

Undeclared Labour in the Construction Industry

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Instead of a foreword

A construction site in Dortmund: A six-story administrative building in the city, still used today in some areas, is to be converted into a four-star hotel. Due to the upcoming soccer world championship, this construction is to be planned and carried out within two months. As the hotel's own advertising states: “World Championship-like!” No building application has been filed yet and nothing has been approved. At the moment, scaffolding surrounds the building and it is being cleared out and gutted. According to the building control department, a building application and a building permit are not required for that work, which is why there is no construction sign. There are no applications on file for the construction trade association and the Department of Health and Workplace Safety. The Turkish investor who is unknown on the site and in the industry announced that if he does not find the construction workers for the job that runs 24 hours a day, including weekends, he will fly in 100 Turkish construction workers.

Mid May a permit was handed out for partially building. During an inspection on site it came out that more than 50% of the 90 workers present had no decent employment contract. Afterwards, the responsible contractor, however, keeps going on in the same way. A new inspection is not foreseeable. Workers continue with extreme long working hours on site, with no personal safety equipment. The scaffold is served by an elevator that transports an unsafe mix of materials and workers. The building site is a mess.

1 On the Economic, Social and Political Bases for “Undeclared Labour”

1.1 Definitions in Germany

The "Law for Intensifying the Fight against Undeclared Work and Illegal Employment,"¹ defines Undeclared Labour:

Whoever performs undeclared labour, provides service or work or has commissioned it and in doing so

1. Does not fulfil his ensuing obligation based on the social security law to register, pay contributions - or comply with the duty to keep records for service - or work as employer, contractor or self-employed person liable to pay social security contributions,
2. Does not fulfil his ensuing tax obligations as a taxpayer based on the service or work provided,
3. Does not fulfil as a recipient of social benefits his ensuing disclosure requirements, based on the service or work performed, to the social security authorities,
4. Does not meet his ensuing duty to register an existing trade from the commencement of the independent business or has not acquired the necessary peddler's license as provider of service- or work performance
5. Independently conducts a licensable craft as an existing trade without being registered in the roll of craftsmen as provider of service- or work performance

In essence, undeclared labour is thus:

1. An infringement of social security law,
2. An infringement of tax law,
3. An infringement of the duty to notify the government employment- and welfare agency
4. An infringement of the Industrial Code (GewO),
5. An infringement of the Handicrafts Regulation (HwO)

Jobs for family members or partners as a favour in the course of helping neighbours and for self-help are not considered undeclared labour if they are not intended to make a profit.²

In the public debate on working conditions in Germany, the terms “shadow economy” and “informal (employment) market” are also used, which however each contain by themselves more than the accepted facts of the case in §§ 1.2 and 1.3 of the Law on Undeclared Employment – for example, one’s own work in the household or family, community work nearby the household, honorary activities.

A additional concept in the discussion about employment conditions in Germany is the "second employment market" – it does not comprise undeclared labour, but rather designates declared labour that, based on publicly financed programs, is not subject to, or only partially subject to, the social security and tax laws and partially or completely exempt from the obligations in these laws. It is based on employment market- and socio-political target programs, laws and ordinances, and has the declared

¹ Law on Undeclared Employment, August 1, 2004, §1.2.

² Law on Undeclared Employment, August 1, 2004, §1.3.

task of (re) integrating the untrained and unemployed into the "first employment market." This goal has not been achieved in many years.

In the areas defined as such, precarious employment- and living conditions prevail based on barely subsistent pay or expense allowances. Although they are embedded differently in the system of employment and social conditions, they correspond to each other in their precariousness, condition themselves in development and mutual lack of prospects, and frequently pervade each other. The frequent change from one area to another has become the normal case, while leaving this precarious area with the transition to the "first employment market" has become the exception.

The transfer of responsibility to the state for the people pushed out of the "first employment market" has serious consequences for the development of the job market and social conditions. The employment- and living conditions made precarious in the growing governmentally "cared for" sectors are weighing heavily directly on the productive resource development in the sectors of production and consumption that have not (yet) been made precarious. This tendency affects not only the continued worsening conditioning of active employment, but also the continued worsening reproduction conditions of capital as well.

In view of the level of deregulations in the employment market- and social conditions, the call for the state to be an organizing power for regulating pending questions appears rather of secondary importance compared to bringing back producers to the common responsibility for the development of production and reproduction.

1.2 The Amounts and Share in the Economy

The economic result produced with the help of undeclared labour and the share in gross domestic product is as before only estimated without empirically proven evidence. The estimates differ widely, primarily due to different inclusions of the types of undeclared labour, various methodological approaches and differing interests (in large or small figures). The estimates used most often in labour market- and social policy come from the following authors and institutions:

- + Pedersen, Rockwool Foundation, inquiries into surveys questionnaires, comparatively low assessment value;
- + Schneider, University of Linz, inquiries into the observed circulation of cash, comparatively high assessment value;
- + The Institute for Applied Economic Research, Tübingen, inquiries on surveys, comparatively low assessment value;

The Organization for Economic Cooperation and Development (OECD) published an international comparative study in 2004 that compares the actual payments to social insurers with the theoretically obligatory contributions. According to this study, 10% of the potential obligatory contributions in Germany were not made in the year 2000.

However, the experts are in agreement in estimating the current dynamic of development – they establish a long, continuing increase of averaged sales volume of undeclared labour up to 2003 and a subsequent gradual reduction:

- + 2003: 370 billion Euro (of this amount, 140 billion Euro in construction, thus almost 40%)

- + 2004: 355 billion Euro;
- + 2005: 345 billion Euro;

And likewise of the averaged share of undeclared labour in the gross domestic product

- + 2003: 17.5%;
- + 2004: 16.5%;
- + 2005: 15.5%.³

1.3 Reasons for Undeclared Labour

The arguments primarily from employers' federations, chambers of crafts and industry, and politically from supply and market oriented tendencies explains undeclared labour as due to wages that are ("too high"), pressures of collective wage agreements that are ("too rigid"), tax rates that are ("too high") and bureaucracy and regulation density that is ("too restricting") - which, taken together, disproportionately burden properly declared labour and make undeclared labour seem profitable.

The argument primarily from the labour unions, social protection associations and politically from the demand and regulation oriented tendency explains undeclared labour as due to unemployment that is ("too high"), border-crossing employment that is ("not controlled enough"), ("insufficient") general contractor liability regarding sub-contracting activity, and the lack of a nationwide corruption register and a nationwide Law on Loyalty to Collectively Agreed Standards – which, taken together, leads to the exploitation of the available growing "reserve armies" in one's own and other countries by undeclared labour.

The prevailing theory and practice of neo-liberal economics and policy concerns overall a strategy to lower the value of labour and thus reduce the share of variable capital as a factor of production. Concretely, this means a general reduction of legally determined standards collectively agreed to and made in the labour market and workplace with the goal of securing profitability in production or service of invested capital. A reduction of costs is thus achieved for investment activities and for labour in the public sector – nation, states and municipalities in Germany are for the moment so financially under funded, that they can only fulfil their tasks in guarantying infrastructure and in providing for lives under conditions that can no longer be maintained without further "undeclared" labour.

In this strategy, undeclared labour only plays one role beside all other forms of the cheapening of labour, which are most often specifically organized as public programs along currently determined needs in increasingly rapid sequence. They intrude into the labour market and social policy and are mostly regulated by laws and ordinances and supported with public resources: Sole proprietor businesses, mini-jobs, midi jobs, training and continuing education, employment measures, job opportunities with expense allowances (One-Euro jobs), and combination wages, among others.

The elimination of trade laws and the weakening of trade structure also follow this strategy. In important trades, and in the construction sector, registering in the roll of craftsmen is no longer required, so that businesses in this sector may also be opened

³ Hintergrundmaterial zum Thema Schwarzarbeit und illegale Beschäftigung, Zentralverband des Deutschen Baugewerbes, March 2006.

without master qualifications and services can be offered and carried out with less regulation.

As a result, a societal agreement with the forms and course of the reduction of the value of labour was made with the implementation of neo-liberal principles in politics and economics. In the private sector – “in the economy”- the system of agreement in wage disputes has adjusted to take part in this process and to develop and make it dynamic in its contradictions. In politics, the governments and public administrations have adapted to processing, concluding and implementing the laws and regulations that promote and secure this process.

Undeclared labour flourishes in this ground.

2 On the Conditions in the Construction Sector

2.1 *The Current Development in the Construction Sector – “From Dive-Bomber to Glider”*

This report is being carried out in a situation that the Federal Office for Construction and Urban Development provides with the headline “Stabilization of the Construction Industry in Sight.”⁴

Investment in construction has been declining for years: from 242 billion Euros in 2000 to 209 billion Euros in 2004 adjusted for price changes with a current renewed reduction by 3.6% in 2005 (201 billion Euros adjusted for price changes), for 2006 a "slow down of the reduction" to 1.2-1.5% is expected. The share of construction investment in the gross domestic product likewise receded: from 11.0% in 2001 to 10.2% in 2003 to 9.4% in 2005.

The structure of the volume of construction (building investments, repair and maintenance), which altogether amounted to 231 billion Euros in 2004, is divided into:

Housing	129 billion Euros
Offices/utilities	66.5 billion Euros
Public works	35.5 billion Euros

In 2005, the figures decreased the most in public works (-5%), in housing about (-3.7%) on average, and the slightest decrease in commercial building (-2.8%).

The volume of construction according to “production groups” was as follows in 2004 in the main building industries: 74.5 billion Euros (32%), in finishing trade: 87 billion Euro (38%), in manufacturing trade: 22.5 billion Euros (10%), in planning and costs 21 billion Euro (9%) and in other construction services 25.5 billion Euros (11%).

The number of employers in construction as a whole continued to decrease. Also, the number of employees and the number of businesses in the building trade continued to decrease.

	2001	2002	2003	2004	2005
Number of employees in the construction industry as a whole	2,186,000	2,028,000	1,908,000	1,838,000	1,727,000
Employees in the building trade*	969,000	866,000	833,000	786,000	734,000
Undertakings in the building trade	79,000	78,500	76,500	76,500	76,000

* Each time at mid-year, the annual average number of employees is lower, 2004: 767,000 and 2005: 717,000.

On the other hand, the number of registered unemployed persons with building trade occupations amounted to 278,000 in 2004 and 286,000 in 2005. This would correspond to an occupation-specific unemployment of 36% in 2004 and of 39% in 2005, if switching occupations or industry does not reduce this number.

⁴ Bericht zur Lage und Perspektive der Bauwirtschaft 2005, Bundesamt für Bauwesen und Raumordnung, Bonn, 2005.

2.2 *Posting of workers – Registrations at the Paid Leave and Compensation Fund of the German Building Industry (SOKA-BAU)*⁵

In the last few years, the number of jobs in the construction sector that were properly registered according to § 2 of the German Posting of Workers Act and recorded through audit reports based on § 3 of that Act have declined.

- + Reduction of foreign construction employers registered as active: from 4,730 in 2000, 4,160 in 2001, 4,000 in 2002, 3,810 in 2003, 3,360 in 2004 to 2,780 in 2005;
- + Reduction of foreign construction workers registered as employed: from 123,000 in 2000, 120,500 in 2001, 115,000 in 2002, 105,500 in 2003, 95,000 in 2004 to 77,000 in 2005;
- + Also, reduction of construction sites registered in Germany since 2001: from 29,500 in 2000, 34,000 in 2001, 33,000 in 2002, 30,000 in 2003, 26,500 in 2004 to 22,000 in 2005.

In comparing individual registrations, it becomes discernable that employment in Germany originating from the European Economic Area States has declined more dramatically than that from states outside of the European Economic Area. In 2005, there were still 1,160 employers and 13,000 workers originating from European Economic Area states working at 7,000 construction sites (in decreasing order from the Netherlands, Austria, Portugal, Denmark). In 2005, there were still 1,600 employers and 64,000 employees originating from states outside the European Economic Area working at 14,900 construction sites (from Poland, Romania, Hungary, Croatia).⁶

2.3 *Focal Points of Undeclared Labour in the Construction Sector*

Generally, several focal points can be determined, which however cannot be verified with data. Here experts obviously describe primarily surveys:

- + Occupational focal points: Iron bending, tiling, erection of scaffolding, demolition work;
- + Qualification focal points: Unskilled and skilled in the industrial area, increasingly salaried activities as well (bogus self-employment, as a rule two-year long "internships");
- + Technological focal points: Interrelationships can especially come about with changing prefabrication levels with increasing assembly-, installation- and finishing work;
- + Plant sizes, subcontractors, market segments: Interrelationships cannot be precisely discerned; however general contractors frequently accept and approve that sub-contractors cannot calculate and offer their prices without falling below the minimum wage;
- + Economic cycles: Interrelationships cannot be precisely discerned, most likely in cycles in the posting states (from which fewer workers depart from if their construction is functioning or even booming); in one's own state, undeclared labour promotes crisis and recession;

⁵ According to the German Posting of Workers Act (AEntG) posted workers have to be registered at the Social Fund operated by the social partners, SOKA-BAU, in Wiesbaden.

⁶ Geschäftsberichte der Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, SOKA-BAU, 2005 and earlier.

- + Contractors: Primarily public sector and private big businesses, but also private, small builders;
- + Regions: Increasing retreat to the legal minimum wage in the old federal states; increasing wages and a noticeable reduction in undeclared labour in the new federal states.

2.4 *Examples of Forms of Undeclared Labour in the Construction Sector*

- “Letter-box Companies” in foreign countries

An expanding service industry in Western- and increasingly also in Eastern Europe offers founding, registration and managing of letterbox companies. Construction companies founded in Great Britain, Portugal or in Eastern Europe “post” workers to Germany, for whom taxes and social security contributions are supposedly paid in their own lands. Often it is a matter of organized crime that had previously been ineffectively combated. The information about business activities of posting undertakings needed for the investigation and verification by the *Department for Financial Control of Illegal Labour* has to be won through legal and administrative assistance. At the moment efforts have started to improve the international cooperation and to accelerate the exchange of information.

- “Cover Companies” and “Check Cashers”

The so-called "cover companies" are bogus firms. They issue fictitious invoices for non-performed subcontractor services, with which the main company claims increased business expenses and can reduce sales tax payments. By the time the fraud is recognized by the Tax Office, the bogus firm is as a rule dissolved. In the meantime, payments made by the main company to the bogus firms are collected by the so-called “check-cashers” and returned in cash after deduction of commissions.

- “Double Entry Bookkeeping”

For the deceptive evasion of the generally applicable minimum wage, working times of 160 hours per month at minimum wage, for example, are recorded in the books - however, in reality 200 hours are worked, without payment for the 40 additional hours and only recorded in a second bookkeeping entry as working hours and without the corresponding payments to the social fund, social security and taxes for these additional working hours.

- “Direct Debit Authorization for Payroll Accounts”

At the conclusion of the contract in their home countries, workers are forced into the collateral agreement to issue direct debit authorizations for their payroll accounts to the employing contractors. Portions of workers’ wages are then again deducted again. Despite formal adherence to the generally applicable minimum wage in the transfer to the payroll account, much lower or the lowest wages can be paid in this deceptive manner, without any kind of controls intervening.

- “Misuse of Social Benefits”

Recipients of social benefits may only have a certain number of hours and a specific amount of additional earnings. If the specified amount is exceeded, the excess amount is charged against the social benefits. In the case of misuse, only the work at the generally applicable conditions that is permitted chronologically and by the

compensation is as a rule registered, even if an employee actually works longer and often below the minimum wage.

Recently, employees in collective agreed small jobs, who cannot achieve a minimum standard of livings with this work – currently about 900,000 people in the Federal Territory – have also been receiving extended social benefits up to the amount that they are legally entitled to. They work for low wages (even up till 48 hours legal working time) and still need unemployment benefits to earn a decent minimum wage. As the de facto mixed earnings are paid out of the tax based unemployment payments this leads in practice to a cut in payments for social security.

- “Work without a ‘truthful’ contract”

Such construction work can be organized for the widest variety of reasons and take on the most widely differing forms:

- + Additional work of employees working under collective wage agreements in exceptional business situations, with key personnel systematically thinned-out regularly (classic overtime), which is not declared or declared at a lower value;
- + Commensurate work of others, as a rule insignificant or lesser paid employed persons in other contractual conditions, for the same reason and in the same form;
- + Commensurate work of non-employed persons, day labourers among others.

2.5 *Reduction of Employment Liable to Contribute to Social Security - Secondary Construction Employment Market*

- Individual Ltd, one-man-operation, bogus self-employment

The work of a classic gang of construction workers falling under collective agreements can be carried out by bogus self-employed persons in a working team. Since January 1, 2004, an enormous number of “firms” have come into existence, especially in the areas taken out of the Handicrafts Regulation.

In the field “tiling” there were about 12,500 independent businesses on January 1, 2004; on June 15, 2005, about 32,500. Of the new registrations, about 75% are so-called one-man-operations, of which about 25% are of foreign nationality.

In the field “concrete floor laying” there were about 1,650 independent businesses on January 1, 2004; on June 15, 2005, about 3,100.⁷

As a rule, the newly registered owners are without certified occupational qualifications; among the tilers, about 80% are unqualified and among the floor layers, about 90% are unqualified.

These businesses do not fall under the Posting of Workers Act and thus are not obligated to comply with the generally applicable minimum wage (if they are not single-person companies).

Bogus self-employment is in many cases linked to – and dependent on – material suppliers (iron, concrete, tiles, etc.) or the production of tools (vehicles, elevators, cranes, etc.).

Individual Plc’s receive at the moment governmental support upon application in their setting-up phase for three years in amounts that decline annually.

⁷ See footnote 3.

- “Non-Profit Job Creation Companies”

These concern external rescue companies in the case of liquidated companies. From here, unemployed persons (as a rule educated and experienced) are placed in regular businesses for a fixed time, in order to perform “training” or an “internship.” This costs the business merely a small fee compared to minimum wages. The process is based on governmental support.

- “Employment Creating Infrastructure Measures”

In this program, businesses receive subsidies when they hire unemployed persons in the scope of governmental contracts. Subsequently, regular jobs in the business can be eliminated. The process is based on governmental support.

- “One-Euro Jobs”

These are “job opportunities with additional expenditure compensation” – that primarily concern the long-term unemployed, who are to be led into the first job market again in this way. Increasingly, they are primarily used by local authorities and social-industrial institutions of private agencies for regular work. In the construction sector, they are displacing normal jobs, primarily in finishing, in deconstruction and conversion, and in demolition, horticulture and landscaping. The process is based on governmental support.

- Combination Wage

Currently, experts are (again) reviewing whether jobs with wages that are (too) low should be publicly supported using governmental wage subsidies in particularly precarious areas of unemployment – first and foremost among older unemployed persons and the long-term unemployed. It is still unclear if this should also take place in the construction sector.

2.6 “Informal Construction Job Market”

Self-organized work without registration of business or entry in the roll of craftsmen, often in interconnecting networks of various trades and occupations, sometimes in longer value-chains from the planning to the finish, especially in conversion, renovation and modernization. This market does not fall under the regulations for declaring labour and is not considered undeclared labour, as long as no striving for profit on a commercial basis exists or rather can be registered. As a rule verification is difficult, especially where criminal engagement is involved.

3 On the Regulations for the Reduction/Prevention of “Undeclared Labour”

3.1 Law on Mandatory Labour Conditions for Transnational Service Provisions⁸

§1 “Mandatory Labour Conditions in the Construction Industry” regulates the application of the generally applicable stated collective wage agreements for the main and secondary construction industry and for labour conditions in the event of posting workers, thus complying with the minimum pay rates including over-time hours and complying with vacation length and pay.

§1a “General Contractor Liability” regulates the inclusion of subcontractors by means of liability of the general contractor for its compliance with the obligations according to §1;

§2 “Inspections” regulate the process for the inspection by authorities of customs check;

§3 “Notification Requirements” regulate the process for the registration of posted employees at the construction including the construction sites and responsible parties on site.

§4 Regulates the delivery of official notifications, §5 administrative fine provisions, §6 the possible exclusion of bid invitations, §7 the validity of mandatory labour conditions, §8 the place of jurisdiction.

The minimum pay for the generally stated applicable collective wage agreements is changing with the results of wage negotiations; in 2005/2006, the minimum wages in the construction industry amounted to:

- + in wage group 1: 10.20 Euros (former federal states) or rather 8.80 Euros (new federal states)
- + in wage group 2: 12.30 Euros (former federal states) or rather 9.80 Euros (new federal states)

Currently, 42% of employed persons in businesses in the new and 19% of employed persons in businesses in the former federal states receive this minimum wage; the average wage of other registered employed persons is above the minimum.

Apart from the unregistered posted foreign employed persons and the unregistered work hours of employed persons with social security, there are additional problems:

- Competition with businesses not subject to the general application from other workmen and tradesmen who are employed at the construction site – the principle “equal pay for equal work at the same construction site” is not realized.
- With the public procurement of contracts, complying with the minimum wage is as a rule not observed; it is frequently obvious that offers and awards are based on prices that cannot keep to minimum wages.
- Controls of compliance with the minimum wage are still insufficient, so that its evasion and the aforementioned misuse- and circumvention facts of the case are only exposed as an example and not nationwide.
- Finally, the enforcement of any sanctions, fees, etc, in foreign countries is not possible in all regulations. Only 15 to 20% of all administrative orders imposing a fine are enforced, which means that 80 to 85% of all identified, negotiated and suspected infringements have no consequences.

⁸ German Law on the Posting of Workers, February 26, 1996.

3.2 *Law for the Prevention of Illegal Employment in Construction*⁹

A general contractor liability was also introduced for subcontractors with this law. The general contractor has to periodically withhold 15% of the subcontractor charges and pay them to the Tax Office. In this way, possible tax evasions can be met head on offensively.

3.3 *Law on Simplifying the Fight against Illegal Employment and Undeclared Labour*¹⁰

A series of improvements of the control were introduced with this law. General contractors were obligated to bear responsibility for the social security contributions of subcontractors commissioned by them. Generally, the authorities' options for cooperation in prosecution were improved and the scope of penalties and administrative fines increased. Advertising possibilities for illegal labour were limited.

3.4 *Law on the Intensification of the Fight against Illegal Employment and Related Tax Evasion*¹¹

The definition of undeclared labour was stated more precisely with the law already named in 1.1.

The law contains the exemption provision according to the Handicrafts Regulation for industry implementation, insignificant employment, ancillary plants and irrelevant subsidiary businesses.

The law also has the obligation to invoice and the obligation to preserve invoices and additional improvements of control- and inspection rights in the prosecution of this type of tax evasion.

3.5 *Law on Loyalty to Collective Agreements (initiative rejected in the Bundesrat in 2002).*

With such a law, the public contract placing authorities are required to award construction contracts only to such companies that base their cost estimating and building on the adherence to pay rates and also demand these rates from their subcontractors. Controls by the contract placing authority should be possible. With this federal law, the initiated practice in state laws in several federal states - Bavaria, Berlin, Bremen, Lower Saxony, North Rhine-Westphalia, and Saarland - had to become generally applicable throughout the whole of Germany.

A positive effect of the Law on Loyalty to Collectively Agreed Standards in the employment policy and towards undeclared labour is occasionally doubted – it would be sufficient if the existing regulations were enforced – with this problem there would likewise be a new regulation. The additional control expenditure is categorized as (too) high.

Currently, several of these state laws are being politically and juridically questioned.

⁹ German Law, September 6, 2001.

¹⁰ German Law, August 1, 2002.

¹¹ This Law on Undeclared Employment (AEntG, August 1, 2004) replaced a former Law (February 6, 1995).

3.6 *Currently: Draft of a Law on Changing the Law Combating Undeclared Labour and the Telecommunications Act (Bundesrat, December 21, 2005)*

The law should make it possible to prosecute and punish the advertising for work that is clearly being offered under crafts- or trade law infringements, in particular advertising with the help of anonymous or rather without further recognizable authorship. The Federal Government currently rejects the Federal Council's draft bill as disproportionate.

4 Examples in Practice

All efforts to limit undeclared labour or to transform it into declared labour in construction still begin with improving state controls and strengthening sanctions. The societal, economic and political bases upon which undeclared labour develops and spreads are regularly masked in their core and are not made an object of efforts. On the contrary, it can be presumed that the current high level of proclaimed and wage-partisan, party-political, governmentally negotiated and regulated activities refer to symbolic policy. Behind this symbolism, agreement seems to prevail that a little mafia-like scene belongs to the industry and nobody is really harmed. It is still viewed as typical for construction and the conditions characterizing it that the greatest possible freedom in negotiating prices, volumes and times with the possibility of mutual advantage-taking or in doubt even cheating is an honest matter among people in construction, among "real men." Third parties are not needed here. Where earlier it was a matter of negotiating daily wages, piecework wages and contractual wages between contractors, building site managers, foremen and convoys, or the negotiation of prices, costs and collateral agreements between builders, architects and building companies, today it is really much more complex, more complicated and where still possible riskier, but not fundamentally different or even completely new.

That is why it is no surprise that undeclared labour on all levels and under all diverging interests – contrary to publicly expressed protestations – is tacitly classified as completely acceptable and in the end unavoidable.

There are also strategic positions that regard undeclared work – just as much publicly supported work in the “second construction job market” as work in supervised situations and work in the “informal construction job market” – as part of a necessary growing correction of the value of active work in the global competition and in neo-liberal job site securing. Incentives for avoiding undeclared labour then seem mostly positive in this strategy, if the cost situation of builders and construction contractors improve, for example with help of:

- + introducing a reduced value-added tax rate for building services;
- + improved tax deductibility of construction charges in owner-occupied residential property;
- + medium- and long-term lowering of additional wage costs.

The divergent gaps in the costs of building services loyal to collectively agreed wages and of those that are generated in undeclared labour, so goes the argument, favours illegal actions in the “first construction job market.”

4.1 *Agreements and Alliances of Labour and Management in the Construction Industry*

Mutual efforts of the social partners in the construction sector to limit undeclared labour - to some extent jointly with governmental authorities - are increasingly suffering from declining membership, in addition to all other problems (i.e. the determination, control and prosecution). Currently, about 50% of the construction companies with approximately 70% of the employees still belong to the social partner organisations in construction. This situation restricts the negotiation and action possibilities in general and of course also in this field. This situation is to be taken into consideration in the assessment of declarations of intent.

- Berlin Declaration of Social Partners in Construction for Combating Illegal Employment¹²

The declaration made the following recommendations:

- + Further development of the social security identification card to a chip card, which is to be carried at every job on construction sites;
- + Establishment of an information alliance among the Federal Employment Office, Customs, social security institutes and Paid Leave and Compensation Fund (SOKA-BAU);
- + Improving controls at construction sites by means of better data comparison;
- + Introduction of a general tax deduction procedure for main contractors.

- Joint Declaration on Enforcement and Control of Minimum Wages in the Construction Industry¹³

The declaration of the partners in collective bargaining stated active participation in the enforcement and control of minimum wages. A central commission was planned as level of action.

- Alliance Declaration of the Industry-Related Action Coalition against Undeclared Labour and Illegal Employment in Construction¹⁴

The action alliance consisting of the Federal Ministry of Finance and the three collective bargaining partners set the following goals:

- + Raising general awareness of the negative consequences of undeclared labour and illegal employment in the construction industry,
- + Fair competition under equal conditions instead of ruinous price competition by illegal practices,
- + Payment of taxes and contributions to social security and to social funds according to the rules,
- + Complying with minimum wages and the social fund process,
- + Steadfastness in the fight against undeclared labour that is profit-driven.

The following measures were agreed to:

- + Strengthening of information to the public,
- + Improving the local flow of information between the organisations and the Department for Financial Control of Illegal Labour on site,
- + Support of regional alliances,
- + Establishment of a working group that meets regularly at the federal level,
- + Intensification of the Federal Finance Ministry's inspection with a view towards inspecting construction sites, especially before the beginning and end of normal working hours as well as on weekends and current forms of concealment of profit-making undeclared labour.

- Agreement on the Joint Fight against Illegal Employment and Undeclared Labour¹⁵

Social partners agreed to the following concrete measures and legislative initiatives:

- + The social service funds of the construction industry should expand their investigation by the tax authorities and external investigations,

¹² Berlin, April 19, 2000.

¹³ Berlin/Frankfurt a.Main, October 29, 2003.

¹⁴ Berlin/Frankfurt a.Main, September 13, 2004.

¹⁵ Berlin/Frankfurt a.Main, July 29, 2005.

- + The preliminary work for specific advice to the Department for Financial Control of Illegal Labour should be improved by forming regional action alliances,
- + Formalized notification forms for reporting when undeclared labour is suspected should be used,
- + The obligation to carry and present identification papers or alternatively a job card for construction work should be legally established.

4.2 *The Federal Customs Administration – Department for Financial Control of Illegal Labour (FKS)*¹⁶

The tasks of preventing, registering, and punishing undeclared labour – in all branches, however with main emphasis in the construction industry, the hotel and restaurant industry, the meat processing industry, the delivery-, transport- and logistics industries, and in the taxi industry – are for the most part concentrated in the *Federal Customs Administration* and here specifically in the *Department for Financial Control of Illegal Labour*. The personnel have been altogether reinforced in the last few years by bringing together customs personnel with government employment office staff previously in the employment market inspection (currently about 7,000 employees).

The statistics still do not provide any branch-specific data. The following were recorded throughout all branches:

- + Inspections of persons at job sites in 2002: 77,000, 2003: 79,000, 2004: 264,000 and 2005: 356,000.
- + Inspections of employers in 2002: 26,000, 2003: 32,000, 2004: 105,000 and 2005: 78,000.
- + Conclusion of preliminary investigations because of criminal offences in 2002: 8,700, 2003: 9,800, 2004: 57,000 and 2005: 81,000.
- + Conclusion of preliminary investigations because of administrative infringements in 2002: 1,700, 2003: 1,200, 2004: 50,000 and 2005: 54,000.
- + In 2005, the sum of administrative fines amounted to 67 million Euro, the value of secured assets for skimming off of assets 13 million; the sum of fines (including compensation for lost value) from judgments and orders of summary punishment 21 million Euro; in comparison, the damage amounts in the scope of criminal- and administrative investigations amounted to 583 million Euros; the total of effected prison sentences, to 995 years.¹⁷

In the construction industry, the following were recorded:

- + Inspections of construction company employers in 2004: 34,000 and 2005: 24,000.
- + Administrative offence proceedings initiated against employers in 2004: 6,700 and in 2005: 10,500.
- + Criminal proceedings initiated against employers in 2004: 3,300 and in 2005: 3,100.
- + An important part of the verification is dedicated to control of workers; these figures are not separately registered by the Department and therefore not available.

¹⁶ Bundesministerium der Finanzen, Bundeszollverwaltung, Finanzkontrolle Schwarzarbeit, Cologne.

¹⁷ Finanzkontrolle Schwarzarbeit, Cologne 2005.

A computer controlled information system – also for data exchange with authorities concerned with tax-, social security-, and social service fund questions – is currently being built. The problem of the quantity of data and the development of appropriate filters for reduction to the necessary data must still be clarified.

Examples of problems with control and prosecution as mentioned during the interviews:

- + Construction site monitoring and controls that are still not sufficiently long-lasting, also outside of the general working hours and on weekends.
- + Still insufficient identification possibilities at the construction site, despite the building contractors and employees' obligation to cooperate. The obligation to carry social security identification, or in the case of posted foreign workers, the E-101 form, is deemed to be insufficient; the obligation to carry personal identification or a passport for all persons present at the construction site is deemed necessary.
- + Bundling of information, inspection actions and cross-border cooperation are still insufficient.
- + Still insufficient possibilities of cross-border administrative fines- and criminal penalty prosecutions and money recovery.
- + Difficulties in the inspection of qualifications and of compliance with standard wages on the construction site can only be counter-balanced by local or regional organs and alliances; at best, mandatory minimum wages can be centrally checked.

Problems of Prevention mentioned during the interviews exist in:

- + Informing the public – “it is not a matter of minor offences.”
- + The setting-up of continually functioning “construction working groups” at the central level and in regional areas.
- + The setting up of cross-border, and if needed, bilateral information for authorities, employers and employees.
- + Continually exposing new, still unknown strategies and as a rule criminal organization structures that do not declare labour.
- + Informing the public and also large, private contract awarders of suspicious factors in dumping offers with the goal of coming to agreement on their elimination from procurement.

4.3 “Networking and Improving the Notification Process”

Recently the different institutes involved in mandatory registration of construction labour – social security, social fund (SOKA-BAU), the Department for Financial Control of Illegal Labour (FKS) and local authorities – have considered whether and how the legally prescribed notification of building sites can be easily linked and compared, taken into account the necessary data protection. The aim is to track down differences in employment figures and financial volume at an earlier stage.

4.4 “Construction Card”

The "construction card" plays a central role in the current discussion – it appears that all sides want it. Significant differentiations however arise to a serious extent in the question of the kinds and quantities of data to be saved, in questions of expense and in

the supervisory authority. These centrally and naturally disputed aspects correlate in multiple ways with another, so that the related disputes between the partners involved are correspondingly unclear and tenacious.

For a long time, one or several pilot projects for testing of the basic framework and conditions are going on. The partners are striving for a large pilot project in the near future in a region or a federal state. One such plan is the so-called “Flensburg Model” that the construction association in Berlin is promoting: introduction of a chip card for businesses with constantly changing work sites with minimal data, name, date of birth, social security number and passport picture.

4.5 *"Gifhorner Model"*

Municipal plan, primarily with regard to handicraft businesses: in cooperation with the district craft association, the district council employs an experienced freelancer in the field, who inspects construction sites every day of the week, around the clock. In the event that infringements are exposed, especially against the Handicrafts Regulation, monetary fine proceedings are carried out as quickly as possible with the aim of consensus and the renunciation of the right of appeal. Supervision and compliance with instructions by the public authorities are guaranteed.

The model is judged to be successful. In the meantime, it is “supporting” itself – the man in the field receives portions of the negotiated administrative fines. In particular, the successful advice to transition to law-abiding trading is classified as a success. However, the process is also categorized as problematic. Besides the fundamentally dubious shifting of control-, inspection- and sanction functions to a private area (endangered in many respects while doing so), its confrontation with professional and organized undeclared labour is professionally inadequate.

There are a series of comparable projects throughout the country, "construction site runners" being one of them.

4.6 *"Prequalification"*

The model of a Technical Control Association for quality and legality of work presented by the union IG-BAU in 2003 is supposed to identify those building contractors who make correct tenders on the basis of rights and laws, carry out work and deliver results. Such an accreditation is to be awarded under public law, and permits private and public customers to award work according to compulsory standards, without costly research and bureaucratic expenditures. The recommendation is not realized.

5 Evaluation

Undeclared labour is a logical consequence of the systematically advancing deregulation of economic and infrastructural processes over a long period of time up to the present. The goal was and is the weakening of governmental, societal organizational- and protective functions and the empowering of private interests and potentials for the free development of the markets. Against the backdrop of negative results emerging from this strategy, recommendations for a solution are calling for a strong state that is capable of acting – provided that they do not want to wait for the further devaluation of work, with which all problems would be obsolete and would no longer have to be solved. The state should, if nothing else is possible, primarily fall back upon police answers (as 100 years ago with the construction police). These are currently being seriously expanded, without being able to solve the political, economic and social core of the problem.

Other models – for example the demands of responsibility and power of labour unions and management – have been to date only considered politically and discussed strategically to a limited extent. However, the labour unions and management have themselves already begun to take such a path “into alliances.” Commensurate with the problem, the establishment of commissions with equal representation of labour unions and management should be considered in the medium-term, which would control and set quality standards under observation of each particular interest, including the professional- and protective levels of community planning- and bidding procedures, construction site- and work safety, technology use and qualification questions etc. with the help of "monitoring." In this way, “reward systems,” certifications etc. could be connected, instead of latent threats of administrative fines and punishment.

For this purpose, it would “only” be necessary to strengthen the roles of labour and management each and in their stabilizing cooperation, and to enable them to (again) perceive their tasks in the sustainable unfolding and reproduction of the productive powers of the construction sector. This would have to be in its entirety the object of social dialog and of the deliberations of labour and management, shifting up to the state’s monopoly on power, but not replacing it. The local authorities, the state and the European Union could concentrate on securing publicly transparent basic conditions and safeguarding the governmental power monopoly and would have to be authorized for fulfilling these tasks.

In the pursuit of such a strategy, high requirements of the law could and would have to be developed and secured for guarantying both employment and health protection regarding products and services. Mediation commissions with equal representation should help secure a rapid enforcement of claims here as well.

All in all, the spectrum of tasks should expand in such a way that a rate above and beyond the common wage and wage relationship is learned about and thus could enable a regulation on a pre-legislative and expanding legal foundation. The common goal of the labour unions and management must be to stabilize the "slumping" conditions in their branch, which have an effect far beyond labour and management themselves. The responsibility for this is worth the debate. It is a matter of societal responsibility.

Appendix:

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