GENERAL MEMORANDUM BELGIUM

1. Brief introduction to Belgian law

a. General background

Sources of Belgian labour law and social security law

Belgium has fairly extensive protective **labour regulations**. An individual can be employed as an employee in the service of an employer, as an independent operator, or as an official in the service of a public administration. The most common labour relationship is that between an employee and an employer.

Typical of Belgian labour law is the wide variety of legal sources. First, there are the laws as enacted by parliaments (both federal and regional) and implementing orders (such as royal decrees drafted by the government). Next, there are the collective labour agreements, which are also an important source of Belgian labour law. They have special mandatory force, partly because these agreements can be declared generally binding. As a result, they are also binding for those employers and employees who are not party to those agreements (see below under 1, c, ii). [1]

In cross-border situations the Rome I Convention or the Rome I Regulation 593/2009 is applicable. For the position of posted workers see below under 2, a, ii.

Belgium maintains three different **social security schemes**: an employees' scheme, a scheme for self-employed workers, and a scheme for civil servants. The conventional social security system comprises seven branches: pensions, unemployment, occupational accidents, occupational illnesses, family allowances, illness and invalidity insurance, and annual holidays. In addition to the social security system, there is also a social assistance system for persons who do not fall under the scope of these seven branches of the social security. These systems, including their organization and the conditions for entitlement to benefits, are laid down in a series of laws that relate to the various social security branches. [2]

In cross-border situations with other EEA Member States and Switzerland, Regulations 883/2004 and 987/2004 are applicable. Belgium has also concluded a number of bilateral social security agreements with third countries.[3]

[1] For more details see: http://www.werk.belgie.be/home.aspx.

[2] For more details see: https://socialsecurity.belgium.be/en/publications/everything-you-have-always-wanted-know-about-social-security.

[3] To be found at: https://www.socialsecurity.be/CMS/en/coming_to_belgium/FODSZ_Convention.

b. Overview of the judicial system

Belgium has specialised courts to deal with labour and social security cases: at first instance the labour tribunals and on appeal the labour courts. The labour tribunals and labour courts consist of a professional magistrate and two judges in social matters, i.e. lay judges appointed by the representative employees' and employers' organizations. The highest law court is the Court of Cassation. Criminal cases are dealt with by the criminal courts.

c. Role of social partners

i) **Social Dialogue**

Trade unions and employers' associations play an important role in the socio-economic decision-making process in Belgium. The industrial relations in Belgium are based on organized joint cooperation at national (federal and regional), sectoral and enterprise levels.

At national level a number of bipartite consultative bodies were set up, such as the National Economic Council and the National Labour Council. At regional level (Flanders, Wallonia and Brussels) both sides of the industry meet in consultative bodies. The National Labour Council is mainly charged with delivering opinions on general social issues that affect employers and employees and on legislative proposals on employment and social law. It is also empowered to conclude national and multi-industry collective labour agreements. These collective agreements are usually declared generally binding, thus giving them legal effect.

At sectoral level, collective bargaining is conducted almost entirely within joint committees which form the backbone of the system of constant social dialogue. Collective bargaining and conflict mediation are by and large incorporated in these joint committees or sub-committees. Joint (sub-)committees are set up by Royal Decree. They can be set up for specific occupations or sectors, as is the case with the "Joint Sub-Committee for road transport and logistics on behalf of third parties" (see further below).

The main task of these committees is to oversee the conclusion of collective labour agreements by the representative organizations and to prevent and settle disputes between employers and employees. During the last few years, both the legislature and the social partners have increasingly used joint committees to implement laws and collective labour agreements.

Given that joint committees play an important role in a lot of different areas (for example in fixing wages), knowing which employers and employees fall under the jurisdiction of a particular committee is crucial. As a general rule, a joint committee has jurisdiction for workers employed by an employer whose enterprise belongs to the branch of industry for which the joint committee has been set up, regardless of the worker's individual occupation. A driver working for a textile company may therefore fall under the jurisdiction of a joint committee for the textile sector and not for the road transport sector.

At enterprise level employer and employee concertation and collaboration is organized by the works council. Works councils have to be set up in enterprises habitually employing an average of at least 50 workers. The works council has the right to information on the economic, financial and social situation of the enterprise. One of its most important tasks is giving advisory opinions. These may concern vocational training, personnel management, the organization of work, structural changes of the enterprise which could affect employment, etc. In addition, the works council has the power to decide in a number of cases clearly defined by law, such as: drafting and changing work rules, setting up general criteria for collective dismissal, setting the dates of annual holidays and supervising compliance with employment legislation. Also at enterprise level, the Committee for Prevention and Protection at work, composed of representatives of the management and of the workers, has an advisory role regarding matters related to the workers' health and safety.

In Belgium employers and unions are organized in professional associations. The "most representative workers organizations" involved in social consultations at all levels, are the Federation of Liberal Trade Unions (ACLVB-CGSLB; about 300,000 members), the Confederation of Christian Trade Unions (ACV-CSC; about 1.7 million members), the Belgian General Federation of Labour (ABVV-FGTB; about 1.2 million members) and the occupational associations affiliated to the latter two.

Employers join professional organisations of the branch of industry in which they are active. These associations are geographically organised. At national level, industrial federations are centralised by the multi-industry organisations. These multi-industry organisations set up at national level are considered to be representative for social consultations. In addition, professional organisations can be awarded representative status on the recommendation of the National Labour Council.

As regards the employees, the most important social partners for road transport are the Belgian Transport Workers' Union (BTB) and the Christian Transcom (ACV-Transcom). For the employers, the most important social partners are the Royal Federation of Belgian Hauliers and Logistic Services (FEBETRA), Transport and Logistics Flanders and the Professional Union of Road Transport (UPTR).

ii) **Collective labour agreements (CLAs)**

Belgium uses legally binding collective labour agreements. The representative unions have a monopoly for concluding such agreements at national, sectoral and enterprise level. A collective labour agreement is an agreement concluded between one or more employees' organisations and one or more employers. They govern individual and collective relations between employers and employees within the enterprise or in an industry, and regulate the rights and obligations of the contracting parties. As regards individual working conditions, these may relate to matters such as pay and bonuses, working hours, annual holidays and paid leave and professional classifications. These individual standard provisions are included in the worker's individual employment contract falling under the scope of the collective labour agreement.

A collective labour agreement is binding for the organisations that have concluded it and employers who are members of such organizations or have concluded such an agreement themselves. They are also binding for the organisations and employers adhering to the agreement and employers who are members of such organisations and all workers in the service of employers bound by the agreement. A collective agreement can be made generally binding by a Royal Decree (so, basically, by the government), making the provisions of

the agreement binding to all employers and employees falling under the scope of the joint committee in which the collective agreement was concluded. A collective labour agreement which is declared generally binding by Royal Decree has the same binding force as such a decree. [4]

The preparatory work for the Law of 5 December 1968 shows that the CLAs that have been declared generally binding are applicable to all activities in Belgium, regardless of where the enterprise which employs the employees in question is established. Consequently, companies that are established abroad also fall under the scope of these CLAs.

iii) The Joint Committee for transport

The employees employed in companies within the sector of road transport and their employers fall under the competence of the "Joint Committee for transport and logistics" (no 140). This Joint Committee has some sub-committees, one of which is the "Joint Sub-Committee for road transport and logistics on behalf of third parties" (JSC no 140.03). [5]

The JSC 140.03 is responsible for workers who mainly perform manual tasks and their employers in companies carrying out road transport and any other forms of land transport of goods for third parties in Belgium, regardless of the traction type of the means of transport used, and for companies exclusively engaged in logistical activities on behalf of third parties.

iv) Collective Labour Agreements regarding transport workers

Within the JSC 140.03 a number of collective labour agreements have been concluded which have been declared universally applicable. This also means that non-compliance with them is subject to penal law (for more information on sanctions, see point 4.1.2). These CLAs are in principle applicable to all companies carrying out road transport and any other forms of land transport of goods for third parties in Belgium. The central criterion for this is the carrying out of transport activities in Belgium, irrespective of the place of business of the employer. However, it seems that in practice these CLAs are not applied to temporary transport activities (other than cabotage) by companies not established in Belgium.

These CLAs concern issues such as: minimum wages, working hours, bonuses and allowances (such as end of year bonus, seniority allowance, premium for night work, Sundays and public holidays, working hours and availability time bonus, overtime remuneration, bonuses for exceeding the average working hours, residence allowance and ARAB allowance). Special CLAs were concluded on the working conditions of mobile workers of companies providing "courier services" and "delivery services". [6]

[4] See the Law of 5 December 1968 on CLAs.

[5] As established by the Royal Decree of 22 January 2010 and amended by the Royal Decree of 15 February 2016.

[6] An overview of the most relevant provisions can be found on the internet under "Joint Sub-Committee for road transport and logistics on behalf of third parties (JSC 140.03) Subsector MOBILE WORKERS".

The most relevant CLAs for international road transport are:

- CLA of 27 January 2005 (74 050) (Royal Decree 24/09/2006 - Belgian Official Journal 28/11/2006) determining the working conditions and wages of the mobile workers employed in the freight transport enterprises in this country for the account of third parties and in the cargo handling enterprises for third parties
- CLA of 30 September 2005 (77 063) (Royal Decree 22/03/2006 - Belgian Official Journal 20/04/2006) on overtime in the sub-sectors for the transport of goods by land on behalf of third parties and for the handling of goods for third parties
- CLA of 30 September 2005 (77 082) (Royal Decree 27/09/2006 - Belgian Official Journal 20/11/2006) on wages and working conditions of mobile personnel of companies providing "courier services" and belonging to the sub-sector of freight transport in this country for third parties
- CLA of 30 September 2005 (77 084) (Royal Decree 27/09/2006 - Belgian Official Journal 20/11/2006) on the establishment of an additional bonus for performances on paid public holidays for workers employed in the companies for transport of goods by land on behalf of third parties and for the handling of goods for third parties
- CLA of 26 November 2009 (96 982) (Royal Decree 30/07/2010 - Belgian Official Journal 09/09/2010) on the determination of pay and working conditions for the travelling personnel of companies providing "delivery services"
- CLA of 26 November 2009 (96 987) (Royal Decree 30/07/2010 - Belgian Official Journal 09/09/2010) on the determination of a financial compensation for night work for mobile personnel employed in companies for transport of goods by land on behalf of third parties and/or for the handling of goods for third parties
- CLA of 26 November 2009 (97 002) (Royal Decree 09/07/2010 - Belgian Official Journal 03/09/2010) on wages and working conditions of the mobile and non-mobile workers of the companies providing "courier services"
- CLA of 15 September 2011 (106 713) (Royal Decree 14/01/2013 - Belgian Official Journal 28/03/2013) on seniority allowance for the mobile and non-mobile personnel of the enterprises for the transport of goods by land on behalf of third parties and/or the handling of goods for third parties
- CLA of 13 March 2014 (121 724) (Royal Decree 8 January 2015 – Belgian Official Journal 6 February 2015) on equal pay for equal work
- CLA of 19 November 2015 (131 219) (Royal Decree 15/07/2016 - Belgian Official Journal 23/09/2016) on the determination of the residence and GRLP allowances
- CLA of 20 October 2016 (136160) (Royal Decree 7/3/2017 - Belgian Official Journal 29/3/2017) on the payment in cash of a part of the wage

2. Implementation

a. Implementation of the parts from Module 1

i. **Fundamental freedoms**

The fundamental freedoms of the EU internal market are directly applicable in Belgium. This is more specifically the case with the freedom of movement for workers and the freedom to provide services. The EU regulations on these issues also apply directly in Belgium, whereas the relevant directives are, in principle, transposed into Belgian law. More details on the latter can be found below.

ii. **Private international law**

The Brussels I Regulation 1215/2012 on judicial competence as well as the Rome I Regulation 593/2008 on the applicable law can be directly implemented in the Belgian legal order. No specific implementation laws need to be taken.

iii. **Posting of Workers Directive (including Enforcement Directive)**

The working conditions to be complied with in case of posting in Belgium, are determined by the Belgian Posting Act of 5 March 2002, which implemented the Posting of Workers Directive 96/71 (PWD). This law was recently amended by the Law of 11 December 2016, which implemented the Posting of Workers Enforcement Directive 2014/67 (PWED).

According to Article 2 of this law, posting means the situation of a worker who temporarily carries out work in Belgium and who either habitually works in the territory of one or more countries other than Belgium or was recruited in a country other than Belgium. The term workers refers to gainfully employed persons. Posted workers are persons who on the basis of an agreement carry out work for a wage or salary under the authority of the undertaking which posts them elsewhere. The employment relationship between the foreign undertaking posting the worker elsewhere and the gainfully employed posted worker should already exist prior to the temporary posting to Belgium and should be retained throughout the period of posting.

An employer posting workers to Belgium must, for work carried out in Belgium, comply with the working conditions (including the wage/salary and employment conditions) laid down by the Belgian legislative provisions (laws), regulatory provisions (Royal Decrees) and generally binding collective agreements which are subject to the provisions of penal law. Being subject to penal law, those provisions are to be considered as public policy provisions, and are therefore considered to be essential provisions safeguarding the rights of workers. These provisions concern, for instance, working time (limits on working hours, rest periods), public holidays, temping and hiring out of workers, well-being at the workplace (safety at work), wage/salary protection (time, manner and place of payments, permitted deductions), minimum wage scales and other labour and employment conditions laid down by generally binding sectorial collective agreements (i.e. subject

to penal law), etc. However, this principle is without prejudice to the application of any working, remuneration and employment conditions of the country of origin more favourable to the posted worker. [7]

It seems that this implementation of the PWD by Belgium goes beyond what this directive allows the Member States to do. More specifically, the interpretation by the Belgian law that all legal provisions which are subject to penal law sanctions are to be considered as public policy provisions within the meaning of Article 3(10) PWD seems not to be in line with the rather strict interpretation by the CJEU of this provision in its judgment in *Commission v Luxembourg*.[8]

With regard to the most relevant hard core terms of employment conditions as set out in Article 3(1) PWD, the following applies in Belgium:

- ***Maximum work periods and minimum rest periods***

The working time may not exceed 8 hours a day and 38 hours a week. In a five-day week the daily limit is 9 hours. The working hours regulation is rather complex and contains a number of special arrangements for, amongst others, shift work, continuous work, night work. Such special arrangements are often laid down in CLAs.

- ***Minimum paid annual holidays***

The duration of the annual holidays to which the employee is entitled in a certain year is proportionate to the effective working days or days of work interruption ranking on a par with working days in the previous calendar year. A full holiday period for 12 months of labour or days considered equal in the holiday reference year amounts to 4 weeks. Additional holidays are sometimes provided for in Collective Labour Agreements.

- ***The minimum rates of pay***

In Belgium, the minimum wage of gainfully employed persons is fixed by collective agreements. In principle, the minimum wage scales are laid down per sector by the competent joint committee. The determination of the joint committee to which a particular undertaking belongs depends on that undertaking's principal activity. The collective agreements concluded within these committees include provisions designed to determine the general basis for calculating wages/salaries according to the various levels of qualifications and posts. These scales indicate the gross wage/salary. The minimum wage scales are automatically adjusted according to developments in consumer prices.

- ***The conditions for hiring out workers***

The employment regulations regarding temporary agency work are part of the Law of 24 July 1987 on temporary work. Through this law, amongst others, the provisions of Directive 2008/104 on temporary agency work were transposed into Belgian law. The Law of 9 July 2012 too implemented a number of provisions of this directive. It contains, inter alia, a provision guaranteeing that the rules applicable at the client's with regard to the fight against discrimination, equal treatment of men and women and motherhood protection also have to be complied with vis-à-vis the temporary agency workers employed by that principal.

[7] For more details see also: http://www.employment.belgium.be/defaultTab.aspx?id=6540.

[8] CJEU 19 June 2008, C-319/06, *Commission v Luxembourg,* ECLI:EU:C:2008:350.

According to the Temporary Agency Work Act of 24 July 1987, temporary agency work is only allowed for permitted temporary work. It is allowed for replacing a permanent employee, for responding to a temporary increase in the work load, or for carrying out extraordinary work. In 2013 the possibility was introduced to allow temporary agency work for so-called intakes as well, i.e. employment agency work aimed at making a temporary agency worker available to a client to fill a vacancy with the intention of hiring him/her for an indefinite period for the same job after the temporary period has ended. If the client employs a temporary agency worker because of other circumstances than those laid down in the law, the employment contract is considered to be an open-ended employment contract between the client and the employee. This also means that the temporary agency work agreement is null and void and that the client is severally liable for the payment of social contributions, wages, compensations and benefits stemming from an open-ended employment contract.

The intention of concluding an employment contract for temporary agency work must be put in writing by both parties for each employee separately, at the latest, at the moment at which the employee starts working for the temporary employment agency. The temporary agency worker's wages may not be lower than the wages he/she would have been entitled to if he/she had been hired by the employer as a permanent employee under the same conditions.

In addition, Article 31 of the Law of 24 July 1987 forbids, in principle, an employer to hire out employees employed by him/her to users who have partial authority over these employees. If this is the case the client and the employee are presumed to be bound by an open-ended employment contract. The main objective of the prohibition is to fight labour traffickers who have no other activity than hiring out workers. Usually this involves persons who do not observe the social security obligations and fail to transfer the advance tax payments to the Treasury. This law is also intended to counter artificial transnational constructions whose only aim is to avoid the application of Belgian labour law. It stipulates that the client's compliance with the obligations regarding well-being in the workplace, both with regard to working hours and rest periods as well as the performance of the agreed work, should not be considered as the exercise of authority. Neither can we refer to transfer of authority if a written agreement specifies which kind of instructions are allowed to be given by the client, more specifically when the client's right to give instructions does not erode the authority of the formal employer.[9] For the application of these provisions to international road transport see further No 3, b, i.

Enforcement Directive 2014/67 (PWED) was implemented in Belgium by the Law of 11 December 2016. This law has introduced a number of amendments in the Belgian legislation. These amendments concern rules on issues such as the identification of genuine posting, documents and information to be provided by the employers to the inspectorates, subcontracting liability and cross-border enforcement of financial and administrative sanctions.

iv. **Social security**

Belgium applies the EU Social Security Coordination Regulations 883/2003 and 987/2009 directly. No specific implementation instruments were adopted.

[9] This law is considered as part of the '*ordre public*' in Belgium and therefore applicable to all employment in Belgium: Cass. 15 February 2016, no C.14.0448.F. Compare Article 9 of Rome I-Regulation.

v. **European Social Dialogue**

The Belgian social partners actively participate in the work of the European organizations involved in the European Social Dialogue. Belgium has also implemented the directives adopted in the framework of the European Social Dialogue, such as Directive 97/81 on part time work (Law of 2 March 2002); Directive 99/70 on fixed term contracts (via the Employment Contract Act of 3 July 1978) and Directive 96/34 on parental leave (via CLA No 64 of 29 April 1997).

b. Implementation of EU law on road transport (only a list, not in detail)

The Belgian rules and regulations concerning road transport are largely determined by the relevant European rules and regulations. They also cover certain rights of employees in this sector. The most important of these are:

- Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons carrying out mobile road transport activities
- Directive 2006/22/EC of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC
- Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport (rules on driving times, breaks and rest periods for drivers)
- Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator
- Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market
- Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport

In Belgium these directives and regulations are implemented and specified by the following instruments:

- Directive 2002/15/EC and Regulation 561/2006 were implemented in Belgium by the Royal Decree of 10 August 2005 and the Royal Decree of 9 April 2007, which was later replaced by the Royal Decree of 17 October 2016 on tachographs, driving times and rest periods
- Directive 2006/22/EC was implemented by the Royal Decree of 8 May 2007
- Regulations 1071/2009 and 1072/2009 were further implemented and specified by the Law of 15 July 2013 on road haulage. This law contains a number of provisions including provisions on control and

sanctions.[10] It is further implemented by the Royal Decree of 22 May 2014 on road haulage (as amended by the Decision of the Flemish Government of 10 July 2018).

- Regulation 165/2014 is further implemented in Belgium by the Royal Decree of 17 October 2016 on tachographs, driving times and rest periods.

3. National framework on transnational transport

a. Introduction and most important problems

Among the most difficult problems reported by the competent authorities as well as the representatives of trade unions are:

- letter-box companies,
- cabotage control,
- tachograph controls,
- non-observance of the regulations regarding driving times and rest periods,
- bogus self-employment,...

The short periods spent in Belgium, language difficulties, the absence of any establishment in Belgium, subcontracting pyramids etc. make it difficult to carry out inspections. Road transport is indeed hard to control for it involves vehicles which are constantly moving in the various Member States. Fake constructions can easily be adapted and moved. The competent inspection agencies often have problems proving that there has been a violation, because of, amongst other things, the grey area in which it is unclear whether the construction is legal or illegal. The European rules concerning the A1 Declaration also render effective control difficult (see memorandum on the EU social security coordination).

Quite often this kind of road transport involves lorry drivers who spend months on end in their lorry and never or rarely return to their so-called country of origin (at least not in their lorry). Frequently the undertaking, for which they work, in another Member State does not carry out any substantial activities in that Member State. During the Christmas Holidays 2015-2016 several hundred lorries registered by a company from Hungary were parked in Belgium on a number of fields rented from farmers for this purpose. During this period the drivers went on holiday to stay with their families in various EU Member States. This situation was amply covered in the national press. The Belgian social inspectorate conducted extra checks to verify whether the Belgian and European legislation had been complied with. It turned out that these drivers received minimum wages of only €300 a month and allowances for expenses of €1500 a month and that to earn this they had to work 80 hours a week. Obviously, these wages are below the minimum wages laid down in Belgian law. However, it was unclear whether the Belgian minimum wages applied to the drivers of these lorries.

[10] Article 43, §4 imposes sanctions, amongst others, on the haulier and the principal who have offered transport at "unacceptably low prices". Unacceptably low prices are understood to mean prices that are insufficient to cover, inter alia, the social costs.

According to the competent inspection agencies the legally imposed rates of fines, punishments and administrative fines are too low, certainly in the case of fraud and serious infringements and are not in proportion to the possible profits made as a result of these infringements. The fines seem to be nothing more than an occasional risk consciously taken by the offenders (often the employer or principal) convinced as they are that this is still cheaper than compliance with the regulations.

Both the inspection of and compliance with the applicable legislation are also complicated by its complexity and by the fact that a lot of different inspection agencies are competent to deal with the various parts of the legislation: driving times and rest periods, wages and other working conditions, social security.

b. Focus points:

i. **Private international law**

Competent Court

So far, in cases relating to international transport there has not been any discussion in Belgian courts on the competence of these courts. However, there is case law regarding claims of personnel of airlines which are not established in Belgium but do carry out activities from Belgium. More specifically, this concerned cases against the airline company Ryanair which is established in Ireland but organizes flights from Charleroi Airport (application of Regulation 44/2001 and Regulation 1215/2010). The employment contracts had been signed in Dublin and the company had chosen to apply Irish labour law. In previous case law the Charleroi Labour Tribunal had ruled that Charleroi was the habitual place of employment of these employees because they always depart from there.[11] But in more recent case law this labour tribunal recanted these rulings in almost identical cases.[12] The tribunal did acknowledge that Charleroi Airport could be considered as the habitual place of employment. However, the fact that Ryanair does not have any organization in this airport, that the instructions are put on the Internet from the Dublin seat and that flights to a multitude of destinations in Europe are carried out led the tribunal to decide that Belgium is not the main State of employment and that, therefore, the Belgian courts are not competent. The appellants lodged appeals against those judgments, claiming, in particular, that the Belgian courts have jurisdiction pursuant to Articles 18 to 21 of Regulation No 44/2001 and that Belgian law governs the employment relationship at issue in the main proceedings pursuant to Article 6 of the Rome I Convention. The Labour Court of Mons decided to refer the case for a preliminary ruling to the European Court of Justice [13], basically asking that Court if the concept of the "place where the employee habitually carries out his work" referred to in Article 19(2) of Regulation No 44/2001 must be interpreted as being comparable to the concept of "home base" defined in Annex III to Regulation No 3922/91. The CJEU delivered its judgment in this case on 14 September 2017. As regards the determination of the concept of 'place where the employee habitually carries out his work', the Court refers to its settled case-law

[11] Labour Tribunal Charleroi 21 March 2005, *JTT* 2005, 263. For a comparable ruling see: Court of Appeal Brussels, 10 June 2008, *TBH* 2012, 173.

[12] Labour Tribunal Charleroi 6 September 2013, R.G. 11/5322/A.

[13] CJEU, Case C-168/16 and case C-169/16, *Nogueira and others v Crewlink and Moreno Osacar v Ryanair*.

according to which that concept covers the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer. To determine specifically that place, the national court must refer to a set of indicia. In the transport sector, it is necessary in particular to establish in which Member State is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found. In the present case, the place where the aircraft aboard which the work is habitually performed is stationed must also be taken into account. As regards, more specifically, whether the concept of 'place where, or from which, the employee habitually performs his work' can be equated with that of 'home base', the Court points out that, owing to the circumstantial method and in order to thwart strategies to circumvent the rules, that concept cannot be treated in the same way as any concept referred to in another act of EU law, including that of 'home base', within the meaning of an EU regulation in the field of civil aviation. Nevertheless, the concept of 'home base' amounts to a significant indicator to determine, in circumstances such as those at issue, the place from which the employee habitually carries out his work. It would only be if, taking account of the facts of each individual case, applications were to display closer connections with a place other than the 'home base' that the relevance of that base in identifying the 'place from which employees habitually carry out their work' would be undermined. Finally, the Court states that the argument that the concept of 'place where, or from which, the employee habitually performs his work' cannot be equated with any other concept is also true as regards the 'nationality' of aircraft. Thus, nor can the Member State from which a member of staff habitually carries out his work be equated with the territory of the Member State of nationality of the aircraft of that company.

Applicable law

The Belgian inspectorates drafted guidelines with regard to their interpretation of the European and Belgian legislation; including with regard to the implementation of the Rome I Regulation and the PWD. [14] As far as Rome I is concerned these guidelines summarise the case law of the Court of Justice in *Koelszch* and *Voogsgeerd.* They indicate that in case of transport activities carried out exclusively in Belgium, Belgian labour law applies, irrespective of the place of business of the employer. In cases of international transport, the following criteria should be applied in order to determine if Belgian labour law is applicable: (1) in which country is the place situated from where the employee carries out his transport assignments; (2) in which country does he receive the instructions for his assignments; (3) from which country is his work organised and (4) in which country are the labour instruments situated? In addition, these guidelines state that the following criteria should also be taken into account: what are the places where the transport is chiefly carried out; what are the places where the goods are unloaded; what is the place where the employee has to report before starting his work; what is the place he returns to after his work has been carried out? If the answer to these questions is "mainly Belgium", according to these guidelines Belgian employment law must be applied.

With regard to the determination of the applicable law by virtue of the Rome I Convention or the Rome I Regulation a number of cases have been brought before the courts in Belgium. On 3 December 2015 the Ghent

[14] To be found at: http://www.siod.belgie.be/sites/default/files/content/download/files/guidelines_transport_24_04_17_nl.pdf

Court of Appeal passed an important judgment in this respect.[15] This case concerned Czech drivers who were formally employed by a letter-box company in the Czech Republic and were seconded to a Belgian transport company. The Court of Appeal held the view that these were drivers who were mainly active in Belgium from where a dispatcher of the Belgian transport firm directly instructed the drivers and where the transport assignments were organized. Furthermore, during their rides the drivers had to report to this dispatcher who also was their contact for all information and problems during the rides. On the basis of these elements the Court decided that pursuant to Article 8 (4) Rome I Regulation there was a close link with Belgian labour law and therefore the latter had to be applied to the employment relationship. (See further on the application of the Belgian legislation on forbidden secondment).

In three other cases the Antwerp Labour Court ruled in a similar vein. One of these cases concerned Mr Szarvas.[16] Mr Szvarvas was a lorry driver who formally spoken concluded an employment contract with a transport company established in Slovakia (CTES). Acting as a subcontractor this company carried out transport activities for a transport firm established in Belgium (EKB). After examination of the facts the labour tribunal decided that there was no relationship of authority between the driver in question and the Slovakian company, but instead that there was such a relationship between this driver and the Belgian firm (EKB). It turned out that the driver received his instructions from EKB, that the company owned the lorry, drew up the bills of carriage and read out the tachograph cards. Therefore, the labour tribunal ruled that Belgian labour law applied.

A case before the criminal court of Bruges concerned a number of Bulgarian drivers whose employer claimed that they were posted from Bulgaria to a Belgian firm. The court, however, held the view that the only thing that took place in Bulgaria was the recruitment of these employees and that the company did not actually carry out activities in Bulgaria. The court was of the opinion that they were in fact employed by a branch in Zeebrugge which was the real employer of these employees. So, according to the court, there was no posting involved. As a result, in a judgment of 26 March 2014 [17] the Bruges criminal court convicted the persons in charge of this firm for illegal employment of foreign workers [18] and failing to register these workers in the Belgian social security system. They were also convicted for employing these workers in degrading circumstances and this on the basis of the provisions in the Penal Code regarding human trafficking (Articles 433quinquies and 433septies). The persons concerned were sentenced to imprisonment and fines.

On 7 September 2016 the criminal court of Ghent ruled in a case concerning a Belgian living in Belgium who used drivers who were sent to Belgium by a temporary employment agency in Poland and a letter-box company in Slovakia. The transports took place from a place of employment in Belgium which was also the place where all the assignments were given. The court was of the opinion that the activities were habitually carried out in and from Belgium and that therefore Belgian labour law was applicable. The person using these drivers was considered to be the employer and convicted for non-compliance with the Belgian legislation.

On 25 April 2016 a number of persons who had used Bulgarian and Turkish lorry drivers who, formally, had an employment contract with fictitious Bulgarian and Turkish companies, were sentenced to 6 to 60 months'

[15] Court of Appeal Ghent, 3 December 2015, 2014/PGG/61 2014/VJ12/53.

[16] Labour Tribunal Antwerp, 14 April 2016.

[17] Criminal Court Bruges, 26 March 2014, 2017/1173.

[18] At the time of the facts there were still transition measures regarding the free movement of Bulgarian workers. As a result their employment in Belgium was still subject to permits which the employer concerned did not get.

imprisonment by the criminal court of Liège because of non-compliance with Belgian labour law.[19] The lorry drivers in question earned €3 per hour and worked 18 hours a day.

In the same vein the criminal court of Bruges sentenced companies and their owners for a number of violations of the social penal code in its judgments of 10 May 2017. In the first case [20] this concerned three transport companies of which one had its seat in Belgium, one in Luxembourg and one in Slovakia. In actual fact these three companies were run from Belgium by the same manager and all the activities were also organised from Belgium. There were no management activities in Luxembourg or Slovakia. The court held the view that these drivers habitually carried out their jobs from Belgium and that both Belgian labour law and social security law applied. The managers were convicted for failing to apply this legislation.

A similar decision was taken in a case of subcontracting by a Bulgarian firm for a Belgian principal.[21] The court took the view that the Bulgarian firm was a letter-box company and that the real employer was the Belgian principal. The activities always started and ended in Belgium; the lorries were parked there; the assignments were given from Belgium and no activities were carried out in Bulgaria. Therefore, the court ruled that both Belgian labour law and social security law applied. The managers were convicted for failing to apply this legislation. The third case concerned a similar situation in which it also emerged that the wages had not been paid. In this case the managers were convicted as well.[22] However, in the fourth case the court held the view that there was no letter-box company involved because activities were carried out in the country where this firm was established.[23]

ii. **Posting**

The abovementioned guidelines of the inspection agencies indicate that a posted employee is an employee carrying out work in Belgium and who either usually works on the territory of one or more countries other than Belgium or has been hired in a country other than Belgium (see Law of 5 March 2002). In the guidelines the following examples are given:

- a German ITT employee is sent out by his German company to carry out an analysis at a Belgian client's of his employer for a period of five months;
- a French parent company sends one of its employees to Belgium to work there for the Belgian branch of the that company for a period of two years;
- a Romanian lorry driver is posted by his employer, a Romanian transport firm, to carry out transport activities in various countries (international road transport) and in Belgium (national transport – cabotage).

As a condition for the application of the Posting of Workers Directive the guidelines also mention the following: the employment relationship between the posting foreign undertaking and the wage-earning

[19] Criminal Court Liège, 25 April 2016.

[20] Criminal Court Bruges, 10 May 2017, S/85/15/ BG.69.98.1226-16 1121.

[21] Criminal Court Bruges, 10 May 2017, 2017/1174.

[22] For a similar decision in the third case see: Criminal Court Bruges, 10 May 2017, 2017/1175. For more details on this case see under 8 "Example case".

[23] Criminal Court Bruges, 10 May 2017, 2017/1175.

posted employee must already exist prior to the temporary posting to Belgium; the employment relationship between the posting foreign undertaking and the posted worker must be maintained during the posting period. Moreover, according to these guidelines, it is imperative that an agreement be concluded between the principal (dispatcher) and the receiver of the service in Belgium. So for there to be a case of posting in Belgium, either the principal or the user must be established in Belgium. In international transport operations this kind of situation occurs, for instance, in the case of (permitted) cabotage (on Belgian territory). [24] According to these guidelines in (most) cases of purely international transit transport in which the contracting transport parties have no tie with Belgium (i.e. no temporary activities in Belgium for a Belgian co-contractor) there is, strictly speaking, in terms of labour law no posting (to Belgian territory) involved. If a foreign haulier mainly carries out transnational transport on behalf of a Belgian transport company, as a rule the PIL regulation will apply. The *Koelzsch* judgment test may have as a consequence that Belgian labour law as a whole is applicable if the conditions of this judgment are met (see above).

If the conditions for posting to Belgium are met, according to these guidelines the Belgian minimum wage must contain the following elements:

- the minimum wage as laid down in the Joint Committee for Transport and Logistics for the driving hours and the hours of loading and unloading. These working hours may lead to payment of wages for overtime;

- the minimum wage for the time the drivers have to be available, for instance, for waiting for the loading and unloading of goods, the issuing of customs forms etc. These hours do not lead to extra payment for overtime;

- ARAB allowances in the transport sector;

- payment of accommodation expenses. These expenses have to be paid to the drivers if, for instance, they are away from home for a period exceeding 24 hours.

iii. **Business trip**

In Belgium there is no sharp distinction between posting and business trips. If an international assignment falls within the ambit of the Law of 5 March 2002, it is considered posting.

iv. **Cabotage** [25]

In case of cabotage transport (a transport company from another Member State transports goods between two different locations in Belgium for a client there) the competent Belgian authorities and inspection services

[24] Recital 17 of Regulation 1072/2009 also states that "the provisions of Directive 96/71/EC [...] apply to transport undertakings performing a cabotage operation".
[25] On the conditions to be fulfilled for cabotage see Regulation 1072/2009 as further implemented and specified by the Law of 15 July 2013 on road haulage.

consider this to be a genuine posting situation (see above). Yet, this is not explicitly dealt with in the Law of 5 March 2002 nor in the case law. However, if the specific conditions for cabotage as laid down in Regulation 1072/2009 and the Law of 15 July 2013 are not fulfilled, and goods are transported by a transport company from another Member State between two different locations in Belgium for a client there, the work will be considered as being fully subject to Belgian employment law.

v. **Intermediary**

The Law of 24 July 1987 forbids, in principle, an employer to hire out employees employed by him to users who have partial authority over these employees. If this is the case the user and the employee are supposed to be bound by an open-ended employment contract. The above-mentioned guidelines of the inspectorate give the following examples:

- agreements according to which a lorry with driver is rented to a client is, in principle, legally not possible;
- a transport undertaking that "lends" its vehicles with drivers to or "places" these at a logistic service provider. The logistic service provider is "supplied with" these manned lorries and can use them as he sees fit. From a strict labour law perspective this is forbidden, more specifically because the logistic service provider will in actual practice exercise the authority of an employer over the drivers concerned;
- a Belgian transport undertaking starting up a branch in another country. However, in the country of the branch's establishment there is no real planning or dispatching but only individuals carrying out purely administrative jobs. All of the planning and dispatching takes place in Belgium at the parent/main company. From the point of view of labour law this is forbidden because the main principal will be the one exercising the authority of an employer over the drivers concerned.

vi. **Social security**

The Belgian courts decided on a number of cases related to the question whether or not transport employees posted to Belgium or working on the territory of various Member States were subject to the Belgian social security legislation.

In a judgment of 18 November 2009 of the labour tribunal of Brussels a Belgian transport company was sentenced to the retroactive payment of social security contributions to the Belgian system for four transport workers who were formally posted to the Belgian company by a Luxembourg company. Initially the competent Luxembourg authorities had issued an E 101 document on the basis of which these employees would have been subject to the Luxembourg social security system. For this purpose, they had applied Article 14(1) Regulation 1408/71. [26] But when the Belgian authorities were able to prove that these employees mainly

[26] See on the application of this legislation the memorandum on social security.

or even exclusively worked on Belgian territory (where they also lived) the Luxembourg authorities withdrew these E 101 documents. On the basis thereof the Brussels labour tribunal sentenced the Belgian firm to the retroactive payment of the social security contributions to the Belgian system for these workers.

vii. **Minimum wage**

The minimum wages for the road transport sector are laid down in collective agreements concluded within the "Joint Sub-Committee for Road Transport and Logistics on Behalf of Third Parties" (JSC No 140.03). A list of the relevant agreements can be found at: http://www.employment.belgium.be/defaultTab.aspx?id=38256. These agreements not only set the hourly minimum wages, but also the end of year bonuses, seniority allowances, premiums for night work, Sundays and public holidays …

4. Monitoring and enforcement

a. Information and transparency

General information for employees

Information on Belgian employment conditions and social security rights and obligations are made available by the Belgian government at the following websites:

The Belgian national website where you can find information about working terms and conditions for workers posted to Belgium can be found at: http://www.employment.belgium.be/defaultTab.aspx?id=6540

b. Monitoring (administration, notification)

i. **Administrative measures**

On the basis of Article 7/1 of the Law of 5 March 2002 (as amended by the Law of 11 December 2016) the employer has to provide the competent officials with the following data in the case of posting:

- a copy of the employment contract of the posted worker or an equivalent document within the meaning of Directive 91/533/EEC;
- the information regarding the foreign currency used as payment of the wages, the benefits in money or in kind linked to the employment abroad, the conditions of repatriation of the posted worker;
- the working hours statements outlining the beginning, end and duration of the daily working hours of the posted worker;

- the pay slips of the wages of the posted worker;
- a copy of the documents regarding the wages laid down in the legislation of the country where the employer is established.

At the request of the officials the employers have to provide a translation of these documents in one of the official Belgian languages (Dutch, French, German) or in in English. The employers must be able to submit these documents up to one year after the employment of workers posted in Belgium. Prior to the employment in Belgium the employers have to appoint a liaison to guarantee the contact with the competent officials.

ii. **Notification system**

Posting

An employer sending an employee to work in Belgium or a self-employed person travelling to Belgium to work there is required to fill in the mandatory declaration known as the Limosa declaration.[27] Any individual not subject to the Belgian social security system who comes to Belgium to work on a temporary and/or part-time basis must be able to present proof of the Limosa-1 declaration.

For workers or self-employed persons, the following data are required: data to identify the worker or self-employed person; the dates of the beginning or end of stay in Belgium; whether the posted person is a temporary worker or is working in the construction sector; the place in Belgium where the services are to be provided; data identifying the Belgian client or principal. For employees, the following data must be included as well: the employer's identification data; the worker's hourly wage.

The Limosa declaration is the first step towards legal employment in Belgium. It is a legal obligation. Non-compliance with this obligation may give rise to criminal or administrative sanctions. The following persons and organisations can be penalised: the employer or his agents and the independent posted worker. All those who have work carried out on their premises, or for whom work is carried out in Belgium, may also be persecuted if they fail to report to the authorities that no proof of a Limosa declaration has been presented.

Proof of the declaration has to be presented before the work in Belgium begins. This covers the entire period of the activities in Belgium. If the work goes on for a longer period than the period initially declared, a new declaration form must be filled in before the end of that initial period.

An employer producing the mandatory Limosa declaration enjoys a number of advantages. He does not have to deal with certain Belgian employment documents for the relevant assignment: terms of employment; staff register and rules applicable to checks on part-time workers. He does not have to draw up individual employee accounts or payslips (per payment period), as long as he can present the equivalent employment documents drawn up in accordance with the legislation in the country of origin. This way a double administrative burden can be avoided.

However, workers and self-employed people in the international transport sector for passengers and goods are exempt from the Limosa declaration, with the exception of inland transport in Belgium (cabotage). This

[27] Introduced by the Law of 27 December 2006 and further detailed by the Royal Decree of 20 March 2007.

exception was justified by the fact that where international transport is concerned it is difficult to name an actual address or to carry out checks as well as by the fact that their presence on Belgian territory is often very temporary.

The European Court of Justice has already passed a number of judgments on the compatibility of the Belgian Limosa system with Union law. The judgments concerned are: CJEU 7 October 2010, C-515/08, *dos Santos Palhota and Others*, EU:C:2010:589; CJEU 19 December 2012, C-577/10, *Commission v Belgium*, EU:C:2012:814 and CJEU 3 December 2014, C-315/13, *De Clercq*, EU:C:2014:2408. Subsequent to these judgments, the Belgian legislation was amended accordingly.

Direct employment relationship

If no posting to Belgium is involved, but instead a direct employment relationship between a Belgian employer and a foreign employee, this employer must, pursuant to the Royal Decree of 5 November 2002, communicate this recruitment electronically to the competent social security institution. This obligation of registration is called the DIMONA registration.

The registration must contain a number of data, such as the identification of the employer, the identification of the employee and for a number of sectors also the joint committee relating to the hired worker. This is, inter alia, the case for Joint Committee No 140 which is competent for the transport sector. The registration must also mention the beginning and the end of the employment relationship.

Non-observance of this obligation will be subject to penal sanctions as laid down in the Social Penal Code (Article 181). Moreover, in case of negligence the employer will be under the obligation to pay a solidarity contribution to the social security institution. In recent case law of Belgian courts this sanction is effectively applied if the judge is of the opinion that the case does not involve valid posting of an employee to a client in Belgium by a foreign employer, but instead a bogus situation in which the actual employers turn out to be a Belgian company. In that case these employers were convicted for not having made this declaration (see further point 7 and 8).

c. Enforcement

i. **General**

Inspectorates

The supervision of compliance with employment legislation is the competence of the Department Supervision Social Laws, which operates under the Ministry of Labour and Employment (Federal Public Service Employment, Labour and Social Dialogue). The supervision of compliance with social security legislation is the competence of the Social Inspectorate and the Inspectorate of the National Office for Social Security. The supervision of compliance with the European legislation on road transport (see 1.2) and of the transposition thereof in Belgian law (including the rules on driving times and rest periods) is performed by the Ministry of

Mobility. For matters concerning the status of foreign employees (employment permit, residence permit, identity papers) the police force too is competent.

If the competent services find that there has been a violation of the legislation on road transport, they can report the offence to the Public Prosecutor. The competent services can also decide on immediate collection of a fine (as provided by the Royal Decree of 19 April 2014).

The "Ministerial Committee for the Fight against Fiscal and Social Fraud", the "Board for the Fight against Social and Fiscal Fraud" and the "Social Information and Investigation Service" (SIOD) coordinate the supervision of the employment and social security legislation.

The Ministerial Committee for the Fight against Fiscal and Social Fraud determines the general policy on this fight against fraud and the priorities of the various services.[28] The Committee also checks whether the implementation of the legislation is the same throughout the country.

Each year, the Board for the Fight against Social and Fiscal Fraud[29] drafts a plan of action that is submitted to the Ministerial Committee for the Fight against Fiscal and Social Fraud for approval. This board consists of the senior officials of the social, fiscal and judicial services, as well as of the police departments involved in the fight against fiscal and social fraud.

The Social Information and Investigation Service (SIOD) is a separate service which answers directly to the competent ministers. The annual policy plan and the annual operational plan for the fight against social fraud are drafted by the SIOD. The SIOD also supports and coordinates joint actions of the various services in the fight against social fraud.

The main task of the Department Supervision Social Laws (TSW) of the Federal Public Service Employment, Labour and Social Dialogue is to uphold the Belgian legislation on pay and working conditions (individual and collective pay and working conditions, working time, rest periods, keeping the social documents, ...). The department consists of two separate units "Road Transport" (one per region). It also has a special unit, called "Covron", which is responsible for the cross-border files and monitors foreign undertakings and employees, including the monitoring of cabotage.

The Social Inspectorate of the Federal Public Service of Social Security monitors the application of the social security legislation. This department has a number of special "Cross-border employment" units that deal with, amongst other things, the issue of letter-box companies. The Social Inspectorate examines whether the work done by and the remunerations of the employees have been declared correctly with regard to the payment of social security contributions.

These social inspection services can act on the basis of a complaint made by an employee, a trade union, a professional association, a report by a third party and at the request of a prosecutor of the labour courts, the Public Prosecutor or the examining magistrate. The social inspectors are free to enter any workplace (including vehicles) or other places that are subject to their supervision or places where, according to a

[28] The Ministerial Committee for the Fight against Fiscal and Social Fraud was established by the Royal Decree of 29 April 2008 (Belgian Official Journal 8 May 2008).

[29] The Board for the Fight against Fiscal and Social Fraud was established by the Royal Decree of 29 April 2008 (Belgian Official Journal 8 May 2008).

reasonable assumption, people are employed who are subject to the legislation they have to monitor, at any time of day or night, without prior notice. However, they only have access to lived-in rooms if the magistrate of the police court has given prior permission for this. They can check a person's identity and interrogate him/her.

The competence to control has been laid down in the Social Penal Code. Apart from a broad authority in terms of control, the social inspectors also have discretionary power, which means that they can choose between a number of options: they can either issue a warning, set a term within which the person in question is to comply with the rules (regularisation) or book a person. In the latter case the report is sent to the Public Prosecutor who decides whether or not to bring the case to trial.

So, the social inspectors are not obliged to inform the Public Prosecutor of all violations. Quite often the Social Inspectorate will aim for a regularisation of the situation, which means that they will try to align the situation with the applicable legislation (such as, for instance, guaranteeing that the employee in question receives his/her rightful wages, or that the required social security contributions are paid). As far as cross-border employment is concerned, an important reason for an attempt in this respect is the sometimes difficult burden of proof, *inter alia*, as regards the situations in which the foreign employer has an A1 Declaration which shows that the employee in question is subject to the social security legislation of the Member State which issued this declaration.

On a regular basis, these inspection agencies carry out joint controls. They also have access to each other's monitoring activities via a central data base.

Benelux Treaty on Cross-border Cooperation for Road Transport Inspection

On 3 October 2015 the Benelux countries concluded the Liege Treaty on cross-border cooperation with regard to road transport inspection. Meanwhile this treaty has been ratified by the three countries in question and has entered into force.[30] This treaty aims at a closer cooperation between the Benelux countries and further harmonization of the inspection of the maintenance of the EU rules on road transport of goods and persons (see above part 2, b.). It provides for exchange of knowledge, expertise, personnel and means as well as for transnational and mutual assistance for the inspection agencies.

Within the framework of this treaty a coordinated inspection action was carried out as recently as 14 September 2018.[31]

Sanctions, including public prosecution

If these inspection agencies proceed to report and refer the case to the Public Prosecutor, the latter has the possibility to dismiss the case, to suggest an amicable settlement or to take legal action against the persons

[30] For Belgium see, inter alia, the Law of 30 March 2017, *Belgian Official Journal* 30 March 2017. See also: http://www.benelux.int/nl/juridische-databank?referentie=&tag=wegvervoer&type=0&domein=0&from=&to=&search=M_2014_6&display=9&ccm_paging_p=1.

[31] See more on this at: http://www.benelux.int/nl/nieuws/benelux-wegcontrole-15-van-de-voertuigen-overtreding.

concerned. In that case, it is up to the competent court to decide on a sanction. The sanctions for violations of the legislation on road transport (including driving times and rest periods) are laid down in the Law of 15 July 2013 (see above under point 1.2.). The sanctions for violations of the legislation on the application of the employment and social security legislation are laid down in the Social Penal Code or in special laws. These sanctions include prison terms or penal fines. The main penalised violations are: non-payment of the required wages, violations of the rules on health and safety at work, violations of the rules on working time, illegal employment of foreign employees, violations of the legislation on temporary employment, non-registration of employment with the competent social security institutions, non-payment of social security contributions, disregarding generally binding collective labour agreements.

Dismissal of a case occurs when the Public Prosecutor is of the opinion that there is no evidence of a criminal violation or that it involves a minor violation which requires no further prosecution. The Public Prosecutor can also propose an amicable settlement, which means that the person who has violated the law pays a sum of money.

If the Public Prosecutor decides not to pursue the case and bring it to trial, the file will be referred to the department Administrative Fines of the Federal Public Service Employment, Labour and Social Dialogue (insofar as it concerns violations of the social legislation). This department can, if necessary, impose an administrative fine. This usually happens with minor violations which the Public Prosecutor does not take to court. The administrative fines are laid down in the Social Penal Code or in special laws.

ii. **Minimum wages (working hours)**

As already indicated above, sanctions for non-payment of the required wages and for violations of the rules on working time are laid down in the Social Penal Code or in special laws.

iii. **Bogus self-employment**

Pursuant to Article 2(2) PWD the definition of a worker for the purpose of this directive is that which applies in the law of the Member State to whose territory the worker is posted.

Under Belgian law, if a person who in theory only has the self-employed status, either chosen or obtained, whereas the reality of their employment situation shows that they carry out work for an employer in the same way as employees, the court can re-qualify the agreement as an employment contract.

Article 337/2 of the Programme Law (I) of 27 December 2006, as amended by the Law of 25 August 2012, lays down a number of criteria on the basis of which an employment relationship is rebuttably presumed to be an employment agreement. These rules also apply to the transport of goods and persons on behalf of third parties and were further developed by the Royal Decree of 29 October 2013.[32] The employment relationships

[32] *Belgian Official Journal,* 26 November 2013. For the implementation of these rules in a case of a bogus self-employed persons who claimed to be posted from another Member State on the basis of an A1 Declaration, see: Court of Appeal Ghent, 19 October 2017, *Nieuw Juridisch Weekblad* 2017, 108.

are reputably presumed to be employment contracts when the analysis of the employment relationship shows that more than half of the following criteria have been met:

- absence of financial or economic risks on the part of the person carrying out the activities;
- absence of responsibility and decision authority with regard to the financial means of the undertaking on the part of the person carrying out the activities;
- absence of decision authority with regard to the purchasing policy of the undertaking on the part of the person carrying out the activities;
- absence of decision authority with regard to the work qualifying for the cost calculation of the activities on the part of the person carrying out the activities;
- absence of an obligation of result with regard to the agreed work on the part of the person carrying out the activities;
- absence of the possibility to hire personnel for the performance of the agreed work;
- not presenting oneself as an undertaking *vis-à-vis* other persons;
- if the person carrying out the job works in spaces which he/she does not own or rent or chiefly works with a motor vehicle which he does not own, lease or rent, or is made available, financed or vouched for by the co-contractor.

In addition, under Belgian social security law, persons carrying out road transport of goods by order of a company by means of vehicles which they do not own or the purchase of which is financed or financially vouched for by the entrepreneur are considered and insured as employees (Article 3, 5° Royal Decree of 28 November 1969).

iv. **Chain liability**

The Belgian Law of 12 April 1965 on the protection of workers' wages provides regulations of several liability if an employer fails to pay his employees the wages due (completely or partially). These regulations allow the employee to obtain, under certain conditions, his/her wages, subsidiarily, from certain third parties considered to be jointly and severally liable. [33]

There are three forms of regulations on joint and several liability: a general regulation [34], a special regulation for illegally staying nationals of a third country[35] and a special regulation for activities in the construction industry.[36]

[33] See more specifically Articles 35/1 et seq. Law of 12 April 1965 on the protection of workers' wages.

[34] See Articles 66 et. seq. Programme Law of 29 March 2012.

[35] This regulation is, as regards wage debts, the transposition into Belgian law (see Article 17 et. seq. Law of 11 February 2013) of Article 8 of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[36] This last regulation was introduced by the Law of 11 December 2016 which transposed the PWED.

The general regulation applies to principals, contractors and subcontractors who for certain activities laid down by Royal Decree make use of one or more contractors or subcontractors. By the Royal Decree of 24 April 2014 this general regulation also became applicable to work falling under the JSC 140.03 on road transport. However, this Royal Decree was annulled by the Council of State in the judgment of 29 June 2015 because the competent Joint Committee had not given a unanimous opinion.[37] So far no new Royal Decree has been passed which means that the general regulation on several liability for payment of wages does not apply to road transport.

v. **Social security (A1)**

An employed or self-employed person who works temporarily in the territory of a State to the social security system of which he/she is not subject, is normally given an A1 certificate by the social security institution of the State in which this person normally works. This is a document issued by the competent body of the sending State which proves that the persons concerned remain subject to the legislation of this Member State.

The Court of Justice stated in this respect that the principle that a worker or self-employed person can only be subject to the social security legislation of one Member State at a time prevents that during the validity period of the A1 certificate this person would be subject to the regulations of a Member State other than the Member State that issued this certificate. As long as the A1 certificate has not been withdrawn or declared invalid, the competent body of the receiving Member State must take into account that the workers concerned are already subject to the legislation of another State, meaning that it may not subject them to its own social security legislation.[38] In the case of a dispute between the competent bodies of the Member States about the question whether or not the certificate had been issued correctly, they have to contact each other in order to settle the issue.[39]

A recent judgment [40] the Court of Justice added that this must not result in individuals being able to rely on EU law for abusive or fraudulent ends. The Court recognised that the fraudulent procurement of a A1 certificate may thus result from a deliberate action, such as the misrepresentation of the real situation of the posted worker or of the undertaking posting that worker, or from a deliberate omission, such as the concealment of relevant information, with the intention of evading the conditions governing the posting provisions. If the institution of the Member State to which the workers have been posted puts before the institution that issued the A1 certificates concrete evidence that suggests that those certificates were obtained fraudulently, it is the duty of the latter institution, by virtue of the principle of sincere cooperation,

[37] Council of State 29 June 2015, No 231.791.

[38] See recently CJEU 9 September 2015, C-72/14 and C-197/14, *X and van Dijk*, ECLI:EU:C:2015:564, paras. 40-42; and CJEU 27 April 2017, C-620/15, *A-Rosa Flusschif*, ECLI:EU:C:2017:309, para 38.

[39] See for the procedures to be followed: CJEU 10 February 2000, C-202/97, *Fitzwilliam*, ECLI:EU:C:2000:75, paras. 57-59; CJEU 30 March 2000, C-178/97, *Banks*, ECLI:EU:C:2000:169, paras. 44-45; CJEU 4 October 2012, C-115/11, *Format*, ECLI:EU:C:2012:606, para 47; and CJEU 27 April 2017, C-620/15, *A-Rosa Flusschif*, ECLI:EU:C:2017:309, paras. 44-47. For more details see the memorandum on the EU social security coordination.

[40] CJEU 6 February 2018, C-359/16, *Altun,* ECLI:EU:2018:63, paras. 48-56.

to review, in the light of that evidence, the grounds for the issue of those certificates and, where appropriate, to withdraw them. However, if the latter institution fails to carry out such a review within a reasonable period of time, it must be possible for that evidence to be relied on in judicial proceedings, in order to satisfy the court of the Member State to which the workers have been posted that the certificates should be disregarded. The persons who are alleged, in such proceedings, to have used posted workers ostensibly covered by fraudulently obtained certificates must, however, be given the opportunity to rebut the evidence on which those proceedings are based before the national court decides, if appropriate, that the certificates should be disregarded and gives a ruling on the liability of those persons under the applicable national law.

Still, the effectiveness of these procedures largely depends on the *goodwill* of the bodies concerned. Meanwhile, this has led to much discontent on the part of a number of Member States, especially with regard to situations in which an A1 certificate validly issued was used to escape the application of the national security legislation in circumstances in which the conditions for a derogation of the State-of-employment principle were not complied with, especially in cases of posting. As a reaction to this, Belgium unilaterally took a number of measures such as the provisions of Articles 22 to 25 of the Law of 27 December 2012. These provisions are intended to fight abuse of law. According to Article 23 of this abuse of law occurs when, with regard to a worker or self-employed person, the provisions of the coordination regulations are applied to a situation in which the conditions laid down in the regulations are not observed, with the aim to shirk the Belgian social security legislation that should have been applied in that situation. This especially concerns the use of letter-box companies. As for social security, Articles 24 says that when the national courts, public social security institutions or social inspectors find such abuse to have occurred, the worker or self-employed person concerned will be subjected to the Belgian social security legislation. The Belgian social security will apply from the first day on which the conditions for its application are satisfied.

This measure does run counter to the provisions of Regulation 883/2004, Regulation 987/2009 and the case law of the Court of Justice, which do not permit unilateral actions by the Member States if an A1 certificate has been issued by the competent body of a Member State. The European Commission too holds the view that this legislation constitutes a violation of the applicable Union law and commenced a breach procedure against Belgium. This has meanwhile led to a claim against Belgium by the Court of Justice (case C-356/15) which delivered its judgment on 11 July 2018. In this judgment, the Court confirmed its previous case law and ruled that legislation, such as the Belgian legislation at stake, which entitles the competent authorities unilaterally to make a worker subject to Belgian legislation on social security matters, is contrary to the provisions of Regulations 883/2004 and 987/2009, more specifically the procedures to be followed in the event of difficulties in the interpretation or application of those regulations. Even in cases of fraud, a specific procedure has to be followed as outlined by the Court in its *Altun* judgment.

However, in judgments delivered before the *Altun* judgment of the CJEU, some Belgian Courts disregarded A1 certificates when they were of the opinion that these were obtained fraudulently, even if in the cases before these courts the procedure as outlined by the CJEU in *Altun* was not followed".[41]

[41] See, inter alia, Court of Appeal Ghent, 18 May 2017, no 2015/SZ/47-55-57-75 and the judgments of the Criminal Court Bruges mentioned on page 16.

vi. **Redress: individual and collective redress**

Social enforcement law

Belgian social enforcement law comprises specialised courts, specialised inspection services, detailed social criminal law applied by the criminal courts and specific sanctions for non-observance of social legislation, in particular administrative fines.

On the inspectorates, the social penal code and the administrative fines: see above under 4,c.

Belgium has specialised courts to deal with labour and social security cases: at first instance the labour tribunals and on appeal the labour courts. The labour tribunals and labour courts consist of a professional magistrate and two judges in social matters, i.e. lay judges appointed by the representative employees' and employers' organisations. The highest law court is the Court of Cassation. Criminal cases are dealt with by the criminal courts. Delegates of representative employees' organisations can represent their members before the labour tribunals and courts. They can institute legal proceedings themselves, *inter alia*, in disputes the members invoke on the basis of collective agreements.

In accordance with Article 6 PWD, the Belgian implementation Law of 5 March 2002, has rendered the Belgian tribunals and courts competent to decide on claims of workers posted to Belgium on the basis of the PWD.

Administrative Committee responsible for the regulation of the employment relationship

In the context of the law laying down criteria on the basis of which an employment relationship is suspected to be an employment contract (combating bogus self-employment) an "Administrative Committee responsible for the regulation of the employment relationship" has been set up. The chambers of this committee have the duty to take decisions on the qualification of a specific labour relationship. The parties of the employment relationship can lodge an appeal against these decisions with the labour courts.

Naming and shaming

Every year or so the Belgian media report on situations of exploitation or abuse of foreign workers. Especially the road transport sector often features in these reports. The Belgian BTB (Belgian Transport Workers Union) and the Dutch trade union FNV-Bondgenoten are running a media campaign against companies organising social dumping practices. The Ikea campaign which they are running at present is a good example of this (http://www.youtube.com/watch?v=wvyBRaE_U78). They draw attention to the fact that social dumping does not only put pressure on the social position of all drivers, Eastern European drivers as well as other drivers in the EU, but also subjects them to degrading circumstances. The Belgian BTB very recently (on 7 September 2017) published a new so-called 'black book' on social dumping in the road transport sector.[42]

[42] https://www.btb-abvv.be/images/WegvervoerEnLogistiek/campagne/sociale_dumping/Nederlands/Zwartboek-2017-NL-DIGITAAL.pdf

5. Problems and solutions found or contemplated

For problems see above under no 3.a.

a. Study commissioned by the Union of Transport Workers

A study commissioned by the Belgian Trade Union of Transport Workers (Belgische Transportarbeidersbond) presented in 2015 a number of proposals to combat social dumping in road transport. [43] It proposed, amongst other things, the following ideas:

At European level:

- No further liberalisation of the cabotage rights or even limiting them (….) and cabotage limitation should also apply to combined transport (Directive 92/106/EEC)
- Introducing a new connecting factor in Private International Law (PIL) via an amendment to the Rome I Regulation
- Introduction of a European minimum wage
- EU regulation or a European collective agreement prescribing a certain level of social conditions for the carriage of goods by road
- Clarification of Regulation 1071/2009 to make it more difficult to set up letter-box companies and better monitoring of the application of this regulation
- Tachograph required for occupational vehicles under 3.5 metric tons
- Improvement of enforcement by, *inter alia*, the establishment of a European inspection and monitoring agency, the pursuit of a higher level of harmonization of sanctions and fines; continued investment in international exchange of personnel

At national Belgian level:

- Including a definition of the place where the driver habitually carries out his activities in the law or in collective labour agreements
- Extension of several liability to the complete chain of principles with actual checks
- Sanctions for offering, performing or commissioning transport for unacceptably low prices (application of Article 43, §4 of the Law of 15 July 2013 on road transport). In order to make this more effective, the transport contracts should be made known to the trade union representatives or submitted to the public authorities
- Implementation in national law of Article 15 of Regulation 1071/2009 confirming that only if a company does carry out genuine transport activities in a Member State, it can be regarded as having an effective and stable establishment in that Member State
- Offering the drivers better access to national courts
- Higher fines for employers

[43] "25 measures against social dumping"

- Prohibition of long rest periods within the vehicle
- Better monitoring and enforcement of EU and national rules
- Application of the provisions in the Penal Code on the prohibition of human trafficking
- Introducing a "social clause" in transport agreements between transport companies and the principals specifying the social rights of the drivers

b. Plan for fair competition in the transport sector

On 3 February 2016 the competent Ministers and State Secretaries, the competent public services and the social partners of the transport industry agreed on a "Plan for fair competition in the transport sector".[44] This included arrangements to take a number of measures at national, Benelux and European level. At the same time a protocol was adopted aimed at cooperation between the competent government and inspection services and the social partners with a view to combating social fraud and illegal work in the road transport sector.

These are some of the measures agreed on in this plan:

At the national level:

- Formulating guidelines regarding the interpretation by the inspection agencies of the European and Belgian rules and regulations
- Setting up a checklist for control in the transport sector[45]
- Uniformising the approach of the public prosecutors of the labour courts with regard to social dumping. The aim is to carry out the monitoring of social dumping practices in close cooperation with the public prosecutors of the labour courts and to make sure that all the offices of these prosecutors treat transport files in the same manner
- Organising better cooperation between government services, social inspection agencies and customs
- Reinforcing the inspection agencies
- More road checks and in particular vehicles weighing less than 3.5 metric tons
- Rules for access to the occupation for vehicles weighing less than 500 kg.
- Establishing a centre to report social fraud (www.meldpuntsocialefraude.belgie.be)
- Making the immediate collection of certain fines more efficient
- Restructuring the list of fines
- Transposition of the Enforcement Directive and the *Koelzsch* judgment
- More stringent application of the legislation on "unacceptably low prices" (Transport Law 15/7/2013) Article 43§4).

[44] https://www.tommelein.com/wp-content/uploads/bsk-pdf-manager/Plan_voor_eerlijke_concurrentie_in_de_transportsector_+_protocol__03_02_2016_NL_167.pdf

[45] See such checklist at: https://www.siod.belgie.be/sites/default/files/content/download/files/4.3_checklists_vervoer_nl.pdf

At Benelux and international level

- Adaptation of the cabotage rules
- Harmonisation of the fines
- Better monitoring of the weekly rest periods
- Compulsory use of a tachograph under 3.5 metric tons
- Access to the occupation for vehicles under 500 kg

At European level

- No further liberalisation of the cabotage rules
- Introduction of a European minimum wage, i.e. a relative scale determined per country, for instance on the basis of the poverty line (60% of the median income)
- Introduction of the principle "equal pay for equal work"
- Organising joint controls with inspection agencies of other Member States. This approach already exists between Belgium and the Netherlands
- More stringent control of compliance with EU Establishment Regulation 1071/2009 with a view to preventing letter-box companies
- Increasing the fight against letter-box companies and illegal posting at the European level through an adaptation of Posting Directive 96/71 and Social Security Regulation 883/2004
- Making a practical guide concerning the interpretation of the European rules applying to international transport

c. Action Plan 2018 "Fighting social fraud and social dumping"

Each year the Belgian Government draws up an action plan with regard to the fight against social fraud and social dumping. The 2018 action plan [46] contains, *inter alia*, the following elements related to road transport:

- Better cooperation between the inspection agencies, the Ministry of Transport, the social inspection services and customs
- Road checks as well as inspection of the registered offices or establishments of the transport companies
- Improving the use of European conciliation proceedings regarding disputes about A1 Declarations
- Active participation in the European Platform for Undeclared Work
- Implementation of the bilateral cooperation agreements concluded with, *inter alia*, France, the Netherlands, Bulgaria, Poland and Slovakia concerning cooperation with regard to the fight against social fraud
- Better cross-border cooperation between the national inspection agencies

[46] "Action Plan 2018. Fight against social fraud and social dumping. Main actions" (to be consulted at: https://www.siod.belgie.be/sites/default/files/content/download/files/actieplan_2018_nl.pdf) . For an audit of the action plan 2015. See Rekenhof, "Actieplan voor de strijd tegen de sociale fraude en sociale dumping", March 2017, 85 p.

- Prioritising the fight against cross-border fraud characterised by non-compliance with the minimum working conditions
- Optimising the use of databases and expansion of existing databases, including the use of datamining systems used by the tax authorities
- Dealing with bogus self-employment
- Proceeding against the posting of employees in the possession of an A1 form for which none of the conditions for posting has been fulfilled (see various conditions).
- Dealing with "constructions" with regard to posting: fraudulent posting by means of undertakings and branches of undertakings established in various European countries.

d. Measures taken so far

Legislation

See above implementation measures in relation to EU transport law (including recent initiatives to strengthen control and sanctions) and EU law on posting of workers.

Protocol of 3 February 2016

With a view to improving the fight against illegal employment, social dumping and unfair competition in road haulage the government services, inspection agencies and social partners concerned agreed on a protocol of cooperation on 3 February 2016. The partners of this protocol considered it necessary to intensify the joint tracing of gross and structural abuse in order to be able to determine the most adequate means to suppress this abuse. In this protocol structural fraud is understood to mean the organisation of false postings and cabotage in the sector and malpractices with regard to the payment of wages and social security contributions resulting from these.

The partners have decided to establish a permanent centre which will be composed of their representatives. This permanent centre will be charged with the implementation of this protocol in order to:

- avoid violations or wrong interpretations of the existing regulations through the publication of a joint brochure with regard to the working conditions in the sector
- sensibilise all parties concerned for the problems and their consequences through their bulletins
- propose, if necessary, adequate bills or regulatory changes
- develop and guarantee means of prevention and control specifically aimed at this sector, such as for instance the unanimous opinion of the social partners in PC140.03 (PC = Joint Committee) with regard to bogus self-employment
- set up procedures of alarm signals to detect illegal practices or irregularities

In addition, the competent government services undertook to provide the necessary information about the applicable legislation and to take the measures required to improve the cooperation between the competent government services and inspection agencies. The social partners concerned undertook to systematically

advise against, *inter alia*, moonlighting and gross malpractices and to set up an information campaign for their members to, amongst other things, point out the risks of moonlighting to employees.

Guidelines on the interpretation of the European and Belgian legislation by the inspectorates

One of the initiatives taken in the implementation of the Protocol of 3 February 2016 is the drafting of guidelines on the interpretation of the European and Belgian legislation by the inspectorates. The most recent version (24 April 2017) of these guidelines is published at http://www.siod.belgie.be/sites/default/files/content/download/files/guidelines_transport_24_04_17_nl.pdf

This document contains the guidelines followed by the inspectorates with regard to the determination of the applicable labour law and social security law. They explain the relevant EU legislation and case law and give some concrete examples of situations in the road transport sector. For more details on the content of these guidelines see above point 3,b.

Raising the degree of monitoring and sanctions

Recently, the competent inspection agencies in cooperation with the Public Prosecutor raised the degree of control of forms of organized fraud and infringements of labour and social security law in the road transport sector. In the meantime, a number of cases have been brought before the criminal courts. Very recently this has led to a number of sentences – imprisonment and/or fines - of, *inter alia*, Belgian principals. The reason for these sentences was the use of fake constructions so as to escape the application of Belgian labour and social security law.

For instance, on 8 May 2017 the various competent services carried out a joint inspection of a big international transport company in Belgium. During this inspection a whole series of infringements of the labour and social security legislation was found, followed by the appropriate charges. Most of the violations concerned the non-payment of wages, the failure to subject the drivers to the social security legislation as required by the Belgian legislation and Regulation (EC) 883/2004, non-compliance with the required driving times and rest periods, making the drivers spend their rest period in their lorries,... The managers of this firm were detained and taken into preventive custody. The press reported extensively on this action.

In the previous months too there were frequent controls.[47] These actions show that in the last few months the competent services raised the level of their checks and took the necessary initiatives to proceed to more effective sanctions.

[47] See more in this respect at the following website: http://www.transportmedia.be/category/news-transport/wetgeving-news/

6. Literature

1. Literature

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7. Case law

See above under point 3,b,i,ii,and vi.

8. Example case

Criminal Court Bruges, 10 May 2017, 2017/1175

This case concerned a so-called posting of transport workers by a Bulgarian company to a transport firm in Belgium. During a control by the social inspectorate it was found that the lorries with Bulgarian registration numbers were driven by Bulgarian drivers (a total of seven). Formally these drivers worked for a company that had its seat in Bulgaria. The manager of this company was a Turkish born Belgian who was also an employee of the Belgian transport firm. The lorries of the Bulgarian company were bought from the Belgian company. However, the lorries remained the property of the Belgian firm until the full purchase price had been paid. The payment was said to be arranged through invoicing by the Bulgarian company to the Belgian firm, but the invoices did not demonstrate this. The invoices did show that only €0.70 per kilometre was charged whereas the average price in Belgium amounts to €0.90 to €0.93 (plus expenses). These payments were made through a Belgian bank account of the Bulgarian firm.

During the weekends the drivers sometimes stayed in the buildings of an old slaughterhouse which was owned by the Belgian company and was partially fit out to provide accommodation to people, albeit in highly unhygienic circumstances. The lorries were parked on these premises.

During the inspection it emerged that the seat of the Bulgarian company was established at the home of one of the employees. No driver ever loaded or unloaded goods in Bulgaria. During the holiday periods the drivers left their vehicles on the premises of the old slaughterhouse. The drivers received their instructions from the manager on these premises. As for the bills of carriage, these too were handed in there, either to the manager of the Bulgarian firm or to the manager of the Belgian company. The tachograph cards were read out there as well. The drivers had a mobile telephone with a Belgian number and a Belgian provider. The drivers were given their assignments through text messages from the manager of the Bulgarian firm. Some drivers were given cash advances by the manager of the Bulgarian company on the grounds where the lorries were parked. The drivers had a fuel card in the name of the Belgian company. During the rest periods they refuelled on the premises of this company.

It was obvious that the employment of these drivers was not organized from Bulgaria but instead from Belgium. The drivers were paid in accordance to Bulgarian labour law. The employment contracts were written in Bulgarian and in English. They provided for a wage of €375 a month and in addition to this the drivers received a daily allowance in accordance with their stay abroad, notably Belgium. The drivers stayed in Belgium for a period of three to four months and mostly slept in their vehicles.

In this case the Public Prosecutor had summoned the manager of the Bulgarian company, this company itself, the managers of the Belgian company as well as this company itself to appear before the criminal court. The charge concerned the failure to register according to the DIMONA registration obligation employees employed in Belgium by an employer established in Belgium, failure to pay the wages owed according to Belgian labour law and employing in Belgium foreign workers for whom a work permit was required but not obtained (this concerned a period in which Bulgarian workers were not yet entitled to free movement because of the transition regulations after Bulgaria's entry into the EU).

The accused denied that they had used fraudulent and fictitious constructions and argued that their business involved valid posting from Bulgaria, both with regard to the applicable labour law and applicable social security law.

However, the court took the view that to determine the applicable law the reality on the shop floor must take precedence over the attested reality, certainly if deception is involved. The same applies when an A1 document has been issued. The court was of the opinion that the employment in question was not valid employment by the Bulgarian company of Bulgarian drivers, but that in reality these drivers usually carried out their work in and from Belgium. The drivers received their instructions from Belgium and the manager exercised his authority as an employer from Belgium as well. No real activities took place in Bulgaria. The court ruled that this was a case of an entirely fictitious construction and thus fraud. Therefore, the court decided that both Belgian labour law and Belgian social security law applied.

The court did not only find the manager of the Bulgarian company and the company itself guilty, but also the managers of the Belgian firm and the firm itself. The conviction concerned in the first place the failure to submit the DIMONA registration, secondly failure to pay the wages in accordance with Belgian labour law and finally illegal employment of foreign workers. The manager of the Bulgarian company was sentenced to six months' imprisonment and a fine of €25 000, the Bulgarian company was sentenced to a fine of €126 000, the managers of the Belgian firm were sentenced to six months' imprisonment and a fine of €25 000 and the Belgian company itself was sentenced to a fine of €126 000. In addition, the goods of the manager of the Bulgarian company, the Bulgarian company and the Belgian company were confiscated for the amount corresponding to the part of the wages calculated in accordance with the applicable Belgian labour law which had not been paid to the drivers.