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Joint conclusions and recommendations of the European social partners in the construction industry on self-employment and bogus self-employment

1. The European social partners in the construction industry, EFBWW and FIEC, jointly recognise the complex industrial processes and labour organisation within the construction industry. The need for high-quality output can be achieved by using a skilled and competent directly employed workforce, together with genuinely self-employed workers.

2. Regardless of the employment status of the worker, EFBWW and FIEC agree that high levels of craftsmanship, social protection and of health and safety protection should be present at all times.

3. EFBWW and FIEC take note of the fact that the situation differs significantly from one Member State to the other in terms of definitions, of relative importance within the sector, of labour market situation and of measures put in place by the public authorities to tackle the problem of bogus self-employment.

I. EFBWW and FIEC recognise the added value of genuine self-employment

4. EFBWW and FIEC take note that within the construction industry many self employed workers are considered to be "sole traders" or "independent contractors" and that their number is growing every year.

5. The main driving force towards genuine self-employment within the construction industry is the desire for entrepreneurship and self-determination, the expectation of a higher net income (by diminishing taxes and social contributions), even at the price of a lesser social protection.

6. EFBWW and FIEC recognise that unfair competition and social fraud are unacceptable in the construction industry and demand that these phenomena are eradicated, using a combination of prevention, information and enforcement.

7. EFBWW and FIEC recognise that genuine self-employment requires specific legal, professional, financial, regulatory and administrative knowledge and skills, as well as commercial risk taking. Allowing persons to be registered as self-employed without this knowledge, skills and acceptance creates unfair competition between genuine self-employed and bogus self-employed, and distorts the construction market.



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II. EFBWW and FIEC reject all forms of undeclared labour, bogus self-employment included

8. EFBWW and FIEC take note of the conclusions of the EU-special barometer on undeclared labour in the EU (10.2007) which indicated that self-employed "are overrepresented among the purchasers of undeclared work" and which stressed the damaging effect of bogus self-employment. Combating bogus self-employment should be approached using appropriate EU and national legislative measures and an adequate system of checks, enforcement and appropriate sanctions.

9. EFBWW and FIEC agree that there are very harmful consequences to 'undeclared labour' in the construction sector. Undeclared labour practices, which include bogus self-employment, are illegal and have serious social, economic and health and safety consequences for the entire sector, both at the macro level (e.g. fiscal and social security) and at the level of individual workers and their employers.

III. Defining the distinction between direct employment and self-employment

10. The study undertaken by EFBWW and FIEC highlights the fact that a huge variety of national definitions exist at the moment and that in the current context cross-border abuses of the status of self-employed worker are difficult to assess and prosecute.

11. Furthermore, the same study also shows that several Member States currently use a set of criteria to determine the nature of the employment status. In order to progress toward a level playing field, EFBWW and FIEC consider that a set of common European criteria which would provide guidelines for determining the nature of the employment status, independently of the legitimate wish of the parties, taking into account the realities of the construction industry, would provide a significant improvement of legal clarity to enterprises and workers. Any initiative in this area should take into account the necessity to respect the rules of subsidiarity.

12. EU case-law puts the criterion of "subordination" at the heart of the core distinction between a directly employed and a self-employed worker. As such the case of Jany (C-268/99) of the European Court of Justice considers that self-employment exists where it is established that the activities are being carried out:

- outside any relationship of *subordination* concerning the choice of that activity,
- outside any relationship of *subordination* concerning the choice of working conditions,
- outside any relationship of *subordination* concerning the choice of conditions of remuneration, working under that person's own responsibility,
- working in return for remuneration paid to that person directly and in full.

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IV. Member State competence for determining the employment relationship

13. The construction industry is characterised by a high mobility of its workers and the cross-border provisions of services have increased significantly over the last few years.

14. Regular controls show that a substantial number of E101 forms are falsified, or contain errors and are unchecked. Hence many migrant workers are in possession of an incorrect social security form.

Because:

- the E-101 is part of Regulation (EEC) 1408/71, which does not harmonise legislation but coordinates social security,
- the legal classification of an employment status is not linked to an E101 form, but to the existence of an employer/employee relationship between two parties,
- the criteria of self-employment should be apparent from the circumstances and contractual terms,

contrary to the ECJ in the "Banks" case (C-178/97) and in the "Herbosch Kiere" case (C-2/05), EFBWW and FIEC state that the type of employment relationship cannot be determined by the E101 form alone; other relevant circumstances need to be considered as well.

15. Therefore, EFBWW and FIEC reject the argument of the ECJ (cases C-178/97 and C-2/05) that the information contained in an E101 certificate determines the employment status. The determination of the employment status should be the legal responsibility of the country in which the work is done, which must decide whether subordination/control is apparent from the working circumstances and the contractual terms. EFBWW and FIEC call upon the EU-legislator to clarify this immediately.

V. Intermediaries on the labour market providing bogus self-employed

16. Bogus self-employment often occurs in a trilateral relationship between the contractor, an intermediary, and the worker. The intermediaries can be agencies/gangmasters or contractors. The practices of gangmasters providing a labour force where workers have a bogus self-employed status, are presenting very real problems for the workers they engage, the bona fide contractors, the construction sector and for the whole society.



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17. EFBWW and FIEC clearly state that an illegally trading gangmaster should be guilty of committing a criminal offence.

18. EFBWW and FIEC agree that all labour providers must comply with the law. In order to root out the practice of gangmasters providing bogus self-employed workers, all labour providers should:

- join a mandatory register set up by the Member States;
- be regularly audited by an independent body
- provide proof that they are in compliance with the law in particular concerning working time regulations, minimum wage legislation and any legislation that deals with adequate pay slips, social security payments, health and safety, housing and site facilities and non-discrimination issues.

19. All labour users must play their part by using only those labour providers that can demonstrate that they are complying with the law.

VI. Combating bogus self-employment

20. In order to combat bogus self-employment, a coherent policy is required, comprising a mix of preventive and punitive measures, which provide the protection of workers as well as the competitiveness of the genuine self-employed in the long term.

VII. Preventive measures

A. Need for awareness raising campaigns

21. Given the extent of the phenomenon of bogus self-employment in the construction industry, a long-term and intensive sector-specific awareness raising campaign is needed. For this purpose, five groups need to be targeted:

- workers
- agencies/ gangmasters
- contractors
- clients
- government/ relevant public authorities

22. The social partners offer their services, in order to ensure that national campaigns are carried out as efficiently as possible.



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23. The European social partners recognise the need for organising awareness raising campaigns in the industry in all the Member States. Such campaigns are necessary in order to inform the various concerned parties and to show them the consequences and risks of bogus self-employment.

B. Public procurement

24. In public procurement, the awarding authorities should favour the award of public contracts to the "economically most advantageous tender" (EMAT), rather than to the lowest bidder.

25. It is always easier for the awarding authority to identify the lowest bidder than the EMAT, but there is a danger that this process will favour bids containing illegal elements and prejudice the interests of honest, law-abiding firms and ultimately their workers.

26. The European social partners in the construction industry urge the awarding authorities to accept responsibility and to put all provisions in place necessary to prevent the award of contracts to abnormally low bidders.

27. All tenders should clearly specify that the use of bogus self-employed (and all other forms of illegal employment) in the chain of subcontracting or outsourcing will be severely sanctioned.

C. Need for an improved cooperation between administrations

28. In order to tackle bogus self-employment efficiently, it is absolutely essential to improve cooperation among the national authorities and between authorities in different countries (social security, insurance, tax, investigation and supervisory bodies). This cooperation entails:

- full and transparent reciprocal exchange of information in legislation, regulations and applicable collective agreements;
- practical, personal cooperation between the various public authorities, using electronic means;
- fast and transparent reciprocal exchange of standardised information and data on company registration, social insurance, taxes etc. .

29. The above-mentioned proposal implies that the European, national and regional authorities must have at their disposal sufficient funding and human resources in order to detect, determine and apply sanctions quickly and efficiently to instances of bogus self-employment. It is essential that checks be carried out also outside normal working hours. The various competent authorities and social partners need to bring this about quickly.

D. The need for simplification of administrative procedures for genuine self-employed workers.

30. The EFBWW and FIEC clearly state that the nature of the construction industry requires specific regulation, therefore deregulation is inappropriate. In order not to burden the genuinely self-employed with unnecessary red tape, the social partners recognise the need to simplify the administration of social and tax matters where necessary. Having taxes deducted at source is an indicator of a direct employment relationship. There therefore should be no tax system in which the income taxes of self-employed workers get deducted at source by the contractor.

VIII. Supply chain responsibility

31. EFBWW and FIEC stress that costs cannot be the only factor to be taken into consideration when negotiating business relations with suppliers. It is in a company's interest to take into account a range of supply chain issues including quality, social and fiscal standards and health and safety policies.

32. Legal subcontracting and outsourcing are usual working methods of the construction industry and have to be acknowledged. However, joint EFBWW-FIEC research projects (on posting and undeclared labour) indicate on the one hand the existence of social security fraud by the abusive use of chains of subcontracting and outsourcing methods in most of the Member States and, on the other hand that bogus self-employed workers are involved in domestic and cross-border subcontracting amongst other due to strong price pressure.

33. EFBWW and FIEC agree that companies should manage their supply chain responsibility in case of subcontracting and outsourcing by a combination of approaches and tools, such as:

- providing clear information to all suppliers on the standards which should be incorporated into all commercial contracts;
- organising regular on-site checks;
- carrying out assessments of suppliers and their practices.

IX. Facilitate transparency on construction sites

34. The European social partners recognise that bogus self-employment is not visible. In order to root out malpractices there is a clear need to put sector specific measures in place, in order to facilitate transparency on construction sites. Such measures could take the form of a Social ID-card or, according to national practices, of any other alternative instrument providing a similar level of transparency. Such instruments would facilitate the verification of whether the information on the employment status contained in such an instrument corresponds with the facts.

35. EFBWW and FIEC propose that everyone on a building site must be in possession of a personal recognition document, issued by the competent national authority or by the concerned body. Such a document should at least allow the identification of the person concerned, his/her employment status (directly employed or self-employed) and the contact information of the issuing national authority or the concerned body.

X. Punitive measures to tackle bogus self-employment should be efficient

36. In addition to the broad spectrum of preventive measures, the European social partners in the construction sector recognise that sanctions are needed in order to discourage and punish fraudulent practices. Appropriate measures at all levels should also be provided to ensure the effective application of penalties across borders.

37. In order to facilitate the detection of bogus self-employment, the relevant authorities services, should devise a simple, transparent and efficient approach.

Special attention must be paid to the following aspects:

- making maximum use of modern Information and Communication Technologies, both when exchanging information between national administrations as well as between administrations in different countries
- personal checks on the construction sites concerned.

38. The large number of building sites, the mobility of the workers and the high percentage of self-employed in the construction industry require an adequate investment in facilities and staffing of inspection services.

39. Where bogus self-employment is identified, action must be taken immediately and efficiently in order to prevent further infraction.

40. Findings by inspection services should be followed by prompt administrative and judicial action. The penalties handed down by the courts must be effective.

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XI. General conclusions and recommendations

41. The European social partners expressly reiterate that they have an important (joint) responsibility for identifying ways to recognise genuine self-employment and to prevent and combat bogus self-employment practices in the construction industry.

42. The European, national and regional authorities are urged to develop a set of common European criteria which would provide guidelines for determining the nature of the employment status and for preventing, reducing and combating bogus self-employment. As stakeholders, the social partners should develop a strategy for the practical implementation of these criteria.

43. EFBWW and FIEC shall ensure an adequate follow up of these recommendations and conclusions and will evaluate their implementation and application two years after their adoption.

44. The original text is the English version. Translations into French, German and Italian are indicative to facilitate the implementation of the joint conclusions and recommendations.

Prague, 5th February 2010

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The EFBWW and FIEC are the sole European social partners of the European construction industry.

The EFBWW represents 2,3 million workers affiliated by 74 trade unions in 30 countries.
FIEC represents 34 federations from 29 countries.

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