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Tackling Dependent and Bogus Self-Employment In the Live Performance and Media Entertainment Sectors

*Discussion Note prepared for Workshop 3, Improving social rights and working conditions for atypical workers
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Introduction

Changing labour markets, restructuring, outsourcing and an increase in temporary work arrangements have led to a blurring of the boundaries between subordinate employment¹ and self-employment in many economic sectors including the live performance and media environments. However, some categories of workers have increasingly found themselves effectively without labour protection owing to their employment relationship being disguised, ambiguous or not clearly defined. The debate at hand focuses on emerging work arrangements which are "in a grey area", an often-used term to describe those types of work that do not easily fit into the traditional binary distinction between "employees" and the independent "self-employed". There are various concepts which have been developed in order to describe and categorize this group of workers.

Bogus self-employment: there are employment relationships which can be regarded as 'bogus self-employment', ie subordinate employment relations which are disguised as autonomous work, usually for fiscal reasons, or in order to avoid the payment of social security contributions and thereby reduce labour costs, or to circumvent labour legislation and protection, such as the provisions on dismissals. This specific and unfair form of contracting is often raised as an issue in the context of the wider debate on self-employment, but in relation to bogus self-employment, the focus is generally on the need for better capacity to enforce existing regulations on dependent employment and to detect and punish violations².

Dependent self-employment: this term is used to describe work relationships where the worker is formally self-employed yet the conditions of work are similar to those of employees. Despite working exclusively (or mainly) for a single employer, workers are neither clearly separated from, nor integrated with, the employer they contract with. In some cases, economically dependent workers may also be similar to employees in other ways. There may be no clear organizational separation - i.e. they work on the employer's premises and/or use the employer's equipment; there may be no clear distinction of task - i.e. they perform the same tasks as some of the existing employees, or tasks which were formerly carried out by employees and later contracted out to 'service providers'. Finally, it may be that the 'service' they sell individually to employers falls outside the traditional scope of 'professional services' - i.e. the tasks are simple, do not require specific skills and no professional knowledge or competence is needed³.

Dependent employment work relationships are not based on employment contracts, but rather on commercial contracts between a self-employed worker and a specific employer. Empirical literature shows that these work relationships create both economic and personal dependence. Economic dependence fundamentally means that the worker takes (part of) the entrepreneurial risk, without the trade-off in terms of employment security. Furthermore, the entrepreneurial possibilities associated with self-employment are also limited in their case, due to the demands of their 'main' employer. Given that these workers have only one (main) employer, they generate the whole, or at least a substantial part, of their income from this work relationship. Personal dependence – or subordination – means that

the outsourcing firm strongly determines working methods as well as the time, place and content of work.⁴ Dependent self-employment also means that both organizational boundaries and the boundaries between employment and self-employment become blurred, resulting in the need to rethink labour and social security law.

Other intermediate forms: But there are also new forms of employment that are 'midway' between dependent employment and self-employment and cannot be easily grouped with either of the two, since they have some features of both. These are employment relationships which have gained importance in recent years, following the deregulation of labour markets and the spread of reorganization policies, which have often included outsourcing of non-core activities and 'downsizing' of the organizational structure.

Legal Status of Dependent Self-employed Workers

Dependent self-employed in most EU Member States legally fall within a so called grey zone and in recent years, nearly all countries have reported an increasing need to find criteria that will help to more effectively define the uncertain status of economically dependent workers⁵. The difficulty in assessing dependent forms of self-employment are being tackled in different ways throughout the European Union. While dependent self-employment does not always have a specific place in labour law, some EU Member States have introduced a hybrid legal category to address the grey area between dependent employment and self-employment. The aim of this hybrid legal category involves facilitating outsourcing activities whilst simultaneously covering dependent self-employed workers with some legal rights that would not exist under the legal status of self-employment. This approach has been adopted in countries like Germany, Italy, the Netherlands and Portugal. Italy has also adopted the approach of extending basic protections to all workers, but with specific protections for specific categories.

Other countries have maintained the strict dichotomy between employed and self-employed and have tried other approaches to capture the growing reality of the dependent self-employed. These have included: (i) presumptions that these are employees and fall within the scope of employment protection legislation (France, Greece, Luxembourg); (ii) reversal of the burden of proving employee status (Belgium); (iii) listing criteria that enable identification of workers as either employees or self-employed (Austria, Belgium, Germany, Ireland⁶); (iv) extending protection to specified categories, even though they are not presumed to be employees (Denmark, France, Germany, Greece, Italy).

Case law has also played an important role where there is no statutory definition of dependent employment (Ireland, Norway, Sweden and the UK) or where the legal definition is quite general⁷. Depending on the features of some EU Member States national welfare state systems, dependent workers tend to usually be outside the scope of labour law protections (dismissal, holiday pay, sick leave) and collective bargaining coverage, while being subject to different fiscal and tax regulations⁸. This has played a role in the introduction of legal forms of employment, as mentioned earlier, mainly to broaden the coverage of social security schemes – and in particular pension schemes – to include these workers.

European Union Policy Debates on Dependent and Bogus Self Employment

Dependent self-employment gained attention at the European level in the context of the broader debate started by the European commission and the European Parliament at the end of the 1990s on the future of work and labour law in EU member states. An expert report, commissioned at that time, (*"The Supiot Report" 1998*⁹) identified the phenomenon of dependent self-employed workers who are "economically dependent on a principal" and in "permanent legal subordination" to their principal, arguing for the application of certain aspects of labour law to workers who are neither employees nor employers.

In the year 2000, the Commission raised the issue of economically dependent work in the consultation of the social partners on the modernization and improvement of employment relations. The social partners and the Commission

agreed that more information and research was necessary. The European Parliament called on the Commission to carry out an in-depth study and to hold a joint public hearing with Parliament on economically dependent workers. A study by Adalberto Perulli¹⁰ was commissioned and published in 2002, to provide a detailed and comprehensive overview of the legal, social and economic situation in relation to economically dependent work in the Member States. The report proposed, among other things, the creation of a new kind of employment relationship (*tertium genus*) lying somewhere between employment and self-employment. There would then be three different employment models, all equal in functional terms: self-employment, where an individual makes his/her own provisions for protecting his/her professional and personal life; subordinate employment, where the employer undertakes to provide such protection; and, finally, quasi-subordinate or “coordinated” employment, where the burden is equally divided between the person performing the work and the principal. The suggestion was that once this new model would have been created some social protection should be extended to it.

In 2006, The European Commission Green Paper on the Modernization of Labour Law in the 21st Century,¹¹ identified the main challenges resulting from the gap between the existing legal frameworks and the realities of the labour market. The aim was to involve the Member States, the social partners and other interested parties in an open debate, in order to look at how labour law could help to promote flexibility in conjunction with security, regardless of the type of employment contract. It recognized that diverse forms of non-standard work had made the boundaries between labor law and commercial law less clear and that the traditional binary distinction between “employees” and the independent “self-employed” was no longer an adequate depiction of the economic and social reality of work. It further identified the question of disguised employment as part of the issues to be tackled.

In 2014, an additional impetus was given to addressing the question of bogus self-employment with the EC decision proposal on establishing a “European Platform to enhance cooperation in the prevention and deterrence of undeclared work”¹² In its exploratory memorandum, the EC stated: “*A closely related phenomenon is falsely declared work, or bogus self-employment, which occurs when the worker is formally declared as self-employed on the basis of a service contract but the work he/she performs fulfills all the criteria that are used by national law and practice to characterize an employment relationship. Bogus self-employment has negative consequences in terms of health and safety and social security of the workers concerned*”. The European Platform to enhance cooperation in the prevention and deterrence of undeclared work” should seek to provide a forum where experts could share information and best practices to face common problems caused by undeclared work and by the related phenomenon of bogus self-employment¹³.

Trade Unions and Dependent Self Employed Workers

In many countries, trade unions have been calling for a redefinition of the boundaries between dependent employment and self-employment stretching back to the early 2000s, in order to provide more protection to workers whom they regard as ‘economically dependent’¹⁴. The Green Paper on the Reform of Labour Law for the 21st Century was heavily criticized by European trade unions¹⁵ and labour law experts for failing to take into account a “social and fundamental rights driven” perspective needed in the reform of the labour market.

Within the live performance and media entertainment sector, two types of representation of dependent self-employed workers can be identified¹⁶. The first refers to the inclusion of economically dependent workers in existing trade unions. The second is through the creation of new union organizations which only organize and represent economically dependent workers, though the latter tend to be cross-sectoral, rather than sectoral unions.

An examples of the first may be found in Germany, where a legal exception means that self-employed freelance journalists are considered dependent workers if at least 50% of their salary comes from a single employer/client, and they are exempt from the competition regulations preventing the conclusion of agreements on common fees and prices. Thus they can be covered by collective agreements negotiated by established sectoral unions.

An example of the second comes from Italy, where labour reforms introduced forms of employment midway between dependent and autonomous. The legislative challenge was to ensure adequate union representation and social protection to autonomous, economically dependent workers. The Italian legislator decided to explicitly define the category of economically dependent workers (so-called *parasubordinati*) as those who perform a “continuous, coordinated and mainly personal” form of collaboration with the same employer (Art 409 N.3, Codice di Procedura Civile). For the *parasubordinati* the legislation provides levels of social protection similar to those guaranteed to dependent workers and they are also entitled to be represented by trade unions in collective bargaining. This last measure has favoured the successful development of trade union representation among economically dependent self-employed workers. In 1998, the main trade union organizations (CGIL, CISL and UIL) all created their own structures (*respectively NIDIL CGIL, ALAI-CISL and CPO-UIL*) for representing non-standard workers (including the *parasubordinati*) and a number of agreements have been signed since then.¹⁷

Recommendations and Ways Forward

Several strands may be developed to drive forward the work on issues around bogus and dependent self-employment.

Ongoing research on the evolution of the situation is needed to inform policy making and strategic decisions. Given the lack of empirical evidence across member states and at sectoral level on the numbers and working conditions of dependent and bogus self-employed workers, there is a pressing need for better data collection. European trade unions should call upon the European commission, and the future European Platform on Undeclared Work to conduct a wide cross-sectoral survey on the extent of the phenomenon of bogus self-employment. The European commission could also, together with Eurostat and Eurofound, make sound use of future European labour surveys and include questions concerning dependent and bogus self-employment. This information should be monitored and integrated in the 2020 strategy ‘ socio-economic monitoring mechanisms (*European semester*)¹⁸. Sectoral surveys could be put on the future work programme of European social partners.

Better legal clarity and definitions: current definitions differ across member states and might create additional barriers to labour market integration and cross-country mobility within the EU in particular for mobile artists in the live performance sector and this may be detrimental to the working and living conditions of potential workers. European trade unions should call upon the European commission and the European parliament to work towards an approximation of definitions or guidelines and or legal criteria that could help to address the so-called “grey area” prevailing regarding the legal status of dependent and bogus self-employment. As an example, FIM’s response¹⁹ to the EC’ Green Paper “Modernizing Labour law to meet the Challenge of the 21st Century” was proposing to establish a clear distinction between the category of “workers” and that of “service providers” in all Member States, and ensuring that such a distinction is recognized by all. The category of workers would be subdivided into employees and “self-employed” economically dependents. The benefits of labour prerogatives (in particular collective bargaining) would, therefore, no longer depend on the existence of a work contract but on the fact of being a worker.

A cooperative dialogue framework for trade unions at inter-sectoral level: given that this issues is increasingly prevalent across a range of diverse sectors, it might be helpful to consider collaborative actions to address the specific dimensions of bogus self employment, including in relation to the future European Platform of Undeclared work. Joint reflection on strategic litigation and case law across sectors could be one of forms of cooperation.

Re-invigorating the policy debate on bogus self-employment The European commission, the European Parliament and the European social partners should continue to reflect and exchange on general guidelines related to dependent self-employment and social protection for (dependent) self-employed in all EU Member States to provide a sustainable solution in the future.

References:

¹There is no single definition of subordinate employment accepted across EU member states. According to Belgium labour law, it can be defined by the employer's right to direct work and to control the worker's performance. The main feature of subordinate employment under labour law is the considerable level of protection that the legislation provides employees. Cf Economically dependent workers', employment law and industrial relations, Observatory: EurWORK, 13 June 2002, Table 1. Definitions of 'dependent employment' in the EU and Norway, <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations>

² cf supra Economically dependent workers', employment law and industrial relations, Observatory: EurWORK, 13 June 2002,

³ "Social protection rights of economically dependent self-employed workers", p 25, 26, European Parliament's Committee on Employment and Social Affairs. IZA, IP/A/EMPL/ST/2012-02 April 2013, PE 507.449 EN

⁴, Supra p 25, Social protection rights of economically dependent self-employed workers", p 25, 26, European Parliament's Committee on Employment and Social Affairs. IZA,

⁵ Cf Supra, EurWORK, 13 June 2002,

⁶Interestingly, Ireland was the only country to introduce "soft regulation" by social dialogue, extending the legal protection of workers in the grey zone. cf Economically dependent workers', employment law and industrial relations, Observatory: EurWORK, 13 June 2002,

⁷ Eurofound, 'Self-employed Workers: Industrial Relations and Working Conditions'. European Foundation for the Improvement of Living and Working Conditions. Observatory: EurWORK, 13 June 2002,

⁸ EIRO 2002

⁹ Transformation of labour and future of labour law in Europe Final report, Dr Alain Supiot, 1998

¹⁰ Study on economically dependent work/parasubordinate (quasi-subordinate) work by Professor Adalberto Perulli Public Hearing 'Economically dependent work/parasubordinate work', Hearing co-organized by the Committee on Employment and Social Affairs and the European Commission, DG Employment and Social Affairs European Parliament, room PHS 3C50, Brussels, 19 June 2003

¹¹ Green Paper "Modernizing Labour law to meet the Challenge of the 21st Century"

22.11.2006COM(2006) 708 final European Commission Green Paper "Modernizing and Strengthening Labour law to meet the Challenge of the 21st Century"

¹² Proposal for a decision on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work /* COM/2014/0221 final - 2014/0124 (COD)

¹³ . The EC decision proposal was published in April 2014 and forwarded to the European Parliament and the Council in order to start the co-legislative procedure. On 7 May 2015, the EMPL-Committee adopted the final report of the Bulgarian Rapporteur Georgi Pirinski (S&D) on the Commission proposal. On 20 November 2015, the Council approved the compromise text negotiated with European Parliament. cf <http://www.eu2015lu.eu/en/actualites/communiqués/2015/11/20-travail-non-declare/index.html>

¹⁴. Article 12a of the German Collective Agreement Act (Tarifvertragsgesetz),

¹⁵ Cf ETUC position paper on the European Commission Green Paper "Modernizing and Strengthening Labour law to meet the Challenge of the 21st Century"- <https://www.etuc.org/IMG/pdf/Annex04-04-07.pdf>

¹⁶ Cf FIA, UNIMEI, EFJ, FIM seminars of 20 May and 8 September 2015 part of the EU project Reaching out to Atypical workers : organizing and representing workers with Atypical contracts in the live performance and audiovisual sectors. cf <http://www.iaea-globalunion.org/atypical-workers>

¹⁷ Cf Non-standard workers: Good practices of social dialogue and collective bargaining, box 6 p 19, Minawa Ebisui, ILO, 2012

¹⁸ The European Semester is the EU's annual cycle of economic policy guidance and surveillance.

¹⁹ cf http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm#2