



Ibec submission to the consultation on the use of intermediary-type structures and self-employment arrangements

30 March 2016

Key messages

1. Consultation must provide clear evidence of widespread misuse before tax policy becomes an instrument of employment relations.

The issue of who is covered by a contract of service, and who should be designated as operating under a contract for services, is a complex one. Individual cases have challenged the courts for decades and a complex and nuanced legal test has emerged in an attempt to address the many and varied forms of relationships which exist. Ibec is concerned that the consultation paper has failed to adequately acknowledge these legal complexities surrounding the contract of service versus contract for services question. Instead, what is proposed is a blunt instrument geared towards treating everyone as an employee, regardless of the reality of the commercial arrangement in place.

There is an absence of hard data to support some of the assertions made in the consultation paper. It is unclear that there is any case to use tax policy in order to address potential misuse of legitimate structures. Any potential misuse is clearly unacceptable. However, the use of sweeping changes to tax policy which would affect both legitimate and illegitimate independent contractors would be both disproportionate and extremely damaging to the ability of companies to bid for crucial projects.

There must be clear evidence provided of substantial loss to the exchequer before changes are made which could be this potentially damaging. The impact of potential changes on companies' ability to deliver specialist projects, particularly in the context of valuable R&D projects, must be borne in mind when striking a balance between dealing with misuse and legitimate use of intermediary structures. Furthermore, Ibec asserts that mechanisms already exist to address situations of what is known as bogus self-employment where they arise.

2. Professional contractors are key to delivering project based work in certain sectors.

The overwhelming feedback from Ibec members was that what are described in the consultation paper as "intermediary-type arrangements and self-employment arrangements" come in a very wide variety of forms and cannot be easily placed into neat categories. Members have explained that these types of arrangements were not undertaken to avoid taxation or employment law obligations but simply reflected the project led nature of the sector. Feedback from members across a number of high value added indigenous and multinational firms suggested that an unsteady stream of project work often requiring very specific or specialist skills was the main driver of the use of independent contractors or managed services or a combination of both.

These types of projects range from capital installation projects in the pharmaceutical sector to software development projects in the ICT sector. Members expressed a preference to employ workers in full-time roles where possible. For specialist project work, however, this would be unviable in the long-term as project work was often highly specialised and transient, sometimes being done by individuals who had a number of different clients for whom they were doing similar work.

3. Labour market flexibility and certainty are key for companies.

From a business point of view the key feedback was that it is critical that labour market flexibility is maintained and certainty is given. A number of companies stressed to us that a large proportion of their project led work in Ireland would not be possible if the legal status of independent contractors was a casualty of the consultation process. The challenges posed by recruiting specialists on the flexible basis needed would be simply too great. There would be a considerable risk in many cases that potentially lucrative projects would be lost to other jurisdictions.

1. Introduction

Ibec welcomes the opportunity to submit on issues surrounding the use of intermediary-type structures and self-employment arrangements in Ireland.

Concern at the absence of hard data

First and foremost, Ibec is concerned that some of the assertions made in the consultation paper published in January 2016 are not supported by adequate data. The stated aim of the consultation is to address the loss to the exchequer that may arise where an individual “who would otherwise be an employee” establishes a company to provide his or her services. This is a loaded statement. In the absence of the usual legal tests being applied to assess whether someone would in fact otherwise be considered an employee, Ibec is concerned that an extremely blunt instrument is being promoted as part of the consultation to bring a greater number of individuals into the income tax net, without examining the individual relationship to assess whether that person should in fact be considered an employee.

The consultation paper goes on to state that the arrangements which are the subject of the consultation “should be distinguished from the fairly common situation in which a genuinely self-employed individual either operates as a sole trader, through a partnership or incorporates his or her business”. However, it fails to elaborate on how it believes such “genuine self-employed individuals” may be so distinguished nor does it address how it can be ensured that such “genuine self-employed individuals” would be exempted from the proposals in part 8.

The consultation paper presents the designation of individuals working on contracts for services as a growing problem in Ireland, without any statistics to support this contention. Likewise, practices such as contracting out, out-sourcing and “zero hours” contracts are cited in the paper as having “blurred the lines” between dependent employment and self-employment. In actual fact, a study was commissioned by the Department of Jobs Enterprise and Innovation at the end of 2015 to investigate the prevalence of zero hours contracts in the Irish economy, and the resulting study, issued by the Kemmy Business School in the University of Limerick found little or no evidence of the usage of zero hours arrangements within Ireland. The conflating of these various types of arrangements is of general concern to Ibec, but particularly so where a narrative is being used to promote potentially significant policy change with far reaching consequences without any evidence to support it.

The background section of the consultation paper includes “managed services” companies with a subtext that such companies are a sham to avoid assigning individuals the correct employment status and tax status. The reality is that many legitimate companies would fall into the description of “managed services”, including those companies providing IT, contract cleaning, security and contract catering services to other companies. The majority of these companies engage their workers on contracts of employment and as such, whilst clients pay for the services provided, income tax is paid for each employee. It is not clear from the consultation paper as to what impact the proposals outlined in section 8 would apply to these managed services companies, many of which are household names - well-established, multi-national companies in their own right. This example highlights the very casual conflation of different types of business structures in the consultation paper, all with a tacit suggestion that they are tax avoidance mechanisms.

Remedies already available

In any case, where situations appear to an interested party to be contrived, be it the Revenue Commissioners, the Department of Social Protection or indeed the individual person providing the service concerned, there are mechanisms already available to challenge the designation of that person as a self-employed individual. The Revenue Commissioners can arrange to conduct an audit and issue their own determination as to the individual's status. Indeed Ibec understands that Revenue has been particularly active in the respect. To this end, the Code of Practice for Determining Employment or Self-employment Status of Individuals has proved to be a useful guide, summarising the key principles addressed by the High Court and Supreme Court when deciding whether or not someone is in fact an employee. Similarly, it is open to an individual, designated as operating under a contract for services or similar arrangement, to challenge that notion by issuing proceedings under any one of the number of employment rights statutes, asserting their entitlement to be treated as an employee.

Ever narrowing flexibility available to companies

The consultation paper refers to the increased diversity in the Irish labour market towards a more complex range of employment relationships. This runs contrary to the pattern of employment law policy development in recent years. With the advent of new legislation such as the Protection of Employees (Part-time Work) Act 2001, the Protection of Employees (Fixed term Work) Act 2003 and the Protection of Employees (Temporary Agency Work) Act 2012, coupled with individual sections such as section 13 of the Unfair Dismissals (Amendment) Act 1993 which designates agency workers as being employees of the end user for the purposes of dismissal, the ability of companies to diversify their employment relationships with employees has been all but removed. The reality is that despite their need to, companies have very few avenues open to them to retain people to work on a flexible basis. There is, from time to time, a very genuine need for specialist skills to be retained on a temporary or freelance basis to complete specific projects within a company. Giving a specific tax status to individuals or managed service companies in the blunt manner proposed could have significant implications for the companies using those services.

Ibec notes the assertion that the solutions proposed at part 8 of the consultation document "...would not impact on workplace employment law". We cannot see how that assertion can safely be made. We have seen the tax status of individuals become a determining factor in the Supreme Court in deciding whether someone is in fact self-employed¹. If the Department of Finance or the Department of Social Protection are concerned about practices within a specific sector of the economy, Ibec urges them to utilise the tools already at their disposal to address the situation rather than seek to take short cuts without any assessment of individual circumstances simply to bring more individuals within the tax net.

Sector specific needs

In recent years there has been growing activity in a number of sectors where project led work is increasingly prevalent. The sectors where this type of work is more common appear to be the life sciences and software sectors, although it is not limited to those sectors.

The nature of work in these sectors is such that firms often hire highly skilled professional contractors who provide their professional services through their own limited company. These specialised professional contractors often provide their expertise on a project by project basis to different companies over a period of time rather than the standard employee-employer relationship often seen in the labour market in the past.

The increase in these types of service provision arrangements has raised the question of how these contractors should be treated both in terms of employment law and the tax system. It is imperative that both

¹ See *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] 4 IR 150

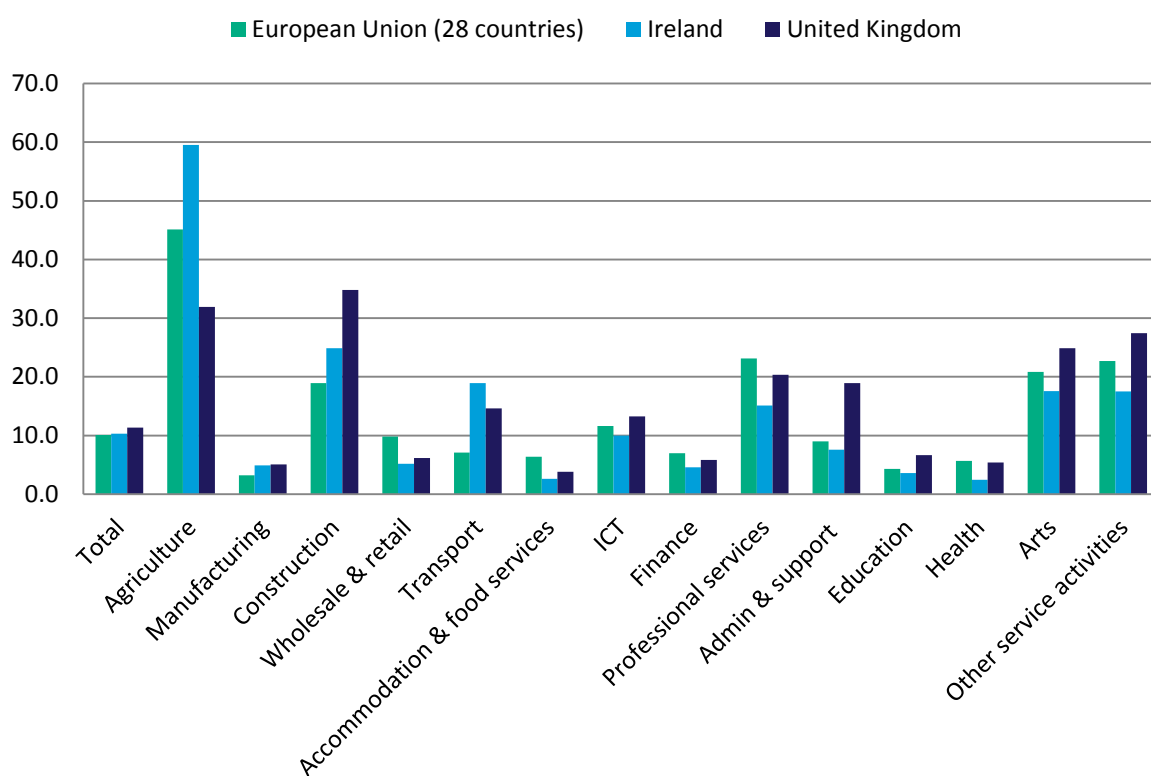
tax and employment law retain this ability for companies to access specialist services on a flexible or temporary basis. Given the importance of this work in a number of high value added multinational and indigenous companies it is imperative that Ireland is not out of line with competitor countries and indeed provides sufficient labour market flexibility to allow those companies to continue their operations here. In this submission we outline the views of our members in the affected sectors on these issues. Firstly, we look at the scale and prevalence of this type of work in Ireland. In our second section we provide some commentary on the views canvassed from Ibec members in the predominant sectors and finally we provide our views on the taxation, human resources and employment law implications of these arrangements.

2. Self-employment, the growth of the services economy and non-standard labour provision

Increased globalisation and the rise of the services economy over manufacturing has led to changes in business needs as regards the provision of labour across the economy. Notwithstanding this and as stated above, the variety of contractual relationships available to companies has been considerably regulated and restricted in recent years. This project based work is very often in the interests of the individuals concerned. There has been a notable increase in the bargaining power of high skilled specialists in recent years. Indeed, Ibec's submissions in recent years on Ireland's international competitiveness for FDI have consistently drawn attention to this trend of capital following high skilled labour rather than the inverse which had been the traditional relationship in the past. These workers are often highly skilled, highly paid, globally mobile and work on a project or freelance basis.

There is little evidence that Ireland is out of line with European norms when it comes to the type of non-standard work which is the subject of this submission. Across all sectors of the economy (figure 1) the only sectors in which Ireland is above the European average are agriculture, transport and construction. Among all sectors bar transport and agriculture, Ireland has significantly less own account workers than the UK. Indeed in the ICT and manufacturing sectors where many Ibec members retain highly skilled professional contractors the prevalence of own account workers is lower than either the EU or the UK.

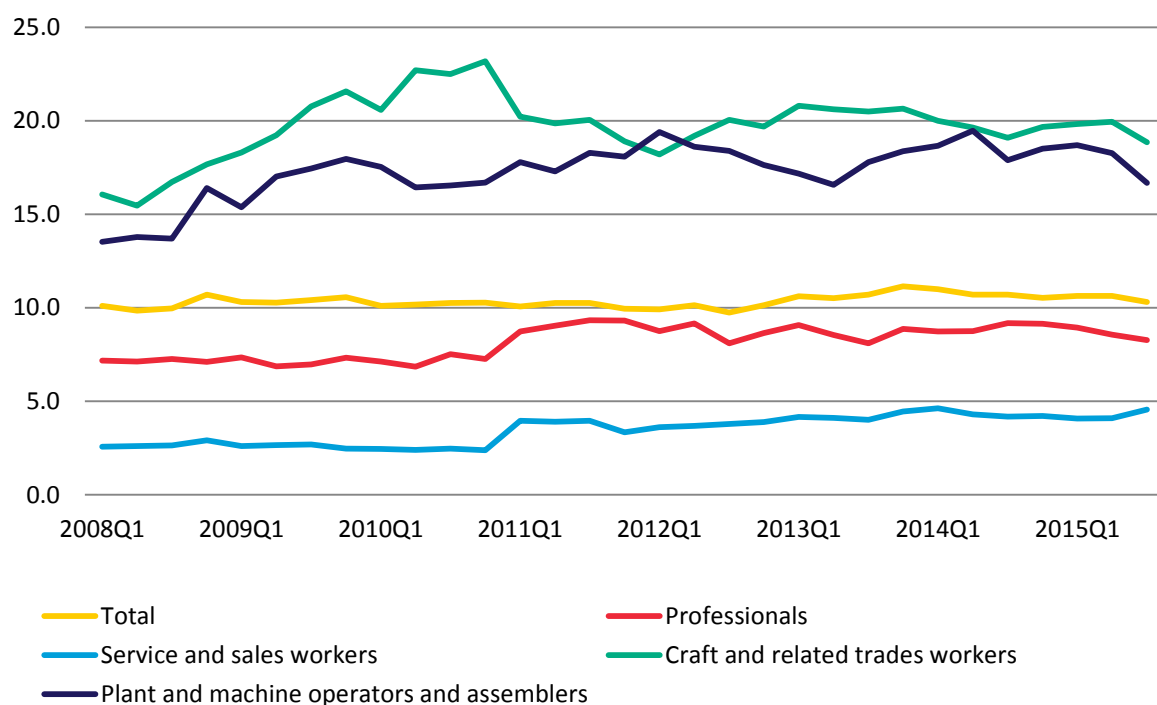
Figure 1: Employment share of own account workers, % of sectoral employment



There is also no significant evidence either of substantial growth in the number of own account workers on aggregate over the past decade or more. Figure 2 displays the share of own account workers in total employment among their occupational group. This has increased only slightly over the past 7 years, from 9.8% of the workforce to 10.3%. The share of own account workers underneath this has remained relatively stable among their occupational groups over time. This suggests where there has been growth in the number

of contractors, such growth has been linked to growth in the sector rather than a growing share of own account workers within that sector.

Figure 2: Employment share of own account workers, % of occupational group



Source: QNHS

It is important in either case to bear in mind that not all of these workers are within the scope of this consultation but are self-employed own account workers in the traditional sense (although such workers may, notwithstanding this, be impacted by the proposals at part 8). The cohort of own account workers who are the subject of this consultation may be small in a European context but they are important in the sectors in which they work. Given the importance of these workers to the ability of Ireland to win projects in the FDI sector it is imperative that policy in this area is based on evidence.

3. Business perspectives

As we have outlined in the previous section the growth of these types of commercial own account workers in general is often overstated and is less prevalent in Ireland than in many other European countries. However, these workers are an important cohort of the labour market. As such, it is necessary to reflect on their unique status and make sure that their status does not become open to abuse.

From a business point of view these workers are important for a number of reasons. Feedback from members across a number of high value added indigenous and multinational firms suggested that an unsteady stream of project work often requiring very specific or specialist skills was the main driver of the use of independent contractors.

These types of projects range from capital installation projects in pharmaceuticals to software development projects in the ICT sector. A common theme in their use is in the installation of specialist machinery or equipment as well as delivery of particular time-limited pieces of research and development work.

A number of firms suggested that their business relied on being able to source short-term specialists for project tasks. Members expressed a preference to employ employees directly in full-time roles where possible. It is often more straightforward from an administrative perspective and the company employing the workers retains greater control over the work itself. For specialist project work, however, this would be unviable in the long-term as project work is generally transient. As such these firms use independent contractors and sometimes managed services companies to undertake the work on their behalf.

Most of the workers in these arrangements are highly skilled and move between jobs readily as demand is high across the sector as a whole. Many have a stated preference not to become a full-time employee as rewards are greater when carried out on the basis of a contract for services due to the high demand for specialised roles. Indeed, large proportions of these workers are not tied to Ireland as a place of work and are globally mobile. For example, many companies use specialists to deliver R&D projects over a period of time; these workers often work on projects across multiple companies and countries often at the same time.

Notwithstanding that such arrangements may be impacted by the proposals at part 8, these scenarios do not seem to be reflected or accepted anywhere in the consultation paper.

From a business point of view the key feedback was that it was crucial that labour market flexibility was maintained and certainty was given that it would continue. A number of companies stressed to us that a large proportion of their project led work in Ireland would not be possible if flexibility was a casualty of the consultation process. This must be a clear outcome of the consultation.

If companies could not source the skills of specialist independent contractors they would not be able to justify hiring full-time employees in their place, and in many cases, the skill set would not be readily available in the employee market. As a result many firms would not be able to bid for crucial FDI projects in Ireland in an efficient manner. The losses to many firms in terms of specialist work in research and development, software, pharma and other high value added sectors would be significant.

What is evident from members' feedback is that the Revenue Commissioners have shown a growing interest in any form of work that does not correspond to the traditional employer/employee relationship. General feedback from members suggests that this has caused some uncertainty for companies. There is a general feeling that lack of understanding of genuine use of professional contractors as well as lack of clear guidelines about their status has led to an unwarranted suspicion of these types of workers. This suspicion has arisen despite the fact that in the vast majority of cases, use of this kind of labour has been completely legitimate. The overwhelming feedback from companies was that these types of arrangements were not undertaken to avoid taxation or employment law obligations but simply reflected the project led nature of the sector.

Many of our members welcomed the opportunity to get clarification from the relevant authorities through this consultation process. The strong opinion of members was that the automatic notion that these types of arrangements were inherently an attempt to avoid tax showed a lack of understanding of the structure of relevant sectors both in Ireland and globally.

There was a general understanding that Revenue had a right to be concerned about their income stream. However, companies stressed that action to allay that concern must be proportional. These contractors are independent in every sense of the word and are neither employed nor keen to be employed as full-time employees. There was a general feeling among members that they would welcome the clarity once and for all as to what structures, safeguards and arrangements would be acceptable to Revenue as long as those arrangements allowed for flexibility and were not overly onerous.

4. Taxation and employment law perspectives options

The consultation raised a number of areas where the use of so-called intermediary-type structures and self-employment arrangements can give rise to potential losses to the exchequer. Namely:

- different outcomes in terms of employers' and employees' PRSI;
- indefinite deferral of the payment of part or all of the remuneration with a consequent deferral of payment of the associated tax/USC;
- payment of unwarranted tax-free expenses;
- different pension planning opportunities; and
- different tax planning opportunities.

Some of these would seem to reflect a common unwarranted suspicion on the part of the state toward self-employed taxpayers. They also seem to take as a given that this class of independent professional is the same as an employee. The inclusion of 'payment of unwarranted tax free expenses' is particularly puzzling given that these expenses could only be paid if incurred solely in the course of their work.

Of major concern to Ibec is that it is unclear that there is any case to use tax policy in order to address potential misuse of legitimate structures. Any potential misuse is clearly in a minority. Using sweeping changes to tax which would affect both legitimate and illegitimate independent contractors would be both disproportionate and extremely damaging to the ability of companies to bid for crucial projects. There must be clear evidence provided of wholesale abuse of the system coupled with a substantial loss to the exchequer before changes should be made which could be potentially damaging to key areas of the Irish economy. This evidence was not present in the consultation document. Simultaneously, these two issues would mean that tax status of legitimate independent contractors would be changed in order to solve a problem which has not been shown to exist.

These potential changes would be likely to significantly affect the ability of companies to win or deliver project work in Ireland. Quite simply, the bar of evidence must be much higher if Government departments wish to make changes which could have major potential knock on implications for winning project work in FDI or indigenous high value sectors. The competitiveness implications of these suggestions are not trivial and neither should they be treated as such.

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