



NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference: VS/2018/0046
Improving expertise in the field of industrial relations



COUNTRY REPORT: BELGIUM

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1) Introduction

This country report on Belgium will try to answer several research questions put forward in the research project New Employment Forms and Challenges to Industrial Relations (hereafter NEWEFIN).

In the period November 2018 to January 2019 a total of 10 interviews were held with representatives of employers' organisations and representatives of trade unions. The analysis has been updated until April 2020.

Obviously, as this national analysis is part of a larger research project, the focus needs to be on the issues specific to Belgian labour law.

The main aim of the NEWEFIN project is to provide a multilevel comparative analysis of how the challenges to labour law and social protection systems, generated by certain trends in labour market flexibility and rising non-standard/new forms of employment, are addressed through innovative policy responses and social dialogue. The idea is to cover the issue of growing non-standard/new forms of employment and the risks that these create for traditional industrial relations structures. The NEWEFIN project addresses the following non-standard/new forms of employment: temporary employment, triangular employment relations, (dependent) self-employment, posted workers, multiple activities companies/subcontracting, and new jobs in the gig economy.

The research questions are:

- What is the impact of these trends on the level of labour/social protection of workers?
- What are the risks to the sustainability and affordability of the welfare system?
- What are the consequences for industrial relations and the social dialogue in general?

The methodology of the research questions in this paper may be considered as traditional. This includes that an analysis is made of the existing regulatory framework, an analysis of the most important case law and of legal scholarship. However, the research has not been to pure legal research methods. Ten semi-structured interviews were conducted which all addressed the same issues with regard to the topic.

2) Figures

For a good understanding, the research questions need to be approached from a Belgian angle. Belgium knows a strongly institutionalised collective bargaining model.¹

First of all, certain figures on the Belgian labour market should be considered.

Full-time employees have a dominant share in the Belgian labour market. At the same time, part-time employment also constitutes an important share of the workforce: 28 % of the workforce are employed on a part-time basis.² Another significant evolution is the rise in the number of independent workers. The number of independent workers has remained relatively stable in the period 2010-2017. A limited increase in the number of independent workers can be found in the period researched (2010-2017).³

Figures:

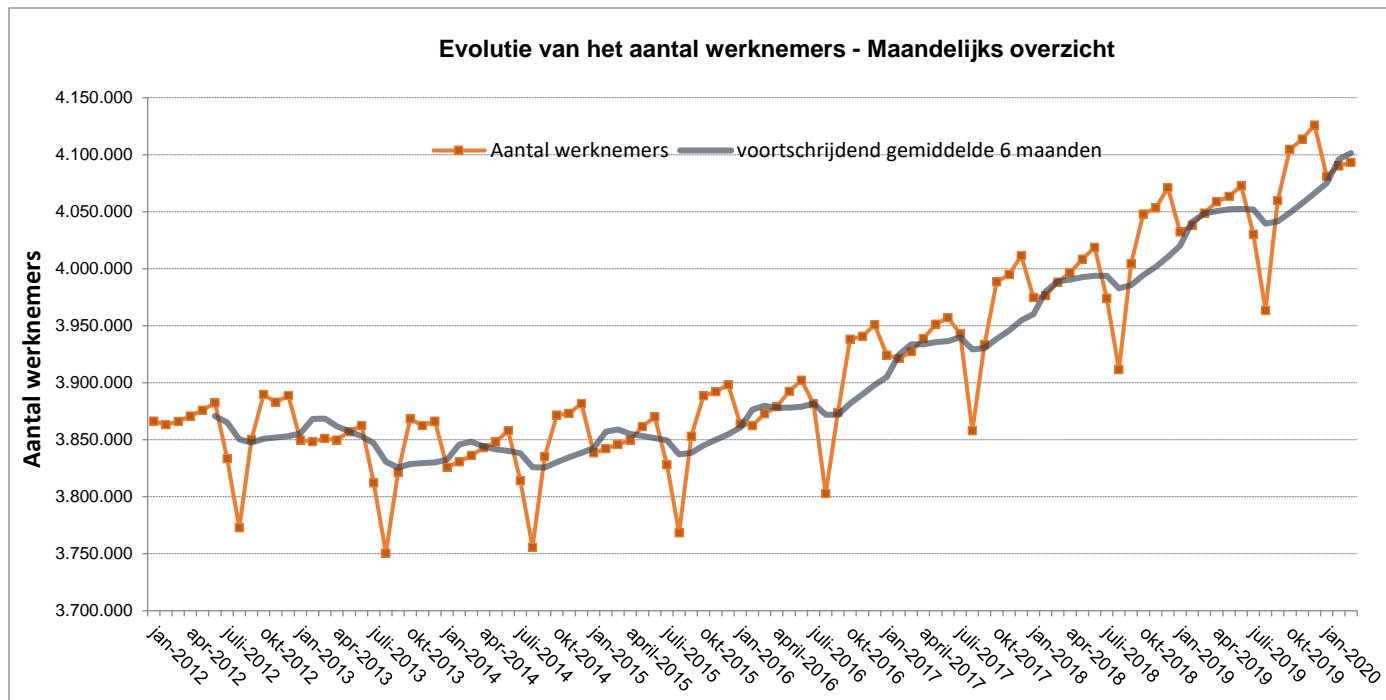
a. Job creation⁴

¹ Read on this topic : J. ROMBOUTS and M. RIGAUX (eds.), De paritaire organen met inbegrip van de paritaire comités, Mechelen, Kluwer, 2005, 224p.

² Figures to be consulted on <https://statbel.fgov.be/nl/themas/werk-opleiding/arbeidsmarkt/deeltijds-werk#figures>

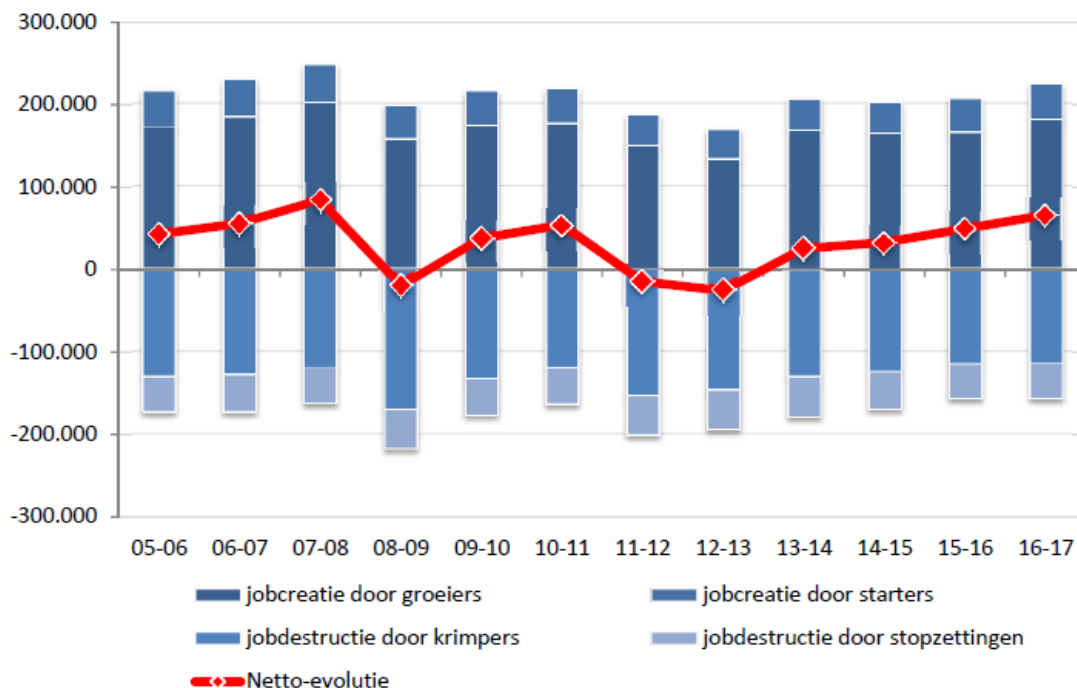
³ 952.585 self-employed persons were registered in 2010 and 1.087.763 in 2017. Figures to be found on <https://economie.fgov.be>

⁴ To be found at <https://www.rsz.fgov.be/nl/statistieken/onlinestatistieken/tewerkstellingsbarometer>

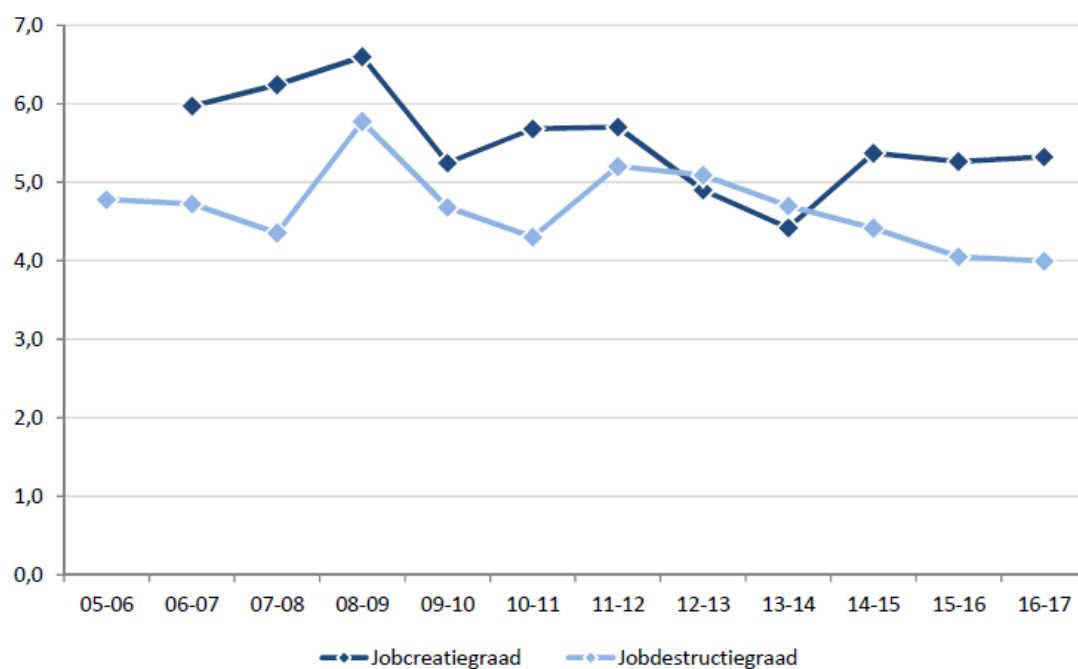


The chart indicates that an important job creation has been undertaken in Belgium during the since the beginning of 2015. In March 2020, 4093144 persons are employed in Belgium. That is 44.200 more than in March 2019.

Job reallocation (Belgium) : job creation and job destruction per type of employer, 2005-2017 – Source: DynaM-dataset, National Social Security Office and HIVA - KU Leuven



Job reallocation (Belgium) : job creation rate and job destruction rate, 2005-2017 – Source: DynaM-dataset, National Social Security Office and HIVA - KU Leuven



- https://www.statistiekvlaanderen.be/beroepsstatuut#werkende_bevolking_telt_bijna_14%_zelfstandigen
- <http://bisa.brussels/publicaties/titels/in-de-kijker/december-2017-een-sterke-groei-van-het-aantal-zelfstandigen-in-het-brussels-gewest#.XJjxq6R7mbg>
- https://rproxy.rsvz-inasti.fgov.be/WebSta/index_nl.htm

Bv.:

Vergelijkende statistieken

Evolutie groei van aangeslotenen

Mannen en vrouwen

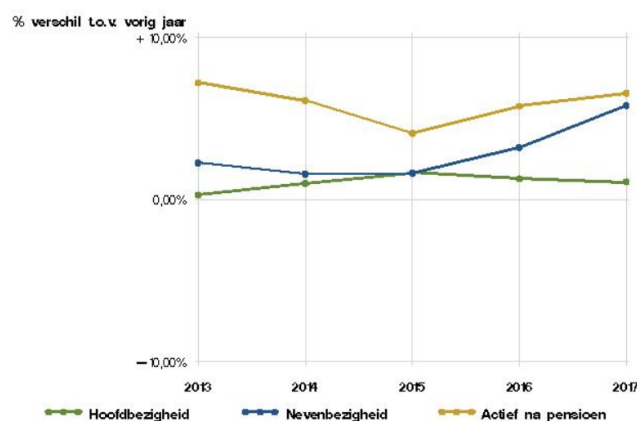
Aard van bezigheid

België

% verschil t.o.v. vorig jaar

Aard van bezigheid	2013	2014	2015	2016	2017
Hoofdbezigheid	+0,28%	+1,00%	+1,65%	+1,29%	+1,10%
Nevenbezigheid	+2,27%	+1,58%	+1,63%	+3,21%	+5,80%
Actief na pensioen	+7,20%	+6,10%	+4,09%	+5,76%	+6,56%

Aard van bezigheid



Moderne overheid, kwalitatieve service

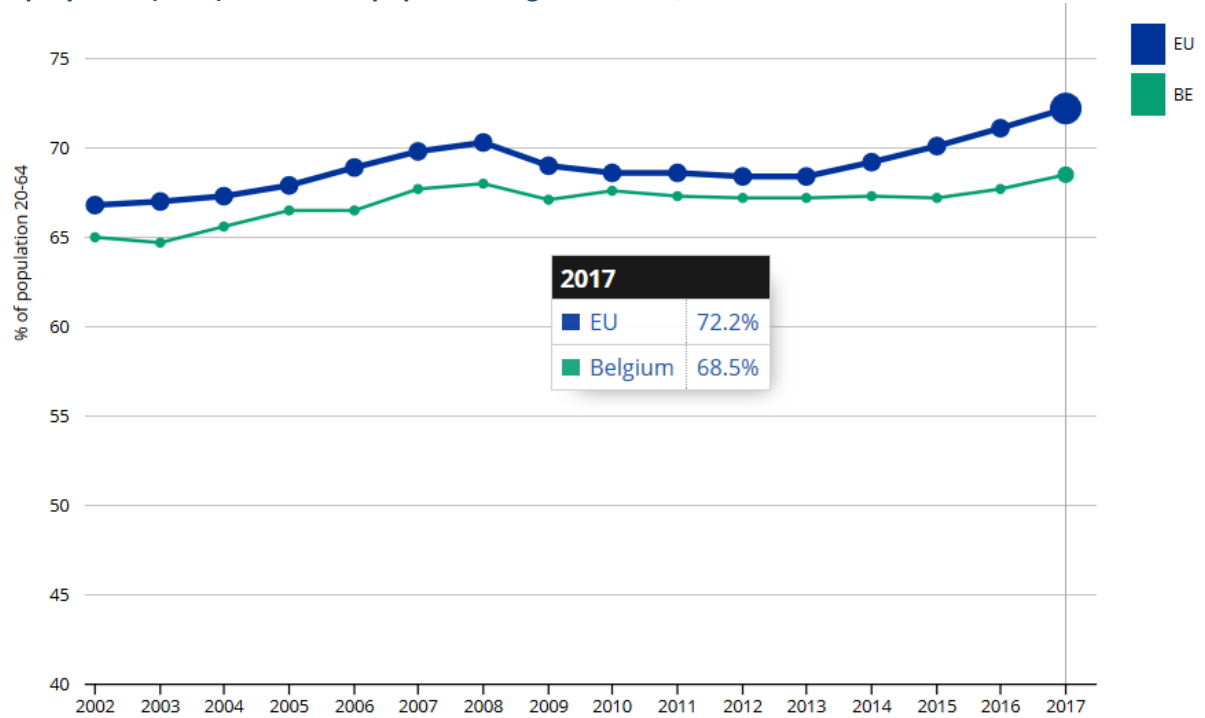
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b. Employment statistics

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics

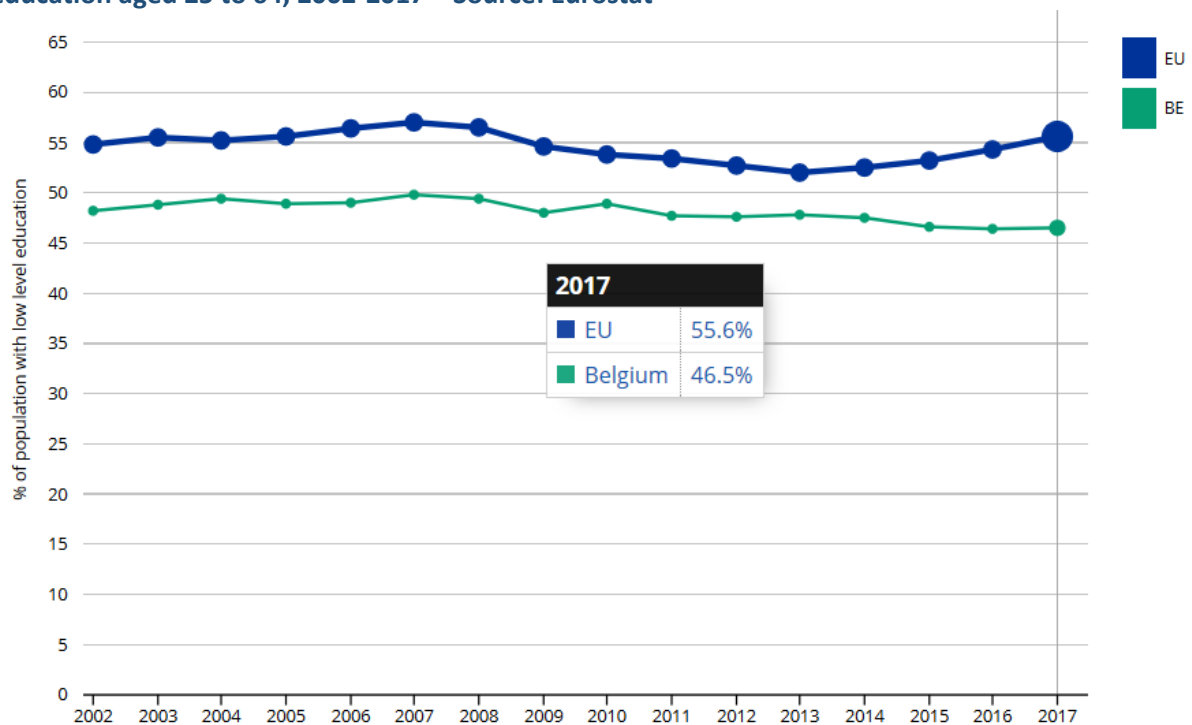
Employment (total) as % of the population aged 20 to 64, 2002-2017 – Source: Eurostat



c. Employment for low education

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics#Precarious_employment

Employment rate of persons with low level of education as % of the population with low level of education aged 25 to 64, 2002-2017 – Source: Eurostat

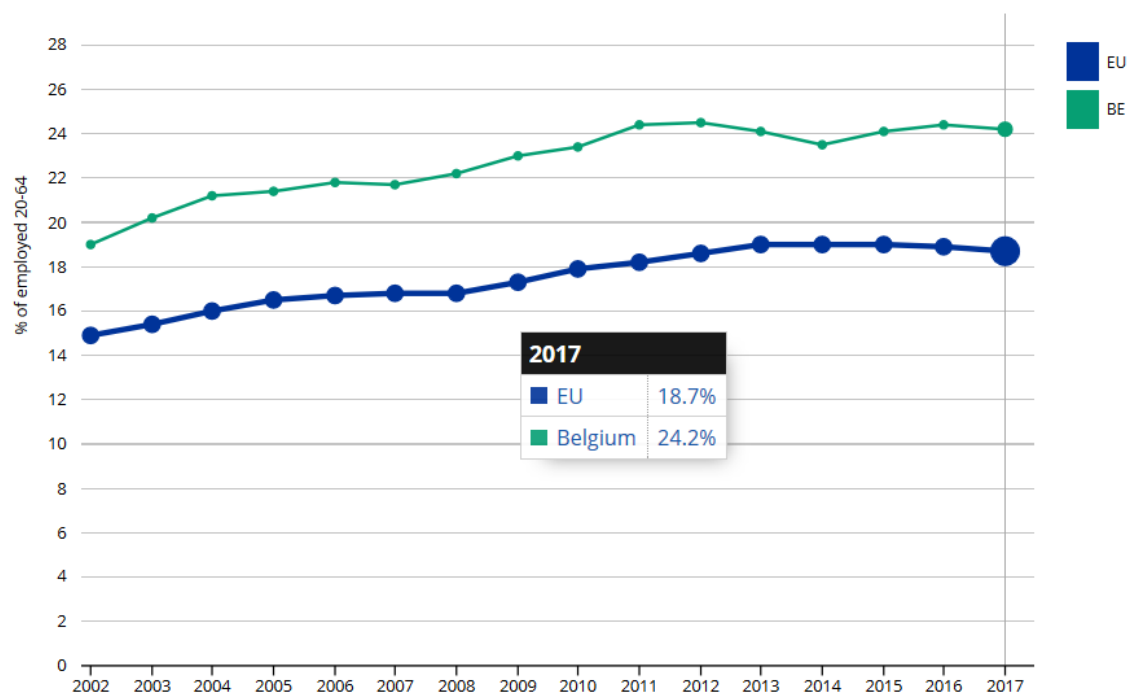


d. Part time work

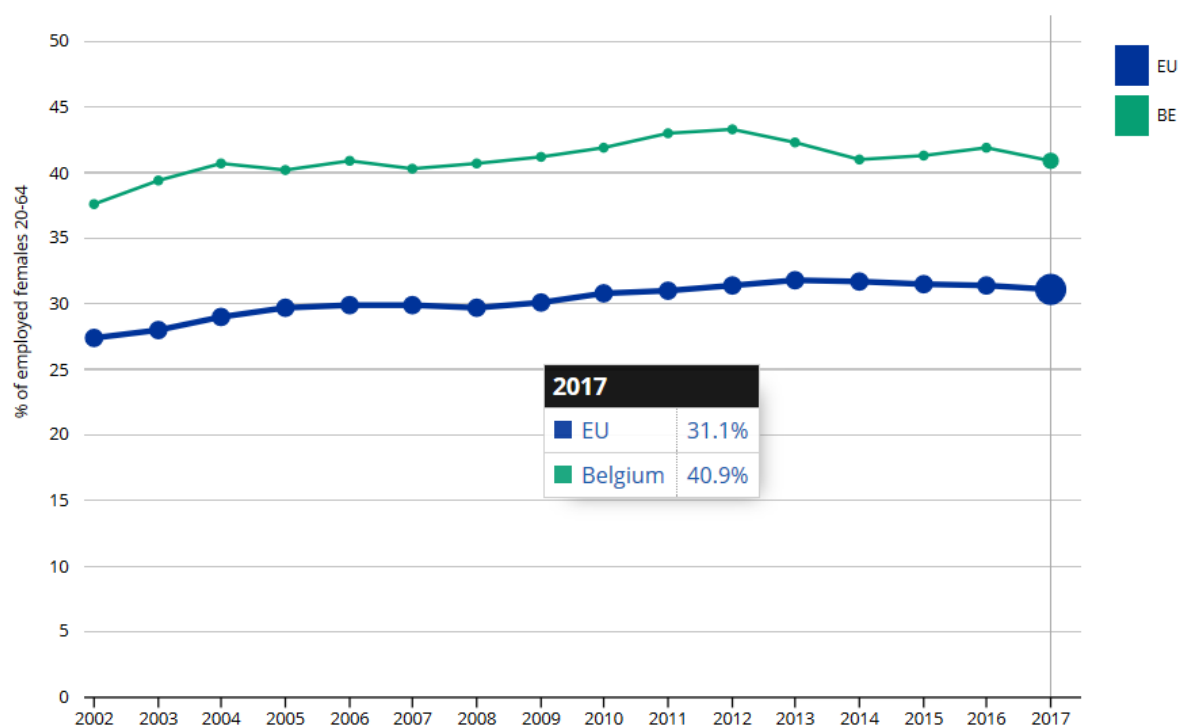
[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment statistics#Precarious employment](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics#Precarious_employment)

The proportion of the EU-28 workforce, in the age group 20-64 years, reporting that their main job was part-time increased slowly but steadily from 14.9 % in 2002 to 19.0 % in 2015, and then fell marginally to 18.7 % in 2017 (see Tool 3 icon 1). By far the highest proportion of part-time workers in 2017 was found in the Netherlands (46.6 %), followed by Austria, Germany, Belgium, the United Kingdom, Sweden and Denmark where part-time work accounted in each case for more than a fifth (20 %) of those in employment.

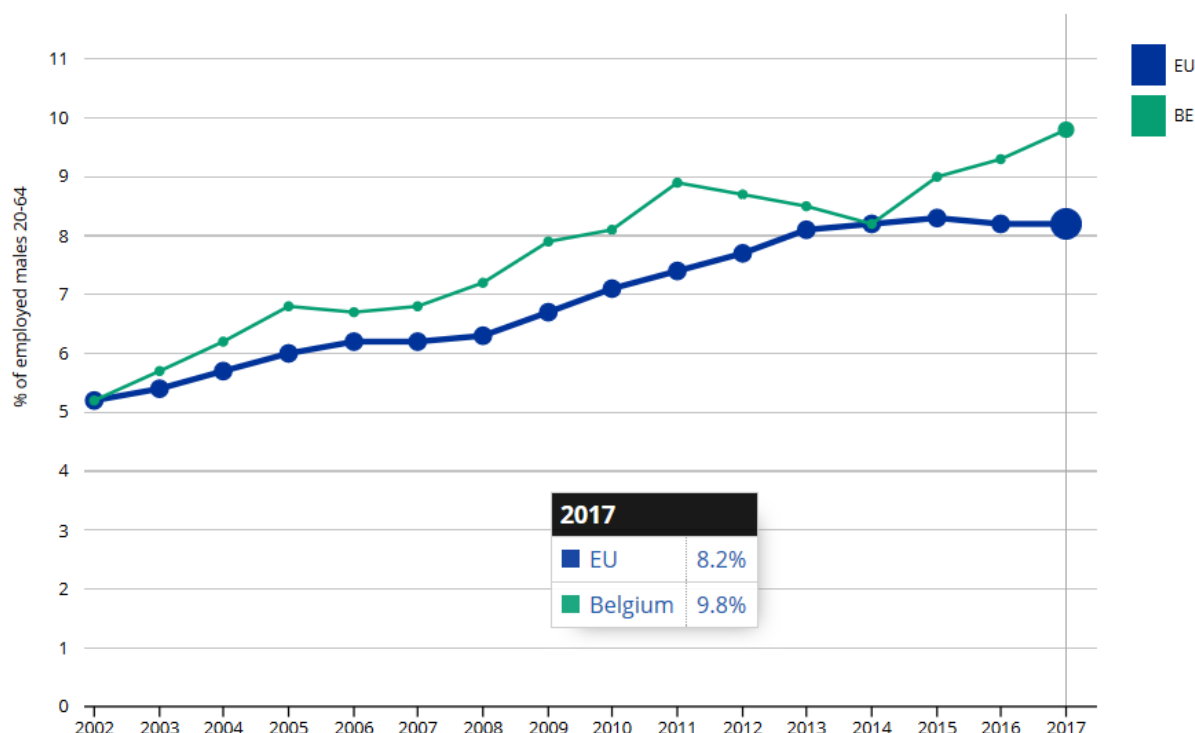
Part-time employment (total) as % of employed aged 20 to 64, 2002-2017 – Source: Eurostat



Part-time employment (female) as % of employed aged 20 to 64, 2002-2017 – Source: Eurostat



Part-time employment (male) as % of employed aged 20 to 64, 2002-2017 – Source: Eurostat



e. Union density of trade unions

Trade unions have always had a high number of members in Belgium. The membership still remains at around 55% in Belgium. It has not led to a big decrease in recent years.⁵ This obviously is linked to the so-called Ghent system wherein the trade unions play a role in the payment of some welfare benefits, mainly with regard to the payment of unemployment benefits. Belgium may be considered to be an exception in comparison with many other EU-countries. It is therefore no surprise that in legal scholarship the Ghent-system is quoted as a solution to reduce the union density in many EU-member states.⁶ However, this plea stands under pressure in the current Belgian system.

Some political parties have taken initiatives to reduce the payment of unemployment benefits through the trade unions. The N-VA (the Flemish nationalist partij which is the biggest in Flanders, the Northern part of the country) defends that it should not be trade unions who pay for employment benefits. They defend the opinion that it should be done by the State. It is obvious that a lower union density might affect the collective bargaining process in Belgium. The compromise-attitude at both sides of the border do influence to balance between

⁵ Read on this topic P. DE BEER and L. BERNTSEN, « Vakbondslidmaatschap onder druk, behalve in België », TAV 2019/3, 255-274.

⁶ P. DE BEER and L. BERNTSEN, « Vakbondslidmaatschap onder druk, behalve in België », TAV 2019/3, 258 and 272.

employers' organisations and trade unions. The program of this political party foresees that unemployment benefits need to be paid by an authority.⁷

At this stage, the proposal is not picked up by other political parties but it might have an affect on social dialogue and collective bargaining in Belgium.

⁷ Party Program of the N-VA to be consulted on <https://www.n-va.be/standpunten/werk-zoeken-en-werkloosheid>

3) Legal Framework

This chapter has a double layer.

The first layer is the Belgian state structure, which needs to be summarized to understand the measures undertaken in Belgium. This fundamental and constitutional layer is necessary for a good comprehension of the report. Second, Belgium was in a political crisis during the period 2008-2010. Against this background, the report has to deal with the state structure and its evolution in a certain time period between 2008 and 2015.

These four time periods coincide with distinct episodes of political reality in Belgium. During the first period 2008-2010, Belgium was governed by three different federal governments following the federal elections of 2007. This period was characterized by sharp political tensions and most political action in Belgium focused on the realisation of a new state reform.⁸

The establishment of a new federal government after the 2007 elections took a large amount of time. The interim government Verhofstadt III remained in power until March 2010, when it was replaced by the federal government Leterme I. During the latter government's term, Prime Minister Leterme was substituted by Mr. Van Rompuy by the end of 2010 as a consequence of the banking crisis.⁹ However, as the coalition did not change until the elections of June 2010, this first period can be considered as a unity. The role of the social partners did not fundamentally change during this period.

The second period concerns June 2010 to December 2011. The elections of June 2010 were won by the Flemish nationalist party N-VA in Flanders, with a right-wing programme, while the Walloon socialist party PS won the elections in the French-speaking part of the country, with a left-wing programme. Because of the Belgian institutional model, a logical sequel 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 natural distrust between the Flemish nationalists and the French-speaking socialists eventually prevented the formation of a joint coalition. The French-speaking socialists finally turned to other political partners. In the end, they formed a government with their Flemish counterparts: the Flemish and French-speaking Christian Democrats and Liberals. However, it took 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 bargaining had to take into account that budgetary issues were analysed 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 were taken relevant to

⁸ 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.

⁹ Der Spiegel International, *Banking scandal brings down government*, 22 December 2008, 1.

the issues researched. An interesting evolution took place in the triangular relationship between government, employers' organisations and trade unions.

The fourth period is the period until 2015. Flemish nationalists again won the elections in Flanders in 2014. In the French-speaking part of the country the outcome of the elections significantly differed from the results in 2010. The French-speaking liberals won the elections even if the French-speaking socialist party remained the strongest party. The obvious consequence was that the government formation was concluded more rapidly (even if strong institutional contrasts remained). The Flemish nationalists constituted a new government with the Flemish and French-speaking Liberals and with the Flemish Christian Democrats. The federal government underwent some major strikes for its policy. It specifically concerned on their ideas with regard to a pension reform by lifting the pension age from 65 to 67 and on wage freeze.

The federal government did not stay in office in its original form. At the end of 2018, Flemish nationalists left government because of a debate over immigration policies. New elections in 2019 delivered a win for the right wing nationalist party (Vlaams Belang) in Flanders and a win for the left wing green and communist parties in Wallonia. N-VA and PS remained the biggest parties in their regions. Since May 2019, no stable government has been formed.

As mentioned, the report starts with a short introduction of the Belgian institutional framework. Understanding the framework is of major importance, 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 come under the competences of the substate entities (the Regions and the Communities).

Furthermore, these sub state entities have obtained additional powers as a result of the recent state reform in 2014. When explaining the institutional framework in Belgium, the previous framework and the current framework therefore need to be taken into account. A short outline of the institutional settings of 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.

4) 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 substate entities was of some importance.

Belgium is a federal state, composed of Regions and Communities. The Communities are competent for powers which can be linked to persons, while the Regions are competent for matters linked to the territory. Belgium has seen 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 installed the Regions (and specifically paid special 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 legally as a federal state. The fifth (in 2001) and sixth (in 2014) state reforms transferred more powers from the federal state to the Communities and the Regions.¹⁰

The Communities are competent for among others education, culture and support to persons, such as child benefits, integration of migrants etc.¹¹

The Regions are competent for among others urban planning, economy, employment policies and scientific research. The latter two may be important for the development of a coordinated policy concerning the implementation of and application in practice of labour policies. However, the scope of this report does not allow to start a detailed debate on the measures taken by the substate entities.

The Belgian system is moreover characterized by its exclusive competences.¹² Exclusive competences mean that each competence has to be exercised by one entity. In other words, each competence is exercised either at federal level or at substate level (at the level of the Communities or of the Regions).

The division of competences is based on the existence of an enumerated list of competences of the Communities and the Regions. These competences are listed in the Special Act of 8 August 1980 on the Reform of the Institutions. The residual powers remain powers of the federal authority. This may change in the future. Article 35 of the constitution currently provides that the residual powers shall be transferred to the Communities and the Regions the

¹⁰ On these topics see 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.

¹¹ On the Belgian State structure, see A. Alen and K. Muylle, *Compendium van het Belgisch staatsrecht*, I, Mechelen, Kluwer (2014), 220-225.

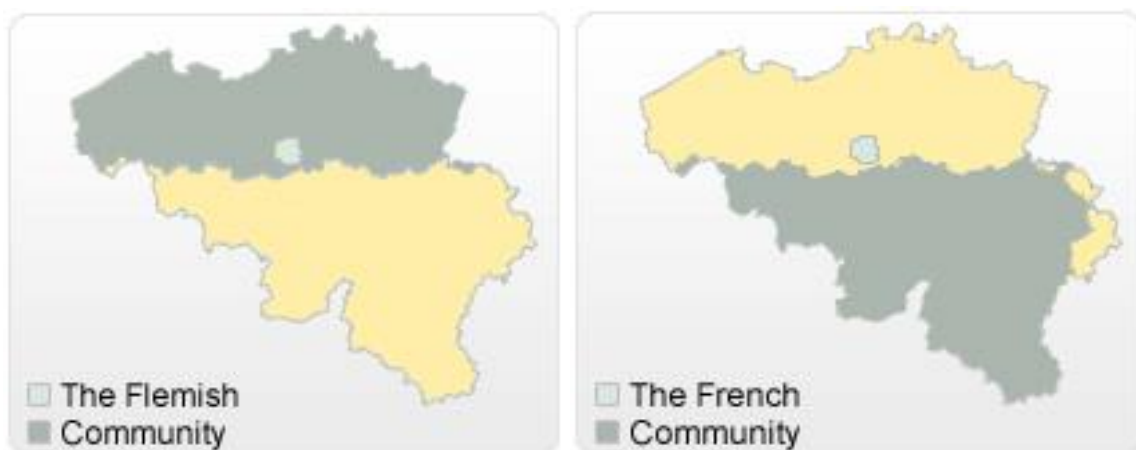
¹² There is an exception to this rule. Tax powers are the only entirely shared powers in Belgium. On this topic, see P. Peeters, *De fiscale autonomie van de deelstaten in België na de Zesde Staatshervorming*, in A. Alen (ed.), *Het federale België na de Zesde Staatshervorming*, Brugge, die Keure (2014), 557-589.

moment that a Special Act of parliament enumerates the specific competences of the federal authority. This article entered into force in 1994, but such a Special Act with an enumerated list of powers for the federal authority has not yet been enacted. Therefore, the shift of the residual powers from the federal authority to the Communities and the Regions has not yet been enacted.¹³

Belgium thus now has three different Communities and three different Regions with exclusive, enumerated powers. Labour law remains a competence of the federal authority. Article 6, first limb, VI, 12° clearly indicates that labour law and social security law remain a competence of the federal authority, whereas 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 boundaries of the three Communities can be best illustrated using the maps below. The first picture shows the boundaries of the Flemish Community, the second picture shows the boundaries of the French-speaking Community and the third picture shows the boundaries of the German-speaking Community. The Flemish and French-speaking Communities both play a role in dealing with person-related matters in Brussels.¹⁴



¹³ On this topic, see J. Velaers, *De Grondwet en de Raad van State: afdeling wetgeving*, Malines, Kluwer (1999), 242.

¹⁴ 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 FEDICT for its willingness to allow him to use these maps.



The boundaries of the Regions are slightly different and can be best understood using the maps below. Neither the territory of Flemish Region nor the territory of the Walloon Region interferes with Brussels-Capital Region. Furthermore, the territory of the Walloon Region includes the territory of the German-speaking 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.¹⁵



b. Belgium: Institutional Framework for Social Dialogue

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

The right to enter in collective bargaining is a fundamental right. Article 23, 1° of the Belgian constitution guarantees the right to collective bargaining as a fundamental social right.¹⁶

The concrete legal substance of this fundamental right is not explained further in the constitution. When read in combination with ILO Convention No 98, it can be understood that collective bargaining includes the aim to sign collective bargaining agreements on labour conditions. Moreover, collective bargaining must be carried out between employers'

¹⁵ 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 FEDICT for its willingness to allow him to use these maps.

¹⁶ On this topic, see G. Maes, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia (2003), 523p.

organisations and trade unions, and the State has the duty to initiate and promote collective bargaining, but the social partners remain free and autonomous to decide whether or not to negotiate.¹⁷

Collective bargaining in Belgium takes place at three different levels. At national or intersectoral 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, 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.¹⁸

At national or intersectoral level there is a National Labour Council, which 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 delivers opinions to a competent minister or to the Chamber of Representatives or the Senate. The Council can act on its own initiative or at the request of the competent minister or a chamber of parliament. Pursuant to Article 2 of the Act of 29 May 1952, the National Labour Council consists of one chairman and 26 representatives. It is composed based on an equal representation of employers and employees. Thirteen representatives represent the employers' organisations (with an 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 bargaining agreements can be signed which apply in the whole country and in all different sectors. It is important to add that every two years an 'interprofessional agreement' is signed within this National Labour Council which sets 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 will become clear later on in this report. They are of decisive importance for a well-functioning social dialogue.

The possibility to conclude collective bargaining agreements between the representatives of the employers' organisations and the trade unions on sectoral level is hierarchically situated below the collective bargaining agreements within the framework of the National Labour Council. The levels are determined by the Crown with a Royal Decree. In 2020, the Crown established 100 joint committees, and 64 joint subcommittees (dealing with branches of a sector) were installed. Those joint committees sign collective bargaining agreements on a sectoral level. This has the major advantage that specific issues can be dealt with on a sectoral level and that the joint committees can take into account the specificities, opportunities and difficulties of the companies in that specific sector.¹⁹

¹⁷ R. Delarue, *Het recht op collectief onderhandelen*, in G. Cox and M. Rigaux (eds), *De grondwettelijke onderbouw van het collectief arbeidrecht*, Mechelen, Kluwer (2005), 119-123.

¹⁸ L. Francois, *Théorie des relations collectives du travail en droit belge*, Brussels, Bruylant (1980), 226-230.

¹⁹ M. Davagle and B. Paternostre, *Droit collectif du travail: 1. Le cadre institutionnel de la concertation sociale*, Limal, Anthemis (2011), 223.

At the third and lowest level are the collective bargaining agreements on company level. At company level, each employer can sign a collective bargaining agreement with one or more trade unions which only applies to the company concerned.

The collective bargaining agreements signed within the framework of the National Labour Council or at sectoral level can be declared generally binding by the Crown. Collective bargaining agreements at company level are never declared generally binding. However, they obviously are binding for the employer as a party, but also for 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 bargaining agreement if his or her employer is bound by the collective bargaining agreement.²⁰ The element whether or not the employee is a member of a (signing) trade union does not affect the legal impact of the collective bargaining agreement. Once the employer is bound by the collective bargaining agreement, it has to apply it to all his employees.

A long-standing debate which was concluded within the scope of the period researched concerned the representativity of the trade unions within the framework of the National Labour Council.²¹ An important modification took place during this research period. The Act of 30 December 2009 for the first time laid down the conditions which must be respected in order to be qualified as a representative trade union. Up to 2009, Belgium granted the competence to be recognised as a representative trade union to the Crown without granting any preliminary conditions. Representative trade unions are those which have been founded to work across the country and act interprofessionally across 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 employees' interests as their statutory goal. With this modification the Belgian legislature conformed the relevant legislation with Article 10 of ILO Treaty No 87 and with the earlier remarks from the International Labour Organization.

c. The Belgian institutional framework of collective bargaining agreement

Belgium knows a very institutionalised legal framework with regard to its industrial relations in the private sector. The Act of 5 December 1968 organises the industrial relations between employers and employers' organisations and representative trade unions.

Collective bargaining agreements can be signed at three different levels: at national level, at sectoral level and at company level. However, in order to participate as trade unions at national level and at sectoral level, trade unions need to be representative. In order to be representative at national level, trade unions need to be working on an interprofessional level, among the whole country and have at least 125.000 members and to be presented in the National Labour Council. The need to be represented in the public and the private sector. Quite some criticism has been exposed towards the existing regulation defending the point of view that the

²⁰ P. Humblet and M. Rigaux (eds), *Synopsis van het Belgisch arbeidsrecht*, Antwerpen, Intersentia (2012), 360.

²¹ On this topic, see F. Dorsemont, *Rechtspositie en syndicale actievrijheid van representatieve werknemersorganisaties*, Bruges, die Keure (2002), 771p.

most representative trade unions are actually involved in those collective negotiations. It does not include less representative trade unions.²² Multiple times, the representation conditions have led to case law in order to find out to what extent these representative conditions did not breach any constitutional norm, namely the freedom of association. The Belgian Constitutional Court decided that this element was not in breach of the freedom of association as the principles as such are not necessary an infringement of the constitutional principle of equality because the Royal decree can, in objective terms, base itself on conditions to facilitate collective bargaining procedures.²³

The current conditions were, before adoption, being discussed with the Committee of Social Rights of the ILO to find out to what extent they did not breach the ILO-Convention nr. 87. Prior to the modification of the regulation in 2009, the Belgian legislator got into contact with the ILO in order to ensure that the Belgian applicable regulation would not infringe the ILO-Convention nr. 87.²⁴ The ILO indicated that the current regulation did not violate the existing ILO-Convention nr. 87.

At the end of this chapter, it is useful to mention the most influential Acts in Belgian labour law:

- The Act of 3 July 1978 on Employment Contracts deals with the regulatory framework of employment contracts for labourers (blue-collar workers) and employees (white-collar workers).
- The Labour Act of 16 May 1971 deals with working time issues.
- The Act of 5 December 1968 on Collective Bargaining Agreements.
- the Act of 19 December 1974 on Collective Bargaining with the Trade Unions in the Public Sector.
- Special attention needs to be paid to the Act of 26 July 1996, which deals with the indexation of wages

d. Regulations on employment relations in Belgium

As mentioned, The Labour Relations Act of 27 December 2006 confirmed the binary model wherein all persons executing employment are categorised as employees or as independent workers. The qualification of the employment relation is linked to different criteria.

The first criterion is the qualification by the parties, the second one the freedom to organise your working time, the third one the freedom to organise your work, and the last one the possibility to hierarchically control the worker.

The conception of this Act was a sequel of a difficult evolution in the case law of the Court of Cassation with regard to the qualification of employment relations as employer-worker relation

²² F. DORSSEMONT, *Rechtspositie en syndicale actievrijheid van de representatieve werknemersorganisaties*, Brugge, die Keure, 2002, 155-156.

²³ Constitutional Court, nr. 9/2009, 15 January 2009.

²⁴ I. VAN HIEL, "De werkgever, de werkgeversorganisatie en de vrijheid van vereniging", *Or.* 2011, 34-35.

or contracts of services. The Court of Cassation had on regular basis ruled that the qualification of the employment relation was difficult to assess.²⁵

In its case law before and after the adoption of the Labour relations Act of 2006, the definition of an employee under Belgian labour law is somebody who delivers work under authority for a salary, according to articles 2 (blue collar workers) and 3 (white collar workers) of the Act of 3 July 1978 on the Contracts of Employment. When litigation occurs, Belgian case law always checks to what extent all of these constitutional elements are present. The Court of Cassation has already decided that the occasional character of performances of the workers or of the employees does not alter the duty to pay social contributions on the wages which are paid to the workers concerned.²⁶ That is an important element in this report as occasional work and part time work, next to a job, constitutes one of the major elements of the development of the platform economy. Later reforms tried to tear occasional work apart from the qualification of a contract of employment but it did not succeed.

There are two manners to define legal relations with an employee. The first one is to define the relationship through legislation (black letter law) while the second one entails that the distinction between employees and independent workers is made based on case law. Belgium applied the second model until the Labour Relations Act of 27 December 2006 when it shifted to the first model. In distinct judgments, the Court of Cassation itself qualified the employment relation based on criteria such as the qualification of the parties, and indications provided throughout the employment relation. The Court pronounced numerous qualification judgments where it substituted the qualification of the parties because an authority link existed between an employer and its employee.²⁷

The Labour Relations Act of 27 December 2006 in fact formalised the existing case law and it clarified the still existing uncertainties. The major criteria became the qualification by the parties on the one hand, and the indications which the judges themselves can deduce from

²⁵ Cass. 3 May 2004, R.S.Z. / Centrum voor Kinesithérapie W. Vermeulen, Arr.Cass. 2004, afl. 5, 771; <http://www.cass.be> (9 juni 2004); NJW 2005, afl. 95, 18, noot [VAN EECKHOUTTE, W](#); Pas. 2004, afl. 5-6, 755; RW 2004-05, afl. 31, 1220 en <http://www.rw.be> (6 april 2005), noot [NEVENS, K](#); TBBR 2005, afl. 5, 271, noot [VAN REMOORTELT, F](#); Cass., 6 december 2004, R.S.Z./ S.L., Arr.Cass. 2004, afl. 12, 1955; <http://www.cass.be> (14 januari 2005); NJW 2005, afl. 95, 21, noot [VAN EECKHOUTTE, W](#); Pas. 2004, afl. 12, 1922; Cass., 5 February 2007, RSZ t. V.L., Arr.Cass. 2007, afl. 2, 285; <http://www.cass.be> (23 maart 2007); Ors. 2007 (weergave PLETS, I.), afl. 6, 24; Pas. 2007, afl. 2, 247; RW 2007-08, afl. 19, 781 en <http://www.rw.be> (9 januari 2008), noot [NEVENS, K](#). Read on this topic W. VAN EECKHOUTTE, « 'Gezag' in de cassatierechtpraak. Een kwestie van bewijs, interpretatie en kwalificatie », NJW 2005, afl. 95, 2-17 and K. NEVENS, « De betekenis van de kwalificatie-arresten verduidelijkt », RW 2007-08, afl. 19, 782-783 en <http://www.rw.be> (9 januari 2008).

²⁶ Cass., 19 May 2008, R.S.Z./J.M., Arr.Cass. 2008, afl. 5, 1233; <http://www.cass.be> (13 juni 2008); JTT 2008, afl. 1013, 297; Pas. 2008, afl. 5, 1214; RABG 2009, afl. 3, 188, noot [VAN STRIJTHEM, D., DE MEULEMEESTER, M.](#); Soc.Kron. 2009 (samenvatting), afl. 10, 555.

²⁷ Cass. 3 May 2004, R.S.Z. / Centrum voor Kinesithérapie W. Vermeulen, Arr.Cass. 2004, afl. 5, 771; <http://www.cass.be> (9 juni 2004); NJW 2005, afl. 95, 18, noot [VAN EECKHOUTTE, W](#); Pas. 2004, afl. 5-6, 755; RW 2004-05, afl. 31, 1220 en <http://www.rw.be> (6 april 2005), noot [NEVENS, K](#); TBBR 2005, afl. 5, 271, noot [VAN REMOORTELT, F](#); Cass., 6 december 2004, R.S.Z./ S.L., Arr.Cass. 2004, afl. 12, 1955; <http://www.cass.be> (14 januari 2005); NJW 2005, afl. 95, 21, noot [VAN EECKHOUTTE, W](#); Pas. 2004, afl. 12, 1922; Cass., 5 February 2007, RSZ t. V.L., Arr.Cass. 2007, afl. 2, 285; <http://www.cass.be> (23 maart 2007); Ors. 2007 (weergave PLETS, I.), afl. 6, 24; Pas. 2007, afl. 2, 247; RW 2007-08, afl. 19, 781 en <http://www.rw.be> (9 januari 2008), noot [NEVENS, K](#).

the existing employment relation on the other hand. Article 333 of the Act provided that the qualification of the parties is the first criterion, the following ones are the freedom to organise the working time, the freedom to organise the work and the possibility to exercise control over the work of somebody else. The consequence is that the judges need to qualify the relation based upon the dossier which is provided. Furthermore, there is no intermediate category between employees and self-employed persons. An intermediate category with economic dependant workers, balancing between the two categories of workers and self-employed is not underpinned in Belgian legislation.²⁸

Specifically with regard to this topic, it is of major importance in to underline the role of the Labour Relations Act of 27 December 2006 which installed an Administrative Commission on to regulate working relations. This Administrative Commission decides on the qualification of employment relations and its decisions can be appealed before the labour tribunal. The Administrative Commission has decided on the status of Deliveroo riders.

The other Act which needs to be underlined with in this chapter is the Act of workable and agile work of 15 March 2017. This Act provides some important novelties on platform workers. The Act introduced some important new measures to enlarge the flexibility of the employment relations.

The consequence of this different categories lies in the scope of social security regulation. While for public servants, social security issues are regulated with splintered regulation. Sometimes, they are submitted to the same regulation (with regard to health care) and similar regulations (with regard to labour accidents). Workers are submitted to seven different branches of social security:

- pensions;
- unemployment benefits
- occupational accidents insurance and occupational health disease insurance;
- family allowance;
- mandatory health care insurance;
- annual leave.²⁹

Self-employed persons are assured for health care, disability to work, family allowance and pensions. However, their protection is far more limited. Furthermore, the financing model differs fundamentally as self-employed persons need to contribute themselves for the social protection while have a got limited protection. It concerns their family allowances, pensions and professional disability.

However, the calculation of the allowances for a self-employed persons differs from the calculation of the allowances of public servants and workers. Furthermore, the amount is lower for self-employed persons. It is therefore important that the qualification of a person as being worker or self-employed to know that with regard to the new forms of employment the

²⁸ K. NEVENS, *De arbeidsrelatie, de zelfstandige en de ondernemer*, Brugge, die Keure, 2011, 657.

²⁹ W. VAN EECKHOUTTE, *Sociaal Compendium Socialezekerheidsrecht met fiscale notities 2019-2020*, Mechelen, Kluwer, 2019, 81-84.

qualification of the relationship as an employment contract or as a contract of employment has significant consequences.

With regard to figures, Belgium knew 1.087.763 self-employed persons in 2017.³⁰ The number of civil servants was up to 400.000 while there were 4,9 million workers in Belgium in 2017³¹. There do not exist concrete figures on bogus self-employment in Belgium.

Furthermore, it is important to recapitulate the impact of collective bargaining agreements within the Belgian social dialogue framework. Social partners sign important collective bargaining agreements at national level in the National Labour Council. These collective bargaining 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 bargaining agreement. Obviously, the generally binding effect is limited to the sector in which this last collective bargaining agreement has been signed. A collective bargaining agreement at company level cannot be made generally binding, although it does apply to the employer who has to respect it with regard to all his employees. Whether or not the individual employees are member of a trade union (notwithstanding whether or not the trade union has signed the collective bargaining agreement) is of no importance with regard to the binding character of the collective bargaining agreement. The key element is the employer. If the employer is bound by the collective bargaining agreement, it has to be applied to all employees falling within the scope of application of the collective bargaining agreement.

³⁰ Figures to be consulted at <https://news.economie.fgov.be/170192-bijna-1-miljoen-kmo-s-in-belgie>

³¹ Figures to be consulted at <http://stat.nbb.be/Index.aspx?DataSetCode=EMPLOY&lang=nl>

5) The legal modifications

a. General Framework Reform since 1996

The legal framework in Belgium underwent some significant changes during the period researched.

The basis for wage restraint can be found in the Act of 26 July 1996 for the improvement of the employability and for the preventive safeguarding of the competitiveness.

The aim of this Act was to improve the competitiveness of the Belgian enterprises with regard to their three most important trade partners (the Netherlands, Germany and France). The Act aimed to provide, based upon an analysis of the wage development in those three countries, the maximal margin for wage development. The Act also provides for a subsidiary role for the legislature.³²

The Act of 26 July 1996 was modified by the Act of 19 March 2017 in order to limit the wage margin which the Central Economic Council indicated for wage development. The new Act of 19 March 2017 provided a new system with a central role to diminish Belgium's historical wage handicap compared to its major trade partners. The reform limits the margins of the wage negotiations. The Central Economic Council provides margins which are considered as the limits for wage increases. This has an influence on the development of wages and the possibilities for social partners to negotiate at national level.

In 2019, it took the social partners numerous negotiations to reach an agreement on the potential wage increases. The interpretation of the new Article 5 of the Act of 26 July 1996 give rise to much debate about whether it left some space (or not) to the social partners for real wage negotiations. The dominant interpretation was that it did not, but a final twist led to an interprofessional agreement which included a wage increase of 1.1% for the wages in the private sector.

b. The Labour Relations Act of 27 December 2006 and its Application in Different Settings

Three distinct files have played an important role in the application of the Labour Relations Act of 2006.

i. *Situation of Uber in Brussels*

To what extent does a labour relation exist between Uber as the provider of services and the person who provides the service by driving persons to a certain destination? In Brussels, Uber

³² *Parl. Doc.*, Belgian Chamber of Representatives, session 1995-1996, No 609/1, 3-7.

provided its services through UberPop. A taxi firm, named Taxis Autolux, claimed that Uber could not offer its services in a certain airport area which is reserved for taxis.

Later that year, the CJEU qualified Uber as a transportation service and not as a platform which facilitates the supply and demand chain in transportation. Without the Uber app the transportation would not exist without the preponderant role of Uber in this process.³³ As a consequence, Uber is subject to the regulation with regard to the freedom of services in the EU, provided by Article 56 TFEU. The qualification of the employment relation between Uber and its drivers was not resolved by this judgment. The Advocate General explicitly stated that the employment relation may therefore not be considered to be governed by labour law.³⁴ However, he did indicate that Uber controlled the price of the service.³⁵

Some Belgian authors defended the opinion that Uber drivers had to be qualified as employees rather than as self-employed persons, given the fact that the majority of the criteria developed under Belgian law are fulfilled.³⁶

New Forms of Employment include a difficult qualification of the employment relation. Some persons are considered to be employees, such as Uber drivers and to a certain extent Deliveroo riders.

The situation is different for many bicycle courriers. Many among them are considered under Belgian law to self-employed persons. They are not covered by any binding collective agreement. As a consequence, the bicycle courriers are not protected against the unemployment of not covered for occupational accidents. Therefore, trade unions decided to open their entities for members who currently are still considered to be self-employed persons. The Christian Democrat trade union has started to investigate how the existing regulation and social protection can be enlarged to persons working in a subordinated position without being covered by labour law or administrative law.³⁷ The aim is to lobby to modify Belgian and EU-regulation to allow a similar protection for platformworkers (even when they are self-employed) than for workers in a subordinated legal situation. In a similar manner, the socialist trade union invokes the necessity to transform the existing regulatory framework in order to

³³ ECJ, C-434/15, 20 December 2017 (*Asociación Profesional Elite Taxi/ Uber Systems Spain SL*), 2 AM (2017) (summary), 160; noot [BLOCKX, J.](#), 119 DCCR (2018), 61; P. Aerts, 361 *Juristenkrant* (2018), 3; 1 *Eur.Vervoerr.* (2018), 19; <http://curia.europa.eu> (22 december 2017), concl. SZPUNAR, M.; 246 JDE (2018) (summary), 79; 4 NJB (2018), 286 en <http://www.njb.nl/> (2 februari 2018); Pb C 26 februari 2018 (dispositief), afl. 72, 2 en <http://eur-lex.europa.eu> (27 februari 2018); P. [Aerts](#), 9 RABG, 806 (2018);, P. [Van Cleynenbreugel](#), 1 *Rev.Dr.ULg.*, 99 (2018); F. Hoogendijk, P. Aerts, 2 RW, 75 (2018-19) en <http://www.rw.be/> (7 september 2018); [E. Valgaeren, C. Michielsens](#), 8 TBH, 903 (2018) en <http://www.rdc-tbh.be/> (21 November 2018); M. Wilms, 3 TBP, 177 (2018).

³⁴ S. NERINCKX, « Has the Status of Companies like Deliveroo and Uber finally been settled? », *Expat News* 2018, afl. 1, 15-17

³⁵ CJEU, Opinion of Advocate General Szpunar of 11 May 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:364.

³⁶ C. Van OLMEN and N. SIMON, « Le lien de subordination à l'épreuve de l'ubérisation de l'économie ? », *SocKron*, 273-381.

³⁷ Verslagboek Transitiecongres ACV 10-12 October 2019, 19 and 24 to be consulted at www.hetacv.be

better protect the platformworkers, regardless whether they should be considered to be self-employed persons or workers.³⁸

However, the situation does not only concern the workers but also the existing employers in the sectors where platformwork has done its entry in the most significant manner. One may think of the situation of cab drivers in Brussels when Uber occurred. There exist collective bargaining agreements for the taxi drivers in Belgium which deal with a large variety of topics, going from wage conditions over night work to working time.³⁹ Even if this sector still includes a large group of self-employed persons, the introduction of Uber as a competitor on the market of transport in the capital of Belgium has had a significant impact. Therefore, the employers' organisation of Taxi Drivers started before the President of the Belgian Commercial Court in Brussels indicating that Uber introduced illegal transport as no license was necessary to transport their passengers in the Brussels capital region while this was a necessity for the taxi Companies.⁴⁰ The President of the Brussels Commercial Court ordered that Uber should suspend it under the obligation of a penalty of 10.000 euros per day that Uber infringes this judgment. However, the financial penalty was only imposed in case the Uber drivers drove for an income which exceeded the costs of the transport. The President asked a prejudicial question to the Court of Justice in case the drivers drove for an income which equaled the costs of the transport.⁴¹

The prejudicial question was, as is generally known not the only case which concerned Uber before the European Court of Justice. The ECJ judged in the Spanish UberX-case that the platform constituted a necessary means for the execution of the service of UberX drivers in Spain. It was therefore considered to be taxi driving company which needed a license in order to execute its service.⁴² The European Court of Justice confirmed its case law in the later Uber SAS case⁴³.

³⁸ ABVV, De Nieuwe Werker, 29 June 2018, 16 to be consulted at <https://www.abvv.be/-/de-nieuwe-werker-nr-12-2018>.

³⁹ Those collective bargaining agreements can be consulted on <https://www.abvv.be/-/de-nieuwe-werker-nr-12-2018>.

⁴⁰ Juristenkrant 2015 (weergave), afl. 315, 5; Jaarboek Marktpraktijken 2015, 388; TRNI 2015, afl. 4, 466, noot [NEYRINCK, N.](#)

⁴¹ Juristenkrant 2015 (weergave), afl. 315, 5; Jaarboek Marktpraktijken 2015, 388; TRNI 2015, afl. 4, 466, noot [NEYRINCK, N.](#)

⁴² ECJ nr. C-434/15, 20 December 2017 (Asociación Profesional Elite Taxi / Uber Systems Spain SL), AM 2017 (samenvatting), afl. 2, 160; DCCR 2018, afl. 119, 61, noot [BLOCKX, J.](#); Juristenkrant 2018 (weergave AERTS, P.), afl. 361, 3; Eur.Vervoer. 2018, afl. 1, 19; <http://curia.europa.eu> (22 december 2017), concl. SZPUNAR, M.; JDE 2018 (samenvatting), afl. 246, 79; Pb C 26 februari 2018 (dispositief), afl. 72, 2 en <http://eur-lex.europa.eu> (27 februari 2018); RABG 2018, afl. 9, 806, noot [AERTS, P.](#); Rev.Dr.ULg. 2018, afl. 1, 99, noot [VAN CLEYNENBREUGEL, P.](#); RW 2018-19 (weergave HOOGENDIJK, F., AERTS, P.), afl. 2, 75 en <http://www.rw.be/> (7 september 2018); TBH 2018, afl. 8, 903 en <http://www.rdc-tbh.be/> (21 november 2018), noot [VALGAEREN, E.](#), [MICHIELSEN, C.](#); TBH 2019 (weergave KEVER, J.), afl. 4, 603 en <http://www.rdc-tbh.be/> (16 oktober 2019); TBP 2018 (weergave WILMS, M.), afl. 3, 177.

⁴³ ECJ, nr. C-320/16, 10 APRIL 2018 (Uber France SAS), AM 2017 (samenvatting), afl. 2, 159; DCCR 2018, afl. 119, 64, noot [BLOCKX, J.](#); <http://curia.europa.eu> (11 april 2018), concl. SZPUNAR, M.; JT 2018, afl. 6734, 484 en <http://jt.larcier.be/> (12 juni 2018), noot [FORGEOIS, M.](#); Pb C 11 juni 2018 (dispositief), afl. 200, 5 en <http://eur-lex.europa.eu>

The Belgian Entrepreneurial Court in Brussels however decided in judgment on UberX in stead of Uber Pop that the services of Uber X could not be declared to infringe the free competition between the service providers.⁴⁴ Uber X namely introduced a new element: in stead of focusing on the necessity of license for taxis. Uber X decided to ask for limousine license. Such a license implies that a car is delivered at the service of customer for three hours at a minimum rate of 90 euros. UberX signs such a contracts with Uber drivers who can then divide their drives into pieces. This means that all drives are divided between UberX-drivers on the platform in order to keep the Uber Limousine license. The major problem with the use of this license does not only concern the query whether or not UberX has abused the limousine license regulatory framework to install Uber again in Brussels but also to what extent that regulatory framework which includes a *numerus clausus* does not infringe the (hierarchically) higher EU-principle of free establishment⁴⁵.

This new case law introduces a new query with regard to the legal status of UberX-drivers. Do they have to be considered as workers or are they self-employed? Legal scholars remain in doubt with regard to this question. It seems that they do not fit in the Belgian concept “worker” nor in the Belgian concept “self-employed”.⁴⁶ However, when we take into account the advice of the Administrative Commission with regard to the regulation of the labour relations on Deliveroo, it seems that Uber drivers enter, as the Deliveroo riders in the concept of “workers”. Until today, no final judgment has been rendered on the legal status of UberX-drivers in Brussels.

Uber entered the Brussels transportation market in 2015. It was considered a platform facilitating transportation in Brussels. The State Secretary for the fight against social fraud, privacy and the North Sea announced that the National Social Security Office had concluded that Uber drivers should be considered self-employed.⁴⁷

In 2017 the National Social Security Office modified its interpretation and indicated that the persons employed by Uber should be considered as employees. This U-turn can only be understood by explaining the evolution of the case law and of the context in which the Uber case has to be discussed.

In the first Uber case, Taxis Autolux filed a claim in order to have the activities of Uber in Brussels terminated based on unfair competition. Uber argued that it was not a transportation company but merely a platform in order to connect the suppliers with demanders. Prior to this

lex.europa.eu (12 juni 2018); TBH 2019 (weergave KEVER, J.), afl. 4, 603 en <http://www.rdc-tbh.be/> (16 oktober 2019).

⁴⁴ Kh. Brussel (NI.) nr. A/18/04854, 18 december 2018, DAOR 2019, afl. 129, 97, noot [VAN DAMME, N.](#); RABG 2019, afl. 9, 750, noot [HEIRWEGH, A.](#)

⁴⁵ N. VAN DAMME, «De ‘Ubersoap’: over de wetsontduiking in de taxisector en het (on) geoorloofd karakter daarvan in het licht van het Europees Unierecht – De herrijzenis van UberPop?», DAOR 2019, afl. 129, 102-112.

⁴⁶ B. BEDNAROWICZ, “Lang Leve Uber : Arbeid in de gig-economie in het licht van het Europees Unierecht”, *JTT* 2018, 97-101.

⁴⁷ *Uber-chauffeurs zijn zelfstandigen*, <http://www.tommelein.com/uber-chauffeurs-zijn-zelfstandigen/>.

claim, the Tribunal of Commerce had ruled twice that Uber had to cease its activities in the airport area, namely in May 2015 and June 2016.⁴⁸ On 18 December 2018, the Tribunal of Commerce ruled that Uber was not allowed to actively enter the taxi market in Brussels giving the fact that it did not possess a license, but it could play its role as provider of transportation with drivers in Brussels.⁴⁹ This market does not contain a *numerus clausus* like the taxi market. The Tribunal of Commerce decided that the Uber drivers are not submitted to control by Uber through their GPS and therefore, they cannot be considered as bogus self-employed persons.⁵⁰

However, in the current social context, the legal position of Uber drivers still remains unclear under Belgian law. The interview with a representative of an employers' organisation of taxi drivers revealed that the arrival of Uber (even if Uber withdrew itself from the taxi market) has had a major influence on social dialogue and the labour and employment relations in the sector. The interviewee stated that he expects that taxi drivers and service transportation in Brussels will in the future be dismantled towards self-employment rather than employment relationships.

This implies that the market of taxi transportation, according to the employers' organisation, will undergo significant modifications. The current situation has led to a shift where more taxi and transportation entities are working with self-employed persons. According to the interviewee, this fixed to a certain extent some imbalanced labour relations where some elements of labour law were in the past not respected in the employment relationships.

The interview with representative of the Taxi Drivers'organisation indicated that an evolution towards a category of workers and self-employed persons will take place. The legal status of Uberdrivers in Belgium remains unclear although the international case law which clearly judged that Uber drivers are employees cannot be denied.⁵¹

ii. Deliveroo-case

Another unclear element with regard to transportation issues is the legal status of the bicycle couriers of Deliveroo. Deliveroo originally concluded contracts of employment with (a part of) their workforce through the application of SMart. However, when the collaboration between Deliveroo and SMart ended in the beginning of 2018, Deliveroo decided to no longer work with employment contracts but only with self-employed persons and with student contracts. SMart is a Belgian cooperation for artists which allows self-employed artists to opt for a contract of employment with SMart as employer. The artists pay a part of their revenue, but they obtained

⁴⁸ K. Lenaerts, *Industrial relations and Social Dialogue in the Age of Collaborative Economy: National Report Belgium*, to be consulted at <https://www.ceps.eu/publications/industrial-relations-and-social-dialogue-age-collaborative-economy-belgium>.

⁴⁹ M. Segers, *Ubersaga duurt voort: ondernemingsrechtbank laat UberX wel toe*, 382 *Juristenkrant*, 4-5 (2019).

⁵⁰ M. Segers, *Ubersaga duurt voort: ondernemingsrechtbank laat UberX wel toe*, 382 *Juristenkrant*, 4-5 (2019).

⁵¹ For the UK Employment Tribunals, *Mr. Y Aslam, Mr. J Farrar & Others v. Uber BV, Uber London Ltd and Uber Britannia Ltd.*, Case n. 2202550/2015, on 28 October 2016 ; For the USA, see The United States District Court for the Eastern District of Pennsylvania, *Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies Inc.*, Civil Action n. 16-573, 11 April 2018 ; For France, see Cour de Cassation, Chambre Sociale, ECLI:FR:CCAS:2020:SO00374, *Uber France, société par actions simplifiée unipersonnelle et autre(s) v. M. A. X.*, Arrêt n°374 du 4 mars 2020.

some advantages, such as with regard to trainings and insurance. With the rise of platform work, SMart extended its scope to platform workers. It started collaborating with Deliveroo in 2016, offering the Deliveroo workers the option between working directly for Deliveroo as self-employed persons or working as an employee for SMart, and thus indirectly for Deliveroo. Deliveroo announced late 2017 that it did want to modify its payment method from an hourly rate to an amount to be paid upon delivery of a parcel to a client. This decision implied that Deliveroo riders were no longer considered as employees of Smart, given the organisation of payments.

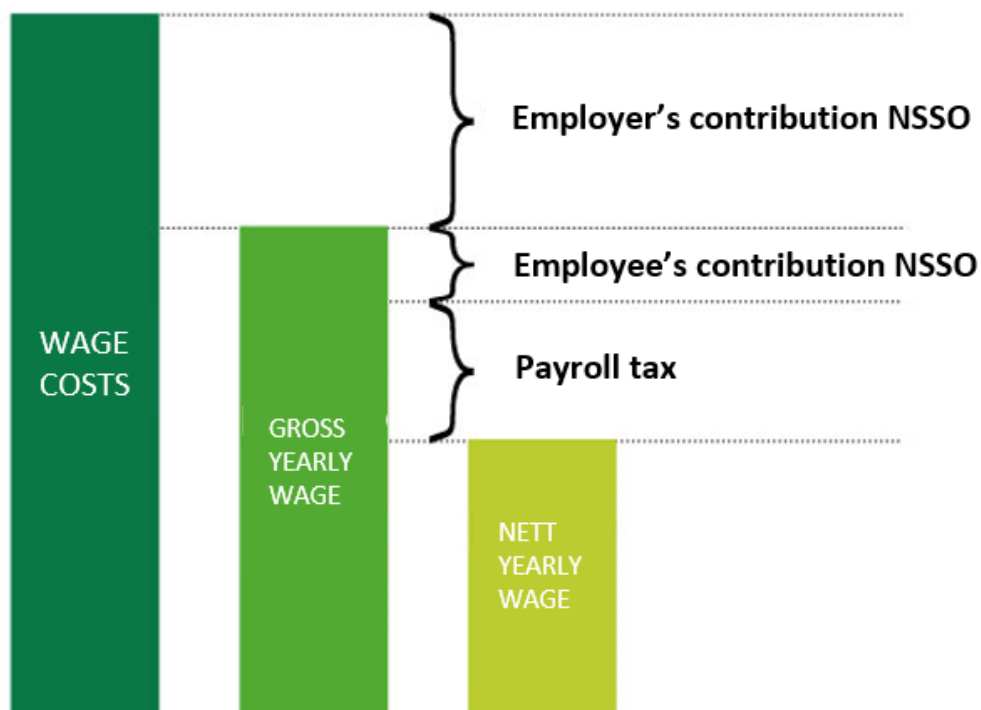
This sparked off a major debate in Belgian media. It should be taken into account that negotiations had been set up between SMart and representative trade unions on a collective agreement concerning the Deliveroo riders employed by SMart. The modification quickly led to a strike among the Deliveroo riders, which was organised by the informal Couriers' Collective. Such a strike indicates that trade unions play an increasingly prominent role in the protection of Deliveroo riders. The Couriers' Collective is supported by the three major trade unions in Belgium and could pay a strike fee.

Interviews showed a similar evolution. A representative of a trade union clearly stated that they actively track down riders in order to inform them about their social rights and social status. This seems to have an impact. One example given was that Deliveroo drivers occupied a building in Ghent and had food delivered by another platform which works with employees and grants full employment contracts.

Currently, Deliveroo is undergoing an investigation by the Ghent Public Prosecutor to find out to what extent the workers of Deliveroo are in fact not bound by a contract of employment. The Public Prosecutor might impose criminal sanctions which are linked to the application of the Labour Relations Act. This investigation is still pending.

One entreprise which was interviewed employs all bicycle couriers with contracts of employment. The managing director of the entreprise indicated how difficult it is to remain competitive with other companies working with self-employed persons. The consequence of opting for contracts of employment is that large parts of the social security protection become applicable to the riders. Social security law implies pension, unemployment revenue, accident at work regimes, insurance against occupational diseases, family allowance, insurance for sickness and invalidity, and annual leave. Self-employed persons receive a lower pension (based on a different contribution scheme) and equal family allowances, but for the other branches, they need to insure themselves.

As a consequence, wage payments in Belgium include large social contributions and payroll tax. The following chart may show this:



The owner of the company who only works with employed riders indicated that these elements make the competition with other companies that use self-employed persons very difficult and almost unfair. Obviously, this company actively acts as employer and does not just provide a platform.

Trade unions indicated that it may be of the utmost importance to set up organisational collaborations in the field of bicycle riders in the platform economy. Given the pending situation, it seems that legal initiatives should be taken to ensure the legal status of these riders.

iii. The situation of bicycle deliverers

The situation is different for many bicycle courriers. Many among them are considered under Belgian law to self-employed persons. They are not covered by any binding collective agreement. As a consequence, the bicycle courriers are not protected against the unemployment of not covered for occupational accidents. Therefore, trade unions decided to open their entities for members who currently are still considered to be self-employed persons. The Christian Democrat trade union has started to investigate how the existing regulation and social protection can be enlarged to persons working in a subordinated position without being covered by labour law or administrative law. The aim is to lobby to modify Belgian and EU-regulation to allow a similar protection for platformworkers (even when they are self-employed) than for workers in a subordinated legal situation. In a similar manner, the socialist trade union invokes the necessity to transform the existing regulatory framework in order to

better protect the platformworkers, regardless whether they should be considered to be self-employed persons or workers.

The situation remains different for some other self-employed persons. Self-employed persons obviously are not considered to enter into employment relations with the persons who pay them for their services. However, the Labour Relations Act of 2006 provides a possibility to requalify the employment relation between the self-employed person and his only client to an employee-employer relation. Article 337/2 of The Employment Relations Act of 27 December 2006 introduces four major criteria to distinguish the employment relation for the contractual relation of a service provider. Those four criteria are the following:

- the will of the parties as expressed in their agreement ;
- the freedom to organise the work time
- the freedom to organise the work;
- the possibility to exercise hierarchical control.

Depending on these criteria, judges can decide whether or not a contract should be qualified as a contract of employment. Employers who try to employ their employees in the most common manner suffer from the impact of competition with self-employed persons. Case law decided that there is no link of subordination between a company and a service provider except in case of simulation or of dissimulation.⁵² On the other hand, share holders who just execute tasks under the hierarchy of the employer have to be considered as employees but may not be considered to be self-employed.⁵³

The Act provides for specific sectors larger exceptions. Those sectors do concern parcel delivery and they also do concern the cab driving sector. The larger exceptions include the introduction of a specific presumption of an employment contract in case the following indicators are present:

- a) lack of any financial or economic interest for the one executing the transport, as in :
 - the lack of responsibility to respect the regulation with regard to paid the transport of persons through buses or coaches
 - the lack of responsibility with regard to the access to the profession or to the market or
 - the lack of responsibility with regard to the technical control of the vehicle,
- b) the lack of responsibility in decision power with regard to the financial means of the company for the person executing the transport ;
- c) the lack of responsibility with regard to the purchase power of the person executing the transport ;
- d) the lack of decision power with regard to the price setting of the one executing the transport except when prices are legally set out.
- e) the guarantee that a fixed revenue will be paid, notwithstanding the company results or the number of performances executed by the person taking care of the transport ;
- f) the fact that the person executing transport is not an employer himself and does not freely recruit any persons to execute some tasks or the freedom to substitute himself ;

⁵² Labour Court, 9 December 2014 to be consulted at www.jura.be

⁵³ Labour Court Ghent, 7 April 2016,

- g) the non-possibility for him to present himself as a company towards other persons ;
- h) the duty to work in spaces of the company and with material whereof a person is not the owner or the renter, since he did not release or ordered the material he uses ;

The most important issue with regard to this topic concerns the installation of an Administrative Commission on the regulation of the employment relations. This Commission was only installed in 2013. It has in mean while granted an advice with regard to the legal status of staff delivering of parcels. The Commission decides whether or not a person is self-employed or should be considered to be a worker.

The decision of the Commission on parcel delivery inclues very important elements with regard to this topic. It based itself on the Royal Decree of 29 October 2013 with regard to transport. It therefore concluded that the employment relation with regard to the distributors of newspapers which were subtreated to subcontractors had to be considered to be working with employment contracts.⁵⁴

With regard to Deliveroo delivery, the Commission only applied the general conditions. Deliveroo workers were until the end of 2017 considered to be employed with contracts of employment. The system was based on the SMART platform which was considered to be employer. The general conditions were applied by the Commission.

The Commission took notice that the will of the parties had blurred due to the withdrawal of SMART. It took into account the ranking of the Deliveroo riders which made that a better timing results in a bigger opportunity to obtain new rides. The commission decided that this included that the deliveroo riders were not free to organise their their working time.⁵⁵ The Commission based its analysis on the earlier case law of the Supreme Court in Belgium, the Court of Cassation. With regard to the freedom to organise the working time, the Court of Cassation decided that the simple fact that a persons can deny a work proposal does not include that the person cocnerned has the freedom to organise its working time.⁵⁶ Because once a persons has accepted a task, he may not be free anymore to organise his working time and terefore, he may be subjected to a link of subordination. Some scholars tend to disagree but the case law still remains.⁵⁷

Furthermore, it indicated that the use of GSP included that the rides of the Deliveroo riders can be tracked by the employer. Therefore, a link of subordination exists between the Deliveroo and the Deliveroo riders.⁵⁸ Belgian case law is uniform that a link of subordination exists

⁵⁴ Administrative Commission of 15 June 2018, nr. 125-FR-20180523 to be consulted on <https://commissiearbeidsrelaties.belgium.be/nl/>.

⁵⁵ Administrative Commission of 9 March 2018, nr. 113-FR-20180123 to be consulted on <https://commissiearbeidsrelaties.belgium.be/nl/>.

⁵⁶ Cass., 18 October 2010, Arr.Cass. 2010, afl. 10, 2532; <http://www.cass.be> (10 november 2010); JTT 2011, afl. 1086, 22; Pas. 2010, afl. 10, 2662; RABG 2011, afl. 15, 1019, noot [NEVENS, K.](#); RW 2010-11 (samenvatting), afl. 39, 1651 en <http://www.rw.be/> (30 mei 2011), noot -; Soc.Kron. 2013, afl. 1, 48, noot.

⁵⁷ K. NEVENS, "Kritische bedenkingen betreffende de algemene criteria in en de temporele werking van de arbeidsrelatiewet", *TABG* 2011, 1028-1038.

⁵⁸ Administrative Commission of 9 March 2018, nr. 113-FR-20180123 to be consulted on <https://commissiearbeidsrelaties.belgium.be/nl/>.

whenever a person executes tasks under the authority of another person.⁵⁹ The Administrative Commission could, consequently, rely on a large number of case law sources.

Deliveroo seemed not to agree with the advice of the Administrative Commission. It set up an appeal procedure before the Labour tribunal hoping to be able to requalify their riders to self-employed persons. The outcome of that procedure is unknown at the publication of this report. The Public Prosecutor simultaneously set up an investigation on the status of Deliveroo riders. That investigation also is still pending.

In general, one may conclude that the legal status of Deliveroo riders is not set out in full in the current circumstances. However, it seems that the current legal qualification is that it should be considered to be a contract of employment.

On a larger scale, some competitors trying to employ bicycle delivery have got major difficulties to deal with the consequences of their choice to grant them a contract of employment. A distinct social security system is applicable to them which leads to a different competitive situation for such employers.

c. Act on workable and agile work

The Act on workable and agile work of 5 March 2017 introduced more flexibility in the labour relations in Belgium. It introduced more flexibility with regard to working time. The so-called little flexibility allows to grant more diversity in the working grids. Through the applicable legislation, it became allowed to spread out the maximum weekly working of 38 hours as an average over a period of a year instead of 4 months. This extension will be based on a collective bargaining agreement or on work regulations on the work floor. The Act also introduced the possibility to organise a so-called plus/minusconto. A collective bargaining agreement on sectoral level can allow to work up to 10 hours per day and 48 hours per week during a period of six years. Furthermore, it introduced a system to transfer conventional days of vacation to the next year or even to a colleague in case the colleague has to take care of a person under 21 years of age or to take care of a person where continuous presence is necessary.

This may not necessarily include major differences as far as new forms of employment are concerned. Other elements were more important: the Act introduced an easier introduction of the concept of occasional telework. Occasional telework includes the possibility for the worker to work at home with a digital network in case of force majeure or for personal reasons. Occasional telework can also be used as a solution in case of bad weather conditions. The authority can install in such conditions a so-called teleworkalarm. Occasional telework needs to be organised based on an agreement between employer and worker. Occasional telework exists next to the possibility of structural and regular telework which is organised by the collective bargaining agreement nr. 85 of 9 October 2005.⁶⁰ This collective bargaining

⁵⁹ Cass. 10 September 2001, S.00.0187F; Cass. 27 April 1998, S.97.0090.F; Cass. 23 June 1997, S.96.0140F; Cass. 9 January 1995, *Pas.* 1995, p. 28; Cass. 14 November 1994, *Pas.* 1994, p. 936.

⁶⁰ CCB of 9 October 2005 on Telework to be consulted on www.nar.be

agreement was the implementation of the European Framework Agreement on Telework of 2002⁶¹ of 16 July 2002.

The introduction of occasional telework implies a larger flexibility in the employment relations. However, it also affects the exercise of control of the employer on the work of the workers. It is therefore necessary to conclude a clear (individual or collective) agreement dealing with the organisation of telework and the costs which are linked to this telework. It is a regulatory obligation for the employer to take care of the costs which are linked to the execution of occasional telework.

Telework seems to be one of the new shapes of employment which seems to be organised through collective negotiations between employers and trade unions. Other new forms of employment include a lot more question marks with regard to the collective bargaining between employers and trade unions.

The Act facilitates in fine the possibility to employ persons during the night in the sectors of logistics and supply. The full prohibition of night work in Belgian legislation with some derogations was considered not allow businesses active in e-commerce to execute their tasks in full competition. Therefore, the Act enlarged the scope of legal night work to those e-commerces.

The Act also allows the worker to save the days which he earned for the executed over hours. It adds new possibilities to the worker to take up some leave.

In general, the Act of 5 March 2017 has introduced far more liberty to the companies to organise the working hours while for the workers the horizon with regard to over hours and annual leave has altered.

It is clear that the Belgian industrial relations play a key role in the reorganisation of the working conditions and of working situations.

d. Other “New Forms of Employment”

i. *Posting of workers*

Some other important topics need to be addressed with regard to new forms of employment and the social dialogue. Belgium is known as an important logistic center in Western Europe. The transport sector and logistical supply can therefore be considered of major importance with regard to the transport sector. A major issue concerns the topic of social dumping in Belgium. The basic regulations which are important concern the two Directives with regard to posting of workers:

- EU-Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as modified by the EU-Directive 2018/957 of the European Parliament and of the

⁶¹ European Framework Agreement on Telework of 16 July 2002 to be consulted on <https://www.etuc.org/en/framework-agreement-telework>

Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

- EU Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

The most important dispositions with regard to this topic are the fact that a posted worker remains under the social security regulation of its home Member State as long as the posting of a worker does not exceed a period of 12 months (which can be extended to 18 months). This posting directives however made the situation of the transport and the construction sector in Belgium very complicated. Therefore, Belgium adapted its legislation with an Act of 27 December 2012 that A1-forms could be denied by the receiving state in case of fraud in the State where the posted worker originally worked. Although it seemed at first glance that this disposition could be kept according to the case law of the European Court of Justice.⁶² Some Belgian legal scholars were already convinced that this opened the possibility to set the fraudulent A1-form aside.⁶³ However, the case law of the European Court of Justice did not open the door more than a crack. In its later case law, the European Court of Justice underlined the legal binding force of the A1-forms. It also underlined the importance of the collaboration between public prosecutors in the EU.⁶⁴ However, this rigid application of the A1-form and of the possibility to put aside a form which was based on fraud.

However, it still remains an issue that posting of workers happens on a regular basis in the transport sector and in the construction sector in Belgium. It has been analysed that companies in the transport sector indicated that a lot of companies replaced their seat to Eastern countries in order to avoid to have to respect the Belgian labour and social security standards.⁶⁵ It shows perfectly one of the major problems of the Belgian transport industry at this moment. The posting directives still allow persons to work in another EU-country for lower standard wages and lower standard social security protection has an impact on the localisation of the transport companies.

ii. Introduction of flexi-jobs

Belgian new forms of employment need to include a new form of employment. The so-called flexi-jobs were introduced by the Act of 16 November 2015. A flexi-job includes the possibility

⁶² ECJ, nr. C-359/16, 6 februari 2018 (Ömer Altun, Abubekir Altun, Sedrettin Maksutogullari, e.a.), *Juristenkrant* 2018 (weergave VAN HIEL, I.), afl. 365, 2; Dr.pén.entr. 2018, afl. 3, 213; <http://curia.europa.eu> (7 februari 2018), concl. SAUGMANDSGAARD OE, H.; JTT 2018, afl. 1309, 225, noot [MORSA, M.](#); Limb.Rechtsl. 2018, afl. 2, 100; Pb C 9 april 2018 (dispositief), afl. 123, 3 en <http://eur-lex.europa.eu> (10 april 2018); Soc.Kron. 2018, afl. 7, 252.

⁶³ I. VAN HIEL, « Rechter kan detacheringsverklaring negeren bij fraude », *Juristenkrant* 2018, afl. 365, 2.

⁶⁴ ECJ, nr. C-527/16, 6 september 2018 (Salzburger Gebietskrankenkasse, Bundesminister für Arbeit, Soziales und Konsumentenschutz / Alpenrind GmbH, Martin-Meat Szolgáltató és Kereskedelmi Kft, Martimpex-Meat Kft, e.a.), <http://curia.europa.eu> (7 september 2018), concl. SAUGMANDSGAARD OE, H.; Pb C 5 november 2018 (dispositief), afl. 399, 4 en <http://eur-lex.europa.eu> (6 november 2018); Soc.Kron. 2018 (samenvatting), afl. 7, 290.

⁶⁵ Report of the VRT (Flemish public broadcasting company) on the existence of post box companies, broadcasted on 15 September 2017 to be found at <https://www.nieuwsbladtransport.nl/wegvervoer/2017/09/15/febetra-topman-zou-er-postbusbedrijfjes-in-slowakije-op-nahouden/>

to execute a side-job next to your own job. You need to have an 4/5 employment in an other job than the flexi-job. The Act of 25 December 2017 has extent the scope of the flexi-jobs to retired people. Flexi-jobs offer the possibility for this group of employees or retired persons to earn some money without being taxed for it. The wage costs equals the earning of the flexi-jobber. Furthermore, you do not have to declare you revenue and you build up social security rights with regard to pension, annual leave and unemployment benefits. The application of a flexi-job is limited to certain sectors. These are the following:

- Bakeries;
- Trade in food ;
- Employees in detail trade of the food sector;
- Employees in groceries;
- Hotels, pubs and restaurants;
- Retail;
- Supermarkets ;
- Hair dresser's ;
- Interim workers with regard to the previously mentioned sector.

No binding collective agreements were signed. Collective bargaining was set aside given the fact that flexi-jobs were not subjected to the existing collective bargaining agreements which existed in the sectors where flexi-jobs were introduced. The Constitutional Court judged that the regulation with regard to the flexi-jobs did not violate the constitutional principle of collective bargaining. The invoked article 23 of the Constitution only invokes the principle to be fairly paid for the work you execute. However, the Constitutional Court decided that there was no indication what a fair salary for the executed work includes. It therefore did not violate the general principle of a fair salary for work, as mentioned by article 23 of the Constitution. Article 27 of the Belgian Constitution which provides the freedom of association. The freedom of association does not formally include the right to collective bargaining. However, the Constitutional Court linked its application of article 27 of the Belgian Constitution to the article 11 of the ECHR, as applied by the European Court of Human Rights. That means that freedom of association includes a right to collective bargaining. The Constitutional Court nevertheless concluded that the right to collective bargaining was not affected as the existing collective bargaining agreements were not altered through the introduction of flexi-jobs. Given that the flexi-jobs did not have any impact on the existing collective bargaining agreement and there exist no stand still principle with regard to the constitutional principle of freedom of association, the Act of 16 November 2015 was considered not to be in breach of the Belgian Constitution.⁶⁶

⁶⁶ Constitutional Court, nr. 107/2017, 28 September 2017 Algemeen Christelijk Vakverbond van België e.a., <http://www.const-court.be> (29 september 2017); BS 10 januari 2018 (eerste uitgave) (uittreksel), 932 en <http://staatsblad.be> (15 januari 2018); Fiscoloog 2017 (samenvatting CB), afl. 1536, 12 en <http://www.fiscoloog.be/> (12 oktober 2017), noot CB; RW 2017-18 (samenvatting), afl. 9, 360 en <http://www.rw.be/> (30 oktober 2017); err. RW 2017-18, afl. 12, 480 en <http://www.rw.be/> (20 november 2017).

iii. Untaxed side jobs

Another important innovation under Belgian law includes the introduction of the possibility to make some untaxed extra money. The Act of 18 July 2018 introduced the opportunity for persons with status as employee, public servant, self-employed or pensioner to earn up to 6000 euros a year without being taxed for it. The focus was put on the work in associations (e.g. sport clubs, amateur dramatics, etc), occasional services between citizens and services (e.g. child care, tutoring) through recognised electronic platforms. Specifically for this last group, the legislator indicated that the aim was to leave those persons (where the qualification as employee or as self-employed person remained difficult) has to be kept out of the debate in case their earnings remained limited.⁶⁷

The most important reason to install this mechanisms was to get those revenues out of the illegal market but also to stimulate new forms of entrepreneurship and to allow new forms of economic activity with a very limited set of rules.⁶⁸ The Constitutional Court decided that this motivation violated the Constitution given the fact that for persons who are professional (whether it is in associations or with the provision of occasional services or on economic platforms) are taxed in full on the salary they gain from their activities (and also on their first 6000 euros they earn) while it for the persons who consider it to be an additional or limited income (of maximum 6000 euros), this is not the case.⁶⁹

Belgian parliament quickly adapted the existing legislation in order to facilitate platform workers to integrate into the labour market. The Act of 18 July 2018 introduced the possibility to earn EUR 6000 a year tax-free for voluntary workers and for occasional services between citizens, but also for persons working in the platform economy. This possibility only exists for retired persons and employees working under a part-time contract of a maximum of 4/5 of a full-time weekly contract.

Both regulations imply a greater possibility for platform workers to gain money in fiscally interesting circumstances. The latter reform constitutes the subject of a pending case before the Belgian Constitutional Court initiated by the independent workers' federations and one trade union, because they consider these measures as an infringement of the common market. The Constitutional Court finally annulled the Act because it was considered to violate the Constitution. Obviously, the Constitutional Court annulled the Act of 18 July 2018 because it violated the Constitution by not providing a reasonable explanation why person in similar situation were treated in a different manner.⁷⁰

⁶⁷ *Parl. Doc.*, nr. 1875/1, Chamber of Representatives, 2015-2016, 13.

⁶⁸ *Parl. Doc.*, nr. 2839/1, Chamber of Representatives, 2017-2018, 513-516.

⁶⁹ Constitutional Court, nr. 53/2020, 23 April 2020 (« Unie van Zelfstandige Ondernemers » e.a., « Algemeen Christelijk Vakverbond van België » e.a., de vzw « Neutraal Syndicaat voor Zelfstandigen » e.a.) to be consulted on <https://www.const-court.be>

⁷⁰ Constitutional Court, nr. 53/2020, 23 April 2020 (« Unie van Zelfstandige Ondernemers » e.a., « Algemeen Christelijk Vakverbond van België » e.a., de vzw « Neutraal Syndicaat voor Zelfstandigen » e.a.) to be consulted on <https://www.const-court.be>

Once again, this legislation created a new form of employment, besides the three distinct groups of public servants, workers and self-employed persons which are not governed by the collective bargaining agreements nor by collective negotiations.

Belgium still remains a country where there exists no intermediate group of workers between the traditional worker and the traditional self-employed person.

6) Conclusion

Belgium has been influenced by platform workers. However, correct numbers of bogus self-employed persons are not available. That does not exclude that there exists a limited increase can be found in the number of self-employed persons.

Within the Belgian collective bargaining framework, workers are covered by collective bargaining agreements at national, sectoral and company level. Collective bargaining implies an important issue in Belgian labour law.

However, with regard to platform workers, it becomes a difficult journey. The binary qualification of persons executing work (workers and self-employed persons) complicates the situation. With regard to Uber, the legal status of taxi drivers may be influenced by the situation of the Uber drivers. The divide between employees as taxi drivers and self-employed taxi drivers may shift. The qualification of the legal status of Uber drivers themselves remains unsolved. However, foreign influences may not be underestimated. For Deliveroo riders, the situation is clearer under Belgian law. The Administrative Commission with regard to labour relations has judged that the Deliveroo riders are employees. Deliveroo appealed this decision before the Labour Tribunal. That case is still pending. This also counts with regard to parcel delivery riders. A lot of them are considered to be self-employed and no decent social security protection can be granted to those persons. The social security protection of self-employed persons delivering parcels is still subject to debate.

The most reforms on new forms employment included the introduction of flexi-jobs in a lot of services and the introduction of untaxed side jobs. The last Act has been declared unconstitutional, due to an action of the trade unions, while the first still exist and tends to enlarge its scope.

Belgium in general has installed some more flexibility in the labour relations with the Act of 5 March 2017. The innovations, however, include more flexibility to telework occasionally and to days of leave.

Belgium has undergone some modifications in labour law but the institutionalised collective bargaining system has still kept the road. There might exist some threats (given the queries on the Ghent system) but in general the system has survived the difficulties.

7) Overview of the interviews:

- 9th November 2018: Interview with a spokesperson of the employers' organisation of cab drivers
- 20th November 2018: interview with a director-general of the Ministry of Employment, Work and Social Consultation
- 22nd November 2018: interview with a member of a trade union in the transport sector
- 26th November 2018: interview with a member of a trade union in the construction sector
- 27th November 2018: interview with HR-Director of parcel delivery company
- 28th November 2018: Interview with trade unionist of local municipalities
- 12th December 2018: interview with two trade unionists at national level
- 13th December 2018: Interview with an leading advisor of the Minister of Employment and Work
- 3rd January 2019: Interview with a Director General of the Ministry of Social Affairs at regional level
- 29th January 2019: Interview with an employer of bicycle delivery persons