

FIGHT PRECARIOUS JOBS

in the construction and
wood industries in Europe



BWI • BHI • BTI • IBB • ICM

www.bwint.org

The Building and Wood Workers' International – BWI is the Global Union Federation grouping free and democratic unions with members in the Building, Building Materials, Wood, Forestry and Allied sectors. The BWI groups together around 328 trade unions representing around 12 million members in 130 countries. The Headquarters is in Geneva, Switzerland. Regional Offices and Project Offices are located in Panama, Malaysia, South Africa, India, Burkina Faso, Curaçao, Chile, Kenya, Russia, Peru, Brazil and Thailand. BWI's mission is to promote the development of trade unions in our sectors throughout the world and to promote and enforce workers rights in the context of sustainable development.

The President of the International is Klaus WieseHügel from the building and forest workers union in Germany. Deputy Presidents are Luc van Dessel from the building and wood workers union in Belgium and Per-Olof Sjöö from GS Sweden, and the General Secretary is Ambet Yuson from the Philippines. The last congress of the BWI was held in Lille France in December 2009.

Fight precarious jobs in the construction and wood industries in Europe

Content	Page
Preface	2
Precarious Jobs and Trade Union Strategies in the Building and Wood Industries in Europe – BWI strategies	3
Illicit employment in the construction industry – overview of the EFBWW campaign (2010)	10
Subcontracting chains and (bogus) self employment in Switzerland: The Trade Union Position	11
Social partner have a say on use of temporary work in the Belgian construction sector	15
We are able to fight bogus self-employment in the Netherlands	17
Experience and strategies with bogus self-employment in United Kingdom	19
The Finnish regulations about subcontracting and liability	21
Subcontracting in Turkish Directorate of Highways and YOL-İŞ Strategy on Organizing	22
Fight precarious work in Ukraine	23
The IG BAU strategy to fight precarious employment and undeclared work in Germany	24
 Annex:	
Proposals on the prevention, detection and sanctioning of illicit employment in the construction industry by the EFBWW	27
BWI Resolution on fighting bogus self-employment in construction adopted by the European Regional Conference in Belgrade (09.2010)	36
Joint conclusions and recommendations of the European social partners in the construction industry on self-employment and bogus self-employment (06.2010)	37
Global Union Principles on Temporary Work Agencies	43
 Bibliography	 47
Glossary	48

Preface

The global economic crisis is putting the trade union movement globally and its members under severe pressure due to an increase in mass unemployment, in precarious jobs and continued pressure on social dumping under the impact of neoliberal policies of government, European Union (EU) authorities and the European Court of Justice.

Trade unions took on these challenges. They campaign and mobilise for an upward harmonisation of wages and working conditions so that union members can receive better conditions and better protection in all European countries. Strikes and mass mobilizations in many European countries and the big European Days of Action organised by the European Trade Union Confederation (ETUC) show the way forward in forcing through the necessary change of course.

At a European level, both ETUC and EFBWW have for some time been dealing with various aspects of precarious employment, particularly with the development of European legislation concerning temporary work, sub-contracting, part-time work, seasonal/short-term work, illegal work, and bogus self-employment.

The BWI European Conference in Belgrade in September 2010 initiated a discussion on precarious employment beyond the European Union borders. At national levels, a number of our affiliates have developed their own strategies and gained experience, which are for the most part not well known to other affiliates. The value added of this event was that we learned from each other and clarified our trade union positions and strategies on how to fight precarious employment. The intention of this brochure is to spread the discussion within the unions and to facilitate the strategy finding.

Vasco Pedrina
BWI Vice-President Europe

Marion Hellmann
Assistant General Secretary

Precarious Jobs and Trade Union Strategies in the Building and Wood Industries in Europe – BWI strategies

1. Introduction

Employment in the construction industry has always been unstable and insecure and short-term for the duration of the construction project due to the project-based nature of the building industry and constant variations in the demands for labour. However some decades ago the majority of workers employed in the industry were employed on a full-time, permanent basis and the higher incidence of short-term and precarious employment is a more recent phenomenon. In fact throughout Pan Europe, we are confronted with increasing forms of precarious jobs in our industries, the bitter fruit of capitalist globalisation. In a study by the European Foundation for the Improvement of Living and Working Conditions it is stated: *„The unprecedented rate of economic activity in the European construction industry over the last quarter of a century has laid a major role in raising employment levels across most economies of the European Union. This development has benefited large and small companies, as well as driven entrepreneurship, with self-employed people making up about 25% of the total labour force in the sector. As a result of the construction boom, the industry has witnessed a rapid spread of the practice of subcontracting, encompassing increasingly long chains of interconnected companies. This scenario has redefined employment relations in the construction sector and, at the same time, reduced the direct social responsibility of the ‘principal contractor’, as labour has been externalised by the use of subcontractors and employment agencies.”*¹ Similar trends can be observed in the European forest industry where most forestry work is subcontracted out; Latvian and Polish subcontractors are working in Sweden; Vietnamese, Mongolian and Slovak workers do forest work in the Czech Republic.

This precarisation of employment relationships is also the case in other developed countries on other continents such as in the USA, Japan, Korea² and Taiwan. Precarious employment is even the norm in many developing countries. Where there is little direct employment, we have large numbers of informal workers, “self employed” workers, agency workers, and labour-only subcontracting as well as long chains of sub-contractors. In certain European countries, such practices have been widely applied for a long time; in others they are relatively new but growing rapidly. They are all the more worrying as they go hand in hand with a weakening of workers’ protection.

At a European level, both ETUC and EFBWW³ have for some time been dealing with various aspects of the phenomenon, particularly with the development of European legislation concerning temporary work, sub-contracting, part-time work, seasonal/short-term work, illegal work, and bogus self-employment. At national levels, a number of our affiliates have developed their own strategies and gained experience, which are for the most part not well known to other affiliates.

¹ Liability in subcontracting processes in the European construction sector - European Foundation for the Improvement of Living and Working Conditions, 2008

² In Korea, according to 2007 figures by the Korean Labour and Society Institute, 55% of the labour market was organised through contract or temporary work. At least 70% of the women workers are contract workers. On average, Korean irregular workers work the same number of hours as their permanent, directly employed counterparts (an average of 46.6 hours per week). Unfortunately, again on average, they earn only 51.9% of the Korean permanent workers’ salary. 66.4% of the irregular workers in Korea are not covered by the national pension system, and 65.5% are not covered by the national health system. 68.5% of irregular workers in Korea have no unemployment insurance, while 83.7% have no paid holiday. 78.7% of all irregular workers in Korea are not part of a five-day working week scheme.

³ EFBWW, Concrete proposals on the prevention, detection and sanctioning of illicit employment in the construction industry, June 2010

2. Analysis of the different types of precarious employment

Precarious work is a term used to describe non-standard employment which is poorly paid, insecure, unprotected, and cannot support a household. In recent decades there has been a dramatic increase in precarious work due to such factors as: globalization, the shift from the manufacturing sector to the service sector, and the spread of information technology. These changes have created a new economy which demands flexibility in the workplace and, as a result, caused the decline of the standard employment relationship and a dramatic increase in precarious work. An important aspect of precarious work is its gendered nature, as women are continuously over-represented in this type of work.⁴

Many different expressions exist to describe precarious “work relationships”. Some of the terms are interchangeable; others describe situations that are alike, but not exactly the same. And sometimes the same words mean different things in different countries, different regions or different languages. Nearly all are approaches that do away with what used to be *“standard employment relationship”, meaning a permanent fulltime job, directly employed by a single company with a regular working week and benefits, and the protection, including against dismissal, that often comes from legal status as an employee.*

Within the Global Union Work Relationships Group, precarious work is seen as the result of employment practices by employers designed to limit or reduce their permanent workforce to a minimum, to maximize their flexibility and to shift risks onto workers. Resulting jobs typically are non-permanent, temporary, casual, insecure and contingent. Workers in such jobs often are not covered by labour law and social security protections.

2.1. Illicit employment

According to the European Federation of Building and Wood Workers (EFBWW) no other sector than the European construction sector is more affected by various forms of social fraud and black labour and therefore a stronger enforcement of and compliance with existing rules at European level is required. Illicit employment⁵ and the parallel economy damage the economy, leave workers unprotected, are detrimental to consumers, reduce tax revenue and lead to unfair competition between undertakings. Undeclared work is particularly widespread in southern and Eastern Europe. Across the EU, 5% of employees admit receiving cash-in-hand wages, varying from 3% or less in most continental countries, the UK and Ireland, to over 10% in some central and eastern European countries. Undeclared work is more concentrated among students, the unemployed and the self-employed, and has a higher incidence in the construction and household services sectors. The detection risk also matters: people who consider the risk to be small are more likely to be involved in undeclared work.⁶

Trade union position:

Trade unions should fight illicit employment and promote the transnational exchange and co-operation between national labour inspectorates to prevent and detect illicit employment.

⁴ http://en.wikipedia.org/wiki/Precarious_work

⁵ See EFBWW definition: Illicit employment is any form of paid or remunerated activities intended to evade all, some or specific legal, regulatory, governmental or collective provisions or payments of a fiscal, social or administrative nature, in accordance with the provisions of the country of employment. Bogus self-employment is explicitly considered as illicit employment.

⁶ http://europa.eu/legislation_summaries/employment_and_social_policy/job_creation_measures/c11710_en.htm

2.2. Subcontracting and outsourcing

Subcontracting has always been important in the construction industry, particularly in building and construction where the production process is divided into a number of discrete activities. These tasks or activities are often carried out sequentially and may require specialised labour. Hence it often makes sense, in technical and economic terms, for general contractors to 'subcontract' some tasks to independent, specialised units.

However, there is evidence from all parts of the world to indicate that subcontracting has increased significantly in the past 2-3 decades. And it is no longer restricted to specialised tasks. In some countries the bulk of the construction workforce is now recruited through subcontractors and other intermediaries as the 'outsourcing' of labour requirements has become the norm.

In most European countries the forestry workforce has been shrinking due to rapid mechanization, particularly in wood harvesting. In addition, forest owners and companies are using more and more subcontractors in forestry work. There are many documented cases in Sweden and Czech Republic where self-employed subcontractors or workers of subcontractors are exposed to higher accident rates and to very exploitative situations.⁷

Subcontracting is more and more on a "labour only" basis and may go through several stages, creating a multi-layer system. At the bottom of the multi-layer subcontracting are the intermediaries who recruit and control workers: they are called as mistris, jamadars or mukadams in India, oyaji in Korea, Kepala in Malaysia, gatos in Brazil, gangmasters in the United Kingdom, maestros in Mexico, Ranstad and Adecco in Europe.

Many companies are using temporary agency work to cut costs and increase flexibility by allowing them to adjust their staffing needs at short notice. It helps employers to find workers with specific skills, as and when they want them, while avoiding recruitment and administration expenses. In the UK, some 80% of temporary agency work is in the service and public sectors, while three-quarters is in construction and manufacturing industry in France. Overall, research shows that a higher proportion of temporary agency workers are unhappy with their jobs and conditions than permanent staff. Many do not choose this way of working, but would prefer secure employment.

The use of workers provided by temporary work agencies raises concerns and challenges for trade unions. This includes the effect that the use of temporary work agencies has on workers with regular and permanent employment as well as on the conditions under which work is performed by workers engaged through such agencies. The triangular relationship between the worker, the user enterprise and the temporary work agency that supplies the worker can undermine labour and social protection, as well as the effective realisation of the right of all workers to form or join trade unions and to bargain collectively. Agency workers must be specifically guaranteed the right to join a union with a collective bargaining relationship with the user enterprise and be part of a bargaining unit comprising direct employees of the user enterprise and be covered by all collective bargaining agreements applying to the user-enterprise.

⁷ Workers from Vietnam, Slovakia and Mongolia worked on assignments originally given to the Less & Forest a.s., which had won many tenders announced by the Lesy České republiky, s.p., the State Forests of the Czech Republic. Collected evidence indicates that most of these workers have not received pay; similarly, owners of the workers' dormitories, often did not receive any reimbursement.
<http://migrationonline.cz/e-library/?x=2278267>; <http://www.bwint.org/default.asp?Index=3297&Language=EN>

Trade union position:

Trade unions should strive to ensure clear criteria on sub-contracting and outsourcing which can be applied nationally and internationally, so that the responsibility for the entire chain rests clearly with the building owner/client or the general contractor to ensure a minimum contractual salary; payment of social security contributions and safety at the workplace.

Where temporary work agencies are permitted to operate, they must be properly regulated and monitored in order to prevent abuses of workers such as human trafficking or fee charging in cross border placements. All recruitment fees, including visa, transportation and hiring fees must therefore always be borne by the user enterprise.

Workers employed through temporary work agencies must have a recognised and enforceable written contract of employment, specifying the terms and conditions of their employment.

Employers should consult trade unions before agency workers are used and negotiate over any effects that the use of these agency workers might have on regular employees, on working conditions or on the collective agreement.

2.3. Bogus self-employment

There are a growing number of sole traders or independent contractors in the construction sector. Genuine self-employment has a place in the sector, alongside directly employed workers. However, bogus self-employment is a problem, often resulting from a trilateral relationship between the contractor, an intermediary (such as an agency or 'gangmaster') and the worker. Essentially, a gangmaster provides the contractor with workers who have a bogus self-employed status yet none of the legal, professional, financial, regulatory and administrative knowledge and skills of genuinely self-employed workers. This means that the workers are at risk as they are not adequately covered by social insurance. Moreover, unfair competition is created between genuine and bogus self-employed workers, thus distorting the market.

Trade union position:

Bogus self-employment should be fought at national and international level, e.g. by defining a set of common criteria which would provide guidelines for establishing the nature of the employment status. The rules of the country-of-work must apply in any case.

2.4. Protection of temporary migrant workers and posted workers

Construction provides a point of entry into the labour market for temporary migrant workers. In the United Kingdom many of the estimated 50,000 Romanians are in construction as a result of restrictions on their work rights. Both Romanians and Bulgarians have UK employment limited to small quotas in food processing and agriculture, despite their EU member-state status – unless they declare themselves to be "self-employed" agents. BWI affiliate construction union UCATT estimates there are 1million casual construction workers with false "self-employed" status in the UK. These workers are denied employment rights and employers (often agencies) avoid paying national insurance for them. Workers can be dismissed without notice, as reportedly happened at the London Olympic site last year.

Migrant construction workers in Russia face widespread abuse both in and outside of the workplace, Human Rights Watch said in a report⁸ In a climate of rising hate-motivated violence against migrants, exacerbated by the global financial crisis, the Russian government is failing to protect these workers from abusive employers, employment agencies, and police. The report documents widespread withholding of wages, failure to provide required contracts, and unsafe working conditions by employers at construction sites across Russia. It also details cases in which workers were unwittingly trafficked into forced labor by employment agencies that promised construction jobs in Russia, but then delivered workers to employers who confiscated their passports and forced them to work without wages. In some cases, these workers were confined and beaten.

The European construction industry is characterised by the high mobility of its workforce. In this framework, the "Posting of Workers" Directive (96/71/EC) constitutes a central piece of European legislation, aimed at regulating the movement of workers posted from one EU country to another. A worker is "a posted worker" when she/he is employed in one European Union Member State but sent by his employer on a temporary basis to carry out construction work in another Member State. This category does not include migrant workers to go to another Member State to seek work and are employed there.

To guarantee that the rights and working conditions of a posted worker are protected throughout the European Union, and to avoid "social dumping" where foreign service providers can undercut local service providers because their labour standards are lower, the European Community law has established a core of mandatory rules regarding the terms and conditions of employment to be applied to an employee posted to work in another Member State.⁹

Wage and social dumping violates fundamental workers rights and may lead to nationalism and xenophobia. The principle of "equal pay for equal work in the same place or in the same geographical area" has to be maintained. The large numbers of migrant workers and posted workers in the building and wood industries must be integrated into the social protection systems in the country-of-work and be entitled to equal treatment.

Trade union position:

Migrating and posted employees must enjoy the same working conditions and equal pay for equal work as that of the national work force.

Workers should not be required to pay deposits, visa and other immigration fees, transportation costs, and recruiting or hiring fees. In the case of agencies dispatching workers to other countries, the agencies should be required to repatriate workers in the event that their employment ends or the user company disappears. Workers must not be required to surrender their passports or other travel or identity documents.

⁸ "'Are you Happy to Cheat Us?' Exploitation of Migrant Construction Workers in Russia,"

<http://www.hrw.org/de/news/2009/02/10/russia-migrant-construction-workers-face-serious-abuses>

⁹ FIEC and EFBWW, the European Social Partners in the construction industry, draw up a web site, which focuses on legal provisions and regulations affecting construction activities, with the aim of helping firms and workers identify those national legal and conventional provisions which have to be respected when workers are posted from one EU country to another. It further identifies those persons or organisations in the country of destination of posted workers from whom further detailed information may be obtained.

<http://www.posting-workers.eu/Content/Default.asp>

Temporary migrant workers should have full rights to legal redress in the country where they work and they should have the right to organize and join trade unions. Migrant workers should receive details of their living and working conditions in a language they understand before leaving their country of origin.

3. International regulations

A key question for the work at the European and international level is: What are the relationships (or situations) under which work is performed that present obstacles to bargaining and organising (or union recognition). Organising and collective bargaining are important angles of the problem. In the end, what is needed are strong unions, which are able to protect members from precarious work situations. And for that, strong laws are needed to allow workers to organise and their unions to properly represent them, including in collective bargaining.

The main regional and international regulatory tools that are appealed to in relation to precarious workers are:

- European Temporary Agency Workers Directive 2008
- European Posted Workers' Directive 1996
- European Charter of the Lisbon Treaty 2009
- European Convention of Human Rights, 1950
- ILO Recommendation No.198 on the Employment Relationship
- ILO Convention No.181 Private Employment Agencies Convention, 1997 and accompanying Recommendation (No. 188)
- OECD Guidelines for Multinational Enterprises and National Contact Points
- Health & Safety legislation
- International Framework Agreements (IFAs)
- ILO C98 the Right to Organise and Collective Bargaining Convention 1949 and ILO C87 Freedom of Association and Protection of the Right to Organise Convention 1948

At the international standard setting level, several instruments have been developed that are of use for unions in their struggle to defend workers in precarious employment. A key development at the international level has been the ILO's work on the employment (or work) relationship issue.

The adoption of the Employment Relationship Recommendation is an important point in the development of new international labour standards concerning disguised employment relationship and triangular/dependent self-employment after ten-year effort since 1994. The Recommendation considers the difficulties of establishing whether or not an employment relationship exists or who is accountable for workers' rights, and particularly noted disguised employment relationships, ambiguous employment relationships and triangular employment relationships.¹⁰

Trade union position:

The International Labour Organisation should adopt a binding international labour standard concerning disguised employment relationship and triangular/dependent self-employment and the protection of workers in this employment relationship.

¹⁰ <http://training.itcilo.org/socdial/webcontents/R198EmplRel.pdf>

4. Main lines of trade union action, including in the area of organising

In construction and forestry, the majority of workers are recruited through intermediaries or agents on a temporary basis and dismissed when they are no longer required. They do not receive holiday pay, sick leave, health care, compensation in case of accidents, pensions, or other benefits. They work long hours and may be obliged to work overtime without additional payment. Wages paid are frequently below the national minimum, and illegal deductions are routinely made. Migrant workers are often discriminated and exploited by unscrupulous employers and recruiters. This is due to the fact that migrant workers lack crucial information and contact with trade unions in the country of destination.

Trade unions should:

- *Campaign against informal and illegal employment and push for direct employment contracts with social security and paid holiday entitlement.*
- *Work to ensure criteria on sub-contracting which can be applied nationally and internationally, so that the responsibility for the entire chain rests clearly with the building owner to the general contractor to ensure a minimum contractual salary; payment of social security contributions and safety at the workplace.*
- *Formalise and streamline collective bargaining systems and push for National Industry Standards that extend bargaining coverage to all workers across the industrial sectors.*
- *Lobby for sectoral wage rates to be established in legislation or through Collective Bargaining Agreements.*
- *Continue to campaign and build capacity on health and safety at work and on skills development.*
- *Unions to organise informal and migrant workers to ensure equal pay and conditions for all workers and to protect national agreements and Labour Standards.*
- *Extend negotiation of International Framework Agreements with key multi-national companies. Provide for guarantees in the Agreements that the companies will offer Decent Work and social protection also to informal workers. Develop effective company networks to secure organising and bargaining rights.*

Marion Hellmann, Assistant General Secretary, BWI

Illicit employment in the construction industry - An overview of the EFBWW campaign (2010)

At the request of the EFBWW affiliated organisations in 2005, the EFBWW decided to start a coordinated campaign to deal the problem of « undeclared labour in the construction industry » at European level. Legal loopholes, political incompetence, practical problems and cross-border social dumping lead to a general consciousness that a European solution to this problem must be sought after. In a first stage, the EFBWW tried to reach an agreement with FIEC. However, after 3 years of unsuccessful discussions with FIEC the EFBWW ended the discussions. The main reason was FIEC:s unwillingness to include the problem of subcontracting and liability in the discussion.

After the break-up of the talks with FIEC, the EFBWW decided to lobby individually towards EU policy makers and legislators to press for a legislative initiative. During this period the EFBWW never entirely closed the door for further talks with FIEC.

After several years of a targeted lobby campaign, the EFBWW decided in 2010 that the time was ready to start an open campaign on “illicit employment in the construction industry” by putting forward several concrete legislative proposals. The aim of this campaign is to generate a broad debate and to increase political pressure which would lead to a European legislative initiative. The EFBWW has identified several topics which could be included in a possible future European legislative initiative.

As a result of the construction boom until 2008, the industry has witnessed a rapid spread of the practice of subcontracting, encompassing increasingly long chains of interconnected companies. Therefore, the most important issue for the EFBWW is the liability of the main contractor for the – preferably whole – chain of subcontractors for the payment of wages and social security contributions. The lack of organised cross-border labour inspectorate coordination became a prominent problem and a source of huge frustration from labour inspectors. According to the EFBWW this can only be resolved by creating a “European Social, Intelligence and Investigation Agency”. The spreading practice of false self-employed – politically advocated by Margret Thatcher in the 1980s to bust the trade unions in the UK – taken over by the EU and many Member States to promote “entrepreneurship”, has become an increasing problem in the construction sector in many countries, and a means to deprive workers of their social rights. The EFBWW has given special attention to this issue by examining the problem in 11 EU-countries. After a profound discussion, FIEC has joined forces with the EFBWW, which has resulted in joint concrete legislative proposals.

Over the years, the EFBWW noticed a significant increase of “letter box companies”, showing up all over Europe. These letter-box companies are used by fraudulent contractors to dump workers from one country to another as a commodity. The EFBWW considers that this practice should be put to a stop and that criminal and civil sanctions should be taken against the legal and physical persons who are directly or indirectly involved in setting up and using letter-box companies. The EFBWW have taken notice of the fact that also Business Europe now explicitly has recognized that the problem should be solved at EU-level.

A particular instrument which would be extremely useful to combat cross-border social fraud in the building industry, and which would facilitate the work of the labour inspectorates, is a social ID-card for the construction industry. Due to the high geographical mobility of building workers, such an instrument should be introduced at EU-level. A social ID-card could have a self-regulating role and could be linked to the electronic registration of the working time, the exchange of valuable data.

Sam Hagglund, General Secretary, EFBWW

Subcontracting chains and (bogus) self employment in Switzerland: The Trade Union Position

1. The problem

Until recently almost everybody in Switzerland underestimated the problems which can be caused by (bogus) self-employment and subcontracting chains, mostly in construction, cleaning and handcraft sectors. Unia has done some research concerning this phenomenon during autumn 2010. Our findings were that these have become threatening issues also in Switzerland. They are often linked with attempts to lower wage and social standards (wage and social dumping). Some forms of unfair competition have clearly also reached Switzerland. In general we are confronted with two phenomena which are linked with

- Subcontracting chains in order to camouflage the “real” contract relations
- (Bogus) self employment in order to circumvent Swiss collective agreements and binding minimum wages especially concerning posted workers.

2. The situation in Switzerland today

These issues are more virulent in the border cantons like in the canton Ticino and in the French speaking cantons, but they are also reaching more and more the German speaking Switzerland. We mostly find (bogus) self employed workers today in the construction (concrete reinforcement works), cleaning, and sub construction work (paving, flooring, painting, insulation, exhibition stand construction) and others, also in general craft sectors. Subcontracting chains are often chosen by general contractors in order to camouflage the “real” contracting relations and conditions. We can see that subcontracting chains have the effect that at the – weakest – end of these chains (bogus) self-employed are executing the work.

- The workload which is claimed to be executed by self-employed persons grew by two thirds between 2007 and 2010, compared to a growth of 18 per cent executed by posted workers. Certain groups of people are obviously declared as self-employed just to circumvent Swiss labour regulations, collective agreements, binding (minimum) wages, etc.. Today approximately 15'000 persons who are declared as self-employed (mostly from the EU) execute approximately 550'000 days of work. Many of these persons used to be either posted workers or persons who were normally appointed as employees in Swiss companies. If we take a look at the checks which are done today, we find out that about 20 to 25 per cent of the controlled self-employed are in fact **bogus** self-employed. This means that out of today's 15'000 self-employed persons in Switzerland approximately 3'000 to 4'000 are in fact **bogus** self-employed.
- In many cases we have seen there is a close link between subcontracting chains and (bogus) self-employment. Often subcontracting chains are used to camouflage the real contract relations and – via many links – to use at the end of the chain (bogus) self-employed workforce. This makes sense from a general contractor's view because self-employed persons can be paid less than posted workers as we have a lot of binding collective agreements and (minimum) wages in Switzerland which also apply to posted workers.
- This means: (Bogus) self-employed are paid less and are not under the scope of social insurances, neither in Switzerland nor – partly – in their home country. That makes self-employed workforce substantially less expensive – and therefore attractive. The self-employed persons are willing to accept this status because they are still earning more than in their own country. Switzerland is well known as a high wage country. Besides

they have often no other choice. Trade Unions suspect that (bogus) self-employment is squeezing the legal posted workers from the Swiss labour market. This form of employment contains a big risk of damage for the Swiss labour relations system: It is far cheaper than legal work; it leads to wage and social dumping and jeopardises the functioning of the Swiss labour market.

- Item it is a danger for the social insurance system. Furthermore the massive wage dumping leads to problems in the system of bilateral treaties between Switzerland and the EU. But the worst part of it is that these abuses are causing a growing xenophobia in Switzerland. Today's estimations say that the SVP populist right wing party which polemizes against foreigners and Switzerland-EU integration can count on a 30 per cent proportion of Swiss voters.

3. Unia's answers, proposals and achievements

In the past the different cantons in Switzerland treated the above issues differently, due to Switzerland's federalist structure. There were some cantons who really tried to fight the misuse of self-employment while others did not see or did not realise the problems and/or did not want to interfere, due to neo-liberal economic policies. And there was also no common understanding about a definition about self-employment and bogus self-employment. Recently we have made some progress:

- We have successfully introduced a new form of collective agreements which are legally binding: Foreign companies who want to work in Switzerland, have to pay deposits in order to be entitled to execute this work. This is the case among others in the following sectors: scaffolding, painters and plasterers, insulation, facility management and so forth. In order to make sure that companies treat their workers accordingly to legally binding collective agreements, companies have to deposit up to 20'000.- Swiss Francs per contract. This is to make sure that in the case of a violation of Swiss legislation or generally binding collective agreements, controlling agencies are able to execute the fines against the affected companies (as in some cases the fines are not enforceable in the country of origin).
- Under pressure from the trade unions and some employers associations, Swiss government adopted a new directive concerning the fight against bogus self-employment (see box at the end of this document). Here we came to a clearer definition and larger fines. This directive has been in force since the start of 2011.
- After the adoption of this directive and due to our efforts, the SECO, our labour ministry, decided to create a tripartite working group with the task to develop the necessary measures for checks and enforcement of the rules against bogus self-employment within this year. In this context, we will try to deal the introduction of a **joint liability respectively a general contractor liability system**.

We are convinced that a joint accountability/liability system is the best solution. It makes sure that in future general contractors are prevented from camouflaging the "real" subcontracting terms via installing subcontracting chains. Further to this, we are striving for more:

- The extension of the application of generally binding collective agreements and generally binding minimum wages also for self-employed people.
- In the case of a suspect that self-employed are in fact employees, he/she shall be forced to prove his/her status. If the person is not able to do so, these persons shall be treated as employees.

- Clear and painful sanctions in cases of violation of Swiss labour law (i.e. exclusion from public biddings...)
- Sanctions have to hit general contractors, not executing persons (that is why we are going for a joint liability/general contractor liability system).

All in all we can state that Swiss Trade Unions made significant progresses in their attempts to fight social and wage dumping in Switzerland which results from ***bogus self-employment*** and ***subcontracting chains***. But there is still a long way to go. We will continue with our efforts.

“SECO”’s (Switzerland’s federal labour ministry) new directive regarding self-employment: a first important step

On January 1st 2011 the “SECO” put into force a directive regarding self-employed activities in Switzerland. With this directive now the controlling agencies can execute their controls under a common and clear definition.

1. Definition

In short, we can say that now one thing is clear:

- *Any self-employed has always to be able to prove his status, if a controlling agency is asking.*
- *We now have a clear definition about self-employment and bogus-self-employment.*
- *The directive delivers also clear criteria how to execute the visits/controls:*
 - *Either there is a “direct” control at the workplace*
 - *Or there is a control in written form.*

In both cases the controlled person/enterprise has to deliver all documents concerning the own status.

- *Key criterion is **not** his status in his home country, but the **real** working and contract conditions in Switzerland. And concerning the **real** contract conditions the facts which are found by the controlling agencies (either cantonal ore collective agreement-controllers) are more important than the papers which are delivered.*
 - *If there is a doubt concerning the status, the self-employed is treated as employee (generally as posted worker or alternatively as employed to a Swiss company).*

2. Sanctions

Along with this directive comes a set of (partly new) sanctions if cases of bogus self-employment are detected. They shall be unbureaucratic, dissuasive and efficient.

- *If the controlled person cannot give the proof of being self-employed, he can be dismissed from the workplace.*
- *Even a ban from working in Switzerland can be the consequence.*
-

There is also a differentiation concerning the question if a (bogus) self employed person works for a Swiss or a foreign contractor:

- ***Foreign contractor/employer:*** *In case the person is bogus self-employed, he will be treated as posted worker > the respective fines will be imposed. In these cases the posting law and posting directive will be deployed. Even a criminal case may be opened.*
- ***Swiss contractor/employer:*** *Swiss labour laws will be applicable > Swiss collective agreements shall be applicable, also (minimum) wages and announcement duties.*

Matthias Hartwich, Department Coordination collective agreements and Vasco Pedrina, National Secretary, Unia Switzerland

Social partner have a say on use of temporary work in the construction sector in Belgium

Temporary work through Temporary and Contract Agencies is recognized as a form of precarious work. However, in the Belgian construction sector the presence of precarious work through these types of agencies is practically not existent. Nonetheless, precarious work is gradually appearing on Belgian construction sites.

Brief historical overview

Until the late 1970's temporary work was mostly used by "gang masters and criminal networks" as a way to organise the black market in the construction sector. This black market was predominant and mainly situated in criminal spheres. It was also used as a way to circumvent existing social protection and labour laws.

This form of black economy had a very negative impact in relation to occupational health and safety issues on construction sites.

In an effort to eradicate this criminal economy, it was decided to forbid all use of temporary work in the Belgian construction sector. The prohibition lasted from the beginning of the 1980's until the end of 2001.

It was only then, and under the pressure to conform to regulations of the International Labour Organization (ILO) and the European Union, that social partners within the Belgian construction sector negotiated a collective labour agreement regulating the conditions to which temporary work could be authorized from January 1, 2002.

The regulations were as follows:

Regulations

1. A specific temporary agency **exclusively for construction workers** had to be founded by already existing temporary agencies.
2. Temporary agencies need a licence, delivered by the respective minister of labour of the regional government of Flanders, Wallonia and Brussels
 - 2.1 This licence can be delivered by the minister **after advice of a specific commission, composed by social partners**, in the respective Socio-Economic Council of the region.
 - 2.2 The commission has to investigate if the temporary agency **complies with all dispositions concerning fiscal and social legislation**, capital and payment of a guarantee to the Social Fund of temporary workers (minimum € 25.000)
 - 2.3 The commission has to **proceed to a screening** by interrogation of the management on experience, financial plan, organisation, etc...
 - 2.4 The **validity** of the licence is for **1 year**
3. Temporary work in a construction company is **only authorized if it is to replace a worker who is incapacitated or because of an increase in the volume of work.**

4. An **approval of a majority of workers representatives is needed**.
5. The temporary worker has to be **titular of a security passport** (delivered after a security training of 16 hours) or to prove an experience of 5 years within the last 15 years as construction worker.
6. **One day contracts** for temporary workers are **not allowed**
7. Temporary work is **not authorized in a 6 month period following a collective redundancy or in case of temporary unemployment** in the company
8. **All collective agreements** on working conditions of normal construction workers (Remuneration, working time, health and safety, social funds of the construction sector) **were also declared generally binding** for construction temporary agencies.

Conclusions

The existing framework on the use of temporary work in the construction sector, gives social partners a great deal to say on the application of this particular form of work in the construction sector. There are also a sufficient number of tools at hand to perform effective control in the practice of temporary work. Currently, temporary work is almost nonexistent in the construction sector in Belgium.

However, it is clear that in Belgium trends of precariousness are also popping up on construction sites. Mala fide employers in search for cheap labour are now exploiting the lack of European coordination and regulation on social security matters and the lack of a social Europe. This is apparent through the presence of a significant number of bogus self-employed and fake posted workers in Belgian construction sites. This is similar to that is happening in other European Member States. Because of this, we need more and better social responsible regulation and a true transnational, cross-border cooperation of labour and social inspectors within the building sectors throughout Europe. .

Tom Deleu & Guy Bonnewijn, International Department, CSC – Building, Industry and Energy, Belgium

We are able to fight bogus self-employment in the Netherlands

FNV Bouw, the building and wood workers union in the Netherlands, is supporting the idea of the “free movement of workers in Europe” We see this as an important achievement and want to act accordingly. We respect the people, wherever they come from, as our colleagues, because of that, they have the same rights as us. We believe in equal pay for equal work. This is easier said than done.

Unfortunately, what we see on the construction sites in Netherlands is different. Many workers from other European countries are illegally employed or paid under the agreed collective agreement. Construction projects where we have encountered these problems are the “2nd Meuse plane” near Rotterdam and at the development of the Emshaven in the Northern Netherlands. This is an area in which unions can have tremendous success in organizing these workers; however, it will require a lot of effort, commitment, and union resources.

Under normal circumstances we achieve results by pressuring employers but in the case of foreign contractors this is more complicated. Because of this complexity we have utilized the media and political pressure nationally and internationally. The abuse of mostly migrant workers damages the image of the building industry and creates unfair competition with employers and contractors who do indeed respect collective agreements.

FNV Bouw invests a lot of time and resources in negotiating collective agreements for our industries. We also spend a significant amount of time to sign agreements with employment agencies. Together with colleagues from the Dutch Labour Inspection we visit worksites and publicly announce and address employment and labour abuses. We jointly develop leaflets and other forms of information in various languages.

The increased employment of illegal, precarious and temporary workers must be seen in the context of labour flexibility. The Netherlands is known for its high percentage of part time employed workers and this is also visible in our industries. Innovations in the construction industry caused drastic changes in the way we organize workers. Where in the past the construction union represented all the workers on a construction worksite, now, we only represent 40%. The other 60% are self employed workers or belong to a different sector and as subsequently different unions such as mechanics, electricians, and engineers. In this newly configuration of the construction industry and work force new forms of employment relations are blooming.

These new developments in the construction industry are unavoidable, particularly due to the changes of industry legislations in the Netherlands and Europe. But also workers are changing. Workers are changing jobs more frequently and demand a better balance between life and work. Some prefer to be “worker” one day and the next day they want to be “self employed”. As said these changes cannot be ignored and “If you can’t beat them, join them.”

Based on these changes, FNV Bouw adjusted its policies and started a joint pilot project on construction sites together with four unions of construction workers, self employed people and a union of electricians. This project is called “FNV on the construction site”. We try to develop a front-office for all workers working at the construction work site. In our “back – office” we deal with the details, depending on the problems and the sector. We want to represent all workers on the work site, not only the construction worker but also the Polish migrant worker, the truck driver, the electrician, the self employed worker, and so on. Together with the unions of the pilot project we represent all workers at the construction site.

This project started 2010 in three pilot locations and we will develop more. In FNV Bouw, we have a tradition, where we learn by doing and in this joint project; we have learned and achieved a lot just by doing. We were able to fight bogus self employment. We were able to convince the government of our new strategy. More importantly, we gained specific knowledge and expertise in the processes of subcontracting and malpractices. We mapped some of these procedures and are now able to challenge abuses of illegal, bogus self-employment and precarious work.

Boards are none existing and we are convinced that policies on this need to be developed jointly with EFBWW and the BWI. We have to inform and support each other but more importantly work together. For example, an Italian contractor active on the 2nd Meuse plane in the Netherlands, employing a Polish sub contractor with Spanish workers requires an International approach.

Ruud Baars, FNV Bouw, Netherlands

Experience and strategies with bogus self-employment in United Kingdom

As in many other EU countries, the number of precarious jobs has been growing in the UK in recent years, not only in construction but in all industrial sectors. However, one of the precarious forms of work, bogus self-employment, has been part of the construction industry already for some decades. Bogus self-employment has been calculated to be in the region of 400,000 workers (2008 figure).

In the 1960s and 70s, there was a large black market in construction, which included cash in hand payments, depriving the state of tax and social security revenues. To counter this the Government of the time introduced a tax system specifically for the construction industry (which is now known as the "Construction Industry Scheme"), designed to extract the lost revenue from the firms and workers.

The features of this tax scheme lie at the root of the massive growth of bogus self-employment since then. The Construction Industry Scheme has established a form of self-employment for tax purposes, requiring no skills or administrative input from the worker other than a quick registration on the scheme (today done online). Employers then deduct tax and employee National Insurance at source from the payments and transfer it to the respective state bodies.

Companies have major advantages when paying their workers through CIS. They pay no employer National Insurance (NI) contributions (which currently stand at 12.8 %), as well as other payments including sick pay, redundancy pay and holiday pay. They do not need to provide training, many employers even do not provide Personal Protective Equipment for their workers. Workers have minor financial advantages from working on CIS, mainly a slightly lower employee NI contribution. On the other hand, they have no employment rights, no holiday pay, redundancy pay and sick pay. Due to their lower NI contributions (and no employer NI payments), these workers either lose out of or receive lower social security contributions.

UCATT's main approach to fighting bogus self-employment has been to lobby for the abolishment or major revamp of the Construction Industry Scheme in order to abandon this form of "self-employment" for tax purposes. Acknowledging its shortcomings there have been several reforms of the CIS since it was introduced, however none of them were a lasting success.

UCATT achieved a major victory last year when, following extensive lobbying, Government conducted a consultation on the CIS system with substantial proposals for reform. While not perfect, the proposals would be a step in the right direction, making it much harder for firms to engage their workers through CIS. More work and lobbying will be needed as and when the system has been changed to further improve it. While the previous Labour Government was committed to go ahead with the reform, it is not known yet what the new Conservative/Liberal Democrat approach will be. During the consultation period large numbers of employer federations (in particular some house builders where the practice is endemic), lobbied the Government to maintain the status quo, as they fear that their competitive advantage will be removed once they are liable to pay employer NI contributions. The next months will show whether the new coalition Government will give in to the employers' demands, or whether it puts priority on bringing in some revenue to consolidate the country's household.

UCATT's second main approach has been to provide legal support to members who are exploited due to their bogus self-employed status. UCATT solicitors have won a number of court cases in this respect, most importantly in claims for holiday pay, but also for redundancy pay, when it was successfully argued that the persons in question were not genuinely self-employed but held worker status.

Dörthe Weimann, UCATT, United Kingdom

Finnish regulations about sub-contracting and liability

In Finland, sub-contracting started to increase rapidly 30–40 years ago. Construction companies began to decrease their own workforce and split work to different sub-contractors. At the beginning, the trade union tried to stop this development, but finally we had to give up. Now there are general contractors who have no workforce at all. Everything is done by other contractors.

Currently, the strategy of trade union is to accept sub-contractors, but we demand, that the sub-contractors are also abiding by collective agreements. With the Finnish companies this is not a problem. The majority of the workers of the Finnish sub-contracting companies are members of the union. With the foreign companies the situation is completely different. The companies do not abide by the collective agreements and legislation and virtually no workers are union members. In the collective agreement of the construction industry we have had for decades a paragraph concerning the liability of the general contractor. If the sub-contractor is not paying wages and other compensations to the workers, the general contractor has the responsibility to pay them. One week's notice must be given to the general contractor after the sub-contractor has failed to fulfil its obligations.

Formerly, this rule had a big significance, but less so now. Only the organized employers are obliged to follow this paragraph of the collective agreement. Though in Finland the collective agreements are generally binding, this paragraph of general contractor's liability is not. Still we have a practice that if there are problems with the sub-contractors, the officers of the union go straight to talk with the representatives of the general contractor. In most cases the general contractors are ready to help to solve the problems of the sub-contracting companies and their workers, though the obligatory legal basis of the main contractor's liability is not clear.

The legislation which bases on the EU directive of the wages security is nowadays more useful than the above paragraph of the collective agreement. The law entitles workers to get their correct wages, which were due less than three months ago. This law, however, does not cover the employees of the companies registered abroad. That means the posted workers working for the foreign sub-contracting companies are practically without any security, if the employer is not paying the wages.

In 2006 we got a new law of the liability of the general contractor or orderer. The general contractor or other orderer, which can be a public authority such as a municipality, has the obligation to clarify the history of the sub-contracting company. The sub-contractor must show documents from the company register, tax officials and the pension fund to make sure that legal obligations have been fulfilled in the past. If the general contractor or orderer makes a contract without checking the documents of the subcontractor company, the authorities can issue fines, which maximum is 15 000 Euros.

This new law helps a little but not enough. Everything can be correct in the registers, but this is not the case on the building sites. Illegal and illicit work is widely spread in the Finnish construction industry, especially lower in sub-contracting chains, and the supervision work made by authorities is virtually non-existent. The onus is therefore on the trade union, which tries to do as much as it can. But its resources are limited and union's only weapon to fight law breaking companies is industrial action. In the modern world this old weapon is much too slow to function well.

Kyösti Suokas, Vice-Chairman, The Construction Trade Union, Finland

Organizing Strategy of Subcontracting in Turkish Directorate of Highways and YOL-İŞ

A great number of workers are employed through subcontractors by the Turkish Directorate of Highways in accordance with the Public Procurement Law. These workers are called “subcontract workers” and employed with fixed term employment contracts, which do not exceed one year and are provided by the third parties who are named as “subcontractors” within the tender contracts which are renewed each year.

However this relationship definitely does not have the characteristics of “the principal employer - subcontractor relationship”. Because, in accordance with the article 2 of Turkish Labour Code No. 4857, the mentioned legal relationship is defined as follows: *“The relationship between the principal (main) employer, and the subcontractor who undertakes to carry out work in auxiliary tasks related to the production of goods and service or in a certain section of the main activity due to operational requirements and for reasons of technological expertise in the establishment of the principal employer and who engages the employees recruited for his purposes only (exclusively) in the establishment of the principal employer”*. So, the works are carried out by sheltering under the title of subcontractor.

The real characteristic of this relationship is a form of temporary employment relationship which is illegal in accordance with The Turkish Labour Legislation. It does not fit to the standards of temporary employment relationship. As a matter of fact, the same workers are employed outside the scope of the collective bargaining agreements along with the workers of the General Directorate of Highways and in the work places under the authority of the General Directorate of Highways by being provided by the subcontractor companies which are changed nearly every year. In accordance with The Turkish Labour Legislation, in case of such an illegal structure, these workers are accepted as the workers of the main employer from the beginning.

Our union has been planning to organize these subcontract workers with their numbers registered in the concerned Regional Directorate of Labour of the General Directorate of Highways which is considered as the main employer in order to stop this illegal labour structure. The union is also planning to legally prove that these subcontract workers are in reality workers of the General Directorate of Highways.

For this reason, these workers began to join the union on May 17, 2010. Approximately 6,300 workers have joined the union. We still wait for the final decision of the High Court in getting these workers recognized as workers of the Directorate of Highways. Although we estimate it will take quite a long time, we believe that we will be successful.

Süleyman Başterzi, Head of Legal Department / Özgür Doruk, International Department, YOL-IS, Turkey

Fight precarious work in Ukraine

Ukrainian trade unions recently discussed their position and attitude concerning precarious work at a meeting in Kiev on August 18, 2010. The position states: workers and their jobs are not commodities. Therefore we have to against precarious jobs.

We consider contract labour as a purchasing of jobs when employer and his liability to the worker are artificially divided. Most contract labour agencies choose bright and attractive words to hide this phenomenon (such as outsourcing or labour leasing) but usually we can see only fraud and cutting of health and safety costs as well as social security funds.

Interesting but true: very often workers who lose “regular” employment and receive contract labour agency work in their first year earn 10-30 percent more compared to their colleagues. But this advantage disappears already in next second season when workers lose up to 40% of the salary which are taken by agencies

It is scary when labour employment influences safe and healthy working conditions. The question is not only in loss of preferential seniority for those who work in hard and hazardous conditions. Precarious work has limited health and safety insurance and formal employers are paying many times less. Very often our construction workers are insured as office workers to save money.

Even worse when workers are injured or die at a worksite, it is impossible to determine the guilty entity and people cannot be treated properly and families do not receive compensation. No one investigates reasons which would prevent accidents in future so the risks simply continue to exist.

Several industrial enterprises in Eastern Ukraine showed their coordinated actions to attract employees using the same labour agency. During this time, companies started to replace regular working places by contract labour at the main industrial units and plants. At the same time, subsidiary and secondary units were outsourced in the beginning of the 2000's. This problem became known only because workers lost up to 20% of salary which was paid as a fee to the labour agency.

The trade union appealed to state labour inspection and demanded a review of employees' leasing contracts. The contract labour agency violated the law and refused to cooperate not only with union but also with state labour inspection. But how can we talk of a legal situation when there is a possibility to earn 3 million euro per year of illegal profit?

The situation changed only when the regional prosecutor intervened. Inspection showed that the labour agency had no written contracts to provide workers and no employment license. All their workers had temporary contracts with no specific working place at all. Under the terms of temporary working contracts workers had to obey to managers of the main enterprise which hired them from the labour agency. And those managers had a right to assess the quality of workers' “services” and not pay if their quality of work was not satisfactory. Workers could be financially punished by the managers of the general contractor and then had their salaries reduced.

The situation was legalized only by the efforts of the regional prosecutor's office but the example shows employers use those fraudulent services with ease. A special law is needed in order to regulate the services of labour agencies.

Vasyl Andreyev, Chairman of Ukraine Construction Workers Union

The IG BAU strategy to fight precarious employment and undeclared work in Germany

The percentage of precarious jobs of all kind and undeclared work in our sectors has been growing for quite a long time. IG BAU has actively fought against this development from the beginning.

The key elements of our strategy are:

1. Introduce minimum wages on the sectoral level by collective agreements which are then declared generally binding and are enforced by government agencies through fining companies found in breach (Germany has no system of a general legal minimum wage). See to it that many other parts of the collective agreements are declared generally binding and are enforced by the state.
2. Introduce a general contractors' liability for the correct payment of wages, mutual pension and holiday fund and social security contributions and VAT by the subcontractors
3. Lobby for a better legal and administrative framework against fake self-employment, undeclared work and precarious working conditions on the national level and cooperate with the state law enforcement agencies
4. Lobby for the introduction of an effective labour inspectorate
5. Fight for a socially responsible public procurement
6. Build up a coalition to fight against undeclared work with those parts of the employers who suffer from unfair competition by undeclared companies or companies who make use of undeclared work and other illegal methods through subcontracting
7. Organise those workers who had to start precarious work or fake self-employment under pressure from their employers or are exploited as "posted workers" and fight for their rights, e.g. by demanding the wage payment directly from the general contractor
8. Lobby directly and/or via our European and International Federations to stop any political or juridical attempts on the European and international level to water down the possibility of the national government to fight against undeclared work etc. in cross-border situations – fight for better regulation on each level and against the misuse of the "European Freedoms" against workers and union rights
9. Support political initiatives for tax benefits for final consumers when they make use of legal companies instead of undeclared work
10. Create public awareness through the media, public conferences etc. by presenting examples – make the "invisible" visible.
11. Publish information about the workers rights and the minimum conditions and warning about the dangers of undeclared work in many languages and distribute them through multiple channels
12. Go on site, go on site and again go on the site and ask your members on the sites to not look away when other workers are employed under bad conditions.

We have had some success with this strategy in recent years. Many legal changes that were introduced are stemming from our activities. But the other side is not sleeping, either. So this seems to be a permanent task - not a limited campaign – which needs some union staff permanently assigned to that task in order to be successful.

*Frank Schmidt-Hullmann, Head of the International Department, Industriegewerkschaft
Bauen-Agrar-Umwelt (IG BAU), Germany*

Annex

Proposals on the prevention, detection and sanctioning of illicit employment in the construction industry by the European Federation of Building and Wood Workers

I. Background

On various occasions, the European parliament called for increased Community legislative actions to tackle “*undeclared labour and the parallel economy*”¹¹ which, to a different extent from one Member state to another, “*damage the economy, leave workers unprotected, are detrimental to consumers, reduce tax revenue and lead to unfair competition between undertakings*”. In adopting the report, the EP expressed its “*deep concern*” at the extent of undeclared work “*which accounts for as much as 20% or more of GDP in some Member states*”. The European parliament wants Community action to combat undeclared labour to be “*more pro-active and incisive*” in order to ensure that the modernisation of labour law in the EU is not confined to the purely theoretical level, but is transformed into effective, high-quality policies.

Undeclared labour leads to serious social, economic and political distortions:

1. Within the overall EU, billions of euro of social and fiscal revenues are evaded by illicit activities. This either leads to an increase of taxes and social contributions (in order to keep the system sustainable) or a decrease of the necessary public services;
2. The rise of undeclared work gradually undermines the stable system of industrial relations, collective agreements and the role of the social partners to manage their sectors;
3. Undeclared labour is a product of “egoism” and the ability of individuals to do things as they like/please. This individual approach of doing things as “I like” undermines every common sense of political consciousness.

The Lisbon Treaty offers new possibilities to the European legislators to deal with the problem of illicit employment. The EU legislators have been neglecting this serious economic, social and political problem for years, by using soft policies, recommendations and benchmarks instead of issuing real legislation.

Tolerating “illicit employment” has severe structural disrupting consequences on a macro and micro social-economic level. It undermines stable industrial relations, stimulates unfair competition, jeopardizes social security and protection for all, and hampers R&D and innovation and so on. The achievement of the Commission’s 2020 strategy of “growth and jobs” with an innovative economy, smart jobs and new skills for the workforce will never be achieved if Europe continues its ostrich policy towards illicit employment.

Despite various urgent calls from the European parliament, the Commission remained reluctant to the strong signals¹² that the European legislator should take up its responsibilities and deal with the problem of enforcement and compliance of existing legislation.

The problem of “illicit employment” is not purely a national issue. The steep increase of the free movement of persons and services, have lead to a steep increase of “transnational illicit employment”. The lack of convincing EU-instruments is a safe haven for criminals, which has lead to huge frustration of labour and fiscal inspectors who are confronted by transnational fraudulent operators.

¹¹ One key report is “Stepping up the fight against undeclared work”, INI/2008/2035

¹² According the Special Eurobarometer report “undeclared Work in the European Union” (October 2007) “undeclared work is a widespread phenomenon in the European Union. On average, almost a quarter of the population is thought to be involved.”

Various elements of this paper (setting up a permanent EU co-ordination structure for labour inspection, a legislative initiative to deal with subcontracting in the construction industry, EU-criteria to distinguish genuine self-employment from false self-employment, ...) have already been endorsed repeatedly by a broad majority the EP on several occasions

II. General objective of the proposed measures

The primary objectives of the proposed measures are to (1) prevent and (2) improve the detection of illicit employment and (3) to impose sanctions on the use of illicit employment. In this respect, the proposals clearly meet the stated requirement for combating illicit employment by means of preventive and repressive measures.

The proposed measures focus on compliance and enforcement of existing legislation in a transnational context.

In order to maximise the effectiveness of the proposed measures, the EU-instruments should include an obligation to achieve results in terms of prevention, detection and imposition of sanctions.

A key feature of the proposed measures is that they form a coherent whole which should not be viewed in isolation from one another.

The prevention, detection and imposition of sanctions concerning illicit employment relate solely to labour, work, pay, terms and conditions of employment and social security. The aim is to promote fair competition among firms, to collect social security contributions more efficiently and to create a coherent package of measures which is effective and transparent.

The proposals aim at a minimum level of harmonisation and coordination. Therefore the principle of subsidiarity should apply insofar as the proposals do not fall under the exclusive competence of the Community.

The EFBWW considers that some measures should take the form of a Directive; others should be dealt with by a Regulation.

III. Precise elements to be included in future EU-legislation

1. Scope of the measures.
2. EU-Definitions
3. Specific rules to tackle illicit labour providers (gang masters) and labour users
4. Specific rules to tackle "letter box" companies
5. Introducing a European Social Identity Card (SIC)
6. Joint and several liability of the main contractor
7. Specific Preventive measures
8. Strengthened checks, investigation and control
9. Facilitation of complaints
10. Obligation to improve domestic administrative co-operation
11. Specific enforcement and compliance
12. Creating a new EU Social Intelligence and Investigation Agency (EU-SIIA) body to prevent and detect illicit employment

1. Scope of the proposed measures.

The construction industry is one of the sectors most affected by illicit employment. Due to the specificities of “illicit employment” in the construction industry, the proposed legislative measures shall at least apply to activities in the field of building work¹³. Of course, all member states should have the possibility to extend the field of application to other sectors.

2. EU- Definitions

At the moment virtually everyone agrees that there is a clear need for a set of European common definitions. The existence (or non-existence) of various national definitions allows criminals to shop around in Member States and to set up their businesses in the countries where they have little to fear.

Illicit employment is any form of paid or remunerated activities intended to evade all, some or specific legal, regulatory, governmental or collective provisions or payments of a fiscal, social or administrative nature, in accordance with the provisions of the country of employment. Bogus self-employment is explicitly considered as illicit employment.

A labour provider acts as an intermediary of employment and provides labour to businesses and individuals, regardless the employment relation.

Labour users are businesses and individuals, for whom a person, regardless the employment relation provides or delivers services or labour.

An employment relationship is an open-ended full-time contract of employment. Derogation from this definition is only possible in the following cases:

- (1) where the existence of a relationship of self-employment is apparent from the circumstances which demonstrate incontrovertibly that there is no relationship of subordination;
- (2) where it is apparent from the circumstances and elements in writing that the employment relationship is on a part-time or fixed-term basis.

The burden of proof for (1) and (2) needs to be provided by the client or employer. The Member states in the country of employment are solely competent for determining the (additional) criteria and conditions governing the employment relationship as well as the legal (re)classification.

A letterbox-company is an illicit instrument by which a company is set up with the goal to evade fiscal, social or labour obligations and responsibilities. Often the company is nothing more than a (mailing) address without a physical responsible. In relation to the problem of “letter box-companies”. It is important to more precisely define at EU-level what is or is not ‘transnational provision of services’ to prevent companies to manipulate applicable law and standards by the use of letterbox-companies.

3. Specific rules to tackle illicit labour providers (gang masters) and labour users

EU-legislation should lay down strict conditions on employment intermediaries in the labour market (temporary agency work, temporary recruitment, posting, ...). The reasons for this are clear as workers who are hired via intermediaries are significantly more likely to be illicitly engaged.

¹³ A definition of the building industry can be found in the annex of the Posting of Workers Directive 96/71/EC

All Member states shall ensure that all labour providers must clearly demonstrate and prove that they are complying with the law, regulations and collective agreement of the country to which they provide labour. All “business-users” must play their part by using only those labour providers that can demonstrate and prove that they are complying with the law, collective agreements, regulation and relevant practices of the sector.

As such all labour providers must:

- a. join a mandatory register set up by the Member States;
- b. must be regularly audited by an independent body,
- c. provide proof that they are in compliance with the law and in particular working time, minimum wage, adequate pay slips, social security, health and safety, housing allocation, equal protection.

Intermediaries which provide labour in a transnational context should be subject to additional controlling measures by the country of origin. Due to the high risk of social fraud, in case of a cross-border employment, the EFBWW proposes that those intermediaries should prove that they are capable to ensure the payment of the wages, working conditions and social security premiums for each worker they employ abroad.

All labour users must play their part by using only those labour providers that must demonstrate that they are complying with the law in a transparent way.

4. Specific rules to tackle “letter box companies”

In particular special attention should be paid to the so-called “letter box companies”. As such, the proposed EU-legislation should clearly forbid employment of workers via or through a “letter box company”. Criminal and civil sanctions should be taken against the legal and physical persons which are directly or indirectly involved in setting up a “letter box company”.

When a presumption or indication exist that a letter box company plays an active role in the employment of workers, immediate measures should be taken by the national authorities to prevent the non payment of fiscal, social and labour obligations.

The EFBWW proposes that all companies, which intend to employ workers in a foreign company (e.g. through posting or by other means), should at least prove that a minimum percentage (50%) of the workers are employed in the country of origin. “Letter box companies” are legal criminal constructions where a middleman is used as a “puppet” and where the real owners/directors/managers are concealed with the aim to evade any form of responsibility. These companies distinguish themselves from regular companies by the fact that they are created and dissolved very quickly and provide foreign workers as “a herd of cattle”.

5. Introducing an European Social Identity Card (SIC)

The EFBWW proposes that everyone, whatever the law applicable to the employment relationship on a building site, must be in possession of a Social Identity Card, issued by the National Authorities of Social Security of the country of origin. The National Authorities must deliver the Social Identity Card periodically to those whose payment of Social Security and insurances is guaranteed.

Everyone must clearly wear the Social Identity Card when engaged on a building site.

The Social Identity Card shall contain at least the following information:

- (1) Picture of the card owner
- (2) Full name of the card owner
- (3) Date and place of birth
- (4) Unique Identification number (could be a National Security Number)
- (5) Contact information of the issuing National Authorities
- (6) Employment status
- (7) Period of validity of the card

All main contractors are obliged to keep a daily staff register on the work place, which includes at least names of the business, identification of the card owner and working hours of the persons on their building sites. The daily registration and control of the SIC on the building site is the responsibility of the main contractor. The main contractors will only permit access on site to those who are in possession of a valid Social Identity Card.

The registered data must be saved for two years and made available at the site at the request of the national authorities.

In order to avoid falsification the SIC should be authenticated by a stamp (hologram). In addition the information on the SIC should be kept in database, which should be accessible to all contractors. The database is a double check to verify whether the SIC is authentic or not.

Through the SIC every worker knows if his employer has declared him at the national Social security¹⁴. The obligation to wear the SIC visibly on a building site, has a self-regulating factor and substantially facilitates the work of labour inspectors.

6. Joint and several liability of the main contractor

The joint and several liability of the main contractors is one of the key elements to prevent and sanction “illicit employment”. It is a fact that most “illicit employment” in the construction industry takes place on the lowest chains of subcontracting.

The relevance of a legislative community instrument has been dealt with by all European Institutions:

- the European Court of Justice decided in 2004¹⁵ that enforcement through a Community instrument of joint and several liability is admissible;
- the European parliament in 2006¹⁶ and 2009¹⁷ decided that “the Commission should establish a clear-cut Community legal instrument introducing joint and several liability at European level, while respecting the different legal systems in place in the Member states”.

However, at this stage the Commission has neglected to face the reality of “social fraud” in the chain of sub-contracting and the responsibility of the main contractors.

¹⁴ The workers who do not receive an SIC have not been declared by his employer.

¹⁵ Wolff & Müller case, EcJ EG 12.10.2004, case C-60/03, Jur. 2004

¹⁶ EP report on corporate social responsibility: A New partnership, 2006/2133(INI)

¹⁷ EP report on the social responsibility of subcontracting undertakings in production chains, 2008/2249(INI)

The EFBWW proposes that an EU-directive should stipulate that the general contractor(s) are liable for the compliance, by all subcontractors and outsourced workers, with the terms and conditions governing pay, employment and social security. The basic principle here is that general contractors have a general obligation to oversee all subcontractors (within the whole chain of subcontractors) and contractors (in case of outsourcing).

- (1) Supervision of pay and employment conditions must be carried out directly by the general contractor.
- (2) Supervision of social security in the posted worker's country of origin is carried out by means of the Social Identity Card system.

All Member states shall ensure that all services providers manage their whole supply chain responsibility in case of subcontracting and outsourcing by at least the following tools:

- Providing clear information to all suppliers on the applicable qualitative and social standards and incorporate these standards into all contracts;
- Organizing regular on-site visits and interviews with the workers;
- Carrying out checks, investigations, controls and assessments of subcontractors and suppliers on their practices, including independent monitoring;

All Member states shall therefore set up a regulatory system of joint and several liability of general or principal undertakings for all subcontractors and outsourced activities. The liability will at least cover:

- a) maximum work periods and minimum rest periods;
- b) minimum paid annual holidays;
- c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- e) health, safety and hygiene at work;
- f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, and of young people;
- g) equality of treatment between men and women and other provisions on non-discrimination.
- h) social security contributions

The Member States shall ensure that all legal and natural persons shall be held liable for the offence referred to in a) to h) where such offence has been committed by any legal and natural person(s), acting either individually or as part of an organ of the legal person, or who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person.

All Member States shall also ensure that a legal and natural person shall be held liable where the lack of supervision or control, by a legal or natural person referred in the previous paragraph (a to c), has made possible the commission of the criminal offence referred to in a) to h) of that legal or natural person.

7. Specific Preventive measures

All Member States shall organize at least once a year an effective and persuasive awareness campaign aimed at warning about the consequences and risks of illicit employment.

Therefore all Members states shall annually develop an efficient strategy to tackle illicit employment. This strategy will contain at least a detailed assessment of the scale of illicit employment and a strategic operation plan. The strategy shall also evaluate the previous action plan. All relevant sectoral social partners will be consulted during the preparation and evaluation phase. The strategic plan shall be made public and transmitted to the European Commission before 30 August annually.

8. Strengthened checks, investigation and control

All Member States shall ensure that effective and adequate, announced and unannounced, inspections are carried out on their territory to control illicit employment. Such inspections shall primarily take place on site. At least 20 percent of all services providers, shall be controlled annually by the competent authorities in the Member States.

With a view to increasing effectiveness of inspections, Member States shall on the basis of a periodical (minimum once a year) risk assessment increase the number of controls of those activities in which illicit employment are concentrated on their territory.

All Member States shall in respect of the checks, investigations and controls, each year before 1 July, communicate to the Commission the inspections, both in absolute numbers and as a percentage of the employers for each activity, carried out in the previous year as well as their results.

9. Facilitation of complaints

All Member States shall ensure that there are effective mechanisms through which complaints can be lodged against legal and national persons in direct contact with illicit employment, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when foreseen by national legislation.

All Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the described measures are complied with, may engage either on behalf of or in support of an illicitly employed worker, with his/her approval, in any administrative or civil proceeding.

10. Obligation to improve domestic administrative co-operation

The internal coordination within the member states between the different national organisations (social partners) and between the different national administrative bodies (inspection services, organisations responsible for implementation,) needs to be efficient (simple, fast and flexible) on the basis of an obligation to achieve results;

All member states must ensure an enhanced coordination of strategies and operations, including uniform data sharing at both national, regional and local levels with a wide array of relevant social partners included at all special levels.

11. Specific enforcement and compliance

Each Member State shall ensure that illicit employment constitutes a criminal offence when committed intentionally, as defined by national law.

Each of the following infringements shall constitute an aggravating criminal offence when committed intentionally, as defined by national law :

- (a) the infringement continues or is repeated;
- (b) the infringement is in respect of more than three illicitly employed workers;
- (c) the infringement is accompanied by particularly exploitative working conditions;
- (d) the infringement is committed by an employer who uses work or services exacted from a person with the knowledge that the illicitly employed worker is a victim of human trafficking;
- (e) the infringement relates to the illicit employment of a minor;
- (f) the infringement relates to the illicit employment of a foreign worker;
- (g) the infringement relates to illicit employment, which is organised;
- (h) the infringement relates to trading of illicitly employed workers;
- (i) the use of a falsified Social Identity Card.

All Member States shall take the necessary measures to ensure that natural and legal persons who commit the criminal offences are punishable by effective and dissuasive criminal penalties .

All Member States should render public the list of employers who are legal and natural persons and who have been held liable for the above criminal offences.

12. Creating a new EU Social Intelligence and Investigation Agency (EU-SIIA) body to prevent and detect illicit employment

External cross-border coordination between the Member States needs to be coordinated at EU level via a permanent coordination Agency which deals with the cross-border 'fight against criminal entrepreneurship within the field of labour, social security and income'.

The EFBWW is rather sceptic towards an EU policy where the co-operation between labour inspectors is governed through bi-lateral agreements. Firstly it takes a lot of time to agree upon one bilateral agreement and secondly the policy of bilateral co-operation agreements requires the existence of 351 bilateral agreements to cover the whole EU and its 27 Member States. Based on these elements the cross-border co-operation between labour inspectors should be organised through a multi-lateral approach.

Various Member States have already established national Social Intelligence and Investigation Services. At this stage there is NO EU-wide coordination between these services.

The EU-SIIA should be more than an 'investigation factory'. It should not only investigate crimes, but also try to prevent fraud by acting against the criminal networks behind the fraud and try to remove the fraud construction by informing the national ministries and the administrations concerned. By these means, the EU-SIIA is an instrument that does not tolerate social fraud. The EU-SIIA should not operate alone, but in cooperation with national partner organizations such as public prosecutors, labour Inspectorates, police and fiscal police.

Its investigation should be more than just 'catching criminals'. For instance, by working together with partner organizations, through exchanging information concerning fraud patterns and by explicit communication about its results in the media, fraud can be prevented. The Agency and its activities will indeed have preventive effects.

It goes without saying that the investigation process should be as effective as possible. This can be done by taking necessary tactical and operational decisions at EU and national level.

By collecting, processing and analyzing information, more knowledge becomes available of ways to prevent, detect and sanction criminal entrepreneurs. As such better choices can be made, for instance with respect to certain themes/priorities, how to give extra attention and which specific investigative techniques are the most successful in given circumstances.

The EU-SIIA should also inform the national Ministries of Social Affairs of relevant fraud risks through so-called 'Policy-documents'. By means of this information from investigations, policymakers and National ministries are able to adapt their legislation and/or regulations in order to make them more fraud-proof. The EU-SIIA should advice national Ministries on how administrative procedures to prevent, detect and sanction illicit employment can be improved as well.

The agency shall also ensure a proper system of data sharing and matching between all competent national authorities. Labour inspectors –working in the field- often need immediate access to data and information which lies in the hand of foreign Ministries. The current exchange of data and information is extremely inefficient and slow. A clear benefit for criminals.

Resolution on fighting bogus self-employment in construction approved by the BWI Regional Conference on 1 October 2010 in Belgrade

The BWI European Regional Conference notes that there are high levels of precarious forms of employment in various of its member countries. In some countries levels have been high for decades, in others they have been raising in recent years. Conference is aware that many employers have used the recession to casualise employment further. This amounts to an attack on workers' pay and conditions.

Conference understands that one of the most acute forms of casualisation is bogus self-employment, where workers are classified as self-employed but have all the characteristics of an employee. Bogus self-employment denies workers basic employment rights. It reduces or eliminates pension entitlements, sick pay, holiday pay and unemployment benefits. Bogus self-employed workers are also at greater risk of injury as they are likely to work on unorganised sites, and are often not provided with necessary personal protective equipment (PPE). Where they are provided with PPE, the costs for it are often deducted from their pay. Bogus self-employment also reduces levels of training and apprenticeships.

In many countries bogus self-employment comes at the expense of public income due to a lower receipt of tax and social security payments. It solely benefits construction firms who make huge savings from engaging workers in such way. It is known that companies who wish to employ their workers direct are often forced out of business due to their competitors' lower personnel costs.

Conference takes note that many BWI affiliated unions are already working towards reducing the levels of bogus self-employment in their country, aiming to protect their members from this type of exploitation.

Conference calls on BWI to

1. oppose all forms of engagement and tax classifications that create or facilitate false self-employment.
2. continue supporting its affiliates in this *endeavour and* to arrange wider co-ordination and exchange as and where necessary.
3. provide assistance to migrant workers, who are easily trapped in and exploited through bogus self-employed engagements.
4. raise the issue to a higher extent during discussions on new International Framework Agreements (IFAs) and in negotiations on already existing IFAs.
5. name and shame companies who cut costs by using bogus self-employed workers, thereby deteriorating workers' pay and conditions and the state of the industry as a whole.
6. the set up a joint work group with the EFBWW to design a plan of action. This plan of action should include amongst other examples: exchanges on best practices and existing material on bogus self employment; lobby campaigns for a general contractors liability and the use of joined declarations with employers organizations on self employment and bogus self employment, etc.

Joint conclusions and recommendations of the European social partners in the construction industry on self-employment and bogus self-employment

1. The European social partners in the construction industry, EFBWW and FIEC, jointly recognise the complex industrial processes and labour organisation within the construction industry.

The need for high-quality output can be achieved by using a skilled and competent directly employed workforce, together with genuinely self-employed workers.

2. Regardless of the employment status of the worker, EFBWW and FIEC agree that high levels of craftsmanship, social protection and of health and safety protection should be present at all times.

3. EFBWW and FIEC take note of the fact that the situation differs significantly from one Member State to the other in terms of definitions, of relative importance within the sector, of labour market situation and of measures put in place by the public authorities to tackle the problem of bogus self-employment.

I. EFBWW and FIEC recognise the added value of genuine self-employment

4. EFBWW and FIEC take note that within the construction industry many self employed workers are considered to be "sole traders" or "independent contractors" and that their number is growing every year.

5. The main driving force towards genuine self-employment within the construction industry is the desire for entrepreneurship and self-determination, the expectation of a higher net income (by diminishing taxes and social contributions), even at the price of a lesser social protection.

6. EFBWW and FIEC recognise that unfair competition and social fraud are unacceptable in the construction industry and demand that these phenomena are eradicated, using a combination of prevention, information and enforcement.

7. EFBWW and FIEC recognise that genuine self-employment requires specific legal, professional, financial, regulatory and administrative knowledge and skills, as well as commercial risk taking. Allowing persons to be registered as self-employed without this knowledge, skills and acceptance creates unfair competition between genuine self-employed and bogus self-employed, and distorts the construction market.

II. EFBWW and FIEC reject all forms of undeclared labour, bogus self-employment included

8. EFBWW and FIEC take note of the conclusions of the EU-special barometer on undeclared labour in the EU (10.2007) which indicated that self-employed "are overrepresented among the purchasers of undeclared work" and which stressed the damaging effect of bogus self-employment. Combating bogus self-employment should be approached using appropriate EU and national legislative measures and an adequate system of checks, enforcement and appropriate sanctions.

9. EFBWW and FIEC agree that there are very harmful consequences to 'undeclared labour' in the construction sector. Undeclared labour practices, which include bogus self-employment, are illegal and have serious social, economic and health and safety consequences for the entire sector, both at the macro level (e.g. fiscal and social security) and at the level of individual workers and their employers.

III. Defining the distinction between direct employment and self-employment

10. The study undertaken by EFBWW and FIEC highlights the fact that a huge variety of national definitions exist at the moment and that in the current context cross-border abuses of the status of self-employed worker are difficult to assess and prosecute.

11. Furthermore, the same study also shows that several Member States currently use a set of criteria to determine the nature of the employment status. In order to progress toward a level playing field, EFBWW and FIEC consider that a set of common European criteria which would provide guidelines for determining the nature of the employment status, independently of the legitimate wish of the parties, taking into account the realities of the construction industry, would provide a significant improvement of legal clarity to enterprises and workers. Any initiative in this area should take into account the necessity to respect the rules of subsidiarity.

12. EU case-law puts the criterion of "subordination" at the heart of the core distinction between a directly employed and a self-employed worker. As such the case of Janý (C-268/99) of the European Court of Justice considers that self-employment exists where it is established that the activities are being carried out:

- outside any relationship of *subordination* concerning the choice of that activity,
- outside any relationship of *subordination* concerning the choice of working conditions,
- outside any relationship of *subordination* concerning the choice of conditions of remuneration, working under that person's own responsibility,
- working in return for remuneration paid to that person directly and in full.

IV. Member State competence for determining the employment relationship

13. The construction industry is characterised by a high mobility of its workers and the cross-border provisions of services have increased significantly over the last few years.

14. Regular controls show that a substantial number of E101 forms are falsified, or contain errors and are unchecked. Hence many migrant workers are in possession of an incorrect social security form.

Because:

- the E-101 is part of Regulation (EEC) 1408/71, which does not harmonise legislation but coordinates social security,
- the legal classification of an employment status is not linked to an E101 form, but to the existence of an employer/employee relationship between two parties,
- the criteria of self-employment should be apparent from the circumstances and contractual terms,

contrary to the ECJ in the “Banks” case (C-178/97) and in the “Herbosch Kiere” case (C-2/05), EFBWW and FIEC state that the type of employment relationship cannot be determined by the E101 form alone; other relevant circumstances need to be considered as well.

Therefore, EFBWW and FIEC reject the argument of the ECJ (cases C-178/97 and C-2/05) that the information contained in an E101 certificate determines the employment status. The determination of the employment status should be the legal responsibility of the country in which the work is done, which must decide whether subordination/control is apparent from the working circumstances and the contractual terms. EFBWW and FIEC call upon the EU-legislator to clarify this immediately.

V. Intermediaries on the labour market providing bogus self-employed

15. Bogus self-employment often occurs in a trilateral relationship between the contractor, an intermediary, and the worker. The intermediaries can be agencies/gangmasters or contractors. The practices of gangmasters providing a labour force where workers have a bogus self-employed status, are presenting very real problems for the workers they engage, the bona fide contractors, the construction sector and for the whole society.

16. EFBWW and FIEC clearly state that an illegally trading gangmaster should be guilty of committing a criminal offence.

17. EFBWW and FIEC agree that all labour providers must comply with the law. In order to root out the practice of gangmasters providing bogus self-employed workers, all labour providers should:

- join a mandatory register set up by the Member States;
- be regularly audited by an independent body
- provide proof that they are in compliance with the law in particular concerning working time regulations, minimum wage legislation and any legislation that deals with adequate pay slips, social security payments, health and safety, housing and site facilities and non-discrimination issues.

All labour users must play their part by using only those labour providers that can demonstrate that they are complying with the law.

VI. Combating bogus self-employment

18. In order to combat bogus self-employment, a coherent policy is required, comprising a mix of preventive and punitive measures, which provide the protection of workers as well as the competitiveness of the genuine self-employed in the long term.

VII. Preventive measures

A. Need for awareness raising campaigns

19. Given the extent of the phenomenon of bogus self-employment in the construction industry, a long-term and intensive sector-specific awareness raising campaign is needed. For this purpose, five groups need to be targeted:

- workers
- agencies/ gangmasters
- contractors
- clients
- government/ relevant public authorities

The social partners offer their services, in order to ensure that national campaigns are carried out as efficiently as possible.

20. The European social partners recognise the need for organising awareness raising campaigns in the industry in all the Member States. Such campaigns are necessary in order to inform the various concerned parties and to show them the consequences and risks of bogus self-employment.

B. Public procurement

21. In public procurement, the awarding authorities should favour the award of public contracts to the "economically most advantageous tender" (EMAT), rather than to the lowest bidder.

It is always easier for the awarding authority to identify the lowest bidder than the EMAT, but there is a danger that this process will favour bids containing illegal elements and prejudice the interests of honest, law-abiding firms and ultimately their workers.

The European social partners in the construction industry urge the awarding authorities to accept responsibility and to put all provisions in place necessary to prevent the award of contracts to abnormally low bidders.

All tenders should clearly specify that the use of bogus self-employed (and all other forms of illegal employment) in the chain of subcontracting or outsourcing will be severely sanctioned.

C. Need for an improved cooperation between administrations

22. In order to tackle bogus self-employment efficiently, it is absolutely essential to improve cooperation among the national authorities and between authorities in different countries (social security, insurance, tax, investigation and supervisory bodies). This cooperation entails:

- full and transparent reciprocal exchange of information in legislation, regulations and applicable collective agreements;
- practical, personal cooperation between the various public authorities, using electronic means;
- fast and transparent reciprocal exchange of standardised information and data on company registration, social insurance, taxes etc. .

23. The above-mentioned proposal implies that the European, national and regional authorities must have at their disposal sufficient funding and human resources in order to detect, determine and apply sanctions quickly and efficiently to instances of bogus self-employment. It is essential that checks be carried out also outside normal working hours. The various competent authorities and social partners need to bring this about quickly.

D. The need for simplification of administrative procedures for genuine self-employed workers.

24. The EFBWW and FIEC clearly state that the nature of the construction industry requires specific regulation, therefore deregulation is inappropriate. In order not to burden the genuinely self-employed with unnecessary red tape, the social partners recognise the need to simplify the administration of social and tax matters where necessary. Having taxes deducted at source is an indicator of a direct employment relationship. There therefore should be no tax system in which the income taxes of self-employed workers get deducted at source by the contractor.

VIII. Supply chain responsibility

25. EFBWW and FIEC stress that costs cannot be the only factor to be taken into consideration when negotiating business relations with suppliers. It is in a company's interest to take into account a range of supply chain issues including quality, social and fiscal standards and health and safety policies.

26. Legal subcontracting and outsourcing are usual working methods of the construction industry and have to be acknowledged. However, joint EFBWW-FIEC research projects (on posting and undeclared labour) indicate on the one hand the existence of social security fraud by the abusive use of chains of subcontracting and outsourcing methods in most of the Member States and, on the other hand that bogus self-employed workers are involved in domestic and cross-border subcontracting amongst other due to strong price pressure.

27. EFBWW and FIEC agree that companies should manage their supply chain responsibility in case of subcontracting and outsourcing by a combination of approaches and tools, such as:

- providing clear information to all suppliers on the standards which should be incorporated into all commercial contracts;
- organising regular on-site checks;
- carrying out assessments of suppliers and their practices.

IX. Facilitate transparency on construction sites

28. The European social partners recognise that bogus self-employment is not visible. In order to root out malpractices there is a clear need to put sector specific measures in place, in order to facilitate transparency on construction sites. Such measures could take the form of a Social ID-card or, according to national practices, of any other alternative instrument providing a similar level of transparency. Such instruments would facilitate the verification of whether the information on the employment status contained in such an instrument corresponds with the facts.

29. EFBWW and FIEC propose that everyone on a building site must be in possession of a personal recognition document, issued by the competent national authority or by the concerned body. Such a document should at least allow the identification of the person concerned, his/her employment status (directly employed or self-employed) and the contact information of the issuing national authority or the concerned body.

X. Punitive measures to tackle bogus self-employment should be efficient

30. In addition to the broad spectrum of preventive measures, the European social partners in the construction sector recognise that sanctions are needed in order to discourage and punish fraudulent practices. Appropriate measures at all levels should also be provided to ensure the effective application of penalties across borders.

31. In order to facilitate the detection of bogus self-employment, the relevant authorities services, should devise a simple, transparent and efficient approach.

Special attention must be paid to the following aspects:

- making maximum use of modern Information and Communication Technologies, both when exchanging information between national administrations as well as between administrations in different countries
- personal checks on the construction sites concerned.

The large number of building sites, the mobility of the workers and the high percentage of self-employed in the construction industry require an adequate investment in facilities and staffing of inspection services.

32. Where bogus self-employment is identified, action must be taken immediately and efficiently in order to prevent further infraction.

33. Findings by inspection services should be followed by prompt administrative and judicial action. The penalties handed down by the courts must be effective.

XI. General conclusions and recommendations

34. The European social partners expressly reiterate that they have an important (joint) responsibility for identifying ways to recognise genuine self-employment and to prevent and combat bogus self-employment practices in the construction industry.

35. The European, national and regional authorities are urged to develop a set of common European criteria which would provide guidelines for determining the nature of the employment status and for preventing, reducing and combating bogus self-employment. As stakeholders, the social partners should develop a strategy for the practical implementation of these criteria.

36. EFBWW and FIEC shall ensure an adequate follow up of these recommendations and conclusions and will evaluate their implementation and application two years after their adoption.

The original text is the English version. Translations into French, German and Italian are indicative to facilitate the implementation of the joint conclusions and recommendations.

Prague, 5th February 2010

Domenico Pesenti
EFBWW President

Dirk Cordeel
FIEC President

Global Union Principles on Temporary Work Agencies

Policy positions differ in the trade union movement, both at national and international levels concerning the use of temporary work agencies. Views vary from total bans on such agencies, to partial bans, to strict regulation. There are also differences as to on what basis workers should be covered by collective bargaining agreements. However, there are certain views shared by all Global Unions.

The first principle is that the primary form of employment shall be permanent, open-ended and direct employment.

Concerns and challenges

The use of workers provided by temporary work agencies raises concerns and challenges for trade unions. This includes the effect that the use of temporary work agencies has on workers with regular and permanent employment as well as on the conditions under which work is performed by workers engaged through such agencies. The triangular relationship between the worker, the user enterprise and the temporary work agency that supplies the worker can undermine labour and social protection, as well as the effective realisation of the right of all workers to form or join trade unions and to bargain collectively. Agency workers must be specifically guaranteed the right to join a union with a collective bargaining relationship with the user enterprise and be part of a bargaining unit comprising direct employees of the user enterprise and be covered by all collective bargaining agreements applying to the user-enterprise.

Using temporary work agencies as a way of replacing direct and permanent employment

There may be legitimate business reasons for using temporary agency workers, including surges of work and seasonal employment, although such work can also be performed through direct employment. However, not all reasons for using temporary agency work are related to the “fluctuation of business” and it has become common to use temporary agency workers to fill previously permanent and direct positions and to reduce costs. Increasingly, workers provided by agencies are used to fill “core” jobs but are not given any opportunity to transition to direct permanent employment. In a growing number of instances entire workforces are provided by temporary work agencies.

Using temporary work agencies to adversely change employment conditions, avoid social responsibilities and evade laws

Companies often use temporary agencies in order to avoid their legal obligations as an employer. This often leads to abuses such as social dumping and all kinds of discrimination. Work then becomes precarious and workers are denied the employment rights and working conditions to which they would otherwise be entitled. Sometimes these agencies are creations by the company concerned, with the company becoming the sole client.

Workers provided by agencies often receive significantly lower compensation than regular employees performing the same work. Such workers are also often not entitled to the same levels of social protection such as retirement provision, the right to unemployment compensation, sickness benefits or maternity leave. Employers often do not invest in the education or training of agency-supplied workers. Lack of training on health and safety increases the risk of occupational accidents and diseases.

Because ending a commercial contract is often less costly than terminating an employment relationship, the cost of downsizing is less where temporary agency workers are engaged. In

various countries and sectors, the financial crisis resulted in massive job losses for temporary agency workers who are not generally entitled to any of the compensations required to be paid in the case of forced redundancies. This experience heightens the danger that as economies recover, employers will increasingly favour temporary agency work as a means to avoid the costs of terminating regular employees. This would add additional instability and volatility to the economy.

Using temporary work agencies to weaken trade unions, avoid collective bargaining or prevent union organising

Employers are at times deliberately using temporary work agencies to reduce the number of workers covered by collective bargaining at their enterprises or to prevent unorganised sections of the workforce from seeking union representation and exercising their right to bargain with the user enterprise, which effectively controls terms and conditions of employment.

One of the principal reasons why workers do not form or join trade unions is fear of discrimination or dismissal. Temporary agency employment increases this fear because it is easier to circumvent dismissal legislation, which has the effect of, indirectly, protecting the right to organise. Too often, contracts are simply ended. In addition, temporary agency employment reduces the workers' stake in an enterprise, as well as the opportunity to participate in trade unions.

The use of workers supplied by temporary work agencies to replace striking workers or to undermine industrial action at a user enterprise is a serious violation of trade union rights.

Using temporary work agencies as a means of exploitation.

Where temporary work agencies are permitted to operate, they must be properly regulated and monitored in order to prevent abuses of workers such as human trafficking or fee charging in cross border placements. When agencies involved in recruiting workers in one country for work in another country charge fees to the workers concerned instead of to the user enterprise, those abuses lead to extreme exploitation, including bonded or slave labour. All recruitment fees, including visa, transportation and hiring fees must therefore always be borne by the user enterpriser.

Fundamental principles on temporary work agencies

- The primary form of employment shall be permanent, open-ended and direct employment.
- Workers provided by temporary work agencies must be accorded equal treatment and opportunities, including equal pay for equal work, with regular and permanent employees with respect to terms and conditions of employment.
- Workers employed through temporary work agencies must have a recognised and enforceable written contract of employment, specifying their terms and conditions of employment.
- Where agencies are permitted to operate, they must be strictly regulated, including through licensing.
- Temporary work agencies must not be used to eliminate permanent and direct employment relationships, diminish the conditions under which work is performed, avoid collective bargaining relationships with trade unions or effectively make it impossible for an agency worker to join a trade union.
- Employers should consult trade unions before agency workers are used and negotiate over any effects that the use of these agency workers might have on regular employees, on working conditions or on the collective agreement.

- The use of temporary agencies should be restricted to cases of legitimate need. As a minimum, there should be defined limits on the use of agency workers, as well as restrictions on the duration of such employment.
- Workers provided by temporary work agencies must be guaranteed access to information on health and safety regulations in the workplace and be given the same equipment, induction and training as permanent workers.
- Adequate and continuous social protection for agency workers, including social security coverage, must be ensured.
- Temporary work agencies must treat workers without discrimination on the basis of race, ethnic origin, colour, sex, sexual orientation, religion, political opinion, nationality, social origin, or any other form of discrimination, such as age or disability. Appropriate regulatory frameworks (governmental, co-regulation or self-regulation) on private employment agencies should include and promote principles, rights and obligations. These include the minimum standards outlined in Convention No. 111.
- Given the over-representation of women in agency employment and the disparity in wages between permanent and agency workers, particular attention must be given to ensure that the equal pay provisions of Convention No. 100 are applied, including equal pay for work of equal value.
- The ILO should play a much more active role in ensuring that temporary employment agencies respect basic labour standards, as well as collecting data on abuses and best practices and monitoring and analysing trends in employment in the private employment agency sector. This research should be carried out in relation with issues relating to the economic crisis and the Global Jobs Pact. The Global Unions should participate in this work.

Principles of public policy with respect to temporary agency work

In addition to organising temporary agency workers, trade unions should seek to ensure that governments fulfil their responsibilities with respect to temporary agency work based on the following principles of public policy.

- Governments have the responsibility to protect the interests of society in stable employment relationships and to ensure the applicability of labour law, the branch of law developed to protect workers in their unequal relationship with employers.
- Governments can limit or ban the use of temporary work agencies in order to protect these broader societal interests.
- Where agencies are permitted to operate, they must be regulated with strict licensing conditions.
- Governments should consult trade unions on issues related to working and employment conditions of the agency workers, as well as on conditions of use of temporary agency work prior to making changes in the regulatory framework.
- The respective roles, obligations and rights of the workers, the temporary work agency and the enterprise using the worker must be clarified when there is an employment relationship between a temporary work agency and a worker. Governments must take genuine and concrete measures such as changes in legislation to ensure that workers dispatched by temporary work agencies are able to effectively exercise their right to join or form trade unions. This includes the right to join a union with a collective bargaining relationship with the user enterprise and be part of a bargaining unit comprising direct employees of the user enterprise and be covered by all collective bargaining agreements applying to the user-enterprise.
- Governments should strengthen labour inspection in order to effectively apply labour law and regulations to employment via temporary work agencies.

- Governments should provide effective mechanisms to protect all workers from health and safety hazards and ensure health & safety conditions of temporary agency workers are the same as of permanent ones. Governments should introduce sanctions for user-enterprises, public and private, not complying with health & safety requirements.
- Workers supplied by temporary work agencies must never be used to replace striking workers or undermine industrial action.
- Temporary work agencies must not charge any fees to workers for dispatching them.
- The user-enterprise must be held liable for all financial and other obligations with respect to temporary agency workers should the agency fail to honour its responsibilities.

Migrant workers dispatched through temporary agencies face specific problems.

- Migrant workers should receive details of their living and working conditions in a language they understand before leaving their country of origin.
- Governments must take active measures to prevent human trafficking and the exploitation of migrant workers by labour intermediaries, both public and private, and by temporary work agencies.
- Governments should ensure that immigration legislation governing migrant workers recruited through agencies does not conflict with labour laws by imposing restrictions on migrant workers' rights to join trade unions or bargain collectively.
- Workers should not be required to pay deposits, visa, transportation and hiring fees. In the case of agencies dispatching workers to other countries, the agencies should be required to repatriate workers in the event that their employment ends or the user company disappears.
- Workers must not be required to surrender their passports or other travel or identity documents.
- Temporary migrant workers should have full rights to legal redress in the country where they work.

Approved by Council of Global Unions General Secretaries Meeting, 11 June 2010, Geneva

Bibliography

- UE « Proposition de directive du parlement européen et du Conseil concernant l'application du principe de l'égalité de traitement entre hommes et femmes exerçant une activité indépendante et abrogeant la directive 86/613CEE » (03.10.2008)
- Self-employed workers : industrial relations and working conditions (European Foundation for the Improvement of Living and Working Conditions, Dublin (2010)
- Travail indépendant et faux travail indépendant dans le secteur de la construction (FETBB et FIEC, Bruxelles)
- Liability in subcontracting processes in the European construction sector (European Foundation for the Improvement of Living and Working Conditions, Dublin (2008)
- The Evasion Economy – False Self-employment in the UK Construction Industry (UCATT Report by Mark Harvey and Felix Behling)

Glossary

The following terms and definitions are taken from the European industrial relations dictionary <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/index.htm> and other sources

Casualisation

The trend to reduce permanent, full-time employment and use more part-time and temporary employment.

Casual worker

is a worker on a temporary employment contract with generally limited entitlements to benefits and little or no security of employment. The main attribute is the absence of a continuing relationship of any stability with an employer, which could lead to their not being considered 'employees' at all. Casual workers differ from other non-permanent workers in that they may often possess fewer rights and less protection.

Employee

An 'employee' is a party to an employment relationship characterised as a contract of employment (or contract of service) between the employer and employee.

Self-employed person

A self-employed person is defined as an independent worker, who works independently of an employer, in contrast with an employee, who is subordinate to and dependent on an employer. However, insofar as the concept of employee implies an element of economic dependence, in that employees are dependent for subsistence paid by the employer, self-employed workers may be little different, as no less dependent economically on their work for subsistence, though paid by their clients or customers.

Illicit employment

Any form of paid or remunerated activities intended to evade all, some or specific legal, regulatory, governmental or collective provisions or payments of a fiscal, social or administrative nature, in accordance with the provisions of the country of employment. Bogus self-employment is explicitly considered as illicit employment.

Labour only subcontractors

Sub-contractors that are employed as "labour only" work under a contractors supervision and direction, and use their materials, tools, etc. A contractor would normally take on labour only subcontractors to assist with a job that requires extra employees. The sub contractor is paid wages by the main contractor and is classed as an employee.

Bona fide subcontractors

Sub-contractors that are used as "bona-fide" work under their own supervision and direction, and provide their own materials, tools, etc. A contractor would normally take on bona fide subcontractors to perform a particular job within his larger contract that he is not able to do (i.e. a building contractor constructing a new house may call upon a plumbing contractor to do all the plumbing in the new home that he is building). The sub contractor is paid by the main contractor as if it was a normal separate job for a customer.

Temporary agency work

Can be defined as a temporary employment relationship between a temporary work agency, which is the employer, and a worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his or her services (the user company).

Temporary agency worker

is employed by the temporary agency, and is then, via a commercial contract hired out to perform work assignments at the user firm. The said work is performed at the user company under the supervision of the user firm.



BWI • Building and Wood Workers' International
BHI • Bau- und Holzarbeiter Internationale
BTI • Byggnads- och Träarbetar-Internationalen
IBB • Internationale des Travailleurs du Bâtiment et du Bois
ICM • Internacional de Trabajadores de la Construcción y la Madera

54, route des Acacias Tel.: + 41 22 827 37 77
 CH-1227 Carouge / GE Fax: + 41 22 827 37 70
 Switzerland www.bwint.org