autonomous, usually highly qualified workers, and may therefore contribute to an increase in the quality of work and innovation of the organisation of work. Designations as "bogus" and "dependent" are used in order to emphasise the dark side of this type of self-employment. "Bogus" to indicate that the term self-employed used here can hardly be qualified as such, "dependent" to show that these so-called self-employed are not independent, neither economically nor in the control of their terms and conditions of employment (M. Westerveld, http://www.uva-aiaas.net/news_agenda/agenda/522).

⁽⁵⁾ In France this archaic type is called "marchandage de main-d'œuvre". The first legal acts to ban this type of labour-only recruitment were already formulated in France in the mid 19th century.

⁽⁶⁾ The European Commission (EC) describes some types of abuses: "In France, the new 'auto-entrepreneur' status has been abused by some employers so that they can pay less tax for employees who are pushed into accepting the new status. In different Member States, including the Netherlands and Belgium, there is 'false self-employment', referring to supposedly self-employed workers whose status (self-employed or employees) is unclear. In theory, they are self-employed (the employer only pays a lump sum of which the worker has to pay his own insurance and other expenses), but, in practice, there is no difference between them and any other employee doing the same work" (EC, European Employment Observatory Review, Self-employment in Europe 2010, p. 29).

3. Definition of self-employed

3.1 There is no unified reference in legislation or regulation to self-employed (7). The term refers sometimes to freelancers, at other times to all self-employed people who work independently. The status implies that they have no employment contract, but provide services to clients or contractors on the basis of a commercial contract.

3.2 The category of self-employed is often split between two extremes (European Foundation, 1996). At one extreme are highly qualified and experienced professionals who are well aware of their market position, know what they are worth and wish to carry on business on their own account. This first group mainly consists of older, well paid personnel who plan and organise their work themselves. The other extreme comprises self-employed people whose status has no purpose other than to reduce the administrative and financial burden on the client. People in that situation are bogus self-employed, have little or no freedom of choice and are entirely economically dependent on their client. Looking at literature this often happens to 2 out of 5 categories of the self-employed that have been defined in a recent study (8).

3.3 From a legal point of view, self-employed are not all in an equally good position compared to employees. A Dutch study, carried out in 2010 by EIM for the Ministry of Social Affairs and Employment, showed how self-employed manage risks. They cannot fall back on collective insurance for employees, and should therefore insure themselves against risks. In many cases, that does not happen. They fairly often have liability insurance (72 %), but are less often insured against illness (20 %) or incapacity for work (36 %). Only one in two self-employed is building up a reserve for retirement. As a result they risk finding themselves in a state of poverty when they retire. In agriculture and construction they are more likely than average to be insured against risks, and those in construction and business services are more likely to have pension provision. The EESC recommends that the self-employed, when applying for this status, be properly informed of the consequences of making only low social and health insurance contributions and of other conditions and obligations involved in starting a business.

4. Frictions and abuse of status

4.1 Whether or not there is an employment relationship, and what rights and protection are linked to this status, has been subject of renewed interest in various European countries in recent years. This is due to significant changes in the way

that businesses operate, with an increase in outsourcing and tendering, while legislators have heeded the call for more flexibility and the reduction of "administrative" burdens, leading to deregulation and a policy that seeks to end "traditional" forms of job security.

4.2 From a legal point of view several European countries tried to draw the line by further developing the definition of "employment relationship" on the basis of various criteria. Such a relationship is characterised by the performance of paid activities in return for remuneration, with any profit from that paid work belonging to the client. Important indicators in that respect include the fact that the work is performed under the control of another party and that the employee is required to be available. They also include the fact that the remuneration is the sole, or main, source of income for the employee and the absence of economic risk for him or her.

4.3 The EESC limits itself to guiding the Member States by suggesting best practice models. A good example is the model from Malta that has proven highly successful.

When considering the employment status of a person who is nominally self-employed and is *prima facie* not considered as an employee, it shall/can be presumed that there is an employment relationship and that the person for whom the service is provided is the employer if at least five of the following criteria are satisfied in relation to the person performing the work:

- (a) s/he depends on one single person for whom the service is provided for at least 75 % of his income over a period of one year;
- (b) s/he depends 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) s/he performs the work using equipment, tools or materials provided by the person for whom the service is provided;
- (d) s/he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
- (e) s/he cannot sub-contract his work to other individuals to substitute himself when carrying out work;

(7) The EC notes (*ibid* p. 6) that there are different understandings and definitions of the term self-employment across the countries, with a number of different subcategories defined: for instance, according to the legal status of the enterprise, whether the business has employees or not (employers versus own-account workers) and/or the sector in which the business operates (e.g. agriculture). Some countries also make the distinction between self-employed status and the status of "dependent self-employed" (e.g. Spain, Italy), where the self-employed person works for only one client. Others distinguish self-employment which is carried out in addition to paid employment (e.g. Belgium).

(8) "Self employed workers: industrial relations and working conditions". EIRO, 2009.

- (f) s/he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
- (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided, and
- (h) s/he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

4.4 Different definitions exist not only in the various European countries⁽⁹⁾, but also in EU law. This lack of clarity creates major problems in cross border situations. The absence of a link between the national and European legal frameworks in relation to the distinction between taking on work and providing services makes the concept of self-employment a problematic subject, particularly in relation to cross-border work.

4.5 From an international perspective it is becoming increasingly difficult to determine whether or not there is an employment relationship. This arises in situations in which the rights and obligations of the parties to the contract are not clear and unambiguous, or where greater flexibility and deregulation make it difficult to verify the possibility that there is an employment relationship. It also arises where legislators create various sorts of intermediate forms, or simply treat the possibility of setting up in self-employment overnight as being one of the new ways that business is conducted.

4.6 The International Labour Organization (ILO) gave an early warning of the potential abuse of self-employment, which lead to circumvention of employee rights and of the legal protection that is usually linked to the employment rela-

tionship. The ILO referred to the possibility of abuse resulting from a combination of factors: legislation is either too narrow or interpreted too narrowly; legislation is worded in such a way that its scope and effects are minimal; although there is indeed an employment relationship, it is unclear who the employer is; various forms of sham self-employment are not covered; and there is a general failure to monitor compliance.

4.7 The definition set out in the International Classification of Status in Employment defines self-employed work as work where the remuneration is directly dependent upon the profits derived from goods produced and services rendered. Historically speaking, that distinguishes three major groups of self-employed people: micro-enterprises, small businesses and freelancers. At the June 2006 General Assembly, a recommendation on the employment relationship was adopted (Recommendation 198)⁽¹⁰⁾. The main aim of that recommendation was to improve national policy on protection of the rights of employees who are in an employment relationship (Art. 1.4).

4.8 At the same time, the ILO worked between 2005 and 2007 to further develop the concepts used. Besides the recommendation already mentioned, several documents were produced that, among other things, give an overview of the existing national rules. From that overview, it is obvious that there is a growing need to develop clear definitions so as to allow differentiation between legitimate forms of self-employment and fraudulent practices whose sole aim is to evade or circumvent employment law and other legal provisions.

4.9 The EESC recommends that tackling the specific problem of the self-employed be discussed in the social dialogue at both European and national level and that organisations representing their interests be allowed to take part in the social dialogue.

Brussels, 21 March 2013.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽⁹⁾ From the legal perspective, several criteria are formulated in the EU Member States with regard to the definition of a labour relation: Subordination to a user undertaking; submission to orders and instructions in the performance of work; integration in a (collective) scheme of planning, execution and control designed by others; economically and socially the worker is dependent on the work done for and by an undertaking that belongs to someone else; financial dependency on a (single) employer (<http://www.clr-news.org/CLR-News/CLR%20News%202-2007%20ISSN.pdf>, p. 35).

⁽¹⁰⁾ The recommendation was accepted with 71 % of votes cast. It has to be noted that the employers delegation cooperated in the preparation of the recommendation and finally decided to abstain from voting.

APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments, which received at least a quarter of the votes cast, were rejected during the discussions (Rule 54(3) of the Rules of Procedure):

Point 1.3

Amend as follows:

- 1.3 *The 2006 ILO recommendation takes a broad approach to the notion of "employment relationship" to allow action against sham self-employment. In determining whether or not there is an employment relationship, the primary focus should be on the facts concerning the activities and the remuneration of the employee, irrespective of how the relationship is characterised in, for example, contractual terms. A hidden employment relationship exists where the employer treats a worker in such a way as to conceal his or her true legal status as an employee, and where contractual terms can have the effect of taking away the protection to which employees are entitled. It has to be noted, however, that ILO recommendations are addressed to national governments and not to the EU.*

Point 4.6

Amend as follows:

- 4.6 *The International Labour Organization (ILO) gave an early warning to national governments of the potential abuse of self-employment, which lead to circumvention of employee rights and of the legal protection that is usually linked to the employment relationship. The ILO referred to the possibility of abuse resulting from a combination of factors: legislation is either too narrow or interpreted too narrowly; legislation is worded in such a way that its scope and effects are minimal; although there is indeed an employment relationship, it is unclear who the employer is; various forms of sham self-employment are not covered; and there is a general failure to monitor compliance.*

Reason

The rapporteur grounds part of his arguments for action at EU level on the ILO "Recommendation concerning the employment relationship" of 2006. However, the ILO limits explicitly the scope of its recommendation to national policies and national laws. Furthermore, it is worth noting that this recommendation was far from being adopted by consensus (quite the common practice in the ILO) – on the contrary, only 71 % of votes cast supported the proposal, with the opposition of the entire employers group.

In accordance with Rule 51(4) of the Rules of Procedure, these two amendments were examined together.

Outcome of the vote:

For: 73

Against: 122

Abstentions: 12
