

DISPATCH NO. 34 – BELGIUM

CHEAP AND FLEXIBLE LABOR FOR NON-PROFITS: HOW THE BELGIAN ‘ACT ON AUXILIARY INCOME’ EVOLVED INTO AN ‘ACT ON ASSOCIATION WORK’

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INTRODUCTION

Recent Belgian governments have stimulated citizens to take up “side jobs”. In order to make this possible, the legislature has adopted targeted legislation that establishes special forms of auxiliary “employment”.

Pieter Pecinovsky and I mentioned such a legislative step in a previous country dispatch on “flexi-jobs”.¹ The flexi-job scheme allows enterprises in certain industries with a high wage cost, like restaurants and bars, to employ pensioners and people who are already quasi full-time employed. These enterprises rely on specific “flexi-job employment contracts”.² Flexi-jobbers are, therefore, employees but of a special, more flexible kind. The scheme has been rather successful in terms of the amount of people using it.³

Complementary to the previous dispatch on flexi-jobs, this contribution covers another saga that took place since 2018. Before being declared unconstitutional, the Act on Auxiliary Income similarly provided citizens

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1. Mathias Wouters & Pieter Pecinovsky, Dispatch No. 10 – Belgium – *Marginal part-time in Europe: 2018’s expansion of flexi-jobs in Belgium* (July 11, 2018), <https://cllpj.law.illinois.edu/dispatches>.

2. Loi portant des dispositions diverses en matière sociale [Law on various social provisions] of Nov. 16, 2015, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Nov. 26, 2015, 70563.

3. At the same time, according to the *Cour des comptes* (Court of Audit), it did entice employers and ordinary employees to partially shift their regular work arrangements towards this more favorable system. The law’s safeguards against opportunistic usage of the system turned out not to be watertight. Because of this, as well as the duty to implement the EU Directive on transparent and predictable working conditions, which contains provisions to constrain on-call work, the time might be right to amend the law on flexi-jobs. COUR DES COMPTES, INCIDENCE DU PLAN HORECA 2015: FLEXI-JOBS, TRAVAIL OCCASIONNEL ET HEURES SUPPLÉMENTAIRES NETTES (2019).

with a formal system to earn money on the side.⁴ The Act allowed people (hereinafter: “additional earners”) to work under three so-called “pillars” by: (i) performing ‘certain types of work’⁵ for ‘non-profit associations’⁶ (by so-called “*travailleurs associatifs*”); (ii) performing an occasional service for a fellow citizen; or (iii) performing platform work on a government-certified peer-to-peer platform.⁷ In case of association work, we think of people who coach a youth team, assist in a non-commercial dance school, or write a cultural non-profit’s newsletter and receive some remuneration in return. Occasional services between citizens are casual jobs, such as cleaning the cars of neighbors, or walking the dogs in a community. The same is true for platform work, in which case citizens presumably use a certified platform to perform these kinds of occasional services between peers.

Similar to flexi-jobbers, in order to use these schemes, additional earners were required to already have a genuine occupation.⁸ If conditions were fulfilled, any income earned through one of these three pillars was, then, free from taxation as long as the individual did not surpass the monthly, or yearly threshold. This threshold was, in principle, 520 euros a month (629 USD) and 6,340 euros a year (7,673 USD). Performing these tasks did not give rise to any social security rights. Furthermore, these forms of work were explicitly excluded from coverage under labor law. A decision that was particularly noteworthy in relation to platform workers and people engaged by non-profit associations.

This dispatch explains why the Act on Auxiliary Income was considered unconstitutional.⁹ Subsequently, the dispatch explains how the Act on Auxiliary Income from 2018 gave rise to an Act on Association Work from 2020. The latter seems designed to offer certain non-profit associations the

4. Loi relative à la relance économique et au renforcement de la cohésion sociale [Law on economic recovery and strengthening of social cohesion] of July 18, 2018, BELGISCH STAATSBLED/MONITEUR BELGE [M.B./B.S.] [Official Gazette of Belgium], July 26, 2018, 59203.

5. For instance, (i) being a caretaker of youth, sports, cultural and artistic infrastructure, (ii) being a guide to people visiting arts, heritage or natural environments, (iii) being a sports trainer, sports instructor, sports coach, youth sports coordinator, sports referee, jury member, steward, terrain attendant-equipment master, signalman at sports competitions, and so forth. *Id.* § 3.

6. These non-profits were defined as any *de facto* association or legal person governed by private or public law which does not distribute or grant, directly or indirectly, any financial advantage to the founders, directors or any other person, unless it serves the disinterested goals defined in the statutes. *Id.* §2.

7. For more on platform work, see Céline Wattecamp, *Belgium*, in THE PLATFORM ECONOMY AND SOCIAL LAW: KEY ISSUES IN COMPARATIVE PERSPECTIVE 44 (Isabelle Daugareilh, Christophe Degryse, & Philippe Pochet, eds., Working Paper No. 2019.10, 2019); SEM VANDEKERCKHOVE & KAROLIEN LENAERTS, EUR. COMM’N, DIRECTORATE-GEN. FOR EMP., SOC. AFF. & INCLUSION, WORKING CONDITIONS AND SOCIAL PROTECTION OF PLATFORM WORKERS IN BELGIUM: POLICY MEASURES AND STAKEHOLDER INITIATIVES (2020).

8. This is true for scheme (i) and (ii), not for platform work through these certified platforms.

9. Also see, Yves Jorens, *The Sharing Economy in Belgium: Status due to Taxation or Non-Status?*, in SOCIAL LAW 4.0: NEW APPROACHES FOR ENSURING AND FINANCING SOCIAL SECURITY IN THE DIGITAL AGE 75–96 (Ulrich Becker & Olga Chesalina eds., 2021).

possibility to engage flexible and cheap ‘*travailleurs associatifs*’¹⁰ with their own applicable legal regulation, instead of relying on volunteers, or proper employees.

THE SOCIAL PARTNERS TAKE THE ACT ON AUXILIARY INCOME TO THE
CONSTITUTIONAL COURT

According to the government, these three forms of auxiliary work, i.e. association work, occasional services and platform work, fall somewhere in between voluntary work and proper employment. In order to grasp where this desire for a form of work in between voluntary work and proper employment is coming from, it is important to clarify the difference between voluntary work and regular employment under Belgian law. Voluntary work is regulated under its own statute.¹¹ Crucially, these volunteers can only receive money to cover their expenses. In one famous example, the *Cour de cassation*—the highest court in the land—was of the opinion that the “volunteers” of a non-profit received remuneration because they could freely attend the festivals, where they were working, and obtained consumption coupons, which they could use at the festival.¹² These benefits constitute a form of remuneration. The non-profit’s “volunteers” were eventually reclassified as employees by the Labor Court of Ghent, with significant consequences for the non-profit in question.¹³

As this example illustrates, unless there is a lack of subordination/authority, it is difficult to escape the clutches of labor law even for “marginal”, or benevolent work. The government considers this problematic because it means that once there is any form of remuneration beyond expenses, social law provisions become applicable, making it difficult to undertake a casual side job. Therefore, the Act on Auxiliary Income was advanced in order to create a “safe space” for forms of auxiliary work that are somewhat remunerated but conducted without the intention of making profits, or earning a livelihood.

Both trade unions and employers’ organizations opposed the proposal from the start. The most representative trade unions and employers’ organizations, which have a seat in the National Labor Council, issued a negative advice. According to them, these schemes would lead to unfair competition because these ‘additional earners’ were not covered by labor law, were not taxed and did not have to pay any social security contributions.

10. These workers perform the kinds of services listed in the legal statute for an organization that classifies as an eligible non-profit under the same legal statute. Loi relative au travail associatif [Law on associative work] of Dec. 24, 2020, BELGISCH STAATSBLAD/MONITEUR BELGE [M.B./B.S.] [Official Gazette of Belgium], Dec. 31, 2020, 98046.

11. Loi relative aux droits des volontaires [Volunteer Rights Act] of July 3, 2005, BELGISCH STAATSBLAD/MONITEUR BELGE [M.B./B.S.] [Official Gazette of Belgium], Aug. 29, 2005, 37309.

12. Cour de cassation [Cass.][Court of Cassation], Mar. 10, 2014, AR S.12.0103.N.

13. Arbeidshof van Gent [Arbh.][Labor Court] (6de kamer), Sep. 21, 2015, AR. 2014/AG/189.

Furthermore, despite the envisioned safeguards, the government's plans might encourage individuals to provide their services through these schemes, instead of offering "professional" services. Especially trade unions feared that the entire scheme would undercut the social protections obtained for regular workers. Instead of relying on professional cleaners, gardeners, swim coaches and so forth, who are employed by businesses, citizens would be incentivized to turn towards fellow citizens wanting to perform these kinds of services in their spare time.¹⁴ Also the employers' organizations were opposed. This was in part because contrary to the flexi-job scheme, which enables some of their members to employ flexible labor, these three pillars would only benefit non-profits and platforms, raising the prospect of unfair competition. A case was lodged in front of the Constitutional Court because the government dismissed the social partners' concerns.

The Court rendered its judgment on the 23rd of April 2020.¹⁵ It spent much time analyzing whether it was justifiable for non-profits' *travailleurs associatifs* to not be covered by labor law, whereas non-profits' employees are. After all, unlike volunteers, these workers are remunerated. This makes them comparable to a non-profit's employees. Therefore, the Court ascertained whether their different treatment was lawful under the Constitution's equality principle. In other words, is this different treatment based on an objective criterion, is it reasonably justifiable and does it accomplish what it sets out to do? As part of these considerations, the Court noted that it is not unreasonable to develop a separate legal scheme to cover the casual helpers of non-profits. However, such an endeavor does not justify a complete exemption from all labor law protections and from the duty to pay income tax and social security contributions. The fact that the legislature assumes that non-profits' *travailleurs associatifs* perform their work with benevolent intentions and consider it supplemental income at best (i.e., "additional earners"), makes little difference. The same is true for occasional services to other citizens, including when it happens through peer-to-peer platforms. According to the Constitutional Court, even if the legislature's unsubstantiated assumptions were true, meaning for instance that none of these additional earners rely on this income for their livelihood, it does not

14. Conseil National du Travail [Nat'l Work Council], Travail associatif, services occasionnels de citoyen à citoyen et économie collaborative organisée par l'intermédiaire d'une plateforme reconnue – Projet de loi et projet d'arrêté royal– Suivi du rapport n° 107 concernant la digitalisation et l'économie collaborative [Associative work, occasional citizen-to-citizen services and collaborative economy organized through a recognized platform—Bill and Royal Decree draft—Follow-up to report No. 107 on digitization and the collaborative economy], Nov. 29, 2017, Avis No. 2065, <http://www.cnt-nar.be/AVIS/avis-2065.pdf>.

15. Cour constitutionnelle [CC][Constitutional Court] decision no 53/2020, April 23, 2020, <https://www.const-court.be/public/f/2020/2020-053f.pdf>.

justify why these persons have to perform their work without any labor protection and without any applicable taxes.

In short, the Court did not consider the government to have any good arguments, like their desire to decrease administrative burdens, to justify the different treatment of these additional earners. The Act on Auxiliary Income from 2018 was declared in violation of the principle of equality. The Court allowed the Act to nevertheless remain in effect until the last day of 2020, so as to offer some legal certainty for the workers involved. Subsequently, a legislative bill was passed regarding association work specifically. The Act on Association Work resurrects only one of the three “pillars” of the Act on Auxiliary Income. No substitute was provided for the performance of occasional services between citizens. For the time being, the taxation of platform work on government certified peer-to-peer platforms will be governed by an older law that was adopted in 2016.¹⁶

THE GOVERNMENT’S SECOND ATTEMPT: AN ACT ON ASSOCIATION WORK

Following the Constitutional Court’s ruling, the government decided to advance a new, less ambitious bill. Since neither the regulation on voluntary work, nor general labor law meets the needs of non-profits, the government is adamant about creating an intermediate status between volunteers and regular employees. The initial idea was for this intermediate status to be accessible to non-profits that perform valuable services to society.¹⁷ Non-profits are of course in favor because the scheme potentially allows them to employ cheaper labor through so-called “contracts for association work”, instead of regular employment contracts. The big trade unions and employers’ organizations remain skeptical, even if this second proposal does increase these workers’ labor protections and increases the amount of taxes due.¹⁸ The social partners remark, for example, that the government has not adequately mapped out what protections are applicable to this kind of work under EU and international labor law.¹⁹ Indeed, they have a point. Belgian law must comply with the European Union’s directives. Because these workers perform services under the non-profit’s authority and are similar to regular employees in this respect, multiple EU directives might apply. One

16. Loi-programme [Program Law] of July 1, 2016, BELGISCH STAATSBLAD/MONITEUR BELGE [M.B./B.S.] [Official Gazette of Belgium], July 4, 2016, 40970.

17. Proposition de loi relative au travail associatif [Bill regarding associative work], of July 8, 2020, Chambre des Représentant de Belgique [Belgian House of Representatives], Doc. 55 1433/001.

18. For example, rest times must be respected, and the legislature has provided workers with a right to compensation that resembles severance pay.

19. Conseil National du Travail [Nat’l Work Council], Proposition de loi relative au travail associatif [Bill regarding associative work], Oct. 27, 2020, Avis No 2181. <http://www.cnt-nar.be/AVIS/avis-2181.pdf>; Conseil National du Travail [Nat’l Work Council], Suivi de l’avis n° 2.181 – Pistes de solution alternatives pour les activités associatives - Conséquences de l’annulation de la loi de relance [Follow-up to opinion No. 2181—Alternative solutions for associative activities—Consequences of the cancellation of the recovery law] Dec. 15, 2020, Avis No 2189, <http://www.cnt-nar.be/AVIS/avis-2189.pdf>.

possible way out is to consider association work as “purely marginal and ancillary”, as understood in the European Court of Justice’s case law.²⁰ However, since people can perform up to fifty hours of association work per month on average,²¹ it is arguably not purely marginal and ancillary, hence, European labor law would apply.

What is more, the legislation department of the Belgian Council of State additionally remarked that the favorable fiscal and social security treatment of association work might constitute state aid under European law. This is because not all “enterprises”, as understood under EU law, can conclude these contracts for association work. As it stands, the contracts are only accessible to a subset of non-profits. Secondly, notwithstanding an increase in labor protections and the imposition of a “solidarity contribution” of ten per cent, the Council of State still has its doubts about the legality of the Act under the equality principle.²²

Some newspapers questioned the viability of the government’s initiative upon receipt of the Council of State’s opinion.²³ Yet the government carried on. Important to note in this respect is how, again, only people who already have a “usual and main” occupation are eligible to perform association work. Furthermore, the amount of non-profits able to rely on the new Act was restricted. It was made unavailable to non-profits in, for example, the youth, cultural or artistic scene.²⁴ For now, only non-profits engaged in the sports sector will be able to use it. Some further amendments were also made to counteract the Council’s legal concerns.²⁵ As a result, the representatives of the sports organizations now complain that the administrative and tax burden has become too high, making the scheme largely redundant, or so they claim.²⁶

Because of this, it is unclear what impact the Act will have. The Act on Association Work may disappear because of its insignificance or may come before the Constitutional Court again. At the same time and similar to the

20. See Case No. C-14/09, *Hava Genc v. Land Berlin*, 2010 E.C.R. I-00931.

21. Loi relative au travail associatif [Law on associative work], *supra* note 10, §5.

22. Conseil d’État [CE][Council of state] Oct. 9, 2020, Proposition de loi relative au travail associatif [Proposal for a law relating to associative work], N° 67.850/1 & 67.851/1.

23. Wim Van de Velden, *Liberalen kunnen onbelast bijverdiene niet redden* [*Liberals cannot save extra income*], DE TIJD: FEDERAAL (Oct. 9, 2020, 9:48 PM), <https://www.tijd.be/politiek-economie/belgie/federaal/liberalen-kunnen-onbelast-bijverdiene-niet-redden/10257237.html>.

24. See initially, Proposition de loi relative au travail associatif [Bill regarding associative work], *supra* note 17.

25. Proposition de loi relative au travail associatif [Bill regarding associative work], of Dec. 15, 2020, Chambre des Représentant de Belgique [Belgian House of Representatives], Doc 55 1433/009.

26. Press Release, Comité Olympique et Interfédéral Belge [Olympic and Interfederal Belgium Committee], Association Interfédérale du Sport Francophone and Vlaamse Sportfederatie [Interfederal Association of Francophone Sport and the Flemish Sports Federation], La nouvelle réglementation du travail associatif n’est pas une solution pour le secteur du sport [The new regulations on associative work are not a solution for the sports sector], TEAM BELGIUM, <https://teambelgium.be/fr/nouvelle/la-nouvelle-reglementation-du-travail-associatif-n-est-pas-une-solution-pour-le-secteur-du-sport> (last visited Dec. 23, 2020).

flexi-jobs scheme, the Act might also in time expand its scope to cover more situations, perhaps gaining importance. The social partners at the National Labor Council are in the meantime trying to come up with an alternative.²⁷

CONCLUSION

In 2017 a report was published sketching what the labor market in Belgium—Flanders in particular—may look like in 2050. The authors are quite candid, mentioning how:

“The career literature is unfortunately dominated by publications from the Anglo-Saxon countries, a literature that is construed around terms such as “boundaryless” and “protean” (careers). This now old-fashioned newspeak has also infected the Low Countries [i.e., Belgium, Luxembourg and the Netherlands]. [. . .] And what about the Flemish citizens? They continue to work. [They do] this mostly faithfully, committed and sedentary. Contrary to the prediction, the average duration of jobs - job seniority - has only slightly decreased over the past two decades (cf. supra). Nor is there a trend towards more job mobility. The proportion of Flemish workers who change job within a year rose between 1992 and 2000 from 3.0% to 5.1%. However, during this new century, a strongly fluctuating pattern is visible showing a rather downward trend in job mobility. The share of employees in temporary contracts peaked in 1999 at 9.5% but has since fallen again to around 7%. [. . .] Regulation through labor law and the often-pyramidal form of social dialogue [in Belgium] lead to a certain “buffering”, making the changes less sudden and explaining this picture of relative stability. A stability that, according to some, limits social inequality and precarisation, according to others leads to rigidity and relative decline.” [Personal translation from Dutch]²⁸

Arguably, this dispatch has sketched an example of this mechanism in action. To this extent, whereas the Constitutional Court considered the original flexi-job scheme not to violate the Constitution,²⁹ after which the government expanded the scheme,³⁰ the Act on Auxiliary Income, which likewise created pathways to earn (largely) untaxed auxiliary income during one’s “spare time”, did run into trouble. Even though the concerns of social partners were brushed aside, both EU law and the Constitution seem to restrict the government’s discretion. When compared to the Act on Auxiliary Income, the government’s second attempt—the Act on Association Work—

27. Conseil National du Travail [Nat’l Work Council], Suivi de l’avis n° 2.181, *supra* note 19.

28. Luc Sels, Sarah Vansteenkiste & Heidi Knipprath, *Toekomstverkenningen arbeidsmarkt 2050*, 2017 WERK. RAPPORT 36–37.

29. Cour constitutionnelle [CC][Constitutional Court] decision no 107/2017, Sep. 28, 2017; Conseil d’État [CE][Council of state] Oct. 11, 2017, un avant-projet de ‘Loi-programme’ [a preliminary draft of a “program law”], No. 62.219/1-3-4, <http://www.raadvst-consetat.be/dbx/avis/62219.pdf#search=62.219%2F1-3-4>.

30. Wouters & Pecinovsky, *supra* note 1.

has increased labor protections, like imposing a minimum remuneration of five euros an hour, as well as increased the (para)fiscal burden on non-profits. However, this runs contrary to the demands of non-profits that simply want a formal arrangement to access cheap and flexible labor. Something which the government is willing to give, but cannot easily provide for a variety of reasons.