

Recognising and Eradicating False Self-Employment in Europe

- EFIP Common Position Paper [Draft] -

General Considerations

The issue of false (also called bogus) self-employment remains in the forefront of debate among EU policy makers, and is included as a priority of the new [EU Platform to Tackle Undeclared Work](#).

Concerns have emerged about the potential exploitation of low-paid, low-skilled vulnerable self-employed workers, mostly those operating in the temporary labour market. However, data confirming or denying the incidence and scale of such occurrences in Europe remains scarce.

Common Myths about Self-Employment

Not everyone in Europe desires a full-time employment. According to one of the latest [Eurobarometer Survey](#), 37% of Europeans want to be self-employed and there is a lot of supporting evidence to suggest that satisfaction is very high among the self-employed because of greater freedom, creativity, self-fulfillment, as well as the ability to choose their own place and time of work. However, only 14% of Europeans actually are self-employed. This happens because of lack of financial support, complex administrative processes and lack of information.

There are unsubstantiated and widespread claims that all self-employed people are being forced into it. However, measurements of entrepreneurial motivations show that the number of setting up as self-employed out of no choice or being forced into it continues to be in the minority. Recent findings from the [Global Entrepreneurship Monitor](#) indicate that the level of “opportunity” entrepreneurship – where people start up for positive reasons (e.g. to make the most of a good idea) is close to five times higher than the level of ‘necessity’ entrepreneurship – where people start up for negative reasons (e.g. because they had no other options for work).

Another erroneous claim is that self-employment raised because of the global recession and that people were coerced into bogus/false self-employment to escape unemployment. Yet this overlooks the fact that – according to [official figures](#) from the Eurostat Labour Force Survey – self-employment and the number of independent professionals had been increasing long before the recession started. It is also telling that the self-employed population is now growing at a very fast rate despite the fact that the European economy is recovering.

Moreover, some commentators have suggested that a large number of the newly self-employed are scratching around for work, arguing that most of the increase in self-employment in recent years lies in a handful of low skilled occupations, including administration, cleaning, driving and construction.

However, data from the [CEDEFOP Skills Forecast 2015](#) actually shows that the biggest increase in self-employment since 2008 has been in professional occupations – one of the highest skilled labour groups.

Finally, it has been argued that with the growth of the sharing economy, workers on platforms would be much better off with a full time job attached to benefits and protections. However, we are still not at a place where digital platforms, of their own, can credibly provide an alternate to jobs. [Recent research](#) found that people are looking to find work on platforms to diversify their income stream, provide a backup in case they lose their main job, make money from a passion and explore new career and business opportunities. This is significant, in view of discussing the level of social security these workers should access, considering most of them already have one main job from which they get social protections and benefits.

Definition Issues

The European Commission defines a self-employed person as someone: *“pursuing a gainful activity for their own account, under the conditions laid down by national law”*. In the exercise of such an activity, the personal element is of special importance and such exercise always involves a large measure of independence in the accomplishment of the professional activities. This definition comes from Directive ([2010/41/EU](#)) on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. This is in contrast to an employee, who is subordinate to and dependent on an employer.

However, no unambiguous definition applicable throughout the European Union currently makes a clear-cut distinction between the genuinely self-employed who work independently and the false self-employed. Each national authority and individual body applies its own legal and regulatory framework provisions, which may vary depending on their remit or policy area (tax law, social security, business law, employment market, insurance). This lack of clarity creates major problems in relation to independent working, above all at cross-border level in the EU internal market.

The topic of false self-employment is strongly related to defining the features of being an employee or being self-employed. Hence, in order to set criteria to recognise and eradicate false self-employment, one should first focus on what self-employment is rather than what it is not. The [European Parliament Resolution on Social Protection for All](#) has also stated that: *“the absence of a clear national definition of self-employment increases the risk of false self-employment”* and the [European Parliament Resolution on the Renewed Social Agenda](#) invites Member States to take initiatives that would *“lead to a clear distinction between employers, genuine self-employed and small entrepreneurs on the one hand and employees on the other”*.

Legal Tests

Most legal systems in Europe differentiate between the employee and the self-employed by applying “legal tests”. The most commonly used is that of subordination, which asks whether an individual is subject to the instructions and control of the employer/client. This, in turn requires exploration of the extent to which the self-employed can work in a flexible way, or whether they simply obey the instructions of their employer.

The [EU definition of a worker](#), as established by the EU Court of Justice, applies three essential criteria to determine the existence of an employment relationship: whether they act under the direction of the client (i.e. the choice of activity, and working conditions), the nature of the work (e.g. is it genuine, effective and regular), and whether the work is remunerated. However, EU Member States decide who is to be considered a worker under their national rules and they remain free to extend the definition of a worker to situations which do not fall under the EU definition. The existence of an employment relationship needs to be established on a case-by-case basis, and the actual qualification of such status results from a comprehensive test of all three criteria.

For instance, the UK (common law) has four tests it variously applies to the problem, each focussing on very different aspects of the relationship between self-employed and client/employer.

1. The first explores notions of control, subordination and supervision and asks whether the individual can be told what to do and how to do it instead of maintaining his/her own autonomy.
2. The second asks the extent to which the individual is integrated into the client organisation and its structures.
3. The third asks whether people are in business on their own account (focussing on investment, provision of equipment, whether the individual uses an accountant, limited company, website, has more than one client and generally looks like a small business).
4. The fourth asks whether there is sufficient mutuality of obligation to offer and then undertake work between the parties' so as to indicate employee status.

By contrast, in most other EU countries (civil law) the definition of employee and self-employed is enshrined in legislation, leaving the courts with much less discretion in using legal tests.

The [2006 ILO recommendation](#) takes a broad approach to the notion of "employment relationship" to allow action against false 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.

To provide greater certainty over employment status, national governments should review the current legal tests established within their employment jurisdictions, creating a set of simple criteria, which are not too open to interpretation.

EU Policy Recommendations

As we move into a 21st Century labour market where we want to enable people to choose flexible work if that is their wish and businesses to tap into the value added enabled by freelancers, policymakers need to avoid a 'one size fits all' approach which either enables genuine self-employment but ignores false self-employment and vulnerable workers or *vice versa*. Instead, they need to recognise the heterogeneity in the freelance labour market and attempt to divide it into advantaged, disadvantaged and false segments.

Governments need a targeted and differentiated policy approach which legitimises and supports the advantaged segments, protects freelancers in the vulnerable segments and clearly defines the difference between false and legitimate self-employment so that the former can be prevented.

Since the term self-employed is understood differently in the Member States, a common European definition of this term is crucial. The European Forum of Independent Professionals defines self-employed professionals as: “*a highly-skilled subset of self-employed workers, without employers nor employees, offering specialised services of an intellectual and knowledge-based nature*”. Self-employed professionals work on a flexible basis in a range of creative, managerial, scientific and technical occupations; they are not a homogeneous group and as such, they cannot be considered or investigated as a whole. They are generally characterised by a large portion of autonomy, a high labour productivity, knowledge intensive performance, social commitment and a large dose of entrepreneurship and specialisation.

It is recommended that the EU Institutions, employers’, employees’ and self-employment representatives adopt a Europe-wide joint recognition of genuine self-employment, including a shared terminology for the various sectors.

What European policy makers really need is a robust but transferrable definition of self-employment based on a clear and comprehensive understanding of what constitutes a flexible labour market. This will be a decisive factor in identifying and eradicating false self-employment across Europe.

About the European Forum of Independent Professionals (EFIP)



EFIP is furthering a commitment to build a better economy — one that puts people at the centre of it, empowering anyone to work for themselves and succeed on their own terms. We are a European not-for-profit collaboration of national associations which represents over 10 million of independent professionals at EU level through targeted research, advocacy and campaigning.

Independent professionals (often referred to as freelancers or contractors) are highly-skilled self-employed workers without employers nor employees. They offer specialised services of a knowledge-based nature and work on a flexible basis in a range of creative, managerial, scientific and technical occupations, primarily in B2B. They are the smallest of small businesses and, with a 45% increase since 2004, they are the fastest growing segment of the EU labour market.

EFIP mission is to strive for European policy, business and social environment to become more conducive to the independent and self-employed way of working, in both the private and public sectors.

More information about EFIP is available on our [Website](#), our [Manifesto](#) and our [Campaign](#).

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EU Transparency Register N.: 823591710024-95