Fake Self-employment in the European Union

- A comparison between the Netherlands and the United Kingdom -

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List of Abbreviations

CIS	Construction Industry Scheme
DER	Declaration of Employment Relationship
ECJ	European Court of Justice
EU	European Union
GBP	Great Britain Pound
HMRC	Her Majesty's Revenue and Customs
ILO	International Labour Organisation
SEA	Single European Act
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
UK	United Kingdom

other abbreviations used incidentally are explained throughout the text

1. Introduction

1.1 Introduction to the problem

According to a classical distinction the labour market is divided in two main groups: the employed and the self-employed. The labour market we talk about in this thesis concerns remunerated actors, not volunteers.

According to case law, what sets the self-employed apart from workers is the lack of a link of authority [1], the self-employed are independent. This classical distinction is fundamental; employees work under subordination of an employer who directs and controls the actual activities. Self-employed persons act independently meaning that they are their own 'boss'. They typically perform their services for multiple clients. Self-employment is positively looked upon as a driver of entrepreneurship and job creation[2]. There are obvious personal and macro-economic reasons for the promotion of self-employment. Personal reasons for self-employment include the preference for autonomy, development and creativity[3]. Both employed and self-employed are highly valuable, they are genuine actors on the labour market. The distinction is here to stay.

Labour markets, however, constantly evolve. The classical distinction is under pressure, it becomes more and more difficult to apply it in practice. Examples may illustrate this development. In the information society, creative workers are at the forefront. These workers self-evidently enjoy creative freedom. Self-employed workers form online networks in which they collaborate when providing their services[4]. Work is increasingly performed across borders. New technologies allow jobs to be outsourced to other countries, control over how and when these jobs are performed is hardly possible.

Despite changing labour relations, the distinction between workers and self-employed remains relevant. Employees enjoy the full protection of labour law, which may include minimum wages,

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[1] C-151/04 Judgment of 15/12/2005, Nadin and Nadin-Lux

[2] See for example G. Picot, M. Manser and Z. Lin, *The role of self-employment in job creation in Canada and the United States*, Canada: U.S. Bureau for Labor Statistics and Statistics 1998 and European Employment Observatory Review, *Self-employment in Europe 2010*, European Commission 2010, p. 5 and A. Thurik, M. Carree, A. van Stel and D. Audretsch, *Does self-employment reduce unemployment?* in Journal of Business Venturing 23 (2008), p. 683

[3] S. Bekker, R. Dekker and M. Posthumus, *Self-employed in the Netherlands: In Need for More Securities?* in Labour Law between Change and Traditions (R. Blanpain and F. Hendrickx eds.), Kluwer Law International 2011, p. 194

[4] T. Friedman and M. Mandelbaum, *That used to be US, what went wrong with America – and how it can come back*, London: Little Brown 2011, p. 83

working time legislation, protection in case of redundancy and typically provisions regarding social security. This is hardly the case for the self-employed. Self-employed persons are in principle not covered by labour law and they are socially hardly (or not at all) protected.

For employers, it is much cheaper to hire self-employed persons to perform work than it is to hire employees. These lower costs are an incentive for enterprises to make a shift to hiring more and more self-employed workers. In practice, it happens that employees are fired and then re-hired as self-employed performing the exact same activities. In the current age of super-capitalism[5], in which maximum profit and low prices dictate the market, a move towards fake self-employment is easily made. Fake self-employed are those who are mistakenly treated as if they are self-employed in a situation which corresponds with one of employment.

This thesis is about the prevention of fake self-employment, a problem not restricted by national borders. In an open market such as the European Union, fake self-employment has strong cross-border effects. In the EU, the self-employed are free to provide their services in all member states. Typically, self-employed workers from countries in eastern Europe move west and outcompete workers in their host countries. Free movement of services facilitates cross-border work while making it hard to rebuff a persons claim to self-employment, even in cases of serious doubt. It is clear that something needs to be done.

1.2 Research question and thesis structure

A problem such as fake self-employment touches upon a wide range of subjects. European Union competences and member state autonomy are at stake here. The main question which this thesis seeks to answer is:

'how should fake self-employment be battled in the context of the European Union?'

The problem of fake self-employment should be looked upon in the right legal context, problems of fake self-employment are (partly) a result of global trends. The remainder of this chapter provides the reader with a global context which should primarily be read as an introduction for subsequent chapters. We will examine the problem more closely at EU level in chapter 2. Because self-employment is established at national level we will examine the current legal framework of the Netherlands and the United Kingdom in chapter 3 and 4 respectively. In addition to that, initiatives aimed at preventing fake self-employment are presented. The final chapter is devoted to

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[5] R. Reich, *Supercapitalism, the battle of democracy in an age of big business*, London: Icon Books 2007, p. 9

comparing these finding. Finally, I will put forward proposals for the effective battle against fake self-employment in the European Union.

1.3 Fake self-employment in a global context; the International Labour Organization

In order to grasp the problem of fake self-employment it is important to look into the topic from a global point of view. The ILO is the international organization responsible for drawing up and overseeing international labour standards, it does so by concluding conventions and recommendations, among other policy documents[6]. We will find that fake self-employment has been dealt with in a number of discussions and policy documents, most of the time indirectly. Direct references to the term 'fake self-employment' are, however, hard to find.

1.3.1 Global trends attributing to fake self-employment

There are global trends that are pushing for the recourse to fake self-employment; let us try to identify these. Statistics on self-employment at a global level are, however, of no use. The notion is interpreted too varied for statistics to carry true meaning when assessing fake self-employment. For example, both poor yet independent street vendors of the Indian informal economy and high-skilled South-Korean IT specialists could rightfully be classified as self-employed. It follows that statistics, indicating an increase (or decrease) of self-employment, could be explained by a number of reasons such as the growth of the Indian formal economy or a recourse to fake self-employment due to higher social security contribution for South Korean employees. This example shows that an increase of fake self-employment is not necessary related to an increase in global self-employment.

Still, it is possible to identify general trends that lead to problems involving fake self-employment. The ILO tripartite Meeting of Experts on Workers in Situations Needing Protection notes that there is a transformation in the nature of work at a global level, the employment relationship gets disguised and legal denominations do not conform to reality[7]. Among the growth of private agency work and cross-border posting of workers, this includes the problem of fake self-employment. Globally, one can observe significant changes in the structure of employment[8]. Several trends can be found attributing to this fact.

A process with a tremendous impact on the employment relationship is globalisation. The ILO World Commission on the Social Dimension of Globalization lists key characteristics of globalisation as 'the liberalisation of international trade, the expansion of foreign direct investment

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[6] http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (as of March 8th 2013)

[7] ILO: Report of the Meeting of Experts on Workers in Situations Needing Protection (the employment relationship: Scope), basic technical document, Geneva, 2000, para. 107

[8] ILO: Report V(1), the employment relationship, fifth item on the agenda, International Labour Conference, 95th Session, Geneva, 2006, p. 8

and the emerge of massive cross-border financial flows'[9]. An effect of globalisation is a shift of power from social partners, which are more or less equal, to capital. Enterprises, driven by consumers and investors strive to cut down the costs of labour in all sorts of manners. Among these techniques is the firing of employees and subsequent rehiring of the same workers as self-employed. The costs of such contractual relations as opposed to traditional labour relations are significantly lower. If a company refuses to do so it will lose the battle to competitors that are willing to follow the demands of the market[10]. If a state provides its workforce with labour standards found to be too costly enterprises will move on to the next country, creating competition based on labour standards among nations.

Closely related to and facilitating globalisation is technological change. The emerge of the information society has had a huge impact on the employment relationship. One can think of employees working at home, connected to their company through their laptop. Work can often be done online; there are no boundaries for information. Whatever an employee can do in the next city can also be done at the other side of the globe. There are networks of self-employed professionals operating at global level who never meet each other in real life, a new and developing growth of work relations called network economics[11]. Self-employment becomes a more obvious choice when work is done in such high-tech ways.

To be able to compete, enterprises find themselves in need of constant change, a process in which workers are seen as any other asset. More emphasis is put on human resource management, workers are not employed on a permanent basis but are employed in a fixed-term, on-call or temporary scheme. Self-employed get contracted to do work which used to be done by employees. As soon as demand goes up or down an enterprise adapt itself to this trend. Slimming down its workforce is a well-known strategy in doing so, contracting self-employed workers is another common method. This is especially apparent in times of crisis[12]. This need for hyper-flexibility in a global market causes fake self-employment.

Another factor attributing to fake self-employment is the growth of the service sector. Work is moving away from factories and direct control over the workers and their jobs is harder to find. Services can often be performed from a distance, often electronically. Traditional jobs are

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[9] ILO: A fair globalization: Creating opportunities for all, report of the World Commission on the Social Dimension of Globalization, Geneva, 2004, p. 24

[10] R. Reich, *Supercapitalism, the battle of democracy in an age of big business*, London: Icon Books 2007, p. 88

[11] A. Hyde, *What is Labour Law?* in Boundaries and Frontiers of Labour Law (Davidov and Langille eds.), Oxford: Hart Publishing 2006, p. 37

[12] ILO: Report V(1), the employment relationship, fifth item on the agenda, International Labour Conference, 95th Session, Geneva, 2006, p. 9

disappearing in this process. Creative workers performing services can no longer be working under instructions of their supervisors, their work is by its very nature done independently. A wider variety of employment contracts becomes possible and self-employment becomes a more obvious choice. With this comes the danger of fake self-employment, just because these workers can perform their work independently does not mean they are not otherwise dependent on their job and are not in need of the protective function of the employment relationship. Moreover, just because the content of creative work is hard to control does not take away that basic aspects of the employment relationship can be still be controlled. Important issues such as working hours and wages are just as important for the service sector as they are in the factories.

These trends clearly show that fundamental change in employment relationships is not confined to a single country, the world of work is indeed globalising and is strongly influenced by new technologies. Work is not limited by borders and neither are enterprises. Fake self-employment is a prime example of a conversion of the employment relationship due to these trends.

1.3.2 The evolution of relevant discussions at the International Labour Organisation

The ILO does not address 'fake self-employment' specifically, however, it has dealt with the topic in discussions on 'contract labour' and, later on, in the broad context of the 'employment relationship'. The annual International Labour Conference discussed 'contract labour' in 1997 and 1998[13]. The intention of the ILO was to protect certain categories of unprotected workers through the adoption of a Convention and a Recommendation. Talks on contract labour focused on dealing with workers that are economically dependent on their contract party. The ILO discussed a possible mid-category of workers in between subordinate employees and self-employed, 'contract labour', 'dependent independents' or 'independent dependents' are terms used to described these workers[14]. However, the adoption of both documents failed. Instead, the Conference passed a resolution in which it invited the Governing Body of the ILO to place these issues on the agenda of a future session of the Conference in case the adoption of policy documents would prove to be desired[15]. Based on these instructions a tripartite Meeting of Experts on Workers in Situations Needing Protection was established in 2000. In its common statement this committee found that 'the global phenomenon of transformation in the nature of work had resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to be protected by labour legislation) did not accord with the realities of working

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[13] ILO: Record of Proceedings, International Labour Conference, 85th Session, Geneva, 1997, 20th Sitting 18 June, Provisional Record No. 18; and Record of Proceedings, International Labour Conference, 86th Session, Geneva, 1998, Provisional Records No. 16 and No. 21

[14] C. Engels, *Subordinate Employees or Self-employed Workers* in Comparative Labour Law and Industrial Relations in Industrialized Market Economies (R. Blanpain ed.), Kluwer 2010, p. 357

[15] ILO: Report V(1), the employment relationship, fifth item on the agenda, International Labour Conference, 95th Session, Geneva, 2006, p. 4

relationships. This had resulted in a tendency whereby workers who should be protected by labour and employment law were not receiving that protection in fact or in law'[16]. This quote shows that the ILO chooses to deal with this problem in the context of the 'employment relationship' instead of focussing on more limited issues such as 'contract labour'. The Committee of Experts found the adoption of instruments by the Conference necessary to warrant appropriate protection. With these conclusions discussions abandoned the notion of 'contract labour' and focused on the 'employment relationship' instead.

The findings of the Committee of Experts and research undertaken by various member states have prompted the International Labour Conference to discuss the employment relationship during its 2003 session. During these discussions the Conference noted that the adoption of an international response to this problem was needed, a recommendation was considered to be an appropriate response. This document should focus on 'disguised employment relationships' among other things, a clear reference to fake self-employment. At the same time a recommendation would provide guidance without setting universal standards for the substance of the employment relationship. Economic, social and legal traditions are thought to be too divergent to deal with the topic in too much detail[17].The outcome of these discussions was the adoption of Recommendation No. 198 on the Employment Relationship in June 2006[18]. Along with this document a Resolution concerning the Employment Relationship was passed as a follow-up to the Recommendation[19].

1.3.3 The Employment Relationship Recommendation

Recommendation No. 198 deals directly with the employment relationship. In the preamble it is stated that 'there is protection offered by national laws (…) which are linked to the existence of an employment relationship'. Importantly for the European Union, in the framework of transnational provision of services, states the preamble, it is important to establish who is a worker in an employment relationship, what rights the worker has, and who the employer is. Uncertainty needs to be addressed to guarantee fair competition and effective protection of workers.

The Recommendation is split into five parts of which the second is headed 'determination of the existence of an employment relationship'. Paragraph 9 states that this determination should be guided primarily by the facts relating to the performance of work and remuneration, not by how the relationship is characterised in the arrangement. In practise this means that the will of the parties is limited, just because a working relationship is labelled as one between contracting parties other

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[16] ILO: Report of the Meeting of Experts on Workers in Situations Needing Protection, doc. MEWNP/2000/4(Rev.), Geneva, 2000, par. 107

[17] ILO: Report V(1), the employment relationship, fifth item on the agenda, International Labour Conference, 95th Session, Geneva, 2006, p. 6

[18] ILO: R198 Employment Relationship Recommendation, International Labour Conference, Geneva, 2006

[19] ILO: Resolution concerning the employment relationship, International Labour Conference, Geneva, 2006

than employer and employee does not mean that this is indeed the case. This is an important principle when battling fake self-employment, without it the parties could easily set aside labour law. The ILO leaves it up to member states to promote clear methods implementing this principle.

In paragraph 11 possible methods for determining the existence of the employment relationship are given. It is indicated that there is (a) the possibility of a broad range of means for determining the existence of an employment relationship. Next, (b) the possibility of a legal presumption of an existing employment relationship where one or more relevant indicators is present. Finally, there is (c) the possibility to classify workers with certain characteristics as either self-employed or employed. Legal presumptions and statutory classification are strong tools battling fake self-employment, the employment relationship becomes a compulsory classification. The downside of these methods is lack of flexibility, often highly regarded at state and individual level.

Paragraph 13 gives possible indicators of the existence of an employment relationship. The indicators are made up out of two categories. The first category (a) concerns instances in which the work is 'carried out according to the instructions and under the control of the enterprise, involves the integration of the worker in the organisation of the enterprise, is performed solely or mainly for the benefit of another person, must be carried out personally by the worker, is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work, is of a particular duration and has a certain continuity, requires the worker's availability or involves the provision of tools, materials and machinery by the party requesting the work'. These indicators concern the conditions of work itself and the relationship between the parties involved. The second category (b) focuses more on economic factors, examples of factors indicating the existence of an employment relationship are the 'periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker's sole or principal source of income, provisions of payment in kind, such as food lodging or transport, recognition of entitlements such as weekly rest and annual holidays, payment by the party requesting the work for travel undertaken by the worker in order to carry out the work or absence of financial risk for the worker'. The ILO has issued an annotated guide to the recommendation which provides a more detailed description and examples of all these criteria[20]. The indicators point to the existence of an employment relationship, thereby ruling out self-employment.

In paragraph 4 (b) it is explicitly stated that 'national policy should at least include measures to combat disguised employment relationships'. A disguised employment relationship is described as a situation in which 'the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee'. Paragraph 4, in indisputable terms, establishes

[20] ILO: The Employment Relationship: an annotated guide to ILO Recommendation No. 198, Geneva, 2007, p. 27-45

state responsibility regarding the establishment of the employment relationship and the battle of fake self-employment.

Paragraph 7 is of particular importance in the context of the European Union. It deals with transnational movement of workers. The ILO recommends that member states may collaborate were appropriate, ‘so as to provide effective protection to and prevent abuses of migrant workers’ in situations in which the employment status is ambiguous. In case ‘workers are recruited in one country for work in another’ bilateral agreements are suggested to prevent adverse effects. The particular problems of fake self-employment in the European Union seem to be directly affected by paragraph 7. Fraudulent practices are apparent in the EU, as we shall see in the next chapter.

With regard to ensuring respect for and the implementation of national policy paragraph 15 mentions the role of labour inspection services in collaboration with social security administration and tax authorities. Close collaboration between these institutions is regarded necessary. Not many words are devoted to this institutional framework, perhaps because their role and competence varies from country to country. Still, it is important to stress the role of labour inspection authorities in the battle of fake self-employment.

1.3.4 The impact of the International Labour Organisation on fake self-employment

A recommendation is only meant to recommend, it is not binding. The document’s wording is broad. Substantial provisions regarding the existence of the employment relationship, found in paragraph 13, are indicators that are often used at national level. The document was issued in 2006 and is mostly a reflection of established national practice and experience. ‘Best practices’ are presented in the Recommendation. This does not mean that the Recommendation bears no influence, it reaffirms the importance of the personal scope of the employment relationship. It acknowledges the principle that the facts, not legal classification nor the will of the parties, are leading. Governments, when drawing up or changing policy can look at the document as an inspiration and a confirmation of what is acceptable. The ILO recommendation stresses the importance of a clear policy regarding employment status at a global level. In the context of action in cross-border context, such as the European Union, its value is also significant because it affirms that such problems are not contained to a single country.

2. Fake self-employment in the European Union

2.1 Introduction

This chapter deals with the European Union's answer to fake self-employment. After identifying two main causes of fake self-employment at EU level, this chapter is limited to the fields of policy that primarily affect fake self-employment. First of all, the 'worker'-concept developed in European labour law and free movement principles is reviewed in paragraph 2.2 and 2.3 respectively. We will see that even though the competence of the Union in labour law is rather limited, free movement principles do have an impact upon the issue. Next, European Union social security coordination is examined in paragraph 2.4, fake self-employment in cross-border situations is for a large part facilitated by social security coordination. Finally, we draw our conclusions regarding the interplay of fake self-employment and EU law in paragraph 2.5.

2.1.1 Growth of self-employment due to lower costs

The costs associated with workers and self-employed highly differ. Hiring a self-employed person instead of an employee is cheaper. The price of hiring self-employed is unrelated to minimum wage or other wage-setting methods such as collective agreements. In the extreme case they make less than the minimum wage. In addition to that, no social security contributions have to be paid when hiring self-employed. Also, the law obliges employers to live up to many expensive standards for employees such as high compensation in case of dismissal, higher wages based on seniority, holiday payments and a right to be paid even if an employee is sick and incapable of work[21]. Hiring self-employed is cheaper, their price is set by the market. An UK report estimated that the true cost difference ranges between 35% and 50%[22]. In the European Union this difference is magnified by differences in the cost of living between Member States. For example, Danish consumer prices were found to be 42% higher than the average in the 27 Member States, Bulgaria was the cheapest country with prices 49% below the average[23]. Related to these price differences, labour is also cheaper in certain Member States. In the European Union, self-employed from a poor country can earn their living for significantly less, causing a lower price of labour. Enterprises rely on the services of these self-employed primarily to reduce costs and to

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[21] For example, Article 7:629 of the Dutch Civil Code obliges employers to keep paying wages for 2 years when an employee gets sick, a period that might be extended up to 3 years if the employer does not live up to his reintegration standards.

[22] Y. Jorens, *Self-employment and bogus self-employment in The European Construction Industry, a comparative study of 11 Member States*, EFBWW and FIEC 2010, p. 29

[23] http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Comparative_price_levels_of_consumer_goods_and_services (as of March 8th 2013)

avoid the application of many legal provisions[24]. In the European Union this trend is augmented by the internal market.

2.1.2 Growth of self-employment due to transitory provisions for acceding Member States

A second cause of a recourse to self-employment are the transitory provisions regarding the free movement of workers for new member states. The free movement of workers provided by title IV chapter 1 TFEU is limited in specific ways for acceding Member States. At present, this is the case for Romania and Bulgaria ever since their accession in 2007. In contrast, the free movement of services, found in title IV chapter 3, was fully applicable from the start[25]. These restrictions are explicitly related to the right to work in another Member State as an employed person, they can last for up to seven year[26]. Access to labour markets of 'old' Member States is restricted for workers, causing recourse to self-employment in order to circumvent these measures. The most common restriction is an obligatory work permit for workers from these countries. The accession treaty gives country specific details in annex VI and annex VII regarding Bulgaria and Romania respectively[27]. Self-employment is a now a lucrative way to circumvent these transitory provisions. Enterprises, in their search for cheap labour, know very well that workers in the acceding states are willing to work for extremely low wages. They will find ways to circumvent the restrictive measures and choose to hire the self-employed instead. Being self-employed, even if this self-employment is fake, is now a way to circumvent these restrictions. The unequal treatment of workers and self-employed for acceding Member States is not desirable, especially considering the relative ease with which self-employment is often established. Fake self-employment is an effect of unequal treatment of workers and self-employed.

2.2 Fake self-employment and the 'worker'-concept

2.2.1 The European Union's competence in labour law

The EU only has those competences transferred to it by its member states, how these competences should be executed is entailed by the treaties. The Treaty on the Functioning of the European Union does not provide a definition of 'worker' nor does it define 'self-employment'. When assessing the competence to define the personal scope of the employment relationship it is logical to first look into the Union's competence in labour law and social policy. According to the

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[24] Y. Jorens, *Self-employment and bogus self-employment in The European Construction Industry, a comparative study of 11 Member States*, EFBWW and FIEC 2010, p. 6

[25] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 41

[26] http://ec.europa.eu/social/main.jsp?catId=466&langId=en (as of March 8th 2013)

[27] Treaty between (...) Members of the European Union and the Republic of Bulgaria and Romania concerning the accession of the republic of Bulgaria and Romania to the European Union concluded june 21st 2005

TFEU the EU has no competence in the core of labour law, e.g. pay, the right to association and the right to strike; this is explicitly stated in Article 153(5) TFEU. Directives affecting social policy either do not contain a legal definition[28] or leave it to Member States to set appropriate requirements[29]. The ECJ confirmed this in the Mikkelsen case. Even though the Commission argued that a European definition was indispensable the court stated that the term should essentially be defined by the Member States[30]. There is one exception, the ECJ has found the 'worker'-concept in Article 157 TFEU to be an autonomous term[31]. This article contains the principle of equal pay for male and female workers for equal work or work of equal value. This interpretation is almost completely based on the case law relating to the free movement of workers[32], discussed in paragraph 2.2.3. Changing the Union's competence in these matters would require amending the treaty for with unanimity is required, this shall prove to be impossible because of the political sensitivity of social issues[33].

2.2.2 The Internal Market

Before exploring the 'worker'-concept in the context of free movement a short introduction to the internal market is in place. The Treaty of Rome, which founded a predecessor of the European Union in 1957, already stated that an essential task of the community was to establish a common market[34]. Up to this date one of the primary tasks of the European Union is the establishment of, what is now called, the internal market. The internal market comprises an area without internal frontiers in which the free movement of goods, capital, services and persons is ensured[35]. For many years no significant progress was made. In 1986 the Single European Act was issued, based on the measures deemed necessary to achieve the objectives originally set out in a White Paper on Completing the Internal Market[36]. The purpose was to have the internal market completed by

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[28] See, for example, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

[29] See, for example, Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC

[30] C-105/84 Judgment of 11/07/1985, Foreningen af Arbejdsledere i Danmark / Danmols Inventar

[31] C-256/01 Judgment of 13/01/2004, Allonby

[32] Y. Jorens, *Self-employment and bogus self-employment in The European Construction Industry, a comparative study of 11 Member States*, EFBWW and FIEC 2010, p. 12

[33] R. Blanpain, *The European Social Model: Myth or Reality?* in European Labour Law Journal (F. Hendrix ed.), Intersentia 2011 – 2, p. 146

[34] Article 2 Treaty of Rome, march 25th 1957

[35] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 3

[36] C. Barnard, *The Substantive Law of the EU*, Oxford: OUP Oxford 2010, p. 11

the end of 1992[37]. The competence for enacting measures for the approximation of Member States laws, which have as their purpose the establishment or functioning of this single market, can now be found in article 114 of the TFEU.

According to the treaty, workers in an employment relationship benefit from the provisions on free movement of workers (title IV, chapter 1). A self-employed person is a provider of services, not a worker. As such, the self-employed benefit from the provisions on free movement of services (title IV, chapter 3). The right of establishment (title IV, chapter 2) can also be invoked by self-employed persons but keeping in mind the specific problems of fake self-employment this thesis is limited to the free movement of services. Cases involving the right to establishment are in principle limited to a single member state and do not cause the specific cross-border fraud dealt with here. Because different provisions apply to workers and self-employed the competence to determine the personal scope of the employment relationship becomes an issue. The European Union provides some guidance in these issues.

2.2.3 The 'worker'-concept in free movement principles

The existence of an employment relationship is key to applying the provisions, rules and principles of labour law[38]. In the European Union the 'worker'-concept is central in these matters. The ECJ accepts no in-between category, one is either a worker or self-employed, both concepts exclude each other[39]. We must examine to what extend the European Union has defined these concepts.

Despite limited competence in labour issues, we shall see that the EU has nonetheless found its way into this central issue of labour law. The internal market and its free movement principles have a strong impact on labour issues at national level. In an early judgement the ECJ decided that, in order to guarantee a uniform application of law, the concept of 'worker' cannot be defined by the Member States[40]. This 'worker'-concept indicates subordinate employment, it refers to employees. Here, the EU has found it necessary to come up with a definition. According to the Lawrie-Blum case a worker is 'a person who for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration'[41]. This definition has been upheld by the court in more recent cases[42]. The ECJ found that a union-wide definition is

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[37] Article 13 Single European Act

[38] B. Waas, *The Legal Definition of the Employment Relationship* in European Labour Law Journal (F. Hendrix ed.), Intersentia 2010 – 1, p. 45

[39] C-55/94 Judgment of 30/11/1995, Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano

[40] C-75/63 Judgment of 19/03/1964, Unger / Bedrijfsvereniging voor Detailhandel en Ambachten

[41] C-66/85 Judgment of 03/07/1986, Lawrie-Blum / Land Baden-Württemberg

[42] For example see Joined cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900

necessary in order for the right to free movement to be effective. To facilitate free movement for workers, the ECJ argues, Member States cannot define the concept divergently as this could have the effect of restricting access to their labour market. This definition was given in the context of the free movement of workers, the effect, however, is not limited to workers. Because the 'worker'-concept and the classification as self-employed exclude each other[43], the definition is in effect a negative indication of self-employment; if the elements of the Lawrie-Blum definition are present one is a worker and thus not self-employed.

The provisions of national law are dependent on the classification as worker or self-employed. At EU level, the classification also entails the applicability of either free movement of workers or free movement of services. The protective function of national labour law can, in certain cases, be regarded as restricting free movement. Self-employed persons should thus be regarded for what they really are and not as workers, if they would be misclassified as workers their freedom to provide services would be restricted. An example of this type of reasoning can be found in the Ypourgos Ergasias-case, the mandatory legal form of an employment contract for tour guides constituted a restriction of the free movement of services for tour guides from other Member States[44]. In this case the classification as employee could not be left to the Member State. It is argued that, as such, EU free movement law constitutes the upper limit for the personal scope of national employment law[45].

It is not only national law which typically provides workers with more protection than the self-employed. The treaty itself has the same effect. Article 45(2) TFEU mentions the abolition of discrimination based on nationality 'as regards employment, remuneration and other conditions of work and employment'. This protection is specifically accorded to workers. Article 56 TFEU regarding self-employed persons does not explicitly mention such conditions. It is for the parties to agree on said terms. Workers are indeed protected better, the personal scope of the employment relationship thus affects the exact scope of non-discrimination provisions. We can observe a difference in treatment of workers and self-employed not only at national level but also at European Union level.

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[43] C-55/94 Judgment of 30/11/1995, Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano

[44] C-398/95 Judgment of 05/06/1997, Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion / Ypourgos Ergasias

[45] T. van Peijpe, *EU limits for the personal scope of employment law* in European Labour Law Journal (F. Hendrix ed.), Intersentia 2012 – 1, p. 42

2.3 Fake self-employment in the context of free movement principles

2.3.1 The competence to define the personal scope of the employment relationship

In order to battle fake self-employment it is necessary to clearly establish the competence to define personal scope of the employment relationship. The ECJ created a contradictory division of competence. On the one hand it ruled that it is for national courts to decide whether a person is a worker or self-employed[46]. On the other hand there is a need for a uniform application of European Union law, causing the ECJ to come up with a definition of its own. Basically, it is a national competence to define the personal scope of the employment relationship but when doing so there are EU standards to keep in mind in order to facilitate free movement. A national decision can be overruled by referring to these European standards. This competence is primarily located at national level, the EU has set limits by providing a definition which we discuss in the next paragraph. As soon as competence is clearly established, this institution has the ability to counter fake self-employment. The contradictory division of competence complicates matters. The guidance given in the form of a definition is largely aimed at facilitating free movement and does not carry enough weight to prevent fake self-employment as we shall see. Competence should be established more clearly.

2.3.2 The definition of the 'worker'-concept

Despite the limited competence of the European Union in 'core' labour issues, the ECJ has defined the 'worker'-concept**.** It has chosen not to formulate a definition of 'self-employment' but instead focused on a definition of 'worker', which in turn rules out self-employment. The definition constitutes a negative definition of self-employment. A misclassification as a worker could possibly restrict free movement, especially compared to a classification as self-employed. Taking this approach, Article 45 TFEU has transformed from an instrument of worker protection into an instrument for the guarantee of the free market[47]. Fake self-employment is effectively tackled if the employment relationship is well-defined. Ideally, a situation of fake self-employed fits the definition of the employment relationship and the classification as self-employed is gotten rid of. By defining the 'worker'-concept in Lawrie-Blum the ECJ has given four constitutive elements: (1) the performance of services, (2) a certain timeframe, (3) the performance of work under the direction of another person and (4) the necessity of remuneration. According to the ECJ, subordination, the third requirement, is most important when distinguishing workers from self-employed[48]. The ECJ confirms that 'any activity which a person performs outside a relationship of subordination must be

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[46] C-431/01 Judgment of 12/09/2001, Ninni-Orasche v. Bundesminister fur Wissenschaft, Verkehr und Kunst

[47] T. van Peijpe, *EU limits for the personal scope of employment law* in European Labour Law Journal (F. Hendrix ed.), Intersentia 2012 – 1, p. 45

[48] C-107/94 Judgment of 27/06/1996, Asscher / Staatssecretaris van Financiën, and C-151/04 and C-152/04 Judgment of 15/12/2005, Nadin and Nadin-Lux

classified as an activity in a self-employed capacity'[49]. Only national courts are competent to decide whether a person is a worker or a self-employed person. When doing so they must adhere to the Lawrie-Blum definition, base themselves on objective criteria and an overall assessment of all the circumstances of the case relating to both the nature of the activities concerned and the nature of the employment relationship at stake[50]. Not only is competence not established clearly, the definition is too vague to effectively battle fake self-employment. An ideal approach should not be exclusively focussed on facilitating free movement but should also promote adequate protection to workers, even if this means that free movement is restricted. Question remains whether such a definition can be envisioned in the context of the EU.

2.3.3 Indicators of subordination

Even though self-employment is left undefined, the ECJ has provided national courts with some guidelines for identifying self-employment in the Jany case[51]. The critical element when distinguishing workers from self-employed is subordination. This case concerned the interpretation of an association agreement of the European Community on the one hand and Poland and the Czech Republic on the other. It involved the free movement of establishment, however, this does not affect the relevance of the interpretation of subordination as a concept. Indicators of the absence of subordination are situations in which the services are performed '(1) outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration, (2) under that person's own responsibility and (3) in return for remuneration paid to that person directly and in full[52]'. The ECJ has provided some guidance when assessing subordination, however, these are mere indicators and are open to interpretation. The decision needs to be made on a case-by-case basis by national courts, fake self-employment could indeed be ruled out by applying these guidelines, still, they are rather weak.

The given tools to battle fake self-employment in the context of free movement are considerably weak. The reason for which the ECJ has found in necessary to define the employment relationship is that of facilitating the internal market. That is why the 'worker'-concept is defined broadly and remains open to interpretation. The ECJ is correct in its observation that subordination is the essential element distinguishing workers from self-employed. It provides some indicators of subordination but the wording of these is again quite broad. National courts are given some

[49] C-268/99 Judgment of 20/11/2001, Jany and others

[50] C-431/01 Judgment of 20/1/2000, Ninni-Orasche v. Bundesminister fur Wissenschaft, Verkehr und Kunst

[51] C-268/99 Judgment of 20/11/2001, Jany and others

[52] C-268/99 Judgment of 20/11/2001, Jany and others

guidance but it seems that free movement principles prevail over the protective function of the employment relationship.

Still, there is little leeway to effectively prevent fake self-employment within this context. The definition of the worker-concept is necessarily broad, especially when it is to be applied in 27 Member States. For now, it seems that the approach taken by the ECJ is in line with practise, there are many schemes in which persons are employed that should all fit the given definition. While a more detailed definition might seem appropriate in the battle against fake self-employment this cannot be realised in the context of the European Union.

2.4 Fake self-employment and social security coordination

2.4.1 The legal framework of social security coordination

The European Union has had detailed legislation dealing with the coordination of social security policy since its early days. The coordination of social security was seen as necessary and requiring active measures because workers cannot be expected to go abroad if this would have negative effects on their social security position[53]. The Union's competence regarding social security coordination can currently be found in article 48 TFEU. The personal scope of the applicable regulations was extended throughout time. Regulation 3 (old) was limited to wage-earners and assimilated workers. Regulation 1408/71 (old) had a similar personal scope but in 1981 this was extended to cover self-employed workers[54]. Even before that extension self-employed workers were not totally unprotected when working across borders, they could rely on the treaty provisions regarding freedom of establishment and free movement of services. The ECJ extended the personal scope of coordination measures by way of dynamic interpretation. It ruled that self-employed were also covered if they were protected against risks by extension of schemes organised for the benefit of the generality of workers, what this means would be decided on a case-by-case basis[55]. The currently applicable legislation, Regulation 883/2004[56] and its Implementing Regulation 987/2009[57], further extend the personal scope by not referring to a professional activity but to 'nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States'.

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[53] F. Pennings, *European Social Security Law*, Kluwer 2011, p. 11

[54] This extension was based on Article 235 EC Treaty, now Article 352 TFEU.

[55] C-19/68 Judgment of 19/12/1968, De Cicco / Landesversicherungsanstalt Schwaben

[56] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, article 2(1)

[57] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

This means that both employees and self-employed persons benefit from the three main principles of coordination; equality of treatment, waiving of residence clauses and maintenance of rights in the course of acquisition. Still, one should keep in mind that there is hardly any social security for the self-employed, this holds true for all EU countries. The coordination rules thus provide us with an indication of which state is competent, that this state hardly provides any social security for the self-employed is a different issue.

A highly important aspect of social security coordination is the set of rules for determining the legislation applicable; these can be found in Articles 11 to 16 in Title II of Regulation 883/2004. These rules determine which member states' social security scheme is to be applied. The outcome of the conflict rules has exclusive effect, meaning that at any given time the system of only one Member State is applicable[58]. The main rule is that of the lex loci laboris-, or state of employment-principle. The choice for the country of employment is obvious, it implies that all those employed by the same employer are subject to the same system and that those employers are not able to employ foreign workers on cheaper terms. The principle is a tool in the battle against social dumping[59].

Regulation 883/2004 provides the basic rule for self-employed persons in article 13(2)(a). It provides that 'a person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to: (a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or (b) the legislation of the Member State in which the centre of interest of his/her activities is situated, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity'. This is yet another example of the lex loci laboris-principle. The wording of this article is clearly open to interpretation, 'substantial activity' and 'centre of interest of his/her activities' are rather open norms. The Implementing Regulation provides indicators of what a persons' centre of interests is in article 14(9); all aspects of occupational activity, a fixed and permanent place of business, the habitual nature or the duration of the activities pursued, the Member State of taxation and the intentions of the person should be taken into account. These provisions and subsequent case law give us an indication of which Member State's legislation is to be applied.

2.4.2 Social security coordination and the self-employed

So far the rules regarding social security coordination seem clear. Both employees and self-employed are principally subject to the social security systems of their respective country of employment. The puzzle gets more complicated as posting becomes an issue. A worker gets posted when he, 'for a limited period, carries out his work in the territory of a Member State other

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[58] This exclusive effect is now codified in article 11(1) Regulation 883/2004

[59] F. Pennings, *European Social Security Law*, Kluwer 2011, p. 55

than the State in which he normally works[60]'. Posting provisions are the most important exception to the lex loci laboris-principle[61]. A situation treated in a manner comparable to posting in that in which self-employed persons temporarily go abroad to perform their services. As is the case with posting in general, these rules are designed to facilitate cross-border movement of work, the self-employed would be deterred from working abroad if this would automatically invoke the application of this host state's social security system. Article 12(2) of Regulation 883/2004 reads; 'a person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months'. The self-employed can provide their services in another Member States for up to two years without becoming subject to this host state's social security. Whereas this rule was initially seen as merely an exception to the main rule, one may wonder whether or not it has become the normal rule due to its excessive use in practice. It is exactly this exception where EU social security coordination strikes at the very core of this thesis. The self-employed are able to create a competitive advantage based on differences in social security contributions. Worse even, in most cases these self-employed are hardly covered by social security. Those who make use of these services are not obliged to pay contributions they would have to pay when hiring employees. In effect, the exception found in article 12(2) of Regulation 883/2004 facilitates unfair competition.

2.4.3 Conflict rules and the A1 form

The above would not be a problem if there would be appropriate means to check whether or not these workers are truly self-employed. The sending state's institutions are competent regarding the classification as self-employed and there is hardly anything host country institutions can do about this. At the very heart of this problem lies the issue of the personal scope of the employment relationship. What Member State has the competence to determine the personal scope of the employment regarding social security? What country determines who is self-employed? It is often fairly easy to register as a self-employed person. For practical purposes Member States' institutions often issue documents which declare they are subject to their social security system. The uniform 'portable document A1' is the model certificate most often used. This is a posting form which confirms which social security legislation applies to a particular person. The A1 form is now a standard form, it is originally drafted by the Administrative Commission which based itself on Member State experiences and practice, we will deal with the Administrative Commission in paragraph 2.3.4.5. The legal basis for the A1 form is found in article 5 of the Implementing

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[60] Article 2(1) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the Framework of the provisions of services

[61] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 25

Regulation. The form is not a constituent condition for posting, the absence of such a form does not preclude the application of article 12(2) of Regulation 883/2004. In the Banks case the ECJ ruled that an A1 declaration (at the time called an E 101 declaration) has retroactive effect[62]. In the same ruling it also concluded that the form, if it has not been withdrawn or declared invalid by the sending state's institution, is binding both on the competent institution of the Member State to which a self-employed person goes in order to carry out a work assignment and the person who calls upon the services of that worker[63]. The court's decision is based on the principle of loyal collaboration between member states. This principle brings along the obligations for the appropriate authorities to precisely asses the facts that are relevant for the application of rules concerning establishment of the applicable social security system and consequently to guarantee the accuracy of the A1 form[64]. Member States have a responsibility to truly assess a person's self-employment status and thus to prevent fake self-employment. An A1 form, issued in another Member State is in principle binding, it prevents the applicability of a host state's social security. The current legal framework of the exception for self-employed who post themselves and the subsequent A1 form with binding force is an open door to fake self-employment.

2.4.4 Battling fake self-employment in the context of social security coordination

The rules implemented to facilitate the internal market clearly have their adverse effects. If a suspicion of fake self-employment arises the host state is left empty-handed. An A1 form is binding upon the state's institution and the person who calls upon the services of that worker. In practice, a country has to accept that certain workers are labeled self-employed that would normally be regarded workers. These fake self-employed outcompete others, they undermine the national labour market and they are deprived of the protection of labour law and social security standards. It is neither in the interest of the host state nor in the interest of these workers that this classification is upheld. In this paragraph we will try to identity the tools to battle fake self-employment in the context of European Union social security coordination.

2.4.4.1 The competence to define the personal scope of the employment relationship

The most effective way to prevent fake self-employment is a proper definition of 'worker'. Being a worker rules out self-employment because, as we have seen, the two notions exclude each other[65]. In the Unger judgment the ECJ has ruled that the 'worker'-concept has community

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[62] C-178/97 Judgment of 30/03/2000 , Banks and others

[63] C-178/97 Judgment of 30/03/2000 , Banks and others

[64] C-202/97 Judgment of 10/02/2000, FTS Fitzwilliam

[65] C-55/94 Judgment of 30/11/1995, Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano

meaning in matters of social security coordination[66], this is so for the same reasons as we have found in free movement issues. However, the ECJ did not go as far as providing us with a definition; decisive is how a national social security scheme defines its personal scope. Once more, the Court made a move in two directions, it confirmed the community meaning of 'worker' while at the same time referring back to national definitions. In more recent judgments the ECJ repeated that any person insured under a social security schemes falling under the material scope of the regulation is under its personal scope[67]. The ECJ explicitly stated that the terms 'employee' and 'self-employed' will be determined on the basis of social security legislation of each Member State where the work is performed[68]. This is also true for cases of posting of self-employed persons[69]. It seems that the Court does not go as far as it does in free movement cases where it comes up with its own definition. This is understandable as social security is politically sensitive. In social security matters there is neither an EU definition of the 'worker'-concept nor a definition of self-employment. The competence lies with national courts, it is at this level that fake self-employment should be battled.

2.4.4.2 Requirement to pursue self-employed activities in sending state

Article 12(2) of Regulation 883/2004 provides that the exception to the lex loci laboris-principle exists only for persons who normally perform an activity as a self-employed person in a Member State. Article 14(3) of Implementing Regulation 987/2009 specifies that 'the words 'who normally pursues an activity as a self-employed person' shall refer to a person who habitually carries out substantial activities in the territory of the Member State in which he is established. In particular, that person must have already pursued his activity for some time before the date when he wishes to take advantage of the provisions of that Article and, during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return'. Simply put, there have to be self-employed activities in the sending state before leaving and he should be able to return to those activities. This condition could effectively prevent the use of self-employment statuses merely established in order to facilitate cross-border fraud. Question is how long one should be performing those activities before being allowed the exception. The Administrative

[66] C-75/63 Judgment of 19 March 1964, Unger / Bedrijfsvereniging voor Detailhandel en Ambachten

[67] See for example C-85/96 Judgment of 12 May 1998, Martínez Sala / Freistaat Bayern and C-275/96 Judgment of 11 June 1998, Kuusijärvi / Riksförsäkringsverket

[68] C-221/85 Judgment of 30 January 1997, Inasti / Hervein and Hervillier and C-340/94 Judgment of 30 January 1997, De Jaeck / Staatssecretaris van Financiën

[69] See Attorney-general Colomor in C-178/97 Judgment of 30/03/2000 , Banks and others

Commission has issued Decision A2 regarding the interpretation of article 12[70]. The second consideration of this decision gives a period of at least 2 months as indicative of enough to be considered to fall under Article 12(2), any shorter period should be decided on a case-by-case evaluation. The self-employed should also maintain the requisite means and a specific infrastructure in his home country of origin as far as necessary so that he can continue that work normally when he returns. Consideration 2 of Decision A2 list 'criteria such as having use of office space, paying taxes, having a professional card and a VAT number or being registered with chambers of commerce or professional bodies' as being indicative of this requirement. This list is not exhaustive and Member States have taken to using different indicators[71]. Two months seems a very short period in order to establish oneself as a business. Still, if the requirement to pursue similar activity in the sending Member States are taken seriously they might very well prevent fake self-employment.

2.4.4.3 Requirement to pursue similar activity

According to article 12(2) of Regulation 883/2004 he should also 'pursue a similar activity' in the host member state. This requirement is new in the current regulation. Article 14(4) of the Implementing Regulation makes it clear that what matters is 'the actual nature of the activity, rather than of the designation of employed or self-employed activity that may be given to this activity by the other Member State'. Just because an activity is usually regarded to be done by employees in a host state makes no difference. The Dutch and German governments have argued that this would have serious consequences, anyone could affiliate himself to the cheapest social security system and outcompete those in the host state. The ECJ dismissed those arguments and pointed to the requirement that he should also normally pursue those activities in the sending country[72]. It is argued that this means that the activities performed must still be seen as self-employed activities as far as the sending state is concerned[73]. This conditions reaffirms that there should have been similar activity in the sending state. The content of the activity should be similar meaning that at least there must have been activity. There have been entertaining debates on this issue, Poland and Germany argued whether or not self-employed asparagus-farmers were allowed to pick

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[70] Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State

[71] See, for example, Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 31

[72] C-178/97 Judgment of 30/03/2000 , Banks and others

[73] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 28

strawberries in their capacity as self-employed workers[74]. This condition is closely related to the condition regarding self-employed activities in the sending state. Neither the regulations, not the ECJ have defined 'similar activity'; again, a narrow interpretation would impede free movement.

2.4.4.4 Dialogue and reconciliation procedure

Disputes may arise regarding the validity of the A1 form and the accuracy of the facts on which it is based. As we have seen, the ECJ ruled that the document is binding as long as it has not been withdrawn or declared invalid by the sending institution. This is now codified in article 5(1) of the Implementing Regulation. Pursuant to article 5(2) of the Implementing Regulation the Member State that receives the A1 form and has doubts about the validity or accuracy of facts therein shall ask the issuing institution for the necessary clarification or a possible withdrawal. The issuing institution has the obligation to reconsider the grounds for issuing the document and, if necessary, withdraw it. The Implementing Regulation obliges the necessary verification 'insofar as this is possible' in article 5(3). This process is now codified and called the dialogue and reconciliation procedure. Decision A1 of the Administrative Commission sets standards for this procedure which are in turn based on Member State practice[75]. There is a clear task of cooperation between Member States when doubts arise. If this is done thoroughly and consequently this could effectively battle fake self-employment, however there are no reports of effective use of the procedure.

2.4.4.5 The Administrative Commission

Where no agreement is reached between Member States the dispute regarding the A1 form may be brought before the Administrative Commission, this follows from article 5(4) of the Implementing Regulation. This should be done no earlier than one month after a request has been made to the sending institution to clarify or withdrawn the document, as described in paragraph 2.3.2.4. Decision (2) of Decision A1 of the Administrative Commission also proscribes this dialogue and conciliation procedure before referring to the Administrative Commission. Article 5(3) of the Implementing Regulation states that the Administrative Commission shall then 'endeavour to reconcile the points of view within six months of the date on which the matter was brought before it'. The Administrative Commission can clarify and interpreted provisions and will aim to reconcile the points of view put forward. The ECJ ruled that the decisions of the Administrative Commission are not legally binding. Still, the Administrative Commission could very well be an effective way of setting standards and interpreting provision in the battle against fake self-employment. However,

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[74] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 29

[75] See Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council

there has not been one case brought before the Administrative Commission[76]. This is unfortunate because the institution certainly has potential in settling difficult issues. Member States are not willing to bring up cases before the Administrative Commission because any ruling would impede their competence to regulate their social security autonomously. Furthermore, these type of cases are not looked upon as pressing enough to require action which could offend a fellow Member State. Besides, do we really need another institution to deal with these issues? Why not take the matter to the ECJ? A competent and experienced institution could indeed be a tool in the battle of fake self-employment. However, we must question the need for yet another layer of bureaucracy in the European Union.

It is clear that there is an extensive range of tools in the battle against fake self-employment in the context of social security coordination. Competence to define the personal scope of the employment relationship is in principle found at national level. Self-employed are obliged to pursue self-employed activities in the sending state before providing these services abroad, these activities should also be similar to those pursued at home. There is now a dialogue and reconciliation procedure when disputes arise and a possible referral to the Administrative Commission. If all this would a applied thoroughly and consequently fake self-employment could indeed be prevented. We should be wary of adding more bureaucracy in these matters. The problem is that Member States do not collaborate very well when disputes arise, little is done about this. Infraction procedures before the ECJ seem to be a bridge too far in these intricate matters.

2.5 Conclusion

We have seen that European Union law contributes to the emerge of fake self-employment. The EU is a facilitator of the problem. Are there provision at EU level which can help to tackle the problem? In the context of the EU, the two main causes of fake self-employment are costs differences between member states and restrictions put on the free movement of workers for acceding Member States.

The competence to define the personal scope of the employment relationship is central in labour law. This competence seems to be divided in a contradictory manner. The ECJ has confirmed that the competence is essentially national. However, it also provided a European definition to guarantee uniform application of treaty provisions. It follows that, while essentially a national competence, there are EU standards to adhere to. This is not the case in social security coordination, for which the divisions of competence is tilted towards Member States. It is

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[76] Y. Jorens and J. Lhernould, *Europe of the Self-employed: Self-employed between economic freedom and social constraints*, EU-Conference - Europe for Self-employed persons, Brussels 2010, p. 37

questionable whether or not this is sustainable as the classification has implications that go beyond social security matters.

The definition provided in the context of free movement of workers is appropriate. It is applicable to 27 Member States and includes a wide range of employment schemes, the definition is therefore necessarily broad. Central elements are indicators of the essential element of subordination are given. These are valid and should be used in practice. The indicators serve as an inspiration for national courts but facts and circumstances should also weigh heavily in their assessment.

Compared to the free movement context, European social security coordination provides more tools in the battle against fake self-employment. This is because free movement is primarily aimed at facilitating the internal market whereas social security coordination is also influenced by the need to protect national social security systems. EU requirements should be strictly lived up to. Member states should collaborate closely and effectively to tackle problems such as questions regarding the validity of A1 forms. So far, the Administrative Commission has not proven to be effective and Member States are not willing to go to the ECJ so problems remain unresolved. There should be fast and thorough procedures to settle disputes. Online information-sharing should be fostered. The 'worker'-concept, as developed in free movement cases, should be applied also in social security coordination. This means that Member States have to live up to common standards when establishing a person's employment status. Even though this would be a clear limitation of Member State competence, it is essential in the battle against fake self-employment. Information on which the employment status is based should be available for all Member States so that institutions and employers can check whether or a persons' status is genuine. In order to combat fraud involving free movement principles more information is needed, otherwise the labour market is headed for disaster.

3. Fake self-employment in the Netherlands

3.1 Introduction

The adverse effects of fake self-employment are found at national level, this is true also for fraud involving fake self-employment in the European Union. Fake self-employment causes dishonest competition by prising employers out of the market that live up to national labour and social security standards. This is a catastrophe for national labour markets and social security[77]. We will now look into the problem in the Netherlands and the United Kingdom. This chapter will focus on the Netherlands.

We have seen that the European Union has a considerable impact on this issue. On the one hand EU law facilitates cross-border fraud involving fake self-employment. On the other hand it offers certain tools to overcome such problems. The European Union and its European Court of Justice indeed have competence in dealing with the problem. Accordingly, they set certain standards. In the current legal framework, however, fraud has to be battled at national level. For example, in the Jany case the ECJ provided some guidance when assessing subordination and then ruled that the final decision needs to be made on a case-by-case basis by national courts[78]. The classification as either employed or self-employed is an essential feature of labour law and social security. National courts should have competence in these matters to ensure both worker protection and the correct application of social security. Still, they have to uphold certain European standards which are mostly there to facilitate the internal market.

The next paragraphs provide an introduction to the role and importance of self-employment in the Netherlands. After that we shall examine how the personal scope of the employment relationship is determined by looking into both labour law and social security law. Next, the specific procedure by which self-employment is established is looked into. We will see that the issue has been fiscalised, the nature of the employment relationship is now largely decided on by the tax service. Now that we have seen how self-employment is legally established in the Netherlands we will assess these findings with regard to the problem of fake self-employment. Finally we will see what initiatives have been taken to address this issue, including those particularly aimed at combatting such fraud in a cross-border context.

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[77] R. Blanpain, *Freedom of services in the EU: a social catastrophe?* in European Labour Law Journal (F. Hendrix ed.), Intersentia 2011 – 3, p. 191

[78] C-268/99 Judgment of 20/11/2001, Jany and others

3.1.1 Self-employment in the Netherlands

In 2011, the number or persons participating in the Dutch labour market was 8.757.400. Out of those the total number of self-employed persons was 1.202.500; out of these 319.200 were self-employed persons with employees and 883.300 were self-employed workers without employees[79]. This thesis deals with self-employed without employees; they made up 10% of all participants of the Dutch labour market in 2011. Their number has significantly increased in recent years; they make up a growing share of total participants in the labour market:

	2007	2008	2009	2010	2011
total participants labour market	8.769.300	8.860.200	8.922.800	8.760.200	8.757.400
total self-employed without employees	737.600	770.400	799.100	879.600	883.300
percentage self-employed without employees	8,38%	8,70%	8,96%	10,04%	10,09%

Source: Eurostat, Labour Market Statistics, Self-employed Persons, Netherlands

Self-employment is looked upon as an important driver for entrepreneurship and job creation. The Dutch government has enacted policy promoting self-employment as a way out of unemployment. The unemployed have the possibility to retain monthly unemployment benefits for up to 6 months when starting a business of their own[80]. During this period they retain their status as employee, a prerequisite for receiving unemployment benefits. In response to the financial crisis there have been more initiatives aimed at facilitating start-ups, examples of which are financial guarantees for new businesses regarding bank loans, micro-financing, refundable coaching and cheap market surveys[81]. Such policy underscores the high regard for self-employment in Dutch politics. A 2010 study among Dutch citizens found that 56,3% of respondents had a favourable opinion of

[79] Eurostat: Labour Market Statistics, Self-employed Persons, Netherlands

[80] See Articles 77a and 78 Unemployment act

[81] European Employment Observatory Review, *Self-employment in Europe 2010*, European Commission 2010, p. 9

entrepreneurs, 33,9% was neutral and only 6,9% thought unfavourable of entrepreneurs[82]. It is safe to conclude that self-employed is positively looked upon in the Netherlands.

3.1.2 Signals of fake self-employment in the Netherlands

Even though a fair share of the Dutch self-employed are made up of middle-aged, high-skilled and financially independent males[83], the group of self-employed is extremely diverse. A considerable share is regarded vulnerable[84]. Dutch self-employed are 2.7 times as likely to be classified poor compared to the national average[85]. Concerns regarding a lack of social security for the self-employed exist also in the Netherlands. For the genuinely self-employment such problems are business risks one consciously takes. If self-employment is fake such problems are a serious problem. Also in the Netherlands, fake self-employment is found to exist.

In 2009, the ministry of Social Affairs and Employment asked the Social-Economic Council for advice on this issue[86]. The government expressed its concerns regarding the growing share of self-employed and asked whether or not a revision of applicable law was necessary. The ministry noted a grey area between employee and self-employed, a distinction becoming increasingly more blurred. A 2008 study found that a growing number of self-employed shared more and more similarities with employees, a group found to consist of about 250.000 persons[87]. The Social-Economic Council was asked whether or not the current labour, social security and fiscal legislation were in balance with this diversification of labour relations. Seemingly, the ministry is aware of problems such as fake self-employment. However, the Social-Economic Council did not regard a fundamental revision of legislation necessary.

3.1.3 Signals of cross-border fake self-employment in the Netherlands

There are no hard data regarding fake self-employment in the Netherlands but it is sure to exist. Labour Unions provide us with numbers which give, however divergent, reason to worry. Most of

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[82] Flash Eurobarometer 283 – Entrepreneurship in the EU and beyond, a survey in the EU, EFTA countries, Croatia, Turkey, the US, Japan, South Korea and China, analytical report, European Commission, Directorate-General for Enterprise and Industry, may 2010, p. 163

[83] R. Dekker and L. Kösters, *ZZP'ers in Nederland: de baanzekerheid voorbij?* in CBS sociaal-economische trends 2010 - 4, p. 7-14

[84] S. Bekker, R. Dekker and M. Posthumus, *Self-employed in the Netherlands: In Need for More Securities?* in Labour Law between Change and Traditions (R. Blanpain and F. Hendrickx eds.), Kluwer Law International 2011, p. 192

[85] W. de Boer, *Werkende armen in Nederland*, Breukelen: NYFER 2003, p. 4

[86] See letter of 21 September 2009, Adviesaanvraag positie zelfstandig ondernemers, Ministerie van Sociale Zaken en Werkgelegenheid, The Hague

[87] Tweede Kamer, 2008-2009, 31311 nr. 23

these figures focus on cross-border fake self-employment, a clear sign that such problems exist. The trade union confederation FNV found that out of 80% of self-employed from Central European Countries 35% can be considered fake self-employed. Bouwend Nederland (representing the construction industry) asserts that 98% of foreign self-employed in the construction industry are fake self-employed[88]. In may 2012, Aannemersfederatie Nederland Bouw en Infra (representing contractors in construction and infrastructure) published a 'Black book' on fake self-employment[89] which spurred significant political debate. The report provides 20 examples of contractors faced with unfair competition, including cross-border fraud. Fake self-employment is found to be very real and creating unfair competition. Their research found that mala fide intermediaries facilitate such practices, 70% of self-employed in construction is presumably fake, the fake self-employed are not bound by collective agreements which is putting labour relations under pressure, fake self-employed make longer hours and do not live up to safety standards thereby endangering health. Finally it is said that such practices lead to a deterioration of society, small and midsize firms are the basis of economic growth and employment and this segment of the economy is being broken down by unfair competition.

3.2 Employment and self-employment in the Netherlands: Labour Law

3.2.1 The employment relationship in labour law

The employment agreement is the central concept in Dutch labour law. The existence of an employment agreement invokes the application of labour law. The law does not provide a definition of employee nor employer, one is regarded as such when work is performed in the context of an employment agreement. The employment agreement is defined in article 7:610 of the Civil Code as 'an agreement under which one of the parties, the employee, engages himself towards the opposite party, the employer, to perform work for a period of time in service of this opposite party in exchange for payment'. This definition contains four constitutive elements of an employment agreement: (1) 'in service of', indicating that work has to be performed in subordination; (2) 'in exchange for payment', meaning that in return for activity one is being remunerated; (3) 'to perform work', indicating any kind of activity and (4) 'for a period of time', indicating an element of time during which work is performed.

How then is the existence of an employment agreement established in a specific case? The text of an agreement, typically representing the will of the parties, gives a strong indication of the kind of legal relationship. Still, the will of the parties is not decisive. The Supreme Court, the court of final

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[88] Y. Jorens, *Self-employment and bogus self-employment in the European Construction Industry, country report: The Netherlands*, EFBWW and FIEC 2010, p. 12

[89] Aannemersfederatie bouw en infra Nederland, *Zwartboek Schijnzelfstandigen - Mbk-bouwondernemers over de destructieve gevolgen van schijnzelfstandigheid,* 2012

instance in labour law, has ruled that besides the text of the agreement all circumstances should be taken into account[90]. Moreover, the facts and circumstances take preference over the text of the agreement indicating a material test. In addition to that, the societal position of a person should also be taken into account, a weak societal position is indicative of employment rather than self-employment[91]. This casuistic approach allows for great flexibility.

3.2.2 The element of subordination in Dutch labour law

The element of subordination ('in service of') is pivotal in distinguishing employees from self-employed. The Supreme Court ruled that subordination is indeed the critical feature of an employment agreement[92]. This is in line with what the ECJ has ruled on the issue. The words 'in service of' are explained as meaning that the employee is in a subordinate relationship to his/her employer in so far that he has to carry out assignments and follow instructions regarding the performance of work and working conditions. This description is purposely broad. The Supreme Court went further ruling that assignments and instructions have 'to be functional with regard to' the performance of work and working conditions[93]. It is not necessary that instructions are actually given, the fact that they can be given is enough to indicate subordination[94]. These rulings remain vague but such flexibility is a must, labour relations are changing and so is the nature of subordination. Working hours and working location are strongly becoming more flexible, largely due to the IT-revolution but also related to an increase of female participation in the labour force, strict subordination is now often inconceivable. Even though these rulings are vague, they do provide some guidelines.

3.3 Employment and self-employment in the Netherlands: Social Security

3.3.1 An introduction to Dutch social security

Social security is a politically and socially sensitive topic. It is an important aspect of a state's mandate. In the European Union Member States enjoy a lot of freedom in setting up their social security system. Employees in the Netherlands are protected against certain risks by way of law, it is mandatory for all employees take part in the employee insurance schemes. The Unemployment Act, the Sickness Benefits Act, and the Disability Act make up the framework of social security for workers. Besides those, a number of social insurance schemes apply not only to workers but to all

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[90] HR 10 oktober 2003, JAR 2003, 263

[91] G.C. Boot, *Arbeidsrechtelijke bescherming*, Den Haag: SDU Uitgevers 2005, p. 107

[92] HR 14 juni 1991, NJ 1992, 173

[93] J. van Drongelen and W.J.P.M. Fase, *Individueel arbeidsrecht deel 1, De overeenkomsten tot het verrichten van arbeid – vakantie en verlof*, Zutphen: Uitgeverij Paris 2011, p. 32

[94] HR 11 november 1949, NJ 1950, 140; HR 16 february 1973, NJ 1973, 370; HR 17 april 1984, NJ 1985, 18

citizens, examples of which are the General Old Age Pension Act and the General Child Benefits Act. In addition to these mandatory state-run programs it is possible to build up additional social security in private schemes, some of which are specifically aimed at employees such as private pension schemes for workers. For the purpose of this thesis this chapter shall only deal with the above mentioned employee insurance acts.

3.3.2 The personal scope of social security

As a rule, insured under the employee insurance acts in the Netherlands are employees. The question is who is an employee? A basic definition is given in article 3 of the Sickness Benefits Act, the Disability Act and the Unemployment Act respectively; 'an employee is a natural person, under the age of 65, who is employed in the private of public sector'. Those employed in the public sector are not dealt with in this thesis because a different legal system applies to them. Those over the age of 65 are excepted because they are entitled to benefits because of old age by reached the pension age. The number of hours one works is irrelevant. For a definition of private employment one needs to look at the employment agreement in the Civil Code[95]. This is the definition of labour law in which the will of the parties is not conclusive. Instead, as we have seen in labour law, the four elements of an employment agreement have to be present to constitute private employment. So far the personal scope of social security law seems to correspond with labour law.

Social security is a matter of administrative law and so cases can ultimately be brought before the Central Court of Appeal. We have seen that in labour law the Supreme Court is competent. As a result both courts have to rule on the same matter. Is their approach the same? Case law provides an example. In a Dutch tv-show contestants were put in a mansion with the goal to stay in longest while performing certain tests and a voting procedure. The women in question had to leave and requested unemployment benefits. The competent institution turned her request down because the women and the tv-producers did not have the intention to conclude an employment agreement. The Central Court of Appeal disagreed and, referring to Supreme Court rulings, found subordination to exist because constant and detailed instructions were given, instructions had to perform personally and she was paid a certain sum of money for the time spend in the mansion[96]. All elements of an employment agreement were present. There was also a fiscal dispute which founds its way to the Supreme Court. It ruled that that all factual circumstances were relevant and came to the same conclusion as the Central Court of Appeal, this was indeed an employment agreement and she was entitled to unemployment benefits[97]. This shows that the Central Court of

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[95] S. Klosse, *Socialezekerheidsrecht*, Deventer: Kluwer 2012, p. 37

[96] CRvB 25 maart 2010, USZ 2010/181

[97] HR 25 maart 2011, USZ 2011/128

Appeal and the Supreme Court apply a uniform test. The intention of the parties is not conclusive; the decision should rather be based on the factual circumstances of the case.

3.3.3 Self-employment according in social security law

The element of subordination remains hard to grasp, it is this element which distinguishes employees from the self-employed. Confronted with the issue of subordination in the context of social security the Central Court of Appeal has ruled on the concept of self-employment. It ruled that self-employment is present when the factual circumstances of work truly and clearly indicate an independent performance of services[98]. An essential indicator is that of carrying entrepreneurial risk[99]. Examples of carrying entrepreneurial risk are investing in machines and workplace, owning your own work-tools, having specific permits, having multiple contractors, employing personnel and being registered at the Chamber of Commerce. On the one hand this vague test enhances flexibility, needed in response to the growing diversity of labour relations. On the other hand this casuistic approach creates legal uncertainty with regard to the outcome. In the next paragraph we will see how this uncertainty is dealt with in the Netherlands.

3.4 The 'Declaration of Employment Relationship' (DER)

3.4.1 Introduction to the 'Declaration of Employment Relationship'

In 2001 the 'Declaration of Employment Relationship'[100] (I shall refer to this as the 'declaration') was introduced to deal with growing difficulties regarding the qualification of labour relations. Based on article 3.156 of the Law on Income Taxes, the DER is a statement on the status of a self-employed person from a fiscal point of view[101]. The declaration is issued by the Tax Service. Even though the issue is central in both labour law and social security the declaration is primarily based on fiscal law and is delivered on request by the Tax Service. It is said that the decision on the nature of the labour relationship has fiscalised.

The declaration states how income generated out of a specific activity should be classified. It is important to note that the declaration is only valid for this kind of activity. The outcome is that income is generated either (I) as the result of an employment relationship, (II) as the result of business activities, (III) as the result of activities for an enterprise of which he or she is the main

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[98] CRvB 22 september 2005, RSV 2006/45; CRvB 17 november 2005, RSV 2006/18; CRvB 25 mei 2006, RSV 2006/255 and CRvB 1 april 2011, USZ 2011/151

[99] S. Klosse, *Socialezekerheidsrecht*, Deventer: Kluwer 2012, p. 40

[100] In Dutch: 'Verklaring Arbeidsrelatie'; abbreviated 'VAR'

[101] Y. Jorens, *Self-employment and bogus self-employment in the European Construction Industry, country report: The Netherlands*, EFBWW and FIEC 2010, p. 3

shareholder or finally (IV) as the result of other activities[102]. A declaration indicating that income is generated as a result of business activities implies self-employment. As a result, no social security premiums have to be paid in relation to these activities and the provisions of labour law to not apply to this relationship. In the Netherlands, self-employed without personnel almost exclusively hold a declaration stating that their income is a result of business activities. Both the holder of the declaration and the contracting party are thus given certainty regarding their relationship. Before engaging in business with a self-employed persons it is typically required that this declaration is produced.

3.4.2 The procedure for obtaining the 'Declaration of Employment Relationship'

The Tax Service has a part of its website specially devoted to self-employed without personnel[103]. Practical information concerning the declaration under scrutiny can be found here. To request the VAR one has to fill in a form which can be downloaded, filled in and then either uploaded or sent in by post. The Tax Service decides on this request within 8 weeks, which can be extended by 5 weeks with a motivation. This decision consists of the issuance one of the four possible declarations and is open to the normal administrative procedure of appeal. Once issued, a declaration is valid for the remaining duration of that specific year. A declaration valid for the next year can be requested from September on. In 2010 the Tax Service started to automatically renew the declaration for those that have obtained a similar declaration for the past three years.

3.4.3 The material test for obtaining the 'Declaration of Employment Relationship'

Material requirements for obtaining the declaration are the core issue in this matter. The request-form consists of four sections and encompasses a long list of answers[104]. The Tax Service bases its decision based on all given answers. None of the individual questions is decisive, they are regarded as a whole and are strongly inter-related. After a first section requesting objective personal information section two, three and four make up the core of the request form.

The second part regards the activities for which the declaration is requested. Question 2a requires a description of the activities. Then one needs to indicate if a similar request has been made for the same activities in the last five years and, if so, what decision had been taken. The next question asks the requestor what type of outcome is desired. Next an indication of the expected total number of hours needs to be given. It is hard to see how this hours-criteria influences the actual nature of the employment relationship. For question 2e an indication of the expected

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[102] Beleidsregels UWV en BD voor de beoordeling en vaststelling van een dienstbetrekking, 2012, bijlage 1

[103] http://www.belastingdienst.nl/zzp/ (as of March 8th 2013)

[104] See request form which can be downloaded at http://www.belastingdienst.nl (as of March 8th 2013)

number of contractors has to be given, this is either (i) less than three, (ii) three to seven or (iii) more than seven. If the answer is less than three, one is hardly ever regarded self-employed. This is often regarded a critical indicator although it is not decisive on its own. Question 2f ask for the number of contractors of the past year and is thus related to 2e. Then one needs to indicate is he/she can have himself replaced regarding the performance of the activities. The obligation of personal performance of activities is inherent to an employment agreement and would indicate subordination. After that the carrying of risk of ill-performance needs to be indicated. Carrying such risk typically indicates self-employment. Question 2j is strongly related to fake self-employment; 'are you expecting to perform the declaration for activities for contractors for whom you have performed similar activities in an employment relationship?'. If this is the case there is a strong indication of fake self-employment. Unfortunately the question is not worded very strongly and can hardly be regarded decisive. The next question also affects fake self-employment; 'are you expecting to perform the indicated activities for contractors that have the same activities performed in an employment relationship?'. To answer this question in the affirmative would be indicative of fake self-employment. Once again, the question is worded weakly.

The third part regards the income one is expecting to generate. An indication of total income needs to be given, a high income indicates financial independence associated with self-employment. Question 3b regard the deduction of income tax by the contracting party which is typically the case of employment. Question 3c then asks if the contractor continues to pay during sickness and holiday. This strongly indicates employment. Question 3d directly refers to subordination; 'are you obliged to follow up all instructions by your contractor regarding the indicated activities?'. Answering in the affirmative strongly indicated subordination and therefore a situation of employment. The final question of section three ask if it is expected that the income out of the activities is expected to come from one contractor for more than 70%. If this is the case, this would indicate an economic dependence not corresponding with self-employment.

The fourth and final section regards certain practical methods which are used in performing the activities for which the DER is requested. Answering these question in the affirmative would indicate genuine self-employment and entrepreneurship. These question involve payment by invoice instead of wages, marketing activities, registration at the Chamber of Commerce, hiring staff, being registered for Value-added-taxes as a business, investing more than €2.500, having the required certificates and, keeping administration and the usual place of activities. These question are all referring to typical aspects of entrepreneurship.

3.5 Findings and initiatives aimed at battling fake self-employment in the Netherlands

3.5.1 The current legal framework of self-employment in the Netherlands

We have seen the legal framework in which self-employment is established in the Netherlands. The central concept in Dutch labour and social security law is the employment agreement. Upon the existence of an employment agreement an employment relationship is established, invoking the full application of labour law and social security provisions. The Civil Code provides a definition of an employment agreement. The factual circumstances are decisive and a material test is thus necessarily performed by the courts. This allows for great flexibility. Self-employment is naturally affected by this because employment rules out self-employment. In the context of battling fake self-employment a test based on factual circumstances can only be cheered upon.

However, flexibility creates uncertainty. Legal uncertainty with regard to the nature of the employment relationship combined with a growing variety of labour relations has spurred the Dutch government to introduce a system to overcome such problems. The 'Declaration of Employment Relationship' was introduced in 2001. By producing this declaration a self-employed can prove his status. Parties are no longer hesitant to go into business with one another. This system has become the primary way in which self-employment is established in the Netherlands. A legal presumption is created and self-employment is facilitated by way of a single questionnaire.

The emerge of fake self-employment can be expected. In the current legal framework, the nature of the employment relationship is decided upon by the Tax Service. Even though such a decision certainly has fiscal implications, labour relations are strongly affected. It is questionable whether such decisions should be left to institutions of taxation. Also, the practice of automatic renewal and the rather formal procedure by which the declaration is obtained are hardly aimed at a thorough assessment of the nature of the employment relationship. Labour relations are increasingly difficult to assess. The current approach is aimed at fast decision-making. Problems such as fake self-employment can only be expected when one is to go about such intricate issues in such a manner.

3.5.2 Initiatives aimed at battling (cross-border) fake self-employment

The intricate problems of fake self-employment have never been high on the political agenda. However, in recent months a greater awareness of the problem has grown. Most political and media attention is focused on cross-border fraud. There is a fear that eastern European workers are taking jobs belonging to the Dutch. The populist, anti-immigrant political party lead by Geert Wilders has been cashing in on such sentiments. One of their, widely criticised, initiatives has been the launch of a website on which the Dutch could voice their complaints about eastern European workers. Over 175.000 complaints were collected of which only 40.000 truly regarded the topic the

website was devoted to. The rest were mostly worried citizens voicing their concerns over a website they found to be discriminative and racist[105].

The 'Black book' issued in May 2012 by the federation of contractors caused a political reaction. As we have seen, the report provides 20 examples of fraud involving (mostly cross-border) fake self-employment. Members of parliament asked parliamentary questions with regards to the report[106]. The Ministry of Social affairs and Employment was asked whether it was aware of cross-border fake self-employment and whether the ministry would consider implementing mandatory reporting for such workers. Members of parliament wanted to know if the ministry was considering closer collaboration with other Member States in the context of preventing fake self-employment. Finally, a request was made to the ministry to push for EU regulations allowing member states more leeway to tackle such practice.

The ministry responded in september[107]. It stated that is was aware of the report and shared the concern expressed in it. However, it did not find it necessary to establish a system in which self-employed from other EU countries had to report themselves before entering the Dutch labour market. It would be too much of an administrative and financial burden. The ministry noted that a similar Belgian system was under scrutiny by the ECJ and it would await its findings. Furthermore, the ministry points to its current effort to battle cross-border fake self-employment by referring to a recent ministerial note[108].

This ministerial note summarises current action on part of the Dutch government with regard to immigrant workers and deals with battling cross-border fake self-employment specifically. The labour inspection is said to pay specific attention to fake self-employment. During 2011 inspections, 382 out of 938 foreign self-employed were found to be fake self-employed. In the first half year of 2012 this number was 162. The labour inspection forwards these findings to the Tax Service. Upon the renewal of the DER this information it then taken into consideration. Overall, closer collaboration between labour inspection, the Tax Service and Immigration services is actively encouraged.

However, these activities are aimed at persons which are registered as self-employed in the Netherlands. More problematic are those that produce ambiguous A1-forms, confirming their self-

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[105] R. de Pré, *Meldpunt PVV: geen effect, toch een trend* in De Volkskrant, 12 december 2012

[106] Tweede Kamer der Staten-Generaal, 2012Z14726 – vragen gesteld door de leden der kamer

[107] Tweede Kamer der Staten-Generaal, 3352 – vragen gesteld door de leden der kamer, met de daarop door de regering gegeven antwoorden

[108] Ministerie van Sociale Zaken en Werkgelegenheid, *beleidsnota over arbeidsmigratie binnen de EU,* August 28th 2012

employed status in their home country. The ministry stressed the importance of the Administrative Commission where member states are constantly looking for appropriate solutions. The main problem is said to be the lack of exchange of information. National institutions issuing A1-forms structurally provide their sister institutions in other member states with information, according to the ministry. The competent institution in the Netherlands actively participates in such activity. When problems occur, contact is sought with sister institutions and they are asked to check their facts.

The media has been rather silent on the topic of fake self-employment, the one exception being reports on the Fair Produce label[109]. The Fair Produce label is an initiative of the mushroom industry and is widely supported by trade unions[110]. A label is put on packages of mushrooms being sold in supermarkets across the country indicating that no unfair labour practices have been used when producing these mushrooms. The label is awarded to producers after a thorough audit. In press releases specific attention is paid to cross-border fake self-employment. Apparently fake self-employment was prevalent in this industry, labour inspections often found underpaid workers which identified themselves as self-employed. The picking of mushrooms was classified a service instead of labour. Foreign self-employed were found to be providing these services. In reality, subordinating and other elements of an employment relationship were found present. The initiative is aimed at polishing the damaged image of the industry and is now widely used in practice. Besides attracting media attention, the ministerial note encourages private initiative and mentions the Fair Produce label as a prime example.

[109] Examples of news reports on the Fair Produce label are ANP, *Kamp blij met eerlijke champignons in schap* in De Volkskrant, may 16th 2012 and L. Boon, *Asscher wil einde aan 'Middeleeuwse toestanden' in champignonsector* in NRC handelsblad, december 28th 2012

[110] www.fairproduce.nl (as of March 8th 2013)

4. Fake self-employment in the United Kingdom

4.1 Introduction

The previous chapter dealt with fake self-employment in the Netherlands. To gain greater understanding of the problem in the context of the European Union this chapter will focus on another member state. We will cross the North Sea and look into the very same topic in the United Kingdom.

Whereas the Netherlands has a legal tradition based on the principles of civil law, the UK has a common law tradition. These are two distinctly different legal contexts. On the one hand, civil law finds its source primarily in statute and takes a top-down approach. Common law, on the other hand, is primarily based on court rulings . Compared with civil law it is a bottom-up, casuistic, process by which law is created. Of course these are generalisations, in reality elements of both legal traditions are found to be mixed[111]. By juxtapositioning the Netherlands and the UK we highlight differences which may partly be the result of this different legal context.

Despite a different legal framework, the Netherlands and the UK are comparable in many way. Both are longtime members of the European Union, the former being a founding member state, the latter acceding in 1973[112]. Both are considered to be highly competitive, service-driven, economies with a growing emphasis on the global financial sector. Both countries have been taking a highly sceptical stance towards further EU integration[113]. With regard to falsely self-employed migrant workers from mostly eastern Europe, both countries are ostensibly in a similar situation. Their labour market is put under pressure by this unfair competition. Their social insurance system is hollowed out by such avoidance of social provisions.

This chapter will first introduce us to the role and importance of self-employment in the UK. Next, we will look into the personal scope of the employment relationship in UK labour law and social security provisions. Then we will see how self-employment is effectively established in the UK and assess this system in light of the battle against fake self-employment. Finally we will see that initiatives have been taken to address this issue , including cross-border situations.

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[111] D. Lengeling, *Common Law and Civil Law - differences, reciprocal influences and points of intersection,* Toronto: Siegen 2008, p. 8

[112] P. Craig and G. de Burca, *EU Law - text, cases and materials,* Oxford: OUP 2008, p. 7

[113] Examples of which are the speech of UK prime-minister David Cameron of january 23rd 2013, full text available at http://www.telegraph.co.uk/news/worldnews/europe/eu/9820230/David-Camerons-EU-speech-in-full.html (as of March 8th 2013) and P. van den Dool, *Asscher houdt grens dicht voor Kroatische werknemer* in NRC Handelsblad, february 16th 2013

4.1.1 Self-employment in the United Kingdom

In 2011, 31.611.500 persons were active in the UK labour market. Out of this massive number, 4.022.600 were considered to be self-employed. For the purpose of this analysis not all self-employed are taken into consideration. Only those working on their own-account, without hiring employees, are considered to be self-employed in the sense of this thesis. The number of self-employed without employees was 3.291.300. In contrast, the total number of self-employed that did hire workers was found to be 713.300[114]. These numbers can be compared to preceding years, showing a gradual increase of self-employed persons without employees as a segment of the UK labour market:

	2007	2008	2009	2010	2011
total participants labour market	30.740.700	31.116.400	31.285.800	31.381.800	31.611.500
total self-employed without employees	2.961.800	2.992.700	3.036.400	3.188.400	3.291.300
percentage self-employed without employees	9,63%	9,62%	9,71%	10,16%	10,41%

Source: Eurostat, Labour Market Statistics, Self-employed Persons, United Kingdom

Also in the United Kingdom, self-employment is looked upon as a driver of economic growth. Start-ups are needed and self-employment is the first step towards entrepreneurship. In a response to the recent economic downturn, the UK government set out a range of instruments aimed at fostering self-employment[115]. For instance, the Enterprise Finance Guarantee Scheme provides GBP 200 million in extra lending to new business, a reduction of corporate tax for start-ups and a job creation scheme excepting new enterprises from paying up to GBP 5000 in employee insurance contributions. These schemes signal a positive political attitude towards self-employment. The general approach is to encourage self-employment, mainly by creating a climate

[114] Eurostat: Labour Market Statistics, Self-employed Persons, United Kingdom

[115] European Employment Observatory Review, *Self-employment in Europe 2010*, European Commission 2010, p. 9

in which starting up is relatively easy, with minimum costs and bureaucracy[116]. This includes initiatives particularly aimed at the unemployed such as New Deal 50 Plus[117]. In this scheme, those over 50 years old that claimed jobseekers allowances for over 12 months are helped to become self-employed as a way out of unemployment. The UK public also seems to think positively of self-employment[118]. A 2010 report found that 46,8% of respondents thought 'rather favourable' of entrepreneurs and self-employed persons, whereas 44,4% was neutral and only 7% responded negatively. Out of this we can conclude that self-employment is highly regarded in both political and public opinion in the United Kingdom.

4.1.2 Signals of fake self-employment in the United Kingdom

However, a positive attitude towards self-employment does not prevent problems such as fake self-employment. In the UK, a high degree of uncertainty exists with regard to legal and social criteria by which workers are classified. Certain groups are thus excluded from the protective functions of labour law and social security altogether[119]. In particular, many self-employed are economically dependent on their contractors.

Fake self-employment is particularly prevalent in the construction industry. There are many construction sites with unreasonably high numbers (over 50%) of self-employed workers in the UK[120]. These workers are regularly confronted with the adverse effects of fake self-employment; their payment falls outside any wage bargaining, they lose entitlement to holiday pay, sick pay, unemployment benefits and they lose protection against unfair dismissal[121]. Although the problem is not limited to the construction industry, it is usually in this sector that fake self-employment is found in the UK. The disproportionate prevalence of fake self-employment in construction is explained by the decrease of public (i.e. government led) demand for construction whereas private demand has grown. UK construction has traditionally heavily relied on public tenders and wages

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[116] European Employment Observatory Review, *Self-employment in Europe 2010*, European Commission 2010, p. 13

[117] http://www.hmrc.gov.uk/manuals/eimanual/eim01660.htm (as of March 8th 2013)

[118] Flash Eurobarometer 283 - Entrepreneurship in the EU and beyond, a survey in the EU, EFTA countries, Croatia, Turkey, the US, Japan, South Korea and China, analytical report, European Commission, Directorate-General for Enterprise and Industry, may 2010, p. 163

[119] R. Boheim and U. Muehlberger, *Dependent Forms of Self-employment in the UK: Identifying Workers on the Border between Employment and Self-employment'*, Institute for the Study of Labor, IZA DP No, 1963, p. 5

[120] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 10

[121] R. Boheim and U. Muehlberger, *Dependent Forms of Self-employment in the UK: Identifying Workers on the Border between Employment and Self-employment'*, Institute for the Study of Labor, IZA DP No, 1963, p. 10

were kept high. This boosted the economy so both government and contractors benefited. However, private demand has driven labour costs down leading to a flexibilisation of labour relations and, ultimately, fake self-employment.

4.1.3 Signals of cross-border fake self-employment in the United Kingdom

As we have seen in both a European and Dutch context, there is a lack of data on fake self-employment. The lack of data is an even bigger problem regarding cross-border fake self-employment. Still, it is clear that cross-border fake self-employment exists in the UK. In much ways comparable to the Netherlands, eastern European workers go to the UK in search of employment. Interestingly, the proportion of self-employed migrant workers was found to be much higher in the UK compared to other western European countries[122]. From 1996 to 2007, self-employment among migrant workers was 20% higher than what would be expected in a strictly national setting[123]. This is particularly the case for the acceding member states of Rumania and Bulgaria, for the ratio of self-employed to employed migrant workers was found to be 11 to 1. This is explained by the way in which free movement of workers has been restricted for these acceding member states whereas free movement of services was granted from the onset (see 3.1.1.2). Moreover, these numbers clearly indicate that fake self-employment must be prevalent amongst migrant workers in the UK. Their disproportionate representation can hardly be explained other than being indicative of cross-border fake self-employment. It has been said there is a 'British disease of bogus self-employment'[124].

4.2 Employment and self-employment in the United Kingdom: Labour Law

4.2.1 The 'contract of service' and 'contract for services'

The UK has seen a slow development led by the courts based on the ancient concept of 'service'[125]. The common law does not distinguish employees and self-employed, instead it developed a distinction between those under a 'contract of service' (employees) and those under a 'contract for services' (self-employed workers). In general, both labour law and social security provisions are primarily applicable to those working under a contract of service. Even though different concept are at the basis of the distinction, the result is often similar to that of the employee/self-employed-concept in civil law jurisdictions. It is clear that the main issue is not which

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[122] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 11

[123] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 11

[124] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 19

[125] S. Hardy, *Great Britain* in International Encyclopedia of Labour Law and Industrial Relations (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 89

terms apply but rather the material requirements. Different tests have been expounded by the courts, we will deal them in historical order.

4.2.2 The test of 'control'

The first test to develop was that of control, a notion similar to that of subordination. If 'when, how, where and to what standard work has to be performed' is controlled, this is indicative of a contract of service[126]. However, in many cases, for example high-skill employees or homework, control cannot be the decisive criteria.

4.2.3 The test of 'integration'

The courts developed an additional test of integration. Question is whether a person is part of an employing organisation or not. Being subject to disciplinary or grievance procedures, owing ongoing obligations and upholding an organisations reputation are highly indicative of integration[127]. This test is of particular importance to workers such as doctors, lawyers and other professional whose work can hardly be controlled.

4.2.4 The test of 'economic reality'

In some cases the test of control and integration proved to be insufficient. This is where a test of economic reality developed. It has to be assessed whether a business is run on ones own account. Indicators of which are taking financial risks, setting prices, providing ones own equipment and being able to have another person perform services instead of personally doing so. This test is particularly aimed at identifying self-employment or a contract for services, thus ruling out a contract of service.

4.2.5 The test of 'mutuality of obligation'

Finally, and strongly linked to the test of economic reality, a test of mutual obligations developed. Here the courts have to assess in how far both parties have obligations towards each other. If the engager is under no obligation to offer a contract to a particular worker, and the worker is under no obligation to accept a contract if offered, there is hardly a mutuality of obligation. The lack of such mutuality is indicative of a contract for services and thus self-employment.

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[126] *Lane* v. *Shire Roofing* [1995] IRLR 493 at 495

[127] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 2

4.2.6 The outcome: a 'mixed test'

The courts apply what is called a 'multiple test' or 'mixed test' in which a multiplicity of factors is considered of which none is decisive[128]. The courts should 'consider all aspects of the relationship, no single feature being in itself decisive and each which may vary in weight and direction'[129]. In addition to this casuistic test the courts also takes the wording of the contract into account[130]. However, if inconsistencies are found these overrule the wordings of the contract or intentions of the parties[131]. Case law has early on fallen into casuistry matter have only gotten more complicated due to changes in the labour force such as the emerge of part-time work, temporary work, homework and self-employment[132]. It has been said that the test developed by the common law creates uncertainty, inconsistency and inadequate coverage of the distinction[133]. In addition to that, specific legislation is often confined to certain categories as workers. For example, statute proscribes a contract of service for merchant seamen, teachers and agricultural workers among others[134].

4.3 Employment and self-employment in the United Kingdom: Social Security

4.3.1 An introduction to United Kingdom social security

The UK has a well developed, and therefore costly, social security system. The system has seen significant changes since its coming into form after the second world war. In the 1980s, under the Tatcher administration, the face of social security changed dramatically. Most notably, those years saw a shift from state-led programs to private responsibility[135]. Social security law is, unlike labour law, mostly based on detailed statutory provisions. For workers, the essential social security schemes are those aimed at incapacity for work, which are the Statutory Sick Pay Act for short term incapacity and the Employment and Support Allowance for long term incapacity, a separate regime for industrial accidents and occupational diseases based on the Social Security Contribution and Benefits Act 1992 Part V and finally provisions targeting unemployment of which

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[128] S. Hardy, *Great Britain* in International Encyclopedia of Labour Law and Industrial Relations (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 91

[129] *O'Kelly* v. *Trusthouse Forte (plc)* [1983] ICR 728 at 743

[130] *Express and Echo Publications Ltd Taunton* [1999] IRLR 367, CA

[131] S. Hardy, *Great Britain* in International Encyclopedia of Labour Law and Industrial Relations (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 93

[132] S. Fredman, *Labour Law in flux: the changing composition of the workforce,* ILJ 1997 - 26, p. 337

[133] S. Hardy, *Great Britain* in International Encyclopedia of Labour Law and Industrial Relations (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 89

[134] S. Hardy, *Great Britain* in International Encyclopedia of Labour Law and Industrial Relations (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 90

[135] M. Partington, *United Kingdom* in International Encyclopedia of Social Security Law (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 27

the Jobseeker's Allowance 1996 is most important. Besides employment-related social security, other statutory provisions cover issues such as health care, child care benefits, pensions and minimum income assistance.

4.3.2 The personal scope of social security

The Statutory Sick Pay Act is only applicable to employees[136]. To determine who is employed one needs to review the facts, the existence of an actual contract of employment is not required. The Employment and Support Allowance is aimed at long term incapacity to work and consist of two types of benefits. On the one hand there is a contributory benefit for which contributions have to be paid. On the other hand there is a safety net of income-related benefits relying on a means-test. The first type is only open to employees, they are entitled to these benefits after paying mandatory social security contributions[137]. By referring to 'employees' it is clear that this covers the same group of workers for which the Statutory Sick Pay Act is applicable. Occupational diseases and industrial accidents are dealt with by a separate regime, it is no surprise that these statutory provisions are only open to employees as well, it is applicable to accidents occurred *'in the course of employment'*[138]*. Finally, the Jobseeker's Allowance provides the unemployed with benefits with the particular aim to seek new employment. Similar to long-term disability benefits two regimes apply; contribution-based and income-based. However, both are based on former employment and thus employees, premiums are to be paid while employed*[139]*.*

To conclude, it is clear that work-related social security is open to 'employees' exclusively. Strangely, there is no given definition of this term. For social security matters the facts of the case are decisive. In this respect, labour law and social security provisions are in line with each other. For determining who is an employee, one needs to assess the facts, a test similar to that regarding a 'contract of service' in labour law. Social security is not provided for the self-employed, an exception being certain workers in the construction industry. We will deal with that particular group next.

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[136] Statutory Sick Pay (General) Regulations, 1982 reg. 16

[137] M. Partington, *United Kingdom* in International Encyclopedia of Social Security Law (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 101

[138] *Nancollas* v. *Insurance Officer* (1985) 2 All ER 833 (CA)

[139] M. Partington, *United Kingdom* in International Encyclopedia of Social Security Law (R. Blanpain gen. ed.), Wolters Kluwer 2012, p. 129

4.4 The 'Construction Industry Scheme'

4.4.1 Introduction to the 'Construction Industry Scheme'

The distinction between those under a 'contract of service' and a 'contract for service' is principally a matter of labour law. In the UK, fiscal law takes the test developed in labour law as a given and goes from there. However, in the construction industry a system of certificates has been introduced somewhat similar to the 'Declaration of Employment Relationship' in the Netherlands. The latest reform has been the Construction Industry Scheme (CIS) of April 2007, a certificate can be obtaining which is prove of ones self-employed status[140].

Up until the predecessor of the CIS, introduced in 1975, employment in the UK construction industry was highly irregular. Taxes and social insurance were evaded by paying in cash. From 1975 on, a system was established by which self-employment was encouraged. This led to as much as 60% of construction workers being self-employed in the 1980s[141]. During those years a test of self-employment was not part of the procedure for obtaining a certificate, workers simple acquired their status by registering.

The current CIS creates two-tier self-employment. First, there is 'superior business class self-employment'. To obtain this classification a true assessment of self-employment is performed, the main requirements being a GBP 30.000 annual turnover and a business compliance test. The second tier is a false self-employment class, for which workers only have to register as self-employed. However, only the first class allows for gross payments by the contractor. For the second class of self-employment taxes and social insurance needs to be paid by the contractor[142]. It seems that the first tier is indicative of genuine self-employment whereas the second tier is mostly there to prevent unregistered work. Two tier self-employed do get their labour taxed and they are insured for social security purposes, however they do not enjoy the protective functions of labour law.

4.4.2 The procedure for obtaining a self-employed status in the 'Construction Industry Scheme'

The procedure for being classified 'superior business class self-employment' is largely comparable to the 'Declaration of Employment Relationship' in the Netherlands. Fake self-employment is not prevalent in this class. The second tier classification is much easier to obtain, it is in this second tier that fake self-employment can easily be established. Moreover, the exact purpose of the

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[140] http://www.hmrc.gov.uk/softwaredevelopers/cis/index.htm (as of March 8th 2013)

[141] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 6

[142] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 7

second tier is not to prevent fake self-employment but to prevent unregistered labour. The UK government is aware of the ambiguous status these workers have, that is why taxes and social security premiums are to be paid even if they are self-employed. The procedure is simple and completely online. On the one hand, those acquiring labour services have a duty to report. Her Majesty's Revenue and Customs leaflet is aimed at engagers of labour services and states 'Under the New CIS, you'll be signing a declaration every month to say that you've considered the employment status of the workers you've paid within the CIS and that none of them is an employee'[143]. On the other hand, workers have to register online by answering a few question appropriately. Even for those who obviously do not run their own business it is easy to obtain this status, no penalties for false declarations have been reported[144].

4.5 Findings and initiatives aimed at battling fake self-employment in the United Kingdom

4.5.1 The current legal framework of self-employment in the United Kingdom

In the United Kingdom the distinction between employees and self-employed is based on the 'contract of service' and the 'contract for services', indicating employment and self-employment respectively. Also in the UK, the distinction is of great importance because only employees benefit from the protective functions of labour law and social security provisions. Both concepts are developed by the courts, as is customary in a common law system. The result of this is highly casuistic in nature. Different tests were developed to assess the nature of the employment relationship. First a test of 'control' pas applied in which the level of subordination was central. When this was no longer sufficient the level of 'integration' was taken into account, is a worker an integral part of a business or is it merely accessory to it?[145] When control and integration were no longer conclusive courts took the 'economic reality' into account, financial dependance on a single contractor does not fit self-employment. Finally, and related to this last aspect courts assessed the 'mutuality of obligations' between parties. If both were obliged to adhere to each others wishes this indicates employment. A final decision is made based on all of these factors in which is called a 'mixed test'. The case-by-case nature of the mixed test could be an effective weapon in the battle against fake self-employment. However, any case would have to find its way to the courts before such an assessment would take place.

Statutory provisions of social security are applicable to 'employees' only. Self-employed are excluded from these schemes. The law does not provide us with a definition of employee but it is

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[143] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 7

[144] M. Harvey and F. Behling, *Self-employment and bogus self-employment in the European Construction Industry, country report: The United Kingdom*, EFBWW and FIEC 2010, p. 7

[145] *Stevenson, Jordan & Harrison Ltd* v. *Macdonald Evan* (1925) 1 TLR 101

clear that the facts of the case are decisive. In effect, employees are those under a contract of service. In other words, labour law and social security have a similar personal scope.

To deal with uncertainty and to prevent unregistered work a certificate system was implemented by which it would be easier to be classified self-employed. This is particularly aimed at the construction industry in which work was hardly reported. The CIS introduced a two-tier self-employment classification. The first, business class self-employment was only granted after a thorough test. The second tier however, gives reason to worry. All that is required is online registration and a monthly declaration by a contractor, clearly an open door to fake self-employment. He who engages labour services has to deduct taxes and pay social security premiums. This way, work is reported and revenue secured. Still, there is no 'contract of service' and thus labour law does not apply to these workers. It is clear that this second tier facilitates fake self-employment. Even though these workers are covered by main social security provision and premium are to be paid, they are not dealt with in their true capacity. Clearly, most of these workers are closer to being employees than self-employed. It is no wonder that fake self-employment in the UK is mostly prevalent in the construction industry.

4.5.2 Initiatives aimed at battling (cross-border) fake self-employment

Fake self-employment is present in the United Kingdom. Problems mostly occur in the construction industry, for a large part this is due to the CIS by which a false self-employment status is acquired easily. Trade unions in the construction industry, lead by the Union of Construction, Allied Traded and Technicians (UCATT), continue to bring the issue to the attention of politics. In 2009, UCATT came close to success when the labour government put forward proposals that would have led to hundreds of thousands of workers being re-classified as employees[146]. However, these plans have been reversed by the current conservative/lib dem administration of David Cameron. UCATT publications, mainly *'the evasion economy'*[147] *and 'the great payroll scandal'*[148]*,* continue to report on fake self-employment. One of the conclusions of these reports is that fake self-employment is costing the Tax Services GBP 1.9 billion annually. Partly in a response to these reports, shadow chancellor of the Labour Party Ed Balls, has announced a review of bogus (of fake) self-employment[149]. However, with the Labour Party not in government it is not expected that any breakthrough reform will take place any time soon.

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[146] https://www.ucatt.org.uk/false-self-employment (as of March 8th 2013)

[147] M. Harvey and F. Behling, *the evasion economy, false self-employment in the UK construction industry,* UCATT report, 2008

[148] J. Elliott, *the great payroll scandal,* UCATT report, 2011

[149] T. Lezard, *UCATT welcomes Balls's promise of bogus self-emploment review,* Union News.co.uk, september 11th 2012

The media has been fairly silent on the issue of fake self-employment. An exception, that proved to be effective, has been the Gizza Proper Job-campaign. Daily Mirror reporters Andrew Penman and Nick Sommerlad have taken the initiative to start a campaign focussing on 'bogus self-employment' which they believed to be prevalent in the UK workforce[150]. The campaign was started to highlight what has been called the 'exploitation of workers' noting that 'many workers are forces to present themselves as self-employed rather than employees so allowing employers to avoid National Insurance and deny workplace rights'[151]. Readers were called upon to send in their experiences regarding fake self-employment, which were gathered and published both online and regularly in the printed Daily Mirror.

In a response to these trade union reports and the Gizza Proper Job-campaign, Her Majesty's Revenue and Customs has declared that more should be done to prevent fake self-employment. Obviously, the focus of this tax institution is on battling tax evasion and thus raising revenue. HMRC has lounged a special part of their website devoted to workers who worry about their employment status[152]. By answering a few question one can quickly assess if their status is genuine. Still, the conservative/lib dem government remains silent on the issue.

Fake self-employment among migrant workers is hardly on the political agenda of the UK. All the mentioned initiatives are primarily aimed at workers in the UK. If fake self-employment were to be dealt with by getting rid of the CIS scheme this would naturally also apply to migrant workers. However, problems mostly occur when migrant workers come to work in the UK as self-employed based on this status acquired in their home country. The UK has to step up and deal with these issues to. The country has notoriously refusing to share information through the Administrative Commission on grounds of privacy[153]. However, it is exactly by exchanging information on national policy that cross-border problem can be tackled. By refusing to do so, even if this is on grounds such as privacy, the UK undermines the EU's, and thus their own labour market.

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[150] for the Gizza Proper Job-campaign blog see http://blogs.mirror.co.uk/investigations/2011/06/gizza-proper-job-a-call-for-ev.html (as of March 8th 2013)

[151] http://www.taxback.com/blog/false-self-employment-crackdown-ir35/ (as of March 8th 2013)

[152] http://www.hmrc.gov.uk/paye/employees/start-leave/status.htm (as of March 8th 2013)

[153] This has been brought to my attention by prof. em. R. Blanpain, unfortunately it has not been reported on.

5. Comparison and proposals

5.1 Comparing the Netherlands and the United Kingdom

In chapter 3 and 4 we have seen how self-employment is established in the Netherlands and the UK respectively. In this paragraph we will compare these finding in the context of the battle against fake self-employment. In doing so we follow a structure similar to that of both chapters. This means we will first look into the prevalence and general attitude towards self-employment. Next, the personal scope of the employment relationship with regard to labour law and social security matters is compared. We will see that both countries came up with schemes aimed at preventing legal uncertainty and registration of self-employment. Finally, initiatives regarding the battle against fake self-employment, including cross-border situations, in the Netherlands and the UK will be compared.

5.1.1 The prevalence and attitude towards self-employment compared

Even though the UK has far more persons participating in the labour market, the share of self-employed without employees is remarkably similar. In 2011, 10,09% and 10,41% were classified self-employed in the Netherlands and the UK respectively. The tables in 3.1.2 and 4.1.2 show that both countries have slowly seen this number grow.

There seems to be a positive attitude towards self-employment in Dutch and UK politics. First and foremost, it is regarded a driver for economic growth. Self-employment is the first step towards starting a business and governments seek to encourage start-ups in diverse ways. Initiatives in both countries are aimed at using self-employment as a way out of unemployment. This includes prolonged social security benefits and tax breaks. Such initiatives are prevalent especially in times of economic downturn. The Dutch and UK public also think highly of self-employment. A 2010 study found 56,3% of the Dutch and 46,8% of the UK public to have a favourable opinion of self-employed workers. Only around 7% of respondents thought negatively of such entrepreneurs. There do not seem to be any significant differences in the prevalence of, and general attitude towards, self-employment in the Netherlands and the UK.

5.1.2 The personal scope of the employment relationship in labour law compared

The personal scope of the employment relationship is a central issue affecting fake self-employment. The provisions of labour law are applicable only to those in an employment relationship in both the Netherlands and the UK. Both countries have taken a distinctly different approach inherent to their legal tradition. In the Netherlands, the civil code defines the ‘employment agreement’. This means a top-down approach consistent with a civil law tradition. In the UK, the courts have developed the ‘contract of service’-concept indicating employment.

Even though different concepts apply, the material requirements that distinguish the employed from the self-employed are remarkably similar. The Dutch definition gives four constituent elements, if present in a given case an employment relationship exists. In the UK, a 'mixed test' is applied for which four tests form the basis. In both countries the facts of the case are decisive, not the wording of the contract nor the will of the parties. Subordination is the critical element of the Dutch definition whereas in the UK subordination is assessed in a 'test of control'. Dutch courts have allowed many indicators to be taken into consideration. Examples of such factors are economic reality, integration and mutuality of obligations. These correspond with the other tests developed in UK courts. Differences are mostly of a formal nature; Dutch courts take the 'employment agreement' as a given and then assesses the facts whereas UK courts start with the facts to which their 'mixed test' is then applied. It is safe to conclude that the outcome of a particular case will often be the same in both jurisdictions.

5.1.3 The personal scope of the employment relationship in social security compared

The social security systems of the Netherlands and the UK are quite comparable. Both have elaborate statutory schemes providing social assistance to all citizens on a wide range of issues. Both countries are considered to have built a welfare-state. However, social objectives are increasingly put under pressure by changes in the demography, working relations and globalisation. Ever since the 1980s, social security has been under constant reform. In particular, the role of the state has declined and more emphasis is being put on individual responsibility. This is an ongoing process, more changes can be expected with liberal political parties currently heading government in both countries.

Specific regimes are aimed at employees in both countries. Statutory provisions regarding sickness, long-term incapacity for work and unemployment benefits are prime examples of schemes open only to employees. UK law refers to 'employees', which is not a central concept of UK labour law (which is based upon the 'contract of service'), in effect similar conditions apply. In the Netherlands, such social security schemes are also open to 'employees' for which the law refers to the civil code and its definition of the employment agreement. The facts of the case are decisive in both jurisdictions. In effect, the self-employed, or those under a 'contract for services', are not covered by essential social security provision in neither the Netherlands nor the UK.

5.1.4 The 'Declaration of Employment Relationship' and the 'Construction Industry Scheme' compared

It is clear that the existence of an employment relationship should be judged upon by assessing the facts in both the Netherlands and the UK. The classification of the employment relationships is

casuistic in nature. This is necessarily so because labour relations are flexible and varied. However, casuistry inevitably leads to uncertainty with regard to the law. Such uncertainty makes creates cautiousness, in the worst case parties will not engage in business because a future reclassification as employment would bring along the full application of labour law and social security. To tackle such uncertainty, both countries introduced comparable schemes by which self-employment is established and registered. By obtaining a particular document a person can prove his self-employed status. Self-employed will find it easier to engage into business based on this legal presumption.

The ‘Declaration of Employment Relationship’ was introduced in the Netherlands in 2001, Dutch workers can have their employment status judged upon and obtain a declaration valid for up to a year. Based on a questionnaire, available online, the Tax Service evaluates each application and provides a certificate. Self-employed tend to obtain a declaration stating that their income is generated out of business activities. This declaration is shown to contractors, these do not have to worry about a future reclassification. From 2010 on, the declaration is automatically renewed for those obtaining the same document for three consecutive years.

The UK’s ‘Construction Industry Scheme’ is very much comparable to the Dutch scheme. Workers complete an online questionnaire and thereby register their self-employed status. However, this scheme is restricted to the construction industry. Also, the CIS introduces two-tier self-employment. Only the first ‘business class’ is obtained after a thorough assessment comparable to the ‘Declaration of Employment Relationship’. The second tier is made up of falsely self-employed workers. The reason these are classified as such is to prevent unregistered work. Taxes and social security contributions are extracted at source, providing these self-employed with some form social security. However, to classify these workers self-employed completely disregards their true status. Labour law provisions are not applicable, thus depriving vulnerable workers of the protection they are due.

Such declarations provides a legal presumption, they are based on a single questionnaire assessed by institutions of tax revenue. That a central concept of labour law and social security is fiscalised gives much reason to worry, especially if fake self-employment is to be prevented. Of course, fiscal aspects are at play. However, they should not gain the upper hand in an issue with significant social implications. It is understandable that countries seek to develop a system providing legal certainty but this should not deprive workers of their rights.

5.1.5 Initiatives aimed at battling fake self-employment compared

In both the Netherlands and the United Kingdom, fake self-employment is reported on extensively by trade unions. Most prominently, the Dutch federation of contractors in construction and infrastructure and the UK's Union of Construction, Allied Traded and Technicians (UCATT) have reported on the specific problems of fake self-employment. However, there is a clear lack of political willingness to take up the issue in both jurisdictions.

In the UK, the current conservative/lib dem government is silent on the issue. A few years back, UCATT came close to success when the labour-led government set out plans which would lead to the reclassification of hundreds of thousands of workers as employees. Unfortunately these plans never saw the light of day. Ed Balls, member of parliament for the Labour Party, has recently announced a review of 'bogus self-employment'. For now, progress has clearly stalled. Concerns about fake self-employment among migrant workers seems to be absent from UK politics. In fact, the UK has been refusing its cooperation in the EU's Administrative Commission on grounds of privacy.

In the Netherlands, trade union reporting spurred significant political debate. Parliamentary questions led to an elaborate response. The government points to its current efforts in the battle against fake self-employment which includes closer collaboration between the Tax Service, labour inspection and institutions of social security. Also, the Dutch government has particularly emphasised that closer collaboration among EU member states is called for. The ministry aims at providing easy access to information in the context of the Administrative Commission.

The media has not reported widely on the issue of fake self-employment in neither the Netherlands nor the United Kingdom. However, both countries saw successful campaigns that brought more attention to the issue. In the Netherlands the 'Fair Produce Label' was introduced in the mushroom industry. Only mushrooms produces fairly, with no exploitation of labour (specifically falsely self-employed migrant workers), were labeled accordingly. The initiative was widely reported in the media and the ministry of social affairs and employment encouraged such private initiative. The UK's 'Gizza Proper Job'-campaign was a Daily Mirror initiative in which people were asked to sent in their experiences regarding fake self-employment. This received much attention and pushed the Labour Party to announce its proposed review of fake self-employment.

Out of this we can conclude that there is some political action taken in the battle against fake self-employment, more prominently so in the Netherlands. Also, private initiatives such as media campaign successfully raise awareness of the issue. However, these initiatives do not focus on the main facilitator of fake self-employment; the 'Declaration of Employment Relationship' and the

‘Construction Industry Scheme’. In the UK, there is an unfortunate absence of action to tackle fake self-employment among migrant workers whereas the Dutch government seems to be making promising progress. In both countries, not enough is done. Attention is being paid to some of the excesses of fake self-employment. I would argue that a more fundamental debate is needed, in which cross-border problems should not be left out.

5.2 Proposals regarding the battle against fake self-employment in the context of the European Union

5.2.1 A threefold plan of action at national level

This thesis seeks to come up with a solution to the problem of fake self-employment in the context of the European Union. The core issue in this battle is the personal scope of the employment relationship; who is employed and who is self-employed and, most importantly, how is this determined? Fake self-employment is essentially the result of inaccuracies in the personal scope of the employment relationship. Economical actors make extensive and creative use of such inaccuracies.

In the EU, the competence to define the personal scope of the employment relationship lies at national level. However, the ECJ set certain standards in the context of free movement to ensure equal application of free movement principles in all member states. It is for national courts to uphold these standards at national level. The manner in which employment and self-employment is dealt with at national level fits within these EU standards. I propose a threefold plan of action at national level:

First of all, administrative schemes such as the ‘Declaration of Employment Relationship’ and the ‘Construction Industry Scheme’ should be revised. The ‘employment agreement’ and the ‘contract of service’, in respectively the Netherlands and the UK, need a fundamental revision. Currently, a great cause of fake self-employment lies in schemes such as the DER and CIS. Uncertainty with regard to the employment relationship is indeed tackled and work is well-registered, as such they are successful. However, self-employment statuses are often obtained too easily. Material tests already apply but these should be more thorough. Procedures should not be limited to online forms, these facilitate the circumvention of a correct assessment of the facts. Both the Netherlands and the UK should overhaul the competence to administer these programs from tax institution to institutions of social insurance. Part of the procedure should be a personal meeting with competent representatives of these institutions. By doing so, the social rather than fiscal consequences are highlighted. Automatic renewal should be abolished but classifications could now be valid for longer periods of time. A self-employment status should not be awarded lightly, if awarded it should be based on truly genuine entrepreneurial spirit.

Secondly, (head)contractors should be held responsible for fake self-employment. Institutions of social insurance, taxes and the labour inspections should collaborate closely to identify fake self-employment. Where fake self-employment is found to exist, responsible contractors should be held liable for paying appropriate wages and social security contributions for as far back as the contractual relationship exists. Importantly, if situations are found in which A1 forms are produced but the actual facts do not correspond with those of self-employment, these workers should fall under the jurisdiction of the host state. Labour law and social security shall be applied to these workers. Provisions of EU law by which the law of the sending state is applicable should be invalid if a formal situation does not conform to reality. An A1 form should not be accorded the strong legal presumption that currently comes along with it. Labour inspections are the competent national institution to judge upon the nature of the employment relationship and a single document cannot contradict such findings. Instead of imposing fines in the classical sense, an employment relationship between the contractor and formerly self-employed person shall be presumed to exist. The protective provisions of labour law and social security provisions shall henceforth apply.

My third proposal is the start of a fundamental debate regarding the employment relationship. Any reform brings along the risk that formerly self-employed workers will no longer be contracted (and effectively become unemployed). Besides providing for these workers during a transitional period, the very distinction between employees and self-employed should be put to question. Is this distinction still appropriate in time of changing labour relations? One the one hand, live-long employability shall slowly replace job security. On the other hand, people still need financial and social security. Labour, social and fiscal law should be reformed so that all economic activity is treated equally. This includes widening the scope of labour law to all that are economically active. Social security should not be financed by contributions paid in the context of the employment relationship but rather out of tax revenue. Regarding taxes, a transition should be made from taxing labour to taxing consumption and the use of natural resources. As a result, the economic incentive (i.e. lower costs) to contract fake self-employed will be done away with. While making the shift to employability, job transition should be facilitated, personal development fostered and the most vulnerable workers should be protected.

5.2.2 Proposals at European Union level

Even though fake self-employment originates at national level, in the European Union borders no longer restrict such problems. In effect, the cross-border movement of workers and provision of services deepens the problems of fake self-employment. There is a race to the bottom in labour standards. National social security systems are increasingly put under pressure and effectively hollowed out. Local workers are priced out of their market. The previous paragraph gave a

threefold plan of action to combat the prevalence of fake self-employment at national level. After noting that the problem is not high on the political agenda the end of such problems is not expected any time soon. Therefore action at EU level is also required.

Most importantly, member states need to collaborate more closely. Information regarding self-employment statuses (and the information on which these are based) should be accessible to all member states. Refusal to provide such information, for example on grounds of privacy in the UK's case, should not be accepted. Member states should look for effective ways in which such information-sharing is possible. The Administrative Commission is the appropriate institution in which such initiatives should be discussed. Online databases should be used to register information at European level. However, keeping in mind that up to now the Administrative Commission has not brought any concrete solutions more detailed legislation might be needed.

If in a particular case a member states is confronted with falsely self-employed migrant workers they should have the competence to refuse such cross-border provision of services. Indeed, this would jeopardise the free movement of services severely. Such measures are however needed for the stability of national labour markets, the sustainability of social security systems and for the prevention of social dumping. At national level, this includes holding (head)contractors responsible for such violations as I proposed in the previous paragraph.

A main cause of fake self-employment in cross-border situations is the restrictions put on free movement of workers for acceding member states. Because free movement of services is granted from the onset, fake self-employment is used to gain access to national labour markets. Member states should stop making this distinction. It is clear that such practices led to a recourse to fake self-employment in acceding member states such as Rumania and Bulgaria. In the future, similar restrictions are foreseen for the newly acceding member state of Croatia. Once again, the same mistake shall be made. Instead, free movement provisions should be applied as a whole.

Most crucially, a fundamental debate on the social dimension of the European Union is called for. Whereas free movement principles are the heart of the EU's mandate, social matters were expected to be brought within its competence by way of a 'spillover effect'. Cross-border fake self-employment is a perfect example of the EU's social mandate lagging behind and not catching up. Economic growth is a false indicator of human development. If we were to continue on the path of further integration, the focus should be on social principles, not neo-liberal wishful thinking. Actual human well-being should be at the heart of the EU's competence. Neo-liberal integration should be halted (perhaps reversed) as long as it is not combined with social conditions.

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