

Dialogue for Advancing Social Europe: Report on Belgium with regard to the impact of EU-regulation on labour relations: report on Belgium

1. Introduction

This country report on Belgium shall try to answer the different research questions which were put forward in the Dialogue for Advancing Social Europe (hereafter also DIADSE)-proposal.

During the previous months a representative of the employers' organisations and two representatives of the trade unions were interviewed during the months August till December 2015.

The focus of the report shall be on the main common research questions within the DIADSE proposal. Obviously, as this part of the research project concerns a national report, the focus needs to be divided on the interplay of EU-elements on the specific national issues of Belgian labour law and the Belgian labour market.

The angle of the report shall be concentrated on the common research question of the Diadse proposal.

The main research questions and research issues for the are the following:

- Which initiatives were and have been taken by the social partners in Belgium to deal with the crisis?
- Which initiatives were and have been taken by Parliament and government?
- Specific attention shall be paid to the introduction of flexibility measures in the labour market
- Specific attention shall be paid to the wage setting on the labour market
- Specific attention shall be paid to regulation on discrimination.

The approach of the research questions may be considered as traditional. In order to be understood, the research questions need to be approached from a Belgian angle. This angle includes a double layer. First of all, the Belgian state structure needs to be summarized in order to understand the measures undertaken in Belgium. A fundamental and constitutional layer is necessary for a good comprehension of the report. Second, Belgium has known a political crisis during this period. Given this background, the report is divided into five chapters. The first one deals with the state structure and each of the following four deals with a certain time period between 2008 and 2015.

These four time periods converge with a distinct episode of political reality in Belgium. During the first period 2008-2010, three federal governments reigned over Belgium as a consequence of the federal elections of 2007. It concerned a period of sharp political tensions where most

of the political action in Belgium focused on the realisation of a new state reform.¹ The establishment of a new federal government took a big amount of time.

The intermediate government Verhofstadt III remained in power until March 2010 when it was replaced by the federal government Leterme I. Within the last government, the Prime Minister was substituted by Van Rompuy by the end of the year 2010 as a consequence of the banking crisis.² However, as the coalition did not change till the elections of June 2010, the period can be considered as a unity. The role of the social partners did not fundamentally change during this period.

The second period covers the months between June 2010 and December 2011. After the elections of June 2010, the Flemish nationalist party (N-V.A) gained the elections in Flanders with a right oriented program while the Walloon socialist party (PS) won the elections in the Frenchspeaking part of the country with a left oriented program. A logic sequel of the Belgian institutional model was that both parties (N-V.A and PS) had to start negotiating about the formation of a government with two fundamentally different approaches. The logical distrust between the Flemish nationalists and the Frenchspeaking socialists eventually prevented the formation of a common coalition. Frenchspeaking socialists finally turned to other political partners. In the end, they formed a government with their Flemish counterparts, the Flemish and Frenchspeaking christian democrats and liberals. However, it took more than 541 days to form a federal government.

During this period, social partners had to execute their task within the framework of a caretaker government. It might be important to stress that this meant that collective negotiations had to take into account that budgetary issues had to be analyzed on a monthly basis. This period ended with the installation of the new government on 6 December 2011.

The third period covers the work of the federal government Di Rupo I which lasted until the elections in June 2014. During this period, some important measures with regard to the issues researched were taken. An interesting evolution took place in the triangle relationship between government, employers' organisations and trade unions.

The fourth and last period constitutes the current legislature. Flemish nationalists again won the elections in Flanders in 2014. In the Frenchspeaking part of the country the outcome of the elections significantly differed from the results in 2010. Frenchspeaking liberals won the elections. The obvious consequence was that the formation of a government (even if strong institutional contrasts still remained) took place in a more rapid way. The Flemish nationalists constituted a new government with the Flemish and Frenchspeaking liberals and with the Flemish christiandemocrats.

¹ Read T. LOUWERSE and P. VAN AELST, "The exceptional Belgian case? Government formation duration in comparative perspective", *Paper prepared for presentation at the conference 'Belgium: The State of the Federation', Vereniging voor Politieke Wetenschappen/Association belge francophone de science politique, Louvain-la-Neuve, 18 October 2013*, to be consulted at http://www.absp.be/wp-content/uploads/2015/03/louwerse_the_state_of_the_federation_2013.pdf, 1.

² Der Spiegel International, « Banking scandal brings down government », 22 December 2008, 1.

The different chapters are divided in a uniform manner. They first deal with the EU-framework, than with the Belgian political framework. The plans which were made at EU-level with regard to Belgium and the Belgian government plans are considered and recapitulated if it is necessary for the research topic. The EU-framework (both on an economic as on a social level) constitutes an important element for the Belgian social dialogue. The cross sellings (or the lack of cross sellings) between legislation and social partners shall be analysed at the end of each chapter.

As mentioned, the report needs to start with a short introduction of the Belgian institutional framework. It namely is of major importance that the framework is understood as most, but not all, of the regulation enacted with regard to labour and employment law are federal initiatives of the Belgian national Parliament. However, some important elements belong to the competences of the sub state entities (the Regions and the Communities).

Furthermore, those sub state entities have received more powers due to the recent state reform in 2014. The explanation of the institutional framework in Belgium therefore needs to be done taking into account the previous framework and the current framework. A short outline of the institutional settings of the social dialogue itself is necessary for a full comprehension of the report. The institutional chapter is therefore divided in a constitutional institutional part and a social institutional part.

2. Belgium: Institutional framework

a) Belgium: state structure

In order to deal with the challenges of the financial crisis in Belgium between 2008 and 2015, the division of powers between the state and the sub state entities is of some importance.

Belgium is a federal state, composed of Regions and Communities. The Communities are competent for those powers which can be linked to persons while the Regions are competent to deal with matters which are linked to the territory. Belgium has known six state reforms since 1970. The first state reform in 1970 founded and installed the Communities, the second reform of 1980 created the Regions while the third state reform of 1988 eventually really installed the Regions (and specifically paid extra attention to Brussels Capital-Region). The fourth state reform in 1993 reformed Belgium from a unitary state to a federal state. This crucial state reform modified article 1 of the Belgian Constitution and defined Belgium as federal state. The fifth (in 2001) and the sixth (in 2014) state reforms transferred more powers from the federal state to the Communities and the Regions.³

The competences of the Communities concern among others education, culture and support to persons. This last subject concerns support such as child benefits, integration of migrants, etc.⁴

The competences of the Regions include urban planning, economy and among others the employment policies and scientific research. Those last two subjects may be important for the development of a coordinated policy concerning the implementation and application in practise of evolutions in labour policy. However, the scope of this report does not allow to start a debate on the measures taken by the sub state entities.

The Belgian system is moreover characterized by its exclusive competences. Exclusive competences mean that each competence has to be exercised by one entity. In other words, each competence is or exercised at federal level or at sub state level (at the level of Communities or of the Regions).

The divide of competences is based on the existence of an enumerated list of competences of the Communities and the Regions. Those competences are listed in the Special Act of 8 August 1980 on the Reform of the Institutions. The residuary powers still remain powers of the federal authority. This may change in the future. Article 35 of the Constitution currently provides that the residuary powers shall be transferred to the Communities and the Regions on the moment that a Special Act of Parliament enumerates the specific competences of the federal authority. This article entered into force in 1994 but that Special Act with an enumerated list of powers for the federal authority has not yet been enacted. Therefore, the

³ Read on these topics A. ALEN (ed.), *De vijfde staatshervorming van 2001*, Bruges, die Keure, 2002, 317p and P. BLAISE, J. FANIEL and C. SAGESSER, *Introduction à la Belgique fédérale: la Belgique après la sixième réforme de l'Etat*, Brussels, CROSP, 2014, 106p.

⁴ Read on the Belgian State structure A. ALEN and K. MUYLLE, *Compendium van het Belgisch staatsrecht*, Mechelen, Kluwer, 2014, I, 220-225.

shift of the residuary powers from the federal authority to the Communities and the Regions has not yet been enacted.⁵

Belgium thus now knows three different communities and three different regions with exclusive, enumerated powers. This implies that those three different Communities dealing with the person-linked matters and three different Regions dealing with territorial linked matters. Labour law remains a competence of the federal authority. Article 6, first paragraph, VI, 12° clearly indicates that labour law and social security law remain a competence of the federal authority although that economy and economic policy is a competence of the Regions.

Furthermore, the three Communities and the three Regions are linked to a certain territory. It is nonetheless important to stress that the boundaries of the Communities and the Regions are not the same. The following maps shall clarify the differences between the Communities and the Regions.

The boundaries of three Communities can best be illustrated on the following maps. The first picture shows the boundaries of the Flemish Community, the second picture shows the boundaries of the Frenchspeaking Community and the third picture designs the boundaries of the Germanspeaking Community. The Flemish and Frenchspeaking Community play both a role in dealing with person-linked matters in Brussels.⁶



⁵ Read on this topic J. VELAERS, *De Grondwet en de Raad van State: afdeling wetgeving*, Malines, Kluwer, 1999, 242.

⁶ These maps can be consulted at http://www.belgium.be/en/about_belgium/government/federale_staat/map consulted on 15 December 2015. The author acknowledges the FEDICT for its willingness to allow him to use these maps.



The boundaries of the Regions can best be understood based upon these maps. As it may become clear the boundaries of the Regions are slightly different. The territory of Flemish Region nor of the Walloon Regions interferes with Brussels-Capital Region. Furthermore, the territory of the Walloon Region includes the territory of the Germanspeaking Community. The following maps make these boundaries clear. The first map shows the Flemish Region, the second map the Walloon region and the third map Brussels Capital Region.⁷



b) Belgium: insitutional framework for the social dialogue

⁷ These maps can be consulted at http://www.belgium.be/en/about_belgium/government/federale_staat/map consulted on 15 December 2015. The author acknowledges the FEDICT for its willingness to allow him to use these maps.

The social dialogue in Belgium not only takes place within the existing political institutional framework but also in a specific social institutional framework. The social institutional framework is rather hierarchical.

The right to enter in collective negotiations is a fundamental right. Article 23, 1° of the Belgian Constitution guarantees the right on collective negotiations as a fundamental social right.⁸ The concrete legal substance of this fundamental right is not further explained in the constitution. When it is read in combination with the ILO-Convention number 98, it can be understood that collective negotiations include the aim to sign collective agreements on labour conditions. Collective negotiations moreover have to be executed between employers' organisations and trade unions while the State has the duty to initiate and promote collective negotiations although that social partners remain free and autonomous to decide to negotiate or not.⁹

Collective negotiations in Belgium take place at three different levels. At national or intersectorial level, representatives of the employers' organisations and of the trade unions negotiate on issues which are of common interest for all employees in Belgium. Notwithstanding the previous, it might be important to stress that Belgian trade unions do not possess legal personality. This entails that trade unions cannot be held liable for potential damages they might cause exercising social actions.¹⁰

At national or intersectorial level exists a National Labour Council. The National Labour Council was established by the Act of 29 May 1952. Article 1 of this Act provides that the National Labour Council is a public body that grants advices to a competent Minister or to Chambers of Parliament. The Council can act on own initiative or on demand of the competent Minister or on demand of a Chamber of Parliament. The National Labour Council is paritary composed and consists, according to article 2 of the Act of 29 May 1952, of one chairman and 26 representatives. Thirteen representatives represent the employers' organisations (with a ensured balance between industry, services, agriculture, trade, handcraft and the non-commercial sector). The thirteen representatives of the trade unions are chosen among the members of the most representative trade unions. Within the framework of the National Labour Council, collective agreements can be signed. Those collective agreements apply in the whole country and in all different sectors. It is important to add that the biannual Interprofessional Agreements set the agenda for the wage policies in the companies. Wage setting is, in principal, a competence of the social partners. The crucial role of those Interprofessional Agreements shall become clear in the rest of this report. They are of preponderant interest for the good functioning of the social dialogue.

The possibility to conclude collective agreements between the representatives of the employers' organisations and the trade unions on sectoral level is situated hierarchically underneath the collective agreements within the framework of the National Labour Council. The levels are determined by the Crown by Royal Decree. In 2015, the Crown had established

⁸ Read on this topic G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 523p.

⁹ R. DELARUE, "Het recht op collectief onderhandelen" in G. COX and M. RIGAUX (eds.), *De grondwettelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 119-123.

¹⁰ L. FRANCOIS, *Théorie des relations collectives du travail en droit belge*, Brussels, Bruylant, 1980, 226-230.

102 parity committees and 68 parity subcommittees (dealing with parts of the sector) have been installed. Those parity committees sign collective agreements on a sectoral level. It grants the major advantage that specific issues can be dealt with a sectoral level and that the parity committees can take into account the specificities, opportunities and difficulties of the enterprises in that specific sector.¹¹

The third and lowest level concern the collective agreements on company level. At company level, each employer can sign (in a parity committee, called the *Entreprise Council* for enterprises with more than 100 employees and called the *Committee for Prevention and Protection at Work* when at least 50 employees are engaged) a collective agreement with one or more trade unions. This collective agreement only counts at company level.

The collective agreements, signed within the framework of the National Labour Council or at sectoral level can be declared generally binding by the Crown. Collective agreements at company level shall never be declared generally binding. However, they obviously are binding for the employer as party but they also bind all employees in the company. Belgian collective labour law generally starts from the idea that each employee is bound by the content of a collective agreement in case its employer is bound by the collective agreement.¹² The element whether or not the employee is a member of a (signing) trade union does not affect the legal impact of the collective agreement. Once the employer is bound by the collective agreement, it has to apply it to all its employees.

A long standing debate which has been finished in the scope of the researched period concerned the representativity of the trade unions within the framework of the National Labour Council.¹³ An important modification has taken place during this research period. The Act of 30 December 2009 containing various dispositions provided for the first time the conditions which need to be respected in order to be qualified as representative trade union. Till 2009, Belgium had granted the competence to be recognised as representative trade union to the Crown without granting any preliminary conditions. The Act introduced the conditions to be qualified as a representative trade union. Representative trade unions are those which are founded to work all over the country and have an interprofessional action all over the country (1), represent the absolute majority of the sectors and of staff categories in the private and in the public sector as far as the majority of the employees are represented (2), possess at least 125 000 (paying) members during a period prior to the nominations of the members in the National Labour Council (3) and aim to defend the interests of the employees as its statutory goal. With this modification the Belgian legislator put itself in concordance with article 10 of the ILO Treaty number 87 and with the earlier remarks of the International Labour Organisation.

¹¹ M. DAVAGLE and B. PATERNOSTRE, *Droit collectif du travail: 1. Le cadre institutionnel de la concertation sociale*, Limal, Anthemis, 2011, 223.

¹² P. HUMBLET and M. RIGAUX (eds.), *Synopsis van het Belgisch arbeidsrecht*, Antwerpen, Intersentia, 2012, 360.

¹³ Read on this topic F. DORSSEMONT, *Rechtspositie en syndicale actievrijheid van representatieve werknemersorganisaties*, Bruges, die Keure, 2002, 771p.

The general constitutional and social institutional framework may be clearer now. Furthermore, it is useful for a good comprehension of the report.

At the end of this chapter, it is useful to mention the most influential Acts in Belgian labour law. The following Acts need to be mentioned:

- the Act of 3 July 1978 on the Contracts of Employment deals with the regulatory framework of the contracts of employment for the labourers (blue collar workers) and the employees (white collar workers).
- the Labour Act of 16 May 1971 deals with working time issues
- the Act of 5 December 1968 on Collective Agreements
- the Act of 19 December 1974 on Collective Negotiations with the trade unions in the public sector
- Specific attention needs to be paid to the Act of 26 July 1996 which deals with the indexation of wages.

c) Conclusion

For a full comprehension of this report, a basic understanding of the Belgian institutional framework grants an important added value. In order to establish a real labour and employment policy dealing with topics such as flexibility and employability, all federal and sub state legislators need to cooperate. Therefore, Belgian governments shall often sign collaboration agreements in order to ensure a good common service of general interest. The major power in the field of labour and employment law remains in the hands of the federal authority. However, some elements with regard to labour policy may be developed at sub state level.

Second, it is important to underline the impact of collective agreements within the Belgian social dialogue framework. Social partners sign important collective agreements at national level in the National Labour Council. These collective agreements can be granted a general character if they are made generally binding through a Royal Decree. The same destiny can be granted to a sectoral collective agreement. Obviously, the generally binding effect is limited to the sector wherein this last collective agreement has been signed. A collective agreement at company level cannot be made generally binding although it does apply to the employer who has to respect with regard to all its employees. Whether or not the individual employees are a member of a trade union (notwithstanding whether the trade union has signed the collective agreement or not) is of non-importance with regard to the binding character of the collective agreement. The key-element is the employer. In case the employer is bound by the collective agreement, it has to be applied to all employees falling in the scope of application of the collective agreement.

3. The period between 2008 and 2010.

a) General framework

The political situation in Belgium was very particular between 2007 and 2010. The result of the elections of 10 June 2007 led to a major schism in the Belgian political framework. The major Flemish nationalist party (N-V.A) won the election in alliance with the Flemish Christian Democrats (CD&V). Their program focused on a new state reform which would shift more powers to the sub state entities.¹⁴ The alliance defended e.g. the opinion that, among many others, employability policies should become a competence of the Regions. A confederal state structure where the emphasis would be on the sub state entities in order to develop their own socio-economic policies. The realisation of such a program collided with the fact that Frenchspeaking community was not claiming any reforms of the constitutional framework.¹⁵

The very difficult negotiations to form a government finally led to the scission of the alliance between the Flemish christiandemocrats and the Flemish nationalists. It took until 21 December 2007 before a new (temporary) government was formed. Mister Verhofstadt became for the third time Prime Minister of a governmental coalition of christiandemocrats, liberals and socialists. This coalition stayed in power until March 2008 when it was replaced by a government led by Prime Minister Yves Leterme (Flemish christian democrat). In the year 2008, Belgium knew three different prime ministers. In March 2008, a new federal government was installed under the auspices of the Leterme. It concerned a government with Flemish and frenchspeaking Christiandemocrats, Flemish and Frenchspeaking liberals and Frenchspeaking socialists. The government fell in December 2008 due to whispers that it had tried to influence the outcome of the Fortis trial. Fortis used to be the major Belgian bank which survived due to a financial support program of the Belgian government. However, some shareholders had set up a trial against the Belgian State in order to recover their losses. Some members of Belgian government were said to have tried to intervene in the process in order to obtain a favorable outcome to safeguard the Belgian economic position.¹⁶

This first government entered into power on a moment that the Lisbon Strategy was still very actual. Belgium had adopted a National Reform Plan in 2005 which focused on the implementation of the Lisbon Strategy. The major element of this reform plan was the so-called Generation Pact.

b) Lisbon Strategy

¹⁴ Election program of the CD&V, 10 June 2007, 58-59 to be consulted at http://www2.cdenv.be/programma/Federaal_programma07.pdf

¹⁵ M. DUBUISSON, «Un siècle sépare les étés de 2007 et de 2010 », *Le Soir*, 23 août 2010 to be consulted at <http://archives.lesoir.be/un-siecle-separe-les-etes-2007-t-20100823-01152Q.html>. The author describes that Frenchspeaking politicians indicated that they were not claiming any institutionnel reform (“On est demandeur de rien”).

¹⁶ Read on this topic Het Nieuwsblad “Krantencommentaren vernietigend voor Leterme”, 18 December 2008 and *Le Soir*, “Leterme devrait démissionner”, 18 December 2008.

The Lisbon Strategy promoted a different form of employability aiming to reduce the skill gaps between the different member states by investing in jobs and learning opportunities.¹⁷ The Lisbon Strategy concentrated on the important aspect of lifelong learning as a basic element of the European social model. More job rotation and more flexible management to reform the European social model were set as goals.¹⁸ The European Council desired to improve the employability rate from 61 % to 70% by 2010 and to improve the employment of women from 51 % to 60%.

The Lisbon Strategy had undergone a new start in 2005. President of the European Commission Barroso made a communication to the Spring Council in 2005 where he stated that more and better jobs needed to be created. Member States and the social partners are invoked to increase their efforts to boost the level of employment *“by pursuing active employment policies which help people in work and provide incentives for them to remain there, developing active ageing policies to discourage people from leaving the workforce too early, and by modernising social protection systems, so that they continue to offer the security needed to help people embrace change.”*¹⁹

The adaptability of the workforce and of businesses and the creation of more flexibility in the labour market had to be improved by the Member States and the social partners.²⁰ More investments in education and training should improve the possibility to move to new jobs. The communication indicated that the Member States and the EU had to collaborate to improve growth and employment. Member States were expected to make strong commitments within their own national reform plans.

The Lisbon Strategy was again translated in a Green paper on the Modernizing Labour Law. The European Commission defended the opinion that the new labour market required the creation of minimum standards of social protection for the forms of atypical labour forms. Furthermore, the existing legal framework of the employment contracts had to be adapted in order to grant more flexibility to the standard contracts of employment.²¹

Belgium made a National Reform Plan in 2005 in order to meet the requirements of the EU and to make its labour market more flexible as desired by the European Union.

c) National Reform Plan 2005-2010

The National Reform Plan of 2005 was entitled “More work, more growth” and contained a few important reforms of the labour market. The document tried to focus on the

¹⁷ Lisbon European Council on 23 and 24 March 2000 Presidency Conclusions, to be consulted at http://www.europarl.europa.eu/summits/lis1_en.htm

¹⁸ Lisbon European Council on 23 and 24 March 2000 Presidency Conclusions, to be consulted at http://www.europarl.europa.eu/summits/lis1_en.htm

¹⁹ Communication by the President to the European Council on 2 February 2005, 9 to be consulted at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0024&from=EN>

²⁰ Communication by the President to the European Council on 2 February 2005, 10 to be consulted at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0024&from=EN>

²¹ Green paper of 22 November 2006 on Modernizing of Labour Law to meet the challenges of the 21st century, 5-7 to be consulted at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006DC0708>

improvement of the competitive position of the enterprises, growth and the employability.²² Furthermore, the different Belgian governments (the federal government and the governments of the sub state entities) signed an agreement to improve the employability in Belgium in general.

The role of the social partners has to be understood within the framework of the politically unstable period. One of the priorities concerned cutting down the wage costs for companies in order to improve the competitive position of the enterprises in Belgium. The second crucial element concerned the reform of labour market in order to improve the employability of the older employees. The aim was to reach in 2010 an employability rate of 70%.²³

The governmental declaration of the government Verhofstadt III indicated that the federal government would make a strategy with its sub state entities (Regions and the Communities) and the social partners to improve the employability. However, as the government Verhofstadt II was in reality an interim government, it could not make big steps with regard to the conclusion of employability issues.

During the reign of the government Leterme I and of Van Rompuy I in 2008 a national recovery program was established. This government agreed on the recovery plan on 4 October 2008. It provided an important role for the social partners. An Interprofessional Agreement (IPA on intersectoral level) within the National Labour Council between the social partners was concluded on 22 December 2008. The impact of this Interprofessional Agreement was significant as the national recovery program explicitly mentioned the signing of an Interprofessional Agreement between the social partners to be crucial for the execution of the national recovery plan.²⁴ Obviously, the national recovery program fit into the EU-economic recovery plan which was announced on 26 November 2008.²⁵ The Interprofessional Agreement set out that the wage increase for workers had to be limited to 250 euro netto spread over two years. This net-approach was novel in Belgian labour law. It concerned a claim of the employers' organisations to reduce the gross wage costs for the employers and thus to improve the competitive position of employers and enterprises in Belgium.²⁶

The so-called exceptional Interprofessional Agreement from 22 December 2008 temporary reinforced the role of the Social Dialogue in Belgium. The link between the social dialogue and the legislative initiatives became the most obvious with the draft of the Economic Recovery Act of 27 March 2009. With this Act Parliament undertook measures to execute the national

²² Nationaal Hervormingsplan, *Meer werk, meer groei*, Brussels, 26 October 2005 to be consulted at http://www.be2010.eu/admin/uploaded/200609061449060.NHP%20Lissabon_NL_def.pdf

²³ Nationaal Hervormingsplan België 2005-2008, *Meer werk, meer groei*, Brussels, vooruitgangrapport 2006, 2006, 43 to be consulted at <http://ec.europa.eu/social/BlobServlet?docId=6080>.

²⁴ Nationaal Hervormingsprogramma 2008-2010, Brussels, 2008, 10 to be consulted at <http://ec.europa.eu/social/BlobServlet?docId=6080>.

²⁵ Communication for the European Commission to the European Council, A European Economic Recovery Plan, 26 November 2008 to be consulted at http://ec.europa.eu/economy_finance/publications/publication13504_en.pdf

²⁶ Uitzonderlijk Akkoord voor de onderhandelingen op sector- en ondernemingsvlak in de periode 2009-2010, *Bijdrage tot het herstel van het vertrouwen*, 22 December 2008, Brussels, 2008, 4 to be consulted at <http://www.cnt-nar.be/INTERP-AKKOORD/IPA-2009-2010-NL.pdf>

recovery plan.²⁷ This Act in fact constituted a legal underpinning of the Interprofessional Agreement of 22 december 2008. The federal government explicitly stated in the parliamentary preparatory works the importance of the social dialogue and its willingness to transform the social agreements into legislation.²⁸

Article 41 of the Economic Recovery Act constituted a perfect example of how Belgian Parliament tried to reconcile flexibility issues with a certain employment security for the employees. In case the employer were to licence its employees due to a restructuring, the employer since the enactment of the Economic Recovery Act of 27 March 2009 has the duty to set up a employability unit in its enterprise. Employees have received the duty to inscribe themselves in this employability unit. In case they have not done it, they will be excluded from unemployment benefits. Furthermore, the employer needed to pay a (so-called reclassification) compensation for those employees who are employed since at least a year. The aim was to help them to find a new job rapidly. The reclassification compensation consists of six months wage in case the dismissed person is aged over 45 years and of three months wage in case he is aged under 45 years. Research had shown that elderly staff members had more difficulties to find a new job. Parliament considered it therefore appropriate to guarantee them a higher reclassification compensation.²⁹

The reclassification budget substitutes the redundancy payments (partially) which are provided in the Act of 3 July 1978 on the Contracts of Employment. In many cases, the redundancy payment (or the notice period) shall be longer than 3 or 6 months. The employer still has to respect the Act of 3 July 1978 by paying the full redundancy amount. However, the redundancy payment needs to be combined with the reclassification amount which makes that notice should be granted four or seven months before the employee is dismissed.³⁰ It should be noted that the introduction of reclassification has to a certain extent altered the long notice periods in Belgian employment law. The long notice periods constitute part of a specific balance in Belgian labour law. Employers did not need to motivate their decision to dismiss a worker according to Belgian employment law. As a counterbalance, Belgium was known for its very long notice periods or its high redundancy payments in case of dismissal.³¹ A redundancy payment under Belgian employment law accords with the amount of wage a worker is entitled to receive in case he kept on working during his notice period. This redundancy payments could rise to 25 or 30 months for an employee with 25 or 30 years of experience in the company.

The reforms of the Act of 22 March 2009 reformed Belgian dismissal law a bit as it tried to reconcile the EU demands on flexibility and security (the so-called concept of flexicurity). It remained very limited reforms though. It should be noted that some Belgian trade unions were not convinced of the necessity to introduce flexicurity. They defended the opinion that the proposals mainly focused on the idea of flexibility whereas the elements of security had to

²⁷ Economic Recovery Act of 27 March 2009, *Belgian Official Gazette*, 7 April 2009.

²⁸ *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 1788/1, session 2007-2010, 1.

²⁹ *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 1788/1, session 2007-2010, 24.

³⁰ *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 1788/1, session 2007-2010, 25.

³¹ K. SALOMEZ, *De rechtspositie van de ontslagmacht van de werkgever naar Belgisch arbeidsrecht*, Bruges, die Keure, 2004,

be reduced.³² During the interviews, a member of a trade union indicated that they did not share the analysis of the European Commission that new forms of flexicurity within the Belgian framework were necessary. According to them, the costs of this reform had to be included in the calculation. The ideal image of flexibility combined with security would imply a huge cost for the State, according to them. These costs were not calculated in the reforms. During the interviews, one of the representatives of the trade unions indeed indicated that the developments since 2008 implied a withdraw of the strength of the social dialogue. The governmental approach for them seemed to reduce the rights and prerogatives of the employees in order to strengthen the position of the employers.

A limited shift towards more flexicurity on the labour market had been made in the Economic Recovery Act. The employers namely received the possibility to become a company in restructuration without the beforehand long-existing duty to apply for a reduction of the age limit with regard to earlier retirement. The bare announcement that the company had been restructurering had become sufficient to be considered as such. The employer, though, also has to fullfil some important duties by the creation of an employability unit and by the payment of reclassification compensations. One could deduce from this agreement that the aim to improve the employability and thus to create a more flexible (and secure) labour market was envisaged in this agreement.³³

The role of the social partners in this setting was clear. Their agreements were translated (with some budgettary adjustments) into legislation. It may be important to stress, at this stage of the report, that trade unions indicated that they had the feeling that the specific role of government as facilitator has already shifted to a different approach.

However, trade unions judged that the situation was in 2008-2010 not yet as bad as in 2014. In that year an important MP of the N-V.A stated that Parliament is not obliged to transpose, without modifications, collective agreements between social partners into legislation. Even if this is legally true, it was considered by the trade unions an important denial of the social dialogue in Belgium. On the other hand, a representative of an employers' organisation indicated that the governments before 2014 had stronger links to the trade unions and that therefore the setting of the social dialogue took place in a different atmosphere than with the current coalition. The current coalition has no clear links with trade unions which makes the social dialogue more balanced according to the for employers' organisations. The representatives of trade unions did not share this analysis by pointing out that the current government does not support the social dialogue but simply the employers' perspective.

In 2008-2010, federal government had to adapt the typical functions of dismissal law in the Belgian labour context. Vandeputte indicated that Belgian dismissal law had three functions, namely the function to order Belgian labour law, to keep legal certainty and to create the possibility to negotiate collectively (1), the function to safeguard the position of the employer

³² ABVV, *Flexicurity: naar de 42-urenwerkweek*, Brussels, ABVV, 2011, 42p. to be consulted at https://www.abvv.be/c/document.../get_file?issuu.com/abvv/docs/flexicurity/

³³ M. VAN PUTTEN, "Onderzoek en evaluatie van het effect van het indienen van het concept "flexicurity" zoals bepaald door de Europese Raad in het Belgisch arbeidsrecht", Report FOD Belspo, 2010, 65.

(2) and finally Belgian dismissal law ensures the protection of the employee (3).³⁴ These functions were very slowly shifted in Belgian labour law.

The approach of the European Commission is namely fundamentally different. It tries to reconcile two elements, namely the creation of the necessary mobility on the labour market and the guarantee of sufficient support to a dismissed employee in his period of transition between two jobs.³⁵

Legislation was adapted in order to guarantee more flexibility to the employers but, according to the trade unions, not to safeguard enough security to the employees. At this stage, it is important to stress that the term “flexicurity” which was at the heart of the Lisbon Strategy was very often fundamentally criticized in Belgian legal scholarship.³⁶ The criticism was multiple and linked to the difficulty to describe the notion of flexicurity. In order to understand the notion of flexicurity better, it might worth to underline that the notion “flexibility” as it will be used within the framework of this contribution shall include the four elements as deduced by Wilthagen in his influential article “internal numerical flexibility, external numerical flexibility, wage flexibility and functional flexibility “.³⁷

External numerical flexibility included the flexibility to dismiss persons as an employer while internal numerical flexibility covered the possibility to modify labour time and labour organisation. Functional and wage flexibility concerned the possibility to rename and restructure functions or to modify or to make the wage component for employees more divergent.

Social partners have played a role in the four aspects of flexicurity during the period 2008-2010.

External numerical flexibility included reforms of Belgian dismissal law. Belgian dismissal law is, as said, known for a very specific balance. Belgian employers have a dismissal power.³⁸ This power includes that Belgian employers could terminate a contract of employment for indefinite duration without granting any motivation. The employer had to respect a long notice period for employees. However, the notice period for the labourers was a lot shorter. Blue collar workers did not enjoy the same notice periods as white collar employees. Those notice periods were limited to 14 days for labourers with less than 20 years of experience and 28 days for labourers with more than 20 years of experience (article 59 of the Contracts of Employment Act) while the notice period for employees (white collar workers) depended on

³⁴ W. VANDEPUTTE, *Ontslagrecht en de arbeidsmarkt*, Brugge, die Keure, 2010, 381.

³⁵ W. VANDEPUTTE, *Ontslagrecht en de arbeidsmarkt*, Brugge, die Keure, 2010, 382.

³⁶ P. VEILLE, “La flexicurity: rédefinir la sécurité des citoyens européens”, *Revue belge droit de la sécurité sociale*, 2007, 735-751 ; M. VAN PUTTEN, « Arbeidsrecht tussen flexibiliteit en zekerheid : existentiële vragen over de flexibiliteit in het arbeidsrecht en de vastheid van betrekking », *SocKron* 2010, 1-11.

³⁷ T. WILTHAGEN, *Balancing flexibility and security in European labour markets. Paper presented at the Conference on Recent Developments in industrial relations, organised by the Dutch Socio-Economic Council (SER) within the framework of the Dutch EU presidency, 2004*, to be consulted at <http://www.tilburguniversity.nl/faculties/law/research/reflect/publications/papers/fxp2004-10-wilthagenser.pdf>, 11.

³⁸ Read on this topic K. SALOMEZ, *De rechtspositie van de ontslagmacht van de werkgever naar Belgisch recht*, Bruges, die Keure, 2004, 457p.

the income but it included a minimum period of three months up to an average of a month for each year of experience within the company (article 82 of the Act on Contracts of Employment).³⁹

The distinction in notice periods constituted the subject of a prejudicial question of the Brussels Labour Tribunal of Brussels to the Constitutional Court with regard to the compliance of these provisions with the principles of equality and non-discrimination which are foreseen in the articles 10 and 11 of the Constitution. Although the Belgian Constitutional Court had already had decided in earlier cases that distinctions between blue and white collar workers included violations of the constitutional principles of equality and non-discrimination, the legislator nor the social partners felt, at that stage, the necessity, to search a preliminary solution for the potential violation of the articles 10 and 11 of the Constitution by the articles 59 and 82 of the Contracts of Employment Act. The distinction between blue and white collar workers in dismissal law was not fundamentally adapted in the period 2008 till 2010.⁴⁰

Modifications which could be linked to flexicurity concern more the internal numerical elements. Parliament decided to enact legislation to reduce the social security contributions in case the labour time was reduced with an hour a week. This measure was installed by Act of Parliament on 19 June 2009 concerning employment measures in times of crisis (hereafter also the Act of 19 June 2009). This Act introduced some measures in times of crisis to sustain employment. Some other measures went even further and introduced the possibility to reduce a labour day a week in case a collective agreement could be reached between the social partners. It underlined again the importance of the social dialogue in Belgium although the circumstances wherein the social dialogue took place were fundamentally different. The Act of 19 June 2009 created possibilities to reduce the labour time which was not a common option until the financial crisis took place. The same Act provided the possibility to suspend temporarily the contracts of employment of employees. The measures could only be taken by companies struggling with difficulties. A company with difficulties is described as a company with a decrease of 20 % (from 2010: 15%) of its turn over in comparison with the corresponding quarter in 2008⁴¹. The major reason was that blue collar workers, even before the modification of the regulation in 2009, could be temporarily left out the production process. A suspension of a contract of employment of a labourer was perfectly legal. The suspension of a contract of employment for employees (legally qualified as technical unemployment) did not exist.⁴²

The Act of 19 June 2009 once again clearly indicated the important role for the social partners. The social partners were encouraged to sign collective agreements on sectoral level

³⁹ T. CLAEYS and I. VERHELST, "De opzegtermijn voor bedienden: recente knelpunten" in M. RIGAUX and W. RAUWS (eds.), *Actuele problemen van het arbeidsrecht 8*, Antwerp, Intersentia, 2010, 75-144.

⁴⁰ One can state that the rigidity of the Belgian dismissal law was criticized by some legal scholars as a barrier for important steps towards more flexibility. On the other hand other legal scholars claimed that a rigid dismissal law was a necessary means to keep security as a basic principle for the workers. Compare W. VANDEPUTTE, "Flexizekerheid: het beste van twee werelden?", *TSR* 2007, 303-357 with M. VAN PUTTEN, *Onderzoek en evaluatie van het effect van het indienen van het concept "flexicurity" zoals bepaald door de Europese Raad in het Belgisch arbeidsrecht*, Brussel, BELSPO, 2010, 63-64.

⁴¹ This figures were enacted by Royal decree of 28 June 2009, as adapted.

⁴² *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 2003/1, session 2007-2010, 6.

to open the possibility to install these crisis measures. Sectoral collective agreements, which were not declared generally binding, were considered the most suitable level. Companies with difficulties could then rely on the sectoral collective agreement. However, if no sectoral collective agreement were to be concluded, the company should sign a collective agreement at company level in order to open the possibility to apply the statutory provisions.⁴³

Social partners have used this possibility on several occasions. The sector metal (paritary committee 209) was the first to sign a collective agreement on 26 June 2009 containing anti crisis measures.⁴⁴ Article 4 of this collective agreement explicitly provided that the aim was to guarantee employment and to avoid dismissals.

A short while later other important sectors followed such as e.g. the construction sector. It thus became clear that the social dialogue between social partners was of crucial importance at that stage of the financial crisis. Social dialogue was considered an crucial tool in overcoming the crisis. The year report of the Federal public Service Work, Labour and Social Concertation indicated that the paritary committees had held a record number of meetings. Even if the number of meetings does not necessarily include a successful year for the social dialogue, it underlines the efforts social partners made to overcome to the crisis. In short, it is obviously difficult to assess the impact of collective agreements dealing with the anti-crisis measures.⁴⁵ However, a link seems to be logical. The increase of the number of meeting of social partners indicated that the social dialogue was at least very vivid during the period 2008-2010.

d) Other modifications to improve employability

The impact of other forms of flexicurity (functional flexicurity and wage flexicurity) on the Belgian labour market can best be measured based on the modifications which deal with the reduction of labour time, the possibility to suspend the employment relations and with wage measures. Those elements were all concerned during the period 2008-2010 when Belgium was hit by the crisis.

The Interprofessional Agreement of 22 December 2008 namely included the possibility for a limited wage increase of 250 euros over two years. This wage increase could be granted through the form of an increase of the food and beverages cheques, the increase of a mobility grant and the creation and the use of the ecocheques. A specific element of Belgian labour law needs to be introduced in the debate. Next to this wage increase, an indexation of the wages is normally applied. The index mechanism in Belgium constitutes a link of the wage to a retail index. In case the prices for retail increase, the wages are increased because life becomes more expensive.⁴⁶ Furthermore, international organisations, such as the OECD,

⁴³ *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 2003/1, session 2007-2010, 7.

⁴⁴ Collective agreement of 26 June 2009 within the paritary committee number 209 for the employees of the metal fabrication industry to be found at <http://www.werk.belgie.be/CAO/209/209-2009-004801.pdf>

⁴⁵ FOD WASO, Jaarverslag 2009, 6. The report indicated that around 2000 meetings were held in the year 2009. The year report can be consulted at <http://www.werk.belgie.be/publicationDefault.aspx?id=30178>

⁴⁶ For an explanation of the index mechanism in Belgium, read the report of the National Bank of Belgium, *Indexering in België: omvang, aard en gevolgen voor de economie en mogelijke alternatieven*, 28 June 2012, 55p. to be consulted at https://www.nbb.be/doc/ts/indexation/nota_28_06_2012.pdf

pledged for an abolition of the link of wages to the index. The OECD granted the advice to abolish wage indexation in its country notes of 2010.⁴⁷ Furthermore, it indicated that companies should have the liberty to opt out of sectoral agreements with regard to wage increases.

The claim of employers' organisations was that this wage increase had to be linked to a decrease of the wage costs for employers. The wage costs for employers are significantly higher in Belgium when compared to its neighbouring countries.⁴⁸

An important nuance needs to be added to this debate. A limited openness for wage increases (from 250 euro) had to be translated into sectoral collective agreements. The Interprofessional Agreement 2009-2010 only granted a general framework for potential wage increases while it belonged to the power of the sectors to sign collective agreements or even to the companies to sign agreements which fit in the general average of wage increases. However, each company and each sector possessed some liberty to differentiate between its employees with regard to how the wage increase was applied.

Functional flexicurity was introduced by enforcing the possibility to recruit persons with contracts of employment of limited duration, the possibility to post employees within another company and the possibility to recruit staff to substitute temporary absent staff members with contract of employment for indefinite duration.

Besides the measures described, some other reforms under EU-influence were realized. An important step concerned the calculation of the redundancy payment in case somebody is dismissed during a period of part time maternity leave. The European Court of Justice decided that Belgian legislation violated the prohibition of discrimination based upon gender when redundancy payments during a period of part time maternity leave were to be made on a part time basis while the lady was employed based upon a full time contract of employment.⁴⁹ Belgian Parliament adapted its legislation with the Act of 30 December 2009 to the judgment of the European Court of Justice.

Some forms of atypical employment were promoted by EU-institutions. It should be stated here that the impact of the European Directive 2008/104/EG enacted on 19 November 2008 demanded a new analysis of the existing regulations. It took Belgian parliament till 9 July 2012 to transpose this Directive.⁵⁰ Atypical employment consists in Belgium of different forms. Typical employment is considered to be a full time contract of employment for indefinite term.⁵¹ Other forms of employment (such as part time employment, posting of workers or temporary employment) are all considered to be atypical.

⁴⁷ OECD, *Economic Policy Reforms 2009 – Going for Growth*, Country notes: Belgium, 58 to be consulted at <http://www.oecd.org/belgium/42222532.pdf>

⁴⁸ Central Council for Company Life, *Methodologische nota vooruitzichten arbeidsduur en loonkosten 2009-2010*, Brussels, 2009, 9p.

⁴⁹ ECJ, 22 October 2009, C-116/08, *Meerts v. Proost NV*.

⁵⁰ P. VANDENBERGH and F. HENDRICKX, "Uitzendarbeid en terbeschikkingstelling" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht : deel 1*, Bruges, die Keure, 2015, 271-272.

⁵¹ P. VANDENBERGH and F. HENDRICKX, "Uitzendarbeid en terbeschikkingstelling" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht : deel 1*, Bruges, die Keure, 2015, 274.

During the time slot which is considered in this chapter, no fundamental reforms on this topic took place. In Belgium, temporary employment and posting of workers are both regulated by the Act of 24 June 1987. This Act prohibits in principle posting of workers and limits the scope of temporary employment to some specific circumstances. An employer is allowed to replace employees who are temporarily unavailable due to a suspension of the contract of employment or to a temporary increase of the workload. The role of the social partners is crucial as a collective agreement in the National Labour Council is necessary to regulate the procedure and the duration of some forms of substitution.

Posting of workers in principle is prohibited. The transfer of authority from one employer to another is in breach of article 31 of the Act of 24 June 1987. The modifications of the Act of 1987 had made of this general prohibition an empty box. Case law and legal scholars agreed that the real impact of article 31 was denied by the following articles of the same Act.⁵² The possibilities to post workers had become very large given the fact that instructions from 1) the user on respecting the duties with regard to well-being at work; 2) instructions on labour- and resting hours; and 3) instructions on the execution of the agreed work that the worker has to execute given the agreement between the user and the employer of the posted worker.

This legislative measure scooped out the original prohibition to post workers. The general prohibition was linked to the previous existence of illegal contractors. The sanctioning mechanism was therefore very strict. Criminal sanctions were provided in case the ban on posting of workers was breached. However, given the scooping out of the original prohibition, posting of workers had become a more common legal process.

⁵² Constitutional Court, 14 June 2012, nr. 75/2012 and P. VANDENBERGH and F. HENDRICKX, "Uitzendarbeid en terbeschikkingstelling" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht : deel 1*, Bruges, die Keure, 2015, 295.

4. Period 2010-2011

a) EU-framework and Belgian political framework

The European Framework had been fundamentally modified in 2010. The European Council introduced a new focus in its communication of 3 March 2010. The European Council targetted an employment rate of 75% for the persons aged 20-64 and this aim should be achieved in 2020.⁵³ In 2010, the agenda of Europe 2020 was made up and substituted the Lisbon Strategy.

Within this framework, Belgium had to set up a national recovery plan for the period 2010-2011 in order to deal with the horizon 2020 targets. The employment rate had been seriously hit in Belgium which led to measures aiming to improve this rate and to try to decrease the level of unemployment in Belgium.⁵⁴

In June 2010, new federal elections took place. The Flemish nationalist party N-V.A won the elections with an overwhelming result of over 30% in Flanders. As a sequel, difficult and longlasting negotiations with the Frenchspeaking parties were started again to form a new federal government. The formation period lasted over a year and a half and constituted the longest government formations negotiations in the world.⁵⁵ It cannot be regarded as a surprise that the number of fundamental decisions taken in Belgium during this period were very limited.

The role of the social partners during this period must be quoted as very important according to a representative of the trade union. They enjoyed a certain social liberty to fill in the existing gaps with a social dialogue. There was space for negotiations, which was only limited by (temporary) adaptations of the existing legal framework.

b) Measures of the caretaker government

The long reigning period of a care taker government recovered the influence of federal Parliament. The Act of 1 February 2011 prolonged the crisis measures which had been enacted by the Act of 22 March 2009 and by the Act of 19 June 2009. In case collective agreements were concluded within the framework of these Acts, the duration of these collective agreements was prolonged, first to 31 March 2011 (by the Act of 1 February 2011) and later till 31 December 2011 (by Act of 12 April 2011).

Although the specific political situation, the caretaker government had to intervene in the socio-political situation. The Act of 12 April 2011 was an initiative of the caretaker government which had to intervene given the impossibility to conclude an Interprofessional Agreement between the social partners. Federal government had taken an initiative by granting a draft of an Interprofessional Agreement on 8 January 2011. The draft of the Interprofessional Agreement provided that there was limited room for wage increases given

⁵³ Communication of the European Commission 3 March 2010, *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final to be consulted at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC2020>

⁵⁴ National Recovery Program 2008-2010, progress report 2009, 9.

⁵⁵ The Telegraph, *Belgium to have a new government after world record of 541 days*, 6 December 2011.

the fact a report of the Central Council of the Company Life indicated that the wage increase of 0,4% in the period 2009-2010 had led to a weaker position of the Belgian companies with regard to its neighbouring countries.⁵⁶

The employers' organisations had supported the draft of Interprofessional Agreement even if they judged that a wage increase included more costs for the employers. The socialist and the liberal trade unions eventually did not accept the proposal of the interprofessional agreement 2011-2012. Their strongest criticism concerned they considered the very limited wage increase of 0,3% to be too low given the fact that some steps had been taken to improve the fiscal position of the companies.

Social partners could not agree on an Interprofessional Agreement and in order to avoid budgetary issues, federal government took the initiative to underpin the original draft of the Interprofessional Agreement with regulation. Federal caretaker government decided to initiate itself the procedure for a reform and to put the social dialogue aside. A legislative basis for governmental intervention was provided by article 7 paragraph 1 of the Act of 26 July 1996 to improve the employability and the preventive safeguarding of the competitiveness (hereafter also the Act of 26 July 1996). This article provides that the Crown (read the government) can provide by Royal Decree the minimal margins for the development of the wage costs.

A Royal Decree of 28 March 2011 executed this competence and provided the possibility for a wage increase in the period 2011 and 2012. The Royal Decree stipulated a wage increase of 0% for the year 2011 and an increase of 0,3% for the year 2012.

c) Distinction between labourers and employees

Another important element which contributed to more difficult relations between social partners and complicated further the social dialogue, was the pending deadline with regard to the abolition of the distinction between the labourers and the employees concerning the notice periods and the first day of sick leave. A new balance between the notice periods for employees and labourers had to be found due to the judgment of the Constitutional Court of 7 July 2011.

The Constitutional Court decided that the distinction in notice periods between blue and white collar workers was in breach of the articles 10 and 11 of the Belgian Constitution. It was not the first time that the Constitutional Court had to answer a prejudicial question on this topic. In the decision 56/93 of 8 July 1993 the Constitutional Court had taken a quite moderate approach to the distinction. The long standing distinction between manual labour and intellectual labour constituted a key element of Belgian labour law and could therefore not be wiped out at once. The Constitutional Court did not consider the distinction unconstitutional in 1993 but it indicated that a gradual extinction of the distinction over years seemed to be constitutional.⁵⁷ On 7 July 2011, the Constitutional Court went a step further and declared the existing distinctions between labourers and employees unconstitutional

⁵⁶ *Parl. Doc.*, Chamber of Representatives, Memorie van Toelichting, nr. 1322/1, session 2010-2011, 1.

⁵⁷ Constitutional Court, nr. 56/93, 8 July 1993.

with regard to the notice periods and the first sick leave day.⁵⁸ The Constitutional Court decided that there existed no objective ground to install a distinction between blue and white collar workers with regard to the notice period. However, the Constitutional Court furthermore decided that the Belgian legislator should be granted some time to diminish the statutory distinction between blue and white collar workers. The consequences of the distinction therefore could be kept until the 8 July 2013.⁵⁹

The consequence of this case law was that the legislator received a period of two years to introduce a different (and perhaps more flexible) dismissal law which made a better balance between blue and white collar workers. Social partners were invited to search a solution for this problem. However, they did not manage to reach an agreement before the mentioned date. A tripartite negotiation was set up where the minister of Labour made a compromise to reconcile the different opinions of the employer's organisations and the trade unions.

Therefore, the federal caretaker government waited for the social partners to find a legal solution for the existing unconstitutionality. Their solution would be transposed into legislation. However, the approaches of the social partners were very different.

On one hand, trade unions feared that the existing better protection of the employees would be lost while employers' organisations feared too high dismissal costs in case of an upgrade of the dismissal protection of labourers towards the protection of employees while employers indicated that an upgrade of the dismissal protection of the labourers to the level of the employees would lead to more costs for the employers which affects the competitiveness of the employers.⁶⁰ The Act of 12 April 2011 had made some steps towards a harmonisation by approaching the notice periods for labourers and employees.⁶¹ It narrowed the distinction. However, the major important difference still remained. The new notice periods were still limited when compared to the notice periods of the employees.

During the whole period 2010-2011 when a government of ongoing affairs was in power, this file dominated the social dialogue on national level.

d) Budget deficit

The period 2010-2011 also needs to be identified as the period of the excessive budget deficit. On 2 December 2009, the European Commission launched a procedure, based upon article 126 of the Treaty on the Functioning of the European Union (TFEU), against an excessive deficit in Belgium.⁶² The Commission clearly indicated that the pensions systems

⁵⁸ Constitutional Court, 125/2011, 7 July 2011, note M. Mahieu en G. Pijcke, «Aménagement dans le temps des effets des arrêts rendus sur question préjudicielle: la Cour constitutionnelle a franchi le cap », *JT* 2011, 717.

⁵⁹ Constitutional Court, 125/2011, 7 July 2011, , note M. Mahieu en G. Pijcke, «Aménagement dans le temps des effets des arrêts rendus sur question préjudicielle: la Cour constitutionnelle a franchi le cap », *JT* 2011, 717.

⁶⁰ Read on this topic D. CUYPERS, "Preadvies: over de hervorming van het Belgische ontslagrecht: willekeurig ontslag en opzeggingstermijnen" in P. BLONDIAU, J. PUT, e.a. (eds.), *Passende arbeid en behoorlijk ontslag*, Bruges, die Keure, 2007, 161.

⁶¹ The notice periods for labourers was prolonged by an adaptation of article 65/2 of the Contracts of Employment Act of 3 July 1978.

⁶² Council Recommendation of 2 December 2009 to end the situation of an excessive budget deficit to be consulted at http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-07_council/2009-12-02_be_126-7_council_en.pdf

were considered to be inappropriate and it considered that a reform of the pension system was imminent. It was therefore a duty for Belgian federal caretaker government to try to find a solution for this matter. Once again, no real measures could be taken given the political instability in the period 2010-2011.

5. The period 2011-2014

a) Belgian political and social framework

The federal government Di Rupo I came into power on 6 December 2011. It had to take measures on an immediate basis. This had an impact on the social dialogue in general. Some measures had to be taken on a very short notice which led to procedures avoiding a social dialogue. These measures were often exactly those to be taken under EU-pressure. Due to the aforementioned excessive deficit procedure which Belgium underwent from 2 December 2009, some important measures had to be taken to reduce its budget deficit. The report of the European Commission indicated that pension measures had to be taken in order to diminish the excessive budgetary deficit. The reform of the pensions and the intention to improve the employability of the elderly part of the population was explicitly mentioned as a demand to improve the budget which was influenced by the European Commission.⁶³

Almost immediately after the start of its legislature, the government took the initiative to reform public pension systems and earlier retirement systems in the private sector. However, reforms of the pensions in the public sector need to be negotiated with the representative trade unions according to the Act of 19 December 1974. The new government avoided to dialogue about the reform of the pensions by initiating the legislative process through an amendment of a pending legislative proposal. The amendment did not need to be negotiated as it was a pure parliamentary initiative. The parliamentary sovereignty played its role. However, the option not to negotiate with the representative trade unions, is considered, by the trade unions as a turning point in the confidence in the social dialogue. Simultaneously, the reform of the earlier retirement procedure was not negotiated with the trade unions. The same principles applied: normally this reform had to be negotiated with the representative trade unions. Once again, a parliamentary amendment provoked a modification of a pending bill. It may not be considered a surprise that the trade unions were not amused with these initiatives.⁶⁴

Federal government had to improve the Belgian economic position. It therefore took measures to improve the employability rate in Belgium. The governmental agreement started with the notion that the employability rate needed to be raised till 73,2%.⁶⁵ The governmental agreement also aimed to resolve the issue with regard to the wage stop. No wage increase, besides the indexation, were allowed. As for the period 2011-2012, no Interprofessional Agreement for the period 2013-2014 was signed. The general wage stop was the crucial element not to conclude any interprofessional agreement for the trade unions. However, it is necessary to underline the inherent liberty in the sectoral model. Within sectors, social partners could set up a dialogue to grant some wage increases to the employees. The general

⁶³ Read on this topic: De Standaard, "Wat houdt de pensioenhervorming in?", 16 December 2011; *Parl. Doc.*, Chamber of Representatives, Amendementen, nr. 1952/3, session 2011-2012, 15-16.

⁶⁴ *Parl. Doc.*, Chamber of Representatives, Amendementen, nr. 1952/3, session 2011-2012, 8-9.

⁶⁵ *Governmental Agreement*, 1 December 2011, 2 to be consulted at http://archive.dirupo.belgium.be/sites/all/themes/custom/tcustom/Files/Regeerakkoord_1_december_2011.pdf

framework did, according to the governmental decision, not allow any space for an increase of the wages.

b) Posting workers and temporary agency employment

Important steps were set to adapt legislation with regard to the posting of workers between companies.

The Directive 2008/104/EC focused on three major pillars:

1. Principal of equal treatment: the basic working and employment conditions to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.
2. Atypical employment: In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking
3. The improvement of the social protection in the minimum protection for temporary agency workers should be accompanied by a review of any restrictions or prohibitions which may have been imposed on temporary agency work. These may be justified only on grounds of the general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented.

The freedom of establishment and the free movement of services called for a reform of the Act of 24 July 1987 on temporary employment and the posting of workers for external users. The biggest problem concerned article 4 of the Directive 2008/104/EC. This article provides the following: *“Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.”*

Social partners had to make an analysis of the existing regulations to prohibit in certain sectors temporary agency employment. In some sectors, such as the moving of houses sector, social partners preferred to keep the existing prohibition to work with temporary agency employment. The social partners judged that experience and safety were crucial elements in this sector for good and safe services.⁶⁶

Recently, the Court of Justice has now decided that regulation including prohibitions for temporary agency employment and posting of workers can be in accordance with the directive 2008/104/EC.⁶⁷ It seems therefore that the prohibition of temporary agency employment in some sectors can be in conformity with EU-law.

⁶⁶ P. VANDENBERGH and F. HENDRICKX, “Uitzendarbeid en terbeschikkingstelling” in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht : deel 1*, Bruges, die Keure, 2015, 274.

⁶⁷ ECJ, nr. C- 533/13, 17 March 2015, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v. Oljytutote ry, Shell Aviation Finland Oy*.

Only interim offices are allowed to play the role of an intermediate agency. Temporary agency employment in Belgium is only possible in the following cases:

- Substitution of a worker with a typical employment relation
- Temporary increase of the work load
- Execution of exceptional work
- Delivery of artistic performances and the production of artistic works
- Inflow.

In case of a substitution of a dismissed worker, temporary agency employment should be limited to six months. This temporary contract can only be prolonged for a period of six months (article 8 of the collective agreement number 108 of 16 July 2013).

The last possibility (inflow) is a novel which was introduced by collective agreement number 108. The aim of this form of “inflow” is to transform atypical employment into typical employment. The social partners aim to enlarge the better social protection linked to a contract of employment with indefinite duration to the temporary agency worker. This reasoning constitutes the basic legal underpinning of article 24 of the collective agreement number 108 in the National Labour Council.⁶⁸ The goal is to grant the temporary agency agent the social protection of a worker with a contract of employment of indefinite duration. This better social protection does not only constitute the goal of social partners. An important step was made in the case law of the Court of Cassation. The Court decided to enlarge the scope of application of the Labour Accidents Act to a temporary agency worker (with a daily contract of 8 working hours a day). This jurisprudence indicated again the evolution towards a larger and better social protection of the temporary agency workers.⁶⁹

The draft of the collective agreement number 108 was ready when the bill for the new Act of 26 June 2013 was drafted. The new Act was in full concordance with the collective agreement number 108. It shows the weight and the importance of the social dialogue next to the signing of Interprofessional Agreements. On sectoral and company level, important sectoral collective agreements to deal with the crisis were signed.⁷⁰ The collective agreement number 108 thus indicated the important role of the social partners can play in the creation of better working conditions in Belgium.

c) The creation of unitary status for labourers and employees with regard to redundancy payments and notice periods

A very important step was the creation of unitary dismissal periods for labourers and employees in the private sector.

As mentioned before, the existing distinction between labourers and employees in Belgian labour law was based on a historical difference. It may be worth to repeat that Belgium knows

⁶⁸ Commentary of the social partners to article 24 of the collective agreement number 108 of 16 July 2013 in the National Labour Council, 22 to be consulted at [http://www.cnt-nar.be/CAO-ORIG/cao-108-\(16-07-2013\).pdf](http://www.cnt-nar.be/CAO-ORIG/cao-108-(16-07-2013).pdf)

⁶⁹ Cass., 10 March 2014, S 12.0094N to be consulted at www.juridat.be

⁷⁰ Collective agreement in the insurance sector (paritary committee number 306) where the possibility for an employee to ask his employer a written motivation for his dismissal was introduced.

a full dismissal power for the employer. This means that in case the employer does not respect the existing dismissal legislation, judges cannot order a reinstatement. To that extent, it is incorrect to state that Belgium knows a system with stability of employment.⁷¹ An employee with a contract of employment of undertermined duration can be dismissed and if the dismissal regulation is not respected, it becomes a very costly or a very long experience. To that extent, the stability of employment in the Belgian private sector is relative.⁷² The notice periods before the modification of the Contracts of Employment Act were fundamentally different for labourers and employees. In the group of employees a distinction was made between the lower employees (earning less than 16100 euro gross a year) and the higher employees. For this last group, judges had to decide. Legal scholarship deduced a formula out of the case law, the so-called formula Claeys.⁷³ The following scheme may make this clear:

Labourers	Lower employees	Higher employees
Less than 20 years of experience: 28 days	Less than 5 years experience: 3 months	Earning less than 120 000 euros a month: Formula Claeys: Notice period = $(0,87 * \text{Anc in years and fractions of years}) + (0,055 * \text{age in years and fractions of years}) + (0,038 * \text{year wage gross} * 117,2 / \text{index of the month of the dismissal}) - 1,95$
More than 20 years of experience: 56 days	Between 5 and 10 years experience: 6 months	Earning more than 120000 euros a year: Formula Claeys: Notice period= $(0,87 * \text{Anc in years and fractions of years}) + (0,055 * \text{age in years and fractions of years}) + (0,029 * \text{year wage gross} * 117,2 / \text{index of the month of the dismissal}) + 2,96$
	Between 10 and 15 years	

⁷¹ R. BLANPAIN, *Arbeidsrecht en vastheid van betrekking*, Antwerp, SWU, 1966, 25.

⁷² A. DE BECKER, *De overheid en haar personeel*, Bruges, die Keure, 2007, 12-26.

⁷³ This formula is based on the analysis of barrister Thierry Claeys who turns the judgments of labour tribunals and labour courts in mathematical model.

	experience: 9 months	
	Between 15 and 20 years experience: 12 months	
	Between 20 and 25 years experience: 15 months	
	Between 25 and 30 years experience: 18 months	
	Between 30 and 35 years of experience: 21 months	
	Between 35 and 40 years experience: 24 months	
	Between 40 and 45 years experience: 27 months	

The differences remained until the Minister of Labour took the initiative to coordinate the negotiations based on a governmental proposal. A representative of the employers' organisations indicated that the long lasting difficulties were linked to the internal organisation of the trade unions. The different sectors entities within the trade unions all had their wishes which hampered the possibility to find a solution for this dead lock.

Therefore, the federal government took over the initiative and proposed a final compromise on 5 July 2013 which received the support of the federal government on 8 July 2013.⁷⁴ This finally let to the enactment of a new Statute on 26 December 2013 which provided new and equal notice periods for blue and white collar workers from 1 January 2014. The notice periods were seriously shrunk for the employees and significantly prolonged for labourers. However, it should be quoted that many distinctions between in the legal status of labourers and employees still remain, e.g. with regard to temporary unemployment and with regard to the payment of vacancy leave.

The periods became the following:

Seniority	Notice Period from 1 January 2014
1st quarter	2 weeks
2 nd quarter	4 weeks
3 rd quarter	6 weeks
4th quarter	7 weeks
5 th quarter	8 weeks

⁷⁴ N. VAN KERREBROECK and M. VERWILGHEN, *De harmonisatie van het statuut arbeider en bediende*, Brussels, Larcier, 2014, 13-15.

6 th quarter	9 weeks
7 th quarter	10 weeks
8 th quarter	11 weeks
Year 2-3	12 weeks
Year 3-4	13 weeks
Year 4-5	15 weeks
Year 5-6	18 weeks (+3 weeks if a year has started)
Year 6-7	21 weeks (+3 weeks if a new year has started)
...	...
Year 20-21	62 weeks (or 63 in case a new year has started)
Year 21-22	63 weeks (+1 week in case a new year has started)
Year 22-23	64 weeks (+1 week in case a new year has started)

As a consequence the existing differences between blue and white collar workers disappeared for the future with regard to the period of notice. However, it was considered fair to keep the distinction with regard to the notice periods between white and blue collar workers till the 1st January 2014. This means that at this moment, the notice period for labourers and employees is divided in two pieces. The first piece concerns the period until the 1st January 2014 and the second period starts at 1 January 2014. The new regulation only becomes applicable on 1 January 2014.

The old rights on redundancy payments for labourers and employees were kept until 31 December 2013. This means that a dismissed labourer and employee receives redundancy payments in conformity with the legislation as it existed until 31 December 2013 and that from 1 January 2014 the new redundancy payments for employees and labourers entered into force. For labourers, the situation becomes even more complicated as this system is disadvantageous for labourers. Their loss is often compensated.

To that extent, a certain flexibility with regard to Belgian dismissal law has been introduced. As said, the role of the European Union is rather indirect. The European Union was promoting the introduction of more (legal) flexibility in work relations. The harmonisation of the redundancy payments for employees and labourers in Belgium was a difficult social theme

with many difficulties for the social partners to reach an agreement. However, the reform includes an important link towards more flexibility in Belgian employment law which was often qualified as being very rigid.⁷⁵

Belgian legal scholars indicated that Belgian dismissal law and the derived stability of the employment relation to defend the idea that (certainly flexisecurity but even) flexibility remained a difficult concept to introduce in Belgian labour law. As mentioned before, Belgian employers had to respect long notice periods when they decided which created a legal basis for a foregoing stability of the employment relation. This element was considered to be a cornerstone in Belgian labour law. It guaranteed an important protection of the employee against dismissal. As a counterpart, the Belgian employer was not obliged to invoke the reasons (or the motives) why a dismissal was granted.⁷⁶ Belgian labour law considered the long redundancy periods versus the lack of motivation as an important balance between employers and employees with regard to dismissal law.

Decreasing the redundancy payment and shortening the notice periods implied that the existing balance in Belgian labour law was modified.⁷⁷ Consequently, Belgian social partners agreed to sign a collective agreement on the motivation of the dismissal of workers.⁷⁸ Social partners reached an agreement on the possibility for an employee to ask the motives of the dismissal decision. The collective agreement number 109 was signed in the National Labour Council on 12 February 2014. The collective agreement stipulated that, in the private sector, a worker may ask the employer the reason for his dismissal. Within the existing framework of labour law, there only existed one possibility for labourers with a contract of employment of undetermined duration, article 63 of this Act. This article provided that a dismissal of labourer, not based on the aptness or the behaviour of the labourer nor on the necessity of the activity of the company or the institution, is an unfair dismissal. In case of litigation, the employer had to prove the invoked reasons for the dismissal.

The wiping out of the distinction between labourers and employees on the notice period led to a different content of the non-existence of the duty for the employer to provide reasons for a dismissal.

d) Motivation of a dismissal

The non-existence of a black letter obligation to grant the reasons for a dismissal of an employee had become one of the major international weaknesses of Belgian labour law. At international level, the ILO and the EU have already taken measures to indicate the importance for an employee to know the reasons why he was dismissed. The ILO-Recommendation of 1963 nr. 119 concerning dismissals indicated that “*no dismissal should appear without a valuable motive*” while article 30 of the Convention on the fundamental

⁷⁵ F. HENDRICKX and C. ENGELS, “Arbeidsrecht voor de spiegel”, *TSR* 2010, 3-59.

⁷⁶ W. VAN EECKHOUTTE, “Een kennelijk redelijker ontslagrecht. De rechten van de werknemer in verband met de motivering van zijn ontslag”, *TSR* 2015, 653.

⁷⁷ Governmental compromise on ending the difference between labourers and employees concerning the dismissal periods, redundancy payments and first day of sick leave on 5 July 2013.

⁷⁸ N. VAN KERREBROECK and M. VERWILGHEN, *De harmonisatie van het statuut arbeider en bediende*, Brussels, Larcier, 2014, 13-15.

rights of the EU provides that each employee enjoys protection against an unfair dismissal according to the Laws of the Union and the national Laws and practices.⁷⁹

It might be useful to underline that Belgium has made a reservation to the application of article 24 of the Revised Social Charter. Article 24 of this revised Social Charter provides that an adequate motive needs to be provided in case of dismissal of an employee. Article 34 of the Revised Social Charter is based on article 4 of the ILO-Convention number 158 which also has not yet been ratified by Belgium.⁸⁰

The social partners indicated that knowing the reasons for a dismissal influences the decisions of the workers whether or not to start a procedure against the unfair dismissal. They considered it therefore an important element of protection for the workers. It is important to add that the social partners decided not to include some forms of atypical employment in the scope of the collective agreement. Article 2 of the Collective Agreement number 109 provides that it applies to all employees with a contract of employment, except those who are dismissed within a period of six months, the temporary agency workers, students workers and in specific circumstances, such as the cessation of the activities and collective dismissal. Nevertheless, temporary workers with a contract of employment with determinate duration are included in the scope of application. Article 9 of the Collective Agreement number 109 limits the sanction from a minimum of three weeks redundancy payment till a maximum of seventeen weeks redundancy payment.

In general, it should be underlined that Belgian labour law does still not know the possibility a claim for reinstatement even in case of an unfair dismissal. The reasoning behind it remains rather logical: an employment relation is fundamentally and irremediably damaged by a first dismissal. Therefore, reinstatement is not a solution that would cure to the problem.⁸¹

Within the public sector, where the number of contractual employees is rising since decades,⁸² this collective agreement is not applicable.⁸³ The only possibility to apply for reinstatement in Belgium belong to the public servants employed with a status. Litigation opposing those public servants to their public employer is not subjected to the common tribunals and courts. The Council of State deals with these litigations and can annul the dismissal decision of a public employer in case it is illegal.⁸⁴ A consequence of the annulment is that the public servant needs to be reinstated. In practice, such a reinstatement may be a difficult task but it is considered an important element in the protection against public

⁷⁹ W. VAN EECKHOUTTE, "Een kennelijk redelijker ontslagrecht. De rechten van de werknemer in verband met de motivering van zijn ontslag", *TSR* 2015, 654.

⁸⁰ W. VAN EECKHOUTTE, "Een kennelijk redelijker ontslagrecht. De rechten van de werknemer in verband met de motivering van zijn ontslag", *TSR* 2015, 654.

⁸¹ K. SALOMEZ, *De rechtspositie van de ontslagmacht van de werkgever naar Belgisch recht*, Bruges, die Keure, 2004, 416.

⁸² R. JANVIER and K. JANSSENS, *De mythe van het statuut voorbij? De nieuwe overheidswerknemer is opgestaan!*, Bruges, die Keure, 2003, 4-5.

⁸³ Article 2 paragraph 3 of the Act of 5 December 1968 on collective agreements and paritary committees excludes (most of) the public sector from the scope of application of this Act.

⁸⁴ R. JANVIER, *Contractanten in overheidsdienst*, Ghent, Mys & Breesch, 1997, 6.

servants to potential arbitrary political decisions. A public servant needs, according to Belgian law, to be protected against potential unfair political interventions.⁸⁵

Belgium knows in the public sector, next to a large group of public servants, a significant group of contractual employees. Those contractual employees constitute (although statutory employment remains the principle underpinned by several Acts of Parliament) a group of 30% of staff in the public sector.⁸⁶ For those contractual employees, given their derogatory legal status, the same forms of protection against political arbitrary actions does not exist. Those contractual employees are subjected to individual employment law.⁸⁷ This has important consequences. They are, however, excluded from the legislation with regard to collective agreements.

In general, the flexibility to dismiss a contractual employee in the public sector is not larger than in the private sector but collective agreements do not exist in the public sector. Collective negotiation and collective concertation procedures obviously exist in the public sector. The outcome of those collective negotiation and collective concertation procedure do not lead to binding agreements. The result of those collective procedures needs to be transposed in the unilateral statutory regulations. Contractual employees in the public sector therefore lack the protection of collective agreements as their counterparts in the private sector. This implies that the collective agreement number 109 cannot be applied in the public sector. There thus exists no possibility to demand the motives for a dismissal in order to use these motives during a procedure and there exists no other legislation demanding t a motivation of a dismissal of a contractual employee in the public sector.⁸⁸ For contractual employees, questions had rised to what extent the legal duty to motivate administrative decisions for authorities, based on an Act of 29 July 1991, influenced the termination of contract of employment in the public sector. The Supreme Court (Court of Cassation) recently (on 12 October 2015) decided that the Act of 29 July 1991 is not applicable on the contractual employees in the public sector since a dismissal decision may not be qualified as an administrative act.⁸⁹

The impact of the collective agreement number 109 in the public sector should also be analysed keeping article 63 of the Employment Contracts Act in mind. Article 38, 2° of the Act of 26 December 2013 on the introduction of uniform status for labourers and employees provided that signing a collective agreement would abolish article 63 of the Act on Contracts of Employment for the private sector while a legislative initiative had to be undertaken in the

⁸⁵ A. DE BECKER, *De overheid en haar personeel*, Bruges, die Keure, 2007, 309-313.

⁸⁶ R. JANVIER and K. JANSSENS, *De mythe van het statuut voorbij? De nieuwe overheidswerker is opgestaan!*, Bruges, die Keure, 2003, 6.

⁸⁷ Article 2 paragraph 3 of the Act of 5 December 1968 on collective agreements and paritary committees excludes (most of) the public sector from the scope of application of this Act.

⁸⁸ During a certain period some authors defended the thesis that a special Act (the Act on the Formal Motivation of Administrative Acts) obliged employers in the public sector to motivate their dismissals. However, the Court of Cassation has decided that this Act may not be considered to be a Special Act obliging the employers in the public sector to motivate their dismissal decisions. Cass., 12 October 2015, nr. S. 13.0026.N to be consulted at <http://jure.juridat.just.fgov.be/JuridatSearchCombined/?lang=nl>

⁸⁹ Cass. 12 October 2015, nr. S. 13.0026.N to be consulted at <http://jure.juridat.just.fgov.be/JuridatSearchCombined/?lang=nl>

public sector. It seems that some political powers believed that the Act on the Formal Motivation of Administrative Acts would be sufficient.⁹⁰

The consequence of their very specific legal status leads to more difficulties. Contractual employees in the public sector were forgotten by the Constitutional Court when it decided that article 63 of the Act on the Contracts of Employment was contrary to the principle of equality given the fact that the uniformisation of the redundancy payments and the notice periods between employees and labourers had become without objective foundation.⁹¹ The Constitutional Court had to decide on the application of article 63 of the Act on Contracts of Employment on a moment that it knew that the collective agreement number 109 had abolished the article. For the contractual employees in the public sector, article 63 of the Act on the Contracts of Employment still exists since it was not abolished for them. Therefore, the debate in the public sector remains to what extent article 63 of the Act on Contracts of Employment does still play a role. As mentioned, article 63 of the Act on Contracts of Employment only was applicable to labourers. Some legal scholars have already defended the opinion that also the employees in the public sector should be allowed to invoke the protection of article 63 of the Act on Contracts of Employment as the reason for the distinction (the shorter notice periods) has been abolished.⁹² This legal approach remains very uncertain.

The specific situation of the contractual workers in the public sector has now as consequence that they remain an important group of people working with a contract of employment which can legally not ask the reasons why they are dismissed. The question may rise to what extent this may not be considered to a discrimination.⁹³

It finally leads to the conclusion that protection of contractual workers in the public sector is not as strong as in the private sector.⁹⁴ The debate can be considered to be an eye-opener for a new debate on collective negotiations in the public sector.

Notwithstanding the previous, collective agreement number 109 may be considered to be a very important step in the Belgian social dialogue. Though, it exactly is criticized for this reason. Some legal authors defend the view that Parliament had to take its own responsibility rather than to transfer difficult decisions to the social partners.⁹⁵ An Act of Parliament could have

⁹⁰ Read on this topic P. SICHEN, *Over de uitgestelde, facultatieve plicht tot formele motivering van het ontslag en het kennelijk onredelijk ontslag*, in J. LEYSEN (ed.), *Sociaal en arbeidsrecht – Permanente vorming balie Kortrijk*, Gent, Larcier, 2014, 29-50.

⁹¹ Constitutional Court, nr. 187/2014, 18 December 2014.

⁹² D. CUYPERS, "Beginselen van behoorlijk bestuur in personeelsmateries: zowel voor ambtenaren als voor overheidscontractanten", *TSR* 2015, 40-41.

⁹³ W. VAN EECKHOUTTE, "Een kennelijk redelijker ontslagrecht. De rechten van de werknemer in verband met de motivering van zijn ontslag", *TSR* 2015, 668.

⁹⁴ D. CUYPERS, "Beginselen van behoorlijk bestuur in personeelsmateries: zowel voor ambtenaren als voor overheidscontractanten", *TSR* 2015, 40-41.

⁹⁵ H. DECKERS and P. JOASSART; "Le droit à la motivation du licenciement: règles de forme et cumul d'indemnités" in F. KEFER (ed.), *L'harmonisation des status entre ouvriers et employés*, Brussels, Anthemis, 2015, 271-296 and L. DEAR and S. GILSON, « L'obligation de motiver le congé et le licenciement manifestement déraisonnable » in F. KEFER (ed.), *L'harmonisation des status entre ouvriers et employés*, Brussels, Anthemis, 2015, 161-242.

brought a solution for the public sector. Furthermore, an Act of Parliament could have integrated all existing (specific) motivation duties in one Statute.⁹⁶ Numerous motivation duties existed before the entry into force of the collective agreement number 109. One can cite the duty to motivate the dismissal of a representative of a trade union and of pregnant women.⁹⁷

This collective agreement may be considered an important and renewed consolidation of the social dialogue within the National Labour Council.

e) Wage stop

Another important issue concerns the wage stop which Belgian government introduced by Royal Decree of 28 April 2013. Social Partners did again not reach an Interprofessional Agreement. Therefore, federal government used the legal procedure provided by the Act of 26 July 1996 on the promotion and the preventive safeguard of the competitiveness. Articles 6 and 7 of this Act, as mentioned before, provide that in case the social partners do not reach an interprofessional agreement on the development of the wages with regard to the wage development, government does a proposal to the social partners. In case this proposal does not lead to a consensus on the wage development for the period of the collective agreement, government has the power to enact itself regulation by issuing a Royal Decree. Article 1 of the Royal Decree of 28 April 2013 provided that the increase for wages was limited to 0%. Although, the index mechanism was kept which meant that a certain wage increase was ensured. It indicates that wage negotiations are currently one of the main barriers of the social dialogue in Belgium. Social partners still decide over the wages but the financial crisis provoked that social partners had major difficulties to agree on this topic.

The wage stop implied that wage negotiations did not take place between the social partners. Some sectoral trade unions reacted with a statement that the withdrawal of the competences to negotiate over the wages put Belgium two centuries back in history.⁹⁸ They started a procedure before the Council of State to claim the suspension and the annulment of the Royal Decree. The metal sector of the socialist trade union lost both the procedures.⁹⁹ Their major argument concerned that article 23 of the Belgian Constitution and article 6.2. of the European Social Charter and article 11 of the European Convention of Human Rights were violated. The Council of State decided that the social partners had the opportunity to negotiate over wage increase, wage decrease or wage stop. The element that the social partners could not reach an agreement does not include that government has not respected the constitutional and international legal duties to negotiate. Government only intervenes in

⁹⁶ H. DECKERS and P. JOASSART; "Le droit à la motivation du licenciement: règles de forme et cumul d'indemnités" in F. KEFER (ed.), *L'harmonisation des status entre ouvriers et employés*, Brussels, Anthemis, 2015, 271-296.

⁹⁷ K. SALOMEZ, *De rechtspositie van de ontslagmacht van de werkgever naar Belgisch recht*, Bruges, die Keure, 2004, 97-102.

⁹⁸ Declaration of 4 February 2015 of the metallo's of the socialist trade union to be consulted at <http://www.metallos.be/nl/pagina/materieel/nieuws/04/02/2015/raad-van-state-beroep-tegen-de-loonstop>

⁹⁹ CoS, Les Metallurgistes de Wallonie et de Bruxelles, nr. 224.863, 27 September 2013 (procedure of suspension); CoS, Les Metallurgistes de Wallonie et de Bruxelles, nr. 230.207, 13 February 2015 (procedure of annulment).

subsidiary order. Social partners had the possibility to negotiate but could not reach an agreement. Article 7 of the Act of 26 July 1996 provides in that case that government can intervene with regulation. The Council of State decided that this should be considered as a proportionate limitation of the right on collective negotiations which can be deduced from article 11 of the European Convention of Human Rights.

6. Period 2014-2015

a) Political and social framework

The entry into power of a new federal government after the elections of June 2014 has led to new evolutions in the social dialogue. The Flemish nationalists (N-V.A) won the elections on the Flemish side while the Frenchspeaking liberals won the elections in the southern part of the country and in Brussels. Federal government is coalition government of the Flemish and Frenchspeaking liberals (MR and Open VLD), Flemish nationalists (N-V.A) and Flemish christiandemocrats (CD&V). Charles Michel (of the Frenchspeaking liberals) became the new Prime Minister.

For the first time in 25 years, no socialist party is represented in government. Furthermore, the representation of political families with strong links with the trade unions is limited to Flemish christiandemocrats. According to the social partners during the interviews, the new composition of the government has largely influenced the social dialogue. Employers' organisations and trade unions both share the opinion that the social dialogue takes place in a totally different framework. Trade unions indicate that the lack of good relations with government implies that their negotiation position has weakened. Employers' organisations claim that the social dialogue had become more reasonable due to the governmental change. Their claim included that trade unions were more willing to accept a compromise than before because of the fear that things might be worse in case government enters into the arena.

b) Index jump and index block

The draft of an interprofessional Agreement 2015-2016 by the government (based on article 6 of the Act of 26 July 1996) proposed a so-called index jump (of 2%) and an index block. The index block ensures that the index jump remains because otherwise an increase of the index would wipe out the index jump. Therefore, the index mechanism needs to be blocked and can only restart on the moment that the 2% limit is exceeded. The index jump and the index block signified that during a period of a year the wages shall not be submitted to an indexation.¹⁰⁰ Social partners disagreed on the opportunity and the usefulness of such an index jump. Employers' organisations defended the view that an index jump was absolutely necessary to improve the competitiveness of the Belgian companies. They based their opinion on a report of the Central Council of Company life.¹⁰¹ Trade unions strongly opposed the idea of an index jump. Their criticism based itself on the conviction that the index jump would lead to an impoverishment of the poorer classes. This measure, according to the trade unions, mainly affects the wages and the social benefits of these groups.

The index jump consisted the subject of a long lasting social dialogue, but in the end again no Interprofessional Agreement on this point could be reached between all social partners. Two of three trade unions accepted the draft of the Interprofessional Agreement although they were not happy with the index jump and the index block. The socialist trade union was the

¹⁰⁰ *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 960/1, 6.

¹⁰¹ Central Council of Company Life, *Technisch Verslag*, 22 December 2014, 3 to be consulted at http://www.ccecrb.fgov.be/txt/nl/report_nl.pdf

only trade union not to accept the project of Interprofessional Agreement due to the index jump and the index block.

Eventually, Parliament adopted an Act to introduce a so-called index jump. Article 2 of the Act of 23 April 2015 installed a jump and a block of 2% with regard to indexation. The index jump means that the automatic indexation of the wages is frozen for a certain period. When the indexation of wages restarts, it is impossible to compensate with the new indexation the “old” index jump. To that extent, it should be understood as an index jump and a temporary index block. This parliamentary intervention was based upon the political idea that the competitive position of Belgian companies would be improved due to the installation of an index jump. Furthermore, the index jump improves the financial situation of the State. The State needs to economize to get a better financial situation with a lower state debt and a balanced state budget.¹⁰²

The draft of the Interprofessional Agreement 2015-2016 also provides a wage stop. No wage increase can be provided in collective agreements for 2015 while a limited increase for the year 2016 of 0,5% gross and of 0,3% net can be granted in sectoral collective agreements.¹⁰³

Notwithstanding the normal procedure provides that a wage stop according to the Act of 26 July 1996 has to be regulated by Royal Decree, Parliament itself took the initiative to enact legislation on this topic. The Act of 28 April 2015 explicitly provides that the wage increase is limited to 0% in 2015 and to 0,3% net in 2016. This action shows how crucial a cooling down period of the wages was for the federalparliament. The so-called wage costs for employers are considered one of the important factors for the difficult economic position of Belgian companies when compared to its neighbouring countries.¹⁰⁴ Cuts in the wage costs were therefore put forward as of preponderant importance by the gouvernement which entered into power in 2014. Therefore, the wage increase is linked to tax law modifications which allow employers to grant such a limited wage increase without extra costs.¹⁰⁵

It goes beyond saying that the impact of such a legislative interventions on the social dialogue or more precisely on some of the social partners is big. As said, trade unions indicate that their position has significantly altered since the entry into force of the government Michel I. As a consequence, trade unions decided to use other means to defend their interests. They have started a procedure before the Constitutional Court aiming to prove the unconstitutionality the Act of 28 April 2015 on the index jump and the index block. However, it should be underlined that the trade unions do not constitute a common front with regard to all issues. For instance, all of the trade unions are represented in the procedure opposing the trade unions to federal government before the Constitutional Court as far as the index jump is concerned.¹⁰⁶ The socialist trade union is the only one which has set up a procedure against the wage stop.

¹⁰² *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 960/1, 2.

¹⁰³ *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 960/1, 11-12.

¹⁰⁴ *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 964/1, 4-5.

¹⁰⁵ *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 960/1, 11.

¹⁰⁶ Belgian Official Gazette, 23 December 2015.

There should be concluded that the evolution of the social dialogue is differently regarded by employers' organisations and trade unions during this period.

An important conclusion is that social partners play a less important role with regard to the setting of the wage conditions. This is not necessarily a sequel of the aspect that Parliament or government does not want to grant the social partners the possibility to negotiate. Government had made up a proposal for the social partners to negotiate over a new Interprofessional Agreement but the social partners could not find an agreement based upon the most recent proposals.

Government can intervene, based upon article 7 of the Act of 26 July 1996, when social partners cannot reach an agreement to set the maximal margins for the wage development and the labour reorganisation and more flexible organisation on the labour market.

That is what happened in 2013 and 2015. The role of government within the collective negotiations is however crucial. Government sets the limits of the collective negotiations. Parliamentary preparatory documents indicate the will of the government to improve the employability rate. In 2013, the employability rate in Belgium in 2013 was 67,2%. The Europe 2020 aimed to achieve 73%. In order to improve the employability rate, the government considered that important measures were necessary. Therefore, it decided to transform the proposal of the Interprofessional Agreement into legislation. It considered that such a measures were absolutely necessary to achieve the aim of the EU by 2020.¹⁰⁷

This previous indicates the indirect effect of the EU on the social dialogue in Belgium. The improvement of the employability rate was one of the factors to enact an index jump and an index block. The wage costs for employers are often considered to be a major reason why the Belgian employability rate is rather low. The aim to reach a higher employability rate is linked to the goals of the EU. Therefore, it can be stated that the Belgian social dialogue is, at least, indirectly affected by the policy of the European Union.

c) Pension

Another important element with regard to the low employability rate concerned the low participation of elderly workers in the labour market. The government tries to raise the pension age. An important measure was the augmentation of the pension age. The governmental coalition agreement indicated that an augmentation of the pension age from 65 to 67 years was necessary.¹⁰⁸

The Act of 10 August 2015 provided a long term project where the pension age raises in shifts to 67 in 2030. Trade unions did not agree with this measure. The social partners nevertheless signed a couple of collective agreements where age measures to shorten the career were reformed. Mainly, the age limit for an early retirement was increased from 55 (or 56) to 58 or even to 60. Examples are the collective agreements numbers 111, 113, 114 and 115.

¹⁰⁷ *Parl. Doc.*, Chamber of Representatives, session 2014-2015, nr. 960/1, 1.

¹⁰⁸ Governmental Agreement, 11 October 2014 of the government Michel I, 30 to be consulted at <http://www.premier.be/sites/default/files/articles/Accord de Gouvernement - Regeerakkoord.pdf>

In general, Government and Parliament play a more important role than before in the setting of the social agenda. Social partners constituted for a long time the heart of the social dialogue. They discussed the wage settings on national level and on sectoral level. The last government has taken another position than previous governments. This government, supported by a parliamentary majority, has enacted legislation and regulation in matters which were generally considered to be the monopoly of social partners. The trade unions perceive this intervention as an important harm of the social dialogue. For employer's organisations, the interventions of government and parliament were absolutely necessary to recover the economic position of Belgian companies. They do not consider this intervention as a break down of the social dialogue.

7. Conclusion

Social dialogue in Belgium underwent, at first sight, some modifications due to internal political tensions in Belgium. The period of the financial crisis was in Belgium linked to a period of significant political instability. The political instability provoked many difficulties as it became more difficult to take political measures in a short period.

The first period 2008-2010 was the period with high political instability. However, the banking crisis hit Belgium hard during the last quarter of 2008. Belgian politicians had to take measures to prevent the bankruptcy of some banks. During this period, social partners still played an important role. Legislative and regulatory initiatives were taken, though, to improve the flexicurity (or better the flexibility) of the labour market. Belgian labour law was often quoted as a rigid legal system where dismissal law provided long notice periods and high redundancy payments. Therefore, Belgians mainly knew job security rather than employment security. An important reform to deal with the long-lasting dismissal protection. The Act of 19 June 2009 provided more flexibility when a company is in difficulty. The Act granted room for social partners to sign collective agreements to deal with the crisis. Many social partners signed collective agreements to take crisis measures, e.g. temporary unemployment for employees.

The biggest political instability existed during the period June 2010 till December 2011. It took the Belgian negotiators 541 days to form a coalition government. However, this period coincided with the excessive budget deficit of Belgium which the Council had launched on 2 December 2009. The EU-Commission report indicated that a reform of the pension system was necessary for the public costs and to improve the employability rate. Therefore, the Belgian Parliament voted the Act of 28 December 2011 to reform pensions in the public sector and the early retirement procedure. The Belgian Parliament voted this reform without negotiating with the social partners. This reform was, mainly for the trade unions, considered to be an important infringement of the social dialogue.

The social dialogue was also influenced by the difficult debate on the reform of the existing distinction between labourers and employees in Belgian labour law. The Belgian Constitutional Court had decided in 2011 that the distinction between labourers and employees on notice periods and redundancy payments was unconstitutional. The debate between the social partners was very difficult. Employers' organisations calculated that an upgrade of the redundancy payments of labourers to the level of employees was too costly in a labour market where the wage costs are already very high (when compared to the neighbouring countries). Trade unions feared that a downgrade of the protection of the employees to the level of the labourers included a very important step back in social protection. Government left, after its formation on 6 December 2011, the initiative to the social partners. They could not reach an agreement. Therefore, the government took the initiative which finally led to a compromise with the Act of 26 December 2013. Government played here a leading role to find an outcome for this deadlock. The outcome can be linked to an important EU-evolution which still demands a larger flexibility. The result is that the notice periods and the redundancy payments have become lower. Furthermore, dismissed workers can ask the motives for their dismissal to their employers. This is an important step in Belgian

labour law, given the existing international provisions. In the end, these elements led to a certain extent to a different sort of dismissal law. It needs to be indicated that Belgian internal case law provoked this reform. However, the EU-Agenda on more flexibility coincides with this development.

The major problem for the social dialogue during the most recent years was the impossibility to find Interprofessional Agreements between all social partners. It should be mentioned that wage negotiations are the competence of the social partners in Belgium. It became more and more difficult to reach an agreement. Social partners could not reach an interprofessionaal agreement anymore since the agreement for 2009-2010. During the reign of the government Di Rupo I (2011-2014) a wage stop was provided although the indexation of the wages was kept. Trade unions did not accept this wage stop as it was considered unbalanced. The last government Michel I (2014-2015) went even a step further and coupled the wage stop to an index jump and index block. The index jump and index block was difficult to accept for the trade unions which led to a pending case before the Constitutional Court. However, only the socialist trade union decided not to sign the Interprofessional Agreement. Eventually, this led to an intervention of Parliament.

It becomes clear from the research that the social dialogue has suffered (mostly at national level) of the crisis. The taken measures to cope with the crisis (e.g. a wage stop and a search to improve the employability rate by reforming the pensions system) were (often) taken outside of the formal social dialogue.

All interviewed social partners stress, however, that in their opinion it does not concern a consequence of a direct intervention of the European Union but rather an internal mechanism and an internal crisis. Even if this might be true, all social partners recognise that the influence and the pressure of the EU on Government (and Parliament) to take specific measures obviously influences the debate. It becomes therefore clear that when Belgium is currently facing difficulties in social dialogue (in the period 2008-2015) are indirectly linked to EU-measures and EU-evolutions.