

# **Fraudulent contracting of work: Sham companies (Austria, Estonia and Italy)**

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## Introduction

Among the fraudulent contracting of work practices, one of the most difficult to identify is the creation of sham companies (usually, in another country). Sham companies are essentially new entities created to disguise the real employer.

Creating a company, even abroad, is – of course – legal and may well be institutionally and economically advisable. However, when the only purpose of its creation is to benefit from more favourable regulations relating to labour and tax (and not to develop an activity in the country), then questions should be asked about the ‘genuine’ nature of the company.

The Eurofound study *Exploring the fraudulent contracting of work in the European Union* emphasises that the term ‘sham contracting’ or ‘sham companies’ embraces a diversity of fraudulent practices, embedded in different institutional contexts (Eurofound, 2016a).<sup>1</sup>

Fraudulent practices are perpetrated for different purposes, the most important of which are to avoid paying, or to save, employment-related taxes and social security contributions, and to evade employers’ liability towards employees. Beyond some recent analysis of ‘letter-box’ companies,<sup>2</sup> there is not much research into sham contracting or sham companies. In addition, EU legislation has not played any role in this respect.

Sham companies share the common goal of disguising the real employer. This can be achieved through different mechanisms such as:

- the creation of companies without assets, generally within subcontracting chains
- commercial or civil law contracts between companies where employees are misrepresented as contractors or company owners
- workers’ cooperatives, where workers lack actual control over the organisation’s decisions.

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<sup>1</sup> The term ‘bogus company’ is also used to cover illicit or illegal situations where enterprises without any assets or actual entrepreneurial activities are created, with the goal of laundering money coming from illegal activities. This information sheet does not consider these practices, limiting its coverage to legal activities.

<sup>2</sup> See, for instance Cremers (2014) and references therein.

## National definitions of sham companies

The way sham companies are created makes it particularly difficult to identify them and so understand their full impact. The three countries under discussion in this information sheet (Austria, Estonia and Italy) display considerable diversity in their definitions of sham companies and in their attempts to combat these practices.

In **Austria**, the term ‘sham’ or ‘bogus’ companies (*Scheinfirmen*) refers to companies without assets (that is, letter-box companies, often with registered offices in empty basements or storage rooms). These serve the purpose only of registering employees with social security institutions, without the intention of paying any taxes or social security contributions: they thus perpetrate a systematic social fraud.<sup>3</sup> They are usually involved in ‘subcontracting pyramids’ (extended chains of subcontractors) and in extended corporate networks (at transnational level, too).

Sham companies operate as follows: companies are established, employees are registered, and after a certain period of time – once the subcontract has been fully executed, the starting capital concealed and the managers have resigned – the company declares itself bankrupt. As a result, the company avoids paying social security contributions and taxes. As there is no capital left, the state cannot claim contributions and taxes from these insolvent companies (Winter-Ebmer et al, 2013). Workers registered by bogus companies may either not work at all (or work in the shadow economy), or work for a company higher up in the subcontracting chain. According to the Federal Economic Chamber (WKÖ), the large majority of bogus companies develop entrepreneurial activities; they are companies whose workers are actually working, in performing a working activity for a company that is different from the sham company.

In **Estonia**, sham contracting is related to practices where direct employment contracts are hidden behind civil law contracts or service agreements that imply the creation of bogus private limited companies (*OÜ-tamine*), with the purpose of evading employment-related taxes, including social security contributions. Recent decisions of the Supreme Court of Estonia stipulate that service agreements between companies are considered employment relationships if one company (that is, the people who are acting as a private limited company) performs a working activity for the other company in the framework of a relationship of subordination to the latter’s management and under the latter’s control (EMTA, 2015).

Other features that, according to court decisions, provide a basis for qualifying service agreements between companies as employment contracts or authorisation agreements, and also falling under the category of civil law contracts between a company and a natural person are as follows:

- the company providing the service issues invoices to the recipient that are for the same amount every month
- the company provides services only or mostly to a single client
- the person who provides the service is also member of the management board of the company that receives the service
- the service agreement features elements typical of employment contracts (for example, fixed working time or control exercised by the employer) (Ärileht, 2015).

In **Italy**, the issue mainly takes the form of bogus workers’ cooperatives. A cooperative is a specific kind of company that has a ‘mutual purpose’, generally intended as the satisfaction of its members’ common needs. The activities of the cooperatives should respect the values of the cooperative movement, including democratic member control and members’ economic participation. For this reason, rules applying to cooperatives include provisions such as a per capita vote at assemblies, limits on the distribution of dividends and the possibility of

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<sup>3</sup> ‘Social fraud’ is the non-payment of social contributions and/or taxes.

distributing a share of the surplus according to the amount of work undertaken by each member (the so-called 'patronage dividend', *ristorno*). A workers' cooperative member is, therefore, both one of the owners and a worker of the company. Bearing this in mind, frauds are related to situations where workers do not exercise any influence over the decisions of the company. Rather, decisions are centralised within a managerial group, which protects its own interests. In reality, then, the cooperative acts as a private company, with one or more managers behaving as the employers.

Fraud is also associated with cases where the cooperative is in reality a branch of the main client (usually the only client) and is directed by it, despite the client being formally involved only in a subcontracting agreement. While doing so, the actual employer aims to bypass liability for wages, social security contributions and other duties characterising employment relationships.

Furthermore, cooperatives can lawfully reduce pay by means of assembly decisions in the case of 'crisis' and adjudicate on other aspects concerning the employment relationship with their members in their statutes and internal regulations. While these possibilities are legal for cooperatives, the choice of this structure with the only aim being to reduce workers' rights is fraudulent.

Apart from abuses of these provisions, directly linked to the legal status of cooperatives, there are many other ways in which bogus cooperatives circumvent the applicable minimum wages, employment conditions and social security contributions. These frauds are reported in relation to other legal entities; however, the legal status of cooperatives provides actual employers with a 'shield' in case of inspections or lawsuits. The most discussed phenomenon is the application of collective agreements signed by less representative social partners or even by social partners existing only on paper (so-called 'pirate contracts'), thus legitimising companies to stick to less onerous employment conditions than those set out by the most representative social partners.

## Difficulty of assessing scale of problem

Quantitative data are not fully available for fraudulent practices in general. Estimates become even more difficult in the case of sham companies, given the need to take into account a number of factors.

In **Austria**, sham companies have featured prominently in political discussions as they have become a greater problem: a new law introduced in 2016 is specifically targeted at combating such companies (Act against Social Fraud – *Sozialbetrugsbekämpfungsgesetz*, SBBG; see below). The use of sham companies is prevalent in the construction sector, but also in the cleaning and small transport sectors. These sectors share several characteristics, such as being labour intensive and involving work that cannot be delocalised but has to take place on site. According to the stakeholders interviewed, registered employees of bogus companies belong to all age groups, with an overrepresentation of workers with a migrant background. Often, they are migrant workers and cross-border workers from Member States that joined the EU after 2004. Depending on the sector, both male and female workers are involved. While the cleaning sector is female dominated, the construction sector is male dominated, with a high prevalence of blue-collar workers. In most cases, but not all, the workers are aware that they are hired by a bogus company. The occupations in which they are employed are generally those requiring low-level qualifications. However, in the construction sector, the phenomenon also affects skilled workers, such as metalworkers and workers in the dry construction segment.

In **Estonia**, there are no reliable estimates enabling the sectors where the phenomenon is more widespread to be identified. However, the interviewees from the Estonian Labour Inspectorate and the Estonian Trade Union Confederation (EAKL) pointed to two crucial practices that have gained public attention. First, in public procurement procedures for transport services, there have been cases in which bids have been assessed as unreasonably low, leading to suspected use of bogus self-employment or service contracts to hire bus drivers. Second, there have been cases in which a board member of a company provides management services to the same company, under a service agreement between companies. In this case too, there are many ways to pay lower taxes (and social security contributions).

There is no information available on how many companies could be implementing fraudulent practices. In 2015, more than 23,000 companies (almost 25% of all companies) did not pay labour taxes; however, this figure also includes inactive companies and those without employees (EMTA, 2015).

In **Italy**, the issue of bogus cooperatives is a recognised political problem, especially widespread in the construction and tertiary sectors. In the tertiary sector, cooperatives are usually active in logistics, accommodation and large-scale retail trade, as well as in other services to enterprises (especially cleaning, reception, private surveillance and portage for hotels and tourist villages) and for public administration (welfare services). Workers in bogus cooperatives are often migrants.

## Drivers and enablers of fraudulent practice

Among the drivers, avoiding costs and employers' obligations are the most relevant. In terms of enabling factors, lack of clarity of regulation, the difficulties of control and the vulnerability of the workers are of concern.

### Drivers – reducing costs and avoiding liability

One of the main objectives of the creation of a sham company is **reducing costs** – principally, saving on social security and employment-related taxes. For instance, **Austrian** sham companies are used in subcontracting chains to save costs, these companies not paying any employment taxes or social security contributions. Similarly, **Italian** cooperatives benefit from favourable taxation regulations, especially when most of the activities are performed by their members (*cooperative a mutualità prevalente*), or when they are registered as 'social cooperatives' (cooperatives managing social and educational services or the employment of disadvantaged people). This favourable taxation context, then, encourages fraudulent practices. In **Estonia**, the considerable differences between labour and corporate taxes lead to companies disguising employment by contracting work through civil law contracts and private limited companies. In some cases, employees (for instance, board members) may also be interested in providing services to a company through their own private limited company, instead of entering into an employment contract: in these cases, employment-related taxes need not be paid and the entire remuneration is paid directly to the private limited company. The owners of the latter can then decide how much they will keep for themselves as a salary and how much they will pay out as dividends; there is considerable leeway and no transparency about the distribution. However, it can have a considerable impact on taxes and public finances.

In all three countries, the aim of fraud is also to **avoid liability** with regard to employees in terms of such aspects as remuneration, working time, annual leave, health and safety, and/or social security contributions.

### Enabling factors: institutional features and vulnerability of workers

Institutional factors are more important in Italy than in Austria and Estonia in terms of enabling this type of fraud – notably, the lack of clarity of existing regulation. In **Italy**, legal provisions concerning outsourcing hamper the proper sanctioning of frauds. As rephrased by Legislative Decree 276/2003 (the 'Biagi Law'), the criteria identifying a sham company are quite vague, only requiring proof that 'the actual employer organises the means of production of the subcontractor and runs the business risk'. Before the reform, the 'ownership' of the means of production was sufficient to identify the real employer. In addition, the 'Jobs Act' (Eurofound, 2015) removed from criminal law the 'fraudulent labour intermediation', which sought to punish intermediation aimed at 'avoiding the application of compulsory law or collective bargaining provisions'. As a consequence, this has limited the power of inspectors to rule on the hiring of workers fraudulently employed through a bogus cooperative. The ambiguities of the legislation – along with a limited number of inspectors and consequently inspections – create significant problems of enforcement.

In **Austria** also, the use of subcontracting chains or subcontracting pyramids is considered a general practice, as public authorities face difficulties in removing sham companies from the market. However, as indicated above (and unlike Italy), the legal framework has been significantly reshaped in an attempt to reduce the possibility of implementing long subcontracting chains and to improve controls over sham companies.

Finally, attention should be drawn to how the vulnerability of the workers can enable this kind of fraud. In **Italy**, members of bogus cooperatives, especially if they are migrants not familiar with the Italian language, are often unaware of their contractual position towards the cooperative, and of the legal framework covering cooperatives and of the rights this entails (such as participation in assemblies). In contrast, in **Austria**, where a significant share of the

workers employed in bogus companies have a migrant background, those interviewed said that they are usually aware of the fraud. Nevertheless, given their weaker bargaining power and lack of alternative employment opportunities, they accept the situation. Furthermore, the roles and competencies of trade unions, acting for and representing workers, are brought into question by these 'sham constructions'.

## Consequences of fraudulent practice

### Impact on business competition

No specific effects on business competition in **Estonia** were systematically reported, beyond a mention that fraudulent forms of contracting work could affect fair business competition, as labour costs depend on whether the worker is formally employed or hired under a civil contract.

The creation of sham companies and their effect on competition are more obvious when subcontracting is also involved. In **Austria**, it has been noted that sham companies are very often part of pyramids of subcontracting chains. Principal contractors never subcontract part of the work to a sham company directly, as they are themselves checked thoroughly before a contract is awarded. Principal contractors are, however, fully aware that a few steps further down the subcontracting chain, sham companies are used because otherwise the business would no longer be profitable. According to WKÖ, companies in the ancillary building trade argue that principal contractors push them to save costs, thus encouraging them to subcontract to bogus companies. Competition between companies becomes even fiercer with the use of sham companies. Not all companies participate, but those that do not face a significant competitive disadvantage. Fraudulent behaviour thus has a considerable effect on business competition. Large, industrial enterprises are usually among the ‘winners’, whereas the losers are small and medium-sized enterprises (SMEs) further down the subcontracting chain.

In **Italy**, one of the main cooperatives’ organisations, the National Association of Cooperatives and Benefit Societies, noted that bogus cooperatives have two negative effects. First, they bring about social dumping and unfair competition, especially by authorising saving on labour costs. Second, the practice of signing ‘pirate contracts’ damages the credibility of all cooperatives.

According to the representative from the Italian Joint National Committee for Building Workers’ Welfare Funds CNCE (the main paritarian institution of the construction sector), the company at the top of the subcontracting chain does not necessarily subcontract work to bogus cooperatives in order to save costs, but rather might be unaware of the employment conditions applied by its subcontractors and lack any control over them. A cumulative trend has been noted, with bogus cooperatives being likely to commit other frauds in terms of the quality of the materials used or by employing a workforce that lacks the necessary skills, with obvious consequences on work quality and competitiveness.

### Impact on working conditions and workers’ rights

In the three countries covered by this information sheet, workers employed in bogus companies generally experience poorer working conditions in terms of wages, working time or health and safety. However, as the term ‘bogus company’ embraces different fraudulent practices, the process through which these negative effects are produced differs.

In **Austria**, employees of a subcontracting company – even a sham one – do not usually experience wage dumping to a large extent, as collective agreements are generally complied with. Nonetheless, as WKÖ points out, fraudulent practices – operating beyond the reach of regulation – lead to reduced incomes. For instance, declared wages do not correspond to the amounts actually received. Workers in sham companies are often forced to give back a share of their pay in cash. According to an inspector from the Vienna Local Insurance Fund (*Wiener Gebietskrankenkasse, WGKK*), this share can amount to as much as two-thirds of the pay. Moreover, in the specific case of the construction sector, bogus companies may avoid paying contributions to the sectoral fund in charge of intermediating a number of wage elements, including holiday pay and severance pay, which are therefore denied to the workers in question. In addition, if sham companies become insolvent (which they usually do) and any wages are outstanding, the latter end up being borne by taxpayers, as these are eventually paid by the Insolvency Payment Fund (*Insolvenzentgeltfonds*). Frauds involving pay may also

entail contracts displaying shorter hours than those actually worked. Negative effects on working time were also highlighted in the interviews. Practice shows that workers in sham companies often work longer hours and enjoy few rest breaks. As a consequence, proneness to work-related accidents increases strongly.

In **Estonia**, entering into a contract with a private limited company – rather than establishing a labour contract with an employee – allows the company to bypass all the regulations on employee remuneration, working time, annual leave, and health and safety, as in cases where workers are contracted as self-employed. Here, the stakeholders interviewed pointed out that civil contracts, as with employment contracts, sometimes contain provisions on working time (for instance, they specify the daily time span within which workers are supposed to perform their working activities). This example points to cases in which companies avoid entering into proper employment relationships but still seek to control the working process. It also highlights that civil contracts sometimes set out a service price that is below the national minimum wage, as stipulated by collective bargaining agreements (which are not applicable outside employment relationships). According to a labour inspector, the issue of occupational health and safety is the most crucial in terms of working conditions. There is no systematic information on differences in occupational health and safety conditions between workers under ‘civil law contracts’ and workers in ‘employment contracts’; nevertheless, various elements show that people under civil law contracts are less protected in this regard, as the owner of a site has fewer legal obligations towards them. In addition, entitlement to social security benefits is hampered because the coverage enjoyed by a self-employed worker or owner of a private limited company is much less than that enjoyed by an employee.

In **Italy**, depending on the different types of fraud implemented, workers can have a wide range of rights negated, mainly in terms of wages, paid leave, protection against dismissals and the safeguarding of health and safety at work. The enjoyment of these rights can be diminished when employees are covered by rules set out by assembly decisions, statutes or pirate contracts that establish less favourable working conditions. For instance, in some cases the statutes of bogus cooperatives were found to suspend members’ right to continue working during pregnancy. The possibility of recovering loss of pay by means of tribunals is also discouraged. In particular, the interviewee from the Italian Federation of Workers in the Trade, Tourism and Service Sectors (FILCAMS) stressed that there are cases of migrant workers being moved from one cooperative to another. While doing so, they are asked to sign statements by which they waive all their previous rights in terms of unpaid wages, in exchange for a small lump-sum payment. And, as in Austria, bogus cooperatives may also fraudulently go bankrupt in order to avoid paying wages and social security contributions to the National Institute of Social Security (INPS). When this happens, workers have a very limited chance of receiving the wages owed to them, and INPS may incur losses because of unpaid contributions.

## Measures to address issue

A variety of actions have been taken in the three countries – regulatory reforms, social partners initiatives and court cases.

### Policy reforms

**Austria** directly addresses the issue of bogus companies through the Act against Social Fraud (*Sozialbetrugsbekämpfungsgesetz, SBBG*), effective from 1 January 2016. This act aims at simplifying the identification and punishment of bogus companies' liability as contractors. A variety of measures is displayed, addressing faster procedure, transparency and impacts on the workers.

The act envisages an accelerated procedure to identify and prosecute bogus companies faster. It works as follows. When there is reasonable suspicion that an undertaking is a bogus company, it is informed in writing. The company then has one week to file an objection. If an objection is put forward, the authorities investigate with a view to determining whether the undertaking concerned is bogus; if no objection is made, the authorities automatically rule that the undertaking concerned is a bogus company. The Ministry of Finance makes a list of bogus companies available online; once placed on the list, registration of employees at the company is no longer possible.

This online list also informs contracting companies which potential subcontractors are, in fact, bogus, and assumes that they will take this into account when hiring subcontractors. If a contracting company hires a bogus subcontractor, the former is also held liable as the guarantor and payer of employees' wage claims and social security contributions.

Employees registered with companies found to be bogus are summoned by health insurance authorities and are obliged to cooperate. If they do not show up within six weeks, their insurance coverage ceases retroactively as of the day when the undertaking was declared a bogus company. If these employees can credibly demonstrate that they have performed work for the bogus company, health insurance authorities are required to investigate the employer. Should this not be possible, the contractor that engaged the bogus company is considered to be the rightful employer if it is, or should have been, aware that the subcontractor is a bogus company and if it cannot prove that the latter's employees have not done work for it. Employees are entitled to outstanding wage claims if they can provide credible proof, for example, by producing documentation – such as the employment contract.

Within the framework of the Fraud Prevention Act 2010 (*Betrugsbekämpfungsgesetz, BBKG*), customers' liability has been also extended to wage-dependent levies. This means that, if building work is being subcontracted to another company, the customer is liable for all wage-dependent levies that the subcontracted company is to pay, up to a maximum of 5% of the wages paid. According to the SBBG, the liability of contractors is increased as they are now considered both guarantors and payers.

The recent implementation of the SBBG means that it is not possible to assess its impact based on reliable research, administrative data or case law. Although all the interviewees deemed the act as highly relevant, evaluations of its expected impact differed. Interviewees from the Construction Workers' Annual Leave and Severance Pay Fund (*Bauarbeiter-Urlaubs- und Abfertigungskasse, BUAK*) claimed that their organisation had already achieved some positive results against bogus companies. They felt that absolute transparency on contracted companies and their trades, as well as on employees and their working times, would greatly facilitate the supervision and monitoring activities implemented by BUAK and other institutions. The WKÖ representative, on the other hand, was not very optimistic that the act would eradicate the use of sham companies as they are usually 'forced' into insolvency and a new one is founded immediately afterwards. All this happens faster than inspection procedures and the publication of an ad hoc list on a dedicated website. Founding a company, or even 10 at the same time, is both straightforward and legal.

In **Italy**, the parliament is examining two legal proposals, following campaigns by the social partners. These are the Charter of Workers' Universal Rights, backed by the Italian General Confederation of Work (CGIL), and a bill to tackle bogus cooperatives, backed by the main organisations representing cooperatives. The charter includes provisions aimed at ensuring equal treatment between the workers of the client and of subcontractors in the case of subcontracting of a production phase, and strengthening the applicability of rules set by collective bargaining for all employers, including rules limiting the possibility of subcontracting specific activities. The bill aims to make inspections of the mutual purpose of cooperatives more targeted and to increase sanctions for cooperatives that refuse to undergo inspections or are found to not comply with cooperatives' values.

Social partners' initiatives have also been launched in Austria and Italy. In **Austria**, the Fair Procurement! (*Faire Vergaben!*) campaign by 3 trade unions and 14 sectoral employers' groups had a considerable influence on the recent amendment to the Federal Public Procurement Act (*Bundesvergabegesetz*, BVergG). The amendment, which came into force on 1 March 2016, introduced several improvements:

- mandatory 'best bidder' principle on public building contracts of more than €1 million
- definition of 'core services': core services can be determined in public tenders and must be provided by the main contractor (they cannot be subcontracted – previously, 99.9% of a contract could be subcontracted)
- transparency on subcontracting: subcontractors must be included in the offer, and they will be checked and approved (if further subcontracting parties are added or changed, they also need to be approved)
- combating wage and social dumping: if more than two offences are registered within 12 months, contractors are excluded from future public procurement procedures.

In **Italy**, the main measure to fight bogus cooperatives is the setting up, under a memorandum of understanding signed in 2007, of the National Observatory on Cooperatives, composed of social partners and government representatives. Similar structured observatories have also been set up at local branches of the Ministry of Labour and Social Policies (Territorial Labour Office). The purpose of these bodies is to provide advice on inspections with a view to ensuring the application of sectoral collective agreements signed by the most representative social partners, as well as in relation to the planning and direction of inspections. According to the representatives of the Italian Federation of Workers in the Trade, Tourism and Service Sectors (Filcams) and the National League of Cooperatives and Mutuals (Legacoop), the activities of the observatories have yielded very different results due to the lack of inspections in some areas of the country.

In **Estonia**, recent concrete measures to tackle bogus private limited companies are related to case law developments. The Supreme Court of Estonia has made three decisions (nos. 3-3-1-12-15, 3-3-1-25-15 and 3-2-1-82-14) supporting the position of the Estonian Tax and Customs Board (EMTA) (Eurofound, 2016b). These decisions stipulated that service agreements between companies are considered employment relationships if one company (that is, the people who are acting as a private limited company) performs work for the other company in the framework of a relationship of subordination to the latter's management and under the latter's control (EMTA, 2015). Therefore, when an actual employment relationship is hidden behind a service agreement between companies with the purpose of evading employment-related taxes, EMTA is now empowered to redefine those agreements as employment contracts, obliging the companies to pay employment-related taxes. EMTA has announced that it would possibly contact those companies that allegedly use fraudulent schemes and ask them to change their practices. Most are small companies, but EMTA has stated that it would start with larger companies whose tax payments would give higher revenue (Õepa, 2015). So far, EMTA has contacted around 200 companies, as against the overall 23,000 companies (not all fraudulent) that are not paying employment-related taxes.

## Policy pointers

In addition to well-known measures, such as running preventive awareness-raising campaigns and increasing systematic fines, there should be a greater focus on **targeting sham companies** through rules on procurement and subcontracting.

**Public procurement:** Responsible public procurement, including labour clauses or requirements on direct employment, can be used to set an example and so reduce bogus contracting, especially in sectors such as construction.

**Subcontracting chains:** Rules on subcontracting should neutralise the possibility of making profits by applying unfair working conditions.

A number of aspects should be considered, including the **strategic role of social partners** in setting the ‘rules of the game’ at multiemployer level, the regulation of joint liabilities between the client and subcontractors, and criteria to identify and punish the real employer.

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