

## 14 Classification of workers for PRSI purposes

- 14.1** Pay Related Social Insurance (PRSI) contributions are payable in respect of earnings of almost all persons of working age (16 – 66).<sup>1</sup> PRSI contributions are paid into the Social Insurance Fund (SIF), which funds a range of social insurance benefits and pensions.<sup>2</sup> In 2021, over €11.8 billion was collected in PRSI receipts.
- 14.2** There are different classes of PRSI contributions, with varying contribution rates (see Annex 14A). In general, the appropriate PRSI contribution class is determined by the nature of a person's employment and weekly earnings. A person's PRSI classification is important because it affects the PRSI contribution rate payable on their salary or income, and the social insurance benefits and/or pensions to which they are (or will be) entitled (see Annex 14B). Because of the different contribution rates that apply, a key risk to the completeness of PRSI contribution receipts is the incorrect classification of liable persons.

### Cases of public sector bodies incorrectly classifying workers for PRSI

A failure by any employer, including public bodies, to understand and to implement the principles set out in the *Code of Practice on Determining Employment Status* may result in a liability for interest and penalties, in addition to a liability for employer's PRSI.

For example, following an internal review, the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media made a payment of €176,400 to the Revenue Commissioners in 2021 in relation to the incorrect classification of eleven workers originally engaged under contracts for service but who should have been classified as employees for the purposes of PRSI.

The payment to Revenue comprised €104,000 in employer's PRSI contribution arrears, interest of €59,000 and a penalty of €13,400.

In 2022, the Office of the Ombudsman for Children paid around €12,000 to Revenue in relation to two workers. The Department of Social Protection reviewed the cases of 19 workers employed by the Office. Two cases were selected for a full investigation and resulted in the liability. The Office subsequently reviewed the remaining 17 workers and is preparing a voluntary disclosure to Revenue in relation to seven of these workers, with the liability expected to be around €21,000.

<sup>1</sup> Unearned income (such as rent or interest) may also be liable for PRSI.

<sup>2</sup> Entitlement to benefits is conditional upon claimants having a certain number of contributions paid or credited in a specified period of time, and satisfying any other scheme eligibility criteria.

- 14.3** The Department of Social Protection (the Department) has responsibility for the PRSI system and the determination of all social insurance matters. The Office of the Revenue Commissioners (Revenue) collects PRSI contributions on behalf of the Department on a statutory basis and under an agency agreement.<sup>1</sup>
- 14.4** This report examines the potential impact of misclassification of employment status on PRSI contributions to the SIF. The report considers
- the clarity of criteria to determine employment status
  - the extent of recorded self-employment in the State
  - compliance activity undertaken to detect misclassification of employment status.

### Criteria to determine employment status

- 14.5** There is no single clear definition of the terms ‘employed’ or ‘self-employed’ in Irish or EU law. Apart from the Department’s determination of employment status for PRSI classification purposes, the employment status of a worker may also be separately determined for other purposes, under relevant legislation. For example
- Revenue may determine a worker’s employment status in the context of deciding their treatment for income tax purposes.
  - The Workplace Relations Commission (WRC) determines employment status as a preliminary issue when adjudicating on employment rights complaints.

Decisions of the Department or the WRC or Revenue are not binding on each other. As a consequence, a determination of employment status in one context (e.g. worker insured under class S for PRSI purposes) does not in itself confer the same employment status in another context (e.g. worker pays income tax under schedule E).

### Code of Practice on Determining Employment Status

- 14.6** The *Code of Practice on Determining Employment Status* was first prepared in 2001 by the Employment Status Group established under the Programme for Prosperity and Fairness.<sup>2</sup> The Hidden Economy Monitoring Group updated the code in 2007.<sup>3</sup> In July 2021, an interdepartmental working group comprising the Department, Revenue and the WRC further updated the code.<sup>4</sup>
- 14.7** The code sets out the criteria used to determine whether a worker is employed or self-employed, based on five key factors established by case law.
- **Mutuality of obligation** — whether, and to what extent, there is an obligation on one party to provide work and on the other party to accept it. The code states that the Irish courts regard the mutuality of obligation as the most important factor, to the extent that when it is not present in an employment situation, the worker is deemed self-employed without the need to consider the other criteria. If a mutual obligation is present, the other criteria must be assessed to determine employment status.
  - **Substitution** — whether, and to what extent, the worker is allowed to send a substitute in the event that they are unable to do the work themselves and, if applicable, who engages and pays the substitute.
  - **Enterprise test** — whether, and to what extent, the worker who has been engaged to carry out the work is doing so as an individual in business on their own account, and has the ability to profit from their own efficiency/entrepreneurial skill or, conversely, runs the risk of suffering a financial loss.

1 The Department pays Revenue an annual agency fee in relation to expenses incurred by Revenue in the collection of PRSI. The fee is a charge on the Social Insurance Fund.

2 The group was established to address concerns over workers being categorised as ‘self-employed’ when ‘employee’ status would be more appropriate.

3 The Hidden Economy Monitoring Group (HEMG) is a non-statutory group to tackle the shadow economy and comprises representatives from business groups, trade unions and State agencies (including Revenue, the Department and the WRC).

4 Other stakeholders such as the Irish Business and Employers Confederation (IBEC) and the Irish Congress of Trade Unions (ICTU) were consulted during the updating of the code. The code is considered as a ‘living’ document which will be updated as necessary to account for any changes to legislation, case law and changes in the labour market.

1 Platform workers are individuals who use an application (such as Uber) or a website to match themselves with customers, in order to provide a service in return for payment.

2 Intermediary companies are personal service companies (where the individual is the sole director and owns most/all shares in the company) and managed service companies (where a number of individuals own the company and only deliver services to one organisation).

3 The digital economy encompasses businesses that sell goods and services via the internet, and digital platforms that connect spare capacity and demand.

4 By comparison, the 2007 version was 12 pages long.

5 This may represent a challenge, in particular, for those for whom English is not their first language e.g. foreign-national students or immigrants who may work in sectors where the risk of misclassification may be higher, such as meat factories or food delivery.

6 A directive is an EU legislative instrument that sets out a goal that all EU countries must achieve but it is up to the individual countries to devise their own laws on how to reach these goals.

7 The Commission estimated that 28 million Europeans worked through digital labour platforms in 2021 and this is expected to increase to 43 million by 2025.

- **Integration** — whether, and to what extent, a worker has become an integral part of a business, as opposed to carrying out work that, although done for the business, is peripheral or accessory to it.
- **Control** — whether and to what extent the person or business paying for the work has control over the worker, including the power to decide what work should be done, as well as when, how and where it should be done.

**14.8** The Department stated that the code is an important and necessary step in guiding and informing people, and is a valuable tool to assist all stakeholders in resolving employment classification issues.

**14.9** The examination team reviewed the revised (2021) code and noted that

- key case law relied upon is set out — this had not been set out in the previous guidance
- the key characteristics of employment and self-employment referenced in the revised code are not materially different to the previous guidance in place — the Department stated that this reflects the fact that case law had not changed significantly between 2007 and 2021
- material had been added in relation to special circumstances and more recent developments in the labour market, including individuals who control companies, agency workers, platform workers, the use of intermediary and managed services companies and the digital economy generally<sup>1,2,3</sup>
- the revised code is significantly more comprehensive than previous guidance, but at 27 pages it may be more onerous to read and understand<sup>4</sup>
- the code is only published in English<sup>5</sup>
- the contrast between employee status and self-employed status might be clearer if presented side-by-side rather than on separate pages (for example, the format adopted in Annex 14C).

**14.10** To date, there has been no survey or similar analysis to assess the extent to which the code is accessed and understood by potential users. Both the Department and Revenue stated that, at this point (as at August 2022), a survey may be of limited value to determine how widely the revised code is used as it was only published in July 2021.

### ***Addressing employment status issues at European Union level***

**14.11** EU law does not currently define the terms 'employed' or 'self-employed'.

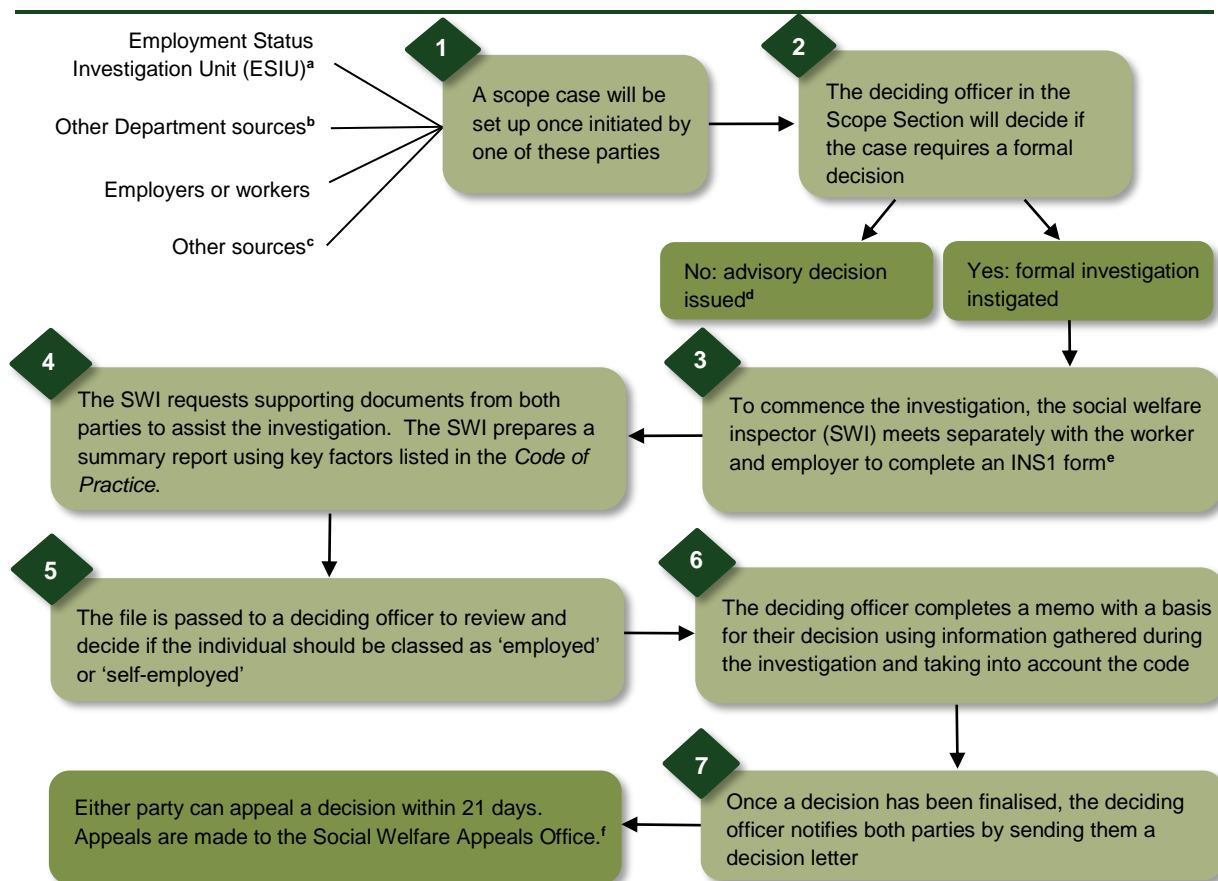
**14.12** Employment status, particularly for platform workers, is being considered at EU level. In December 2021, the European Commission proposed a set of measures, in the form of a draft directive, to improve working conditions for platform workers and to support the sustainable growth of digital labour platforms in the EU.<sup>6,7</sup> Significant amendments were made to the draft directive in September 2022, and it may be several years before a final directive is agreed and comes into force.

## Employment status determinations

**14.13** The Department's Scope Section deals with all decisions relating to PRSI insurability including employment status, company directors, family employments, partnerships, civil and public servants (class A or class D), and office holders (including specified 'public office holders'). The Scope Section decided between 1,250 to 1,500 cases each year in the period 2018 to 2021.

**14.14** Scope Section decisions on a worker's employment status are made on a case-by-case basis, taking account of the particular circumstances of the case and relevant legislation, case law, and the *Code of Practice* — Figure 14.1 outlines the decision process. The Department has stated it does not apply decisions on sample cases to other individuals working with the same employer but that it might consider this approach, if, and only if, each worker concerned agreed and that each worker would be entitled, if they so wished, to an individual assessment.

**Figure 14.1** Employment status decision process

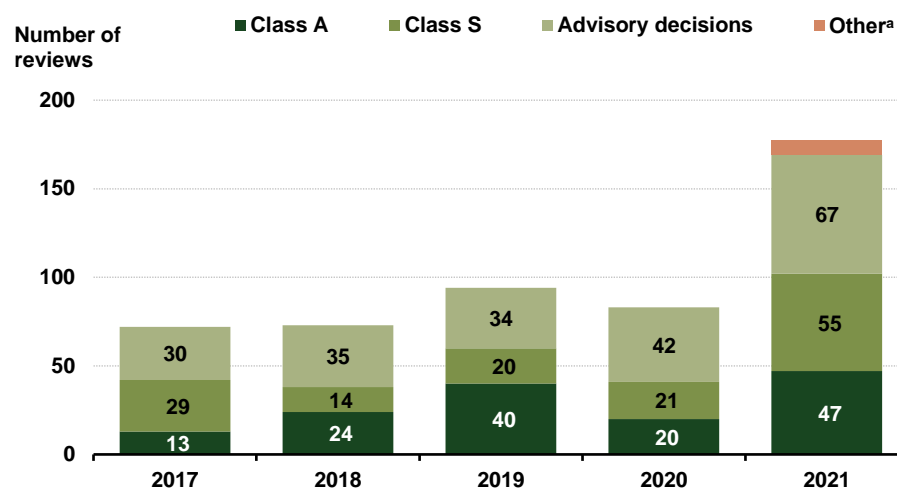


Source: Office of the Comptroller and Auditor General

- Notes:
- a The ESIU comprises a team of SWIs who focus on employment status investigations.
  - b Other Department sources includes the Department's special investigation unit, the joint investigation unit (JIU) (which comprises the Department, Revenue and the WRC), SWI and insurability case issues that may arise during claims processing across the Department's various schemes.
  - c Other sources include the Department of Enterprise, Trade and Employment, whose redundancy and insolvency legislation is tied to insurability under the social welfare acts, and therefore may also request confirmation of insurability.
  - d Deciding officers can make advisory decisions where they deem that a formal decision is not required. Advisory decisions are normally given when confirmation of an existing class of PRSI is requested or when a change of PRSI class is not required, or where a change of class is required but the parties are in agreement about the change.
  - e The INS1 is the 'form for determination of employment or self-employment' that addresses key factors regarding an individual's working arrangements.
  - f Appeals can also be made to the Courts or to the Office of the Ombudsman.

- 14.15** In the past, Scope Section typically determined 70 – 100 employment status reviews per year. There was a significant increase in the number of determinations in 2021 (see Figure 14.2).

**Figure 14.2 Employment status decisions and outcomes, 2017 to 2021**



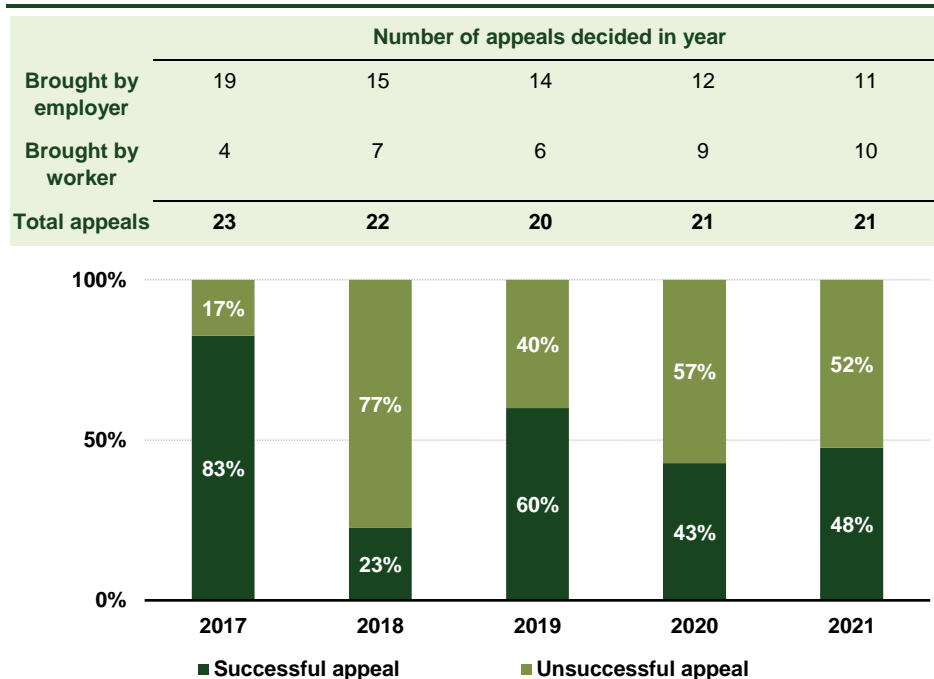
Source: Department of Social Protection

Note: a In 2021, there were other outcomes in eight cases, comprising five class M, two class J and one class K decisions.

- 14.16** The main PRSI classes that the Scope Section decides upon in relation to employment status are class A and class S. A 'class A' outcome is where the Scope Section completed an employment status review and decided a worker should be classified as an employee for PRSI purposes and pay PRSI at the class A rate (see Annex 14A for further details on PRSI classes). This could represent confirmation of employment status where the worker was already classified as class A, or a change of employment status to class A where the worker was previously misclassified (e.g. as class S). The Department stated that the vast majority of determinations made by the Scope Section resulting in a class A outcome relate to a change in classification. Prior to 2022, the Department did not compile data on both the original and final PRSI class for each decision — the Department has compiled this information for cases commencing since March 2022.
- 14.17** A randomly selected sample of 25 cases processed by the Scope Section in 2021 was reviewed for this examination. The examination team found that in each case reviewed, all five key factors to determine employment status were investigated, regardless of whether mutuality of obligation existed or not. Each case file recorded evidence of a nature that appears to be relevant to the determination, including evidence gathered in interviews with the worker and the employer.
- 14.18** Employment status decisions by the Scope Section can be appealed to the Social Welfare Appeals Office by the worker or the employer. Examples of appealed employment status decisions include cases that relate to whether a worker is employed or self-employed; whether a public sector worker should be class A or class D; the appropriate classification for company directors; and appeals in relation to voluntary PRSI contributions.

- 14.19** In the period 2017 to 2021, there was an average of around 21 appeals of employment/self-employment decisions each year (see Figure 14.3).

**Figure 14.3 Insurability of employment status appeal outcomes**



Source: Social Welfare Appeals Office

### ***Determination of employment status in other jurisdictions***

- 14.20** Issues and concerns around the determination of employment status are not confined to Ireland.<sup>1</sup> In the UK, HM Revenue and Customs has, since 2017, made available an online tool ('Check Employment Status Test' or CEST) for use by workers and employers to assist in the determination of employment status. The CEST tool poses questions relating to the contractual arrangements and working practices and addresses the same key factors (such as mutuality of obligation) as the code.
- 14.21** HM Revenue and Customs has committed to accepting the result produced by the CEST tool, provided the information entered is accurate and the tool is used in accordance with the guidance provided. However, the tool does not produce a result in all cases. For example, it did not determine a result in around 20% of cases in the period 2019 to 2021.
- 14.22** In discussions with the examination team, the Department emphasised the judgement required to determine employment status, due to the wide variety of work arrangements and the need to seek the perspective of both the worker and the employer. The Department stated
- that a detailed review of a worker's employment status by the Scope Section provides a greater assurance on complex arrangements than an automated process
  - where a worker's arrangements are less complex, the worker can use the factors outlined in the code to assist them in establishing their correct status and revert to the Scope Section if any doubt remains.

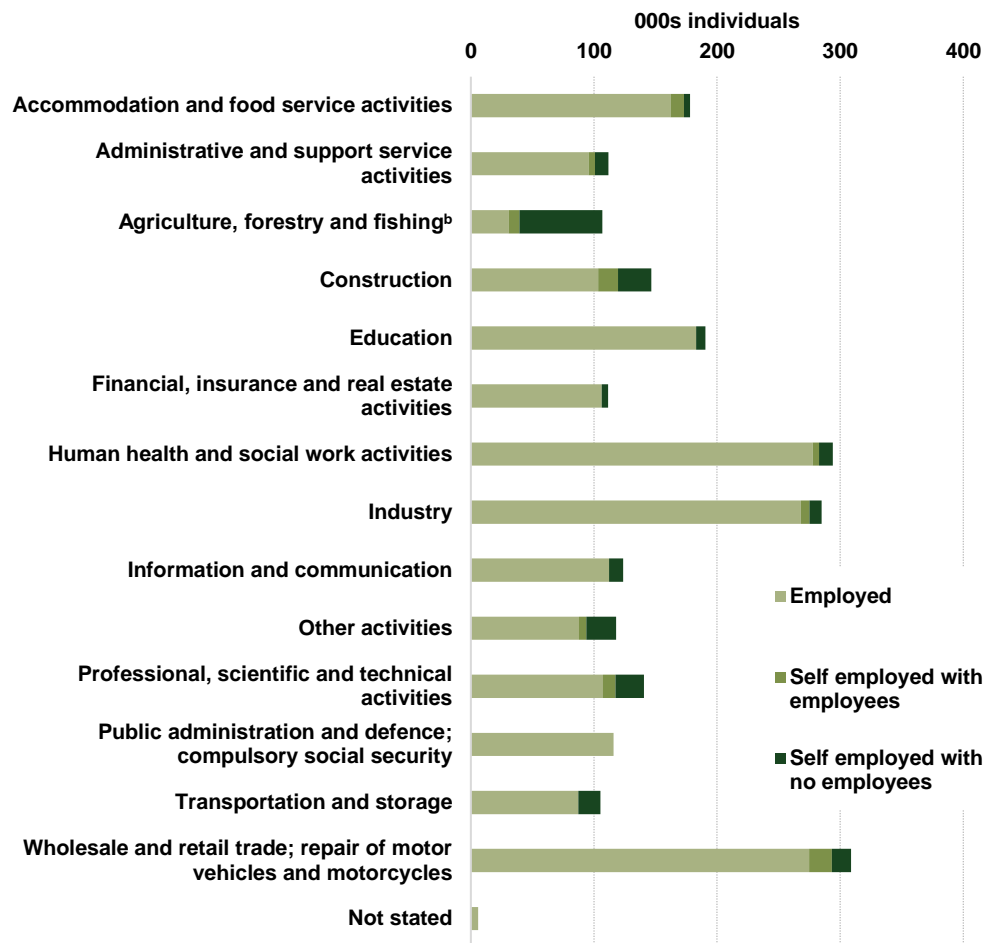
<sup>1</sup> Examples include: the Uber BV vs Aslam case in the UK; in Spain when enacting a law recognising food delivery riders as employees ('Riders' Law'); and in the Netherlands where the Court of Appeal ruled that Deliveroo workers are entitled to an employment contract.

## What is the extent of self-employment in the State?

### Labour Force Survey estimates of self-employment

**14.23** Based on quarterly labour force surveys, the Central Statistics Office (CSO) provides regular estimates of the numbers in employment, and their employment status. At the end of 2019, the CSO estimated that around 2.4 million individuals were employed or self-employed in the Irish economy (Figure 14.4).<sup>1</sup>

**Figure 14.4 Number of individuals working in the Irish economy by sector, Quarter 4 2019<sup>a</sup>**



<sup>1</sup> The examination used 2019 as a reference year to avoid the impact of the pandemic on the number of individuals who were self-employed and on the value of their income.

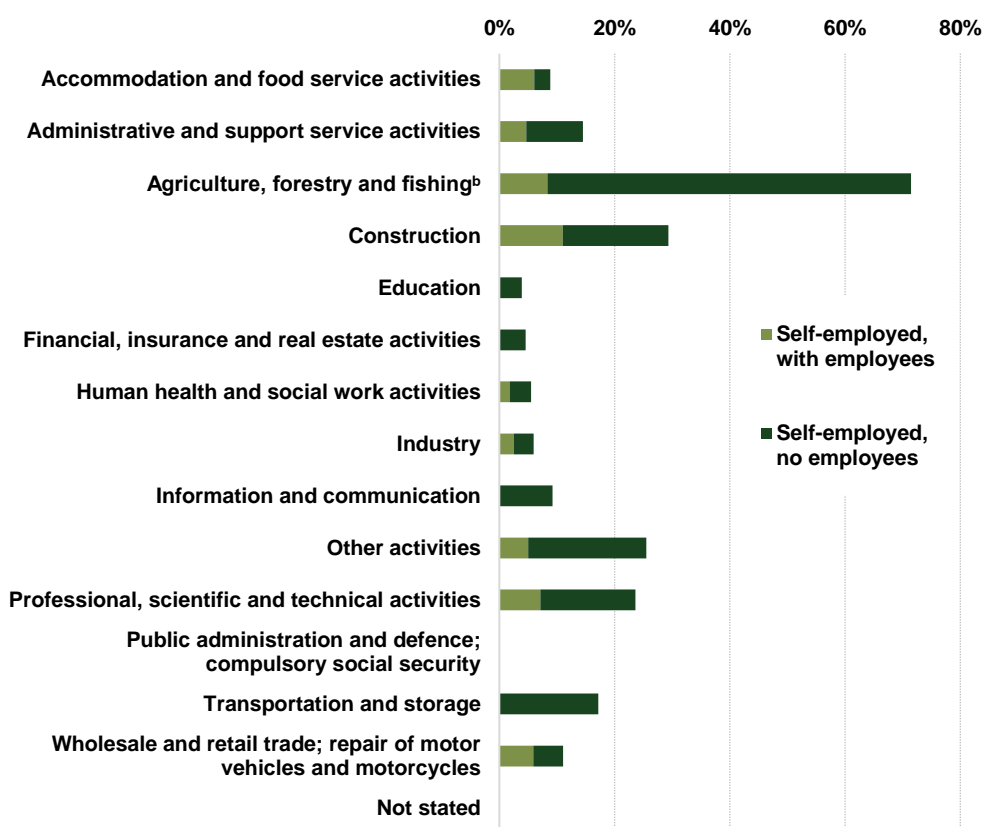
Source: Central Statistics Office. Analysis by the Office of the Comptroller and Auditor General.

Notes: a Classification is by the NACE (Nomenclature générale des Activités économiques dans les Communautés Européennes) structure, which is the statistical classification structure for economic activities in Europe. Platform workers have not been classified separately under the NACE structure.

b In this sector, self-employed with no employees includes over 5,000 individuals who were working for a relative.

**14.24** The CSO data indicate that around 2 million (86%) individuals are employees, 99,000 (4%) are self-employed with employees and 244,000 (10%) individuals are self-employed without employees (includes individuals assisting a relative). Unsurprisingly, the proportion of workers self-employed is highest in agriculture, forestry and fishing (71%). Other sectors with high self-employment rates are construction (29%); professional, scientific and technical activities (24%); transportation and storage (17%); and the general 'other activities' category (26%) (see Figure 14.5).

**Figure 14.5 Self-employment rates (with and without employees), by sector, Quarter 4 2019<sup>a</sup>**



Source: Central Statistics Office. Analysis by the Office of the Comptroller and Auditor General.

Notes: a Classification is by the NACE structure.

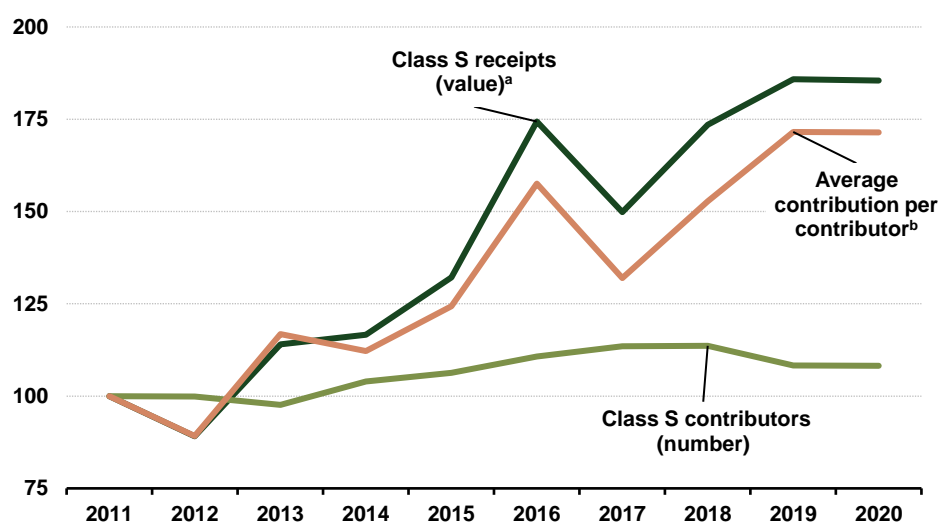
b In this sector, self-employed with no employees includes over 5,000 individuals who were working for a relative.

### **PRSI estimates of self-employment**

**14.25** Data from the PRSI system indicate that the number of persons classified in class S has increased moderately in the past decade. In 2020, the number of class S contributors — 351,000 — was around 8% higher than in 2011 (see Figure 14.6). In contrast, the revenue raised through class S related contributions in 2020 was 86% higher than in 2011, reflecting significantly increased average earnings for class S contributors over the period.

**14.26** Class S PRSI contributors accounted for 11% of all PRSI contributors in 2020. Reflecting the relatively lower contribution rates for class S contributors, the associated PRSI contribution receipts account for 6% of all PRSI receipts collected in 2020.

**Figure 14.6 Class S PRSI receipts and number of contributors, 2011 to 2020, indexed to 2011**



Source: Department of Social Protection. Analysis by the Office of the Comptroller and Auditor General.

Notes: a The value of class S receipts for each year relates to the preceding fiscal year i.e. the 2020 receipts are based on 2019 trading income.

b The average contribution per contributor reflects contributions received and the number of class S workers in that year.

1 The examination used 2019 as a reference year to avoid the impact of the pandemic on the number of individuals who were recorded as self-employed and the value of their income.

2 In the Revenue data, the individual's NACE code is the one selected by the taxpayer at the time of tax registration (with occasional updates following Revenue case work).

3 Revenue's figures are on a tax unit basis, where one unit may represent one or two individuals — either an individual with any personal status who is singly assessed or a couple in a marriage or civil partnership who have elected for joint assessment.

4 Revenue stated that it will form a working group with the CSO to prepare for the next NACE update which is due to be implemented in 2025. This will present an opportunity to improve alignment of NACE usage for statistical purpose.

### Revenue estimates of self-employment

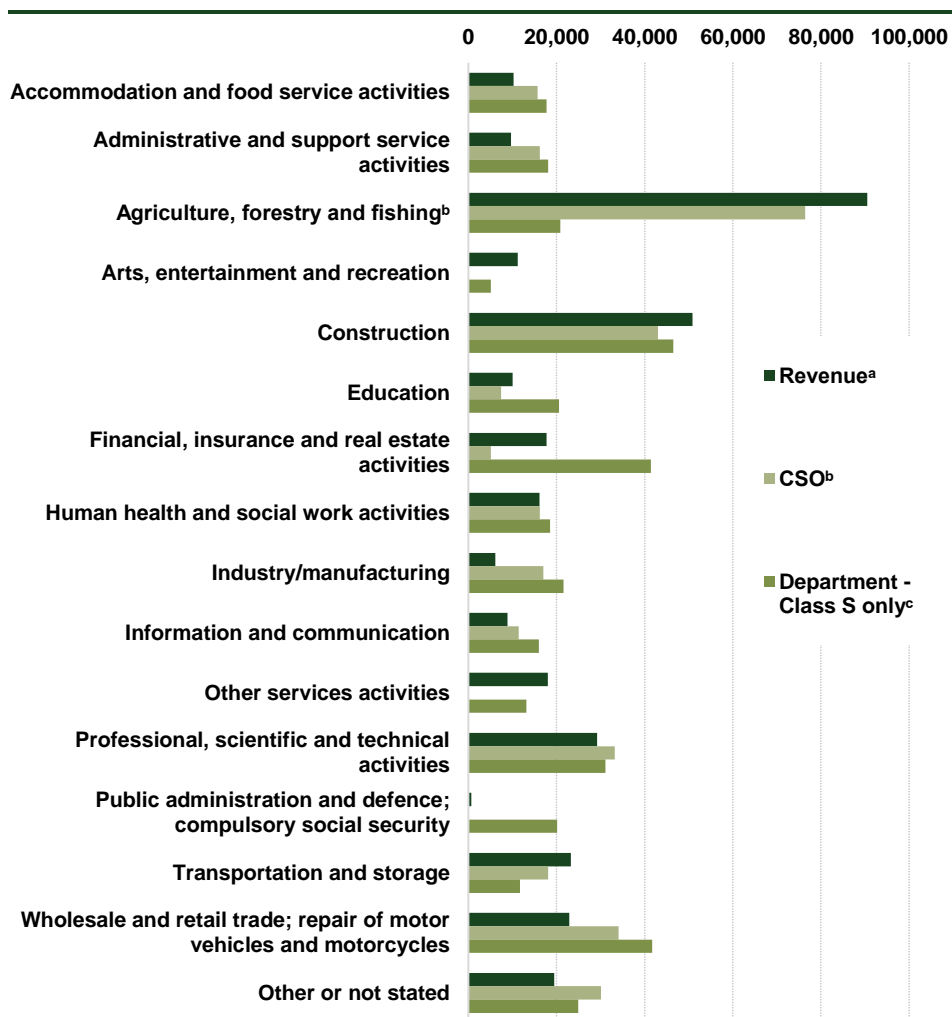
**14.27** Separately, Revenue uses data from income tax returns of all self-assessed individuals in the State (Form 11 returns) to identify self-employment. This includes taxpayers who do not trade (e.g. company directors, those in receipt of foreign investment or rental income) and who consequently are not at risk of employment misclassification. Revenue stated this data is a key underpinning for risk assessment and compliance interventions.

### Comparison of estimates

**14.28** 2019 data on the extent of self-employment, by sector, was provided by the Department (based on the number of PRSI returns and the Department's record of the last known employment sector) and Revenue (based on Form 11 returns).<sup>1,2</sup> The overall number of self-employed individuals is broadly similar: CSO figures indicate 324,000 self-employed; Revenue figures indicate 345,000 (with reported trading income of €18.3 billion in 2019); and the Department indicates 369,000.<sup>3</sup> This represents a 14% difference between lowest and highest estimates.

**14.29** However, there is a very significant variation within individual economic sectors between the three information sources (see Figure 14.7).<sup>4</sup>

**Figure 14.7 Number classified as self-employed, by sector, in 2019 — comparison of CSO data with data from the Department of Social Protection and Revenue Commissioners**



Source: Department of Social Protection, Central Statistics Office, and Revenue Commissioners. Analysis by the Office of the Comptroller and Auditor General.

Notes: Basis of analysis and assumptions

- a Data from Revenue relates to individuals who filed a Form 11 return for 2019 with trade panels completed for the relevant sector. This data is on a tax unit basis, where one unit may represent a singly assessed individual or a couple who elected for joint assessment.
- b The CSO data is drawn from the result of the labour force survey for Q4 2019 (not the entire year). Figures for the agriculture, forestry and fishing sector includes around 5,000 individuals who were assisting a relative.
- c The Department's data relates to class S PRSI returns made for 2019 — the Department explicitly states that the sectoral breakdown of PRSI contributions is based on the economic activity code of the last known employment sector and may not reflect the sector of the contributor in the reference year.

- 14.30** The Department stated there are a number of reasons for this variation, such as
- the Department's data is based on the economic activity code of the last known employment sector as captured by the Department's administrative systems, and so may not reflect the sector of the contributor within the reference year
  - a person may submit a return to Revenue but have no PRSI liability as their income is under the threshold of €5,000
  - persons with more than one income source from different economic sectors may be classified differently in the Department, Revenue or the CSO data
  - persons in receipt of Approved Retirement Fund payments, which are liable to pay class S on those payments, may be classified in the Department's data as self-employed in the financial services sector based on the economic activity code of the fund administrator.<sup>1</sup>
- 14.31** Changes made to the labour force survey conducted by the CSO will provide further information on the extent of 'economically dependent self-employed' individuals.<sup>2</sup> The Department has stated that it will engage with the CSO to review this data, as it expects that PRSI misclassification is most likely to be present within this category, and to establish its usefulness in sectoral analysis.
- 14.32** Greater certainty around the level of self-employment in each sector of the economy is required to inform risk analysis and targeted compliance activity.

***Why do some individuals who are not employees pay tax on a PAYE basis?***

- 14.33** The Department is responsible for determining PRSI class while Revenue is responsible for the determination of the appropriate schedule for income tax payment purposes. The decision of one organisation is not binding on the other, and there are occasions where the determination of employment status may appear to differ. For example
- **Home tutors** — The Department of Education has an administrative agreement with Revenue that while home tutors are subject to class S PRSI (self-employed for the Department), income tax and PRSI are deducted under the PAYE system (the Revenue treatment for employees) and the tutor must file an income return only if they are in receipt of other income.
  - **Coroners** — From a Revenue perspective, all payments to coroners, which arise in their capacity as office holders, are chargeable to income tax under schedule E and subject to deductions at source under the PAYE system i.e. treated similar to an employee. The Department considers that a coroner is an 'office holder', subject to class M PRSI.
- 14.34** For both examples, Revenue has stated that the PAYE system is a tax and contributions collection mechanism, and allocation of an individual to schedule E for tax collection purposes does not confer employment rights or employment status for PRSI purposes.

<sup>1</sup> Distributions from Approved Retirement Funds are subject to PAYE. Where the recipient is not a chargeable person, they will not appear in the Revenue data used in Figure 14.7. Where the individual is a chargeable person, Figure 14.7 would reflect their main income source.

<sup>2</sup> 'Economically dependent self-employed' individuals are defined as self-employed individuals without employees, who have only one (or one main) client, and whose one (or one main) client decides the working hours.

- 14.35** Revenue has proposed non-standard taxation arrangements for self-assessed platform/gig economy workers by taxing income earned on a PAYE basis, to provide more certainty as regards their end-of-year liability.<sup>1</sup> Under these arrangements, the platform administrators would calculate the tax to be withheld from each payment to the worker by querying the individual's personalised withholding tax status via a secure and responsive Revenue interface. Employment status for PRSI purposes would need to be determined separately.

### ***Recent analysis of the impact of intermediary companies and misclassified self-employment***

- 14.36** A 2018 report jointly produced by the Department, Revenue and the Department of Finance aimed to estimate the potential loss of income tax and PRSI resulting from intermediate-type structures and certain self-employment arrangements.<sup>2</sup> The report considered the available CSO data and stated that there is no quantitative data on the incidence of disguised (or misclassified) employment in Ireland.
- 14.37** In June 2021, the Joint Committee on Social Protection, Community and Rural Development and the Islands, undertook an examination of the issue of 'bogus' self-employment i.e. misclassification of employment status. The examination report recommended that the Department, in conjunction with the CSO, should develop a framework for collecting data on areas of employment where there is a potential risk of bogus self-employment. The Department stated that the additional data from recent amendments to the CSO labour force survey will be informative in that regard.

### **Compliance activity to address the risks of misclassification of employment status**

- 14.38** Neither the Department nor Revenue has estimated the potential loss of PRSI contributions due to the misclassification of employment status i.e. the 'tax gap'. They state that this is on the basis that the estimation of such figures would not assist them in targeting their response to risk, and that resources involved in carrying out such exercises would be better used in tackling the various risks identified under their compliance programmes.
- 14.39** In 2019, Revenue, in conjunction with the Department and the WRC, carried out a series of unannounced investigations on construction sites.<sup>3</sup> Of 6,650 workers whose employment status was reviewed in the course of the investigations, 94% were found to be in order. Fewer than 300 workers (4.5%) were identified as unregistered, and were duly classified as new class A employees. Fewer than 100 workers (1.5%) were found to be incorrectly classified for PRSI purposes, and were reclassified to class A.
- 14.40** These results suggest that the misclassification of construction sector workers as self-employed is not widespread, and that unregistered workers may be a more significant problem in the sector.

### ***Compliance activity of the Department's ESIU***

- 14.41** The Department's Employment Status Investigation Unit (ESIU) was established in August 2019, with the focus of detecting and investigating misclassification of employment status. The ESIU targets both specific employers and sectors.

<sup>1</sup> Revenue Commissioners, Submission to the Commission on Taxation and Welfare, January 2022.

<sup>2</sup> *The use of intermediary-type structures and self-employment arrangements: implications for social insurance and tax revenues*, the Department of Social Protection, the Department of Finance and the Revenue Commissioners, 2018.

<sup>3</sup> Virtually all construction site visits were unannounced.

- 14.42** To May 2022, the ESIU has not used random sampling to select cases for investigation. The current ESIU approach, based on employment trends and other sources of information, is to target sectors of interest for compliance activity.<sup>1</sup>
- 14.43** The Department stated that as the ESIU is still in an early phase of operation, it has focused mainly on the construction sector and the media/journalism sector, and that it will target other sectors over time.
- 14.44** The Department sets annual targets for employer investigations and PRSI compliance by social welfare inspectors (SWIs), including ESIU activity. While a specific portion of these targets has not been allocated to ESIU to date, the Department intends to do so for 2023.
- 14.45** To date, the number of staff allocated to ESIU has been low — from establishment to early 2022, total staffing was between six and nine staff. In June 2021, the Department’s Management Board sanctioned an increase of twelve officers for the ESIU, as well as six staff for the Scope Section; the intention is that the first four of the new ESIU positions will be filled from September 2022.
- 14.46** From its inception to June 2022, the ESIU reviewed over 500 employers and their contractors across various sectors. Following those reviews, 311 investigations were commenced (see Figure 14.8). By August 2022, 167 of the investigations had been completed. This resulted in the reclassification of 93 workers for PRSI purposes, and arrears totalling €811,000 had been identified (an average of €8,720 per worker).
- 14.47** Of the 167 investigations completed, there were 34 cases on appeal as of August 2022 — the majority (65%) of these appeals relate to the media/journalism sector.

**Figure 14.8 ESIU investigations commenced from August 2019 to June 2022, by sector — status as at August 2022**

Sector	Number of investigations commenced	Number of investigations ongoing	Number of investigations complete	Number of workers reclassified	PRSI arrears charged to employers €000
Media/journalism	110	28	82	50	452
Construction	104	82	22	9	104
Meat industry	33	18	15	5	13
Health/wellness	12	3	9	4	1
Forestry/ agriculture	5	1	4	—	—
Manufacturing	2	—	2	2	33
Miscellaneous services	29	10	19	15	119
Miscellaneous other	16	2	14	8	89
<b>Total</b>	<b>311</b>	<b>144</b>	<b>167</b>	<b>93</b>	<b>811</b>

Source: Department of Social Protection

<sup>1</sup> The ESIU targets employers for inspection considering factors such as

- cross checking data and information with Revenue
- referrals from other social welfare inspectors
- concerns raised by trade unions or other bodies
- whether the employment type is likely to have marginalised, low-paid workers vulnerable to exploitation
- whether prevalence of self-employment with that employer or sector is notably larger than other comparable employers or sectors.

- 14.48** During 2021, the ESIU completed investigations of 90 workers who had been in class S for PRSI purposes. The result of the investigations was that 40 workers (44%) were reclassified by Scope Section as class A; the remaining 50 workers (56%) were confirmed to be class S.<sup>1</sup> The investigations involved individuals who worked for 40 different employers — 19 of the employers (47%) had one or more workers reclassified to class A and 23 employers (57%) had workers confirmed to be class S.<sup>2</sup>
- 14.49** During the course of an investigation, an employer may agree to accept the assessment of the ESIU and transfer misclassified workers to class A (employees) without the requirement for a Scope Section decision. In the period from 2019 to June 2022, this resulted in 117 workers transferring from class S to class A (not included in Figure 14.8 above). These cases related to the construction sector, with PRSI arrears of €323,000 charged to employers (an average of €2,760 per person reclassified).
- 14.50** Revenue is the collecting agent for PRSI contributions, including any arrears of contributions from employers arising from the misclassification of workers. When a Scope Section decision is finalised, the ESIU issues a compliance notice to the employer. The Department also informs Revenue of the PRSI class amendments and where additional PRSI is receivable.

### ***Misclassification compliance work outside of the ESIU***

- 14.51** In addition to ESIU staff noted above, there are approximately 350 other SWIs across the Department, comprising
- 256 general SWIs
  - 99 Special Investigation Unit (SIU) SWIs.
- 14.52** The role of 'general' SWIs includes investigating selected cases where a benefit or allowance is claimed, to investigate suspected fraud and detected irregularities, and to carry out inspections on employers to ensure that they are complying with the PRSI system. Claimants and employers are required to furnish the inspector with any information or documentation deemed relevant to the investigation. The objective of the SWIs in the SIU is to investigate social welfare fraud and abuse — including cases where concurrent working and claiming is alleged.
- 14.53** In 2021, SWIs conducted approximately 6,600 employer and PRSI reviews. However, the work of these SWIs is not primarily focused on the detection of misclassification of employment, though such cases may be detected — there is no breakdown available on the number of employment status reviews conducted by general SWIs. Where SWIs conduct employment status investigations, their reports are submitted to the Scope Section for decision. 20 of 110 formal Scope Section decisions in 2021 as per Figure 14.2 did not originate from the work of the ESIU — the Department stated most of these decisions and the 67 advisory decisions originated from the SWIs. Where a local investigation becomes complex or is likely to result in a larger scale project, SWIs may request the ESIU to investigate.

<sup>1</sup> One of the 90 investigations related to a case where the worker was selected for investigation due to previous class S contributions but was making class A contributions at the time the investigation commenced.

<sup>2</sup> Two employers had multiple workers investigated where some workers were determined to be class A and some were determined to be class S.

### ***Action by the Department to address misclassification findings in its compliance work***

- 14.54** The ESIU has conducted targeted rather than random control testing, and the number of cases reviewed by the ESIU is still far less than would be required to establish reliable estimates of the incidence of misclassification of workers.

- 14.55** A project undertaken by the ESIU analysed cases it had undertaken in the period to September 2021 aimed at identifying characteristics of potentially misclassified workers. The Department stated that, to May 2022, the data has not yielded any meaningful patterns or trends to help predict risks. However, it intends to record the characteristics of investigated cases on an ongoing basis to ensure that data is available to inform future investigations. The ESIU will re-examine the usefulness of the data when significantly more employment status decisions have been made.

### ***Revenue compliance activity***

- 14.56** Revenue stated that employment classification is a complex area and that there is no single profile of a self-employed taxpayer — for example, the complexity and judgement required is reflected in a case known as Karshan (Midlands) Limited (trading as Domino's Pizza) v Revenue Commissioners (see Annex 14D).
- 14.57** Revenue targets compliance interventions and investigations based on risk models and compliance resources are targeted at the areas of greatest assessed risk.<sup>1</sup> Revenue has stated that it has conducted a range of projects over the years on specific business sectors where misclassification was included as part of the potential risk areas examined. While instances of widespread misclassification have not been identified through these projects, the learning from such projects is re-applied to future projects to improve the targeting and risk examination procedures. Consideration of employment status is included in Revenue's planned compliance work for 2022.

### **Conclusions and recommendations**

- 14.58** Misclassification of employment status may arise where a worker is classified as self-employed but has the characteristics of being an employee (or vice versa). A key impact of the misclassification of employment status is the difference between PRSI contribution rates for the employed and self-employed. This may result in a loss of PRSI contribution income for the Social Insurance Fund (SIF), but may also result in misclassified workers being deprived of access to social insurance benefits in the long term. There is no reliable estimate of the level of misclassification of employment status in Ireland.

### ***Criteria for the determination of employment status***

- 14.59** There is no single clear definition of the terms 'employed' or 'self-employed' in Irish or EU law. In July 2021, the Department, Revenue Commissioners (Revenue) and the Workplace Relations Commission (WRC) published a revised *Code of Practice on Determining Employment Status*. While the revised guidance is more comprehensive than prior guidance, it is lengthy and only published in English. To date, there has been no assessment of the extent to which the code has been used by workers or employers reviewing an employment status.

<sup>1</sup> Revenue uses its 'Risk Evaluation and Profiling (REAP)' system to enhance its understanding of sectoral risks and to learn from the outcomes of previous compliance projects.

**Recommendation 14.1**

The Department, in consultation with Revenue and the WRC, should consider opportunities to make the code more accessible. Opportunities to evaluate the extent of use and understanding of the code by relevant parties should also be considered.

**Accounting Officer's response**

Part-agreed.

The Department considers that the increased length of the revised code reflects the fact that it is significantly more comprehensive than previous guidance. A range of stakeholders were consulted during the drafting stage, and the code was written and formatted in accordance with plain language guidelines. The Department's view is that, taking on board the advice of stakeholders and by adhering to the principles of plain language, the information contained in the code is relatively easy to understand and is accessible by workers and employers who have an interest in the matter. To the extent that there may be a knowledge deficit, this is more likely to relate to awareness of the information and code rather than the content or accessibility of the code itself.

The Department will, as part of its ongoing engagement with Revenue, the WRC, and other stakeholders consider opportunities to make the code more accessible. Opportunities to evaluate the extent of use and understanding of the code by relevant parties will also be considered. This may include the re-running of previous large scale information campaigns using social, broadcast and print media.

The Department will give consideration to providing the code in other languages.

- 14.60** The Scope Section in the Department is responsible for the determination of employment status for PRSI purposes. An employment status decision may be requested by a worker or employer, or may arise from the work of the staff of the Department, Revenue or other bodies. The number of employment status decisions was between 70 and 100 per annum in the period 2017 to 2020, but increased significantly in 2021, to almost 180 decisions. Just over 20 decisions were appealed to the Social Welfare Appeals Office each year.

***The extent of misclassification of employment status***

- 14.61** Aggregate data on the extent of self-employment in the State available from the CSO, Revenue and the Department appears broadly consistent. However, when analysed on an economic sector basis, there appears to be significant differences in the estimated numbers identified as self-employed in certain economic sectors. There is no formal periodic analysis or reconciliation of apparent conflicts in the estimates.
- 14.62** While both the Department and Revenue conduct investigations targeting the misclassification of employment status, neither has estimated the related potential loss of contributions to the SIF. Random sampling and testing of the classification of a sufficient number of individuals would be required to accurately estimate the prevalence of misclassification of employment.

**Recommendation 14.2**

The Department should develop a programme of random reviews of PRSI classification in order to establish reliable estimates of the extent of misclassification of employment status and of the associated lost contributions to the SIF. Such a programme may also assist the development of a risk model to better target compliance activity.

**Accounting Officer's response**

Part-agreed.

The Department's inspectorate carries out targeted investigations based on data analytics, sectoral profiling and cases referred by workers, employers, other Departmental scheme areas and Revenue. It liaises with Revenue inspectors as part of the Joint Investigation Unit. Proposed enhancements to the CSO's Labour Force Survey should improve the quantification of the number of 'economically dependent self-employed' individuals which will assist the Department in further targeting employment status investigations. These strategies are seen as the most effective use of resources and will remain as the primary approaches. In addition, as part of this approach, unannounced reviews will be undertaken in key sectors of concern similar to that set out in Section 14.39. These will not be conducted for the purposes of establishing reliable estimates (though they may help in this regard) but as part of an approach to identify and investigate sectors where there is some intelligence that misclassification may be a particular problem.

***Compliance activity to detect misclassification of employment status***

- 14.63** The Department established the Employment Status Investigation Unit (ESIU) in 2019 to focus on the misclassification of employment status. However, staffing levels of the ESIU have not enabled significant progress to be made across a range of sectors. The Department approved a significant increase to staffing level for the unit in June 2021. The first four of the additional positions are expected to be filled in September 2022. The Department has not yet set specific targets for the number of investigations to be conducted by the ESIU.
- 14.64** Of the 90 targeted investigations completed by the ESIU in 2021, 40 (44%) resulted in a change of PRSI status from class S to class A. While the misclassification rate in those targeted investigations was significant, the results provide no indication of the scale of misclassification across the economy generally.
- 14.65** The Department has established a project to learn from the results of investigations completed — while that project has not yet yielded significant benefits, its continued operation may provide valuable insights to inform future compliance activity.

### **Recommendation 14.3**

The Department should set annual targets for the ESIU for the number of investigations by sector, and ensure that adequate resources are allocated to meet those targets.

#### **Accounting Officer's response**

Part-agreed.

The Department already sets annual targets for employer investigations and PRSI compliance by social welfare inspectors, including ESIU, and the latter's activity counts towards these targets. While a specific portion of these targets has not been apportioned to ESIU to date, the intention is to apportion separate targets to the general SWI cadre and ESIU for 2023.

While setting such targets by sector will be looked at, it may not make sense to do that as it may hinder the flexibility the Department's inspectorate needs to employ on a regular basis. In common with all other areas of the Department, the staffing levels assigned to the ESIU are monitored to ensure an efficient and effective use of available staff resources.

**Annex 14A PRSI classes — 2022**

PRSI class	Description of individuals covered	Maximum applicable rates <sup>a</sup>	
		Individual	Employer
A	Employees under the age of 66 in industrial, commercial and service-type employment who have reckonable pay of €38 or more per week from all employments as well as public servants recruited from 6 April 1995. <sup>a</sup>	4%	11.05%
B	Permanent and pensionable civil servants, registered doctors and dentists employed in the civil service and Gardaí recruited prior to 6 April 1995.	4%	2.01%
C	Commissioned officers of the defence forces and members of the army nursing service recruited before 6 April 1995.	4%	1.85%
D	Permanent and pensionable employees in the public service, other than those mentioned in classes B and C recruited before 6 April 1995.	4%	2.35%
E	Minister of religion employed by the Church of Ireland representative body.	3.33%	6.87%
H	NCOs and enlisted personnel of the defence forces.	3.9%	10.35%
J	People in private sector employments with reckonable pay of less than €38 per week from all employments. However, a small number of employees are insurable at class J, no matter how much they earn, such as employees aged 66 or over or people in subsidiary employment.	Nil	0.5%
K	Since 2011, certain public office holders pay PRSI at a rate of 4% on all income, where their income is over €5,200 a year. Public office holders with weekly income of €100 or less should be returned at class M.	4%	Nil
M	People with a nil contribution liability such as employees under 16, people 66 or over (including those previously liable for class S), persons in receipt of occupational pensions or lump sum termination payments and public office holders with a weekly income of less than €100.	Nil	Nil
P	Self-employed people whose main income comes from share fishing (optional payment in addition to class S contributions).	4%	Nil
S	Self-employed people, including certain company directors, certain people with income from investments and rent, and certain local authority members.	4%	Nil

Source: Department of Social Protection

Note: a Rate applicable is dependent on the amount of weekly gross pay (including notional pay where relevant). The applicable rates displayed above are the highest rate payable in each case. For example, a class A employee who earns less than €352 in a week is not liable for PRSI in that week and where a class A employee earns less than €410 in a week, the employer rate is reduced to 8.8%.

**Annex 14B Summary of benefits in 2022 for each insurance class**

<b>Benefit / Class</b>	<b>A</b>	<b>B, C, D</b>	<b>E</b>	<b>H</b>	<b>J, M</b>	<b>P</b>	<b>S</b>
Jobseeker's benefit	✓			✓		✓ <sup>b</sup>	
Jobseeker's benefit (self-employed)							✓
Illness benefit	✓		✓	✓		✓ <sup>b</sup>	
Maternity benefit	✓		✓	✓			✓
Paternity benefit	✓		✓	✓			✓
Adoptive benefit	✓		✓	✓			✓
Health and safety benefit	✓		✓	✓			
Invalidity pension	✓		✓	✓			✓
Widow's, widower's or surviving civil partner's (contributory) benefit	✓	✓	✓	✓ <sup>c</sup>			✓
Guardian's payment (contributory)	✓	✓	✓	✓			✓
State pension (contributory)	✓		✓	✓			✓
Treatment benefit	✓		✓	✓ <sup>c</sup>		✓	✓
Occupational injuries benefit	✓	✓ <sup>a</sup>			✓ <sup>d</sup>		
Carer's benefit	✓	✓	✓	✓ <sup>c</sup>			
Partial capacity benefit	✓		✓	✓			✓
Parent's benefit	✓	✓	✓	✓			✓

Source: Department of Social Protection

- Notes:
- a Limited occupational injuries benefits are available to those insured under class B and none are available to those insured under class C.
  - b Jobseeker's Benefit and Illness Benefit is limited for those insured under class P.
  - c Widow's, widower's or surviving civil partner's (contributory) benefit, treatment benefit and carer's benefit are the only benefits paid during service for those insured under class H.
  - d Occupational injuries benefits are available to those insured under class M in certain circumstances.

## Annex 14C Factors determining if a worker is an employee or self-employed

Characteristics of an employee	Characteristics of self-employment
<b>Mutuality of obligation</b>	
The payer must provide a reasonable amount of work and the worker must perform all such work.	There is no obligation on either party to provide or accept work.
Is obliged to perform work on a regular basis by working set hours or a given number of hours per week or month.	Controls the hours of work in fulfilling the job obligations.
<b>Substitution</b>	
Inability to subcontract the work.	Is free to hire other people, on his/her terms, to do the work which has been agreed to be undertaken.
<b>Enterprise test</b>	
No exposure to personal financial risk in carrying out the work and does not assume any responsibility for investment and management in the business.	Exposure to financial risk and assumes responsibility for the investment and management of the enterprise, with an opportunity to profit from sound management in the scheduling and performance of engagements, including costing and agreeing a price for the job.
Receives a fixed rate wage, working set hours and receives expenses.	Owns their own business.
Entitled to sick pay and overtime.	Provide their own insurance cover.
Tax deducted from wages through PAYE system.	Registered for self-assessment tax returns or VAT.
Works for one person or for one business.	Ability to provide the same services to more than one person or business at the same time.
Supplies labour only and does not supply materials or equipment for the job.	Provides the materials, equipment and machinery necessary for the job and has a fixed place of business where these items can be stored.
<b>Control</b>	
Works under the control of another person that tells them what, how, when and where the work is done.	Controls what, how, when and where the work is done, and whether they do it personally.
<b>Integration</b>	
Is an integral part of the organisation, may have employees reporting to them.	An independent contractor is likely to be an accessory to the business.

**Annex 14D Karshan (Midlands) Limited trading as Domino's Pizza  
v Revenue Commissioners**

Date	Event
2011	<ul style="list-style-type: none"><li>Revenue commenced case working.</li></ul>
2012	<ul style="list-style-type: none"><li>Interviews with drivers conducted.</li><li>Revenue issued audit notification letter concluding drivers were taxable as PAYE employees.</li></ul>
2016	<ul style="list-style-type: none"><li>Appeal proceedings heard before the Tax Appeals Commission (TAC) — Revenue's conclusion upheld.</li></ul>
2019	<ul style="list-style-type: none"><li>The company appealed to the High Court which upheld the determination of the TAC.</li></ul>
2022	<ul style="list-style-type: none"><li>The Court of Appeal (by a 2 to 1 majority) set aside the High Court decision and determined that the drivers were self-employed independent contractors because no mutuality of obligation existed.</li></ul>

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Source: Revenue Commissioners