Overview on the main results of the entire Project: definitions, shortcomings and best practices in rules tackling undeclared work, the role of the social partners

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Undeclared Work in Agriculture (VS/2015/0026):

from Brussels, 28th-30th May 2015
“Undeclared and illegal work in agriculture: reasoning on legal definitions, labour inspection and effective sanctions”

through Lisbon, 15th-18th October 2015
“Promoting simpler and clearer rules for regular work”

Amsterdam, 19th-20th May 2016
“Promoting simpler and clearer rules for regular work – common aim for Europe, the Social Partners and the Member States”

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Brussels, 28th-30th May 2015
“Undeclared and illegal work in agriculture: reasoning on legal definitions, labour inspection and effective sanctions”

I item: Problem setting, uncertainty on definitions of connected phenomena and different National approaches

Problem Setting:

Free and fair competition  Social Dialogue and Civil Rights

EU level/National level regulation

Definitions:
- Informal Economy (ILO), Undeclared Work (EU, Eurofound), Illegal Work
- Undeclared Work: different National definitions and consequences
- Bogus Self-Employment
- Envelope Wages
- Social Fraud in Posting of Workers

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Undeclared work:

- a phenomenon to identify;
- (legal) definitions, in order to tackle U.W.
- U.W. and related items
U.W.: the phenomenon

The ‘non-observed’ economy refers to the following activities [Eurostat]:

**Underground activities**, defined as those activities that are productive and legal but are deliberately concealed from public authorities to avoid:

- payment of income, value added or other taxes;
- payment of social security contributions;
- having to meet certain legal standards such as minimum wages, maximum hours, safety or health standards, etc.;
- complying with certain administrative procedures, such as completing statistical questionnaires or other administrative forms.

**Illegal activities**, defined as those productive activities that:

- generate goods and services forbidden by law (e.g. production and distribution of illegal drugs);
- are unlawful when carried out by unauthorised producers [UN uses “unauthorised persons”] (e.g. unlicensed practice of medicine).

**Production of households for own final use**, defined as those productive activities that result in goods or services consumed or capitalised by the households that produced them, such as:

- production of crops and livestock;
- production of other goods for their own end use;
- construction of own houses and other own-account fixed capital formation;
- imputed rents of owner-occupiers, and services of paid domestic servants.

Non-observed informal activities, being part of the informal sector also covering observed activities undertaken informally; in general, informal activities are those productive activities conducted by unincorporated enterprises in the household sector that are unregistered and/or are less than a specified size in terms of employment, and that have some market production.
“informal economy”:
(a) refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements; and
(b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in rearms, trafficking in persons, and money laundering, as defined in the relevant international treaties.

[ILO Recommendation n. 204, approved in Geneva 12.6.2015, 104th ILO Conference 2015]
Undeclared Work in the EU:

“any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory system of Member States”. [see COM/2007/0628]

This definition links undeclared work with tax and/or social security (http://www.eurofound.europa.eu/ef/observatories/eurwork/industrial-relations-dictionary/social-security) fraud and covers a range of activities from informal household services to clandestine work by illegal residents, but excludes criminal activities. 

[Eurofound, European Industrial Relations Dictionary]
...still on Undeclared Work (in the EU):

In **July 2013**, the **Commission** launched a **formal consultation** of the EU social partners. It pinpointed the **three main issues surrounding undeclared work**: 

- abusive behaviour regarding working conditions and/or health and safety norms, leading to the involvement of labour inspectorates;
- fraud on social insurance contributions, involving social security inspectorates;
- tax evasion, mobilising tax authorities.

*Eurofound, European Industrial Relations Dictionary*
Illegal Work in the EU:

**Directive 2009/52/CE, on illegally staying third-country nationals:**

Art. 2 (definitions):
“For the specific purposes of this Directive [...] d) “illegal employment” means the employment of an illegally staying third-country national”.

“In **BE, FI, FR, IT, MT, NL and SE**, illegal employment constitutes a criminal offence in itself, with or without the circumstances referred to in Article 9(1). These circumstances are usually treated as aggravating factors”.

*[EU Commission, Communication COM (2014) 286 final]*
“Undocumented Workers”: legal or illegal work?

Directive 2009/52/EC

minimum standards on sanctions and measures against employers of illegally staying third-country nationals

What are my rights if I am found to be working illegally in an EU country?

Even if you have worked without the necessary authorisation, you will have the following rights:

- **Your employer must pay any unpaid wages that she/he owes you.** The amounts are based on the legal minimum salary and calculated on working time for at least a minimum of three months, unless your employer provides evidence to the contrary.

- Your host EU country must make sure that you get any unpaid wages, even after you have left the country.

- Any costs for sending unpaid wages to you after you have left the country must be paid by your former employer;

- **You may be able to formally complain against your employer,** either directly or through a trade union. Trade unions can represent you in any civil or criminal proceedings if you so wish.

*(see: EU Commission – EU IMMIGRATION PORTAL)*
"concealed employment":
“employment which, while not illegal in itself, has not been declared to one or more administrative authorities to whom it should be made known, thereby leading to the evasion of legal regulations, the evasion of taxes, or the evasion of a reduction of social security entitlements”.  

[OECD, Glossary of Statistical Terms, 2002]
U.W.: (legal) definitions – related items

Bogus self-employed (definition):
person who, though hired as a self-employed person under national law, for tax, administrative or organisational reasons, acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in Allonby, EU:C:2004:18, paragraph 72), does not share in the employer’s commercial risks (judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking (see judgment in Becu and Others, C-22/98, EU:C:1999:419, paragraph 26).

[CJEU, Case FNV Kunsten Informatie en Media c. Staat der Nederlanden C-413/13]

Some MSs in Europe consider bogus self-employment as a form of “social fraud”.

U.W.: (legal) definitions – related items

Bogus self-employed
It must be recalled that according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking.

[CJEU, Case Confederación Española de Empresarios de Estaciones de Servicio, C-217/05, par. 43-44]

Bogus self-employed
The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC [“employee”, ed.] if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

[CJEU, Case Allonby, C-256/01, par. 71]
U.W.: (legal) definitions – related items

Envelope wages
whereby a formal employee receives part of their wage on a declared basis and the remainder on an undeclared basis. Both jobs and enterprise-based definitions omit these forms of undeclared work, since the worker is in a formal job and the work takes place in a registered enterprise

[Williams-Renooy, Measures to tackle undeclared work in the EU, Eurofound, 2008].

Envelope wages
Partially undeclared work is sometimes also called "under-declared work", "envelope wages" or "cash-in-hand". In these cases only part of the employee's salary, usually the minimum salary, is paid officially, while the rest is given to the employee directly "tax free". It also covers situations where an employee is declared to work part-time, but in reality works full-time


Some MSs in Europe consider envelope wages as a form of “social fraud”.
Legal Definitions (at national level)

- **Illegal Work**
- **Undeclared Work**
- **Bogus Self-Employment**

**Note:** the answers are referred to 16 EU MSs.
**Legal Definitions (at national level)**

|        | AT | BE | DE | ES | FI | FR | HU | IE | IT | LV | LT | NL | PT | SE | UK |
|--------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Ill. Wrk | no | no | no | yes | no | yes | no | no | no | no | no | yes | no | no | no |
| Und. Wrk | yes | yes | yes | yes | no | yes | no | no | yes | no | yes | no | no | yes | no |
| Bogus S-Empl. | no | no | no | no | no | no | yes | no | no | no | no | yes | no | no | no |

**To be pointed out:**

- Undeclared Work *as* Undeclared Income: SE, UK;
- Undeclared Work *and* Social Fraud: BE, FR;
- PT’s legal definition of Bogus Self-employment: *“apparent supply of services that, meeting the formal characters of the employment contract, can cause a loss to the employee or to the State”*;
- UK, HMRC consultation: *“False self-employment is where someone whose engagement terms would dictate that they should be treated as an employee falsely presents their terms and conditions as though they would be self-employed”*. 
4) In your country, is there a difference between “illegal work” and “undeclared work”?

**Illegal Work vs. Undeclared Work**

*Does there exist a clear distinction?*

- **Undeclared work is a form of illegal work**
  - AT, BE, DE, FR, HU, LT, PT

- **Totally Different Regulation (definition & sanction)**
  - ES, IE, IT, NL, SE, UK

- **Quite Confused (lack of both definitions)**
  - FI, LV
Bogus Self-Employment and UDW

➢ “Social Fraud” concern: BE, FR, DE (and some forms of protection);

➢ Full Protection concern: AT, ES, IT, NL, PT;

➢ Tax & Social Security contributions concern: IE, UK;
II item: Effectiveness, Enforcement, Labour Inspection, Coordination of controls

Enforcement:
- Labour Inspection
- Coordination of Controls at National level
- Effectiveness of sanctions
- Effectiveness of workers rights (tools)
- Joint and Several Liability at National level
Brussels Seminar

1) What are the sources of law that govern labour inspections in your country? What powers do labour inspectorate services have and what rights do entities being inspected have (Please specify the type of legislation)?

The role of labour inspection:

Enforcement (most of the MSs)

Promotion-Preventive action (ex. FI, NL, PT, UK)
1) What are the sources of law that govern labour inspections in your country? What powers do labour inspectorate services have and what rights do entities being inspected have (Please specify the type of legislation)?

**Compliance based**
- ex. FI, IE, LT, NL, SE, UK

**Deterrence (sanctions) based**
- ex. FR, ES, BE, IT

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Brussels Seminar

1) What are the sources of law that govern labour inspections in your country? What powers do labour inspectorate services have and what rights do entities being inspected have (Please specify the type of legislation)?

Traditional Direct State Control    vs.    Most of the EU Countries

Enforced self-regulatory models    See NL, SE, FI, LT

(Which) role for the Social Partners?

Complaint    Involved in controls
A regulatory approach: Responsive Regulation

- Easy rules
- Responsive to the regulated,
- Preference to self-regulation (better collective) when possible, or
- To enforced self-regulation

**The Regulatory Pyramid**

- Criminal law
- Administrative violation
- Tripartite Regulation (State + Social Partners)
- Collective agreements, Employment contracts
- Information and Legal Advice

**The Enforcement Pyramid**

- Criminal penalties
- Administrative Sanctions (most of the MSs)
- Mandatory Guarantee for wages imposed by labour inspectors (NL)
- Tripartite Regulation (ex. Conventions de Partenariat, BE, FR)
- Warnings (UK), Written advices (FI), Improvement notices (FI), Recommendations (LT)
- Information and Promotion

[see Ayres & Braithwaite, Responsive Regulation, 1992]
Item: Regulating employment contracts and labour relations

Employment relations:
- Employment contracts in agriculture
- Seasonal work
- Joint employment
- Administrative burdens: recruitment/termination; social security; taxation

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2) Employment contracts: recourse to different types of employment contracts

**Full Time Permanent Contract**
- The most common: 56%
- Very common: 31%
- Quite common: 0%
- Other: 13%

**Full Time Fixed Term**
- The most common: 38%
- Very common: 25%
- Quite common: 31%
- Other: 6%

**Seasonal Work**
- The most common: 50%
- Very common: 44%
- Quite common: 6%
- Other: 0%

**Part-Time**
- The most common: 31%
- Very common: 25%
- Quite common: 44%
- Other: 0%
2) Employment contracts: recourse to different types of employment contracts

**Apprenticeship**
- The most common: 0%
- Very common: 25%
- Quite common: 12%
- Other: 63%

**Temporary Work Agency**
- The most common: 0%
- Very common: 19%
- Quite common: 50%
- Other: 31%

**Miny Jobs, Vaucher**
- The most common: 69%
- Very common: 0%
- Quite common: 0%
- Other: 31%
2) Employment contracts: recourse to different types of employment contracts

Some National Examples

**GERMANY**
- The Most Common: *Full Time Permanent*
- Very Common: *Seasonal Work, Apprenticeship*
- Quite Common: *Fixed Term, Mini Jobs, Part Time*

**ITALY**
- The Most Common: *Fixed Term, Seasonal Work*
- Quite Common: *Full Time Permanent, Mini jobs (Voucher), Part Time*

**HUNGARY**
- The Most Common: *Seasonal Work*
- Very Common: *Full Time Permanent*
- Quite Common: *Fixed Term, Temporary Agency Work*

**FRANCE**
- The Most Common: *Fixed Term, Seasonal Work*
- Quite Common: *Full Time Permanent, Apprenticeship, Temporary Work provided by Independent Contractors*

**SWEDEN**
- The Most Common: *Full Time Permanent Contracts*
- Very Common: *Fixed Term, Seasonal Work, Temporary Work provided by Independent Contractors*
4) Seasonal work

**When does Seasonal Work apply?**

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>FI</td>
<td>Where “the nature of the works is annually connected to limited periods of time”</td>
</tr>
<tr>
<td>SE</td>
<td>“dependent on weather... only applicable for outdoor work”</td>
</tr>
<tr>
<td>AT, CY, DK, FI, HU, IT, NL, PL, PT, SE</td>
<td>Contracts linked to “seasons” (specific parts of the Year)</td>
</tr>
<tr>
<td>BE</td>
<td>Seasonal + Casual</td>
</tr>
<tr>
<td>DE</td>
<td>Just Quantitative limits (n. hours/months)</td>
</tr>
<tr>
<td>BE, DE, LT</td>
<td>Not necessarily linked to specific parts of the year (quantitative limits throughout the year)</td>
</tr>
</tbody>
</table>

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4) Seasonal work

Percentage of Seasonal Work

0%  20%  40%  60%  80%  100%

DE  CY  DK  ES  NL  BE  HU  FI  AT

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6) **Administrative requirements for the recruitment of workers**

**Formal notice to Public Authorities: How does it work?**

### Formal Notice: When?

| Previous: AT, FR, HU, IT, LT, PT | Contextual: BE, CY, CZ, DE (minijobs), ES, NL | After: DE (others), DK, FI, PL, PT, SE |

### Formal Notice: Form

| E-com: BE, DE, DK, ES, HU, IT, LT, NL, PL (general), PT | Paper: CY, CZ, SE | Both possible: AT, FI, FR, PL (up to 5 wrkrs) |

### Formal Notice: How Many?

| Just one: AT, BE, DK, HU, IT, LT, PL, SE | More: CY, DE, ES, FI, FR, NL, PT |  |
6) Administrative requirements for the recruitment of workers

Formal Errors (in recruiting): How are they treated?

Formal Errors are treated differently than Undeclared Work

DK, FI, HU, IT, PT

Formal Errors are treated the same as Undeclared Work

AT, BE, CY, DE, ES, FR, LT, NL, PL, SE
7) Administrative requirements for managing employment relations

MANAGING Employment Relations.
Formal communication to Public Authorities: How does it work?

ADMINISTRATIVE DOCS
- Just 1 e-doc: BE, DK, HU, IT, PL
- Just 1 paper doc: CZ
- More e-docs: AT, DE, FI, FR, NL, PT, SE
- More paper docs: AT, CY, ES, FI, FR, LT, PT

SOCIAL SECURITY DOCS
- Just 1 doc: CZ, DK, HU, PL
- 1 to worker + 1 to P.A.: BE, CY, IT, LT, SE
- 1 to worker + more to P.A.s: DE, ES, FI, PT
- More docs to wrkr + to P.A.s: AT, FR, NL

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Il item: The role of collective bargaining in agriculture

The role of the Social Partners:
- Collective bargaining in agriculture;
- Tripartite regulation and Self-regulation (CAs): looking for good practices
- **New issues** related to flexibility (working time, employment contracts, salary, “productivity bargaining”);

- **Good practices** of social dialogue and tripartite regulation directed to improving regular work.
Thank you for your attention.

Questions, suggestions and comments are welcome!

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Amsterdam
19th and 20th of May 2015

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