

CONCRETE PROPOSALS

ON THE PREVENTION, DETECTION AND SANCTIONING OF ILLICIT EMPLOYMENT IN THE CONSTRUCTION INDUSTRY

This paper contains specific headings (topics) which all need to be included in specific EU-legislation to deal with the problem of illicit employment.

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This paper has been prepared and presented by the European Federation of Building and Woodworkers (EFBWW), which organises 75 national trade unions from 31 countries. The EFBWW is a recognized European social partner for the construction, wood and furniture sector.



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I. Background

On various occasions, the European parliament called for increased Community legislative actions to tackle “*undeclared labour and the parallel economy*”¹ which, to a different extent from one Member state to another, “*damage the economy, leave workers unprotected, are detrimental to consumers, reduce tax revenue and lead to unfair competition between undertakings*”. In adopting the report, the EP expressed its “*deep concern*” at the extent of undeclared work “*which accounts for as much as 20% or more of GDP in some Member states*”. The European parliament wants Community action to combat undeclared labour to be “*more pro-active and incisive*” in order to ensure that the modernisation of labour law in the EU is not confined to the purely theoretical level, but is transformed into effective, high-quality policies.

Undeclared labour leads to serious social, economic and political distortions:

1. Within the overall EU, billions of euro of social and fiscal revenues are evaded by illicit activities. This either leads to an increase of taxes and social contributions (in order to keep the system sustainable) or a decrease of the necessary public services;
2. The rise of undeclared work gradually undermines the stable system of industrial relations, collective agreements and the role of the social partners to manage their sectors;
3. Undeclared labour is a product of “egoism” and the ability of individuals to do things as they like/please. This individual approach of doing things as “I like” undermines every common sense of political consciousness.

The Lisbon Treaty offers new possibilities to the European legislators to deal with the problem of illicit employment. The EU legislators have been neglecting this serious economic, social and political problem for years, by using soft policies, recommendations and benchmarks instead of issuing real legislation.

Tolerating “illicit employment” has severe structural disrupting consequences on a macro and micro social-economic level. It undermines stable industrial relations, stimulates unfair competition, jeopardizes social security and protection for all, hampers R&D and innovation and so on. The achievement of the Commission’s 2020 strategy of “growth and jobs” with an innovative economy, smart jobs and new skills for the workforce will never be achieved if Europe continues its ostrich policy towards illicit employment.

Despite various urgent calls from the European parliament, the Commission remained reluctant to the strong signals² that the European legislator should take up its responsibilities and deal with the problem of enforcement and compliance of existing legislation.

The problem of “illicit employment” is not purely a national issue. The steep increase of the free movement of persons and services, have lead to a steep increase of “transnational illicit employment”. The lack of convincing EU-instruments is a safe haven for criminals, which has lead to huge frustration of labour and fiscal inspectors who are confronted by transnational fraudulent operators.

¹ One key report is “Stepping up the fight against undeclared work”, INI/2008/2035

² According to the Special Eurobarometer report “undeclared Work in the European Union” (October 2007) “undeclared work is a widespread phenomenon in the European Union. On average, almost a quarter of the population is thought to be involved.”



Various elements of this paper (setting up a permanent EU co-ordination structure for labour inspection, a legislative initiative to deal with subcontracting in the construction industry, EU-criteria to distinguish genuine self-employment from false self-employment, ...) have already been endorsed repeatedly by a broad majority the EP on several occasions

II. General objective of the proposed measures

The primary objectives of the proposed measures are to (1) prevent and (2) improve the detection of illicit employment and (3) to impose sanctions on the use of illicit employment. In this respect, the proposals clearly meet the stated requirement for combating illicit employment by means of preventive and repressive measures.

The proposed measures focus on compliance and enforcement of existing legislation in a transnational context.

In order to maximise the effectiveness of the proposed measures, the EU-instruments should include an obligation to achieve results in terms of prevention, detection and imposition of sanctions.

A key feature of the proposed measures is that they form a coherent whole which should not be viewed in isolation from one another.

The prevention, detection and imposition of sanctions concerning illicit employment relate solely to labour, work, pay, terms and conditions of employment and social security. The aim is to promote fair competition among firms, to collect social security contributions more efficiently and to create a coherent package of measures which is effective and transparent.

The proposals aim at a minimum level of harmonisation and coordination. Therefore the principle of subsidiarity should apply insofar as the proposals do not fall under the exclusive competence of the Community.

The EFBWW considers that some measures should take the form of a Directive, others should be dealt with by a Regulation.

III. Precise elements to be included in future EU-legislation

1. Scope of the measures.
2. EU-Definitions
3. Specific rules to tackle illicit labour providers (gang masters) and labour users
4. Specific rules to tackle "letter box" companies
5. Introducing a European Social Identity Card (SIC)
6. Joint and several liability of the main contractor
7. Specific Preventive measures
8. Strengthened checks, investigation and control
9. Facilitation of complaints
10. Obligation to improve domestic administrative co-operation
11. Specific enforcement and compliance
12. Creating a new EU Social Intelligence and Investigation Agency (EU-SIIA) body to prevent and detect illicit employment



1. Scope of the proposed measures.

The construction industry is one of the sectors most affected by illicit employment. Due to the specificities of “illicit employment” in the construction industry, the proposed legislative measures shall at least apply to activities in the field of building work³. Of course, all member states should have the possibility to extend the field of application to other sectors.

2. EU- Definitions

At the moment virtually everyone agrees that there is a clear need for a set of European common definitions. The existence (or non-existence) of various national definitions allows criminals to shop around in Member States and to set up their businesses in the countries where they have little to fear.

Illicit employment is any form of paid or remunerated activities intended to evade all, some or specific legal, regulatory, governmental or collective provisions or payments of a fiscal, social or administrative nature, in accordance with the provisions of the country of employment. Bogus self-employment is explicitly considered as illicit employment.

A labour provider acts as an intermediary of employment and provides labour to businesses and individuals, regardless the employment relation.

Labour users are businesses and individuals, for whom a person, regardless the employment relation provides or delivers services or labour.

An employment relationship is an open-ended full-time contract of employment. Derogation from this definition is only possible in the following cases:

- (1) where the existence of a relationship of self-employment is apparent from the circumstances which demonstrate incontrovertibly that there is no relationship of subordination;
- (2) where it is apparent from the circumstances and elements in writing that the employment relationship is on a part-time or fixed-term basis.

The burden of proof for (1) and (2) needs to be provided by the client or employer.

The Member states in the country of employment are solely competent for determining the (additional) criteria and conditions governing the employment relationship as well as the legal (re)classification.

A letterbox-company is an illicit instrument by which a company is set up with the goal to evade fiscal, social or labour obligations and responsibilities. Often the company is nothing more than a (mailing) address without a physical responsible. In relation to the problem of “letter box-companies”. It is important to more precisely define at EU-level what is or is not ‘transnational provision of services’ to prevent companies to manipulate applicable law and standards by the use of letterbox-companies.

³ A definition of the building industry can be found in the annex of the Posting of Workers Directive 96/71/EC

3. Specific rules to tackle illicit labour providers (gang masters) and labour users

EU-legislation should lay down strict conditions on employment intermediaries in the labour market (temporary agency work, temporary recruitment, posting, ...). The reasons for this are clear as workers who are hired via intermediaries are significantly more likely to be illicitly engaged.

All Member states shall ensure that all labour providers must clearly demonstrate and prove that they are complying with the law, regulations and collective agreement of the country to which they provide labour. All “business-users” must play their part by using only those labour providers that can demonstrate and prove that they are complying with the law, collective agreements, regulation and relevant practices of the sector.

As such all labour providers must:

- a. join a mandatory register set up by the Member States;
- b. must be regularly audited by an independent body,
- c. provide proof that they are in compliance with the law and in particular working time, minimum wage, adequate pay slips, social security, health and safety, housing allocation, equal protection.

Intermediaries which provide labour in a transnational context should be subject to additional controlling measures by the country of origin. Due to the high risk of social fraud, in case of a cross-border employment, the EFBWW proposes that those intermediaries should prove that they are capable to ensure the payment of the wages, working conditions and social security premiums for each worker they employ abroad.

All labour users must play their part by using only those labour providers that must demonstrate that they are complying with the law in a transparent way.

4. Specific rules to tackle “letter box companies”

In particular special attention should be paid to the so-called “letter box companies”. As such, the proposed EU-legislation should clearly forbid employment of workers via or through a “letter box company”. Criminal and civil sanctions should be taken against the legal and physical persons which are directly or indirectly involved in setting up a “letter box company”.

When a presumption or indication exist that a letter box company plays an active role in the employment of workers, immediate measures should be taken by the national authorities to prevent the non payment of fiscal, social and labour obligations.

The EFBWW proposes that all companies, which intend to employ workers in a foreign company (e.g. through posting or by other means), should at least prove that a minimum percentage (50%) of the workers are employed in the country of origin. “Letter box companies” are legal criminal constructions where a middleman is used as a “puppet” and where the real owners/directors/managers are concealed with the aim to evade any form of responsibility. These companies distinguish themselves from regular companies by the fact that they are created and dissolved very quickly and provide foreign workers as “a herd of cattle”.



5. Introducing an European Social Identity Card (SIC)

The EFBWW proposes that everyone, whatever the law applicable to the employment relationship on a building site, must be in possession of a Social Identity Card, issued by the National Authorities of Social Security of the country of origin. The National Authorities must deliver the Social Identity Card periodically to those whose payment of Social Security and insurances is guaranteed.

Everyone must clearly wear the Social Identity Card when engaged on a building site.

The Social Identity Card shall contain at least the following information:

- (1) Picture of the card owner
- (2) Full name of the card owner
- (3) Date and place of birth
- (4) Unique Identification number (could be a National Security Number)
- (5) Contact information of the issuing National Authorities
- (6) Employment status
- (7) Period of validity of the card

All main contractors are obliged to keep a daily staff register on the work place, which includes at least names of the business, identification of the card owner and working hours of the persons on their building sites. The daily registration and control of the SIC on the building site is the responsibility of the main contractor. The main contractors will only permit access on site to those who are in possession of a valid Social Identity Card.

The registered data must be saved for two years and made available at the site at the request of the national authorities.

In order to avoid falsification the SIC should be authenticated by a stamp (hologram). In addition the information on the SIC should be kept in database, which should be accessible to all contractors. The database is a double check to verify whether the SIC is authentic or not.

Through the SIC every worker knows if his employer has declared him at the national Social security⁴. The obligation to wear the SIC visibly on a building site, has a self-regulating factor and substantially facilitates the work of labour inspectors.

6. Joint and several liability of the main contractor

The joint and several liability of the main contractors is one of the key elements to prevent and sanction "illicit employment". It is a fact that most "illicit employment" in the construction industry takes place on the lowest chains of subcontracting.

The relevance of a legislative community instrument has been dealt with by all European Institutions:

- the European Court of Justice decided in 2004⁵ that enforcement through a Community instrument of joint and several liability is admissible;

⁴ The workers who do not receive an SIC have not been declared by his employer.

⁵ Wolff & Müller case, EcJ EG 12.10.2004, case C-60/03, Jur. 2004



- the European parliament in 2006⁶ and 2009⁷ decided that “the Commission should establish a clear-cut Community legal instrument introducing joint and several liability at European level, while respecting the different legal systems in place in the Member states”.

However, at this stage the Commission has neglected to face the reality of “social fraud” in the chain of sub-contracting and the responsibility of the main contractors.

The EFBWW proposes that an EU-directive should stipulate that the general contractor(s) are liable for the compliance, by all subcontractors and outsourced workers, with the terms and conditions governing pay, employment and social security. The basic principle here is that general contractors have a general obligation to oversee all subcontractors (within the whole chain of subcontractors) and contractors (in case of outsourcing).

- (1) Supervision of pay and employment conditions must be carried out directly by the general contractor.
- (2) Supervision of social security in the posted worker's country of origin is carried out by means of the Social Identity Card system.

All Member states shall ensure that all services providers manage their whole supply chain responsibility in case of subcontracting and outsourcing by at least the following tools:

- Providing clear information to all suppliers on the applicable qualitative and social standards and incorporate these standards into all contracts;
- Organizing regular on-site visits and interviews with the workers;
- Carrying out checks, investigations, controls and assessments of subcontractors and suppliers on their practices, including independent monitoring;

All Member states shall therefore set up a regulatory system of joint and several liability of general or principal undertakings for all subcontractors and outsourced activities. The liability will at least cover:

- a) maximum work periods and minimum rest periods;
- b) minimum paid annual holidays;
- c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- e) health, safety and hygiene at work;
- f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, and of young people;
- g) equality of treatment between men and women and other provisions on non-discrimination.
- h) social security contributions

The Member States shall ensure that all legal and natural persons shall be held liable for the offence referred to in a) to h) where such offence has been committed by any legal and natural person(s), acting either individually or as part of an organ of the legal person, or who has a leading position within the legal person, based on:

⁶ EP report on corporate social responsibility: A New partnership, 2006/2133(INI)

⁷ EP report on the social responsibility of subcontracting undertakings in production chains, 2008/2249(INI)



- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person.

All Member States shall also ensure that a legal and natural person shall be held liable where the lack of supervision or control, by a legal or natural person referred in the previous paragraph (a to c), has made possible the commission of the criminal offence referred to in a) to h) of that legal or natural person.

7. Specific Preventive measures

All Member States shall organize at least once a year an effective and persuasive awareness campaign aimed at warning about the consequences and risks of illicit employment.

Therefore all Members states shall annually develop an efficient strategy to tackle illicit employment. This strategy will contain at least a detailed assessment of the scale of illicit employment and a strategic operation plan. The strategy shall also evaluate the previous action plan. All relevant sectoral social partners will be consulted during the preparation and evaluation phase. The strategic plan shall be made public and transmitted to the European Commission before 30 August annually.

8. Strengthened checks, investigation and control

All Member States shall ensure that effective and adequate, announced and unannounced, inspections are carried out on their territory to control illicit employment. Such inspections shall primarily take place on site. At least 20 percent of all services providers, shall be controlled annually by the competent authorities in the Member States.

With a view to increasing effectiveness of inspections, Member States shall on the basis of a periodical (minimum once a year) risk assessment increase the number of controls of those activities in which illicit employment are concentrated on their territory.

All Member States shall in respect of the checks, investigations and controls, each year before 1 July, communicate to the Commission the inspections, both in absolute numbers and as a percentage of the employers for each activity, carried out in the previous year as well as their results.

9. Facilitation of complaints

All Member States shall ensure that there are effective mechanisms through which complaints can be lodged against legal and national persons in direct contact with illicit employment, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when foreseen by national legislation.

All Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the described measures are complied with, may engage either on behalf of or in support of an illicitly employed worker, with his/her approval, in any administrative or civil proceeding.



10. Obligation to improve domestic administrative co-operation

The internal coordination within the member states between the different national organisations (social partners) and between the different national administrative bodies (inspection services, organisations responsible for implementation, ...) needs to be efficient (simple, fast and flexible) on the basis of an obligation to achieve results;

All member states must ensure an enhanced coordination of strategies and operations, including uniform data sharing at both national, regional and local levels with a wide array of relevant social partners included at all special levels.

11. Specific enforcement and compliance

Each Member State shall ensure that illicit employment constitutes a criminal offence when committed intentionally, as defined by national law.

Each of the following infringements shall constitute an aggravating criminal offence when committed intentionally, as defined by national law :

- (a) the infringement continues or is repeated;
- (b) the infringement is in respect of more than three illicitly employed workers;
- (c) the infringement is accompanied by particularly exploitative working conditions;
- (d) the infringement is committed by an employer who uses work or services exacted from a person with the knowledge that the illicitly employed worker is a victim of human trafficking;
- (e) the infringement relates to the illicit employment of a minor;
- (f) the infringement relates to the illicit employment of a foreign worker;
- (g) the infringement relates to illicit employment, which is organised;
- (h) the infringement relates to trading of illicitly employed workers;
- (i) the use of a falsified Social Identity Card.

All Member States shall take the necessary measures to ensure that natural and legal persons who commit the criminal offences are punishable by effective and dissuasive criminal penalties .

All Member States should render public the list of employers who are legal and natural persons and who have been held liable for the above criminal offences.

12. Creating a new EU Social Intelligence and Investigation Agency (EU-SIIA) body to prevent and detect illicit employment

External cross-border coordination between the Member States needs to be coordinated at EU level via a permanent coordination Agency which deals with the cross-border 'fight against criminal entrepreneurship within the field of labour, social security and income'.

The EFBWW is rather sceptic towards an EU policy where the co-operation between labour inspectors is governed through bi-lateral agreements. Firstly it takes a lot of time to agree upon one bilateral agreement and secondly the policy of bilateral co-operation agreements requires the existence of 351 bilateral agreements to cover the whole EU and its 27 Member States. Based on these elements the cross-border co-operation between labour inspectors should be organised through a multi-lateral approach.



Various Member States have already established national Social Intelligence and Investigation Services. At this stage there is NO EU-wide coordination between these services.

The EU-SIIA should be more than an 'investigation factory'. It should not only investigate crimes, but also try to prevent fraud by acting against the criminal networks behind the fraud and try to remove the fraud construction by informing the national ministries and the administrations concerned. By these means, the EU-SIIA is an instrument that does not tolerate social fraud. The EU-SIIA should not operate alone, but in cooperation with national partner organizations such as public prosecutors, labour Inspectorates, police and fiscal police.

Its investigation should be more than just 'catching criminals'. For instance, by working together with partner organizations, through exchanging information concerning fraud patterns and by explicit communication about its results in the media, fraud can be prevented. The Agency and its activities will indeed have preventive effects.

It goes without saying that the investigation process should be as effective as possible. This can be done by taking necessary tactical and operational decisions at EU and national level.

By collecting, processing and analyzing information, more knowledge becomes available of ways to prevent, detect and sanction criminal entrepreneurs. As such better choices can be made, for instance with respect to certain themes/priorities, how to give extra attention and which specific investigative techniques are the most successful in given circumstances.

The EU-SIIA should also inform the national Ministries of Social Affairs of relevant fraud risks through so-called 'Policy-documents'. By means of this information from investigations, policymakers and National ministries are able to adapt their legislation and/or regulations in order to make them more fraud-proof. The EU-SIIA should advice national Ministries on how administrative procedures to prevent, detect and sanction illicit employment can be improved as well.

The agency shall also ensure a proper system of data sharing and matching between all competent national authorities. Labour inspectors –working in the field- often need immediate access to data and information which lies in the hand of foreign Ministries. The current exchange of data and information is extremely inefficient and slow. A clear benefit for criminals.