The new Romanian regulation of undeclared labour

Professor **Raluca DIMITRIU**[1]

Abstract

The "black" labour is an indicator of how efficient is the enforcement of the labour law. Irrespective of how progressive may the labour law system be in a society, the proliferation of work without employment contracts expresses the failure of the labour law system in the real market. In Romania, Labour Code has been dramatically changed in the summer of 2017, especially with the declared goal to better organize the fight against the undeclared work. This paper is an analysis of the impact of these changes in an attempt to highlight the consequences of the new regulation, which seems to be fighting undeclared work predominantly by punitive tools. Following a general approach to the vulnerability of the worker without an employment contract, as well as some of the reasons for such choice, the analysis starts from the identification of the practical difficulties raised by the new regulation. On the other hand, the paper highlights the benefits of returning to the consensual nature of the employment contract, as well as the disadvantages of the excessive widening of the definition of the concept of undeclared work.

Keywords: *labour law, undeclared labour, Romanian Labour Code, labour inspection*

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1. The concept of undeclared work

Labour performed without employment contract ("black market labour") constitutes the labour performed in the absence of a written employment contract, although the juridical relation between the parties actually corresponds to such a contract.

We shall not include in this concept those activities that are illegal *per se* (forced labour, crime-related activities), but only those activities that are not forbidden by the law and may be object of a legally recognized contract. In the EU, undeclared work is defined as any remunerated activity that is legal in terms of its nature but not declared to public authorities taking into account the differences between the regulations of the various Member States.

Also called informal labour, the undeclared labour is the work performed in the absence of an employment contract registered under the law in the country where the work is performed. By contrast, the *grey work* (sub-declared work) implies the existence of an employment contract but involves elements that do not correspond to reality: a declared salary that differs from the actual salary, a

[1] Raluca Dimitriu – Department of Law, Bucharest University of Economic Studies, raluca.dimitriu@cig.ase.ro

declared position that differs from the actual position, a working time longer than the legal or stipulated-in-the-contract working time, unpaid social security, labour norms under the level of contractual norms. Sometimes, the deviations are related to the law, but to the applicable collective labour agreement.

Legally, this is called simulation: there is a contract – public but unreal, and in parallel another juridical document which is genuine, but occult.

Workers can be considered to be part of several concentric circles: standard employees in the middle with non-fixed term employment contract and beneficiaries of labour law protection; then the circles of fixed-term employees, temporary employees, and people who, under the appearance of independent workers, hide the same vulnerability like the employees; finally, the outer circle covering workers without written employment contracts, who perform informal work ('black labour or "grey" labour). The latter are entirely deprived of legal protection; their number is increasing due to the effects of the economic crisis.

Definitive for informal employment is not the employment itself (by hypothesis inconsistent with regulatory requirements) but the arising vulnerability of the worker[2].

Work is declared or undeclared from the perspective of workers; distinctly, the economy can be formal or informal from the perspective of employers. In the informal sector of the economy, work may be entirely undeclared, because employers themselves are not registered. Indeed, beyond the "European" way of relating to informal work, perceived as a phenomenon that is detrimental for both the worker and the society as a whole, the issue of informal work aquires a different note as soon as the frame of reference shifts to other countries of the world. If we move away from the European model and try to encompass the whole picture, the landscape changes fundamentally. The statistics of the International Labour Organization estimate that more than half of the world's working population is working in the informal sector[3]. In such systems, the emphasis is not on "employment" – often formally non-existent – but on "work", in the attempt to identify minimal forms of protection not of those employed but of those who work. Globalization thus leads to a rethinking of the boundaries of labour law, under the pressure of specific working arrangements that Western law is not familiar with.

2. Causes

The reasons why people accept to perform undeclared work are diverse; they go from ignorance of the effects of such an option to cultural determinants or constraints of various natures, mainly of economic nature. Most of the times, the causes are multiple, intertwined.

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[2] See, R. Dimitriu, *Dreptul muncii. Anxietati ale prezentului*, ed. Rentrop și Straton, Bucharest, 2016, p. 156 ff.

[3] ILO: *Transitioning from the informal to the formal economy*, Report V(1), International Labour Conference, 103rd Session, Geneva, 2014

From a neo-liberal perspective, the failure to declare employment contracts is nothing more than a reaction against overwhelming taxes and contributions, against a corrupt state, which has too much interference on the free market, which causes workers to opt for informal unregistered contracts in order to avoid costs and a waste of time[4]. In this perspective, undeclared work appears as a free option.

On the contrary, most authors who documented the phenomenon appreciate that, as a rule, undeclared work is amplified in those economies "where the state does not intervene or has inadequate interventions for the protection of workers against poverty"[5], as workers are not free but forced to opt not to declare the work contract. This also seems to be the approach of the European Parliament, which, for example, in Decision 2016/344[6] refers to workers "forced to accept" undeclared contractual arrangements.

The proliferation of undeclared work is also a consequence of the flexibilization of contractual arrangements and work schedules, which sometimes make control activities more difficult. At European level, for example, abuse of zero-hours contracts or civil contracts (concluded by falsely-independent workers)[7] is reported. "Undeclared work prisoners"[8] workers are often underprivileged, sometimes lacking the right to work in that specific country, or are among the most vulnerable (the young or persons at the end-of-career, non-employable, minority etc.)

In a market in which some employers use undeclared work and others do not - using black work provides a remarkable competitive advantage (though clearly unfair) in conditions of social dumping. Since "black" work leads to a reduction in sale prices, it will be condemned with less vehemence by customers. In fact, all forms of illegal work (payment of wages below the legal minimum, use of immigrant workers without work permits, etc.), since they lead to price reductions, can create such civic dilemmas among consumers[9]. In this context, civic conscience (which we manifest, for example, by refusing to buy products imported from countries where child labour is used) is also of some relevance in keeping the phenomenon of unregulated work under control.

As far as our continent is concerned, beyond the legal aspects, an important psychological component can be identified among the causes of this phenomenon.

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[4] Colin C. Williams, *Out of the shadows: Classifying economies by the extent and nature of employment in the informal economy*, în "International Labour Review" nr. 154(3), September 2015, p. 336.

[5] *Ibidem*.

[6] Decision (EU) 2016/344 of the European Parliament and of the Council on the establishment of a European platform to strengthen cooperation on the fight against undeclared work, published in Official Journal of the European Union L 65/12 of 11 March 2016.

[7] European commission, *Shadow Economy and undeclared work*, 2014, p. 2: http://ec.europa.eu/ europe2020/pdf/themes/07_shadow _economy.pdf (consulted on 15.10.2017).

[8] Ene Corina – Maria, Burghelea Cristina, Badea Liana, *Undeclared work – personal choice or necessity?*, in „Revista economica" [Economic Review] no. 2(55) 2011, p. 274.

[9] Indeed, committing crimes normally leads to public opprobrium. When it comes to work-related crimes – the society does not always react negatively, as the immediate consequence of committing these crimes is the fall in the price of products and services.

Against the background of the general aging trend of the European workforce, the lack of confidence in the sustainability of the pension system is accentuated. The fact that undeclared paid activities will deprive the worker of pension is no longer a real concern, as long as those who work legally, paying full contributions, may end up having the same fate.

The amplification of the phenomenon of undeclared work thus reveals a problem even deeper, regarding the inability of European legislators to build a credible system for younger generations. As if the threat of the collapse of pension systems is not enough, young people are exposed to general unpredictability, the changing of "game rules" along the way, a permanent demand for professional and geographical flexibility. As a result, *the lack of a long-term vision on their part may not be a surprise.*

In today's globalized society, the issue of undeclared work has important connections with that of clandestine immigration. The analysts of these phenomena[10] hesitate on the causality: is it the opportunity for undeclared work and within the shaddow economy that encourages the levers of clandestine immigration, or is it the latter which, through the supply of labour, essentially informal, feeds the clandestine economy?

Moreover, the refugee crisis has added a new dimension to the difficulties faced by the authorities in containing the phenomenon. Researching the impact of this crisis on the labour market is only at the beginning[11].

3. Reactions

But Member States are reacting in different ways against undeclared work. On the one hand, diminishing the attractiveness of undeclared work is pursued by adopting coherent systems of reducing labour taxation and establishing a strong correlation between contributions and benefits[12]. On the other hand, contravention sanctions are opted for, sometimes even criminal ones, most often directed against the employer, but sometimes also against the worker without forms. There are also experiments: starting with September 2015, Italy has adopted a series of intransigent sanctions directed mostly against undeclared work in the agricultural sector: criminal sanctions and even confiscation of agricultural land cultivated by the use of undeclared workers are applied here[13]. So far, Italy has not been a positive example in terms of limiting undeclared work; in this case the sanctioning of both the employer and the worker has led to the covergence of the interests of

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[10] For details, from the perspective of the Italian system, Bruno Caruso, *Immigration Policies in Sothern Europe*, in Conaghan, J., Fischl R.M., Klare, K. (coord.), „Labour Law in an Era of Globalization. Transformative Practices & Possibilities", Oxford University Press, 2005, p. 308 ff.

[11] However, some first estimates have been made. http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/approaches-towards-the-labour-market-integration-of-refugees-in-the-eu

[12] European Commission, "Shadow Economy and undeclared work", *op. cit*., p. 4.

[13] http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/approaches-towards-the-labour-market-integra tion-of-refugees-in-the-eu (consulted on 15.10.2017).

these categories and has created even greater difficulties in identifying contraventions[14].

Sanctions for undeclared work are enforced by the competent bodies in each Member State, namely[15]:

Labour Inspectorate	Social security inspectorates	Fiscal authorities
Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Luxembourg, Latvia, Lithuania, Netherlands, Portugal, Poland, Romania, Slovakia, Slovenia, Hungary	Belgium, Spain	Austria, Denmark, Estonia, Finland, Germany, United Kingdom, Sweden

The Romanian legislator has opted to fight against the phenomenon of informal work by predominantly punitive means. Both employer and employee can be sanctioned by contravention.

Against the theoretical and practical background presented above, Government Emergency Ordinance no. 53/2017[16], a normative act that modified the Labour Code by introducing a broad definition of the concept of undeclared work, as well as a more nuanced sanctioning of it, was adopted.

Thus, according to art. 15^1 of the Labour Code, undeclared work is:

a) the employment of a person without the conclusion of the individual employment contract in written form on the day before the beginning of the activity.

This was until now the only form of "black" work, sanctioned as such. However, the change from the previous regulation is that the act no longer constitutes a criminal offense under any circumstances. Regardless of whether less than 5 people or more than 5 people, without legal forms, have been admitted to work the deed will constitute all contravention. Indeed, it has been noticed that criminal sanctions do not help reduce the phenomenon of undeclared work, as the deed was often considered not to present the degree of social danger of a crime, and the prosecution was slow and not always completed with the punishment of the offender. Much more effective were the administrative sanctions.

According to art. 260 para. (1) lit. e) of the Labour Code, the employment of a person without the conclusion of an individual employment contract shall be sanctioned with a fine of 20,000 lei for each identified person[17].

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[14] Bruno Caruso, *Immigration Policies in Sothern Europe*, în Conaghan, J., Fischl R.M., Klare, K. (coord.), *op. cit.*, p. 313.

[15] http://europa.eu/rapid/press-release_MEMO-14-272_en.htm (consulted on 15.10.2017).

[16] published in the "Official Gazette of Romania" no. 644 of 7 August 2017.

[17] As regards the current control campaigns to identify undeclared work, employers must be particularly cautious. There were situations where the visit was carried out by the manager of the parent company, but the labour inspector considered it to be undeclared work. In any case, it shall be avoided that pesons that are foreign to the business wear the uniform of the company, enter areas reserved only for the staff, carry out any kind of activity on the machinery or production equipment, etc.

In order to clarify the relationship between the employer and the persons found at the controlled workplaces, labour inspectors may request the completion of the identification cards, including those who have the status of "visitor". In addition, beyond the control of employment relationships, we note that the employer remains responsible for the safety and health of such people present within his company as visitors, scholars, trainees, or other collaborators.

We point out that while the admission to work without the conclusion of an individual employment contract of more than 5 persons has lost its criminal character and is now considered a contravention, the employment of a person residing illegally in Romania, if the employer knows that he or she is a victim of trafficking in human beings remains a criminal offense and is punished by imprisonment from 3 months to 2 years or by fine.

b) the employment of a person without recording the employment relationship in the general register of the employees no later than the day before the beginning of the activity.

So far, the non-registration of the contract in ReviSal was sanctioned as an administrative offence, but not by the Labour Code, but by the provisions of Art. 9 para. (1) of the Government Decision no. 500/2011, modified by the Government Decision no. 877/2016, a legal text that is currently repealed.

The penalty is tightened: the employment of a person without transferring the employment relationship to the general record of the employees no later than the day before the beginning of the activity is sanctioned with a fine of 20,000 lei for each identified person (compared to 10,000-20,000 lei, provided by Government Decision No. 500/2011).

At present, not only the conclusion of the contract must be recorded before the beginning of the activity, but also any modification of the contract. The 20-day period referred to previously in art. 17 para. (5) of the Labour Code has been removed, so that any additional amendment to the employment contract must be recorded the day before the change takes effect.

The only changes for which no additional acts are concluded, and therefore not registered with ReviSal, are those that occur due to the law or applicable collective agreement.

c) Calling an employee to work during the period when his individual employment contract is suspended.

This is the legal establishment of a decision reached by the judicial practice. It is the Decision of the High Court of Cassation and Justice no. 20/2016[18], which stated that the phrase "without the conclusion of an individual employment contract" provided by art. 260 para. (1) lit. e) of the Labour Code also includes the situation of the suspended individual employment contract. Although at that time this decision was controversial, it should be noted that the person who carries out activities – for example, during the unpaid leave – is in the exact same situation as the person carrying out the activity without having had any contract with the beneficiary of the work.

[18] Published in the "Official Gazette of Romania" no. 927 of 17 November 2016.

The legal provision, in the very definition of undeclared work, of the case of persons who have suspended employment contracts also invites caution. In principle, the employees whose contract is suspended do not have reasons to be in the firm; if they are still present, in case of control from the labour inspector they will have to be able to reasonably justify their presence there.

Allowing an employee to work during the period when he has the individual employment contract suspended, is punishable with a fine of 20,000 lei for each identified person.

d) Calling an employee to work outside the working hours established under the individual part-time employment contracts.

The provisions of art. 105 para. (1) lit. c) of the Labour Code, according to which the part-time employee can not provide overtime, are taken into account. It is considered that, since the contract was part-time, the work carried out outside this fraction of the contract takes place outside the contractual bounderies, so it is virtually without contract.

Allowing an employee to work outside the working hours established under the individual part-time employment contracts, is punishable with a fine of 10,000 lei for each identified person.

In order to make it possible to verify compliance with these rules, the Government Emergency Ordinance no. 53/2017 also modified the content of art. 119 of the Labour Code, which now provides that the employer has the obligation to keep at the workplace the record of the hours worked daily by each employee, highlighting the start and end hours of the work program, and presenting this record to the control the inspectors, whenever required.

However, the introduction without any nuance or circumstantiation of this obligation to record the working time makes the legal norm particularly difficult to apply precisely by the correct employers who are facing difficult problems today.

In response to employers' reactions across the country, the Labour Inspectorate issued a communication in September 2017 to clarify how this obligation is going to be fulfilled. Bellow is an extract:

"This record is mandatory not only to create the possibility of checking how the employer complies with the legal provisions on working and resting time, but also for the correct issue of the salary sheet, the Order of the Ministry of Public Finance no. 2.634/2015 regarding the financial-accounting documents, stipulating in Annex no. 2, Group V, Salaries and other Personal Rights, the fact that the records of the time actually worked underlie the drawing up of the wage bill, a document drawn up for calculating the monetary rights due to the employees, as well as the contributions and other amounts due.

Given the importance of keeping track of the time actually worked, both for the employee and the employer as well as for the institutions which have the competence to verify compliance with the legislation on working and rest time, as well as the establishment of the employees' money rights, the related contributions and other amounts due, it is understood that the intention of the regulator was to oblige the employer to keep a real record of the hours actually worked by each

employee. For a correct record of working time, materialized in the centralized timetable drawn up on a montly basis for the purpose of drawing up salary sheets, it must be based on the primary documents of evidence existing at the workplace where the employee actually carries out the work, even if this is a mobile place, like drivers, for example, which is something that has also been happening until now.

By amending Article 119 of the Labour Code, by GEO 53/2017, as of 7 August 2017, the legislator merely clarified an already existing regulation, which, for the correct application, still had to rely on the hours actually worked by the employee, and not, as sometimes found in practice, on a number of hours recorded in a centralized time sheet drawn up at the employer's headquarters without taking into account the actual activity of the employee.

As regards the way in which the hours worked by the employee are tracked, the legislator did not determine how the employer should keep this record, the latter having the attribute according to the Labour Code to determine the organization and functioning of the establishment. Thus, this record can be kept both on paper and electronically, for people who have access to the workplace by a card, or record the period in which they actually perform the activity in any other way (eg tachograph recording of driving time, breaks and rest periods for drivers) so that the monthly centralizing record be based on these primary records of the actual time of work performed by the employee at his place of work, whether fixed or mobile".

From this communication of the Labour Inspectorate, as well as from the practice of the labour inspectors so far, it can be noticed that:

- there is no need for an attendance register, as the employee's signature is not required;

- if the company uses the electronic monitoring through the access cards of the employees' presence in the company, it is a record of the hours of activity within the meaning of the law;

- a worker may be appointed within the team/group of workers to keep track of the hours of arrival/departure of each employee. This person will be appointed by internal decision of the employer;

- fieldwork will be highlighted through specific forms, including the time spent on clients, or travel to them, based on the judgment of the Court of Justice of the European Union C 266/14. The Court ruled that if workers do not have a fixed or regular job, the travel time they spend on daily journeys from home to the places where the clients designated by the employer are located are 'working time';

- the number of hours worked by an employee in a given period may be changed only prior to the moment the modification takes effect by an additional act and not as previously regulated when the aditional act could be drawn up within 20 days of the date of the change (prior to negotiation by the parties).

In conclusion, on the occasion of the checks carried out, the labour inspectors verify, regardless of the form under which the employer presents and manages the recording of the hours worked by his/her own employees, if at the level of the respective employer there is a situation highlighting the hours for the beginning and the end of the activity, so that the real working time of each

employee is clear. Regardless of the form in which the employer chooses to keep track of working hours, it is essential to be able to prove and demonstrate for each working day, for each employee, the start and the end time of the work program, the employer being free to use one of the following methods, without limiting them: presence record, manual/automatic attendance sheet, collective attendance sheet. In addition, on the basis of each individual employment contract, in relation to the working time recorded in each of them, the employer can prepare a record of the working time of each employee, evidence that will be the basis of daily attendance at work.

Although a solution could be online monitoring, in order to check the period when the employee is logged in, this is an option for a small segment of employers and a small sphere of activities.

In practice, the issue originating from the case of part-time employees who are retained in full-time activity but paid according to the part-time contract – a clear situation of non-compliance – has lead to an obligation affecting all employers and all employees, including full-time workers.

In addition, in order to meet the labour inspectors' efforts to perform an effective control of undeclared work, Government Emergency Ordinance no. 53/2017 also introduced the obligation of the employer to keep a copy of the individual employment contract for the employees who work in that place. This obligation also, contained in art. 16 para. (4) of the Labour Code has already created a number of practical problems because not all secondary working places meet the legal conditions for keeping copies on employment contracts and maintaining the confidentiality of the employee's personal data, salary or other specific items.

Where is the place of committing the offense of illegal employment: where the work is actually provided or where the legal forms would be made (e.g. at the employer's headquarters)? The High Court of Cassation and Justice had the chance to give a decision in this respect: the decision of the 1st Civil Section no 4036/2012, considering that the place where the offence is committed is the place where the work is performed: 'to decide upon territorial competence of courts means to identify the place where the offence has been committed. According to art.276 para.(1) letter e) in the Labour Code, the offence is to receive people for work without concluding an employment contract. Consequently, the offence does not have as material element the lack of an employment contract under the art.16 para.(1) in the Labour Code, but the act of receiving people for work, of using their work without such a contract. As the use of work without employment contract is an act for which the employer is made responsible, as he uses the undeclared labour, the place where the offence is committed is the place where the people working without complying with legal requirements are found. Any other decision would mean to transfer without permission the contents of the offence from the use of work without employment contract to the obligation to conclude the employment contract, an obligation that in itself does not entail any legal consequence if it does not result also into the use of the work. It results therefore that the law-maker did not sanction the failure to conclude an employment contract

but the use of the work under these circumstances. Consequently, the offence is considered to be committed where the people performing such work are found'.

4. Conclusions

The definition of undeclared work has been significantly extended by the entry into force of Government Emergency Ordinance no. 53/2017. This makes the outline of the concept of undeclared work, as it results from the European documents, much broader. The amendment to the Labour Code is the expression of some requests from the Labour Inspection, fully understandable in terms of the results of the monitoring of the phenomenon at national level, but not always in full consonance with the theoretical concept of undeclared work.

Sometimes, practical work is made more difficult because the new regulations are not sufficiently nuanced to cover the many practical situations that may occur. The most important difficulties are experienced in the case of employees who do not carry out their activities entirely at the company's headquarters, those whose work has a certain specificity – such as work in education – or those whose activity can not be physically monitored.

There are reasons to expect that the forceful means introduced by the current form of the Labour Code to fight undeclared work will not be without consequences and the ways of circumventing the legal provisions will diminish. But the price is likely to be substantial: reducing the number of part-time contracts, stiffening working relationships, sanctioning and even harassing the correct employers who would not have the intention of employing undeclared workers, discouraging atypical and very atypical forms of employment, and generally turning the economic enterprise into a "bed of Procrustes" that does little to meet the standards of modern business on a market as competitive as it is today.

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