

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

Part 1:

Summary of a comparative study of 11 Member States



European Federation  
of Building  
and Woodworkers



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

European Federation  
of Building  
and Woodworkers



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Editor: Werner Buelen

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

**A comparative study of 11 Member States**

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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 16 % of workers are self-employed today, according to “Employment in Europe 2008”. The level of self-employed workers is even higher in some countries, such as Greece (37 %), Poland (27 %), Cyprus (25 %), Italy (27 %), and Romania (32 %).*

*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 noted an increase in 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 business 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 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 the 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 - examined the positive impact of genuine self-employment on the labour market and 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, Sweden, Poland, Romania, Great Britain, Ireland and Italy.*

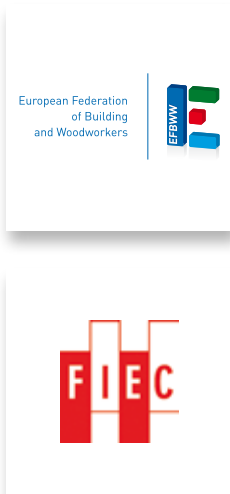
*The overall comparative analysis has been made available in German, English and French (Part1). A summary of the various national reports is published separately, in English only, and is available as an Appendix to the comparative analysis (Part 2). Those who wish to consult the complete original national reports can download them from the EFBWW ([www.efbww.org](http://www.efbww.org)) or FIEC ([www.fiec.eu](http://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 the 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 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*



# Introduction

During recent years, the European labour market has experienced some fundamental changes, particularly with regard to a growing flexibility and fragmentation and “casualisation” of employment, with employers relying more and more on outsourcing and downsizing and moreover a highly “casualised” workforce. The times when workers were used to having a full time permanent employment relationship with their employer are in the past, and have been replaced with atypical employment situations made possible by the development of a wide range of new types of worker (and employment contract), all contributing to the growing pan-European labour market. For different social or economic reasons, employers are relying more and more on employees from other companies provided on the basis of service agreements, by outsourcing what are often major company tasks or hiring self-employed personnel. Traditional hierarchic structures, where the employer effectively controls how the work is done, are more and more unlikely and now it is readily accepted that many of the quality control issues are actually handled by “employees” from different companies. In addition the ownership of equipment and the hiring of staff is increasingly handed over to other entities, with the staff being usually employed by global employment companies. There is an obvious co-sharing of control, as was the case for example with temporary employment agencies. Quite often, in these

“ Today, three people have been arrested under suspicion that they have not paid or paid an insufficient amount of income tax and social security contributions. The persons involved are the two owners and the accountant of an interim employment agency. Through this interim agency, Polish<sup>1</sup> workers were being hired as self-employed labour, when in actual fact they were working as employees. The interim agency paid at least € 200.000,00 less income tax and social security contributions than there were expected to. The Polish workers believed that the interim agency had paid all due income tax and the social security contributions. ”

Newspaper, the Netherlands, 3 October 2008

triangular employment relationships both parties perform some of the functions of the traditional employer, making it often difficult to establish who exactly the real employer is. The relationship between the user company, the service-provider and the latter’s personnel, is complex. It can indeed not be ignored that the changing labour market and the growth of practices such as outsourcing and contracting out, has meant that employers are increasingly interested in hiring workers with a non-traditional labour relationship. The appearance of new forms of employment may at a some stage have definitely contributed to the growing flexibility and

<sup>1</sup> Interchangeable with other nationalities



“casualisation” of the labour market, yet it has also led to a growing number of workers with an unclear employment status who are therefore outside the scope of protection normally associated with a traditional employment relationship<sup>2</sup>. The possibility of outsourcing and subcontracting part of the production process, often motivated by cost reduction strategies, has set the stage for a whole range of contracts that do not comply with the classical model<sup>3</sup>. Deregulation has also made it extremely easy to sign up as a self-employed person. A few minutes are all that’s needed to fill in the few forms.

The accession of the new Central and Eastern European states into the European Union and more significantly the fact that unlike the free movement of workers, the free movement of services was already applicable to these countries from the initial accession date of 1 May 2004, has further increased this recourse to these new forms of labour, sometimes associated with instances of social dumping. The application of the free movement of services has led to a situation where more and more people become or act as “self-employed” not only to circumvent access restrictions to foreign labour markets, but also to avoid the implementation of minimum social standards and conditions in the host country. In these situations, the self-employed of today are no longer individual entrepreneurs, highly qualified workers, but rather a vulnerable part of the workforces, devoid of all necessary social protection and exploited by employers, who rely on their services primarily to reduce the social costs and to avoid the application of many legal social provisions. A trend can thus be noticed, where more and more people rely

on workers with “self-employed” status and subordinate employment decreases. This is certainly the case in the construction sector, a sector where the proportion of self-employed is considerably higher than elsewhere. As well as the self-employed, the number of workers posted abroad and temporary workers from abroad is also on the increase. All these new forms of employment have increased the role of the labour supplier.

The growing recourse to all these new forms of workers, leads to a situation where the difference between traditional employee-employer relationship, legally termed “subordination” and self-employment becomes more and more blurred.

An employer who resorts to self-employed workers instead of salaried employees can sometimes avoid paying considerable social and tax contributions and circumvent other labour obligations. But very often, these so-called self-employed workers an employer relies on, happen in fact to be “disguised” employees. These “bogus self-employed” are people who to the outside world behave themselves as employed, although they are registered as self-employed. Bogus self-employment is to all intents and purposes identical to subordinate employment, yet disguised as autonomous work, usually in order to reduce labour costs, for tax reasons and to avoid payment of high social security contributions. “Disguised employees” not only have a lesser degree of protection compared to subordinate employees, the fact that a lower level of contributions is paid, may also undermine the stability of the social

2 ILO, “Employment Relationship”, 95th session 2006 report V (1), p. 3

3 Cremers, J., Self-employed and the free provision of services, Presentation, CLR-coordinator, AIAS-Amsterdam, Vilnius - 7 June 2007, p. 7



security systems together with all actions of solidarity.

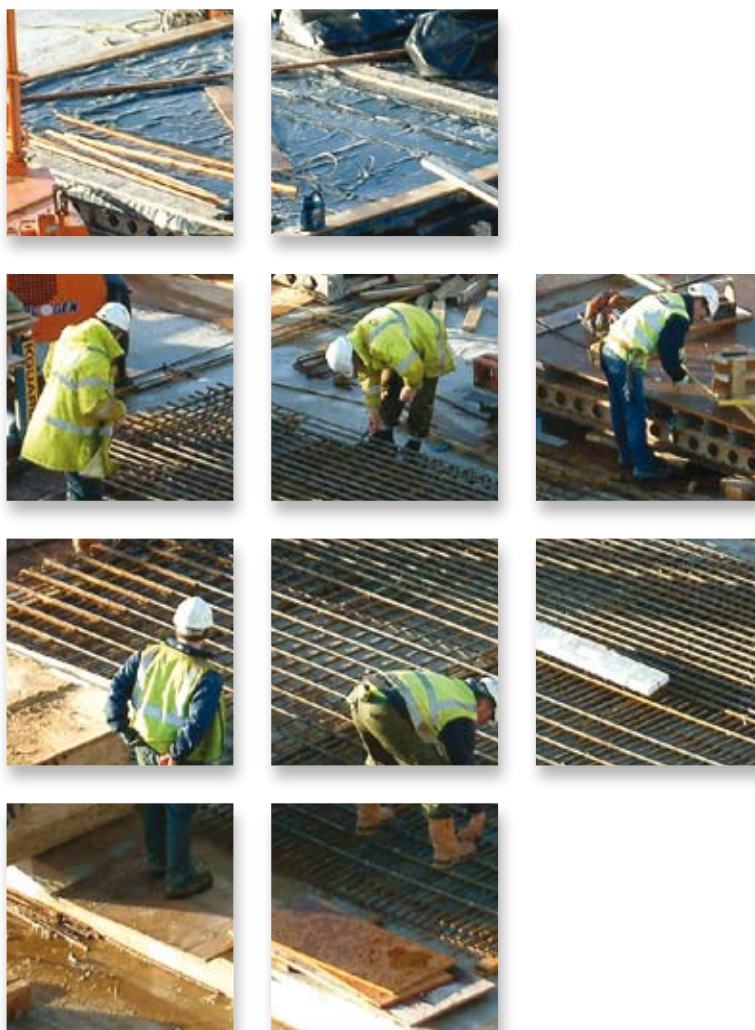
Making a clear distinction between subordinate employment and self-employment is therefore very important. In all the legal systems of the European Union there is a dichotomy between the concepts of employed person on the one hand and self-employed person on the other. There is a traditional binary divide regulating the performance of work, with every legal system starting out from the presumption that one is either a worker or self-employed. This clear distinction is also important as it is used as a basis for defining the benefits and advantages and more in general, the legal status of the persons concerned. In essence, both national labour and social security systems are built upon these two concepts.

This study's objective is to compare how several Member States of the European community define self-employment status and how they (attempt to) tackle the problem of bogus self-employment. This comparative exercise is based on Expert reports answering a series of questions on self-employment and bogus self-employment.

Given the number of Member States analysed and the scope of the matter in hand, our analysis cannot hope to be fully exhaustive. However this comparative analysis provides an opportunity to see how this fundamental issue for the stability of our social security systems is currently being dealt with at Member State level. Our analysis is based on the Member States which have handed in a report to this end i.e.: Belgium, the Neth-

erlands, France, Germany, Italy, UK, Spain, Ireland, Romania, Poland and Sweden and they all take into consideration the situation in 2008.

Before looking at a comparative analysis of the national reports, we first want to see how this problem is dealt with on a European level.





# Bogus self-employment: The European Perspective

Most of the member states recognize a dual classification or binary divide within the concept of “labour relations”: workers on the one hand and self-employed on the other<sup>4</sup>. In essence, both national labour and social security law systems are built upon those two concepts.

The question arises whether (social) European law itself is acquainted with this important division, with regard to the application of the rights and liberties, as laid

down in the Treaty. In particular, it should be assessed whether (1) both primary and secondary Community law yield any textual or legal definitions, and (2) how these notions - if there are any - should be interpreted. Furthermore, it could be interesting to single out any tendencies concerning the demarcation between workers and the self-employed, and the level of social protection granted to both categories.

## Definition and description within primary Community law

### *Free movement of workers*

Both article 39 and 42 EC cite the term “workers”. The Treaty itself excludes any employment in the public service<sup>5</sup> from this concept. Apart from that, one reaches the conclusion that the Treaty lacks a positive definition. In either way, only natural persons can fall into the scope of article 39 EC (and not moral persons, in contrast with the articles related to free service provision).

From the very beginning, the European Court of Justice (hereafter: “ECJ”) determined the exact scope of this phrase, stating that this

concept has a community meaning, referring to all those who, as such and in whatever way, are covered by the different national systems of social security<sup>6</sup>.

In general, a “worker” is defined as a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration<sup>7</sup>. Consequently, four elements are relevant: (1) the performance of services, (2) a certain timeframe, (3) the performance of work under the direction of another person, and (4) the necessity of a remuneration.

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4 Leaving aside government officials (civil or public servants).

5 Art. 39, 4° EC.

6 ECJ 75/63, Unger v. Bedrijfsvereniging voor Detailhandel en Ambachten, 1964.

7 ECJ 53/81, Levin v. Staatsecretaris van Justitie, 1982; ECJ 133/85, Kempf v. Staatsecretaris van Justitie, 1986; ECJ 66/85, Lawrie-Blum v. Land Baden-Württemberg, 1986; ECJ 197/86, Brown v. the Secretary of State for Scotland, 1988; ECJ 344/87, Bettray v. Staatsecretaris van Justitie, 1989; ECJ 357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992; ECJ 3/90, Bernini v. Minister van Onderwijs en Wetenschappen, 1992; ECJ 85/96, Martínez Sala v. Freistat Bayern, 1998; ECJ C-188/00, Kurz v. Land Baden-Württemberg, 2002; ECJ 337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, 1999; ECJ C-138/02, Collins v. Secretary of State for Work and Pensions, 2004; ECJ C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, 2004; ECJ C-109/04, Kranemann v. Land Nordrhein-Westfalen, 2005; ECJ C-228/07, Petersen v. Arbeitsmarktservice Niederösterreich, 2008.

The ECJ particularly seems to emphasize the part “under the direction of another person” as an essential feature of the employment relationship. The bond of subordination appears to be the most important element by which one may distinguish “workers” from the “self-employed”<sup>8</sup>. The national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue<sup>9</sup>.

Furthermore, the ECJ stresses that the pursued activities should be “real and genuine, with the exclusion of activities undertaken on such a small scale as to be regarded as purely marginal and ancillary or accessory”<sup>10</sup>. This does mean not however, that short term employment in itself, would be automatically excluded from the scope of article 39 EC<sup>11</sup>.

The Community concept of the worker does not necessarily match legal descriptions, found in the legislation of many Member States. Moreover, neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in determining whether or not the person is a worker for the purposes of Community law<sup>12</sup>.

Summing up, one may note that the Court’s interpretation of “workers” and “activity as an employed person” regarding the free movement of workers, covers a large range of employment relationships, and is independent of national definitions. It is certain that it

cannot be interpreted narrowly<sup>13</sup>. The Court made it clear that this rather broad EC-based interpretation is necessary in order to ensure that the benefits of the Treaty are granted to certain categories of persons<sup>14</sup>.

### *Right of establishment and free service provision*

The personal field of application of articles 43, 44, 2° and 47 EC is marked as “self-employed”, which in the Dutch version of the Treaty for example - is described in a negative manner: “other than paid/salaried employment”. Taking into consideration the broad definition of “workers”, as honed by case law, the self-employed are perhaps considered a residual category. This is somehow reflected in the Treaty terminology seeing as the more generic term “activities (as self-employed)” is used.

The self-employed, unlike workers, can be both natural and moral persons; the Treaty refers to them as “nationals”. As for workers, activities connected to the exercise of official authority, are not included in the concept of “self-employment”<sup>15</sup>.

As stated above, the ECJ confirmed that “any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of article 43 EC”. This implies that, in order to make a proper distinction between the workers (art. 39 EC), the presence or absence of a relationship of subordination is significant. However, where a preliminary ruling is called for (art. 234 EC) only national courts are competent to decide

8 ECJ C-107/94, Asscher v. Staatssecretaris van Financiën, 1996; ECJ C-268/99, Jany and Others v. Staatssecretaris van Justitie, 2001; ECJ C-151/04 and C-152/04, Nadin, Nadin-Lux SA v. Durré, 2005.

9 ECJ C-431/01, Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, 2003; ECJ C-456/02, Trojani v. Centre public d’aide sociale de Bruxelles, 2004.

10 ECJ 53/81, Levin v. Staatssecretaris van Justitie, 1982; ECJ 337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, 1999; ECJ C-431/01, Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, 2003; ECJ C-228/07, Petersen v. Arbeitsmarktservice Niederösterreich, 2008.

11 ECJ C-431/01, Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, 2003.

12 ECJ 53/81, Levin v. Staatssecretaris van Justitie, 1982; ECJ 344/87, Bettray v. Staatssecretaris van Justitie, 1989; ECJ C-188/00, Kurz v. Land Baden-Württemberg, 2002; ECJ C-456/02, Trojani v. Centre public d’aide sociale de Bruxelles, 2004.

13 See case law mentioned under footnote nr. 4.

14 ECJ 53/81, Levin v. Staatssecretaris van Justitie, 1982.

15 Art. 45 EC.

whether a person is either a worker or self-employed person<sup>16</sup>. Within this framework, the ECJ provides some “guidelines”, in order to direct the national courts. An (economic) activity, pursued by a self-employed person, falls under the scope of the right of establishment if it is carried out by the person providing the services (1) outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration, (2) under that person’s own responsibility, and (3) in return for remuneration paid to that person directly and in full<sup>17</sup>.

The Court already ruled, for example, that the director of a company of which he is the sole shareholder does not carry out his activities in the context of a relationship of subordination, and so he is to be treated not as a “worker” within the meaning of article 39 EC but as pursuing an activity as a self-employed person within the meaning of article 43<sup>18</sup>.

Article 49 EC, on the other hand, provides an accurate description of service provision (carried out by - self-employed - nationals of a Member State). It incorporates any service (mostly activities of an industrial or commercial nature, craftsmen and (liberal) professions), normally rendered in return for remuneration. The definition of an (independent) service provider could thus be described as “any natural person who is a national of a Member State, or any legal person as defined in article 48 EC and established in a Member State, who offers or provides a service”<sup>19</sup>.



16 ECJ C-431/01, Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, 2003; ECJ C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, 2004; ECJ C-151/04 and C-152/04, Nadin, Nadin-Lux SA v. Durré, 2005.

17 ECJ C-268/99, Aldona Malgorzata Jany and others v. Staatssecretaris voor Justitie, 2001. Note that this case concerns a preliminary ruling related to the interpretation of the Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Poland and the Czech Republic, on the other part. This does not however affect the relevance of the judgement for the purposes of interpreting art. 43 EC.

18 ECJ C-107/94, Asscher v. Staatssecretaris van Financiën, 1996.

19 See art. 4, 2) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, 36.

## Principle of equal pay for male and female workers for equal work or work of equal value

Article 141, first paragraph EC also mentions the notion of (male and female) “workers”. Further, this article refers to common concepts such as “employment and occupation” and “job”.

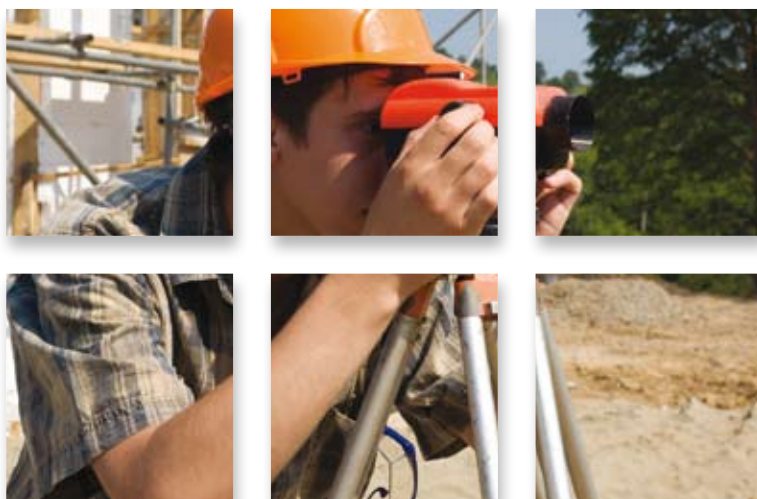
The ECJ stressed that the term “worker” within article 141 EC should be judged on its own merits. Since there is no single definition in Community law, it varies according to the area in which the definition is to be applied<sup>20</sup>. Either way, the phrase “worker” used in article 141 EC cannot be defined by reference to the legislation of the Member States but has a meaning specific to the Community. Moreover, it cannot be interpreted restrictively<sup>21</sup>.

The interpretation of “worker” within the legal framework provided by article 141 EC is nonetheless almost completely based on the case law related to the free movement of workers. A worker is seen as a person who,

for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration<sup>22</sup>. It is clear from this definition that the authors of the Treaty did not intend that the term “worker”, within the meaning of article 141 EC, should include independent providers of services who are not in a subordinate relationship with the person who receives the services<sup>23</sup>.

The question whether such a relationship exists must be answered in each particular case bearing in mind all the factors and circumstances which determine the relationship between the parties. The formal classification of a self-employed person under national law does not exclude the possibility that a person may be classified as a worker within the meaning of article 141 EC if his independence is merely notional, thereby disguising a subordinate employment relationship within the meaning of that article<sup>24</sup>.

It is somehow remarkable that the Court - within the scope of article 141 EC - explicitly gives precedence to the facts, more than the formal (written) qualification inter parties of an employment relationship.



20 ECJ 85/96, *Martínez Sala v. Freistat Bayern*, 1998.

21 ECJ C-256/01, *Debra Allonby v. Accrington & Rossendale College and others*, 2004.

22 *Ibid.* Cf. (in the context of the free movement of workers) ECJ 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986; ECJ 85/96, *Martínez Sala v. Freistat Bayern*, 1998.

23 ECJ C-256/01, *Debra Allonby v. Accrington & Rossendale College and others*, 2004. Cf. (in the context of the free movement of workers) ECJ 337/97, *Meeusen v. Hoofddirectie van de Informatie Beheer Groep*, 1999.

24 ECJ C-256/01, *Debra Allonby v. Accrington & Rossendale College and others*, 2004.

## Characterization within secondary Community law

Article 1 of Regulation 1408/71<sup>25</sup> designed to coordinate social security matters for migrant workers, defines the concepts of employed and self-employed persons very broadly and doesn't make reference to general national definitions. It refers to any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants. Furthermore, according to article 2 of the Directive 96/71<sup>26</sup> relating to the

posting of employed persons, the definition of worker shall be that used in the Member State to which the worker is posted, for the purpose of the directive.

One last remark: a few provisions within the Social Policy Chapter of the Treaty<sup>27</sup> also refer to the notion "worker"<sup>28</sup>. Of course, the interpretation of this term is interwoven with the concepts adopted by secondary Community law (definitions throughout various regulations, directives, etc.)<sup>29</sup>.

## Tendencies

Although both primary and secondary Community law recognize the basic distinction between workers and self-employed, economic and social reality have tended somehow to draw the two statutes<sup>30</sup> together and to grant the same level of (social) protection, irrespective of the person's legal position.

This trend can be traced back to several EU-texts.

It may be mentioned that even non-binding norms and political instruments aim for social equality, regardless of professional statute. An example of this kind of soft law is the Community Charter of the Fundamental Social Rights of Workers, the introduction of which reads:"[...] Whereas its aim is on

the other hand to declare solemnly that the implementation of the Single European Act must take full account of the social dimension of the Community and that it is necessary in this context to ensure at appropriate levels the development of the social rights of workers of the European Community, especially employed workers and self-employed persons [...]" Moreover, the Charter addresses "any worker", in "every profession or occupation"<sup>31</sup>.

Even in positive legal texts, there is a clear tendency to abolish the distinction between employed and self-employed persons, and simply refer to a broad category ("persons carrying out work")<sup>32</sup>.

25 Council Regulation 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5 July 1971, 2 (hereafter briefly cited as "Regulation 1408/71/EEC").

26 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997, 1-6.

27 Title XI EC.

28 See in particular art. 137, 1., a), c), d), e) and f) EC.

29 Supra, subtitle "3. Characterization within secondary Community law".

30 See also: COMMISSION OF THE EUROPEAN COMMUNITIES, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (COM (2007) 627 final), Brussels, Commission of the European Communities, 2007, 7, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0627:FIN:EN:PDF.

31 Art. 2 Community Charter of the Fundamental Social Rights of Workers.

32 A. PERULLI, Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects, Brussels, Commission of the European Communities, 2003, 28, ec.europa.eu/employment\_social/labour\_law/docs/parasubordination\_report\_en.pdf.

One example may be found in the European legislation concerning equal treatment, which covers “members of the working population, including self-employed persons”<sup>33</sup>.

Another example are the rules governing the organisation of the working time of persons performing mobile road transport activities<sup>34</sup>. Directive 2002/15/EC refers to the (broad) category of “persons performing mobile road transport activities”, which covers mobile workers, as well as self-employed drivers<sup>35</sup>. The purpose of the Directive - to establish minimum requirements with regard to the organization of working time in order to improve the health and safety protection for persons performing mobile road transport activities, to improve road safety and rectify distortions of competition conditions- need not depend on the ques-

tion whether a mobile worker is either employed or self-employed. Nevertheless, the ECJ recalled that self-employed drivers and employed ones are not in the same situation, when it comes to the organization of their working time. The former must, in addition to activities directly linked to road transport, take on general administrative work which does not concern the latter<sup>36</sup>.

Where the co-ordination of national social security schemes is concerned, Regulation 1408/71/EEC<sup>37</sup> nowadays covers both employed and self-employed persons, as a result of a historical process.



33 Art. 6 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26 July 2006, 23.

34 See Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities, OJ L 80, 23 March 2002, 35 (hereafter briefly cited as “Directive 2002/15/EC”).

35 See art. 3, d), e) and f) Directive 2002/15/EC.

36 ECJ C-184/02 and C-223/02, Kingdom of Spain and Republic of Finland v. European parliament and Council of the European Union, 2004, consideration nr. 65.

37 Supra, subtitle “3. Characterization within secondary Community law”.



# Bogus-self-employment: The comparative overview

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

The dual classification that exists within the context of labour relations between subordinate workers and the self-employed in the member states of the European Union is a cornerstone of labour and social security law. We must then address the fundamental question of how today subordinate employment and self-employment are defined and which techniques or methods are used to distinguish them.

Different tendencies can be noticed in this regard. While in some countries, no statutory definition of these concepts is envisaged, in other member states the statutory definition is provided only for direct employment, while there are a few countries which provide a statutory definition of both concepts.

The fact that a clear definition is provided, either through legislation or case law, should however not be overestimated, as it does not follow that those countries that have a definition, have a more clear-cut distinction between employment and self-employment.

It would seem likely that countries dependant on common law would not have a specific definition. But even in this instance, the lack

of a statutory definition does not automatically imply the absence of any related statutory provisions. In Ireland for example all employees are protected by the Terms of Employment (Information) Act, which includes the obligation to provide a written statement of the terms of employment as well as mandatory notification of any changes in the details set down in the latter statement.

France is in an intermediate position. On the one hand the definition of direct employment is defined quite concisely through case law, but on the other hand, direct employment is also present in the Labour Code which defines the subordinate employer-employee relationship, one of the primary elements that determine direct employment status, and it also provides a description of the concept of self-employment.

Some countries only define the concept of direct employment. In the Netherlands, the Civil Code defines a labour contract as: *“the contract through which one of the parties, the employee, commits himself to another party, the employer, to work in return for remuneration for a specific period of time”*.

There is no statutory definition of the concept of self-employment, the self-employed being described as a person who is not an employee.

In the United Kingdom, the binary distinction between both statuses is historically based on the distinction between the “contract of services” and the “contract for services”. This was consolidated in the National Insurance Act of 1946 that aligned both the fiscal and the legal definitions of employment.

Other countries, however, have defined both concepts. For instance, the Italian Civil Code<sup>38</sup> defines an *employee* as an individual, serving under the control and the instructions of an employer, who receives a salary to perform his/her duties. The *self-employed* is an individual performing his/her activities without being under the control and the instructions of an employer.

The Swedish report describes the essential criteria that determine an employment relationship in legislation, regulations or case law as follows: salary, subordination to the employer, fixed schedule, using the employer’s tools, social benefits paid in part by the employer, being entitled to a number of rights set out in the collective agreement (annual leave, medical leave,...), representation by trade unions and support for redundancy periods. Registration with the tax authorities is the determining criterion for being considered as a self-employed worker. Without registration a person is considered to be working illegally. Other important criteria are: planning of one’s own work, own equipment and tools, less extensive subordination, risk taking, working for more than one contractor<sup>39</sup>.

Finally, in Belgium, the Framework Law of 27 December 2006 defines the concept of employee as “*a person, who commits to an employment agreement, in exchange for a wage, under the authority of another party, the employer, to perform work*”. The self-employed person is “*a person, who practises an employment activity outside the authority of an employer and who is not committed to a statute*”. According to this law, four criteria are important in establishing the difference between self-employed persons and employees:

- 1) The will of the parties as expressed in the agreement, when this corresponds to the reality or in other words, when this corresponds to the concrete execution of the employment agreement;
- 2) The freedom of organization of working time;
- 3) The freedom to organize the work;
- 4) The possibility of establishing hierarchic control.

In several countries, an indirect definition can be established. In Spain, a definition can be drawn from the scope of application of the Spanish Workers’ Statute according to which an employment contract will be presumed “*if a person (the worker) freely and individually, 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*”. Self-employment is defined as an economic professional activity carried out on a regular basis, individually and directly by a person, without being affected by somebody else’s management or guidance.

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38 Art. 2094 of the Italian Civil Code. See Report Italy, p. 5.

39 It should be noted that the Sweden report mentions the different criteria as being developed by legislation, regulations and case-law without drawing a clear line of the sources of these criteria.

In Rumania, the individual labour contract is: “a contract according to 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, termed salary”.

As far as genuine self-employment is concerned, the Polish Freedom of Business Activity Act and the Personal Income Tax Act define the notion of “business activity” which includes that the self-employed is entirely responsible for the services provided, the business activity is not performed under the management or in a place and at a time indicated by the client, and the self-employed takes on the economic risk linked to his/her services.

Since a statutory definition is rarely provided, the definition and the demarcation of both concepts were developed by case-law through the use of tests aimed at distinguishing between the direct employment and self-employment status based on objective criteria. In this regard case law often extends the concept of subordinate employment to include people that traditionally do not fulfil the criterion of judicial subordination, but who are in one way or another dependent on someone else’s business.

This is naturally the case for the common law countries such as Ireland<sup>40</sup> or the U.K. The example of the UK is particularly significant since four overlapping tests can be taken into consideration with none taking precedence over the other:

- 1) **The test of control** (i.e. duty to obey orders, discretion on hours of work, supervision of mode of working);

- 2) **The test of integration** (i.e. the fact that the person is part of an employing organization or not, subject to disciplinary or grievance procedures, inclusion in occupational benefit schemes);
- 3) **The test of economic reality** (i.e. method of payment, freedom to hire others, providing of own equipment, investing in own business, method of tax payment, coverage of sick pay and holiday pay, taking of financial risks in order to make profits or suffer losses);
- 4) **The mutuality of obligation** (i.e. duration of employment, regularity of employment/re-engagement, right to refuse to work, customary to the trade).

Due to the existence of these different tests, legal classification has become a difficult task.

Whereas the first three tests rather point in the direction of the employment status, the last one points in the direction of the self-employment status. Observers notice that these four tests in actual fact create increasing complexity and uncertainty. In addition, the demarcation between both statuses must always be based on a case by case approach and consequently no general rule may be stated.

But these tests are also well established in member states that do not follow the common law system such as Italy<sup>41</sup>, Spain<sup>42</sup>, France<sup>43</sup>, Belgium or the Netherlands, all member states where the legislation provides a definition for these concepts. The broad character and the lack of precision in the legislation often require courts to complete the existing statutory definitions. It should be noted that these types of test are also used in Romania and Sweden<sup>44</sup>.

40 In Ireland, since there is no legal definition of both statuses, the case law also developed a body of characteristics of a direct employment relationship (controlled in one’s work, fixed wage, no equipment, no financial risk, fixed hours, subsistence and travel paid, only supply of labour, etc.) but also factors for a self-employment (own one’s business, financial risks, responsibility for management, control over the work, supply of materials, agreement on the price for the job, etc.).

41 In Italy, the courts apply various forms of tests with factors related to (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) skill level and self determination, (vi) freedom to work for other employers, (vii) investment and business, (viii) if the worker has employees.

42 In Spain the factors of direct employment are the voluntarily acceptance of the work, respect of working hours agreed on the contract, risks borne by the employer, tools provided by the employer, holidays agreed on both parties according to the collective agreement.

43 In France, the employment relationship implies three characteristics: the performing of labour for a third person, the payment of wage, the subordination relationship. Regarding self-employment: the most important criterion is the absence of subordination. Judges will usually see if the employment contracts criterion are met to distinguish an employment contract from a self-employment contract.

## The impact of Regulation and deregulation in this field

Bogus self-employment is disguised employment. The phenomenon of bogus self-employment is not described as such in national legislation.

Indirect references to this status can however be found. For example, the Italian legal system sets forth a variety of rules concerning bogus self-employment. Italian Law also defines “semi-dependent employment” as “disguised work”<sup>45</sup>. This lack of clarity lead some commentators to conclude that bogus self-employment refers to a status that might appear ambiguous, i.e. although the worker is self employed, the job performed seems to classify him/her in an intermediate category between employee and self-employed worker. Another example is Ireland, where national law does not mention “bogus self employment” but the Tax system and the national agreement mention it indirectly by stipulating what is an abuse of a typical self-employment/services relationship.

Since 1997, French law uses the category of “concealed labour” which encompasses two types of situations:

- ◆ **The concealment of activity** i.e. when profit-oriented activities are run in such a manner that they intentionally breach tax or social legislation ;
- ◆ **The concealment of an employment relationship**, which encompasses bogus self-employment.

In France, bogus self-employment is considered as genuine self-employment until

the contract has been re determined as an employment contract. Therefore, if the self-employed worker is in a state of subordination, the instigator of the contract can be prosecuted for concealed employment and the contract will have to be drawn up afresh as an employment contract.

One of the main issues leading to bogus self-employment is that in almost all countries, hardly any formalities have to be fulfilled to set up as a self-employed worker and thus it is easy to start to perform self-employed activities. Furthermore, the forms of bogus self-employment have gradually become more and more sophisticated. In Spain, bogus self-employment can take the form of civil societies or worker cooperatives which, under the semblance of independent work, in reality involve employment contracts. In Italy, a typical example is a “single-firm” worker with a VAT number, who is exclusively working for a single business concern. In other countries as well bogus-self-employment takes the shape of one-person businesses. In the Netherlands the discussion mainly focuses on situations of self-employed workers without subordinate staff that present the following characteristics: they have no staff, they have one or more persons to whom they are answerable, the work they do is normally performed by employees, the work is carried out on assignment only, they rarely if ever have their own work premises, they are responsible for their own activities, the payment is on a per task basis and there is no regular remuneration. When these people

<sup>44</sup> But it should be noted that these criteria are not based on case-law in Sweden but on the basis of the trade union officials’ observations when using their right of information on the sub-contractors.

<sup>45</sup> In France, it is referred to as a “grey zone”.

depend very closely on one or more persons, they can be seen to be bogus self-employed.

In Sweden, in the construction sector, it takes the form of individual persons holding an F-tax certificate which is the simplest way of being self-employed.

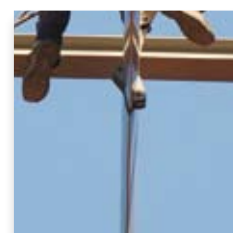
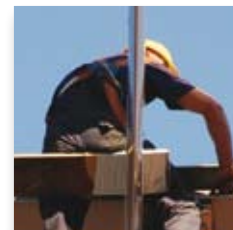
In Germany a specific case of abuse of the status of self-employment became apparent in the last years (so-called Wir-AG, Ich-AG with several persons). There are increasing examples of cases in which a “head” and numerous unskilled or poorly skilled workers of new member states present themselves as a GbR (Gesellschaft bürgerlichen Rechts) or similar foreign company constellation without the necessary precondition for the formation of such a company being met. In such cases it is to be checked whether the employees do actually act in a partner status or whether there exists a de facto employer-employee relationship between the person concerned and the German or foreign “head” of company. With the registration of trade of a GbR there is no check whether this constellation is a real GbR with partners or a company with employees.

In Belgium, there are two main forms of bogus self-employment in the construction industry: an employee with a bogus additional self-employed activity (the employee performs the same activities for the same person, both as an employee and as a self-employed worker as additional activity) and within the structure of a Cooperative Company with limited responsibility. In Ireland, we come across four different types of (bogus) self-employment: the self employment part-

nership, individual self-employment, within limited companies and joint ventures. One of the latest and most sophisticated forms of bogus self employment encountered in many countries is work procured via intermediaries (see below).

Combating bogus self-employment deals with the question of how to correctly assess and legally classify employment using the tools provided by legislation or prescribed by case law. How does the judge expose bogus self-employment and classify it as employment? A preliminary question that needs to be solved is to what extent parties may qualify their own relationship and whether the judge may reconsider this qualification and if so what limitations to this action are there?

Although generally speaking parties are completely free to arrange their contractual relations within the limitations imposed by law in the end the question is whether the intention of the parties or the factual situation is predominant in defining the labour relation. In Poland the will of both parties is decisive, and the Court must respect it. This implies that if both parties wish to be involved in a self-employment relationship, then the case presented by the National Labour Inspectorate representative will be dismissed. In France on the contrary, the recognition of a direct employment situation depends neither “*on the will expressed by both parties*” nor on “*the name given to the agreement*” but only on “*the factual conditions under which the service is supplied by the worker*”. The same conclusion can be drawn for Germany where the way the relationship in a contract is concluded has no bearing on how the distinction is made. It is



rather a question of the exact nature of work and how it is actually carried out.

In the Netherlands too the factual situation seems to prevail although the national courts interpret it slightly differently. For the Supreme Court the factual situation prevails, but the Court will only look at the factual performance when uncertainty exists as to whom a contract is drawn up between, and not when the labour contract is clear from the outset. The Courts of Appeal however pay more attention to the factual situation of the labour agreement than to the agreements between or intentions of the parties.

In Belgium, the situation lies somewhere in the middle seeing as the will of the parties is decisive so long as services rendered correspond to the purpose of the contract.

Which elements and criteria are currently considered as conclusive in establishing the nature of an employment situation? In most the countries, case law is very revealing in this respect.

In Spain, the following criteria are taken into consideration: 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. Similar indicators can be found in Italy (e.g. subordination, ownership or not of the tools used to perform the activities), as in Sweden<sup>46</sup>. But in Italy, attention will also be paid to the type of job performed, as the performance of "low-skill jobs" is likely to imply the presence of bogus self-employment while self-employment is generally linked to certain kind of jobs, particularly the more specialised or qualified (floor layer, tiller, etc.).

In Ireland, the following issues are assessed: does the worker own the business; are they exposed to financial risks, are they financially responsible for faulty or substandard work carried out under the terms of the contract; are they responsible for the investments and management of the enterprise; do they have the opportunity to profit from sound management in the scheduling and performance of activities and tasks; do they have control over what is done, how it is done and whether he/she does it personally; are they free to hire other people, on their own terms, to do the stipulated tasks; can they provide the same services to more than one person or business at the same time; who provides the materials for the job; who provides the necessary equipment and machinery for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account...

According to German case law the distinguishing criterion between an independent activity and dependent employment, is the degree of personal dependency of the self-employed. Certain criteria may in this respect indicate dependent employment instead of self-employment, i.e. if no typical indicators of entrepreneurial behaviour is recognisable e.g.: no entrepreneurial risk, no entrepreneurial initiative and no discretion to take entrepreneurial decisions; no activity on market in entrepreneurial capacity; no own permanent establishment; no disposal of own labour; no obligation to procure work materials, no capital employed and no autonomous decision-making in terms of acquiring goods, recruiting staff, deploying capital and equipment.

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<sup>46</sup> It should be noted that these criteria are not based on case-law in Sweden.

In the Netherlands, the Courts consider the following as elements that would seem to indicate self-employment: that the persons were not paid during the days when they were ill, they bought the products/materials themselves, they also worked using their own equipment and protection and they worked for different clients.

Belgium is rather particular since after years of discussion before the Courts, the Law of 26 December 2006 defines four specific criteria to be used to distinguish the self-employed status and the employment status: the will of the parties as expressed in the agreement as long as it corresponds to the reality, the freedom of organisation of the working time and work, and hierarchic control.

In the numerous tests described above, we may notice that some criteria prevail: subordination, independence regarding working time and work schedule, responsibility and the risks assumed by the worker, the use of one's own tools, and the fact that one works for several clients.

An interesting legislative pronouncement in the Netherlands that has considerably facilitated the answer to the question over the distinction between a self-employed worker and an employee is the Employment Relationship Declaration (VAR). This declaration is a statement concerning the self-employed worker's status from a fiscal point of view that has to be delivered on request to the Tax Service. The delivery of a declaration of employment relationship (VAR) is viewed by the Tax Office as well as by the competent social security institutions for labour insur-

ance coverage (UWV) as a confirmation that activities are performed as an independent worker exercising his business or profession. The evaluation in concreto of the employment relationship is therefore no longer of any importance. The criteria applied for the delivering of this Employment Relationship Declaration (VAR) are established by law and further developed by case law. The following are considered as essential criteria for independent entrepreneurship: the responsibility for the organization of the activities involved; the duration of the activities; the capital involved in the activities; the possibility of debtors' risk; that the works is performed for one or more clients; the extent to which the worker is dependent on one client; the extent to which the person can take their own initiative in the fields of purchasing, of increasing the profit, advertising etc. and the fact that the person concerned does not have to perform the work personally.

## Labour and Market developments

Looking at the number of employees and self-employed working in the construction sector, we may notice two opposite tendencies.

In some countries, there are many more self-employed workers than employed persons:

- ◆ This is the case for the Netherlands where the construction sector has a large amount of self-employed workers. Of the 170.000 workers in the sector, 12.000 are directly employed, 50.000 are active as formally self-employed and 80.000 are working as self-employed without personnel.
- ◆ This is also the case for Spain where in 2007, 46,5 % of construction companies had no employees, whereas 25,8 % had between one and two employees.

On the contrary, in some member states the number of employees is far greater:

- ◆ This is the case for Belgium where there were 208.754 employees and 56.312 self-employed workers in 2007. The amount of employees is thus 4 times higher.
- ◆ UK: 50 % of the workers in the construction industry are employees and 50 % are self-employed in 2007.
- ◆ Italy: 1.915.000 workers of which 1.191.000 employees and 723.000 self-employed (1st quarter of 2008).

- ◆ In France, in December 2007, there were 364.324 self-employed and 1.766.800 direct employees in the construction sector. Thus self-employees represent 20,6 % of the total number.

Between these two opposite tendencies, there is the intermediate position of U.K where the number of self-employed and direct employees in the construction sector is almost perfectly balanced. Indeed, by 2007, there were just over 700.000 self-employed and just under 700.000 direct employees in the construction sector.

In Poland, there were 994.000 workers in the construction sector in 2006, of which, 189.000 were self-employed workers and 101.000 were “own-account workers”. According to the trade unions, however, some 50 % of those employed are self-employed and are working on the basis of an agreement for performance of specific tasks/mandate agreements.

Accurate official figures and statistics on the rate of bogus self-employment in the construction industry are scarce. Some average figures can however be worked out:

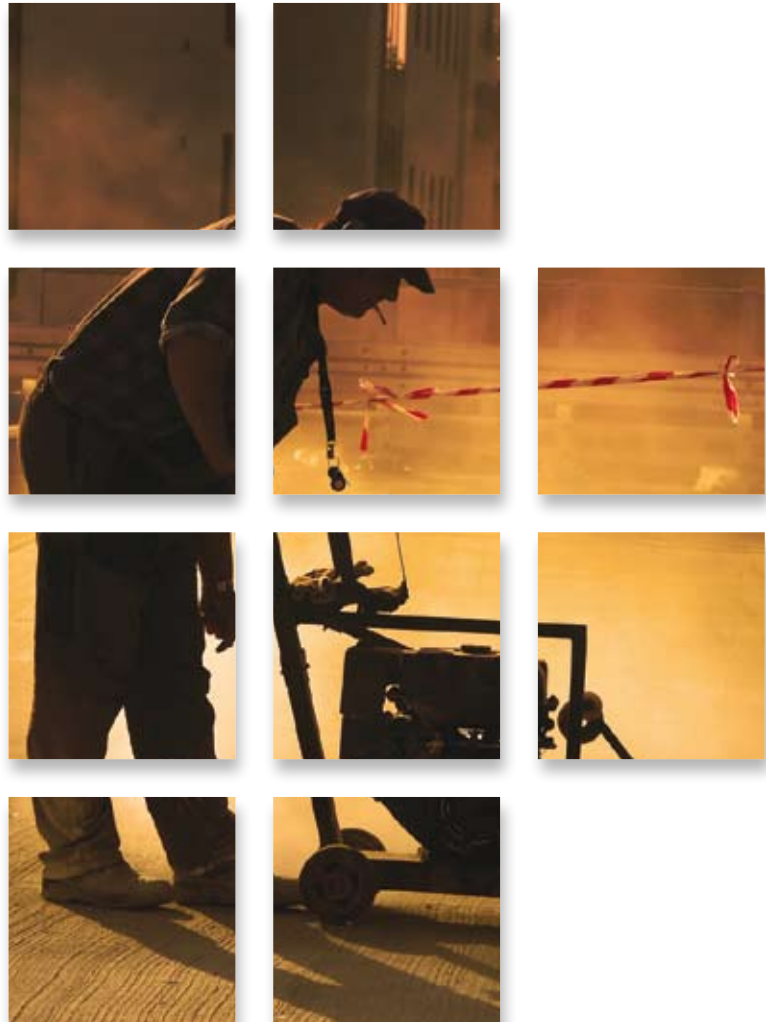
In France, in 2007, 9,7 % of the companies inspected in the construction industry were charged with a violation of the law and 4 % of these offences were linked to status abuse. In the U.K., the surveys indicate a round figure of 400.000 bogus self-



employed, being one of the countries most confronted with bogus self-employment. In Sweden, according to the trade union representatives, 25 % of the total number of self-employed workers in the construction sector could be bogus self-employed. In Ireland, 10 years ago, there were 70.000 self-employed in the construction sector out of which 12.000 were bogus self-employed. In Germany it is estimated that for one regular job in the construction sector there is one other on the black labour market. In the Netherlands, 10 % of the total number of persons working in the Construction Industry is considered as Dutch bogus-self-employed people. As far as the number of foreign bogus self-employed is concerned, the statistics provided by the social partners differ considerably. Bouwend Nederland (the Employers organizations) asserts that 98 % of the foreign self-employed without personnel operate 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.

But how many of these people are now migrant workers? In most of the countries, there are no figures available as is the case for Belgium, Spain, Italy, Romania, Poland and France. Some other countries provide estimates. In the U.K., there were only 100.000 non nationals in the construction sector in 2006, a number increasing in the last years (for 2008 the figure seems to be around 300.000). In the Netherlands it is estimated that 80 % of the self-employed workers are migrant workers, mainly due to their low tar-

iffs. In Sweden, almost all the self-employed workers are migrants and in Ireland, a study showed that one out of six workers in the labour force is of foreign nationality.



## Cross-border effects

It has already been mentioned above that the free movement of services is considered as one of the causes for the increase in bogus self-employment. Due to the binary divide between employed and self-employed persons in an international context problems may arise with regard to the question as to whether the competent national authorities have the right to challenge the classification provided by the legislation and the competent authorities of other Member States. With respect to social security, the Court of Justice ruled that an individual's insurance status should be defined in accordance with the social security legislation of the Member State in whose territory the insured person is actually working, and that criteria linked to labour laws should be disregarded<sup>47</sup>.

As a consequence of the above, and even after the ECJ's decisions in *Hervein* and *De Jaeck*, the competent national authorities have often disregarded the social security E 101 forms issued by the authorities of other Member States, especially when these forms classify the insured person as self-employed, whereas the nature of their activities would or could have made them subject to the national social security scheme for employees if the national law in their country had been applied. After the decisions of the Court of Justice in the *Fitzwilliam*<sup>48</sup>, *Banks*<sup>49</sup> and *Herbosch Kiere*<sup>50</sup> cases, it is clear that this opinion is not correct. The labour judge of a Member State is not authorised to determine the validity and authenticity of a certificate

issued by the competent institution of the posting Member State in accordance with Article 11(1)(a) of Regulation 574/72.

In the aftermath of the Court of Justice's *Fitzwilliam* and *Banks* decisions, concern was expressed by the authorities regarding the difficulties of reviewing and supervising the contents of E101 forms delivered by other Member States.

The Court of Justice ruled that, so long as an E 101 certificate has not been withdrawn or declared invalid by the authorities of the Member State which issued it, the certificate binds the competent institutions and the courts of the Member State in which the workers are posted. Consequently, a court of a Member State where these workers are hosted is not entitled to assess the validity of an E 101 certificate with regard to the bases on which such a certificate was issued, in particular the existence of a direct relationship between a business established in a Member State and the workers which it has posted to another Member State, during the period of their posting.

This ruling has sparked a lot of criticism. It is said that the ECJ has made the E101 certificate virtually inviolable and thus has rendered national authorities almost powerless to act against fraudulent postings to their country. Indeed, the authorities of the receiving State, whether social security institutions or the judiciary, are no longer in a position to



47 Case C-221/95 *Hervein and Hervillier v INASTI* [1997] ECR I-609;

48 Case C-202/97 *Fitzwilliam Executive Search v Bestuur van het Landelijk Instituut Sociale Verzekeringen* [2000] ECR I-883

49 Case C-178/97 *Banks v. Théâtre royal de la Monnaie* [2000] ECR I-205; see also case C-3/98 *Schacht and others*.

50 Case C-2/05 (*Herbosch Kiere*).

check whether the substantive posting conditions are met.

At the end of the day, this situation leads to a lot of irritation and frustration among national institutions and inspection services. Distrust and suspicion among Member States is an ongoing condition.

This is heightened by the fact that the quality of E101 forms received by the national authorities continues to pose problems. A good deal of forms are incomplete or contain deletions, even with regard to essential information (i.e. identification of the person concerned, relevant article of the Regulation, duration etc.).

This almost absolute indication that the legislation behind the E-101 form as applied is also the correct one, together with the inapplicable escape clause - in case of doubts concerning the correct application of the posting provision, the dispute must be discussed before the Administrative Commission for Migrant Workers and eventually be brought before the Court of Justice - has led to a situation, where the means of control on behalf of the receiving state are undermined. They have to rely completely on positive cooperation with the inspection services in the sending state. The E-101 form therefore loses its role as an instrument by which the application of the posting provisions can be verified. The receiving member state is therefore subordinate to the opinion of the sending state. This situation is however also in line with the case law of the Court of Justice on free movement of services according to which a posted worker is subject to the labour conditions of

the sending state<sup>51</sup>. As they do not intend to join the national labour market of the receiving state, they cannot be seen as and brought into line with the local workers' status and consequently both the labour conditions and the labour laws of the state where they are working do not apply to them. so long as one applies the principle of origin. In this respect, posted workers might be treated differently to workers in the receiving state. The labour laws of the latter country may only be applied, if there is a possible impediment to the free movement of services, if it is justified by reason of general interest and, more in particular, if the principle of proportionality is respected. For all these reasons it is recommended that further cooperation between states be set up perhaps by developing a European instrument designed to combat social fraud.

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<sup>51</sup> See clearly Case 49/98(Finalarte), 21 Oktober 2001, 2001, 7831 and Case 164/99 (Portuguesa), 24 January 2001, Jur. 2002, 787

## Social security and fiscal (tax) development

The binary divide between the self-employed and employees forms the building blocks for the national labour and social security systems and define the benefits and advantages for the persons concerned. Traditionally, employed persons enjoy more rights than the self-employed. The labour rights concern rules regarding wage and salary protection (working time, minimum remunerations, manner and place of payment), terms and conditions of employment, the working schedule (limits on working hours, rest periods, Sunday rest, breaks), rules on social records, supplementary pensions, interim work, additional social advantages, the continuation of payment of remuneration by the employer during sick leave, the protection against dismissal, annual and special leave (medical leave, maternity leave, etc.) paid by the employer, as well as representation in labour committees, etc.

In some countries, we see that the self-employed are protected by the laws on health and safety. In Belgium for example the self-employed are protected to the same extent as employees by the Law of 4 August 1996 on the welfare of workers at work when working on temporary or mobile construction sites. Also in the Netherlands, through application of a Government General Measure the obligation to respect the law's stipulations regarding health and security has been extended to the self-employed in cases where the work performed can involve very high risks for the security and safety of the persons concerned.

An additional problem is that the voice of these self-employed people may not be heard and does not play an important role, contrary to employees who through the worker's committees of the company are in a position to negotiate on working conditions. Employers are therefore not obliged to bargain with the trade unions with regard to self-employed people.

Traditionally, the self-employed have to pay fewer contributions and are less protected by social security measures. The difference in terms of social security protection varies from state to state, leading to a so-called "social gap" as in Poland, Spain, Romania, Italy and the Netherlands. In the Netherlands for example the self-employed workers do not have any benefit in case of sickness and incapacity for work nor unemployment benefits. In addition, in 2004, insurance against the inability to work for the self-employed was abolished. This means that they have to arrange their own insurance coverage. Although self-employed persons have the same rights as employed people to an old-age pension (as the law on old-age pensions is applicable to everybody who lives in the Netherlands), their protection may be more limited as the self-employed are not allowed to contribute to collective pension funds and are thus totally dependent on their insurance funds. They have the opportunity of supplementing the insurance provided by the industry sector within which they perform their activity. This voluntary continuation

has recently been extended up to ten years, so afterwards, they must find their own solutions. Practice shows however that only very few self-employed without personnel take advantage of this opportunity (2 %).

In Romania, the indemnities received are often small since self-employed workers tend not to declare the whole amount of money received.

As social security contributions are limited to a minimum in Poland, self-employed are only entitled to a minimum retirement pension and a minimum sickness benefit. In U.K., the social protection of self-employed workers is also less comprehensive, as they have no right to sick pay, no rights to child care, parental leave or to additional earnings related state pension.

But it should be pointed out that many member states have managed to improve the social coverage of self-employed workers as is the case in Belgium, Ireland and France. The case of France is noticeable since both statuses have converged considerably over the years.

In 2006, the RSI (social regime for the self-employed) was created. This regime guarantees a retirement pension (with the affiliation to a complementary pension being compulsory), sickness and maternity benefits and collects the social contributions of the self-employed. Moreover, this regime is compulsory for self-employed persons in the construction sector<sup>52</sup>. Self-employed persons must compulsorily pay for their own social contributions according to their professional income. If the professional income does not

exceed a certain amount (4.534 EUR for 2008) then the self-employed person is exempted from social contributions.

All this led commentators to conclude that as far as social costs and benefits are concerned, self-employed do not have specific advantages compared to employees.

Finally, one can also remark that in Sweden and Ireland, self-employed persons are entitled to unemployment allowances, benefits that are typically reserved for employed persons.

But these additional protections are also envisaged in some cases in relation to applicable tax regimes. . Although the self-employed have to pay VAT, which they can deduct, the self-employed profit from certain advantages which lead to the payment of less income tax, as for example deductions, allowances for start up costs, etc.

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<sup>52</sup> More generally, the coverage for the self-employed is mandatory in France.

## Self-employment in a triangle relation

A growing point of concern and an element that is held responsible for the creation of much bogus-self-employment is the increase in the number of “male fide” intermediaries, employment agencies which to a large extent are involved in arranging work assignments for the self-employed.

The growing use of outsourcing and subcontracting, poses the difficult question of the employer’s control in situations of triangular employment relationships. Here, we are dealing with workers, employed by an enterprise as a provider that performs work for a third party, the user. The basic difficulty these people are faced with, is to find out who their employer is and as such what rights they have and who is responsible for them<sup>53</sup>. Quite often, in triangular employment relationships both interlocutors perform some of the functions of the traditional employer, leading to difficulties in defining who the actual employer is.

Establishing the difference between outsourcing, subcontracting, temporary personnel and the condition often forbidden by national laws of providing personnel at the disposal of third parties is a complicated issue. In international relations this problem is even more complicated, as quite often foreign interim agencies are involved in the posting of employees, who are hired by these agencies to be put at the disposal of a user abroad.

As these foreign agencies only have to stick to the rules of their country of origin and can

perform activities in a hosting state without major administrative complications, this has led to an increase in the recourse to (male fide) agencies. As foreign intermediaries are not legal subjects according to Swedish law, it is difficult to take action against them. A Dutch report shows that approx. half of the most important companies hire employees via employment agencies (bona fide or male fide), another 10 % via subcontractors and 3 % as posted workers. Working with male-fide intermediaries has led to different forms of fraud. Agencies located in other European countries have organised vast fraudulent systems using both self-employed workers and workers posted temporarily abroad.

Today the role of the gang masters still exists and is also taken over by these male fide illegal intermediaries or agencies who play a significant role in hiring employees in the new-EU-countries. Some countries have taken action, attempting to prevent construction companies from changing into intermediaries. Polish construction companies that delegate their employees for assignments abroad have to employ workers in Poland as well and only up to 50 % of the employed workforce can be sent abroad at the same time.

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53 ILO, “Employment Relationship”, 95th session 2006 report V (1), p. 11

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

Different causes are indicated for bogus self-employment.

In Belgium, the new legislation on Employment relationships is considered as an example of dubious legislation as the criteria for deciding whether there is an employment relationship are considered too vague. In the Netherlands as well as Belgium the free movement of services is mentioned as one of the causes for this increase in bogus self-employment. Other factors are: for the employees: the need to be an individual, the desire to work according to one's own perspectives and expectations, fiscal advantages, etc.; for the employers: to make use of production factors in a more efficient way, the need for flexibility and lower salary costs. The Netherlands mention that the government has introduced provisions that stimulate persons who obtain social security benefits to choose independent entrepreneurship, as they want to diminish the number of people that rely on social security benefits. In Sweden and in the Netherlands, fiscal stimulation measures are also viewed as a reason.

Reduction/lower costs (labour, social security and taxes) are quite often considered as one of the main reasons (Romania, Spain, Ireland, UK, Poland...). Except for Sweden - where there are no extra costs or benefits for a company in terms of tax and social security payments when engaging a self-employed worker as opposed to a direct employee - in the other members states, hiring a self-

employed person costs less money to the company/the employer than hiring an employee. In Ireland, companies save 10.75 % when hiring a self-employed worker instead of an employee. In the UK, engagers of self-employed pay no national insurance, whereas the engagers of direct employees pay 12 %. It has been estimated however that the true cost differential ranges between 35 and 50 %.

In addition, in the Netherlands, if the self-employed person is unable to work, the employer does not run any financial risk. In fact, according to the Civil Code, an employer is obliged to continue salary payments for up to a maximum of 2 years for sick employees. In the Netherlands however certain organisations claim that lower costs are not responsible for the increase in the number of the self-employed with personnel (which are quite often bogus-self-employed people), and do believe that the self-employed without personnel are paid by the principal the same, if not a higher, hourly tariff.



## Assessment of prevention and combating measures and sanctions

In the first place, several mechanisms have been introduced that should prevent different forms of bogus self-employment. In Belgium the LIMOSA-system (general obligation to notify every form of employment to the authorities) is a means of prevention in particular for reducing bogus self-employment as a result of the application of the free movement of services.

In the Netherlands, in 2004, the Temporary Employment Agency sector together with the trade unions set up the SNCU (Foundation for the compliance with the Collective Bargaining Agreement for Temporary Workers) that investigates possible infringements of the Collective Labour Agreement on Temporary work and where necessary presents the case before the Courts.

Trade unions have established a contact point where one can report any abuse and infringements of temporary work (the Association of international employment agencies).

In Italy, greater coordination between social security administration, tax administration and police has been encouraged. Through the so-called “libro unico”, inspections proceedings were made easier and the so-called DURC helped reduce the phenomenon of bogus self-employment (by requiring a document certifying the regularity of a business’s contributions).

In Spain, the most efficient tool was the passing of an Act in 2007 which regulates the status of self-employment.

In order to combat the phenomenon of bogus-self employment, several countries (Belgium, the Netherlands, France, Italy, Spain, Sweden,...) have introduced measures that impose severe penalties in case of bogus self-employment which include criminal sanctions.

In Belgium, the worker is requalified as an employee, which implies total compliance with the current labour laws: wage claims, holiday pay and resignation remuneration, etc. Moreover, social security contributions (from employer and employee) are increased with a 10 % surcharge and 7 % interests which will be claimed retroactively. The employer may receive a jail sentence ranging from 8 days to 3 months.

In France a person risks 3 years imprisonment. Additional penalties are also possible: debarring of the business, the requisition of tools, machinery, goods, stocks; the publication of an announcement of the judgement, etc.

In Spain, risk management regulation infringements can be prosecuted and sentenced to an economic sanction ranging between 1.052,54 EUR and 30.050,61 EUR for a serious offence and between 30.052,62 and 601.012,10 EUR for a very serious offence. However, these sanctions are very rarely applied.

The sanctions might be high, but in order to be applied cases have to be brought, proven and won before the Court. This is quite often the problem. In Ireland it is reported



that hardly any case is successful. In Poland, bogus self-employment can only be brought to court by a self-employed person who claims they were forced to endorse this status. Checks cannot be performed by inspectors from the National Labour committee and only social insurance institutions or tax of-

fices can assess the self-employed on social insurance contributions or taxes. And if for example a foreign legal person is condemned before the Court, there is often a problem in that national measures combating fraud are usually nationally tailored and are difficult to apply in an international context.

## Conclusion

The phenomenon of different forms of bogus-self-employment is widespread at a European level and might endanger the actual social systems, including vocational and professional training. It is clear that further measures have to be taken at national and

European level to combat the consequences of bogus-self-employment as social dumping etc... In particular there is a need for a well-developed framework and European tool to combat social fraud.



# Appendix

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