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CURBING THE UNDECLARED EMPLOYMENT OF FOREIGN LABOUR

by

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SUMMARY

The presence in Belgium of foreign illegal workers is, by definition, difficult to measure and control, but threatens to undermine the whole social security system and the principle of fiscal solidarity. Until recently, checks were not very effective and the penalties not severe enough to be dissuasive. In fact, in order for an employer to give up hiring illegal workers, the risk of checks and actually incurring a fine must be higher than his wage cost savings.

To deal with this situation, the Belgian Government has set up a system to curb undeclared employment which entails multiplying workplace checks and imposing heavier fines on employers who break labour laws and regulations concerning the employment of foreign workers. In order to facilitate these checks, an unforgeable personal identity card has been introduced in the construction sector. This system has allowed authorities to combat illegal employment more effectively as worksite checks are undertaken on a regular basis; its success could lead to its extension to other sectors of activity.

CURBING THE UNDECLARED EMPLOYMENT OF FOREIGN LABOUR

Robert Gilles

In order to be employed legally in Belgium, foreign non-EC workers must be authorised to live in the country, after first obtaining a work permit according to the regulations currently in force (see Annex 1 for a few facts and figures on immigration and Annex 2 which summarises the current regulations). Over the past four years, Belgium, like other EC countries, has been faced with an influx of immigrants, the vast majority of whom enter the country illegally and work in the black economy.

Illegal workers are by definition not included in the official migration statistics. The number of illegal immigrants in Belgium is put at between 50 000 and 100 000. Apart from illegal inflows, account must also be taken of anomalous situations arising from the non-renewal of residence visas, students staying on after terminating their studies, seasonal workers who fail to return home when their contracts expire, and asylum seekers who, after several months' wait, are refused political refugee status.

All of these people tend to go underground and are absorbed into different sectors of the black economy, in particular the hotel and catering trades, cafés, the clothing industry, agriculture and horticulture, cleaning and building renovation.

In response to this situation, the Belgian Government has set up a system to curb undeclared employment. In the special case of the building industry, it has developed an unforgeable identification paper which should reduce undeclared employment.

1. Legal measures to curb undeclared employment

{Measures adopted by the Government}

The Belgian Government, faced with this situation, considers that large-scale employment of undeclared workers could seriously undermine the whole social security system and the principle of sharing the tax burden. Moreover, if it were not curbed, the employment of foreigners not authorised to be in the country would encourage illegal immigration. In April 1992 a whole package of measures was therefore introduced to combat the employment of undeclared foreign labour:

1. The ban on immigration, decided in 1974, is to continue. Nonetheless, some foreigners are still allowed to stay in Belgium, in particular under the legislation on the right of asylum, family reunification and exceptional labour market situations.

2. The provisions governing the residence and employment of foreign labour are to be strictly applied and firm and resolute action will be taken to combat illegal immigration, the main target for such measures being those who exploit illegal immigrants (intermediaries, employers, proprietors). It seems more appropriate to impose heavy penalties on employers so as to discourage them, rather than to prevent immigrants entering the country in search of work. Expulsion orders on their own seem altogether ineffective.

To implement these measures the existing regulations need to be changed, particular as regards the issuance of work permits and penalties. In addition, workplace checks will have to be more stringent and co-operation greater between the departments concerned (The "Office des étrangers" as regards residence, the departments responsible for issuing work permits, the investigative and police services as regards checks).

{More stringent checks}

The "Inspection des Lois Sociales" in the Ministry for Employment and Labour is responsible for checks at the workplace. It is assisted by other inspectorates and the police. Fifty new inspectors have been appointed, boosting the Inspectorate's numbers to 240 nationwide. In addition to this new task, the Inspectorate has to continue to monitor compliance with labour legislation and collective agreements in the country's 230 000 enterprises.

For this reason, and despite these improvements, checks can still only be made on a limited number of employers. Alone, they are not therefore going to significantly reduce undeclared employment. On the contrary, they are likely to have little or no effect unless the present system of penalties is overhauled.

{Severer penalties}

An analysis of the penalties imposed in the past three years does indeed show that penal or administrative fines tend to be set at the legal minimum (BF 100 000 or 10 000 depending on whether the worker is living in the country illegally or legally). Also, the government department often adopts the out-of-court settlement system, with the fine averaging BF 5 000 - 10 000.

All told, these penalties have absolutely no deterrent effect because the employer using these foreign workers avoids paying social security and tax contributions which total a minimum of BF 30 000 per month. The fines he may incur, should he be investigated, amount to far less than the "savings" he can make pending a possible investigation.

A Bill currently before Parliament, and which could be passed in early 1993, provides for the following penalties:

- A penal fine of between BF 300 000 and 600 000 instead of between BF 100 000 and 200 000 when the worker is living in the country illegally and has no work permit;

- A penal fine of between BF 170 000 and 600 000, instead of between BF 10 000 and 100 000, when the worker is employed without a work permit;
- An administrative fine of between BF 150 000 and 500 000, instead of between BF 15 000 and 75 000, when the worker is in the country illegally and has no work permit;
- An administrative fine of between BF 15 000 and 100 000, instead of between BF 1 000 and 50 000, if the worker has no work permit; the amount of the out-of-court settlement proposed by the government department cannot be less than the amount of the administrative fine;
- Payment by the employer of the residence and repatriation costs of the foreign worker and his family;
- Distraint or sequestration of the employer's movable property;
- An injunction by the commercial court prohibiting any type of business activity at the request of the investigating authorities.

In conclusion, the authorities consider that more checks and stiffer fines will significantly curb the undeclared employment of foreign workers and, ipso facto, illegal immigration too. Since 1990, workers in the building industry in Belgium have been issued with personal identity cards in an effort to combat fraudulent practices by manpower suppliers. Experience has shown this card to be an effective means of tackling the undeclared employment of labour in this sector. Were it to be extended to other sectors, it could become an additional arm in combating the undeclared employment of illegal immigrants.

2. The unforgeable identity card and its use in combating the employment of undeclared workers

Why was it decided to introduce an unforgeable identity card in Belgium for workers in the building industry, and how has it helped to combat the employment of undeclared foreign labour? The full history is given in Annex 3.

It was in the 1960s that manpower suppliers began to resort to dishonest practices. At the time, those who came later to be known as "slave traders" supplied workers to users without paying either the social security contributions or the taxes on the wages paid. These workers were for the most part miners who had taken early retirement as a result of the many pit closures in the coal mining regions in southern Belgium. The practice started in the iron and steel industry, and then spread to the construction industry and particularly such labour-intensive trades as masonry and concreting.

In 1976, to counter these practices, an Act was passed regulating all forms of temporary work and prohibiting the provision of labour. Labour suppliers then took advantage of the loopholes offered by sub-contracting. Officially they no longer supplied labour; instead they became sub-contractors, concluding fictitious business contracts with their client.

The investigating services found it difficult to prove that they were indeed acting as labour suppliers; but at the same time these "employers" -- generally "front" companies -- still did not pay any social security contributions or tax. Generally, the companies would be declared insolvent within a year or two, whereupon another company would immediately be set up, under other names, and the fraud would continue.

{Registration of building contractors}

In 1978 the government therefore introduced new measures which it hoped would be more effective, notably the registration of building contractors. The legislation is preventive and is designed to give "registered" entrepreneurs a sort of label of reliability as regards tax and social security payments. To be registered and remain registered, entrepreneurs must be up to date with their tax and social security contributions. Registration is refused or withdrawn when an entrepreneur has committed serious social security offences. The provisions apply to both Belgian and other EC country enterprises; non-EC companies cannot be registered.

The Act does not expressly make registration a condition for operating as an entrepreneur, but registration is a prerequisite for tendering for government contracts and for obtaining certain government subsidies for construction and renovation work. Moreover, any contractor or entrepreneur who enters into a contract with an unregistered entrepreneur or sub-contractor becomes jointly responsible for their social security and tax liabilities. As a result, unregistered enterprises virtually no longer have access to the market.

The system of registering entrepreneurs functioned in this way for ten years. Many were refused registration or deleted from the register because of non-settlement of tax or social security liabilities or serious offences against the regulations regarding their business activities. As a result, many individuals lacking adequate technical, administrative and financial means were forced out of the market; these decisions also made for more efficient collection of tax and social security contributions, employers who failed to pay on time were running the risk of being struck off the register.

Nonetheless, these measures did not completely eliminate fraud, since it was only after three or four quarters that the Commission had sufficient evidence to take action. Quite a large proportion of contributions could still be avoided (around BF 100 000 per worker per quarter). The firms set up by the "slave-traders" went out of business faster than before, but others automatically took their place.

{The personal identity card}

New measures were decided upon and became effective in April 1990 (for details see Annex 2). They are summarised in the two-column table below; on one side are set out the obligations of the prime contractor, and on the other the penalties in the event of non-compliance.

Obligations of prime contractor • Penalties in case of non-compliance

When one of six trades •• Fine up to a ceiling of 5 per cent of (earthworks, concreting, formwork, the total cost of the works. concrete reinforcing, masonry demolition) is involved on a building site, the prime contractor must inform the national social security authorities before work begins and supply a list of sub-contractors.

On all worksites, the prime contractor must keep a daily list of all workers employed, including those employed by sub-contractors. Fine of BF 60 000 per worker found missing on the list during a check.

All workers employed on the site must be in possession of a duly stamped personal identity card. • This identity card is only issued if the employer is up to date with his social security contributions. It gives the employer's and worker's identities and the date of starting work. This unforgeable document is issued by an official body. • a) If all the workers employed by a sub-contractor engaged in one of the listed trades are not in possession of a valid card, the main contractor must withhold 50 per cent on the invoices; if he fails to do so, he becomes jointly responsible for the sub-contractor's tax and social security liabilities.

••••• b) Non-possession of the card may give rise to a penal fine (BF 2 600 - 50 000 + a lump sum of BF 60 000) or an administrative fine (BF 1 000 - 50 000 + a lump sum of BF 60 000).

{The results}

Since April 1990, the investigative services have carried out systematic checks on worksites throughout the country. Checks have been carried out at around 700 sites and on some 14 000 workers. Many offences have been found, mainly involving workers not entered on the daily list and workers without identity cards. The fines provided for were imposed in the case of "slave-trader"-type enterprises. Prosecutions or administrative penalties were proposed in the case of non-possession of identity papers.

Since the checks were stepped up and these fines introduced, prime contractors have become increasingly reluctant to use such sub-contractors and the number of enterprises committing this type of offence has fallen steadily. At the same time, the number of undeclared foreign workers employed on building sites falling within the ambit of the Act has also fallen, since their presence on the site obviously puts the prime contractor seriously at risk.

3. Conclusions

The identity card may thus be considered to be an effective means of combating irregular employment of both Belgian and foreign workers. However, it can only be fully effective if workplace checks are carried out regularly

and if the penalties are sufficiently dissuasive. Consideration is currently being given to the possibility of extending the use of such identity documents to other sectors.

An opportunity to do so might be provided by the implementation of EC Directive 91/533 which requires employers to inform workers of contractual working conditions or labour relations. The identity document might be brought into use in all sectors. In addition to the information currently contained, it could also include the personal data required by the Directive.

Annex 1

A few facts and figures on immigration

Belgian population: 9 900 000
of which:

- 900 000 foreigners resident in the country legally (9 per cent);
- 540 000 (5.4 per cent) EC nationals;
- and 360 000 (3.6 per cent) nationals of non-EC countries (including 135 000 Moroccans, 80 000 Turks, 12 000 US nationals, 11 000 Zaireans, 10 500 Algerians, 6 000 Tunisians, 5 500 Yugoslavs, 5 000 Poles).

Dependent workers employed in the private sector

2 200 000 or 22 per cent of the total population

- of which 200 000 foreigners or 9 per cent of those in dependent employment [140 000 (6.3 per cent) EC nationals and 60 000 (2.7 per cent) nationals of non-EC countries, including 21 000 Moroccans, 12 000 Turks, 2 000 Algerians, 2 000 Yugoslavs, 1 600 Tunisians].

Asylum-seekers

- 1985: 7 644
- 1992: over 15 000 (fewer than 10 per cent of asylum-seekers are ultimately awarded political refugee status).

Work permits issued to immigrants

- 1989: 3 697
- 1990: 4 521
- 1991: 5 055

Estimated number of illegal immigrants

- between 50 000 and 100 000, with Poles accounting for around 25 per cent, Moroccans 20 per cent and Turks 15 per cent, on the basis of spot checks.

Number of illegal immigrants taken in for questioning by the police

- 1989: 6 220
- 1990: 7 440, of which 4 500 were issued with expulsion orders.

Findings of the "Inspection des lois sociales"

- In compliance• Undeclared workers employed
- with the law•• illegally

1989••	72••	105
1990••	111••	440
1991••	219••	473
1992••	476••	1 228

Annex 2

Summary of current regulations concerning the residence and employment of foreign workers

To be employed in the broad sense, workers must meet two conditions:

- they must be legally resident in Belgium; and
- they must be in possession of a work permit.

A. Residence

To be authorised to enter Belgium and to live there, foreigners must meet the following conditions:

- hold a valid national passport with a visa valid for Belgium (for a number of countries, the visa requirement is waived; these include Hungary, Poland, Czechoslovakia, Turkey, Morocco, Tunisia and Yugoslavia);
- have adequate means of support;
- not be thought liable to jeopardise public order or national security;
- not have been repatriated or expelled from Belgium in the last ten years.

After being authorised to enter Belgium, foreigners who do not plan to remain in the country for more than three months must simply register with the local authorities in the place where they are staying within eight working days of their arrival (except if staying in a hotel).

Should they plan to stay for more than three months in Belgium, prior authorisation must be requested from the Belgian diplomatic mission or consulate in their place of residence abroad.

In some cases, this authorisation may be sent by the foreigner to the burgomaster of the commune where he is living, should he already be in Belgium. The authorisation is issued by the Minister of the Interior or his representative responsible for immigration policy in Belgium. These individual authorisations are granted on the basis of national economic interests or on humanitarian grounds.

Foreigners granted refugee status have the right of abode in Belgium. To obtain this status, they must lodge a claim with the competent authorities on arrival. Should the request be admissible, they will be granted temporary residence pending a decision by the relevant authorities (Commissariat général aux réfugiés) as to whether the request is founded.

B. The work permit

{Principles}

No employer may employ a non-Belgian national in Belgium unless he has obtained an employment permit. No foreign worker can work in Belgium without having obtained a work permit. A worker is defined as any person who carries out any kind of work, with or without a work contract, under the authority of another.

{Exceptions}

These provisions do not apply to:

- nationals of EC Member States;
- certain foreign workers with a special status (e.g. the staff of
 - diplomatic missions, journalists, athletes);
- students on courses;
- drivers or pilots working for a foreign employer.

{Employment permits issued to employers}

The labour market situation is a consideration in granting this permit and priority is given to the Belgian labour force. This permit is not required when workers are already in possession of papers allowing them to work in Belgium (see below: work permit A).

Provisional employment, before the employer has obtained the requisite permit, is allowed in the case of:

- workers who qualify for permit A (see below);
- workers for whom the labour market situation does not apply.

Employers may hire workers on a provisional basis only if they apply for an employment permit within three days.

{Work permits issued to workers}

There are three types of permit:

- Work Permit A which is of indefinite duration and is valid for all forms of dependent employment.
 - This permit is granted on application by the worker:
 - on the basis of a specified number of years of work during a legal and continuous period of residence (2 to 5 years, according to case);
 - on the basis of a specified number of years of legal and continuous residence (3 years for recognised political refugees, 5 years for others);

- -- on the basis of a family tie with a worker holding an A permit (spouse, unmarried children under the age of 21).
- Permits B and C which are valid for 12 months and are issued only for a specified employer or sector. These permits are renewable.

They are issued subject to the following conditions:

1. There must be a lack of manpower for the job in question on the Belgian labour market. There are exemptions for domestic workers, students, managerial staff and refugees.
2. The workers must be nationals of a country with which Belgium has signed a labour convention (e.g. Turkey, Morocco, Algeria, Tunisia, Yugoslavia). Here too exemptions are possible in the case of highly skilled workers, managers, students and refugees.
3. Workers must undergo a medical examination.
4. Workers must have signed a work contract with their employer setting out the mutual obligations of the contracting parties.

C. Sanctions against employers

Employers who do not abide by the rules on the employment of foreign workers may be given a prison sentence of 8 days to one month and/or be fined BF 100 000 to 200 000 if they employ a worker residing in the country illegally and not in possession of a work permit.

The same penalties may be applied to persons who have been instrumental in the employment in Belgium of a foreigner without a work permit or who have requested or received money to procure him a job. A prison sentence of 8 days to one month and/or a fine of between BF 10 000 to 100 000 may be imposed in the case of a foreign worker not in possession of a work permit.

The fine is levied for each foreign worker unlawfully employed. In the event of a repeated offence within three years, the penalties are heavier: imprisonment for one month to one year and/or a fine of BF 100 000 to 500 000. The investigative services bring the offences to the notice of the judicial authorities.

It is up to the government department (the Labour Inspectorate) to decide:

- to bring the case to court. The court will either pass one of the above sentences or acquit the accused;
- to propose an out-of-court settlement, bringing the case to a close;
- not to take action. In this case the dossier is transmitted to the Director-General of the Service d'Etudes Juridiques in the Ministry of Employment and Labour.

The Director-General of the Service d'Etudes Juridiques may decide:

- either to impose an administrative fine of BF 15 000 - 75 000 when the foreign worker is an illegal resident without work papers and BF 1 000 - 50 000 when he is resident in the country legally but has no work permit;
- quite simply not to press proceedings when, for example, there is insufficient evidence.

When foreign workers are not properly entered in the enterprise's personnel register, as tends to be the case, the employer is also liable to the penalties specified in the regulations concerning the proper entry of workers (measures designed to combat moonlighting and which are directed as much at Belgian workers and legally resident foreign workers as illegal immigrants).

These regulations provide for a penal fine of BF 2 600 - 50 000 or an administrative fine of BF 1 000 - 50 000 as well as for a lump sum payment of BF 60 000 to compensate for the non-payment of social security contributions.

It is for the court or official responsible for imposing the administrative fines to decide whether these should or should not be combined with the penalties provided for by the legislation on the employment of foreign workers.

Summary of the measures adopted to combat
dishonest practices by suppliers of labour in the building industry

- A. The Act of 1976 on all forms of temporary work and the supply of labour
(replaced by the Act of 24.7.1987)

Temporary work agencies may supply labour in a few specified cases (replacement, work overload). Otherwise this practice is prohibited. Those who supply workers in breach of these provisions and those who employ them are jointly responsible for the payment of the social security contributions and wages, allowances and other benefits deriving from the contract. Offences of this kind may also attract penalties.

- B. Act of 1978 on the registration of entrepreneurs

This Act is intended to confer on registered entrepreneurs a sort of label of reliability as regards tax and social security payments. When work is placed with a non-registered entrepreneur, the contractor is jointly responsible for the tax and social security liabilities of the other contracting party.

{The general principles}

Entrepreneurs are not required by law to be registered. However, registration is a qualifying condition for tendering for government contracts and for the award of government subsidies (the construction and regeneration grant). Moreover, contractors or entrepreneurs who conclude contracts with non-registered entrepreneurs or sub-contractors are required to inform the National Social Security Office which is responsible for collecting social security contributions; they are jointly responsible for the tax and social security liabilities of the other contracting party.

{Registration procedure}

{Scope}

The Act applies to all legal natural entities and undertaking building works -- construction, alteration, finishing, fitting out, repairs and maintenance, cleaning and demolition of all or part thereof -- as well as any activity involving the supply of a movable asset and its installation in a building, such that it becomes immovable. The Act does not cover work undertaken in connection with the alteration, fitting out, repair, maintenance or cleaning of an existing housing unit, nor privately commissioned building work on a one-family house.

{Grant of registration}

Registration is granted, rejected or, where necessary, withdrawn by a commission comprising three members from the departments concerned (finance,

social security and labour), three members representing management and three members representing the unions.

{Terms and conditions of registration}

The enterprise must:

- be established in Belgium or in another EC Member State;
- be registered for VAT purposes in Belgium and, in the case of foreign firms, have a representative domiciled in Belgium responsible for compliance with tax requirements;
- be registered with the National Social Security Office in Belgium if staff are employed or, if the enterprise is established in another EC Member State, be registered in the country of origin in accordance with the relevant legislation;
- not be bankrupt;
- not be in serious breach of the legislation and regulations applying in the area of activity for which registration is requested;
- not have committed, in the 5 years preceding the application, serious and repeated tax and social security offences;
- have the financial, administrative and technical resources to ensure that future obligations can be met.

{Disclosure of the Commission's decisions. Appeals}

Commission decisions to award, reject or withdraw registration are notified to the applicant by registered letter and published in the Journal Officiel. The applicant may be heard by the Commission. Should the latter stand by its decision, the applicant may appeal through the normal legal channels.

{Obligations and responsibilities of the contractor}

Anyone who uses a non-registered enterprise to carry out building work is required to inform the agency responsible for collecting social security contributions, to withhold 30 per cent of the total invoice and pay it to the agency.

Moreover, he is jointly responsible in the eyes of the law for the tax liabilities of the other contracting party as to 35 per cent of the price of the work, and for his social security liabilities as to 50 per cent of the price of the work.

C. New provisions in force since April 1990

The registration system has been maintained. New preventive measures have been introduced which are designed to:

- facilitate early detection, in particular through checks at the workplace;
- increase prime contractors' responsibility for the liabilities of their sub-contractors.

{Joint liability of prime contractors}

The activities concerned are earthworks, concreting, formwork, concrete reinforcing, bricklaying and masonry, and demolition. For these types of works, the prime contractor is required to withhold 50 per cent from invoices paid to the other contracting parties, whether or not they are registered, and to pay 35 per cent to the National Social Security Office and 15 per cent to the tax authorities. These payments are advances on the amounts subsequently calculated to be owing. The prime contractor can only escape this obligation if all the workers of sub-contractors employed on the worksite possess a stamped personal card proving that their employer is up-to-date with his social security contributions.

When these amounts have not been withheld on all payments to sub-contractors in respect of a particular site, the prime contractor, the sub-contractor and any subsequent sub-contractors are jointly responsible for the payment of tax and social security contributions, as well as for workers' wages.

{Investigative measures}

{Information on new worksites}

Before the start of works on any building site involving the above six activities, the prime contractor is required to transmit to the National Social Security Office all the information needed to ascertain the scale of the works and identify all the sub-contractors involved at any particular stage. This prior information enables preliminary preventive checks to be carried out on the site. Non-compliance with this requirement may incur a fine, the ceiling on which is 5 per cent of the total amount of the works.

{Daily presence list}

Every day sub-contractors are required to transmit a list of all workers employed on the site to the prime contractor. For his part, the prime contractor is required to keep a daily list of workers employed at each worksite. This list should contain the following information: the date, the name and address of the prime contractor and his National Social Security Office number, the surname and first name and date of birth of every worker and the number of his entry in his enterprise's staff register.

This list must be permanently available to the official inspectors. The prime contractor must keep the lists for a period of 5 years at his head office. Anyone who fails to keep these lists or who omits any worker or enters false information must pay the National Social Security Office a sum equal to the quarterly social security contributions (around BF 60 000), multiplied by the number of workers whose positions are found not to be in order.

{The personal card}

Every worker employed in the construction industry must possess a personal identity card or "fiche individuelle". This card must give the following information:

- a) For the employer
 - Name and address
 - The responsible joint industrial council
 - The social security registration number
- b) For the worker
 - Surname and first names
 - Date of birth
 - Job
 - Date of taking up duties.

The card must be given to the worker by the employer on his first day of work. As soon as possible, and at the latest within three months of starting work, this provisional card must be replaced by a duly stamped personal card issued by the sector's security agency. This is an unforgeable document similar in appearance to a credit card.

This agency only issues a duly stamped card if the employer meets the following conditions:

- He has paid his social security contributions;
- When he employs at least 5 workers for the first time, he has paid an advance installment on his contributions of BF 17 000 per worker;
- When he increases the number of workers employed in the course of the quarter by more than 20 per cent, he has paid the advances statutorily required;
- He can produce copies of forms E101 or E102 for workers employed in accordance with the provisions of EC Regulation 1408/71 on secondment;
- He can produce copies of the authorisation and work permit for the non-EC workers he employs.

Should even one worker employed by the sub-contractor not be in possession of a duly stamped personal identity card, the prime contractor is required to withhold 50 per cent on the invoices of the sub-contractor in question and he becomes jointly responsible for the payment of the debts of the aforesaid subcontractor (see B.1 above).

END-OF-TEXT