6th Annual Legal Seminar
European Labour Law Network

Undeclared Work

Seminar Report

17 + 18 October 2013
Venue: Radisson Blu – Frankfurt/Main Germany
The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-28, EFTA and EU candidate and pre-candidate countries.

The Programme has six general objectives. These are:

(1) to improve the knowledge and understanding of the situation prevailing in the Member States (and in other participating countries) through analysis, evaluation and close monitoring of policies;

(2) to support the development of statistical tools and methods and common indicators, where appropriate broken down by gender and age group, in the areas covered by the programme;

(3) to support and monitor the implementation of Community law, where applicable, and policy objectives in the Member States, and assess their effectiveness and impact;

(4) to promote networking, mutual learning, identification and dissemination of good practice and innovative approaches at EU level;

(5) to enhance the awareness of the stakeholders and the general public about the EU policies and objectives pursued under each of the policy sections;

(6) to boost the capacity of key EU networks to promote, support and further develop EU policies and objectives, where applicable. For more information see:

http://ec.europa.eu/employment_social/progress/index_en.html

The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.
Dear Reader,

Please, find herewith an account of the 6th Annual Legal Seminar of the European Labour Law Network (ELLN) that took place on 17 + 18 October 2013 in Frankfurt/Main Germany.

This report consists of presentations, speeches and background documents as used during the Seminar as well as discussion notes of the working group discussions.

The content of the report is the sole responsibility of the ELLN.

Prof. Dr. Bernd Waas  
Professor of Civil, Labour and Comparative Law  
Goethe University Frankfurt, Germany  
Co-ordinator ELLN Network

Prof. Dr. Guus Heerma van Voss  
Professor of Labour and Social Security Law  
University of Leiden, the Netherlands  
Assisting Expert ELLN Network

November 2013
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### PROGRAMME

6th Annual Legal Seminar European Labour Law Network

#### “Undeclared Work”

17 + 18 October, 2013  
Venue: Radisson Blu – Frankfurt / Main Germany

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<th>Time</th>
<th>Event</th>
</tr>
</thead>
</table>
| 14.00 – 14.30 | **Arrival of Participants**  
Registration and Refreshments                                           |
| 14.45 – 15.20 | **Opening & Welcome**  
**Prof. Bernd Waas** – Goethe University Frankfurt, Germany  
**Ms. Muriel Guin** – European Commission                               |
| 15.25 – 15.45 | **General Introduction**  
**Prof. Colin Williams** – Sheffield University, United Kingdom         |
| 15.45 – 16.15 | **Undeclared Work: An activity-based legal typology**  
Keynote speech by **Prof. Edoardo Ales** – University of Cassino, Italy |
<p>| 16.15 – 16.45 | Reflection by <strong>Prof. Polonca Končar</strong>, University of Ljubljana, Slovenia |
| 16.45 – 17.00 | <strong>Photo session in foyer for ELLN members and staff, coffee break</strong>    |
| 17.00 – 18.15 | <strong>Moderated working groups 1-4</strong>                                      |
| 19.30 – 22.00 | <strong>Aperitif &amp; Dinner at the Radisson Blu</strong>                             |</p>
<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>08.45 – 09.00</td>
<td>Registration</td>
</tr>
<tr>
<td>09.00 – 09.30</td>
<td>Undeclared Work: Possible sanctions on closer examination Keynote speech by Prof. Bernd Waas, Goethe University Frankfurt, Germany</td>
</tr>
<tr>
<td>09.30 – 10.00</td>
<td>Reflection by Prof. Leszek Mitrus, Jagiellonian University Krakow, Poland</td>
</tr>
<tr>
<td>10.00 – 11.15</td>
<td>Moderated working groups 1-4</td>
</tr>
<tr>
<td>11.15 – 11.30</td>
<td>Coffee Break</td>
</tr>
<tr>
<td>11.30 – 12.00</td>
<td>Transnational aspects of undeclared work and the role of EU legislation Keynote speech by Prof. Sonia McKay – London Metropolitan University, United Kingdom</td>
</tr>
<tr>
<td>12.00 – 12.30</td>
<td>Reflection by Prof. Ludwik Florek – University of Warsaw, Poland</td>
</tr>
<tr>
<td>12.30 – 13.30</td>
<td>Lunch</td>
</tr>
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<td>13.30 – 14.45</td>
<td>Moderated working groups 1-4</td>
</tr>
<tr>
<td>14.45 – 15.00</td>
<td>Coffee Break</td>
</tr>
<tr>
<td>15.00 – 15.45</td>
<td>Discussion Discussion with Sam Hägglund, General Secretary, European Federation of Building and Woodworking (EFBWW) and Jan Willemen, Vice-President SOC, European Construction Industry Federation (FIEC)</td>
</tr>
<tr>
<td>15.45 – 16.00</td>
<td>Closing Mrs. Muriel Guin – European Commission Prof. Bernd Waas</td>
</tr>
</tbody>
</table>
1. General Summary and Conclusions of the Seminar

The European Labour Law Network (ELLN) was established in 2005. Its first activity started with the composition of a Study Group on a Restatement of European Labour Law. In December 2007 the ELLN acquired a second task as it was assigned a contract with the European Commission – Directorate General for Employment, Social Affairs and Equal Opportunities. Under this contract, the ELLN forms the European Network of legal experts in the field of Labour Law, dealing with both individual and collective rights/aspects (the Network). This Network advises the European Commission regarding developments of individual and collective labour law and consists of thirty legal National Experts (covering all European Members States and EEA countries), and a Scientific Committee of seven legal experts.

In this framework, the Network organises every year a seminar with the aim to promote an open discussion on a specific topic between experts in the field of labour law, social partners and representatives from other organisations involved in labour law.

This year’s Annual Legal Seminar took place in Frankfurt am Main, Germany at Radisson Blu on 17 + 18 October 2013 and had 165 participants. Originally there had been 184 registrations.

The theme of this year’s Seminar was “Undeclared work”.

The programme was divided into five main sessions:

1. General Introduction to the theme of the Seminar
2. Undeclared work: An activity-based legal typology
3. Undeclared work: Possible sanctions on closer examination
4. Transnational aspects of undeclared work and the role of EU legislation
5. Discussion with Sam Hägglund, General Secretary, European Federation of Building and Woodworking (EFBWW) and Johan Willemen, Vice-President SOC, European Construction Industry Federation (FIEC)

Topics 2, 3 and 4 were introduced by a keynote speaker, and reflected upon by three other speakers; these three sessions were concluded by a working group discussion.

During the fifth session, two members discussed their practical experience with issues of undeclared work.
Speakers
In order to further develop the topics as mentioned above, both distinguished academic experts and practitioners were invited to introduce the programme sessions by giving either keynote speeches on the topic or reflections on these keynote speeches.

The first session was held by:
- **Prof. Colin Williams** – Sheffield University, United Kingdom

The second session was introduced by:
- **Prof. Edoardo Ales** – University of Cassino, Italy

A reflection was given by:
- **Prof. Polonca Končar** – University of Ljubljana, Slovenia

The third session was introduced by:
- **Prof. Bernd Waas** – Goethe University Frankfurt, Germany

A reflection was given by:
- **Prof. Leszek Mitrus** – Jagiellonian University Krakow, Poland

The fourth session was introduced by:
- **Prof. Sonia McKay** – London Metropolitan University, United Kingdom

A reflection was given by:
- **Prof. Ludwik Florek** – University of Warsaw, Poland

The fifth session was held by:
- **Sam Hägglund**, General Secretary, European Federation of Building and Woodworking (EFBWW) and **Jan Willemen**, Vice-President SOC, European Construction Industry Federation (FIEC)
Apart from the speakers (5x external) and members and staff of the Network (45x), the following types of attendees were represented: representatives of the Ministries (31x), Permanent Representations of the Members States (1x), Social Partners (19x), representatives of the European Commission (4x), ILO (1x), EELA (1x), Eurofound (1x), EELJ (1x), and other (academic) experts in the field of labour law (33x). Due to this year’s subject representatives of Labour Inspectorates and other national authorities dealing with “Undeclared Work” attended (23x). In total, 33 countries were represented: The EU Member States, the 3 further EEA States, Turkey and Russia. 25 of the EU Member States sent all together 55 officials. Compared to 2010-2012, where 18-22 participants came from Ministries, the number of representatives from Ministries alone was increased by at least 41%.

**Overall conclusions**

The Annual Legal Seminar discussed three important subjects.

The first was the legal typology of undeclared work.

Prof. Ales provoked the discussion with the thesis that to describe the multifaceted socio-economic phenomenon of undeclared work, a typology based on ‘paid activity’ is required rather than traditional legal concepts.

It was discussed that some countries do have more problems with undeclared work than others. And not always it is a problem to have undeclared work: almost everybody sometimes has worked in it. There is also a grey area of ‘underdeclared’ or ‘misdeclared’ work that makes the problem more diffuse. However, the recent economic crisis has opened the door for phenomena as ‘bogus self-employment’, fragmentised work and ‘envelop wages’. The relative importance of undeclared work may have increased.

In spite of the differences, all Member States of the European Union (and European Economic Area) share the problem how to construct the system of labour law such that undeclared work can be combatted. Various countries have for this purpose created new types of labour relationships in between the employment contract and independent work (f.i. Germany, Italy, UK). However, fear was expressed that this could be used to dismantle labour protection rather than improve it. Legal certainty is also not created by certification (Italy), since this creates new problems.
Complexity and stringency of the system of registration do not always prove to be helpful (Belgium, Spain, Lithuania, Latvia).

The situation also differs from country to country in relation to the economic situation. Labour costs are an important factor. It is also important to inform the workers well of their interest in long-term protection, for instance saving for pensions.

The second item was sanctions. The discussion on possible sanctions was opened by prof. Waas who advocated a wide notion of sanctions, including for instance the use of civil law besides administrative and criminal law. The participants agreed that sanctions should form a mixture of preventive and repressive actions and should cover all possible parts of the law. The preventive approach was supported, but incentives cost also money as well and monitoring and controlling them.

It was considered important to have a sophisticated system with incentives for good behaviour (carrot) as well as sanctions on bad (stick). The government must be active in prevention, monitoring, evaluation and enforcement. Even in countries where social partners can play an effective role in the work place (Sweden), the government has to enforce for instance tax regulations. In the UK a pay helpline is useful. The amount of labour inspectors is still important (ILO). It is also necessary to distinguish the various sectors in which undeclared work takes place (from high-tech to marginal work) and find specific solutions per branch of industry. For instance, undeclared work in private households is specifically difficult to tackle. In some branches, like constructing, chain liability may be effective (Italy, Norway). The government should not prevent organisation of self-employed like in Ireland.

The sanctions in various countries are different. In some contracts it leads to nullity of the contract (Germany and Austria), while in others it does not or only in more specific cases of criminal activities. Sometimes tax and social security sanctions are more effective than labour law sanctions. However, also civil law measures can be successful. For instance the presumption of an employment contract if a person works for another person for a defined period (the Netherlands). In criminal law the possibility was mentioned that the employer is considered to be engaged in criminal activity in case he employs five undeclared employees (Romania). In administrative law,
some countries exclude certain employers from tenders or cancel certain benefits for them (France, Germany). In Belgium and Austria the system of ‘service vouchers’ in domestic work seems to work quite well. The Norwegian system of ID-cards in the building industry proves to be effective. This last system was also advocated by both sides of the European social partners in the building industries during a panel discussion.

The ‘floor of rights’ approach was also mentioned in order Other proposals consisted of ‘blacklisting’ or banning companies from government contract who do employ undeclared workers, publication of the names of offenders, involvement of social partners, targeting end users, and TV campaigns to inform workers of their rights.

The last topic of the conference dealt with the transnational aspects of undeclared work and the role of EU legislation.

Prof. Mc Kay introduced this theme with a focus on three areas: informal posting, third country nationals and cross-border informal work.

In the discussions the negative link between migration, undeclared work and social exclusion was illustrated. For cross-border worker the right to reside in the country is a major obstacle. In order to claim their rights it is necessary that migrant workers can profit from social security benefits on the short-term. Women workers are more vulnerable in this respect in the private households, though male workers in the IT-sector are confronted with bogus self-employment. The developing of alternatives for the standard employment contract can specifically bring migrant workers in a weaker position. On the other hand, a stronger position according to traditional labour arrangement may harm their chances to receive the standard employment contract and an increase of illegal work can be the result. This makes the need for formulating minimum standards and a ‘floor of rights’ more urgent. A serious concern are interns working unpaid or for low wages in several countries. ILO-Convention no. 177 on Home work did not have much impact yet.

The possibilities for EU measures were judged differently: some discussants argued that it is impossible to harmonise labour law sanctions, while others stressed the urgency to do this. Some discussants stressed the differences between the countries. Arguments in favour are that the same problems with the quality of work exist in all countries: everybody needs social security and every worker should be able to become a legal worker. According to this approach a level field of
at least minimum protection, like the so-called ‘floor of rights’ in the social field, could prevent abuse of the common market in avoiding the application of national rules which protect workers.
2. General Introduction

2.1 Introduction Presentation by Prof. Colin Williams

Welcome to the 6th Annual Legal Seminar of the European Labour Law Network (ELLN)

Tackling undeclared work: An introduction
Professor Colin C. Williams
University of Sheffield, UK

Outline

• Definition of undeclared work
• Extent and nature in the European Union
• Explanations/theorisations
• Tackling undeclared work in Europe
  – Possible policy approaches
  – Existing policy approaches
• Future ways forward

Definition of undeclared work

• Any paid activities that are lawful as regards their nature but not declared to the public authorities, taking into account the differences in the regulatory system of Member States (European Commission, 2007: 2)
  – Not declared to the public authorities for:
    • Tax purposes
    • Social security purposes
    • Labour law purposes

Magnitude of undeclared work

• How big is the undeclared economy?
• Nobody knows
• Estimates range from 2% - 38%
  – Indirect versus direct methods

Size of undeclared economy as % of GDP, 2012 (Schneider, 2012)
Nature of undeclared work

- Begun to unravel diversity of undeclared work:
  - Waged employment vs. self-employment
  - Different forms of undeclared waged employment
    - Undeclared waged employment
    - Under-declared waged employment: envelope wages
  - Different forms of undeclared self-employment
    - Hidden enterprise culture: informal entrepreneurship
    - Commercial versus social entrepreneurship
    - Paid favours

Participation rates in undeclared and under-declared work, %

<table>
<thead>
<tr>
<th>Type</th>
<th>% of all undeclared work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undeclared waged employment</td>
<td>20</td>
</tr>
<tr>
<td>Self-employment for family, friends, neighbours &amp; acquaintances</td>
<td>55</td>
</tr>
<tr>
<td>Self-employment for other private persons of households</td>
<td>20</td>
</tr>
<tr>
<td>Other/don’t know/refusal</td>
<td>5</td>
</tr>
</tbody>
</table>

Under-declared work/envelope wages

- 5% of employees receive envelope wages
- Receive 43% of their gross income as undeclared earnings

Undeclared wage paid as remuneration for:
- Regular work 29%
- Overtime/extra work 27%
- Both regular & overtime work 36%
- Refusal/don’t know 8%

Explanations/theorizations

- Modernisation explanations
  - Residue/leftover; enclaves; disappearing
- Structuralist explanations
  - Economic necessity; survival; neo-capitalism
- Neo-liberal explanations
  - Choice; rational economic actors
- Post-structuralist explanations
  - Choice; social actors; identity

Motives of suppliers

<table>
<thead>
<tr>
<th>Motive</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Could not find a job</td>
<td>16%</td>
</tr>
<tr>
<td>Person acquiring it insisted on non-declaration</td>
<td>12%</td>
</tr>
<tr>
<td>Were able to ask for a higher fee for work conducted</td>
<td>5%</td>
</tr>
<tr>
<td>Taxes and/or social security contributions too high</td>
<td>13%</td>
</tr>
<tr>
<td>Both parties benefited</td>
<td>47%</td>
</tr>
<tr>
<td>Bureaucratic tape to work formally is too complicated</td>
<td>8%</td>
</tr>
<tr>
<td>State does not do anything for me, so why should I pay taxes</td>
<td>5%</td>
</tr>
<tr>
<td>Just seasonal work and not worth declaring it</td>
<td>23%</td>
</tr>
<tr>
<td>Working undeclared is common in region/sector so there is no alternative</td>
<td>16%</td>
</tr>
</tbody>
</table>

Tackling undeclared work

- Who is responsible for tackling undeclared work?
- Potential policy approaches
- Existing policy approaches

Who is responsible for tackling it? directions of change

Tax

Labour law

Social security

North

West

South

East
**Possible broad policy approaches**

- Do nothing/laissez-faire
- Eradication
- De-regulation
- Facilitating formalization
- In practice, facilitating formalization being advocated in Europe

**Facilitating formalization:**

- **Sticks/negative reinforcement**
  -  Candles/positive reinforcement
  - Combining sticks and carrots

**Typology of policy approaches**

<table>
<thead>
<tr>
<th>Approach</th>
<th>Method</th>
<th>Measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard: compliance: deterrent</td>
<td>Improvement</td>
<td>Deterring the unregarded (enforcement)</td>
</tr>
<tr>
<td>Hard: compliance: incentive</td>
<td>Promotion</td>
<td>Increasing opportunities for compliance</td>
</tr>
<tr>
<td>Soft: commitment</td>
<td>Trust</td>
<td>Supporting the desire for outcomes</td>
</tr>
</tbody>
</table>

**‘Hard’ approach: Deterrence measures**

<table>
<thead>
<tr>
<th>Measures</th>
<th>% Selection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penalties</td>
<td>87</td>
</tr>
<tr>
<td>Use of administrative sanctions for purchasers/companies</td>
<td>85</td>
</tr>
<tr>
<td>Use of direct sanctions for suppliers/employees</td>
<td>74</td>
</tr>
<tr>
<td>Use of indirect sanctions for suppliers/employees</td>
<td>62</td>
</tr>
<tr>
<td>Measures to promote detection</td>
<td>63</td>
</tr>
<tr>
<td>Workplace inspections</td>
<td>100</td>
</tr>
<tr>
<td>Registration oflicht and monitoring work at work places</td>
<td>74</td>
</tr>
<tr>
<td>Coordination of activities across government</td>
<td>57</td>
</tr>
<tr>
<td>Codetermination, model contracts etc</td>
<td>60</td>
</tr>
<tr>
<td>Use of peer to peer sanctions (e.g. employee collective)</td>
<td>59</td>
</tr>
<tr>
<td>Coordination of activities across government</td>
<td>53</td>
</tr>
<tr>
<td>Coordination of data sharing across government</td>
<td>65</td>
</tr>
</tbody>
</table>

**‘Hard’ approach: Preventative incentives**

<table>
<thead>
<tr>
<th>Measures</th>
<th>% Selection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reducing the regulations</td>
<td>88</td>
</tr>
<tr>
<td>Safeguard procedures for compliance to existing regulations</td>
<td>87</td>
</tr>
<tr>
<td>Technological innovation to prevent underemployment</td>
<td>83</td>
</tr>
<tr>
<td>Initiating new categories of work</td>
<td>87</td>
</tr>
<tr>
<td>Hard: direct sanctions</td>
<td>87</td>
</tr>
<tr>
<td>Use of social security incentives</td>
<td>85</td>
</tr>
<tr>
<td>Initiatives to ease transition from unemployment into self-employment</td>
<td>85</td>
</tr>
<tr>
<td>Initiatives to ease transition from self-employment into employment</td>
<td>83</td>
</tr>
<tr>
<td>Changing minimum wage upwards</td>
<td>88</td>
</tr>
<tr>
<td>Changing minimum wage downwards</td>
<td>82</td>
</tr>
<tr>
<td>Changing support to business start-ups</td>
<td>85</td>
</tr>
<tr>
<td>Microfinance to business start-ups</td>
<td>82</td>
</tr>
<tr>
<td>Supporting peer to peer networks/alternative</td>
<td>81</td>
</tr>
<tr>
<td>Innovating supply chain responsibility</td>
<td>87</td>
</tr>
</tbody>
</table>

**‘Hard’ approach: Curative incentives**

<table>
<thead>
<tr>
<th>Measures</th>
<th>% Selection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Measures to encourage purchasers to select formal goods and services</td>
<td>35</td>
</tr>
<tr>
<td>Service vouchers</td>
<td>35</td>
</tr>
<tr>
<td>Targeted direct incentives (e.g. incentives to reduce informal employment)</td>
<td>41</td>
</tr>
<tr>
<td>Targeted indirect incentives (e.g. VAT reductions)</td>
<td>17</td>
</tr>
<tr>
<td>Measures to stimulate suppliers/formalization</td>
<td>9</td>
</tr>
<tr>
<td>Individual-level incentives for formally disclosing undertakentactivity</td>
<td>17</td>
</tr>
<tr>
<td>‘Formalization’ advice to business</td>
<td>30</td>
</tr>
<tr>
<td>Targeted VAT reductions</td>
<td>17</td>
</tr>
<tr>
<td>Provision of record-keeping software to businesses</td>
<td>15</td>
</tr>
<tr>
<td>Provision of record-keeping software to businesses</td>
<td>27</td>
</tr>
<tr>
<td>Provision of record-keeping software to businesses</td>
<td>27</td>
</tr>
<tr>
<td>Gradual formalization schemes (e.g. wage agreements)</td>
<td>13</td>
</tr>
</tbody>
</table>
### ‘Soft’ approach: Commitment measures

<table>
<thead>
<tr>
<th>Measure</th>
<th>% of nations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Campaign to inform undeclared workers of risks of undeclared work</td>
<td>63</td>
</tr>
<tr>
<td>Campaign to inform undeclared workers of benefits of declared work</td>
<td>57</td>
</tr>
<tr>
<td>Campaign to inform workers of risks and costs</td>
<td>61</td>
</tr>
<tr>
<td>Campaign to inform workers of benefits of declared work</td>
<td>52</td>
</tr>
<tr>
<td>Use of normative appeals to people to declare their activities (incentives)</td>
<td>52</td>
</tr>
<tr>
<td>Measures to change perceived fairness of system</td>
<td>26</td>
</tr>
<tr>
<td>Measures to improve procedural justice</td>
<td>27</td>
</tr>
<tr>
<td>Measures to improve social security/labour law knowledge</td>
<td>40</td>
</tr>
<tr>
<td>Adoption of commitment rather than compliance approach (i.e., ‘responsive regulation’)</td>
<td>20</td>
</tr>
<tr>
<td>Campaigns to encourage a culture of commitment to declaration</td>
<td>19</td>
</tr>
</tbody>
</table>

### Relative importance given to different policy measures

<table>
<thead>
<tr>
<th>Type of Measure</th>
<th>Most Important</th>
<th>2nd Most Important</th>
<th>Least Important</th>
</tr>
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<tbody>
<tr>
<td>Deterrence</td>
<td>57</td>
<td>17</td>
<td>16</td>
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<tr>
<td>Preventative incentives</td>
<td>19</td>
<td>46</td>
<td>23</td>
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<tr>
<td>Curative incentives</td>
<td>14</td>
<td>19</td>
<td>32</td>
</tr>
<tr>
<td>Commitment</td>
<td>10</td>
<td>18</td>
<td>29</td>
</tr>
</tbody>
</table>

### Policy measures viewed as most and least effective by national stakeholders

<table>
<thead>
<tr>
<th>Type of Measure</th>
<th>Most Effective</th>
<th>2nd Most Effective</th>
<th>Least Effective</th>
</tr>
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<tbody>
<tr>
<td>Deterrence</td>
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<td>13</td>
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<tr>
<td>Preventative</td>
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<td>Curative</td>
<td>15</td>
<td>27</td>
<td>31</td>
</tr>
<tr>
<td>Commitment</td>
<td>10</td>
<td>19</td>
<td>44</td>
</tr>
</tbody>
</table>

### Which approaches are most effective?

- Little systematic evaluation of the effectiveness of different policy measures
- Little systematic sharing of knowledge on ‘good practice’
- Outcome: poverty of knowledge on what works and what does not

### Ways forward: 7 issues

2. Need for more extensive evaluation of policy measures
   - Evaluate in terms of objectives they set themselves
   - Use common units of evaluation (e.g., return/cost ratio)?
3. Need to understand which policy measures are most effective in various contexts
4. Need to understand what combinations and sequences of policy measures are most effective in various contexts
5. Need to understand which policy measures are most effective in various contexts
6. Little attention to ‘commitment’ rather than ‘compliance’ approach
7. Need to develop more nuanced tailored approaches that take account of varying motives for participation and barriers to formalization

### Thank you for listening
3. Keynote Presentations and Reflections

3.1 Keynote presentation by Prof. Edoardo Ales

Undeclared work: An activity-based legal typology

Professor Edoardo Ales
University of Cassino and Southern Lazio, Italy

1. Definition of undeclared work
- Undeclared work is duly defined as ‘any paid activity that is lawful as regards its nature (i.e. is not criminal) but not declared to public authorities, taking into account differences in the regulatory system of Member States’ (COM(1998) 219 final).
- An activity-based definition is used because it allows for the inclusion of forms of undeclared work that are popular in Europe and which are excluded in enterprise and/or jobs-based definitions’ (Williams and Renney, 2008)

2. Aims of the presentation
- Conceptualise ‘paid activity’;
- Identify active and passive registration and declaration duties, their object, general and specific purpose and the public authorities involved;
- Typify the breaches of legal duties of registration and/or declaration, referring them to the juridical or physical person performing each activity.

3. Conceptualising paid activity (I)
- The concept of paid activity is multifaceted
  - Two main typologies:
    - Business: Carried out by a juridical person (a company), usually in the form of a small enterprise;
    - Work activity: Performed by a physical person (a worker) within the scope of either a self-employed or an employed relationship.
  - It is not easy to draw a clear-cut distinction between business and work activity, as well as between self-employment and employment relationships within work activities.

3. Conceptualising paid activity (II)
- Distinctions and definitions are crucial from a legal point of view:
  - Different duties of registration and/or declaration apply when qualifying paid activity as a business or work activity, as self-employed or employed;
  - The concept of paid activity changes in accordance with its qualification due to the differences in the branch of law or the different regimes within the given branch.

4. (Self-)qualification of paid activity (I)
- Each economic actor must decide, unilaterally or by agreement with another party, which legal model among those applicable in the relevant regulatory system corresponds to the given case (so-called self-qualification process).
- Different legal and financial responsibilities for both the providers and users of the paid activity apply to each self-qualification.
4. (Self-)qualification of paid activity (II)

- In some cases, self-qualification comes easy;
- In others, it may be disputed.
- In yet others, the weight of legal and financial responsibilities attached to the respective qualification may give rise to:
  - An inappropriate and more favourable self-qualification of the paid activity, resulting in a misdeclaration;
  - An absence of registration and/or declaration.

5. (Self-)qualification of paid activity: Disputed cases (I)

- Disputed cases:
  - Business can also be carried out by a physical person (an entrepreneur) who has established a small or medium enterprise and who combines her own work within the company with the organisation of paid activities performed by other juridical or physical persons.

5. (Self-)qualification of paid activity: Disputed cases (II)

- Work activity:
  - Disputed cases may arise from the increasing presence of work relationships to which, from a legal and/or socio-economic point of view, it is difficult to fully apply the rules governing the employment (labour law) or the self-employment (civil law) relationship.

6. (Self-)qualification of paid activity: General remarks

- Two general remarks on qualification:
  - A third typology of work activity has been introduced, coordinated self-employed or quasi-subordinated worker.
  - To resolve a disputed case, the certification of the labour contract can be requested by either party.

7. Branches of law applicable to each paid activity (I)

- The respective branch of law can be determined once the paid activity has been (self)-qualified.
  - Business: Company law - if performed by a physical person (entrepreneur), social security law may apply.
  - Self-employed: Civil law - in many cases, labour market regulations (with regard to the declaration duty) and social security law apply.
  - Coordinated self-employment combines labour and civil law provisions; special provisions of social security law apply.
  - Employed: Labour law and social security law apply.

7. Branches of law applicable to each paid activity (II)

- Generally, tax law applies to any paid activity and shall be declared to the tax authorities.
- Furthermore, any business (including self-employed persons) shall register with a trade authority, usually a Chamber of Commerce.
- Licenses and permits are often requested by various public or independent authorities.

8. Object and general purpose of registration and/or declaration

- The object of registration and/or declaration is the establishment, transformation, extension or termination of any paid activity.
- Registration and/or declaration duties of a paid activity serve four general purposes:
  - Employment policy and protection;
  - Social protection;
  - Start-up and transparency;
  - Taxation.
9. Specific aims of employment policy

- To remove the newly hired worker from the job seekers list.
- To initiate the job seeking process in case of termination of a work relationship by implementing, e.g., active labour market policies.
- To collect statistical data on (un)employment and (in)activity rates.

10. Specific aims of employment and social protection

- The aims of employment and social protection are implemented by:
  - Labour authorities (in some countries health authorities as well), through labour (health) inspections, who are in charge of monitoring the application of mandatory work regulations, be they of a statutory or of a contractual nature;
  - Social security bodies who are in charge of management and implementation of public or private mandatory social insurance or assistance schemes, often by using their own inspectors.

11. Active and passive registration and/or declaration duties attached to each paid activity (I)

- Business must register for start-up, transparency and taxation purposes and declare the establishment, termination, transformation or extension of any type of work activity for employment policy and protection, social protection and taxation purposes;
- Self-employment (if performed as a business) must register for transparency and start-up purposes and submit a self-declaration for social insurance and taxation purposes; it must declare the establishment, termination, transformation or extension of any type of work activity for employment policy and protection, social insurance and taxation purposes.

11. Active and passive registration and/or declaration duties attached to each paid activity (II)

- Coordinated self-employment or quasi-subordinated work must submit self-declaration for social protection and taxation purposes. The client must declare coordinated self-employment, for employment policy and protection, social insurance and taxation purposes;
- Employment must be declared by the employer for employment policy and protection, social insurance and taxation purposes.

12. Types of violations of registration and/or declaration duties

- Absence of registration and/or declaration of a paid activity.
- Partial declaration of a paid activity.
- Declaration as self-employment (also coordinated or quasi-subordinated) of an employment relationship.

13. Absence of registration and/or declaration (I)

- The notion of absence of registration and/or declaration is self-evident. It can refer to all paid activities:
  - Business
  - Self-employed
  - Coordinated self-employed
  - Employment
  - Beneficiaries of social security benefits.

13. Absence of registration and/or declaration (II)

- In the case of business, such a violation may consist either of:
  - Absence of registration and of declaration of any type of work relationship to the relevant public authorities; or
  - Registration without declaration of (or part of) any type of work activity to the relevant public authorities.

13. Absence of registration and/or declaration (III)

- In case of self-employment, violations may consist either of:
  - Absence of registration and (in case of business) of subsequent declaration of any type of work activity to the relevant public authorities; or
  - Registration (in case of business) without declaration of (or part of) any type of work activity to the relevant public authorities; or
  - Absence of self-declaration and (in case of business) of declaration of (or part of) any type of work relationship to the relevant public authorities.
**13. Absence of registration and/or declaration (IV)**

- In case of coordinated self-employment, violations may consist either of:
  - Absence of declaration by the client to the relevant public authorities;
  - Absence of self-declaration to social security bodies.

**13. Absence of registration and/or declaration (V)**

- In case of employment, violations may consist of an employer’s absence of declaration of the employee to the relevant public authorities.
- One specific case recently addressed by EU law is absence of notification by the employer of third country nationals as required by Art. 4(1)(c) Directive 2009/52/EC, which may conceal ‘illegal employment’ defined as “employment of an illegally staying third-country national” (Art. 2(1)(d) Directive 2009/52/EC).

**13. Absence of registration and/or declaration (VI)**

- In case of beneficiaries of social security benefits, violations may consist of absence of self-declaration of the paid activity performed by the beneficiary to the relevant benefits provider, despite entitlement to the benefit which usually excludes earning of any other income (Pieters, 2007).
- In case the beneficiary performs coordinated self-employed or employed activities, the client/employer agrees to omit declaration to the relevant public authorities.

**14. Partial declaration**

- Partial declaration refers to an activity (described as ‘grey work’, ‘under-declared work’ or ‘envelop work’) that is performed within the scope of a declared work (usually employed) relationship whilst the relevant public authorities are deceived as to its quantity in terms of revenue, earned income, worked hours, etc.

**15. Misdeclaration**

- Misdeclaration refers to a declaration as a business or as a self-employed (also coordinated or quasi-subordinated) relationship of a subordinated work activity (bogus self-employment, misdeclared work, Svarc system).
- When we look at the changes introduced in the regulatory system of work activities in some European countries, one could say that unethical business has assumed new forms of misdeclared work (e.g., VAT workers in Italy).

**16. Conclusions (I)**

- Only an activity-based legal typology is sufficiently articulate and accurate to describe the multifaceted socio-economic phenomenon of undeclared work.
- An activity-based approach reflects the urgent need of establishing a set of rights which must be applied to any paid activity, thus reducing the appeal to misdeclare work.

**16. Conclusions (II)**

- An interesting model is already provided by EU and national health and safety legislation which covers any paid activity, considering that the lack of healthy and safe working conditions is one of the most severe disadvantages of undeclared work.
- Further progress can be achieved in terms of entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, as referred to in Art. 34 of CFRUE.

**Thank you for listening**
3.2 Reflection by Prof. Polonca Končar

**Undeclared work: An activity-based legal typology**

**Reflection**
Professor Polonca Končar
University of Ljubljana, Slovenia

Basic features of the Slovenian law

- Covers the prohibition of undeclared work;
- In the Slovenian language, the terms “black work” and “black employment” are actually used.

Defining undeclared work

The following cases of performing an activity or work shall be deemed **undeclared work**:
- Legal entity pursues an activity that is not recorded in the register of companies or carries out an activity not defined in its constituent document or has no statutory documents relating to the fulfillment of the conditions for performing a registered activity;
- An entrepreneur pursues an activity that is not recorded in the relevant register.

Undeclared work

- A legal entity or an entrepreneur pursues an activity despite a temporary ban on carrying out such an activity;
- A foreign company carries out an activity without an appropriate permit and not through an affiliated company;
- An individual who is not registered or notified as stipulated by the Act carries out an activity or work.

Not considered undeclared work

- Mutual help between neighbours
- work on one’s own account
- emergency work
- humanitarian, charitable voluntary and aid work
- personal supplementary work.

Defining undeclared employment

**Undeclared employment** is deemed to occur when a legal entity or entrepreneur fulfilling the conditions for carrying out an activity:
- Fails to conclude an employment contract or a civil law contract on the basis of which work can be carried out, and fails to register a worker to the social security bodies;
- Employs an alien or a stateless person contrary to the regulations.
Undeclared employment:
- Allows a student to work without a student referral form issued by an authorized job-brokerage agency;
- Allows such a referral form to be used by another person;
- Illegally employs a third country national.

Undeclared employment:
The activity of a worker employed by an individual on his own account to carry out undeclared work is considered undeclared employment as well.

Not deemed undeclared employment:
- Short-term work
- Emergency work, humanitarian, charity, voluntary work.

1. Complex phenomenon (influenced by different actors; discussion from different viewpoints possible).
2. Different consequences - mainly negative:
   - Social dumping
   - Segmentation of labour market
   - Threat against human dignity
   - Negatively affects objectives of employment strategies at EU and national level.

1. Labour lawyers should pay more attention to the part of undeclared work which is submitted to rules governing the employment.
2. Special attention to different preventive measures intended to shift undeclared work into the realm of declared work is needed. They should not be misused or interpreted in the sense that they promote work outside the employment relationship. Work within the employment relationship should remain the priority form of work.

Prof. Ales claims: Undeclared work has been convincing defined.

My question: What about the ILO concept characterized by the use of the broader notion "informal economy"? Does it contain any elements that could be used to tackle "undeclared work"?

Thank you for listening
3.3 Keynote presentation by Prof. Bernd Waas

Undeclared Work: Possible sanctions on closer examination

Professor Bernd Waas
Goethe University Frankfurt, Germany

Undeclared work is defined as ‘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’.


Current state of research

- ORSEU: Developing personal and household services in the EU - A focus on housework activities, 2013: ‘Public measures supporting the demand-side have resulted in new jobs or physical persons performing each activity’.

A focus on sanctions

A. Civil law ‘sanctions’
B. ‘Atypical sanctions’ in criminal law and administrative offence law

What role for civil law?
Civil law vs public law.
Blurred boundaries: A feeling of unease:
→ Punitive/exemplary damages.
Civil law is open to the idea of sanctioning/preventing wrongdoing:
Section 134 Civil Code: ‘A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion’ (see also Art. 1184 Code Civil, Art. 1448 des Codicis Civile, Illegality Doctrine).

Freedom of contract within the boundaries of applicable law.

Unity and consistency of the law.

Purpose of fighting undeclared work

Does any form of wrongdoing within the scope of moonlighting result in nullity?

Purpose of fighting undeclared work (‘...unless the statute leads to a different conclusion...’)

→ Combating unemployment.
→ Protecting enterprises from predatory pricing.
→ Protecting customers from inferior performance.
→ Preventing losses in terms of tax revenue and social security contributions.

Consequences of partial nullity

Illicit worker remains bound by the contract.

Claim for performance can only be fulfilled when delegating the task to a law-abiding contractor.

V. Warranty claims

Problem: To hold that warranty claims are not affected by the nullity of the contract makes moonlighting attractive (and, in any event, largely free of risk).

Federal Civil Court: In principle, no warranty claims, but another result may be reached in an individual case by applying the principle of good faith.

VI. Non-contractual claims

Agency of necessity, torts, unjust enrichment (restitution)

Problems:

Condicio ob turpe vel iniustam causam: Plaintiff must be free from turpitude.

In case of a restitution claim: What amount can be claimed? The usual market price?

Condictio ob turpe vel iniustam causam

Section 817 of the Civil Code: ‘If the purpose of performance was determined in such a way that the recipient, in accepting it, was violating a statutory prohibition (...), then the recipient is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach (...).’

Illegality defence (in sentence 2): Nemo audittur turpitudinem suam allegans.
**Federal Civil Court: Section 817 sentence 2 to be interpreted narrowly as the customer shall not be allowed to keep a good or service without pay. Exclusion of contractual claims (apart from sanctions under public law) represents a sufficient means for sanctioning/preventing wrongdoing.**

But: How can it be that a contractor is allowed to have recourse to the courts in order to enforce his claim to pay even if he violated the law?

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**Scope of the claim**

**Scope of the claim to unjust enrichment**

Federal Civil Court: Calculation, in any event, not on the basis of the market price (the agreed price might have been far lower, no warranty claims).

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**Contracts of employment**

If undeclared work involves a contract of employment:

**Federal Labour Court:** Violation of statutory prohibition usually does not lead to comprehensive nullity, which would run counter to the need to protect the employee.

The Law Commission (UK): 'The employment contract is not like other contracts, given its role as a gateway to a host of statutory employment rights'.

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**Entitlement to sick pay**

**Accident during illicit work: Entitlement to sick pay?**

What if the accident that led to illness would have occurred even if all health and safety requirements had been met?

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**Illustration 1**

So-called Verfall (forfeiture) according to section 73 of the Penal Code: "If an unlawful act has been committed and the perpetrator acquired something in exchange for the act or out of it, the court shall order forfeiture of what has been acquired".

Possibility of skimmed profits arising from unlawful acts.

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**Forfeiture**

**One problem in this regard:** Is the perpetrator allowed to subtract 'expenditures'? In Germany, the ‘gross coverage principle’ applies to prevent profit-oriented crimes.
Forfeiture can contribute to levelling of the playing field between legal and illegal work.

Illustration 2

Exclusion from participation in a public tender.

Section 21 of the Act on Fighting Illegal Work: Exclusion from bidding for a construction contract for up to three years.

Possible legal objections

Legal objections might be unfounded, as social concerns are widely recognised as an admissible selection criterion for the award of public contracts.

However: The problem of possible ‘double penalties’ (ne bis in idem) exists.

Conclusions

Undeclared work can and should be sanctioned in civil law, but the consequences for the parties must be carefully thought through.

As regards criminal law and administrative offence law, attention should be paid particularly to sanctions other than fines and penalties.
3.4 Reflection by Prof. Leszek Mitrus

The fight against undeclared work: Sanctions and incentives

Professor Leszek Mitrus
Jagiellonian University Kraków, Poland

Outline of the speech

1. Undeclared work as a target of sanctions and incentives
2. Possible sanctions on closer examination
3. Possible incentives on closer examination
4. Conclusions

Undeclared work

- Any paid activity that is lawful as regards its nature (i.e., is not criminal) but not declared to public authorities, taking into account differences in the regulatory system of Member States;
- Registered employment: Decisive factor for enforcing rights related with work (e.g., employee rights, health care, social security).

Types of undeclared work

- A “side activity” performed by persons seeking additional income from time to time (e.g., babysitting, small repairs, etc.);
- Undeclared work on a regular basis as a major or only source of income (e.g., construction or agriculture sector);
- The real problem: The latter category.

Consequences of undeclared work

1. For an individual:
   - Erosion of employee rights, instability (precarious work);
   - Lack of proper social coverage, social exclusion.
2. For the social system as a whole:
   - Avoiding taxes and social security contributions; Budgetary problems, social dumping.
2. Possible sanctions on closer examination

1. Civil and labour law: Nullity of an employment contract is not an acceptable option.

2. Penal law: Offence against employee rights, employer should be subject to a fine.

3. Fiscal measures: Necessity to pay by an employer all taxes and contributions with interest.

- Other sanctions
  - Companies:
    - Exclusion from public procurement
    - Responsibility for subcontractors.
  - Persons carrying out undeclared work:
    - Loss of social benefits (e.g., unemployment allowance).

- Institutions involved
  - Various authorities and labour market actors:
    - Need for concerted action and cooperation
    - Access to information; Developing databases.
  - European level:
    - Common guidelines
    - Mutual learning process
    - Exchange of best practices.

- Considerations on sanctions
  - Response to violations already committed;
  - Remedy for negative consequences affecting a particular individual;
  - Sanctions are not suitable for resolving the problem of undeclared work in general.

- Incentives to discourage undeclared work
  - Global perspective, important for effectiveness of the entire social system
  - Legal framework provided by legislator
  - Fiscal measures
  - Awareness raising campaigns.

- Possible actions to be taken
  - Spreading information on effects of undeclared work;
  - Fiscal measures:
    - Reducing labour costs, tax allowances (e.g., “mini jobs” in Germany);
    - Diminishing discrepancies between various types of contracts (especially employment contract and civil law contract).
Modernising labour law

- Commission Green Paper of 2006 "Modernising labour law to meet the challenges of the 21st century":
  - Section 3f directly addresses negative effects of undeclared work.
  - Resolution of the European Parliament of 09.10.2008 on stepping up the fight against undeclared work: "appropriate training policy is a first step towards combating undeclared work" (point 72).

Social partners

- 4 July 2013: Commission launches consultation with social partners on prevention and deterrence of undeclared work, Art. 154(2) TFUE.
- Scope of consultation (i.a.):
  - Possibility, scope and objectives of action taken at European level;
  - Role of social partners,
  - Potential negotiations in the field of fighting undeclared work.

Europe 2020 Integrated Guidelines (I.a. employment policy)

- Council Decision 2003/578 on employment guidelines: Member States called on to undertake measures to transform undeclared work into regular employment (point 9);
- Council resolution of 29 October 2003 on transforming undeclared work into regular employment.

Considerations on incentives

- Intended to resolve the problem at the general level;
- Range of possibilities, broader scope of action in comparison to sanctions;
- Medium and long-term perspective (future-oriented measures), sometimes ad hoc measures.

4. Conclusions

- Comprehensive and long-term strategy is indispensable;
- Sanctions and incentives supplement each other; incentives should be given priority;
- Close cooperation between all authorities and labour market actors is a precondition of an effective fight against undeclared work.

Thank you for your attention 😊
3.5 Keynote presentation by Prof. Sonia McKay

**Focus**
- Informal posting of workers between Member States
- Third country nationals working without permission in informal sectors;
- Cross border informal work

**Context**
- Global trends favour temporary/circular migration
- Creating the conditions for undeclared work due to the temporary nature of their stay
- Undeclared work is not the consequence of crossing borders but is structural within MS labour markets
- Undeclared work appears to correlate with austerity measures

**Informal work, austerity and the crisis**
'The biggest dilemma especially during the economic crisis is that both employers and employees agree on precarious work, to avoid paying the full amount of taxes. Since there are no clear prospects about future pensions, many do not think about the future. Therefore Latvian society in general, according to regular sociological polls, massively supports work in the grey economy.’
(Respondent to Study on Precarious Work and Social Rights, 2013)

**Definition of undeclared work**
'Forms of employment that side-step the norms of employment regulations; the concept is taken to mean any paid activities that are lawful, as regards their nature, but not declared to the public authorities, bearing in mind differences in the regulatory system of Member States'

**Research findings**
- More equal societies have smaller undeclared economies than less equal ones (Williams and Renuzy, 2013)
- A reduction in labour inspection has also been identified as a factor increasing the volume of undeclared work.
- Cautious estimates suggest at least 1.5m to 3.8m undocumented migrants within the EU.
- Eurobarometer survey (2007) identifies specific sectors and migrants as involved in informal work.
**Informal work, sectors and precarious work**

- Retail
- Agriculture
- Construction
- Hotels
- Restaurants and cafes
- Domestic work

**Precarious work**
- Work subject to intense fluctuations
- Work that is mobile
- Inability to enforce rights
- Absence of social insurance protection
- Risks to health and safety
- Insecurity and insufficient income

**Workers at risk of precariousness**

<table>
<thead>
<tr>
<th>Group of workers perceived as being at risk of precarious work (% of survey responses)</th>
<th>Not precarious</th>
<th>Precarious</th>
<th>More precarious</th>
<th>Highly precarious</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undocumented migrants</td>
<td>2</td>
<td>2</td>
<td>6</td>
<td>85</td>
</tr>
<tr>
<td>Third country migrants</td>
<td>2</td>
<td>7</td>
<td>33</td>
<td>55</td>
</tr>
<tr>
<td>Women workers</td>
<td>2</td>
<td>11</td>
<td>43</td>
<td>40</td>
</tr>
</tbody>
</table>

  - Applies to all paid employees including expatriate employees (Art.1 and 4) – right to information and to access to remedies
  - However, exclusions impact on transnational workers and enforcement work:
    - Those without documents and potentially those whose work is undeclared where the contract is not enforceable
    - Those whose total employment relationship is less than a month
    - Those working fewer than eight hours or whose work is casual, justifying non-application

- Case law on 91/533/EC and transnational workers

  - Commission of the European Communities v Grand Duchy of Luxembourg C-445/03: requirement that service providers from another Member State had to obtain individual work permits for non-nationals whom it wished to deploy within a Member State was in breach of Art 49 of the Treaty and that workers were entitled to terms and conditions as established in the Member State in which they were originally engaged.
  - Joined cases C-388/86, C-502/86, C-522/88 to C-54/98 and C-386/98 to C-71/98: no prohibition on Member States imposing a requirement to improve the employment conditions of such workers where the local conditions were superior

- Employer sanctions Directive 2009/52/EC

  - Does not apply to third country nationals legally resident regardless of their right to work
  - Does not apply to those utilising free movement rights
  - Does not apply to posted workers
  - Applies to activities that are ‘or ought to be’ remunerated
  - Obliges employers to pay for work done and to make social security contributions (Art. 6)
  - Right to be informed about rights (Art.6)
  - Assumption of at least three months’ employment

- Directive 96/71 EC onposted workers

  - ‘A worker who, for a limited period of time, carries out his (or her) work in the territory of an EU Member State other than the State in which he (or she) normally works’ (Art.2)
    - Aims—to facilitate cross border working—provided there is an employment relationship
    - Excludes those who seek work of own accord
    - Does apply to third country migrants who are posted

- Case law on 96/71/EC and transnational workers

  - Wolff & Müller GmbH & Co. KG C-60/03: a national law that placed liability on the contractor in relation to securing that established terms and conditions was complied with, even where those terms and conditions were applied to workers posted by a sub-contractor from another Member State.

- Examples from POSTER project

  - Incomplete or non-declaration (the posting is correct but additional hours are not declared to the social security and the tax department in the country of origin, or the work is not declared at all);
  - Fake posting (falsified or forged A1/E101 certificates);
  - Front companies (though the contract is in reality executed in the host country, employment is through subsidiary companies established in other EU States); and
  - Undeclared posting, which can predominantly be seen as false self-employment, undeclared cross-border work and cross-border recruitment of temporary workers
6th ANNUAL LEGAL SEMINAR EUROPEAN LABOUR LAW NETWORK

KEYNOTE PRESENTATIONS AND REFLECTIONS

New enforcement directive 2012

- To set more ambitious standards to inform workers and companies about their rights and obligations;
- To establish clear rules for cooperation between national authorities in charge of posting;
- To provide elements to improve the implementation and monitoring of the notion of posting to avoid the multiplication of "letter-box" companies;
- To define the supervisory scope and responsibilities of relevant national authorities;
- To improve the enforcement of workers’ rights, including the introduction of joint and several liability for the construction sector for the wages of posted workers as well as the handling of complaints.

Limitations

- No proposal to cover undeclared work;
- Claim that raising significantly the level of protection may encourage abuses, circumvention of the rules and undeclared work;
- Raising significantly the level of protection of posted workers may increase abuses and circumvention of the applicable rules as well as undeclared work if not compensated by additional efforts regarding monitoring, controls and enforcement. Equal working conditions for local and posted workers will greatly reduce the flows of illegal posting.

The interplay between immigration and employment rights

- Process of cross border movement may result in workers who are less knowledgeable;
- More likely to be found in atypical forms of employment;
- Two approaches:
  - Deterrence – detection and punishment
  - Enabling – encourage compliance

False self-employment

- Transnational workers potentially drawn where direct employment is not permitted under immigration law;
- Relationship of unequal power;
- Offer of work dependent on a single source;
- Forced declarations of self-employment;
- May provide short-term benefits in the form of tax and social security contribution levels;
- Employer gains absolutely.

Conclusion: labour markets

- Structure of the labour market determines the level of undeclared work;
- Growth of new forms of work where transnational workers are over-represented;
- Tightening immigration controls;
- Widening gap between rich and poor countries;
- Austerity measures including reduction in inspection.

Conclusion: legal framework

- Legal framework based on standard employment relationship;
- Transnational workers may be excluded;
- Account not taken of shifts in employment status;
- Exclusions impact disproportionately on transnational and temporarily placed workers;
- Gender impact reflecting genderised migration and employment.

Thank you for listening.
3.6 Reflection by Prof. Ludwik Florek

Undeclared work or undeclared contract of employment

Types of work that might be undeclared:
- Employment relationship
- All types of dependent (subordinate) work (indirectly Directive 91/533).
- The term "worker" has a Community meaning.
- Worker refers to any person who is protected under national employment law (Art. 3.1 of Directive 2006/54 - temporary agency work).
- Escape from labour law
  - Some types of work are performed under civil law contracts, e.g., a contract to perform a specified task.
  - Self-employment.

Monitoring declared work

National authorities can require a written document;
- The limited significance of Directive 91/533 to fight against undeclared work
  - The directive does not cover forms of employment other than the employment relationship.
  - The directive does not provide for any sanctions;
  - Workers can claim their rights. Specifically, they can pursue their claims by judicial process after possible recourse to other competent authorities.

The notion of undeclared work

A clear definition is important to properly understand the scope of undeclared work: searching for a cheap service provider.
- OECD definition
  "Employment... which, while not illegal in itself, has not been declared to one or more administrative authorities...
- ILO definition
  "Work [employment] which does not comply with the requirements of national laws, regulations and practice (ILO).

Undeclared work in European law

Employer's obligation to inform employees (Directive 91/533)
- Three meanings of the document:
  - Employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.
  - Every employee must be provided with a document containing information of the essential elements of his contract or employment relationship.
  - Conditions may not be changed unilaterally.
  - Disclosure of employment (employment cannot be hidden).

The significance of a written document confirming employment

Western and Eastern points of view:
- Old EU countries – undeclared work of migrants and posted workers.
- New EU countries – domestic undeclared work.
- Three different situations of posting
  - An undertaking posts workers on its own account.
  - An undertaking posts workers to an establishment owned by the group.
  - The provision of services may take the form of either performance of work by an undertaking on its own account and under its direction or by hiring-out workers for use by another undertaking.
  - Temporary employment undertakings or placement agencies hire out workers.
Country in which undeclared work can be uncovered

- A contract of employment exists in the posting country.
  Undeclared work exists first and foremost in the state where the posted worker normally works.
- A contract of employment does not exist in the posting country
  - Recruitment before posting
  - Placement agencies use civil law contracts.

Two cases of undeclared work

- First case: An employment relationship between the posting undertaking and the worker during the period of posting (Art. 1.3.a of Directive 96/71).
  Undeclared work is possible in both posting and host countries.
- Second case: Undeclared work only in the host country.

Responsibility for undeclared work

- A building contractor established in the Member State concerned becomes liable (Wolff & Müller C-60/03);
- Searching for a cheap service provider;
- Posted workers' interest in declaring their work
  - Medical assistance (covered by health insurance); placement agencies use civil law contracts
  - Unemployment benefits
- Information connected with secondment (Art. 4 of Directive 91/533).

Sanctions for undeclared Work

- Private remedies
  - A worker can pursue his claims by judicial process after possible recourse to other competent authorities (Art. 8 of Directive 91/533);
  - The right to remuneration (even illegal workers are entitled to this right).
- Public penalties
  - Financial penalty (Art. 5.2.a of Directive 2009/52 for minimum standards on sanctions and measures against employers of illegally staying third country nationals)
  - National legislation
    - Fine
    - Penal interest.

Undeclared work of illegally staying third country nationals

- Illegal work is - as a rule - undeclared work.
- Single permit for third country nationals to reside and work in the EU (Directive 2011/98)
  - According to Article 11 c of the Directive, where a single permit has been issued in accordance with national law, it shall authorise, during its period of validity, its holder to at least exercise the specific employment activity authorised under the single permit in accordance with national law.
- Permit = declared work?

Sanctions and measures against employers of illegally staying third country nationals

- Recital 7 of the Preamble of Directive 2009/52
  - The definition of employment should encompass its constituent elements, namely activities that are or ought to be remunerated, undertaken for or under the direction and/or supervision of an employer, irrespective of the legal relationship.
- Financial sanctions and criminal penalties.
Questions

- What are the key elements or references for defining undeclared work?
- Does a national definition change the effectiveness of a labour inspectorate’s response to undeclared work?
- How can a common definition and understanding of undeclared work be coordinated within the EU?

Possible future EU measures to prevent and deter undeclared work

- Improved cooperation between Member States’ enforcement authorities, such as labour inspectorates, tax and social security authorities.
- Sharing of best practices on prevention and deterrence measures, identifying common principles for inspections of employers, promoting staff exchanges and joint training and facilitating joint control actions.

Thank you for listening
4. Working Group Discussion Reports: Session 1-

4.1 Discussion questions

Working Group on “Undeclared work: An activity-based legal typology”

Thursday 17 October: 17.00 – 18.15 hrs.

Questions to be discussed:

1. Could preventive procedures (as, for instance Certificazione) help in avoiding legal uncertainty in the qualification of the paid activity?
2. Could the concept of coordinated self-employment or quasi-subordinated work help in avoiding legal uncertainty in the qualification of the paid activity?
3. Could the floor of rights approach (for instance by guaranteeing a more extensive social security coverage) help in countervailing the recourse to misdeclared work?
4. Could (too) strict employment protection be regarded as an incentive for undeclared work?
5. Is there still a need for simplification of registration and/or declaration procedures?

4.2 Working Group Discussion Reports

4.2.1 Working group 1 chaired by Prof. Ann Nummhauser-Henning

In his keynote speech, Prof. Eduardo Ales presented an activity-based typology of undeclared work, distinguishing between business activity and work activity, the latter being subdivided into self-employment and employment. Prof. Ales also mentioned an in-between group, the Italian parasubordinate or quasi-subordinate workers and/or the German arbeitsnehmerähnliche Personen or so-called coordinated self-employed persons. The initial discussion focused on the compatibility of such a three-fold system with national systems (Question 2). Portugal introduced similar practices like Germany and Italy for quasi-subordinated workers in the late sixties. The new Labour Code of 2003 led to a deregulation of protection for this group. The UK TUC representative, Ms Reed, concludes that the existence of this in-between group of ‘workers’ in the UK system has led to a deregulation of labour law. Furthermore, the introduction of some protection (minimum wage) for quasi-employees, (home-workers) in Austria has resulted in the ‘disappearance’ of this
group of workers, and moving demand to other deregulated sectors rather than providing increased protection for such workers. A regulated ‘third’ category similar to the case in Germany has now been introduced in Austria as well. Attention was also drawn to the fact that this discussion focuses on how to determine the boundaries between different phenomena/groups rather than on undeclared employment as such. Undoubtedly, however, (bogus) self-employment is often about how to circumvent protective employment rules and taxation. Prof. Ales referred to the innovative certification practices applied in Italy to clarify the status/typification of a given contract (Question 1). Portugal has also introduced a new procedure to differentiate contracts. In Sweden, such practices implemented by an ‘academic independent certification body’ seem incompatible with the role and objectives of the social partners, whereas an Austrian representative mentioned the legal requirements relating to the certification of temporary work agencies in some MSs as a (sort of) parallel practice. An Italian representative raised doubts about the effectiveness of said certification process – it has only been used in 20,000 cases over the last ten years and decisions are frequently based on limited (employer) information. Moreover, the aim of the qualification procedure is not to prevent legal uncertainty, but to avoid litigation. In general, considerable skepticism was expressed about other (more formalised) systems than the binary divide between self-employment and employment (as interpreted by the courts according to the de facto situation) in combination with a presumption of employment. This notwithstanding, a misrepresentation provides the possibility for the authorities involved to evaluate the said relationship because it is brought to their attention.

With reference to the establishment of a set of rights for any work activity, regardless of the character or interrelations between contract status and, for example, employment protection, the discussion was dominated by concern that the creation of ‘in-between’ groups and increased protection for more or less dependent work providers (Questions 3 and 4) would lead to a deregulation of protection (also in employment) rather than increased overall protection (compare above). One practice currently in use (Slovenia, Austria) that has some record of success and was favoured by the participants of the debate is social security contribution reforms diminishing/eliminating the differences between contributions paid for different status contracts. An incentive was reported by the representative from France: Certain groups (self-employed?) do not have to pay social security contributions for a two-year period. Also, tax subsidies were discussed as a solution to the black labour market. The complexity of registration was raised as another important issue (Question 5).
Participants noted that a discussion on the blurred concept of ‘employers’, which is also in need of a typology, was basically absent during the conference. Another such aspect is the role of intermediaries.

4.2.2 Working group 2 chaired by Prof. Robert Rebhahn

1. It seems that it is quite difficult to identify suitable preventive procedures (as, for instance, *Certification*) for countries to avoid legal uncertainty in the qualification of the paid activity. All speakers agreed that certification is not a suitable way to tackle undeclared work, as it might create new problems. The Working Group agreed that undeclared work should not be equated with misdeclared work. The two categories raise different aspects, also because they have different characteristics. The Working Group further agreed that the notion of informal economy should not be equated with undeclared work, especially regarding the situation outside Europe. Moreover, it was said that typologies are a mean and not and end in themselves.

2. The expert from Romania stated that a concept of coordinated self-employment or quasi-subordinated work does not really help avoid legal uncertainty in the qualification of the paid activity, also because such a structure applies more to white collar worker than to common workers. Nearly all participants agreed with the first statement. The Working Group further agreed that the said category might help reduce misdeclared work, but not undeclared word.

3. Nearly all participants agreed that the floor of labour rights approach could help countervail the recourse to misdeclared work, but less to undeclared work. Nevertheless, research in Belgium, for instance, indicates that further regulations and legislative developments in the field of undeclared work have led to overregulation and much confusion. Nearly all participants asserted that complexity and stringency do not help prevent undeclared activities. In Spain, the same problems exist. The Spanish system is too complex and too stringent; however, it must be stressed that a high level of protection cannot be equated with a complex system.
Labour law in **Latvia** is not very complex and has a simple structure, but stringent regulations do, of course, exist for undeclared work. Nevertheless, it must be stressed that we cannot have one regulation that applies for all countries due to the fact that every country has its own legal and economic structure and that a country's culture plays a role as well. This is why we need a different regulation.

The expert from **Norway** stated that it is not only the complexity of law that leads to undeclared work. High labour costs have significant implications on the rate of undeclared work in many Member States. The consequence in Norway is that many domestic workers are working undeclared and receive very low wages. Social dumping in the informal sector is a fact and it must be stressed that women working in private homes are one of the most affected groups. In the opinion of the expert, a reduction of labour costs leads to lower rates of undeclared work.

The **ILO** expert stated that the amount of labour inspectors is quite important for every country. Raising the amount of inspectors could be a possible way to lower the rates of undeclared work in all EU Member States. Research figures of the **ILO** have revealed good results in that respect. It is also a question of the proportionality of sanctions, otherwise enterprises would simply disappear due to the fact that they cannot pay such high sanctions.

Another suggestion came from **Belgium**, where contracting bodies can “buy” service vouchers. Workers are covered by social security and receive a specific minimum wage (EUR 8.50 - 9.00).

Moreover, tradition should not be underestimated. In **Romania**, for instance, it is often difficult to convince both sides - the employer and the employee - because they do not have trust in the pension system. People are often self-employed because they do not believe they will receive any pension when they are old. Employers often do not mind because they do not have to pay additional labour costs.

The **Irish** expert thinks that one of the motives for undeclared work is the perceived benefits for both sides. Lack of respect for authorities and tax-related issues must also be borne in mind. Moreover, there is a large IT industry in Ireland. Most of the employees work under service contracts and are self-employed. This means they have
no job security, no holiday entitlement and no specific working times which leads to misdeclared work.

**France** stated that social security is the key and that all Member States must work on developing social security stimuli.

This is also very important for the participant from **Portugal**. Many people are bogus self-employed, but some legislative developments are currently taking place and employers are responsible for type of contract. Other problems arise for the traditional service of women in households. They often perform undeclared work – nearly all countries agreed and stated that these traditions also exist in their own countries. The experts from the **ILO and Spain** explained that there some national legislation had been implemented in Spain, but that it had not yet been proven to be successful at all. Bogus self-employment, undeclared and misdeclared work are still very widespread.

4. **Nearly all** participants stated that strict employment protection is more of an incentive for misdeclared work than for undeclared work. In **Norway**, for example, strict regulations apply. Nevertheless, domestic workers work under bad conditions and the majority perform undeclared work. It is very difficult for them to enter the legal market. There are a number of benefits for them if they do, but they just do not know how to register. One solution could be the establishment of certain registration desks where such workers can find the necessary forms and information – also in different languages. In general, it was held that one should look for the reasons/causes/explanations of mis- and undeclared work, such as complexity of regulations, stringency of regulations, costs associated with regulations and – especially with regard to social security pension contributions – the expectation to be rewarded later. Undeclared work will be high if both parties involved believe that non-declaration benefits them. One important aspect seems to be the time horizon that the working person takes into account; some, especially younger people, do not think about pension age or doubt that the system will still be working effectively once they reach retirement age. Some speakers stressed that the crisis might have reduced the time horizon some working persons take into account.
5. **All** participants agreed on the importance of the possibility to register quickly and easily (if registration is required). However, most speakers claimed that there is no real need for simplification of registration and/or declaration procedures in their country. Only the expert from Greece held that there is a real need for this due to the fact that online registration or other facilities simply do not exist.

### 4.2.3 Working group 3 chaired by Dr. Tomas Davulis and Prof. Ales

The important preliminary question was raised in the discussion on undeclared work several times whether we should intervene and tackle undeclared work or leave it be. Some believe there is no need to take any action, since the problem is very marginal in their country is very marginal (Germany), or because of the way the system works in their country (Russia). Moreover, the national experts recognised that almost everyone engages in undeclared work from time to time, e.g. when paying babysitters, or students who work on the basis of stipends (which is the case in Sweden), which they agree should be allowed.

It was suggested to associate the notion of undeclared work with precarious situations and to specifically target those situations.

The rightful position of labour law in the debate was discussed as well: it was acknowledged that the issue exists in a gray area of legality and the question is whether legislation can or should be used to fight the phenomenon, or whether the discussion should be left to economists, sociologists and politicians to arrive at a solution to deal with the drawbacks of undeclared work.

After all, the problems undeclared work gives rise to in practice are serious with regard to social security and taxation, albeit not as much as with regard to labour law itself.

However, it was acknowledged that labour law also plays an important role to clarify the typology: National institutions (i.a. tax and social security authorities) that penalise illegal situations need to know who to target and how to regulate, monitor and enforce. A typology is indispensable, because a certain consequence is tied to each type of contract in practice. The exercise to try to define the different forms of undeclared work is thus not merely a formal exercise, but is linked to the practical aspect of labour law. As witnessed in Italy, the increase in labour contract types has led to a rise in grey work (not so much black work), and thus a more comprehensive analysis of the
notion of undeclared work is necessary. The question was raised whether the classical approach should continue to apply (dividing workers into strict categories of employed/legally self-employed or undeclared workers, and sanction all workers who do not fall within the first category), or whether another approach should be used. For example, regardless of the contract type (or not) the worker has, we need to ensure that he/she becomes a legal worker if he or she performs any type of undeclared work.

If the latter approach is preferred, then the “floor of rights” mentioned in question 3 of the Working Group questions could be useful. Existing EU legislation could be extended to cover more individuals, i.e., also to those performing undeclared work. For example, the definition of ‘worker’ in EU health and safety legislation served as a basis for a possible extended definition of undeclared worker. Not only the fact that the worker performs ‘paid activity’ (according to the respective legal structure) would be decisive, but also the place of work. Thus, if an individual performs work at a given place where certain activities are organised and performed (whatever his/her legal status, e.g., volunteers as well), he or she have to be protected according to health and safety regulations.

In any case, all participants agreed that arriving at one definition for the terms “worker”, “employee”, “self-employed worker” etc. is not feasible, but that a teleological approach is a more viable option. Our objectives should determine the scope of these terms: Who do we want to give social protection to? Whose tax contributions does the State need to sustain the social security system? Etc.

Moreover, it was stressed that in deciding whether we want to fight UW or leave it be, we must look at the motives and intentions of both employers and workers: “To prescribe an effective remedy, we have to really understand what the disease is.”

When specifically contemplating possible approaches to deal with undeclared or misdeclared work, two suggestions were given in the keynote presentations:
- Ensure undeclared workers are covered by legislation, sanction them and make UW disappear; the “stick” approach.
- Introduce a beneficial tax for employers and employees who abide by the labour law and register all workers; the “carrot” approach.

All participants agreed that a combination of these two approaches should be pursued, but attention was also drawn to the problem of transnationality. The floor of rights can work well in a national context, but falls short in the EU context because of fierce competition between
employers in the EU. If a Member State introduces a floor of rights, an employer can have recourse to employees in other countries with lower labour costs. Member States should include the effects of the measures with a view to the EU context to ensure that they are not simply relocating the problem. This problem was evident in the Laval case (Sweden). The carrot approach could ultimately lead to a change in the general opinion of the population on UW to denounce undeclared work.

Answer to the Working Group Questions in more detail:
- Could the concept of coordinated self-employment or quasi-subordinated work help avoid legal uncertainty in the qualification of the paid activity?
In the country in which this concept was created (Italy), it was said to ease some of the legal uncertainty. However, the drawback of many different typologies of labour contracts has caused many forms of ‘grey’ work rather than ‘black’ work.
- Could (too) strict employment protection be considered an incentive for undeclared work?
This question was seen as presupposing that employment protection could be deemed a negative issue, a point of view that is not shared by the national experts. One national expert, however, did mention this point and confirmed the fact that the declaration of an employee might work to his/her disadvantage when looking for a job, because undeclared work is cheaper and less burdensome for the employer.
- Is there still a need for simplification of registration and/or declaration procedures?
It was mentioned that the registration of employees could prove to be too much of an administrative burden on the employer, resulting in the preference to not declare workers (save if sufficient incentives are in place to overrule such a burden).
4.2.4 Working group 4 chaired by Prof. Catherine Barnard

Before the detailed questions could be considered it was felt that more scoping needed to be carried out to define undeclared work more clearly and consider why it is problematic. This might impact on possible responses.

It was recognised that undeclared work could cover a range of situations from

- Work where no taxes/social security are paid
- Part legal work (taxes/social security are paid)/part illegal work (taxes/social security are not paid)
- Generally worked is performed legally (with tax and social security contributions paid) between 9am-5pm five days a week but some ‘mates rates’ work is carried out at weekends or in the evenings. Perhaps somewhat tongue in cheek, it was suggested that such work, if performed at reduced cost (and undeclared) for elderly neighbours might even been part of the ‘big society’

Who is engaged in it?

- Domestic workers, predominantly women. However, they are more likely to be regularised after a period (eg because they want access to healthcare – Norway, Austria)) than men working in the construction industry
- Young people – through use of internships – increasing view (UK, Ire) may need to be paid NMW
- Migrant workers, especially men in the building industry

Why is work undeclared?

- Austerity – individuals are short of money
- Perception that tax take is too high (eg Turkey)
- ‘Everyone else is doing it’ and low risk of being caught
- Greed
- Fear of loss of social security benefits, especially if all benefits are withdrawn once any paid work is obtained (cliff edge problem)

It was also argued that there may be different reasons depending on the sectors involved. A further sub-category was also introduced: work wrongly declared, notably where an individual
declares themselves self-employed and thus covered by civil law rather than an employee and so covered by employment law (e.g., Lithuania). This raised questions as to why this was the case: what incentives are in place to lead to this?

Why is undeclared work considered a problematic?

- Macro-level – loss to the economy of tax revenue, especially important in times of crisis
- Micro level – fear individuals might be in abusive relationship (but NB some workers to be paid envelope wages). If this is the case then ‘mates rates’ need less control than other types of undeclared work

Possible Responses

There then followed a lively discussion of the possible ways of addressing the issue of undeclared work. The suggestions in the questions for discussion found less favour than the following:

(1) Economic sanctions
- ‘Blacklisting’ companies who do not pay social security contributions (combined with liability for clients if they use those companies, thus one facet of their due diligence enquiries). This has proved an effective technique in the building industry in Austria
- Banning those companies guilty of using undeclared work from government contracts (e.g., Ireland and Malta) (in Ireland an example was given of where a company had been engaged in serious violations of the law but resources were devoted to prosecuting only two cases of easily proveable violations in order to trigger the exclusion from access to procurement contracts). Concerns were expressed as to:
  - the compatibility of this practice with the public procurement rules
  - where contracts were for a relatively long period (e.g., 4-6 years) how breaches of the rules on undeclared work would be monitored and thus fed back into the next round of the procurement process.

(2) Reputational sanctions: transparency obligation
- In Ireland tax evaders over 25000 euros have their name published in the press every quarter. This has proved to be an effective sanction albeit it does not help in the case of repeat defaulters

(3) Registration and certification
This has been required in a number of states including Lithuania and Latvia. In Latvia and Slovenia laws have been recently introduced requiring the registration of employees with revenue/social security authorities before they start employment. Concern was, however, expressed about the level of bureaucracy involved especially where, as in the case of a micro business like a hairdressers, there is no access to the internet.

(4) Financial incentives to register with the tax/social security authorities
- While attractive, for many states this was rejected due to the fiscal constraints under which they are operating. However, in Turkey a programme whereby employers enjoy lower social security contributions provided they declare their employees in the ordinary way has enjoyed some success.

(5) Role of social partners
- Involvement in monitoring (Sweden)
- Involvement in identifying where resources should be devoted to address undeclared work (Ireland, Slovenia). Irish law also allows significant data sharing between enforcement agencies which, in the case of undeclared work, has also been supported by the social partners.

Some participants expressed concern that there is inadequate cooperation between the social partners on cross-border undeclared work. More generally concern was expressed about the weakness of the trade unions in the Baltic States. More positively, it was reported that there was good cooperation between Scandinavian and Latvian trade unions, albeit not about undeclared work.

(6) Indirect approach
- Targeting end users eg supermarkets to get the supermarkets to ensure their suppliers are complying with national labour law, combined with a public awareness campaign. This has proved to be highly effective in the Netherlands

(7) Softer approach
- TV advertising campaigns encouraging people to pay tax (particularly important in Italy).

These approaches are not necessarily either/or. As the Dutch example shows, a mix of public-private instruments may be necessary to combat undeclared work. This can be seen in the temporary agency work sector. First, the sector itself created a certification system, which applies to domestic as well as foreign temporary-work agencies. Secondly, domestic and foreign agencies
must register with the Chamber of Commerce. Finally, in recent years an inspection foundation (SNCU) was set up by the social partners in the agency sector. The main task of SNCU is to monitor and enforce compliance with the generally applicable collective agreement.
5. Working Group Discussion Reports: Session 2-

5.1 Discussion questions

Working Group on “Undeclared work: Possible sanctions on closer examination”
Friday 18 October: 10.00 – 11.15 hrs.

Questions to be discussed:

1. There are two suggested approaches to undeclared work. One is to engender compliance by detecting and punishing non-compliance. The other is to encourage compliance by providing benefits to those engaged in formal work. Which of these two approaches would you support as the most effective in dealing with undeclared work?

2. If undeclared work is structural within EU labour can you discuss measures that might be advanced to reduce it?

3. Sanctions: What are the legal effects in your country on contracts aiming at undeclared work?

4. What are the specific employment law consequences of the application of sanctions?

5.2 Working Group Discussion Reports

5.2.1 Working group 1 chaired by Prof. Ann Numhauser-Henning

In his keynote speech, Prof. Berndt Waas discussed possible sanctions for undeclared work and their efficiency, particularly the role of civil law sanctions. He argues that the concept of sanctioning is often understood too narrowly – namely as penalties and fines. Both penal and administrative law offers other possibilities (such as the withdrawal of the driver’s license and/or a prohibition from participating in public procurement procedures). The possibilities of civil law are often largely ignored. The key question thus is: How can we effectively tackle undeclared work? The working group initially discussed alternative approaches – already raised by Prof. Colin Williams in his introductory speech – at length, namely of the carrot and the stick or preventive versus reactive measures (Question 1). In general, ‘a balanced approach’ is favoured, but, as Prof. Mitrus emphasised in his comment, the preventive approach and its potential to resolve problems related to undeclared work at a more general level must be considered as well as the importance of adequate remedies for the negative consequences of such work for an individual. Prof. Kessler
from France asserted that not only incentives come at a cost – monitoring and control are often very costly as well. And there are no ‘one fits all’ solutions to these problems.

With regard to best practices on the incentive side VAT-lotteries (Slovakia) were mentioned as well as rewards for ‘white businesses’ (Portugal) in specific sectors (restaurants, hair salons, etc.) that are known for undeclared work activities. To enforce the payment of sales taxes, a receipt lottery was introduced in Slovakia. This measure provides for a bi-weekly lottery and was adopted following the ‘receiving a receipt’ campaign. However, the experiences of other countries with regard to such measures have not been unequivocally positive. The introduction of ‘mini jobs’ – a maximum monthly salary of EUR 450 – in Germany was mentioned, but also criticised despite creating pension entitlements – as leading to poverty among the elderly. Tax credits (Sweden, Ireland, Portugal) and ‘service check systems’ (Belgium) were mentioned as ways to turn black markets white. Among reactive measures introduced was the revocation of the preclusion from public contracts and procurement (Malta).

Question 2 raised a more ‘political’ debate whether ‘seeking a more equal society’ was a suitable way forward. A general lack of effectiveness of labour law regulations in society was perceived by the participants and the question was raised about what kind of society we actually want. The intention of undeclared work is, generally speaking, cheaper prices. The activities of the Troika in the wake of the economic crisis were about achieving results, avoiding any underlying political issues. There was a lengthy discussion whether undeclared work has increased out of economic necessity due to the ongoing crisis. Undoubtedly, the economic crisis was considered to have made it even more difficult to secure workers’ rights, opening the door for bogus self-employment, ‘envelop wages’ and illegal combinations of benefits and fragmentised work. There is also ‘poor consumer drive in the current crisis economies’. At the same time, the crisis has brought with it a shrinking economy, as pointed out by Prof. Trimikliniotis from Cyprus. A fair conclusion could be that the relative importance of undeclared work may have increased due to the crisis.

Concerning the legal effects of contracts relating to undeclared work and specific employment law consequences (Questions 3 and 4), several examples were discussed. In Belgium, the law provides that undeclared work does not lead to the nullity of the contract whereas in Germany, each situation must be differentiated.
5.2.2 Working group 2 chaired by Prof. Robert Rebhahn

1. The Working Group agreed that undeclared work should not be equated with illegal work. There are two suggested approaches to undeclared work. One is to engender compliance by detecting and punishing non-compliance. The other is to encourage compliance by providing benefits to those engaged in formal work. Both approaches are interesting for all countries but nearly all participants agreed that sanctions are more effective than other procedures, but the right balance must be found between sanctions and benefits (sticks and carrots). The Working Group agreed that undeclared work might be better tackled by means/sanctions of tax and social security law than by means of labour law. The ILO expert stressed that some people are just trying to survive and that they have to work undeclared. They are not able to pay any fees or sanctions and they are not the right address for sanctions or penalties. Preventive measures are very important to the ILO and these measures can be taken by ministries.

2. Undeclared work is structural within EU labour laws and measures for a reduction are scarce. Finding the right definition could be a possible way, according to the ILO expert, and it is also a question of salaries and wages. The expert from Cyprus stated that every country has to develop its own definition of undeclared work and that sanctions must be increased. No minimum standards are provided to people who work in undeclared jobs. The participant from Latvia stressed that every country has unique problems and that a general regulation is nearly impossible.

3. The experts also discussed specific employment law consequences related to the application of sanctions and whether it might be possible to harmonise these. Latvia was of the opinion that harmonisation is virtually impossible. Norway strongly disagreed with Latvia and stressed that we need a common regulation in all EU Member States. The same quality of work exists in every country and anyone who works independently needs social security. That is the reason why all measures should equally apply to all Member States. Some speakers noted that there is a presumption of an employment contract in their country if a person works for another person for a
defined period with a defined minimum hours per week. Others concurred, and for many participants this seems a good measure.

There is another consequence in the **UK (and Ireland)**. It is up to each individual to claim wages which were not paid by the contractual body. According to the common law system, no contract exists and individuals do not have any status. This implies that there are no entitlements for employees who perform undeclared work due to illegal activity. In **Portugal, Latvia, The Netherlands and Spain**, a contract may exist, but further distinctions between illegal and undeclared work are necessary.

In **Spain**, some individuals simulate employment to obtain social benefits (especially unemployment benefits after the unavoidable termination of the employment contract).

**Romania** has very stringent sanctions in place for both sides. The contract is null and void in the future and if the employer has more than five undeclared employees, the employer is considered to be engaging in criminal activity. Moreover, sanctions delivered by the controlling bodies must be paid. Nevertheless, this procedure is not very successful in Romania, and hence the rate of undeclared work is very high. In other countries, not only the employer/client, but also the working person may be sanctioned in case of undeclared work.

**France** and **Germany** agreed on an exclusion from certain tenders. According to French law, it is possible to cancel certain benefits which were paid due to unemployment or other social reasons. Similar regulations exist in **Germany and Austria**.

In general, it was agreed that legal as well as informal help could be used to tackle undeclared work.

Several speakers emphasised that the consequences of undeclared work for social security law are considerable, especially if an undeclared worker has the same entitlements (after laying his/her work open) as in the case of declared work.
5.2.3 Working group 3 chaired by Dr. Tomas Davulis and Prof. Ales

As was agreed in the earlier Working Group, a combination of sanctions and incentives (“sticks” and “carrots”) should be used to tackle undeclared work. However, focusing on the legal technicalities of the typology of definitions and sanctions alone was deemed a useless exercise, unless a connection was directly made to the consequences in practice. For example, one needs to look at the types of undeclared work that are to be eradicated (e.g., the situation of babysitters does not need to be addressed).

There was general consent that incentives are more effective than sanctions, and that the use of media is important to create awareness of the problem. A social climate needs to be created in which undeclared work is stigmatised.

When taking a closer look at sanctions, it was mentioned that they should not primarily be seen as penalising the employer, but rather as giving the employee the rights he or she is entitled to under an employment contract. As such, sanctions and their typology are very important as well. For example, in many cases, labour law provides for the transformation from the status self-employed to an employment relationship for employees who are said to be self-employed, but who are actually employed. This shows that typology is a useful exercise, because one needs to know how the activity is qualified and how it can be re-qualified when a claim is filed in court.

In more detail, it was mentioned that most Russian and Eastern European countries (e.g., Bulgaria) distinguish between employment contracts and civil law contracts, each with their own rights and obligations. Even though some guarantees exist to allow workers to benefit from the rights of an employment contract, mis-qualification and misuse cannot always be countered.

The role of the labour inspectorates is particularly important in this regard, although their methods are agreed to have various levels of success (in Bulgaria they are not as successful, in Italy, on the other hand, they are fairly successful). In Sweden, such institutions do not exist and controls of undeclared work are left to the trade unions, which are generally not interested in the problem. It depends on the climate and the attitude of society in these countries.

The general conclusion was that tripartite action (employers and employees, trade unions, labour inspectorates) is necessary to tackle undeclared work, combining sanctions and incentives. Moreover, to decrease the existing motives for undeclared work, campaigns and media need to be
utilised to raise awareness that undeclared work will not be a win-win situation in the long run for the collective interests of the nation.

Answers to the Working Group Questions in more detail:
- There are two suggested approaches to undeclared work.
The Working Group members quickly agreed that a combination of different approaches is necessary to tackle undeclared work. Sanctions are needed to discourage employers from hiring undeclared workers and to help workers receive the rights granted in employment contracts. Incentives are necessary to alleviate (administrative) burdens on employers wanting to register their employees and to persuade them into doing so, and to show employees that undeclared work is only a temporarily gainful. Last but not least, campaigns and media should be utilised to show both parties that undeclared work is not a win-win situation in the long term, and that the social climate should evolve to denounce undeclared work.
- If undeclared work is structural within EU labour can measures be discussed that might be promoted to reduce it?
In Italy a new category of workers was created to counter the ever-present bogus self-employment: The coordinated self-employed (in-between employees and self-employed persons). They are (from a trade union point of view) treated as workers, and are thus entitled to trade union rights, collective bargaining, collective agreements, etc. They are exempt from competition law, as they are regarded to be a category that is closer to an employee than to an employer.
- Sanctions: What are the legal effects in your country on contracts covering undeclared work?
- What are the specific employment law consequences of the application of sanctions?
  - Bulgaria:
Bulgaria has the highest percentage of undeclared work and there is a strict division between an employment contract and a civil law contract. Work relationships in Bulgaria must always come in the form of an employment contract. Thus, if a worker carries out undeclared work, the formal requirement of a written employment contract is denied and the contract will be void. One exception exists to this rule: The contract will not be considered invalid if the breach of law can be remedied (e.g., if the contract will be made in writing). Then, the rights granted by the employment contract will apply as though the contract had been valid from the beginning.
The labour inspectorate may decide to treat a contract as an employment contract if work has been carried out, even if not within the framework of a contract. However, this method is not very effective. People are prepared to carry out undeclared work because they need money and fast.

If an employment contract is hidden in the form of a civil contract, this will not have a lot of social security consequences, since the parties to the civil contract are compulsorily insured. However, they will not be insured against accidents at work, work-related diseases and unemployment. One problem therefore arises: If an accident happens at work but the civil contract was not declared as an employment contract, nothing can be done (even in the courts).

Even if the invalidity of a contract is declared, the consequences for the employee are the same as those for the employee with a valid employment contract, if the employee was in good health when concluding the contract.

- **Sweden:**

In Sweden, labour inspectorates do not exist. Control of work places is left to trade unions. An oral contract is as valid as a written one (also with regard to employment contracts). Unemployment contracts are not necessarily registered. If undeclared work takes place in companies where TUs work, they can monitor it. But this has not happened in the past, e.g., trade unions cooperate with the construction industries.

Therefore, Sweden does not have a real labour-related actor to tackle undeclared work. TUs are not really interested, nor are employers’ agencies. The only actor who really use a ‘stick’ are the tax authorities. The focus when tackling undeclared work should also be on other branches of law and not only on labour law issues.

- **Italy:**

In Italy, a new employee category has been introduced: The coordinated self-employed (in-between employees and self-employed persons). They are (from a trade union point of view) treated as workers, and thus are entitled to trade union rights, collective bargaining, collective agreements, etc. They are exempt from competition law, as they are considered to be closer to employees.

- **Ireland:**

In Ireland, an interesting problem has arisen:

The Competition Authority has (CA) stated that self-employed persons are prohibited from organising in a trade union because they are undertakings. This creates a problem when trying to
organise workers who have incorrectly been designated as self-employed persons. If the trade union does this, the CA will view it as a cartel and fines the millions will be levied.

The trade unions in Ireland do not agree. ILO convention states that the right to organise applies to all workers. The EU Charter needs to be interpreted in line with ILO convention. If trade unions want to tackle undeclared work, they need to be able to organise and meet with these quasi-self-employed persons. To deny collective bargaining rights to this group of individuals under the umbrella of competition law is quite hefty.

5.2.4 Working group 4 chaired by Prof. Catherine Barnard

In this session there was much discussion of carrots and sticks; sticks predominated, albeit there was some concern as to whom the sticks were addressed (employers, employees, end users etc)

The sticks
- Civil sanctions
  - Norway provided an interesting example of the building industry where all workers have to have ID cards which are obtainable only if the individual is registered with social security and tax authorities. Super labour inspectors can go into workplace and stop work if the workers do not have ID cards. This is proving highly effective.
  - There was general agreement on the great importance of an effective labour inspectorate regime to help address undeclared work but a recognition that this is under threat due to government cuts (eg Ireland thought that 90 labour inspectors were needed in 2007 (agreed with the TUs), now 55), Malta has suffered a 75% reduction in labour inspectors but this is gradually being reversed). It was also recognised that there was a need for native speakers as labour inspectors to reach into migrant communities. Ireland provided a good example of labour inspectors engaged in smart sharing of information between agencies. They can access this information on their laptops while in the employers’ premises. This has provided a powerful incentive for employers to comply with their obligations. Some countries have a system of super labour inspectors, especially in the building sector (Norway, Austria).
- In those countries without a labour inspectorate other vehicles have been used such as the UK’s pay helpline where the individual needs only to ring the helpline which will then refer the individual’s case on to the appropriate agency.

- Chain liability (Italy, Norway)
  - Contract may be void if using undeclared work (Germany, Austria) but this was considered unusual

- Criminal sanctions
  - Applied to employers (generally), possibly to employees
  - Those systems where labour inspectors were represented, it was clear that criminal sanctions were seen as a last resort (in Ireland this was only 1.5% of cases); labour inspectors tried to work with the employers.

There were some examples of carrots too:

- Tax and immigration amnesties
- Cutting social security contributions if the employers declare employees in the ordinary way (Turkey) or having a lower rates of social security contributions for a second or subsequent job (Malta)
- A voucher system has been introduced in Austria for those doing domestic work. Vouchers can be easily purchased as tobacconist shops or the equivalent and some of the money paid is forwarded to the social security system, meaning that the employees are covered up by the social security system. In that way, they are registered.

It was also discussed how employees would be protected even in the face of the employer’s default. There were two main possibilities:

- In Italy employees continue to enjoy social protection even where their employers have failed to make the relevant contributions
- In Slovenia undeclared workers are presumed to be employed on an open-ended contract. Likewise, in Malta there is a rebuttable presumption that if not stated in the contract, the contract is presumed to be an employment contract.

Finally, innovative ways of enforcement were considered. A good example came from the UK where a special helpline has been established in respect of certain rights including pay. This
helpline is easily accessible for workers and directs the individual to the relevant agency who may be able to step in to help without the need for the worker to start a court proceeding. This stands in contrast with the Netherlands, where even if the employer is ordered to pay an administrative fine, the worker still has to go to the civil court in order to claim his wages and other terms and conditions.
6. Working group discussion reports: Session 3 –

6.1 Discussion questions

Working Group on “Transnational aspects of undeclared work and the role of EU legislation”

Friday 18 October: 13.30 – 14.45 hrs.

Questions to be discussed:

1. Employment law at both national and EU level has traditionally been founded on a notion of the standard employment contract. Might this contribute to the exclusion of transnational workers?

2. What are the gender implications of undeclared work? Does it replicate existing labour market segmentation or are the barriers between ‘male’ and ‘female’ work challenged within informal work economies?

3. We have observed that there is an association of migrant workers with undeclared work in all Member States. Does this have implications for integration strategies and what could be done to reverse the negative associations of migrant status?

4. It has been suggested that one of the reasons for the rise in undeclared work is a reduction in labour inspection. Is this something that you have observed in your contexts and what have the consequences been?

5. What implications does the ILO convention on Home Work (No. 177) have in your country?

6. Is the fact of interns working unpaid or for low wages a serious concern in your country?

6.2 Working group discussion report

6.2.1 Working group 1 chaired by Prof. Ann Numhauser-Henning

In her keynote paper, Prof. Sonia McKay discusses transnational aspects of undeclared work, and in particular EU legislation (such as the Cinderella Directive 91/533/EEC, the Sanctions Directive 2009/52/EC, the Posted Workers’ Directive 96/71/EC), with a focus on three key areas: Informal posting, third country nationals without a work permission, and cross-border informal work. She acknowledges a global trend favouring temporary, circular and selective migration, which in itself creates conditions in which undeclared work flourishes. Within the context of tightening migration
controls throughout the EU, migrants are not only more likely to be pushed into undeclared work; the question whether their subsequent precariousness puts pressure on the working conditions of those in declared work must also be addressed.

Doubts were initially raised whether the prevalence of standard employment contracts contributes to the exclusion of transnational workers (Question 1). It was argued that there was no longer a clear divide between standard employment and – first and foremost – other types of employment, but rather a continuum explained by flexicurity strategies and other developments.

With regard to the line between employment and service contracts (business activities), Prof. Risak from Austria argued in favour of a new and more sensible (in terms of dependency) employment concept (Question 3). Nevertheless, flexible work forms are very common in most labour markets today, and not least among transnational workers. The lack of the right of undocumented migrant workers to reside in the country of work is no doubt the major obstacle for tackling its undeclared character, the reduced social security rights of flexible work in some MS are also very problematic. According to Prof. McKay, workers will only believe that it is in their interest to declare their work if it is covered in the social benefit system – also in the short term.

Whereas within the EU and between the MS it was argued that the focus should be on bogus self-employment/posting, if a more global perspective is taken, it is the segregation of African and Asian workers that in fact requires attention. As regards cross-border work, the idea was raised that the same labour laws should apply for all workers in a given territory. Cross-border workers are known to be associated with undeclared and precarious work. For Austria, the example of ‘24-hour care work’ for limited periods (two weeks) as a new cross-border practice (in this case with Bulgaria and Rumania) was mentioned. This brought the group’s attention to the gendered perspective on transnational labour (Question 2), an aspect that was generally recognised since migrant work often relates to domestic (cleaning and care) work – traditionally ‘women’s work’.

Women migrant workers are also known to be the most vulnerable and are thus in a situation to accept precarious working conditions, whether from a contractual or other points of view. Work in private households is especially difficult to control and undeclared work is therefore especially widespread in this sector. Mention was also, however, made of the IT-sector as a male dominated branch of frequent bogus self-employment.

The role of labour inspectorates was also discussed (Question 4). In The Netherlands, the reduction of labour inspectorates is a reality and concepts such as ‘labour inspectorate holiday’ have developed, referring to a period free of controls post-inspection. ‘Hyper mobile workers’
(especially in the construction industry) are a growing group that is not controlled. In Sweden, the role of labour inspectorates is to a great extent traditionally left to the social partners who monitor the application of collective agreements covering most of the labour market. As far as undeclared migrant work is concerned, this is a major problem since these workers, as a rule, do not become members of trade unions and are, generally speaking, marginalised on the Swedish labour market because nobody assumes responsibility for their working conditions apart from the social dumping aspect. Tradition clashes with reality as no real control mechanism is in place.

The session was concluded with a discussion on youth and their part in undeclared work (Question 6). Many examples of more or less ‘precarious’ forms of economic activities for young people at low or no pay were presented. These examples were characterised by ‘exploitation in declared/regulated forms’ (internships, trainees) and not by its undeclared character.
6.2.2 Working group 2 chaired by Prof. Robert Rebhahn

1. Nearly all Member State experts agreed that employment law at both national and EU level has traditionally been founded on a notion of the standard employment contract. This might contribute to the exclusion of transnational workers. The UK representative stated that this is only a legal framework. Specifying the status of an employee is important with reference to access to employment rights – benefits and social security. The expert from the Czech Republic promoted the idea of a benchmark for both employers and workers. Some immigrants work under extremely bad conditions and are often very poor. That is the reason why we need a specific list of rights and minimum standards. ILO conventions do not suffice and only have a minor impact on the situation in the Czech Republic. The ILO agreed to this and that several recommendations for a list of rights in this particular case could be provided.

2. The participants confirmed that there are gender implications of undeclared work. There is a large group of female domestic workers but nevertheless, many Latvian male workers are often unpaid – especially in the construction sector. Most individuals engaged in undeclared work are men, but it is also a question of type of work. In the domestic sector more women than men are affected while the opposite is true for the construction sector. Undeclared work is also an issue in the Spanish textile industry. Many women are home-based and work for large companies.

3. It is more of a political issue to discuss negative associations of migrant status and getting access to the labour market than a question of labour law.

4. Nearly all countries stated that there has been no change in the rate of undeclared work in line with changes in the number of labour inspectors or results are still being expected or unclear. Finland and Iceland did not change the amount of labour inspectors. Greece and Portugal now have more labour inspectors and the ILO confirmed that the rate of undeclared work is now lower than in the past in Sweden, The Netherlands and Greece.
5. The ILO convention on Home Work (No. 177) has nearly no implications in all represented countries.

6. Interns working unpaid or for low wages are a serious concern in nearly all represented countries. In Spain and Portugal, many employees work for the same undertaking in the same shift, department or sector but are treated differently. Some enjoy better conditions, some are treated poorly for the same work. In Germany, internships are often paid less though these internships often replace full-time positions.

6.2.3 Working group 3 chaired by Dr. Tomas Davulis and Prof. Edoardo Ales

1. The Group agreed that labour law shall not only focus on the standard employment contract but shall also take what we call marginal workers (Randbelegschaft in German) into account, who in many cases are transnational workers. Moreover, the Group reflected on the necessity to have clearer and, to the extent possible, common definitions within EU labour law, be it employed or self-employed persons, in order to clarify the personal scope of application of EU law instruments.

2. According to the Group, undeclared work often refers to care activities which are primarily performed by female workers. This is the case, for instance, in Germany, where many women are from Eastern European countries, such as Poland or Ukraine, and take care of elderly people without being declared to the public authorities. Moreover, informal work economies are likely to replicate declared labour market segmentation as far as the gender dimension is concerned.

3. According to the Group, there is a strong negative link between migration, undeclared work and social exclusion. On the other hand, the Italian experience shows that conditioning the legal stay of third country nationals to their employment status in times of high unemployment rates fuel illegal work and illegal immigration, feeding criminal organisations which are involved in human trafficking.
4. There was widespread agreement among the Group that labour inspection shall be reinforced and that labour law has to provide a stable and clear conceptual framework to labour inspectors in order to help them ascertain misdeclared work. The Swedish delegate regrets the absence of labour inspection in Sweden. Theoretically speaking, trade unions play that role, but this is not always the case, above all when it comes to envelop work, which, as it happens, is not considered problematic in many other European countries.

5. In many countries, home work conceals undeclared work.

6. At least in Italy, this seems to be a serious concern.
6.2.4 Working group 4 chaired by Prof. Catherine Barnard

This session led to a wide ranging discussion of the rather disparate questions for discussion. Given the limited time, those questions which had been considered in the earlier working groups were not discussed again here (qu’s 1, 4, 6)

As to the first question, there seemed to be no relation between undeclared work and the standard employment contract, nor did the use of the standard employment contract exclude transnational workers. Issues of transnational labour, especially when it came to migration from outside the EU (ie third country nationals), related more to migration law, with different questions and difficulties.

In respect of the second question, there was a general view that men tend to remain in undeclared work for longer than women. In Norway the Fafo Institute conducted two surveys, one in 2006 and a follow-up in 2010. According to the 2006 study, most male workers were employed in the building industry, while women workers mostly worked in the cleaning sector. According to the 2010 report, most of these male workers were still undeclared. Nevertheless, the facts/numbers show that there was a higher percentage of women who were in declared work, possibly because of their need to access social services such as health care.

As to the fifth question, it seems that ILO Convention No. 177 hardly has had any impact. However, ILO Convention No. 81 on labour inspection may have some impact.
7. Discussion with Social Partners

Discussion with Sam Hägglund, General Secretary, European Federation of Building and Woodworking (EFBWW) and Johan Willemen, Vice-President SOC, European Construction Federation (FIEC)

During the Friday afternoon session chaired and moderated by Prof. Guus J.J. Heerma van Voss, the representatives of the social partners embarked on a discussion of the topic “undeclared work” from a legal point of view. After a short presentation of the panel discussants, Mr. Sam Hägglund, who is General Secretary of the European Federation of Building and Woodworking (EFBWW), took the floor.

Mr. Hägglund first made a reference to the common positions to be adopted regarding the enforcement directive and the posting of workers directive. These positions will not so much be dealing with the legal issues, but the way how to tackle undeclared work as the other side of social dumping and illegal actions.

The examples in this field are concrete. An Irish temporary work agency is currently creating the biggest problems as social security contributions for the workers are not being paid and wages are being withheld for various reasons. The method followed is the recruitment of workers in low labour cost countries (especially with regard to social security contributions) and then posting them to high labour cost countries. The employers are subsidiaries to the “letterbox” company. This new business model of cheap labour and “social cost shopping” avoiding the payment of social security contributions is currently expanding.

A case from the Netherlands involving the same Irish company was reported. While workers from Portugal were posted in the Netherlands by the aforementioned company, it was reported that almost 1,000 Euros were deducted from the wages for different kinds of expenses.

According to Mr. Hägglund, this business model is failing in terms of fundamental rights as well as economic rights. He characterised this as a “lose-lose-lose” situation (as compared to the “win-
win” situation) for all the parties involved, i.e. the employers, the employees, the industry and the customers.

In the 1990s there has been a European Commission study regarding the cost of labour and the final product in the construction industry. It was observed that in the UK there were the most expensive houses and the industry was therefore insufficient. As a result, the industry started using self-employed construction workers (around 50%) in order to lower the costs. This phenomenon is repeating today as this lesson has already been forgotten.

Mr. Hägglund recommended that these phenomena should be addressed on a European level. The fight against false self-employment should be reinforced by the checking and controlling procedures provided for in the enforcement directive. He stressed out that if there is no enforcement, then the regulations will just stay on paper.

The second panel discussant was Mr. Johan Willemen, Vice-President SOC of the European Construction Federation (FIEC). Mr. Willemen mentioned that as a general contractor he employed 2,000 people. He started his presentation by saying that the posting of workers goes back to the start of Europe and more specifically to the freedom of workers to work everywhere in Europe thinking without borders. Then there were only 9 countries involved and nothing was foreseen for creating a Social Europe. However, the situation today with 28 countries is completely different; a gap in costs has now been created and the workers are the victims. Mr. Willemen argues that employers do not want illegal labour and it is impossible for small businesses to work with Polish domestic workers who do not pay any VAT and social security contributions. As far as social security is concerned, the “victims” are the host countries as the social security contributions of the posted workers are paid in the country of origin. According to Mr. Willemen’s opinion, the social security contributions should be paid where people work.

After these two presentations, Prof. Heerma van Voss opened the discussion for questions and dialogue between the social partners.

Mr. Hägglund noted that his federation has been active in the posting of workers directive which during the 1990s was a main issue, but in the meantime it was watered down by rulings of the European Court of Justice. Cross border work should be dealt with by regulating at least the basic rights of the host country. Like other federations, he would like to hear about the ideas, solutions
and themes in this respect, for example proposals to find other regulations to tackle with “letterbox” companies. He posed questions about the perspectives of an EU social security card and joint liability of contractors. Finally, he concluded that a new EU agency for undeclared work in transnational cases would be a good approach to deal with this matter. However, he pointed out that co-operation between authorities in different countries could be a difficult issue.

Mr. Willemen then talked about the system in Belgium which is called LIMOSA. According to this system, the employers have to declare the employees to the social security authorities before they start working. He said that he is in favour of a social identity card and further proposed that every worker at the building site has to wear an identity badge with a photo and information on the company for who he/she works. In Sweden this system is already working.

With regard to joint liability, he contented not to agree because such a measure would impose a responsibility about illegal workers who are not paid for what they should be paid. In addition, the employer cannot control if someone is complying with tax and other responsibilities. The employer can ask the employee to show the identity card, but he/she cannot demand it.

After this discussion, Prof. Heerma van Voss asked whether it seemed more plausible to have an identity card on a country by country level or on a European level. Mr. Hägglund was in favour of regulating the issue on European level because an EU model is better. In Mr. Willemen’s opinion, the identity card should be introduced on a European level, but he noticed that there may be difficulties as national systems have different regulations about labour. He brought as an example the situation in Belgium where there are different labour rules in each region. Prof. Heerma van Voss concluded that the industry is in favour of the identity card, but the countries may raise obstacles.

Another theme of the discussion was if there are other propositions to be taken under consideration, e.g. national supervision.

Mr. Hägglund referred to the stick and carrot example which was already brought up during the Thursday afternoon session by Prof. Williams. Mr. Hägglund is of the opinion that exploiting workers is a criminal offence when it is continuous and repeating, subjecting the workers to job
trafficking. He proposed that sanctions and incentives should be both included in the measures; in his view, incentives are preferable, but stricter sanctions for severe cases are needed.

Mr. Willemen then pointed out that companies are just names and you cannot penalise them for illegal work cases. In his opinion, there should be central databases for each country accessible on EU level on whether people are paying their social security contributions. The problem should also be addressed on an international level due to the world economic market, because in the next years other situations are likely to occur, especially regarding third-country national workers.

Regarding sanctions for undeclared work, Mr. Hägglund added that there should be a ban of public contracts for companies with undeclared workers. He also drew attention to the fact that big contractors are hiding behind providers of exploiting workers. As for the naming and shaming issue, the companies need to have a “clean” name. In practice it is impossible for labour providers to get into the markets of some countries (outside of the legal system/informal banning system).

Mr. Willemen expressed his view that there is a big gap in the cost of foreign labour. Social security contributions and taxes cost less in Poland as in Belgium when a Polish worker is brought to work in Belgium; Mr. Willemen argued that the Polish worker would cost about 25% less than the Belgian worker. Moreover, there is no control of how much the workers have been paid as many deductions from their wages occur (for catering, housing, etc).

The last issue raised by Prof. Heerma van Voss was the civil sanctions issue. Regarding civil sanctions Mr. Hägglund argued that due to the vulnerable situation of workers only checking is not enough. The lower cost of labour makes the competition unequal, which is one step behind. There is no talk about wage policy for national partners. Mr. Willemen disagreed with the civil sanctions option, because the joint liability is a “high penalty” and does not constitute a good system. A controlling system is better than penalties and a good solution for everybody. The central system in Belgium with data mining and figures on companies is – in his opinion – rather successful and it should be implemented in other countries as well.
8. List of Delegates

Roland ABELE, dfv Media Group (RIW), Germany
José ABRANTES, Member ELLN, New University of Lisbon, Portugal
Edoardo ALES, Member ELLN, University of Cassino and Southern Lazio, Italy
Andris ALKSNIS, Employers Confederation of Latvia, Latvia
Diego ÁLVAREZ ALONSO, Member ELLN, University of Oviedo, Spain
Yamam AL-ZUBAIDI, The Swedish Equality Ombudsman, Sweden
Diane ANGERMUELLER, European Commission - DG Employment, Social Affairs and Inclusion, Belgium
Michel ASEGLIO, FPS Employment, Labour and Social Dialogue, Belgium
Helga AUNE, Member ELLN, University of Oslo, Norway
Anthony AZZOPARDI, Department of Industrial and Employment Relations, Malta
Máris BADOVSKIS, Ministry of Welfare, Latvia
Kadriye BAKIRCI, Hacettepe University, Turkey
Effrosyni BAKIRTZI, Staff member ELLN, Goethe University Frankfurt, Germany
Marilena Nicoleta BALABUTI, Labour Inspectorate Bucharest, Romania
Zoltán BANKÓ, University of Pécs, Hungary
Barend BARENTSEN, Member ELLN, Leiden University, The Netherlands
Catherine BARNARD, Member ELLN, University of Cambridge, United Kingdom
Juliano BARRA, Université Paris 1 Panthéon-Sorbonne, France
Dirk BEEKMAN, Ministry of Social Affairs and Employment, The Netherlands
Christine BELLIZZI, Bellizzi Legal Offices, Malta
Amelie BERG, Ministry of Employment, Sweden
Gyula BERKE, University of Pécs, Hungary
Isabella BILETTA, Eurofound, Ireland
Elín BLÖNDAL, Member ELLN, Bifröst University, Iceland
Magdalena BOBER, BUSINESSEUROPE, Belgium
Agnieszka BOLESTA, Ministry of Labour and Social Policy, Poland
Silvia BORELLI, Italian General Labour Confederation (CGIL), Italy
Matthias BROLL, Staff member ELLN, Goethe University Frankfurt, Germany
Jaap BUIS, Randstad / Eurociett, The Netherlands
Laura CALAFÀ, University of Verona, Italy
Domenico CAMPOGRANDE, European Construction Industry Federation (FIEC), Belgium
David CARVALHO MARTINS, University of Lisbon, Gómez-Acebo & Pombo Abogados, S.L.P., Portugal
Iva ČATIPOVIĆ, University of Zagreb, Croatia
Romana ČERVINKOVÁ, Ministry of Labour, Social Affairs, Family, Slovakia
Dragomir Georgin CIPRIAN, Labour Inspection of Romania, Romania
Michèle CLAUS, Federation of Enterprises in Belgium (FEB), Belgium
Stefan CLAUWAERT, European Trade Union Institute (ETUI), Belgium
Omar CUTAJAR, Malta Business Bureau, Belgium
Daniel CUYPERS, University of Antwerp, Belgium
Tomas DAVULIS, Member ELLN, Vilnius University, Lithuania
Diwaëlle DE ALBUQUERQUE SARMENTO, University of Paris I Panthéon-Sorbonne, France
Massimiliano DELFINO, Università di Napoli Federico II, Italy
Raluca DIMITRIU, Member ELLN, Academy of Economic Studies, Romania
Michael DOHERTY, National University of Ireland Maynooth (NUIM), Ireland
Padraig DOOLEY, NERA National Employment Rights Authority, Ireland
Kristine DUPATE, Member ELLN, University of Latvia, Latvia
Matleena ENGBLOM, Member ELLN, Finnish Metalworker’s Union, Lawyer, Finland
Sjoerd FEENSTRA, European Commission - DG Employment, Social Affairs and Inclusion, Belgium
Ludwik FLOREK, Warsaw University, Poland
Christina GEORGANTA, SEV Hellenic Federation of Enterprises, Greece
Ivana GRGUREV, Member ELLN, University of Zagreb, Croatia
Karolina GRITZERÓVÁ, Ministry of Labour and Social Affairs, Czech Republic
Muriel GUIN, European Commission - DG Employment, Social Affairs and Inclusion, Belgium
Sam HÄGGLUND, European Federation of Building and Woodworkers (EFBWW), Belgium
Rudolf HAHN, State Labour Inspection Office, Czech Republic
Matúš HANUS, Ministry of Labour, Social Affairs and Family, Slovakia
Guus HEERMA VAN VOSS, ELLN Co-organiser, Leiden University, The Netherlands
Jitka HEJDUKOVÁ, Confederation of Industry of the Czech Republic (SP CR), Czech Republic
Wolfgang HELLER, Federal Ministry of Labour and Social Affairs, Germany
Johannes HEUSCHMID, Hugo Sinzheimer Institute, Germany
Jan HIJLT, Ministry of Employment and the Economy, Finland
Mijke HOUWERZIJL, Tilburg University, The Netherlands
Petr HŮRKA, Member ELLN, Charles University Prague, Czech Republic
Guus HEERMA VAN VOSS, ELLN Co-organiser, Leiden University, The Netherlands
Jan-Luca JANSSEN, Staff member ELLN, Goethe University Frankfurt, Germany
József Krisztián JÁRAI, National Labour Office - Directorate for Labour Inspections, Hungary
Jan-Luca JANSSEN, Staff member ELLN, Goethe University Frankfurt, Germany
Eli Mette JARBO, Ministry of Labour, Norway
Brian KEARNEY, Department of Social Protection, Ireland
Vincent KENRICK, Revenue Commissioners, Ireland
Ádám KÉRI, LIGA, Democratic League of Independent Trade Unions, Hungary
Anthony KERR, Member ELLN, University College Dublin, Ireland
Francis KESSLER, Member ELLN, Université Paris 1, France
György KISS, Member ELLN, University of Pécs, Hungary
Polonca KONČAR, Member ELLN, University of Ljubljana, Slovenia
Jan-Luca JANSSEN, Staff member ELLN, Goethe University Frankfurt, Germany
Yasemin KÖRTEK, University of Applied Labour Studies of the Federal Employment Agency, Germany
Eleftheria KOURENTA, Ministry of Labour, Social Security and Welfare - Labour Inspectorate, Greece
Jens KRISTIANSEN, Member ELLN, University of Copenhagen, Denmark
Daniela KRÖMER, CMS Reich Rohrwig Hainz, Austria
Miriam KULLMANN-KIOCKE, Staff member ELLN, Leiden University, The Netherlands
Katharina LINDNER, Federation of Austrian Industries, Austria
Mariagrazia LOMBARDI, Ministry of Labour and Social Affairs - Labour Inspectorate, Italy
Claude LORANG, Labour and Mining Inspectorate, Luxembourg
Esther LYNCH, Irish Congress of Trade Unions (ICTU), Ireland
Nikita LYUTOV, Kutafin Moscow State Law University, Russia
Vilius MAČIULAITIS, State Labour Inspectorate, Lithuania
Xenia MALA, Permanent Representation of the Slovak Republic to the EU, Slovakia
Christine MARBURGER, Staff member ELLN, Goethe University Frankfurt, Germany
Damjan MÄSERA, Labour Inspectorate, Slovenia
Sonia MCKAY, Working Lives Research Institute, London Metropolitan University, United Kingdom
Claudia MENNE, European Trade Union Confederation (ETUC), Belgium
Reile MEYERS, Staff member ELLN, Leiden University, The Netherlands
Aron MIFSUD BONNICI, General Workers' Union (GWU), Malta
Lorna MIFSUD CACHIA, Member ELLN, Dingli & Dingli Law Firm, Lawyer, Malta
Emil MINGOV, Ministry of Labour and Social Policy - Labour Inspectorate, Bulgaria
Sabine MIRTSCHING, Ministry of Social Affairs Hessen, Germany
Leszek MITRUS, Member ELLN, Jagiellonian University Krakow, Poland
Liis NAABER-KALM, Labour Inspectorate, Estonia
Mona NÆSS, Ministry of Labour, Norway
Alan C. NEAL, University of Warwick, United Kingdom
Euredice NEPVEU, Staff member ELLN, Leiden University, The Netherlands
Deniz NIKOLAUS, Staff member ELLN, Goethe University Frankfurt, Germany
Mārīte NORIŅA, State Labour Inspectorate, Latvia
Natasa NOVAKOVIC, Croatian Employers’ Association, Croatia
Ann NUMHAUSER-HENNING, Member ELLN, Lund University, Sweden
Siobhan O’CARROLL, Department Jobs, Enterprise & Innovation, Ireland
Davide PAPA, Ministry of Labour and Social Affairs - Labour Inspectorate, Italy
Costas PAPADIMITRIOU, Member ELLN, University of Athens, Greece
Martina PERRENG, DGB Confederation of German Trade Unions, Germany
Susanne PIFFL-PAVELEC, Federal Ministry of Labour, Social Affairs, and Consumer Protection, Austria
Maria PIHL, Ministry of Social Affairs, Estonia
Peter POGACAR, Ministry Of Labour, Family and Social Affairs, Slovenia
Raymond POINCET, Ministry of Labour, France
Wolfgang PORTMANN, Member ELLN, University of Zurich, Switzerland, representing Liechtenstein
Željko POTOČNJAK, University of Zagreb, Croatia
Jeremias PRASSL, University of Oxford, United Kingdom
Baiba PUĶUKALNE, State Labour inspectorate, Latvia
Jean-Luc PUTZ, Member ELLN, Luxembourg District Court, Judge, Luxembourg
Eglė RADIŠAUSKIENĖ, Ministry of Social Security and Labour, Lithuania
Carita RAMMUS, European Commission - DG Employment, Social Affairs and Inclusion, Belgium
Sigrid RAND, Institute for Economics, Labour and Culture (IWAK), Goethe University, Germany
Natasa RANDLOVA, Randl Partners, Czech Republic
Wilfried RAUWS, Member ELLN, Free University of Brussels, Belgium
Robert REBHAN, Member ELLN, University of Vienna, Austria
Hannah REED, Trades Union Congress (TUC), United Kingdom
Vadim REIMER, Staff member ELLN, Goethe University Frankfurt, Germany
Katja RIHAR BAJUK, Ministry Of Labour, Family and Social Affairs, Slovenia
Martin RISAK, Member ELLN, University of Vienna, Austria
Mia RÖNNMAR, Member ELLN, Lund University, Sweden
Kristof SALOMEZ, Free University of Brussels (VUB), Belgium
Vít SAMEK, CMKOS Czech Moravian Confederation of Trade Unions, Czech Republic
Laura SCHAFFER, Staff member ELLN, Goethe University Frankfurt, Germany
Marlene SCHMIDT, Hugo Sinzheimer Institute, Germany
Siebe SCHOUTEN, Ministry of Social Affairs and Employment - Labour Inspectorate, The Netherlands
Robert SCHRONK, Member ELLN, Matej Bel University, Slovakia
Achim SCHUNDER, Publishers C. H. Beck, Germany
Petr SEIDL, Ministry of Labour and Social Affairs, Czech Republic
Achim SEIFERT, University of Jena, Germany
Iacopo SENATORI, Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy
Fotini SISMANIDOU, Ministry of Labour, Social Security and Welfare, Greece
Krassimira SREDKOVA, Member ELLN, Sofia University “St. Kliment Ochridski”, Bulgaria
Hrafnhildur STEFÁNSDOTTÍR, Confederation of Icelandic Employers SA, Iceland
Stefan STRÄSSER, Confederation of German Employers’ Associations (BDA), Germany
Vatroslav SUBOTIĆ, Ministry of Labour and Pension System, Croatia
Gaëtan TAVITS, Member ELLN, University of Tartu, Estonia
Beryl TER HAAR, University of Amsterdam / AIAS, The Netherlands
Karen THORMANN, Ministry of Employment, Denmark
Evelien TIMBERMONT, Free University of Brussels, Belgium
Nicos TRIMIKLINIOTIS, Member ELLN, University of Nicosia PRIO Cyprus Centre, Cyprus
M. Carmen TRUJILLO ABAOCA, Labour and Social Security Inspectorate, Spain
Joana VASCONCELOS, Portuguese Catholic University (Lisbon), Portugal
Maria-Luz VEGA RUIZ, Intenational Labour Organisation, Switzerland
Noel VELLA, Department of Industrial and Employment Relations, Malta
Didier VERBEKE, Federal Public Service Social Security, Belgium
António VERGUEIRO, Confederation of Portuguese Business (CIP), Portugal
Hans Peter VIETHEN, Federal Ministry of Labour and Social Affairs, Germany
Bernd WAAS, ELLN Coordinator, Goethe University Frankfurt, Germany
Manfred WEISS, Goethe University Frankfurt, Germany
Silvia WENZEL, Staff member ELLN, Goethe University Frankfurt, Germany
Elisabeth WIJKMAN, Ministry of Employment, Sweden
Johan WILLEMEN, European Construction Industry Federation (FIEC), Belgium
Colin C. WILLIAMS, University of Sheffield, United Kingdom
Andreas ZENS, Federal Ministry of Labour and Social Affairs, Germany
9. **Annex**

9.1 **Keynote Papers**

9.1.1 **Keynote Paper by Prof. Edoardo Ales**

*Undeclared work: An activity-based legal typology*

*Prof. Edoardo Ales, Cassino*

Undeclared work has duly been defined as ‘any paid activity that is lawful as regards its nature (i.e. is not criminal) but not declared to public authorities, taking into account differences in the regulatory system of Member States’.¹

An activity-based definition is used because ‘it allows for the inclusion of forms of undeclared work that are popular in Europe and which are excluded in enterprise and/or jobs-based definitions. Prominent examples include: the under-reporting of income by self-employed people and formal businesses, which are excluded in an enterprise-based definition; and ‘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’.

Starting from this definition, the paper aims to: 1. Conceptualise paid activity; 2. identify active and passive registration and declaration duties, their object, their general and specific purposes and the public authorities involved; 3. typify the breaches of legal duties of registration and/or declaration, referring them to the juridical or physical person performing each activity.

**I. ‘Paid activity’: What we mean**

The concept of ‘paid activity’ is multifaceted. Within this concept, two main forms of activity stand out - a *business* activity carried out by a juridical person (a company), above all in the form of a small enterprise, and *work activity* performed by a physical person (a worker) within the scope of either a *self-employed* or an *employed relationship*.

As is well known, it is not easy to draw a clear-cut distinction between *business* and *work activity*, particularly with regard to the activity performed within the scope of a self-employed relationship, as well as between *self-employment and employment relationships* within the scope of *work*.

activities. From a legal perspective, distinctions and definitions are, needless to say, crucial. First, because different registration and/or declaration duties apply when qualifying paid activity as a business or work activity, self-employment or employment. Secondly, due to the differences in the branch of law or the different regimes within that branch (this is of particular significance in tax law), the concept of paid activity changes in accordance with qualification. Hence, different legal and financial responsibilities for the provider and user of paid activity apply to each qualification.

First and foremost, each party must decide—unilaterally or by agreement with another party—which legal solution among those applicable in the relevant regulatory system corresponds to the given case. For some cases, such a process of self-qualification comes easy. In others, self-qualification may be disputed. In yet others, the weight of the legal and financial responsibilities attached to the respective qualification may give rise to a different and more favourable self-qualification, resulting in a misdeclaration or even an absence of registration and/or declaration (see below).

Disputed cases may relate to both business and work activity.

With regard to the first case, it must be emphasised that business can also be carried out by a physical person (an entrepreneur), who has established a small or medium enterprise and who combines her own work within the company with the organisation of paid activities performed by other juridical or physical persons. In such cases, the activity qualifies both as a business and as a self-employed work activity. Consequently, in countries in which a mandatory social insurance scheme exists for self-employed persons, the physical person shall not only be registered as an entrepreneur but also be insured as being self-employed.

As far as work activity is concerned, disputed cases may relate to an increasing presence of work relationships to which, from a legal and/or socio-economic point of view, it is difficult to fully apply the rules governing the employment (labour law) or the self-employment (civil law) relationship.

This may, for instance, occur when a worker neither performs her tasks under the direction and control of an employer, nor is totally free to organise her activity since it is part of a wider organisation with which the activity needs to be continuously coordinated. Continuity and coordination, which in many cases are synonymous of a single client situation, are features that are likely to push the legislator to extend part of the rights guaranteed to subordinate workers to such activities without, however, qualifying the relationship as ‘employed’. This means that, apart from those rights, general rules on self-employment continue to apply to that particular relationship. This is the case in Italy where so-called ‘coordinated self-employment’ performed within the scope of a project work contract is regulated by Legislative Decree No. 276 of 2003.

To help the potential parties of a work relationship avoid uncertainties which may lead to an incorrect qualification of the case, the Italian legislator (through the above mentioned legislative decree) introduced a procedure of certification of labour contracts which can be initiated (upon request of either party) by labour authorities or by independent bodies (Commissioni di certificazione) created, among others, by universities and chaired by a labour law professor. A contract that has undergone the certification procedure will produce a presumption of proper

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qualification of the employment relationship (as employed, coordinated self-employed, self-employed or sub-contracting) before the labour, health, social security and tax authorities in case of inspection. Only a court decision may revert this presumption.

Uncertainty may also arise when a self-employed worker is considered to be economically dependent because she finds herself in a single client situation, thus requiring the extension of some of the rights guaranteed to subordinate workers. This is the case in Germany for Arbeitnehmerähnliche Personen.

By extending some of the rights guaranteed to employees to work relationships that qualify as self-employed, legislators have introduced a further form of work activity i.e., ‘coordinated self-employment’ or ‘quasi-subordinated work’ which must be declared as such.

II. Registration and declaration duties: Object, general and specific purposes and the public authorities involved

Once each paid activity has been qualified, a specific branch of law applies.

As is well known, company law applies to business (including business carried out by self-employed persons). However, as already emphasised above, if the activity is performed by a physical person (entrepreneur), social security law may also be applicable.

Theoretically speaking, only civil law should apply to self-employed relationships. In many cases, labour market regulations apply (as far as the declaration duty is concerned) and, more and more frequently, so does social security law.

A combination of labour and civil law regulations as well as special provisions of social security law applies to coordinated self-employed relationships or quasi-subordinated work.

Needless to say, labour law and social security law apply to employment.

More generally, tax law is applicable to any paid activity and must be declared to tax authorities. Furthermore, any business (including business carried out by self-employed persons) shall be registered with a trade authority, in most cases, a Chamber of Commerce. Often, licenses and permits have to be submitted to various public or independent authorities.

The purpose of registration and/or declaration is the establishment, transformation, extension or termination of any business or work activity.

One may say that the registration and/or declaration duty of a paid activity serves four general purposes:

(i) Employment policy and protection: Any work activity shall be declared for employment policy and protection purposes in order to allow employment services and labour authorities to perform the tasks assigned to them by the relevant regulatory system.
(ii) Social protection: Any work activity (including business carried out by self-employed persons) shall be declared for social protection purposes in order to allow social security bodies to perform the tasks assigned to them by the relevant regulatory system, be it legal or contractual.

(iii) Start-up and transparency: Any business (including business carried out by self-employed persons) shall be declared and registered for start-up and transparency purposes, i.e., to initiate the activity, by obtaining the licences and permits required by the relevant regulatory system from trade authorities.

(iv) Taxation: Any paid activity shall be declared for tax purposes in order to allow tax authorities to perform the tasks assigned to them by the relevant regulatory system.

Generally speaking, one may say that the establishment, transformation, extension or termination of any work activity shall be declared by anyone who organises and profits from them.

More specifically, the relevant public authorities pursue specific aims within the scope of employment policy and protection and social protection purposes.

In fact, a declaration (often called communication) submitted to the employment services allows them (a) to remove the newly hired worker from the job seekers list; (b) to initiate the job seeking process in case of termination of a work relationship by implementing active labour market policies, among others; (c) to collect statistical data on employment and unemployment rates. These activities strictly relate to the realisation of employment policy.

In some countries, employment services must forward the ‘communication’ to the authorities responsible for the realisation of employment protection and social protection. Labour authorities (in some countries the health authorities as well) are responsible for the former and supervise the application of mandatory work regulations, be they of a statutory or of a contractual nature, through labour (health) inspections. Social security bodies are in charge of the management and implementation of social protection measures, i.e., of the implementation of public or private mandatory social insurance or assistance schemes. This often involves their own inspectorates.

Different active and passive registration/declaration duties are attached to each paid activity. In particular:

(i) Business must be registered for start-up and transparency as well as for taxation purposes, and shall declare the establishment, termination, transformation or extension of any kind of work activity for employment policy and protection, social protection and taxation purposes;

(ii) Self-employment (if performed as a business) must be registered for transparency and start-up purposes and self-declaration for social insurance and taxation purposes must be made; (if performed as a business) self-employed persons shall declare the establishment, termination, transformation or extension of any kind of work activity for employment policy and protection, social insurance and taxation purposes;

(iii) Self-declaration is mandatory for coordinated self-employment or quasi-subordinated work for social protection and taxation purposes. In case of coordinated self-employment, the client must declare it for employment policy and protection, social insurance and taxation purposes;
(iv) Employment shall be declared by the employer for employment policy and protection, social insurance and taxation purposes.

III. Types of violations of legal duties of registration and/or declaration and paid activities they can be referred to

Different types of violations of legal duties of registration and/or declaration can be identified. These are:

(i) Absence of registration and/or declaration;

(ii) Partial declaration;

(iii) Declaration as self-employment (also coordinated or quasi-subordinated) of an employment relationship.

The presence or lack of intent to perpetrate such a violation is not relevant for our purposes. It is relevant with regard to the definition of sanctions which might be reduced if the perpetrator can demonstrate that there was no intention to conceal the work activity.

(i) The notion of absence of registration and/or declaration is self-evident. It may refer to all paid activities.

In the case of business, violations may consist either of an absence of registration and of declaration of work relationships of any kind to the relevant public authorities, or of a registration without declaration of (or part of) work activities of any kind to the relevant public authorities.

In the case of self-employment, violations may consist either of an absence of registration and (in case of business) of a subsequent absence of declaration of work activities of any kind to the relevant public authorities, or (in case of business) of a registration without declaration of (or part of) work activities of any kind to the relevant public authorities; or of an absence of self-declaration and (in case of business) of an absence of declaration of (or part of) work relationships of any kind to the relevant public authorities.

In the case of coordinated self-employment, violations may consist either of an absence of declaration by the client to the relevant public authorities or of an absence of self-declaration to social security bodies.

In the case of employment, violations may consist of an absence of declaration of the employee by the employer to the relevant public authorities. As far as employment is concerned, one specific case, recently also incorporated in EU law, is the absence of notification by the employer of employed third country nationals as required by Art. 4(1)(c) Directive 2009/52/EC, which may conceal ‘illegal employment’ defined as “the employment of an illegally staying third-country national” (art. 2(1)(d) Directive 2009/52/EC).
A very interesting and slightly different case is the **beneficiaries of social security benefits**. As far as such benefits are concerned, violations may consist of an absence of self-declaration to the relevant benefits provider (be it the employment services, the health authority or a social security body) of the paid activity the beneficiary is performing, despite her entitlement to the benefit which usually excludes earning of any other income. In case the beneficiary performs coordinated self-employed or employed activities, the client/employer agrees to omit declaration to the relevant public authorities.

This can be regarded as the only win–win situation in case of an absence of declaration since, on the one hand, the beneficiary can continue to receive the benefit, adding another undeclared income while, on the other, the user of the paid activity can set a remuneration that falls below the threshold for declared work activity. In all other cases of absence of declaration, the worker will always be at a disadvantage, since she will neither benefit from any kind of employment protection nor from social insurance coverage. This is why undeclared work can be equalised with indecent work.

(ii) Partial declaration refers to an activity (described as ‘grey work’, ‘under-declared work’ or ‘envelop work’) that is performed within the scope of a declared work (above all, employed) relationship, whilst the relevant public authorities are misled about its quantity in terms of level of revenue, earned income, worked hours, etc.

In the case of an employment relationship, this may be considered a win-win situation for the unethical employer and employee since, on the one hand, the employer is seemingly complying with the duty of declaration and, on the other, the employee enjoys a decent level of social insurance coverage, additionally earning a tax free remuneration for the grey work performed (usually as overtime work) on which the employer, in turn, does not need to make social insurance contributions and pay taxes due in case of full declaration.

(iii) In the case of declaration of a business or of a self-employed (including coordinated or quasi-subordinated) relationship of a subordinated work activity (so-called bogus self-employment, misdeclared work, Švarc system), it is the employer who benefits.

Indeed, if we look at the changes that have been introduced in the regulatory system of work activities in some European countries, it seems that unethical business has explored new forms of misdeclared work in response to legislature fighting bogus self-employment.

This is the case in Italy, where coordinated self-employed contracts have (also) been used for quite some time to conceal employment relationships. In 2003, the legislator intervened to tighten the legal requirements make the legal requirements stricter, permitting coordinated self-employment contracts only for predefined projects to be performed autonomously within a fixed period of time (the already mentioned project work contract). Consequently, the number of so-called VAT workers increased. VAT workers are individuals who perform their activity under subordinate legal and economic conditions, but are linked to the ‘employer’ by a contract of services that they provide as a small entrepreneur. To reverse this trend, the Italian legislator introduced a rebuttable presumption of subordinate work in 2012 for cases in which such a VAT worker provides services for a single client and her income falls below a certain annual threshold.

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IV. Conclusions

Staring from an activity-based definition of undeclared work, this paper has aimed to conceptualise ‘paid activity’, to identify active and passive registration and declaration duties, their object, their general and specific purposes and the public authorities involved, to typify the breaches of legal duties of registration and/or declaration, referring them to the juridical or physical person performing each activity.

The concept of ‘paid activity’ is multifaceted. Two major forms can be identified - the concept of business carried out by a juridical person (a company), mainly by a small enterprise, and that of work activity performed by a physical person (a worker) within the scope of either a self-employed or of an employed relationship.

It is not easy to draw a clear-cut distinction between business and work activity, above all when performed within the scope of a self-employed relationship, as well as between self-employment and employment relationships with regard to work activities.

Each party must decide—unilaterally or by agreement with another party—which legal solution among those applicable in the relevant regulatory system corresponds to the given case. For some cases, such a process of self-qualification comes easy. In others, self-qualification may be disputed. In yet others, the weight of legal and financial responsibilities attached to their respective qualification may give rise to a different and more favourable self-qualification, resulting in a misdeclaration or even an absence of registration and/or declaration.

Disputed cases may relate to both business and work activity.

With regard to the first case, it must be emphasised that business can also be carried out by a physical person (an entrepreneur), who has established a small or medium enterprise and who combines her own work within the company with the organisation of paid activities performed by other juridical or physical persons. In such cases, the activity qualifies both as a business and as a self-employed work activity.

As far as work activity is concerned, disputed cases may relate to an increasing presence of work relationships to which, from a legal and/or a socio-economic point of view, it is difficult to fully apply the rules governing the employment (labour law) or the self-employment (civil law) relationship.

To help the potential parties of a work relationship avoid uncertainties which may lead to an incorrect qualification of the case, the Italian legislator, through legislative Decree No. 276/2003, introduced a procedure of certification of labour contracts which can be initiated (upon request of either party) by labour authorities or by independent bodies (Commissioni di certificazione) created, among others, by universities and chaired by a labour law professor. A contract that has undergone the certification procedure will produce a presumption of proper qualification of the employment relationship (as employed, coordinated self-employed, self-employed or sub-contracting) before the labour, health, social insurance and tax authorities in case of inspection. Only a court decision may revert the presumption.

By extending some of the rights guaranteed to employees to work relationships that qualify as self-employed, legislators have introduced a further form of work activity i.e., ‘coordinated self-employment’ or ‘quasi-subordinated work’ which must be declared as such.
Once each paid activity has been qualified, a specific branch of law applies.

The purpose of registration and/or declaration is the establishment, transformation, extension or termination of any business or work activity.

It can be said that the duty of registration and/or declaration of a paid activity serves four general purposes: (i) Employment policy and protection; (ii) Social protection; (iii) Start-up and transparency; (iv) Taxation.

Generally speaking, the establishment, transformation, extension or termination of work activities of any kind shall be declared by anyone who organises and profits from them.

More specifically, the relevant public authorities pursue specific aims within the scope of employment policy and protection and social protection purposes. In fact, the declaration (often called communication) submitted to the employment services allows them (a) to remove the newly hired worker from the job seekers list; (b) to initiate the job seeking process in case of termination of a work relationship by implementing active labour market policies; (c) to collect statistical data on employment and unemployment rates. These activities strictly relate to the realisation of employment policy.

In some countries, employment services must forward the ‘communication’ to the authorities responsible for the realisation of employment protection and social protection. Labour authorities (in some countries the health authorities as well) are in charge of supervising the application of mandatory work regulations, be they of a statutory or of a contractual nature, through labour (health) inspections. Social security bodies are in charge of the management and implementation of social protection measures, i.e., of the implementation of public or private mandatory social insurance or assistance schemes. This often involves their own inspectorates.

Different active and passive registration and/or declaration duties are attached to each paid activity. Therefore, different types of violations of legal duties of registration and/or declaration can be identified. These are (i) absence of registration/declaration; (ii) partial declaration; (iii) declaration as self-employment (also coordinated or quasi-subordinated) of an employment relationship.

(i) The notion of absence of registration and/or declaration is self-evident. It refers to all paid activities. A very interesting and slightly different case is the beneficiaries of social security benefits. As far as such benefits are concerned, violations may consist of an absence of self-declaration to the relevant benefits provider (be it the employment services, the health authority or a social security body) of the paid activity the beneficiary is performing, despite her entitlement to the benefit which usually excludes earning of any other income. In case the beneficiary performs coordinated self-employed or employed activities, the client/employer agrees to omit declaration to the relevant public authorities.

(ii) Partial declaration refers to an activity (described as ‘grey work’, ‘under-declared work’ or ‘envelop work’) that is performed within the scope of a declared work (usually employed) relationship, whilst the relevant public authorities are misled about its quantity in terms of level of revenue, earned income, worked hours, etc.
(iii) A third type of violation is the declaration of a business or of a self-employed (including coordinated or quasi-subordinated) relationship of a subordinated work activity (so-called bogus self-employment, misdeclared work, Švarc system, VAT workers). Indeed, if we look at the changes that have been introduced in the regulatory system of work activities in some European countries, it seems that unethical business has explored new forms of misdeclared work in response to legislature fighting bogus self-employment.

One may hence conclude that only a legal typology grounded on an activity-based definition of undeclared work, i.e., an activity-based legal typology, can duly articulate such a multifaceted socio-economic phenomenon in order to be better understood.

On the other hand, one might say that such an activity-based approach also reflects the urgent need to establish a set of rights which must be applied to any paid activity as defined above, thus reducing the appeal to misdeclare work.

Health and safety legislation at the EU and national level already provide an interesting model which covers any paid activity as such, considering that the lack of healthy and safe working conditions represent one of the worst disadvantages of undeclared work.

Further progress needs to be made with regard to the lack of ‘entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment’, making reference to Article 34 of the CFREU, which recognises such an entitlement ‘in accordance with the rules laid down by Community law and national laws and practices’.

September 2013

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9.1.2 Keynote Paper by Prof. Bernd Waas

Undeclared work: Possible sanctions on closer examination

Prof. Bernd Waas, Frankfurt

I. Introduction

According to the definition of the European Commission, undeclared work is “any paid activity that is lawful as regards its nature but not declared to public authorities, taking into account differences in the regulatory system of Member States.” The key question has always been how we can effectively tackle undeclared work. There are now numerous configurations of sanctions and incentives in existence, as can be seen in the legal systems of the Member States of the European Union. Yet regardless of how meritorious these are, what is striking here is that the concept of sanctioning is, for the most part, relatively narrow. Evidently, thoughts mainly run along the lines of penalties and fines, which the state imposes on the undeclared worker and/or his employer. This falls short of what is needed in two ways. First, this approach falls short because – in terms of penal law and law governing administrative offences – we should not stop at considering possible penalties or fines, but should also ask whether other tools might not be found in these areas which could possibly be utilised in the context of tackling undeclared work. Second, it falls short particularly because the role that other areas of law, particularly civil law, could play in this context is largely ignored. This is astonishing when we consider the significance of sanctions under civil law in the context of violations of competition law, for example. In this field, Council Regulation (EC) No 1/2003 of 16 December 2002 led to a real paradigm change from administrative enforcement of EU competition law to “private enforcement”, which is sometimes described as a “change from an administratively led ex-ante control to an ex-post control driven by private initiative.” However, above all it is astonishing because consequences of undeclared work under civil law are suited to quite considerably influencing the associated risks for those involved. The following presentation will give both a brief overview of further legal consequences of criminal and administrative offences outside of penalties and fines (III.) and a look at civil law (II.). The latter is actually the focus, and consequently it must be addressed straight away in this presentation. Solely for reasons of time, I will not seek to provide a comprehensive investigation.
comparing different legal systems. Rather, all of the points made will primarily be based solely on German law, which should, however, be sufficient to illustrate the relevant problems.

II. Sanctions for undeclared work under civil law

The idea that civil law could provide sanctions for violations of the prohibition of undeclared work may be surprising at first glance. After all, the focus of civil law is the relationships between legal entities. In public law, on the other hand, the focus is the legal relationships between the individual and the state (and those within the state). This differentiation between private law and public law, which existed even in Roman law, began to prevail in civil law in continental Europe at the start of the 19th century, and later in the legal systems of common law. In view of this, it would appear to begin with that there is little room for considerations of punishment or general prevention in civil law.

In fact, in German civil law doctrine, for example, there is widespread unease as regards such considerations. In addition, we are often expressly warned against assuming considerations of general prevention, such as those we are familiar with from the USA (as punitive damages) or the UK (as punitive or exemplary damages). However, this does not change the fact that civil law is not closed off to the idea of general prevention at all. One example is the anti-discrimination directives 2000/43/EC and 2000/78/EC, which expressly demand “effective, proportionate and dissuasive sanctions” in recital 26 (Directive 2000/43/EC) and recital 35 (Directive 2000/78/EC). However, in terms of violations of the prohibition of undeclared work – which are the only interesting aspect in the current context – a sanction only arises if the prohibition has an impact on the effectiveness of the contract for undeclared work and influences the claims owed to those involved. This gives rise to numerous problems, which will now be illustrated.

1. Invalidity of the contract for undeclared work

At the outset, things are relatively simple. In most legal systems, the consequence of a violation of the prohibition of undeclared work should be that corresponding agreements are void, or at least unenforceable. In France, this is governed by Art. 1133 of the Code Civil; in Italy by Art. 1343 of the Codice Civile. In Germany, Section 134 of the German civil code (Bürgerliches Gesetzbuch, BGB) forms the legal basis for this. It states: “A legal transaction that violates a statutory

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11 Honsell, in: Staudinger Bürgerliches Gesetzbuch [Staudinger commentary on the German civil code], 2011, Einleitung zum BGB [Introduction to the German civil code] recital 46.
14 Cf. only also DCFR Section 3 II.–7:301, Comments note 14 (for English and Scottish law).
15 Art. 1133: “La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l’ordre public”.
16 Art. 1143: “Quando la causa è illecita tutto il contratto è illecito e, come tale, l’ordinamento lo colpisce con la sanzione della nullità”; cf. also Art. 1418 of the law; cf. generally also DCFR Section 3 II.–7:301, Comments note 2.
prohibition is void, unless the statute leads to a different conclusion”. The fact that the legal transaction becomes void in the event of violation of a prohibitive law was essentially recognised back in the times of Roman law.\textsuperscript{17} This is an expression of the fact that the principle of private autonomy always finds its limitations in applicable laws. The introduction to the Draft Common Frame of Reference speaks of “freedom respected so far as consistent with policy objectives”.\textsuperscript{18} At the same time, regulations such as that of Section 134 BGB account for the aim of unity and consistency in the legal system. This calls for violations of laws from other legal areas to not be left ignored in civil law.\textsuperscript{19} Regulations such as that of Section 134 BGB certainly serve the purpose of protecting the general public, first and foremost if not exclusively. Ultimately, their main task is to “extend” assessments of (usually) public law or penal law-based prohibitive laws into civil law.\textsuperscript{20}

a) Scope of prohibition

The fact that the prohibition of undeclared work, which, in Germany, is contained within the law combating undeclared work and illegal employment (\textit{Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG}) of 23 June 2004, essentially functions as a prohibitive law within the meaning of Section 134 BGB and therefore at least potentially entails the invalidity of a contract aimed at undeclared work is generally recognised in the case law of the German courts and in the legal literature. The courts see the purpose of the law as being to combat unemployment, to prevent endangerment of commercial, particularly craft-based, businesses through wage and price undercutting and to protect clients suffering as a result of sub-standard services and incorrect use of raw materials. At the same time, the law is believed to aim to prevent a reduction in tax revenues and the contributions received by social and unemployment insurance funds. According to the case law, the sense and purpose of the law is not just to limit the actual occurrence of undeclared work as a regulatory provision, but to deny the underlying legal transaction legal effect in the interests of economic order. According to the courts, the purpose of the law, preventing undeclared work, can only be achieved if contracts violating the law are seen as legally ineffective.\textsuperscript{21}

As evident as all of this is in principle, the problems that occur in the application of regulations such as that of Section 134 BGB are extremely difficult. This becomes clear as soon as we consider the fact that the German legislator defines very different violations as prohibited undeclared work in the law against undeclared work. As these include independent provision of services and works by a person not registered on the register of qualified craftsmen (Section 1 para. 2 no. 4 SchwarzArbG), we must ask whether the violation of such a provision under commercial law can or must also entail the invalidity of an agreement with the client.\textsuperscript{22} This applies because the

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\textsuperscript{17} Cf. only Kaser, Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht [prohibitive laws and acts in violation of prohibitions under Roman law], 1977.
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\textsuperscript{18} DCFR, p. 54.
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\textsuperscript{19} Cf. also DCFR, Introduction, p. 50: "A ground on which a contract may be invalidated, even though it was freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society”.
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\textsuperscript{20} According to Looschelders, in: Heidel/Hüßtege/Mansel/Noack, Bürgerliches Gesetzbuch – Allgemeiner Teil/EGBGB [German civil code – general section/introductory act to the civil code], 2nd edition 2011, Section 134 BGB recital 1 et seq.
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\textsuperscript{21} Cf. only Bundesgerichtshof (BGH) [Federal Court of Justice] of 23.09.1982 – VII ZR 183/80 (under II. 1b aa).
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\textsuperscript{22} Sack/Seibl, in: Staudinger Bürgerliches Gesetzbuch [Staudinger commentary on the German civil code], 2011, Section 134 BGB recital 76; cf. from the case law BGH 22.09.1983 – VII ZR 43/83; 19.01.1984 – VII ZR 121/83.
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corresponding violations already give rise to a penalty (or fine). This is particularly relevant because the obligation with which the prohibition of undeclared work links in this context only exists for the provider of the services, thus at most representing what we would consider a one-sided prohibitive law.

However, a range of complex questions must also be asked regarding the possible consequences under civil law of violations of prohibitive laws in general, and of the prohibition of undeclared work specifically. This becomes clear in the proportionately simple case that a contractor provides a certain service without an invoice and therefore violates obligations under tax and/or social security law. In such a case, should the result be that the contract becomes void for both parties? And what should be the extent of the invalidity in actual terms? It would seem obvious that a client should not be able to claim for fulfillment of the promised service under such a contract. But should he also be deprived of warranty claims if the contractor has provided a defective service? And what should happen if movements of assets occur during implementation of the void contract? “A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him” states Section 812 para. 1 clause 1 BGB. This is the “classic” case of what is known as condictio indebiti. This occurs when a service was provided but there was never a legal basis for the service, meaning that the recipient did not have any entitlement to the service. The question is thus: does the violation of the prohibitive law also exclude the claim for restitution of the person providing the service?

The fact that all of these questions are regarded with the same severity in other legal systems is made clear in Section 3 II-7:302 (Contracts infringing mandatory rules) of the Draft Common Frame of Reference, among others. In no less than three paragraphs, this provision sets out the legal consequences that will be incurred if a contract violates a prohibitive law. The regulation is developed in such a way that it becomes immediately clear how different the consequences can be if a contract violates a statutory prohibition.

b) Personal impact of the invalidity
Let us answer the questions that I have just mentioned one at a time. The first question concerns the personal impact of violations of the prohibition of undeclared work. Should a violation of obligations under tax or social security law by the contractor also lead to invalidity of the contract vis-à-vis the client and therefore rob the latter of his contractual rights? The commentary on the Draft Common Frame of Reference on this issue is as follows: “For whose protection does the rule exist? This factor is closely related to the issue of the purpose of the rule. If, for example, the rule

Cf. in this respect, for example, also DCFR, Section 3 II.–7:302: Section 3 II-7:302, Comments, p. 568: „If the rule in question provides for a criminal or administrative sanction against the wrongdoer, the imposition of that sanction may be enough to deter the conduct in question without adding the nullity of the contract. The goal of deterrence is usually better achieved through such criminal or administrative sanctions than by way of private law“.

Cf. in this respect most recently Schleswig-Holsteinisches Oberlandesgericht [Higher Regional Court of Schleswig-Holstein] of 16.08.2013 – 1 U 24/13: “The purpose of intensifying the fight against undeclared work is best served if a violation of its manifestations leads to total invalidity of the contract (...). Partial invalidity of just the agreement to not issue invoices for the works would not have the desired deterrent effect.”

Cf. also DCFR, Section 3 II-7:302, Comments, p. 565: „An infringement of a mandatory rule of law may arise in respect of who may conclude the contract, how it may be concluded, the contents or purpose of the contract, or (exceptionally) the performance of the contract“.
in question merely prohibits one party from entering or making contracts of the kind in question, it does not follow that the other party may plead the illegality to prevent the contract taking effect”.27 According to case law in Germany, all-sided invalidity only occurs in the event that both parties violate the prohibition of undeclared work. By way of contrast, in the event of one-sided violations, the invalidity is limited to the party that violated the prohibitive law, whereby, however, an exception exists if the client did not act in violation of the prohibition himself but nevertheless was aware of the violation of the prohibition of undeclared work by his contractual partner and consciously used it to his advantage. The reason for limiting the consequences of invalidity is simple: the law-abiding client should retain his contractual claims. However, this leads to a quite considerable consequential issue, as the client must consequently be permitted to bring action against the undeclared worker for provision of the service that is in violation of the prohibition, and for a court to rule on this accordingly. This is, however, excluded, for reasons that require no explanation. The courts in Germany tackle the issue by assuming in cases such as that mentioned that the contractor is obligated to transfer responsibility for execution of the work for the client to a law-abiding business.28 Seen from a dogmatic point of view, this solution is not entirely harmless. From a practical point of view, it seems logical, as the undeclared worker must fear considerable financial disadvantages if he constantly remains subject to the other party’s claim for fulfilment as per the contract. A while back, the Federal Court of Justice explicitly stated that this solution served to achieve important aims of the law against undeclared work, namely “to protect the interests of the employment market and craftspeople and to prevent a reduction in tax and social security revenues”. If contractors must fear financial disadvantages, this is believed to cover the idea of deterrence and to be suited to prompting them to refrain from concluding contracts for undeclared work.29

c) Existence of warranty claims
But what about warranty claims of the client? The following case illustrates the issue: the client and contractor agree that a certain service will be provided without invoice, and will therefore be kept secret from the tax authorities. In the event of provision of a defective service by the contractor, should the ordering party have warranty claims against him even though he was visibly trying to achieve a saving by concluding the “illicit earnings agreement”? If one looks at the problem from the point of view of the contractor, one may tend to want to maintain the client’s warranty claims. This applies in any case if the contractor only considers the invalidity of the contract at the point of defending against the rights of the client arising from the provision of the defective service. In fact, the Federal Court of Justice has long assumed that warranty claims should be retained by the client. The Court justified this with the principle of good faith: It was believed that if the contractor has provided a defective service, he is acting contrary to good faith if he calls upon total invalidity of the contract vis-à-vis the client asserting the warranty claims.30 It can, however, be seen differently: If the client is granted warranty claims even in the event of invalidity of the contract, the commissioning of undeclared work would tend to become risk-free. In this case, a client acting unlawfully would not be placed any differently to one acting lawfully. In addition, the ordering party benefits from the intended tax evasion in the illicit earnings agreement. Why, then, should his reliance on the existence of the contract be protected?

27 DCFR, Section 3 II-7:302, Comments, p. 567 (cf. also Illustration 3 with the explicit example of undeclared work).
Essentially, the client is certainly not placed in an entirely protection-free position if he is denied contractual claims against the contractor. Here we must think about claims due to tortious acts, for example, if we consider the case that a building contractor who is providing “illicit” renovation work does damage to the previously intact building of the client. Also from a dogmatic point of view, there is much to be said for denying warranty claims, at least by reference to the principle of good faith. After all, if a provision prescribes invalidity of a legal transaction that violates a statutory prohibition, then, as explained above, this serves the purpose of protecting public interests and general legal relations. However, under these circumstances, it then seems extremely problematic to annul the prohibition, in a sense, referring to circumstances in the relationship between the parties to the contract. The Federal Court of Justice recently came round to this way of viewing the issue and assumed that invalidity prescribed in accordance with Section 134 BGB in the public interest and to protect general legal relations “(could), if necessary, be overcome within extremely narrow boundaries by calling upon good faith”.31

d) Extra-contractual claims
Between those involved in a contract for undeclared work, there exists a legal relationship; this is conveyed by the contract. However, alongside this, those involved are related to one another very generally as participants in a legal transaction. The result of this is that the provisions on legal obligations, for example, are essentially also applicable to them. In view of the aforementioned regulations, this circumstance then leads, among other things, to the question as to whether an undeclared work can (at least) demand compensation for the services that he has provided according to the law on unjust enrichment. In this context, we must also consider Section 3 II-7:303 of the Draft Common Frame of Reference, which also refers to the provisions on unjust enrichment regarding the legal consequences of a contract (or similar) violating a prohibition. The matter of possible liability for enrichment on the part of the recipient of a service involves numerous problems. A good way to illustrate this is to consider, for example, the question of the amount of a possible obligation to pay compensation: this is essentially to be determined in accordance with German enrichment law on the basis of what is known as objective theory. This means that, for example, a person that has utilised services without a legal basis is liable for compensation in the amount of the wages that are standard on the market. Remaining in the context of the rendering of undeclared work, the undeclared worker could, however, demand more from the other party than he had – invalidly– agreed with him as part of settlement of unjust enrichment. With this in mind, basing the case on objective theory must be discarded from the outset in the present context. The courts in Germany also believe that contractual warranty claims do not exist from the outset due to the contract being void. As a result, the undeclared worker must put up with considerable deductions from his claim.32

With all of this, however, the question now arises as to whether enrichment claims should not be excluded from the outset in the relationship between the undeclared worker and the client. Such an exclusion could arise for German law in Section 817 clause 2 BGB. According to this, claims for restitution are excluded if the person providing the service has violated a statutory prohibition or good morals. The aim of this regulation is essentially the Roman legal concept condictio ob turpem vel iniustam causam, and it probably exists in the majority of European legal systems in one way or another. In the past, the regulation of Section 817 clause 2 BGB has been quite openly classified as

31 BGH of 01.08.2013 – VII ZR 6/13 (under II. 2.).
32 BGH of 31.05.1990 – VII ZR 336/89.
a “punishment for adopting a reprehensible attitude”. However, we have now moved away from this way of viewing things, which, in this form, does not fit into civil law at all. Today, the provision is primarily associated with the idea of denial of legal protection. The purpose of the exclusion of restitution for unjust enrichment is thus to deny legal protection for a claim derived from a legal transaction that is unlawful or violates good morals. Legal transactions with such a flaw should not be able to be brought before the state courts, in other words. In addition, there is considerable consensus within the legal literature that the provision of Section 817 clause 2 BGB ultimately aims at general prevention, despite the fact that it is emphasised time and again that in private law this idea should only be approached with the utmost care. The decisive question in the present context is whether, in the event of a void contract for undeclared work, Section 817 clause 2 BGB opposes a claim for restitution on the part of the undeclared worker. If we take the view of the Federal Court of Justice as a basis, this is not the case: According to the Court, the provision indeed generally applies for cases such as the present one. However, it is believed to be inconsistent with the principles of good faith if the recipient of the service does not have to reimburse the value of that obtained unlawfully, but can rather keep it free of charge. Correspondingly, the Federal Court of Justice believes a limiting interpretation of Section 817 clause 2 BGB to be imperative. In this case, it is also noted the law against undeclared work does not primarily seek to protect one or both parties to the contract, but rather serves the purpose of protecting public interests. The Court believes that the implementation of the objectives of the law should not necessarily mean that the party ordering undeclared work should be able to keep the service without charge, at the expense of the undeclared worker. It is also believed that the usually economically stronger client should, under no circumstances, be treated more favourably than the economically weaker undeclared worker. Under these circumstances, says the Federal Court of Justice, it would not be fair for the ordering party favoured by the advance service to be allowed to retain the unjustified benefit free of charge. The actual judgement of the Court states: “The exclusion of contractual claims together with the risk of criminal prosecution and back-payment of taxes and social contributions in the event that the undeclared work is discovered already ensures the general preventative effect desired by the legislator. The granting of a settlement under enrichment law (…) does not contradict this general preventative effect, in the Senate’s opinion.”

This can also be seen differently. The protection granted by the Federal Court of Justice with the aid of the principle of good faith reduces the risk for the contractor associated with undeclared work, and therefore to some extent contradicts the aim of fighting undeclared work as effectively as possible. This is exactly the view taken recently by the Higher Regional Court of Schleswig-Holstein against the awarding of an enrichment claim, because this would take away part of the risk of the undeclared work “by allowing the supplier to utilise the aid of state courts to implement a counter-claim despite the legal violation”. The deterrent effect that could be achieved through the combination of sanctions under public law and under civil law was deemed to be minimised in an impermissible manner.

e) Special case: An employment contract as undeclared work

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33 BGH of 06.05.1965 – II ZR 217/62; also Schwab, in: Münchener Kommentar zum BGB [Münchener commentary on the German civil code], Section 817 BGB recital 9.
34 BGH 31.05.1990 – VII ZR 336/89, NZA 1990, 809.
35 Cf. Sack/Seibl, in: Staudinger, Bürgerliches Gesetzbuch [Staudinger commentary on the German civil code], 2011, Section 134 BGB recital 278.
36 Schleswig-Holsteinisches Oberlandesgericht of 16.08.2013 – 1 U 24/13 (under II. 3.).
The considerations set out thus far have all related to the event that the undeclared work is being carried out by a self-employed person. This then raises the question as to whether they can also be considered correct if an employer concludes an agreement for undeclared work with an employee. We should particularly think of the event that the parties to the employment contract agree that the remuneration will be paid without taking into account taxes and social contributions. The question that must be answered in this respect is: in such a case, is it just the illicit earnings agreement that is void, or does the invalidity cover the entire employment contract?

The starting point for considering this question is the fact that in designing the contract in such a way, the employer is committing fraud towards social security providers. In addition, he is violating provisions under tax law by providing false information regarding facts that are important to taxation, i.e. the amount of income, and reducing the amount of tax to be paid. Indeed, penal laws often form prohibitive laws within the meaning of Section 134 BGB. However, the Federal Labour Court (BAG) assumes that the purpose of the laws does not require the employment contract to be seen as void. The interests of mutually supportive society and the treasury are considered sufficiently protected by the fact that the evasion agreement as such is void due to a violation of the statutory provisions. According to the Federal Labour Court, an extension of the consequence of invalidity to the basic contractual relationship would go against the protective purpose of the law, as if the employment contract were void the employee would have no claim to consideration from the employer, and without such a claim on the part of the employee neither social security contributions nor taxes would be due. Unlike in the cases decided upon by the Federal Court of Justice, the law is believed not to aim to prohibit the provision of services or works as such, but merely to combat the evasion of taxes and social security contributions. By contrast, provision of work as such is not prohibited.\(^{37}\) It is also recognised in other legal systems that, in terms of unlawful labour contracts, there sometimes must be consequences other than those under civil law. This is what is set out in a paper of the English Law Commission for the Trade Union Congress (TUC), for example: „One major difficulty has been the interaction between the doctrine of illegality and employment law. The employment contract is not like other contracts, given its role as a gateway to a host of statutory employment rights“.\(^{38}\)

2. Further sanctions under civil law

When considering sanctions for undeclared work under civil law, we should not solely consider the relationship between the undeclared worker and his contractual partner. A highly significant aspect when considering the legal consequences of undeclared work is the question of the consequences for the relationship between the undeclared worker and his employer.

a) Right of termination

The question that really stands out in this context is whether, and under what circumstances, an employer is entitled to terminate the contract when he realises that an employee that he employs is working undeclared. It is immediately obvious that answering this question has considerable significance for the effectiveness of the fight against undeclared work. Anyone who risks the loss of his (regular) job if working undeclared will think twice as to whether he wishes to enter into illegal activity alongside the legal activity. If we take German law as a benchmark again when


\(^{38}\) The Law Commission, Illegality and Employment Law, 2005, S. 1.
answering the question regarding the consequences of undeclared work in terms of rights of termination, the situation is that termination, or even termination without notice, is entirely justified if an employee is working undeclared alongside his regular job. However, a closer look shows that this only applies if the undeclared work is being carried out during the employee’s working hours or the form of the undeclared work represents an impermissible competing activity. In the former case, the fundamental entitlement to termination arises on the basis that the employee is violating his obligation to work vis-à-vis the employer. In the latter case, it arises on the basis that the employee is violating a secondary obligation under the employment contract – namely the obligation to not enter into competition with the employer. If neither one nor the other circumstance is the case, termination is prohibited under German law as the undeclared work does not have any relevant impact on the employment relationship. The private life of the employee should not concern the employer. In this context, we must also remember that the purpose of rights of termination as they are understood in Germany is to combat disruptions to the employment relationship, and not to punish any misconduct on the part of the employee, regardless of the form this takes. One can also express it differently: The idea of general prevention (vis-à-vis other employees) as it is understood in Germany is, for rights of termination in general, and for the balancing of interests required in the assessment of terminations under German law in particular, at best, “a viewpoint with limited sustainability”.

Correspondingly, it is out of the question for the authority to terminate to be used as a sanction for undeclared work.

b) Entitlement of the undeclared worker to continued payment of remuneration

In any case, there are certainly other conceivable legal consequences in the contractual relationship between the employer and the employee, which all lie beneath the threshold of termination but nevertheless would have a palpable effect on the employee. In this respect, we should consider the question of whether, in the event of inability to work due to illness, an employee is entitled to continued payment of his remuneration by the employer if the inability to work is the result of an accident that occurred whilst working undeclared. If we once again answer this question according to German law, Section 3 para. 1 of the law on continued payment of remuneration (Entgeltfortzahlungsgesetz, EFZG) provides a starting point. According to this, entitlement to continued payment of remuneration in the event of illness only comes into question if there is no blame on the part of the employee. The question is thus whether, generally or at least under certain circumstances, blame on the part of the employee is to be assumed if the illness is due to an accident at work and it occurred whilst doing undeclared additional work. In fact, case law individually affirms a general exclusion of entitlement to continued payment of remuneration. In the literature, on the other hand, a differentiation is generally made and it is, for example, assumed that entitlement to continued payment of remuneration exists if, but only if, the undeclared worker can provide his “regular” employer with proof that the accident that occurred whilst working undeclared occurred whilst complying with all health and safety provisions.
III. Further measures under penal law and law governing administrative offences

1. Penalties and fines
In order to effectively tackle undeclared work, every legislator will consider integrating criminal and administrative offences into law. There is a broad range of tools available in Germany in this respect. This ranges from administrative offences, which, for example, involve violations of obligations to inform social security providers, to criminal offences. The latter are particularly varied. For example, a specific criminal offence may aim to employ cheap workers from abroad and therefore has an impact on residence and foreign nationals law. By contrast, according to Section 266a of the German criminal code (Strafgesetzbuch, StGB) it is generally punishable if an employer withholds contributions of the employee to social security, including employment promotion, from the collecting body. If offences are committed under penal law or law governing administrative offences, the offenders are threatened with monetary fines, or indeed imprisonment under certain circumstances. Thus, according to Section 9 of the SchwarzArbG, those that fraudulently obtain social benefits whilst violating declaration obligations are punished with a custodial sentence of up to three years or with a financial penalty. In such cases, consideration must also be given to fraud in accordance with Section 263 of the criminal code, whereby the punishment ranges from a custodial sentence of six months to ten years in particularly serious cases (Section 263 para. 3 clause 1 StGB). Ultimately, undeclared work often goes hand in hand with the offence of tax evasion. This results – according to Section 370 para. 1 of the German tax code (Abgabenordnung, AO) – in a punishment of a custodial sentence of up to five years. The way in which financial penalties and custodial sentences are measured on an individual basis highly depends on the discretion of the respective national legislator, whose estimations are sometimes entirely open to change. For example, for some time now German penal law has been characterised by the attempt to avoid short custodial sentences and grant a certain priority to financial penalties.\(^{42}\) However, if the relationship between these two types of punishment is in flux within a single legal system itself, considerations of foreign legal systems will, in this case, not be granted great weight from the outset.

2. Further measures
Overall, however, instead of comparing national penal frameworks, it may be considerably more productive in this context to ask what tools penal law may provide beyond the punishments themselves. This question may be surprising at first glance, as one could think that the answer that penal law and law on administrative offences has to give to misconduct could not be anything other than a penalty or fine. However, upon closer inspection, this way of viewing the issue turns out to be erroneous, as the example of withdrawing an offender’s driving licence following a driving offence clearly shows. At least as it is understood in Germany, this does not represent a punishment but is, according to German terminology, “a measure for reform and safety”. The purpose is not to punish the offender. It is rather a purely preventative tool for maintaining safety on the roads.\(^{43}\)

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\(^{42}\) Stree/Kinzig, in: Schönke/Schröder Strafgesetzbuch [German criminal code], 28th edition 2010, Section 47 StGB recital 1.

\(^{43}\) v. Heintschel-Heinegg, in: BeckOK-StGB [German criminal code], Section 69 StGB recital 1.
a) Confiscation of illegally acquired financial benefits
Upon closer inspection of German law, the legal regulations on so-called forfeiture in particular come into consideration in the present case. From a foreign point of view, these regulations are, however, only understandable if one knows that the system of financial penalties does not permit disgorgement of the benefits gained from the offence under German law. However, so-called forfeiture now serves the purpose of such disgorgement, although the sentencing thereof, as in the case of confiscation of a driving licence, does not represent a punishment or even a punishment-like measure, but rather a unique measure whereby case law notably places the focus on the aim of prevention.\(^\text{44}\) According to Section 73 para. 1 StGB – the central provision in terms of penal law – the court must order forfeiture of everything that the offender or participant in an offence "acquired (...) from it or obtained (...) in order to commit it". The principle that applies here is what is known as the gross value principle. This means that the offender or participant in an offence is prohibited from deducting "expenses" that he has incurred, for example in planning and preparing for the act. This includes, for example, the purchase price and other expenses, such as necessary trips, in the case of impermissible trade in narcotics. The fact that such “expenses” should not be able to reduce what is obtained (making them useless) should, according to the will of the German legislator, contribute to preventing profit-oriented offences. Whether and to what extent a law provides for such forfeiture is left to the discretion of the relevant national legislator.\(^\text{45}\) However, in this case the institute is suited – for example, in the exercising of impermissible activities – to balancing out distortions of the competition between legal and illegal work.

b) Exclusion from public procurement
Alongside the responsibility of those involved in undeclared work under penal law and any possible measures to be taken against these people, there is still the question of what sanctions should be considered for companies themselves. According to German law, the possibility of exclusion from public contracts should be considered in particular. This links in with violations of the law against undeclared work, but also a violation of Section 266a StGB. Correspondingly, an exclusion – for a period of up to three years – particularly comes into question if another person is entrusted with undeclared work (Section 8 para. 1 no. 2 SchwarzArbG), commissioning of contractors or sub-contractors takes place in violation of the prohibition of employment of foreigners (Section 404 para. 1 of the German social code (Sozialgesetzbuch, SGB) III) or foreigners are employed without authorisation (Section 404 para. 2 no. 3 SGB III). It must also be noted that the administrative offences leading to the ban on contracts may also be committed by leading employees or commissioned parties of the company.\(^\text{46}\) A ban on contracts can be issued even before implementation of penalty or fine proceedings, if, in the case in question, there is no reasonable doubt of serious misconduct in view of the evidence available. Legal objections to such bans on awarding of contracts are, however, not founded if social considerations are identified as a criterion for selection in the awarding of public contracts, as generally happens under European

\(^{44}\) BGH, NJW 2002, 3339.
\(^{45}\) Cf. on German law, for example, Neumann/Kahle/Miersch, Ist eine Vermögensabschöpfung bei Schwarzarbeit im Handwerk möglich? [Is disgorgement possible in the case of undeclared craft-based work?], in: Gewerbearchiv – Zeitschrift für Wirtschaftsverwaltungsrecht [Journal on economic administration law] 2010, 193.
In addition, we must consider the issue of possible “double sanctions” (exclusion from bidding on the one hand and sanctioning with measures under penal law or law governing administrative offences on the other). However, it must also be considered that the state can hardly be restricted to only one type of reaction. Furthermore, it should be possible to greatly alleviate the problem of multiple interventions – for example through a strict proportionality check.

IV. Conclusion

The aim of this presentation was to make it clear that when looking at possible sanctions for undeclared work it is worth not artificially restricting the concept of sanctioning to penalties or fines. For example, German penal law recognises the option of disgorgement. Sentencing an offender to such forfeiture is also a possibility in terms of the rendering of undeclared work. Above all, however, considering consequences of undeclared work under civil law seems to be extremely worthwhile in terms of the relationship between the undeclared worker and his client, as well as in terms of the relationship between the employer and an employee that works undeclared “on the side”. Here, it should be realised that the prohibition of undeclared work can be implemented all the more effectively, the greater the risk of undeclared work is for those involved.

September 2013

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48 Cf. generally, for example, Mestmäcker, Die koordinierte Sperre im deutschen und europäischen Recht der öffentlichen Aufträge [Coordinated bans on public contracts in German and European law], in: Betriebsberater 1995, 1.
9.1.3 Keynote Paper by Prof. Sonia McKay

Transnational aspects of undeclared work and the Role of EU legislation

Prof. Sonia McKay, London

I. Introduction

This paper deals with the transnational aspects of undeclared work and the role of EU legislation, focusing on three key areas: the informal posting of workers between Member States, including false posting; the presence of third country nationals on the territory without work permission and thus working in the informal sectors of the economy; and cross border informal work. It acknowledges a global trend supported by policy at EU and national state level, that favours temporary, circular and selective migration, and that consequently also creates the conditions in which undeclared work grows (either because individuals stay on after the period of temporary migration and work in the informal sector, or because the very temporary nature of their stay, as this paper argues, is not conducive to the declaration of work and income, in conditions where workers do not experience returns on their investment in taxes. The paper begins by providing a context for undeclared work in its transnational aspects. It then looks at some of the key legal instruments. Finally it envisions contractual arrangements designed to circumvent national regulations or taxation requirements, such as false self-employment. The focus is on migration as a transnational phenomenon in relation to undeclared work. This requires a consideration as to whether, in a context of tightening migration controls throughout the European Union, those who migrate are not only more likely to be pushed into undeclared work but whether their consequent precariousness puts pressure on the working conditions of those in declared work.

II. Context

It is important at the outset to assert the view that undeclared work does not arise as a consequence of border crossings and migration or of undocumented migration, but as something that is and has been ever-present, to a greater or lesser extent, within the structures of the labour markets of all Member States, so that ‘undeclared work is part of the economy’. Why this is important is because it helps explain the difficulties faced in attempting to eradicate it. Recent research has suggested that there has been ‘an on-going small decline in the size of the undeclared economy’, however; it has also noted a clear correlation between ‘the wider austerity measures pursued and [its] size and growth’. Thus in those Member States which have introduced austerity programmes, the outcome has been a further growth in undeclared work. And given that the number of Member States that have been forced to adopt such programmes is

still rising, this points to potentially a larger informal labour force. In our study on precarious work and social rights (hereinafter PWSR) respondents also identified informal or irregular work as growing in several Member States, particularly as a consequence of austerity and the crisis, as the following statement implies:

‘The biggest dilemma especially during the economic crisis is that both employers and employees agree on precarious work, to avoid paying the full amount of taxes. Since there are no clear prospects about future pensions, many do not think about the future. Therefore Latvian society in general, according to regular sociological polls, massively supports work in the grey economy.’

As Williams and Renooy (2013) noted more equal societies have smaller undeclared economies than less equal ones, so that the size of the undeclared economy seems to be ‘a result of under-regulation, not over-regulation’. A reduction in labour inspection has also been identified as a factor increasing the volume of undeclared work. Indeed the existing data can only under-represent its size, in a context where it cannot be measured accurately simply because it is undeclared and especially where it is performed by individuals who cross borders to undertake it, whose presence on the territory may be unknown. Indeed the Eurobarometer 2007 study warned that with the low number of respondents who reported having carried out undeclared work or having received ‘envelope wages’, the study results needed to be interpreted with great care.

This is possibly even more the case for undocumented migrants where the most cautious estimates suggest a presence of between 1.5m and 3.8m, in a context where Member States accept that it is impossible to provide robust statistics and who in most cases will either be in undeclared or falsely declared work.

Undeclared work can be defined as:

‘Forms of employment that side-step the norms of employment regulations; the concept is taken to mean any paid activities that are lawful, as regards their nature, but not declared to the public authorities, bearing in mind differences in the regulatory system of Member States.’

Just less than one in ten of those surveyed by Eurobarometer had acquired services which they assumed were undeclared. Those services included the purchase of CDs and other technical equipment and household services, typically house cleaning or care for children or the elderly, activities in construction, repair activities and personal services. These are all areas of work where

53 Ibid.
54 Eurobarometer, p.3.
transnational and migrant workers are over-represented. And although the survey itself states that there were no reported differences in the share of non-nationals working in undeclared work, this is in the context of its own caveat that those who were undocumented were un-represented in the survey sample. Furthermore while Eurobarometer suggests that EU citizens working in other Member States may not be significantly over-represented among those in undeclared work, it cannot be assumed that this finding also applies in the case of third country nationals and in particular of those without a right to work. It is argued here that in so far as undeclared work is a feature of labour markets in all Member States, it encourages the migration of those without documents or of those who are willing to work without paying tax or social security.

Indeed, within the general context of undeclared work, there are widespread perceptions that migrant labour, both from within the EU or as third party nationals, are more likely to be engaged in such work. The Eurobarometer study\textsuperscript{57} found that among the categories of workers that were perceived as engaged in undeclared work, one in four (23\%) believed that ‘illegal immigrants’\textsuperscript{58} fell into this category and although overall 41 per cent identified the unemployed with undeclared work, in Greece, Spain, Italy, the Republic of Cyprus and Luxemburg, respondents were more likely to identify migrants, as the main actors in undeclared work. Diesis (2010)\textsuperscript{59} also noted that undocumented migrants were commonly associated with undeclared work but that also ‘non-declared work can equally concern migrants that have a regular status’ and that this was exacerbated by the difficulties experienced in getting qualifications recognised, discrimination based on ethnicity in the workplace and problems related to residency and work permits. And this occurs despite, as Engblom (2010) has noted, the ILO’s Committee on Freedom of Association has made it clear that irregular migrants are also entitled to fundamental trade union rights, including the right to be represented so that denying irregular migrants labour law protection could be seen as not respecting the country’s international commitments\textsuperscript{60}.

III. Known sectors of undeclared work

What is already known about undeclared work suggests that it is located within particular sectors. Respondents to the Eurobarometer study indicated, as sectors where they had acquired goods or services from undeclared activities: retail, household services, construction, repair and hotels, restaurants and cafes. The PWSR study similarly identified agriculture, construction, tourism, hotels and restaurants and domestic work, as where undeclared work was likely to be found. Work subject to intense fluctuations in demand was also associated with informal or irregular work and this is also likely to be work that transnational workers are over-represented in, because they are particularly mobile and flexible. Thus the sectors indicated above are also those where cross border and migrant labour has a sizeable presence. Of course this perhaps leads to the posing of the question as to whether undeclared work is a response to transnational migration or whether it


\textsuperscript{58} While this term is quoted here, generally in the paper the term that will be used is ‘undocumented’ or ‘irregular’ migrant. This is because the author does not agree with the concept of ‘illegality’ being attached to status. Workers are not ‘illegal’ it is the constraints of immigration rules that deny them the right to work in the absence of legal permission.

\textsuperscript{59} Ibid.

is the case that transnational migrants (and in particular those without documents) might gravitate towards existing loci of undeclared work. As a report from the OECD noted:

‘[t]he employment of undocumented foreigners is just one element, and not necessarily the most important, of economic activity in the so-called ‘underground’ or ‘undeclared’ economy... whatever is done to combat the hiring of illegal immigrants must address the problem of undeclared work in general and not just the employment of illegal immigrants per se’\(^{61}\).

Undeclared work shares its characteristics with those of precarious work where the latter is defined as the inability of individuals to enforce their rights, where social insurance protection is absent, where health and safety is put at risk and where work does not provide sufficient income to enable people to live decently. Insecurity is another key element of precarity. It encompasses work uncertainty; income insufficiency; a lack of protection against dismissal; an unknown length of employment; and where there is uncertainty about future employment\(^ {62}\). The literature suggests that among the groups more likely to be working in precarious conditions are migrants both from within the EU and outside of it (Bhalla and McCormick, 2009\(^ {63}\); Porthé et al., 2009\(^ {64}\)) and undeclared work is almost always identified with precarity. In the PWSR study\(^ {65}\) those identified as in the ‘most precarious’ category were undocumented migrants, third country female migrants and then third country male migrants (see Table 1).

Table 1. Groups of workers perceived as being at risk of precarious work (% of survey responses)

<table>
<thead>
<tr>
<th></th>
<th>Not precarious</th>
<th>Precarious</th>
<th>More precarious</th>
<th>Highly precarious</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undocumented migrants</td>
<td>2</td>
<td>2</td>
<td>6</td>
<td>83</td>
</tr>
<tr>
<td>Third country migrant women workers</td>
<td>2</td>
<td>7</td>
<td>33</td>
<td>55</td>
</tr>
<tr>
<td>Third country migrants</td>
<td>2</td>
<td>11</td>
<td>43</td>
<td>40</td>
</tr>
</tbody>
</table>

Source: Study questionnaire survey

Porthé et al. (2009)\(^ {66}\) in their study of undocumented workers in four Spanish towns found they perceived their work as including ‘high job instability; disempowerment due to lack of legal protection; high vulnerability exacerbated by their legal and immigrant status; perceived insufficient wages and lower wages than co-workers; limited social benefits and difficulty in exercising their rights; and finally, long hours and fast-paced work’. It is important at this point to make it clear that there is not necessarily possible to distinguish between EU migrants crossing borders in search of work and third country migrants, in terms of their tendency to precarity, as it is more a consequence of the type of work that individuals perform and the conditions under which it occurs. The drivers for precarity include: lack of knowledge of host country language; lack

\(^{61}\) Informal employment and promoting the transition to a salaried economy, OECD Employment Outlook, 2004.

\(^{62}\) PWSR, 2012.


\(^{65}\) PWSR, 2012.

\(^{66}\) Ibid.
of awareness of rights; and lack of skills and these are likely to be equally present in all transnational migrant groups.

IV. The legal framework at EU level

Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship notes in the preamble that ‘new forms of work have led to an increase in the number of types of employment relationship’ and specifically provides that ‘in the case of expatriation of the employee, the latter must, in addition to the main terms of his contract or employment relationship, be supplied with relevant information connected with his secondment’. The directive applies ‘to every paid employee having a contract or employment relationship defined by the law in force in a Member State’ (Art.1). Thus while it potentially covers those migrants who work under a contractual relationship defined by law, it excludes those who work without documents and potentially also excludes those whose work is undeclared, where Member State law does not recognise the enforceability of the employment relationship under such circumstances. Furthermore the directive excludes those whose total employment relationship is less than a month, as well as those working fewer than eight hours and those whose ‘casual and/or specific nature’ of work justifies non-application by objective considerations (Art 1(2)(b)). These three exclusions potentially result in transnational workers not having access to the rights, despite their specific inclusion within the provisions of the directive under Art. 4 which applies to expatriate employees defined as those: ‘required to work in a country or countries other than the Member State whose law and/or practice governs the contract or employment relationship’ and therefore covers those posted to work in another Member State. For these workers there is entitlement, prior to departure, that they be given certain basic information, including as to the duration of the contract, the currency in which remuneration is paid, the benefits in cash or kind and the conditions governing repatriation, with provision for the latter merely to make reference to the law in practice in the country where the work is to be performed. Member States must (Art 8) provide, within their legal systems, measures to enable workers to pursue their claims arising from the rights in the Directive. In terms of the specific application of the Directive to workers posted from one Member State to another, in Commission of the European Communities v Grand Duchy of Luxembourg C-445/03, it was held that a requirement that service providers from another Member State had to obtain individual work permits for non-nationals whom it wished to deploy within a Member State was in breach of Art 49 of the Treaty and that workers were entitled to terms and conditions as established in the Member State in which they were originally engaged. In the joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 the Court clarified that there was no prohibition on Member States imposing a requirement to improve the employment conditions of such workers where the local conditions were superior to those applicable in the original Member State. However, in practice the Directive is weakly enforced. In the PWSR study half of those interviewed stated that the absence of a written contract was an indicator of both informality and precariousness and that it was tied up with avoidance of tax and

68 Finalarte Sociedade de Construção Civil Ldª (C-49/98), Portugaia Construções Ldª (C-70/98) and Engil Sociedade de Construção Civil SA (C-71/98) v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha (C-50/98), Tudor Stone Ltd (C-52/98), Tecnamb-Tecnologia do Ambiente Ldª (C-53/98), Turiprata Construções Civil Ldª (C-54/98), Duarte dos Santos Sousa (C-68/98) and Santos & Kewitz Construções Ldª (C-69/98).
an absence of social security rights. The Directive did not adequately address this gap and as one respondent noted:

‘A written contract would guarantee the minimum rights to all workers but the ubiquitous problem is that agreements are not signed to avoid paying taxes. In these cases the parties, an employer and an employee, mutually agree that a worker will be excluded from social benefits. Such mutual agreements can still include some social rights and benefits but they are insecure and are exclusively related to mutual trust which can be breached.’

Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals offers some measure of protection to those migrants working without permission and by assumption, working either in undeclared work or in falsely declared work (with false identities or documents). In the preamble to Directive it is argued that ‘a key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status’ suggesting that there is a pull between the pre-existence of an informal labour market and transnational migration. It is of course the power to impose sanctions on employers where much of the focus on the Directive has been. Importantly: 1. The directive does not apply to third country nationals legally resident, regardless of whether or not they have a right to work – this means that there is no sanction envisaged under the directive for employers who employ those without an existing right to work but with a right of residence. 2. The directive does not apply to those utilising freedom of movement – thus it does not apply to those who have a right to move; and 3. It does not apply to those who have a right to work in one Member State and who are posted to another. The directive appears to have wider application than 91/533/EEC as it applies to ‘activities that are or ought to be remunerated, undertaken for or under the direction and/or supervision of an employer, irrespective of the legal relationship’. Art 6 is relevant here as it sets out the obligations on employers to make payments for outstanding work, even where this has been performed by a worker who does not, or no longer, fulfils the requirements for stay or residence. The obligation is to pay at a nationally recognised rate of pay and the aim is to ensure not only that workers have a minimum level of protection, but also that they cannot be deprived of this simply because they have reached an agreement with the employer to receive less (Art 6(1)(a)). Furthermore the employer is obliged to also make social security contributions (6(1)(b)). There is nothing in the Directive to indicate whether workers for whom such contributions are made then have entitlements arising from them, either immediately or in the future. Art 6(2)(b) gives workers the right to be ‘systematically and objectively informed about their rights’ to unpaid wages before the enforcement of any return decision, while Art 6(3) establishes a presumption of at least three months’ employment (unless it can be proved to be otherwise) for the calculation of any sums due. Engblom (2010) argues that Art 6 of the Directive acknowledges that irregular migrants might have employee status.

V. The posted workers’ directive

Directive 96/71 EC on the posting of workers applies to all workers who are posted from one Member State to work in another. It defines as a posted worker a ‘worker who, for a limited
period of time, carries out his (or her) work in the territory of an EU Member State other than the State in which he (or she) normally works’ (Art.2). The definition of a posted worker does not apply to individuals who decide of their own accord to seek employment in another Member State, seagoing personnel in the merchant navy or the self-employed. While the Directive does not thus apply to migrants who themselves decide to go to a Member State to seek work (whether or not their own national origins are in another Member State) it does also apply to third country migrants who are posted from one Member State to work in another. It also will not apply where the status of an individual who is posted changes, as Clark (2012)\(^{72}\) noted in the research conducted under the POSTER project ‘one of the main situations we have encountered in this research is precisely the existence of a no man’s land between a formal established posting and illegal work’ so that ‘true’ may be ‘false’ after a while.

The aims of the directive are to assist in the movement of workers across borders and to allow for the opening of the internal market to competition between providers in Member States. The preamble to the Directive acknowledges that the ‘trans nationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship’ and it is this which it seeks to address. Art. 1 of the Directive states that it applies to posted workers ‘provided there is an employment relationship between the undertaking making the posting and the worker, during the period of posting’. In cases where the Directive applies then posted workers have entitlements to be treated no less favourably than defined in law or collective agreements, in relation to their terms and conditions.

In the case of Wolff & Müller GmbH & Co. KG C-60/03 the Court established that a national law that placed liability on the contractor in relation to securing that established terms and conditions was complied with, even where those terms and conditions were applied to workers posted by a sub-contractor from another Member State. The importance of the ruling is in its recognition of the obligations of the contracting party when sub-contracting work. At the same time the Commission has acknowledged that ‘in practice, these core employment conditions are often incorrectly applied or not enforced in the host Member State. Posting can be abused by companies artificially establishing themselves abroad, just to benefit from a lower level of labour protection or lower social security contributions’. Examples provided by POSTER were:

- Incomplete or non-declaration (the posting is correct but additional hours are not declared to the social security and the tax department in the country of origin, or the work is not declared at all);
- Fake posting (falsified or forged A1/E101 certificates);
- Front companies (though the contract is in reality executed in the host country, employment is through subsidiary companies established in other EU States); and
- Undeclared posting, which can predominantly be seen as false self-employment, undeclared cross-border work and cross border recruitment of temporary workers\(^ {73}\).


\(^{73}\) Ibid. at p.28.
In 2012, in recognition of the inability of the Directive to eliminate abuses in relation to the posting of workers, the Commission proposed a new enforcement directive with the following aims:

- To set more ambitious standards to inform workers and companies about their rights and obligations;
- To establish clear rules for cooperation between national authorities in charge of posting;
- To provide elements to improve the implementation and monitoring of the notion of posting to avoid the multiplication of "letter-box" companies that use posting as a way to circumvent employment rules;
- To define the supervisory scope and responsibilities of relevant national authorities;
- To improve the enforcement of workers’ rights, including the introduction of joint and several liability for the construction sector for the wages of posted workers as well as the handling of complaints 74.

However, in its proposal for a new directive there is no reference to the question of undeclared work and this remains excluded from the provisions relating to posted workers and those in undeclared work could not therefore claim entitlement to equal treatment by relying either on the original directive or on the proposed enforcement directive. The impact assessment for the proposal 75 suggests that ‘raising significantly the level of protection of posted workers may encourage abuses and circumvention of the applicable rules as well as undeclared work, with negative impact on fair competition’. Furthermore it also suggests that there could be a negative impact on SMEs in high labour cost countries that ‘might be affected negatively by an upsurge in undeclared work and other illegal practices’ further noting:

‘Raising significantly the level of protection of posted workers may increase abuses and circumvention of the applicable rules as well as undeclared work if not compensated by additional efforts regarding monitoring, controls and enforcement. Equal working conditions for local and posted workers will greatly reduce the flows of legal posting.’

If these assessments are correct then they represent a significant challenge to the impediment of undeclared work should that be a policy objective. It appears that the assessment finds a fine dividing line between the protection of those in declared work and the encouragement of greater amounts of undeclared work. The example in the box below demonstrates the limitations of the current legal protection.

A company established two legally independent undertakings, one in Latvia and the other in the destination country. The Latvian company was responsible for the posting of the workers but the reality was that the contractual relationship was established with the company in the destination country. In cases of non-payment of wages it had been established that it was not possible to bring claims in the Latvian courts because the contracts were performed in another country. However, what was found was that for the workers concerned who, once their posting had ended, had returned to Latvia, pursuing legal claims in the destination country was problematic due to their lack of resources and also frequently of evidence of the contractual relationship.

(Source: PWSE study)

74 Commission to boost protection for posted workers, Reference: IP/12/267, 21/03/2012
VI. The interplay between immigration and employment rights

One of the themes here has been to explore how the regulation of entry into a Member State determines the conditions of employment for those who cross borders to work. Inside the EU, and despite the significant body of regulation aimed at the prevention of ‘social dumping’ and on guaranteeing equal rights to all workers, it is clear that freedom of movement of workers has, at least in some areas of employment, promoted lower standards of working conditions. The very process of movement across borders makes it more likely that the workforce will consist of those who are less knowledgeable about their rights and how to enforce them. This places them in conditions of vulnerability, due to lack of knowledge and awareness of the social protection measures that apply in the new country of residence. Additionally, workers who move from one Member State to another in search of work are more likely to be found in atypical forms of employment. In the UK for example, migrant workers (both EU and third country nationals) are more likely to be found in agency and fixed-term work. In the PWSR study migrant workers were identified as among those groups of workers most likely to be employed in jobs with the least protection and/or access to welfare entitlements. As Williams and Renooy (2013) have demonstrated, Member States have introduced measures to address informal work which they categorise as based on one of two approaches – a deterrence approach ‘which seeks to engender compliance by detecting and punishing non-compliance; and an enabling approach, which aims to encourage compliance by either preventing businesses or people from engaging in undeclared work from the outset’. They suggest that punishing non-compliance had become more commonplace. In some cases the response has involved a reduction in legal protections, with the aim of removing the ‘advantage’ to the employer of seeking out ‘cheaper’ undeclared work (see box below).

In Latvia the government adopted an Action plan to diminish non-registered employment. The initiative came as a response to the deep financial and economic crisis in the country, high unemployment rates, consolidation of the state budget, a need to collect as much tax as possible and to protect vulnerable employees (those employed in the shadow economy). The Action envisaged a more active policy for the State Labour inspectorate to fine employers who employ workers without a formal work agreement and who do not pay taxes. The Action plan stipulated that employers, who are found to be employing irregular workers, should pay taxes for three months for each irregularly employed worker, regardless actual length of irregular employment.
(Source: PWSR study)

VII. False self-employment

Bogus (or false) self-employment is a form of employment relationship located somewhere between subordinate and independent work, where the form of the employment relationship is classified as that of an independent, self-employed contractor, but where the conduct of the relationship mirrors that of subordinate relationships. Although false self-employment is not a necessary product of transmigration and employment it is covered here because migrant workers are potentially drawn to this form of work, particularly where immigration controls do not permit direct employment, as was the case for Bulgarian and Romanian citizens in the UK following Accession. False self-employment describes a relationship of unequal power, where the offer of work is dependent on a single source rather than with a range of clients, as would be the case in a genuine self-employment and therefore represents, in reality, economically dependent work. It is
also a process where individuals may be hired and then placed under pressure to declare themselves as self-employed. This occurs because it involves less administration and provides greater flexibility for the employer, while it is often accepted or sought after by the worker because it can provide short-term benefits through reduced tax or social insurance obligations. Because it is often performed outside of the standard employment relationship, the proportion of transnational workers, relative to their overall population, is likely to be greater. Immigration law can push foreign workers into bogus self-employment where they do not have the permission to work as dependent workers. Those in bogus self-employment are more vulnerable than dependent employees due to their exclusion from collective bargaining and the resultant absence of procedures dealing with disciplinary matters. The fact that self-employed workers are excluded from social protection is often consequent on social insurance contribution rules that specifically omit self-employed workers. However, while workers potentially ‘gain’ in the short run from not having deductions made for social insurance, the employer gains absolutely. The employer permanently saves the cost of contributing to social insurance, while the worker loses the future benefits that would accrue in the event of unemployment or illness or retirement. Thus bogus self-employment shifts the burden of the risks associated with breaks in employment entirely on to the worker.

Where self-employed status is imposed on the worker there is the potential for challenging the validity of the employment status. Such challenges, however, are likely to be dependent on the existence of either representation or labour enforcement bodies and the absence of either or both makes it difficult to challenge bogus self-employment. Thus in sectors like agriculture and construction, which have been considered more challenging to reach out to and which are, throughout the EU poorly organised, in part due to the nature and required mobility of the workforce, undeclared work is over-represented.

VIII. Conclusion

This paper has argued that it is the structure of the labour market that drives undeclared work, particularly in the context of transnational migration. The growth of temporary, casual and agency employment demands workers with a level of flexibility and mobility which migrant labour is better positioned to provide and thus transnational migration is over-represented in these forms of employment. At the same time tightening controls on migration; a widening gap between the richest and poorest in many Member States, in particular those affected by austerity measures; a reduction in labour inspection, sometimes as a response to cutting state budgets, may be drivers of both undeclared work and of irregular migration.

An examination of the legal framework at EU level has revealed that this continues to be based on a notion of the standard employment relationship and the effect has been to exclude transnational workers from some of the legal protection envisaged, regardless of whether they are regular or irregular migrants and of whether they originate in the EU or are third country nationals. Furthermore the framework does not take account of shifts in employment status, in particular following on from original postings. Additionally excluding those on short contracts or working few hours a week will inevitably impact more on workers whose presence on the territory is temporary. The imperative is also for a restructuring of social welfare to take account of new forms of employment and in particular to recognise that the growth in undeclared work in private households has promoted vulnerable employment among women migrant workers. Workers will only believe that it is in their interests to declare their employment when the system responds to
the forms of work they are engaged in and this will require social welfare provision that it is possible to move in and out of quickly, to respond to temporary and casual periods of employment.

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