



European Platform
tackling undeclared work

Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work

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EXECUTIVE SUMMARY

The aim of this report is to advance understanding of (i) the trends in undeclared work encountered in temporary agency work (TAW) at both national and cross-border level and (ii) how national authorities and social partners are tackling the issue of fraudulent agency work (FAW) prompting undeclared work. The report focuses on the existing measures and mechanisms that national authorities deploy in tackling FAW and the good practices emerging at cross-border level in tackling FAW.

The focus is the **fraudulent use of temporary agency work for the purposes of undeclared work**. The report excludes other temporary agency activities, which can be illegal, criminal or illegitimate (e.g. use for human trafficking, fake vacancies, abuse of health and safety rules, agencies overcharging fees for employers and workers). The definition of TAW reflects the typical triangular employment relationship between the temporary work agency, worker and employer (thus excluding other private employment agencies without such triangular employment relationship).¹ Across the EU, **most temporary work agencies and user undertakings are compliant** with the legal framework rules and are not involved in facilitating undeclared work. It is important to remember that this report focuses on temporary work agencies and user undertakings that do not comply with existing regulations.

Methodology

The main methods used in preparing the report include:

- Desk research into the key evidence available at European, international and (selected) Member State level in relation to the issue of TAW prompting undeclared work.
- Targeted interviews with enforcement authorities (where relevant, interviews with national social partners were also conducted) in selected countries, on the relevant presence of agency work, the prevalence of TAW in the labour market and/or existing approaches to tackling FAW.
- Targeted interviews with sectoral European social partners, the World Employment Confederation (WEC) Europe and Uni Europa, which are recognised social partners in sectoral social dialogue at EU level in the temporary agency sector.
- Case studies on selected practices of enforcement authorities and social partners in addressing undeclared work in TAW situations at national and cross-border level.
- Information and conclusions from the online thematic review workshop on this topic, organised on 12-13 November 2020 with over 40 Platform members and observers.

Undeclared work in temporary work agencies

Working through temporary work agencies (**TWAs**) is an established feature of **European labour markets**, accounting for 2.1 % of total employment across the EU (Eurostat 2020, data as of 2019). At the same time, marked cross-national variations are evident, with TAW representing a small proportion of the national labour market in some countries.

TAW helps employers and workers to respond more flexibly to emerging economic and labour market needs. The problem addressed here is the use of TAW for the purposes of undeclared work.

A key challenge is that some **activities** delivered through TWAs can be considered **susceptible to the risk of undeclared work**. This is due to certain characteristics of

¹ The temporary work agency is defined using the legal definition in the Article 3 of the Directive 2008/104/EC as "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction". As further explained in section 2.2, TWAs are different from the private employment agencies which solely provide services such as matching offers and applications for employment and never become a party to the three-way employment relationship.

TAW, such as highly competitive price pressures on labour costs, the often-precarious nature of temporary employment, and the complex and opaque subcontracting chains involved. This creates potential for FAW, prompting undeclared work.

Evidence reviewed for this report shows **little existing research** on FAW for the purpose of undeclared work. Nor are there any quantitative or qualitative estimates of the extent of the problem. The thematic review workshop on this very subject identified individual, **anecdotal cases and examples** of undeclared temporary agency work, both in the national and in the cross-border context. This reinforces conclusions that robust evidence is lacking on the scale of the problem and its characteristics, notably whether the problem is primarily a case of under-reporting wages by legitimate workers, user undertakings and/or temporary work agencies, or whether unlicensed/unregistered workers, user undertakings and/or temporary work agencies are common. This knowledge base needs to be further developed, especially to deepen the understanding of the extent and characteristics of undeclared agency work both at the national level and in the cross-border context.

New forms of labour intermediation, traditionally undertaken by agencies, appear to be emerging, especially using social media channels (both in the national and cross-border contexts). The thematic workshop on this subject relays that the 'creativity' of fraudulent behaviours is stark, often one step ahead of authorities. Such agencies change their company status from one sector to another to evade rules, and frequently change names. Anecdotal evidence indicates that FAW prompting undeclared work **occurs at both national and cross-border level**. At the cross-border level, it is challenging to detect due to a combination of factors. The complexity of the employment relationship between worker, agency and end undertaking is amplified when such activity occurs across borders. This is further compounded when there is the involvement of 'letterbox' TWAs, unregistered/unlicensed agencies, and 'phoenix' activities across long and complex subcontracting chains involving numerous entities, with TAWs employed at the lowest level of the chain.

Undeclared work in TAW at the national and cross-border levels **often occurs alongside other violations of the regulatory framework**, such as breaches of the equality principle (ensuring equal pay and equal working conditions for temporary agency workers and other types of workers working for the same employer²), failure to adhere to the posting of workers legal framework or violating occupational health and safety rules. At both national and cross-border level, the nature of FAW prompting undeclared work involves unregistered and under-declared employment. Undeclared work occurs both when agencies are unregistered and unlicensed, and when registered agencies under-report the economic activity and hours worked. A cross-border dimension can also occur with agencies operating as letterbox-company-type chains, with complex ownership structures in several EU Member States and third countries. Reported cases also mention third-country nationals involved in undeclared agency work. However, as highlighted in the thematic review workshop on this subject, far from being solely a cross-border problem, it is also a national-level issue.

Tackling undeclared work in TAW

Public authorities and social partners have recognised the problem and taken action at the national and cross-border levels to prevent, deter and detect FAW prompting undeclared work (and to incentivise compliance with the existing TAW legal framework).

TAW is regulated at EU/international level (providing a set of minimum rules and standards) and at national level. National legal frameworks have different levels of

² Article 5(1) of Directive 2008/104/EC: '[The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.](#)'

stringency in regulating TAW, ranging from very flexible to very strict³. **Legislative actions** improving the regulatory framework – emphasising the systematic chain of responsibility and involving the user undertaking – appear to be a potentially effective instrument for preventing undeclared work. Collective agreements and other social partner actions (e.g. self-regulation, codes of conducts, raising awareness and helping affected parties) are important supports in enforcing the current rules and preventing abuse of TAW.

Currently, most countries covered in the study require **a registration** of the temporary work agency with the authorities, alongside a range of accompanying conditions (such as a permanent representative in the country of registration). Countries who have registrations in place tend to have a better overview of existing agencies, however, registration requirements can also prompt agencies to take other forms and adopt new business models.

Data sharing and mining between different enforcement authorities of a country (and with non-governmental stakeholders) is also an important instrument. This is not currently fully exploited, partly due to challenges imposed by compliance with data protection requirements and the rules governing the roles of different institutions. Furthermore, the success of data-driven tools depends on agencies being registered in the official systems, which is often not the case. For unregistered agencies, enforcement authorities focus on checks for irregularities which may be an early warning of other fraudulent activity.

Equally important have been **detection measures taken by the enforcement authorities**, in particular labour inspectorates. Several countries have recognised the fight against FAW as a strategic priority for their national labour inspectorates, allocating dedicated staff and resources to tackle the problem. The thematic review workshop emphasised the key role of workplace inspections in detecting fraudulent agency work, and shared the experiences of capacity building of inspectors.

Cross-border cooperation between enforcement authorities is important in tackling FAW. While this requires time and resources to set up, it has mutually beneficial results for the parties. Examples of successful cross-border actions in respect of FAW include exchanges of information through existing systems and channels, as well as joint / concerted inspections, bilateral cross-border cooperation structures (e.g. working groups) and study visits. The focus of cross-border cooperation in the Member States sampled for this report is predominantly on improving the risk of detection and sanctions against FAW (involving undeclared work and other social fraud). To a lesser extent, cross-border cooperation involves education and awareness-raising initiatives. By contrast, cross-border initiatives promoting compliance with the existing regulatory framework have been developed to a lesser extent.

At both national and cross-border level, the fight against FAW prompting undeclared work takes place within the broader framework of tackling a wide range of potentially fraudulent and abusive behaviours associated with TAW. The measures tend to tackle multifarious aspects of FAW, including – but not limited to – prompting undeclared work. Thus, the fight against FAW prompting undeclared work is undertaken within a broader approach to tackling social fraud and other violations and fraudulent behaviours encountered in TAW (e.g. disrespect for equal treatment of TAWs in comparison to permanent employees, non-payment of minimum wages, or disregard for occupational health and safety rules).

Finally, the report identifies **considerable potential for EU added value in combating FAW**, both nurturing the opportunities for shared learning on good practices from national measures and facilitating cross-border cooperation on the problem. Concrete actions and

³ As shown in section 2.4, the national legal frameworks were considered primarily within the scope of implementing the Directive 2008/104/EC and relationship with other EU instruments and sources (EU regulation of TAW). In addition, other national legislation was considered, including the implementation of the Directive 96/71/EC on posting as amended by Directive 2018/957 (in particular regarding TWA) and the Private Employment Agencies Convention, 1997 (No.181) (ILO regulation of TAW).

knowledge development are identified for follow-up in the work of the European Platform tackling undeclared work.

1 INTRODUCTION

This report focuses on undeclared work arising from the fraudulent use of agency work (FAW). The report excludes other activities of temporary work agencies (TWAs) that might be illegal, criminal or illegitimate (e.g. the use of TWAs for human trafficking, fake vacancies, abuse of health and safety rules, TWAs overcharging fees for employers and workers).

Temporary agency work (TAW) refers in this context to work arising out of the triangular relationship between a temporary work agency (TWA), a worker and a user undertaking⁴ (also referred to as a company, end user, end client or final provider of work), reflecting the current legal understanding of the term⁵.

TAW plays an important role in European labour markets, helping companies to temporarily increase their labour to meet short-term increases in demand, while providing workers with more flexible employment arrangements. Although the vast majority of TAW is a legitimate activity, an emergent concern is that **certain characteristics of TAW**, such as price pressures on labour costs, the non-standard and more flexible nature of temporary employment and the complex subcontracting chains involved, **can result in undeclared work through FAW**. This can occur where there is the illegal operation of TWAs (e.g. without fulfilling registration, licensing and operating conditions) and where the TWA and/or user undertaking fails to fully comply with tax, social security and labour law. This can be especially problematic in the cross-border context, with long and often opaque subcontracting chains with several companies involved in numerous Member States.

The report evaluates **the extent and characteristics** of such FAW at both national and cross-border level, and undeclared work arising from FAW. The report also examines **existing measures and mechanisms** used by national enforcement authorities and social partners to tackle FAW, as well as emerging good practices.

The main methods used to explore the topic include:

- **Desk research** into the key qualitative and quantitative evidence on the description, key characteristics and features of TAW and, in particular, undeclared work arising from FAW (see [REFERENCES](#)).
- **Targeted interviews with enforcement authorities** (and national social partners) in selected countries on their current measures to tackle FAW (countries were chosen based on the presence of agency work in the labour market and/or existing approaches to tackling FAW). This included expert interviews in Belgium, France, Italy, the Netherlands, Poland, Romania and Slovenia.
- **Targeted interviews with sectoral European social partners**, the World Employment Confederation (WEC) Europe and Uni Europa, which are recognised social partners in the [EU sectoral social dialogue on TAW](#).
- **National case studies** on enforcement authorities' practices to tackle FAW (identified after the initial review of the evidence).
- Information and conclusions from the **online thematic review workshop** on this topic, organised on 12-13 November 2020 with over 40 Platform members and observers. Designated delegates from 19 EU Member States representing labour inspectorates, customs authorities, ministries of labour and the European level social partners, as well as representatives from the European Labour Authority and the European Commission took part in the meeting.

The next section provides an overview of TAW, followed in section 3 by a review of the types and characteristics of undeclared work that arise from FAW. Section 4 then reviews the national measures to tackle FAW and the undeclared work that arises, followed in

⁴ 'User undertaking' is any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily (Article 3(1)(e) of Directive 2008/104/EC).

⁵ Article 3 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

section 5 by a review of cross-border cooperation to address FAW and the resultant undeclared work. Section 6 identifies the success factors involved, while section 7 draws some conclusions and proposes ways forward.

2 WHAT IS TEMPORARY AGENCY WORK?

2.1 Overview

This section provides a description of TAW, its legal definition and key characteristics, followed by the analysis of the evidence on the size of TAW and a brief overview of the legal framework regulating TAW. This section is based on an extensive review of the available quantitative data, legal acts, and the academic and grey literature.

Key findings

- **TAW is a triangular employment relationship** between a worker, temporary agency and user undertaking. This distinguishes it from other forms of atypical work and other types of private employment agency activity (e.g. pure matching without offering an employment contract, providing training or recruitment services).
- **In 2019, 2.1 % of workers in the EU-27 were employed by officially registered temporary agencies** and this has grown over the last decade (according to Eurostat). However, there are marked differences between countries. In some cases, TAW is a very minor feature of the national labour markets and its potential link to undeclared work is not a priority for enforcement authorities.
- **Temporary agency workers tend to be younger, lower skilled** and recruited for comparatively lower-skilled tasks and jobs at the user undertakings.
- The TAW industry is fragmented, with several global private recruitment agency brands, alongside a multitude of smaller, local or regional agencies (with **at least 80 000 TWAs existing in Europe⁶**). This prevalence presents a considerable challenge for enforcement authorities.
- TAW has a strong sectoral dimension, being particularly widespread **in the industry and construction sectors**, which also showed the most rapid growth in the past 10 years (Eurostat). Declines in the use of TAW are noted in the service sectors of ICT, financial, professional and support services. For enforcement authorities, this suggests a possible sectoral focus in dealing with TAWs.
- TAW is **regulated at EU/international level** (providing a set of minimum rules and standards) and at national level. **National legal frameworks have different levels of stringency** when regulating TAW, ranging from very flexible to very strict. For enforcement authorities, especially when dealing with cross-border issues related to TAW, this implies the need to be aware of different national legal TAW frameworks.

2.2 What is temporary agency work and how does it differ from other types of atypical⁷ employment?

TAW⁸ typically refers to a triangular employment relationship between a worker, temporary work agency (TWA) and user undertaking.⁹ The worker enters into a contract of employment or an employment relationship with a TWA, with a view to being assigned to a user company for which they will work temporarily under their supervision and

⁶ WEC Europe 2018.

⁷ Atypical employment relationships do not conform to the standard or 'typical' model of full-time, regular, open-ended employment with a single employer over a long time span. They include part-time work, temporary work, fixed-term work, casual and seasonal work, self-employed people, independent workers and homeworkers (Eurofound, 2017).

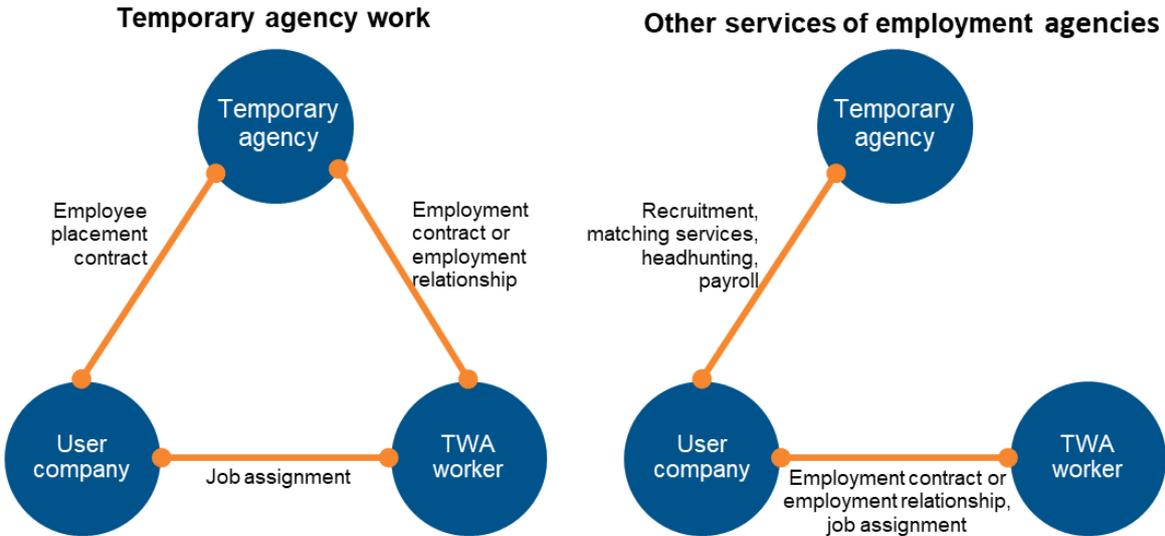
⁸ Also referred to in some contexts as private employment agencies or recruitment agencies. This report uses the term 'temporary agency' in line with the relevant EU legislative framework.

⁹ User undertaking' is any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily (Article 3(1)(e) of Directive 2008/104/EC).

direction.¹⁰ This three-way employment relationship distinguishes TAW from other atypical forms of work, such as collaborative platforms,¹¹ fixed-term or temporary work. In contrast to TAW with a three-way employment relationship, in other forms of atypical work, workers are (purportedly) hired and employed directly by the user undertaking, without the presence of a TWA.

This TAW relationship is also distinct from situations where private employment agencies solely provide services such as matching offers and applications for employment and never become a party to the three-way employment relationship. It is also distinct from those private employment agencies providing services related to job-seeking, provision of information or training (recruitment and selection, artists' agencies, outplacement, head-hunters, sports brokers). Such differences are further illustrated in Figure 1.

Figure 1. Temporary agency work and other services of temporary agencies



Source: ICF (2020).

The relevant TAW contract is of limited or unspecified duration, with no guarantee of continuation, and is not based on the intention to work for the same user undertaking on a permanent basis. The user undertaking pays fees to the agency, which in turn, pays wages¹² to the worker. In most EU Member States, TWAs are considered the employer (for the purposes of labour law).¹³ Flexibility for both the worker and employer is a key feature of TAW and it thus enhances the flexibility of the European labour market.

In the context of free movement of workers in the European Union, TAW also provides an opportunity to meet the fluctuations in labour market demand through the cross-border deployment of workers and therefore cross-border labour mobility. There are several scenarios of how the workers can be posted by the temporary work agencies in the cross-border situations (see Figure 2).

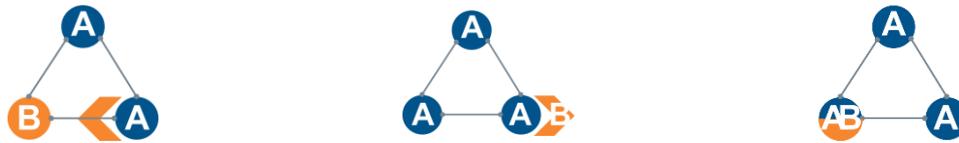
¹⁰ For example, the definitions of TAW employment relationships in Article 3 of Directive 2008/104/EC. international Labour Organization (ILO) (n.d.). Temporary agency work. Sectoral Brief.

¹¹ There is some debate about the extent to which platform work can be considered similar to TAW and the line between the two is sometimes considered fine. However, this report focuses on the existing legal definition of temporary work, which does not explicitly include platform work.

¹² At least those that would apply if the worker had been recruited directly by the user to do the same job. (Limited derogations from the principle of equal treatment are possible under Article 5(2) and (3) of Directive 2008/104/EC.)

¹³ With the exception of Czechia, where both the user and the agency are considered the employer (Schömann and Guedes, 2012).

Figure 2. The posting of workers by temporary work agencies in a cross-border context



Temporary agency workers posted by their temporary agency in Member State **A** to a user undertaking in Member State **B**.

Temporary agency workers posted in Member State **B** by the user undertaking established in Member State **A** to provide services in Member State **B**.

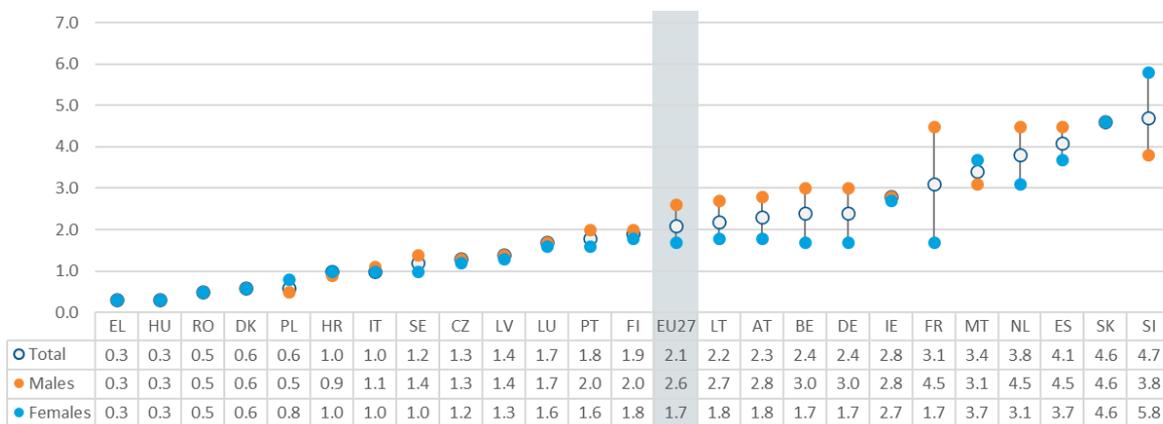
Temporary agency workers posted in the context of cross-border intra-group or intra-company posting between the different sister companies in two Member States.

Source: ICF elaboration (2020).

2.3 What is the size of the temporary agency work sector?

The last decade has seen TAW become an established feature of the European labour market. According to Eurostat,¹⁴ in 2019, 2.1 % of workers were employed via officially registered¹⁵ temporary agencies across the EU-27 (see Figure 3). TAW is particularly widespread (as a proportion of total employment) in Slovenia, Slovakia, Spain, the Netherlands and Malta. By contrast, it is below 0.5 % of total employment in Greece and Hungary. TAW is more common among male workers, with 2.6 % of men employed in the EU-27 working through a temporary agency, compared to 1.7 % of women. Slovenia, Malta, Poland and Croatia were the exception, with more women temporary agency workers than men.

Figure 3. Temporary agency work as a proportion of total employment, by gender, 2019 (Eurostat)



Source: Eurostat (2019). Temporary employment agency workers by sex, age (From 15 to 64 years) and NACE Rev. 2 activity [lfsa_qoe_4a6r2], accessed 12/05/2020. No data for Bulgaria, Cyprus and Estonia.

As shown in Figure 4, across the EU-27, the proportion of TAW has risen by 0.2 percentage points (p.p.), with particularly marked increases in Slovakia, Ireland, Lithuania and Luxembourg. However, significant decreases have been registered in Latvia and Slovenia.

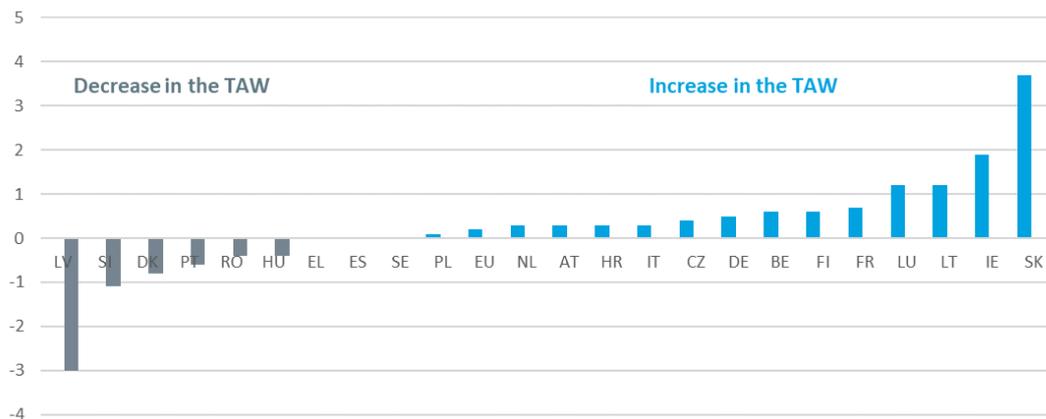
The Covid-19 pandemic will have severely impacted these trends. In May 2020, social partner organisations estimated that from 50-70 % of agency workers had lost their

¹⁴ Similarly, the Eurofound 2015 European Working Conditions Survey (EWCS) found that 2 % of employed pan-European survey respondents had TAW contracts.

¹⁵ Illegal or unregistered/unlicensed temporary work agencies or dubious go-betweens may use the same business model as legally operating agencies.

jobs in some countries (WEC, 2020). The EU sectoral social partners for TAW issued a joint statement to mitigate the impact of the crisis and prepare for recovery, calling for stronger cooperation between the public and private employment services to enhance labour market access for those exposed to displacement, exclusion and transition (WEC and UNI Europa, 2020). A surplus of labour following the relaxation of lockdown measures, combined with uncertainty about possible subsequent waves of the virus, might prompt companies to turn to the services of TWAs, including those operating fraudulently.

Figure 4. Temporary agency work as a proportion of total employment (p.p. change), 2008-2019



Source: Eurostat (2019). Temporary employment agency workers by sex, age and NACE Rev. 2 activity [lfsa_qoe_4a6r2], accessed 12/05/2020. No data for Bulgaria, Cyprus, Estonia and Malta.

Evidence also points to the **use of TWAs when posting workers in the cross-border context**. 2017 data on the proportion of posted workers via TWAs were available from nine Member States. Of these, the share of posting through TWAs amounted to 27 % in France, 13 % in Austria, 11 % in Belgium, 4 % in Poland and 1 % in Luxembourg (European Commission, 2019).

Figure 5. Key temporary agency work sector statistics, Europe, 2019



Source: WEC (2019).

Industry figures reported by WEC Europe¹⁶ provide further insight into the dynamics of the sector. Historically, the top four largest TAW markets (market size, placement) in Europe have been the UK,¹⁷ Germany, France and the Netherlands.

Significantly, the TAW sector in Europe is composed of several global private recruitment agency brands, together with a multitude of smaller, local or regional agencies. WEC Europe counts over 80 000 agencies among its members (Figure 5).

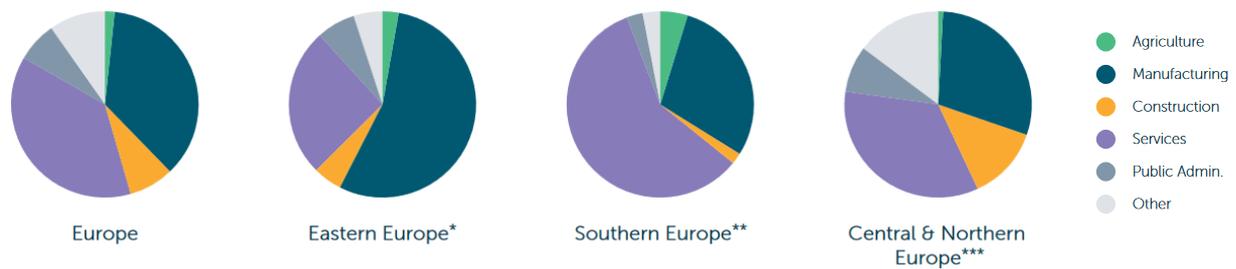
TAW has a strong sectoral dimension. It is particularly widespread in the industry and construction sectors, which showed the most rapid growth in the past 10 years (see Figure 7). By contrast, TAW is infrequently used in public administration and other service sectors. Historical trends in the sectoral use of TAW show marked differences. Significant growth is observed in industry and construction, wholesale and retail, transport, accommodation and food service activities, while declines are evident in the service sectors of ICT, financial,

¹⁶ The TAW employer organisation in Europe, and a recognised EU-level social partner in the TAW sector.

¹⁷ When the WEC paper was published, the UK was an EU Member State.

professional and support services. Despite this decline, many agency workers continue to be employed in the services industries (see Figure 6 and 7).

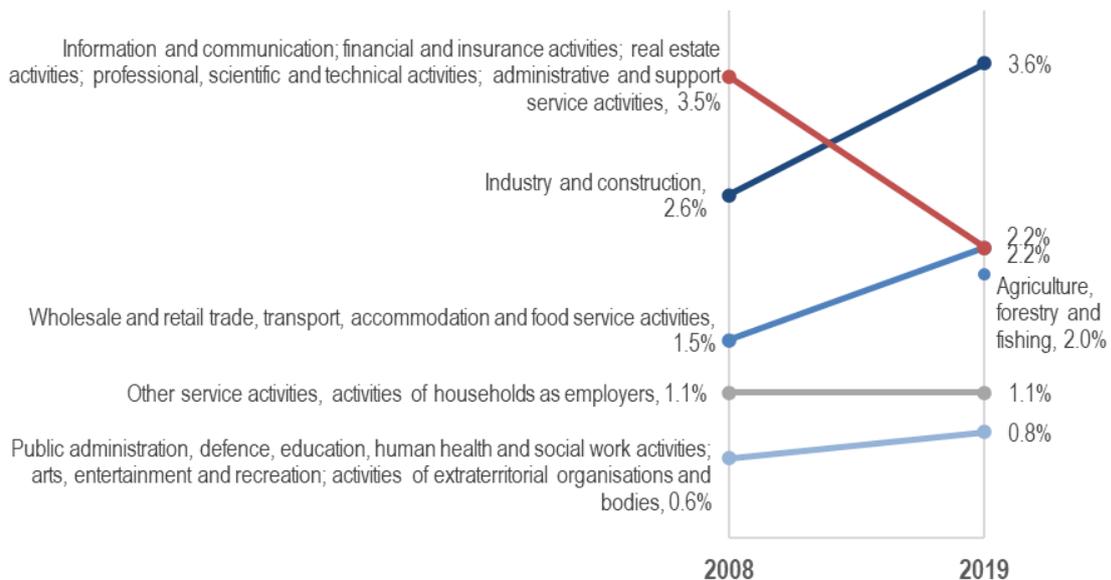
Figure 6. Breakdown of agency workers, by industry, 2019



Source: WEC (2019).

Note: *Croatia, Czechia, Poland, Russia ** Italy, Spain, Portugal, Greece *** Belgium, France, Germany, the Netherlands, Norway, Switzerland

Figure 7. Temporary agency work as a proportion of total sectoral employment, 2008-2019, EU-27



Source: Eurostat (2019). Temporary employment agency workers by sex, age and NACE Rev. 2 activity [Ifsa_qoe_4a6r2], accessed 13/05/2020. Further detailed sectoral breakdowns are not available.

Recently, a spotlight was put on the labour-intensive meat processing industry and its use of temporary workforce via temporary work agencies (see EFFAT 2020). The meat sector has been shown to be very dependent on mobile EU workers from other Member States. Country case studies by EFFAT showed that many of the meat processing workers normally travel between the countries with meat processing facilities and their own country on a regular basis. Often, they are employed through temporary work agencies, rather than by the user undertaking. For example, in the Netherlands, some 80% of the workers in the Dutch meat industry are from Central Eastern Europe and are employed via temporary work agencies. In Ireland and Germany also, a large proportion of meat processing industry workers were considered to be employed by temporary work agencies.

TAW is also prevalent in the medium and high-skilled sectors, such as ICT and aviation (Jorens et al., 2015). In the latter, TWAs and other employment agencies are used to provide pilots and crew members to a range of airlines on fixed-term contracts. This allows airlines to respond to short-term fluctuations in demand (e.g. during the peak summer season). While the precise number of pilots or cabin crew hired by temporary work

agencies is 'unknown', attendees at the Platform's air transport seminar suggested that atypical employment arrangements in general, and bogus self-employment in particular, is fuelling cost-competition between airlines (Turnbull, 2020).

In 2016 **younger workers (3.1 % of those aged 15 to 34)** were more likely to find themselves in TAW compared to the overall working age population (1.9 % among those aged 15 to 64 years). Similarly, those employed in lower skilled occupations were more likely to find themselves in TAW than more skilled labour market participants (ILO, 2016). Research has shown that agency workers often tend to be recruited for comparatively low-skilled tasks and jobs by user employers (European Parliament, 2016). The occupational groups most commonly hired through TWAs are plant and machine operators and assemblers, those in elementary occupations, and craft and related trades workers. There is also a high incidence of young and relatively low-skilled temporary agency workers in manufacturing and other industries. Agency work is often concentrated within elementary occupations in the services sector, where no specific skills are needed.

2.4 How does the existing EU/international and national legal framework affect the fraudulent use of agency work?

TAW is regulated at EU, international and national level (see Annex 2). The EU and international level framework has established a minimum set of rules and standards, while national legislators have further developed that minimum regulatory framework into specific rules and regulations. **National legal frameworks have different levels of stringency** when regulating TAW.

TAW at EU and international level is regulated through the following instruments, setting the minimum rules:

- Directive 2008/104/EC and relationship with other EU instruments and sources (EU regulation of TAW);
- Directive 96/71/EC on posting as amended by Directive 2018/957 (in particular regarding TWA);
- Private Employment Agencies Convention, 1997 (No.181) (ILO regulation of TAW); and
- European Social Charter and the Council of Europe regulation of TAW.

At EU level, [Directive 2008/104/EC of 19 November 2008](#) aims to ensure the protection of temporary agency workers and to improve the quality of TAW by ensuring that the principle of equal treatment (on basic working and employment conditions) is applied to temporary agency workers and by recognising TWAs as employers. The Directive seeks to take into account the need to establish a suitable framework for the use of TAW that contributes effectively to job creation and the development of flexible forms of working. More specifically, the Directive:

- Establishes the principle of equal treatment in user undertakings, while allowing for certain limited derogations under strict conditions;¹⁸

¹⁸ Article 5 sets out the main derogations:

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by

- Limits national prohibitions or restrictions on the use of temporary agency work;
- Improves agency workers' access to permanent employment, collective facilities in user undertakings, and training; and
- Includes provisions on the representation of agency workers.
- Includes provision on information of worker's representatives on the use of TAWs

Equal treatment in basic working and employment conditions covers pay, working time, overtime, breaks, rest periods, night work, holidays and public holidays. This is a compulsory list from which no derogation is permitted.

Box 1. Core provisions of Directive 2008/104/EC

The Directive sets out the principle of non-discrimination in respect of the essential conditions of work and of employment between agency workers and workers who are recruited by the user employer, including for pregnant and breast-feeding workers.

Agency workers should have equal access to amenities and collective services at work. Member States should facilitate access to training for temporary workers.

The user employer should keep temporary workers informed of any permanent vacancies. Member States must ensure that any clauses preventing the conclusion of a contract of employment or an employment relationship between the user employer and the temporary worker are null and void or may be declared null and void. Temporary workers should not be charged any recruitment fees.

Member States can restrict the use of TAW only on the grounds of general interest, relating in particular to the protection of temporary agency workers, the requirements of health and safety at work, or the need to ensure that the labour market functions properly and abuses are prevented. This is an indicative, non-exhaustive list of the grounds that may justify prohibitions and restrictions.

Other grounds of general interest may also justify restrictive measures in so far as they are legitimate and proportionate to their objective and comply with the Directive on TAW and other applicable EU legislation and principles, such as the freedom to provide services. Recital 22 of the preliminary observations of Directive 2008/104/EC provides for two contrasting arguments, however. Firstly, Article 4(4) of the Directive introduces an explicit exception for national rules on **registration, licensing, certification and financial guarantees or monitoring** of TAW, which remain fully within Member States' remit. Secondly, such rules must not hinder market access, or do so in a justified and proportionate way, in compliance with Articles 49 and 56 of the Treaty on Functioning of the European Union (TFEU) services, freedom of establishment and legislation on non-discrimination.

Other core legal framework instruments are analysed in Annex 2. These may have a particular effect on:

- TAW provided in the framework of posting of workers. In this case, the rules of Directive 96/71/EC apply to the cross-border provision of services (TAW included). Today, the Directive on posting of workers must be taken into account in case of posted temporary agency workers, but the new provisions of Directive 2018/957/EC on TAW will become applicable to posted TAW as soon as they enter into force (from 30 July 2020).

them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.'

- Thirteen Member States¹⁹ have ratified the ILO Convention on Private Employment Agencies, whose provisions are similar, albeit with greater detail and broader scope.

At national level, the regulation of TAW is diverse, ranging from very strict to very flexible. Prior to Directive 2008/104/EC, Member States regulated TAW in various ways, including by law, through collective agreements, or some combination of the two. Since the entry into force of the Directive, national laws have been adopted, with various approaches to regulating TAW (European Commission, 2014).

The regulation of TAW at national level does not cover a number of concepts and characteristics relevant to the functioning of FAW. For example, few Member States specify the requirement of 'temporariness' of the worker's assignment to the user undertaking (Eurofound 2016). In addition, few stipulate a 'maximum total duration' or indicate the 'reasons justifying the renewal' of the assignment with the same user employer. Finally, the use of sanctions is – arguably – crucial to the effectiveness of systems for identifying, enforcing and following up agencies and user companies that violate existing TAW regulations and prompt undeclared work. However, the type and level of sanctions provided by Member State legislation vary substantially, from penal sanctions (e.g. fines, imprisonment) to civil sanctions (e.g. damages, rewriting of the employment contract, withdrawal of the agency's licence) (Schömann and Guedes, 2012).

¹⁹ The following EU Member States have ratified ILO Convention No. 181: Belgium, Bulgaria, Czechia, Finland, France, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Spain.

3 WHAT PROMPTS UNDECLARED WORK IN THE CONTEXT OF TEMPORARY AGENCY WORK?

3.1 Overview

This section maps the scale and key characteristics of FAW prompting undeclared. It builds on an extensive review of the academic and grey literature, together with fieldwork for the report (stakeholder interviews, case study research). The inputs provided by the experts and stakeholders are complemented by the literature, which serves as the baseline for this section. Relevant results from the fieldwork are highlighted where appropriate. Caution is needed when interpreting these findings, given the absence of a detailed evidence base on the links and extent of FAW prompting undeclared work in the existing literature. The fieldwork also showed that evidence of and insights into the aspects, scale and characteristics of FAW prompting undeclared work are available in quite a partial and anecdotal way from European and national enforcement authorities and social partners.

Key findings

- **The connection between TAW and undeclared work**, and specifically how FAW prompts undeclared work, is an area where **little research** has been undertaken. The thematic review workshop also identified individual anecdotal cases and pointed to the lack of robust evidence base on the subject.
- There are **no quantitative or qualitative estimates** of the extent of FAW prompting undeclared work. The gap in data availability at both European and national level prevents a more accurate assessment of the problem.
- There is a **debate in the existing research on the relationship between TAW and undeclared work**. While there is research highlighting the advantages of TAW in allowing companies to respond flexibly to labour needs and thus diminishing the need to resort to undeclared work, other research argues that TAW leads to worse working conditions (e.g. lack of attention to occupational health and safety issues, lower wages, low access to training or union representation) and higher levels of undeclared work.
- Poorer working conditions contribute to the overall **vulnerability of temporary agency workers**. Such vulnerability can open the door to abuse, in particular undeclared work, other types of social fraud, and non-compliance with occupational health and safety rules or collective bargaining agreements. Such risks may lead to higher rates of exploitation and cases of FAW prompting undeclared work.
- **FAW prompting undeclared work occurs both at the national and the cross-border context**. In the latter case, this is due to the complexity of the employment relationship between worker, agency and end undertaking, which is amplified when they occur across the national jurisdictions. Another key factor in prompting undeclared FAW in cross-border situations is the activities of 'letterbox' TWAs, unregistered/unlicensed agencies, and 'phoenix' activities, often across long and complex subcontracting chains involving several entities across several EU Member States and third countries.
- At both national and cross-border level, the nature of FAW prompting undeclared work appears to **involve unregistered and undeclared employment of temporary agency workers**. In cross-border cases, FAW prompting undeclared work can also occur in **the context of posting of workers undertaken by TWAs**. Thematic review workshop discussions confirmed that undeclared work appears to occur when agencies are unregistered and unlicensed, and when registered agencies under-report the economic activity and hours worked. A cross-border dimension can also occur with agencies operating as letterbox-company-type chains, with complex ownership structures in several EU Member States and third countries. Anecdotal reports also mention third country nationals

involved in undeclared agency work. However, as highlighted in the thematic review workshop on this subject, far from being solely a cross-border problem, it is also a national-level issue.

3.2 What are the key types and characteristics of undeclared work in temporary agency work?

There is little research on the connection between the different forms of TAW and undeclared work. The reflections below are based on stakeholder interviews and expert input and thus provide qualitative descriptions of how the two phenomena are linked at both national and cross-border level. Caution is needed when interpreting these findings, given the absence of detailed evidence in the literature and the resulting reliance on the personal views of the stakeholders interviewed.

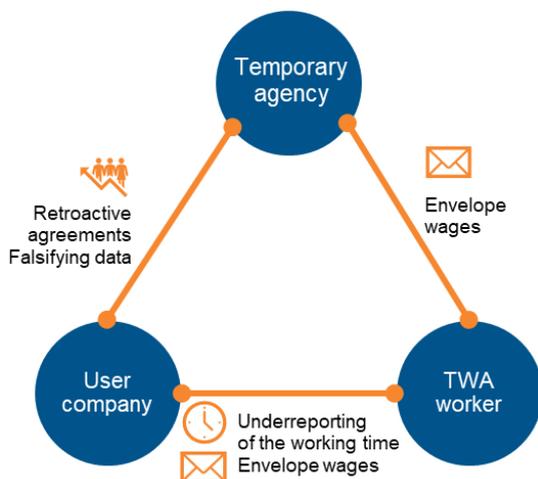
In the EU, across the board, TAWs and user undertakings operate in compliance with the legal framework rules and are not involved in facilitating undeclared work. **This report focuses on TAWs and user undertakings that are *not* compliant with the regulations.**

Another important aspect is FAW prompting undeclared work in the national and cross-border contexts. While no hard data are available, reflections from the evidence available (including workshop discussions) suggests the problem exists at both national and cross-border levels.

3.2.1 The nature of undeclared work in temporary agency work

From a geographical perspective, FAW prompting undeclared work can occur in both national and cross-border situations. In view of the three-way employment relationship involved in TAW, undeclared work at national and cross-border level can, in principle, occur at several stages of the employment relationship (see Figure 8):

Figure 8. Undeclared work in the three-way employment relationship involved in temporary agency work



Source: ICF (2020).

- **Between the worker and the agency** – where the agency pays envelope wages to the worker to save tax and social security costs, without the explicit involvement or knowledge of the user undertaking;
- **Between the worker and the user company** – where the latter underreports the working time to the agency to save on fees and may choose to pay envelope wages to the worker for the remaining time worked; and
- **Between the user company and agency** – where the TWA, in secret agreement with the user employer, covers up undeclared work by the employer, by making an agreement for TAW with retroactive effect or by using falsified data.

In the above cases, all three stakeholders – worker, employer and TWA – are registered legitimate workers, employers and TAWs. The result is that undeclared work practices take the form of **under-declared employment**.

However, one or more of these stakeholders can also be unregistered/unlicensed and when this is the case, undeclared work takes the form of **wholly undeclared work and unregistered employment**. The following permutations are hypothetical possibilities, some of which are more likely in practice than others:

- **Unregistered worker, licensed TWA and formal employer** – where a licensed TWA provides a worker to a user company, and does not register the employee for tax, social security and/or labour law purposes, to make cost savings on the tax and social contributions owed.
- **Unregistered worker and unlicensed TWA and formal employer** – where an unlicensed TWA (e.g. unlicensed agricultural gangmaster²⁰ agency, construction industry labour provider) provides unregistered workers employed on an undeclared basis (e.g. seasonal workers or day labourers picked up from well-known locations each morning) to a formal employer for an undeclared fee and the workers are paid ‘cash-in-hand’.
- **Unregistered worker, licensed TWA and unregistered company** – where a licensed TWA provides unregistered workers to an unregistered business on an undeclared basis, for a fee.
- **Unregistered worker, unlicensed TWA and unregistered company** – where an unlicensed TWA (e.g. construction industry labour provider) provides unregistered workers to an unregistered business for an undeclared fee. All stakeholders collude in failing to declare the transaction for tax, social security and/or labour law purposes.
- **Registered worker, unlicensed TWA and formal employer** – this is not a logical possibility, since an unlicensed TWA could not provide a registered declared worker.
- **Registered worker, licensed TWA and unregistered businesses** – this is a logical possibility, but it is unlikely that an unregistered business would approach a licensed TWA to employ a registered worker, for fear of being caught.
- **Registered worker, unlicensed TWA and unregistered business** – this is not a logical possibility.
- **Registered worker, licensed TWA and formal employer** – this is the formal legitimate employment relationship that is the norm across the industry.

Eurofound (2016) highlights fraud in relation to the temporariness of contracts and their fraudulent use to meet companies’ permanent needs, despite being established in law exclusively for a limited duration and for temporary or exceptional reasons (such as through the Directive 1999/70/EC of 28 June 1999 on fixed-term work). Such misuse is to circumvent fair dismissal regulations and to avoid economic and organisational costs. National reports note that this fraudulent use is mainly due to loopholes in national provisions. At EU level, however, the rules on fixed term work as set by the Directive 1999/70/EC do not apply to TAW. In fact, the Court of Justice of the European Union (CJEU) has clarified that rules set by Directive 99/70/EC on fixed-term work to prevent abuse stemming from the repeated use of fixed-term contracts apply neither to the employment relationship between a worker and a TWA nor to the relationship between that temporary worker and the user employer.²¹ The 13 EU Member States that ratified ILO Convention No. 181 are bound by the principle of a ‘temporary’ assignment (time-limited), laid down in the definitions of the Convention.

National level

Stakeholder interviews drew attention to particular types of possibilities at national level. One such type was the unregistered employment of TAWs at user undertakings, where workers are deployed by the TWA to undertake tasks without reporting their activities to the authorities (either fully or partially concealing their work activities). In such cases, the three-way employment relationship between worker, agency and end undertaking is not registered with the authorities, in line with the national regulatory framework. As a result, these temporary agency workers do not have written contracts or terms of employment

²⁰ Person who organises and oversees the work of temporary manual workers.

²¹ CJEU judgment of 11 April 2013, *Della Rocca v. Poste Italiane SpA*, C-290/12, pp. 36, 39; See also: Countouris and Horton (2009), Mimmo (2013), Robin-Olivier (2013), Schömann and Guedes (2012), and Ferrara (2013).

and their remuneration is likely to remain undeclared. The stakeholders pointed out that, in principle, failure to fully register the employment of TAWs could occur in several ways in the chain of the three-way relationship characterising TAW:

- By the TWA alone, without the knowledge or involvement of the end undertaking; and
- By the end undertaking and the TWA together, with both parties actively involved.

Another type of fraud relates to the envelope wage payments (under-declared employment). Here, in order to reduce their tax and social security payments and therefore save on labour costs, the full remuneration of TAWs is not declared to the public authorities. This occurs when temporary agency workers receive two salaries: an official declared salary and an additional undeclared ('envelope') wage, which is hidden from the authorities so as to avoid the related tax and social security payments. Alternatively, the number of hours worked by temporary agency workers can be under-declared, for example to evade paying the minimum wage. Here, again, stakeholders noted that the payment of envelope wages to temporary agency workers could occur in several ways:

- **By the TWA alone**, without the knowledge or involvement of the end undertaking; and
- **By the end undertaking and the temporary work agency acting together**, with both parties involved.

Stakeholders pointed out that, often, FAW prompting undeclared work can occur alongside other labour law violations (not paying the statutory minimum wage, wages not equal to similar permanent employees, withholding holiday pay or sick pay, etc.). Other fraudulent behaviours in this context are the operation of unlicensed/unregistered TWAs, 'phoenix' activities (where temporary work agencies are rapidly opened and closed in a carousel fashion under different business names, all the while owned by the same individuals), as well as disrespecting and undercutting the collective bargaining agreements on wages and working conditions for temporary agency workers.

Similarly, workshop discussion reached a conclusion that undeclared work in this context occurs when **agencies are unregistered and/or unlicensed**. There is also sometimes a cross-border dimension to such agencies when they operate as letterbox-company-type chains with complex ownership structures in several Member States and third countries. This makes a risk assessment very difficult and requires early intervention at the national level.

Cross-border level

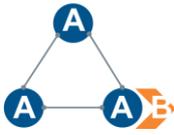
In cross-border situations, the nature of FAW prompting undeclared work also involves unregistered and under-declared employment of temporary agency workers, much like the national level described above. What sets it apart is, in the words of one stakeholder '*when it is crossing the border*'. In such cases, FAW prompting undeclared work can also occur in the context of posting of workers undertaken by TWAs, in addition to other contexts of cross border work. This results from the complexity of the employment relationships between worker, agency and end undertaking, which is amplified when it occurs across national jurisdictions. It is worth recalling the different types of posting of workers introduced in section 2.2 (see Figure 9).

In this context, FAW prompting undeclared work can occur in several ways:



- TWA posts temporary agency workers from Member State A to a user undertaking in Member State B. A TWA could use a fraudulent approach to posting and fraudulently underreport or not register the full employment of workers to the authorities in Member State A, in the absence of effective control mechanisms between Member States A and B. For the end undertaking in Member State B, there is scope for undeclared work, as it could underreport the working hours to the TWA, which resides in another Member State and is

thus unlikely to be aware of the full employment situation in Member State B.



- Temporary agency workers posted in Member State B by the user undertaking established in Member State A to provide services in Member State B. Again, this could open the scope for undeclared work, as it is relatively easy for the user undertaking to underreport or not register the full employment with the authorities in Member State A, as activities are carried out in Member State B. If Member State B is the place where the worker habitually works, this could be interpreted as a non-genuine posting.



- Temporary agency has workers posted in the context of cross-border intra-group or intra-company posting between sister companies in two Member States. Here, the scope for undeclared work arises where complex employment relationships are carried out across borders but within the same company, with subsidiaries and sister companies involved in the chain of employment.

Expert assessments point to evidence of existing **abuse of the rules on posting of workers through TWAs in several Member States** (Eurofound, 2016). This has been reported in Austria, Belgium, Czechia, Denmark, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Romania, Slovenia and Sweden. These abuses chiefly concern TWAs formally established in one Member State, usually in Eastern European countries, sending posted workers to other Member States, typically in Nordic and Western countries.

Another key factor in prompting undeclared FAW in TAW in cross-border situations is the **activities of 'letterbox' TWAs**, unregistered/unlicensed agencies, and 'phoenix' activities, often across long and complex subcontracting chains involving several entities (TAWs and others) across borders. Extensive subcontracting chains that involve foreign TWAs could also include *de facto* subsidiaries or entities controlled by the contractor and may be used to misrepresent the nature of employment contracts. The complexity of such subcontracting chains exposes them to the risk of undeclared work, as the boundaries and responsibilities for enforcing TAW regulations are easily blurred between chain entities.

Finally, cross-border FAW prompting undeclared work seems to involve **migrant workers to a significant extent** (both relating to mobile EU workers and third country nationals). Stakeholders interviewed for the study noted that this is particularly likely to happen in the cases of seasonal work in the agriculture and tourism sectors. Often, the short-term nature of this work and the complexity of cross-border employment relationships between the agency, worker and end undertaking makes it more prone to undeclared work. In fact, the greater likelihood of undeclared work among the migrant workers could also explain the higher risk of undeclared work in these sectors.

3.2.2 The impact of temporary agency work on undeclared work and working conditions

The existing literature debates the effects of TAW on national labour markets, both in relation to prompting undeclared work and the overall quality of working conditions.

At national level, some evidence suggests that **bona fide TAW** can have a beneficial effect by reducing the prevalence of undeclared work (WEC, 2018; IDEA Consult, 2015; Williams and Renooy, 2014; Ciett, 2011). For example, using the Organisation for Economic Co-operation and Development (OECD) indicators of the strictness of employment protection legislation and data on the size of the undeclared economy, Williams and Renooy (2014) showed a simple bivariate correlation (not a causation) between the regulation of TAW and temporary contracts and the size of the undeclared economy. The undeclared economy was found to be smaller in countries where fixed-term contracts and TAW were regulated more effectively. These correlations are echoed in the analyses of IDEA Consult (2015),

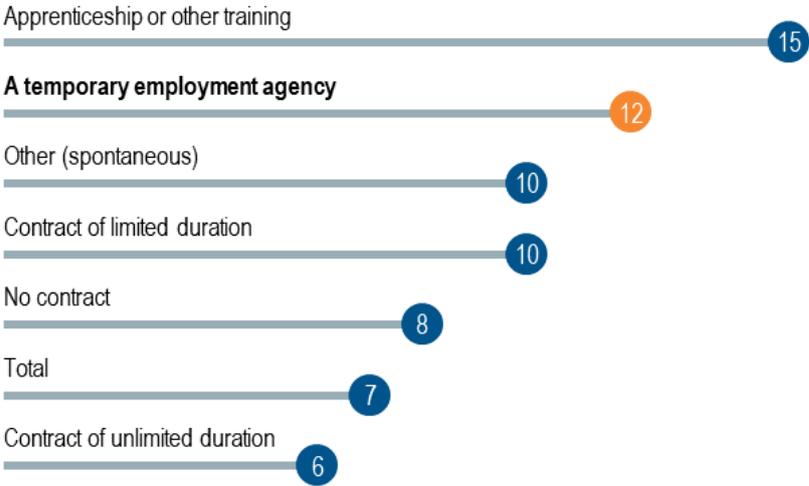
SEO (2014) and Cielt (2011). The conclusion reached was that countries where TWAs are better established and easier to access, and subject to 'efficient' regulation, tend to have a lower prevalence of undeclared work. In such contexts, firms can easily resort to TWAs to fulfil their need for casual and cyclical labour.

However, other studies point out the problems for **working conditions** when TAW regulations are misused. These two sets of literature are not mutually exclusive. In the latter, the evidence shows how FAW – especially where it prompts undeclared work – should be considered in the broader context of the more vulnerable working conditions often experienced by temporary agency workers (especially where TWAs and end employers are not compliant with the existing legal framework). Here, the abuse of the typical characteristics of TAW makes workers more vulnerable and can prompt undeclared work. Such worker **vulnerability** can open the door to abuse, in particular undeclared work, other types of social fraud, and non-compliance with occupational health and safety rules or collective bargaining agreements. Such risks may lead to higher rate of exploitation and cases of FAW prompting undeclared work.

The **precariousness** of working conditions faced by some temporary agency workers has been explored in the literature. Some research found that some forms of TAW can be precarious for the workers involved (Schömann and Guedes, 2012; European Parliament, 2016). Due to the short, limited-time stay with the user undertaking, such workers may not have been given access to the employment rights associated with the length of service and may have limited access to union representation (even assuming they become aware of the existence of a trade union in the short time they are on a TAW contract). The quality of work can also be a problem, depending on the nature of the work: TAW can disproportionately involve repetitive labour and little information about workplace risks. Temporary agency workers tend to have less control over the kind of work they do and how they do it, receive less training, have a higher rate of workplace accidents, be less well-informed about safety, do more shift work, and have less time to complete their work. Temporary agency workers have also been found to be disproportionately exposed to occupational safety and health risks, as they are new to their tasks and often not properly inducted by their user employer (Senior Labour Inspectors Committee (SLIC), 2019).

This can be further illustrated by the fact that in the representative pan-European workforce surveys, temporary agency workers report **experiencing discrimination more frequently** than other types of workers (see Figure 9). While this is only an approximate and indirect estimate of FAW promoting undeclared work, it provides some useful context within which to consider the undeclared work phenomenon and TAW. According to the EWCS 2015, 12 % of temporary agency workers reported experiencing discrimination (which encompasses any type of discrimination at the workplace, including FAW prompting undeclared work). This is twice the rate of discrimination reported by permanent workers, and higher than the 8 % discrimination rate reported by workers without an employment contract.

Figure 9. Workers experiencing any type of discrimination, by type of employment contract, EU, 2015



Source: Eurofound (2015) EWCS.

3.2.3 Complex subcontracting chains in the national and cross-border context

As discussed in section 3.2.1, the presence of long, complex and opaque subcontracting chains can prompt undeclared work in TAW, at both national and cross-border level. Box 2 describes the fraudulent activity of one TWA and the complexity of its operation in a cross-border context.

Box 2. Abusive practices of a temporary work agency in its cross-border operations

The example illustrates the abusive practices of a temporary work agency working across the borders over the course of the last 10 years.

The company was a multinational temporary work agency with a network of subsidiaries throughout Europe (thus falling within the definition of the Directive 2008/104, although other forms of ownership and operation were used, and frequently changed, see below). Its business model was to hire workers from lower-wage EU countries for work in the higher-wage EU countries, while exploiting differences in the social security regimes. It operated on a large scale, in a systematic and apparently respectable way. Its clients were often well-known firms and household names. It had offices around Europe and appeared to be a firm of substantial size and resources.

Workers who worked for the company or one of its subsidiaries, as well as unions and enforcement authorities that dealt with them, accused them of not paying wages regularly, dismissing workers who complained, using double contracts, and paying wages in violation of the relevant collective agreement and/or less than what was originally agreed, including undeclared work.

As a consequence of its fraudulent behaviour, the company had been at the centre of several industrial and legal disputes. Cases were brought against it for violating domestic labour standards and avoiding the payment of social security contributions in Sweden, Germany, France and the Netherlands:

- One of the group's companies which had been operating in France was convicted of undeclared work and fined EUR 70 000. At the same time, the company had to pay EUR 2.5 million in social security contributions to the French state;
- In the Netherlands, the company was convicted for not paying the collectively bargained pension;
- In Sweden, the company owed EUR 2 million in outstanding social security contributions at the time it closed down; and
- Infringements by the company had been reported in relation to the construction of a nuclear power plant in France, Olkiluoto in Finland, the Eemshaven and Avenue 2 construction sites in the Netherlands, and several sites in Sweden.

Furthermore, the company underwent frequent ownership and name changes, with apparent aim to evade detection. The Staffing Group A.(R) Ltd., faced with the enquiries from the police, labour inspectorates and judicial authorities in several countries, closed down and was replaced by a new staffing group, with the same structure – O. Ltd. Most A.(R) Ltd companies around Europe were liquidated or changed their names. Several links were found that showed A.(R) Ltd. and O. Ltd. to be intimately connected. For instance, the person responsible for business development at A.(R) Ltd. continued to work with O. Ltd. Another person represented both companies at the same time.

In 2015, the French construction company B., as the main (and liable) contractor of A.(R) Ltd., was ordered to pay damages of EUR 150 000 and to pay EUR 22 million to the French social security and tax authorities. The judgment in the first instance referred to the deliberate creation of complex, cross-border structures, with the aim of illegally employing some 500 Polish and Romanian workers over a period of several years. This social fraud took place at a construction site for a nuclear plant.

In Poland, A.(R) Ltd. had two recruiting offices, in Krakow and Gdynia. The A.(R) Ltd. companies that handled the recruitment offices were liquidated and the company 'BC S' took over the operation. The recruitment offices were located at the same address as before, and the only thing that changed was the company sign. The CEO remained the same. 'BC S' supplied staff at the same time for A.(R) Ltd. and 'O. Ltd'.

Source: Berntsen and Lillie (2015), ETUI Policy brief N°7-2015. Media investigations: Irish TV documentary, Dutch TV documentary, Danish TV documentary. CJEU, Case C-189/14.

In sub-contracting contexts, typical TWAs are often **active at the lowest levels of a subcontracting chain** and are not easily discovered during on-site inspections. Rather, they are typically identified only after significant research and cross-border exchange of information between labour inspectorates and other enforcement authorities. Sometimes, they are *de facto* letterbox companies hiding behind highly complex subcontracting chains, as Box 3 below describes.

Box 3. Construction sector letterbox companies in the subcontracting chain, Belgium

Aim:

To check compliance with the regulations applicable to TWA.

Description:

In recent years, the Belgian Labour Inspectorate found more than 440 subcontractors across different levels at the construction site of the new headquarters of an international military institution in Brussels. Problems were found at the lowest (5th and 6th) subcontracting chain levels, with registered TWA as well as recruitment agencies operating without a licence to hire temporary agency workers, and several letterbox companies creating the impression that they were legitimate construction companies or TWAs.

One was a Portuguese recruitment agency, with a letterbox company established in Romania, providing Romanian and Bulgarian workers to one of the Portuguese subcontractors at a higher level in the subcontracting chain. In reality, the workers were directly employed by the Portuguese construction company, which had very few employees. The letterbox company's sole activity was to find labour in Romania and Bulgaria and, as their employer, 'post' them (with A1) to Belgium. The letterbox company had no real economic activity in Romania, was not involved in the construction contract, and had no real assets or capital in Romania. Thus, it appears that its main role was to provide a workforce without having to comply with the rules and conditions typically applicable to TAW.

In addition to illegally operating in Belgium by hiring out staff for the construction sector without a licence, labour inspectors found that the wages paid to workers did not conform to the applicable minimum wage in the Belgian construction sector. Nor were the wages equal to the wage and working conditions of the Portuguese subcontractor's workers (for the same job at the same location). Belgian labour inspectors calculated the wage supplement to be paid for the hired Bulgarian and Romanian workers.

A legal system of joint liability applies in such cases, whereby any contractor at a higher point in the chain can be held liable for these supplement or wages where they failed to fulfil their obligations (in accordance with the legal provisions of Directive 2014/67). This joint chain liability counts only for the wages earned in the future, after notification by the inspection. The employer itself remains responsible for the wage payment. The labour inspectorate negotiated with the military commanders-in-chief (who had commissioned the work) and agreed to immediately dismiss the workforce provider (illegally operating FAW-letterbox company) from the workplace. The workers were taken on by another subcontractor in the chain, judged *bona fide* by the inspectorate after a check, and paid the correct minimum wage. The manager of the FAW-letterbox company became untraceable. It was impossible to obtain a payment of the wage supplements for the last few months. The Romanian inspectorate was informed via the internal market information (IMI) tool, but the company had already been dissolved in Romania. Another system of chain liability for the direct co-contractor in the chain could

not be applied for social security and tax contributions, as long as the A1s were not withdrawn by the Romanian social security institution.

The Belgian Labour Inspectorate tackled some of these cases on the basis of the regulatory chain liability (tax and social security contributions) and joint liability for wages of workers of (each possible) subcontractor(s) in the chain.

Source: Stakeholder interviews undertaken for this report.

Similar complex chains of sub-contracting were identified in the meat processing industries in several European countries (EFFAT 2020). The research revealed that, for example, companies that act as subcontractors in the meat processing industry in Germany or Spain are mainly multiservice companies. These companies are sometimes established by temporary work agencies to avoid employer obligation to ensure equal treatment according to the Temporary agency workers directive. Often, a labour intermediary (not necessarily a TWA as defined within the meaning of Directive 2008/104/EC) would recruit such workers in the origin country and usually charge them a recruiting fee and the travel costs to the country of destination. Once they reach the destination in Germany, they are employed by a German subcontractor that, most of the time, owns only an office in Germany with a limited number of staff. Strong connections exist between the labour intermediary in the departure country and the subcontractor established in Germany, making boundaries between establishing what is the temporary agency or the employer blurred and difficult for workers to understand.

A common problem is that workers (who are, in fact, temporary agency workers) **do not know exactly who** in the subcontracting chain they are **really employed by**. Rather, they are faced with many companies and intermediaries at the worksite. It is therefore important to refer to [Directive \(EU\) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union](#). This Directive, once transposed, will require Member States to ensure that employers inform their workers of the essential aspects of the employment relationship, including – in the case of temporary agency workers – the identity of the user employers. These provisions not only protect workers – including TWA workers – but also offer instruments for better control and monitoring by labour inspectors.

3.3 How widespread is the fraudulent use of agency work phenomenon?

The available literature contains **no quantitative or qualitative estimates** of the extent of FAW prompting undeclared work.

Individual cases and examples shared by the participants in the thematic review workshop pointed to the existence of fraudulent agency work prompting undeclared work, both at the national and cross-border levels. This shows awareness of the problem. However, **robust evidence on the scale, extent and features of the problem is lacking**.

In the absence of a robust evidence base, the available circumstantial evidence and information in the existing research and the stakeholder consultations undertaken for this report have been analysed (with the appropriate caution) to explore the extent of the FAW prompting undeclared work. This gap in data availability at European and national level prevents a more accurate assessment of the extent of FAW prompting undeclared work.

Estimates in the existing research

At European level, both quantitative and qualitative sources have investigated the spread of undeclared work and fraudulent employment relationships.

In quantitative terms, **surveys have been conducted** to understand the prevalence of undeclared work in the general population, **without measuring issues specific to TWAs**. For example, the latest Eurobarometer survey from 2019 measuring the incidence

of undeclared work in the general population did not specifically investigate the extent to which this is present among TWAs (European Commission, 2020).²²

More qualitative research has been conducted on the problem of fraudulent contracting of work across various types of employment relationship, **but without a focus on TAW prompting undeclared work** (e.g. Eurofound, 2016). In that research, fraudulent contracting referred to employment contract situations not meeting the necessary requirements, i.e. failing to respect at least one of the formal criteria used to 'qualify' for the employment contract. One of the forms of fraudulent contracting considered in the research was undeclared work. At the same time, it has been acknowledged that it is difficult, in practice, to distinguish between undeclared and fraudulent forms of contracting work. The research based on the assessments of national experts rated self-employment, fixed-term work and the posting of workers as most affected in terms of fraudulent contracting. The fraudulent use was defined as failing to respect at least one of the formal criteria used to 'qualify' for the employment contract. By comparison, FAW was identified as a significant issue in 12 of the 29 countries covered in the research.

This research also pointed to the existing fraudulent occurrence of FAW in cross-border situations of employment and contractual relations between companies (Eurofound 2016). In this Eurofound study, posting of workers was cited by 15 national reports as a form of contracting work significantly affected by fraud. This includes both posting through subcontracting and TAW (Eurofound, 2016). National examples reported included:

- Austria: abuse mainly through the provision of TAW from neighbouring Member States, which leads to wage dumping (not applying collectively agreed wage rates); and
- Czechia: cross-border TAW appears to be significantly affected by fraudulent use.

Estimates based on enforcement authorities' inspections

While stakeholders' opinions and estimates pointed to FAW prompting undeclared work as a problem, they did not provide quantitatively robust supporting data.

The operational data available from national enforcement authorities do not capture the specific aspect of TAW prompting undeclared work (across the countries sampled here). Typically, data are collected on the whole range of violations encountered when inspecting the agencies, including undeclared work. This is borne out by interviews and desk research in three countries. Table 1 provides an overview of type and scale of recorded undeclared work-related violations in Belgium, Poland, Romania and the Netherlands (with further detail provided below).²³

These inspection data are not directly comparable between countries, due to the different national regulations and means of selecting TWAs and user companies for inspection. However, across the countries sampled here, enforcement authorities do not report inspection data findings directly relating to TAW prompting undeclared work.

²² The previous Eurobarometer 402 measuring undeclared work (2013) did not distinguish temporary agency workers, identifying only dependant and non-dependant employees.

²³ Similar information was not provided in the consultations with stakeholders from Italy, France and Slovenia.

Table 1. Undeclared work violations recorded during inspections of temporary work agencies

Key types of violation	Belgium	Netherlands	Poland	Romania
Detection of undeclared work in TAW	Not specifically reported	Not specifically reported	9 % of TWAs inspected (irregularities in payment of wages and other employment benefits)**	Not specifically reported
Evasion of payment of full salary	50 % of cases inspected (infringements relating to social fraud including non-compliance with minimum wage** ^(d))	30 completed verdicts against non-compliant employers and EUR 2.5 million in back payments to temporary agency workers* ^(d)	33.6-37.3 % of TWAs had arrears due to non-payment of social security, health insurance, employment and pension benefits** ^(d)	9 % of TWAs inspected (irregularities in labour relations and occupational safety and health)** ^(d)
Evasion of working time regulations	:	:	17 % of user companies**	:

Note: *2017 data. ** 2018 data. (d) definition differs. (:) data not available.

Source: Desk review and stakeholder consultations undertaken for this study (2020).

In **Belgium**, recent inspections of TWAs by enforcement authorities found infringements relating to social fraud (covering undeclared work and other forms of social fraud, e.g. non-compliance with minimum wage) in some 50 % of cases. This is significantly higher than both the internal benchmark of 28 % and the 32 % infringement rate recorded in inspections for all sectors in 2018. Internal assessments of cross-border work through TWAs estimate that 95 % of such deployments are correct, with 5 % corresponding to fraudulent work (including undeclared work and other forms of fraud). These data also include cross-border infringements.

In **the Netherlands**, one of the core institutions in the labour market ensuring compliance with the collective bargaining agreements in the TAW sector is the joint bipartite committee SNCU (see Box 5). The SNCU carries out TWA-related investigations and inspections. About 90 % of preliminary investigations lead to an inspection, most of which find a deviation from the Collective Labour Agreement (e.g. non-payment of collectively agreed wages, with undeclared work being one of them). These are usually rectified by the employer, with those who do not cooperate facing prosecution. In 2016, the SNCU carried out 350 inspections. In 2017, it saw 30 completed verdicts against non-compliant employers and EUR 2.5 million in back payments to temporary agency workers.

In 2018, the **Polish** Labour Inspectorate (PLI) found irregularities in 83 % of the 360 TWAs inspected (an increase of 10 p.p. compared to 2017).²⁴ Several TWAs were not registered, therefore were providing their services illegally (15 %). The most common irregularity was the lack of a written agreement between the TWA and the user company on the employment conditions (36 % of inspections) and not sharing information on these conditions with the worker (18 % of inspections). Undeclared work-related violations were

²⁴ In 2018, there were 3 369 TWAs registered in Poland, of which 11 % were inspected.

recorded in 9 % of TWAs inspected. The enforcement authorities found irregularities in the payment of wages and other employment benefits for over 1 500 employees (2 % of all employees in the TWAs). In addition to the labour inspectorate, the regional authorities are obliged to inspect TWAs in Poland. Since January 2018, they check with the social insurance institution to determine whether the TWA has arrears due to non-payment of social security, health insurance, employment and pension benefits. In 2018, over one-third of TWAs were late with these payments and 1.5 % lost their licence as a result (PMoFLSP, 2019). Another common type of violation detected by the Inspectorate was setting a different remuneration for leave or paying the wage equivalent for unused leave (PLI, 2019a). As inspections were conducted in 'at risk' TWAs,²⁵ the number of violations related to undeclared work does not appear to be substantial.

In parallel, the Polish Labour Inspectorate conducted inspections at user companies (349 entities) of these TWAs.²⁶ Violations of temporary employment regulations, including occupational health and safety regulations, were found in 66 % of user inspections (compared to 68 % in 2017). 40 % of users did not sign a written agreement with the TWA on the employment conditions, 23 % of users did not inform the TWA on the remuneration for work to be performed by the temporary worker, or the health and safety conditions of the work performed (which often results in less favourable treatment of temporary employees). In addition, 17 % of user companies violated working time regulations (PLI, 2019a).

Polish enforcement authorities target TWAs that post employees to work abroad or that employ foreigners to work in Poland. In 2018, only 6 % (47 630) of all temporary agency workers in Poland were involved in such situations, with over 5 700 user companies, mainly in Germany, Ukraine and France (PMoFLSP, 2019). Meanwhile, over one-third of all temporary agency workers in Poland (35%, or 270 775) were of foreign origin – mainly Ukrainians (91 %), who, on rare occasions, were then delegated to work abroad (PMoFLSP, 2019).

The number of irregularities found in TWAs dropped compared with previous years, when violations were found in half of the agencies inspected. In 2018, 43²⁷ TWAs did not have a written contract with the posted worker or user company, or did not keep records on either. In addition, TWAs delegating foreigners to work in Poland did not comply with regulations introduced in 2017 in the 'Act on employment promotion and labour market institutions' that obliges TWAs to translate the contract into a language understood by the worker and to provide workers and user companies with information on the rules of entry, stay and work of foreigners in Poland. Undeclared work-related violations were not reported separately for TWAs providing cross-border services (PLI, 2019a).

In 2018, the **Romanian** Labour Inspectorate (RLI) checked the compliance of TWAs and user companies with the legal provisions in the area of labour relations (not specifically undeclared work) and occupational safety and health (RLI, 2019). Over half of the TWAs registered in Romania were inspected (277 out of 535), resulting in financial sanctions for 25 of them (around EUR 23 000 in total). Similar to other countries, inspections undertaken in TWAs placing workers abroad did not report specifically on undeclared work-related violations. Of 1 034²⁸ agencies inspected, 116 were sanctioned, including 35 that were fined.

Evidence from the European social partners

Perspectives from sectoral social partners at the European level in the thematic review workshop showed how fraudulent agency work prompting undeclared work can occur in

²⁵ Those reported by (former) employees, identified through media monitoring (mainly cases of illegal/non-registered TWA or those discriminating against jobseekers in job posts), those not inspected in 2015-2017 and those that delegate employees to work abroad or vice versa, delegate foreigners to work in Poland.

²⁶ In 2018, there were 22 757 user companies, of which 2 % were inspected.

²⁷ Information is not available on the number of TWAs posting workers abroad that were inspected in Poland, nor is there any information about the total number of TWAs providing such services in 2018.

²⁸ In 2018, there were 1 191 employment agencies sending Romanian citizens abroad.

their respective sectors, both at the national and cross-border levels. Social partners did not provide estimates of the undeclared agency work occurring in their respective sectors.

A presentation from the Employers' Group of Professional Agricultural Organisations in the European Union (Geopa-Copa) illustrated how characteristics of temporary agency work increase **the risk of undeclared work in the agriculture sector** (see Box 4).

Box 4. Temporary agency work in the agriculture sector

Non-standard forms of employment have been appearing in the agriculture sector, including temporary employment, seasonal work, and multi-party employment relationships, involving temporary agency work.

According to Geopa-Copa, key factors prompting fraudulent agency work in the agriculture sector are:

- Low profitability of the sector, putting pressures on reducing labour costs, one of the key variables in profit structures.
- Persisting labour shortages requiring additional labour force being brought from abroad, including countries outside the EU.
- Different rules governing the deployment of temporary agency workers in the Member States creating scope for jurisdiction shopping.

Source: Delgado, M. (2020).

A presentation from the **European Federation of Building and Woodworkers** revealed the risks of fraudulent temporary agency work in **the construction sector** and how this manifests also in cross-border temporary agency work.

Such agencies provide labour force at the lowest levels of the supply chain, often on very cheap and flexible employment conditions. As agencies operate and compete on the basis of labour-supply-only, they have often no material link with the activities of the user undertakings. Fraudulent behaviours are wide ranging, including dodging the legal/collectively agreed wages, bypassing vocational education and training (VET) and occupational safety and health (OSH) obligations, providing poor quality and overcharged housing, and charging high recruitment fees. In some cases, the cross-border temporary agency postings of workers across the EU are also associated with social fraud or abuse (involving letterbox companies, posting companies, social security and tax fraud). Overall, fraudulent agencies have creative business models in generating income from charging recruitment fees, disguising employment as business trips, and offering package posting (where the worker gets the full package of work, accommodation and meals from the agency, making them extremely dependant on the agency), withdrawing passport.

Across Europe, the **care sector** is dominated by many small employers operating at local or regional levels. At the same time, the sector also employs mobile EU workers, often women, who are working unregistered and isolated in people's homes. Both features make it extremely hard to assess the problem and reach vulnerable workers. Shared by **UNI EUROPA**, a case of Spanish nurses being recruited by an agency to work in Germany illustrates the challenge of identifying fraudulent behaviours and tackling them in practice (see Box 5).

Box 5. The case of Spanish nurses recruited by agencies to work in Germany

Between 2013 and 2015, recruitment agencies recruited Spanish nurses with university qualifications to come and work in Germany. High levels of unemployment in Spain twinned with drastic labour shortages in Germany created a market for different recruitment agencies in Spain. These agencies would set up recruitment events at universities or other places and lure young Spanish nursing graduates with the prospect of receiving language training and working in Germany's big cities such as Berlin, Munich, Frankfurt and Cologne. Qualified nurses would sign an initial contract with the German recruitment agency to work in Germany. Upon arrival in Germany, they would be forced

to sign a second contract which contained a penalty clause, stating that if the workers decided to leave the job before a three years period, they would have to pay back EUR 8,000 for the language training they would receive.

These practices were widespread with many nurses reporting them to Spanish embassy or consulates. Among others, the complaints concerned the inclusion of reimbursement clauses if the worker left the position before an agreed period. Although not illegal in general, they were often applied in an abusive manner. The Labour Department of the Spanish embassy provided the following support to address the issue:

- Individual actions: providing assistance, information, translation, mediation with the companies, referring cases to the German Inspectorate and facilitating access to legal aid.
- General actions: joint actions were organised, e.g. with German and Spanish trade unions (especially with the Faire Mobilität), the Federal Employment Agency and the General Council of Nursing Associations. Information was provided in the initial phases of mobility projects and best-practice agreements were signed with regional authorities.

In turn, activists and the German trade union ver.di provided information to Spanish nurses coming to work in Germany. However, as they could not address all the questions, Spanish nurses were referred to informal networks, such as Oficina Precaria as well the Grupo Accion Sindical. In the meantime these organisations had made the German trade union (ver.di) aware of the situation, which committed some of its resources in the private care sector to tackling these fraudulent recruitment practices as well as the undeclared work, which went hand in hand in the sector.

Local Spanish activists from the Oficina Precaria and Grupo Accion Sindical were the first point of contact for these workers. Moreover, ver.di serviced and advised these workers. This made it easier for care workers to access information about their rights.

Sources:

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4 TACKLING UNDECLARED WORK IN TAW AT THE NATIONAL LEVEL

4.1 Overview

This section explores the current national measures in place to tackle FAW, including the use of undeclared work (section 5 focuses on measures to tackle this at cross-border level). A comprehensive review of the practitioner literature on temporary agency work was used to identify the policy responses, as well as a detailed review of the previous materials produced by the [Platform in its virtual library](#). The national measures outlined here also build on the fieldwork (interviews with enforcement authorities and – where relevant – social partners) for the report in the sample of countries with a relevant presence of TAW in their labour market (Belgium, France, Italy, the Netherlands, Poland, Romania and Slovenia). National stakeholders indicated policy examples in their countries, which are presented in short case study boxes throughout this section. In addition, experiences shared in the thematic review workshop have also been reviewed for this section.

Key findings

- National legislators, enforcement authorities and social partners use a range of measures to tackle FAW at national level. The measures to tackle undeclared work arising from FAW are usually part of a broader approach to tackle social fraud, and other violations and fraudulent behaviours encountered in TAW (e.g. failure to respect the equal treatment of temporary agency workers and permanent employees, non-payment of minimum wage, or disregard for occupational health and safety rules).
- National governments have made **legislative changes to deter, prevent and enable the sanctioning of FAW prompting undeclared work**. These are part of the overall drive to regulate TAW more effectively and ensure further compliance with existing labour law, social security, tax and occupational safety and health regulations. Effective approaches combine legislative measures with awareness raising among all stakeholders.
- Preventing agency work prompting undeclared work by using **licencing and registration** systems can successfully foster compliance amongst agencies. On the other hand, registration can also result in fraudulent activity happening through other forms which are harder to detect (such as social media channels). The impact of registration systems on undeclared agency work could be further investigated.
- National registration systems also support measures aimed at **data exchange and mining** between public authorities to detect and sanction undeclared agency work. In several countries, this tool is used extensively to tackle fraudulent agency behaviours, in others the authorities are not permitted to use this tool due to data protection frameworks. In any case, authorities using data systems are limited by the data available within them, mostly on registered agencies, and not capturing new forms of labour intermediaries. The potential to further use data exchange mechanisms at the national level needs to be further nurtured.
- Social partners in several Member States have negotiated **collective bargaining agreements** and self-regulation initiatives intended to prevent and protect workers from the risk of becoming involved in undeclared work in TAW. Social partners have also pursued **awareness raising** to improve the level of knowledge about FAW prompting undeclared work. Effective social dialogue measures have been identified as a successful approach to tackling FAW.
- Enforcement authorities have pursued measures to detect and sanction FAW prompting undeclared work. This includes **strategic approaches to tackling FAW through annual priority setting** and resource allocation, joint cooperation with social partners, improved capacity to tackle FAW, and the use of sanctions. The measures have not been evaluated to assess their effectiveness, although stakeholders consider the concurrent use of several types of measure key to success.

- Preventive measures and incentives to encourage compliance with the existing TAW regulatory framework were not identified among the Member States considered here. This is largely because the legal framework for TAW in most Member States already provides significant incentives for the use of regular and legal TAW.
- A **holistic approach** to tackling FAW prompting undeclared work could be further developed, including joining-up operations, as well as data-mining, sharing and analysis, at both national and cross-border level, and considering a fuller range of improved sanctioning and detection, prevention, education and awareness-raising measures.

4.2 The role of national legislators in deterring, preventing and enabling the sanctioning of fraudulent agency work prompting undeclared work

The review of available literature found that Czechia, Finland and Germany have made recent changes to their legislative framework regulating TAW, while interviewees highlighted legislative changes in Belgium, the Netherlands and Poland. These changes sought to make FAW prompting undeclared work less feasible, and included legislative provisions establishing joint responsibility for ensuring correct payments across the subcontracting chain, regulating the number of contracts that can be held with a TWA, duration of deployments, and size of wages and social security contributions paid in the context of TAW. Each is considered in turn below.

4.2.1 Legislative measures to deter and prevent fraudulent use of agency work across complex chains of subcontracting

In relation to establishing a joint chain of responsibility, examples of legislative measures were identified in the Netherlands and Finland as they demonstrate interesting approaches in terms of their comprehensive coverage and range of labour regulations covered (including those aspects relevant to the undeclared work).

It is worth recalling that most Member States have measures in place to regulate the system of liability in subcontracting chains. In addition, Article 12 of the Enforcement Directive (2014/67/EU) on the posting of workers stipulates that the contractor higher up in the chain could be held liable for 'any outstanding net remuneration, corresponding to the minimum rates of and/or contributions'. In the construction sector, Member States are obliged to install such a direct liability system. Furthermore, the Member States, following the Directive's aims, can introduce supply chain responsibility in all sectors. All Member States should have adopted measures to reflect these rules at national level, as the transposition deadline was 18 June 2016.

The implementation report took stock of the implementation of the Article 12 requirements in 2019²⁹. Indeed, a number of Member States have taken measures to extend the concept of such a liability further. To start with, the minimum requirement for the construction sector (Article 12.6, requiring as a minimum making direct ('first tier') contractors in the construction sector generally responsible in case of the employer's (subcontractor's) failure to pay wages at least corresponding to the applicable minimum wage and contributions to social security) was limited to the construction sector only in nine Member States (Croatia, Estonia, Finland, Ireland, Lithuania, Poland, Romania, Sweden and the UK). All other Member States have extended the minimum requirement scheme of subcontracting liability to other sectors. Amongst these, eleven Member States (France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovakia and Spain) have decided to extend the scheme to all sectors of the economy.

Furthermore, some Member States broadened the application of liability in terms of its scope and range. While most Member States limit the liability to the direct contractor, ten Member States (Austria, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands,

²⁹ European Commission (2019).

Slovenia, Spain and Sweden) provide for the possibility to claim unmet payments also from parties that are not in a direct contractual relationship with the posting employer.

The main aim of such measures is to avoid fraudulent behaviour of TWAs and to ensure their compliance with the existing regulations, including those aspects prompting undeclared work within TAW.

In 2015, **the Dutch government** passed the Act on Combating Spurious Labour contracts (*Wet Aanpak Schijnconstructies, WAS 2015*) to combat fraudulent labour contracts that aim to evade legal minimum standards on wage levels and/or standards in terms and conditions for payments in collective agreements (European Parliament, 2016). A range of labour contracts were covered, including those related to TAW, with the aim of having a comprehensive approach. The range of labour standards, wages, and collective bargaining agreements were also covered, including those aspects related to undeclared work.

The Act set out a regulation whereby every link in a chain of contracted labour, lending or dispatching work (including TAW), is jointly responsible and liable for payments, according to the legislative framework and collective bargaining agreements, including the payment of tax and social security. This aimed to prevent unfair competition and strengthen the legal rights of employees by preventing underpayment and exploitation of workers. The main intention was to prevent fraudulent subcontractors from damaging the chain of economic activity and the interests of workers, by making sure that in fraud cases, the next level up in the chain would be responsible for complying with the existing regulations, thus covering aspects related to undeclared work. Joint responsibility was thus intended to improve workers' (including temporary agency workers) protection and fair competition. The Act was adopted in response to national discussions on bogus labour contracts and complex chains of (sub)contracting, often used in the agriculture, construction and transport sectors.

The Act was accompanied by an awareness-raising campaign, initiated by the Ministry of Social Affairs and Employment, in collaboration with sectoral organisations. The campaign targeted the public and entrepreneurs, informing them of the requirements, restrictions and risks (introduction of chain liability) associated with the new law. The government website (*rijksoverheid.nl*) set out the changes resulting from the new Act. A document compiling the most common questions and answers about the new rules under the Act was also developed and made available [online](#). Employers' organisations in the construction, transportation and TAW sectors organised information meetings, attended by officials from the Ministry of Social Affairs and Employment. The interviews for this report noted that the communication effort overall was useful in raising awareness of the issues, as well as explaining the new rules to a broader set of stakeholders and the wider public, including temporary agency workers themselves.

Finland carried out a similar type of regulatory change to establish a chain of responsibility in the use of agency work, particularly in the construction and road transport sectors. This change consolidated the obligations and liability of the contractor when work is contracted out (Cremers et. al., 2017). Finland requires the party responsible for a construction project to obtain the necessary guarantees that subcontractors (including agencies) will fulfil their various obligations. This makes it the responsibility of anyone using subcontractors and TAW to ensure that employers meet their obligations. The new arrangements impose this responsibility for all links in the supply chain, emphasising the overall responsibility of the buyer and the main contractor. All parties in the supply chain – buyer, developers, main contractor, subcontractors – are obliged to report their contract and employee details. The buyer and the main contractor must collect this information and file a monthly report with the tax administration. Contracting parties must ask for and obtain documents that verify certain registration and payment of taxes, and that refer to any collective bargaining agreement or corresponding conditions. Depending on the results of the background check, contracting may be subject to penalty. The contracting party must inform its employee representatives of subcontractors or the use of employment agency workers.

In the road transport sector, the Finnish Act on Contractors' Obligations and Liability stipulates that the direct contractor is liable for temporary agency workers and subcontractors (Haidinger, 2018). During its inspections of transport company premises, the national Occupational Safety and Health Agency checks subcontractors' compliance with social insurance, collective agreements, or tax payments.

4.2.2 Legislative measures to regulate the conditions of using temporary agency work

Legislative measures to regulate how temporary agency workers are employed have been identified in Belgium, Czechia, Germany, the Netherlands and Poland, encompassing the number of contracts they can hold and the duration of deployment, as well as the payment of their wages and social security contributions. These measures were taken to further regulate TAW and ensure compliance with existing labour law, social security, tax and occupational safety and health regulations, thus covering aspects related to tackling undeclared work. An important tool in this context is the registration requirement of temporary work agencies with the authorities.

A law in **Belgium** forbids the (direct) hiring-out of a worker (from company A to company B) without the intermediation of a registered and licensed agency, except under certain strict circumstances (Federal Public Service (FPS), n.d.). Hiring out is defined as a worker lent out by their employer to a user who makes that worker work within their undertaking and exercises over that worker a part of the employer's authority that is normally exercised by the actual employer. In the hiring out situations intermediated by the agency, the user undertaking is jointly liable for payment of remuneration, compensation, social benefits and social security contributions arising from the employment contract concluded by the workers they have hired in. Exceptions are permitted in cases of collaboration between two undertakings of the same economic and financial entity, or for temporary performance of specialised tasks requiring a specific professional qualification, or on the basis of consent from the Social Legislation Inspectorate, given after agreement of the social partners of the user undertaking concerning this hiring out of workers. The hiring out of workers must be of limited duration and the workers concerned must receive the same remuneration, compensation payments and social benefits as the permanent workers carrying out the same functions within the user undertaking. This legislation is considered a useful instrument for labour inspectors to combat fictitious subcontractors in the chain (FPS, n.d.), as user undertakings can only hire temporary workers via a registered and licensed TWA. Such licensed and registered agencies are expected to be less likely to engage in FAW prompting undeclared work, as well as to be more compliant with the existing regulations.

In **Czechia**, the legislator adopted clearer rules on the successive use of fixed-term contracts in respect of TWAs (Eurofound, 2016). TWAs must abide by the general national rules in Czechia on fixed-term contracts, where the maximum duration of fixed-term contracts is three years and two reiterations. With this provision extending to TAW, the rules are now consistent across all fixed-term employment. Again, the intention was to strengthen overall compliance with the existing regulations and encourage TWAs and end undertakings to respect the framework.

In 2017, **Poland** specified regulations on the maximum length of deployment (18 months within a 36-month period) of a given employee to a specific employer. This clarification reduced the common practice of a company using the same employee over time by contracting a different TWA to employ them. The TWA was created solely to repeatedly direct the same employees to the same user companies. Some experts argued that more restrictive regulations on the duration of deployment and labour shortages would prompt some TWAs to bypass the regulations by offering outsourcing services unregulated in Poland or delegating workers through TWAs set up abroad, e.g. in Belarus and Ukraine (Forsal, 2019).

New regulations were therefore introduced, including for TWAs delegating workers to Poland. Such activity now requires entry on the register of TWAs (alongside other conditions to be registered as a temporary agency in the national register, see Box 6). In

addition, TWAs are obliged to translate the employment contract into a foreign language understood by the worker and to provide them and user companies with information on the regulations of work and stay of foreign workers in Poland.

Box 6. National Register of Employment Agencies, Poland

Aim:

To certify that an employment agency's activities are in accordance with the law, ensure security for its clients and guarantee the quality of services.

Description:

The National Register of Employment Agencies contains information on employment agencies providing employment services, personal and career counselling or temporary work in Poland.

An application to be registered is submitted to the regional authorities where the agency is based (in the case of Polish entities) or where the services will be provided (in the case of EU/European Economic Area (EEA) entities providing services in Poland). After payment of a small fee (EUR 44 / PLN 200) and checks (e.g. no arrears in tax, social and health insurance contributions), the regional authorities provide a certificate that allows the TWA to operate in Poland.

Only TWAs currently on the National Register of Employment Agencies are deemed to be legally operating and can provide temporary work services. TWA and job placement agencies directing people to work abroad with foreign employers can be fined from EUR 6 550 to EUR 21 900 (PLN 3 000 to PLN 100 000) for operating without the certificate.

Every employment agency is obliged to submit an annual activity report to the regional authorities. The Ministry of Family, Labour and Social Policy compiles these into [annual reports on the activities of employment agencies](#).

The website of the National Register of Employment Agencies contains useful information for employment agencies (e.g. all applicable legal acts), and their clients. Workers can find here information on certified agencies and guides on how to [work safely abroad](#), including in specific countries like [the Netherlands](#) or the UK, or in particular sectors, e.g. maritime to which Poles are often delegated.

Consulting the National Register of Employment Agencies website is often recommended to workers and companies before establishing a relationship with a TWA.

The register is also the first source for the National Labour Inspectorate to shortlist inspected entities and check the legality of a TWA.

Since 2017, employment agencies are obliged to provide information on the location of the office where the services will be provided. This regulation aimed to facilitate inspections by the National Labour Inspectorate and was welcomed by Polish enforcement authorities. However, the fact that the regulation does not specify what constitutes an office allows the establishment of virtual offices/letterbox TWAs. In such cases, enforcement authorities cannot carry out an inspection. They have therefore called on regional authorities to exclude the possibility of registering a TWA with a virtual office address.

Source: Stakeholder interviews for this report; Polish National Labour Inspectorate (2019). Report from activities in 2018

Register of agencies: www.stor.praca.gov.pl

In the Netherlands, the Balanced Labour Market Act (WAB) came into force on 1 January 2020. This law applies to both fixed-term staff and temporary workers. The previous provision on consecutive fixed-term employment contracts (three temporary contracts in two years) has been replaced by a new rule: three temporary contracts in three years. Temporary employee contracts in which wage payment obligations are excluded (phase A

without agency clause) are classified as 'on-call' contracts as of January 2020. If the contract has lasted for 12 months, the employer must make a suitable proposal to the employee for a contract with a fixed number of hours that is at least equal to the average monthly work volume in the past 12 months. In such cases, the exclusion of the obligation to continue payment of wages is withdrawn. If the employee refuses this proposal, the obligation to continue payment of wages can again be excluded for the remainder of phase A. In principle, there is a risk of undeclared work during phase A 'on call': for example, where the end undertaking and TWA could secretly agree to let the temporary worker work undeclared.

Also **Germany** reformed its TAW regulation with the Act of reform of Temporary Agency Work in 2017. This reform aimed to ensure that TAW responds to its core function (dealing with peak periods and temporary staff fluctuations) and prevent the abuse of service contracts. From April 2017, any company hiring temporary agency workers is restricted to a maximum period of 18 months. However, different regulations can be negotiated and included in a collective agreement covering the sector in question. Longer workforce deployment times are also possible. After nine months, temporary agency workers shall receive the same pay as permanent workers employed by the user employer. Longer adjustment periods of up to 15 months are only possible where pay is gradually raised to the level of 'standard' workers (i.e. permanent full-time contracts) under the terms of a collective agreement (Hanesch, 2017). TAW is fully covered by social insurance, and agency workers are represented by works councils. The creation of TAW sector-specific wage scales under collective agreements has led to a significant wage differential between agency workers and comparable, directly employed staff in user employers, even when controlling for individual characteristics, occupational status and employment history. By law, temporary employees are not allowed to enter the construction industry and TWAs must be licensed by the German government. These two legal mandates are efforts to prevent dubious companies from entering the marketplace. The legislative changes saw TAW increase nationally, reaching a high of around one million workers shortly before the 2008 crisis and continuing to account for some 800 000-900 000 jobs since then. TWA represents approximately 3 % of the entire German labour force (Welcome Centre Germany, n.d.).

Concrete findings from the thematic review workshop

The workshop demonstrated the success of national level **registration of temporary work agencies**. Some countries require by law a registration of temporary work agencies with the authorities, alongside a range of accompanying conditions (such as a permanent representative in the country of registration).

Norway provided an example where all staffing enterprises engaged in the hiring of labour in the country have a duty to report these activities to the Norwegian Labour Inspection Authority. The scheme requires staffing enterprises engaged in activities in Norway, regardless of whether the enterprise is Norwegian or foreign based, to have a permanent representative in the country, who must be authorised to fully act on the enterprise's behalf in all legal situations.

Similarly, **Spain** imposes a number of conditions to be fulfilled by an agency to be registered, such as:

- An organisational structure
- Exclusively offering temporary work mediation (with some exceptions)
- Up to date in the fulfilment of its tax or social security obligations
- Financial guarantees to ensure compliance with their salary, compensation and social security obligations to the employees
- Not having been sanctioned (suspension of activity) on two or more occasions
- To include the term "Temporary Employment Agency" or its abbreviation "ETT" in its name.

Other countries do not have such registration requirements for the temporary work agencies (for example, **the Netherlands**). In this context, a recent study undertaken for

the Dutch Parliament recommended the establishment of such a national register in the country, to allow for better overview and controls of temporary agencies (Aanjaagteam Bescherming Arbeidsmigranten, 2020).

Countries that have registration systems tend to have a better overview of the existing agencies. However, having such registration can also prompt fraudulent agencies to take other forms and adopt new business models.

This experience was illustrated by **Belgium** at the thematic review workshop, where strict rules regarding operating licenses for temporary work agencies are enforced (including the need to have no social or fiscal debts, following all regulations, obligations to communicate correctly) and a deposit of EUR 75,000 has to be secured before they can start operating. Additionally, in the prior declaration of employment in Belgium (the national Limosa system), companies must indicate the sector in which they are active – and since 2017 TWAs must enter their approval number. This requirement has probably contributed to a drop of temporary work agencies registered in Belgium from over 26,000 in 2017 to 4,000 in 2019. At the same time, enforcement authorities noted the emergence of new forms of labour intermediation, which moved online to social media channels; these are much more difficult to detect and regulate.

Finally, participating countries shared their publicly available registers of temporary work agencies as an important information resource to establish which agencies are registered in the countries (see Table 2).

National authorities have also started to exchange information on **existing national registers of temporary work agencies**. For example, study visits between France, Portugal and Romania provided space to better understand the TAW regulatory framework and facilitated exchange of information on available agency registers, licensing/certification procedures, annual reporting and financial guarantees required in each of the country involved.

Table 2. Examples of national registers of temporary work agencies

Country	National register
Bulgaria	https://www.az.government.bg/intermediaries/temporary_employment/
Germany	http://www.spitzenverbaende.arbeitsagentur.de/
Ireland	https://www.workplacerelations.ie/en/publications_forms/current_employment_agency_list.pdf
Poland	www.stor.praca.gov.pl
Spain	https://expinterweb.mitramiss.gob.es/sigett/consultaPublicaETT
Norway	https://www.arbeidstilsynet.no/registre/registrerte-bemanningsforetak/

4.2.3 Legislative measures to sanction the misuse of temporary agency work

The Member States sampled here all have sanctions in place to punish the misuse of existing TAW rules. Several types of sanction are used by the Member States, ranging from requalification of the fraudulent form of contracting work into the proper contractual relations, to criminal sanctions, with a range of civil and economic sanctions in between.

One sanction applicable to FAW is requalification of the employment relationship. Accordingly, when a FAW work relationship is detected, labour courts do not declare the fraudulent employment contract null and void, but instead convert the 'disguised' one into a proper contractual employment relationship, and apply the appropriate terms retroactively. In relation to fictitious TAW, such requalification sanctions exist in Czechia, France, Hungary and Luxembourg (Eurofound 2016).

Other types of sanction applied to FAW range from suspension of TAW activity, administrative financial fines and suspension of TWA activity, for example:

- In **Belgium**, fines are set for violations of existing TAW rules and regulations with the amounts multiplied by the number of workers involved;³⁰
- In the **Netherlands**, the administrative sanctions may involve the 'temporary suspension' or 'definitive closure' of the activity, notably in the case of unlawful or unauthorised TWAs; and
- In 2017, **Poland** expanded the catalogue of offences on non-compliance with provisions on temporary work limits and types of work that cannot be performed by TAW. The fines can be applied for TWA and user companies.³¹

4.3 The role of enforcement authorities in preventing, detecting and sanctioning fraudulent agency work prompting undeclared work

The enforcement authorities have undertaken a number of measures to detect and sanction FAW. This reflects their primary role as authorities enforcing the existing legislative framework and, where relevant, the collective bargaining outcomes applicable to TAW. Several types of approach are used, including a strategic approach to tackling FAW through annual priority setting and resource allocation, joint cooperation with social partners, improved capacity to tackle FAW, and the use of sanctions.

4.3.1 Enforcement authorities adopting a strategic approach to prevent, detect and sanction fraudulent agency work

A strategic approach to tackling FAW has been reported by the enforcement authorities in Belgium, France, the Netherlands and Poland. This typically involves identifying FAW as a specific work priority for the inspectorates, i.e. targeted inspections focused on FAW, as well as consistent joint actions with other stakeholders, such as social partners. This is illustrated through the following examples.

In **Belgium**, the [2020 National Action Plan](#) for regional and federal enforcement authorities foresees 55 different actions, embedded within a series of five strategic options.³² One of the five strategic options relates to the fight against social fraud in the cross-border context (Priority 5), including FAW prompting undeclared work. The strategy acknowledges the importance of a holistic approach in the fight against social fraud, and involving enforcement authorities and social partners in a coordinated long-term approach. Within this priority, the Strategy envisages a number of prevention, detection and better cross-border cooperation actions.

The choice of priorities and actions reflects the results of the labour inspectorate survey in Belgium, in which national stakeholders rated social dumping as their top priority. Discussions with the social partners also revealed that they consider FAW to be on the rise, with the risk increasing alongside the rise in posted workers.

A similarly strategic approach is evident in **France**, where the National Plan to combat illegal work highlights the government's priorities in this respect. Of the core measures, 25 refer to strengthening the effectiveness of combating illegal work and posting fraud through temporary work in the agricultural sector (Ministry of Labour in France, 2019).

³⁰ For example, the Level 2 penalty (either a criminal fine of EUR 50 to EUR 500 or an administrative fine of EUR 25 to EUR 250) can be applied when the agency or end undertaking has deployed a temporary worker outside of cases where the law authorises it, or without respecting the procedure provided by law or a collective labour agreement. See Articles 176 to 177:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2010060607&table_name=loi

³¹ TWA, user companies and those acting on their behalf can be fined between EUR 220 and EUR 6 550 (PLN 1 000 to PLN 30 000) for: employing or directing to particularly dangerous work (including construction), employing or directing to replace worker during industrial action or worker who was made redundant in past three months, and not providing safe and hygienic work conditions work ([Act on temporary agency workers](#)). In addition, TWAs delegating employees to work abroad can be fined between EUR 6 550 and EUR 21 900 (PLN 30 000 to PLN 100 000) for operating without a licence.

³² Information based on interviews with the stakeholders in Belgium and SIOS/SIRS (2020). Action plan for 2020 [available in French].

The National Plan recognises the increasing complexity of fraudulent activity, including the use of TAW. This is noted as particularly relevant for the use of TWAs located abroad, which bypass national controls. The National Plan priority is to fight the fraudulent posting of workers and other forms of serious fraud in contracting work. It emphasises the particularly complex fraudulent posting situation, pointing to the fraudulent creation of establishments, fraudulent posting through TAW, or fraudulent intra-group posting.

Similarly, in **the Netherlands**, the fight against FAW is a longstanding priority for the labour inspectorate.³³ TAW is considered a risk sector, as its competitiveness is highly sensitive to the cost of labour. The inspectorate thus has a specific programme for TAW, with a comprehensive risk assessment every four years. In practice, this means that the work on TAW receives specific attention through dedicated project leaders, advisors and inspectors, who work to ensure that the rules relating to minimum wage, working hours, working conditions and wages are respected by TWAs and user employers.

In **Poland**, TWAs have been a priority inspection group for several years. Enforcement authorities check compliance with the Law on temporary agency workers and the correct posting of employees to and from Poland. 2020 sees a particular focus on inspections in TWAs run by third-country nationals (PLI, 2019b).

4.3.2 Enforcement authorities tackling fraudulent agency work in cooperation with social partners

In Belgium, joint action to tackle FAW within the broader context of social fraud was taken with the social partners, especially in the key sectors of construction, meat processing, transport, hospitality, retail and catering (horeca), security and agriculture. In this context, tripartite action plans were developed between the social partners and the labour inspectorates. The deep sectoral knowledge of the social partners improves labour inspectorates' understanding of FAW, leading to better targeted actions. This complements the results of official data-mining systems in helping to detect fraudulent agencies.

In 2018, the Belgian inspection services concluded a formal agreement with employers' organisations, including the representatives of TAW sector. In 2018, the Business Charter was signed by **SIOD/SIRS**, five federal social inspection departments (and their heads), and employers' organisations of the Group of 10 (an organisation of employers covering the most important business organisations in the country). Within the Group of 10, the TAW sector (Federgon) is represented by the largest employers association, the Union of Belgian enterprises (VBO). The Charter aims to contribute to the fight against social fraud through efficient and high quality social inspections and by identifying a number of cross-cutting principles, such as discretion and confidentiality.

Likewise **in the Netherlands**, cooperation with social partners (e.g. trade unions) plays an important role in enforcement authorities' work on tackling FAW. The social partners check compliance with the collective agreements regulating the TAW sector and covering nearly all TAWs (see section 4.4), as well as other information relating to FAW, and provide this information to the enforcement authorities (see Box 7). They can also ask the inspectorate to investigate suspected cases of evasion of a collective labour agreement, relating to TAW. In such cases, the social partners can use the ensuing report in a civil case. This option has been in place for several years, with unions often using it to prompt enforcement authorities to act.

In France, the outcomes of the National Plan refer to reinforced cooperation between services, as well as 'partnership conventions' developed between government and sectoral social partner representatives (e.g. road transport and removal services, signed on 28 July 2015; construction sector, signed on 23 February 2016).

4.3.3 Enforcement authorities improving their capacity to prevent, detect and sanction fraudulent agency work

Measures to strengthen capacity and adapt the competences of enforcement authorities are described in the Platform's Toolkit on competence profiles of labour inspectorates and

³³ Information from interviews with stakeholders in the Netherlands.

inspectors in tackling undeclared work.³⁴ Risk assessment by enforcement authorities is a central element in combating FAW, as it can increase the success rate of inspections.

In order to tackle FAW effectively and efficiently, enforcement authorities typically require:

- Up-to-date information on labour market trends and TWA fraud schemes, including at cross-border level;
- Detailed information on the characteristics of fraudulent behaviour and how these are captured by existing formal data collection systems and/or informal data sources;
- Effective cooperation with other public bodies owning relevant data and/or similar risk assessment functions or competences (e.g. licensing TWAs);
- Advanced tools for risk assessment to supplement inspectors' local knowledge;
- Enhanced cooperation, with inspection and communication units using the outcomes of risk analysis;
- International approaches, including better capacity to operate cross-border;
- Modern tools for evaluating enforcement tools and practices;
- Management support in setting the priority and strategy for FAW (annual plan, staffing needs, developing expertise, allocation of staff, training, collaboration with social partners and foreign counterparts, providing information, awareness-raising, adaptation of the role or division).

Several enforcement authorities have taken particular measures to raise their capacity in tackling FAW.

In **Czechia**, the State Labour Inspection Office (SLIO/SUIP) strengthened its monitoring activities to detect fraud in the TAW sector. This is a targeted initiative by the Ministry of Labour and Social Affairs (MoLSA), funded by the European Social Fund (ESF) (Eurofound, 2016). A series of reforms since 2012 strengthened the inspection capacity of SLIO. Similarly, capacity building initiatives of inspectors exist in **Belgium** where inspectors have to inspect at least ten TWAs per year, and in **Luxembourg** where inspectors receive training in inspection methods for agencies.

Concrete findings from the thematic review workshop

Workshop discussions highlighted how important the capacity of authorities is in undertaking **data sharing and mining** to identify, detect and sanction undeclared agency work. Experiences from **Iceland and Finland** highlighted how sharing permissions in the legislation are used to carry out data mining through co-operation between different authorities. In **Iceland**, data mining between authorities and multi-authority cooperation is one of the most fruitful tools to tackle problems in this field, but it is mostly helpful with partially undeclared activity of TWAs. When it comes to fully undeclared TWAs, enforcement authorities find cooperation with social partners and user undertakers to be a vital part of gaining information. When dealing with buyers of TWA services (user undertakings), enforcement authorities also try to raise awareness on their responsibilities.

However, data sharing and mining is not currently fully exploited, partly due to the challenges imposed by compliance with data protection requirements and the rules governing the roles of different institutions. Also, the success of data-driven tools depends on agencies being registered in the official systems, which is often not the case. Indeed, **Spain** highlighted that existing national detection tools and approaches are effective to detect fraudulent behaviours of registered agencies, data which is available in official systems and databases. In contrast, such data mining approaches are less useful when confronted with fraudulent agencies, unregistered and informal, operating loosely to offer labour intermediation services online, notably through social media channels.

³⁴ Available soon from the [virtual library of the European Platform tackling undeclared work](#).

In this context, the workshop heard how **the Netherlands** used data exchange and mining between different public authorities and stakeholders outside government in the temporary agency sector to connect and exchange information and expertise about agency work, also to inform and educate end employers and agency workers. Sharing of data between institutions also helped to ensure enforcement and restore the correct payment of wages, taxes and social security contributions. Future developments focus on how to use the exchange of data for research purposes and approach the challenges of fraudulent agency work pro-actively.

Finally, the sectoral experience highlighted in **Luxembourg** related to enforcement authorities using other available information sources in the sector to feed into its risk assessment activities. In particular, authorities use prior notices of work in large building activities in the construction sector as a data source in the detection and sanctioning of fraudulent agency work. The legislation foresees that the person who plans to set up a large construction site is required to submit a prior notice to the labour inspectorate. The notice allows to identify the work site, the main operators but also the number of workers, companies and independent contractors on the premises. Thus, before the enforcement authority inspects the site, they consult the prior notice. In this way, they can detect the companies employed on the site. In a second step, they consult information from existing databases and check workers on the company's record.

4.3.4 Enforcement authorities using sanctions to penalise fraudulent agency work

Several types of sanction are used by the Member States, ranging from correction of the fraudulent form of contracting work into the appropriate legal form, to criminal sanctions, with a range of civil and economic sanctions in between.

Some Member States consider the correction of the employment relationship a sanction, for example in the case of fraudulent contracting work or fictitious TAW (**Czechia, France, Hungary, Luxembourg**). Under some legal systems (e.g. **France, the Netherlands**), the administrative sanction may involve the 'temporary suspension' or 'definitive closure' of the employer's activity, notably in the case of unlawful or unauthorised TWAs.

If fraudulent TAW is embedded in a posting situation, the enforcement of Directive 2014/67/EU may be relevant where a Member State has transposed Article 4 such that false or inconsistent posting relationships may be transformed by way of sanction into a direct relationship in the host country between the worker and the user employer.

Another legal device widely used in the Member States (with examples identified in **Austria, Belgium, France, Germany, Italy, the Netherlands and Poland**) is to impose joint liability on both the formal employer and user undertaking for fraudulent employment contracts with regard to the payment of wages and social security contributions. This liability is applied in the case of FAW, posting of workers and subcontracting.

The judgment of the CJEU in joint cases C-64/18, C-140/18, C-146/18 and C-148/18 is relevant here. The questions referred to the Court related to fines exceeding EUR 13 million (eventually increased by 20 %) imposed under **Austrian** legislation for failure to comply with obligations in respect of the posting of workers – more specifically, compliance with Article 56 TFEU (freedom to provide services), Directive 96/71/EC, Directive 2014/67/EU and/or the Charter of Fundamental Rights of the European Union. The ruling in this instance can be similarly assumed to apply to TWAs in the context of posting.

In granting the reach of the judgment beyond the case at issue, the CJEU justified the existence of financial administrative penalties and/or fines (provided for by Chapter VI Directive 2014/67/EU): *'national measures which are liable to restrict or to make less attractive the exercise of the fundamental freedoms guaranteed by the TFEU may nonetheless be permitted where they serve overriding reasons in the public interest, are appropriate for attaining their objective, and do not go beyond what is necessary to attain that objective.'* Put simply, under Article 56 of the TFEU and/or under Directive 2014/67/EU, such measures must be proportionate.

The CJEU found that provisions laying down fines that vary according to the number of workers concerned, do not seem, in principle, to be disproportionate. However, in the event of non-compliance with obtaining administrative authorisations and keeping salary documents, Article 56 TFEU must be interpreted as precluding national legislation from providing for fines:

- That cannot be less than a predefined amount;
- That are imposed cumulatively for each worker concerned and with no upper limit;
- Supplemented by a contribution to the costs of proceedings up to 20 % (in the event of rejection of the appeal against the decision imposing such fines); and
- That are converted into several years' imprisonment, in case of non-payment.

4.4 The role of social partners in preventing, detecting and raising awareness on fraudulent agency work

Social partners have also taken measures to tackle FAW, including through collective agreements negotiated for TAW to prevent and protect workers from undeclared work in the temporary work sector. Their measures include awareness-raising and the provision of broader information to prevent and identify undeclared work promptly and more effectively. For instance, as a consequence of extensive collective bargaining coverage, in the Netherlands and Germany, collective agreements now cover most of the TAW sector countrywide. In other countries, the proximity of trade unions has been used to reach and inform workers about their rights in the context of TAW. Key success factors include an existing strong system of sectoral collective bargaining and a tradition of cooperation with social partners.

4.4.1 The use of collective bargaining agreements to prevent and deter undeclared work in temporary agency work

In the Netherlands, social partners in the TAW sector already had a series of collective agreements. For example, an obligation for registration exists, without a system of licences for TWAs. New rules have now been agreed between the social partners, under the Employment Agencies Collective Agreement, covering all 850 000 temporary agency workers. These came into effect on 30 December 2019 and will be in place until 2021 (this is the standard period of validity for the collective bargaining agreements in the country).³⁵ Under these new rules, temporary agency workers should have a stronger legal position, better job security and guidance on sustainable employability. This should strengthen their labour market position and act as a deterrent to engage in the undeclared work. The rules include:

- Notification of termination of temporary employment contracts with agency clause (phase A) will apply after 26 weeks and will be 10 calendar days;
- Obligation to continue payment of wages for temporary workers in phase B (and C) will be 100 % of their last earned salary, instead of 90 %;
- Continued payment of wages during illness is 90 % in the first year and 80 % in the second year (instead of 91 % in the first year only);
- Holiday benefit is 8.33 % instead of 8 %; and
- Temporary workers in phase A who were not entitled to special leave without having built up sufficient reserve – will now have the right to special leave (e.g. birth leave, exam leave).

³⁵ Undutchables (n.d.). Changes in the CLA & WAB as of January 2020. Available at: <https://undutchables.nl/about-us/news/changes-cla-and-wab>. A summary of the Collective Labour Agreement can be found at: <https://www.abu.nl/app/uploads/2019/08/Samenvatting-CAO-september-2019-EN.pdf> and <https://www.abu.nl/cao/>

Another core initiative in the Netherlands is the joint operation of a specific structure driven by the social partners focused on fighting the fraudulent use of TAW (see Box 7).

Box 7. Foundation for Compliance with the Collective Labour Agreement for Agency Workers (SNCU), the Netherlands

Aim:

To support compliance with the existing framework and fight abuse of TAW through a joint social partner structure.

Description:

In the Netherlands, social partners in the TAW sector set up a bipartite committee to support compliance with legislation and collective agreements and to fight fraudulent use of the TAW – **the Foundation for Compliance with the Collective Labour Agreement for Agency Workers (SNCU)**.³⁶ The SNCU operates nationally and applies to all stakeholders who fall under the scope of the sectoral Collective Labour Agreement for Agency Workers.

The SNCU raises awareness by disseminating information via a range of channels, such as traditional and online media, publications, a website and a telephone helpdesk. Monitoring occurs through inspections, which are usually triggered via the complaint reporting tool that is accessible to everyone. The SNCU can write to an employer with a request for data on wages and employment contracts, for example. Where the data are found to comply, the case is closed. Where they do not, a second inspection takes place, at the employer's place of business. The employer is asked to rectify any issue of non-compliance identified during the inspection and this is subsequently verified by the SNCU (this inspection is funded by the employer). If the employer fails to comply, the SNCU starts a judicial procedure that may result in the employer's liability for compensation claims and recovery payments.

The SNCU focuses its activities on the temporary work sector, which allows for highly targeted, effective and efficient inspections. About 90 % of preliminary investigations lead to an inspection. Most of these inspections find a deviation from the Collective Labour Agreement, which are usually rectified by the employer. Employers who do not cooperate are prosecuted. Following the launch of a new website and Facebook campaign in 2016, the SNCU saw an increase in the number of questions and complaints reported. In 2016, the SNCU carried out 350 inspections and answered 2 500 questions through its helpdesk. In 2017, it saw 30 completed verdicts against non-compliant employers and EUR 2.5 million in back payments to temporary agency workers.

The SNCU is an example of an effective bipartite social partner initiative targeting the TAW sector. It has a holistic combination of tasks, including targeted inspections, awareness-raising and communication, and is funded jointly by employers and trade unions. The work of the SNCU has uncovered non-compliance and led to court verdicts and recovered wages for temporary agency workers.

Source: The Foundation for Compliance with the Collective Labour Agreement for Agency Workers (SNCU)³⁷ stakeholder interviews.

Following **Germany's** changes to the TAW regulation in 2013, a series of collective agreements were concluded and now cover much of the TAW sector (European Parliament, 2016). The collective agreements aimed to ensure earnings supplements in order to close the wage gap between agency workers and comparable staff in the sector in a stepped manner, depending on the duration of the assignment. The metalwork sector has a

³⁶ European Platform tackling undeclared work (2018). Good practice fiche – Netherlands: Foundation for compliance to the Collective Labour Agreement for Agency Workers (SNCU) – Enforcing compliance with collective labour agreements. Brussels: European Commission. Available at: <https://ec.europa.eu/social/udw>

³⁷ European Platform tackling undeclared work (2018). Good practice fiche – Netherlands: Foundation for compliance to the Collective Labour Agreement for Agency Workers (SNCU) – Enforcing compliance with collective labour agreements. Brussels: European Commission. Available at: <https://ec.europa.eu/social/udw>

collective agreement that entitles agency workers to receive an offer for direct employment by the user employer after an assignment period of 24 months. Overall, these agreements are considered to have made TAW less precarious in sectors and firms with strong trade unions.

In **France**, social partners' involvement in fighting FAW is relatively recent, as this was typically the domain of the public authorities. Several agreements have been concluded with some sectoral partners, such as the *Prism'emploi* ('*Partenariat pour la lutte contre le travail illégal dans le travail temporaire – 10 mai 2006*'), which represent TWAs. As part of the National Plan to combat illegal employment, enforcement authorities are seeking to update the partnership agreements with the main sectors (agriculture, entertainment, etc.). The social partners chiefly raise awareness among temporary workers and those companies using temporary work. Professional organisations can also bring cases to the attention of prosecuting authorities.

Finally, to reduce abuse of TAW, the Employment Relationships Act in **Slovenia** gives powers to trade unions and works council to request annual information on the reasons for the use of posted workers, as well as their number.

4.4.2 Awareness-raising measures by social partners

Other types of measure taken by social partners include supporting agency workers to know their rights (Belgium, France, the Netherlands and Portugal), blacklisting bogus TWAs (Czechia) and support mechanisms to advise workers (Italy).

In the wake of legislative changes in 2016, the **Belgian** trade union confederation (FGTB/ABVV) developed a [website to raise agency workers' awareness of their rights](#). Since October 2016, agency workers in Belgium have the right to receive a contract before starting work. The contract can be signed on paper or via a computer or smartphone, using an identity card or password. The trade union website explains the legal situation to agency workers, along with advice on how to enforce their rights in practice. It also includes a YouTube tutorial (in French and Dutch) on how to use the online facility.

The fight against FAW is organised at national level through bipartite collaboration between the social partners and self-regulatory codes of conduct. Belgium, the Netherlands and Portugal have an ombudsman to collect complaints, act upon cases of FWA and mediate between the parties (WEC, n.d.).

In **Czechia**, the Czech-Moravian Confederation of Trade Unions (CMKOS), together with the Czech Metalworkers' Federation (OS KOVO), has attempted to tackle the issue of illegal TWAs (Eurofound, 2016). They have encouraged actions to combat illegal 'pseudo' agencies by enhancing the reputation and status of *bona fide* agencies, and introduced a non-compliance list ('blacklist') of irregular TWAs.

In Ireland, the government consulted with the social partners on TAW (Eurofound, 2016). At the same time, trade unions launched an [information campaign on fraudulent forms of contracting in general](#) – including in the TAW sector – especially bogus self-employment. Trade unions have lobbied to ensure compliance with the overall legal framework regulating TAW, such as respecting the principle of equal treatment of agency workers in practice, making TWAs and user undertakings jointly liable so that workers can ensure enforcement of their rights, licensing TWAs and introducing a statutory code of practice. Trade unions have also provided submissions and feedback to the government's draft bill on temporary agency workers in 2012 (ICTU, 2012), asking for stricter enforcement and formulation of the rules to avoid exploitation of agency workers (without a specific reference to undeclared work). The Bill was adopted in 2012 and remains the current law regulating TAW in Ireland (Irish Statute Book, 2012).

Italy's trade unions play an important role in the agriculture sector, particularly in the southern part of the country. Undeclared work is particularly problematic in the agricultural sector (Stefanov et al., 2019c). However, campaigns organised by trade unions in Italy did not focus specifically on TWAs but, rather, on undeclared work and labour exploitation generally. Trade unions collaborate with the labour inspectors and support temporary agency workers in any controversy arising with their employer and/or agency. The unions

are also involved in awareness-raising activities to change the attitudes and biases of workers and employers towards TAW. The unions are constrained in their actions by the lack of human and financial resources to address the full scope of FAW.

5 EXISTING CROSS-BORDER COOPERATION TO TACKLE FRAUDULENT AGENCY WORK

5.1 Overview

This section explores current cross-border cooperation to tackle the fraudulent use of TAW, including undeclared work, within the sample of countries considered here (for more detail on national measures, see section 4). A comprehensive review of the practitioner literature on TAW was used to identify policy initiatives, together with a detailed review of the previous materials produced by the [Platform and available in its virtual library](#). Cross-border measures presented here build on the fieldwork conducted in the sample of Member States (via interviews with enforcement authorities and, where relevant, social partners), all of which have a relevant presence of TAW in their labour markets (Belgium, France, Italy, Poland, Romania Slovenia and the Netherlands). National stakeholders pointed to good policy examples, which are presented in the short case study boxes throughout this section. The discussion in the thematic review workshop was also used to inform this section.

Key findings

- FAW (including undeclared work and other social fraud) is an issue in the cross-border context, with developing **approaches** to prevention, detection and awareness-raising.
- **Several examples of successful cross-border cooperation in tackling fraudulent TAW have been identified**, showing a variety of cooperation formats, including exchanges of information through existing systems and channels, joint inspections and institutionalised structures of bilateral cross-border cooperation (such as working groups, regular joint inspections), and study visits. A number of cooperation activities have been funded through the Platform. This highlights the substantial added value of cross-border cooperation in addressing FAW, including undeclared work.
- **The focus of the cross-border cooperation** analysed in the sample Member States has **predominantly been on improving detection and sanctions** against FAW (including undeclared work and other social fraud). To some extent, cross-border cooperation has also prompted education and awareness-raising initiatives. By contrast, cross-border incentives to make it easier and more beneficial to comply with the existing regulatory framework have received less attention.

5.2 Fraudulent agency work prompting undeclared work in the cross-border context

Although hard data are not available, stakeholder interviews indicate that FAW, including undeclared work, is challenging to detect in the cross-border context.

It is therefore unsurprising that addressing the fraudulent use of TAW in cross-border situations (e.g. highly mobile workers) and in the posting of workers is increasingly a priority for labour inspectorates and other enforcement authorities. According to one stakeholder, *'fraud does not stop at the border'*.

The need to tackle FAW through joint cross-border action is similarly recognised by the Platform. In a 2019 survey of Platform members, 11 Member States (Belgium, Denmark, Ireland, Spain, France, Croatia, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal) reported fraudulent TWAs as a key priority for their cross-border cooperation actions, while nine (Czechia, Estonia, Greece, Hungary, Austria, Slovakia, Finland, Sweden) stated that they do not currently cover fraudulent TWAs through cooperation actions but will need to do so in future (Stefanov et al., 2019a). This means that FAW is on the agenda of the enforcement authorities in 20 Member States. In general, the survey respondents believed that tackling fraudulent TWAs would be one of the core cooperation areas for

enforcement authorities within the next three to five years. This highlights the added value of EU-level action in this area.

Cross-border cooperation is important in the context of posting of workers, which also takes place via TWAs. According to the European Commission, data on the proportion of posted workers via TWAs was available from nine Member States. Of these, the share of posting through TWAs in 2017 amounted to 27 % in France, 13 % in Austria, 11 % in Belgium, 4 % in Poland and 1 % in Luxembourg (European Commission, 2019).

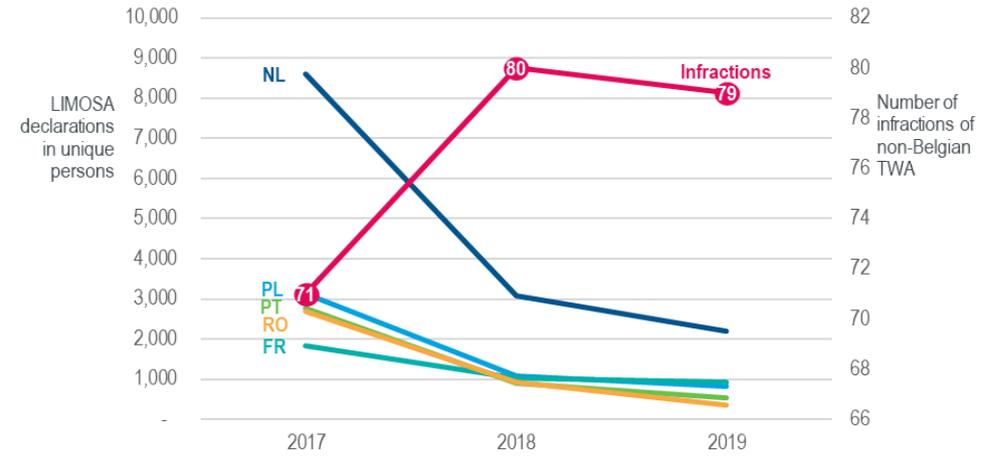
Experiences shared in the thematic review workshop highlighted individual cases of undeclared agency work, however, the conclusion pointed to the lack of robust evidence to understand the extent of the problem at the cross-border level.

Such is the experience of detecting fraudulent agency work in **Belgium** using the national LIMOSA system, where the requirement to register is suspected to have led to the declining number of registered agencies (see Box 8).

Box 8. Fraudulent agency work in Belgium

Changes in 2017 required temporary work agencies to enter their registration number when registering in the national LIMOSA system, if they wanted to provide their services in Belgium. It is suspected that this led to the drop in the number of foreign TWAs, as demonstrated in the data below. At the same time, the number of infringements detected by the enforcement authorities among foreign TWAs has remained relatively stable.

Figure 10. LIMOSA declarations in unique persons and number of infractions by non-Belgian TWA



Source: LIMOSA system.

Similarly, **Norway** highlights how undeclared work, alongside other violations, can occur in sectors where temporary agency workers from abroad are widely represented, such as construction, fish processing, healthcare and seasonal agriculture. This is because in the context of fraudulent agency work, the employment relationships 'fall between the chairs'. Both at the national and at the cross-border level, it is often unclear who in the chain of employment is responsible for compliance with labour law regulations, and the user undertaking often lacks the duty of care to enforce such rules on the temporary agency workers (see Box 9).

Box 9. Undeclared agency work in the fish sector in Norway



Due to seasonal work (mainly in the winter/spring), the fish industry in Norway employs many foreign workers (mainly from Lithuania, Latvia and Romania). In a particular case described in the workshop, workers from Lithuania were employed via a Lithuanian TWA, working alongside Norwegian colleagues.

The Norwegian labour inspectorate discovered that workers were not paid minimum wages, were not paid for all worked hours (thus engaged in under-registered undeclared work), worked illegal hours and had no adequate housing. The Lithuanian TWA companies also avoided paying taxes in Norway.

The inspectorate discovered an intricate so-called “enterprise scheme” with a systematic shift of foreign TWA-type companies, under the same ownership structures. When orders/sanctions from the enforcement authorities were given, the workers were transferred to a new TWA company, under the same owners. The owners of the TWA-companies were located in Lithuania and/or Russia. They took care of all practical handling of fish but did not take responsibility for the correct implementation of temporary agency workers’ rights.

Source: Lund, P. (2020).

5.3 Key aspects of current approaches in cross-border cooperation to detect and sanction fraudulent agency work

The importance of a holistic approach has been highlighted in the Platform’s work as a key success factor in transforming undeclared into declared work.

The Platform define the holistic approach as:

Where national governments use a whole-government approach to tackle undeclared work, by joining-up the policy and enforcement level of strategy and operations in the fields of labour, tax and social security law, and involve and cooperate with social partners and other stakeholders. This approach involves using the full range of direct and indirect policy measures available to enhance the power of, and trust in, authorities respectively. The objective is to transform undeclared work into declared work in an effective manner.

Source: Glossary of the European Platform tackling undeclared work

Within the framework of the holistic approach, a range of available policy initiatives have been identified, forming a spectrum of effective and interlinked approaches. As shown below, the following types of policy measures are evident in cross-border cooperation tackling FAW:

- Implementing more effective sanctions (section 5.4);
- Improving the risk of detection, including developing data-mining, matching and sharing (section 5.5) and inspections (section 5.6); and
- Implementing education and awareness-raising campaigns (section 5.7).

The Member States sampled in this report showed no instances of measures improving the ease and benefits of engaging in declared work through demand and supply side initiatives aimed at TWAs, TAWs and/or user undertakings or measures aimed at modernising enforcement authorities (defined as customer-friendly initiatives and better information on the work of enforcement authorities in relation to TAW).

5.4 Cross-border data and knowledge exchange between enforcement authorities to prevent and sanction fraudulent agency work

Examples of data and knowledge exchange between enforcement authorities were identified between France and Bulgaria, France, Portugal and Romania, and Romania and the UK. These examples highlight the value of concrete and practice-oriented exchanges between the authorities, enabling them to develop a better understanding of each other's TAW regulatory framework, operational systems and procedures, leading to joint inspections and better targeting of FAW. In general, the data and knowledge exchanges related to the overall functioning of TAW and a range of violations in the spectrum of FAW (including FAW prompting undeclared work).

One example of cooperation is the joint work between the enforcement authorities of **France and Bulgaria** (Stefanov et al., 2019b). This was in the context of significant flows of agency workers between the two countries. In 2017, 4 % of posted workers in France were Bulgarian (20 513), mainly working in agriculture (67 %). Half of the Bulgarian TWAs posting workers abroad posted to France. Authorities in both countries detected various violations of workers' rights and potential social dumping associated with these postings. In one specific case, Bulgarian workers sent to work in France via a letterbox company raised concerns with the General Labour Inspectorate in Bulgaria about outstanding wages and social security contributions. The Bulgarian authorities requested information about the case from their French colleagues over the IMI system and by telephone. They then conducted inspections in the sending company, registered in Bulgaria and in France. As a result, the French authority collected evidence to begin penal proceedings. They were able to prove that no such sending company was officially registered in Bulgaria and that the receiving French company was fraudulent. This allowed authorities to fully inform the workers of their rights, while the French and Bulgarian inspectors increased their understanding of the administrative processes and documents necessary to pursue a more efficient case in each country.

The labour inspectorate in **France** provides several examples of collaboration between the inspectors, based on a transparent and institutionalised procedure – correspondence networks of neighbourhood (*reseaux de correspondance de proximité*). In 2018-2019, this special relationship concerning TAW was established with Portugal and Romania, through staff visits organised under the Platform. The meetings were triggered by an increase in the number of TWAs from these countries operating in France. The visits provided space to better understand the TAW regulatory framework and facilitated exchange of information on available TWA registers, licensing/certification procedures, annual reporting and financial guarantees required. This basic information speeds up the verification process of TWAs operating in another country. In the case of the French-Romanian exchange, the visit also yielded an agreement on improvements in the future cooperation via IMI (e.g. setting up a conference call before sending a request via IMI) (European Platform tackling undeclared work, 2018a and 2019a).

In fighting FAW at cross-border level, the Romanian Labour Inspectorate relies on cooperation with other Romanian institutions (see Box 8) and the enforcement authorities of other Member States. The Inspectorate has also experience in both preventive and deterrence measures against FAW. The **Romanian Labour Inspectorate also had cross-border cooperation with some of the UK's enforcement authorities** (see Box 10).³⁸ That cooperation included an exchange of experiences, inspectors and information on the nature of labour inspections and identification of fraudulent TWAs in both countries. This created an understanding of how both institutions work and led to inspections based on sharing of information and experiences.

³⁸ The UK has no labour inspectorate as such. Rather, different agencies or authorities have enforcement powers over different labour issues like temporary work. Among them are the Employment Agency Standards Inspectorate, the Gangmasters Licensing Authority, and the HMRC.

Box 10. Cross-border cooperation between the Romanian Labour Inspectorate and Her Majesty's Revenue and Customs (HMRC) in the UK (acknowledging the future of Brexit), towards tackling FAW

Aim:

Establish long-term cooperation between the two authorities with the aim of improving their mutual knowledge and capacity in tackling FAW.

Description:

The Romanian Labour Inspectorate and the HMRC sought to develop strong cooperation in the area of tackling FAW.

The primary driving factor for this cooperation was an increase in the TWAs registered in Romania sending workers to the UK. The Romanian companies recruiting workers and sending them to the UK are required to have a UK licence. The Romania uses the IMI system to provide its colleagues in the UK with the necessary information on companies registered in Romania.

In addition to the IMI information exchange, the two authorities have engaged in concerted and joint inspections. The Romania participated in joint inspections organised by the HMRC in the UK. The two authorities have also exchanged inspectors for training purposes, with the objective of providing them with the necessary cross-border practical knowledge and experience for tackling FAW.

There has been no formal evaluation of the cooperation practice, but Romania notes that this long-term cooperation has allowed both authorities to get to know each other's methods of work, resulting in faster cooperation.

Source: Stakeholder interviews; Romanian Labour Inspectorate (2019). Labour Inspectorate Annual Activity Report 2018.

Joint actions and staff exchanges organised under the Platform contribute to a greater understanding of TAW regulations. In particular, information on the national registers of TWAs allows enforcement authorities to swiftly and independently check the legitimacy of foreign TWAs operating on their territory.

Staff visits organised under the Platform can also provide an inspiration for practical tools and approaches in the fight against cross-border FAW. In 2019, representatives of the **Polish Labour Inspectorate** visited **the Netherlands** to gain knowledge of the procedures and tools used to check the legality of work of EU nationals and third-country nationals who take up employment through TWAs. As over one-third of temporary agency workers in Poland are from Ukraine, enforcement authorities considered the dial-in interpretation services used in the Netherlands particularly useful. In recent years, Polish enforcement authorities have reported more cases of workers employed by Ukrainian or Belarusian companies and posted to work for Polish TWAs. The Polish enforcement authorities were thus keen to become familiar with the inspection methodology and compliance checks with Directives 96/71/EC and 2014/67/EU for workers employers based in another Member State or outside EU/EEA and Switzerland.

5.5 Cross-border sanctions for fraudulent agency work

Sanctions are an important deterrence measure to tackle fraudulent cross-border activity of TWAs and user undertakings. However, they are not used very often in cross-border contexts and the ability to issue them depends on the degree of cooperation between enforcement authorities across the different legal jurisdictions. Usually, cross-border sanctions relate to fraudulent posting situations and enforcement authorities use the specific IMI module to cooperate with colleagues in another Member State (Williams, 2019). Information about sanctions issued to TWAs and/or user companies was not widely available across the sample of countries analysed here.

Concrete examples in the framework of **Belgium-Netherlands** cooperation (see Box 7) showcased some examples of sanctions applied to the fraudulent use of TAW in the cross-border employment situations, as follows:

- Fictitious employment relationships: One joint inspection found that workers in Belgium (mainly Bulgarians) were registered with the Dutch Tax Administration as self-employed without staff. In reality, they were employed as temporary workers. This joint inspection led to tax corrections and collections in the Netherlands and withdrawal of A1 returns.
- Fraudulent TWAs not complying with the registration requirements: Several TWAs did not comply with the current legislation in either Belgium or the Netherlands. As a result of the joint investigation, one TWA in Belgium was fined for non-compliance with registration requirements.
- Social benefit fraud: the investigations detected large-scale social benefit fraud. Workers in Belgium generally received social security benefits in the Netherlands. This was a UWV allowance (unemployment or incapacity to work and/or assistance allowance for a communal social service (often The Hague)). There were no payroll tax returns and social security contributions had been evaded. At the time of research, appropriate sanctions were considered.

5.6 Joint /concerted inspections and institutionalised bilateral cross-border cooperation between enforcement authorities

A number of examples of joint inspections and institutionalised cross-border cooperation structures were identified, in particular between Spain and Romania, Belgium and the Netherlands. Such joint enforcement-oriented activities have brought a range of benefits to both sides – revealing the specific characteristics of FAW, the concrete challenges of enforcing the regulatory framework, and demonstrating the scale of tax and social fraud through concrete experience. In general, such activities were related to the overall functioning of TAW and a range of violations in the spectrum of FAW (including prompting undeclared work).

The Spanish Labour Inspectorate (ITSS) invited Romania to carry out a joint inspection during the garlic harvesting campaign in the Spanish province of Albacete from 1-4 July 2019 as part of the staff learning visits and joint action activity of the Platform. The primary focus was on Romanian agricultural workers working in the Spanish province to detect possible infringements concerning undeclared work, labour, social security and occupational safety and health (OSH) regulations. The joint inspection activities covered the issue of TAW. Participation of the Romanian enforcement authorities in the joint inspection provided valuable information on the TAW regulations in Romania. During the visit, the employment status of workers was checked and interviews were conducted with two Spanish TWAs and their users. However, the staff visit did not specifically detect cases of undeclared work performed by temporary agency workers, whilst other important results were achieved (European Platform tackling undeclared work, 2019b).

Cross-border inspections of FAW can require additional tools, such as multilingual questionnaires (legally accepted in both countries and standardised with typical questions); tablets or phones for translation; or handbooks that outline legislation and the targets for inspections. The **Belgian** and **Dutch** authorities, for example, have a common handbook on TWAs (see Box 11, (Stefanov et. al. 2019b)). These tools require IT and language skills, as well as shared access to the latest company data in social security/tax/business registers. They may also require additional skills within the inspection team. The Belgian-Dutch cooperation arose in the context of significant cross-border flows of workers taking advantage of the freedom of movement principle. To some extent, such workers (cross-border commuters, international transport drivers, employees working simultaneously in more than two Member States, posted workers) were working fraudulently, using TWAs

that were neither registered nor licensed by the national authorities.³⁹ This allowed them to bypass the national regulations affecting TWAs and the regulations on the posting of workers. The practical cases showed that it was often difficult to differentiate between the abuse of rules relating to the TAW regulations and those relating to the posting of workers. In a number of cross-border cases where infringements were uncovered on a case-by-case basis, FAW and the abuse of workers' rights in posting situations often went hand-in-hand.

Box 11. Benelux Working Group on FAW

Aim:

In Benelux, in 2013, a working group was established, focusing on FAW and developing an action plan to coordinate cooperation between the different national authorities.⁴⁰

Description:

This cooperation was underpinned by the Benelux Joint Declaration on cooperation in the fight against social dumping (13 February 2014), as well as the Recommendation of the Benelux Committee of Ministers (23 September 2015), relating to the development of multilateral cooperation in the fight against social fraud at Benelux and European level.⁴¹ The Directive on the posting of workers and the Enforcement Directive also formed a legal basis for cooperation and exchange of information. The cooperation strategy of the three countries is based on the duty of good mutual assistance in cross-border monitoring of the Directive on the posting of workers and the TAW Directive .

Over the years, inspectorates of the Benelux countries developed consultation and operational working relationships, focusing on TWAs. This collaboration addresses legal differences, such as TWAs in Belgium needing to obtain an operating licence but only being obliged to register in the Netherlands.

The Working Group is made up of representatives from the inspection department of the Dutch Ministry of Social Affairs and Employment (SZW), the Luxembourg Inspection Service (Labour and Mines Inspectorate), the Belgian Ministry of Employment, Labour and Social Dialogue, and the Inspection and Control Services of the Regions of Belgium (FOD/WASO, *Vlaamse sociale inspectie*, RSZ). Membership has also been extended to the representatives of the Belgian (Special Inspectorate of Taxes) and Dutch tax administrations.

The Working Group meets on a regular basis and has met 12 times between 2015 and mid-2018. One of its core activities – joint inspections between Belgian and Dutch inspectorates – have been taking place for several years. The aim has been to have at least 1-2 annual joint inspections. The group has also developed a manual for joint inspections.⁴²

The subjects of investigation are selected by analysts and operational staff, based on information from the Belgian databases (Limosa and checkin@work) and the relevant Dutch systems. The competent national authorities have also come together to discuss the results of data-mining from the official databases of the registered agencies. Such technical data-mining results have then been used to select TWAs for inspection, including joint cross-border inspection. The Annual Plan 2020 foresees further actions of

³⁹ For example, in Belgium, to register as an agency requires a capital requirement of EUR 75 000, together with the need to be active on the Belgian territory and an obligation to pay a 10 % contribution to the social fund.

⁴⁰ *Coopération du groupe de travail Benelux 'Agences d'intérim frauduleuses' (FR), Samenwerking Benelux Werkgroep Frauduleuze uitzendbureau's (NL).*

⁴¹ A specific chapter on social dumping and fraud was included in the Benelux Treaty and continuous reference was made to the issue in the joint declarations of the prime ministers of the Benelux countries.

⁴² The Benelux 'Roadbook' on cross-border joint inspections of fraudulent TWAs. The 'Roadbook' is a template that specifies the legal and operational aspects of each individual inspection. It starts with an agreement on target companies, based on risk analysis and data-sharing. It also contains user-friendly information about the relevant legislation in each country and the competences of all parties involved in the inspection. The Roadbook lists the team leaders in each country, the aims and detailed information on coordination on the day of the inspection. As a result, it helps to increase understanding of foreign regulations and establishes a procedure for well-prepared cross-border inspection activities (European platform tackling undeclared work, 2019).

the relevant administrations, in a bid to deepen the exchange of data as part of a pilot project to detect fraud on unemployment benefits.

During the period 2015-2019, a series of joint inspections were carried out

Such joint inspections revealed certain characteristics of FAW, such as several types of fraud occurring in parallel to FAW, including fictitious employment relationships, TWAs that do not comply with the legislation in either Belgium or the Netherlands, and large-scale tax and social fraud.⁴³

Source: Stakeholder interviews; European Platform tackling undeclared work (2019c). Good practice fiche – Belgium: Roadbook for joint inspections by Belgian and Dutch enforcement authorities tackling undeclared work.

This example of cross-border action demonstrates the successful development of a permanent cooperation platform, supported by the Benelux secretariat, where joint cross-border inspections yield useful results each year. The model is strongly operational and mutually beneficial, highlighting the European added value of cross-border cooperation.

Another successful experience was presented in the thematic review workshop, where **Norway** highlighted the benefits of developing cross-border cooperation with enforcement authorities from Lithuania, in order to tackle fraudulent agency work through a bilateral agreement and concerted action on both sides (see Box 12). This resulted in the fraudulent agency ceasing its activities in Norway and a significant rate of conversion of undeclared work to declared jobs.

Box 12. Tackling undeclared agency work in the cooperation between Norway and Lithuania

The joint action taken by Norwegian and Lithuanian enforcement authorities related to a case from the fish processing industry in Northern Norway (see also Box 9). In 2019 a temporary work agency from Lithuania was involved in a range of fraudulent behaviours, including undeclared work.

Acting alone, the Norwegian labour inspectorate faced several challenges to detect and sanction the fraudulent behaviours. The Lithuanian workers were instructed to lie to the authorities during inspections regarding the working hours and salary per hour. The inspectors faced language problems in conversations with the workers, who were afraid to talk and to tell the truth. The inspectors also discovered that the cash flow goes to bank accounts in Lithuania which cannot be verified by Norwegian authorities. The persons behind the TWA system are not in Norway and nobody knew anything about the persons registered as the TWA-owners. During inspections, the TWA provided the Norwegian authorities with false timesheets from Lithuania which showed very low income registered, which is clearly a case of undeclared work harming both workers and society.

In 2017, Norway signed an agreement of cooperation with Lithuania (and five other countries) which was funded by EEA grants. The labour inspectorate from Norway had a designated contact person in the Lithuanian labour inspectorate who agreed to cooperate in this case.

This case started in the winter of 2019, and is still, at the time of the thematic review workshop, being processed by tax and police authorities. The Norwegian labour inspectorate visited Lithuania to discuss the case with its Lithuanian counterparts. There was also visit from Lithuanian tax authorities in Norway. A concerted inspection was conducted. The Lithuanian labour inspectorate inspected two of the TWA agencies, and ensured that documents made available for Norwegian labour inspection. This allowed for better control of contracts, timesheets, pay-slips, accounting, ownership, and

⁴³ See also: Dutch Inspectorate of Social Affairs and Employment (2019). State of decent work 2019 – risks at the bottom of the labour market.

addresses of TWA owners. An important discovery was when the «hidden» main company behind the TWAs in Lithuania «surfaced» and contacted the inspectors.

As a result of the bilateral cooperation, the fraudulent agencies ended their activities in Norway. Some of the workers were employed by the Norwegian fish plant, thus entering declared employment (from approximately 60 workers in each of the TWA involved, around half transferred into declared jobs). In addition, other sanctions/actions were taken, such as administrative fines to the Norwegian fish plants: EUR 25 000 and EUR 45 000 (appealed). The Norwegian labour inspection filed report to the Norwegian police regarding the Lithuanian TWAs (which was in process at the time of the workshop). Norwegian tax authorities also filed a report to the Norwegian police regarding the Lithuanian TWAs (also in process).

5.7 Cross-border awareness-raising campaigns

Cross-border campaigns to inform (potential) temporary agency workers of the risks and costs of working undeclared were identified, initiated by both the sending (e.g. Poland, Romania) and receiving countries (the Netherlands). Such campaigns covered a whole range of subjects relating to workers' rights and obligations, as well as the working conditions when working in another country. The topic of working legally and safely via TWA was also included in such campaigns, as a separate issue.

In tackling FAW, the Romanian Labour Inspectorate cooperates with **other Romanian institutions and authorities abroad**, primarily the Ministry of Romanians Abroad and the Romanian embassies in other Member States. In 2018, the awareness-raising campaign 'Information at home! Safety in the world' was organised by the two institutions (see Box 13).

Box 13. National Campaign 'Information at home! Safety in the world', Romania

Aim:

Inform Romanian citizens about the risks they may be exposed to when pursuing work, education or other opportunities abroad.

Description:

In 2018, the awareness-raising campaign 'Information at home! Safety in the world' was organised by the Ministry of Romanians Abroad, with the support of the RLI. The campaign targeted Romanian citizens, including pupils, students, teachers and school principals, before their departure to another European country.

The campaign included information, on the fraudulent job matching services and placement abroad by TWAs, as well as the risks to which Romanian citizens may be exposed when looking for a job abroad. Due to the numerous instances of undeclared work, trafficking and labour exploitation through TWAs, and due to its status as a (primarily) sending Member State, the Romanian authorities took steps to inform and protect citizens willing to work abroad. Information included the situations and conditions to avoid, workers' rights in other Member States, and the authorities that can help Romanian workers experiencing undeclared or fraudulent working conditions abroad.

Figure 11. 'You found a job that could interest you? Watch out for possible "TRAPS"!'



Source: Campaign 'Information at home! Safety in the world!'

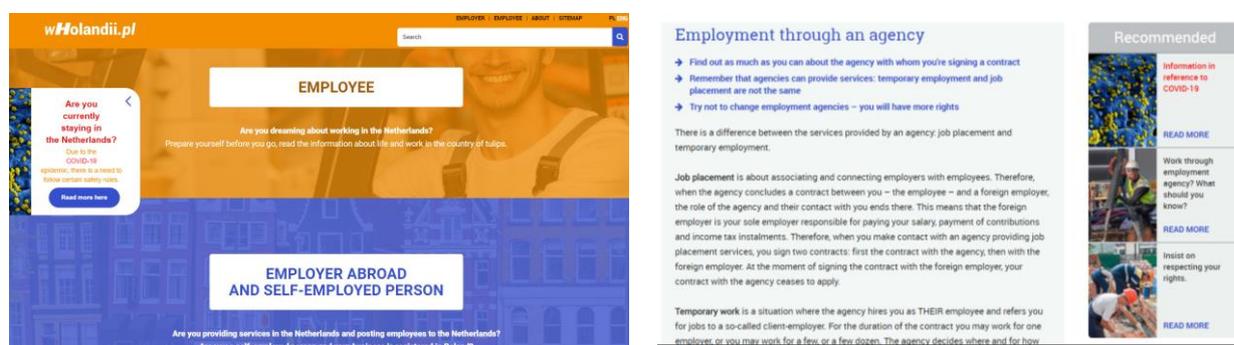
The awareness-raising activities included dissemination of brochures, provision of information, and organisation of events across all regions in Romania. Information events were supported by labour inspectorates and police. At cross-border level, the Ministry of Romanians Abroad provides information on its website and through a 24/7 phone line, which was set up to give advice to Romanian citizens residing and working in another Member State. The Ministry advises people in exploitative or fraudulent situations about the Member State authorities or Romanian representatives (embassies or centres) they should contact. The Ministry also cooperates with the Orthodox Church to reach out to the Romanian diaspora.

Although the evaluation of the campaign is not publicly available, it was considered a success at the launch of its third edition in 2019. According to the National Agency Against Human Trafficking, the campaign contributed to decreasing human trafficking cases in Romania. There were also plans to expand the campaign to Moldova to respond to the needs and requests from its Romanian minority.

Source: National campaign 'Information at home! Safety in the world!' (2019). Romanian national news agency (9 April 2019)

The portal 'In Holland' is an interesting example of an initiative of a receiving country to inform the citizens of main sending country about their rights and obligations in the foreign labour market. The website is an initiative of Embassy of the Kingdom of the Netherlands in Warsaw, targeting Polish citizens either considering or already working in the Netherlands. It includes pages (in Polish, thus accessible directly to the target audience) dedicated to employment through a Polish or Dutch employment agency and information for employers posting workers.

Figure 12. Website for Polish citizens considering or already working in the Netherlands (available in Polish and English)



Source: wHollandii.pl

6 A COMBINATION OF SUCCESS FACTORS TO FIGHT FRAUDULENT AGENCY WORK



Successful prevention, deterrence and detection of FAW at national level builds on a combination of factors:

- **Strong political support for the fight against FAW:** a well-developed regulatory and legislative framework closing possible loopholes, supported by consistent political attention and spotlight on FAW, either as a standalone issue or in the context of other anti-fraud priorities.
- **Involvement of social partners:** tripartite cooperation with cross-border and TAW social partners and *bona fide* agencies is crucial. Social partner involvement can take a variety of forms, including formal agreements with enforcement authorities, developing direct mechanisms for reporting violations, sharing of intelligence and regular exchange of views and experiences.
- **Sectoral focus and targeted initiatives to fight FAW:** a small proportion of TWAs are involved in FAW, thus a targeted risk-based approach using up-to-date intelligence (including insights and information from sectoral/cross-sectoral social partners) is most effective, as it allows targeting of those sectors where FAW is more common.
- **Awareness-raising campaigns:** Workers exposed/potentially exposed to TAW should be aware of the risks and their rights, as should the general population. FAW should receive appropriate attention to help to change attitudes and broaden knowledge of temporary workers' rights.
- **Adequate capacity and resources for enforcement authorities:** TAW is often very complex (especially in a cross-border context) and significant resources are needed to develop adequate and appropriate measures.



Successful **cross-border cooperation** depends on a number of factors:

- **Political will and attention to the issue of FAW and social fraud across cooperating Member States** is important to stimulate fruitful cross-border cooperation tackling the complex issue of FAW. Where this political willingness exists, enforcement authorities have found it easier to establish the appropriate cooperation channels and structures.
- **Institutional capacity to engage in joint cross-border cooperation activities and carry out joint inspections:** enforcement authorities on all sides need to have the necessary human and financial resources and capacity to plan, execute, and follow-up the results of the cooperation activities in addressing FAW. Where enforcement authorities lack the capacity to engage in complex activities relating to FAW, the cross-border cooperation in tackling FAW tends not to advance.
- **Appropriate resources and personnel** allocated to the cooperation structures is crucial. Such cooperation requires a coordinated and sustained effort over time, and must seek to fully understand the complex institutional landscapes on both sides, as well as the existing regulatory framework in relation to TAW. The development of such in-depth understanding of each other's contexts takes time and should be sufficiently planned and resourced.
- **Awareness and attention to the practical aspects:** access to and sharing of data across borders has been found to be a critical success factor in ensuring successful cooperation on the ground. Sharing information about national TWA registers, for example, was found to be especially useful in the information exchange.

7 CONCLUSIONS AND WAYS FORWARD

At 2.1 % of total employment, work through TWAs has become an increasingly established feature of the European labour market (Eurostat, 2020). The TAW industry is fragmented, with several global private recruitment agency brands, alongside a multitude of smaller, local or regional agencies. This creates a considerable challenge for enforcement authorities. Across the EU, many TWAs and user undertakings are compliant with the legal framework rules and are not involved in facilitating undeclared work. This report focused solely on TWAs and user undertakings that do *not* comply with existing regulations.

At the same time, TAW is considered a risk sector in terms of prompting undeclared work, due to the competitive price pressures on labour costs, the relatively more precarious nature of temporary employment, and the complex and opaque subcontracting chains involved.

FAW prompting undeclared work occurs at both national and cross-border level. Often, undeclared work in TAW appears to occur alongside other violations of the regulatory framework, such as failing to treat temporary agency workers the same as other employees, abusing the posting of workers rules or health and safety rules. However, robust evidence is lacking on the scale of the problem and its characteristics, notably whether the problem is primarily a case of under-reporting wages by legitimate workers, user undertakings and/or temporary work agencies, or whether unlicensed/unregistered workers, user undertakings and/or temporary work agencies are common.

At both national and cross-border level, the fight against FAW prompting undeclared work takes place within the broader framework of tackling a wide range of potential fraudulent and abusive behaviours associated with TAW (e.g. tax or social security fraud, abuse of the posting of workers rules).

Looking ahead, there is potential for EU added value in optimising the fight against FAW, given its cross-border nature and the potential for sharing best practice across Member States. Concrete actions and further learning could usefully incorporate the following actions by the key stakeholders.

Enforcement authorities

At national level, the statistical data infrastructures of enforcement authorities could be finetuned to capture the dimension of FAW prompting undeclared work more precisely.

Future practical exchanges between enforcement authorities to tackle FAW prompting undeclared work could centre on:

- Concerted inspections of both TWAs and user undertakings;
- Effective implementation of joint liability schemes (wages, taxes, social security contributions) for all levels of a chain, in particular the user employers;
- Effective licensing and registration conditions for TWAs and the impact of enforcement in driving compliance;
- Supporting the development of tripartite collaboration agreements with social partners and enforcement authorities, and self-regulation by social partners (e.g. creation of a quality label for bona fide TWAs);
- Examples of name-and-shame measures used to tackle FAW, including their effectiveness and lessons learned;
- Practical application of Article 4 of the Enforcement Directive on the posting of workers in the case of non-genuine posting (through correction of the labour relationship, with direct effects on the user employer);
- Analysing whether and in which ways a national level system for compulsory registration of temporary work agencies can facilitate a better overview and control over the existing agency market

- Further strengthening national authorities' capacity and capability in matters of data sharing and data mining, including at the cross-border level. New solutions could be considered to capture the bogus agencies which are not registered in the official systems of enforcement authorities (examples referred to the media analysis or social media outreach to workers).

EU level

- From an institutional perspective, an effective fight against FAW requires robust knowledge and exchange of information between the enforcement authorities and other stakeholders, such as national and European sectoral social partners, national authorities responsible for granting licences and overseeing the agencies, as well as tax, social security and other relevant institutions. The ELA and the Platform could further promote such approaches.
- To know more about the problem of fraudulent agency work, further research would be needed to assess the magnitude and characteristics of the problem to estimate its importance and relevance as an issue of concern. Important aspects to investigate relate to the need to understanding the different types of fraudulent temporary agency work, evaluate and analyse the benefits and costs of the agency registration and certification and other effective practical tools, and identify good practices tackling fraudulent agency work, which are transferable to other contexts.
- In practical terms, actions could be operationalised in several ways. One avenue could be to organise a TAW national action day simultaneously across the Member States, to raise awareness and draw attention to the issue. The SLIC has previously run campaigns focused on TWA. For example, a campaign between 2017 and 2019 focused on the health and safety issues faced by temporary agency workers.⁴⁴ There is merit in considering how such campaigns could be extended to other issues affecting temporary agency workers, such as FAW prompting undeclared work, which could then be levelled up by the ELA. Data gaps in measuring FAW prompting undeclared work could be closed at European and national levels. At European level, the future measurements of undeclared work incidence could consider the aspect of TAW.
- Further support could be provided to cross-border cooperation to tackle FAW. This might involve study visits and thematic support for concrete cooperation concepts, such as joint inspections focused more specifically on TAWs, or in specific sectors with a risk of FAW prompting undeclared work. The joint inspection handbook developed by Belgian-Dutch authorities (the Roadbook) could serve as a blueprint for such inspections and could be translated and adapted to other national contexts.
- Support for data exchange between national authorities relating to the detection of FAW within and between Member States warrants further attention. This could take the form of specific supports to identify the concrete data exchange requirements, for example, relating to the rules regulating the registration and licencing of TWAs, modalities of exchange in practice (e.g. which channels to use and how), and ways to ensure the compliance with data protection regulations.
- EU and national authorities could facilitate cooperation between Member States on TAW through the work and activities of the Platform. Material support would be welcome (e.g. joint inspections, preparing inspections, translating documents). In particular, this could involve sharing insights and experiences of applying the practical methodologies to monitor the complex world of TWA, developing targeted data-mining approaches, education, awareness-raising and training initiatives.
- Increased cooperation with neighbourhood countries is particularly deserving of attention, as temporary agency workers are often vulnerable groups of third-country

⁴⁴ <https://www.european-temporary-work-campaign.eu/>

nationals. The Platform/ELA could pair the main receiving countries within the EU and those pairs could then start cooperation efforts with non-EU sending countries.

- Further attention could be dedicated to developing and intensifying cross-border relations between the enforcement authorities with respect to FAW, as this tends to be *ad hoc*. Joint inspections focused specifically on TAW and sectors with a high risk of FAW prompting undeclared work could contribute to creating an effective pan-European network of key enforcement authorities based on cooperation and trust. A more regular programme of Platform-supported study visits could also be helpful here.
- A knowledge database could be developed, containing key elements of Member States' national legislation pertaining to TAW, competences of various authorities, conditions for licence and registration, points of contact, as well as an overview of possible deterrence, prevention and awareness-raising measures and sanctions.
- Another knowledge generation activity could be to establish a centralised 'knowledge bank' of existing TWA national registers (see Table 2 for examples of such registers). This would facilitate rapid access to national registers. Registers of TWAs are usually the first step when verifying credibility of TWAs, including in a cross-border setting. In the short term, the Platform/ELA could compile information for enforcement authorities with links to publicly available TWA registers and provide a compendium of the basic regulatory framework. Over the longer term, the ELA could develop an EU database for enforcement authorities, automatically linked to the national registers and updated automatically.

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ANNEX 1: LIST OF CONSULTEES

Organisation	Country
WEC Europe	EU
Uni Europa	EU
Uni Europa	EU
Eurofound	EU
<i>FOD Werkgelegenheid – SPF Emploi</i>	Belgium
Ministry of Labour, France	France
EURES Services	Italy
Labour Inspectorate, the Netherlands	Netherlands
Labour Inspectorate, the Netherlands	Netherlands
FNV	Netherlands
Labour Inspectorate, Poland	Poland
Labour Inspectorate, Romania	Romania
Labour Inspectorate, Slovenia	Slovenia
Ministry of Finance, Slovenia	Slovenia

ANNEX 2: EU and international legal framework for temporary agency work

This Annex details the legal framework regulating TAW at European and national level, supporting the summary provided in section 2.4.

Directive 96/71/EC on posting of workers in the framework of the provision of services, as amended by Directive 2018/957 (in particular regarding TWA)

Amendments to the Directive on posting of workers have an impact on temporary agency workers. Recital 12 of the Amending Directive 2018/957 makes it clear: 'Directive 2008/104/EC of the European Parliament and of the Council (1) gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. That principle should also apply to temporary agency workers posted to the territory of another Member State. Where that principle applies, the user undertaking should inform the temporary-work agency about the working conditions and remuneration it applies to its workers'.

An important clarification relates to the relationship between Directive 2008/104/EC on temporary agency work and Directive 96/71/EC on the posting of workers. Recital 22 of Directive 2008/104/EC states that it should be implemented in compliance with the provisions of the Treaty on the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC.⁴⁵

The Directive on temporary agency work in principle covers national situations, whereas the Directive on the posting of workers is specifically aimed at cross-border situations. Having said that, the Directive on temporary agency work also fully applies to mobile workers who work in a Member State other than their own as if they were national workers, while the Directive on posting applies solely to posted workers, i.e. workers who, for a limited period, carry out their work in the territory of a Member State other than the State in which they normally work.

The ILO regulation of TAW: the Private Employment Agencies Convention, 1997 (No. 181)

Where Directive 2008/104/EC puts forward the principle of equal treatment (with some possible derogations), the Convention wants the authority to take measures to ensure 'adequate protection' for the workers employed by (genuine) TWAs (Article 1, paragraph 1B), in relation to a number of stated issues, such as: collective bargaining, minimum wage, working time and other working conditions, statutory social security benefits, access to training, occupational safety and health, compensation in case of occupational accidents or diseases, maternity protection, etc. Article 12 states that these issues should be taken care of by the agency and/or by the user employer. The Private Employment Agencies Recommendation, No. 181 (1997) supplements the basic conditions of the Convention and provides more detail for the adoption of measures.⁴⁶

The scope of Convention No. 181 is much broader than that of Directive 2008/104/EC. The former addresses 'private employment agencies', while the Directive targets classic triangular relationships between TWAs, temporary workers and user employers. A 'private employment agency' comprises:

- a) Services for matching offers and applications for employment, without the private employment agency becoming a party to the employment relationships that may arise therefrom.
- b) Services consisting of employing workers with a view to making them available to a third party, which may be a natural or legal person (referred to below as a 'user

⁴⁵ Report from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, {SWD(2014) 108 final.

⁴⁶ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R188

enterprise') and which assigns their tasks and supervises the execution of those tasks.

- c) Other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organisations (e.g. the provision of information) that do not set out to match specific offers and applications for employment.

For the purposes of the Convention, the term 'workers' includes jobseekers.

There are some differences, as certain provisions of the Convention regulate issues that are not covered by the Directive:

1. The legal status of private employment agencies shall be determined in accordance with national law and practice, and after consulting the most representative organisations of employers and workers. However, Article 56 TFEU (freedom to provide services) is applicable in this case and could have an effect (see C-397/10 *Comm v Belgium*).
2. A Member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice. The Directive states only that the conditions for a licence or certification fall outside its scope (thus referring to national legislation).
3. Possibly relating to undeclared work: a Member shall adopt all necessary and appropriate measures to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that provide for penalties, including prohibition of those private employment agencies engaging in fraudulent practices and abuses. Such a restriction will, however, have to comply with the conditions of general interest foreseen in Article 4(1) of the Directive.
4. Where workers are recruited in one country for work in another, the Members concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment.

The following EU Member States have ratified the Convention (as at end May 2020):

- Finland – 25 May 1999;
- Spain – 15 June 1999.
- Netherlands – 15 September 1999;
- Italy – 1 February 2000;
- Czechia – 9 October 2000;
- Portugal – 25 March 2002;
- Hungary – 19 September 2003;
- Lithuania – 19 March 2004;
- Belgium – 28 September 2004;
- Bulgaria – 24 March 2005;
- Poland – 15 September 2008;
- Slovakia – 22 February 2010; and
- France – 28 October 2015.

Case-law on TWA

In its first judgment from 17 March 2015 on the Directive on temporary agency work (C-533/13 *AKT*), the CJEU gave its interpretation of **Article 4** of Directive 2008/104/EC.

It is now clear that Article 4 only obliges Member States to review potential prohibitions or restrictions on the use of TAW, rather than to amend its legislation. The Court also guaranteed the right of the social partners to regulate the use of TAW in collective agreements. It stated that Article 4(1) does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of TAW that are not justified on grounds of general interest within the meaning of Article 4(1). The questions asked in the preliminary ruling did not refer to the compatibility of any national restrictive rule with Articles 49 and 56 TFEU (freedom of establishment and freedom to provide services, respectively). Recital 22 of Directive 2008/104/EC states: 'This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services', meaning that national prohibitions contradicting these provisions could always have been challenged on this ground.

In [C-397/10](#), the CJEU ruled that **Belgium** failed to fulfil its obligations under Article 56 TFEU by making TWAs providing their services in the territory of the Brussels-Capital Region subject to the requirement to:

- Have as their sole business activity the provision of workers; and
- Have a particular legal form.

Case-law on TWA in the framework of posting

In the case '**Essent**', the CJEU ruled that 'Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which, where workers who are nationals of non-member countries are made available by an undertaking established in another Member State to a user undertaking established in the first Member State, which uses them to carry out work on behalf of another undertaking established in the same Member State, such making available is subject to the condition that those workers have been issued with work permits'. Although this case related to subcontracting (and not TWA or Directive 2008/104/EC), the circumstances showed a hiring-out directly from one commercial service provider to another. A TWA providing the same workforce could hypothetically have been considered, without altering the meaning of the judgment.

In [C-18/17](#) (*Danieli and Other*), the CJEU clarified the relevance of European law in determining the rules applicable to atypical '*posting arrangements*' (in the context of complex cross-border subcontractors and hiring-out of third-country nationals).

Pursuant to Articles 56 and 57 TFEU, interpreted in the light of settled case-law, and considering the transitional provisions annexed to the 2012 Act of Accession, the CJEU ruled that:

- The work permit requirement imposed on Croatian nationals can be justified (the referring Court shall ascertain whether the activities carried out justify such a requirement); and
- Articles 56 and 57 TFEU interpreted in the light of settled case-law (*Essent*), preclude Austria from requiring a work permit for third-country nationals.