

European Platform to enhance cooperation in the prevention and deterrence of undeclared work

Impact Assessment (SWD (2014) 137, SWD (2014) 138 (summary)) of a Commission proposal for a Decision of the European Parliament and of the Council on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work (COM (2014) 221 final)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment (IA) accompanying the above proposal, submitted on 9 April 2014.

Undeclared work, defined by the Commission as 'any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account the differences in the regulation system of Member States'¹, is a complex, multifaceted, and by its very nature, difficult to measure phenomenon which affects all Member States. According to the Commission, it impacts negatively on working conditions, fair competition and public budgets by lowering work quality standards, creating risks for the health and safety of workers, jeopardising the financial sustainability of social protection systems, and undermining the competitive environment for businesses. The fight against undeclared work is high on the EU policy agenda since the larger the shadow economy, the more difficult it will be to achieve the target of 75 per cent of 20-64 year olds in employment by 2020, as set out in the Europe 2020 Strategy. In this context, both the Flagship initiative 'an Agenda for new skills and jobs'², and the Communication 'Towards a job-rich recovery'³, stress the need to move from informal or undeclared work to regular employment in order to reduce unemployment. The Communication calls for improved cooperation between Member States in this field and announces the launch of consultations for the establishment of an 'EU level platform between labour inspectorates and other enforcement bodies to combat undeclared work'.

The European Parliament, in its resolution on 'effective labour inspections as a strategy to improve working conditions in Europe'⁴, welcomed the Commission's initiative to create a European Platform and called for strengthened cooperation at EU level to fight undeclared work.

Problem definition

According to the IA, besides the heterogeneity of undeclared work, which makes it difficult to measure and detect, thus complicating policy responses, the effectiveness and efficiency of Member States' actions to tackle this phenomenon are also hampered by the fact that undeclared work is discussed only sporadically and in an uncoordinated way in different committees and working groups at EU level. Also, existing cooperation between Member States is patchy, both in terms of the Member States involved and the issues covered, with only a few attempts having been made to learn from each other's experiences.

¹ Communication from the Commission "Stepping up the fight against undeclared work" COM(2007)628.

² Communication from the Commission "An agenda for new skills and jobs: a European contribution towards a full employment" COM (2010) 682 of 23 November 2010.

³ Communication from the Commission "Towards a job-rich recovery" COM (2012) 173 of 18 April 2012

⁴ European Parliament Resolution of 14 January 2014 (2013/2112/INI).

Two main 'governance' problems are identified⁵:

- insufficient cooperation between enforcement authorities at EU level because the responsibility of tackling undeclared work lies with different institutions, such as labour inspectorates, social security inspectorates and tax authorities, which do not all meet at EU level.
- difficulties in dealing with the international (cross-border) dimension of undeclared work. With the mobility of workers being a fundamental freedom of the Union, cross-border employment situations are frequent. The difficulty of identifying undeclared work in such a context suggests a need for increased cooperation between Member States in that field.

The Commission explains that the drivers underlying the above shortcomings are threefold:

- *A lack of knowledge about the division of competencies between enforcement agencies, the precise legal definitions of undeclared work in other Member States and the links between different EU policies and tools, hinders effective cooperation. Member States' efforts to exchange their views and experiences on different practices are also hindered by the absence of a dedicated common forum.*
- *Enforcement authorities' traditional mechanisms and resources are meant to tackle mostly domestic aspects of undeclared work. In cross-border cases of undeclared work, enforcement authorities face difficulties in identifying their counterparts in another Member State and their competences. In addition, different data protection rules can hamper the development of common data sharing facilities, and the lack of competences outside national territories limits the performance of inspections and application of sanctions in cross-border cases.*
- *Despite general agreement on the need to fight undeclared work, in practice there might be a low sense of urgency to tackle the problem in some Member States and therefore insufficient political priority given to the fight against undeclared work.*

The problem definition section of the IA provides a very general overview of the problems related to undeclared work, notably the different types of undeclared work, the sectors mostly affected (construction sector, followed by household services, personal services, private security, industrial cleaning, agriculture and catering) and the potential causes of such activity. It includes statistics on the estimated share of undeclared work in the Member States (annex II), stressing the need for cautious assessment of the results given the divergences in the underlying methodology and indicators used. It also provides a table with the existing voluntary cooperation projects between Member States in the field of undeclared work⁶.

The 'governance' problem in need of EU action is however insufficiently presented and evidenced. The IA does not provide any examples or evidence of insufficient cooperation between enforcement authorities at EU level. The presented drivers are generally lacking substantiation; in particular the alleged difficulties arising from differences in data protection rules are not further detailed or discussed in the IA. The IA appears to consider that limited participation by Member States in voluntary multilateral projects is linked to a low awareness of the urgency of the problem⁷. It does not discuss other reasons for Member State low participation in multilateral projects, such as the lack of resources, or the possibility that the limited exchange of best practices might be a sign of a low demand from Member States for cooperation activities, rather than a low awareness of the urgency of the problem (considering in addition the fact that according to the IA 'all Member States have in the last 10 years introduced measures to step up their fight against undeclared work'⁸). The IA does not clarify the incentives that different Member States could have in cooperating (for example in the aforementioned cooperation projects) to tackle undeclared work. The fact that the IA does not provide any information on the outcome of the existing cooperation projects in terms of

⁵ IA, p. 14-19.

⁶ IA, p. 19.

⁷ IA, p. 20.

⁸ IA, p. 51.

improved cooperation between enforcement authorities and/or exchange of best practices, makes it difficult to judge the effectiveness of existing multilateral cross-border cooperation to fight undeclared work.

The cross-border dimension of the problem is also insufficiently detailed: the IA does not indicate how relevant cross-border issues are in the difficulties encountered by national authorities in tackling undeclared work (for example share of cross-border cases), and does not illustrate with examples the specific problems identified related to the posting of workers or bogus self-employment. The few arguments (lack of coordination, no comprehensive approach to undeclared work) provided to explain why existing expert groups at EU level, many of whom work on issues related to undeclared work, are not in a position to tackle appropriately this problem, and notably ensure cross-border cooperation, are rather vague.

The baseline scenario is very succinct and does not clearly substantiate the reasons why demand driven cooperation among Member States in the form, for example, of bilateral agreements 'addressing the most pressing needs such as exchanges of data'⁹ would not be sufficient to tackle the relevant issues, given in addition the fact that 'since the beginning of the recession, a wide range of policy approaches and measures to tackle undeclared work have been introduced across the Member States' and 'it can be assumed that Member States would continue like this in the future'¹⁰.

Objectives of the legislative proposal

The *general policy objective* is to support Member States in their efforts to prevent and deter undeclared work. This general objective is translated into the following *specific objectives*¹¹:

- 1) To improve cooperation between Member States' different enforcement authorities at EU level to prevent and deter undeclared work more efficiently and effectively.
- 2) To improve Member States' different enforcement authorities' technical capacity to tackle cross-border aspects of undeclared work.
- 3) To increase Member States' awareness of the urgency of the problem and to encourage Member States to step up their efforts to fight undeclared work.

On the *operational level* the initiative has the following three main purposes:

- 1) Providing a forum for experts of different Member States to make contacts, share information and best practices.
- 2) Providing a framework to develop expertise.
- 3) Developing a mechanism for a more operational coordination of actions.

Range of options considered

The following five options were examined in the IA:

- **Policy option 1:** no new action beyond the existing working groups and initiatives.
- **Policy option 2:** better coordination of the work of the different existing working groups/committees at EU level that discuss topics linked to undeclared work¹²: DG EMPL would nominate a coordinator for the discussion and activities of the different groupings in respect of undeclared work.
- **Policy option 3:** individual body with voluntary membership: this option provides for the setting up of a European Platform to enhance EU cooperation in the prevention and deterrence of undeclared

⁹ IA, p. 21.

¹⁰ IA, p. 21.

¹¹ IA, p. 24-25 and executive summary p. 7.

¹² Senior Labour Inspectors Committee (SLIC), Expert Committee on the Posting of Workers, Employment Committee (EMCO), Committee on administrative cooperation in taxation, Administrative Commission for social security coordination, IA, p. 22.

work. Participation in the platform would be voluntary but once a Member State agrees to engage itself, participation in the activities of the platform would become mandatory. The platform would be set up by the Commission and would comprise representatives of different enforcement bodies of the Member States (who would be appointed by the Member States) and other stakeholders, such as social partners. The member appointed by the Member State would act as a single point of contact, liaising with the national authorities dealing with the various aspects of undeclared work. The platform would be chaired, coordinated and managed by the Commission. Once established, the platform would adopt its rules of procedure and its work programme. Tasks could include: developing the knowledge of undeclared work through the development of common concepts, adoption of guidelines for inspectors or handbooks of good practices, and developing the technical capacity to tackle cross-border aspects of undeclared work.

- **Policy option 4:** individual body with mandatory membership. Participation in the European Platform referred to above would be mandatory.
- **Policy option 5:** Attaching the platform to an existing body The Commission considers that an attachment to a specific expert group would not be a good solution since it would mean linking the fight against undeclared work to a specific theme. This option provides instead for the integration of the fight against undeclared work into EUROFOUND¹³ (hereafter 'Eurofound'). Since Eurofound's tasks are limited to research and development of projects to provide knowledge and support for EU policies, making it responsible for coordinating action to prevent and fight undeclared work in general would require a change in the founding regulation and a new mandate.

The Commission discarded the option of creating a European Union decentralised agency responsible for enforcing EU law and fighting against undeclared work. The reasons were the administration costs for establishing a new agency, and the fact that the 2012 Common Approach of the European Parliament, the Council and the Commission¹⁴ discouraged the creation of new agencies and urged existing ones to streamline their activities and increase their performance.

The description of the options is very general and insufficient information is provided on how they would work in practice. This is particularly true for option 2 which is explained in very broad terms in only one paragraph, not enabling the reader to assess the feasibility of such an option. As for the platform (options 3 and 4), no information is provided on what its concrete status would be or how it would liaise with existing expert groups to avoid overlapping tasks as foreseen by the Commission. The participation of social partners in the platform is also unclear. Regarding option 5, the explanation given as to why the platform could not be set up as a subgroup to a specific expert group is not substantiated and seems to have been discarded without proper analysis in the IA. Nor is the integration of the fight against undeclared work into the work of Eurofound explored at any great length.

The Commission's preferred option is option 4. According to the Commission, the cost and effectiveness of Options 3 and 4 would be similar if one assumes that all Member States take part voluntarily in the platform under option 3. However, the Commission sees a clear advantage in option 4 because of the mandatory participation which removes the uncertainty linked to the willingness of Member States to become a member in the first place. Mandatory participation is considered to be a necessary element of the platform 'because cooperation to tackle cross-border aspects of undeclared work, which is one of the essential objectives of the initiative, could not be fully achieved if some Member States were in and others out'¹⁵. The other options were found to offer only very limited improvements.

¹³ European Foundation for the Improvement of Living and Working Conditions.

¹⁴ Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, June 2012, available at http://ec.europa.eu/commission_2010-2014/sefcovic/headlines/news/2012/07/2012_07_17_joint_agreement_agencies_en.htm

¹⁵ IA, p. 39.

Scope of the Impact Assessment

The assessment of impacts only answers the question to what extent the different options achieve the specific objectives set, i.e. awareness of the urgency of the problem and stepping up efforts to fight undeclared work, contribution to better cooperation between different enforcement authorities, and technical capacity to address cross-border aspects of undeclared work. The economic, social and environmental impacts of the initiative are not assessed. The Commission explains this by indicating that the initiative under discussion concerns governance issues and that overall 'good governance is expected to have an impact on the social situation and the economic performance'¹⁶. It goes on to indicate that 'the incidence chain from the establishment of a platform against undeclared work to reduced undeclared work is rather long' and that 'it was impossible to establish a sufficiently direct link between the functioning of a platform, the reduction of undeclared work and economic performance or social well-being', which is why it was found unrealistic to assess the social or economic impacts per se.

Generally speaking, the assessment of impacts appears to rely on a great number of assertions that are not fully substantiated (for example, regarding option 2, the Commission merely indicates that 'the experts from different areas will not really meet' or that 'suggestions developed at the European level are not likely to adequately take into account the multidimensional aspects of undeclared work'¹⁷). Regarding the platform, there is no assessment or discussion of the tasks that the platform will undertake, particularly in light of the objective that 'the Platform would evolve progressively from a forum for exchange of information and best practices, to more elaborate forms of cooperation as mutual trust and experience build up. Ultimately the platform should be able to undertake joint trainings and exchange of staff, and coordinate operational actions, including joint inspections and data sharing'¹⁸. In this context, the IA hardly discusses the risk that the platform might *not* evolve in the intended direction, in case of a lack of commitment and/or resources by Member States to engage in more substantial cross-border cooperation that goes beyond the exchange of information and best practices. The Commission itself recognises in this respect that 'setting up a group with mandatory membership would be more difficult' and that 'since it is not a choice to join the Platform some Member States could be less committed to engage in more operational coordination of actions or developing expertise'¹⁹ with the consequence that 'if there was reluctance in Member States to engage in these activities, progress with actual cross-border cooperation could be relatively slow, meaning that bi-and multilateral agreements and the soft forms of cooperation will prevail for some time'²⁰. The IA is also unclear as to whether mandatory participation in the platform implies also mandatory participation in its activities, or whether some flexibility would be left to the Member States in this regard.

The question of how the national contexts and differences in tackling undeclared work will be taken into account in the work of the platform, especially in view of developing common principles/standards for inspections etc., is not addressed.

The costs of each option are indicated but are not accompanied by any explanation as to how they were calculated. The costs would fall mainly on the Commission. Regarding the establishment of the platform, the Commission indicates that the operational costs of the platform shall not exceed 2.1 million euro per year and that the administrative costs would amount to maximum 600 000 euro per year.

Subsidiarity / proportionality

The proposal is based on article 153 (2) (a) TFEU, which provides that 'the European Parliament and the Council may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting

¹⁶ IA, p. 30.

¹⁷ IA, p. 32.

¹⁸ IA, p. 36.

¹⁹ IA, p. 36.

²⁰ IA, *idem*.

innovating approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States'. Some Member States questioned whether article 153 provides a sound legal basis for a mandatory requirement for Member States to participate in a platform given that this article provides for the adoption of measures 'designed to encourage cooperation between Member States'.

The IA explains that the main responsibility when tackling undeclared work lies with the Member States but that action at the EU level has the potential to improve the effectiveness and efficiency of Member States' actions when tackling undeclared work. The EU dimension lies in the cross-border aspects of distortion and destabilisation associated with high levels of undeclared work, the benefits of mutual learning and the need for cooperation across borders to fight some forms of undeclared work. EU action would support the efforts of Member States by enhancing cooperation in the deterrence and prevention of undeclared work at EU level, making it more effective and efficient and thereby adding value to Member States' actions.

The establishment of a platform with mandatory participation is deemed proportionate since it 'encourages' cooperation between Member States on the prevention and deterrence of undeclared work without any harmonisation of the laws and regulations of the Member States'²¹. The proportionality of this option is not discussed in greater detail in the IA, despite the strong preference for other options expressed by employers and Member States during the stakeholder consultation, such as the creation of a subgroup of an existing group, or better coordination of already existing groups in the case of employers, and voluntary participation in the platform in the case of Member States.

One reasoned opinion was submitted by the UK House of Commons which questions the requirement for mandatory participation in any EU platform and considers that the Commission has not demonstrated that the proposed action at EU level is necessary or effective to achieve the objective of tackling undeclared work. The Commission replied to the concerns expressed by the UK House of Commons by letter dated 11 August 2014 reiterating, for the most part, the findings of the IA. However, the Commission also indicated that 'this mandatory participation in the platform would be combined with some degree of flexibility allowing Member States to modulate their participation in some of the activities of the Platform according to their needs and priorities'²². This appears to be a new element which is not mentioned in the IA or the Commission proposal.

Budgetary or public finance implications

The proposal is budget neutral. It does not require additional staff resources, since Commission staff (2.5 full time employees) will act as the Platform's Secretariat, and the activities of the platform will be funded through the PROGRESS axis of the European Union Programme for Employment and Social Innovation (EaSI) 2014-2020.

SME test / Competitiveness

No SME test was performed. The IA indicates that 'the initiative under discussion concerns different enforcement authorities of the Member States and the development of better cooperation between these authorities at EU level. Therefore no direct impacts on SMEs were identified'²³.

Quality of data, research and analysis

The IA relies on a 2010 Regioplan external 'feasibility study on the establishment of a European platform for cooperation between labour inspectorates, and other relevant monitoring and enforcement bodies to prevent and fight undeclared work'. The study was based on desk research, interviews with over 20 stakeholders, a web-based survey covering all Member States and four workshops. Other sources of information that played a prominent role in the preparation of the IA include a 2013 report from Eurofound entitled 'tackling

²¹ IA, p. 39.

²² Reply of the Commission to the UK House of Commons dated 11.8.2014, C(2014)5848 final, available at http://www.connect.ep.parl.union.eu/parnaweb/cms/lang/en/Subsidiarity_1/2014_proposals

²³ IA, p. 6.

undeclared work in 27 European Union Member States and Norway: approaches and measures since 2008', which was accompanied by an updated database of measures taken between 2008 and 2013, and special Eurobarometer 402 on 'undeclared work in the European Union' (2013).

The IA is accompanied by useful annexes on the estimated size of the shadow economy and undeclared work in the EU (annex II), on the measures taken by Member States to prevent and fight undeclared work and actors involved in these measures (annex III), and on the mapping of the initiatives and activities in different policy fields linked to undeclared work at EU level (annex IV). However, no data is provided on cross-border cases.

It is unclear from the IA whether the examined options are derived from the 2010 Regioplan study, the results of which are not well reflected in the IA. Generally speaking, the description of the options and the assessment of impacts could have been more developed, in particular regarding their functioning in practice, and the need for closer forms of cooperation encompassing all EU Member States could have been better substantiated. An assessment of the lessons learned from the experience with existing cooperation projects would have been useful in this respect. Several issues, such as the potential lack of commitment of Member States to engage in more operational actions, and the impact this could have on the objectives to be achieved by the platform, or the way national contexts and different national approaches to tackling undeclared work will be taken into account in the tasks of the platform, might have benefitted from more thorough discussion.

Stakeholder consultation

No open public consultation was carried out on the envisaged options or measures and their estimated impacts, the Commission explaining that 'a public consultation was not carried out because the envisaged activity involves institutional actors with whom the Commission carried out consultations directly'²⁴. The Commission indicates that the consultation of stakeholders was done as part of the on-going work with Member States in the framework of the Directors General of Industrial Relations (DG IR) meetings, the Senior Labour Inspectors Committee (SLIC) and the Administrative Commission for Social Security Coordination. It is however unclear from the IA on which aspects of the initiative national authorities were consulted and what their views were, in particular in relation to the options and impacts. The IA simply indicates that Member States 'were asked to share their views regarding several aspects of enhanced cooperation such as the added value in EU cooperation in the field of undeclared work and the most appropriate framework for this cooperation'²⁵. It appears from the IA that in discussions Member States expressed a preference for a platform with voluntary membership, which was not the option finally chosen. Their opinions on the other options could not be found in the IA.

As for social partners, the IA indicates that their views were collected during first and second stage consultations (4 July 2013 to 4 October 2013 and 30 January 2014 to 13 March 2014). A summary of the responses received is included in annex I. The purpose of the first stage consultation was to obtain social partners' views on the possible direction of European Union action aimed at enhancing cooperation between Member States in the prevention and deterrence of undeclared work. The second stage consultation aimed to obtain their views on the content of the envisaged initiative. Social partners mostly agreed that a European Platform could be an appropriate vehicle for enhancing cooperation between Member States. The majority of them considered that participation in this EU level cooperation should be mandatory for all Member States, that all relevant bodies should be included and that cross-border as well as national issues should be covered. Most of the employers' representatives were of the opinion that a platform should be established, but not as a separate new structure. Instead, they favoured the creation of a subgroup or better coordination of existing groups. Most of the trade unions favoured the establishment of an independent new body²⁶.

²⁴ IA, p. 9.

²⁵ IA, p. 9.

²⁶ IA, p. 41-42.

Monitoring and evaluation

The IA indicates that the Commission will regularly report to the Council and the European Parliament on the work of the platform (no frequency is indicated) to inform about the work programmes of the platform, the tasks fulfilled and the frequency of meetings. The work programmes of the platform will define targets (in line with the operational objectives) and criteria on which to assess progress towards their achievement. Examples of progress indicators linked to the operational objectives are provided. The IA indicates that the Platform will be evaluated four years after the entry into force of the Decision establishing it.

Commission Impact Assessment Board

The Commission's Impact Assessment Board (IAB) delivered **a positive opinion** on the draft version of the IA on 22 January 2014. However, it asked DG EMPL to better demonstrate the cross-border nature of the problem and the added value of an EU initiative, to better present the content of the options and the proportionality of the chosen one, and to better present stakeholders' views. While the Commission states that the report was revised along the recommendations of the Board²⁷, several of the above shortcomings still appear to be present in the current version of the IA.

Coherence between the Commission's legislative proposal and IA

The Commission proposal and the IA appear to correspond.

Conclusions

Overall, the impression is that the IA did not benefit from a sufficiently thorough assessment and analysis, in particular as regards the options and their impacts. A more detailed and developed evidence base would have been helpful in contributing to a better understanding of the scale of the problem, in particular with regard to its cross-border dimension, and of the added value of cross-border mandatory cooperation between Member States in tackling undeclared work.

This note, prepared by the Ex-Ante Impact Assessment Unit for the Committee on Employment and Social Affairs (EMPL) of the European Parliament, analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at: <http://www.europarl.europa.eu/committees/en/studies.html>

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²⁷ IA, p.8.