

Undeclared Labour in the Construction Industry
- New measures in Switzerland -

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New measures to combat undeclared labour in Switzerland

1. Background

The reality is that undeclared labour represents an increasing threat to the public purse and in general to national economies. This phenomenon has implications for the economy in terms of lost receipts for the tax authorities and social security institutions as well as leading to distortion of competition and wage dumping. Today in Switzerland it is estimated that around 40 billion Swiss francs, or 10% of gross domestic product, have eluded the tax and social security authorities. While this is not yet a particularly high figure on an international comparison, the trend is upwards. It is, however, difficult to gauge the real extent of losses resulting from undeclared labour. But it is clear that substantial amounts of contributions are being lost as a result of undeclared labour.

Undeclared labour is not only an economic and/or financial crime but also has social, ethical and legal consequences. Particularly important, above all for construction sites, are the risks to employee protection.

The construction sector seems particularly badly affected by undeclared labour. Such phenomena as temporary work, self-employed work, the high proportion of immigrants, and growing presence of small firms (tough market access hurdles), subsidiary contracts and subcontracting have all increased in recent years. These factors have paved the way for undeclared labour to emerge and develop.

It is therefore in the interests of workers and (honest) employers to counter this trend. Close cooperation and coordination between authorities, social partners and the private sector are necessary and desirable.

The current efforts to contain undeclared labour in Switzerland have basically focused on two macro-levels, that is creating incentives for not working in the black economy and tightening up supervision and penalties.

2. The new law

After a lengthy consultation phase, during which the authorities and social partners hammered out agreement on a draft *Confederal law on combating undeclared labour* (*Bundesgesetz gegen die Schwarzarbeit, BGSA*), last year the Swiss parliament passed the law by a large majority. The *BGSA* enters into force on 1 January 2008 and is designed to combat undeclared labour by cutting red tape and improving supervision and sanctions.

In Swiss law, undeclared labour corresponds to a pent-up demand, in particular due to lack of coordination between the various implementing bodies. The broad spectrum of circumstances encompassed by the phrase undeclared labour were until now governed by a thicket of laws and overseen by different implementing authorities. This had the consequence that resources were spread too thinly and no overall view of the extent of the undeclared labour problem was available. Of particular importance is the relationship between Switzerland and the EU (freedom of movement of people, implementation of the posting law) and cooperation between Cantons. The Cantons and supervisory bodies need to work together constructively and be guided by solutions found in other Cantons.

The new *BGSA* should put right these failings. When the law comes into effect, an information campaign will be launched to raise awareness among the economic actors concerned.

3. Measures

Cutting red tape for social security

In particular for workers employed on a short-term basis and for mini-jobs in small firms or private households, registration procedures, the obligation to deduct social security contributions and taxes will be simplified. The simplified accounting procedure should serve as an incentive for employers to declare small dependent employment activities to the social security authorities.

Submission to the simplified procedure is always voluntary. The maximum earning in order to be eligible for the simplified accounting procedure is currently only about CHF 50,000. Application of the simplified procedure will therefore not be possible for most building firms; so, ways of effectively simplifying procedures for a wider circle of SMEs are simply not available at the moment.

The simplified procedure allows employers to deduct all social security contributions and taxes from the wage each month. The accounting procedure is carried out by a single body, the Compensation Fund of the General Pension Insurance Scheme. In addition, special procedural rules apply, such as the waiving of advance payments employers are normally required to make. The simplified procedure reduces the administrative burden for employers. But, on the other hand, in order to apply this procedure employers must comply with their obligations concerning cooperation and payments. Otherwise the normal procedure inevitably becomes applicable again, in particular where applicable concerning the levying of tax and social security contributions.

Supervisory and coordination responsibilities of the Cantons

The Cantons have an obligation to set up a professionally staffed supervisory body involving the social partners. Responsibility for implementing the law will be transferred to this body.

This measure signifies greater supervisory powers in the Cantons. In general, the Cantons will make the existing "tripartite commissions" responsible for implementing and supervising the law. These commissions were set up under the bilateral agreements concluded with the EU to apply the posting law and prevent wage dumping as a consequence of the free movement of people with EU countries.¹ A *tripartite commission* comprises representatives of workers and employers organisations as well as the authorities. It assesses normal local, occupational and sectoral wages, monitors the labour market and, where wage dumping is observed, reaches an understanding with the employers concerned. Where it is ascertained that the local, occupational or sectoral wages normally prevailing are not being paid repeatedly and in a fraudulent manner, it applies for the issue of a standard employment contract (laying down statutory minimum wages) or of a declaration that an existing collective agreement (GAV) is generally applicable².

The Confederal Law on Combating Undeclared labour (BGSA) is therefore another addition to the existing flanking measures governing free movement of people with EU countries already laid down in the Posting Act.

It is interesting in this case that the left-wing parties and the majority of the Cantons support the additional supervisory powers, while the parties representing small businesses and most

¹ See also Jan Cremers, Peter Donders "Free Movement of Workers in the EU", CLR Studies 4, The Hague 2005, chapter on Switzerland.

² GAV, Gesamtarbeitsvertrag = collective agreement in Switzerland.

employers organisations were critical or definitely opposed to them. Only the construction industry employers emphasised the need to strengthen such supervisory bodies in order to step up the fight against undeclared labour; this clear position taken up by construction employers reflects the significance and/or risks of undeclared labour in construction.

The aim of this part of the law is to create a single, central body at Canton level, with the role of gathering information, coordinating supervisory activities and taking action. In order to achieve this aim, the social partners must have a key role to play.

But involving the tripartite commissions more closely is not without its problems. Not all the commissions have the necessary or same organisation, structures and resources for taking on these tasks. It is, however, certainly an advantage that the Cantons have to coordinate their supervisory activities concerning undeclared labour with other existing bodies. This allows the Cantons to continue the good cooperation built up over the years. The problem of the very different approaches employed for dealing with similar circumstances, depending on the Canton in which they occur, should be addressed by means of inter-Canton coordination. Experience gained by supervising collective agreements declared generally applicable as well as the posting law will enable the Cantons to draw lessons and put in place the administrative machinery for supervising undeclared labour. Furthermore, it is in any case a requirement that activities be coordinated -- Cantons are not completely free as to the manner in which they must proceed.

The *BGSA* therefore requires the Cantons to intensify the drive against undeclared labour. In order for the supervisory duties of the Canton authorities to also be put into practice, it is necessary to link together measures to fight undeclared labour with implementation of the flanking measures relating to free movement of peoples with the EU. Both labour market supervision activities have numerous parallels and often also relate to the same sets of circumstances.

Linking up administrative data and obligation to communicate results of inspections

In order to improve on shortcomings in coordination, it will be possible to link up administrative data – in particular social security data concerning old age and survivors insurance, invalidity insurance, i.e. state pension insurance, and unemployment insurance -- and the exchange of results of supervisory activities between the bodies involved. In addition, it is compulsory to communicate and/or publish the results of inspections of employers. The Canton authorities must send to the State Secretariat for Economic Affairs (*Seco*) a copy of the decision to exclude employers from public procurement procedures or to cut their financial assistance. *Seco* produces a list of employers who have had such sanctions applied to them and this list will be made available on the Internet.

Summing up, the linking up of administrative data, needed for effective checks to be made in good time, will be regulated and so enhanced. Coordination by the Cantons is required in the regulation; but in order for it to be implemented in practice and function effectively, the Confederal authorities also need to be involved actively and continuously.

Tougher sanctions

Stricter sanctions against all forms of undeclared labour and in addition the introduction of the so-called "horizontal" sanction are important features of the new *BGSA*. The introduction of this extra sanction makes it possible to exclude non-complying employers from public procurement procedures or subsidies.

Also on the question of sanctions, construction employers have distanced themselves from other employers and clearly taken a stand (with the trade unions) in favour of tougher sanctions. The proposed more stringent sanctions should both have a deterrent effect and also generate additional resources for conducting more inspections.

As well as excluding non-complying companies from public procurement procedures, in the case of serious or repeated violations, public financial support may be withheld or reduced.

The case for tougher sanctions is defensible in fact. But these being drastic measures, it must be ensured that this instrument is not misused. The widely varying interpretations by Cantons of such terms as "serious violation" must be standardised as far as possible, in any case with interpretation assistance from the Confederation.

Tougher sanctions coupled with the publication of non-complying companies were key demands by the trade unions in the new law and will doubtless be effective in achieving their aim.

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