

Self-employment and bogus self-employment in the European construction industry

Expert Report

Self-employment and bogus self-employment
in the construction industry in Belgium

Prof. dr. Yves Jorens / Mrs. Tineke Van Buynder



Project carried out
with the financial support
of the European
Commission

I. Demarcation between direct employment/ genuine self-employment and genuine self-employment/ bogus self-employment, bogus self-employment/undeclared work.

§ 1. Setting the scene

A. Direct employment

1. Does a definition exist for direct employment in your national law, regulations or in collective agreements?

Direct employment is not defined in national law, regulations or collective agreements. However, an employment agreement is typical for direct employment. An employment agreement is a contract to accomplish work, in which one party, namely the employee, commits himself to another party, namely the employer in a relationship of subordination of under the hierarchy of the employer, to work in exchange of a salary/wage. The employment agreements of servants, trade representatives, blue collar and white collar workers are regulated in the Act of 3 July 1978¹.

2. Which criteria (in the legislation, regulations or in case-law) are seen as characteristic for a direct employment relationship?

The criteria that are characteristic for a direct employment relationship are not described in the legislation or the regulations. The existence of an employment agreement, which is typical for direct employment, is determined by four elements namely:

- the agreement
- the work
- the wage
- the authority of the employer²

3. Is there a definition of employee and employer?

The concept of an employee is defined in the Program Act of 27 December 2006³. An employee is a person, who commits himself in an employment agreement, in exchange of wage, under the authority of another party, the employer, to accomplish work. The concept of employer can be defined as a natural or legal person, who is hiring one or more employees due to an employment agreement⁴. It can also be defined as a person who is linked with the employee by an employment relation that is characterized by a subordinate bond, an occupation, based on a statutory relation, a factual relation, a contract, an employment agreement or another kind of agreement⁵.

¹ Wet van 3 Juli 1978 betreffende de arbeidsovereenkomsten, B.S., 22 August 1978

² W. VAN EECKHOUTTE, *Sociaal Compendium Arbeidsrecht 2005-2006*, Mechelen, Kluwer, 2006, nr. 2019

³ Titel XIII van de Programmawet (I) van 27 december 2006, B.S., 28 December 2006

⁴ W. VAN EECKHOUTTE, *Sociaal Compendium Arbeidsrecht 2005-2006, o.c.*, nr. 2050

X, *De Valks juridisch woordenboek*, Antwerpen, Intersentia, 2004, 354

⁵ W. VAN EECKHOUTTE, *Sociaal Compendium Arbeidsrecht 2004-2005*, Mechelen, Kluwer, 2005, nr. 6347

B. Self-employment

4. Does a definition exist for (genuine) self-employment in national law?

The concept of a self-employed person is also defined in the Program Act of 27 December 2006⁶. A self-employed person is a natural person, who practises an employment activity outside the authority of an employer and who is not committed by a statute.

5. Which criteria (in the legislation, regulations and work-contracts or in case-law) are seen as characteristics for genuine self-employment?

In the Program Act of 27 December 2006, 4 criteria are mentioned in order to make the difference between self-employed workers and employees (see infra):

- The will of the parties as expressed in the agreement, when this corresponds to the reality or in other words, when this corresponds to the concrete execution of the employment agreement;
- The freedom of organisation of the working time;
- The freedom to organize the work;
- The possibility to execute hierarchical control.

6. Does your national law mention the phenomenon of bogus self-employment and if so, how is it defined?

There is no legal definition of bogus self-employment. However, bogus self-employment can be defined as the situation, in which somebody takes voluntarily or forced the statute of self-employed, while in reality he works under the subordination of an employer⁷.

7. Which criteria (in the legislation, regulations or in case-law) are seen as an indicator that a person is working bogus self-employed?

In the Program Act of 27 December 2006, 4 criteria are mentioned in order to make the difference between self-employed workers and bogus self-employed workers (see infra):

- The will of the parties as expressed in the agreement, when this corresponds to the reality or in other words, when this corresponds to the concrete execution of the employment agreement;
- The freedom of organisation of the working time;
- The freedom to organize the work;
- The possibility to execute hierarchical control.

⁶ Titel XIII van de Programmawet (I) van 27 december 2006, B.S., 28 December 2006

⁷ X, *Voorcoming en bestrijding van schijnzelfstandigheid. Verslag van het Rekenhof aan de Kamer van Volksvertegenwoordigers*, Brussel, Rekenhof, 2004, 8.

8. Which different forms of self-employment/bogus-self employment can be encountered in your legal system?

The two main forms of bogus self-employment in the construction industry are:

- An employee with a bogus additional self-employed activity

A person is self-employed in an additional activity, when he exercises at the same time a self-employed activity and a professional activity for an employer. Before an activity can be seen as a self-employed additional activity, the principal activity should amount to at least half of a fulltime job. The amount of working hours a month should be at least half of the amount of working hours a month of a fulltime job in the same company or the same sector. An employee with an additional self-employed activity, doesn't have to pay any social security contributions if the annual income does not exceed a particular amount established every year (1.263,48 EUR in 2008)⁸.

An employee with a bogus additional self-employed activity, performs the same activities for the same person, on the one hand, as an employee and on the other hand, as a self-employed person in an additional activity, in order to avoid rules on working time and the payment of social security contributions. However, article 5bis of the Act of 3 July 1978⁹ stipulates that the additional service performances in the frame of a service agreement, will be presumed as performed in the frame of an employment agreement without proof of the contrary, if the person for who he performs such services is linked to him by an employment agreement for the performance of the same activities¹⁰.

According to the Social Inspection, Bouwunie, ACLVB and Confederatie Bouw, this form of bogus self-employment is the most wide-spread in the building sector and is hard to control.

- The structure of a limited liability cooperative society¹¹

In this structure the shareholder resorts under the statute of a self-employed. However, in some companies, there is a dominant shareholder, who can steer the most important decisions of the society. The working partners, who don't have this dominant position, will be imposed to follow the instructions of the dominant shareholder for example the instructions about working time. Those working partners are actually employees. Most of the time, they only own a little amount of shares. According to article 30quater of the Act on social security (RSZ-wet)¹², this person, who has entered into a cooperative society as a partner, in order to escape the social security legislation of employees, is principally responsible to pay his part of the social security contributions as an actual employee. Furthermore, this article determines that the King must decree the date, when this stipulation will come into force. At the moment, there is no such Royal Decree. According to Confederatie Bouw, this illegal structure of a limited liability cooperative society is very well-known in the building sector.

⁸ <http://www.NationalInstitutefortheSocialSecurityoftheSelf-employed.be/>

⁹ Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten, *B.S.*, 22 August 1978

¹⁰ X, *Voorcoming en bestrijding van schijnzelfstandigheid. Verslag van het Rekenhof aan de Kamer van Volksvertegenwoordigers, o.c.*, 23. However, according to recent jurisdiction, it is possible to perform activities, formerly performed in a subordinate relation with an employer as an employee, as a self-employed person for the same employer without a relationship of subordination. Cass. 27 November 2006, *NjW* 2007, 413.

¹¹ Coöperatieve Vennootschap met Beperkte Aansprakelijkheid (CVBA) Wet 20 juli 1991 houdende sociale en diverse bepalingen, *B.S.* 1 August 1991

¹² Besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, *BS*, 30 December 1944; Wet 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid, *B.S.*, 25 July 1969

9. In comparison to the directly employed, which employment rights do formally self-employed workers hold, and which rights do they not hold?

In comparison with the directly employed, the self-employed workers do not have labour rights. The essential provisions in labour law are only meant to safeguard the rights of employees. However, the self-employed are protected by the Act of 4 August 1996 on the welfare of workers at work¹³ when they work on temporary or mobile construction sites.

These are the main provisions, which stipulate the concept of working, remuneration and employment conditions. A very wide range of regulatory provisions (acts and royal decrees) and provisions laid down in agreements (generally binding collective labour agreements) are subject to criminal law (which is public law).

These provisions are spread over a number of different acts and royal decrees, including the following:

- Act of 12 April 1965 on the protection of the remuneration of workers¹⁴;
- Act of 8 April 1965 laying down employment regulations¹⁵;
- Labour Act of 16 March 1971 (concerning Sunday rest, working time, night work,...)¹⁶;
- Act of 4 January 1974 on public holidays¹⁷,
- Royal decree of 23 October 1978 on maintaining social records and the Royal Decree of 8 August 1980 on maintaining social records¹⁸;
- Act of 24 July 1987 on temporary work, temporary employment and the putting of workers at the disposal of another party¹⁹;
- Act of 4 August 1996 on the welfare of workers at work²⁰;
- The provisions of generally binding collective agreements concluded under the Act on collective agreements of 5 December 1968 with regard to wage/salary scales, end-of-year bonuses,...²¹.

These provisions concern rules concerning wage and salary protection (time, manner and place of wage/salary payments, terms and conditions of employment, the working schedule (limits on working hours, rest periods, Sunday rest, breaks), working on public holidays, rules on social records, sending temporary personnel and putting workers at the disposal of another party, welfare of workers at the workplace (safety at work), permitted wage/salary deductions) and minimum wage scales laid down by generally binding sectoral collective agreements.

According to article 5(1) of the Act of 5 March 2002²², an employer who second his workers to Belgium must, for work carried out in Belgium, must comply with these provisions on

¹³ Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, *B.S.*, 18 September 1996

¹⁴ Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers, *B.S.*, 30 April 1965

¹⁵ Wet van 8 april 1965 tot instelling van de arbeidsreglementen, *B.S.*, 5 May 1965

¹⁶ Arbeidswet van 16 maart 1971, *B.S.*, 30 March 1971

¹⁷ Wet van 4 januari 1974 betreffende de feestdagen, *B.S.*, 31 January 1974

¹⁸ Koninklijk besluit nr. 5 van 23 oktober 1978 betreffende het bijhouden van sociale documenten, *B.S.*, 2 December 1978

¹⁹ Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, *B.S.*, 20 August 1987

²⁰ Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, *B.S.*, 18 September 1996

²¹ Wet van 5 december 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités, *B.S.*, 15 January 1969

²² Wet van 5 maart 2002 tot omzetting van de richtlijn 96/71/EG van het Europees Parlement en de Raad van 16 december 1996 betreffende de terbeschikkingstelling van werknemers met het oog op het verrichten van diensten, en

working, wage/salary and employment conditions laid down by Belgian law, administrative regulations or agreements which are subject to the provisions of criminal law.

The CLA (collective labour agreement)²³ is a very important source in labour law with a full legal statute due to the Act of 5 December 1968 on the collective labour agreements and the joint committees²⁴. The most relevant (sectoral) collective labour agreements in the building sector (Joint Committee nr. 124) stipulate minimum remunerations, labour regulations, working hours, early retirements, supplementary pensions, interim work and additional social advantages such as loyalty and bad weather inactivity stamps.

The remuneration and labour regulations are determined in the provisions of the sectoral collective labour agreements of 21 June 2007²⁵, 25 October 2007²⁶ and 2 June 2005²⁷. The minimum remuneration is paid according to the seniority and the function classification of the worker (unqualified, first unqualified, specialised, first specialised, qualified first grade, qualified first grade). Moreover, there are extra salary allowances for the foreman (qualified second grade), head of team A (qualified first grade), head of team B (qualified second grade).

The head of team is entitled to an hourly wage which is at least 10% higher than the hourly wage of those working in his team and with the highest professional qualifications and 10% higher than the hourly wage of his own professional qualifications. Young people from 15 up to 18 years are paid according to their age. Additionally, there are also salaries applicable to students and professional students. Furthermore, there are premiums for special work, such as unhealthy, risky, difficult and inconvenient work. There are also additional salary

tot invoering van een vereenvoudigd stelsel betreffende het bijhouden van sociale documenten door ondernemingen die in België werknemers ter beschikking stellen, *B.S.*, 13 March 2002

²³ A CLA is an agreement between one or more trade unions and one or more employers or employers' organisations. A CLA determines individual and collective relations between employees and employers in companies or in company branches and regulates the rights and obligations of the contracting parties. There are three types of collective labour agreements:

1. Intersectoral collective labour agreements which are concluded in the National Labour Council by all represented organisations or which are concluded in the National Labour Council when a company branch doesn't resort under a Joint Committee or when a established Joint Committee doesn't work;
2. Sectoral collective labour agreements which are concluded within the Joint Committees;
3. Company-level collective labour agreements which are concluded by the trade unions and one or more employers or representative employers' organisations.

The National labour Council was established by the Act of 29 May 1952 (*Wet 29 mei 1952 tot inrichting van de Nationale Arbeidsraad, B.S.*, 31 May 1952). The council is a national and interprofessional joint organ which is competent for social matters such as the conclusion of collective labour agreements with a national and interprofessional scope. These agreements are declared generally binding by Royal Decree. Joint Committees are permanent bodies at sectoral or subsectoral level in which representative trade unions and employers' organisations are represented. The conclusion of collective labour agreements is the most important task of the Joint Committee, the more so since collective labour agreements concluded within, can be decreed generally applicable. The conditions determined in the provisions of sectoral collective labour agreements vary from one sector to another. Which conditions of collective labour agreements are applicable depends on the principal activity of the company concerned. This principal activity indicates under which Joint Committee the company falls, which in turn determines which sectoral collective labour agreements, are applicable.

²⁴ *Wet van 5 december 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités, B.S.*, 15 January 1969

²⁵ Koninklijk besluit van 24 juli 2008 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 21 juni 2007, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de arbeidsvoorwaarden, *B.S.*, 13 August 2008

²⁶ Koninklijk besluit van 24 juli 2008 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 25 oktober 2007, gesloten in het Paritair Comité voor het bouwbedrijf, tot wijziging van de collectieve arbeidsovereenkomst van 21 juni 2007 betreffende de arbeidsvoorwaarden, *B.S.*, 13 August 2008

²⁷ Koninklijk besluit van 27 september 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 2 juni 2005, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de arbeidsvoorwaarden, *B.S.*, 9 November 2006

allowances for consecutive shift or night work. Other allowances are foreseen as well such as allowances for wear and tear of tools, home-to-work mobility, subsistence and accommodation that the employer must provide when the worker is occupied at a location that is too far from home that it becomes impossible to return every day.

Insofar as his employer declares the remunerations and pays the contributions due, the worker can also benefit from the advantage of the loyalty stamp due to the CLA of 25 March 2004²⁸ and the CLA of 13 September 2007²⁹. Once a year after the end of the year of service (1 July – 30 June), the granting by the Fund for the Living Security takes place. The advantage is equal to 9 % of the gross salary earned for the work carried out during the year of service.

Furthermore, the CLA of 22 December 2005³⁰ specifies the provisions regarding to the working hours. This CLA updates the CLA of 6 December 1973³¹. On the one hand, the normal annual working duration in the building sector is 38 hours a week. This normal duration is the average on an annual base. On the other hand, the effective normal working time is 40 hours a week and the working time reduction (from 40 to 38 hours a week) occurs by the allotment of 6 rest days and 6 additional rest days a year. These additional rest days entitle the workers to a daily fixed allowance which is equal to the unemployment allowance, increased with the complementary unemployment allowance allocated by the Fund for the Living Security³².

For the normal working regulation the next rules apply:

- the working time amounts to 8 hours a day;
- the weekly duration amounts to 40 hours;
- the work is divided over the first 5 working days (the workers are not allowed to work on a Saturday, a Sunday or a festivity day) and
- the workers are not allowed to work before 6 hour or after 19 hour.

In the building sector, Saturday normally is a rest day. This is stipulated in the Act of 6 April 1960³³ regarding the principal prohibition to perform construction works on Saturday. The CLA of 30 June 1980³⁴ and the CLA of 29 May 2007³⁵ stipulate the exceptions on this principal prohibition. On the one hand, the CLA of 30 June 1980 regards an exception on

²⁸ Koninklijk besluit van 1 april 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 25 maart 2004, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de toekenning van getrouwheidszegels en weerverletzegels, *B.S.*, 21 June 2006

²⁹ CLA of 13 September 2007, <http://www.werk.belgie.be/CAO/124/124-2007-004204.pdf>

³⁰ Koninklijk besluit van 29 september 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 22 december 2005, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de arbeidstijdorganisatie, *B.S.*, 15 December 2006

³¹ Koninklijk besluit van 14 mei 1974 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 6 december 1973, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de arbeidsduur, zijn wekelijkse spreiding over vijf dagen en de toegestane afwijkingen, *B.S.*, 30 October 1974

³² Fonds voor Bestaanszekerheid van de werklieden uit het bouwbedrijf. Fund for the Living Security is the fund responsible for the payment of all kinds of social allowances.

³³ Wet van 6 april 1960 betreffende de uitvoering van bouwwerken, *B.S.*, 7 May 1960

³⁴ Koninklijk besluit van 21 oktober 1980 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 30 juni 1980, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de afwijking van de verplichte rust op zaterdag voor de werklieden die op die dag ten dienste staan van de cliënteel in de onderneming voor de handel in bouwmaterialen, *B.S.*, 14 November 1980

³⁵ CLA of 29 May 2007, <http://www.werk.belgie.be/CAO/124/124-2007-001831.pdf>

the prohibition to work on Saturday for workers who are serving clients in a company specialised in the trade of building materials. On the other hand, the CLA of 29 May 2007 changes the provisions of article 7, § 2 of the Royal Decree Number 213³⁶ by means of the Act of 8 June 2008³⁷. Because of this adjustment, a company is capable to use maximum 64 hours per calendar year, in order to perform construction works on Saturday. This maximum of 64 hours per calendar year must be subtracted from the 130 hours per calendar year, that can be executed during periods of summer or intense activity. Consequently the rules regarding the organisation of the working time and the legal exceptions make it possible to perform construction works outside the scheme of five working days a week³⁸.

C. Semi-dependent workers

10. Do you know the phenomenon of “semi-dependent” employment? (i.e. situations where people are working in conditions similar to a labour contract, however, without having formally concluded such a contract).

According to the Belgian Social Inspection, the phenomenon of semi-dependant employment is also well known as “portage salarial” (because this mechanism was especially notorious in France, however since 25 June 2008, the phenomenon “portage salarial” has finally been legalized, within the framework of the act n° 2008-596 on the modernization of the labour market³⁹). Normally a construction is set up with an “umbrella company”. The self-employed person appeals at this kind of company in order to set up a structure, where he can be a false employee hired by and employer namely the “umbrella company”. The self-employed person becomes a salaried false employee. The company that offers the system of “portage salarial” takes care of the administrative duties and all payments regarding the social security of the self-employed person.

However, the self-employed person is free to plan his working hours, doesn't work in a relationship of subordination, seeks his clients and sends them every month an overview of the performed activities.

In exchange for the recovery of payments for the self-employed activities, the “umbrella company” pays a “salary” to the self-employed person. Due to this sophisticated system the false employee is entitled to all kinds of social security benefits of employees such as medical care and invalidity benefits, unemployment benefits, pensions, family benefits, benefits for occupational accidents and diseases.

11. Is this category of "semi-dependent" workers somewhere defined and subject to specific provisions or (even) protected in your labour law?

The phenomenon of “semi-dependant” workers is also subjected to the Program Act of 27 December 2006⁴⁰. However, there is no legal definition available.

³⁶ Koninklijk besluit nr. 213 van 26 september 1983 betreffende de arbeidsduur in de ondernemingen die onder het paritair comité voor het bouwbedrijf ressorteren, *B.S.*, 7 October 1983.

³⁷ Wet van 8 juni 2008 houdende diverse bepalingen, *B.S.*, 16 June 2008

³⁸ <http://www.meta.fgov.be/>

³⁹ A new article was created (L.1251-64 du Code du Travail) in order to define “portage salarial” and an article was modified (L.8241-1 du Code du Travail) in order to legalize “portage salarial”.

⁴⁰ Titel XIII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

D. Undeclared labour

12. Does a definition exist for undeclared work in your national law?

There is no legal definition of undeclared labour. However, in the Act of 6 July 1976⁴¹ there is a legal definition of illicit work, a form of undeclared work, only referring to the informal individual work for one's own account. Illicit work is defined as the work that can be the subject of a profession related to craftsmanship, commerce or industry and which is carried out by a natural or a legal person not registered in the register for craftsmen or the commercial register, or who is in breach of the legal provisions concerning licenses, insurance obligations or registration with relation to the exercise of a profession, as far as this work has a specific professional character, be it due to its size or technical nature, to its frequency or to the use of certain materials or tools.

E. Labour relationship

13. How are different economic or labour relations (subcontracting, working under service agreements, etc.) defined in your legislation?

A service agreement is defined in article 1779 of the Civil Code⁴². A service agreement is a contract, in which the one party (the principal or founder) engages the other party (the subcontractor) to accomplish work in an independent way by doing material and intellectual activities.

There is no legal definition of subcontracting. Subcontracting can be defined as a contract in which the one party (the principal or principal contractor) engages the other party (the contractor or self-employed) to accomplish work by doing material and intellectual activities without the responsibility of representation and without being in a subordinate position with regard to the principal or principal contractor .

14. Do the parties have the complete freedom to arrange their contractual relationship?

According to the Program Act of 27 December 2006⁴³, the parties have the complete freedom to arrange their contractual relationship, however,

- the public order and the mandatory rules may not be breached;
- the effective execution of the agreement must correspond with the nature of the employment relationship;
- the qualification due to the effective execution is predominant when this qualification excludes the legal qualification, chosen by the parties.

15. Which elements/indicators are predominant in determining a labour relation: the intention of the parties or the factual situation?

The intention of the parties is predominant while the factual situation is less important.

⁴¹ Wet van 6 juli 1976 tot beteugeling van het sluikwerk met handels- of ambachtskarakter, *B.S.*, 20 July 1976

⁴² Artikel 1779 Burgerlijk Wetboek

⁴³ Titel XIII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

16. Which indicators are considered to be of such importance that the existence of an employment relationship is a priori excluded or presumed?

In order to research the link of subordination, according to the Program Act of 27 December 2006 four indicators exist:

- The will of the parties as expressed in the agreement, when this corresponds to the reality or with other words to the concrete execution of the employment agreement; In case of reclassification, the whole written agreement with all the clauses will be judged and not only the name that was given to the document.

- The freedom of organisation of the working time;

Following clauses can indicate the existence of an employment contract:

- A fixed work time scheme
- Notification in case of absence
- The obligation to “prick” in order to register work hours
- No autonomy to plan vacation

In order to judge the employment relationship, the organisational restrictions or commercial duties are taken into account

- The freedom to organize the work;

When the job description and the instructions are very precise and will be imposed by an hierarchical principal, this will be an important indication that there exists an employment agreement.

- The possibility to execute hierarchical control.

These four criteria must not be applied cumulative and each criterion is not crucial on itself.⁴⁴

17. Have there been any court cases in relation to the employment status of bogus self-employed workers? Which are the main elements the courts looked at? What were the outcomes?

The most important court cases of the Court of Cassation are officially known as the “kwalificatiearresten” or the qualification judgments⁴⁵. The judgment of 5 February 2007⁴⁶ of the Court of Cassation clarifies the trend of these judgments. The Court of Cassation had decided that the qualification, the name that was given to the agreement by the parties, was predominant except when the elements would exclude this qualification or would be contradictory.

This decision implicates that it’s difficult for the National Social Security Office to proof bogus self-employment. Next to the latter qualification rule determined by the Court of Cassation, there are other rules to define the employment relationship. The Court of Cassation determined the rule that the qualification can’t be an extralegal presumption. Furthermore, the qualification rule exists that the qualification of an agreement doesn’t increase the weight of the legal burden of the National Social Security Office. When the parties have qualified

⁴⁴ J. LORRE, Aard van de arbeidsrelatie als deus ex machina, *R.W.*, 1662-1676; W. VAN EECKHOUTTE en G. DE MAESENEIRE, Arbeidsrelatieswet. Het bepalen van de rechtsaard van arbeidsrelaties, *NjW*, 98-119; H. VAN HOOGENBEMT, Zelfstandigheid en schijnzelfstandigheid na de Programmawet (I) van 27 december 2006, *Or.*, 49-65

⁴⁵ Cass. 23 december 2002, *J.T.T.* 2003, 271; Cass.; 28 april 2003, *J.T.T.* 2003, 261; Cass. 8 december 2003, *J.T.T.* 2004, 122; Cass. 3 mei 2004, *R.W.* 2004-05, 1220; Cass. 6 december 2004, *N.J.W.* 2005, 21; Cass. 20 maart 2006, *R.W.* 2006-07, 1317; *J.T.T.* 2006, 276.

⁴⁶ Cass. 5 februari 2007, S.06.0024.N, www.cass.be

their agreement and therefore their employment relation, the National Social Security Office doesn't have to prove anything. Another qualification rule verifies that the National Social Security Office, as a prosecuting party, must deliver the final proof for the existence of an employment agreement, when there is no legal presumption, which according to the Court implies that the fact that the work is exercised under the authority of an employer or a principal must be justified. The National Social Security Office will carry the risk of evidence. In addition, another rule determines that the factual judges must follow the rules regarding the burden of proof. The evidence that the National Social Security Office must deliver, should justify that authority can be applicable in case of execution of the work, or at least that the possibility exists. Pure indications that point to economical dependence aren't sufficient enough. Even small performances, exercised without any regularity, can resort under the Act on employment agreements⁴⁷, which implies that the employer must pay social security contributions.

F. Employment status

18. Did the legislator in your country insert certain presumptions in the law indicating that in certain circumstances or for certain jobs an employment or self-employment relation is compulsory?

There is a legal presumption⁴⁸ that the director of a company will always be regarded as a self-employed person. Normally, legal presumption is principally indisputable except when a pensioned director has an unsalaried mandate.

19. Have any instructions been developed by the authorities (e.g. social security administrations, the tax offices) or the social partners in your country, as to give indications for making a distinction between employee and self-employed statute?

The social partners of the building sector have formulated different kinds of sectoral criteria in order to make a distinction between an employee and a self-employed person and to add specific criteria (by means of a Royal Decree) to make the Program Act of 27 December 2006 more complete.

Following specific criteria stipulate factual elements of cooperation between parties that can indicate the presence or absence of authority:

- The obligation to achieve a result is characterising for a self-employed worker. On the other hand, an employee is only bound by a best-efforts obligation and must not necessarily achieve results;
- The responsibility and decision power concerning the financial resources to keep the venture profitable are essential characteristics of a self-employed worker;
- A fixed and/or guaranteed remuneration can indicate employment under the authority of an employer. Paying fixed advances to self-employed workers in order to make them able to buy (raw) materials for their assignment are current practices in the construction sector. This manner of working cannot be considered as remuneration of an employee;

⁴⁷ Wet van 3 Juli 1978 betreffende de arbeidsovereenkomsten, *B.S.*, 22 August 1978

⁴⁸ Koninklijk besluit nr. 38, 27 juli 1967 houdende inrichting van het sociaal statuut der zelfstandigen, *B.S.*, 29 July 1967

- A personal and substantial investment in the venture with own resources and a personal and substantial participation in the profits and losses of the venture are characterising for a self-employed worker;
- Subcontracting with their own employer during the duration time of the employment contract or mainly subcontracting with the previous employer starting within a period of six months after the termination of the employment contract are an indication of bogus self-employment. This criterion can be only called upon when the subcontracting activity is the same as the one which was exercised during the employment contract;
- Wearing working clothes of the principal can imply an element of authority. On the other hand, wearing specific protective clothing of the principal, observing, explaining and understanding the safety regulations cannot indicate an element of authority;
- Manifesting themselves as a venture in the presence of the co-contractor or of third parties is an expression of an independent statute;
- When the transportation of the self-employed person happens mainly with vehicles of the principal, this can be an indication of a link of subordination;
- When the self-employed person, who is classified in the team of the principal and practises the same tasks as the employees of the principal, he can be considered as linked by an employment contract;
- Working in work spaces and/or with their own material can indicate an independent service performance. The use of collective means of protection, such as scaffolds which are not the own possession of the self-employed person, is the daily manner of working in the construction sector, which is motivated by security measures and cannot be seen as an element of an employee statute.
- The possibility to hire staff or being able to replace oneself. The possibility to replace oneself is a typical characteristic of an independent cooperation. Conversely, in case of an employment contract, the employee is obliged to perform the task personally.

The principal can and is always allowed - taking into account the security of its own staff, of the staff of other subcontractors and of third parties, with the risk restriction concerning observing several regulations, as well as taking into account the agreed work and expected quality of this – to make following demands to the substitute of the self-employed person or his staff without applying this as a specific criterion:

- requiring a legal stay in Belgium;
- asking to give proof of the C3.2A form, the work permit, the Limosa declaration, the E101 form, the E 102 form, the residence permit,...;
- imposing and demanding the required competences for the performance of the agreed work;
- not accepting indecent behaviour or an inappropriate commercial attitude.

These elements can lead to the point that the substitute can be denied access to the workplace, without considering this as a restraint to hire staff or to replace oneself.⁴⁹

⁴⁹ Paritair comité voor het bouwbedrijf, Uitvoering sectoraal akkoord 2007-2008, Werkgroep “Schijnzelfstandigen”, Stand van zaken (25 September 2008).

20. Do certain alarm procedures exist?

There is a special “blinker” procedure regarding the presumption of bogus self-employment. When somebody is affiliated as a self-employed and the authorities find out by means of the affiliation form that the declared job activity was formerly, executed as an employee with the applicable social security scheme of employees⁵⁰, the National Institute for the Social Security of the Self-employed will send a copy of the affiliation form to the National Social Security Office. When the National Social Security Office disputes the affiliation, they must communicate this to the National Institute for the Social Security of the Self-employed before the end of the second month following the date of the sending.

Afterwards, there will be a meeting between both services. When the affiliation is found ungrounded, it will be annulated by the National Institute for the Social Security of the Self-employed⁵¹.

§ 2. Figures/ Extent:

A. Direct employment/ self-employment

21. Are there, according to your knowledge, any official statistics on the number of directly employed and formally self-employed workers in the construction sector?

According to the estimations of the employers' organisation Bouwunie, based on statistics of the National Institute for the Social Security of the Self-employed en National Social Security Office, there were 208.754 employees and 56.312 self-employed workers in 2007.

Employees	Self-employed workers	
208.754	56.312	2007

22. What is your personal assessment concerning the number of directly employed and self-employed?

According to Confederatie Bouw, the amount of directly employed persons in the building sector is much higher than the amount of self-employed workers (almost 4 times higher).

23. Are there, in your view, any official statistics on how these figures have developed over the last years?

According to the estimations of Confederatie Bouw, the total amount of employees in the building sector has increased continuously the last 10 years, with a significant acceleration in

⁵⁰ However, according to recent jurisdiction, it is possible to perform activities, formerly performed in a subordinate relation with an employer as an employee, as a self-employed person for the same employer without a relationship of subordination. Cass. 27 november 2006, *NjW* 2007, 413.

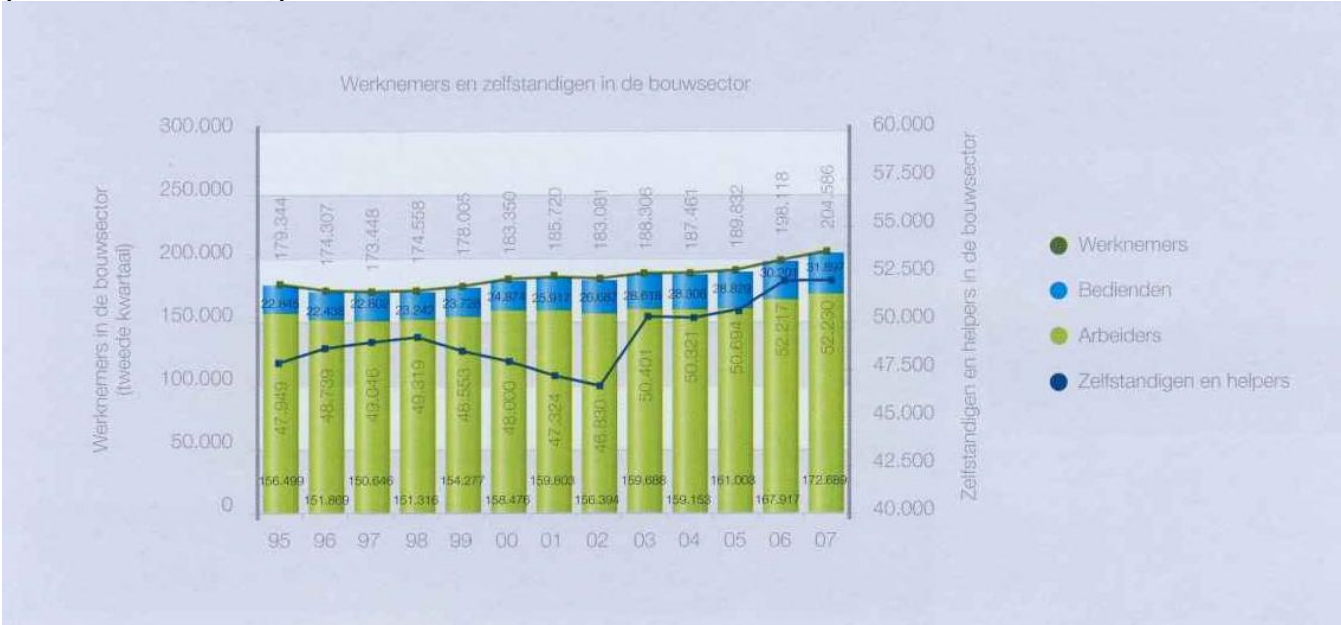
⁵¹ Koninklijk besluit van 25 januari 1991 tot wijziging van artikel 6 Koninklijk besluit 19 december 1967 houdende algemeen reglement in uitvoering van het Koninklijk besluit nr. 38 van 27 juli 1967 houdende inrichting van het sociaal statuut der zelfstandigen, *B.S.*, 16 April 1991

the last two years 2006 (+ 8000) and 2007 (+6000). In 1997 there were almost 174.000 employees, while this number rose to more than 204.000 in 2007 (+17%).

However, the evolution of the figures for self-employed workers is different. The total number has been rising since the last 10 years, from 49.046 in 1997 to 52.230 in 2007, though it follows a completely different pattern in comparison with the employees. Until 2002 the number has been decreasing. From 2002 to 2007 it has been increasing again, with a big acceleration between in 2002 (46.830 → 50.401) and a moderate acceleration between 2005 and 2006 (50.649 → 52.217).

In proportion to the number of employees there were 28% self employed persons in 1997 and 25,5% in 2007. So over the last 10 years both numbers have been rising, but the number of employees has been rising a little bit faster in comparison with the self employed persons.

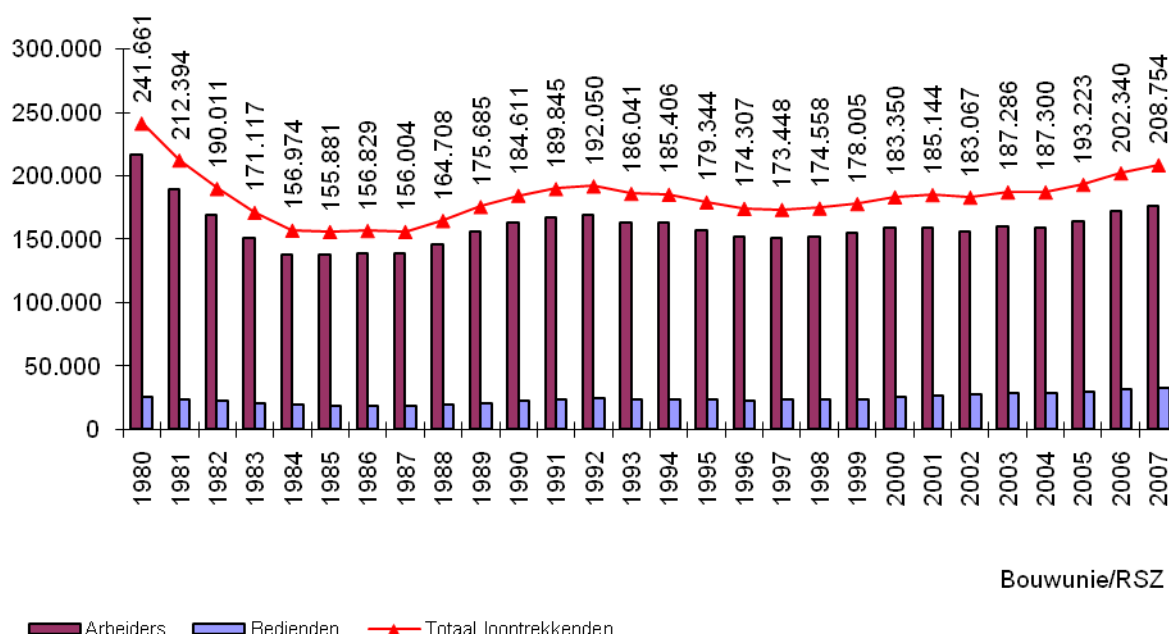
Evolution employees and self employees in the buidling sector 1995- 2007 (Confederatie Bouw)



When the figures of Confederatie Bouw are compared to the figures of Bouwunie, there is a slide difference between both estimations. Despite the difference in absolute figures, the trends are comparable. The only big difference is the significant increase in self employed persons in 2007 (+3000), which brings the proportion of self-employed to employees in 2007 to the number of 27% instead of the 25,5% of Confederatie Bouw figures.

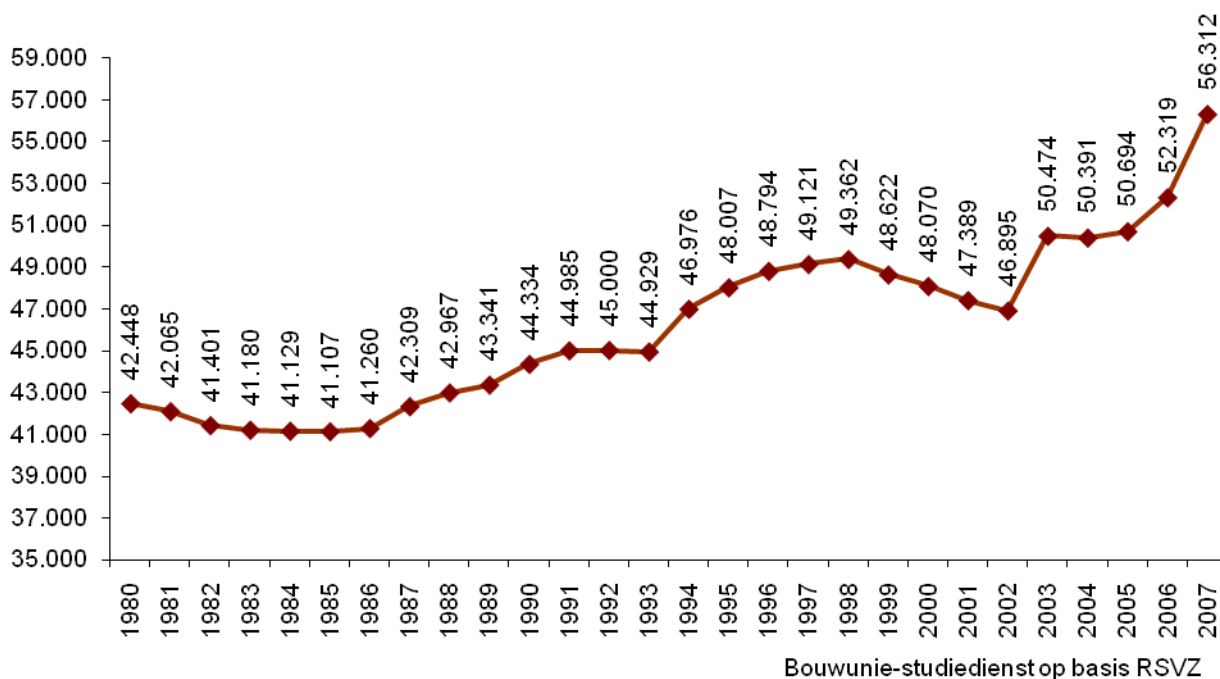
Evolution of the amount of employees in the building sector

Evolutie van het aantal loontrekkenden in het bouwbedrijf



Evolution of the amount of self-employed workers in the building sector

Evolutie van het aantal zelfstandigen in het bouwbedrijf



24. What is your personal assessment of how the numbers have developed?

According to Confederatie Bouw and Bouwunie, the big increase as from 2002 can be linked to the enlargement of the European Union. Furthermore, economic tendencies can also play an important role.

25. How has the ratio of self-employment compared to direct employment in the construction sector evolved compared to other industries in the country?

There are no figures available, regarding the evolution of the ratio between self-employment compared to direct employment in the construction sector, which contrast with other sectors.

B. Self-employment/bogus self-employment

26. What percentage of formally self-employed can be seen as bogus self-employed? What is the basis of your estimate?

Regarding to the percentage of bogus self-employed workers there are no figures available, only presumptions. No “wild” estimations have been made.

27. In your view has there been an increase or decrease in the number of bogus self-employed in the last years? How do you explain the changes?

According to Bouwunie, there is a rise which can be related to the “expansion of EU”, while according to Confederatie Bouw, the number of bogus self-employed is decreasing. However, according to the trade unions (ACV, ABVV and ACLVB), there is an increase in bogus self-employment. This is a consequence of the new Belgian Act on the labour relations⁵², which is vague and needs to be revised. Free movement (EU) of services is also a reason why the amount of false self-employed is increasing (see infra).

According to the Belgian Social Inspection, there is a decrease due to the difficulties of the new EU-members such as Poland to find employers for their own economy.

C. (Bogus) self-employment and migrant workers

28. Which percentage of these self-employed people are, in your opinion, migrant workers?

Regarding to the percentage of migrant workers there are no official figures available. Again, nobody dears to make “wild” estimations regarding the percentage.

29. Can you give the reasons why this percentage is high/low, according to your view?

⁵² Titel XIII van de Programmawet (I) van 27 december 2006, B.S., 28 December 2006

The employers' organisations (Confederatie Bouw and Bouwunie) as well as the trade unions (ACV, ABVV and ACLVB) presume that there is an increase of migrants from the new EU-countries.

30. Do you believe that the official available figures are reliable as regards the numbers of directly employed, formally self-employed and bogus self-employed in construction?

The employers' organisations (Confederatie Bouw and Bouwunie) as well as the trade unions (ACV, ABVV and ACLVB) don't believe that the official figures are completely trustworthy because the figures are based on estimations and don't cover the EU and non-EU immigrant workers working as directly employed, formally self-employed and bogus self-employed.

II. The impact of regulation and deregulation in this field

§ 1. Laws and regulations:

31. Which laws and regulations govern self-employment in the construction sector?

The Royal Decree number 38⁵³ governs self-employment in the construction sector.

32. Are there any laws or regulations that have shown to lead to an increase or decrease of the numbers of genuine self-employed/ bogus self-employed workers in the construction sector?

According to ACV, the new Act regarding employment relations⁵⁴ is so vague that this lead to an increase of bogus self-employed. The fact that there are no Royal Decrees and a ruling commission to clarify the distinction between an employee and a self-employed makes the legal insecurity even bigger.

§ 2. Qualifications:

33. Can anybody register as self-employed, and in any craft? Which conditions have to be fulfilled?

Anybody can register as a self-employed when following conditions are fulfilled:

- Choosing a corporation form. Of course the self-employed can choose to be a natural or a legal person;
- Opening a bank account with a financial institution;
- Doing a VAT registration;
- Subscribe himself with the "office window of corporations⁵⁵" and proof his undertaking capabilities and his knowledge of management;

⁵³ K.B. nr. 38, 27 juli 1967 houdende inrichting, van het sociaal statuut der zelfstandigen, *B.S.*, 29 juli 1967

⁵⁴ Titel XIII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

⁵⁵ Ondernemingsloket

- Subscribe himself in the Crossroads Bank for Enterprises (CBE)⁵⁶ and receive an corporation number and a residence number;
- Affiliate with the National Institute for the Social Security of the Self-employed and pay social security contributions⁵⁷;
- Knowledge of the basic principles of business administration and if necessary specific professional skills must be proven.

34. Are there any checks on the qualifications when registering as self-employed?

The self-employed entrepreneur or a representative of the company must prove that he knows the basic principles of business administration, irrespective of whether it concerns a natural person or an authorised representative of a company and irrespective of whether the activity is exercised as a primary or a secondary activity⁵⁸.

Furthermore, when a self-employed worker want to exercise a regulated building profession, he has to give proof of specific professional skills.

The regulated building profession can be categorised in 9 groups:

- the structure activities (masonry, concrete or demolition works);
- plasterer, cementing and floor activities;
- flagstone, marble and nature stone activities;
- roofing and water proofing activities;
- carpenter and glazier activities;
- the final finishing activities (painting and wall paper works and placing supple floor covering);
- the installation activities for central heating, climate regulation, gas and sanitary;
- electrotechnical activities;
- general contracting activities.⁵⁹

Such proof can be given by means of a degree/certificate, work experience or an examination.

§ 3. Business statute:

35. Which status does a self-employed have? E.g.a company status, or an individual person with VAT number, or can the status of a self-employed take both forms?

Both forms are possible. A self-employed person can be a natural person with a VAT number such as a one-man company or a legal person in the form of a company such as a limited liability cooperative society.

⁵⁶ Kruispuntbank Ondernemingen (KBO)

⁵⁷ T. MESSIAEN en V. DOOMS, *Schijnzelfstandigheid : balanceren op een slappe koord*, Gent, Larcier, 2005, 16-18.

⁵⁸ Wet van 15 december 1970 op de uitoefening van beroepswerkzaamheden in de kleine en middelgrote handels- en ambachtsondernemingen, *B.S.*, 20 March 1971

⁵⁹ Koninklijk besluit van 29 januari 2007 betreffende de beroepsbekwaamheid voor de uitoefening van zelfstandige activiteiten van het bouwvak en van de elektrotechniek, alsook van de algemene aanneming, *B.S.*, 27 February 2007

36. Which procedure has to be followed to register as self-employed (e.g. online, telephone,...). Which documents need to be provided?

See supra question 33.

37. Are there any checks⁶⁰ whether a person is genuinely self-employed? If yes, what do they involve?

There is a special “blinker” procedure to check the presumption of bogus self-employment. See supra question 20.

§ 4. Enforcement:

38. Does the legislator enforce its legislation concerning self-employment⁶¹ and how?

The legislator can enforce its legislation. The National Social Security Office can dispute the affiliation form of the self-employed person and the National Institute for the Social Security of the Self-employed can destroy this affiliation form. In this case both services work together in order to prevent ungrounded affiliations. Practical checks are executed by the inspections such as the inspection of the National Social Security Office and the National Institute for the Social Security of the Self-employed. Furthermore there are all kinds of inspections such as the fiscal inspection, the social inspection, the inspection of social laws, the medical and technical inspection. They can ask all kinds of documents such as E101 forms (see infra), films and accounts when inspecting self-employed workers.

§ 5. Migration:

39. Is there a direct link between specific legislation and in-/ out-migration? Please describe this link.

A number of countries were added to the European Union as from the 1 May 2004 (namely: Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary and Slovenia) and as from the 1 January 2007 (Romania and Bulgaria). In Belgium, provisions were made for a transition period (until 1 May 2009 and 1 January 2012 respectively) in which the free movement of workers is prohibited⁶². Furthermore, the free movement of services and the freedom of settlement is also allowed in Belgium. However, employees and self-employed

⁶⁰ E.g. is there desk-top check of documents, also in conjunction with other authorities? Is there a practical check whether facilities are in place (e.g. van, tools).

⁶¹ E.g. does it carry out on-site inspections? How frequent? Are these inspections pre-announced?

⁶² Koninklijk besluit van 24 april 2006 tot wijziging van artikel 10 van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 10 May 2006; Koninklijk besluit van 24 april 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, naar aanleiding van de verlenging van de overgangsbepalingen die werden ingevoerd bij de toetreding van nieuwe lidstaten tot de Europese Unie, *B.S.*, 28 April 2006; Koninklijk besluit van 20 december 2006 tot wijziging, als gevolg van de toetreding van Bulgarije en Roemenië tot de Europese Unie, van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 28 December 2006; Koninklijk besluit van 19 december 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers naar aanleiding van de toetreding tot de Europese Unie van Bulgarije en Roemenië, *B.S.*, 28 December 2006.

workers from these countries to Belgium on a temporary base is allowed because this is a form of providing temporary services⁶³.

III. Development of the overall construction sector; Development of the labour market in construction

General questions

40. Overall, how has the construction sector developed over the last years?

The trade unions as well as the employer's organisations link the development of the construction sector with the enlargement of the European Union. The employment of more migrants of the new-EU-members has increased over the years.

41. Do you think that this development has impacted on an increase/decrease of the number of self-employed and bogus self-employed in the country? Are there any official sources/statistics that you can refer to?

The social partners see a clear link between the enlargement of the European Union and the increase of self-employed and bogus self-employed migrant workers of the new EU-countries in Belgium.

According to Bouwunie, the (above) transitional measure⁶⁴ which prohibits the free movement of workers and allows the free movement of services/freedom of establishment, has an impact on the increase of the number of self-employed and bogus self-employed migrant workers of the new EU-countries in Belgium. However, there are no official sources/statistics that can illustrate this.

IV. Cross-border effects of self-employment/bogus self -employment (Banks case, 2000)

§ 1. Migration/enlargement:

42. Has there been, according to your opinion, in-/out-migration related to the possibility or non-possibility of working (bogus) self-employed in the country?

⁶³ <http://meta.fgov.be/>

⁶⁴ Koninklijk besluit van 24 april 2006 tot wijziging van artikel 10 van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 10 May 2006; Koninklijk besluit van 24 april 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, naar aanleiding van de verlenging van de overgangsbepalingen die werden ingevoerd bij de toetreding van nieuwe lidstaten tot de Europese Unie, *B.S.*, 28 April 2006; Koninklijk besluit van 20 december 2006 tot wijziging, als gevolg van de toetreding van Bulgarije en Roemenië tot de Europese Unie, van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 28 December 2006; Koninklijk besluit van 19 december 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers naar aanleiding van de toetreding tot de Europese Unie van Bulgarije en Roemenië, *B.S.*, 28 December 2006.

According to ACV, there is a direct link between immigration of new EU-nationals and the possibility to work as a false self-employed. ACV is even aware of special illegal constructions in the building sector in order to “welcome” new EU-nationals to work as bogus self-employed workers.

43. Do you think that there is a direct link between the EU enlargement process and the increase in (bogus) self-employment in the construction industry in your country?

According to Bouwunie, the (above) transitional measure⁶⁵ which prohibits the free movement of workers and allows the free movement of services/freedom of establishment, causes the increase of bogus self-employment of migrant workers from the new EU countries in the Belgian building sector.

§ 2. Classification:

44. Which problems can be noticed when looking at filled in E-101 forms? Does it happen that these forms are not accepted and that the mentioned status of the worker is reclassified? Which procedure is followed?

When an employee or self-employed person is seconded or works simultaneously in two or more countries, he must be in the possession of an E101 or E102 form.

Following seconding conditions must be fulfilled:

- the seconding must be temporarily with a maximum period of 12 months (however prolongation is possible);
- seconding is not allowed to replace another seconded employee of self-employed person;
- the seconded employee or self-employed person must be preliminary submitted to the social security legislation of the country of origin;
- the employer or self-employed person must have a establishment and must exercise a substantial activity in the country of origin (in order to prevent bogus self-employment);
- the organic bond between the seconding company and the seconded employee must maintain. (The latter implies that the employer must have the responsibility regarding the recruitment, the employment agreement, the dismissal and the determination of the nature of the employment.)

⁶⁵ Koninklijk besluit van 24 april 2006 tot wijziging van artikel 10 van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 10 May 2006; Koninklijk besluit van 24 april 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, naar aanleiding van de verlenging van de overgangsbepalingen die werden ingevoerd bij de toetreding van nieuwe lidstaten tot de Europese Unie, *B.S.*, 28 April 2006; Koninklijk besluit van 20 december 2006 tot wijziging, als gevolg van de toetreding van Bulgarije en Roemenië tot de Europese Unie, van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en van het koninklijk besluit van 25 april 2004 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *B.S.*, 28 December 2006; Koninklijk besluit van 19 december 2006 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers naar aanleiding van de toetreding tot de Europese Unie van Bulgarije en Roemenië, *B.S.*, 28 December 2006.

The social security service of the sending member state, which allocates the E101 form, must investigate if the above conditions are fulfilled. Unfortunately, this investigation seldom takes place. Furthermore, it is difficult for this services to investigate the organic bound. On the other hand, it is not easy for the Belgian social services to examine if the social security contributions are paid in the country of origin, if the employer or the self-employed person exercises a substantial activity in the country of origin and if the Belgian minimum wages are really paid.

Moreover, according to case law of the European Court of Justice (Fitzwilliam⁶⁶, Banks⁶⁷ and Herbosch Kiere⁶⁸), a court of the host Member State is not entitled to scrutinise the validity of an E101 form (not even in case of fraud when the employee is classified as a (bogus) self-employed person) as regards in particular the existence of a direct relationship, within the meaning of Article 14(1)(a) of Regulation No 1408/71⁶⁹, read in conjunction with paragraph 1 of Decision No 128⁷⁰, between the company which seconded the employee and the seconded employee himself. In so far as an E 101 form establishes an assumption that seconded employees are properly affiliated to the social security system of the Member State in which the undertaking, which seconded those employees, is established, such a form is binding on the competent institution of the Member State to which those employees are seconded. The principle that employees are to be covered by only one social security system would be otherwise undermined.

However, the competent institution which issued the E101 form, must review the grounds for its issue and, if necessary, withdraw the form if the competent institution of the host Member State expresses doubts as to the correctness of the facts and of the information contained therein, in particular because the information does not correspond to the requirements of article 14(1)(a) of Regulation No 1408/71. When the concerned institutions do not reach an agreement, they can refer the matter to the Administrative Commission. When the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the applicable legislation, the host Member State may at least bring infringement proceedings to the European Court of Justice to scrutinize the correctness of the information contained in the E101 form. As long as the E101 form has not been withdrawn or declared invalid by the authorities of the Member State which issued it, an E101 form issued under Article 11(1)(a) of Regulation No 574/72⁷¹ binds the competent institution and the courts of the Member State in which the employees are seconded. Consequently, the competent institution and the courts of the Member State cannot reject the E101 form unilaterally and therefore cannot make the seconded employees in question subject to their own social security system. Furthermore, according to the Banks case, the E101 form may be issued with retroactive effect, even after the end of an assignment. However, Decision No 181⁷² stipulates that the E101 form is preferably issued before the seconding begins.

⁶⁶ H.v.J. 10 February 2000, nr. C-202/97 (Fitzwilliam), *Jur. H.v.J.* 2000, I-883.

⁶⁷ H.v.J. 30 March 2000, nr. C-178/97 (Banks), *Jur. H.v.J.* 2000, I-2005.

⁶⁸ H.v.J., 26 January 2006, nr. C-2/05 (Herbosch Kiere), *Jur. H.v.J.* 2006, I-1079.

⁶⁹ Verordening (E.G.G.) nr. 1408/71 van de Raad van 14 juni 1971 betreffende de toepassing van de sociale zekerheidsregelingen op werknemers en zelfstandigen, alsmede hun gezinsleden die zich binnen de Gemeenschap verplaatsen, *P.B. L* 149, 5 July 1971.

⁷⁰ Besluit 128 betreffende de toepassing van de artikelen 14, lid 1, sub a, en 14 ter, lid 1 van Verordening (E.G.G.) nr. 1408/71 van de Raad betreffende de wetgeving die van toepassing is op de gedetacheerde werknemers en zelfstandigen, die tijdelijk werken buiten de bevoegde lidstaat, *P.B. E.G.* 7 June 1986, nr. C 141.

⁷¹ Verordening (E.G.G.) nr. 574/72 van de Raad van 21 maart 1972 tot vaststelling van de wijze van toepassing van de Verordening nr. 1408/71 betreffende de toepassing van de socialezekerheidsregelingen op werknemers en zelfstandigen, alsmede op hun gezinsleden, die zich binnen de Gemeenschap verplaatsen, *P.B. L* 74, 27 March 1972.

⁷² Besluit 181 betreffende de uitlegging van artikel 14, lid 1, artikel 14bis, lid 1, en artikel 14ter, lid 1 en lid 2, van Verordening (E.G.G.) nr. 1408/71 van de Raad betreffende de wetgeving die van toepassing is op de gedetacheerde werknemers en zelfstandigen, die tijdelijk werken buiten de bevoegde lidstaat *P.B. L* 329, 14 December 2001.

According to the National Office for Social Security, in practice, the Administrative Commission doesn't play its mediative role. An efficient collaboration between the competent institutions of the host country and the country of origin is therefore very important. However, according to the Social Inspection, the collaboration with the Polish competent institutions has become more efficient because of problematical attraction of Polish workers for their own economy.

Furthermore, according to the National Social Security Office, fraud of E101 forms, in order to be able to work as a bogus self-employed person, is more difficult in case of simultaneous work as an employee in one country and as a self-employed person in another. If a self-employed person works simultaneously as an employee in one country and as a self-employed person in another, he is only insured under the legislation of the country where he works as an employee. Thus, as a principle, self-employment in another country is also insured in the country where the person works as an employee⁷³. However, many countries have particular rules which allow for a deviation from this main principle of insurance in the country where the person works as an employee⁷⁴.

Additionally, in the building sector, according to ABVV, the CLA about the statute of the trade unions give the trade unions the right to ask information about social documents such as E101 forms to subcontractors and their contractors⁷⁵.

Besides, according to ACV and the Social Inspection, when the Inspection of Social Laws concludes that the rules on minimum wages and labour regulations are breached in case of bogus self-employment, this could trigger the presumption that the E101 form is not valid.

45. Which problems does one encounter when filling in the E101 form?

According to the Social Inspection, it is easy to falsify the E101 form. First of all, the authenticity is a huge problem, because the inspection almost never sees original forms. If the original exists, it will be kept at the chair of the company and the involved employees will carry a copy or a copy will be send to the competent institution. Moreover, it is very easy to download the E101 form and to use this as a false certificate because these forms are freely available on the internet. In addition, most of the E101 forms are filled in by hand. According to the Social Security of the Self-employed there are also translation problems. This causes difficulties during the procedure in which the competent institutions check the validity of the E101 form. Furthermore, there are also a lot of translation expenses due to these translation problems. When employees have a false E101 form at their disposal, the question rises which Member State can claim social security contributions. A false form of secondment equals the lack of a secondment form but this does not necessarily means that the secondment itself is illegal⁷⁶.

⁷³ Article 14(c) of Regulation No 1408/71.

⁷⁴ In the cases mentioned in Annex VII.

⁷⁵ Koninklijk besluit 22 maart 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 29 januari 2004, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende het statuut van de syndicale afvaardigingen, *B.S.*, 17 May 2006; Koninklijk besluit van 17 maart 2008 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 21 juni 2007, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de wijziging van de collectieve arbeidsovereenkomst van 29 januari 2004 betreffende het statuut van de syndicale afvaardigingen, *B.S.*, 25 April 2008

⁷⁶ Y. JORENS en F. VAN OVERMEIREN, *Voorstellen voor een beter evenwicht tussen grensoverschrijdende tewerkstelling en de sociale bescherming*, Basisrapport in het kader van het Project PODW "Grensoverschrijdende Tewerkstelling in België" i.o.v. de Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg, Gent, 2006, 51.

V. Social security and fiscal (tax) developments

Classification:

A. Tax system:

46. Which tax system regulates the construction sector? Is it a national system, or a industry-specific one?

The national tax system regulates the construction sector. There is no industry-specific tax system. However, a typical regulation regarding indirect tax that is related to the employment relation with a contractor, is the system of 6% VAT tariff when a person appeals to a registered contractor in order to renovate his older house⁷⁷. This tariff is very beneficial because the normal VAT tariff amounts to 21%⁷⁸.

47. What do you believe is the overall loss in income of tax and other social security payments for the government as a result of bogus self-employment?

The trade unions, as well as the employer's organisations believe that the overall cost in income of tax and other social security payments for the government as a result of bogus self-employment is very high. However no estimations have been made.

B. Companies:

48. What are the costs and benefits for a company in terms of tax and social security payments when engaging a self-employed worker instead of a direct employee?

When the employer/company hires a self-employed person, he doesn't have to pay any social security or tax contributions. However, in case of engaging an employee, the employer/company has to pay social security contributions to the National Office for Social Security. The social security legislation is stipulated in the Act on the National Office for Social Security⁷⁹ and the Act on the general principles in social security⁸⁰.

As from 1 October 2008 the following employers' social contribution percentages are applicable⁸¹:

⁷⁷ Koninklijk besluit van 18 januari 2000 tot wijziging van het koninklijk besluit nr. 20 van 20 juli 1970 tot vaststelling van de tarieven van de belasting over de toegevoegde waarde en tot indeling van de goederen en de diensten bij die tarieven, *B.S.*, 29 January 2000

⁷⁸ G. VAN LIERDE en L. MONSEREZ, "De nieuwe registratieregeling: een voorbeeld van de moeilijke verhouding tussen het vrij verkeer van diensten en de Belgische bouwsector", *Or.* 2008, (121) 122.

⁷⁹ Besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, *BS*, 30 December 1944; Wet 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, *B.S.*, 25 July 1969

⁸⁰ Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid voor werknemers, *B.S.*, 2 July 1981.

⁸¹ Confederatie Bouw

Less than 10 employees	Employer's social contribution (%)			
	A	B	C	D
Sector				
A. Social contributions (RSZ/ONSS)				
A.1 Global contribution				
1. Sickness and invalidity				
- medical care	3,80	3,80	3,80	3,80
- invalidity benefits	2,35	2,35	2,35	2,35
2. Unemployment	1,46	1,46	1,46	1,46
3. Pensions	8,86	8,86	8,86	8,86
4. Family benefits	7,00	7,00	7,00	7,00
5. Occupational accidents	0,30	0,30	0,30	0,30
6. Occupational diseases	1,00	1,00	1,00	1,00
Subtotal	24,77	24,77	24,77	24,77
A.2 Other contributions				
1. Annual vacation	6,00	6,00	6,00	6,00
2. Paid educational leave	0,08	0,08	0,08	0,08
3. Supporting contribution	0,05	0,05	0,05	0,05
4. Child care	0,05	0,05	0,05	0,05
Wage restraint	7,48	7,48	7,48	7,48
5. Asbestos fund	0,01	0,01	0,01	0,01
6. Special contribution unemployment and seniority	0,10	0,10	0,10	0,10
7. Special contribution unemployment	0,00	0,00	0,00	0,00
Wage restraint	0,00	0,00	0,00	0,00
8. Fund closure companies				
9. Classical assignments	0,14	0,14	0,14	0,14
Wage restraint	0,01	0,01	0,01	0,01
10. Temporary unemployment	0,15	0,15	0,15	0,15
Wage restraint	0,01	0,01	0,01	0,01
Subtotal	14,08	14,08	14,08	14,08
Total A	38,85	38,85	38,85	38,85
B. Fund for the Living Security (FBZ/FSE)				
1. Fund of craft education	0,40	0,40	0,40	0,40
2. Guaranteed wage	1,50	1,50	1,50	1,50
3. Royal Decree number 213	2,60	2,60	2,60	2,60
4. Legal holiday pay	10,27	10,27	10,27	10,27
Total B	14,77	14,77	14,77	14,77
C. Single holiday pay (RSZ/ONSS)	3,72	3,72	3,72	3,72
D. Structural reduction	- 7,06	- 7,06	- 7,06	- 7,06
E. Lump sum contribution Fund for the Living Security (FBZ/FSE)	11,98	11,74	11,74	8,33

F. General social costs				
1. Work clothing	1,40	1,40	1,40	1,40
2. Insurance occupational accidents	10,20	10,20	10,04	10,04
3. Civil liability	0,50	0,50	0,50	0,50
4. Industrial safety	0,60	0,60	0,60	0,60
5. Occupational medicine	0,48	0,48	0,48	0,48
6. Public holidays	8,18	8,18	8,18	8,18
7. System bad weather inactivity	4,10	4,10	0,00	0,00
8. Loyalty premium	9,12	9,12	9,12	9,12
9. Payment social contribution (RSZ/ONSS)	0,34	0,34	0,34	0,34
10. Divers (GWL/SHG)	1,96	1,96	1,96	1,96
11. Mobility				
- Transportation	2,59	2,59	2,59	2,59
- Mobility	2,41	2,41	2,41	2,41
12. Readjustment social contribution (RSZ/ONSS)	0,63	0,63	0,63	0,63
Total F	42,51	42,51	38,25	38,25

General total	104,77	104,53	100,27	96,86
---------------	--------	--------	--------	-------

More than 10 employees Sector	Employer's social contribution (%)			
	A	B	C	D
A. Social contributions (RSZ/ONSS)				
A.1 Global contribution				
1. Sickness and invalidity				
- medical care	3,80	3,80	3,80	3,80
- invalidity benefits	2,35	2,35	2,35	2,35
2. Unemployment	1,46	1,46	1,46	1,46
3. Pensions	8,86	8,86	8,86	8,86
4. Family benefits	7,00	7,00	7,00	7,00
5. Occupational accidents	0,30	0,30	0,30	0,30
6. Occupational diseases	1,00	1,00	1,00	1,00
Subtotal	24,77	24,77	24,77	24,77
A.2 Other contributions				
1. Annual vacation	6,00	6,00	6,00	6,00
2. Paid educational leave	0,08	0,08	0,08	0,08
3. Supporting contribution	0,05	0,05	0,05	0,05
4. Child care	0,05	0,05	0,05	0,05
Wage restraint	7,48	7,48	7,48	7,48
5. Asbestos fund	0,01	0,01	0,01	0,01
6. Special contribution unemployment and seniority	0,10	0,10	0,10	0,10
7. Special contribution unemployment	1,60	1,60	1,60	1,60
Wage restraint	0,09	0,09	0,09	0,09
8. Fund closure companies				
9. Classical assignments	0,15	0,15	0,15	0,15
Wage restraint	0,01	0,01	0,01	0,01

10. Temporary unemployment	0,15	0,15	0,15	0,15
Wage restraint	0,01	0,01	0,01	0,01
Subtotal	15,78	15,78	15,78	15,78
Total A	40,55	40,55	40,55	40,55

B. Fund for the Living Security (FBZ/FSE)				
1. Fund of craft education	0,40	0,40	0,40	0,40
3. Royal Decree number 213	2,60	2,60	2,60	2,60
4. Legal holiday pay	10,27	10,27	10,27	10,27
Total B	13,27	13,27	13,27	13,27

C. Single holiday pay (RSZ/ONSS)	3,81	3,81	3,81	3,81
----------------------------------	------	------	------	------

D. Structural reduction	- 6,23	- 6,23	- 6,23	- 6,23
-------------------------	--------	--------	--------	--------

E. Lump sum contribution Fund for the Living Security (FBZ/FSE)	11,98	11,74	11,74	8,33
---	-------	-------	-------	------

F. General social costs				
1. Work clothing	1,40	1,40	1,40	1,40
2. Insurance occupational accidents	10,20	10,20	10,04	10,04
3. Civil liability	0,50	0,50	0,50	0,50
4. Industrial safety	0,60	0,60	0,60	0,60
5. Occupational medicine	0,48	0,48	0,48	0,48
6. Public holidays	8,46	8,46	8,46	8,46
7. System bad weather inactivity	4,10	4,10	0,00	0,00
8. Loyalty premium	9,12	9,12	9,12	9,12
9. Payment social contribution (RSZ/ONSS)	0,34	0,34	0,34	0,34
10. Divers (GWL/SHG)	4,06	4,06	4,06	4,06
11. Mobility				
- Transportation	2,59	2,59	2,59	2,59
- Mobility	5,45	5,45	5,45	5,45
12. Readjustment social contribution (RSZ/ONSS)	0,63	0,63	0,63	0,63
Total F	47,93	47,93	43,67	43,67

General total	111,31	111,07	106,81	103,40
---------------	--------	--------	--------	--------

Uncertainties about the gross salary exist on the basis of which contributions have to be paid⁸².

Salary signifies 'any advantage in money or that can be expressed in money, granted by the employer to the employee as a counterpart for labour, and to which the employee is directly or indirectly entitled through his contract with the employer⁸³'. Thus for example commissions, benefits in kind and fees are considered to be salary, and contributions will be due. Furthermore, employers also have to pay a wage moderation contribution.

⁸² Article 23, Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid voor werknemers, B.S., 2 July 1981.

⁸³ Article 2, Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers, B.S., 30 April 1965. Loonbeschermingswet

This wage moderation contribution amounts to 5,67% of the worker's salary, augmented with 5,67% of the employers' benefits due, including the contributions for the paid educational leave (0,08%) and a contribution for the closure of companies (a general contribution of 0,14% for companies with 1 to 19 employees or of 0,15% for companies with 20 or more employees, and a special contribution of 0,15% for the financing of the temporary unemployment scheme and of the seniority complement for older unemployed persons). This contribution is raised with 0,40% for the employees subject to the laws concerning the annual vacation for salaried workers. The following contributions are also due: a contribution of 0,05% for childcare and a contribution of 0,10 % for high-risk groups. When employers are employing ten or more employees on 30 June of the previous year, they have to pay an extra contribution of 1,69% for the unemployment scheme.

In order to promote employment, various measures are taken to reduce the amount of the social security contributions to support certain target groups: long-term job-seekers, older employees, first employments, young employees, low salaries, high salaries and employees benefiting from the collective labour time reduction or from the four days/week system in their company. Furthermore, a contribution of 0,01% of the total payroll is reserved for financing the Asbestos fund as from 1 April 2007. There is also a system for structural reduction of social security contributions, planning to definitively reduce the employer's social security contributions and therefore to increase the competitiveness of companies.

However, since a few years, the Belgian social security system is also funded by alternative financial resources, with the aim to reduce employers' contributions. Instead of taxing labour, alternative financing such as a percentage of VAT revenue is transferred to social security⁸⁴. Furthermore, the employer does also have to pay tax contributions, when hiring an employee. The employer has to deduct a wage contribution on the net taxable wage (= gross wage, reduced with the social security contributions of the employee) and transfer this to the institution of income taxes. The wage tax is in fact an advanced payment on the income tax. The actual payment will take place two years later, on the moment of the tax declaration. The height of the wage tax is legally determined and varies according to level of income and the family situation⁸⁵.

C. Workers:

49. Which benefits do workers have when working as a self-employed person as regards tax and social security payments?

On the one hand, employees have to pay social security contributions to the National Social Security Office as well as their employer. For employees the Act on the National Office for Social Security⁸⁶ and the Act on the general principles in social security⁸⁷ is also applicable.

As from 1 January 2008 the following employees' social contribution percentages are applicable:

⁸⁴ X, *Everything you have always wanted to know about social security*, Brussel, Federale overheidsdienst sociale zekerheid, 2008, 10-11.

⁸⁵ <http://minfin.fgov.be/>

⁸⁶ Besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, *B.S.*, 30 December 1944; Wet 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, *B.S.*, 25 July 1969

⁸⁷ Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid voor werknemers, *B.S.*, 2 July 1981.

Sector	Employee social contribution (%)
1. Sickness and invalidity	
- medical care	3,55
- invalidity benefits	1,15
2. Unemployment	0,87
3. Pensions	7,50
4. Family benefits	0,00
5. Occupational accidents	0,00
6. Occupational diseases	0,00
Total (= 'global contribution')	13,07

On the other hand, self-employed workers have to join and pay social contributions to a social insurance fund for self-employed people or to the National Auxiliary Fund for Social Insurance of the Self-Employed, controlled by the National Institute for the Social Security of the Self-employed. The National Institute for the Social Security of the Self-employed has to collect the social contributions and coordinate the payment of benefits (except for medical care and invalidity benefits).

For their main self-employed activity, the self-employed workers have to pay a quarterly social security contribution to the social insurance fund they are affiliated with. This contribution is calculated on the net professional labour income of the self-employed person in the third calendar year ('reference year') preceding the year during which the contributions were paid. Starting self-employed workers don't have a 'reference year'. Therefore, they must pay provisional social security contributions.

The amounts in 2008 (income of 2005) are:

Professional income per ceiling	Amount of the contribution
Up to 11.420,41 EUR	628,12 EUR per quarter
Between 11.420,41 EUR and 49.315,46 EUR	22% of net professional income
Between 49.315,46 EUR and 72.675,38 EUR	14,16% of net professional income
More than 72.675,38 EUR	0 EUR

Persons, who have a self-employed additional activity next to their main occupation (as an employee) and retired people who still have a professional activity, don't have to pay social security contributions or have to pay only a reduced contribution as long as their annual income does not exceed a particular amount established every year⁸⁸.

Furthermore, in Belgium, one has to distinguish direct tax namely Value Added Tax (VAT) from indirect tax (personal tax).

The personal tax an employee pays in comparison with a self-employed person is exactly the same. A self-employed person in a one-men corporation resorts also under the same tax regime as an employee. The tax rate is progressive and 50% for incomes higher than 31.700 EUR.

Tax rates for corporations (corporation tax) with more than one shareholder are fairly lower, from 24,98% to maximum 33,99%. Consequently, for self-employed workers it can be beneficial to start a corporation when the income is increasing.

⁸⁸ X, *Everything you have always wanted to know about social security*, o.c., 10-12.

Comparison personal tax and corporation tax for tax year 2008⁸⁹:

Profits subject to tax	Personal tax - self employed in one-men business	Corporation tax
2.500 EUR	425 EUR	1.197,25 EUR
10.000 EUR	2.371,04 EUR	3.746,50 EUR
20.000 EUR	9.014,83 EUR	7.145,50 EUR
30.000 EUR	15.529,38 EUR	10.544,50 EUR
50.000 EUR	29.538,88 EUR	17.342,50 EUR
100.000 EUR	64.788,88 EUR	34.337,50 EUR

What can be regarded as a benefit for self-employed workers in a one-men corporations over workers is the direct tax regime. Self-employed workers can deduct the VAT, while employees can't.

Moreover, both employees and self-employed workers can reduce professional costs (such as car expenses, restaurant costs,...) from their gross income in order to pay less taxes. However, for self-employed workers it's easier to proof their professional expenses than for employees⁹⁰.

Given the above information, it is clear that the self-employed workers have to pay lower social security contributions in comparison with the employees while there are only slide differences between employees and self-employed workers regarding payment of taxes.

50. Which disadvantages do self-employed workers in construction have concerning tax and social security payments, compared to direct employees?

Both employees and self-employed workers can benefit from:

1. sickness and disability insurance;
2. old-age and survivor's pensions;
3. child benefits and allowances.

While employees can also benefit from unemployment benefits, annual vacation and insurances for occupational accidents and diseases, self-employed workers can profit from an insurance in case of bankruptcy and a scheme for benefits after a childbirth or an adoption⁹¹.

An overall financial management finances the different social security sectors according to their treasury needs. In the social security scheme of the employees, every social security sector has a specific semi-public payment institution ('parastatal') responsible for the payment of benefits:

- National office for family allowances (RKW – ONAFTS);
- National employment office (RVA – ONEM);
- National pension office (RVP – ONP);
- National institute for sickness and invalidity insurance (RIZIV – INAMI);

⁸⁹ http://www.genv.be/pages/info_belastingen.html

⁹⁰ <http://minfin.fgov.be/>

⁹¹ X, *Everything you have always wanted to know about social security*, o.c., 2.

- Fund for accidents at work (FAO – FAT);
- Fund for occupational diseases (FBZ – FMP);
- National office for annual vacation (RJV – ONVA).

In the social security scheme of self-employed workers, the National Institute for the Social Security of the Self-employed coordinates the payment of benefits (except for medical care and invalidity benefits). The paid benefits are family benefits, maternity aid, benefits from the insurance for bankruptcy and unconditional pensions⁹².

However, the brief overview of the different categories of expenses for provisions of social security distributed between employees and self-employed, teaches us that the expenses for provisions for direct employees are much lower than the expenses for provisions for self-employed workers.

The different categories of expenses for provisions (2007)⁹³:

2007	General scheme for employees	General scheme for self-employed workers
Health care provisions	18.331.432 EUR	1.287.221 EUR
Health care benefits	3.773.269 EUR	252.764 EUR
Pensions	15.713.717 EUR	2.318.897 EUR
Child benefits and allowances	3.724.223 EUR	350.258 EUR
Occupational accidents	165.807 EUR	
Occupational diseases	312.462 EUR	
Unemployment	8.363.610 EUR	
Bankruptcy		2.338 EUR
Total	50.384.520 EUR	4.211.478 EUR

Furthermore, there are no significant disadvantages regarding tax payments although dividends distributed by a Belgian company are in principle liable to a withholding tax with a rate of 25% (ordinary shares) deducted at source. However, in case of a self-employed person, this rate is reduced to 15% when certain conditions are met⁹⁴.

D. Pensions:

51. Are self-employed people compulsorily insured in the state pension system? If not, can they voluntary chose to pay into the state pension system?

Self-employed workers as well as employees care compulsorily insured in the state pension system. To obtain a retirement pension, they have to meet a number of conditions. First, self-employed workers, as well as employees must have reached a given pension age (64 years for women and 65 years for man) and second, they can no longer exercise a professional activity.

⁹² X, *Everything you have always wanted to know about social security, o.c.*, 7-8.

⁹³ M. BREDA, RIZIV, dienst voor geneeskundige verzorging, actuaariaat, budget

⁹⁴ Article 269, paragraph 3, Wetboek van 10 april 1992 van de inkomstenbelastingen 1992, B.S., 30 July 1992

52. Do other (e.g. private, paritarian) occupational pension systems for self-employed workers exist?

A self-employed can built up a supplementary pension capital by means of the system of Free Supplementary Pension for Self-employed (VAPZ)⁹⁵, which is part of the second pillar.

53. Are there any imminent changes in the pension system that might have an impact?

Due to the Generation Pact, workers are entitled to a sectoral conventional early retirement which differs from the official legal early retirement.

The CLA of 21 June 2007⁹⁶ and 22 February 2008⁹⁷ specify the provisions of the conventional early retirement⁹⁸ in the building sector⁹⁹. The early retirement entitles the older worker, in case of dismissal, to receive a supplementary allowance from his former employer next to his unemployment benefit. Consequently, a early retirement differs from the traditional pension (based on built up pension rights) because it is a special allocation of unemployment benefits. The early retirement is conventional when it is based on a collective labour agreement. The workers of the building sector are, according to the collective labour agreements, entitled to a fulltime or a part time conventional early retirement as soon as they reach the age of 58 , 57 or even 56 years. However, strict rules apply to receive the supplementary allowance from the Fund for the Living Security.

When the worker wants to be allowed to receive a conventional early retirement at the age of 58 years, he has to proof minimum 25 working years as an employee (of which 10 years in the building sector) by means of "legitimation" cards¹⁰⁰. In the framework of the Generation Pact¹⁰¹, workers whose early retirement takes effect after 31 December 2007, have to justify in some cases no less than 35 working years as an employee. If the worker becomes disabled at the age of 56 years, he is entitled to a early retirement when he can proof his disability by means of a medical attest and at least 33 working years as an employee (of

⁹⁵ Vrij Aanvullend Pensioen voor Zelfstandigen

⁹⁶ Koninklijk besluit van 2 juni 2008 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 21 juni 2007, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de toekenning aan sommige bejaarde arbeiders van een aanvullende vergoeding (brugpensioen) ten laste van het "Fonds voor bestaanszekerheid van de werklieden uit het bouwbedrijf", B.S., 13 August 2008

⁹⁷ Koninklijk besluit van 12 augustus 2008 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 22 februari 2008, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de toekenning van een aanvullende vergoeding (brugpensioen) ten laste van het "Fonds voor bestaanszekerheid van de werklieden uit het bouwbedrijf" voor ontslagen arbeiders van 56 jaar en ouder met een loopbaan van 40 jaar, B.S., 9 September 2008

⁹⁸ Collectieve arbeidsovereenkomst nr. 17, gesloten op 19 december 1974 in de Nationale Arbeidsraad tot invoering van een regeling van aanvullende vergoeding ten gunste van sommige bejaarde werknemers indien zij worden ontslagen, algemeen verbindend verklaard bij koninklijk besluit van 16 januari 1975, B.S., 31 January 1975

⁹⁹ Koninklijk besluit waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst nr. 92 van 20 december 2007, gesloten in de Nationale Arbeidsraad, tot invoering van een regeling van aanvullende vergoeding voor sommige oudere werknemers die worden ontslagen, ter uitvoering van het interprofessioneel akkoord van 2 februari 2007, B.S., 21 February 2008

Article 110-111, Wet van 26 maart 1999 betreffende het Belgisch actieplan voor de werkgelegenheid 1998 en houdende diverse bepalingen, B.S., 1 April 1999

Article 3, Koninklijk besluit van 3 mei 2007 tot regeling van het conventioneel brugpensioen in het kader van het generatiepact, B.S., 8 June 2007

¹⁰⁰ A legitimating card is a document, delivered by the Fund for the Living Security, on which the number of effective working days or equalized days in service of one or more construction companies is indicated. This document gives the worker the right to receive all kinds of social allowances such as a early retirement, frost and/or snowfall compensations,...

¹⁰¹ Koninklijk besluit van 3 mei 2007 tot regeling van het conventioneel brugpensioen in het kader van het generatiepact, B.S., 8 June 2007

which 10 years in the building sector) through legitimization cards or when he can validate 40 working years as an employee (of which 10 years in the building sector) also by using legitimization cards. Moreover, a worker can take a half time early retirement when he is 57 years old and when he can proof at least 25 working years as an employee (of which 10 years in the building sector and no less than one year seniority in a company where the rules of labour performance decrease are applicable) via legitimization cards.

Since 1 January 2007, the system of supplementary pensions in the building sector, the so-called second pillar, changed profoundly.

The new rules regarding supplementary pensions are formulated in the CLA of 16 November 2006¹⁰² and are conform to the Act of Supplementary Pensions¹⁰³. The most important modification is the replacement of the former repartition¹⁰⁴ system by a capitalisation¹⁰⁵ system. In this new sectoral supplementary pension scheme, workers are entitled to a capital or a supplementary interest in proportion with the number of working years in the building sector (validated by legitimization cards) when they reach their pension age. Furthermore, the field of application has become wider. All workers with an employment contract, entering into service with one of the employers in the building sector, are automatically included in the new pension scheme as from 1 January 2007. For the rest of the workers, a transition period is foreseen. However, the regulation for workers, who are already pensioned, and widows stays the same. A special sectoral pension fund (Pensio B) was specifically founded by and for the building sector, in order to finance this pension scheme. This pension fund is financed by the Fund for the Living Security¹⁰⁶ and not by the employer or the employee.

This two imminent changes increases the gap between self-employed workers and employees because self-employed workers are not entitled to a early retirement nor a supplementary pension (unless they built up a supplementary pension capital by means of the system of Free Supplementary Pension for Self-employed (VAPZ)¹⁰⁷, also part of the second pillar).

54. Are you aware of any available data concerning the percentage of self-employed construction workers that have state and/or additional pension provisions?

According to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw) there are no available data concerning the percentage of self-employed construction workers that have state and/or additional pension provisions.

E. Unemployment benefits:

55. Do formally self-employed people qualify for unemployment benefits?

In principle, only employees are entitled to unemployment benefits. Self-employed workers can never resort to the unemployment scheme, as they do not pay any contributions for it.

¹⁰² Koninklijk besluit van 13 juni 2007 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 16 november 2006, gesloten in het Paritair Comité voor het bouwbedrijf, tot oprichting van een "Fonds voor bestaanszekerheid voor de aanvullende pensioenen van de werklieden uit het bouwbedrijf", B.S., 9 July 2007

¹⁰³ Wet van 13 maart 2003 betreffende de aanvullende pensioenen en het belastingstelsel van die pensioenen en van sommige aanvullende voordelen inzake sociale zekerheid, B.S., 15 mei 2003

¹⁰⁴ Repartition: financing the pensions of the non-actives with pension contributions on the wage of the actives.

¹⁰⁵ Capitalisation: saving and investing reserves in order to pay future pensions.

¹⁰⁶ Fonds voor Bestaanszekerheid voor de Aanvullende Pensioenen van de Werklieden uit het Bouwbedrijf

¹⁰⁷ Vrij Aanvullend Pensioen voor Zelfstandigen

Moreover, self-employed workers cannot benefit from special sectoral unemployment advantages in case of bad weather, frost and/or snowfall.

The Fund for the Living Security grants the advantage of the stamps for bad weather inactivity to construction workers. This advantage is stipulated in the CLA of 25 March 2004¹⁰⁸ and the CLA of 13 September 2007¹⁰⁹. All construction workers are entitled to a fixed premium of 50% in compensation for salary loss in case a started working day has to be interrupted because of bad weather and amount to 2% of the gross wages declared to the social security institutions.

Furthermore, a frost and/or snowfall compensation is awarded to construction workers holding a “claimant” legitimation card, valid for the current working year, and who are made temporarily redundant by their employer during periods of heavy frost and/or heavy and persisting snowfall, acknowledged by the Fund for the Living Security as giving right to compensations for the compensation zone comprising their place of employment, provided they are made temporarily redundant due to frost and/or snowfall, or for the compensation zone comprising their place of residence, provided they are made temporarily redundant for any other reason. The frost and/or snowfall compensations are not awarded for the periods of rest as mentioned in the Royal Decree Number 213¹¹⁰ nor for the periods of rest in execution of the collective labour agreement of the Joint Committee 124. Moreover, there is a special complementary compensation for loss of working hours due to frost (as a compensation for the loss of holiday money during frost periods).

Other advantages are a “construction-compensations” for temporary (economic, bad-weather) and full unemployment and a dismissal compensation (in case of employment less than 20 years).

56. Are there any forms of other financial support or benefits they qualify for when without work?

For self-employed workers can benefit from a social insurance in case of bankruptcy. Normally, self-employed workers are not entitled to unemployment benefits unless they have already worked as salaried persons before. In that case, they can still be entitled to unemployment benefits on particular conditions.

F. Health insurance:

57. How are the self-employed health insured in comparison to direct employees?

Health insurance is destined to salaried and self-employed workers. Just like salaried persons, the self-employed are entitled to medical care as well. Until 31 December 2007, only covered the “big risks” were covered by the compulsory insurance scheme for self-employed workers. Nevertheless, self-employed workers had the choice to complete their coverage with the “small risk” by paying an extra contribution. “Small risks” include for example dental care, medicines, certain small operations, nursing care, physiotherapy, orthopaedic care, trusses certain laboratory analyses, doctors' consultations and visits.

¹⁰⁸ Koninklijk besluit van 1 april 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 25 maart 2004, gesloten in het Paritair Comité voor het bouwbedrijf, betreffende de toekenning van getrouwheidszegels en weerverletzegels, *B.S.*, 21 June 2006

¹⁰⁹ CLA of 13 September 2007, <http://www.werk.belgie.be/CAO/124/124-2007-004204.pdf>

¹¹⁰ Koninklijk besluit nr. 213 van 26 september 1983 betreffende de arbeidsduur in de ondernemingen die onder het paritair comité voor het bouwbedrijf ressorteren, *B.S.*, 7 October 1983.

As from 1 January 2008, self-employed workers are entitled to the same reimbursement rates for all medical care and medicines as those for the employees, without having to pay their mutual insurance fund for a voluntary insurance. Consequently, in the sector medical care of the health insurance, there is only one scheme left, namely for employees and self-employed workers, which will guarantee the same rights for all. In other words, the self-employed workers are no longer obliged to pay their mutual insurance fund for a voluntary insurance. Moreover, the insurance for “small risks” will automatically be included in the contribution they pay to the mutual insurance fund they are affiliated with.

With regard to sickness benefits, a distinction should be made between employees and self-employed workers. Just like employees, self-employed workers have to join an insurance institution and fulfil a 6- month waiting period. For employees, incapacity for work consists of two periods namely the primary incapacity for work and the period of invalidity.

However, in the self-employed workers' scheme, there can be distinguished three periods of incapacity for work:

- a non-indemnified period of one month;
- an indemnified period of primary incapacity for work of eleven months;
- an invalidity period, starting after one year of primary incapacity for work.

Although, self-employed workers don't benefit of the insurance against accidents at work, occupational diseases and accidents on the way to and from work, they can always fall back on the sickness and invalidity insurance from the self-employed workers' scheme. However, the system of “occupational risks” is very interesting because in comparison with the sickness and invalidity insurance the 90 % of the wage instead of 60 % is reimbursed to the employee as from the 31th day.

According to the trade union ACV, this difference in reimbursement can lead to difficult situations because self-employed workers and especially false self-employed workers can also have accidents at work, occupational diseases or accidents on the way to and from work. For example the phenomenon of “painters' disease” (due to chemicals used by painters) is a recognized occupational disease in the building sector. However, (false) self-employed workers are also capable to get this kind of sickness. Because they can't benefit of the system of “occupational risks” they fall back on the sickness and invalidity insurance from the self-employed workers' scheme, in which they are only reimbursed 60 % of their wage instead of 90 % as from the 31th day.

58. What happens when self-employed are without work?

Health insurance is not only destined to employees or self-employed workers but also to the unemployed. So when a self-employed person is without work, he is still entitled to health care.

G. Health and safety:

59. Do the same health and safety rules/regulations apply for self-employed and employees?

The same health and safety rules or regulations of the employee are applicable to self-employed workers, who work on temporary or mobile construction sites, due to the Act of 4

August 1996¹¹¹. A temporary or mobile construction site means any construction site at which building or civil engineering works are carried out. A list of such works is laid down by the Royal Decree of 25 January 2001¹¹².

This health and safety rules are applicable to ordinary employers and to self-employed workers and employers, who themselves work on the site together with their employees. For the project, the project supervisor, who is responsible for execution, the contractors and the subcontractors should also be able to seek the assistance of other contractors and subcontractors.

Within the meaning, a subcontractor means a contractor who carries out work for another contractor. Different levels of responsibility should be established, reflecting the place which each contractor occupies in the project chain in order to insure the safety and health of all workers. This scheme assumes the existence of a vertical relationship in which a project supervisor responsible for execution seeks the help of contractors. Nevertheless, it may be possible that the client himself chooses various contractors without procuring the services of a project supervisor. In this case, there is a horizontal relationship between different contractors operating on the same level. Then, it has to be accepted that the client himself plays the role of project supervisor responsible for execution of the project.

The project supervisor responsible for execution, who is at the top of the pyramid, has the following obligations:

- he must comply with the safety and health requirements himself;
- he must guarantee that they are complied with by all contractors and subcontractors involved in executing the project, even if he only has an indirect link with these contractors or subcontractors;
- he must also ensure compliance by the workers.

The contractor has the following obligations:

- he himself must comply with the safety and health requirements;
- he must ensure that his own direct subcontractor complies with them;
- he must also guarantee that his subcontractor's subcontractors and every other subcontractor down the line comply with them;
- he must ensure that the workers comply with them;
- he must ensure that anyone sending workers to him complies with them.

The subcontractor has the following obligations:

- he himself must comply with the safety and health requirements;
- he must guarantee that his own direct subcontractor complies with them;
- he must guarantee that his own workers and his direct subcontractor's workers comply with them;
- he must guarantee that anyone sending workers to him complies with them.

In the public sector, the Act on public procurement¹¹³ remains in force. However, in applying this Act the principles laid down in the Act of 4 August 1996 have to be taken in account.

Imprisonment from eight days to one year and/or a fine of 50 to 2000 EUR (multiplied by 5.5) can be imposed on any persons involved in carrying out the project who fail to comply with

¹¹¹ Hoofdstuk V "Bijzondere bepalingen betreffende tijdelijke of mobiele bouwplaatsen", Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, *B.S.*, 18 September 1996

¹¹² Koninklijk besluit van 25 januari 2001 betreffende de tijdelijke of mobiele bouwplaatsen.,*B.S.*, 7 February 2001

¹¹³ Wet van 24 december 1993 betreffende de overheidsopdrachten, *B.S.*, 22 January 1994

the provisions on workers' welfare, according to article 87 of the Act of 4 August 1996¹¹⁴. Moreover, an administrative fine of 250 up to 5000 EUR can also be imposed on them.

60. Are there specific health and safety provisions which only apply to employees?

The act of 4 August 1996¹¹⁵ on welfare of workers in the performance of their work and its implementing decisions is the basic act regarding safety and health at work for employees. This act applies to every employer who employs workers. The employer is responsible for introducing a welfare policy and for adapting this in light of practical experience gained, the development of working methods, and working conditions. Furthermore, he is responsible for the structural planning of prevention via a dynamic risk control system regarding "welfare". This concept includes safety at work, the protection of the health of workers at work, hygiene at work, psycho-social stress caused by work, ergonomics, embellishment of the workplace and measures of the undertaking regarding the environment.

In the building sector, the Royal Decree of 31 August 2005¹¹⁶ stipulates important obligations regarding the use of stepladders and means of protection during temporary activities at heights. The employer is obliged to use suitable employment tools and means of protection in order to prevent accidents at work and occupational diseases. According to the trade union ABVV, this is an important Royal Decree that should also be applicable on (false) self-employed workers.

61. Are the self-employed integrated in workplace risk assessments?

According Act of 4 August 1996, in order to control risks through detection and analysis and the adoption of specific measures of prevention, they employer must make an analysis of the risks within his company on the basis of which he can take preventive measures. Such a preventive measure may consist of making personal protection equipment available free of charge for example protective clothing and shoes. In the building sector this is the availability of protective clothing is stipulated in a CLA. However, (false) self-employed workers are not integrated in this kind of workplace risk assessments. Only the employees are taken into account.

Consequently, according to ACV, the risk assessments give an incorrect view on the risks within the company. Furthermore, the (false) self-employed cannot benefit from the protective measures.

62. Are the self-employed integrated in the information and training on health and safety or medical surveillance? Please explain the procedure?

In accordance to the Act of 4 August 1996, the employer should also take the measures necessary to ensure that the workers have sufficient information and instructions about protective equipment at work. The information and instructions should be written down and be understandable to the workers concerned. However, in this information sessions, the self-employed workers are not officially integrated. Furthermore, self-employed person are not allowed to join the training on health and safety and they cannot benefit from the medical surveillance¹¹⁷.

¹¹⁴ Hoofdstuk V "Bijzondere bepalingen betreffende tijdelijke of mobiele bouwplaatsen", Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, *B.S.*, 18 September 1996

¹¹⁵ Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, *B.S.*, 18 September 1996

¹¹⁶ Koninklijk besluit betreffende het gebruik van arbeidsmiddelen voor tijdelijke werkzaamheden op hoogte, *B.S.*, 15 September 2005

¹¹⁷ Koninklijk Besluit van 28 mei 2003 met betrekking tot het gezondheidstoezicht, *B.S.*, 16 juni 2003

Nevertheless, according to article art 33 §1 of the Act of 4 August 1996, each employer must found an Intern Service for Prevention and Protection¹¹⁸. Furthermore, the employer is obliged to have at least one prevention adviser, who offers assistance to the direction and management with the execution of the welfare policy.

In a company with less than 20 employees, the employer is obliged to fulfil the role of prevention adviser. The Royal Decree of 27 March 1998¹¹⁹ stipulates that the prevention advisor must follow courses on health and safety. Consequently, this is the only way, to follow this kind of courses as a self-employed person.

VI. Abuse of the statute of self-employment (cause, consequences, forms of abuse)

§ 1. Causes

63. Which factors do you think trigger an increase of self-employment and bogus self-employment in your country¹²⁰?

According to Bouwunie this (above) legal construction (see supra question 39) in which free movement of workers is prohibited, and the free movement of services/freedom of establishment is allowed, causes the increase of bogus self-employment of migrant workers from the new EU countries in the Belgian building sector.

§ 2. Forms of abuses

64. In which forms and shapes can bogus self-employment be encountered in the construction sector of your country? (Note: Question already asked in A2.5)

See supra question 8: employees with an additional self-employed activity and cooperative societies are the forms of bogus self-employment that are encountered in the construction sector of Belgium.

The following case illustrates the construction of cooperative societies in which the phenomenon of bogus self-employment is common. A Belgian director had a affiliation contract with three Polish persons, who had become shareholders. The court concluded bogus self-employment. The Polish persons were economical dependent because they didn't have any clients, they worked with the tools of the firm, they didn't took any financial risk and the prices were set by the principal. The facts that the Polish persons didn't know the content of the affiliation contract and the Belgian director determined the payments, working hours and working places were sufficient enough as proof of the judicial subordination.¹²¹

¹¹⁸ Interne Dienst Preventie en Bescherming

¹¹⁹ Koninklijk besluit van 27 maart 1998, betreffende de Interne Dienst voor preventie en bescherming op het Werk, *B.S.* 31 March 1998; Errata: *B.S.*, 11 June 1998

¹²⁰ e.g. economic downturn, tax system, old age, redundancy/ self-employed statute as condition for work

¹²¹ Rb. Antwerpen (13^{de} kamer) AR 03/3476/A, 14 december 2004, onuitg.

§ 3. Consequences

65. What do you believe are the consequences of bogus self-employment for the construction sector and the country as a whole e.g. in terms of Social inclusion - Health and safety on sites - Vocational training system/apprenticeship places - Quality of work?

Concerning the consequences of bogus self-employment for health and safety on sites: see supra question 59.

Regarding vocational training and apprenticeship places, the self-employed workers don't have the right to follow a course organised by the Fund of craft education formally known as "Fonds voor vakopleiding". The regulations concerning craft education is laid down in a sectoral CLA of the Joint Committee 124 of the building sector.

As regards the quality of work, according to ACV to long working days that self-employed workers perform in order to reach a result are not beneficial for the quality of work.

VII. The role of intermediaries (such as agencies) in bogus self-employment

§ 1. General questions

66. Please explain in detail how legal and illegal intermediaries work in organising (bogus) self-employment in the construction industry (agencies, gang masters, subcontracting, seconding).

In big construction firms, it's not always easy to distinguish who has the authority over the employees. There are difficulties to see the difference between subcontracting and putting workers at the disposal of another party. In order to know if there is a case of bogus self-employment, one has to proof the authority of the employer-contractor.

According to the Social Inspection, gang masters often bring (bogus) self-employed workers and users together in illegal constructions, in which neither fiscal nor social security contributions are paid. This can take the form of slave-trade because in some cases the (bogus) self-employed worker is not paid because the result of his work was not "sufficient" enough. When they receive payments, those payments are lower than the minimum wage or they receive a minimum payment but work long days.

Today gang masters are replaced by illegal intermediaries or agencies. Also intermediaries such as seconding agencies play a significant role in hiring employees of the new-EU-countries such as illegal seconding agencies from the Netherlands, who are seconding Polish bogus self-employed workers to Belgian users.

Furthermore, the (bogus) self-employed workers (often non EU-nationals) can constitute, together with a Belgian director, a Belgian company (often a limited liability cooperative society or a limited liability partnership), in which they function as working partners and shareholders. Normally, in this construction, intermediaries will be called upon, in order to make the link with the actual employer unclear.¹²²

¹²² J. BUELENS, *Tewerkstelling van buitenlandse arbeidskrachten in de bouwsector: de constructies van deloyale concurrentie juridisch belicht en doorprikt (?)*, Antwerpen, Universiteit Antwerpen, 2007, 145.

67. Is working through certain forms of subcontracting or interim agencies regulated in your country?

Working through certain forms of subcontracting is regulated by the “article 30bis system”. This is the regulation regarding joint liability and the duty to deduct social security contributions when the contractor has social security debts.

This “article 30bis system” is stipulated in the Act of 27 June 1969¹²³ and due to the judgment of the Court of Justice of 9 November 2006 (C-433/04)¹²⁴ about the fiscal equivalent of this system (Royal Decree of 29 December 1992¹²⁵), this “article 30bis system” was also modified by the Program Act of 21 December 2007¹²⁶. The “article 30bis system” applies to contractors, subcontractors and their principals. This system is specifically introduced for the building sector in order to combat the practices of social fraud by gang masters.

As from 1 January 2008, the system of the joint liability and deductions on invoices for social security and tax debts, does no longer apply for not registered contractors. Although, a registration can be useful for the contractor in order to be requested by clients, who want to profit from VAT tariff reduction, construction premiums and/or allowances.

The phenomenon of seconding agencies that puts (bogus) self-employed workers at the disposal of a user is not regulated in Belgium. However, the phenomenon of interim agencies is regulated by the Act of 24 July 1987¹²⁷ on temporary work, temporary employment and the putting of workers at the disposal of another party. “Interim work” is a form of temporary work permitted by law that is performed by a worker (the temp) for the account of an employer (the temp agency) for a third party (the user). “Putting workers at the disposal of another party” means a situation in which a worker is lent out by his usual employer to a user who employs the worker within his company and exercises a part of the employer's authority that is normally exercised by the actual employer over that worker. This construction can lead to abuses such as cases in which the worker doesn't earn the wage/salary to which he would normally have been entitled to if he had been engaged by the user as a permanent employee. For this reason, putting workers at the disposal of another party is in principle prohibited.

This prohibition is stipulated in the Act of 24 July 1987¹²⁸ on temporary work, temporary employment and the putting of workers at the disposal of another party. Only in accordance with conditions laid down by law, derogation from this prohibition of the putting of workers at the disposal of another party is possible.

Sending temporary personnel is only possible for the execution of certain types of temporary work, permitted by law. The most important cases of temporary work permitted by law are the following:

- the replacement of a permanent employee;
- to meet the demands of a temporary increase in work;
- to ensure the execution of exceptional work.

¹²³ Wet 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid, *B.S.*, 25 July 1969

¹²⁴ ECJ, Case C-433/04, Commission/Belgium, 9 November 2006

¹²⁵ Koninklijk besluit nr. 1, 29 december 1992 met betrekking tot de regeling voor de voldoening van de belasting over de toegevoegde waarde, *B.S.*, 31 December 1992

¹²⁶ Programmawet van 27 april 2007, *B.S.*, 8 mei 2007

¹²⁷ Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, *B.S.*, 20 August 1987

¹²⁸ Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, *B.S.*, 20 August 1987

However, the agreement for temporary work is always supposed to be an employment contract.

During the period of temporary work, the temporary employee is entitled to the same salary as that which he would have had if he would have been hired by the user as a permanent employee.

Interim work is prohibited when there is a strike or a lock-out in the user's undertaking. Sending temporary personnel is also forbidden in some sectors.

In the Belgian building sector interim work is a recent phenomenon. Only at the end of 2002 the ban of interim work was ended because the employers had difficulties with finding workers. Furthermore, the allowance of interim work proves to be useful in the fight against different kinds of social fraud such as gang masters. However, the use of interim work in the building sector is very strictly regulated. The appealing to interim workers must conform to the strict conditions and modalities as specified in the CLA of 24 June 2005¹²⁹. Interim work is only allowed to replace a permanent worker who is unfit for work or in case of a temporary increase in the work volume. The interim worker must have the same rights as the permanent worker in order to avoid the undermining of the existing social regulation. Only companies, who have an authorisation of the competent region to operate as a temporary work agency for the building sector, are allowed to put workers at disposal of construction companies. The rules relating to authorisation conditions and procedures fall within the competence of the different Regions (Brussels Capital Region, Flemish Region, Walloon Region).

In case of violation of the legal or sectoral provisions, the employment contract between the temporary work agency for building and the interim worker is terminated. In this case, the interim worker will be bound to the user by an employment contract for an indefinite term. In this case the building company may no longer call appeal to interim workers for a period of 12 months.

68. Which obligations have to be fulfilled by an agency when engaging (bogus) self-employed workers?

The phenomenon of seconding agencies that put (bogus) self-employed workers at the disposal of a user is not regulated in Belgium. Only the use of interim agencies is regulated. According to the Act of 24 July 1987, the obligations that have to be fulfilled by interim agencies in order to engage temporary workers is concluding two agreements. On the hand, the intention to conclude a contract for temporary work must be written no later than on the date when the employee enters into the service of the interim agency for the first time. On the other hand, the contract for the temporary work itself must be written no later than within two working days from the date on which the worker enters into the user's service.

69. Which liabilities do the principal contractor and the client have in this respect?

Under the system of joint liability¹³⁰, the client or the contractor who, for specified construction works, appeals to a contractor or subcontractor is jointly liable for the deduction of a certain percentage of social security and tax contributions if the contractor has social and fiscal debts at the moment when the invoice is paid. On the one hand, in case of social security debts of the contractor or subcontractor, the customer or contractor has to deduct 35 % of the indebted amount (VAT excluded) and has to transfer this amount to the social

¹²⁹ Koninklijk besluit van 2 oktober 2006 waarbij algemeen verbindend wordt verklaard de collectieve arbeidsovereenkomst van 24 juni 2005, gesloten in het Paritair Comité voor het bouwbedrijf, tot vaststelling van de voorwaarden en modaliteiten van uitzendarbeid in het bouwbedrijf, *B.S.*, 9 September 2006

¹³⁰ Programmawet van 27 april 2007, *B.S.*, 8 mei 2007

security institutions. On the other hand, in case of tax debts of the contractor or subcontractor, the costumer or contractor has to deduct 15 % of the indebted amount (VAT excluded) and has to transfer this amount to the tax institutions. However, in case the amounts of the social security or tax debts are smaller than respectively 35 % or 15 % at the moment of the payment of the invoice, only the actual amount has to be deducted. When the amount of the invoice is smaller than 7.143 EUR, the deduction must always be 35 % of the invoice amount. There is only a joint liability when the deductions and transfers were not accomplished, while it was obliged. The joint liability applies for the social security and tax debts of the (sub)contractor, during the conclusion of the contract as well as during the execution of this contract.

Furthermore, there is also a system of chain liability when there has been an appeal to several subcontractors for the execution of construction works, although only the relation between the client and the contractor or the contractor and the subcontractor will be taken into account. When the sub-subcontractor has a social security or tax debt, the subcontractor, who is the direct contracting partner, must do a deduction on the indebted amount. When the subcontractor neglects this obligation, this will be qualified as a social security or tax debt of the subcontractor himself. This implicates that the contractor, who is the direct contracting partner of the subcontractor, must also do a deduction on the indebted amount. When the contractor also ignores his obligation, he becomes jointly liable for the social security and tax debts of the subcontractor and the sub-subcontractor although there is no direct relation with the sub-subcontractor.

Bogus self-employment was concluded in the following case in which a chain construction had been set up. The principal contractor concluded a sub-contract agreement with a Belgian subcontractor. This Belgian subcontractor worked together with two Polish persons, who were, according to him, the working partners of a sub-subcontractor. However, the court decided that there was no written and preliminary permission to proof this. Moreover, the invoice couldn't proof this either because the Belgian subcontractor was also director of the sub-subcontractor. Eventually, the court concluded bogus self-employment. The two Polish workers were economical dependent because they didn't have any clients, they worked with the tools of the firm, they didn't took any financial risk and the prices were set by the Belgian subcontractor. Furthermore, the Belgian subcontractor was re-qualified as their employer because he told them what to do, transported them to the working place and supervised their work¹³¹.

70. Which control systems have been set up to monitor the use of bogus self-employed workers?

In order to control if the registered or not registered (sub)contractor has any social security or tax debts, efficient databanks are needed. Because the fiscal databank is not already operational, the Program Act of 21 December 2007 stipulates that the fiscal equivalent of the deduction obligation and the joint liability will be postponed until 1 January 2009 at the latest. However, the new "article 30bis system" is already operational as from 1 January 2008 because the National Office for Social Security already owns a databank.

71. What preventive and/or repressive measures exist to combat the intermediaries who are found to organise bogus self-employed workers?

See infra, question 72.

¹³¹ Rb. Antwerpen (13^{de} kamer) AR 05/4171/A, 19 juni 2006, onuitg.

72. What are the sanctions or consequences for the intermediaries, workers and companies when working against the law in these triangular labour relations?

First of all, according to the Act regarding employment relations¹³² the employment relationship will be re-qualified. Because the self-employed worker will be re-qualified as an employee and the seconding agency as an interim agency, the Act of 24 July 1987¹³³ will become applicable¹³⁴. Intermediaries, who second their workers to third parties against the articles 31 and 32 of the Act of 24 July 1987¹³⁵ on temporary work, temporary employment and the putting of workers at the disposal of another party, may be prosecuted under criminal law. The same applies to users who, contrary to the law, employ workers seconded to them.

In such cases, the user may also be deemed to be linked to the worker under an employment contract for an indefinite period from the commencement of the performance of work.

Imprisonment from eight days to one month and/or a fine of 26 to 500 EUR (multiplied by 5,5) can be imposed on any person involved in carrying out the project who fail to comply with the provisions of the Act of 24 July 1987. This fine will also be multiplied by the amount of workers, who were employed against the law. These sanctions are also applicable on the user, who employs the workers against the articles 31 and 32 of the Act of 24 July 1987 (except for article 32, § 4, second, which relates to the application by the user of the law regarding the rules of Welfare at work).

Moreover, an administrative fine of 50 up to 1.250 EUR can also be imposed on them. This administrative fine will also be multiplied by the amount of workers, who were employed against the law.

However, the joint liability for the payment of social security contributions which is stipulated in the Act of 24 July 1987 (Art. 31, § 4) as a sanction in case of illegally putting workers at the disposal of another party is not applicable in the case of international seconding of the employee to the user because this leads indirectly to also implementing the Belgian social security legislation which is contrary to article 14,1,a of the Regulation No 1408/71¹³⁶. The claim of the social security contributions itself, as a sanction for illegally putting workers at the disposal of a user is not contrary to the Regulation 1408/71. However, in the framework of seconding in accordance with the European rules, the Belgian judge is not competent to claim the payment of social security contributions in Belgium. Nevertheless, the criminal and administrative sanctions on the prohibition to put workers at the disposal of a user remain applicable¹³⁷.

¹³² Titel XIII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

¹³³ Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, *B.S.*, 20 August 1987

¹³⁴ In case of seconding this act will become applicable because it is an act of public order

¹³⁵ Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, *B.S.*, 20 August 1987

¹³⁶ Verordening (E.G.G.) nr. 1408/71 van de Raad van 14 juni 1971 betreffende de toepassing van de sociale zekerheidsregelingen op werknemers en zelfstandigen, alsmede hun gezinsleden die zich binnen de Gemeenschap verplaatsen, *P.B. L* 149, 5 July 1971.

¹³⁷ Cass. (3e k.) AR S.02.0039.N, 2 juni 2003 (R.S.Z. / Frangema Staal) Arr. Cass. 2003, afl. 6-8, 1310; <http://www.cass.be> (12 augustus 2003); Pas. 2003, afl. 5-6, 1099; R.C.J.B. 2007, afl. 1, 24, noot VAN MEERBEECK, J., MAHIEU, M

73. What is your assessment of the outcome of these preventive and/or repressive measures?

According to ACV the new “article 30bis system” with the limited system of chain liability is not sufficient enough because only the relation between the client and the contractor or the contractor and the subcontractor will be taken into account. On the other hand, according to the Social Inspection, the new “article 30bis system” is efficient enough, because the customer or the contractor always have to check if the contractor or subcontractor have social and fiscal debts at the moment when the invoice is paid. This implies that there exist a higher risk that the customer or the contractor will be jointly liable.

VIII. Prevention and combating measures

§ 1. Prevention measures on national levels

74. Which penalties for non-compliance with legislation on self-employment exist?

As a penalty for non-compliance with the legislation on self-employment, the statute of the self-employed person will be re-qualified to the statute of an employee. This will lead to consequences concerning social security and tax contributions, labour and criminal law.

In case of requalification of the self-employed to an employee, social security contributions namely the employees and employer’s contributions, increased with 10% surcharge and 7% interests, will be retroactively claimed by the National Social Security Office. The term of limitation of the recovery of the contributions, the surcharges and the interests, is 5 years and starts as from the last day of the month following the quarter of a year in which the contributions are indebted. The contributions that are paid by the bogus self-employed to the National Institute for the Social Security of the Self-employed, can be reclaimed within the period of 5 years (term of limitation) taking effect on the day that the contributions are paid.

Also tax contributions such as advance levy of industry will be retroactively claimed in case of requalification of a self-employed to an employee because the income will be reclassified as a wage. Furthermore the bogus self-employed does no longer have a VAT-duty and must request the cancellation of this duty.

On the level of labour law, the contract will qualified as an employment contract as from the beginning of the employment, which implicates wage claims, claims concerning holiday pay and resignation remuneration,... However, the term of limitation is short, namely 1 year after the termination of the employment agreement or 5 years after the fact from which the claim originates during the execution of the employment contract. In order to get round the term of limitation, one can appeal on a claim ex delicto. Not paying holiday pay or year end premiums can be sanctioned by criminal law. In this case the material element (for instance not paying holiday pay) or the intentional element (deliberately not paying) of the crime must be proven.

Moreover, in case the self-employed is re-qualified to an employee, the employer can be prosecuted by the criminal court because of non-compliance with the rules concerning declaration and payment of social security contributions. Imprisonment from eight days to three months and/or a fine of 26 to 500 EUR (multiplied by 5,5) can be imposed on any

person. This fine will also be multiplied by the amount of employees, who were employed against the law, up to maximum 100.000 EUR¹³⁸.

In the near future, a Commission regarding the regulation of employment relations will be established¹³⁹. This Commission will have two divisions namely an normative and an administrative division. The normative division will examine certain sectors and professions where the risk of bogus self-employment exists. The administrative division will be responsible for “social rulings”. This implies that the administrative commission will judge certain individual files by means of a binding advise. Additionally, after a social ruling, social amnesty can be possible regarding the above mentioned punitive consequences in case of requalification.

When the bogus self-employed person is re-qualified as an employee by means of a social ruling, only the social security contributions namely the employees and employer’s contributions, without any surcharges or interests, will be retroactively claimed by the National Social Security Office¹⁴⁰.

75. How widely are they applied?

According to ABVV, these penalties for non-compliance with legislation on self-employment are widely applied and are a terrible example for other employers who are planning to work with bogus self-employed workers.

76. Are there any functioning tools or regulations that have shown to be successful in reducing the levels of bogus self-employment?

As from 1 April 2007, there is a general obligation to notify every form of employment in Belgium namely foreign employed or self-employed workers to the Belgian authorities by means of the LIMOSA-system¹⁴¹. Moreover, the trade unions or the employers’ organisations have the right to claim labour rights of the seconded employees (or seconded bogus self-employed workers, who are re-qualified as employees) before a Belgian court¹⁴². In addition, the Social Inquiry and Tracing Service (SIOD) was founded in 2006 as successor of the Federal Coordination Committee in order to combat social fraud in a more efficient way¹⁴³. The above taken measures, are conditions to open the borders of Belgium completely for free movement of workers of the new EU-member states as from 1 May 2009. However, there is one condition that isn’t fulfilled yet namely the condition regarding the joint liability of the contractor or the principal in case when the rules on minimum wages and labour regulations are breached. According to ABVV and ACV, the latter condition must be fulfilled in order to efficiently combat social dumping and more specifically bogus self-employment.

According to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw) there is still a lot of legal insecurity because there are no efficient functioning tools or regulations that were successful in reducing bogus self-employment.

¹³⁸ T. MESSIAEN en V. DOOMS, *o.c.*, 66-106.

¹³⁹ The Commission will be established as soon as a Royal Decree is issued.

¹⁴⁰ Titel XIII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

¹⁴¹ Koninklijk besluit tot uitvoering van het Hoofdstuk 8 van Titel IV van de programmawet (I) van 27 december 2006 tot voorafgaande melding voor gedetacheerde werknemers en zelfstandigen, *B.S.*, 28 March 2007

¹⁴² Article 8bis and 8ter, Wet van 5 maart 2002 tot omzetting van de richtlijn 96/71/EG van het Europees Parlement en de Raad van 16 december 1996 betreffende de terbeschikkingstelling van werknemers met het oog op het verrichten van diensten, en tot invoering van een vereenvoudigd stelsel betreffende het bijhouden van sociale documenten door ondernemingen die in België werknemers ter beschikking stellen, *B.S.*, 13 March 2002

¹⁴³ Titel XII van de Programmawet (I) van 27 december 2006, *B.S.*, 28 December 2006

77. Are there any existing measures already in place which, when used more efficiently- would help to combat bogus self-employment?

According to Bouwunie, the existing LIMOSA-system can be useful in order to combat bogus self-employment, when this system would be used more efficient. Furthermore, the E101 form must become electronically consultable on the internet instead of on paper.

78. Which new measures do you believe have to be introduced to combat bogus self-employment?

According to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw), by means of a Royal Decree specific criteria for the building sector must be added to the four general criteria (see supra question 16) of the new Act on employment relations in order to combat bogus self-employment. Furthermore, the Commission regarding the regulation of employment relations (with the normative and administrative division) must be established in order to social ruling and amnesty.

The Social Inspection recommends a good collaboration between the inspections and the Court of commerce on the level of transfers of information regarding the Crossroads Bank for Enterprises (CBE) in order to check the statute of self-employed workers.

§ 2. Prevention measures on national levels

79. Which measures do you believe should be adopted on the European level to combat bogus self-employment?

According to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw), the Social Inspection and Social Security of the Self-employed an efficient collaboration between the competent institutions of the different Member States is very important in order to check if E101 form are subject to fraud. The different social (and tax) inspections of the different Member States must conclude collaboration agreement to work together more efficiently.

An umbrella social/fiscal inspection covering all the social/fiscal inspections of the European Union would be ideal to combat bogus self-employment. Furthermore, Confederatie Bouw and Bouwunie advise the implementation of the LIMOSA-system on a European level. Furthermore, Bouwunie recommend the implementation of electronic E101 forms in this European database.

80. How should those measures be applied in the national context of your country?

According to Confederatie Bouw, all the social/fiscal inspections must respect a code of conduct on the national level which obliges to work together with other social/fiscal inspections in an efficient manner. Moreover, ACV recommends the transfer of information regarding employment/self-employment/bogus self-employment by means of cross border databases bases in each Member State.

81. Are there any functioning tools or regulations that have shown to be successful in reducing the levels of bogus self-employment?

On the European level, there are no functioning tools or regulations that have shown to be successful in reducing the levels of bogus self-employment.

BIBLIOGRAPHY

I. LITERATURE

BUELENS, J., *Tewerkstelling van buitenlandse arbeidskrachten in de bouwsector: de constructies van deloyale concurrentie juridisch belicht en doorprikt (?)*, Antwerpen, Universiteit Antwerpen, 2007, 145.

JORENS, Y. en VAN OVERMEIREN, F., *Voorstellen voor een beter evenwicht tussen grensoverschrijdende tewerkstelling en de sociale bescherming*, Basisrapport in het kader van het Project

PODW "Grensoverschrijdende Tewerkstelling in België" i.o.v. de Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg, Gent, 2006, 51.

LORRE, J., Aard van de arbeidsrelatie als deus ex machina, *R.W.*, 1662-1676

MESSIAEN, T. en DOOMS, V., *Schijnzelfstandigheid : balanceren op een slappe koord*, Gent, Larcier, 2005, 16-18.

VAN EECKHOUTTE, W., *Sociaal Compendium Arbeidsrecht 2005-2006*, Mechelen, Kluwer, 2006, nr. 2019

VAN EECKHOUTTE, W., *Sociaal Compendium Arbeidsrecht 2004-2005*, Mechelen, Kluwer, 2005, nr. 6347

VAN EECKHOUTTE, W., DE MAESENEIRE, G., Arbeidsrelatieswet. Het bepalen van de rechtsaard van arbeidsrelaties, *NjW*, 98-119

VAN HOOGENBEMT, H., Zelfstandigheid en schijnzelfstandigheid na de Programmawet (I) van 27 december 2006, *Or.*, 49-65

VAN LIERDE, G. en MONSEREZ, L., "De nieuwe registratieregeling: een voorbeeld van de moeilijke verhouding tussen het vrij verkeer van diensten en de Belgische bouwsector", *Or.* 2008, (121) 122.

X, *Everything you have always wanted to know about social security*, Brussel, Federale overheidsdienst sociale zekerheid, 2008, 10-11.

X, *Voorkoming en bestrijding van schijnzelfstandigheid. Verslag van het Rekenhof aan de Kamer van Volksvertegenwoordigers*, Brussel, Rekenhof, 2004, 8.

X, *De Valks juridisch woordenboek*, Antwerpen, Intersentia, 2004, 354

II. INTERVIEWS

Marie-Paule Smets, Federal Department of Employment, Labour and Social Dialogue, Inspection, Brussels, 17 September 2008

Jona Ceuppens, National Social Security Office, Direction International Relations, Brussels, 2 October 2008

Ivan Grootaers, ABVV (Algemeen Belgisch Vakverbond), Brussels, 30 September 2008

Fabrice Meeuw, ACV (Algemeen Christelijk Vakverbond), Brussels, 17 September 2008

Patrick Franceus, ACV (Algemeen Christelijk Vakverbond), Brussels, 17 September 2008

Luc van Dessel, ACV (Algemeen Christelijk Vakverbond), Brussels, 17 September 2008

Peter Börner, ACLVB (Algemene Centrale der Liberale Vakbonden van België), Brussels, 29 September 2008

Eric Decoo, ACLVB (Algemene Centrale der Liberale Vakbonden van België), Brussels, 29 September 2008

Marc Junius, Confederation Construction (Confederatie Bouw), Brussels, 29 September 2008

Hendrik De Wit, Confederation Construction (Confederatie Bouw), Brussels, 29 September 2008

Jean-Pierre Waeytens, Construction Union (Bouwunie), Brussels, 29 September 2008

Anja Larik, Construction Union (Bouwunie), Brussels, 29 September 2008