

# Institutional management in fighting against undeclared work.

## Considerations on some selections from notable studies in the matter.

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**Abstract:** *Fighting against undeclared work represents a task that most of the countries need to do. Regarded as a phenomenon which undermines the economy of a country, the undeclared work became subject of analysis and debate in European Union, more and more, mostly after 2001.*

*In the research that aims to analyze the institutional management of the fight against undeclared work, first we must see some selections of notable studies made by important bodies and organizations. The role of the European Commission and the International Labour Organization in the research is important; what those institutions were released in the matter has strong impact on national policies and also in the targets that management of the national authorities is considering to implement.*

*The European Commission had made some research on the undeclared work, focusing on the forms and on the tools that national institutions could or should use to fight efficiently against this phenomenon. According to some research made by European Commission<sup>1</sup>, “undeclared work may come in different forms. The most common type is work carried out in a formal undertaking, partially or fully undeclared. Partially undeclared work is sometimes also called “under-declared work”, “envelope wages” or “cash-in-*

<sup>1</sup> See <http://ec.europa.eu/social/main.jsp?catId=706&intPageId=2983&langId=en>.

hand". Another type is undeclared "own account" or self-employed work, where self-employed persons provide services either to a formal enterprise or to other clients, such as households. Undeclared work occurs in all kind of economic sectors, both within countries and across borders. It is often carried out in sectors like construction, renovation or repair works, gardening, cleaning, provision of childcare or HORECA (Hotel / Restaurant / Catering – food services)".

Most of the member states in E.U had implemented a national system of labour inspection that is enforced to tackle the phenomenon of undeclared work and to diminish it.

Definitely, the undeclared work creates an unfair competition between employers, who are positioned on different levels regarding the costs of the labour that are taking into consideration when their profit is analyzed. Also, it creates a discriminatory situation between legal employed workers and those workers who performed undeclared work, because the latter are not properly and equally ensured in the national insurances systems that protects them from unemployment, sick and loose of the working capacity.

For this reason, the institutionalized fight against undeclared work is subject to proper management, starting from the legal tools that national system provides for the organizations that are entitled to do this. In this regard, we must consider the general background that comes from the European Commission and the ILO, and the national background, that comes from the national law and administrative system and from the national policies that are deriving from European in this aspect.

**Keywords:** institutional management, undeclared work, labour administration

## 1. General background

In March 2014 European Commission had released a Report on Undeclared work in European Union<sup>1</sup>, referred to as the Report, relying on a fieldwork from March – April, 2013. According to this Report, "undeclared work is defined as 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. This definition has been used systematically by the Commission since its 1998 Communication on undeclared work. The definition notably excludes criminal activities which are defined in national law. Crime and tax fraud as such are outside the scope of employment policy".

As the undeclared work was introduced in the European Employment Strategy and

since 2001 has been taken to the second pillar of the employment guidelines, the member states had committed to combat undeclared work,<sup>2</sup> and that was considered by a 2008 Report conducted by European Commission on two ways: (1) a focus on deterrence (by improving detection or increasing penalties) and (2) encouraging compliance by preventing people from taking up undeclared work, enabling the legitimization of previously undeclared work and changing attitudes.

The first way of combating undeclared work is considered by most of the Europeans respondents to the Survey made in the frame of the Report as a proper one, as "the majority of respondents (56%) say that if someone was discovered to be receiving income from work which was not declared to the relevant

<sup>1</sup> See [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_402\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_402_en.pdf).

<sup>2</sup> See also "Undeclared work in the European Union" page 2, European Commission, March, 2014. For further information, see [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_402\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_402_en.pdf).

authorities the sanction would be the normal tax and social security contributions, plus a fine. A fifth (21%) thinks that the punishment would be to pay the normal tax and social security contributions. Only a small minority (6%) imagine that the person would be sent to prison. Around one in eight respondents (12%) say they “don’t know” what sanction would be imposed.<sup>3</sup> As we can notice, Europeans are regarding the undeclared work as socially dangerous, as the majority of the respondents consider that the contributions and taxes payment must be supplemented by a fine, the main responsibility in this matter – meaning the recovery of the contribution and the fining - being transferred to the national authorities. The fight against undeclared work relies mostly on three types of enforcement bodies:

- Labour inspectorates addressing abusive behavior regarding working conditions and/or health and safety norms;
- Social security inspectorates fighting fraud on social insurance contributions;
- Tax authorities dealing with tax evasion<sup>4</sup>.

Normally, the main deterrence which comes from the fight against undeclared work lies with the powers of the labour inspectorates and the tax evasion authorities, whose role is to prevent and to punish

such a phenomenon<sup>5</sup>. The International Labour Organization issued a study in 2013 comparative study on Labour Inspection Strategies for Combating Undeclared Work<sup>6</sup> that, according to the Preface of that study, was carried out during the biennium 2012-13 and was coordinated by the ILO, Labour Administration and Inspection Programme (LAB/ADMIN) in cooperation with the EC Unit EMPL-B2/Labour Law. Taking into consideration the purpose of this study, which was to consider the role of national labour inspection systems in the EU within the strategic policy response to undeclared work, we can conclude and also notice that the whole member states deterrence policy is relied on the labour administration and for that reason the way the management is conducted must be in accordance.

Regarding the role and the capacity of the labour inspection, the ILO Study results consider that this institution is an important ally for dealing with the problem of undeclared work, but also the same study takes into consideration the lack the necessary resources, tools, procedures and coordination

<sup>5</sup> According to the 2013 ILO Study several institutions address the diversity of issues related to undeclared work, mostly labour inspectorates, social security, tax and immigration authorities. Although labour

Inspectorates are among the leading agencies, some countries tend to focus more on compliance with tax laws rather than on protection of workers’ rights. In Austria and Germany, for instance, the function to supervise undeclared work was transferred to the Federal Ministry of Finance in 2002 and 1991, respectively. The 2013 ILO Study we refer here is available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---lab\\_admin/documents/publication/wcms\\_220021.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_220021.pdf).

<sup>6</sup>idem

<sup>3</sup>See supra, page 96.

<sup>4</sup>See <http://ec.europa.eu/social/main.jsp?catId=706&intPageId=2983&langId=en>.

with other relevant authorities to prevent, identify and remedy such cases. The ILO notes that the credibility of any inspectorate depends to a large extent on its ability to advise employers and workers on the most effective means of complying with the legal provisions within its remit in all areas. However, consider the study, it also depends on the existence and implementation of a sufficiently efficient labour inspection system<sup>7</sup>.

As for the European Council, this body has posted on its web page a short information that announces that the Commission proposed the creation of a European platform against undeclared work on 9 April 2014. The platform will bring together the Commission, social partners and EU national authorities in charge of combating undeclared work, such as labour inspectorates and social security authorities. They will exchange information and best practices on fighting against undeclared work. The platform will also promote training for staff from various countries and identify common principles for inspections. What is interesting in this post is that there are the negative effects of the undeclared work such as: (1) for workers, it's said, undeclared work translates into lower pension rights, less access to healthcare, poor working conditions and potential breach of employment rights, (2) for businesses it creates unfair competition since companies that do not declare their workers gain an unfair advantage and (3) for governments, it means lost tax and social security revenue.

The Commission takes into consideration that the fight against undeclared work belongs to the member states. Nevertheless, creating a common platform to ease the co-operation between member states in fighting

undeclared work - who tends to take an over-broad dimension - represents a step to a centralizing policy in the matter.<sup>8</sup>

## 2. Romanian National background

In Romania, The Law 108/1999 regarding the establishment and organization of labour inspections regulates that the Labour Inspection is an authority of the state central administration, under the subordination of the Labour Ministry<sup>9</sup>. The main characteristic of this institution is that it has its own juridical personality – that means it can represents itself – and has under subordination, in its own turn, the labour inspectorates that are organized at county level.

According to the Article 1 (4) and Article 5 of the Law 108/1999, “the Labour Inspection acts in order to ensure the social protection of labour, based on the provisions of art. 41 of the Constitution of Romania, republished, and, respectively, the provisions of International Labour Organization Convention No. 81/1947 concerning labour inspection in industry and commerce, which has been ratified by the State Council Decree No. 284/1973 and the Convention of the International Labour Organization No. 129/1969 on labour inspection in agriculture, ratified by the Decree of the State Council No. 83/75. The Labour Inspectorate performs the following general functions:

a) as State authority, to ensure the exercise of monitoring compliance with the legal provisions in its fields of competence;

<sup>8</sup>See <http://www.consilium.europa.eu/en/policies/labour-mobility/platform-against-undeclared-work/>

<sup>9</sup>Now, the Ministry of Labour, Family, Social Protection and Elderly.

<sup>7</sup>idem

b) communication, ensuring the exchange of information with the authorities of Central and local public administration, as well as natural and legal persons subject to inspection work, inform them and citizens on how they respect and apply the provisions of the legislation in the areas of competence;

c) representation, ensuring, on behalf of the Romanian Government and the Romanian Government, representation of internally and externally in its areas of competence;

d) training, which is achieved through training and further training of its staff, in accordance with the law;

e) cooperation, ensuring the pursuit of collective action, domestically and internationally, in the fields of competence;

f) administration, to ensure the management of the assets in the public domain, i.e. private State or, as the case may be, of the administrative-territorial units of the administration or the use, of the funds allocated for the purpose of functioning according to the law, and organizing and managing the information systems necessary for their own activities.”

In Romania, the legal system is relying on the written form of the labour contract. As such, the national law is regulating that all employees<sup>10</sup> must have concluded the written form of the labour contract before the

work is coming to be performed<sup>11</sup>. The work performed by up to 5 workers without a written labour contract concluded for each is considered an undeclared work and is punished with a fine<sup>12</sup>. What overpasses the 5 person limit is considered an felony and is sanctioned under the Penal Code. Supplementary, the Labour Code punishes with a fine the person who performs undeclared work, so the legal system fights on both directions, sanctioning both employer and employee.

The policy of the state regarding the way the undeclared work is tackled is in continuous change, due to the intervention of the national bodies among the courts are playing an important role. For example, in a Decision of the High Court issued in 2016 is concluded that “the regulation, to the labour code, of the rules on proof of legal relationship can work and method of use thereof to

<sup>11</sup> See article 16 (1) – (3) of the Labour Code – Law 53/2003, where is regulated that the individual labour contract shall be concluded on the basis of consent of the parties, in written form, in the Romanian language. The obligation to conclude individual labour contract in written form belongs to employer. The written form is required for the conclusion of the contract valid. Prior to the commencement of the work, the individual labour contract shall be registered in the general register of employees, which shall be sent to the territorial Labor Inspectorate. The employer is obligated, prior to the commencement of the activity, to give the employee a copy of the contract of employment.

<sup>12</sup> See article 260 (1) e) of the Labour Code, where is regulated that to work up to 5 people without the conclusion of an individual labour contract, concluded in accordance with art. 16. (1) is considered contravention and must be sanctioned by a fine from 10,000 to 20,000 lei lei for each identified person.

<sup>10</sup> We mean here of those who have the juridical relations regulated by the Labour Code. Others that are under a special Law, should have the form regulated by that Law.



establish internship contribution in social insurance law has experienced a certain evolution, as follows: Until 3 April 2011 (date of entry into force of law No. 40/2011 for the modification and completion of the law No. 53/2003 on the labour code), the written form of the contract of employment was required *ad probationem* (article 64 of law No. 10/1972 on labor code of the Socialist Republic of Romania, with subsequent amendments and additions to article 16 of law No. 53/2003-labour code the previous amendment of law No. 40/2011). Thereafter, written form of the contract of employment is provided for *ad validitatem* (article 16 of law No. 53/2003 on the labour code, which took place after the amendment of law No. 40/2011 in force and currently). Therefore, by the year 2011, the legal relationship of employment could be proven with documents, but also with any other means of proof. According to the adopted legislation in matters of social security, by 1 April 2001, the date of entry into force of law No. 19/2000, length of period of contribution was (article 9 of law No. 3/1977 on the pensions of State social insurance and social assistance, as amended, paragraph 1, and article 160. (5) and article. 161 of the Law nr. 19/2000, as amended and supplemented). Thereafter, the qualifying period of contribution shall be calculated in proportion to the contributory period (art. 8 of the law No. 19/2000, as amended and supplemented, art. 19 para. (1) of Law No. 263/2010, with subsequent amendments and additions). In conclusion, for the period worked prior to the date of entry into force of law No. 19/2000, i.e. April 1, 2001, recognizing seniority in the workplace takes effect in respect of qualifying period of contribution of the insured person. The reasoning of previous relevant

legislation was picked up in the same terms, and in accordance with law No. 263/2010 with amended and supplemented, in accordance with art. 391. (1) (a). a). After April 1, 2001, constitutes contributory period those periods of contribution of the insured persons".<sup>13</sup>

For that reason, the national policy must rely now also on the fact that undeclared work is affecting the recognition of the contributory periods that are used in establishing the right to pensions, health and unemployment indemnities. The fact that the person who works in an undeclared labour relationship loses its rights to further social benefits must be highlighted in the state policy that prevents this phenomenon.

### 3. Some considerations on the subject

Taking into consideration what we had in mind with this research, as well as European and national level of the phenomenon, we must agree that tackling undeclared work must include the new effects that this phenomenon implies, as well as the continuous reasons why the parties in a labour relation are regarded when choosing this form. For that reason, the improvement of the way the public money is spent and the increase of the public trust in the public procurement, the improving of the fight against corruption and illegal activities and improvement of the transnational cooperation must be issues that should be introduced in general perspective of the fight against undeclared work.

<sup>13</sup> See point 19 of the Romanian High Court 2/2016.

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