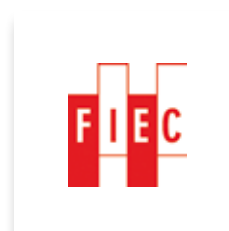


Self-employment and bogus self-employment in the European construction industry

Part 2:

Abstracts of 11 country reports



This report was drafted by order of the European Social partners for the Construction Industry (EFBWW and FIEC)

European Federation
of Building
and Woodworkers



With the financial support of the DG for Employment and Social Affairs of the European Commission



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Editor: Werner Buelen

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

Abstracts of 11 country reports:

Belgium

France

Germany

Ireland

Italy

Poland

Romania

Spain

Sweden

The Netherlands

United Kingdom

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Foreword

There have always been self-employed workers in the construction industry. Craftsmen in particular are often self-employed workers. Approximately 14% of construction workers are self-employed today, according to “Employment in Europe 2005”. The level of self-employed workers is even higher in some countries, such as Greece (40%), Poland (29%), Cyprus, Italy, Portugal, UK.

The distinction between self-employed workers and employees has important fiscal, social and economic consequences:

- *Self-employed workers work under their own professional responsibility and therefore do not work under the authority of the main contractor;*
- *the method of payment of taxes and social security contributions differs between self-employed workers and employees;*
- *Some working conditions (wages, working time, rest periods, ...) governed by collective agreements or by specific legislative, administrative and regulatory provisions are not applicable to self-employed workers;*
- *As a consequence, relatively extended social protection (e.g. in case of temporary employment, occupational accidents, early retirement, ...) is more restricted for self-employed workers.*

During recent years, labour inspectors, tax inspectors and social partners have noticed an increase of self-employed workers in the construction industry. In fact, some countries have chosen to promote self-employment as a driving force for their economic development and therefore easily grant self-employed status to workers.

This increase is also partly due to organizational and economic developments in the construction sector. The main company becomes more and more a ‘user’ and is surrounded by a constellation of companies and self-employed workers with whom they have flexible relations of a purely businesslike character. This development has led to an increase in “dependent self-employment” or “dependent outsourcing”. This economic dependence on one employer blurs the distinction between self-employed and employee status.

Apart from discussions at national levels, the phenomenon of self-employment has also received attention at the European level. In 2002, the European Commission commissioned a study on economically dependent work/ parasubordinate (quasi-subordinate) work. This report was discussed by the European Parliament on 19 June 2003 in a public hearing.

In 2003, the Council also adopted a Recommendation concerning the improvement in health and safety protection at work for self-employed workers (2003/134/EC).

In its resolution on the application of the Posting of Workers Directive, dated 26/10/2006, the European Parliament made a number of clear statements on the issue of self-employment and bogus self-employment.

Finally, various cases at the European Court of Justice are a very important source of information. This research examines the ways in which self-employment and bogus self-employment are characterised in the EU Member States, in line with the interpretation of the ECJ.

Based on this evidence, the European Social Partners for the construction industry (the FIEC and EFBWW) have decided to analyse the legal, regulatory, administrative, organizational and practical aspects of self-employment and bogus self-employment in the construction industry. The survey - which was co-financed by the European Commission - has examined the positive impact of genuine self-employment on the labour market and has also looked at the measures which have been developed to prevent, detect and sanction bogus “self-employed”, as well as their impact. This research was conducted in 11 countries: Belgium, the Netherlands, France, Spain, Germany, Sweden¹, Poland, Romania, the United Kingdom, Ireland and Italy.

The overall comparative analysis has been made available in German, English and French (Part 1). A summary of the various national reports is published separately, in English only, and is available as an Appendix to the comparative analysis (Part 2). Those who wish to consult the complete original national reports can download them from the EFBWW (www.efbww.org) or FIEC (www.fiec.eu) websites.

With this research the European Social Partners for the construction industry (the EFBWW and FIEC) are aligning their discussions with ongoing EU discussions. Finding a balance between promoting genuine self-employment and the free movement of services, and combating bogus self-employment and the exploitation of EU legal loopholes, is an essential dialogue to which the EFBWW and FIEC is committed with the aim of developing a common approach for the benefit of a long term sustainable construction industry. The joint conclusions and recommendations of the EFBWW and FIEC on self-employment and bogus self-employment in the construction industry will be made available as an Appendix to the comparative analysis.

The outcome of this extensive research would not have been possible without the numerous contributions from national experts and contact persons interviewed (officials, employers, workers, ...), who provided valuable input based on their direct practical experience “on the ground”.

Finally a word of gratitude should be given to the steering group members. Without their perseverance and valuable contributions, the study would not have been achieved.

Werner Buelen
Program manager

¹ The abstract from Sweden is not published in this publication but will be made available together with the Swedish report on the EFBWW (www.efbww.org) or FIEC (www.fiec.eu) websites.

Experts Report

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

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

February 2009

I. The demarcation between direct employment/genuine self-employment and genuine self-employment/bogus self-employment, bogus self-employment and the impact of regulation and deregulation

1.1. Demarcation between direct employment/genuine self-employment

The demarcation between direct employment and genuine self-employment is the link of subordination. In cases of direct employment there is a relationship of subordination between the employee and the employer. On the one hand, an employee is defined (in the Program Act of 27 December 2006) as a person, who commits himself to an employment agreement, in exchange for a wage, under the authority of another party, the employer, for the purpose of accomplishing a job. On the other hand, an employer can be described as a natural or legal 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 other kind of agreement. Furthermore, an employment agreement is typical of direct employment. But also the concept of a self-employed person is defined (in the Program Act of 27 December 2006) as a natural person, who practises an employment activity outside the authority of an employer and who is not committed by a statute.

1.2. Demarcation between genuine self-employment/bogus self-employment

While there is no link of subordination in cases of genuine self-employment, in the case of bogus self-employment, somebody voluntarily or forcedly assumes the status of self-employed, while in reality the person can or should be defined as an employee subordinated to an employer.

1.3. Bogus self-employment and the impact of regulation and deregulation

Before the Program Act of 27 December 2006, the famous case law of the Court of Cassation (namely “kwalificatiearresten” or the qualification judgments) tried to qualify the phenomenon of bogus self-employment. In this case law, the Court of Cassation established certain rules in order to distinguish between direct employment and self-employment. In one of these cases, the court considered that the name/description given by the parties to the agreement, established the quality of the employment relationship, except when the elements would seem to exclude this qualification or appeared contradictory. Consequently, when the parties have qualified their agreement and therefore their employment relation, the National Social Security Office was not in a position to prove the bogus self-employment.

However, according to another judgement, it is up to the National Social Security Office, as a prosecuting party, to prove the existence of an employment agreement. The factual judges must follow the rule that the National Social Security Office must prove that authority can be applicable in case of the execution of the work, or at least that the possibility exists. However, indications of economic dependence are not enough.

Nevertheless, next to the case law of the Court of Cassation, there also exists some legislation to combat the phenomenon of bogus self-employment. The Act of 3 July 1978, article 5bis specifies that additional service performed in the context of a service agreement, will be presumed to have been performed under an employment agreement unless proof to the contrary is provided, if the person for whom said person performs such services is linked to him/her by an employment agreement for the performance of the same activities. Furthermore, according to article 30quater of the Act on social security (RSZ-wet), a person, who has entered into a limited liability 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. Moreover, this article determines that the King must decree the date, when this stipulation will come into force. Unfortunately, until now there is no such Royal Decree.

Last but not least, in order to combat bogus self-employment, the Program Act of 27 December 2006 was enacted. In this Program Act four indicators are specified with the purpose of establishing the link of subordination:

- ◆ The will of the parties as expressed in the agreement, when this corresponds to the concrete execution of the employment agreement;

However, in case of reclassification, not only the name of the document, but the whole written agreement with all the additional clauses will be judged.

- ◆ The freedom to organise the working time;

The existence of an employment contract can be indicated by the following clauses:

- Fixed work time schedules;
- Notification in case of absence;
- The obligation to register work hours;
- No freedom to plan vacations.

These organisational restrictions or commercial duties are taken into account in order to judge the employment relationship.

- ◆ The freedom to organise the work;

The precise job description and instructions by the hierarchical principal are an important indication that there exists an employment relationship.

- ◆ The possibility to execute hierarchic control.

However, these four criteria need not be applied cumulatively and each criterion is not crucial in itself. In addition, the social partners of the building sector have formulated specific sector criteria in order to make a distinction between an employee and a self-employed worker and to add specific criteria (by means of a Royal Decree) to make the Program Act of 27 December 2006 more complete. These specific sector criteria stipulate factual elements of cooperation between parties (as e.g. the obligation to achieve a result, the personal and substantial investment, manifesting as a venture in the presence of the co-contractor or of third parties,...) that can indicate the presence or absence of authority.

II. Labour and market developments

In 2007, there were 208,754 employees and 56,312 self-employed workers, according to the estimations of the employers' organisation Bouwunie, based on statistics of the National Institute for the Social Security of the Self-employed of the National Social Security Office.

Over the last 10 years, the total amount of employees in the building sector has increased continuously, with a significant acceleration over the last two years 2006 (+ 8,000) and 2007 (+6,000). According to the estimates of Confederatie Bouw, in 1997 there were almost 174,000 employees, while this number rose to more than 204,000 in 2007 (+17 %).

However, compared to the number of employees, the total number of self-employed workers has been rising for the last 10 years, from 49,046 in 1997 to 52,230 in 2007, though it follows a completely different pattern. Firstly, the numbers were on the wane until 2002. Afterwards, from 2002 until 2007 they began increasing again, with a big acceleration between 2002 (46,830 ± 50,401) and a moderate acceleration between 2005 and 2006 (50,649 ± 52,217).

The big increase of self-employed workers from 2002 onwards can be linked to the enlargement of the European Union, according to Confederatie Bouw and Bouwunie. Besides, economic tendencies can also play an important role.

No figures are available from other sectors on the evolution of the ratio between self-employment compared to direct employment in order to compare them with the construction sector. Moreover, there are also no figures available, regarding the percentage of bogus self-employed workers. Nevertheless, according to Bouwunie, there is a rise in the number of bogus self-employed persons which can be related to the "enlargement of EU". Also the trade unions (ACV, ABVV and ACLVB) believe that the amount of bogus self-employed persons is increasing due to the phenomenon of posting. Conversely, according to the Belgian Social Inspection and Confederatie Bouw, there is a decrease due to the difficulties of the new EU-members such as Poland to find employers for their own economy.

Furthermore, the number of migrant workers who are working in Belgium is unknown because there are no official figures available. Nonetheless, the employers' organisations (Confederatie Bouw and Bouwunie) as well as the trade unions (ACV, ABVV and ACLVB) assume that there is an increase in migrants from the new EU-countries such as Poland and Romania.

Finally, the latter organisations do not believe that the official figures regarding the number of employees and self-employed persons are completely reliable because these figures are based on estimates and do not cover the EU and non-EU immigrant workers working as directly employed, officially self-employed and bogus self-employed.

III. Cross border employment effects on self-employment and bogus self-employment

As of the 1st of May 2004, the European Union enlarged to include a number of countries (namely: Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary and Slovenia) and as of the 1st of January 2007 Romania and Bulgaria. In Belgium, the free movement of workers is prohibited during a transition period (until 1st of May 2009 and 1st of January 2012 respectively).

However, the free movement of services and the freedom of establishment is applicable from the first day of accession. As a result, employees and self-employed workers from these new European countries are allowed to work in Belgium on a temporary basis as posted workers. According to Bouwunie, the free movement of services/freedom of establishment is responsible for the increase of the number of self-employed and bogus self-employed migrant workers of the new EU-countries in Belgium. However, no official sources/statistics can prove this statement. Moreover, according to ACV, there is a direct link between the immigration of new EU-nationals and the possibility of working as a bogus self-employed. In addition, ACV is aware of special illegal constructions in the building sector in which new EU-nationals are “welcomed” to work as bogus self-employed workers. Furthermore, this is a consequence of the vague criteria stipulated in the new Belgian Program Act regarding labour relations.

Due to cross border employment E101 or E102 forms are abused by bogus self-employed persons. E101 or E102 forms are used when an employee or a self-employed person is posted or works simultaneously in two or more countries. Normally, in order to receive such a form the following posting conditions have to be fulfilled:

- ◆ The maximum duration of the posting has to be 12 months (however prolongation is possible);
- ◆ The method of posting does not allow for the replacement of another posted employee or self-employed person;
- ◆ For a start, the posted employee or self-employed person must be subject to the social security legislation of the country of origin;
- ◆ (In order to prevent bogus self-employment) the employer or self-employed person must exercise a substantial activity and be established in the country of origin;
- ◆ The organic bond between the posting company and the posted employee has to be maintained. (The last statement implies that the employer must be responsible for the employment agreement, recruitment, dismissal and the determination of the nature of the employment.)

As a rule, the social security service of the sending member state, which allocates the E101 form, has to investigate to ensure that the above conditions are fulfilled. Unfortunately, this investigation seldom takes place. Moreover, the organic bond is extremely difficult to establish. In addition, it is difficult for the Belgian social services to check if the employer or the self-employed person exercises a substantial activity in the country of origin, whether social security contributions are paid in the country of origin, and whether the minimum wage envisaged in Belgian is actually being paid. Besides, according to case law of the European Court of Justice (Fitzwilliam, Banks and Herbosch Kiere), a court of the host Member State is not allowed to inspect the validity of an E101 form with regard to the existence of a direct relationship, within the meaning of Article 14(1)(a) of Regulation No 1408/71, read in conjunction with paragraph 1 of Decision No 128, between the company which posted the employee and the posted employee himself.

Consequently, such a form is binding for the competent institutions of the Member State to which these employees are posted, in so far as an E101 form establishes an assumption that posted employees are correctly affiliated to the social security system of the Member State in which the business concern, which posted these employees, is established. Otherwise, the principle that employees are to be covered by only one social security system would be undermined.

Nonetheless, if the competent institution of the host Member State has doubts about the correctness of the facts and of the information contained therein, in particular if the information does not correspond to the requirements of article 14(1)(a) of Regulation No 1408/71, the competent institution which issued the E101 form must review the grounds for its issue and, if necessary, withdraw the form. However, the institutions concerned can refer the matter to the Administrative Commission, when they do not reach an agreement. The host Member State may at least bring infringement proceedings to the European Court of Justice to examine the correctness of the information contained in the E101 form, when the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the applicable legislation. Unless the E101 form has been withdrawn or declared invalid by the authorities of the Member State which issued it, the E101 form issued under Article 11(1)(a) of Regulation No 574/72 binds the competent institution and the courts of the Member State in which the employees are posted. As a result, the competent institution and the courts of the Member State cannot reject the E101 form unilaterally and for that reason cannot require that the posted employees in question be subject to their own social security system. Besides, according to the Banks case, even after the end of an assignment, the possibility exists of issuing an E101 form with retroactive effect. Nevertheless, according to Decision No 181, it is advisable to issue the E101 form before the beginning of the posting. In practice, though, the Administrative Commission does not play its role as mediator, according to the National Office for Social Security. Hence, an efficient collaboration between the competent institutions of the host country and the country of origin is essential. This very cooperation is often considered to be the weak point. In recent years, an efficient collaboration with Polish institutions has been set up.

However, frauds involving E101 forms, with the purpose of employing a bogus self-employed person, are more difficult in the case of simultaneous work as an employee in one country and as a self-employed person in another, according to the National Social Security Office. Where a 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. Therefore, in principle, employee status in one country can guarantee insurance for that same person even when self-employed abroad. However, deviation from this main principle of insurance in the country where the person works as an employee, is possible in several countries.

Furthermore, it is very easy to falsify the E101 form. Firstly, the authenticity is a huge problem as the inspecting bodies almost never see original forms. If the original E101 form exists, the company will keep the document at the head office and the employees concerned will carry a copy with them or a copy will be sent to the competent institution. In addition, it is very simple to download the E101 form freely from the internet and to use this as a fake certificate. Besides, most of the E101 forms are filled in by hand. Lastly, there are also translation problems. This causes difficulties for the competent institutions to verify the validity of the E101 form. Moreover, due to these translation problems, there are a lot of translation expenses. When employees or self-employed workers have a false E101 form at their disposal, the question arises as to which Member State can claim social security contributions. A fake E101 form for a posting means the lack of a posting form although this does not necessarily mean that the posting itself is illegal.

IV. Self-employment in a triangular relation: the role of intermediaries

It is not always easy to distinguish who has the authority over the employees, certainly not in big construction firms. As a result, it is difficult to see the difference between subcontracting and making workers available to another party. Consequently, the authority of the employer-contractor has to be verified in order to know if there is a case of bogus self-employment.

According to the Social Inspectors, gang masters frequently bring (bogus) self-employed workers and users together in an illegal triangular relationship, in which no fiscal or social security contributions are paid. Sometimes, this illegal triangular relationship can take the form of slave-trade because in some cases the (bogus) self-employed workers are not paid because of so-called “insufficient” results of their work. Often, their wages are lower than the minimum wage. Furthermore, as part of the wage, the reimbursement for accommodation and stay is frequently included (sometimes at “Hilton-prices”), while the circumstances of their lodging is miserable and largely overpriced. However, the Collective Labour Agreement (CLA) of the Joint Committee 124 of the building sector (21 June 2007) stipulates that the employer has to bear the costs of lodging and food for employees who are working at a considerable distance from their place of residence. Therefore, these costs cannot be deducted from the wage by the foreign employer.

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

Besides, the (bogus) self-employed workers (often non EU-nationals or new EU-nationals) can set up, 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. Usually, in this set up, illegal intermediaries will be involved, in order to make the connection with the actual employer totally untraceable.

The “article 30bis system”, which is stipulated in the Act of 27 June 1969 and modified by the Program Act of 21 December 2007, was specifically introduced for the building sector in order to combat the practices of social fraud by gang masters. This system applies to contractors, subcontractors and their principals. According to this system, the client or the contractor, who, appeals to a contractor or subcontractor for specified construction works, is jointly liable for the deduction of a certain percentage of social security and tax contributions (respectively 35 % and 15 %) if the contractor has social and fiscal debts at the moment when the invoice is paid. Moreover, chain liability is also possible, 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. However, because only the relation between the client and the contractor or the contractor and the subcontractor will be investigated, the new “article 30bis system” with the limited system of chain liability is not sufficient to combat social fraud, according to ACV. On the other hand, according to the Social Inspectors, there is a higher risk with joint liability, because the customer or the contractor always has to investigate if the contractor or subcontractors have social and fiscal debts at the moment when the invoice is paid.

In Belgium, the phenomenon of posting agencies that put (bogus) self-employed workers at the disposal of a user is not regulated. However, the Act of 24 July 1987 on temporary work,

temporary employment and the putting of workers at the disposal of another party, regulates the phenomenon of interim agencies. In case of an illegal triangular relation in which bogus self-employment is involved, the employment relationship will be re-qualified according to the Act regarding employment relations. The bogus self-employed worker will be re-qualified as an employee and the posting agency as an interim agency. As a result, intermediaries, who post their workers to users and these users, who employ these posted workers, in defiance of articles 31 and 32 of the Act of 24 July 1987 will be prosecuted. However, in the case of international posting, 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 cannot be used to apply Belgian social security legislation which is contrary to article 14,1,a of the Regulation No 1408/71 because the Belgian judge is not competent to claim the payment of social security contributions in Belgium. Nevertheless, according to the judgement of the Court of Cassation of 2nd of June 2003 (R.S.Z./Frangema Staal), the criminal and administrative sanctions remain applicable.

V. Abuse of the status of self-employment (causes, consequences, forms of abuse)

5.1. Causes and origins of bogus self-employment

According to the trade union ACV, the new Program Act concerning employment relations is so vague that it becomes difficult to define bogus self-employed and this can lead to an expansion of this phenomenon. Moreover, the legal insecurity is growing, because there are still no Royal Decrees (containing specific indicators for the construction sector) nor a commission ruling to clarify the difference between an employee and a self-employed.

Furthermore, according to Bouwunie, the transitional measure which prohibits the free movement of workers and allows the free movement of services/freedom of establishment, causes an increase of the number of self-employed and bogus self-employed migrant workers from the new EU-countries in Belgium.

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

- ◆ An employee with a bogus additional self-employed activity;

In this case an employee performs the same activities for the same person firstly as an employee and secondly as a self-employed worker as an additional activity to avoid rules on working time and the payment of social security contributions (see however legal presumption as described above).

- ◆ The structure of a limited liability cooperative society.

In this situation a working member, who does not have a dominant position, will be forced to follow the instructions of the dominant share-holder and has to be considered as an employee instead of a self-employed worker (see also legal presumption as described above).

5.2. Short and long term consequences of bogus self-employment on:

5.2.1. Health and safety

Health insurance is meant for salaried as well as for self-employed workers. Consequently, self-employed workers are also entitled to medical care. However, with regard to sickness benefits, there is a difference between employees and self-employed workers. Self-employed workers have to join an insurance institution and fulfil a 6- month waiting period, just like employees.

But, for self-employed workers, there are three different periods of incapacity for work, whereas for employees, incapacity for work is of two different kinds, namely primary incapacity for work and a period of invalidity. The three periods of incapacity of work applicable to the self-employed are:

- ◆ 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.

For employees, the first month is covered by their employer, who continues to pay their salary. Self-employed workers do not benefit from the insurance against accidents at work, occupational diseases and accidents on the way to and from work. They can only fall back on the sickness and invalidity insurance of the self-employed workers' scheme. Unfortunately, the sickness and invalidity insurance is less beneficial than the system of "occupational risks" because only 60 % of the wage, instead of 90 %, is reimbursed to the self-employed worker as of the 31st day of incapacity to work.

As stipulated in the Act of 4 August 1996, the same health and safety rules of employees are applicable to self-employed workers, who work on temporary or mobile construction sites. A temporary or mobile construction site can be described as any construction site at which building or civil engineering works are carried out. The Royal Decree of 25 January 2001 contains a list of such works.

Besides, the Royal Decree of 31 August 2005 specifies important obligations regarding the use of stepladders and means of protection during temporary activities at heights, carried out in the building sector. Unfortunately, this Royal Decree is not applicable to self-employed workers.

Furthermore, the Royal Decree of 27 March 1998 stipulates that the employer is obliged to fulfil the role of prevention adviser in a company with less than 20 employees. Moreover, this employer, who is a self-employed worker, has to follow courses on health and safety.

5.2.2. Vocational training

Self-employed workers are not entitled to follow vocational training organised by the Fund of craft education formally known as "Fonds voor vakopleiding". The regulations concerning craft education are laid down in a sector's CLA of the Joint Committee 124 of the building sector.

5.2.3. Pensions

Self-employed workers as well as employees are entitled to a legal state pension, which is part of the first pension pillar. Moreover, the self-employed can also build up a supplementary pension capital by means of the system of Free Supplementary Pension for Self-employed (VAPZ), which is part of the post pillar.

However, self-employed construction workers are not entitled to the supplementary pensions of the building sector as formulated in the CLA of 16 November 2006 which is equivalent to the Supplementary Pensions Act. In this new sector supplementary pension scheme, only 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.

Self-employed workers are neither entitled to a conventional legal or sector early retirement. As stipulated in the CLA of 21 June 2007 and 22 February 2008, only workers have the right to the conventional early retirement for the sector, which differs from the official legal early retirement, as soon as they reach the age of 58, 57 or even 56 years. When the worker wants to be entitled to receive a conventional early retirement at the age of 58 years, he has to prove at least 25 working years as an employee (of which 10 years in the building sector) by means of “legitimation” cards. Furthermore, 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. When the worker becomes disabled at the age of 56 years, he is entitled to early retirement when he can prove his disability by means of a medical test and at least 33 working years as an employee (of which 10 years in the building sector) by means of legitimization cards or when he can validate 40 working years as an employee (of which 10 years in the building sector) also by means of legitimization cards. Besides, a worker can also take a half time early retirement when he is 57 years old and when he can prove 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 decrease in labour performance apply) by means of legitimization cards.

These two important changes (as stipulated in CLA of 16th of November 2006, CLA of 21st of June 2007 and 22nd February 2008) within the building sector increases the gap between self-employed workers and employees because self-employed workers are not entitled to early retirement nor to a supplementary sector pension. Nevertheless, the self-employed can build up a supplementary pension capital by means of the system of Free Supplementary Pension for Self-employed (VAPZ).

5.2.4. Unemployment benefits

Because self-employed workers do not pay any contributions for the unemployment scheme, they are not entitled to unemployment benefits. However, in case they have already worked as salaried persons before, they still have the right to receive unemployment benefits when particular conditions are met. Furthermore, in case of bankruptcy, self-employed workers are entitled to a social insurance.

Additionally, in case of bad weather, frost and/or snowfall, self-employed workers cannot benefit from special sector unemployment advantages. The Fund for the Living Security grants the advantage of stamps for bad weather inactivity only to construction workers.

This sector unemployment advantage is specified in the CLA of 25th of March 2004 and the CLA of 13th of September 2007. When a working day, that has already begun, has to be interrupted because of bad weather, all construction workers receive a fixed premium of 50 % in compensation for salary loss and this premium amounts to 2 % of the gross wages declared to the social security institutions.

Moreover, a frost and/or snowfall compensation is granted to construction workers, who have a “claimant” legitimization card, applicable for the present working year, and who are

made temporarily redundant by their employer during periods of heavy frost and/or heavy and persistent snowfall, acknowledged by the Fund for the Living Security as granting the right to compensations for a compensation area which includes their place of employment, provided they are made temporarily redundant due to frost and/or snowfall, or if the compensation zone includes their place of residence, provided they are not made temporarily redundant for any other reason. However, the frost and/or snowfall compensations are not awarded for the periods of rest envisaged by the collective labour agreement of the Joint Committee 124 nor for the periods of rest mentioned in the Royal Decree Number 213. In addition, there is a special complementary compensation for loss of working hours because of frost (as a compensation for the loss of holiday money during frost periods).

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

5.2.5. Social security

Self-employed workers as well as employees can benefit from:

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

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

When the social security benefits for employees are compared with those of self-employed persons, one can conclude that self-employed workers receive fewer benefits because they pay also fewer contributions.

VI. Assessments of prevention and combating measures to tackle bogus self-employment

6.1. Investigations, checks and control

A special “blinker” procedure exists, to check if there is a case of bogus self-employment. If the authorities discover through the self-employed affiliation form that the declared self-employed job activity was formerly executed as an employee under the applicable social security scheme for employees, the National Institute for the Social Security of the Self-employed will send a copy of this affiliation form to the National Social Security Office.

Furthermore, if the National Social Security Office disputes the affiliation, they are obliged to communicate this to the National Institute for the Social Security of the Self-employed before the end of the postal month following the date of the forwarding. Moreover, in order to prevent ungrounded affiliations, the affiliation form of the self-employed person will be destroyed by the National Institute for the Social Security of the Self-employed.

Inspections are carried out by the National Social Security Office while the National Institute for the Social Security of the Self-employed can also perform investigations and practical checks. Besides, there are all kinds of inspections such as fiscal inspections, social security inspection, inspection on compliance with social laws, medical and technical inspection. These inspections can check all kinds of documents such as E101 forms and accounts when inspecting self-employed workers.

6.2. Prevention

There is a general obligation to notify every form of foreign employment and self-employment in Belgium to the Belgian authorities by means of the LIMOSA-system. Furthermore, the trade unions or the employers' organisations have the right to defend the labour rights of the posted employees (or posted bogus self-employed workers, who are re-qualified as employees) before a Belgian court. Besides, in order to fight social fraud in a more efficient way, the Social Inquiry and Tracing Service (SIOD) was founded as the successor of the Federal Coordination Committee. The measures illustrated above were taken in order to be able to open the borders of Belgium entirely, as from the 1st of May 2009, to the free movement of employees and self-employed workers of the new EU-member states. However, there is another condition that has not been fulfilled yet, as no agreement could be reached, namely that concerning the joint liability of the contractor or the principal in cases where the rules on minimum wages and labour regulations are breached. According to the trade unions, in order to combat social dumping efficiently and more specifically bogus self-employment, the latter condition must be introduced.

6.3. Combating and sanctions

According to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw), due to the lack of efficient tools and regulations, there is still a lot of legal insecurity when attempting to combat bogus self-employment on a national and European level.

First of all, the different social and tax inspections of the different Member States must work together more efficiently through collaboration agreements.

Additionally, according to Confederatie Bouw, all the social and tax inspections must respect a code of conduct on a national level which requires them to operate together with other social and tax inspections of other member states in a better organised manner. An umbrella social and tax inspection covering all social security and tax inspections for the European Union would be ideal to combat bogus self-employment. Besides, on the transfer of information level with the Crossroads Bank for Enterprises (CBE), the Social Inspectors recommend a close collaboration between the inspections and the Chamber of commerce in order to investigate the statute of self-employed workers more efficiently.

In order to check if E101 forms are subject to fraud, a well-organised collaboration between the competent institutions of the different Member States is essential, according to all the social partners (ABVV, ACV, ACLVB, Bouwunie and Confederatie Bouw), the Social Inspection Office and Social Security of the Self-employed. Moreover, according to Bouwunie, the paper E101 form has to be changed into an electronic form, consultable on the internet. Moreover, in order to transfer information regarding employment/self-employment/bogus self-employment more efficiently, ACV recommends cross border databases based in each Member

State. If the existing LIMOSA-system could be used more efficiently, according to Bouwunie, this system could be more useful in order to combat bogus self-employment. Furthermore, Confederatie Bouw and Bouwunie suggest the implementation of the LIMOSA-system at a European level. In addition, Bouwunie recommends the implementation of electronic E101 forms linked to this European LIMOSA-database.

As a sanction for non-compliance with the Program Act on employment relationships, the statute of the self-employed person will be re-qualified to the statute of an employee. In case of requalification there will be consequences on the level of social security, tax, labour and criminal law.

In case of requalification of the self-employed to an employee, the employees' as well as the employer's social security contributions, increased with a 10 % surcharge and 7 % interests, will be claimed retroactively by the National Social Security Office. The term of limitation of the recovery of the social security contributions, the surcharges and the interests, is 5 years starting on the last day of the month of the quarter of the year for which the social security contributions are owed. Within this period of 5 years, the social security contributions that are paid by the bogus self-employed to the National Institute for the Social Security of the Self-employed, can be reclaimed from the day that the contributions are paid.

Besides, in the case of the requalification of a self-employed person to an employee, also tax contributions such as advanced industry payments will be retroactively claimed because the income will be reclassified as a wage. Moreover, the bogus self-employed must request the cancellation of their VAT-duty.

Furthermore, as regards labour law, the service contract will re-qualified as an employment contract from the start of the employment, which involves wage claims, claims concerning holiday pay and resignation remuneration, Compared to the limitation applicable in social security law, the limitation period applicable in labour law 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 avoid this short term of limitation, one can appeal on an ex delicto basis because failure to pay holiday pay or yearend 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 verified.

Moreover, the employer can be prosecuted by the criminal court due to non-compliance with the rules concerning declaration and payment of social security contributions where the self-employed worker is re-qualified as an employee. The sanction will be imprisonment from eight days to three months and/or a fine of 26 to 500 EUR (multiplied by 5.5). Because this fine will be multiplied by the amount of employees, who were employed against the law, this fine can amount up to maximum 100.000 EUR.

As stipulated in the Program Act on employment relationships, a commission to assess the regulations governing employment relations will be created. This Commission will be divided into a normative and an administrative division. On the one hand, the normative division has to examine certain sectors and professions where the risk of bogus self-employment exists. Furthermore, the administrative division has to be responsible for "social rulings". Consequently, the administrative commission has to judge certain individual files by means of a binding advice. Moreover, social amnesty can be possible regarding the above mentioned

punitive consequences when the bogus self-employed person is re-qualified as an employee after a social ruling. In case of a social ruling, only the social security contributions i.e. the employees' and employer's contributions, without any surcharges or interests, will be retroactively claimed by the National Social Security Office.

In order to combat bogus self-employment more efficiently, the four general criteria of the new Program Act on employment relations, have to be backed by specific criteria for the building sector to be added by means of a Royal Decree.

VII. Conclusions and recommendations of the expert

With regard to genuine self-employment, the most important difference with direct employment is the relationship of subordination between the employee and the employer.

Self-employed workers do not have any labour rights, compared to those directly employed. Moreover, self-employed workers receive less social security benefits compared to employees because they also pay less social security contributions.

The phenomenon of bogus self-employment can be described as the situation in which somebody voluntarily or forcedly assumes the statute of a self-employed, while in reality, there is a link of subordination with the client. Often, the wage of a bogus self-employed is lower than the minimum wage.

Over the years, the phenomenon of bogus self-employment has increased and taken different forms such as bogus additional self-employed activity and the structure of a limited liability cooperative society. Frequently, intermediaries such as posting agencies are involved in illegal triangular relationships. Furthermore, it can be assumed that the transitional measures, which prohibit the free movement of workers and allow the free movement of services/freedom of establishment, in the context of the expansion of the European Union, cause an increase of the number of (bogus) posted self-employed migrant workers from the new EU-countries to Belgium.

The existing legislation that has been created to combat the phenomenon of bogus self-employment, has to become more efficient by means of Royal Decrees. Consequently, in the context of article 30quater of the Act on social security (RSZ-wet), the King must decree as soon as possible a date to make this stipulation come into force. Furthermore, by means of a Royal Decree, specific criteria, that provide a clear distinction between an employee and a self-employed worker, have to be formulated by the social partners of the building sector and introduced in order to clarify the four existing indicators included in the Program Act of 27 December 2006 (the will of the parties, the possibility to execute hierarchic control, the freedom to organise the work and the working time).

A well-organised collaboration between the different social and tax inspections of all the Member States, can be strongly recommended and may be achieved through collaboration agreements and a code of conduct. Furthermore, the establishment of an umbrella social and tax inspection system covering all the social and tax inspections of the European Union would be advisable to combat bogus self-employment more effectively. Moreover, at a national level, a good collaboration between the social and tax inspections and the Chamber of commerce, can be recommended, in order to investigate the statute of self-employed workers more efficiently by means of the Crossroads Bank for Enterprises (CBE).

Where cross border employment is concerned, E101 forms are often abused and falsified by bogus self-employed persons. Luckily, fraud of E101 forms is more difficult in case of simultaneous work as an employee in one country and as a self-employed person in another because the self-employed worker will be only insured under the legislation of the country where he works as an employee. An efficient collaboration between the competent institutions of the different Member States is essential in order to investigate fraud and falsifications of the E101 form. Moreover, it is advisable to replace the paper version of the E101 form with an electronic form, in order to make easy consultations possible on the internet.

As of the 1st of May 2009, Belgium will open its borders entirely to the free movement of employees and self-employed, if four conditions are fulfilled. Three of these four conditions are already met namely the LIMOSA-duty to notify every form of foreign employment and self-employment in Belgium to the competent authorities, the existence of the opportunity for trade unions or the employers' organisations to defend the labour rights of the posted employees (or posted bogus self-employed workers, who are then re-qualified as employees) before a Belgian court and last but not least the establishment of the Social Inquiry and Tracing Service (SIOD) as a successor to the Federal Coordination Committee. The only condition that has not been implemented yet is the condition regarding the joint liability of the contractor or the principal in cases where the rules on minimum wages and labour regulations are violated.

Moreover, on a European level, cross border databases based in each Member State can be useful to transfer information regarding employment/self-employment/bogus self-employment more efficiently. Consequently, the existing LIMOSA-system can be implemented on a European level in order to use this database more efficient. Furthermore, in this European LIMOSA-database the implementation of electronic E101 forms can be recommended.

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Experts Report

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

Sandrine GINESTE

January, 2009

I. The demarcation between direct employment/ genuine self-employed and genuine self-employment/bogus self-employment

1.1. *Direct employment:*

Although the French labour statute is drawn up by national laws, regulations or collective agreements, none of them provides a definition of direct employment

That role of defining direct employment was taken over by case law which progressively defined direct employment.

The case law assumes the existence of a contractual employment relationship if three components apply simultaneously:

- ◆ Performing labour for a third person;
- ◆ Payment of a wage;
- ◆ Establishment of a subordinate relationship (defined by Art. L.8221-6 of the Labour Code).

The employer is defined as the party of the employment contract that has three exclusive rights over the employee: the right to give orders, the right to control the execution of his orders, the right to sanction a default in the execution of orders imparted.

As the definition is quite broad, it is the role of the court to establish whether the three rights are properly enforced and to control their effectiveness.

As for employees, they have been defined since 1931 by the Court of Cassation (Civil Supreme Court) as necessarily bound by a tie of labour subordination to the employer¹. As a result, the employment contract is a contract that places the employee under the authority, direction and supervision of the co-contracting party.

1.2. *Self-employment:*

A recent study by the Ministry of Labour² assesses the situation of self-employment in France and proposes ways to improve the situation for genuine self-employed people. The report also evaluates the importance of the “grey zone” between direct employment and self-employment and proposes a new status between both statuses, namely: “the economically dependant workers”.

Genuine self-employment has been defined by national law. Unlike employment, self-employment is not drawn up by the Labour Code but by common rules concerning contracts for enterprises (Civil Law).

The scope of self-employment concerns all the people that perform labour for someone else, in exchange for a wage, in an independent manner and using its own methods and tools. Thus, the main criterion to define self-employment is the absence of subordination. To decide whether a situation falls within the scope of employment or self-employment, adjudicators will use the criterion defining employment contracts in order to distinguish between a self-employment contract and a labour employment contract.

Since 1997, French law uses the category of ‘concealed labour’ which encompasses the majority of undeclared labour practices including bogus self-employment.

The ‘concealed labour’ category contains two types of situations:

- ◆ The ‘**concealment of activity**’ (when profit-oriented activities are managed in such a manner that they intentionally breach tax laws or socio-legislative rules);
- ◆ The ‘**concealment of an employment relationship**’, which encompasses ‘bogus self-employment’.

Concealment of an employment relationship is often used in order to avoid complying with the obligations defined by the Labour Code and in order to avoid payment of taxes and social security contributions.

A bogus self-employee is considered as a genuine self-employee as long as the contract has not been re-established as an employment contract.

As for genuine self-employment, bogus self-employee will also respect the two following obligations (Labour Code art. L8221-6):

- ◆ Being registered with the relevant professional registers, depending on the sector and activity and at the URSSAF (which is the French public authority in charge of collecting social tax and social insurance contributions from self-employed persons);
- ◆ Having an activity in accordance with what has been declared.

But if in fact the self-employed is in a state of subordination toward the so-called contractor (i.e.: the employer), the originator of the situation can be prosecuted for concealed employment³ and the contract has to be re-established as an employment contract.

The social security Code⁴ defines four types of self-employment categories:

- ◆ Craft-industry professionals;
- ◆ Industrial and commercial professionals;
- ◆ Independent professionals (‘professions liberals’ such as lawyers, architects, surgeons, etc.);
- ◆ Agricultural professions.

With regard to bogus self-employment, there are no specific pre-established conditions. A bogus self-employment situation exists whenever the conditions defined above are fulfilled.

Over the years, the employee status has provided the worker which a much greater degree of protection than the self-employed one. This situation has led adjudicators to recognise employee status to many ostensibly self-employed situations. Recently, the social protection of the self-employed has been widely reinforced. This was the reason for the creation of the RSI (Social Regime for the self-employed)⁵ in 2008. This regime ensures payment for retirement, sickness, and maternity benefits and collects the social contributions of the self-employed.

Affiliation to RSI is compulsory for the self-employed in the construction sector. The contribution to the Regime is based on the worker’s professional income.

1.3. Semi-dependent workers:

In France, there is no specific requirement for written labour contracts. If a person is working in conditions which fulfil the requirements of a labour contract without a formally written contract, the judge will re-qualify it as a labour contract.

Semi-dependant workers are also envisaged and protected under the French legal system. According to case-law⁶, a person “working in conditions similar to a labour contract without however having formally underwritten such a contract” will be considered as an employee by the adjudicator. The court only defines an employment contract based on factual criteria.

1.4. Undeclared labour:

The Law in favour of small and medium size enterprises (2005-882 of the 2nd of August 2005) has redefined undeclared work under the category of illegal labour.

This illegal work category encompasses: - “Concealed labour”: which was defined by an Act⁷ as an activity intentionally hidden to avoid payments of taxes or social contributions. It covers a wide range of offences: firstly, employers who do not register with the trade, company or professional registers; secondly, those who do not declare their activity or income to the URSSAF, and finally, employers who under declare the number of working hours their employees perform for their company.

Other situations have also been listed as illegal work: bogus self-employment, the illegal accumulation of employment relations (*cumul irrégulier d’emplois*), fraud in connection with social wages, fraud in connection with social benefits (*fraude aux revenus de remplacement*), the illicit supply of workers (*prêt illicite de main d’oeuvre*), trafficking of workers (*délit de marchandage*), law infringements in connection with the employment of foreigners, fraud in connection with the employment of foreign enterprises on French soil (*fraude liée à l’intervention des entreprises étrangères sur le territoire français*).

1.5. “Subcontracting”

is defined as an “operation in which a contractor assigns the responsibility of the execution of a contract to another contractor through a subcontract. The second contractor is termed the subcontractor”⁸.

In the context of a subcontract, the subcontractor is free to take any initiative or decision in order to fulfil the contract. The fact that the main entrepreneur provides the materials required does not change the status of the contract. On the contrary, the subcontractor cannot be just a manpower provider unless the subcontractor’s company is also a temporary work agency. Similarly, the subcontractor cannot be just a provider of building material. Consequently, the elements of a subcontracting contract differ from the elements included in a sales agreement (price fixing, cession, etc.).

Furthermore, the subcontractor cannot be a representative/agent (*mandataire*) of the main entrepreneur.

Another economic or labour relationship is the ‘temporarily posted workers’ category. It is defined as the situation in which a worker is sent to France in order to fulfil a mission by an employer that is regularly established abroad. This status is classified under the 96/71 European

directive of the 16th of December 1996. European workers, with regard to social security considerations, are not allowed to work under this status for more than 2 years (1 year, plus one year extension).

The service agreement must be declared to the labour inspectorate (*inspection du travail*) before the beginning of service provision. These employees are protected by the general regulations of the French Labour Code, even if they are sent on a mission organized according to temporary work conditions. Seeing as they are working in France, these workers are protected by French statutory regulations and conventional rules with regard to working time, health, safety, paid holidays and protective measures for pregnant women and against child labour. However, these temporarily posted workers are still affiliated to their former security system.

The parties involved in a labour contract do not have complete freedom to determine their contractual relationship. The Labour Code aims precisely at protecting employees by limiting their contractual freedom. This limitation is organized in three levels:

- ◆ The highest level of protection is the Labour Code which must be complied with by all parties regardless of the sector;
- ◆ Moreover, inter-professional collective agreements assume a statutory role and also regulate contractual relationships;
- ◆ In addition, sector agreements must be taken into account and have a wide effect (legal working time, vocational training, etc.).

The predominant element which determines a labour relationship is the fact that a Labour contract in France is considered as a matter that concerns “public order”. In other words this means that a direct employment situation is not established on the basis of *‘the will expressed by both parties’* nor on *‘the name given to the agreement’* but only with regard to *‘the factual conditions under which the service is provided by the worker’*⁹.

The existence of a bond of subordination determines the existence of a direct employment relationship.

Indicators of a bond of subordination are many but fall into two categories:

- ◆ Evidence that the employer controls the employee’s working conditions (abeyance to specific working times, orders concerning priorities, control of the process);
- ◆ Provision of material by the employer (for instance: no private tools or private material).

Two court cases can illustrate the importance of the diverse elements that have been described above:

On the 10th of March 1998, the Criminal Court re-qualified the subcontracting contracts of two craftsmen into direct employment contracts. Although the two craftsmen were registered as self-employed, the Court ruled that they both had a bond of subordination to their former co-contractor.

In another case¹⁰, the Court re-qualified a contract where two self-employed persons were supposedly working through a temporarily work agency with a third person. The Court ruled that they were in fact working in a direct employment situation with the supposed client of the temporary work agency.

Both cases illustrate the superiority of the factual situation over the literal aspects of the contract. And prove the importance assigned to the bond of subordination when a re-qualification case is examined in court.

1.6. Employment status:

In order to protect certain employees, the legislator has decided that for certain jobs, an employment relationship is compulsory. For instance, models or journalists are presumed to be employees. Symmetrically, the social security Code has earmarked four types of jobs where self-employment is compulsory. Self-employment is presumed by the legislator under certain conditions¹¹: mainly when the worker is registered as self-employed in the relevant professional registers (depending on the sector and activity concerned) and with the URSSAF. The Minister of Labour has worked with Construction social partners in order to produce specific informational booklets¹². Each booklet targets a specific actor of the sector (the client, the main contractor, the subcontractor) in order to cover all the different questions concerning direct employment, self-employment, and subcontracting (documents needed, liability system, etc...). A 'Charter of good practices'¹³ was also disseminated in 2004.

With regard to the existing reporting procedure, if any questionable situation seems to occur, everyone (worker, witness, etc.) is entitled to contact any of the authorized supervising bodies: the criminal police; the labour inspectorate; the tax Office inspectorate; customs offices; social security organisations.

1.7. Comparison between the rights of employees and the rights of the self-employed:

According to the national institute of statistics and information on the economy (Institut national de la statistique et des études économiques, INSEE), there were 261 900 self-employed in the construction sector in 2007, and 1 473 600 directly-employed. The self-employed thus represented a proportion of 15 % of total employment in the construction sector. As self-employed occupation is not so sought after in France as direct employment and the growth of the construction industry over the past 10 years has made employment preferable to self-employment (major recruitment by companies, owing to the good economic climate), our personal opinion is that self-employment is not as developed here as it is in other specific sectors (such as the transport sector for instance).

Yet, it is worth pointing out that there is a big difference between the building sector (bâtiment) and the public works sector (travaux publics). With regard to the volume of self-employment: in the building sector, certain jobs (termed '*second oeuvre*' (*secondary jobs*)) are more likely to be performed under self-employment status (such as painters for instance) while in the public works sector the use of the self-employed is very limited due to the kind of activities involved (road building, civil engineering etc...). Indeed, Public works Companies need large quantities of people and team work whereas painting can easily be handled by self-employed workers.

Due to the expansion of the sector over the last decade, the number of self-employed is on the increase but the proportion of self-employed relative to the numbers of total employment remains almost the same: according to the INSEE, the proportion of self-employed in the construction sector was 15.5 % in 1997, and 15 % in 2007.

In June 2007, there were 25 549 700 people representing total employment and 2 243 200 million self-employed in France. The ratio of self-employment compared to total employment was therefore of 8.8 %.

The ratio of self-employed in the construction sector is therefore two times bigger (15 %) than the average national rate, but as we said before, this % includes the craftsmen who are registered as self-employed because of the registration yet are in fact managing their own little company with, normally, less than 10 employees.

As a conclusion, the comparison between the two is not really possible.

1.8. Self-employment/bogus self-employment in the construction industry:

We do not have any figures or assessments concerning bogus self-employed in the construction sector, and even less on a global level.

According to the most recent assessment (the assessment of the '2007 National Plan against illegal work'¹⁴), 70 086 companies were controlled by a supervisory body in 2007, 22.8 % of them being from the construction sector: 9.7 % of these companies were charged with law violations and 4 % of these offences were linked to status abuse. But we do not have any figures at our disposal concerning the rate of bogus self-employment.

However, in 2005, global figures have showed that, looking at the different types of law violations¹⁵, bogus self-employment represented 0.21 % of these global violations.

Bogus self-employment does not appear to have increased over the past years.

This development is linked to the activity growth in the construction sector. According to the FFB¹⁶ (French Building Federation), this trend has made the use of directly-employed workers very attractive for companies which were having more and more difficulty recruiting. Relying on direct-employment in this economic context was a way of retaining the loyalty of the employees and being sure of having the necessary amount of workforce for the job. Conversely, an FFB representative agreed that in a low growth situation, the use of self-employment could either be a way for some workers to create their own job or might encourage some employers to favour bogus self-employment in order to lower labour costs (see answer to question V.5).

1.9. (Bogus) self-employment and migrant workers:

No statistical data is available on this subject.

(Bogus) self-employment and migrant worker matters are linked to the way France defines migrant people. According to French law there is no difference between migrant and French people. As a consequence, official statistics cannot identify the origin of a person living on French soil (it is forbidden by the law).

It can however be stated based on the only qualitative information available that migrant workers play quite an important part in the construction sector.

II. The impact of regulation and deregulation in this field/labour relationship

2.1. Self-employment/bogus self-employment and legislation

Self-employment in the construction sector is widely governed by common laws applicable to all sectors.

However, the construction sector is governed by some specific regulation concerning liability, based on the law of the 31 of December 1975 which defines the rights and duties of each actor of the economic chain: the client (*le maitre d'ouvrage*), the main contractor and the subcontractor. This law addresses the challenge of bogus self-employment in the construction sector. It clarifies the notion of liability by setting the responsibility of each of the actors in the production chain. The Law underlines the primary responsibility of the client (*maitre d'ouvrage*) in cases of undeclared work (by a main contractor or a subcontractor). The client is also reminded that he has to require that the main contractors hand over all the contracts concluded with subcontractors. It is compulsory for the client to verify their legality.

In order to prevent any actor from shirking their responsibilities, any subcontractor that enters into a contract with another entity becomes a main contractor in his own right, and will be bound to respect the same regulations as a client.

2.2. Qualifications

Not just everyone can register as self-employed in any craft. It is necessary to have at least a CAP diploma (professional ability certificate) or 3 years of professional experience in the field concerned. If the registered person does not meet the required conditions, it is then necessary that at least one of his assistants does.

Also, three other conditions are legally considered as compulsory: the self-employed must be over 18 years old, he/she must not have a police record that would forbid self-employment and he/she is not allowed to have more than 10 employees (unless specific dispensation is granted).

The registration is purely an attestation. The Chamber of crafts and trades (*Chambre des métiers et de l'artisanat*) only passes on the information to the other relevant authorities. If there is a doubt on the legality of the self-employee's situation, the President of the Chamber will point out the questionable record to the '*préfet*' (local representative of the central authority) and the D.G.C.C.R.F (the ministerial administration specialized in frauds).

2.3. Business status:

The status of a self-employed worker is termed '*individual business with a European VAT number*'.

Registration procedure: When registering, the self-employed must prove that he/she is over 18 and that he/she did not commit any of the forbidden offences by presenting his/her police record.

Apart from that, he/she must also declare 2 things: the number of employees/trainees he/she is planning to hire/train and his/her professional background in the sector.

These documents can either be delivered to the Chamber while registering or mailed to the Chamber.

Undeclared work in France is handled by a wide range of supervisory and semi-public bodies which regularly check if self-employees are genuine or bogus. The most important supervisory bodies are the Labour Inspectorate (*inspection du travail*), the gendarmerie and criminal police, the tax office inspectorate, the Customs Service (douanes) and the URSSAF which also has inspectors at its disposal.

Each body handles a particular aspect of the supervision: “while the Labour Inspectorate in its work lays the emphasis mainly on uncovering suspicious enterprises and getting employees to comply with the regulations and acting preventively, the police and gendarmerie tend to issue tickets immediately in the event of an infringement”¹⁷.

The URSSAF checks the volume of social insurance contributions controls the volume of unpaid social contributions and claims them when necessary.

III. Migration

There is a link between the freedom to provide services that is protected by the European Union, and certain migrations linked with the status of self-employed.

The freedom to provide services protects the right any self-employed from any country of the E.U has to provide services in another country of the E.U. He can fix any price for the service provided, regardless of the countries' minimum wage policy. Consequently, self-employed from certain countries are very competitive in terms of cost when compared to domestic providers. If some believe that this encouragement does not always lead to bogus self-employed, especially in France¹⁸, it is to be pointed out that this situation is an actual threat in other countries where the use of bogus self-employment has been encountered.

IV. Cross border employment effects on self-employment and bogus self-employment

The activity in the sector has been dynamic for the past decade. After a decade of decrease of the activity and two very difficult years in 1997-1998, the sector has benefited from a decade of growth since the end of 1998.

In 1999, the growth of the sector in volume was up by 5.3 % and was particularly high in the building sector (bâtiment) with a 6.1 % growth rate that remained stable in 2000. In 1999 and 2000, enterprises in the public works sector experienced a growth in their activities for the first time since 1994. However, the general activity growth was less dynamic for the global construction sector between 2001 and 2004.

Since 2004¹⁹, the construction sector has had a very positive growth in production (2.5 % in 2004, 4.1 % in 2005 and 3.6 % in 2006) which was particularly positive in 2007 with a growth of 4, 2 %. According to the Minister for Equipment, Ecology and Sustainable growth, the activity growth for the sector in 2008 should fall between 1, 2 % and 2, 1 %, with the prospect of the financial crisis. Despite that situation, the requirements are still positively oriented Labour wise. In 2008²⁰, enterprises in the construction sector expect to hire 164 000 persons, which is slightly more than the previous year (+3 000).

The construction industry is indeed one of the main sectors encountering a persistence of recruitment difficulties. Entrepreneurs consider that 2/3 of hire projects are going to be difficult in 2008. This rate reaches 80 % for certain professions (for instance painting jobs). Furthermore, recruiting difficulties also concern big companies (enterprises with more than 200 employees) despite their attractive position and the availability of internal Human Resources departments.

Total employment in the construction sector ²¹ (Employees and non-employees)	Employees and non-employees in thousands of persons	Evolution in % compared to the previous year
1998	1 379,4	- 0,6 %
1999	1 405,1	+ 1,8 %
2000	1 463,1	+ 4,1 %
2001	1 502,5	+ 2,7 %
2002	1 527,7	+ 1,6 %
2003	1 532,7	+ 0,3 %
2004	1 556,3	+ 1,5 %
2005	1 612,4	+ 3,6 %
2006	1 684,2	+ 4,4 %
2007	1 766,8	+ 4,9 %

It should be pointed out that an important part of the French construction sector's growth is due to large enterprises (Bouygues, Vinci, GTM, Eiffage, Spie) that have important activities in foreign markets and outside metropolitan areas. The activities of these five large companies account for close to one third of the national industrial turnover²² for the sector.

Accordingly to our expert advisors, the activity growth for the sector over the past decade has tended to encourage employers to use direct-employed workers. Unlike other sectors in France²³ there is a strong demographic growth in the French labour construction sector: skill gaps tend to increase for certain jobs or professions. In this context, the construction sector is regularly identified as a sector at risk when it comes to illegal work. Several explanations have been put forward as to why this should be the case. First of all, a threshold effect (*"effet de seuil"*) has regularly been called into question as a potential source of illegal work exploitation by various actors. This effect would include a variety of reasons which might lead enterprises to use undeclared work.

The first reason that this effect would seem to point towards, is that in a context where the number of small enterprises has constantly risen during the past twenty years²⁴; one of the easiest ways for this growing number of small businesses to avoid changing their administrative and fiscal status (and therefore sidestep the risk of being subjected to more regulations or taxes) is to prevent themselves from getting bigger. Indeed, the administrative environment in which a company evolves in is often based on the number of employees it has.

A second reason is the binding regulations on working hours, seeing as undeclared work is often remunerated on the basis of daily or hourly rates.

A third reason that has been suggested is that the sector might use self-employment and bogus self-employment in order to adapt to the business cycle and an unstable market. But this argument has not been proven. In actual fact it would lead to an increased use of undeclared work in the current situation that has not been proven so far. As Marcus Kahmann²⁵

states “evidence rather points to a relatively stable amount of undeclared labour over time, the economic functions and forms of which may vary according to changing business requirements”.

A self-employed worker that is based in a European country other than France is considered as a company and not a worker, therefore he/she can freely provide its services on French territory.

In this context, the worker’s activity does not fall under the freedom of circulation for workers but under the freedom to provide services. Therefore, unlike workers, a self-employed person can freely work in any State of the European Union; secondly, there are no minimum wages for the self-employed. The survey made by the Senate in 2006²⁶ pointed out that with the EU enlargement, there was a risk that certain workers might register as self-employed at their local register and then use this opportunity to work in France. Paradoxically however, the report concludes that this type of fraud is rarely encountered in France.

The E101 form: The E-101 form is delivered by the country in which the worker is still affiliated to the social security system. Once in France, these forms are submitted to the CLEISS (Linking Centre of European and International Social Security Systems).

If the CLEISS considers a form as questionable regarding its legality, it will contact the entity that delivered the form and require them to ascertain the form’s legality. It is not the role of the CLEISS to eventually reclassify the worker’s status.

V. Social security and fiscal (tax) developments

Apart from the specific VAT system that regulates the sector, the global tax system is a national system.

This overall loss owing to the bogus self-employed cannot be specifically estimated. However, the overall volume of undeclared social insurance contributions (regardless of the sector) has been assessed by ACOSS between 1996 and 2002 (ACOSS, 2003) : in 1996, the volume of social insurance claimed by the URSSAF reached 393 millions of euro and 681 millions in 2002.

As for the costs and benefits for companies when working with the self-employed - a company does not pay any social security payments or social tax. As for the costs and benefits of the self-employed, they do not have specific benefits as regards to tax and social payments compared to direct-employees since the two systems have widely converged through the years²⁷. For instance, social insurance coverage for the self-employed is mandatory in France.

Since the creation of the RSI (Social Regime for the Self-employed) in 2006²⁸, born out of the merger between different compulsory special schemes which handled different groups of self-employed (CANCAVA, ORGANIC, CANAM), the self-employed engaged in the construction sector and their partners are affiliated to the RSI .

The self-employed are required to pay for their own social contributions which are calculated based on their professional income. The contribution to the URSSAF is fixed at 5,4 % of the global professional income (income subject to taxation) of the self-employed. If the professional income does not exceed a certain amount (€4 534 for 2008), the self-employed is exempted from paying social charges. The contribution for health risk is fixed at 5,9 % of professional income:

- ◆ Up to a maximum of €166 380 (for more details the site of the RSI can be consulted)

- ◆ The minimum contribution, even where a deficit is reported, is calculated on an income of €13 310.

The other contributions: 16.65 % for retirement (for the basic regime + 6.50 % for the complementary regime - mandatory since 2004), 1.20 % for invalidity and death.

Since the 1st January 2008, self-employed of very small enterprises (micro-enterprises) can benefit from a kind of social protection: the maximum amount of social contribution and social charges cannot exceed a certain percentage of their income.

Assisting spouses (of self-employed in Craft sectors) who have adopted the status of “collaborators” do not pay health insurance contributions. They benefit from the health insurance of their husband (or wife). Assisting spouses (collaborators) contribute to their retirement’s insurance.

Since 2001, the self-employed receive the same level of coverage for sickness risk benefit (health insurance). The risks covered are sickness, maternity, retirement, invalidity, death.

With regard to assisting spouses: one of the main advantages since the 1st of July 2007²⁹ is that the assisting spouse of a self-employed is obliged to choose a status (employee, partner or collaborator). Therefore, their social coverage has become mandatory. Those opting for a “collaborator status” will therefore benefit from a greater social coverage. Assisting spouses, since the reform of 2005, have an extended coverage on retirement, sickness and maternity. It is important to note that this status is reserved for couples legally married (while excluding PACS or cohabitation). They can represent a personal right to retirement payments, which cannot be cancelled after a divorce or the death of their spouse. As far as health insurance is concerned, the assisting spouse, who does not receive remuneration, is considered as an indirect beneficiary (rightful owner) of his/her spouse’s rights.

It is worth noting that the deadlines and the payments are very complex, and often lead to difficulties for the self-employed to forecast the amounts of future payments. Moreover, another difficulty is the fact that some professional contributions are based on past incomes and not on real income.

Furthermore, the unemployment insurance for the self-employed is more expensive than the social contribution an employer would normally pay.

One of the other disadvantages the self-employed endure is that they can be forced for economic reasons not to subscribe to social security payments for work accidents or professional diseases or might even not be able to ensure themselves against unemployment.

Pensions: Self-employed from the construction sector are compulsorily insured by the RSI for their pensions. Since 2006, the RSI is the only occupational pension system for the self-employed. However, it is compulsory to be affiliated to a complementary pension scheme. Since both are compulsory, the rate paid by a self-employed person for state and additional pension is 100 %. Moreover if a self-employed also has an activity as an employee, he will then also be affiliated to the general regime.

There are no imminent changes likely to the French pension system, an overall reform has just been completed and the regime is actually quite balanced according to our source at the Chamber of Crafts and Trades.

Unemployment benefits: the self-employed do not qualify for unemployment benefits if they do not subscribe to an optional insurance for unemployment. Nevertheless, like every person

over the age of 25, they are eligible to the RSA (active solidarity income) and other financial support that depends on their family situation. When a self-employed is without work, he stays affiliated to the RSI (which is the last regime he was affiliated to) and benefits from the rights listed above. This situation lasts until the self-employed changes his status by becoming an employee.

Health and safety: Health and safety rules and regulations in the Labour Code only apply to employees. Self-employed workers work on their own terms and conditions.

However, since the Directive 89/391/EEC of 12 June 1989 (which has been adopted in France) on “the introduction of measures to encourage improvements in the safety and health of workers at work”, the self-employed must be taken into account. Furthermore, this directive has been completed by the Council Directive 92/57/EEC³⁰ of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile work sites. This Directive “aims to promote better working conditions in this sector of activity which exposes workers to particularly high risks. It requires safety and health considerations to be taken on board during the design and organisation of projects. It also provides for the establishment of a chain of responsibility, linking all the players involved, in order to prevent any risks. The provisions of the other specific directives apply, except for those contained in Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace.” The Self-employed are included in this framework. Since this directive, the self-employed “*must also comply with specific provisions concerning the use of work equipment and personal protective equipment, in order to preserve the safety and health of all persons present on the site.*”³¹

Employees benefit from a protective system which contains several health and safety provisions. In companies of more than 50 employees a Committee for health, safety and working conditions (CHSCT), composed of worker delegates, protects and suggests improvements to the working conditions. In companies of less than 50 workers, the labour inspector can impose the presence of a CHSCT if working conditions require it.

In all sized-companies, labour inspectors regularly visit building sites and can be asked to do so by any worker. Labour Inspectorates ensure that all safety and health rules are complied with.

The Directive 89/391/EEC states that: “*during the project preparation stage, the project supervisor, or where appropriate the client, shall take into consideration the general principles of prevention concerning safety and health referred to in the framework Directive (89/391/EEC), and shall take into consideration any safety plans when deciding upon architectural and/or organizational aspects and when estimating the period required for completing the various items or stages of work. As for the coordinators, they shall coordinate implementation of the general principles of prevention, draw up a safety and health plan and prepare a file containing relevant safety and health information to be taken into consideration during any subsequent works.*”³² In accordance with the article 10 of directive 89/391/CEE, workers and/or their representatives shall be informed of all the measures to be taken concerning their safety and health on the construction site. The information must be comprehensible to the workers concerned. However, medical supervision is only applied to direct-employees.

It has to be pointed out that the Modernization of the Economy Act (4th of August 2008) has created a new status called ‘auto-entrepreneur’. This status allows an individual businessman or an employee who wants to start a complementary activity to be acknowledged as self-employed but without having to register with the Professional or Trade Register. Furthermore, an ‘auto-entrepreneur’ will have a preferential tax regime: if the turnover is under 32 000 euros (if the company is a

service company) or 80 000 euros of turnover (for a sale company), he will only be taxed by 23 % in the first case and 13 % in the second. The main goal is to encourage small undeclared businesses to declare themselves but trade unions fear it might encourage bogus self-employment.

VI. Abuse of the status of self-employment (causes, consequences, forms of abuse)

As the causes and forms of abuse have been explained in the previous point we will only refer to the consequences of bogus self-employment. These are numerous.

First of all, the main problem for the country is that it causes a breach in the social contribution system and leads to a loss of income for the State and the social system.

It also establishes unfair competition among businesses, thus helping less productive firms to stay on the market. This issue refers specifically to the freedom to provide services (see answer to question II.9) but also, in some specific cases, to bogus self-employment.

Secondly, bogus self-employment has profound consequences on the image of the construction sector.

Thirdly, bogus self-employment has important repercussions on social standards (statutory and contractual employment regulations in general) by weakening them and by encouraging more fraudulent behaviour. Moreover, bogus-employment puts pressure on trade and commercial law regulations. Thus encouraging the progressive lowering of social standards. On a more limited level, bogus self-employment leads to greater risks for workers on building sites and particularly for the bogus self-employed (for the reasons detailed above). It can also have consequences on the quality of work in certain circumstances (when self-employed workers from a country with lower training standards are used as bogus self-employed in France).

VII. The role of intermediaries

According to the survey arranged by the French Senate, it appears that agencies in other European countries have organised vast fraudulent systems using both self-employment and workers posted temporarily abroad. According to sources interviewed some foreign agencies offer bogus self-employed workers online to French companies.

Also, the Senate's survey³³ on the 'construction sector and the enlargement' paradoxically points out how an important number of self-employed in other European countries are sent as temporarily posted workers to France. Even if this option seems paradoxical seeing as these workers must then be guaranteed a minimum wage, it also allows them to be paid as intermediaries.

Both interim agencies and subcontracting are highly regulated in France. Interim agencies are subject to many obligations: there is a special status in France for Temporary Work Enterprises (ETT). An enterprise that is not an ETT is not allowed to rent workers on a temporary basis³⁴. Once the company is registered as an ETT (which is compulsory³⁵), it must comply with specific obligations: the rental of the workers must be its exclusive activity³⁶ and the activity must be financially guaranteed by a warrantor³⁷. Temporary Agencies are subjected to

identical regulations as standard enterprises when it comes to illegal work. Foreign Temporary Agencies are also subject to all these legal constraints.

As far as subcontracting is concerned, the obligations and liabilities they have to abide by were defined in a 1975³⁸ statute. This law defined the rights and duties of the client (the 'maitre d'ouvrage'), the main contractor and where necessary the subcontractor. Furthermore, the social insurance Law adopted on the 13th of August 2004³⁹ strengthened the liability regulations for subcontracting in construction sector. In 2005, the implementation decree of the Law in favour of small and medium enterprises has raised the level of sanctions levied against illegal labour.

Temporary Agencies in France are subject to identical regulations as common enterprises when it comes to illegal work (see response to question VII.2).

All persons or entities that underwrite a contract for more than 3000 euros for the purpose of having a job done, for having a service provided or entering into a commercial agreement are required to verify that the co-contracting party does not use illegal labour.

If the client does not check, then the client can be prosecuted on the grounds of illegal labour⁴⁰. That is why every contractor must insist on receiving a certain amount of documentation when entering into a contract. The client must ask for it every 6 months until the contract is executed⁴¹.

Moreover, the contractor must ask the co-contractor for a list of names of all the foreign workers with work permits together with their working agreements. That list is mandatory for workers from new Member states and can be asked for every six months⁴². If this formality is not complied with, the contractor can be forced to pay a fine, along with the agency or subcontractor, which will be used to send the illegal workers back to their countries. Since 2004, the Government has launched three programs to combat illegal work (2004-2005; 2006-2007; 2008-2009). In 2008, the institutional structure was renewed: the national commission against frauds will from now on be supported in its mission by an inter-ministerial delegation against fraud (délégation interministérielle de lutte contre la fraude). This new delegation will partly endorse the work of the former inter-ministerial delegation against illegal work (délégation interministérielle de lutte contre le travail illégal).

VIII. Prevention and repression

Sources we met believe that preventive and repressive measures in France help maintain bogus self-employment at a low level but as no figures concerning the phenomenon are known, it is not possible to assess this opinion.

The sanctions when prosecuted for bogus self-employment are the sanctions that apply when charged for the use of concealed labour. A natural person, when prosecuted, risks 3 years of imprisonment and a fine of 45 000 Euros. Also, the following additional penalties can apply when a natural person is prosecuted:

- ◆ To be banned from the practice of the incriminated business for the duration of 5 years;
- ◆ The forfeiture of tools, machinery, goods in hand and stocks in trade;

- ◆ The publication and announcement of the judgement;
- ◆ Temporary or permanent exclusions from public authority commissions.

Also when a juridical person is prosecuted, it risks a fine of 225 000 Euros. Furthermore, the following additional penalties can apply:

- ◆ Dissolution of the business;
- ◆ Banning from practicing the incriminated business;
- ◆ Permanent or temporarily closure of the enterprise affected (not applicable in the event of employment without a residence permit);
- ◆ Temporary or permanent exclusion from public authority commissions;
- ◆ Forfeiture of tools, machinery, goods in hand and stock in trade;
- ◆ Publication and announcement of the judgement

Unfortunately, we do not have the figures concerning each penalty's application. However, in 2005, for a total of 26 177 enterprises monitored in the construction sector, the DILTI (former inter-ministerial delegation against illegal labour) listed 1 253 violation of the law that were punished⁴³. It is not possible to assess the different tools or regulations aimed at reducing the phenomenon, as statistics are not available.

Sources from trade-unions believe that bogus self-employment is mainly to be found in small and medium business.

Most of these companies do not have union representatives that could be a relevant intermediary in the cases where the use of bogus self-employment is suspected. Trade unions believe that expanding the right of representation so as to make it compulsory that there is at least one union representative in every company would effectively reduce bogus self-employment.

The Senate's survey proposed several measures which might be introduced to fight bogus self-employment:

- 1) To encourage and reinforce the liability of professionals in different ways:
 - Compulsory posting on each building site of the names of every subcontractor, even the smallest ones;
 - Compulsory communication to the work council of all the documents the main contractors has which relate to subcontractors.
- 2) To facilitate control actions on building sites:
 - More monitoring operations on Sundays and at unusual times;
 - Making it easier to use translators for inspection purposes
 - By making it compulsory for posted construction businesses to designate an official intermediary within the work teams who is responsible for liaising between the company and the French authorities

The FNTB and the FFB stressed that companies were rarely aware of the regulations they were meant to comply with. Therefore, distributing informative booklets on the subject to entrepreneurs or reminding them of the risks of non compliance with the law is an important step. Both the FNTB and the FFB organised informative campaigns and consider them useful.

Prevention measures on a European level: The Senate's survey proposed several measures in order to fight bogus self employment on a European level. According to the survey, the Commission's work on the posting of workers in the context of service provision operations should include an assessment of the self-employment status.

- 1) Make the Commission enlarge the scope of its work so as to include:
 - An assessment on the way people switch from an employment status to a self-employed status in the various member states;
 - Carry out research to establish a global definition of the criteria that define bogus self-employment;
 - Produce a survey that might assess the opportunity of including certain categories of self-employed within the scope defined by the 96/71 directive.
- 2) To strengthen the European cooperation concerning social security by:
 - Building a shared information system ("social-net") between member state social security institutions so as to enable easy cross-checking on possible frauds;
 - Bilateral conventions between France and European member states already exist that include the automatic transfer of social security data for all posted workers from their country of origin to their destination country. The country recommends that France should conclude such conventions with countries applying for accession to the EU.
- 3) There could be some merit also in setting up a Europe wide discussion on the necessary conditions by which "self employment" criteria could be made consistent throughout the EU:

These measures cannot be applied pre-emptively on a national scale.

No existing functioning tool on the subject seems to be actually relevant according to the various sources.

Conclusions and recommendations:

The state of play in France where bogus self-employment is concerned is a particular one seeing as the employee status is generally favoured. Even if the percentage of self-employed is higher in the construction sector compared to the economy in general, the likelihood of bogus self-employment is actually more concentrated in the building sector, and particularly in the "second oeuvre" (secondary job) compartment rather than in other areas of the construction sector. Also, it is more likely to take place in SMEs than in larger companies. For a few years now, the French authorities have been trying to fight bogus self-employment by implementing a national plan against illegal work (which includes bogus self-employment even if it is not clearly stated), with more controls and more sanctions levied against companies. Nevertheless, this issue needs to be analysed in greater depth by the French authorities for the future as there are difficulties in trying to keep the scale of the phenomenon in check.

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Experts Report

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

Edith Gross

I. The demarcation between direct employment and self-employment

1.1. Definition and criteria

Direct employment is an occupation according to the interpretation of section 7(1) SGB IV (Sozialgesetzbuch), which states that paying contributions to all departments of social security is compulsory. As there is no legal definition for employee and employer, regulations and collective agreements rely on this definition. There is overall agreement on this definition. An employee is anyone who under instruction delivers a contractually agreed performance within the context of a working environment determined by an employer.

There is no legal definition of self-employment or bogus self-employment. As opposed to employees, the self-employed of any kind (independent, entrepreneurial, employer, one-man-company, freelancer, professional person) are not subject to employment law and social security provisions. Thus, they do not hold any workers rights, as laid down in legal or administrative provisions or collective bargaining agreements. The “arbeitnehmerähnliche Selbständige (a working relationship very similar to that of the self-employed worker)”, could be termed semi-dependant workers as they are essentially self-employed who are also subject to pension funds (see chapter 5 below). They mainly perform tasks for one client on a long-term basis yet not on a regular basis but in the context of a specific project. The distinction between “arbeitnehmerähnlich Selbständige” and other forms of employment and self-employment appears to be the trickiest one.

In order to distinguish between independent activity and dependent employment, case law in Germany has established that a person can be deemed to be self-employed if the decisions concerning the performance of their activity and their working hours are chiefly left to their own discretion. The distinguishing criterion is the degree of personal dependency of the self-employed. How the relationship in a contract is defined, has no bearing on how this distinction is made. It is rather a question of the exact nature of the work and how it is actually carried out. No single criterion is conclusive, it is the overall situation which counts (section 7a(2) SGB IV).

To distinguish between employment and self-employment, certain criteria may point toward dependent employment rather than self-employment especially when:

The activity is on a long term basis and mainly for one customer only; a person is deemed to be acting essentially for a single customer when this person obtains at least 5/6 ths of his/her entire income from this one activity;

- ◆ The same kinds of activities are regularly carried out for the customer by his own employees;
- ◆ The activity appears to correspond to what the employee used to do for the same customer on an employer - employee basis; in addition, no typical indicators of entrepreneurial behaviour are recognisable e.g.:
- ◆ No entrepreneurial risk, no entrepreneurial initiative and no discretion to make entrepreneurial decisions;
- ◆ No activity in the market in an entrepreneurial capacity;

- ◆ No permanent premises of one's own,
- ◆ No employee's at one's own disposal,
- ◆ No obligation to procure work materials,
- ◆ No capital employed,
- ◆ No autonomous decision-making in terms of acquiring goods, recruiting staff, deploying capital and equipment.

The mere registration of a self-employed trade or registration in a trade register is not enough to validate the assumption of an independent activity. There are no assumptions in the law that would seem to indicate that in certain circumstances or for certain jobs an employment or self-employment relationship (in the construction industry) is compulsory. The authority to decide whether or not, from a social insurance perspective, an activity is carried on independently resides solely with the competent social insurance provider. To this end the decision is taken either by the competent health insurance institutions in their capacity as collecting bodies for general social insurance contributions (section 28h SGB IV), by the pension insurance organisations as part of the regular inspection activities on employers (section 28p SGB IV) or by the clearing office of the Deutsche Rentenversicherung Bund (DRV-Bund) within the context of a procedure to determine status (section 7a SGB IV). Where judicial proceedings are involved, the matter is decided by a civil court. Annex Appendix 6 contains a sample application form to determine social insurance status.

The decision from a taxation perspective is a matter for the regional fiscal authorities and the fiscal courts. (see also chapter 8.2. below).

The standard for distinguishing between dependent and independent activity is almost identical in civil legislation, tax legislation and employment law.

1.2. Dimension of employment and self-employment

Self-employment in Germany has grown in recent years. When taking into consideration the total of employees and self-employed, the number of self-employed has risen faster. Self-employment being fostered by labour market policies and supported by start up bonuses is part of the reason, but growth of market-driven self-employment was even greater.

In the construction industry, new trade registrations underwent a remarkable change in structure between 2004 and 2006. Whereas the number of new registration of businesses decreased, new registrations of self-employed (small businesses or secondary activities with no employees, which need no registration in the Official Register of Crafts and Trades or Trades Register) in 2006 were nearly two and a half more than in 2000.

New registration of self-employed in construction has been favoured by subsidies in as part of labour market policies. Figures show that the finishing trades have made use of this support to a much greater extent than the main trades. However, following a peak in 2005, the number of subsidised new registrations has fallen sharply.

However, there were sectors in the West-German economy where self-employment rates were traditionally at a higher level, as in the construction industry, but construction in that decade was among the sectors with the highest self-employment growth rate. Growth in construction

exploded in the next decade from 1994 to 2004 in terms of numbers and percentage of all employment in the construction industry.

Thus, in the long run self-employment in German construction has grown faster than in the rest of the economy. Growth in construction was three times higher than in the rest of the economy.

Whereas total self-employment rose by two thirds, self-employment in construction has grown by nearly 190 %. Thus, the ratio of self-employment in German construction has grown, both as a ratio of all self-employed in Germany and relative to all the self-employed in the construction industry in Europe.

The same is true is for the ratio of self-employed over the total of employers and self-employed (both legally seen as Selbständige - self-employed) in the German construction sector.

The self-employed are mainly German nationals. They can be regarded as “forced” self-employed in some cases when the original business has been set up out with formerly unemployed persons. After a period of unemployment benefit payments for long term unemployment, a way out of avoiding having to fall back onto social benefits is to try self-employment in a subsidised scheme. Other instances of “forced” self-employment have been reported when former employees are working as self-employed workers for the same “employer”.

1.3. Bogus self-employment and undeclared work

The extent of illegal work can obviously only be estimated. From the most often quoted works on the illegal economy in Europe, one can surmise that the estimated total of illegal occupation in Germany grew until 2003, then declined and grew up again between 2006 to 2007.

An important part of the illegal turnover is supposed to be produced in the construction sector, representing more than one third of the entire turnover in 2007. This is 81 % of the regular construction volume. It is estimated that the productivity of this type of work is lower than the average productivity in construction, it can be estimated that for one regular job in construction there another one on the black labour market.

More than one definition exists for undeclared labour according to the various regulations e.g. the law to combat illegal work (Schwarzarbeitsbekämpfungsgesetz - law on combating undeclared work- SchwarzArbG) in section 1 (1)(2). In general, everyone who acts in defiance of legislation and regulations such as collective agreements has to be regarded as illegal.

Notification procedures exist for illegal practices. Everyone can download a “Meldebogen” form to report any observations. For bogus self-employment itself no notification procedures have been introduced even if, for example, suspicious circumstances in the crafts registration procedures with local authorities have been reported.

No court cases involving bogus self-employment have been held because it is not a matter that is handled by the courts. The court has to decide whether the employment relationship is one of direct employment or not (see distinction in chapter 1.1 above). Thus, no numbers or estimates are available for bogus self-employment. In recent years, awareness of this grey area has risen and the Financial Control on Undeclared Work (Finanzkontrolle Schwarzarbeit -FKS) is working on specific statistics.

1.4. Financial Control on Undeclared Work (*Finanzkontrolle Schwarzarbeit -FKS*)

Since the accession of the new member states, there have been some indications that rules on cross-border freedom of services and companies are being circumvented in certain cases through bogus self-employment or mock postings and that employees have been posted illegally and wage dumping is taking place. This is damaging not only for the state institutions such as tax authorities and the social security funds, but also for the workers employed below acceptable and legal standards and denied insurance protection. It also has a detrimental effect on the national economy, which cannot possibly keep up when the competition circumvents existing regulations. In response to these developments, the German government set up a task force in March 2005 designed to combat the abuse of the freedom of services and business establishment provisions. Under the joint leadership of the Federal Ministry of Finance and the Ministry of Labour and Social Affairs, appropriate measures are to be taken to ensure that existing Community provisions on freedom of services and establishment are adhered to (Ministry of Finance 2006).

In the meantime the FKS contributes to the correct transfer of tax and social contribution in a very effective way (see below chapter 8.2.).

II. The impact of regulation and deregulation

The German Labour market is still fairly strictly regimented despite a number of decisive steps have been taken since the 1980s. A relatively complex tax system, complicated and time consuming regulations for business start-ups and a high level of educational qualifications to become self-employed in specific sectors of activity are the main restraining factors of a liberalisation of the work place. The high educational requirements fit into a general framework of policies introduced after 1945 and mainly aimed at protecting the existing self-employed and the so-called “Mittelstand”. In order to be self-employed in many fields of the construction industry means accessing special forms of apprenticeship and the attainment of the status of “Meister” (Lohmann et al. 1999 p.7).

2.1. Labour market measures and self-employment

Programmes to foster business start-ups have been introduced. In 1986, the Labour Authority started to pay bridging allowances (“Überbrückungsgeld”) to unemployed persons, essentially a subsidy for six months for an amount equivalent to previous employment benefit entitlements. The fluctuation rate in and out of self-employment was high. After the fall of the wall, from 1991 to 1994, the particularly high entry rate in Germany even topped the United Kingdom rate. Different forms of subsidies were introduced in the meantime such as “Existenzgründer-Zuschuss”. E.g. the “Ich-AG” model, in the form of subsidies for former unemployed persons and “Überbrückungsgeld” for non-active persons relying on social benefits (Hartz IV).

The sharp increase in the number of allowances for Existenzgründungszuschuss (Ich-AG’s) in 2004 and 2005 did not lead to stable self-employment. The allowance was granted for up to three years. The scheme ended in 2006.

The subsidised self-employed in construction as a percentage of the total subsidised persons

amounts to about 12 % in Germany-West and more than 20 percent in Germany-East (2005). The ratio of subsidised self-employment is the highest in the service industries. In Germany in 2003, about 70.000 persons were supported in total through both these both schemes.

2.2. Self-employment and legislation - Amendment of Trades and Crafts Code - Handwerksordnung (HwO)

In addition to these labour market measures, the high formal barriers to entry in self-employment were lowered for specific occupations. There has been a shift in policy from protecting certain existing self-employed categories to creating new self-employment. Promotion of self-employment already began at the end of the 1970s but without clear evidence of occupational results (Lohmann et al. 1999 p.7). The expansion of solo self-employment as a new phenomenon is a result of push and pull factors (Bögenhold/Fachinger 2007). Forced moves from employment status to self-employment status have been observed, though there is no statistical evidence that this is a widespread phenomenon in the construction sector. On the other hand people might be attracted to the idea of working for themselves. Since 1.1.2004 a new regulation of Trades and Crafts Code - Handwerksordnung (HwO) is in force. In general, permission has to be granted to provide services in trade or craft activities, as these are licensed. The trades and crafts involved are listed in Appendix A of the German trades and Crafts Code. To become self-employed in these listed occupations one must obtain a special Qualification certificate, which has to be ratified by the respective authorities, and then register according to the instructions of the Handwerksordnung (the ordinance referring to handwork) (section 9(1) HwO).

Besides this normal and widespread procedure other craft and trades are listed in Appendix B1 and Appendix B2. Registration is compulsory but no proof of qualification when starting-up activities as self-employed in these occupations is required. This new regulation boosted the start-ups in certain profession, which have been switched from Appendix A to Appendix B. This is particularly true for tilers.

In Germany at the beginning of 2004, there were 12.401 tilers in business according to Appendix A. New registrations in 2004 amounted to 14.410 with 1.266 withdrawn craft registrations so that the number of registered tilers doubled in the year 2004. Out of the newly registered tilers 10.990 were self-employed as “Ein-Mann-Betriebe” of which close to one quarter were foreign nationals.

One can observe that in the same period the number of “Meisterprüfungs” and new apprentices declined remarkably.

III. Development of the overall Construction Sector

3.1. Construction Industry Activities

Even following the sharp and long lasting crisis from the middle of the 1990's until 2005, the construction industry was still the major economic sector in terms of both internal demand and the national labour market. The construction industry accounts for about four per cent of the Gross National Product. Employment in construction is five per cent of national employ-

ment. About half of construction expenditure goes for housing, half of which goes towards repair and maintenance, where small businesses are frequently used.

During 2006 and 2007 construction volumes rose and redundancies slowed down, but, since the beginning of the financial crisis in 2008, activity has fallen once more. Market demand has fallen sharply, but the governments recovery measures were directed mainly at stimulating construction activity. Thus the short term future of the construction industry in German looks reasonably secure.

Small firms dominate the construction industry. More than two thirds of the businesses have less than six active persons (owners included). The ratio of owners actively engaged in their enterprises both with and without employees is way above the average for the rest of the economy.

Figures for the main trades show that the number of people working without employees accounts for nearly one quarter of all business concerns.

3.2. Labour market developments

Statistical data on the amount and development of bogus self-employment is not available. In German statistics there is discrimination between independent and dependent labour only; with all forms of independent labour being lumped into the same statistical figure. Statistical evidence that self-employment and bogus self-employment could be on the rise can be traced to the growth of atypical employment. Atypical employment falls within one of the following categories: short term contracts, part-time work and payment below the levels set by collective bargaining agreements. The numbers for atypical employment have increased between 1997 and 2007 by about 50 %, whereas so called normal employment (Normalarbeitsverhältnis, with unlimited full-time contracts and payment according to the collective bargaining agreements) has decreased by about six per cent.

The rise in the number of jobs was not linked to an increase in the total volume of hours worked. As this has been nearly constant between 1997 and 2007, there has been a growth of persons active in the labour market achieved by replacing full time employment with part-time employment.

The rise in the number of persons active in the labour market was also fostered by subsidies for self-employment introduced in the 1990's as a measure promoted by Labour market policies to increase participation in the labour market.

For start-ups subsidised as part of the labour market supporting measures the essential question is not only whether or not the enterprise can establish itself on the market and become a company with its own employees. It can also be viewed as a success, if an independent worker manages to move into a dependent employment relationship. Data show that, even a five percent success rate for employed persons who have been independent workers before is low compared to other European countries, there is a high and increasing mobility rate among independent workers. In 1993 half of the independent workers stepped into dependent employment relationships and in 2007 it was about 75 %. (Schulz Buschoff, Karin, Schmidt, Cornelia: Independent workers in Europe (WZB SP I 2006-122) Berlin 2006, p 3).

In the construction industry, the unification of Germany in 1990 resulted in a boom and in a peak of employment in 1995. Since then total employment has fallen by about one third.

By far the main reduction was observed in the main trades, which lost half of its employment, whereas in the finishing trades the fall off was about 20 %. Thus, two out of three employees in construction today are working in finishing trades.

At the same time the number of self-employed in the entire construction industry has increased. Whereas the number of employees decreased by 32 %, the number of employers and self-employed in total increased by 14 per cent. As shown in table 4, among these two groups the growth rate of self-employed was much higher than the growth rate of employers.

Reduction of employees, in particular for the main trades, is not the reason for the increased numbers of self-employed. Directly employed construction workers left the sector for employment in other industries and services. As shown in section 2.1, the increasing number of businesses set up is due to the new regulation on occupation in the finishing trades.

IV. Cross border employment effects on self-employment and bogus self-employment

4.1. Posting of workers and contract labour

Germany opted for restrictions and transitional arrangements when the new member states joined the EU on 1 May 2004, and Romania and Bulgaria on 1 January 2007. Since the accession of the new member states, there have been indications that regulations for free movement of workers and the freedom to provide cross-border services in certain cases have been circumvented, e.g. through bogus self-employment and other practices that undermine fair competition and equal treatment of workers. In response to these developments, the German Government set up a task force in March 2005 in order to combat the abuse of freedom of movement and service provision opportunities.

Table 1 Posting of workers 2004-2007

Number of	2004	2005	2006	2007
Posting companies	3357	2773	2368	2200
from countries with free movement of workers	1229	1164	1075	1094
from countries with transitional arrangements*	2128	1609	1293	1106
Posted workers	95130	76923	68321	59775
from countries with free movement of workers	14289	12979	11454	11869
from countries with transitional arrangements*	80841	63944	56867	47906
Construction sites	26606	21930	19808	17067
With workers from countries with free movement	8325	7023	6635	6371
With workers from countries with transitional schemes	18281	14907	13173	10696

* Countries with transitional arrangements are all EU Member States that joined the EU on 1 May 2004 and on 1 January 2007, Source: SOKA-BAU

Almost half of the posted workers from countries with transitional arrangements came from Poland and two thirds of the building sites with posted workers are located in four Bundesländer (regions): Nordrhein- Westfalen, Hessen, Baden-Württemberg and Bayern. The entitlements for workers to receive holiday pay are processed by SOKA-BAU. SOKA-BAU uses the right to control registration extensively, also in co-operation with FKS, which acts as the monitoring authority for illegal employment and black labour market. Since 2006, the monitoring program includes payment of minimum wages and working time. In recent years, the decline in the number of posted workers is remarkable. The same is true when considering the development of contingents for temporary migrant workers according to bilateral government agreements.

Compared to the contingents for all industries and the real influx of contract workers in the construction industry the decline in the number of contract workers was greater compared to there rest of the economy. One can assume that the decline in the number of posted workers and contract labour, despite the increased amount of contingents, could be linked to the influx of foreign self-employed onto the German market.

4.2. Workers rights

Mandatory working conditions are laid down in legal or administrative provisions. They apply to all workers in Germany. They are differentiated from collectively agreed working conditions in the Posted Workers Act, where the majority of the company's working hours are dedicated to certain fields.

Mandatory and collectively agreed working conditions do not apply to self-employed persons.

Mandatory working conditions concern working time and breaks, paid annual working holidays, minimum wages including overtime pay (§§ 138 and 134 BGB), regulation for intermediaries (AÜG), Health and Safety (e.g. ArbSchG; SGB VII; GewO). Implementation of the working conditions established on the basis of collective agreements for posted workers depends on the field of activity. It is the general contractor who is held liable where the sub contractor (and the sub-sub-contractor) fails to guarantee implementable working conditions. Workers have the right to take legal action to ensure compliance with working conditions. Legal claim offices (Rechtsantragsstellen) provide further information.

4.3. Collective agreement on social fund scheme in the construction industry

Every employee is entitled to paid holidays. In the construction industry, particular collective agreements apply: The Federal framework agreement for the construction industry (Bundesrahmentarifvertrag für das Baugewerbe (BRTV)) and the collective agreement on the social fund scheme in the construction industry (Tarifvertrag über das Sozialkassenverfahren im Baugewerbe (VTV)). They are declared as generally applicable (Allgemeinverbindlichkeitserklärung), though foreign workers and posted workers are also registered in this scheme. Mutual recognition of comparable holiday funds or regulations in other countries exists (France, the Netherlands, Belgium, Austria, Denmark, and Switzerland). The contribution to the holiday fund is calculated on the gross wage and amounts to 14.7 percent (2007) and is paid by the posting company. In total these payment amounted to 46.135.215 Euro in 2007 (2004: 67.409.743 Euro). The collective agreements on social funds do not apply to the self-employed.

4.4. Abuse of E 101 certificate

The presentation of a filled in E 101 form in Germany is binding for all authorities (according to decision of Bundesgerichtshof (Federal Court of Justice) (BGH) October 2006 following the EuGH decision 26 January 2006 (“Herbosch Kiere”), even if the filled in form is obviously not correct or falsified. The verification of the E 101 form is subject to FKS control activities. The German government has already reached bilateral agreements with France, Austria, Romania and Bulgaria in order to improve cooperation between the authorities.

It was recommended that efforts be made to guarantee cooperation between the respective administrative bodies across all member states of the EU. The “Committee of experts for posting of workers” at a European level has to develop ways of improving co-operation.

V. Social security and fiscal (tax) developments

5.1. Social security for the self-employed

Seeing as in Germany the social security system is based on the Bismarck model, benefits gained are related to membership and contributions paid. This provision is designed for employees and the self-employed are systematically not included. Certain exceptions exist (see chapter 5.2.) They are subject to private insurance schemes, which are not compulsory. One can file an application to clarify one’s own status in the social security system. A form is provided by the Deutsche Rentenversicherung - retirement insurance (DRV), which establishes the status according to the information provided by the self-employed.

Sickness: Benefits in kind and cash benefits.

There is no independent statutory protection system for the self-employed (new regulation in 2009).

Unemployment: There is no compulsory unemployment insurance for self-employed craftsmen. The self-employed without work are entitled to social benefits (Hartz IV).

Since 1 February 2006 a special scheme applies for subsidised self-employed (former unemployed persons, who have received unemployment benefits) on a voluntary basis. This scheme will last until 2010.

Employment injuries and occupational diseases: This is a statutory scheme for employees (Berufsgenossenschaften - association of industrial workers’ compensation insurance carriers), membership contributions are paid by the employer. The employer himself is not covered. Under certain conditions, employers are offered the opportunity to insure themselves on a voluntary basis.

5.2. Pensions

In Germany there are special provisions for self-employed craftsmen and retailers within the scope of the general system and there are independent social security systems for farmers, self-employed artists and publicists and special schemes for the members of those professions that have the right to form associations (e.g. architects, surgeons, lawyers)

All craftsmen are subject to compulsory membership in the general retirement insurance scheme.

The qualifying period is five years, beyond that minimum period membership can be continued or not on a voluntary basis. Benefits are granted in accordance with the regulations of the general system, which means that the amount of benefits depends mainly on individual contributions. Self-employed very often do not continue the general insurance scheme and conclude contracts with individual private insurance companies.

As an exception of these regulation owners of registered crafts under the provision of Appendix B1 and B2 of HwO (Handwerksordnung) are not subject to compulsory insurance schemes. Since 1. January 2004 (amendment to the Handwerksordnung in force, see 2.2. above) this is also true for newly registered self-employed under Appendix B1. That means that self-employed with occupations that have been shifted from Appendix A to Appendix B1 e.g. the large amount of newly registered tilers have from 1. January 2004 only have the possibility to participate in pension schemes on a voluntary basis. No information is available to what extent they make use of this possibility.

5.3. Self-employment and tax system

There is no special tax system applicable to the construction sector. The self-employed are subject to VAT and income tax, under the national system. Anyone who sets up a commercial undertaking or a permanent business must under section 138 Abgabenordnung- Fiscal Code (AO) notify the local authority as to where this undertaking or permanent business is located. This authority is in charge of trade registrations and it will immediately forward the information to the respective tax office. Every self-employed is issued a VAT number. Turnover is not subject to VAT, if it is below a limit of 18.000 Euro per annum.

Every income is subject to income tax. This is a personal tax. Below a certain limit, no tax is to be paid. This limit also depends on family status.

The overall loss of income of tax and social security contributions is estimated as high, although no statistics are available. The checks by Finanzkontrolle (FKS) discovered numerous cases and collected large amounts of social contributions (see tables 25 and 26 below).

5.4. Comparisons between wages and fees

The calculation of a fee and a wage contain different elements. Wage elements are direct costs (collectively agreed as wage per hour) social costs, amounting to about 80 % of direct costs. When calculating the price of labour in an offer, the rate calculated per hour (Stundenverrechnungssatz - hourly rate for installation) contains labour costs, overheads and return on investments.

The self-employed often compete in the market by calculating only a wage rate, not including costs for social insurances. In the short run the self-employed will survive, but when faced with social risks, they are not insured. If they took into account the price with all elements of subsistence in a long-term perspective, they might not be competitive on the market, where the price is falling. Cases are reported by the FKS, where foreign construction companies offer cooperation by providing qualified work (e. g. roofer) at a price of 19.00 Euro rate per hour (Stundenverrechnungssatz) including social costs, social security contributions, travel costs and costs of on site accommodation.

5.5. Labour law applicable

The self-employed are not subject to labour law. No restrictions on working time or dismissal apply.

VI. The role of intermediaries (Self-employment in a triangle relation)

In the main construction trades, leasing of workers (Arbeitnehmerüberlassung (AÜG)) is not permitted and is not reported. In the finishing trades it is permitted and is practised, yet detailed information or figures are not available. The unauthorised leasing of workers is generally sanctioned with an administrative fine (section 16 AÜG). The unauthorised leasing out of foreign workers without a work permit is punishable as a criminal offence by the lessor company (section 15 AÜG).

As well as agencies for temporary workers agencies for craftsmen occurred have also sprung up owing to internet.

VII. Abuse of the status of self-employment

7.1. “Wir-AG”

A specific case of abuse of the status of self-employment became apparent in recent years (the so-called Wir-AG, Ich-AG with several persons). There are increasing examples of cases in which a “head” and numerous unskilled or poorly skilled workers of new member states present themselves as a GbR (Gesellschaft bürgerlichen Rechts) or similar foreign company set up without having met the necessary prerequisites for the setting up of such a company. In such cases it is to be verified whether the employees do actually act with a partner status or whether there exist a de facto employer-employee relationship between the person concerned and the German or foreign “head” of the company.

The trade registration provides no verification of a GbR as to whether this cooperative structure is a real GbR with partners or a company with employees. In Germany this form of company is regarded as one of the main perpetrators of self-employment status abuse. As Germany opted for restrictions and transitional arrangements for the free movement of workers from the accession member states, in certain cases workers from Romania adopt self-employment status to get into the German labour market. It was observed that these migrant workers are less qualified, as qualified workers remain in the Romanian labour market. The “head” of a GbR with these Romanian workers as “partners” is acting as an employer; if the “head” is in bogus self-employment himself, the contractor is the employer of the workers and liable for the consequences. It was assumed that this conformation of Wir-AG’s was enforced by criminal means. The problem of this grey zone of German law and regulation is now being addressed by the authorities.

Figures or estimates of the numbers of bogus Wir-AG’s are not yet available.

7.2. Causes and consequences of bogus self-employment

In the case of Wir-AG (see 7.1) bogus self-employment causes problems in several respects.

- ◆ The Wir-AG's, acting with unqualified or less qualified workers impose a problem on the German labour market, where unqualified workers suffer the highest unemployment rates.
- ◆ Due to the fact that by registering a Wir-AG's in Appendix B HwO there is no verification of qualifications, the quality of the work is not guaranteed. As a consequence, "Pfusch am Bau" (poor workmanship) was reported especially in the case of tilers and unskilled workers from Romania.

Besides foreign Wir-AG's, self-employment in construction (Ein-Mann-Betriebe) is not a problem related to migrant workers. The self-employed are mainly German. Bogus self-employment in general leads to several short- and long-term consequences.

Health and safety

As health insurance is not compulsory for the self-employed, very often the cost of private insurance is not calculated in the price for the work carried out. That may cause problems for the self-employed in case of accident and occupational disease. Without work, he will fall back on the social benefit system. Health and safety on site is part of the contractor or client's liabilities. On site compliance with health and safety measures by companies depend on the size of the companies or the constructions sites. The integration of self-employed in the construction process with respect to health and safety often leads to problems on smaller construction sites. Although statistics do not show an increase in working accidents and occupational diseases, a huge impact has been reported. Self-employed very often do not comply with health and safety regulations and provisions.

Vocational training

With the amendment of Handwerksordnung (HwO) from the 1st of January 2004 onwards the possibility was given to set up business in construction work areas without the obligation to certify qualifications.

As shown in chapter 3 the number of master certificates has declined. The master qualification in general includes as a prerequisite a three-year apprenticeship period. The self-employed, who started up without master qualification will probably not take part in continuous training schemes. This is due to the workload of self-employed on the one hand and low interest in training in general on the other.

Self-employment leads to less participation in apprenticeship schemes, because most self-employed either do not have the permission to do so or are not interested in taking part in apprenticeship. In the case of tilers a decline in apprentices is already noticeable (see table 13).

Social inclusion

In the construction industry self-employment is not subject to either the trade union or the employer's organisations.

Associations of self-employed in construction are not reported. Membership of chambers of commerce is only compulsory for self-employed with a masters degree, listed in Appendix A HwO.

VIII. Assessment of prevention and combating measures to tackle bogus self-employment

8.1. Investigations, checks and control

The FKS (Finanzkontrolle Schwarzarbeit) acts as the monitoring authority for illegal employment and black labour market. Since 2006 these checks include payment of minimum wage and working time.

Staff for this tasks has been enhanced recently to about 6.500 persons.

Table 2 FKS - Control of regular employment 2004-2006

	2004	2005	2006
Number of employer checked			
In construction industry	34283	24374	28443
In other industries	70682	53942	54815
Total	104.965	78.316	83.258
Administrative offences			
In construction industry	6.903	10.515	8.209
In other industries	10.434	9.839	8.540
Total	17.337	20.354	16.749
Number of criminal offences			
In construction industry	3.311	3.147	4.320
In other industries	5.888	6.926	8.930
Total	9.199	10.073	13.250

Source: Finanzkontrolle Schwarzarbeit (FKS)

In 2007 the number of employers checked declined to a total amount of 62.256.

8.2. Combating and sanctions

Penalties exist for non-compliance with tax legislation, social insurance law, trading legislation and trades and crafts legislation.

Where the conditions necessary for self-employment are not met, the situation constitutes an employer - employee work relationship. Firstly, the remuneration paid for the work carried out is subject to income tax. Secondly, an employee-employer-relation in Germany triggers certain social security reporting, contribution and accounting obligations. Non-compliance is deemed to constitute illegal work under section 1(2)(1) of the German law to combat illegal work (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG). Failure to report or contribute may be linked to the crime of withholding and embezzling remuneration as defined in section 266a of the German Penal Code (Strafgesetzbuch, StGB). The number of cases increased from 1990 to 2006 by 253,5 percent p.a. reaching a figure of 8,819 in 2006 (Statistisches Bundesamt - federal office for statistics, own calculations by N. Wulf, Hauptverband der Bauindustrie).

Only the employer can be deemed the offender. The sole liability for paying the employees share to the collecting office rests with the employer; section 28e SGB IV. Under Section 28a(1) SGB IV, the employer is also required to inform the collecting body of the existence of all dependent employee - employer relationship.

The would-be client must be aware that they can become an employer when bogus self-employment is detected. Furthermore, section 111 SGB IV provides for administrative fines for breaches in reporting, contribution and reporting obligations.

Self-employment is subject to Trade legislation and Trades and crafts legislation. Whoever fails to submit or submits incorrect, incomplete, or late notification pursuant to section 14 GewO is deemed under 146(2)(1) of this Code to have committed an administrative offence. Section 148 states that whoever persistently repeats the latter offence is committing a criminal offence. Under section 117(1)(1) HwO (Handwerksordnung), anyone who carries on a trade listed in Appendix A to the Code without being registered in the crafts and trades register is committing an administrative offence. Same is true for provisions of cross-border services where the provider is not in possession of the certification required under section 9(2) and section 4EU/EWR-HwV (EU/ERW-Handwerksverordnung).

In addition, whoever fails to meet his obligation to notify independent activities according to section 14 GewO is guilty of illegal work. The same is true for anyone who performs a trade without being registered in the crafts and trades register (section 1(2)(4) and section 1(2)(5) SchwarzArbG). These persons then commit an administrative offence under section 8(1)(1)(d) resp. (e) SchwarzArbG). Section 2(1), second sentence, of the SchwarzArbG which states that the regional revenue authorities are responsible for ensuring that tax obligations have been met and section 2(1), third sentence, entitles the customs administration (Hauptzollämter) to participate in these checks. The customs authorities also investigate whether there are reasons to suspect that tax obligations arising from contracts for work and services are not being met.

IX. Conclusions and recommendations

There are already good legal and administrative provisions in force to prevent and to combat illegal practices in the grey-area of bogus self-employment.

The following measures and actions are recommended:

In order to prevent bogus self-employment the registering authorities should check the applications for registering concerns involving occupations listed in Appendix B1 and B2 of the Trade Regulation Code (Gewerbeordnung (GewO)) when there are suspicions of bogus self-employment. In some cases it is obviously bogus self-employment from the start. Information should be provided to applicants in several languages, applying persons should bring the application personally to the registration office instead of sending it e.g. via internet.

There is good legislation and regulations in force but verifications of non-compliance should be reinforced. More personnel for the Finanzkontrolle Schwarzarbeit (FKS) is recommended to ensure more checks on companies and on sites. Sentences and fines are high but more legal proceedings need to be filed, otherwise illegal practices will often go unpunished.

High motivation for illegal practices still persists. In 2004 three regulations were introduced which made the use of bogus self-employment practices more tempting: re-regulation of the Trade Regulation Code on 1 January 2004, ten new member states joining the EU on 1 May 2004 and a new subsidy scheme for company starts ups (Ich- AG's) as a labour market measure.

As the gap between employee labour costs and the fees calculated by the self-employed is rather wide it is recommended that in order to protect the self-employed, especially in the

construction sector, they be required to comply with compulsory social security schemes. At least status verification (self-employed or employee) with the general pension insurance should become compulsory for start ups registering for the first time. On the other hand this gap can also be narrowed by reducing (indirect) labour costs.

These recommendations together with others have been brought up in informal or formal discussion procedures but so far a common consent to their implementation has not been reached.

Experts Report

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

Cristina M. ANA¹

January 2009

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

1. Definitions/demarcation line:

Direct employment:

There is no statutory definition for direct employment in the Irish law. However, all employees are protected under the law by the Terms of Employment (Information) Act 1994 and 2001. The act provides that an employer must provide his/her employee with a written statement of the particulars of the employee's terms of employment. It also provides that an employer must notify the employee of any changes in the particulars provided in the statement. The lack of a statutory definition is compensated for by a whole body of case law that has developed in common law.

While all of the following factors may not apply, an individual would normally be an employee if he or she fulfils the following criteria seen as characteristic for a direct employment relationship:

- ◆ Is under the control of another person who establishes how, when and where the work is carried out.
- ◆ Supplies labour only.
- ◆ Receives a fixed hourly/weekly/monthly wage.
- ◆ Cannot subcontract the work. If the work can be subcontracted and paid for by the person subcontracting the work, the employer/employee relationship may simply be transferred on.
- ◆ Does not supply materials for the job.
- ◆ Does not provide equipment other than small tools of the trade. The provisions of tools might not have a significant bearing on determining whether employment status may be appropriate given all the circumstances of a particular case.
- ◆ Is not exposed to personal financial risk in carrying out the work.
- ◆ Does not assume any responsibility for investment and management of the business.
- ◆ Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.
- ◆ Works set hours or a given number of hours per week or month.
- ◆ Works for one person or for one business.
- ◆ Receives expense payments to cover subsistence and/or travel expenses.
- ◆ Is entitled to extra pay or time off for overtime.
- ◆ Additional factors to be considered:

- ◆ An individual could have considerable freedom and independence in carrying out work and still remain an employee.
- ◆ An employee with specialist knowledge may not be instructed on how to perform the work.
- ◆ An individual who is paid by commission, by share, by article or job, or in some other atypical fashion may still be regarded as an employee.
- ◆ Some employees work for more than one employer at the same time.
- ◆ Some employees do not work at the employer's premises.
- ◆ There are special PRSI (Pay Related Social Insurance) rules for the employment of family members.

Self-employment:

There is no statutory definition for (genuine) self-employment in the national law but there is a code of practice, and there is also case law. The law makes the distinction between contract for service and contract of services.

While all of the following factors may not apply to the job, an individual may normally be self-employed if he or she fulfils the following criteria seen as characteristics for genuine self-employment:

- ◆ Owns his or her business.
- ◆ Is exposed to financial risks, by having to bear the cost of making faulty or substandard work carried out under the contract.
- ◆ Assumes responsibility for investment and management of the enterprise.
- ◆ Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks.
- ◆ Has control over what is done, how it is done and whether he/she does it personally.
- ◆ Is free to hire other people, on his/her terms, to do the work which has been agreed to be undertaken.
- ◆ Can provide the same services to more than one person or business at the same time.
- ◆ Provides the materials for the job.
- ◆ Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which generally speaking would not be an indicator of a person in business on their own account.
- ◆ Has a fixed place of business where materials, equipment etc. can be stored.
- ◆ Costs and agrees a price for the job.
- ◆ Provides his or her own insurance cover e.g. public liability cover, etc.
- ◆ Controls the hours of work in fulfilling the job obligations.

The national law does not mention “bogus self-employment”. However, the RCT (Relevant Contracts Tax) system and the national agreement mention bogus indirectly, by stipulating what is an abuse of a typical self-employment/ services relationship.

The criteria seen as an indicator that a person is working as a bogus self-employed person are the following:

- ◆ Generally an individual should satisfy the self-employed guidelines; otherwise he/she will normally be an employee.
- ◆ The fact that an individual has registered for self-employment or VAT under the principles of self-assessment does not automatically mean that he or she is self-employed.
- ◆ An office holder, such as a company director, will be taxed under the PAYE (the Pay as You Earn) system. However, the terms and conditions may have to be examined by the Scope Section of the Department of Social and Family Affairs to decide on the appropriate PRSI (Pay Related Social Insurance) Class.
- ◆ It should be noted that a person who is a self-employed contractor in one job is not necessarily self-employed in the next job. It is also possible to be employed and self-employed at the same time in different jobs.
- ◆ In the construction sector, for health and safety reasons, all individuals are under the direction of the site foreman/overseer. The self-employed individual controls the method to be employed in carrying out the work.

The forms of self-employment/ bogus self-employment which can be encountered in the Irish legal system are the following:

1. Self-employment partnership (even if this is not a distinct juridical entity, it is treated as such in regard to taxes).
2. Individually self-employed.
3. Limited company.
4. Joint venture.

In comparison to the directly employed, the employment rights formally held by the self-employed workers are unemployment allowance and medical care, which are both received by employees and the self-employed. The rights the self-employed does not hold are the pension and sickness compensation schemes, death and service schemes for the employees, which do not have a correspondent for the self-employed.

Semi-dependent workers:

The phenomenon of “semi-dependent” employment is encountered in Ireland, even though the term is not used as such.

There is a system that recognises a difference in payment (ORI) if workers work for an agency and not directly for the constructor that is the beneficiary of their work. Usually, a minimum salary is paid by the agency to these workers and the rest is provided for them by the constructor.

Undeclared labour:

Undeclared work is not defined in the law, however undeclared income, from a tax perspective, is somehow defined in the law, to the extent that the law stipulates what a person should declare in terms of income. The law states that it is mandatory for the income to be declared. Also the use of the term “hidden economic group” was established at the request of the trade unions.

Labour relationship:

Different economic or labour relations such as subcontracting of services or work force, working under service agreements, etc. are encountered in practice as follows:

Subcontracting of work force is quite a generalized phenomenon in the construction field, and often the workers are employees of the subcontractor/ employment agency, and they are often underpaid in comparison with the employees of the main constructor (beneficiary of the work).

In the construction sector the main contractors work less with their own employees but often use subcontractors of work force. The situation became problematic as even though there are a series of acts protecting employees, there is no legislation to protect the self-employed. - According to the representatives of the trade unions interviewed.

The legislation is due to change this perspective in 2008; according to the new draft law all workers will have the same terms and conditions as the employees of the main constructor. This new law, when adopted is expected to completely discourage intermediaries in labour relationship, as well as subcontracting of work for the purpose of cutting expenses.

In theory, the parties do have complete freedom in establishing their contractual terms. Courts can look at the facts and disregard the will of the parties if the real situation points towards a different set up than the one established in the contract.

There is case law of the Supreme Court that considers statements such as: “You are deemed to be an independent contractor”, “It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise”, “It is agreed that the provisions of the Unfair Dismissal Act 1977 do not apply”, “you will not be an employee of this company”, “you will be responsible for your own tax affairs” are not contractual terms and have little or no contractual validity. While they may express an opinion of the contracting parties, they are of minimal value in coming to a conclusion as to the work status of the person engaged.

Employment status:

The Revenue has elaborated a “Code of Practice for Determining Employment or Self-Employment Status of Individuals” published in 2008 that makes the distinction between employee and self-employed status.

The following procedure can be considered an alarm procedure against bogus self-employment: As the self-employed must be registered for VAT, the RCT 1 form is sent to the Revenue. The Revenue has set up a follow up procedure to the RCT1 form. There are also joint teams (from several institutions: the Revenue, NERA) that follow on the RCT 1 form and their focus is on bogus self-employment.

Sharing information is the main joint task of the team as well as risk evaluation and the elaboration of an analytical profile. A risk tool was also developed and there are also specific rules to it. The inspectors in the joint teams have developed efficient criteria to detect bogus self-employment: the inspectors use cross referencing instruments, and they compare the data obtained during the inspections performed with the constructors’ incomes declared at the end of the year. The new RCT1 form was developed as a result of consultations with the trade unions.

The corroboration of the effects of the RCT1 form, the Code of Practice for Determining Employment or Self-Employment Status of Individuals” published in 2008 and the fines that will be applied as a consequence are believed to be able to solve the bogus self-employment practice in Ireland. All counterparts met during interviews seemed optimistic in this respect.

2. Figures/Extent²:

Direct employment/self-employment:

According to figures found on www.fas.ie 10 years ago there were 70,000 self-employed in the construction sector out of which around 12,000 were bogus self-employed (according to the estimates of the counterparts interviewed).

There are 285,000 workers engaged in the construction sector in Ireland. 60,000 workers have recently lost their jobs because of the crises/recession in the construction industry.

Self-employment/bogus self-employment:

Bogus self-employment has decreased according to the NERA (National Employment Rights Authority) and Revenue. In 2007 a pilot project was developed and implemented establishing joint investigation units that examined the incidence of bogus self-employment; 25 % of their resources were allocated to the construction sector. The objective of the project was to detect as many bogus self-employed as possible. The conclusions of the project were that the figures for bogus self-employment are decreasing.

In addition, when considering that on the one hand, the obligation the self-employed must fulfil are more onerous than they were before, and on the other hand, the RCT1 form states more restrictive conditions to the criteria for self-employment and that the Revenue increased demands and inspections, it can be concluded that combating bogus self-employment in the future will be more successful than it was in the past.

(Bogus) self-employment and migrant workers:

Desktop research has shown that:

According to the most recent Central Statistics Office figures, one in six workers in the Irish work force is now of foreign nationality. To what extent this inward migration has transformed the Irish workplace has yet to be established.

The increase of employment in the construction sector was also the largest across all sectors of the Irish economy. In 2000, there were 166,200 people employed in construction; by 2005 this number had increased to 242,200 (CSO, 2006). There has been, however, a decline recently in the number of people employed within this sector. Employment fell by 6,000 people between the first and third quarter of 2007, which was probably a result of the slowdown in residential housing activity. The numbers of firms reporting vacancies is also smaller. In January 2007, 20 % of companies in the construction sector reported vacancies compared to 9 % by November of that year. This figure contrasts significantly with the 16 % of companies who reported vacancies across all sectors of the economy. The number of the self-employed in construction however has increased, which may indicate either a growth in maintenance related activities or the fact that constructors are increasingly cutting back on direct employment, in order to cut costs.

II. The impact of regulation and deregulation in this field:

Self-employment can take one of the following shapes: a sole trader, partnership or limited company. The type of structure chosen depends on the kind of business that is carried out. Regularly, in the construction field the self-employed works as a sole trader.

Much of the process of establishing oneself as self-employed requires the same information whether the person is a sole trader, a partnership or company. The guide to self-employment *Toil and Trouble* (pdf)³ is available on the Department of Social and Family Affairs website.

The main legal obligation when becoming self-employed is that the person aiming to become self-employed must register as such with the Revenue Commissioners⁴. If the person wishes to use a business name then this must be registered with the Companies Registration Office. A Certificate of Business Name will then be issued which must be displayed prominently at the place of business⁵. The Certificate of Business Name is needed to open a business bank account.

Also, in order to set up as a sole trader one must register as self-employed for income tax purposes with the Revenue Commissioners.

As a self-employed individual one pays tax under the self-assessment system⁶. There is a Preliminary Tax (an estimate of tax due) to be paid on or before 31 October each year and a tax return not later than 31 October following the end of the tax year. An annual tax return must be filled in. The records should state:

- ◆ All purchases and sales of goods and services and
- ◆ All amounts received and all amounts paid out

Further information about personal pension⁷ can be found in the Revenue booklets IT 10 A Guide to Self Assessment⁸ and IT 48 Starting in Business⁹.

The self-employed must register for Value Added Tax (VAT)¹⁰ if the annual turnover exceeds or is likely to exceed the following annual limits: €70,000 for the supply of goods or €35,500 for the supply of service. (Before 1 March 2007 the limits were €55,000 and €27,500 respectively)¹¹.

PRSI (Pay Related Social Insurance):

The self-employed pay Class S PRSI contributions. This entitles them to a limited range of social insurance payments including, Widow's/Widower's Contributory Pension, Orphan's (Contributory) Allowance, State Pension (Contributory), Maternity Benefit, Adoptive Benefit and the Standard Bereavement Grant. Class S social insurance contributions are paid at a rate of 3 % on all income.

If the income is above €26,000 there is also a 2 % Health Contribution to be paid on all income. This is paid directly to the Revenue Commissioners when the annual tax return is made.

The self-employed have to register for Class S social insurance with the Department of Social and Family Affairs (DSFA)¹².

Insurance:

Although the self-employed are not legally obliged to be insured when carrying on a business, they are advised to have insurance cover for various situations. The Back to Work Enterprise Allowance Scheme encourages¹³ those receiving certain social welfare payments in Ireland to become self-employed. If someone takes part in the Back to Work Enterprise Allowance scheme, they retain a percentage of their social welfare payments for 4 years. If they become self-employed, they may get extra support, for example grants for training, market research, business plans and access to loans to buy equipment. Also assistance is provided by the state for this category in paying for public liability insurance.

In terms of legislation 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, the interlocutors met considered that the guidelines for self-employment issued by the Revenue have certainly made a difference in this respect. Also during the interviews conducted for the purpose of this research another change in legislation had an impact on self-employment, this change occurred in 2006 stipulating that even in case of foreign contracts and payments made from outside Ireland, if all work is performed in Ireland, the taxes shall be paid in Ireland while the old law abrogated by this one, stipulated that only the foreign source of income that was brought to Ireland was subject to taxes in Ireland. The presumed impact this legal norms has had on self-employment is that it has encouraged it because people have tried to avoid the new law and thus concluded self-employment contracts so as not to disclose the information regarding the place where all the work has been executed, in order not to pay tax.

Qualifications:

To register with the Revenue Commissioners as a self-employed sole trader one must complete the tax registration form TR1¹⁴. This form can be also used to register for VAT. The person applying for the TR1 will receive a “Notice of Registration” confirming that he or she is registered for income tax and, if applicable, for VAT. To register a business name one must apply to the Companies Registration Office (CRO) using Form RBN1¹⁵ or online using CORE (Companies Online Registration Environment).

To register for Class S social insurance with the Department of Social and Family Affairs one should complete Form SE3¹⁶. For information on PRSI for the self-employed one can contact the local social welfare office or the Self-Employment Section of the Department of Social and Family Affairs.

Anybody can register as self-employed in any craft. The professional qualifications are not checked by the state authorities.

Only non-residents have a different questionnaire to fill in than the ones mentioned above. It is envisaged that a special Unit within the Revenue office in Dublin will be established for all non resident self-employed.

The status of a self-employed person can be either a company status or an individual person with a VAT number. The enforcement of the legislation concerning self-employment¹⁷ is handled by the Revenue Office.

There aren't any restrictions for the citizens of the Member States of the European Union to work in Ireland, only for the citizens of the new Member States. The latter ones can only work as self-employed and cannot have direct employment contracts.

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

Development of the construction sector over the last years:

Over the past few years the construction industry has played an important role in the Irish economy. By 2006, the construction sector accounted for 24 % of GNP and its total output was €36.5 billion (CIF, 2008). The total share of employment for this sector was 12.6 % in 2005 - the highest among the European Union member states (with an average of 7.9 %). However, it seems that the Irish economy in 2008 has registered a downturn, with the construction sector, in particular, subject to a significant slowdown. There has been a decline in residential and housing construction that impacted on the numbers of new developments in the Irish labour market and on migrant employment in the construction sector.

According to the CSO 2008 report¹⁸ on Construction and Housing in Ireland¹⁹, the key issues include:

- ◆ Gross value added from building and construction was €16.7 billion in 2007, accounting for 9 % of GDP and 10 % of GNP.
- ◆ Gross value added from this sector increased by only 0.1 % in 2007 while GDP and GNP rose by 6 % and 4 % respectively (at constant prices).
- ◆ Output from the construction sector was €38.5 billion in 2007. This is estimated to drop by 23 % in 2008 to €29.7 billion (based on figures from DKM/DEHLG).
- ◆ The residential sector accounted for nearly 60 % of construction output in 2007. The output from this sector declined by 6 % in 2007 and was estimated to decrease by a further 38 % in 2008.
- ◆ Employment in construction fell by 10 % from nearly 282,000 in the second quarter of 2007 to 255,000 for the same period of 2008. All of this decrease can be attributed to a decline in employee numbers rather than the self-employed.
- ◆ Almost €2.2 billion (18 %) of the Public Capital Programme was spent on housing in 2007, an increase of 35 % since 2002.
- ◆ The number of houses completed in 2007 decreased by 12 % to 78,000.
- ◆ Figures for the first two quarters of 2008 show a significant slowdown with only 70 % of the number of completions when compared to the same period in 2007.

As stated previously in the key findings of the CSO 2008 report on Construction and Housing in Ireland this development in the construction sector in Ireland did impact on a decrease of the employment figures in the construction sector, the numbers fell by 10 % from nearly 282,000 in the second quarter of 2007 to 255,000 for the same period of 2008. “All of this decrease can be attributed to a decline in employee numbers rather than the self-employed” the report concluded.

IV. Cross-border effects of self-employment/ bogus self -employment

Migration/enlargement:

The workforce profile of the construction sector in Ireland (as is the case elsewhere) is not homogenous; it ranges from low skilled workers to highly specialised and qualified employees. Employment itself can also be differentiated between investors, contractors, subcontractors, self-employed and regular contract employees.

The construction sector demands a large proportion of unskilled work. The low social status associated with physical work makes such employment not particularly attractive for the domestic labour force. In such cases, the sector can experience labour shortages that need to be filled. One of the solutions for those labour shortages is the employment of flexible workers, recruited on the international rather than domestic labour markets. As a result, migrants play an important role for the sector often as unskilled work force.

Construction is an important sector for labour migration. During the construction boom of recent years the sector experienced a significant inflow of migrants, particularly from the accession countries. As can be seen from Table 1, migrants accounted for 13 % of the total industry workforce in the third quarter of 2007. This compared, for example, to almost 30 % of migrant workers in the hotels and restaurants sector (CSO, 2007).

Table 1 Employment and nationality in Construction industry 2004-2007 compared to Total employment and nationality in Ireland 2004-2007²⁰

Year	Irish Nationals in Construction Vs. Total Employment Irish Nationals	Non-Irish Nationals In Construction vs. Non-Irish Nationals in all industries	Of which: United Kingdom in constructions vs. in total	EU15 excl. Ireland and UK in constructions vs. in total	Accession states EU15 to EU27 In construction vs. in total	Other In construction vs. in total	Total persons in construction Vs. total employment	(Non-national as % of total) in construction vs. in all industries
2004 (thousands)	205.5/ 1,746.30	15.7/ 146.8	5.5/ 45	2.4/ 24.9	4.9/ 24.8	2.8/ 52.1	221.1/ 1,893.10	7.10%/ 7.75%
2005 (thousands)	223.5/ 1,788.30	29.1/ 206	7.1/ 52.2	1/ 27.9	16.2/ 68.9	4.8/ 57	252.6/ 2,076.90	11.52%/ 12.81%
2006 (thousands)	233.3/ 1,810.80	47.1/ 266.1	7.9/ 52.6	1.3/ 32.7	29.9/ 108.8	8.1/ 72	280.4/ 2,076.90	16.80%/ 12.81%
2007 (thousands)	234.6/ 1,818.60	48.6/ 327.4	6.3/ 50.7	1.4/ 29	35.7/ 165.7	5.1/ 82.1	283.2/ 2,146.00	17.16%/ 15.26%

During the interviews conducted for the purpose of this research, the interlocutors have concluded that, according to their view, in the process of enlargement, the labour market changed substantially; the labour market changed firstly because of the massive increase in the demand for labour and secondly because a significant part of the necessary labour force was provided through migrant workers, this allegedly allowed costs to remain low; it is believed that allegedly migrant workers often accepted lower payments than the domestic labour force.

In terms of migrant labour, the following recruitment strategies have been identified:

- ◆ Indirect external recruitment: recruitment of foreign workers that are already present in the country;
- ◆ Direct external recruitment: recruiting foreign workers directly from their country of origin;
- ◆ Subcontracting: outsourcing to companies who employ foreign workers or outsourcing foreign companies who bring their own workers from the country of origin (posted workers);
- ◆ Internal labour market recruitment: recruitment of foreign workers on site and dispatching them internationally.

It is possible that employers increasingly use migrant workers to avoid investment in training and up-skilling of their national workforce.

V. Social security and fiscal (tax) developments

No details regarding the difficulties in filling in the E101 form could be established during the interviews within this research, this matter seems to be unknown to both the representatives of the trade unions and employer's organisations, as well as the representatives of the state authorities.

Tax system:

Ireland taxation of an individual's income is progressive, the higher the income is, the higher is the rate of tax payable. The tax rates for an individual (in 2007) are 20 % and 41 %.

There are reduced rates of tax for certain income earners.

The standard corporate tax rate is currently fixed at 12.5 %. For trading income.

Corporate tax of 10 % is applied to companies observing certain conditions. The 10 % tax rate will remain till 2010. Corporate tax of 25 % is imposed on passive income.

Income Tax for an Individual:

An individual is liable for tax on his income as an employee and on income as a self-employed person. Tax will be payable on income earned in Ireland and overseas by an individual who meets the test of a "permanent resident" of Ireland. A foreign resident who is employed in Ireland pays tax only on income earned in Ireland.

One of two tests must be passed to be considered an Irish resident: residency for more than 183 days a year in Ireland or residency for more than 280 days over a period of two years. It is important to point out that as regards taxable income from a salary; the employer is required to deduct the amount of tax payable on a monthly basis. A self-employed person must prepay income tax that will be offset on filing an annual return. The advance payment is determined on the basis of the return made for the previous year. In the event of a new business, the advance will be calculated on the basis of estimates made by the owner of the business.

Certain payments are deductible from taxable income as detailed below:

Table 2 Ireland individual income tax rates 2007 (single):

Tax base (EUR)	Tax (%)
0 - 34,000	20%
34,001 and over	41% on base exceeding 34,000

The rate of tax payable on capital gains in 2007 is 20 % for individuals. A capital loss may be offset against a capital gain in the current year, or against a capital gain in the coming years. There are exemptions from capital gains in the following cases, among others, subject to certain conditions:

- ◆ The first EUR 1,270 of capital gain.
- ◆ Gains from lotteries and betting.
- ◆ The sale of a main residential asset.

Ireland Reporting Dates and Payment:

The tax year in Ireland for individuals ends on December 31. Advance payments of income tax are based on the “self assessment” method.

An Individual - An individual whose income is only from a wage pays his income tax to the tax authorities on a monthly basis. A self-employed individual is required to pay 90 % of the tax forecast for the year by November 1, or an amount that is identical to the tax he paid the previous year. Annual returns must be filed by January 30. Fines are imposed for arrears in filing an annual return at the rate of 5 % of the tax on returns submitted by March 31. The fine is 10 % in the case of returns submitted after March 31.

A Limited Company - Advance payments on tax is similar to that of an individual. It should be pointed out that the fine for filing a late report is 5 % .

The interlocutors interviewed referred to the overall loss in income of tax and other social security payments for the government as a result of bogus self-employment as being slight, because the state takes 35 % from all the self-employed (bogus self-employed included).

Companies:

When engaging a self-employed worker instead of a direct employee a company saves, 10.75 % of the payment it would make for an employee.

Workers:

Regarding tax and social security payments when working as a self-employed, the workers do get to keep a larger net income, and if their estimates are correct (or if they choose not to declare the difference between income estimated and income earned) there is no further tax and social security benefits to be paid except for the 35 % that are held by the contractor and given to the tax authorities.

Pensions:

The self-employed are compulsorily insured in the state pension system if the income they

make is lower than the threshold of 30,000 Euro per year. The pension contribution is collected through the 35 % of the income that the contractor retains from their pay cheque and hands over to the tax authorities. The average pension contribution for the self-employed is 5 % of their income.

For employees the contributions can vary between 12,5 % and 0 % . This variation is produced in direct proportion with the income. The employer also pays a pension contribution of 10.50 % for the employees.

The self-employed can benefit from a private occupational pension system.

The interlocutors stated during interviews that the percentage of self-employed construction workers that have state and/or additional pension provisions is quite low. While the direct employees must underwrite this private construction pension system, so they in fact have two pension systems where their subscription is mandatory, for the self-employed, the second pensions system is not mandatory for all of them, just for the ones that fulfil the “worker” status criteria).

Unemployment benefits:

The self-employed are not covered for the periods when they are without work, they do not benefit from unemployment contributions.

There is another form of financial support the self-employed qualify for when without work and this is means tested state aid. This benefit is received from the state when the self-employed prove they have no means for living.

Health insurance:

The self-employed are health insured like the direct employees. The health contribution is 2 %. State medical care is free.

Health and safety:

The same health and safety provisions apply to the self-employed and employees.

Although the Irish construction sector is highly regulated from the health and safety point of view, due to the character of the industry and the conditions on sites, the industry seems to be the most dangerous sector for both fatal and non-fatal accidents (Table 4).

Alternative Compliance Incentives:

Liability insurance for employers is available from insurance companies. Employer liability insurance (ELI) is compulsory in some EU states such as the UK but not in Ireland. The construction industry is a high-risk industry and as such the cost of insurance of this type is likely to be high. Compelling the industry to seek such insurance could inflate the price of premiums and add a significant cost to the industry.

The consequences of non-compliance with good safety and health practice in the construction sector are too severe to exclude the possible involvement of the Courts.

A construction industry request has been made for an amendment of Regulation 97 of the Construction Regulations 2006 to clarify the provisions relating to “Works on roads, foot-paths and cycle tracks” and the phrase “at all times when the works are in progress”.

Having considered the matter, the Health and Safety Authority's proposes that Regulation 97 of the Construction Regulations 2006 be amended so as to clarify the provisions applicable to ensure that, in respect of construction road works, adequate guarding and lighting is provided, that traffic signs are placed and maintained and, where necessary, operated as reasonably required for the safe guidance or direction of persons, having regard, in particular, to the needs of people with disabilities. There must be at least one person on site, at all times when the works are in progress, who has been issued with a valid CSCS card relating to health and safety at road works, and the works must be supervised by a competent person who has been issued with a valid CSCS card relative to signing, lighting and guarding on roads.

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

The interlocutors interviewed for the purpose of this research have stated that the causes that trigger an increase in (bogus) self-employment in Ireland are:

- ◆ *Revenue regulations.*
- ◆ *Reductions of costs: (bogus) self-employment is cheaper for the employer/constructor and the self-employed; a service contract is more lucrative for both.*

Interlocutors have stated during the interviews that: *There is no proof that migrant workers are more noncompliant with genuine self-employment provisions than Irish nationals because the PPS number that is being provided to every self-employed individual in Ireland and the records kept for self-employment do not require the nationality to be recorded.*

As a consequence, there have been awareness campaigns on bogus self-employment led by the authorities targeting migrant workers in particular.

Another consequence could be that an increase of bogus self-employment is likely to lead to a greater casualisation of the sector, deteriorating the traditional relationship between the employer and employee, which would not be the same in case of contractor and bogus self-employed, to impact on vocational training etc.

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

The structure of the construction sector lacks homogeneity not only in regard to employees but also with employers. Types and sizes of the firms in the construction industry vary from self-employed subcontractors (one-person companies) to large companies with hundreds of employees. Although it is not possible to give the total number of the companies involved in the construction sector in Ireland, some conclusions on the structure of the sector can be drawn from available data. According to the QNHS²¹, in the fourth quarter of 2004, there were over 227,000 people working in the Irish construction sector and 146,000 of those were employed by companies with less than 20 persons. The Census of Building and Construction reported that there were 524 firms employing more than 20 persons in 2000. However, even though this figure had risen to 736 firms, employing over 65,000 workers in 2004 (CSO, 2005), in terms of employment share the main players are relatively small firms.

During the last 20 years large firms have gradually shifted from employing workers directly to utilising subcontracted small companies and self-employed construction workers to carry out various tasks.

In 2004 there were only 224 companies in Ireland that were directly employing more than 50 people and the total share of employment for such companies was 16.7 %. **Currently, more than half (122,100) of all workers in the construction sector are now either self-employed or work for small firms employing less than ten people (CSO, 2007).**

Therefore, it could be concluded that subcontracting is quite wide-spread in the construction industry in Ireland. The majority of companies are of medium and small size and the number of those who are directly employing more than 250 people is in fact very small. Special trade and certain parts of large developments, such as plumbing, electricity and concrete are increasingly outsourced to smaller companies which are subcontracted by the larger firms of the sector. Moreover, the number of self-employed construction workers has significantly increased in recent years.

Another strategy is the use of foreign subcontractors and posted workers. In Ireland, posted workers are covered by the same employment rights as other workers. Therefore, they should be paid in accordance with the Registered Employment Agreements of the construction sector (EIRO 2003).

Consequences/measures taken:

As mentioned above, regulations are in place with regard to working conditions and wages. However, there is some evidence of worker exploitation, mainly by paying lower rates than those set up in the Registered Employment Agreements. Such cases along with issues linked to migrant workers' rights have been raised by trade unions, statutory bodies and NGOs. There are also some issues related to agency workers. The SIPTU campaign, Justice for Agency workers, has highlighted some problems experienced by these workers, many of whom migrants, who often are in worse conditions than directly employed workers (SIPTU 2007).

There are reasons to believe that the increasing use of outsourcing and subcontracting in the Irish construction sector may have a detrimental effect on training and apprenticeships and may lead to the growing casualisation of work.

VIII. Prevention and combating measures

The measures for non-compliance with legislation on self-employment taken at national level are:

- ◆ The obligation of registering employment agreements;
- ◆ The possibility of bringing abuses of direct employment /self-employment into court (according to the representatives of the institutions interviewed, there are hardly any cases tried successfully, but it is expected that this too will develop more in the future);
- ◆ The new form of the Revenue Office put in place since April 2008 in which the distinction between self-employment and employment is clearly stressed, also adds to the conditions one must fulfil in order to be genuinely self-employed; - the results of the introduction of this new form should be assessable soon;
- ◆ The numbers of the inspectors in the joint investigation teams has been increased in response to a bigger number of notifications of bogus self-employment, the Revenue

Office has 32 full time inspectors (not only for the construction sector but fully aware of the construction sector being a priority), DSFA - 72 inspectors, NERA- 86 inspectors, out of which 12 foreign language inspectors;

- ◆ Apart for inspectors the Revenue has also auditors that perform all the checks of the income declarations and their number has also increased, as it is believed that the more checks from the revenue the greater the dissuasive effect the checks will have;
- ◆ Establishment of joint monitoring groups made up of representatives of the social partners and state authorities that might examine the effects of the measure taken and make propositions for new possible measures to address bogus self-employment.

The interlocutors have stated that in order to reduce the number of the bogus self-employed the measure to be taken is increasing the number of revenue inspections. As for the measures that should be adopted at a European level to combat bogus self-employment, the interviews suggested that increasing the joint approach of the member states would help combating bogus self-employment as well as increased education and raising awareness of the prejudices of bogus self-employment, the use of a code of good practices was also suggested as a possible solution along with the establishment of regional teams and national teams to address bogus self-employment. It was also suggested that at EU level a recommendation should be made for all member states to combat bogus self-employment or for the legislation of the member states to be amended in such a way that bogus self-employed that are in fact employees be treated as such.

IX. Conclusions and recommendations:

- ◆ The guidelines for self-employment issued by the Revenue Office are expected to make a real difference in discouraging bogus self-employment, therefore a recommendation could be to monitor the impact of the guidelines in the near future;
- ◆ Initiatives like the SIPTU campaign, Justice for Agency workers, has highlighted some problems experienced by these workers, many of whom migrants, who often are in worse conditions than directly employed workers (SIPTU 2007), therefore this kind of initiatives should continue;
- ◆ As there are reasons to believe that the increasing use of outsourcing and subcontracting in the Irish construction sector may have a detrimental effect on training and apprenticeships and may lead to the growing casualisation of work, this fact should be the subject of awareness campaigns, so as to ensure contractor's responsiveness to its effects;
- ◆ The awareness campaigns on bogus self-employment led by the authorities targeting specifically migrant workers should have their impact assessed;
- ◆ As the interlocutors have stated, in order to reduce the number of bogus self-employed the measure to be taken is increasing the number of revenue inspections, we take this point and make the same recommendation;
- ◆ As for the measures that should be adopted at a European level to combat bogus self-employment, it can be concluded that increasing the joint approach of the member states would help combat bogus self-employment as well as increased education and raising awareness of the prejudices of bogus self-employment, the use of a code of good practices.

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- 2 Please always state the source of your information: official statistics (where?) or personal assessment (based on...)
- 3 <http://www.welfare.ie/EN/Publications/Documents/toiltrouble.pdf>
- 4 see section on 'Tax' below
- 5 There is an information leaflet on http://www.cro.ie/_uploads/downloads/Infnote14v3.pdf
- 6 <http://www.revenue.ie/index.htm?/leaflets/it10.htm#section2>
- 7 http://www.citizensinformation.ie/categories/money-and-tax/personal-finance/pensions/personal_pensions
- 8 <http://www.revenue.ie/leaflets/it10.pdf>
- 9 <http://www.revenue.ie/leaflets/it48.pdf>
- 10 http://www.revenue.ie/index.htm?/services/bus_start4.htm
- 11 There is more detailed information in the Revenue booklet IT 49 VAT for Small Businesses: <http://www.revenue.ie/leaflets/it49.pdf>
- 12 The DSFA has published a leaflet PRSI for the Self-Employed-SW74: <http://www.welfare.ie/EN/Publications/SW74/Pages/1WhatbenefitsmayIgetbypayingClassSPRSI.aspx>
- 13 http://www.citizensinformation.ie/categories/social-welfare/social-welfare-payments/social-welfare-payments-and-work/back_to_work_enterprise_allowance
- 14 <http://www.revenue.ie/forms/formtr1.pdfpo>
- 15 http://www.cro.ie/_uploads/downloads/rbn1.pdf
- 16 <http://www.welfare.ie/forms/se3.pdf>
- 17 E.g. does it carry out on-site inspections? How frequent? Are these inspections pre-announced?
- 18 The report aims to present a comprehensive picture of the Irish construction industry, primarily from 2002 - 2008, using statistics compiled by the Central Statistics Office, other producers of construction statistics and administrative data sources.
- 19 <http://www.cso.ie/releasespublications/documents/construction/current/constructhousing.pdf>
- 20 Source: CSO - QNHS (2004 - 2007 third quarter)/ CSO- Central Statistics Office, the Quarterly National Household Survey (QNHS)
- 21 The Quarterly National Household Survey (QNHS) is a large-scale, nationwide survey of households in Ireland. It is designed to produce quarterly labour force estimates that include the official measure of employment and unemployment in the state (ILO basis). The survey began in September 1997, replacing the annual April Labour Force Survey (LFS). The QNHS also conducts special modules on different social topics each quarter.

Experts Report

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

Prof. Edoardo Ales and Dr. Michele Faioli¹

March 2009

Introduction

The Italian strategy against bogus self-employment focuses more than before on rewarding regular businesses, meaning those businesses which correctly enforce labor, social security and safety regulations by means of incentives and special conditions for orders, tenders and so on.

In addition to an effective repressive system, it seemed necessary to convey the notions of prevention, information and training in view of the creation – by institutions, workers and entrepreneurs together – of a general labor culture that is positive and legal.

The aim is to make legal work more convenient than undeclared work while maintaining an effective level of social protection.

I. The demarcation between direct employment/genuine self-employed and genuine self-employment/bogus self-employment.

1.1. The statutory approach

The statutory approach focuses on the definition of “employee”.

As to the legal provisions you can refer to the followings:

- ◆ **Article 2094 of the Italian Civil Code** sets forth the definition of **employee** (i.e. an individual, serving under the control and the instructions of the employer, who receives a salary to perform his/her duties).
- ◆ **Article 2222 of the Italian Civil Code** sets forth the definition of **self-employment** (i.e. an individual performing his/her activities without being under the control and the instructions of an employer).

Since the statutory distinction between employees and self-employment is not clear, the courts apply various forms of test; every test is open-ended in its application, freely incorporating all factors related to the (i) integration into the employer’s business and the relevant employer control, (ii) duration of relationship, (iii) work scheduling and the relevant employer control, (iv) location of work, (v) degree of skills and self-determination, (vi) freedom to serve other employers, (vii) investment in business, (viii) if the worker has employees (for relevant case law of the Italian Supreme Court, see *Cassazione civile, sez. lav.*, February 1, 2006, no. 2249; *Cassazione civile, sez. lav.*, February 10, 2006, no. 2904; *Cassazione civile, sez. lav.*, October 9, 2006, no. 21646)

The tendency of the courts is to attribute a broad definition to the condition of “employee” for protection purposes.

Article 2222 of the Italian Civil Code is the legal matrix of the type of occupations that are **not** encompassed in the definition of “employee”.

To such worker status belong (i) independent contractor, (ii) the co-operation relationships that may be implemented in an ongoing continuative supply of services (“CoCoCo” - i.e. *collaborazione coordinata e continuativa*), (iii) the project work (*Lavoro a progetto*) that provides an ongoing continuous supply of services related to a specific project.

The Italian legal system sets forth a variety of rules based on such worker status. The main rules regarding bogus self-employment are the following:

- ◆ **Article 409 of the Italian Code of Civil Procedure** states that co-operation relationships may be implemented for an ongoing continuous supply of services, mainly carried out on a personal basis, though without subordinate status. By means of this rule, practitioners and labor courts defined this type of self-employment as “CoCoCo” (or “*lavoro parasubordinato*”).
- ◆ **Article 61 of Act no. 30 of 2003** (the so-called *Riforma Biagi*) states that ongoing continuous collaborations, mainly carried out on a personal basis and without subordinate status, as per article 409, no. 3, of the Italian Code of Civil Procedure, must be included in one or more specific projects, jobs or related training schemes, that are decided by the principal and autonomously managed by the collaborator on a result basis; they must be performed under the coordination of the principal and independently of the working time. This regime aims at limiting the use of CoCoCo.
- ◆ **Article 1, par. 772, of Act no. 296 of 2006** (Collective bargaining and *Lavoro a progetto*) states that for all intents and purposes, the salaries paid to workers shall be proportional to the quantity and quality of the work performed and shall take into consideration the salaries usually paid for similar services, with reference to national collective bargaining agreements.

Article 1746 of the Italian Civil Code states that agency agreements may be underwritten which entitle a party to undertake the promotion, on a permanent basis and on behalf of the party, of the execution of specific contractual agreements in specific areas in return for remuneration.

It is not easy to come up with a definition of self-employment/bogus self-employment within the Italian legal labor system that may encompass all these different forms.

The notion of **bogus self-employment** refers to the condition of many workers whose status might appear as “ambiguous” (i.e. although the worker is self-employed, the job he/she performs seems to classify him/her in an intermediate category between employee and self-employed worker).

The Law also defines **semi-dependent employment** as “**disguised work**” (Act no. 296 of 2006 refers to the notion of “*lavoro non correttamente utilizzato*” (work not appropriately exploited)).

Disguised work stems from the collapsed distinction between the different regimes of the employees and the self-employed. Disguised work is considered a malpractice; workers are not granted the full protection of the coverage envisaged under applicable law and collective bargaining agreements.

The employer can mainly benefit from the reduction of the following items:

- (i) Cost of payroll taxes
- (ii) Administrative costs
- (iii) Wage liabilities
- (iv) Obligation to bargain with unions.

It is worth noting that there is no definition of **undeclared work**. Such a definition can be drawn from the measures implemented by the Italian legal system to regularize undeclared work. Such measures refer to a “tautological” notion: undeclared work is work that is “not declared” to the competent authorities. However, it is worth noticing that Act no. 296 of 2006 has recently included semi-dependent work under the heading of undeclared work. This is indisputable. In fact, the legal prescriptions for the regularization of undeclared work, set forth in Act no. 296 of 2006, apply to both phenomena: (i) undeclared work and (ii) semi-dependent work.

1.2. Statistical observations

The construction sector reached the following business target/development in the last decade (Eur/millions):

Types of investment	1999	2000	2001	2002	2003	2004	2005	2006	2007
Building sector	93.529	102.726	109.729	119.361	125.017	132.816	139.296	145.618	154.676
Housing	42.067	45.593	47.166	49.387	51.959	55.407	61.147	66.396	71.451
Non-residential buildings and other works	51.462	57.133	62.563	69.974	73.058	77.410	78.149	79.222	83.224

Source: ISTAT data

Gross investments

Types of investment	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Building sector	105.795	115.436	124.463	132.844	137.691	147.264	153.085	160.033	165.601	165.047
Ordinary repairs	22.532	24.444	25.703	26.996	27.863	29.265	30.591	31.705	33.009	34.165
Production value	128.328	139.880	150.166	159.841	165.554	176.529	183.677	191.738	198.610	199.212

Source: CRESME data

Workers

Workers	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total Building	1.507,8	1.553,9	1.656,0	1.697,8	1.749,1	1.786,7	1.866,4	1.884,4	1.930,3	1.943,0
Workers – building sector	946,2	985,6	1.057,3	1.107,0	1.146,4	1.160,2	1.228,9	1.258,9	1.284,2	1.212,0
Self-employed – building sector	561,6	568,3	598,7	590,8	602,7	626,5	637,5	625,5	646,1	731,0

Source: ISTAT data

It is worth highlighting in this respect that development in this business/target area has not significantly impacted on the increase in the number of self-employed and bogus self-employed:

Building sector

	2002	2003	2004	2005
Irregular workers (in thousands)	179,4	148,2	148,4	160,5
Irregular self-employed (in thousands)	10,9	10,9	10,9	10,7

ISTAT statistics on employment in the building sector relating to the first quarter of 2008 show that this sector taken as a whole rose to 1,915,000 workers, of which 1,191,000 employees and 723,000 self-employed. According to the latest statistics, self-employment represents over 35.0 % of workers of the sector (37.75 %), with an increase due to the business cycle (1st quarter 2008/4th quarter 2007) of + 2.6 % compared to - 6.0 % for subordinate employment.

As far as trends are concerned (1st quarter 2008/1st quarter 2007), both employment and self-employment show a negative trend equal to - 1.9 % and - 3.3 % (- 0.1 % is the overall negative trend for the sector) respectively.

At the date of the last survey, the overall employment amounted to 1,014,000 Italian workers and 177,000 foreign workers, whereas self-employed workers amounted to 646,000 Italian self-employed and 77,000 foreign workers (both EU and non-EU). It should be noted that, when analyzing the data for the last three-year period (2005 - 2007), the share of Italian self-employed workers remains steady at between 630/640,00 people, whereas the share of foreign self-employed workers is on the rise, going from 28,000 people in the 1st quarter of 2005 to 77,000 people in the 1st quarter of 2008 (+ 175.0 %). In particular, there was a constant increase in foreign self-employment in the surveyed period: + 17.8 % in 2006 as compared to 2005; + 20.75 % in 2007 as compared to 2006.

ISTAT shows a trend leading to a decrease in the share of self-employment, both in the Italian economy and in the building sector, ranging between 700 and 750,000 people. As mentioned before, in the 1st quarter of 2008 self-employment involved 723,000 people. At any rate, we may say that there is a percentage of self-employment in this sector that is influenced by boom and bust cycles, and linked to market and economic conditions; in fact, during employment downturns, the share of self-employment tends to increase, while it tends to drop if employment expands.

In the building sector there was a sharp increase of + 6.9 % in the percentage of self-employed workers between 1993 and 1999 (except for 1998), going from 34.9 % to 41.5 %; following this it constantly decreased to 37.5 % in 2006, and then increased again in 2007, reaching 38.3 %. When talking about numbers and trends, a shift from subordinate employment to self-employment has been reported. At first, this phenomenon was a natural result of the employment crisis in the building sector which took place in the early '90's, the post-bribesville years which also saw a marked slow down of public tenders.

This trend also continued during the boom of the sector ('96 - '08 - now we are in a slackening that the experts define as a "plateau") which included employment in the building sector. During this time self-employment became a way of changing the structure of businesses and work in the sector itself.

From an analysis of ISTAT data from 1993 to 2007, we can observe that the share of self-employment work shows a growth over the entire period under consideration (+ 29.3 % compared to + 12.1 % for subordinate work), as there was no employment crisis between 1993 and 1998 but self-employment accounted for the jobs of many of the new job seekers. The ISTAT data referring to the last three-year period (2005/2007) show nevertheless a wavering trend, shifting from a minor slowdown in 2005 (- 0.1 %) to a stronger one in 2006 (- 2.0 %), whereas the first quarter of 2007 was extremely positive (+ 3.0 %) and the second one negative (- 6.0 %). The first quarter of 2008 showed a negative trend (- 3.3 % between the first quarter of 2007 and the first quarter of 2008).

The overall increase in self-employed workers in the building sector amounts to 125/130 thousand people from 1993 to 2007.

We are facing a true fragmentation of the sector, as also shown by the data of the *Casse Edili* (Paritarian Institutions mainly aimed at providing social security benefits for building sector employees), where there is an average of workers equal to 5.3 % as of September 30, 2007.

1.3. The incidence of bogus self-employment in the building sector according to the social partners

It is difficult to assess, in absolute or percentage terms, the incidence in the building sector of bogus self-employed workers on self-employment in general, since there are neither tools nor systems to verify a practice which currently exists and, according to the Social partners, is steadily increasing.

It is possible to identify some indicators that would seem to confirm this trend. Some of these indicators show that this phenomenon is increasing rapidly, partly due to the relative simplicity of obtaining a VAT number and entering the construction market in Italy.

The building sector has for many years now constantly eluded full-time subordinate employment contracts in a number of ways. If, thanks to the DURC (*Documento Unico di regolarità contributiva*- the certificate that, by means of one application only, certifies at the same time the regularity of a business with regard to National Institutes for Social Security (INPS and INAIL) and Cassa Edile's accomplishments, checked in observance of their respective regulations), strongly backed by the unions, there has been a considerable increase in supervision and inspection work on the building sites, undeclared work is likely to be superseded and replaced by so-called "disguised work".

This includes the widespread use of "part time" labour on building sites. Based on the data obtained from the *Casse Edili* for the 12 urban areas examined, the recourse to this contractual form was virtually inexistent in 2000, whereas in 2007 the number of workers hired under this kind of contract reached 32,000, with an increase of + 75.0 % in 2006.

Other forms of elusion are for example a distorted use of the articles of apprenticeship, whereas another emerging phenomenon, though marginal for the time being, is that of joint-ventures.

Disguised work is difficult to quantify, though there are some indicators.

Data from the social partners therefore reveal that bogus self-employment is growing increasingly, especially as far as foreign workers are concerned.

Finally, the social partners are focusing on the definition of disguised work and the prevailing

trend would be to set a ceiling for contractors. It is undoubted, after all, that a “one-firm” worker with a VAT Number, working exclusively for a single business, actually hides an employment relationship and therefore subordinate employment.

Another signal is the possession of work tools, ownership of which may or not may be another indicator. These are ploys by which many businesses in the building sector try to reduce labour costs, thus effectively undermining fair market competition.

Another indicator is the type of job performed.

Self-employment in the building sector is widespread, or else linked to certain kinds of jobs, above all the most qualified: floor layer, tiler, etc. Most likely, where “low-skill jobs” are concerned, this is an indicator of bogus self-employment.

How is it possible to stem this phenomenon according to the social partners?

A solution for the building sector could be to record the self-employed workers in the Casse Edili under a separate heading. This would make it possible to keep an eye on the flow between self-employment to subordinate employment and vice-versa, as well as the opportunity of comparing the applications to the Chambers of Commerce in order to register for a VAT number. This would enable, on the one hand, the monitoring of the building market as a whole and, on the other hand, the extension to self-employed workers of those services and assistance supplied by the Casse Edili to subjects who do not benefit to such an extent, if at all, from the Italian welfare system.

II. The impact of regulation and deregulation in this field.

The most recent deregulation of the Italian labour market (the so-called *Pacchetto Treu* - Act. No. 196 of 1997 - and the so-called *Riforma Biagi* - Act no. 30 of 2003), only slightly reduced the phenomena related to bogus self-employment, disguised work and irregular work.

On the contrary, the latest reform of the labor inspections system (Act no. 30 of 2003 and Legislative Decree no. 124 of 2004) had a significant impact on the phenomena. It is quite common to see employees and (putative/bogus/ambiguous) self-employed workers sitting side by side and performing the same activities without any visible distinction.

According to the prevailing case law, each form of work (and thus also self-employment/bogus self-employment) and its relevant protection (social security regime and work conditions regime) is defined by the factual conditions under which the work is performed (*Cassazione civile, sez. lav.*, February 11, 2004, no. 2622; *Cassazione civile, sez. lav.*, December 17, 1999, no. 14248; *Cassazione civile, sez. lav.*, November 23, 1998, no. 11885). This means that, although the parties may define their labour relationship as self-employment, a worker is always entitled to the protection which the kind of work she/he actually performs deserves.

In conclusion, the main working agreements on the Italian labour market are a preliminary step to understanding the complexity of the Italian labour market and the number of existing social security and work condition regimes. A list of them can be found below:

- ◆ Standard employees (direct employment relationship)
- ◆ Independent contractors (including *CoCoCo* and *Lavoratori a progetto*)
- ◆ Individual entrepreneurial workers
- ◆ Labour market entrants
- ◆ Marginal workers
- ◆ Informal labour relations.

As regards protection and its relevant costs, please see below:

Standard employees (direct employment relationship)	High social security protection	High level of protection for working conditions	High level of unionization (voice, collective agreement, etc.)	High level of costs (approximately 40% of contributions)
Independent contractors	Low social security protection	Low level of protection for working conditions	Low level of unionization (voice, collective agreement, etc.)	Low level of costs (approximately 25% of contributions)
Individual entrepreneurial workers	Low social security protection	Low level of protection for work conditions		Low level of costs (it varies case by case)
Labor market entrants	Low social security protection	Low level of protection for work conditions	Low level of unionization (voice, collective agreement, etc.)	Low cost level (it varies case by case)
Marginal workers	Low social security protection	Low level of protection for working conditions	Low level of unionization (voice, collective agreement, etc.)	Low level of costs (it varies case by case)
Informal labor relations	No social security protection	No level of protection for working conditions	Potential unionization (voice, collective agreement, etc.)	No costs

2.1. Self-employment/bogus self-employment and legislation

The prevailing case law recently stated that a self-employment relationship is considered bogus/disguised where the parties do not define a project in the contract. (Court of Ravenna, November 24, 2005; Court of Rome, May 9, 2006, no. 9650; Court of Milan, November 10, 2005, no. 4625).

This is an important result arising from **Article 69 of Legislative Decree no. 276 of 2003**, that introduced a **legal presumption** against bogus self-employment and disguised work.

It states that ongoing continuous collaborations created without a specific project, work or related training scheme, pursuant to article 61, paragraph 1, of Legislative Decree no. 276 of 2003 are considered as open-ended employment relationship with a subordinate status from the very beginning of the employment relationship. If the court ascertains that the employment relationship, entered into on the basis of the dictates of the above mentioned article 61, has become a subordinate employment relationship, it will then become a subordinate

employment relationship based on the kind of agreement that results by the work actually performed by the parties.

It is worth noticing that the court's test will exclusively ascertain, in compliance with general legal principles, the existence of the project, work or technical training and cannot be asked to include any form of assessment or criticism of the, technical, organizational or production choices which are entirely in the hands of the principal.

2.2. Self-employment/bogus self-employment and collective bargaining

In the Italian legal system, the relationship between self-employment and collective agreement employment can be analyzed from **two points of view**:

The first one is the application of the collective agreement to self-employed workers. For the purposes of this research, we may say that, according to some collective agreements, *CoCoCo* may be applied to *lavoratori a progetto* (project workers).

Recently, Article 1, par. 772, of Act no. 296 of 2006 states that the salaries paid to self-employed workers (*lavoratori a progetto* - project workers) shall be proportional to the quantity and quality of the work performed and shall take into consideration the salaries usually paid for similar services, in compliance with the national collective agreements.

The second one is that collective bargaining is mainly used to regularize bogus self-employment, disguised work and undeclared work.

Collective bargaining agreements are the framework used to apply a due salary and social security protection to the workers (bogus self-employed, disguised workers) on a progressive basis (the so-called "*contratti di riallineamento*" or "*contratti di regolarizzazione*").

The unions execute a shop level agreement with the employer. According to this agreement, the parties (i.e. the employer and the trade unions) can then establish which workers are engaged in bogus forms of self-employment, disguised work or irregular work. This option allows the employer to benefit retroactively from an amnesty but also forces the employer to hire those workers as fully employed for the future.

2.3. Self-employment/bogus self-employment and social protection contributions/payment (mandatory/voluntary)

The malpractice of bogus self-employment is mainly determined by the social security contribution gap between the employment relationship and self-employment. A general reduction of this gap is being introduced.

Self-employed workers are enrolled in the public social security system. There are special social security funds managed by the National Institute of Social Security (INPS) and other public entities.

Generally, self-employed workers are required to pay social security contributions.

As for *CoCoCo* or *lavoratori a progetto*, social security contributions are paid by the principal (there is a 1/3 withholding on the total amount of the social security contribution). Social security contributions for *CoCoCo* or *lavoratori a progetto* may approximately amount to 25 % of pay.

In compliance with Act no. 296 of 2006, to *CoCoCo* or *lavoratori a progetto*, the main social security schemes (i.e. retirement, invalidity, survivorship pensions, maternity, sickness) apply.

III. Labor and market developments

3.1. Loss of social security, fiscal revenue for authorities

Many theorists, social partners and the competent office of the National Fiscal Authority that we contacted declare that the loss can amount to 20-30 % of both social security contributions and tax.

IV. Cross border employment effects on self-employment and bogus self-employment

There is a direct link between specific legislation and in/out migration. It mainly concerns the legal position relating to the employment of nationals of the new EU Member States, after the EU enlargements on May 1, 2004 and on January 1, 2007.

The legal provisions concerning the right to enter and work, the right to establishment, the position of family members and sanctions for individuals who did not abide by the law were ineffective and not suitable to curtail the widespread illegality already in existence. As far as immigration schemes are concerned, the Italian legal system is helpless against the exploitation of illegal immigration.

There were transitional measures related to the nationals of the new EU Member State which defined undeclared work, bogus self-employment, semi-dependent work

V. Self-employment in a triangle relation

5.1. The role of intermediaries

The workers performing their activities in a so called “triangle relation” are similar to “leasing” employees. The workers involved perform their activities for illegal intermediaries (illegal agencies and/or gang-masters), under illegal subcontracting and/or posting conditions. The intermediaries supply a group of workers, usually an entire sector and/or division, to a client company. These workers follow the work rules and indications provided by the client company and the intermediary. They are under the instructions and disciplinary powers of the client. The intermediary collects these workers every morning in places where the workers usually gather. They are paid on a daily basis according to this agreement; they can be paid less than the minimum wage. Generally they are undeclared to the competent authorities or they perform their activities as bogus self-employed and/or semi dependent workers.

Workers do not usually carry out their job at one site for more than a certain period; once a specific activity is done, they are assigned to another client.

Pursuant to Legislative Decree no. 276 of 2003, agency work occurs when a temporary work agency loans a temporary “employee” (NOT a self-employed worker) from one firm to another for short term assignments. This means that an agency cannot loan self-employed workers.

VI. Abuse of the status of self-employment (causes, consequences, forms of abuse)

6.1. Causes and origins of bogus self-employment

The main factors are the following:

- a. The decentralization of production has fostered the growth of many atypical forms of employment (among them, self-employment and bogus self-employment)
- b. The “gap” between the labour rights regime that applies to employees and the one that applies to the self-employed. Social dumping practices are implemented.
- c. New work organization practices for new forms of business

By virtue of a court order, the self-employment relationship is considered as an employment relationship as of the commencement of the self-employment.

The court may rightly assess the amount of work performed and the resulting liability for the employer (social security contributions, penalties, unpaid overtime, minimum wage differences, etc.).

In addition, the above mentioned administrative and/or criminal sanctions apply.

6.2. Short and long term consequences of bogus self-employment on:

6.2.1. Health and safety

1. Legislative Decree no. 81 of 2008 has recently stated that the health and safety regime applied at the workplace also applies to the self-employed (and thus *CoCoCo* and *lavoratori a progetto*). As a matter of fact, Art. 2, letter a) of this law defines a “worker” irrespective of the “nature of the labor agreement executed”. Art. 15 sets forth the general protection measures applied to workers.

Healthcare is governed by Article 41 and following. In particular, it states that it is mandatory in the cases provided for by current regulations and whenever a worker (irrespective of the “nature of the labor agreement executed”) so requires.

2. Healthcare will include (i) pre-employment medical examination aimed at ascertaining the lack of contraindications related to the job the worker is to perform, in order to assess his/her fitness for that specific office, (ii) regular medical examinations to check the workers’ physical conditions and issue a fitness eligibility for that specific office. The intervals at which such assessments have to be performed, unless provided for by the relating regulations, will be usually once a year. Such intervals may have different deadlines, fixed by the competent physician according to risk assessment. The supervisory body, where advisable, may fix both the nature and intervals of the health monitoring procedure, overriding the indications provided by the competent physician.

6.2.2. Vocational training

The self-employed workers (and thus *CoCoCo* and *lavoratori a progetto*) can be involved into vocational training. It is not a right; the principal can organize specific vocational training for self-employed workers.

No evidence exists that bogus self-employment can have an impact on workers' skill levels.

6.2.3. Pensions

Self-employed workers are entitled to retirement pension benefits. To calculate such benefits, age requirements as well as contributions records are required.

The Italian social security system provides for benefits for unemployment, sickness and maternity, accidents at work and occupational diseases, as well as old-age, invalidity and survivor's pensions, and family allowances.

The system is run by the National Institutes for Social Security (for private sectors INPS and INAIL). All employees and self-employed workers pay social security contributions.

Social security contributions are deducted at source from the gross salary by the employer, who pays about two-thirds of contributions, while the remaining third is paid by the employee.

Self-employed workers (*CoCoCo* and *lavoratori a progetto*) must register and pay contributions to a separate social security fund that is run by INPS. Social security contributions are deducted at source from the gross compensation by the principal, who pays around two-thirds of contributions, while the remaining third is paid by the self-employed workers.

6.2.4. Social security

Workers are insured according to the general system. The healthcare system provides benefits in kind to the whole population.

As of January 2009, due to the general recession, a significant reform of unemployment benefits is going to be implemented: the *lavoratori a progetto* should be entitled to an **unemployment benefit** that amounts to 10 % of the general revenue of the previous year (Act no. 185 of 2008 - pending final approval).

6.2.5. Social inclusion

There are no measures to socially include the *lavoratori a progetto*. The Italian legal system does not make any reference to the concept of social inclusion that is widely defined at European level.

Given that we can consider the social assistance provided by the Italian legal system as a measure of social inclusion, it is worth noticing that self-employed workers (*CoCoCo* and *lavoratori a progetto*) are entitled to social assistance schemes.

VII. Assessment of prevention and combating measures to tackle bogus self-employment

7.1. Investigations, checks and control

Inspections are carried out by the Ministry of Labor and/or the Social security authorities. Very high and severe civil and/or administrative and/or criminal sanctions apply to intermediaries that break the law.

7.2. Prevention

Legislative Decree no. 124 of 2004 sets forth a new framework for inspections proceedings. An inspector can issue (i) sanctions, (ii) persuasive orders, (iii) settlement incentives, (iv) injunction orders. An inspector can also provide legal literacy to the employer in order to induce him/her to implement laws and regulations.

Legislative Decree no. 124 of 2003 states that there should be a permanent coordination among (i) social security administration, (ii) tax administration, (iii) police. This should facilitate the fight against undeclared work and bogus self-employment. “Permanent coordination” means that each administration is obliged to share databases, information, figures, significant activities, its own inspection know-how and knowledge etc. as well as to arrange a joint program of inspections.

Each of the above mentioned administrations is represented in the so-called *Cabina di regia* (i.e. Central Governmental Commission) established at the Ministry of Labor.

Legislative Decree no. 123 of 2007 sets forth a series of ways to easily recognize bogus self-employed individuals and/or undeclared workers (e.g. mandatory badge, mandatory and prompt information transfer to inform the competent authorities about hiring, dismissal, transfer etc.).

Act no. 133 of 2008 introduces the so-called “*libro unico*” that in lieu of the previous documentations/registers related to hiring, attendance, payroll books, should make the inspections proceedings easier.

7.3. Combating and sanctions

There are legal provisions that affect both phenomena (bogus self-employment/undeclared work).

There are two legal arrangements that caused some decrease:

- a) **The first one** is the so called *DURC*, i.e. the certificate that, by means of one application only, certifies at the same time the regularity of a business with regard to INPS, INAIL and *Cassa Edile*'s contributions and formalities, all verified in accordance with their respective regulations. *DURC* may be requested via network communication from the *Sportello Unico Previdenziale* (i.e., a Processing Center), that is the main way, by filling in the questions that appear on the screen. Upon participation in a tender and until award, the business may declare that it has fulfilled its contributory obligations.

The certification of regularity must be requested:

- (i) For tenders/subcontracts for constructions in the public works sector,
- (ii) For private building works,
- (iii) For service contracts:

The *DURC* was strongly called for and promoted by the unions.

- b) **The second one** is a recently introduced sanction. Act no. 81 of 2008 states that in order to guarantee the workers' health protection and safety, as well as to fight undeclared and irregular work, the watchdogs of the Ministry of Labor and Social Security, in conjunction with the recommendations of the various Public Administration bodies according to their respective authority, may adopt measures to suspend an entrepreneurial activity should they find that the employed personnel is not registered in the payroll nor in any other mandatory documentation found at the workplace, as well as in the event of serious and repeated infringements of the protection of health and safety provisions at the place of work.

The implementation of the suspension will be communicated to the *Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture* ("Supervisory Authority for public work contracts, services and supplies") and to the Ministry of Infrastructures, according to their respective authority, so that they may issue an interdiction order that shall prohibit negotiations with the public administrations and all participation in public tenders. The provisions of this paragraph shall also apply to work performed on construction sites.

Some of the infringements to health and safety at work, which can be considered as grounds for the above mentioned interdiction order, are reported below:

Infringements that cause an exposure to general risks are:

- ◆ Non-fulfillment of the document for risk evaluation;
- ◆ Failure to provide adequate training;
- ◆ Failure to institute a prevention unit;
- ◆ Infringements which lead to asbestos risk.

The legal provisions indicated under a) and b) are very widely applied.

7.4 Data relating to the inspections

The data relating to the inspections carried out in the First Quarter of 2007 provided by the Ministry of Labor are the following:

from January 1 to March 3, no. 489 interdiction orders have been issued, of which no. 169 revoked in order to be regularized.

If one examines the data from August 12, 2006 to March 31, 2007, the interdiction orders increased to 999, of which 368 have been revoked due to the subsequent regularization.

The Ministry of Labor mainly focused on the construction sector, for which it enjoyed the full

support of the Unions and ANCE (i.e. National Association of Building Sector Employers), by carrying out inspections in 5,980 construction sites that revealed increased numbers of employed workers up 12,646 units compared to 2006. This demonstrated that the Ministry's initiative to carry out inspections may be fruitful and successful, as it stimulates regularization.

From August 1, 2006 until March 31, 2007 there were 94,054 recruitments in the construction sector.

After a thorough analysis of the data, there has been a remarkable increase when compared to the data of the First Quarter of 2006; the inspected businesses increased by 23.37 %, the irregular ones by 24.44 %, while the number of workers that were found to be irregular increased by 69.12 %, of which almost 9 % were entirely undeclared workers.

VIII. Conclusions and recommendations

Proposed policy measures at national and European level:

The strategy should be focused on the businesses which correctly enforce labour, social security and safety regulations, while an effective repressive structure needs to be maintained. These businesses should benefit from incentives and special terms for orders, tenders and so on.

The aim is to make regular work, rather than undeclared work, more convenient, in compliance with legal regulations.

On the basis of their studies on this matter, the Authors of this report suggest the following proposals:

1. In order to avoid the malpractice of the bogus self-employment, **national legal systems** should reduce, where necessary, the social protection gap between employment and self-employment, without depressing the social protection of the former.
2. Furthermore, through European Social dialogue, a **European or EC Legal framework** should be gradually implemented on the following items:
 - a. Registering the worker's career/employment history from beginning to conclusion
 - b. Providing the competent authorities with these records through IT support systems
 - c. Providing workers with an "official" smart card so that their employment history may be tracked
 - d. Ensuring tax/social security benefits for the employers who hire workers previously engaged in undeclared/bogus/semi-dependent jobs
 - e. No amnesties (this means that the employer should no longer benefit from any kind of amnesty; this is to avoid employers benefitting twice from the bogus/disguised/undeclared work first and the relevant amnesty second).
 - f. Providing, as a second best to open-ended contracts, tenure track contracts along with a strong and effective social security connection
 - g. Supporting broad programs to simplify laws and regulations

- h. Simplifying official management for businesses
- i. Designing measures to create a business-friendly culture in government (i.e. simplifying tax/social security management)
- j. Sharing information on what tax revenues are used for rationalizing business registration and licensing regimes, and separate the one from the other
- k. Reducing registration fees and statutory requirements, without relinquishing control.

REFERENCES

- 1 Edoardo Ales is dean of the Law School and labor law professor at the University of Cassino and Dr. Michele Faioli is a professor at the University of Rome

Experts Report

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

Dr Anna Kwiatkiewicz¹

January 2009

I. The demarcation between direct employment/genuine self-employed and genuine self-employment/bogus self-employment

Direct employment:

the Labour Code (Dz.U. 1974 Nr 24 poz. 141, Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy) defines employee and employer rights and obligations. It also provides the definition of employee and employer:

- ◆ “An employee is a person employed on the basis of an employment contract, by appointment to a position, by election, designation or cooperative employment contract” (Dz.1, rozdz. I, art. 2);
- ◆ “An employer is an organizational unit, even if it does not hold legal entity status, including a physical person, if they employ employees” (Dz.1, rozdz. I, art. 3).

There are no other regulations concerning employee and employer relations; possible stipulations concerning employment relations included in the collective agreements cannot be less favorable than those stipulated by labour law.

Genuine self-employment:

the genuinely self-employed are economically-active people, not employed on the basis of employment contracts, but who own their own businesses and provide services to one/multiple clients; the business (economic) activity was defined in the Freedom of Business Activity Act of 2004: art. 2 stipulates that “a business activity consist of for-profit production, construction, commercial and service activities, in prospecting for, exploring and extracting useful minerals, and in professional activities pursued on an organized and continuous basis”. On the basis of the Personal Income Tax Act the self-employed are entitled to a flat-tax rate of 19 % on their aggregate income. On 1 January 2007 the definition of business activity was further detailed - in order to be entitled to a 19 % flat-tax rate the self-employed have to comply with 3 rules that have to be fulfilled jointly:

- ◆ The self-employed is entirely responsible for the services provided;
- ◆ The business activity is not performed under management and in a place and time indicated by a client;
- ◆ The self-employed assumes on him/herself the economic risk connected to the services they provide.

Moreover, to maintain the right to a flat-19 %- tax rate an employee who used to have an employment contract with an employer for whom they now provide services, must have at least one client other than their former employer during the fiscal year.

In Poland it is possible to group the self-employed into 4 categories:

- ◆ Employers with employees;
- ◆ “Own account workers”: they do not run their own business, but work on the basis of civil law contracts, there are 2 types of these contracts: 1. *agreement for performance of specific tasks (umowa o dzieło)* which stipulates that there is a final, tangible product and

that intellectual property rights to this product are transferred to the client who, from then on, can dispose of them as they please; 2. *mandate agreement (umowa zlecenia)* which stipulates what activities and when they are to be performed;

- ◆ Traditional self-employed workers (freelancers, artists, artisans, etc.), sometimes called “free professions”;
- ◆ Bogus self-employed who are, in actual fact, employees.

Demarcation: an employee works for the benefit of an employer and works under his management, whereas the self-employed provide services for the benefit of their client and work independently; the self-employed do not fall within the scope of the Labour Code.

Bogus self-employment:

is a situation of “false” self-employment, it means that the self-employed provides services for an employer, but de facto their relationship is a relationship of subordination (dependent employment): the self-employed has no responsibility for the services provided, the self-employed works under the client’s management who is de facto an employer who indicates the place and time where the business activity is to be performed, so de facto where an employee works.

Demarcation: the self-employed is someone who provides services for their client(-s), while a bogus self-employed is someone who acts as a regular employee, but whose legal basis for cooperation is not an employment contract, but a cooperation agreement (commercial contract) and instead of getting a monthly salary they issue an invoice for their work. The decisive factor in deciding whether self-employment is genuine or bogus is the way in which the work is performed.

The National Labour Inspectorate representative outlook²

Courts often look at the intentions of the parties and their will as to the type of the contract they wish to enter into. In reality, the will of the parties is binding and defines the type of relationship, and the court has to respect it - as a consequence, only when an employee claims bogus self-employment can the case be won, but cases are dismissed when both “employer” and “employee” claim that the relationship is as they intended it to be. The National Labour Inspectorate is only entitled to evaluate regular employment contracts, therefore self-employment does not concern the labour inspectors, unless there is a claim of bogus self-employment.

Table 1. Structure of employment in construction sector (2000-2006)³

Category/Year	2000	2001	2001	2003	2004	2005	2006
Total employment in the sector	990	950	880	847	862	924	994
Self-employed	165	195	175	172	157	175	189
“Own account workers”	112	121	107	104	89	101	101

Undeclared work is defined in the law on employment, promotion and labour market institutions (Dz.U. 2004 Nr 99 poz. 1001, ustawa z dnia 20 kwietnia 2004 r.) and in other regulations linked to work performed in Poland by foreigners. According to these regulations undeclared work is an employment situation when:

- ◆ Employment contracts and working conditions are not confirmed in writing within a certain timeframe;
- ◆ The employee is not registered with the social security system;
- ◆ An unemployed takes up work without informing the appropriate private labour office;
- ◆ The employed foreigner does not hold a valid work permit or he/she is employed in a different capacity (or under different working conditions) than stipulated in the work permit⁴.

II. The impact of regulation and deregulation in this field

Employment relations are regulated by the following legal regulations:

- ◆ The Labour Code (Dz.U. 1974 Nr 24 poz. 141, Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy) - the key legal act defining relations between employers and employees;
- ◆ Law on employment promotion and labour market institutions (Dz.U. 2004 Nr 99 poz. 1001, ustawa z dnia 20 kwietnia 2004 r.) detailing the state's obligations to promote employment;
- ◆ Law on temporary employment (Dz.U. 2003 Nr 166 poz.1608, ustawa z dnia 22 września 2003) which defines the rules for temporary employment and for cooperation between temporary work agencies and the employer-user (the client of the temporary work agency). According to this law "temporary work" means "performing work for a certain employer - user, for a time that may not exceed that defined by law"; performed tasks include tasks of a seasonal or periodical nature or in case of emergency, tasks which would not have been otherwise completed by the employer-user in a due time, tasks which were to be performed by an absent regular employee.
- ◆ Different laws regulating employment of foreign workers.

Running a business activity is regulated by the following legal prescriptions:

- ◆ The Freedom of Business Activity Act (Dz.U. Nr 173, poz.1807, ustawa z dnia 2 lipca 2004) which stipulates the definition of business activity;
- ◆ Personal Income Tax Act (Dz. U. 1991 Nr 80 poz. 350, ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych), amended in 2004, which stipulates the conditions under which a business activity can be treated as self-employment and can be eligible for a flat-19 % tax rate;
- ◆ Business Activity Law (Dz.U.z 1999 r. Nr 101, poz. 1178 z późn.zm.) which defines the rules for taking up and exercising a business activity on Republic of Poland territory as well as the tasks required of the public administration and local authorities with regard to an economic activity.

a. Self-employment/bogus self-employment and legislation

Anybody can register as self-employed and in any profession/craft; there are no specific, preliminary conditions that have to be met. There are no checks on required qualifications when registering self-employment in the construction field. National qualifications standards for some construction professions have been developed in cooperation with the Ministry of Labour, but complying with them is not mandatory when registering a business activity. There are no laws that might result in an increase or decrease of self-employment or bogus self-employment in the construction sector. In Poland the self-employed have the status of a physical person running a business activity (individual person with VAT number).

Registering self-employment: - “Own account workers” perform their tasks on the basis of agreements for the performance of specific tasks/mandate agreement - signing the appropriate contract starts self-employment (and registering with Social Insurance Institution in some cases);

- ◆ In order to register a business activity one has to fill in a registration form and deliver it to the Municipality (Urząd Gminy) that runs the Economic Activity Register; other appropriately filled in forms (REGON number registration - statistical number, NIP [Personal Income Tax] registration or, most often, actualisation and - optionally VAT-R registration) can also be submitted to the Municipality which will send them to the appropriate institutions; the cost of registration is 100 PLN [approx. 35 EUR] and 50 PLN [approx. 17 EUR] for each alteration). The required documents are: ID card, filled in registration form;
- ◆ When a business activity is registered as self-employed it is compelled to collect a statistical number (REGON) from the Central Statistical Office. The required documents are: ID card, confirmation of registration in the Business Registry;
- ◆ Registering the business activity with the Tax Office and providing information on the type of declarations. The following documents are required for the purpose: ID card, confirmation of registration in the company registry; REGON number, document confirming right to business premises and bank account number. This has to be done prior to performing any tasks which would imply issuing an invoice and paying taxes;
- ◆ Choosing the tax regime: most often a 19 %-flat tax rate;
- ◆ Filling in and submitting appropriate documents to the Social Insurance Institution (*Zakład Ubezpieczeń Społecznych, ZUS*) - in order to do so, the required documents are: ID card, bank account number, copies of NIP and REGON number registration documents, filled in ZUS ZFA form (registration as a social security contributor).

All these activities have to be done in person. The whole process usually takes up to one month (up to 14 days for the business activity registration in the Municipality, which is the first step in the process). Entrepreneurs claim that the length of the process of registering a business activity is one of the most criticized barriers to the development of entrepreneurship in Poland⁵.

Table 2. Self-employment in Poland: basic figures (2000-2006)⁶

Year	2000	2001	2002	2003	2004	2005	2006
Total employment	14540	14043	13772	13718	14058	14390	14911
Of which, in individual farming	2533	2500	2383	2373	2377	2306	2101
Number of self-employed	3254	3231	3083	2990	2956	2972	2911
Of which, the „own account workers”	2669	2703	2565	2459	2400	2411	2327
Self-employed as a percentage of total employment	22.4%	23%	22.4%	21.1%	21%	20.7%	19,5%
Of which, the „own account workers”	18.3%	19.2%	18.6%	17.9%	17.1%	16.8%	15,6%

Note: real numbers in thousand. Source: LFS data (2000-2006), as of the 4th quarter of the year.

b. Self-employment/ bogus self-employment in the construction sector

Employers' association representative outlook⁷

The percentage of self-employed in the construction sector is relatively high compared with other sectors of economy - because there is a relatively big number of people who earn relatively well and register their own companies to avoid paying high taxes and social security contributions.

Table 3. Self-employment statistics: breakdown by sectors (2000-2006)⁸

Year	2000	2001	2002	2003	2004	2005	2006
Agriculture, hunting and forestry	2742	2673	2542	2525	2540	2469	2268
	1874	1858	1746	1655	1623	1618	1522
	1804	1817	1708	1619	1584	1575	1472
Manufacturing	2920	2734	2527	2587	2736	2813	3037
	207	180	171	184	185	193	203
	100	97	83	76	84	95	97
Construction	990	950	880	847	862	924	994
	165	195	175	172	157	175	189
	112	121	107	104	89	101	101
Trade and Repairs	2060	2005	1958	1971	2051	2046	2105
	559	546	523	493	496	475	468
	347	357	333	312	307	293	289
Transport, storage and communication	878	837	807	819	843	912	1029
	151	148	127	125	119	139	141
	127	117	102	91	88	102	103
Education	1020	949	996	1110	1055	1131	1152
	17	11	11	12	14	16	17
	11	-	6	5	7	9	11
Health care and social work	924	888	984	844	837	844	886
	43	55	56	60	51	60	62
	31	43	47	48	36	40	47

Note: real numbers in thousands; the first figure represents total employment in the sector; the second - total number of self-employed, and the third - number of „own-account workers”

Source: LFS data (2000-2006), as of 4th quarter of a year

National level trade union representative outlook⁹

Statistical data describing self-employment in the construction sector is not very informative due to the very broad definition of the construction sector used by the Polish Main Statistical Office (Główny Urząd Statystyczny, GUS); moreover, the results cannot be compared with the European data as the definition of the sector used by Eurostat is different: “It is very hard to provide any reliable estimations on self-employment or bogus self-employment in the construction sector, it would be even naïve to try to do so”. Another challenge in researching self-employment and bogus self-employment are blurred borders between the two and also blurred borders between self-employment and undeclared work. Estimating total employment in the construction sector is further complicated by the lack of data concerning construction work performed in the country side (it is entirely undeclared work) and seasonal fluctuations typical for the sector.

The construction sector is one of the sectors with the highest percentage of self-employed.

Research conducted by trade unions has proven that there is no direct correlation between self-employment and economic cycles - good economic conditions do not eliminate self-employment, bogus self-employment and undeclared work. In a good economic climate there is a growing demand in the construction sector and, as a consequence, self-employment and bogus self-employment rise. At present the percentage of self-employment and bogus self-employment is on the rise in Poland.

Self-employment is not always imposed by employers who often prefer to have regular employees to better exercise control and manage their work. Moreover, quite often there are cases of “mixed employment”: legal employment is combined with illegal employment, especially when services are provided with the use of expensive equipment (i.e. cranes) - some hours are worked legally and some illegally. Some 50 % of those employed in the construction sector are self-employed and people working on the basis of agreements for performance of specific tasks/mandate agreement. The latter prevails while employment time is short.

The National Labour Inspectorate representative outlook

According to the estimates of the National Labour Inspectorate the majority of those working in the construction sector and not regular employees are not self-employed, but workers contracted on the basis of agreements for performance of specific tasks/mandate agreement.

The Employers' Association declares that approx. 20 % of people working in construction (including those working abroad) are working on the basis of work contracts alternative to regular employment contract - the majority of them are self-employed. There are approx. 400 000 people directly employed in SMEs and between 200 000 and 300 000 self-employed plus those employed in microenterprises. All this data is just estimated based on the information received from companies - there are no official statistics available. There are different reasons for the popularity of self-employment in the construction sector:

From an employers' perspective:

- *Seasonality of the sector - smaller risk/lower labour costs for employer;*
- *Responsibility for the performed tasks and a result-based, not a time-based, remuneration - for employers this is important as it eliminates paying over-time¹⁰;*
- *Improved effectiveness - the employer is able to engage the best subcontractor and the price for his services is guaranteed as well as the deadline for performing the task;*
- *The employer is ready to pay more to a self-employed subcontractor knowing that he avoids the following:*
- *Paying social security contributions and contributions to the National Disabled Persons Rehabilitation Fund (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych, PFRON) from his profit (% of the salary);*
- *Dealing with sick leave especially in fall and winter season: approx. 20 % of the workforce is on sick leave, out of which 20-30 % is false sick leave;*
- *Paying holiday allowance;*
- *Creating reserves for pensions and paying compensation packages in case of termination of the contract;*
- *Paying daily allowances in case of delegation (approx. 95 % of construction workers is delegated).*

From workers perspective:

- *Possibility to choose "client-employer" - self-employed can choose localisations of construction sites favourable for them;*
- *Ability to work all over Europe - 90 % of construction workers work outside their hometown;*
- *Higher income - a flat 19 %- tax rate + some 1000 PLN (approx. 300 EUR) savings on social contribution;*
- *Flexibility in adapting to changing economic situation: migration in order to find jobs;*
- *Development of entrepreneurial spirit translated into improved productivity.*

c. Self-employment/ bogus self-employment and collective bargaining

According to the legal regulation on trade union activity (Ustawa z dnia 23 maja 1991 r. o związkach zawodowych, Dz.U. 1991 Nr 55 poz. 234) employees have the right to create and join trade unions (Rozdz.1 art.2, ust.1) independently of the their type of employment contract, members of agriculture production cooperatives and persons working on the basis of agency agreements, provided they are not employers.

As a general rule both self-employed and bogus self-employed in Poland do not belong to trade unions or any other forms of employee representation. In a recent discussion (meeting

of the Tripartite Commission on 8 May 2008) on trade union representation and mandates, NSZZ “Solidarność” introduced the idea of guaranteeing the self-employed the possibility to join trade unions.

III. Labour and market developments

In Poland, like in other European countries, development of the construction sector is correlated with the overall economic climate and the possible return on investments: when enterprises invest in a country, it quickly translates into development of the construction sector; whenever there are any symptoms of economic slowdown, the situation in the construction sector worsens. In the years 1999-2003 there was a construction boom in Poland, followed by a crisis when employment in the construction sector was cut by some 200 000 people. Skilled workers were not interested in regular employment contracts as the self-employment status guaranteed them more flexibility and more income.

At present, the situation in the construction sector is very good: production grows by 15-17 % per year and this favourable trend should last until 2013¹¹. There is a demand for the services of big construction companies as well as individual, usually self-employed workers. Employment in the construction sector grows by 30 % - there is a big demand for skilled workers. Recently, an influx of workers can be observed: it is caused by the requalification of workers from other sectors (i.e. mining sector), reverse migration and an influx of young graduates - construction firms invest more and more in vocational training, both at the level of vocational schools and higher education (i.e. polytechnic).

National level trade union representative outlook

The construction sector is a very sensitive sector - employment fluctuates depending on the economic situation and seasonal fluctuations. Employment in the construction sector is not a subject of any inter-sectoral regulations and the Polish labour law does not cater for the needs or the employment reality of the sector (i.e. seasonal fluctuations). Another example of this separation is the lack of regulations concerning the end of the career in the construction sector. The Lack of these regulations means that linking one's professional career to the construction sector can be very risky.

It is worth mentioning that recently the situation has changed and since employers encounter more problems with recruitment and in maintaining good employees, there are more and more regular employment contracts concluded - these ensure that employers have an appropriate number of employees with adequate skills. This situation was reported both by trade unions and employer organisations representatives.

The Employers' association representative believes that cases of bogus self-employment in the construction sector are rare - self-employment seems to be the natural form of employment relationships in this sector. Cases of bogus self-employment could be observed during the economic slowdown of 2000-2003, when employees were "talked into" setting up their own companies. At present, in almost all cases it is their choice - their mentality has changed and they have become more entrepreneurial. For a healthy construction company with good perspectives the natural employment pattern is a combination of core employees (on regular employment contracts) and co-workers (usually self-employed subcontractors) - that usually constitute not more than 10 % of all workers. Subcontractors are usually companies/workers that provide services which are outside the main specialization of the principal contractor; subcontractors usually operate in highly specialised areas. The chain of subcontracting companies is another natural feature of the construction sector.

Employers complain about the asymmetry of the Polish labour laws: according to this law, employees can claim their rights while the employer has no sanctions to impose if the employee does not show up at the construction site - which is a frequent problem in the construction sector and carries considerable consequences for an employer. A year ago, a permanent problem for employers was the low level of employee loyalty due to labour shortages.

Loss of social security, fiscal revenue for the authorities: the Self-employed are entitled to reduced social security contributions as well as reduced taxes compared to regular employees.

Personal Income Tax (PIT). The self-employed pay a flat-rate of 19 % (Personal Income Tax, PIT), they avoid paying progressive Personal Income Tax (PIT) of 19 %, 30 % and 40 % respectively.

Value Added Tax (VAT). The self-employed are obliged to pay Value Added Tax (VAT). In general there are 2 rates of VAT applicable to the construction sector: some of the provided services are subject to 7 % VAT (i.e. construction-installation services, reconditioning and maintenance of an infrastructure associated with housing construction); remaining construction services are subject to a 22 % VAT.

Table 4. Tax calculation in Poland (2008) - progressive tax scale¹²

Tax calculation method		Tax
Over	Up to	
	44 490 PLN	19% minus 586,85 PLN
44 490 PLN	85 528 PLN	7 866,25 PLN + 30% for incomes above 44 490 PLN
85 528 PLN		20 177,65 PLN + 40% for incomes above 85 528 PLN

Social security payments: For the self-employed, mandatory social security contributions are limited to the minimum level, which most often leads to a situation where they are entitled to a minimum retirement pension and minimum sickness benefits.

IV. Cross border employment effects on self-employment and bogus self-employment

In Poland the self-employed who want to provide their services abroad, but wants to pay social security contribution in Poland, are forced to exercise their business for at least 2 months in Poland before moving abroad - otherwise the Social Insurance Institution is not willing to confirm the E101 form. In fact, only the willingness to run the business should be sufficient to get the E 101 form confirmed. When an enterprise exercises its business activity in Poland and another EU country, confirmation of the E101 form is not problematic. Where the construction sector is concerned there are other, less complicated ways of working abroad than registering one's own company; the tendency is to choose the easiest solutions, i.e. in the case of Germany where the labour market is still closed for Polish workers, construction workers were registering themselves with craft associations to ensure themselves a legal basis for performing their activity. In case of migrant workers coming to Poland from third countries these are usually unskilled and low skilled workers who work illegally. Registering their stay and obtaining a work permit would be too costly an option, moreover, they are not interested in profiting from the social security system and protection rights.

National level trade union representative outlook

There are only some 35 000 work permits issued in Poland each year, approx. 50 % of which are issued to managers and to native speakers who work as foreign language teachers. 90 % of those who come from abroad are not declared and do not have work permits.

Another tendency is that even if a person is registered, a part of the job he/she does is performed illegally (working longer hours than declared). The tendency is that unskilled and low-skilled employees come to work in Poland, while better skilled workers (graduates from vocational schools, usually young people) leave Poland to work in "old" EU countries. Recently the situation has changed significantly: with Poland entering the Schengen area the majority of the third country nationals (Ukrainians, Belarusians) go on to the "old" EU countries as salaries in Poland are not that attractive anymore. Migrant workers are mainly unskilled workers that can be engaged for physical work. These migrations are usually seasonal, which does not promote a formal ratification of their status.

The National Labour Inspectorate has no right to perform any checks on migrant workers unless they are regular employees employed on the basis of a regular employment contract. Recently, there has been a liberalization of the relevant legal regulations and migrant workers from Ukraine, Belarussia and Russia can be employed up to 6 months without a work permit - there are no regulations that stipulate what kind of employment contract should be signed, it can even be an oral agreement. There are plans to extend the period of work without a permit up to 12 months and to make the citizens of Moldova and Georgia also subject to this regulation. The fee for the work permit has been reduced from 1000 PLN (approx. 300 EUR) to 50 PLN (15 EUR) for a seasonal worker and 100 PLN (approx. 30 EUR) for a yearly work permit. Migrant workers report that work permits are not the only problems they encounter - obtaining a visa seems to be a big challenge¹³.

Migrant workers are mainly workers coming from the third countries and they are either delegated to work abroad or employed on the basis of regular employment contract.

V. Social security and fiscal (tax) developments

Regular employees in the construction sector are subject to the same social contribution regulations and tax calculation rules as regular employees from other sectors. There are no other – more or less favourable – regulations concerning employment relations in the construction sector. There are no collective agreements signed at the sector level; the only specific regulations concern health and safety norms and technical norms.

VI. Self-employment in a triangular relation

The role of intermediaries

There is a law on temporary workers that determines the relationship between temporary work agencies, employer-user and temporary workers. No specific regulations concerning temporary work in the construction sector are in place. There are no measures to combat intermediaries who organise bogus self-employed workers seeing as the only controls that can be performed are controls performed by the National Labour Inspectorate (Państwowa Inspekcja Pracy) and they assess the working conditions only for those in direct employment. When there were additional controls introduced to eliminate illegal employment, they were not numerous enough and all the illegal workers always managed to flee from the construction site before the check even began. In the light of such inadequate measures to eliminate a more serious problem - illegal employment, self-employment is not subjected to the scrutiny of any control institutions.

National level trade union representative outlook

Trade unions are aware of the situation, but they do not take any actions as attempts aimed at strengthening controls at construction sites would worsen the situation of construction workers (less work, less money etc.). They view existing measures as being highly ineffective. Sometimes there are quasi-collective agreements concluded for workers hired via intermediaries to ensure decent salary levels (direct employees). Intermediation is profitable so long as a large number of employees is required and/or a company regularly uses the intermediation services of a temporary work agency. Before Schengen, intermediation was mainly an illegal procedure organized by gangmasters.

The National Labour Inspectorate representative outlook

Temporary employment agencies do not recruit construction workers, and do not work with the self-employed, as temporary workers are employed by temporary work agency and perform work for employer-clients. Contracts between temporary agencies and employer-users stipulate what the obligations of the parties concerning health and safety are. 'The temporary workers' cooperation with the agency is based on employment contracts or civil law agreements.

Employers' association representative outlook

Temporary work is not very popular in the construction business. Workers usually work in teams and they have to be trained. Managers of construction sites are responsible for teams so they usually prefer to work with people they know - cooperation with new people is too big a risk. The self-employed are not the "clients" of temporary work agency. It is worth noting that Polish construction companies delegating their employees for assignments abroad have to employ workers also in Poland - only up to 50 % can be sent abroad. This regulation prevents construction companies from changing into intermediary agencies.

VII. Abuse of the status of self-employment (causes, consequences, forms of abuse)

a. Causes and origins of bogus self-employment: A two-fold perspective has to be adopted¹⁴:

- ◆ Employer perspective: significant reduction of labour costs (taxes, social security contribution, additional financial and non-financial benefits that must be granted to regular employees, training programs, health and safety training/protection etc.), flexibility in hiring and firing workers (flexible human resource management), transfer of responsibility and risk; as a result the services provided by an employer can be cheaper;
- ◆ Employee perspective: lower tax rates - "tax optimization", reduced mandatory social security contributions, more money available immediately for the self-employed than for regular employees, some incentives (i.e. Makro, Cash and Carry card) envisaged for those running their own business; as a result "salary"/price for services from a self-employed person is lower.

National level trade union representative outlook

Self-employment is often a choice of the employee, not the employer. Self-employment concerns not only workers with low skills, but also with higher skills.

A significant number of workers prefer regular employment that gives them more rights and protection than the slightly higher income that the self-employed can secure. Some employers also prefer regular employment as it enables them a greater control over the workers. This is why foreign companies entering the Polish construction sector offer traditional employment. If the situation in the sector were more stable, more regular employment contracts would be concluded.

b. Short and long term consequences of bogus self-employment on:

Health and safety: There are contradictory opinions about influence of bogus self-employment on health and safety standards. All health and safety stipulations and training programs are foreseen for regular employees and not for the self-employed (subcontractors), therefore self-employment may potentially lead to a worsening of work and safety standards¹⁵.

National level trade union representative outlook

In the short- and long-term the work environment becomes more and more hazardous for the self-employed as they do not take part in any health and safety training.

The National Labour Inspectorate representative outlook

The National Labour Inspectorate representative has a contradictory opinion: health and safety standards have to be guaranteed at the construction site regardless of the status of the people working there - it is the responsibility of the principal constructor to guarantee a safe work environment. However, in case of accident it may turn out that the situation of the injured self-employed is worse than for a regular employee - while they are not working, they are not earning any money and the sickness benefit to which they are entitled is minimal.

Employers' association representative outlook

Employers' representatives believe that health and safety conditions are the same for all workers on a construction site independently of their status - there has to be an accepted construction site safety plan and all workers have to undergo health and safety training.

The self-employed have to comply with all health and safety norms that are binding for enterprises in the construction sector - these are additional expenses for the self-employed. The self-employed worker is responsible for any damage caused. According to the trade union representative, the self-employed are very rarely insured against civil liability; there are no obligations that might make them buy appropriate insurance. The Employers' organisation representative claims that the self-employed all have the required insurance, including civil liability insurance.

National level trade union representative outlook

The construction sector is top in the ranking for serious accidents, the level of accidents remains unchanged. Trade unions believe that it may possibly rise due to increasing self-employment. Health and safety is conditioned by appropriate vocational training and when workers have limited access to it - as is the case of the self-employed - their professionalism may decrease and they are then at greater risk while performing their job.

The self-employed are not guaranteed protective clothing, but they have to comply with all health and safety regulations/rules. There are no regulations that would enable principal contractors to check the qualifications of the self-employed to perform certain tasks and their compliance with health and safety norms. There are cases where the self-employed are reimbursed by an employer for the costs incurred to comply with health and safety norms/training, but such situations are determined by individual contracts. Serious accidents have to be reported to the National Labour Inspectorate - the inspectors examine accident sites independently of the workers' employment relationship. The only possible abuse is that a serious accident will be treated as a light one - it is up to the employer to decide about the nature of an accident - and it will not be reported to the National Labour Inspectorate.

Vocational training: which is still not a very regular activity - is almost always addressed to regular employees; the self-employed very rarely participate in vocational training programs financed by an employer.

National level trade union representative outlook

Limited access to vocational training is a serious disadvantage for self-employment: in construction there have been important developments of new technologies and new materials and they require regular training to update skills. The self-employed have to pay for their training themselves -as they have to bear the cost, they almost never take part. In the future there may be the threat of a growing discrepancy in qualifications between regular employees and the self-employed.

Employers' association representative outlook

On the contrary, the employers' association believes that the self-employed update their skills on a regular basis as they learn on the job. They also participate in training activities delivered by technology or new material providers. However, their major problem is financing vocational training - in vocational schools they finance internships - and they have no guarantee that the trained young worker will come to work for them - there are frequent instances where trained workers have been "bought".

Pensions: Self-employment has a serious effect on the pension system: the self-employed pay minimum social security contributions. Alternative pension schemes or systems such as equal treatment occupational pension systems for the self-employed do not exist. It depends on an individual decision of the self-employed whether he/she wants to invest i.e. in a private investment fund with a view to securing their pension; these are not system solutions. According to the trade union representative they hardly ever have additional insurance; on the contrary, the employers' representative believe that almost all self-employed have alternative investments for pension purposes.

According to the employers' association representative the majority of self-employed have additional pension insurance (so-called "3rd pillar"). These people are aware of their situation in the labour market, are entrepreneurial and take responsibility for their future. They do not rely on the state social security system, but rely on their own investment that will pay for their future pensions.

Lack of knowledge in this respect or insufficient social security contributions are rather typical for people employed on the basis of the civil law agreements - these are usually people with low skills and low income levels.

Social security: In case of sickness or injury the self-employed is entitled to sickness benefit for 30 days after the accident. This benefit amounts to 80 % of the minimum wage (at present minimum salary in Poland is 1126 PLN, approx. 330 EUR). A majority of the self-employed pay minimum social security contributions - they are entitled to some 600-700 PLN (approx. 170- 210 EUR) of sickness benefit paid for 9 months. They are also entitled to disability pension if they are not able to return to work.

The National Labour Inspectorate does not act in this field: there is no regulation stipulating what type of social insurance the self-employed should have.

Social inclusion: The self-employed are "outside" the main stream of the labour market and they do not have access to some activities, such as training, developing qualifications, social fund or social benefits. Self-employment is sometimes seen as a way of leaving the unemployment statute; however, in Poland it is still very rare that someone unemployed sets up their own company and actively creates a job for themselves, leaving the ranks of the unemployed¹⁶. It can be stated that self-employment is rather the prerogative of skilled, entrepreneurial people willing to take some risks to earn more money.

VIII. Assessment of prevention and combating measures to tackle bogus self-employment:

a. Investigations, checks and control:

As of 1 January 2007 there are more checks to assess whether the self-employed are entitled to a flat-tax rate of 19 % (3 conditions for running business activity - see definition of self-employment in point 1 of this report). It is possible that a self-employed worker who was forced to set up his own enterprise can take his/her case to court to claim bogus self-employment and prove that actually he/she should be employed as a regular employee. Checks cannot be performed by inspectors from the National Labour Inspectorate, they can only come into play when an employee reports a problem concerning the appropriateness of his/her employment relationship. On the other hand all workers at construction sites are assessed and treated in the same way as far as health and safety regulations are concerned. Health and safety issues are regulated in contracts signed between the principal contractor and subcontractors - the same conditions are to be guaranteed for all employed - for the given construction site.

Only Social Insurance Institution (ZUS) or the Tax Office (US) can verify the self-employed as regards to social insurance contributions or taxes.

b. Prevention:

Regulating self-employment in the construction field: All suggested measures to tackle bogus self-employment in the construction sector are preliminary ideas, not yet included in regulations or even draft regulations.

National level trade union representative outlook

It would be possible to regulate self-employment in the construction sector if complying with national qualification standards were made a mandatory requirement in order to register a business activity. The principle constructor subcontracts parts of the work to many subcontractors, and the self-employed are at the end of the chain. Such a long chain increases risk, as the principal contractor is not responsible for the work performed by sub-contractors. Self-employment can be limited by growing insurance contributions that would make the business more expensive: insurance rates could be linked to the qualification level of the self-employed or having completed relevant health and safety training.

Another indirect method of regulating self-employment would be through the introduction of a law that bars contractors overusing self-employment from tendering procedures or charges the main contractor with responsibility for work performed by the self-employed, subcontractors.

Also positive incentives to promote those who employ legally could be introduced.

The National Labour Inspectorate engages in activities aimed at promoting legal employment contracts, informs about consequences of illegal employment at the construction sites and provides necessary information regarding legal compliance with employment contracts.

Employers' association representative outlook

The 3 conditions justifying self-employment are sufficient. Self-employment is a natural type of employment in construction, therefore limiting it is not advisable. If the level of taxes and social contributions were lower, more people would be employed on the basis of regular employment contracts as employers also see advantages in this type of employment relationship.

c. Deterrents and sanctions:

According to all sources, combating bogus self-employment should be done by promoting regular employment. This would entail defining working condition standards and improving the legal environment so as to promote regular employment. Another possible initiative could be promoting enterprises that have low accident rates. In general, a more reasonable approach seems to be “civilizing self-employment” as there is always a loophole in the legal system which means that repressive measures turn out not to be very efficient.

It is very hard to combat irregularities in the construction sector and even trade unions do not take actions against such irregularities as bogus self-employment or extensive overtime - this is the reality in the construction sector and fighting it means taking action against oneself.

The National Labour Inspectorate controls construction sites - either the ones that were reported as the “problematic ones” or the larger construction sites. As far as the irregular employment contracts are concerned the National Labour Inspectorate representatives state that they cannot perform checks on the self-employed, they only assess civil law agreements, and, when relevant, have them changed into regular employment contracts. In the last 3 years there were fewer cases won than before; the number of such cases (changing civil law agreements into regular employment contracts) has decreased - if the employee is not supporting the case, the case will not be won.

The majority of the National Labour Inspectorate’s reports concern workers’ rights, maternity leave, holiday leave, length of notice and discrepancies resulting from differences between regular employment and civil law agreements. The employer may even be fined by the court up to 30 000 PLN (approx. 8 930 EUR) if irregularities in the employment contracts are detected (so-called “acting against employee rights”). The cases can be taken to court or even to the Public Prosecutors’ Office in the cases of serious abuse such as criminal offences.

The verification of the legality of employment of foreigners has been assigned to National Labour Inspectorate only since the beginning of 2008 - due to very short time this regulation has been in force, no data nor results are available at present.

Conclusions/recommendations:

1. The primary reason for bogus self-employment in Poland is the avoidance of higher taxes (employee) and reduction of labour cost (employer).
2. At present the construction sector in Poland is in a good shape - more and more often employers are willing to employ workers on regular contracts - it ensures that they have the right number of committed people with the right skills¹⁷.
3. In Poland the construction sector is the one with the biggest share of self-employment. The Employers’ organisation representative believes that self-employment is a natural feature of the construction sector, and that the majority of the self-employed are genuine self-employed.
4. There are no legal regulations that determine what type of employment relationship is required: the intentions of the parties decide the nature of the employment contract. Both trade unions and employers’ organisations believe that almost always self-employment is the choice of the employee and that employers are more and more willing to employ people on regular employment contracts.
5. Self-employment in Poland has similar features as self-employment in the EU, but “the Polish specificity” seems to be employing construction workers on the basis of civil

law agreement (agreement for performance of specific tasks or mandate agreements)
– usually skilled workers are self-employed, while civil law agreements are reserved for unskilled and low skilled workers.

6. The self-employed are not subject to the National Labour Inspectorate verifications: they may become subject to their investigations only when they employ other people.
7. Research has shown that in Poland intermediaries are not active in the construction sector. Before entering into the Schengen area there was more intermediation activity performed usually by gangmasters to bring illegal workers from the neighbouring Eastern block countries. Temporary work agencies do not act as intermediaries for the self-employed.
8. Bogus self-employment results in lost taxes and social security contributions as well as guaranteeing only a minimum level of social protection for the self-employed. There are no estimates of how much money is lost. Trade unions believe that social protection is much worse for the self-employed, while employers believe that the self-employed take over the responsibility for their social protection and complement the minimum level of the state-guaranteed social protection with additional, private arrangements.
9. As far as preventive measures are concerned, they are linked more to fighting illegal employment than bogus self-employment. It seems that the general tendency is to “streamline” employment contracts and to ensure that 2 predominant types of employment relationships function on the market: regular employment contracts and enterprises providing services for their clients.
10. According to the trade union representative, potential European level regulations could include the following:
 - Introducing a directive broadening the scope of responsibility for all the parties involved in the project, this would also imply a greater responsibility on behalf of the principal contractor;
 - Regulating bogus self-employment - all parties would be responsible for complying with the legal prescriptions of a signed employment contracts; the “responsibility chain” would be much tighter;
 - Defining an acceptable number of subcontractors in the subcontracting chain [Comment AK: seems not to be feasible as it would limit freedom of competition];
 - Working out a European definition of self-employment and types of illegal employment - including bogus self-employed.
11. According to the employers’ organisations representative the only possibility to reduce bogus self-employment and self-employment in general is to reduce taxation and social security contributions - in other words, to make work “reasonably priced”.

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- 3 Source: conference material J. Czarzasty, Self-employment in Poland: recent trends and prospects, Vilnius, 7-9 June 2007; http://www.conf.etude.org/~jean-claude_le_douaron/efbww07/docs/
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- 5 Annex 1 presents reasons why workers prefer self-employment to regular employment contracts.
- 6 Source: conference material J. Czarzasty, Self-employment in Poland: recent trends and prospects, Vilnius, 7-9 June 2007; http://www.conf.etude.org/~jean-claude_le_douaron/efbww07/docs/, slide 5.
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- 8 Source: conference material J. Czarzasty, Self-employment in Poland: recent trends and prospects, Vilnius, 7-9 June 2007; http://www.conf.etude.org/~jean-claude_le_douaron/efbww07/docs/.
- 9 All national level trade union representative opinions were formulated on the basis of the interview conducted with Mr Jakub Kus (ZZ "Budowlani") in Warsaw on 14 August 2008.
- 10 In Poland regulation concerning over-time is very costly for an employer: for the first 2 hours of overtime employer pays 50 % extra and for the next ones - 100 % extra.
- 11 The report was drafted in September 2008; it has to be taken into consideration that the present financial crisis can influence the future condition of the construction sector.
- 12 As of 2009 the progressive tax scale is to be simplified - there will be only 2 tax regimes in force: 18 % and 30 %; the flat-tax rate for the self-employed will remain at the present level of 19 %. It will be interesting to observe whether this change in the tax system influences the number of regular employment contracts and the number of the self-employed.
- 13 Tyle zachodu o Wschód (So much fuss about the East), Gazeta Wyborcza, Dodatek "Praca", 15.09.2008, pg. 1.
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Experts Report

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

Cristina M. ANA¹

I. The demarcation between direct employment/genuine self-employed and genuine self-employment/bogus self-employment

Direct employment: The employment relationship is the concept used to describe the relationship between an employee and an employer, in which an employee commits him or herself to perform labour under certain circumstances in return for a salary. The employment relationship is the legal link between an employer and an employee, which creates reciprocal rights and obligations between employee and employer and is also the basic concept by which workers gain access to rights and benefits associated with employment in the areas of labour law and social security.

The definition of direct employment, in fact the definition of the individual labour contract under Romanian national law is stated in article 10 of the Labour Code (Codul Muncii² - in Romanian) - “An individual labour contract is a contract based on which a natural entity, called employee, undertakes to perform work for and under the authority of an employer, who is a natural or legal entity, in exchange for payment, called salary”. The characteristic criteria for a direct employment relationship as stipulated in legislation, regulations (collective agreements) and case law are:

- ◆ The work performed- the work is performed for a certain period of time, according to the schedule established by the employer- usually 8 hours per day, 40 hours per week.
- ◆ The risks for the work performed - the work is carried out for the profit of the employer who also bears all risks for the activity.
- ◆ The salary- for the work performed the employee receives remuneration called salary.
- ◆ The subordination of the employee to the employer- “the work is performed under the authority of the employer” according to the Romanian labour code.

Genuine self-employment: the (genuine) self-employed are economically-active people, who own their own businesses and provide services to one/multiple beneficiaries/clients; such an economic activity was defined in a new normative act - Government Emergency Ordinance³ no 44/2008 that regulates the development of economic activities by authorised natural persons, individual enterprise or family enterprise and defines the economic activities - “the agricultural, industrial, commercial activity developed in order to obtain goods or services at a cost and which are intended to be sold or exchanged on organized market or to determined or determinable beneficiaries to obtain profit”. Such activities can only be performed by authorised persons, individual or family enterprises. The self-employed are not subject to the Labour Code.

Besides the activities developed by authorised natural persons, individual enterprise or family enterprise (such as services, commercial activities, production of various goods etc.), self-employment contracts can also involve the sake of authorial rights - a contract that can be concluded by any natural person (authorised or not) for specific intellectual property rights detained for a product or job (when the author transfers them to the other contractual party).

The criteria (as stipulated in the legislation, regulations and also work-contracts and case-law) seen as characteristics for genuine self-employment are the following:

- ◆ The responsibility is civil (not disciplinary as is the case with direct employment);
- ◆ There is minimal subordination towards the beneficiary of the work;
- ◆ There is no fixed schedule;
- ◆ The benefit obtained is called “remuneration” (instead of “salary” - term used for direct employment);
- ◆ The time involved in performing the activity or service is not considered as a working period and the self-employed person does not benefit from social insurance benefits.

Demarcation: the employee works for the benefit of an employer and works under the authority of the employer, being subordinated to the latter, while the self-employed provides services for the benefit of his/her client and works independently.

Bogus self-employment: is a situation of “false” self-employment, it means that the self-employed provides services for (in fact) an employer, not a client/beneficiary and de facto their relationship is one of subordination (dependent employment): the self-employed does not use his/her own working tools, but the ones of the client/beneficiary, the self-employed does not bear the risk of the working activity, the client does, the self-employed does not have the responsibility for the services provided, the self-employed works under the “client’s” management who is de facto their employer and he/she indicates the place, the time and the criteria for the “business activity” (work) to be performed, thus de facto fulfilling all the conditions and criteria that define employee employment.

In Romanian national law the phenomenon of bogus self-employment is not mentioned. No criteria, in the legislation, regulations or in case-law have yet been established as indicators that a person is working as bogus self-employed.

The representatives of the National Labor Inspection Office have stressed that the National Labor Inspection has competence to undertake inspections on employment contracts and undeclared work, even if they do not have specific competences on self-employment. There was one case where the labor inspectors found that a person performed undeclared work, they applied a fine and recommended an employment contract to be concluded between the parties, when the parties concluded a service contract/self-employment, the labor inspection applied a second fine and maintained its initial suggestion for an employment contract to be concluded. This case is currently in court, because the parties contested the labor inspection decision. They have however applied fines and even closed down construction sites after detecting a large number of workers that were not registered and because they were not included in the health and safety training.

Demarcation: while the self-employed is a person providing services for a client, the bogus self-employed is someone who acts as a regular employee, even if the legal basis of the services/work provided is not an employment contract, but a commercial contract. The similarity between the two is the type of contract and the fact that payment for both is not a salary but remuneration received after completion of an invoice. While the self-employed assumes the risks for the activity performed for the client, is not subordinated to the client, works with his/hers own tools and the activity is not restricted to a fixed schedule, the bogus self-employed

does not assume the risk for the work done, does not use his own tools, he/she is subordinated to the client that establish a set schedule.

Undeclared work - the Labour Code stipulates the obligation of the employer to conclude an individual work contract in writing before starting work. If the contract is not concluded in writing, it is presumed that the contract has been concluded for an undetermined period of time. If the employer allows employees to perform work without concluding an individual employment contract, the worker can request the employment contract to be formalized in court, the company the work is executed for can in theory be required to conclude an employment contract, to pay taxes and social contributions retroactively, and could also be fined.

However, this situation, according to all parties interviewed, has been encountered in practice.

According to the stipulations of the Labour Code, undeclared work is a situation of employment if:

- ◆ Employment contracts and working conditions are not confirmed in writing ;
- ◆ The employee is not registered in the social security system;

According to the representatives of the trade unions both types of undeclared work - with no type of contract or with a contract covering only the minimum salary are extensively encountered in the construction industry in Romania.

Undeclared work in the construction industry in Romania takes three forms:

- a. The worker has no form of contract with the construction company;
- b. The worker has an employment contract with the company but for an undersized declared salary (usually the minimum legal salary) compared to the one agreed with the employer, and the difference is paid by the latter and cashed by the employee as undeclared money. This sum is not declared anywhere by the worker, therefore, no tax or social contributions are deducted from it.
- c. The worker is in fact a non Romanian citizen holding a tourist visa.

Undeclared labour involving migrant workers has in the recent years made its appearance in the construction industry and in the Romanian construction industry labour market.

According to recent media reports dated September 2008 some of the big construction companies use Turkish labour entering the Romanian territory with a 3 month tourist visa. Informally confirmed by representatives of the construction companies, the Turkish workers are recruited via Turkish Agencies that provide Romanian construction companies with illegal labour that is renewed every three months (the duration of a valid tourist visa).

Table 1. Structure of employment in the construction sector (2005)

Total employment (in thousands)	507
Employees (%)	80,2
Employers (%)	2,0
Self-employed (%)	17,0
Family Contributing member (unpaid)(%)	0,7
Member of a co-operative (%)	0,1
Of total, women (%)	9,3
Employees (%)	8,9
Employers (%)	0,2
Self-employed (%)	0,2
Family Contributing member (unpaid)(%)	-
Member of a co-operative (%)	-

Source: Household labour force survey⁴ (HLFS 2005)

II. The impact of regulation and deregulation in this field.

Employment relations are regulated by the following legal regulations: The Labour Code⁵ (Codul Muncii - *Legea* nr. 53 din 24 ianuarie 2003) represents the main legal act defining relations between employers and employees, the health and safety provisions, the labour conditions etc.; Law no. 279/2005⁶ on apprenticeship at the work place (*Legea* nr. 279/2005 privind ucenicia la locul de munca - Monitorul Oficial nr. 907/11.10.2005); Law no. 203/1999 (republished) concerning work permits (*Legea* nr. 203/1999 republicata privind permisele de munca); Law no. 130/1996 concerning the collective labour agreement (*Legea* nr. 130/1996 privind contractul colectiv de munca);

The laws that govern *self-employment* and the *running of a business activity* (which includes the construction industry) are: Government Emergency Ordinance no 44/2008 and Law no 184/2001 concerning the organization and performance of the profession of architect. According to these laws certain conditions have to be met in order to register as self-employed. Some activities may not be performed by self-employed persons and some of them are subject to certain conditions that need to be fulfilled - as indicated in the CAEN⁷ codes.

The laws that define *temporary employment* are: The Labour Code (Codul Muncii 2004), article 88, which defines temporary employment and the relationship between the temporary human resources agency and the user (employer/client of the temporary work agency); the labour code also refers to forced labour leasing, this law restricts personnel leasing to two situations: when the rightful employees are in annual/medical or special leave, or have their contract suspended or when the company (employer) needs a temporary seasonal labour force or specialized labour and the Government Decision no. 938/2004 on the conditions for registration of temporary work.

The laws defining *subcontracting*⁸ in the construction industry in Romanian law are: Law no. 145/1999 modifying and completing Law no 114/1996 on interior and exterior design, works and

services subcontracting (Legea nr. 145 din 07/27/1999 and Legea locuintei 114/1996). According to the law service provision can be subcontracted to companies. In general, in the construction industry subcontracting is done to accomplish the working tasks together with the main employer/construction company, or for delivering building materials necessary for work to be accomplished or to provide the main contractor with specialist services required to complete the task.

2.1. Self-employment/bogus self-employment and legislation

The laws that govern *self-employment* and the *running of a business activity* (which includes the construction industry) are Government Emergency Ordinance no 44/2008 and the Law no 184/2001 concerning the organization and the performance of the profession of architect.

According to these laws certain conditions have to be met in order to register as self-employed. Certain activities may not be performed by self-employed persons and some of them are subject to certain conditions that need to be fulfilled - as indicated in the CAEN⁹ codes, as follows:

The conditions that are to be fulfilled in order to register as a natural person, individual or private enterprise are:

- a) The person requesting the registration should be at least 18 years of age - for natural persons, that want to develop economic activities individually and independently, or as main founders of an individual enterprise or familial enterprise, or 16 years of age - if they are members of a familial enterprise;
- b) The person requesting the registration must have a clean fiscal record, meaning the person has not committed any actions sanctioned by financial, customs or financial and fiscal regulations, such as the ones that are reported in fiscal records;
- c) The person requesting the registration must have a declared work premises;
- d) The person requesting the registration fills in a declaration that he/she has complied with and fulfils all the conditions stated in the law.
- e) The person requesting the registration provides documents attesting their professional experiences (education diplomas and certificates, professional competence certificates etc.)

As for verification of the qualifications presented in order to register as self-employed, the director of the Registry of Commerce has the competence to verify the documents provided by the applicants.

In terms of status, a self-employed can have the following:

- 1) As an authorised person- the payment of VAT optional up to 30.000 euro, after this threshold the payment of VAT is compulsory. Such a person can not hire someone else to perform the job, he or she is not considered as an employee.
- 2) Individual enterprise (it is not considered a legal entity); the person responsible for individual enterprise is considered a tradesman; the owner of an individual enterprise can hire third parties with individual labour contract.
- 3) Family enterprise: this is comprised of two or more members of a family; it can not hire third parties with individual labour contracts; it does not have assets and it does not become a legal entity. The members of the family are considered tradesmen.

The registration procedure for the self-employed involves:

- ◆ An application to be filled in at the Registry of Commerce of the place where the applicant establishes its legal headquarters.
- ◆ The necessary documents are the same as those required by a natural person with a VAT number.

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 are as follows:

- ◆ When hiring an employee, the company has to pay taxes to the state for a total of 26,9 % (19,5 % social insurances, 6 % health insurances, 1 % unemployment, 0,4 %- the minimum tax- it varies up to 2 %- for risks of accidents and professional illness).
- ◆ When concluding a contract with a self-employed person, the company does not have to pay any taxes or social contributions for that person.

The disadvantages of self-employed persons in construction with regard to social security benefits, compared to direct employees are that they are the only contributors to these social security taxes. The self-employed have to fill in a declaration in which they choose the amount of money that they wish should be covered by insurance (it is not mandatory to ensure the total amount of money they receive and/or declare) therefore the social benefits (pensions, health, unemployment) are paid corresponding to the amount of money contributed to the state. The percentage is 29 %. They do not benefit from unemployment services unless they conclude a contract with the unemployment agency and pay taxes- the taxes are 1 %.

In terms of taxes, the income contribution is 16 %, same as for the employees.

Table 2. Self-employment in Romania: general figures (2005)¹⁰

Status of employment	Number (in thousands)
Total	9147
Employees	5921
Employers	154
Self-employed	1795
Contributing family worker (unpaid)	1267
Member of an agricultural holding or of a co-operative	10

Source: Household labour force survey (HLFS 2005).

The question of bogus self-employment relates to the differences used in the different member states to describe the borderline between genuine employment and genuine self-employment.

The costs of an employment contract for both the employee and employer are:

A. taxes due by the employee	B. taxes the employer pays:
income tax 16 %	- accident risk insurance - 0.5%
unemployment tax - 0,5%	health insurance - 5.5%
pension tax - 9.5%	- medical leave insurance - 0.5%
- health insurance - 6.5%	- pension tax - 19.5 %
	- unemployment tax - 1 %
	guarantee against employer insolvability - 0,25%

The tax system that regulates the construction sector is the national system; there are no industry-specific ones in Romania.

2.2. Comparison between the rights of the employees and the rights of the self-employed

In comparison to the directly employed, the rights which the formally self-employed workers hold are visibly smaller, as they do not benefit from any of the rights included in the collective labour agreements. Even though the self-employed do benefit from the social security indemnities corresponding to the amount of money declared (pensions), health insurances and benefits covering periods without working contracts (corresponding to “unemployment”), they tend not to declare the whole amount of money received and therefore their benefits in terms of pension, health insurance and unemployment are visibly smaller than the ones of the employees.

Therefore, it can be concluded that the self-employed workers:

- ◆ Benefit partially from social security indemnities: they have to fill in a declaration in which they choose the amount of money they wish to have insured (they are not obliged to ensure the total amount of money they receive) and the public pensions are paid corresponding to the amount of money contributed to the state.
- ◆ They do not benefit from unemployment services unless they conclude a contract with the unemployment agency and pay taxes;

The self-employed do not have the following rights stated in the collective labour agreements:

- ◆ Annual leave;
- ◆ Any special leave entitlement that the employees might have depending on their collective agreements (bereavement leave, child adoption special leave, child birth special leave, child/spouse sickness special leave, sabbatical leave entitlement, etc.)
- ◆ Right to training and professional specializations covered by the employer;
- ◆ Right to an 8 hour working day with break intervals;
- ◆ Right to be represented by trade union organizations and in negotiation of collective agreements and everything the collective agreements address;

- ◆ Right to participate in labour conflicts and strike when their contractual rights are not respected or any other matters in relation with their employment;

2.3. Self-employment/bogus self-employment in the construction sector/forms that could be assimilated to bogus self-employment or are considered legally borderline.

2.3.1 Semi-dependent workers

The phenomenon of “semi-dependent” employment is not defined or subject to specific provisions or protected in any way under Romanian labour law, but in practice there are situations where people are working in conditions similar to a labour contract yet without having formally concluded such a contract or they perform the activity based on a civil contract being authorised persons or having an individual or family enterprise, when in fact the subordination to the contractor is identical to a typical employment situation.

The labour relationships and trends in the construction industry, even though, in theory, the parties have the complete freedom to arrange their contractual relationship, and the individual labour contracts have a legal part and a conventional part - subject to negotiation (the legal part refers to rights and obligations of the parties regulated by the law and the parties can only negotiate rights higher than the minimum standard stipulated by the law or collective agreements) and it may appear as if the employees is in a favourable situation due to the law and collective agreements negotiated at national level, branch level or company level which already stipulate rights in their favour and they are only required to negotiate above these rights. In actual fact such negotiation is possible only for important positions within the companies or for critical positions, while for the rest of the employees (blue colour workers) such contracts are, in fact, contracts for acceptance only.

The civil contracts (the case of self-employees) do not have any restriction and they can be negotiated entirely by the parties, in theory, although, in practice, in the construction industry the working party usually approves contracts that are unilaterally drawn up by the employer/contractor and are not really subject to negotiation¹¹.

Regarding the predominant elements/indicators that determine a labour/direct employment relation in Romania, it can be said that the intention of the parties to conclude an individual labour contract is essential. The elements considered to be of equal importance to the existence of an a priori labour contract include:

- ◆ The characteristics of the work performed- the work is performed for a certain period of time, according to a schedule established by the employer- usually 8 hours per day, 40 hours per week;
- ◆ The risk: the work is exercised for the profit of the employer who bears the risks for the activity;
- ◆ The salary- for the work performed the employee receives a remuneration called salary;
- ◆ The subordination of the employee to the employer - the work is performed under the authority of the employer;
- ◆ Observing all the rights the worker is entitled to according to the collective agreement (annual leave, sabbatical leave, all special leave entitlements, training opportunities, right to be represented by a trade union association etc.).

The indicators that are considered to be essential in order to establish that an employment relationship is a priori excluded are the presence of a service contract with all the legal traits of such a contract, both *de facto* and *de jure*, that details all the duties and obligations the two parties have in their relationship.

There have been few court cases that have addressed the issue of the employment status of workers; in fact cases in Romanian specialized labour courts refer to the establishment of an individual labour contract. The court examined the intention of the parties to conclude an individual labour contract and, at the same time, assessed the important elements of an individual labour contract: working conditions, salary, working time, location etc.

The law in Romania does not contain any presumptions indicating that in certain circumstances or for certain jobs an employment or self-employment relation would be compulsory, nor have there been any instructions developed by the authorities (e.g. social security administrations, the tax offices) or the social partners, with regard to indications that might distinguish between employee and self-employed status. There are no official statistics on the number of directly employed and formally self-employed persons in the construction sector. Although, from the interviews held¹², it appears that direct employees are increasingly being replaced with service subcontracting agreements. This happens because the main construction companies are subcontracting entire parts of their activities at construction sites to smaller companies, which in fact do not provide the materials to accomplish the given task but only the labour force. This is, in fact not a genuine subcontracting of services contract, but a disguised subcontracting of work force contract. The contract between the subcontractor and the workers supplied is either an employment contract or none at all (and in this latter situation undeclared work is encountered). It is legal, from the point of view of the Romanian legislation to have such a contract between the two companies. It is not verified by the labour inspectors or any other state authority whether the work is performed by the constructor using its own means or the ones of the main construction company. No such contract has been attacked in court for not being a genuine services contract or an atypical work force recruitment agency type of contract exceeding its legal prerogatives.

Considering that in the construction industry private investments have exceeded public investments and the current crisis in human resources this sector is confronted with it could be speculated that this impacts on the increase of the number of self-employed. As the bogus self-employed are concerned, it seems that in Romania, this sophistication of undeclared work has not yet earned itself a place. Undeclared work is still the rule in the construction sector in Romania. Companies are increasingly subcontracting parts of their work either to specialised construction companies for several specific activities or to subcontractors that only provide work force. This can be explained by the will of the construction companies to cut costs (such as the ones they have to bear with employing workers), to ease the burden of the dismissal procedure (in case they do not need the workers for longer periods of time) and in order not having to pay potential compensatory payments the employees might qualify for, such as training, the costly days when employees are entitled to be on annual and special leave etc.

This type of subcontracting can be considered a rather recent development in the construction industry. Its legal version can be considered to be the contract for the hire of a temporary work force. This latter form of employment is also called personnel leasing, and it essentially means working through a temporary labour agent¹³.

In this situation it can be concluded that bogus self-employment is encountered, the labour/business relationship between the main construction company and the subcontracting company is a false one, seeing as the labour relationship between the subcontracting company's employees and the main constructing company (the user) should be a direct employment relationship.

The second type of contract that can be considered a form of bogus self-employment encountered in the construction industry, yet on a smaller scale, is the following one:

In very few cases, for positions higher up in the hierarchy of a construction company than what is called blue collar workers¹⁴, such as architects, chief engineers or managers, the following labour relationship is quite frequent in Romania:

The person (architect, engineer etc) has two contracts with the construction company:

- a. a direct employment contract, usually for the minimum legal salary;
- b. a cession of author rights contract, in which the employee transfer his/her rights for a construction project, report, scientific research etc, to his/her employer.

With this type of contract the employee does not have to be registered as self-employed.

This situation also occurs when a construction company does not declare all it pays to its employees and the latter have an additional part of their remuneration undeclared¹⁵. For example the labour contract reports the minimum legal salary, while the employee receives more from the employer, but the remainder is not declared. This practice has been revealed during interviews with several people working in constructions who wish to remain anonymous.

What is predominant, however for the construction industry is not this type of bogus self-employment but undeclared work; the parties interviewed have concluded that, according to their own experience, bogus self-employment is a sophistication that has not yet found its place in the construction sector in Romania.

III. Labour and market developments

3.1. Internal context for the employment in the construction industry in Romania/ Romanian migrant workers abroad

In Romania, the construction industry was identified as one of the sectors with the largest shortage of workers in 2007. According to the Soros Foundation research - "The labour market in Romania and immigration", published on November 20th, almost half of the companies in the sample declared they encountered difficulties when recruiting and employing people and the majority of them expect that this type of difficulties will increase in the future. More than half of the interviewed managers declared they have been confronted with serious difficulties in finding available qualified workers for close to two years. According to 70 % of the managers interviewed the main cause of this deficit in available qualified workers is the migration of the labour force outside Romanian borders¹⁶.

3.2. External context for the employment in the construction industry in Romania

A recent survey of the Manpower employment services company shows that Romania ranks first in Europe, the Near East and Africa in employment intentions for the next three months. Worldwide, the study ranks Romania second to Singapore only, while the smallest employment intentions are to be found in countries such as Great Britain, France, Italy and Spain. The study shows that 43 % of the employers intend to increase the number of employees over the next period of time.

The Manpower study also identifies the fields with the highest employment expectations, and among these is the construction industry.

All employers answered one specific question: how do you envisage the modification of the total number of employers in your company during the next three months, by the end of June 2008, by comparison with the current quarter. The answers received vary between “an increase in the number of employees” to “a decrease or no new employee at all”.

Overall, the net forecast for employment in the second quarter of 2008 in some cases is an impressive 36 %. According to the Manpower Overall Three Month Report on employment forecasts, out of the 841 companies interviewed, 43 % intend to increase the number of employees over the next quarter. On the other hand, only 7 % of the employers expect the employment to drop, while 49 % anticipate no changes at all¹⁷.

Until the outbreak of the financial crisis the construction companies estimated an increase of up to 54 % in the number of employees.

In fact, the Construction Employers' Association has announced that it was intending to import major work force numbers over the next period in time, from countries such as China, Bulgaria, Turkey, Ukraine or the Republic of Moldova, i.e. places where wages are much lower than in Romania. Most workers come from China.

The main advantage to this solution is that foreign workers come to Romania via recruiting agencies and have contracts for one or two years, so that there is no risk of them migrating to other companies and they cannot return to the country of origin throughout the duration of the contract. While these workers come to Romania, the local workforce prefers to go abroad, where their labour is more generously rewarded. In Italy, for instance, a construction worker earns around 1000 euro a month; a foreman - around 1500, and an engineer - 4000 euro.

In Romania, the expenses incurred by foreign workers are minimal. While a Romanian worker who has returned from abroad will ask for 1000 euro, a Chinese worker will ask for 200 euro tops. With an average of six people accommodated in an apartment, 30 to 40 Euros will be spent on rent, with an additional 10-20 for food. Assuming that all these people have the necessary conditions for a decent life, including a translator and a doctor for the whole group of a couple hundred people, it all adds up to 300 euro per worker, and this speaks for itself”, adds Nimrod Zvik. “Romania ranks second in a worldwide estimate of increased employment

in April-June 2008, tying with India and Peru, and outranked only by Singapore, where the expected increase is 60 %”, stated the representative of Manpower Romania.

Financial crisis puts construction industry “with its back to the wall”.

According to the Romanian Association of Construction Entrepreneurs (ARACO), the base word in construction industry is prudence. “The main problem of this industry is represented by the availability of financing for next year. There are two possibilities here, as long as financial problems aggravate, some projects will be cancelled for lack of funds, and the investment value will be reduced in the case of others. They would be among the first short-term effects that are felt on the construction market”. Moreover, ARACO representative pointed out that the only way of financing in the construction market, at present, would be the customer’s money.

The international financial crisis that began at the end of 2008 has had a direct impact on the construction industry in Romania, and an indirect one, as well. Thus, besides the fact that it is more and more difficult for companies to obtain financing, Romanian workers who went abroad, now return to the country asking for jobs in this field, which means there is no longer any personnel crisis in this field.

The construction sector, a sector which provides jobs for 423,000 people, will also “adapt” to a falling market.

IV. Cross border employment effects on self-employment and bogus self-employment

In Romania the self-employed intending to work abroad legitimately (profiting from the social security system and protection rights) have to fill in the E101 form. In order to do so they need to provide the Administrative Commission for Social security of Migrant Workers (CNPAS) the following documents.

The ARACO representative also stated that it would be possible that only 370,000 employees remained in the sector, in early 2009. Not only the Romanians working abroad in the construction sector will remain unemployed, but also the employees in Romania. The drop in investments in real estate projects and in the pace of construction will make the number of employees who will enter technical unemployment exceed the figure of 53,000, at the beginning of next year.

1. The certificate for fiscal attestation- proving they do not have any payment duties to the Romanian state.
2. The certificate for the current status of fiscal contribution for the last 12 months.
3. The updated financial record of the authorised natural person (NAP).
4. The registration as authorised natural person certificate.
5. The certificate attesting they function as an authorized natural person.

6. The certificate attesting the sum of the activity as natural authorized person.
7. The working contracts or pre-contract between the Romanian authorized person and the company abroad.
8. The identification card for the authorized natural person.

Also, the following details about the independent activity of the natural authorized person have to be provided: registration number, the type of activity according to the CAEN codes, the address of the premises of the NAP, the date when the NAP was registered with the Commerce Registry Office, information about the activity that will take place abroad, the period envisaged for working abroad (up to 12 months).

The person requesting the E101 form also has to provide the following data about the company the NAP will work for abroad: address, identification number (accompanied by as many details as possible, to permit the identification of that company).

Apart from these details the NAP will have to sign a declaration according to which he/she undertakes to:

- ◆ Pay social contributions in Romania for the whole period of work abroad;
- ◆ Maintain the authorization to work as a NAP;
- ◆ Maintain the necessary means to again undertake the independent activity in Romania after finishing the work abroad, including payment of income taxes due according to the law.
- ◆ Informing CNPAS about all changes that occur during the period of work abroad prior to the deadline when the period expires and to return the E 101 form for modification/cancellation.

As stated at point 3.1 of this report, the number of Romanian migrant workers that left Romania through the National Agency for Labour force (ANOFM) decreased after Romania joined the EU. 32.500 Romanians left the country through the ANOFM, this figure is more than 40 % lower than in 2006, according to the statistics provided by the ANOFM. This tendency is explained by the ANOFM officials by the fact that once the status of EU citizens had been obtained, it became easier for Romanians to find a work contract on their own.

V. Social security and fiscal (tax) developments

The employees in the construction industry are subject to the same social contribution regulations and taxes calculation rules as all regular employees in other sectors. The only specific regulations for this sector are the ones concerning health and safety norms and technical norms.

VI. Abuse of the status of self-employment (causes, consequences, forms of abuse)

The *causes* of bogus self-employment seem to be numerous when comparing the benefits obtained from practicing this form of labour:

From the employer's perspective the benefits (that can be considered causes) are:

- ◆ Reducing the labour costs (taxes, social security contribution, vocational training programs, health and safety training/protection, covering for the periods when the employee is on annual or special leave);
- ◆ Gaining a more flexible human resources dynamics
- ◆ Transfer of risk;
- ◆ Avoiding trade unions to defend workers rights, and also avoiding the potential financial losses produced by strikes, labour conflicts etc,
- ◆ Maintaining a privileged position on the market (being able to keep the prices low, by avoiding all the above mentioned costs).

From the perspective of the self-employed:

- ◆ Reducing cost and therefore keeping a bigger amount of income by reducing the mandatory social security contribution one has as an employee.

From the perspective of the state:

- ◆ The state's benefit form failing to detect bogus self-employment and setting things in their rightful place is not having to pay social benefits as it would have to if employees were entitled to them.

The *consequences* of bogus self-employment could be visible in the future in a number of areas related to social benefits, health and safety, vocational training, lack of the fidelity long term employment entails, the dedication of the worker that comes with long term employment and the possibility to control qualified, accountable workers.

Health and safety: potentially more accidents and professional illness/invalidity due to non-compliance with the health and safety provisions where the self-employed are concerned.

The total number of sanctions issued by the labour inspection for breaches of health and safety provisions in 2007 was 29, 6 % higher than in 2006. For the same reason as many as 5691 sites were closed by the labour inspectors in 2007 in comparison to 3580 in 2006, 1440 in 2005, and 1414 in 2004¹⁸. The statistics provided by the labour inspections did not reveal however if these increasing figures are mostly due to an increase in people working on construction sites without a formal direct employment contract.

The representatives of the employers' organizations have stated that the training on health and safety issues is provided to all workers on a construction site.

Vocational training is seldom encountered where the self-employed are concerned in the construction industry and it is absent for all temporary work force and workers without any form of contract.

Pensions

In the construction industry there are no other occupational pension schemes available. Starting in 2007, for all people paying social contributions to the state it became mandatory to register with a private pension scheme, the workers in the construction sector, irrespective of whether they are employees or self-employed, are no exception.

In theory self-employment should not have negative consequences on pension benefits, but in practice the self-employed tend to pay minimum social security contributions and this fact will probably have serious repercussions when these people reach retirement age. It will then be very difficult for them to maintain a decent living standard.

In the case of Romanian migrant workers working in other EU member states with direct employment contracts and paying contributions to the respective member state it will be interesting to see what system they will refer to in order to collect their pensions (especially if they contributed to several member states and their country of origin), considering that in most of the member states there are no electronic archives for the national pension system, and, more importantly, in view of the fact that the Romanian national pension system has not yet signed any agreement with the equivalent institutions in other member states in this respect. No interviewed person was able to explain the use of the E202 form.

VI. Prevention and combating measures to tackle bogus self-employment:

Except for the inspections carried out by the National Labour Inspection and the sanction levied by the labour inspectors, there are no other measures in force to tackle bogus self-employment. As for prevention measures, with the exception of the dissuasive effect that the sanctions applied might have on bogus self-employment, no other forms of prevention are envisaged in Romania.

By analysing the fines applied by the labour inspectors following their investigations, checks and controls, one reaches the conclusion that the average sum collected for fines issued due to the absence of an employment contract is not sufficiently discouraging compared with the financial benefits engendered by self-employment. On the other hand, in the vast majority of the cases the actual decisions reached by the labour inspectors are challenged by the person the sanctions are levied against in the courts of law and, due to civil procedure provisions this results in a suspension of the execution for the duration of the trial. Trials take a long time in Romania, and therefore the dissuasive effect of the sanction issued by the labour inspectors once again is curtailed..

Usually, the inspections undertaken by the National Labour Inspection's territorial units take place when an employee lodges a claim relative to his/her employment relationship, reporting that certain rights have not been guaranteed. Also, surprise controls can take place to verify if the workers are legally entitled to perform the work. Another prerogative of the labour inspectors is to check the implementation of health and safety norms on construction sites. There have been numerous cases where higher fines have been applied (up to the equivalent of 24.000 euro) and the construction sites have been closed down, following a check by the Labour Inspectors.

VIII. Conclusions and recommendations

Bogus self-employment is still an unfamiliar concept for the Romanian construction industry. It represents a sophistication of the labour market that is as yet underdeveloped, while its ancestor - "undeclared work" - is still far more likely.

The only two types of “bogus” self-employment encountered, on a small scale, similar to the practices that are recognised as falling under the heading of “bogus self-employment” in other member states are:

1. Subcontracting, when in actual fact the main construction company should implement direct employment contracts with its employees or those self-employed workers that work for the subcontractor;
2. Sale of royalty contracts agreed with the company by which the author is already employed. The work performed under the sale of royalty contracts should in actual fact be regimented by a direct employment contract.

According to the people we have interviewed both forms of bogus self-employment, as well as the undeclared work that is reported as taking place on a much larger scale compared to bogus self-employment, are appealing mainly due to the financial benefits they entail. All parties: the workers, the construction companies and the state lose out, even though it may wrongly appear that they have something to gain from the implementation of bogus self-employment.

- ◆ The workers - even if it appears that they get to keep more money, because they do not have to pay social contributions as a percentage of the whole amount of wages received, in the long term, their social benefits are diminished or, it may happen that they are deprived of their social benefits, if they choose not to declare their income and contribute accordingly to income and social taxes.
- ◆ The employers - the advantages for the employer are the reduced costs- not having to pay income and social taxes contributions to the workers, being able to fire them when the activity is working at a loss, avoiding the trade unions defence of workers rights, and also avoiding the potential financial losses engendered by strikes, labour conflicts etc, maintaining a privileged position on the market (being able to keep the prices down, as all the above mentioned costs are sidestepped). On the other hand, the employer forsakes the loyalty long term employment ensures, the workers' dedication that comes with long term employment and also the possibility to control qualified, accountable workers.
- ◆ The state - on the one hand the state wins by not having to pay social benefits it would be required to pay if employees were entitled to them, yet on the other hand the state loses, because many of the people do not declare the entire sums of money received in self-employment services contracts, and therefore the income tax contributions are also lower.

Recommendations:

- ◆ It should be stated in the legislation that no other forms of economic relationships may be envisaged in the presence of the criteria that determine direct employment indicators, and these criteria should be clearly stated in the law;
- ◆ The labour inspection organisations should introduce specific controls aimed at identifying bogus self-employment;

- ◆ The way the Romanian state collects its income and social taxes from the Romanian workers working in other EU member states should be looked into closely;
- ◆ The subcontracting of a certain part of work on a construction site (a false subcontracting of services that is in fact a subcontracting of work force) should, if not genuine, be terminated and the parties should be required to pay the subcontractor's workers all their salary and social dues retroactively, as if a valid personnel leasing contract had been concluded instead of a service one.
- ◆ A further study should examine how a person working in several member states will be able to collect their pension rights and whether the existing system can handle the increasing number of workers that are in this position.

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- 5 Adopted with Law 53/2003 - www.protectiamuncii.ro/legislation/legi_in_domeniul_securitatii_si_sanatatii_in_munca.shtml - 42k
- 6 www.inspectmun.ro/Legislatie/LegislatieB/legislatieb.html
- 7 CAEN establishes the classification for all activities within the national economy.
- 8 Apart from the subcontracting in the construction industry, subcontracting is also defined in the law on services (including medical), public acquisitions, civil law etc.
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- 10 <http://www.insse.ro/cms/rw/pages/arhivabuletine2008.en.do>
- 11 According to the statements people interviewed.
- 12 when the institutions to which the representatives making the statement belong to is not mentioned in the report it is because other witnesses interviewed then the representatives of the social partners have expressed their wish to remain anonymous.
- 13 An analysis of the personnel leasing can be found in annex 1 to this report.
- 14 A blue colour worker is the one with minimum qualifications required for construction, for e.g. painter, carpenter etc, according to the industry specific language code used by the persons interviewed.
- 15 Situation encountered often for blue colour workers, as explained at point IV.7.1 "Undeclared labour in the construction industry".
- 16 More details about the Romanian migrant force can be found in annex 2 to this report.
- 17 However, it is worth noting that these assessments were made before the financial crisis occurring at the end of 2008.
- 18 <http://www.inspectmun.ro/RAPORT%20ANUAL/RAPORT%20IM%202007web.pdf>

*Experts Report*¹

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

Miguel Gutiérrez Pérez

Seville, February 2009

1 N.B.: “All the views expressed by the author are not necessarily shared by the Spanish employers’ representatives”

I. The demarcation between direct employment/ genuine self-employed and genuine self-employment/bogus self-employment.

1.1. Definition of direct employment

A definition of **direct employment** does not exist in Spanish law, although a definition can be drawn from the scope of application of the Spanish Workers' Statute. Therefore, a contract will be presumed if a person (the worker), freely and personally, renders a service to another party (a company, an employer or an entrepreneur), for which this person is paid. This person will work as an employee, under the employer's guidance and management.

A **direct employment relationship** must be accepted voluntarily and as an employee, which implies subordination and a payment. The employee will also have to respect the working hours on which both parties have agreed in the employment contract.

The employer will assume the risks involved in the work of his employees. The necessary tools will be provided by the employer, while the employee's holidays will have to be agreed on by both parties, or according to what is stipulated in the collective agreement.

An employee is a person who, voluntarily, renders a service for which he/she is paid. These services exist under another person's management and guidance.

An employer is a natural or legal person who receives the services offered by his employees and also provides guidance and management.

Some rights are held by employees and not by self-employed workers, such as redundancy payments and paid leave. There are also rights which are common to both the employee and the self-employed, such as the right to an invalidity or retirement pension, granted by the department of Social Security, or the right to public health care.

However, there are big differences between employees and self-employed workers concerning Social Security payments. In the case of employees, it is their employer which assumes most of these costs, depending on the employee's salary and which will determine the employee's future pension benefit. As for the self-employed, these will choose the amount payable to the department of Social Security within the limits set by the law, which will also determine their future pension benefits.

Concerning the right to be represented, employees have specific representatives (the workers' representative or the works council) appointed to legitimately defend the interests of the workers. Self-employed workers do not have these specific representatives, although associations such as the Spanish national federation of associations of self-employed workers (ATA) and the self-employed workers' union (UPTA) make sure the rights of the self-employed are protected.

1.2. Definition of genuine self-employment

Self-employment can be defined as the economic or professional activity carried out regularly, personally and directly by a person, without being affected by somebody else's management or guidance. According to Law 32/2006 of 18th October, subcontracting self-employed workers is legal, and subcontracting in the construction sector is specified in Article 5 of this law.

1.3. Definition of bogus self-employment in the Spanish law

There is no such mention in Spanish law. Nonetheless, a negative definition of bogus self-employment can be found in articles 1 and 5 of the Royal Decree 197/2009 of 21st February, which specifies the Self-employed worker's statute concerning self-employed workers who are economically dependent.

Thus, a bogus self-employed worker would have one main client, from whom he would perceive at least 75 % of his total income, therefore not fulfilling the requirements specified in the law (article 5: the self-employed worker and the employee will have different working conditions; the self-employed worker will have his own production infrastructure, etc.).

However, this phenomenon appears clearly in jurisprudence, therefore each case must be analysed. Nonetheless, we are referring to those cases in which companies hire self-employed workers who, in reality, work as employees, for the job is done exclusively and under the company's guidance and management.

A good example of case-law is a sentence passed by the High Court on 31st March 1997 in which a professional photographer, using his own camera and vehicle, took photos for a newspaper which used to assign him a particular area. Once the photographer submitted the photos, the newspaper would pick out the ones that would be published, for which the photographer was paid. Moreover, in the sentence it is stated that "the plaintiff (the photographer) could offer his services to other companies (although whether he did or not was not specified)".

The High Court believed there was an employment relationship and therefore suspended the sentence of the appeal. Among the arguments, the most representative is the following: "The photographer works as an employee, which constitutes an employment relationship. The plaintiff does not do his job on his own initiative and for himself, as he does not sell his photos in the media market. Instead, he carries out his activity following precise indications given by a media company. This company can choose some of the photos at an agreed price, for which this company receives the right of publication". (Despite this -the High Court adds-, the photographer keeps the moral rights).

According to case law, the criteria which show that a person is working bogus self-employed are fixed working hours, holidays, leave and other days off, use of the company's technical means by the worker and guidance and monitoring of the worker's job by the company.

1.4. Different forms of self-employment/bogus-self employment in Spain

These forms of self-employment/bogus self-employment are gradually becoming more sophisticated: the constitution of civil societies, worker cooperatives or community property which, under the appearance of independent work, involve an employment contract. Usually a company signs a commercial contract with a civil or cooperative society although, in reality, these societies work under the guidance and management of the contractor, which means that they cannot freely carry out their activity. However, these measures are also used legitimately by self-employed workers in their professional activity.

II. The impact of regulation and deregulation in this field.

Self-employment/bogus self-employment and legislation

The law which regulates self-employed work in the construction sector is Law 20/2007, of 11th July, of the Spanish Statute of Self-employed Workers. This applies to every natural person developing an economic or professional activity, regardless of the sector, which is carried out on a regular basis, personally and directly, and not being affected by somebody else's guidance or management.

Self-employment/bogus self-employment and social protection contributions/payment (mandatory/ voluntary).

Regarding the payment of social security, the self-employed worker can choose the amount payable within certain minimum and maximum limits set by the law.

In regards to tax payment, the amount payable will not be fixed. It will depend on the income statement of the self-employed worker.

Self-employed workers are bound to pay for the complete amounts regarding social security and VAT. Employees are exempt from these obligations.

Self-employed persons can join private insurance companies, which offer voluntary forms of insurance, complementary to the compulsory Social Security system. This is highly recommended to both self-employed workers and employees, to lighten the burden of the Social Security system. In this sense, self-employed workers and employees tend to be similar.

Figures/Extent:

Direct employment/self-employment

According to the Spanish Central Businesses Directory (DIRCE), in 2007 46.5 % of the construction companies had no employees, whereas 25.8 % had between one and two employees. These percentages remain the same in previous years. Thus, according to the data from 2005, 46.1 % of all construction companies had no employees, whereas 24.9 % had between one and two employees. As for 2006, 46.7 % of these companies had no employees and 25.2 % had one or two employees. These are the latest official figures provided by DIRCE.

COMPANIES - CONSTRUCTION SECTOR - NUMBER OF EMPLOYEES

	2005	2006	2007
No employees	46.1%	46.7%	46.5%
1-2 employees	24.9%	25.2%	26.8%

The absence of employees and, therefore, the bigger presence of self-employed is caused by the phenomenon known as subcontracting, predominant in this sector. It is also known that some self-employed workers are not registered with the department of Social Security to avoid the payments.

According to the figures provided in a study by the Spanish national federation of associations of self-employed workers (ATA), between 1995 and 2007 there was a rapid growth of self-employed professionals working in the construction sector (77.7 %). This has been even more pronounced in the last five years (2003-2007) increasing by 38.7 %, which meant 173,513 more self-employed workers in the sector. The biggest growth happened in 2007 (10 %). This data contrasts with the sudden fall experienced in 2008 which, during the course of the year, has been reduced by 18,033 self-employed workers (-3.2 % as for December 2007).

Self-employed workers in the construction sector	1995-2007	2003-2007	2008
Increase	77.7%	38.7%	
Decrease			-3.2%

Despite the change of trend, the contribution made by the construction sector to the RETA (special scheme for self-employed workers) has been growing since 1995: while that year it accounted for 11.5 of the total amount of self-employed workers, by August 2008 it represented 17.2 %.

RETA	1995	2007
Contribution made by the construction sector	11.5%	17.2%

The decrease in the number of self-employed professionals working in the construction sector in 2008 reveals the crisis that the sector is experiencing at the moment. However, figures show the relevance of self-employed workers in the construction sector, explained to a certain extent by the wish of employers to subcontract services, as a way to reduce the costs. Working with self-employed people instead of employees would reduce costs, since the employers (contractors) would not have to pay for the taxes and Social Security required when hiring an employee.

According to a study carried out by the Spanish national federation of associations of self-employed workers (ATA), the number of self-employed workers registered has fallen by 0.6 % since December 2007, from 3.4 million members at the end of last year to 3.3 million registered in August 2008. This source also states that in periods of economic recession the number of members registered in the special scheme for self-employed workers (RETA) usually decreases. Thus, between 1990 and 1993 the number of members registered as self-employed only increased by 0.7 % and in 1992, when the single payment of the unemployment benefit was suppressed, it was even negative for the first time (-1.3 %).

Despite these figures, during the period (1990-2008) analysed by the national federation of associations of self-employed workers (ATA), the number of self-employed workers registered with the department of Social Security increased by 45.32 %, going from 2.1 million self-employed professionals in 1990 to 3.3 million by August 2008.

The study reveals that, from 1995 to 2007, the number of self-employed workers in the construction experienced a very rapid growth (+77.7 %), with a bigger expansion in the last five years (+38.7 %), especially in 2007 (+10 %).

Nonetheless, this data contrasts with the “plummeting” of the construction sector in the present financial year since, in the course of this year, 18,033 self-employed workers have lost their jobs. Despite the change of trend, the contribution of this sector to the RETA has been increasing steadily since 1995, when it only accounted for 11.5 % of the total number of self-employed workers, whereas in August 2008 it represented 17.2 %.

In the construction sector, the number of workers registered as self-employed between 1995-2008 decreased by 0.5 %, from 275,212 to 273,790. According to ATA, this data explains the loss of weight in the economy over the years, as in 1995 self-employed workers in the industry accounted for 12 % of the total number of workers in that sector, whereas now they only represent 8.7 %.

ATA states that, despite being a sector with a stable number of self-employed workers, in the course of this year this number has plummeted, losing more members in 2008 than over the last five years (-3,527).

The service sector has also experienced a slight fall in the number of self-employed workers, despite the fact that these numbers have been increasing steadily by about 2.4 %. This year, the evolution in the number of self-employed is also positive (+0.4 %). In 1995, this sector represented 73.6 % of all self-employed workers, whereas now it accounts for 71.4 %.

Trade is the economic activity which has been affected the most by the current crisis, for 4,278 family businesses have been forced to shut down in 2008, a number which contrasts with the growth experienced last year (+4,617). Thus, the data shows a fall of 7.2 % in the number of members claiming to be self-employed, going from 36.6 % in 1995 to 28.5 % in 2008.

The transport sector (with multiple fluctuations over the last years) decreased its number of self-employed workers by 0.5 % in 1999-2001. On the contrary, between 2002 and 2007 this sector experienced a constant increase (8.5 %) and reaching its peak in 2007. However, from last year onwards, there has been a change of trend in the transport sector, with occupation falling by 0.3 % as a consequence of the constant rise in fuel prices.

On the contrary, catering and hotel management are the only sectors which have enjoyed continuous growth since 1995, although they went through a downturn in 1999 which meant that the annual increase dropped from 2.3 % to 0.5 %. Until August 2008 they had experienced a dramatic increase similar to 2006 and 2007. Nonetheless, the weight of this sector has decreased overall, from 12 % of the total number of self-employed workers in 1995 to 10.5 % in August 2008.

According to ATA, the number of self-employed in the real estate sector has gone through an “unstoppable” increase. Between 2003 and 2007, the figures of those registered as self-employed grew by 45.4 %, from 163,927 members in 1995 to 452,516 in August 2008. This represents an increase of 176 %. What is also important is the fact that this sector has doubled its weight during this period, from 7.1 % in 1995 to 14.4 % in 2008.

Finally, another report of the association states that the primary sector saw a steady increase until 2006, cut short in 2007, with a fall of 1.6 %. This report also explains that, excluding the integration of farmers into the RETA, the sector has grown by 3.3 %, as it did in 2006. During this period, its weight increased slightly, going from 2.1 % of the total number of self-employed workers in 1995 to 2.8 % in 2008. If we include those working in agriculture, it accounts for 9.8 % of all self-employed professionals.

Self-employment/bogus self-employment

A study carried out by the national federation of associations of self-employed workers (ATA) shows that more than 6.5 % of self-employed professionals can be considered bogus self-employed, out of which around 80 % would be men and the rest women. Also, about 52 % of these are under 35 years of age, 40 % between 36 and 54 years-old and only 8 % are over 55.

The highest number of bogus self-employed professionals work in the service industry (73.69 %), 8.58 % participate in the manufacturing and production sector, while 17.73 % are involved in activities included in the extraction and collection of natural resources side of the economy.

Although there is no official records of this phenomenon, several associations, such as the self-employed workers' union (UPTA) and the national federation of associations of self-employed workers (ATA) have confirmed and denounced the growth of bogus self-employment. This is seen by companies as a form of cutting wages and social costs to the detriment of employment conditions.

(Bogus) self-employment and migrant workers

There are no official figures concerning the percentage of migrant workers in this situation. It is difficult to assess how many of these workers work as “bogus” self-employed, as it is an irregular form of employment.

Although there is no official data regulating this phenomenon, several associations, such as the self-employed workers' union (UPTA) and the national federation of associations of self-employed workers (ATA) have revealed the growth of bogus self-employment among migrant workers, especially after the enlargement of the European Union.

Regarding the specific details, it is important to mention that, in order to carry out any lucrative or professional activity, foreign workers over 16 years of age must obtain a permit to work in Spain. Once in possession of this work permit, they will be entitled to work as an employee or as self-employed in any sector of the economy. This is specified in the Organic Law 4/2000, of 11th January, regarding the rights and liberties of foreigners in Spain and their social integration. The requirements to obtain the permit are included in Articles 36-42 of this law.

The figures concerning the numbers of directly employed and formally self-employed are issued by the Spanish Ministry of Labour and Immigration, from the Social Security register. However, it is difficult to have reliable figures regarding bogus self-employed, since this is an irregular form of employment².

III. Labour and market developments

Overall, the construction sector has experienced a substantial decrease in the number of employment contracts, while the number of redundancy procedures has increased considerably. This is due to the economic problems the construction companies have been experiencing since the beginning of 2008, caused by the fact that less credits are being given and by a rapid fall in the number of house sales.

Loss of social security, fiscal revenue for authorities:

There are no official figures concerning the overall loss as a result of bogus self-employment, although we believe they could be high.

IV. Cross border employment effects on self-employment and bogus self-employment

In Spain, there is no direct relationship between incoming/outgoing migration and the possibility of working as bogus self-employed.

According to the figures provided by the Spanish national federation of associations of self-employed workers (ATA) and the self-employed workers' union (UPTA), 60.8 % of the 52,454 foreign workers who registered with the RETA (special scheme for self-employed workers) during the first ten months of 2008 were Romanian.

According to the figures published by Fecoma-CCOO (Spanish national federation of construction and timber), self-employed workers coming from EU countries have increased by 47,391 (+57.1 %), especially workers coming from Romania and Bulgaria. Also, most self-employed professionals coming from the EU work in the construction sector. However, there is no mention of the phenomenon of bogus self-employment among EU workers. Control is very difficult since this is an irregular situation.

V. Social security and fiscal (tax) developments

The tax system that regulates the construction sector is national, with no industry-specific system that applies to this particular sector. Therefore, like in any other sector, the construction sector will comply with Income Tax and VAT legislation.

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 hiring a self-employed worker instead of a direct employee, a company benefits from not having to pay social security dues for the worker, as these costs will be taken on board by the self-employed worker himself.

There is also the fact that training and taking on highly specialized workers to carry out a temporary, yet fundamental, activity, is more expensive than hiring self-employed workers for that particular job.

Benefits that workers have when working as a self-employed person as regards tax and social security payments:

Regarding the payment of social security, the self-employed worker can choose the amount payable within certain minimum and maximum limits set by the law.

In regards to tax payment, the amount payable is not a fixed. It will depend on the self-employed worker's income.

Self-employed people are compulsorily insured under the state pension scheme.

Pensions:

We do not have the official figures of the Spanish association of collective investment and pension funds (INVERCO) on the number of self-employed construction workers that have additional pension provisions. However, we believe this is not a usual practice, for most self-employed workers choose to pay the smallest amount possible to the department of Social Security.

VI. Self-employment in a triangle relation

The role of intermediaries:

In actual fact it is not easy to distinguish between different employment relationships in the construction sector: subcontracting or bogus self-employment. This task is usually carried out by the Labour Inspection Agency, through the verification of the working conditions or the worker's documentation. Using several subcontractors is very common - as is genuine self-employment, although often bogus self-employment is used to disguise a work relationship that is in reality one of direct employment.

Subcontracting is regulated by article 42 of the Workers' Statute, with the Law 32/2006 of 18th October. Thus, article 3.1h) defines subcontracting as a commercial practice engaged in by productive organization whereby the contractor or subcontractor hires another subcontractor or self-employed worker to do part of a job which was assigned to him.

Also, subcontracting allows, in many cases, a higher degree of specialization and training of workers and a frequent use of technical resources, which has a positive effect on the investment in technology. Moreover, it facilitates the integration of small and medium-sized businesses in the construction sector, while it contributes to the creation of new jobs.

Obligations to be fulfilled by an agency when engaging self-employed workers:

The developer can directly engage as many contractors as he may consider necessary, whether they are natural (self-employed) or legal persons (companies).

The contractor can hire subcontractors (self-employed or companies) to do the job for which he was hired.

The first and second subcontractors can also take on a third party (self-employed or companies) to carry out the activity for which the first two were hired, unless the third party only provides the labour (including portable manual and power tools).

Subcontracting can be extended to cover specialized work, technical difficulties, fortuitous or inevitable and unexpected circumstances, but only after receiving the approval of the building control department. Nonetheless, since it is an exceptional measure, the building control department will have to put on record its approval and the reasons that support their decision in the subcontracting register. It will also be necessary to inform the health and safety coordinator, the workers' representatives and the labour authority. A report stating the subcontracting circumstances and a copy of the entry from the subcontracting register will be submitted to the labour authority.

The main contractors and the subcontractors must verify the following aspects:

- 1) Accreditation and registration in the Spanish register of credited companies.

2) The number of subcontractors involved (which we analysed in the previous question).

Sanctions or consequences for the intermediaries, workers and companies when working against the law in these triangular labour relations:

Defaulting on the obligations of accreditation and registration, or on compliance with the subcontracting agreement, which have already been analysed, will entail that the main company will be jointly liable together with the defaulting subcontractor, and towards the contractor, with regard to responsibilities concerning labour and social security. This is the case regardless of the sector of activity of the parties and without prejudice to other responsibilities which may be stated in the social legislation.

In Spain, even though there is still a long way to go, we believe an important step has been taken, thanks to the creation of a register of natural and legal persons which subcontract in the construction sector. As for the sanctions imposed for illegal work, we consider joint responsibility to be appropriate, as this will guarantee each party and ensure that all the legal requirements are fulfilled.

VII. Abuse of the status of self-employment (causes, consequences, forms of abuse)

Causes and origins of bogus self-employment:

The factors that cause an increase of self-employment and bogus self-employment are the attempt of companies to cut costs, since they do not have to pay for social security or taxes, which apply only to employees. Also, the increase of bogus self-employment is due to the attempt of workers to reduce the costs of self-employment.

Short and long term consequences of self-employment on health and safety, vocational training, pensions, social security and social inclusion:

Article 26 of the law 20/2007 of 11th July, which stipulates the Self-employed Workers' Statute, states that the special scheme for self-employed workers of the Social Security system will cover:

- a. Health care in the event of pregnancy, illness and accident, be they work-related or unrelated.
- b. Economic benefits in the event of temporary disability, pregnancy risks, maternity, paternity, risks after childbirth, invalidity, retirement, death, survival and dependent children.

Measures will be taken to put the rights and benefits of the self-employed on the same level as those of employees.

Consequently, the differences in social benefits between self-employed workers and employees tend to decrease.

Integration of the self-employed in workplace risk assessments:

Article 8 of Law 20/2007, of 11th July, which regulates self-employment does indeed state that, while employees and self-employed workers do their job in the same workplace, and also while self-employed professionals do their job at their clients' facilities, duties of cooperation, information and instruction, included in Risk Management Law 31/1995 of 8th November, will apply

to all workers. Companies which hire self-employed workers to do a job related to their own business sector and when this job is done at the company's facilities, must meet the regulations regarding risk management also with self-employed workers. When these workers have to use machinery, equipment, products, materials or tools provided by the company (client) but not within the company's facilities, the latter will make sure that these objects do not pose a threat to the worker as long as they are installed and used appropriately for their intended purposes. The self-employed worker will be entitled to cease his activity and leave the workplace when he considers that the activity carried out entails a high and imminent risk to his life or his health.

Moreover, article 9.6 of the law 20/2007 of 11th July, which regulates the Self-employed Workers' Statute, specifies that companies which do not meet the requirements regarding the risks taken by self-employed workers at their workplace will be held responsible if these workers have an accident due to this breach.

Integration of the self-employed in the information and training on health and safety or medical surveillance:

Risk management regulations do not include self-employed workers as far as the medical examination programs aimed at employees are concerned.

VIII. Assessment of prevention and combating measures to tackle bogus self-employment:

Penalties for non-compliance with legislation on self-employment:

If the worker did not comply with his obligation of registration as a self-employed person within 30 days of the start of his professional activity, this will be considered a serious offence and will imply an economic penalty which may vary between 300.51 Euros or 3,005.06 Euros, depending on the seriousness of the violation.

If the worker does not comply with risk management regulations, this will be seen as:

- ◆ A serious offence if, while working together with employees or other self-employed workers in the same facilities, the worker does not take the cooperation and coordination measures necessary for the prevention and management of job risks.
- ◆ A very serious offence if, while working together with employees or other self-employed workers in the same facilities, the self-employed professional does not take the cooperation and coordination measures necessary for the prevention and management of job risks, when these activities are considered dangerous or highly risky.

These offences imply an economic penalty which may vary between 1,502.54 Euros and 30,050.61 Euros, if the offence was serious and between 30,050.62 Euros and 601,012.10 Euros if it was very serious.

"Self-employed workers will also be held responsible for offences against the regulations concerning foreign workers" (Article 2 of the Law of Social Offence and Penalty).

The penalties envisaged by the law are very rarely applied, even when an obligation is not complied with.

Instruments or regulations currently in force that have shown to be successful in reducing the levels of bogus self-employment

In Spain, the most efficient instrument in reducing bogus self-employment was the passing of Law 20/2007 of 11th July, which regulated the Statute of Self-employed Workers. According to this law, self-employed workers are recognized as economically independent, aiming to end bogus self-employment. The aim of this law was to remove the possibility of becoming an economically dependent self-employed worker.

In order to tackle the problem of bogus self-employment better more work inspections would be necessary. This would improve the understanding of the real employment situation that some workers face at their places of work.

IX. Proposed policy measures at national and European level/conclusion/recommendations.

In this chapter we will present the conclusions drawn after analysing the situation of the self-employed in Spain, in all sectors and in the construction sector in particular:

Self-employment is fairly spread throughout Spain. This led to the passing of the Statute of Self-employed Workers in 2007, which gives a precise definition of self-employment and specifies their rights and responsibilities.

It is also worth highlighting the fact that self-employment is possible in any sector of the economy. The law does not restrict self-employment to any specific sector. Also, foreign workers can work as employees and as self-employed in all sectors of the economy, once they have been granted a valid work permit.

Bogus self-employment still exists in Spain, However, thanks to its regulation in articles 1 and 5 of the Royal Decree 197/2009 of 21st February, which explains the Self-employed Workers' Statute concerning economically dependent self-employed workers, bogus self-employed workers are more easily recognizable, as the breach of one legal requirement will be enough to detect a case of bogus self-employment.

Besides, now the labour jurisdiction controls the cases of bogus self-employment (specified in article 17 of the law 20/2007 of 11th July which contains the Self-employed workers' Statute), which is a good way to tackle this problem, since this jurisdiction works fast and has a good knowledge of the parties involved in the labour market. This results in quick and effective solutions for problems between clients and self-employed workers and therefore discourages workers from engaging in bogus self-employment.

Moreover, we have reached the conclusion that self-employment is very common in the construction sector, especially in the form of subcontracting, This allows, in many cases, a higher degree of specialization and training of workers and a frequent use of technical resources, which affects positively the investment in technology. Moreover, it facilitates the integration of small and medium-sized businesses in the construction sector, while it contributes to the creation of new jobs.

As for possible recommendations, bogus self-employment should be tackled by introducing a series of new assessment measures to be added to those already in place. A good solution

would be the creation of a specific department within the Inspection agency responsible for supervision over self-employment.

Finally, the improvement of the social scheme for self-employed workers is very necessary, and the implementation of a series of fiscal and Social Security bonuses could be positive to reduce the amount of the payments. This would be a good way to tackle the problem of the black market.

REFERENCES

2 For this information, please visit www.mtas.es

Experts Report

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

The abstract from Sweden is not published in this publication but will be made available together with the Swedish report on the EFBWW (www.efbww.org) or FIEC (www.fiec.eu) websites.

Experts Report

Self-employment and bogus self-employment in the construction industry in The Netherlands

**Prof. Y. Jorens/Prof. Saskia Klosse -
with collaboration of Mrs Corrie Kooijman**

January 2009

I. Demarcation between direct employment/genuine self-employment and genuine self-employment/bogus self-employment, bogus self-employment and the impact of regulation and deregulation

Most of the labour relations in the Netherlands are legally based on a private agreement. Apart from the traditional labour agreement, the law mentions two other types of labour agreements: i.e. the contract of assignment and the agreement regarding the payment of services (services-based agreements). The labour agreement is the contract through which one of the parties, the employee, commits himself to another party, the employer, to work against remuneration for a specific period of time.

The employee can rely on the protection of various laws.

For the determination of a labour contract, four elements, as clarified by case law, are important:

- ◆ The work that must be carried out has a compulsory character. Consequently, nobody can refuse to fulfil the tasks assigned to them and if an employee delegates his work to another person without asking for the employer's agreement, the labour contract can be terminated.
- ◆ The work must be performed for a certain period of time. Although this concept was introduced by the legislator to make a difference between a labour agreement and the agreement of assignment, it is no longer an independent condition
- ◆ A remuneration must be paid to the employee and
- ◆ The work is performed under the authority of another party. The employer may give the employee specific instructions about the tasks that he/she has to fulfil, although this need not be done in practice, merely ensuring this possibility is sufficient.

How can one determine if someone is working under the authority of an employer?

The Courts have however interpreted this condition differently.

For the Supreme Court, (the Court of Cassation) the intention of the parties when concluding the agreement is the point of departure for finding out if one works under the authority of someone else. In addition one has to look at how the parties have executed the terms of the agreement. On the other hand the CRvB (Central Appeals Tribunal, board of Appeal dealing with Social Security) pays particular attention to the facts and looks at the formal side of the concept.

Within the conditions of law, parties have the complete freedom to arrange their contractual relationship.

For the Supreme Court the previously established working conditions are not decisive, but additional information can be deduced from the way the parties have fulfilled their tasks in practice and the modifications they have introduced to the content of the contract. The factual situation therefore prevails on the form of the labour agreement (the so-called inten-

tion of the parties). The Supreme Court only looks at the initial intentions of the parties and checks if the parties have changed their initial engagements. The Court however will only look at the factual performance when uncertainty exists as to whom a contract is concluded with, and not when it is clear from the beginning that there is a labour contract.

The Central Appeals Tribunal (CRvB) pays more attention to the factual situation of the labour agreement than to the arrangements or intentions of the parties. The tax offices seem to follow the lead of the Central Appeals Tribunals.

The concept of employee is defined in unemployment legislation, (the WW). The employee is a person younger than 65 years old, who has a private or statutory labour relation.

The law has extended the concept of employee to other types of work relationship, the so-called fictitious employer-employee relationships, that are considered as an employer-employee relationship notwithstanding the fact that the required conditions are not met (in the majority of cases, this is when someone is not working under the authority of another person). As is the case for example with assimilated, persons who perform activities on the basis of a service agreement as well as the people who help them, intermediaries and those that assist them. On the basis of a General Measure of Government (Algemene Maatregel van Bestuur (AMvB), the so-called Rarity Decision, other types of fictitious employment are also included as employees. Some employment relationships can however not be assimilated as persons who perform activities as a self-employed; those who perform activities only for and on behalf of the company for whom they work as general manager or the self-employed entrepreneur.

A self-employed person is described as a person 'who is not an employee'.

Until recently, for certain fictitious/bogus employment relationships the following formulation was used in employee insurances to differentiate between a self-employed person: 'except for the cases in which the work is performed within a company or as an independent activity of the profession'. This definition has constantly been challenged over the years until the definition was modified to become "the self-employed person is somebody younger than 65 years old, who lives in the Netherlands and who benefits from profits as a result of his/her business activities (unless he/she is not responsible for running the business on his/her own account)."

The phenomenon of "semi-dependent" employment (i.e. situations where people are working in conditions similar to a labour contract without having formally concluded such a contract) occurs especially among self-employed who are starting their activities. Employers end the labour agreement with their employees and then hire them as freelancers or self-employed in order to carry out the same activities as before.

It is always a complicated and difficult task to find out if someone is employed as an employee or as a self-employed person. A measure that has simplified this task to a big extent is the so-called Declaration of employment relationship (VAR). This declaration is a statement on the status as self-employed from a fiscal point of view delivered on request by the Tax Service. The declaration offers the possibility to determine if the taxpayer enjoys advantages as result of an employment relationship(s); out of the profits of his business activities; as a remuneration, or as a consequence of other activities. A decisional framework was set up in 2005 on the nature of the employment relationship that strengthens the legal effect of this declaration.

The delivery of a declaration of employment relationship (VAR) is considered by the Tax Office as well as by the competent social security institutions for the execution of the work insurances (UWV) as a confirmation that activities are performed as an independent exercising his/

her business or profession. The evaluation in concreto of the employment relationship is no longer of any importance. When a declaration of employment relationship (VAR) is delivered, neither the UWV will insure someone for work insurances (sickness, unemployment and disability (ZW, WW, WAO-, WIA) nor the tax office will regard the employment relationship as a an employee-employer situation leading to the payment of premiums for the general social insurances or to the levying of taxes on the income received.

The criteria applied for the delivering of this Declaration of employment relationship (VAR) are determined by law and further developed by case law. The essential criteria for independent entrepreneurship are (most of the time):

- ◆ The responsibility for the organization of the activities
- ◆ The duration of the activities
- ◆ The capital involved in the activities
- ◆ The possibility of debtors` risk
- ◆ Working for one or more principals
- ◆ The extent to which one is dependent on one principal.
- ◆ The extent to which the person can take their own initiative in the fields of purchasing, increasing gains, advertising etc.
- ◆ The fact that the person concerned does not have to perform the work in person

These elements must be taken into consideration as a whole, depending on the nature of the work performed and not individually. This is why it is not possible to come up with a precise definition and to separate these elements in advance. As there are no precise criteria, it was decided to opt for legal security on the consequences. According to case law the risk one runs in relation to one's business activities is essential in particular when considerable investments are made in machines or in a company building. The use of one's own equipment, having a transport certificate, working for more principals, employing personnel and being registered in the commercial register, all point in the direction of performing activities as an entrepreneur or as a professional.

The tax office may compare the data of the request with other data, and it may also do research on the use of the issued declarations. If the UWV or the tax office finds out that for a certain task an invalid VAR is used, that the VAR is used for other activities which are not stated in the VAR or that the VAR is falsified, an analysis of the content of the VAR will be made. When it is found out that we are dealing with an employer-employee relationship, the necessary taxes on income and premiums for social insurances have to be paid and a penalty may be applied.

Practice shows that the answer to the question as to whether we are confronted with an employee or self-employed has been considerably simplified with the introduction of this declaration.

The phenomenon of bogus self-employment refers to someone who finds him/herself in the twilight zone between self-employment and genuine employment. So on the one hand, this person is in a dependent position to his/her ex-employer, and it may seem that we are dealing with a subcontracting relationship. On the other hand, this group also includes people who perform work as self-employed persons, but who are considered as employees by the law on

work insurance. FNV ZBo (the association of independent constructors) believes that bogus self-employment often goes hand in hand with fictitious employment.

Bogus self-employment is mostly traced to cases of one-person businesses, the so-called self-employed without personnel (ZZP).

This group of self-employed without personnel has several of the following characteristics:

- ◆ They do not employ employees
- ◆ They work for one or more principals, one of which is the most important
- ◆ They perform work that normally is done on the basis of an employment agreement
- ◆ Their activity is restricted to add special skills and knowledge to their own field
- ◆ They only carry out the work after they have received the assignment, and not on their own initiative
- ◆ They do not recruit employees, they do not or hardly invest in buildings, land or capital goods.
- ◆ They scarcely own or do not own any business premises; this is usually different from the workplace.
- ◆ They are responsible for their own activities
- ◆ They are paid per task, they do not receive a constant regular remuneration
- ◆ They are dependent on the external economic infrastructure

Let us give here an example of a national case of bogus self-employed workers, concerning Hungarian reed-thatchers.

The Court of First Instance judged that we were dealing with a case of bogus self-employment. A posting company was responsible for the management of the tasks and the tenders for the Hungarian reed-thatchers, the administration, the office facilities and the accommodation. The Hungarians were considered to be unable to obtain assignments on their own in the Netherlands. They did not advertise. The Court refers to the labour inspection report where it is mentioned that the posting company decided which project was assigned to which reed-thatchers; that the company was responsible for the performance of the reed-thatchers and that it also had the authority to replace them. Also the price paid to carry out the work was established by agreement with the posting company and the invoicing was done neither by the workers themselves, nor by their accountants on their behalf, but by the posting company. According to the Court, the fact that there was no relationship of subordination between the three reed-thatchers and the plaintiff did not imply that the plaintiff could not be considered as the employer. On Appeal however the Council of State did not follow the Court of First Instance and judged that the court erroneously decided that the foreigners did not perform the work as self-employed in the framework of a cross-border provision of services. The Council came to that decision by looking at the following elements: the foreigners were not paid during the days when they were ill, they had bought the reed themselves and they had also worked using their own equipment and protection. Moreover, the minister did not question the following facts: the foreigners have their main residence in Hungary, they accomplish tasks in other member countries of the European Union, tasks that they did not receive via

the plaintiff and they have many principals. One important factor was that since the 1st of July 2008, the foreigners had in each of the cases worked in the Netherlands for another principal. That the foreigners were not aware of the payment regulations is of no major importance, as it now appears that they have determined the terms of the agreements together with the interested partners. Moreover, activities as self-employed do not exclude collaboration between the three self-employed. The conclusion was reached that the overall circumstances showed that the foreigners were dependent from the mediation of the office, but not that the activities were performed under a relation of subordination

Or another example. A Polish company hires the services of several one-person companies in Poland and has temporary contracts with them. This Polish company sells its services through temporary contracts in the Netherlands with Dutch companies. It acts as a go-between/an interim agency and does not pay any income tax or social security contributions. The Polish workers in essentially work under the subordination of the Dutch client.

II. Labour and market developments

The available statistics on the number of directly employed and formally self-employed persons in the construction sector differ to a large extent. There are approx. 170,000 workers in the construction industry. FNV (Netherlands Trade Union Confederation) announces that 12,000 of these workers are directly employed. They fall under the CLA (Collective Labour Agreement) for the Construction Sector. 50,000 are active as formally self-employed

It is general believed that the number of the self-employed without personnel that are active in the Dutch construction sector has increased. In two years there has been a 31 % growth, from 52,600 to 69,050. Almost two thirds of them are general workers, most of them registered as repair people for household chores (25,400) or as carpenters (12,400). The specialized (24,550) self-employed without personnel are registered as painters (7,600), plumbers (3,750) or bricklayers (3,350).

Bouwend Nederland (Building the Netherlands) and CNV assert that this number increased to 80,000 in 2008. It is generally believed that the self-employed without personnel is a growing market. A yearly growth of 15 % is seen as a careful estimation.

Out of 90,000 construction companies, only 53,000 (60 % participation in 2007) are companies with at least one employee (including the entrepreneur himself).

This also explains why there are so many self-employed without personnel.

The most frequent form for self-employed without personnel (96 %!), is indeed the one-man business¹. The one-man business has the advantage that there are hardly any costs. The annual invoices do not have to be approved by an accountant, and there is also no impediment against hiring temporary staff. The income of the entrepreneur is the result of the one-man business and consequently, only income tax has to be paid. Possible investments can be balanced with previous incomes. Consequently, the investment risk can be considerably limited. The entrepreneur must comply with certain conditions imposed by the Tax Office in order to enjoy some of the advantages (tax deduction for self-employed, deduction for company start ups). Typical of this legal form is that one is liable with the entire capital for the company's debts.

The number of employees that fall under the Collective Labour Agreement for the Construction sector is also diminishing and counts +170,000. FNV ZBo asserts that 4 out of 10 working in the construction sector fall under the stipulations of the CLA Construction. CNV claims 185,000 workers fell under the CLA Construction in 2001, but that this amount had decreased to 115,000 in 2006.

Statistics show that in general the number of employees is decreasing, while the amount of the self-employed without personnel is growing.

According to the labour unions, 10 % of the total number of persons have to be considered as Dutch bogus self-employed people. The labour unions believe that the number of bogus self-employed has decreased considerably since the implementation of the law on the extension of the legal effects of the VAR (Declaration of employment relationship) on the 1st of January 2005.

As far as the number of foreign bogus self-employed is concerned, the statistics provided by the social partners differ considerably. Building the Netherlands (employers) asserts that 98 % of the foreign self-employed without personnel work as bogus self-employed. FNV (Netherlands Trade Union Confederation) asserts that out of 80 % self-employed workers from Central European Countries, 37 % can be considered as bogus self-employed.

III. Cross border employment effects on self-employment and bogus self-employment

The law on Labour by Foreigners regulates the access of foreigners to the Dutch labour Market. This Law does no longer apply to for example Polish workers, but it does still apply to Romanian and Bulgarian workers. These last persons still need to obtain a work permit.

This law states that the obligation to have a labour permit is not applicable in the case of foreigners performing work temporarily in the Netherlands in the context of the free movement of services, for an employer who is located outside the Netherlands in any other state of the European Union, or in any other Member state of the agreement regarding the European Economic Area , or in Switzerland, provided that:

- ◆ The foreigner is allowed to perform work for his employer in the country where the employer is located.
- ◆ The employer announces the activities to the Central Organization for labour and Income in advance before the work starts by a Declaration and an E101 Form or a similar form is delivered and
- ◆ There is no use made of the freedom of services legislation to put someone at somebody else's disposal.

In the Netherlands, it is sufficient to be in possession of a VAR Declaration to start working as a self-employed without personnel.

It is general believed that the VAR and E101 have increased in-/out-migration related to the possibility or non-possibility of working as (bogus) self-employed.

As it is extremely difficult to receive work permits, deploying Romanian and Bulgarian people as employee has become more and more complicated. An alternative is to let them work as

self-employed without personnel as in this case a work permit is no longer necessary. A lot of intermediary people abuse this situation by proposing people who work as self-employed without personnel in exchange for attractive tariffs. The foreigners are registered with the Chamber of Commerce and the tax office delivers the required VAR declaration. It also frequently happens that they receive a declaration from the foreigners` police, stating that they are allowed to work as self-employed without personnel.

The conditions that have to be fulfilled before one can speak about posting and the E101 forms lead to several problems.

Before we can speak about posting, there are special conditions that must be fulfilled.

- ◆ The existence of an organic link between the employer mentioned on the E101-declaration and the posted employees traced back to the work place in the receiving state;
- ◆ The existence of a sufficient relationship between the employer or self-employed and the sending country as to which legislation applies;
- ◆ Doubt on the exact interpretation of the prohibition to replace a posted worker;
- ◆ The difference between posting situations as detailed in art. 14,1 and simultaneous employment as detailed in art. 14 bis,1 of Regulation 1408/71.

Interviews have revealed that the information on the E101 forms is not always clear. The information cannot be completely trusted or cannot be read (because it is written in another language and translation is very expensive). It is also not sure how a principal can verify whether the declaration is valid and genuine. The existence of an organic link is almost impossible for the principal to verify. The tax office controls the matter afterwards and the labour inspection finds that bogus self-employment exists in certain cases of self-employed without personnel (one is of the opinion that it is possible to prove that there is a link of subordination). The employer becomes subject to income tax and is obliged to require payment of premiums for work insurance.

It is noticed that the issuing institutions easily proceed with delivering the E101-form hardly seem to check whether the conditions for posting are fulfilled. It also happens that a person can be posted without an E101-form, and that this form is only requested in case of inspections in the recipient country. Fraud cases involving E101-declarations often occur. The interviewees declare that the prime contractor/principal is saddled with the problems. Many citizens out of the Central and Eastern European States work under complicated subcontracting arrangements, gang masters and employment agencies and often they can present their E101-form, although it is presumed that they do not pay contributions in the sending country.

IV. Self-employment in a triangle relation: the role of intermediaries

Temporary working agencies play an important role as an intermediary for the placement of foreign employees and personnel with the user company. Many of these personnel placements abroad takes place through the members of the sector organizations, ABU, NBBU and VIA. A smaller number of temporary personnel works with non-organised interim agencies that are however registered with the Chamber of Commerce,. Another part works through non-registered, *mala fide*, agencies.

A recent report by Regioplan shows the number of companies that hire foreign employees via employment agencies (but it is not known if we are dealing here with bona fide or mala fide agencies). Approx. half of the most relevant companies hire employees via employment agencies, another 10 % via subcontractors and 3 % as posted workers. Some of the intermediaries work under others names.

In 2006, there were approx. 80,000 people working illegally through mala fide intermediaries.

Working with mala-fide intermediaries has led to different forms of fraud.

Salary fraud (the employee is not paid a wage complying with the collective labour agreements)

This is the most frequent form of fraud. The tariffs paid by mala fide intermediaries are lower than that paid by bona fide intermediaries. This tariff starts from 16 euro per hour, but in reality is higher, especially for qualified people. Lower tariffs are paid using a series of methods:

- ◆ A minimum salary is paid whereas the income stipulated in the Collective Labour Agreement for the Interim-Sector should apply;
- ◆ Not respecting other provisions regarding payment conditions, for example paying employees by the lot;
- ◆ Paying the minimal salary according to the CLA, without however ever offering bonuses or increase in remuneration;
- ◆ Even after a certain legal period, the foreign employees are not paid according to the income standards of other countries. They continue to receive the minimum income corresponding to their country of origin, which is most of the time lower or sometimes does not even exist;
- ◆ The employers pay little or no premiums for social insurances and do not withhold taxes on salary;
- ◆ Employers do not offer their employees holiday leave and most of the time, they calculate the holiday leave together with the sick leave and do not update or maintain the necessary documents;
- ◆ The employer does not pay the foreign employees for a few months. The employees are offered money in advance when they begin to work and after a few months they are not paid or even worse, they receive no payment whatsoever.

Payment fraud (an entrepreneur or interim agency does not deduct any or sufficient premiums for social insurance or tax on wages.

This kind of fraud can come in different forms. Any employment agency is obliged to withhold income tax and to pay premiums for social insurance. Mala fide intermediaries do not pay anything or only for a fictitious small number of personnel. Other mala fide intermediaries pay their taxes on a reduced remuneration, for example after deducting the lodging costs from the salary. Many other mala fide intermediaries pay a low remuneration to their employees, but they add fictitious allowances to the actual remuneration, such as allowance for kilometres.

Exploitation through accommodation

Exploitation through accommodation may occur in three ways, all of which may happen at the same time:

- ◆ The costs for lodging are deducted from the gross salary and tax on income and premiums for social insurances are levied on these reduced amounts;
- ◆ There are more people staying in the house than legally allowed and
- ◆ The retained tariffs per hour are not in conformity with what is offered.

Illegal employment (the foreign work migrant is not in the possession of the compulsory work permit)

Illegal employment concerns especially Romanian and Bulgarian workers. Sometimes, the mediation of groups of Turkish Bulgarians goes hand in hand with money laundering practices. Long working days are no exception when it comes to mala fide intermediaries. The extra-hours are usually unpaid.

Exploitation through transport

High costs are charged for transporting employees from their homeland to the Netherlands. These costs are often settled as a deduction from the salary through shady mechanisms. It is difficult to find out these practices. This situation is especially the result of the lack of written documents/proof and the weak/isolated position of the employee. It is in the interest of the mala fide agency to keep the employee completely isolated and as far from possible from the reality. Thus, the employee does not know how things are regulated in the Netherlands, as far as remuneration, working hours and lodging are concerned.

The interviewees assert that in most cases of bogus self-employment an intermediary is implicated. At this moment, it is very easy to set up an employment agency. This is the situation for the time being as there are no special requirements. Trade unions are in favour of introducing special measures, on the one hand in the sector, by requesting a certificate of recognition for all employment agencies, and on the other hand, by passing clearer laws making the hiring company responsible when they work with unrecognized employment agencies. Registration of employment agencies would become compulsory. The Ministry intends to secure the compulsory registration of all the employment agencies in the Waadi- Law on Allocation of work force by intermediaries.

V. Abuse of the status of self-employment (cause, consequences, forms of abuse)

5.1. Causes and origins of bogus self-employment

Several factors are considered as being responsible for increases in self-employment and bogus self-employment

In general the economic situation and the favourable entrepreneurial climate are important factors.

For the employees there is

- ◆ The need for individualization (being one's own boss);
- ◆ Being able to work according to one's own perspectives and expectations;

- ◆ The possibility to adjust paid labour to suit one's personal circumstances;
- ◆ To have more principals for whom one can work as well
- ◆ As the fiscal advantages.

For employers there are the following advantages:

- ◆ They can make use of production factors in a more efficient way;
- ◆ There is flexibility regarding working hours as be work can stopped from one day to the next. One is therefore in a position to adapt to the developments in the building sector and
- ◆ Lastly there are lower salary costs.

Building the Netherlands does not believe that lower costs are responsible for the increase in the number of the self-employed with personnel, and asserts that self-employed without personnel are paid the same, if not a higher, tariff per hour by the principal. The total cost may in the end even be more advantageous for the employers as they do not have to pay for additional hours of work. From an economic perspective, this is even more advantageous for the employer.

The Dutch Trade Union Confederation and CNV however assert that the business risk for having or not having work, or when the employee falls ill (Regulations regarding the continuation of payment of remuneration during sickness leave make it less attractive for employers to employ workers) does not exist and is totally born by the self-employed without personnel. In most cases, it is not a matter of hiring cheap labour. The greatest advantage for the employer is, according to Building the Netherlands, the flexibility: Choosing to become a self-employed without personnel can however also be a forced option when an employee loses his job or sees no other possibility to find a job than becoming a self-employed without personnel especially for their former employer. Financial reasons play an important role if one is forced to choose between self-employed without personnel (due to dismissal, bankruptcy of the company where they used to work, conflicts with the employer). Trade unions assert that this phenomenon is also triggered and stimulated by the CWI (Centre for Work and Income), and its policy regarding people who receive social security benefits, as by the UWV in the WAO (Disability insurance act) framework all of which want to diminish the number of people that can rely on benefits granted by the WW (unemployment)and WAO-disability insurance act/WIA.

- ◆ The government has installed provisions that stimulate persons who obtain social security benefits to choose for independent entrepreneurship (see the Decree on Assistance for the Self-employed (Bbz) and the law on Start up Credit for the Disabled due to labour reasons (Bsa).

According to Building the Netherlands this is a misconception. They assert that in the past, there have been many complaints about social security institutions that have regularly set up barriers to prevent people from setting up their work as a self-employed person without personnel. Many research studies (MKB-small and medium enterprises, UPC-consultancy) show that the employees themselves choose to opt for the status of self-employed without personnel after carefully assessment.

The Dutch Trade Union Confederation and CNV do not agree with this opinion. These associations state that need plays a greater role than shown by statistics.

- ◆ But also the increase in the number of intermediate employment agencies who to a growing extent concentrate on arranging assignments for self-employed without personnel play a role in the increase of self-employed without personnel. Until 2002 it was not possible for a temporary employment agency/job exchange agency to recruit people for the construction sector. The liberalization made it possible and the number of self-employed without personnel that start work via these agencies has increased.
- ◆ The introduction of the VAR and of the E101 form has made it much easier for both foreign and Dutch self-employed without personnel to start working as self-employed without personnel.
- ◆ As long as labour law remains inflexible (with regard to protection against dismissal), it is interesting for employers to work with self-employed without personnel.
- ◆ Also the tax regime stimulates this switch as self-employed people benefit from a number of fiscal advantages, which mean that the self-employed without personnel retain a high net amount of the gross payment they receive. An entrepreneur may benefit from tax deductions, and he/she may make use of an allowance for start up and the fiscal fund for old age. Consequently, the entrepreneur has to pay less income tax.

5.2. Short and long term consequences of bogus self-employment on health and safety, vocational training, pensions, social security and social inclusion.

The CNV and the Dutch Trade Union Confederation declare that due to the increasing number of self-employed without personnel the necessary financial support for the social security system drops away which is a risk for its financial sustainability and solidarity. Due to the high cost self-employed people are not inclined to insure themselves on the private market. Consequently large groups of small entrepreneurs remain uninsured. A company does not have to pay premiums for social insurances, or levy taxes and premiums for work insurances.

The principal of a self-employed without personnel does not have to pay benefits according to the provisions of the CLA (Collective Labour Agreement) (for example, the employer does not have to pay bonuses for working at irregular hours). The trade unions observe that this is a way to avoid protection against dismissal. Another problem is that they have to perform dangerous work. If a self-employed without personnel becomes unable to work, the employer bears no financial risk.

Constructing Netherlands on the other hand believes that a self-employed without personnel analyses the risk he/she has to take. The tariffs paid to a self-employed without personnel is the same or higher than the one that the employer pays to his/her own personnel. The claims filed for payment by the social security system are so reduced that the income decrease can be easily taken care of. After a few years, the financial situation of a self-employed without personnel is such that he/she insures him/herself privately against certain risks. FNV ZBO confirms the phenomenon that only later on insurances are concluded.

The trade unions assert that compulsory participation prevents unfair competition (if somebody does not pay premiums, they can work for lower remuneration). Building the Netherlands however assert that self-employed without personnel have no need for this. The choice to start working as a self-employed without personnel is a free choice and this would be

removed by the compulsory nature of the participation. The possibility to sell one's own company is also seen as a form of pension security.

A self-employed has no right to a minimum salary or holiday money, does not acquire any rights to a holiday period, has no protection against dismissal or benefits in case of sickness and incapacity for work. Until the 1st of August 2004 there existed an insurance against the incapacity for work for the self-employed. This social security insurance was abolished and the entrepreneur must now arrange insurance under his/her own terms. This can be done via an insurance company. The premiums are fixed in accordance with the age and the risk of the person concerned and are most of the time rather high. There is no waiting period. 42% of the self-employed without personnel have concluded a separate insurance against incapacity for work.

At the beginning the entrepreneur may continue his/her work insurances on a voluntary basis with the UWV (WW, ZW en WIA).

As the old-age pension legislation is applicable to anybody who is living in the Netherlands, also self-employed have the right to receive a pension.

The self-employed are however not allowed to contribute to collective pension funds and that is why they are dependent on their insurance funds. Several options are open to them. Firstly the self-employed have the possibility to continue the insurance provided by the branch of industry within which they perform their activity. Most of the self-employed without personnel working in the building/wood industry have this possibility. This voluntary continuation has recently been extended up to ten years, out of which the first three are fiscally facilitated. Afterwards, they must find their own solutions. The self-employed without personnel must also pay their employees and employers part of the premium. Secondly for a number of professional categories, the self-employed without personnel are obliged to participate in the old-age insurance for the branch of industry in which they work. This applies to BPF - building sector (this refers to wood carving and masonry, building terraces, floors, plasterer's work and constructions) and to BPF - painters sector (painting, surface finishing and glass installation). Thirdly there is also the possibility for individual provisions through an annuity. It is also possible to reserve a certain annual amount via the financial fund for old age (FOR).

Today most of the self-employed can only go to commercial insurers if they want to build up a pension. In about 133 out of 563 pension funds in the Netherlands it is possible to further build up a pension if you begin as a self-employed person. A rough estimate by the CNV shows that there are only very few self-employed without personnel choose to take advantage of this option. Only 2% of the self-employed without personnel do so according to CNV.

Private insurance companies notice the gaps in the market and have developed attractive insurance packages for this group. The Netherlands Trade Union Confederation, CNV and FNV ZBO declare that the lack of a pension security fund is an under-estimated problem. The trade union confederation of the Netherlands (FNV) will build up a pension fund for the self-employed (second-pillar pension system) with very competitive prices. Also CNV wants to offer this type of pension security fund to the self-employed.

It is asserted that the self-employed are not willing to insure themselves against provisions within their own profession that could even endanger the further existence of these provisions. This situation is confirmed by the Dutch Trade Union Confederation and by the CNV. They also assert that this situation may have serious consequences for the quality of work in the long term, as no contributions are paid to training at workplaces and educational funds.

Building the Netherlands states that the best employees will end up opting for the status of self-employed without personnel. Thus, the quality of the work performed will not suffer from this choice. A good self-employed without personnel will do everything to ensure that he remains a highly competent person with the necessary professional knowledge and expertise. If not, he risks losing assignments and clients. In the long run, most entrepreneurs will insure themselves against incapacity for work and end up concluding an insurance with a pension security fund.

While the law on working hours does not apply to the self-employed, the law on working conditions partly applies to self-employed without personnel. Anyone who performs work on a building site (even one-man repair job) falls under the stipulations of the law on working conditions.

Thanks to the application of a General Measure of Government the obligation to respect the law's stipulations regarding health and security can also be extended to the self-employed. Such a possibility has been used to some extent. Indeed, only in cases where the performing of labour can cause such high risks for the security and safety of the persons concerned, it is stipulated that any measure of protection against these risks are applicable to everybody who performs such an activity, even to those who are in a position of independence.

For the Dutch Trade Union Confederation, FNV Zbo and CNV the health and security regulations must be the same for employees as for self-employed without personnel. If there are different regulations that apply to the self-employed, lack of security and unfair competition arise. Building the Netherlands states that the self-employed without personnel are very well aware of the financial risks they run. In addition, the main contractor is responsible for the whole building site as a result of the rules on chain responsibility thus also for the place where the self-employed without personnel performs his/her work.

VI. Assessment of prevention and combating measures to tackle bogus self-employment

6.1. Investigations, checks and control

It is the Labour Inspectors who carry out the controls. During recent years, this institution concentrated a lot on illegal work but after the 1st of May 2007, they also paid growing attention to other forms of mala fide behaviour. The Labour Inspectors are also intensifying and implementing stricter controls on compliance with the Law on minimum income. Penalties for illegal practices (administrative penalties) have been considerably increased lately.

In 2007, the Labour Inspectors filed 723 cases against employment agencies, 97 of which ended up with the application of penalties in Court (13 % resulted in a law infringement).

Occasionally, even the SIOD -Social Information and Investigation Service- is successful in tracking down and applying penalties to the most important parties involved in mala fide practices. SIOD is a territorial investigation service under the authority of the Ministry of Labour and Social Affairs. It deals with major and complex cases of fraud and concentrates particularly in fighting abuse concerning work insurance, general social insurance, social compensation and labour market regulations.

The tax office in general checks company registers and invoices

6.2. Prevention

In 2004, the Employment agency sector together with the trade unions set up the SNCU (Foundation for compliance with the Collective Agreement for Temporary Workers) that investigates possible infringements of the Collective Labour Agreement on Temporary work and where necessary brings cases to Court.

Trade unions have established a contact point where one can report any abuse and infringements of temporary work regulations. This Association of international employment agencies (VIA) can easily be contacted without too many formalities. For the moment, enquiries are being made as to whether other sector organizations could also play a role in the activities of this contact point.

ABU, NBBU, VIA, FNV, CNV, De Unie and LBV have recently made a DVD in Polish about working in the Netherlands providing information on Labour agreements and the regulations regarding accommodation and transportation.

It also has to be mentioned here that in Collective labour Agreements more and more provisions on the responsibility of the hiring company are inserted, often related to the question of whether use has been made of certified employment agencies.

6.3. How to combat bogus self-employment ?

The following proposals were made.

- ◆ A clear definition of the concept of “self-employed without personnel”. The Government strives to formulate a clear uniform definition of self-employed without personnel, however, due to the policy consequences this might have, it is unclear whether and, if it is to be, when this will be successfully achieved. FNV and CNV: More controls, heavier fines. Enforcement and control on the link of subordination is not sufficient nowadays. Workplace and accounting checks should take place at the same time. The labour Inspectors should pay more attention on verifying payment of the minimum salary and wages in compliance of the Collective Labour Agreements (CLA). Controls should not only take place during the day and during the week. Verification and checking methods for the E101 forms must be improved.
- ◆ Abolishing the obligation for Bulgarians and Romanians to obtain a labour permit. Keeping this permit obligation, will help to maintain illegal employment and guarantee mala fide intermediaries the necessary supply of labour.
- ◆ The phenomenon of self-employed without personnel is largely abused in order to deny somebody who actually performs work as an employee all the rights he/she has. The Dutch Trade Union Confederation worries a lot about this issue, especially because the regulations regarding the free movement of workers are eluded through the application of these possibilities. They insist that The Hague should take this aspect into account in the framework of the discussions on open borders.
- ◆ Certification of temporary agencies and interim agencies (both at a national, and European level). Linked to this: make it compulsory for user companies to perform activities with certified agencies only. User companies that do not perform activities with certified agencies would be responsible for the correct payment of salaries and tax deductions. The Minister for Social Affairs has in the meantime declared that he is in-

tending to make user companies that perform activities with non-certified companies responsible for paying the minimum legal salary. It would also make controls much easier. The legislation will be adapted by the Minister so that employers who hire personnel through non-certified temporary agencies will be responsible for the payment of the salary of the temporary worker.

- ◆ FNV ZBo pleads for the inclusion of specific determining factors for tariff calculations in collective labour agreements in order to be able to set a minimum tariff (while avoiding accusations of price regulation). According to them this would be the only measure that might enable real enforcement. The tariffs should be set up so that in addition to insurance against labour incapacity one against old-age would also be provided. Another question is if the self-employed without personnel would really make use of these options. CNV wants to go one step further and pleads for a uniform minimal salary established by Government. The question remains if this would be accepted by the National Competition Authority.
- ◆ FNV ZBO: It is a challenge to investigate the possibilities for a collective labour agreement in the construction area for all working people (flexible personnel, cleaning personnel, self-employed without personnel, foreigners, fixed personnel, etc.) Today only 4 out of 10 people fall within the field of application of the CLA. This leads to erosion.

REFERENCES

- 1 An entrepreneur can choose between different legal forms in order to perform his/her activity: the one-man business, the general or the limited partnership, the private company or the corporation.

Experts Report

Self-employment and bogus self-employment in the construction industry in the United Kingdom

Professor Mark Harvey

Felix Behling

January 2009

I. The demarcation between direct employment and self-employment/ the impact of regulation and deregulation in this field

1. *The juridical demarcation:*

The juridical demarcation between direct employment and self-employment in the United Kingdom is based on case law rather than statutory law. The emergence of the ‘binary divide’ between the two employment statuses emerged at the end of the nineteenth century and during the interwar period, and was based on the distinction between the ‘contract of services’ and the ‘contract for services’ (Freedman, 2001; Deakin and Morris, 1995; Deakin and Wilkinson, 2005). It was consolidated in the immediate post-war legislation, notably in the National Insurance Act, 1946, when for the first time, the legal definition and the fiscal definitions of employment status were aligned together.

However, as Freedman has observed, the basis of the binary divide has always been based on the ‘facts of the case’, and there has been a changing basis of demarcation between the two employment statuses during the course of the twentieth century. Critical legal tests have been developed, and overlay each other, so that no one principle takes absolute precedence over any other. In historical succession, however, the four tests have been control, integration into the organisation, business reality, and mutuality of obligation. The characteristic tests are summarised in the table below.

Control	Duty to obey orders Discretion on hours of work Supervision of mode of working
Integration	Disciplinary or grievance procedure Inclusion in occupational benefit schemes
Economic Reality	Method of payment Freedom to hire others Providing own equipment Investing in own business Method of payment of tax and NI Coverage of sick pay, holiday pay
Mutuality of obligation	Duration of employment Regularity of employment/re-engagement Right to refuse work Customary to the trade

1.1. The first to emerge as the principal test was that of **control**. If a worker is under the control of the engager of services, for example determining when, how, where and to what standard the labour services are performed, then this control was taken to indicate employment, not self-employment. But there are many examples of workers who are clearly self-employed, yet come under the control of their client: window cleaners, cleaners of domestic households, personal service providers, are cases in point. So **control** became one test amongst others.

1.2. **Integration** was a later significant additional test focusing on whether a person was part of an employing organisation or not, subject to disciplinary or grievance proce-

dures of that organisation, and owing obligations to that organisation, not undermining its reputation whilst engaged in working for it, and so on. There are many professions, such as doctors or lawyers, who have considerable control over their how, when, and to what standard they work, but are part of an organisation, hence employed. Nonetheless, case law yielded significant counter example - a famous case of a freelance video-camera operator exemplified a worker who, when filming, was necessarily thoroughly under the control and integrated into the organisation producing films¹. Yet, in every other respect he was self-employed, providing his own equipment, submitting invoices for work undertaken, and working for multiple clients.

- 1.3. Such cases brought to the foreground the **economic reality** test of whether someone was in effect in business on their own account, taking financial risks in making profits or losses, through assuming the responsibility for setting the price for undertaking the service, providing the necessary equipment, or being able to pay someone else to undertake the service in their place. Meeting the independent business test then became a critical indicator - although not the sole one - of self-employment status.
- 1.4. The **mutuality of obligation** test has introduced a new level of lack of clarity and uncertainty into the legal determination of employment status, because it risks confusing casualised employment with self-employment². Casual workers are often engaged successively by multiple employers. This is a mark of their insecurity and extreme dependency on opportunities for employment, and is frequently accompanied by involuntary periods of unemployment. This test makes it hard to distinguish between casual workers, the most dependent employees, and the genuinely independent workers who may choose to work intermittently, at times of their own choosing, and for multiple clients. In the construction industry today - and in the docks in earlier periods - hiring by the day, being picked at random from a group on a street corner, is a mark of extreme economic dependency combined with absence of mutuality of obligation. For dock labour, there was no question but that the engagement was one of employment. Today, in the construction industry, these occurrences frequently fall into the evasion economy of false and illegal self-employment.

As these different tests have emerged, supported by many precedents of case law, legal classification has become complex, uncertain and unclear. As we have just seen, three tests (control, integration, economic reality) might point unequivocally in one direction (employment status), only for the fourth test to point in the other (self-employment). In the words of an authoritative work on labour law we are faced with 'an open-ended multiple test, in which any one of a number of factors could turn out to be essential in tipping the balance on one side or another.' (Deakin and Morris, 159).

2. The fiscal demarcation:

In the United Kingdom, a parallel system of classification of employment status developed through the regulations affecting liability to income tax and national insurance. Thus, considerably in advance of a sharp binary divide in legal terms, the Finance Act of 1922 established a separate tax schedule for employed and self-employed workers, and progressively from then on a divide in terms of liability to national insurance (for unemployment benefit, sick pay and other out-of-work benefits). Thus, income tax was deemed payable on salary or wages accrued when under a contract of service, whereas taxation on profits of the trade, with al-

allowances for costs of the trade, applied to those working under a contract for services. This binary fiscal divide subsequently formed the basis of Pay As You Go income tax automatically deducted at source by the employer, as against self-assessment of income from profits of the trade, applicable to the self-employed. Income tax has been the most important source of state revenue from 1945 onwards, unlike many continental European countries.

The 714/SC60 was in place until the next major reform of the construction tax regime in 1999 when the Construction Industry Scheme (hereinafter, CIS) was introduced. This reform failed to address the fundamental flaws of the previous system, and retained the two-tier classification of the self-employed. However, there were significant changes, notably the replacement of a contract-based SC60 tax system, by a worker-based system in which an identified individual self-employed worker had their tax deducted at source by the engager, under what was then called CIS4 registration.

The main new features of the reform modified the two-tier self-employment system.

The first tier was now 'superior business class' self-employment status, CIS 5/6, with a threshold of a £30,000 annual turnover and a business test. This set conditions for gross payments and self-management of tax by the self-employed. The second tier, CIS4 self-employed worker had tax deducted at source at a lower rate than standard rate (18 % as against 22 %).

A workplace identity card system for both classes of self-employed was introduced, with a photograph (a compulsory system, a significant but relatively unremarked innovation). The card also carried the National Insurance number. An obligation was placed on contractors engaging the CIS4 self-employed to deduct tax at source and provide Inland Revenue with taxation vouchers for each payment and transfer the tax owed by the self-employed to the Treasury.

By imposing a threshold of £30,000 annual turnover as a condition for a self-employment status where the self-employed retained responsibility for paying their tax (the gross payment method), the new rule in effect excluded a significant proportion of genuine self-employed from the normal rights and responsibilities of self-employment. By so doing, this new regime sharpened the distinction between the business class self-employed and the dependent self-employed. The certification and voucher system for the latter equally clearly placed greater obligations on the engager, even more consistent with those of an employer. It should be emphasised that thresholds and business tests of this kind operate in no other sector of the economy, for the simple reason that millions of genuinely self-employed working for private clients would be excluded from their legitimate self-employment status by virtue of the £30,000 threshold. So the conflict between law and taxation classification of status in the construction industry became more acute, not less, with the Construction Industry Scheme.

Moreover, far from utilising the new identity card system, and the shift to taxing individuals rather than contracts for the second-class self-employed, in order to control and police employment status, 1,063,728 CIS 4 certificates were issued to individuals within months of the introduction of the new scheme. This was at a time when the total construction industry manual workforce did not exceed 1 million. At the time, Inland Revenue documents on the new scheme affirmed that 'the registration card in particular was not proof of self-employment'. But, certification effectively proved to be a form of legitimisation. The second class self-employed were exempted from the more rigorous test of the business class self-employed, and, in effect walked through an open door to self-employment status. As Jane Kennedy, Financial Secretary to the Treasury, stated in a Parliamentary written answer (Hansard, 21 November, 2007)

The second reform, the New Construction Industry Scheme, was introduced in April 2007. The two-tier self-employment system remains almost unaltered from its predecessor, with a superior business class self-employment, allowing gross payments on condition of a £30,000 turnover threshold and a business compliance test, and the same false self-employment class with their tax deducted at source by their engagers. Most of the reforms are operational and administrative, relating to how tax is returned to Her Majesty's Revenue and Customs (HMRC) and how it is accounted for (the previous voucher system and certificates have been dropped).

The identity card system has been dropped, and in its place an electronic internet registration and verification procedure using National Insurance and Unique Taxation Reference numbers has been implemented. On the one hand, engagers of labour services are now obliged to sign, on a monthly basis when submitting their taxation returns, that they have checked the employment status of the providers of labour services.³ There are penalties for false declarations. On the other hand, the Electronic Status Indicator, discussed above, can be used both by engagers and engaged. For the engaged, registration to be self-employed can now be accomplished over the internet, by simply answering questions appropriately. It is difficult to see that this will pose any barriers to entry into false self-employment, indeed the reverse. However, as the system has only just been introduced, statistics on the employment status composition of the workforce are unavailable.

On the evidence so far, HMRC have not penalised any contractor or self-employed person for false declaration of employment status.

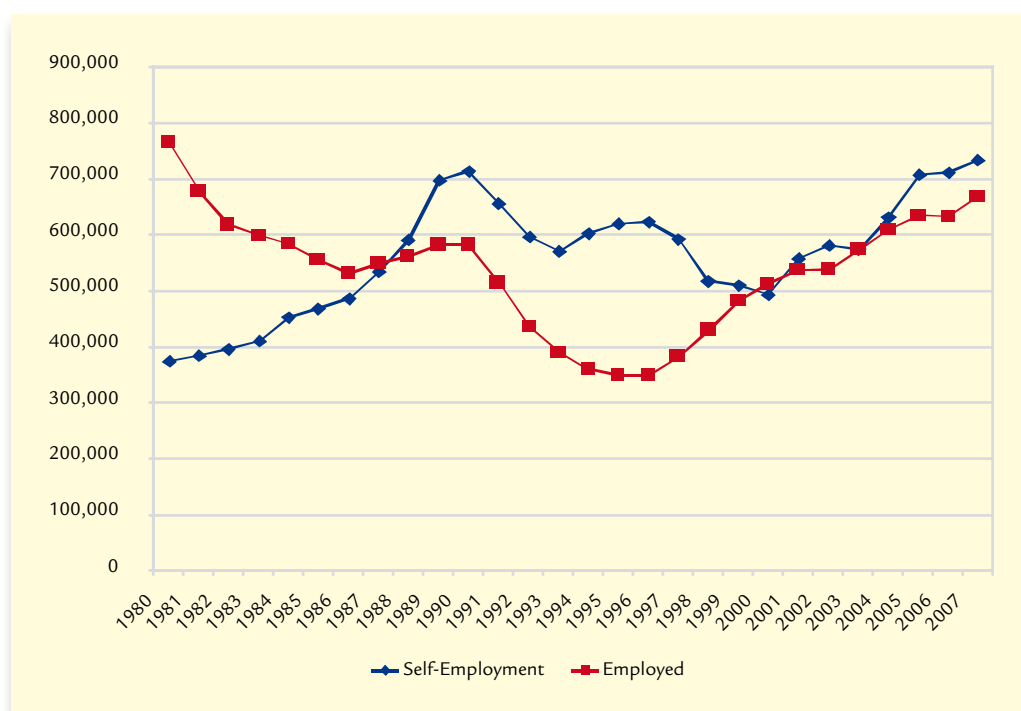
At present, no instances have arisen where penalties have had to be imposed because of an incorrect declaration of employment status by a contractor. (Jane Kennedy, Financial Secretary, HM Treasury, Hansard, January 31, 2008).

II. Labour and market developments

1. *The evolution of direct employment, self-employment and bogus self-employment*

Estimates of the level of genuine and false self-employment as recorded by official statistics will then also be presented.

Figure 1. Trends in direct and self-employment, manual workforce, 1981-2007



Source: Housing and construction Statistics, BERR, HMSO, 2008

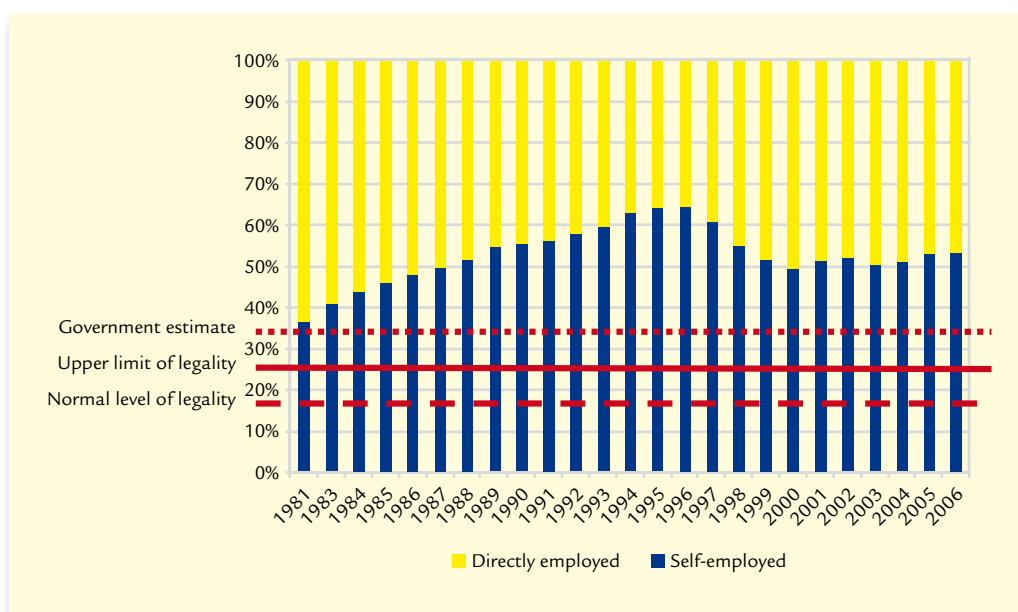
The figure above demonstrates the trends in direct and self-employment from 1981 to 2007. At the outset of the period, there were two directly employed for every one self-employed manual construction worker. Following the period of deregulation under the Thatcher government, there was a steep rise in the numbers of self-employed to a peak of 700,000 in 1990, and an equally steep decline of directly employed to a trough of 360,000 in the mid-1990s. Thereafter, as the industry pulled out of a recession, the number of directly employed rose in pace with the rise in numbers of self-employed, so that by 2007 there were only marginally more self-employed than employed, just over 700,000 for the self-employed and just under 700,000 for the directly employed.

The pattern of the trend strongly reflects the economic cycle, but also the different phases of the fiscal regulation and deregulation of self-employment status. Thus, in 1996, there was an attempt to tighten the controls over self-employment status, which resulted in reducing the proportion from over 60 % of the total manual work-force to near parity with direct employment. Most significantly, there is no evidence that the 2001 Construction Industry Scheme produced the claimed effect of reducing the proportion of self-employed.

2. The assessment of the scale of bogus self-employment

By its very nature, there can only be more or less robust estimates of the extent of bogus self-employment among the numbers of officially recorded self-employed. The most recent government estimate is that there are approximately 200,000 bogus self-employed out of a total of 710,000, or nearly a third of all self-employed (HM Treasury note to UCATT, July 2008). That might seem a very substantial level of bogus self-employed. However, there are strong reasons to consider this to be a serious underestimation, and that the true figure, and more robust estimate, is closer to 400,000 bogus self-employed. Figure 2 below sets out what might be seen as the various levels of estimates for the scale of bogus self-employment.

Figure 2. Estimated levels of bogus self-employment in the UK Construction Industry, 1981-2006



Source: Housing and Construction Statistics, BERR, HMSO, 2007

The government estimate of 200,000 bogus self-employed suggests that the proportion of self-employed to direct employed in the total manual workforce reaches 35 %, 10 % more than any other advanced economy, including one of the most deregulated labour markets, the USA. No indication has been given as to the evidential basis of this estimate. Moreover, this proportion only returns to the historically high figure of the early 1980s, the period immediately after the amnesty absorbed the ‘lump’ self-employed into the registered self-employed. At the time, the Inland Revenue official responsible for employment status recognised that many of these were ‘quasi-PAYE for the quasi-employed’ (Harvey, 1995). Using country comparisons, it can be assumed that the upper limit of legal and genuine self-employed is around the 25 % level of the total manual workforce. This underpins an estimate of 400,000 bogus self-employed. If the UK was to more closely approximate the European levels of self-employment, the proportion of the total workforce falls to 18 %, and the estimate of bogus self-employed rises to 480,000. In the light of these considerations, an estimate of 400,000 can be assumed to be a robust round figure, and a range between 350,000 and 450,000 bogus self-employed is highly probable.

A further source of evidence has consistently supported this estimate. Site surveys undertaken in 1991, 2000, and 2007 (Harvey, 1995, 2001, 2008) provided evidence of a high proportion

of large construction sites with over 50 % of the workforce self-employed. In a significant proportion of sites, there were over 75 % self-employed, including on sites of over 500 workers. Whereas high levels of genuine self-employed might be witnessed on small jobbing contracts, these levels of self-employment on sites of over 50 manual workers are clearly unreasonable. It would be equivalent to suggesting that workers on a car assembly line could each be considered to be self-employed contractors in business on their own account. There are therefore strong economic reasons to suggest that on large sites of this kind, 20 % self-employed is an upper limit. These surveys therefore support the estimate just given of a round figure estimate of 400,000 bogus self-employed.

Finally, the estimate is based on the nature of the organisation of the supply of self-employed labour. In the United Kingdom, large firms ceased to be direct employers of labour from the 1980s onwards, and outsourced labour to either labour agencies or labour-only contractors. Following a legislative change in 1997, there was a change in agency tax rules who supply workers to the construction industry (S134 ICTA 1988), requiring them to 'operate PAYE on payments to construction workers'⁴. This is reflected in the statistical trend noted in Figure 1. However, labour-only subcontractors were exempted from these rules, and continue to supply self-employed labour on a mass basis. As an organisation of the supply-side, including quite large firms supplying the bulk of labour on to many construction sites often on a continuous basis with the same workers, the dominant form of economic organisation is at odds with the legal classification of self-employed workers in business on their own account.

III. Cross border effects

Migrant labour and self-employment

The scale of migrant labour in the UK is relatively modest when compared with other European countries. In 2006 there were about 200,000 non-national construction workers in both Germany and France, 500,000 in Spain, and only 100,000 non-nationals in the UK. The boom in Spain's construction industry relied heavily on migrant labour. However, a view of current patterns of migration in the United Kingdom, Germany, France and Spain demonstrates quite clearly that only the United Kingdom combines migrant labour with self-employment to any significant extent. Indeed, all migrant labour shows higher ratios of self-employed to employed when coming into the UK than for the national workforce as a whole, where the ratio is approximately 1 self-employed to 1 directly employed. The most extreme deviation in this direction occurs with migrant labour coming from the new accession countries, the EU 27, where there are 11 self-employed construction workers for every 1 directly employed. But the numbers coming from Bulgaria and Rumania are relatively low compared with those coming from the 10 new accession states. Consequently, overall, the level of self-employed amongst migrants to UK construction is 20 % higher than would be expected from the national workforce, during the period 1996 to 2007.

There is evidence that many have entered without any significant test of self-employment. In answer to written parliamentary questions, John Healy, Financial Secretary to the Treasury, (Hansard, 16 April, 2008), provided the following statistics for those issued temporary, 3 month, self-employment CIS4 registration without National Insurance numbers:

Table 2. Number of temporary registrations of migrant self-employment

2004-5	74,000
2005-6	77,000
2006-7	76,000
Total	227,000

From the Labour Force Survey statistics, it is clear that not all 227,000 remained in the UK construction industry. The point to remark on here is the ease with which migrants can enter into false self-employment and became part of the UK construction evasion economy. Given the very high ratio of self-employed migrants to direct employees, and their presence on major construction sites in large numbers working as gangs for labour-only subcontractors, it is reasonable to assume that a high percentage of the migrant self-employed are, not by choice, bogus.

These figures clearly demonstrate that characteristics of the national labour markets determine the employment status of incoming migrant labour. There are two main explanations that can be offered for this marked contrast between the UK and the rest of Europe. The first is relatively straightforward. Legislation on migration from the enlarged Europe (the EU 25) with ten new states⁵, and the new accession states of Bulgaria and Rumania (the EU 27), discriminates between employed and self-employed. The former are required to enter on the worker registration scheme, whereas the latter can enter without registration, according to the *Accession (Immigration and Worker Registration) Regulations, 2004*, (The Stationery Office, HMSO, and the *European Accession Treaty, 2006*⁶.

The second reason, however, is that genuine self-employment requires an ability to conduct a business on one's own account. This assumes an adequate knowledge of the taxation system, an ability to communicate independently with clients, and a capacity to submit tenders, contracts and invoices for work undertaken. All this places a considerable barrier to entry into genuine self-employment for many migrants. However, false self-employment - direct employment in all but name and tax status - requires none of these capabilities. For these reasons, it is clear that the majority of migrant workers enter the ranks of the false self-employed. The estimates presented above concerning the level of bogus self-employed apply to the manual workforce overall, not distinguishing between nationals and migrants. But, by implication, a higher percentage of migrants are likely to be false self-employed, given that they have no other option but to enter as self-employed, and are known to be employed en masse on large construction sites.

IV. Abuse of the status of self-employment (causes, consequences, forms of abuse)

1. *The causes of mass bogus self-employment*

In assessing the causes of bogus self-employment on a major scale in the UK construction industry, the contrast needs to be drawn with those other sectors of the economy where the normal expectation is for high levels of self-employment: catering, distribution, domestic services, transport, for example. In the UK, the level of self-employed in these sectors is no more

than 15 %, comparable with most other European countries. Yet the same legal framework applies to all UK sectors, and, as noted above, much of the case law is drawn from outside the construction industry. The major and most important distinguishing feature of the construction industry is its fiscal system, the peculiar tax regime where taxes are deducted by the engagers of labour, under SC60 and CIS4 certification. Moreover, each shift in the trend of the statistics presented in Figure 1 is matched by a change in the fiscal regime: the amnesty, Thatcher's deregulation, the introduction of the Construction Industry Scheme, the tax regulation of employment agencies, and the New Construction Industry Scheme.

The main driver behind the emergence of mass bogus self-employment has undoubtedly been the cost differential between direct employment and self-employment. The engagers of false self-employed pay no National Insurance, whereas the engagers of direct employees currently pay 12 %. This alone exerts considerable cost pressures against direct employment, given the absence of controls over entry into self-employment status and the absence of effective legal enforcement of employment status. Along with this initial cost differential, however, there are additional cost pressures arising from the absence of sickness pay paid by employers, the frequent absence of holiday pay, and the absence of redundancy pay for the self-employed. Additionally, engagers of the self-employed make no contribution to pensions. It has been estimated that the true cost differential between direct and self-employment ranges from between 35 % and 50 % (Evans and Lewis, 1989). In these circumstances, once false self-employment reaches a critical mass, it presents inescapable competitive pressures on all engagers of labour to employ bogus self-employed workers. There is little other explanation for the rise of self-employment to over 60 % of the manual workforce in the early 1990s, prior to the beginnings of re-regulation. The persistently high percentage of over half the manual workforce is a symptom of weak regulation and poor enforcement of the law.

2. *The consequences of bogus self-employment*

a. For the bogus self-employed:

The consequence of bogus self-employment can be summed up in terms of the transfer and assumption of all risks of employment onto the employee. It should be noted that many of the differences listed also apply to the genuinely self-employed. However, the genuinely self-employed in principal are in a position to cover the risks better, by pricing the risks into their contracts. Moreover, they have discretion and control over their engagements. The bogus self-employed have the worst of both worlds, lack of independence and control and lack of the protection that goes with employment. The costs and disbenefits of the following fall on the false self-employed:

- ◆ Sickness. The self-employed are not entitled to any sick pay, unlike employees.
- ◆ Interruptions of work. The self-employed are not paid during periods of inclement weather, with any cessation of work resulting in an immediate cessation of pay.
- ◆ Unemployment. The bogus self-employed are much more likely than the genuine self-employed to experience unemployment (Harvey, 2001), and even more so than the directly employed. They are not entitled to redundancy pay or unemployment benefits (Jobseekers Allowance). They also have no protection against dismissal.
- ◆ Childcare, parental leave, care of dependents are all borne at the full cost by the self-employed, as there are no rights to benefits in this domain, in contrast to the employed.

- ◆ Pensions and retirement age. Unlike employees, the self-employed have no retirement age, and the evidence points to continued working beyond 65 by significant proportions of the self-employed (Clery et al. 2007). Although entitled to basic state pension, a higher proportion of self-employed than employed fail to attain entitlement to the full basic pension, and all self-employed are excluded from rights to additional, earnings related, state pensions. Pensioner poverty is most highly concentrated amongst the self-employed (Sainsbury et al. 2006).
- ◆ Volatility of wages. Most of the bogus self-employed are paid at prices fixed by labour-only subcontractors, usually as a payment per shift (day). In periods of recession, these wages are subject to significant reductions, between 40-60 % cuts during the last recession in the 1990s (Harvey, 2001). There is evidence that the current recession has also begun to have a similar impact. Such volatility is not experienced by direct employees, whether or not they are paid according to collective agreements.

The countervailing benefits involve lower costs of national insurance, and some increase in the allowances that can be claimed against costs to the business. The primary short-term gain is payment of National Insurance at 8 % of the wage, as against 11 % for the directly employed. However, most bogus self-employed are paid a wage at a level fixed by their engagers, and so they have none of the entrepreneurial opportunities of the genuine self-employed to make profits on their own account.

b. For the industry, including the skills deficit:

There are short-term cost benefits from employing bogus self-employed to employers. Again, as with the consequences for the bogus self-employed, the benefits also apply to engaging the genuinely self-employed. However, the point is that the engagers are downloading the risks onto the engaged while at the same time exercising the control and determining the costs of labour in ways characteristic of employment:

- ◆ Employers pay no National Insurance, currently standing at 12.8 % of the wage.
- ◆ Employers are not liable to pay sick pay (notably the first three days of sickness).
- ◆ Employers frequently do not pay holiday pay as a separate and additional component to the wage.
- ◆ Employers make no contributions to supplementary or occupational pension schemes. This will become more significant when the current pension reform comes into operation in 2012, when employers will be obliged to pay 3 % of the wage to support a second state pension.
- ◆ Employers, especially labour-only subcontractors, pay no costs towards training, as the self-employed cannot and do not support on-site apprenticeships.
- ◆ Employers of the bogus self-employed have no obligation to pay the costs of redundancy, as the self-employed have no entitlement to redundancy however long they have been engaged by the subcontractor.

c. For the state: the fiscal loss:

The fiscal consequences for the state of mass bogus self-employment are considerable, principally in terms of loss of revenue from National Insurance and direct taxation. It should be emphasised again that the estimates of losses only reflect officially registered levels of self-employment, and not the informal economy where no taxes or national insurance are paid. In the first instance, the estimates are based only on immediately identifiable direct losses arising from non-payment of taxes and national insurance.

Table 2 below presents the range of possible losses to HMRC as a consequence of the loss of the Employers' National Insurance at 12.8 % and the lower rate of National Insurance paid by the bogus self-employed (8 % as against 11 %).

Table 3. Estimating the fiscal black hole of false self-employment

	Number of workers	£300 Per week £	£400 per week £	£500 per week £	£600 per week £
At 15% self-employment	510,250	1,418,719,510	1,837,940,910	2,257,162,310	2,684,274,190
At 20% self-employment	433,000	1,203,930,520	1,559,683,320	1,915,436,120	2,271,188,920
At 25% self-employment	375,750	1,044,750,330	1,353,466,530	1,662,182,730	1,970,898,930
At 33% self-employment	268,150	745,574,986	965,887,026	1,186,199,066	1,406,511,106

If we take the underestimate provided by the government (Figure 1, above) for false self-employed at 268,150 and the lowest wage of below the 2002 level we arrive at a minimum figure of £746 million per year. If we take a higher but still reasonable figure of false self-employed at 433,000, and an average wage of £500 per week, the fiscal hit to the taxpayer reaches £1.9 billion per year. A reasonably certain estimate suggests that the true figure lies somewhere between those limits, and if we were to take our two round figures of 400,000 false self-employed and an average wage of £475 per week we obtain the closest justifiable estimate of £1.7 billion per year. As levels of false self-employment have fluctuated over the years, and wages have increased over the decade, the total losses over this period cannot readily be calculated. But a figure of £15 billion would not be far wrong.

Of this figure, the most significant proportion of the evasion economy undoubtedly arises from the employers of false self-employed not paying National Insurance. The extent of their evasion amounts to £985 million per year, or 58 % of the total loss. A point made earlier is worth repeating: the difference between tax evasion and avoidance is that the latter is the perfectly legitimate use of all available means, allowances, and offsets, to reduce a person or company's tax liability. Tax evasion means deliberately not paying tax that one is legally obliged to pay. Of course, that has to be proved, and the illegality of false self-employment will be discussed later. But if a worker is in effect employed by an employer as opposed to engaged by a client, under a contract of services rather than a contract for services, then the engager is legally an employer, and liable to National Insurance at 12.8 %. We have demonstrated that the employment status of an estimated 400,000 self-employed workers cannot be other than one of employment. Contractors on the large site mentioned above, for example,

are not the clients to 900 separate and independent self-employed workers, in business on their own account. So this is powerful evidence of evasion, not avoidance.

Indirect costs. Although lacking the research necessary for sound quantitative estimates, the other side to the direct costs of loss of revenue from lower tax and national insurance are the additional state expenditures to support disadvantaged self-employed. Given the restricted entitlement to sick pay and in particular the low level of the basic state pension (20 % of the average weekly wage of a construction worker), self-employed workers who cease to be able to continue working in old age have a disproportionately high claims for means tested benefits, housing benefit, pension credits, and the like (Sainsbury et al., 2006). It has already been noted that the self-employed are likely to have lower levels of continuity of service to support entitlement for even the full basic state pension. A disproportionate number of self-employed therefore have an old age income below the level triggering means-tested benefits. Moreover, a disproportionate number of self-employed have no other supplementary pension rights. The state therefore bears considerable additional indirect costs related to false self-employment, particularly for those in old age. These indirect expenditure costs are therefore to be added to the estimated revenue losses of £1.7 billion per year.

V. Self-employment in a triangle relation

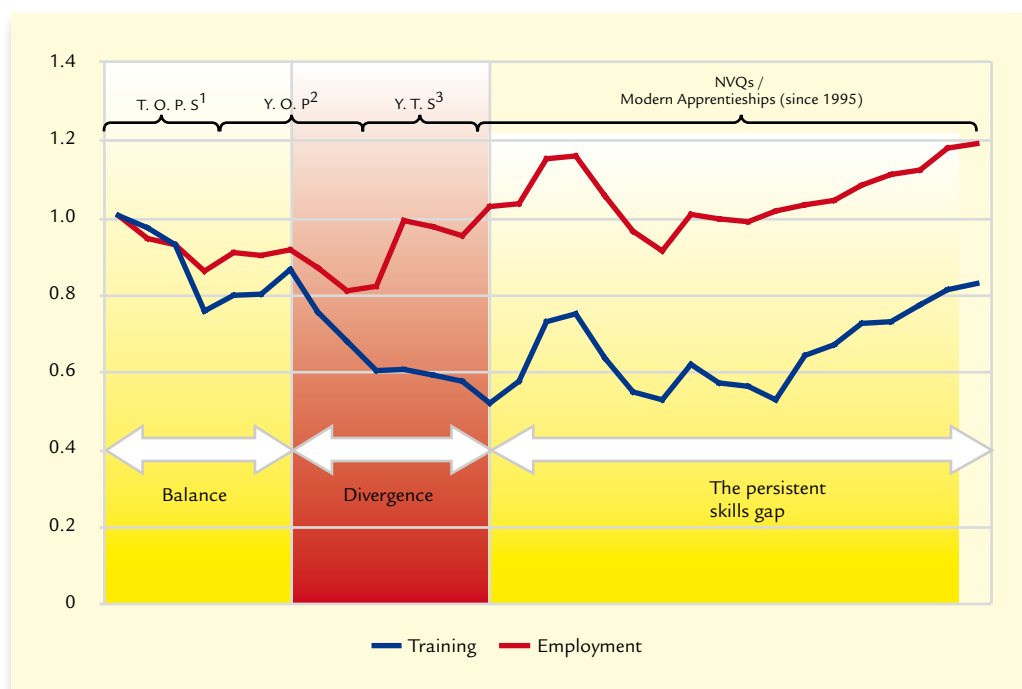
The cost savings are immediate and visible on the balance sheets of subcontractors supplying self-employed labour to the industry. The long term disbenefits are difficult to quantify, but are not doubt considerable, and the UK construction industry has a low productivity record when compared with many European counterparts. There are two main long-term disbenefits constraining increases in productivity:

Productive organisation and innovation. The practice of outsourcing labour and subcontracting the supply of labour to labour-only construction companies has resulted in major dislocations and inefficiencies in contract management (Harvey, 2002). The extended chains of subcontractors, often competing with each other in ways that impede the coordination of production, leads to loss of management control over the productive process. The low investment in skills and innovation. By far the greatest impact of the growth of mass bogus self-employment has been the lack of the industry's investment in skills and the innovation that follows the upgrading of skills for new technologies. Over 75 % of firms in the UK construction industry do not invest in any skills training (Construction Industry Training Board, 2008; Davies, 2008). This has produced the skills gap, an annual shortfall of 24,000 or more. This figure assumes, moreover, that the required skills level has remained static since 1974, when in other European countries, trainee ratios to the workforce have reflected demand for increasing levels of skill.

However, as is shown in Figure 3 below, the skills gap opened up exactly at the time when bogus self-employment grew, on its way up to 60 % of the manual workforce, between 1979 and 1985, following Thatcherite deregulation. Once the divergence opened up between the total workforce and the percentage of trainees, the gap never closed. There has been a persistent and cumulative lack in training for skills within the UK industry. The stabilisation of high levels of mass false self-employment persisted with the rise and fall of the total workforce, as did the gap. Each year there is a lack of replacement of skills, the skills gap grows. To make up the cumulative shortfall, it has been estimated by the CITB that over 87,000 trainees are

needed every year for the next decade, double the level of current training. This gap, as Figure 3 shows, has persisted despite the implementation of new training provision, on the supply side of training, leading to the introduction of NVQs and the Modern Apprenticeship.

Figure 3. The emergence and persistence of a skills gap in UK construction



Source: CITB Construction Skills

VI. Assessment of prevention and combating measures

Given the scale and duration of the ‘British disease’ of bogus self-employment, many attempts have been made, and proposals discussed and negotiated to address the problems. Although the national expert is entirely responsible for these proposals for reform, there is considerable support from unions, and UCATT endorses the specific objectives contained within them. Both the ex-Construction Confederation, other industry organisations, and the Health and Safety Executive have recognised the need for this or similar reforms.

The report was able to identify and demonstrate the key cause and origin of the growth of mass illegal self-employment in a conflict between a tax regime peculiar to the construction industry and the legal case law on employment status. The case law itself gives rise to opportunities for uncertainty and complication in assessing employment status. The tax regime introduces tax incentives and the use of an instrument for revenue collection that directly conflicts with one of the main legal tests, the ‘economic reality’ test for self-employment of being in business on one’s own account. A defective but unambiguous tax incentive, combined with a conflict between taxation and legal regulation of status, has driven out genuine direct employment from the industry, and replaced it by bogus self-employment. Several reforms in the construction taxation regime have signally failed to rectify the situation, and the most recent one show clear signs of continuing to promote the economy of tax evasion. There is a major and imminent risk that the pension reform to be introduced in 2012 will add to the competitive pressures towards illegal self-employment unless the industry can be first restored to health.

VII. Conclusions and recommendations

The purpose of the reform has the following aims:

- ◆ To correct major labour market distortions
- ◆ To recover £1.7 billion of legal tax revenue
- ◆ To restore normal employment rights of legal employment, and eradicate the illegal exploitation of vulnerable, particularly migrant, labour
- ◆ To re-establish the basis for investing in home-grown skills
- ◆ To promote productivity and innovation by investing in employment
- ◆ To bring the construction industry into line with all other sectors of the economy with regard to employment status
- ◆ To ensure that construction workers are as enabled to enjoy retirement and pensions as are workers in other industries

To address these objectives the proposals for reform involve a significant simplification of the current regulatory regime, and essentially to stop treating the construction industry as a special case. Self-employed status, genuine independent agents acting as businesses on their own account, should be encouraged and protected against dilution. The business reality test should be restored to prime position.

It is therefore proposed that the construction industry is brought back into line with all other sectors of the economy, and at the same time to simplify the tax regime by adopting a **single taxation employment status**. We propose abolishing the threshold for self-employed status for all genuinely self-employed construction workers, that creates a special category of ‘business class’ self-employed. We propose abolishing the secondary, taxed-at-source, self-employed tax status. It conflicts with the law and facilitates unlimited access to false self-employment status.

- ◆ A single self-employed tax status should be established in which all self-employed are paid gross, and are responsible for their own tax affairs
- ◆ Her Majesty’s Revenue and Customs remain responsible for issuing certificates of eligibility for self-employed status, on the basis of appropriate criteria
- ◆ Indicative norms for assessing an economic reality test of self-employment for certification
 - Self-determination of method of payment and level of payment, including price setting.
 - Evidence of submitting tenders for work
 - Freedom to hire others in substitution
 - Providing capital equipment
 - Providing materials at own expense
 - Investing in own business, office, and infrastructure
 - Submission of invoices for completed work

- Payment of own tax and NI
- Personal coverage of sick pay and holiday pay

Without evidence of genuine self-employment, the worker should be deemed to be employed. On major construction sites, therefore, the default case for the large majority of engagements should be the employment contract.

REFERENCES

- 1 Hall v Lorrimer, 1994.
- 2 Mutuality of obligation 'has had the effect of excluding from protection workers in casual employment relationships, where the existence of mutual obligations to provide work (in the case of the employer) and to accept any work which is offered (in the case of the worker) is in doubt.' Burchell et al., 1999. 7.
- 3 The HMRC leaflets explain to engagers: 'Under the New CIS, you'll be signing a declaration every month to say that you've considered the employment status of the workers you've paid within CIS and that none of them is an employee.'
- 4 Document supplied by Inland Revenue.
- 5 The ten new states accepted under the Accession Regulations, May 2004, were the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and the Slovak Republic.
- 6 The relevant regulation of the latter Treaty is The Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations, 2007, No. 3012. (The Stationery Office, HMSO)

Appendix

Team and steering group



National experts:

The Netherlands

Yves JORENS
Saskia KLOSSE

Belgium

Yves JORENS
Tineke VAN BUYNDER

Romania

Cristina M. ANA

Spain

Miguel Gutiérrez PEREZ

Germany

Edith GROSS

France

Sandrine GINESTE

Sweden

Cristina M. ANA

Poland

Anna KWIATKIEWICZ

Italy

Edoardo ALES
Michele FAIOLI

UK

Mark HARVEY
Felix BEHLING

Ireland

Cristina M. ANA

Steering group:

FIEC

Domenico CAMPOGRANDE
Liz BRIDGE
Vincent DETEMMERMAN
Karine DUFOUR

EFBWW

Werner Buelen/programme manager
Dörthe Weimann
John Kerstens

Co-ordinators:

Yves JORENS
Harald HAUBEN, www.bb-international.eu
Cristina M. ANA

