

Thematic review workshop:

Platform thematic review workshop: Methods and instruments to gather evidence of undeclared work

Prague, Czechia, 25-26 October 2023

EXECUTIVE SUMMARY

This Platform thematic review workshop provided participants with an opportunity to deepen their understanding of the methods and instruments to gather evidence of undeclared work. The workshop brought together 27 participants from 15 different countries, representing labour inspectorates, social security institutions, social partners, and governmental organisations. The event was also attended by representatives of the European Labour Authority (ELA), thematic experts and members of the Platform support team. Participants exchanged good practices, identified aspects that could be transferred to different settings and explored how the challenges involved could be overcome.

Introduction to the theme of the workshop



Representatives of ELA welcomed participants and, after stressing that mutual learning is one of ELA's most important activities, noted that the aim of the thematic review workshop was to provide an opportunity to exchange practices, identify aspects that could be transferred to different settings, and to deepen understanding of the methods and instruments to gather evidence of undeclared work. Participants were also reminded that the thematic review workshop is based on the study on 'Methods and instruments to gather evidence of undeclared work' which was shared with all the participants ahead of the workshop.

A welcome speech was also given by a representative of the Ministry of Labour and Social Affairs from the host country who stressed the importance of mutual learning and how this can be converted into measures to improve tackling undeclared work. It was also mentioned that legislative changes are currently taking place in Czechia.

The thematic expert presented the main aspects of the discussion paper and focused on i) the types of evidence gathered by labour inspectors and enforcement authorities to prove the different types of undeclared work (i.e. unregistered employment, under-declared employment, or bogus self-employment); ii) the common challenges when gathering evidence to prove undeclared work, including how these challenges have been overcome in other Member States; iii) the common reasons for appeals and/or lack of success in proving the existence of undeclared work in court; and iv) the legal presumptions applicable to tackle undeclared work established by law in the different Member States.

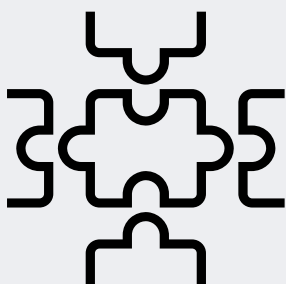
Presentation from the host country on the evidence types that are used to prove undeclared work that might potentially be transferable to other countries



After presenting the legal framework to tackle undeclared work in Czechia, how inspections are conducted, and the type of evidence used, the participants from the host country focused on the challenges in collecting evidence of undeclared work. A current phenomenon is the lack of cooperation of employers as fines are not very severe. Another current challenge is disguised employment, namely the practice of employers to conclude employment contracts with their employees and pass them over to another employer. The importance of the collaboration with other authorities, including trade unions and NGOs, was stressed for a high success rate of inspections.

Questions from participants sought clarification on whether photos can be taken, and videos and recordings made during inspections and whether authorisation is needed. It was explained that the law establishes that no one can take photos or make videos or recordings without authorisation except for labour inspectors and other enforcement authorities. Hence, these instruments are used to prove undeclared work and are normally accepted in courts.

Evidence types gathered to prove undeclared work



Participants from two Member States presented the types of evidence used as proof of undeclared work in their respective country.

- ▶ **Slovenia** mostly focuses on detecting unregistered employment. They explained that the data of the Fiscal Cash Register, whose purpose is the prevention of tax evasion and fraud, is used to detect unregistered employment. More specifically, every taxpayer (business subjects) using cash transactions must issue and validate an invoice for every performed transaction by using Fiscal Cash Register. The 'operator' data (i.e., the tax number of the employee) and the information on the business premises are stored in the system and analysed. An alarm is triggered when a few irregularities are detected such as the employee's tax number is incorrect or does not exist or the employee is not registered as the company's employee. If undeclared work is detected, a fine is issued by the financial Administration and the case is given to the labour inspectorate. The Postal Order pilot project aimed at detecting taxpayers who receive a large number of payments via postal orders without having a registered activity was also presented. Finally, it was explained that employees can be fined if they work without an employment contract and do not report the employer for undeclared employment.

- ▶ **Latvia** explained that the types of evidence which can be used to prove undeclared work include documents containing information on facts, information and documents provided by persons, and information on facts which have been recorded at the workplace. The rights of inspectors are established in the State Labour Inspectorate Law which gives labour inspectors the right to inspect, interview people, inspect documents, and request that employers, employees and other persons present a personal identification document or a driving licence, or an employee's certificate. The law also allows inspectors to take photos and make audio and video recordings, but employees need to be informed in advance. Statements/ testimonies of employees and other persons can also be used. It was also stressed how IT tools and information gathered through databases, registries and other systems facilitate the detection of undeclared work.

Questions sought to understand how legal sanctions are imposed on the offender if there is no legal entity in Slovenia. It was explained that much depends on whether there are bilateral agreements in place. If not, it might be difficult to impose sanctions to a legal entity established abroad. Clarification was also sought on the fine which can be imposed on employees in Slovenia who do not report their employer for illegal employment. However, it was explained that they are currently in the process of eliminating such fines.

Working Group Discussion I: sharing learning on the types of evidence gathered to prove (i) unregistered employment, (ii) under-declared employment, and (iii) the misclassification of a dependent employment relationship as self-employment (i.e. bogus self-employment)



During the working group discussion, participants shared experiences on the types of evidence gathered in their respective countries to prove undeclared work. Points included:

- ▶ For unregistered employment, **workers must be seen at the workplace.**
- ▶ **CCTV recordings, videos and photos** can be used as additional evidence. In **Greece**, photos can be taken only under certain conditions, e.g., if inspectors need to prove the identity of the worker.
- ▶ **Drones** during inspections can be used.
- ▶ For platform workers such as **food delivery workers**, who do not have a **workplace, a magnitude of information must be collected** to prove undeclared work.
- ▶ For **delivery platforms, packing tracking data** can be used to detect undeclared work.

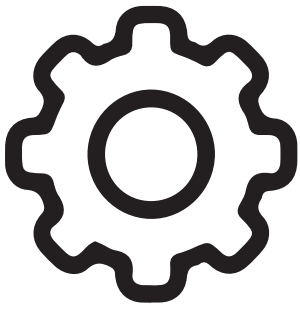
- ▶ **Company uniforms** and/or **equipment** indicate an employment relationship, however in case of bogus self-employment also **other attributes of dependence** might need to be proven.
- ▶ **Digital cards and chips** that record entrance and exit from the workplace can be used in **Belgium, Czechia, Greece** and **Lithuania**.
- ▶ **Working time schedules**, in particular for under-registered employment, are used in **Belgium, Greece** and **Lithuania**.
- ▶ **Bank transfers** can be accessed through the labour prosecutor. Bank transfers can be accessed only by the Immigration Services in **Finland** and the Financial Police in **Greece**.
- ▶ To prove **bogus self-employment, a set of criteria** such as the existence of a workplace, whether the equipment is provided by the employer, if the worker performs work for other entities are all factors used to prove the existence of an employment relationship.
- ▶ **Inspectors' statements** are used in **Portugal**.
- ▶ The **complete description** in the enforcement reports of the act by which the offense was committed, the specification of the offender, the place and time of the offence, and the method of committing the offence is crucial to prove undeclared work.
- ▶ For **telework**, inspectors do not have the means to check the actual working hours as they cannot access private property. Digital cards are planned to be used also for this purpose.

Presentation from the host country on the challenges in gathering evidence to prove undeclared work



The legal framework of 'illegal work' in Czechia was presented. It was explained that the concept of 'illegal work' is narrower than that of 'undeclared work'. As of 1 January 2024, a new definition of 'illegal work' will enter into force where the duration of the work performed will become irrelevant for the work to be considered as 'illegal'. The following challenges were discussed when gathering evidence of undeclared work: non-cooperation of the inspected workers, shared controls with customs whose checks are often insufficient, impossibility of questioning witnesses, difficulties in identifying the employer/entity deserving the fine, etc. The types of evidence which could be accepted, and which are not currently accepted were also mentioned. The presentation was concluded with a set of questions for the participants, addressed during the working group discussions.

Sharing learning on common challenges in gathering evidence to prove undeclared work



Participants from two Member States presented the challenges labour inspectors and enforcement authorities face when they gather evidence to prove undeclared work.

- ▶ **Spain** presented the challenges they experience when gathering evidence as proof of under-declared work. It was explained how inspections are conducted and what type of evidence is collected. In Spain, legal presumptions for part-time workers exist as well as a presumption of certainty of inspections. The following challenges were discussed: the right to privacy and data protection issues during inspections, employees are afraid and lie to labour inspectors, employees sometimes are not willing to talk to labour inspectors, refusal to submit any documentation or the documentation is submitted without being signed by the employer or by the employee.
- ▶ **Finland** presented the challenges they experience when gathering evidence as proof of the misclassification of employment as self-employment. The presentation focused on 'light-entrepreneurship' and how this has been used to mask an employment relationship as self-employment, especially in the work performed by foreign workers, through digital platforms and in the construction sector. It was also explained that the employer falsely marketed light entrepreneurship by using invoicing service companies. The challenges in collecting evidence to prove the misclassification of employment as self-employment include: companies present the workers as employees to a main contractor and as light entrepreneurs to labour inspectors, employers talk to each other, use lawyers who know labour law and try to answer in ways to disguise the characteristics of an employment relationship, and refusal of the workers to speak.

Questions sought to understand whether in Finland it is common for employers to be trained on how to answer to labour inspectors. It was explained that this is common as, normally, questions are sent to the employers 2-3 weeks in advance, and they can prepare and hide the truth. One technique used by labour inspectors to unveil the truth is to ask the same questions in different ways.

Working Group Discussion II: sharing learning on challenges in gathering evidence to prove (i) unregistered employment, (ii) under-declared employment, and the misclassification of a dependent employment relationship as self-employment (i.e., bogus self-employment)

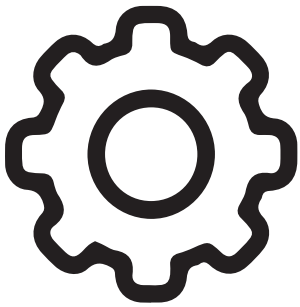


During the working group discussion, participants shared their experiences on the challenges faced when gathering evidence to prove undeclared work. Points included:

- ▶ The **person is not on site or does not appear to be working during an inspection.**
- ▶ Difficulties in accessing **private property.**
- ▶ Lack of clear guidance on when it is possible to use **digital tools** such as WhatsApp, videos, or mobile phones.
- ▶ **Work schedules** are kept by the company and could be **falsified.**
- ▶ The **fine for non-cooperation is much lower** than the fine for the actual violation.
- ▶ **Non-declaring overtime** and hiding payments as bonuses, deposits, balances.
- ▶ **Court cases take too long** (including appeals).
- ▶ **Complex subcontracting chains:** e.g., the company closes down and sends the workers to a second firm, which in turn subcontracts them to a third firm.
- ▶ **Companies use fake uniforms or uniforms of other companies.**
- ▶ **Invoicing service companies,** as inspections focus on the main employer (light entrepreneur in Finland).
- ▶ No cooperation from the employee: **'Today is my first day at work'**.

The questions from the host country were also addressed. These related to the possibility of conducting undercover inspections, to the need of the work to be of a minimum duration for it to be considered illegal, and to the existence of non-compliance lists and whether these were public.

Legal presumptions applicable to undeclared work



Participants from three Member States presented the legal presumptions applicable to undeclared work.

- ▶ **Lithuania** presented the legal presumptions applicable to unregistered employment. In case of unregistered employment, it is deemed that the illegal labour relation has lasted for three months, and that the employee is paid the minimum monthly pay. Among the challenges experienced when using legal presumptions, it was mentioned that often, employers agree to violations and indicate a shorter period of work; and that both employers, employees and institutions specify a concrete period of work which is often shorter than three months.
- ▶ In **Belgium** several legal presumptions exist to combat undeclared work. Work is presumed to have been performed in execution of an employment contract if more than half of the nine listed criteria are met. A rebuttable presumption of employment contact is also established for specific sectors such as construction, the cleaning industry, and now also for activities performed through digital platforms. By a Royal Decree, criteria may also be replaced or supplemented with criteria specific to certain sectors or professions. Presumptions for social security (hence they are not applicable to labour law) exist for a few professions such as artists and sportsmen. The role of the Administrative Committee for the Regulation of the Employment Relationship in qualifying the nature of the employment relationship was also explained. It was clarified that such an assessment is binding, and a request can be submitted before the commencement of the work.
- ▶ **Estonia** presented the legal presumptions applicable to the misclassification of a dependent employment relationship. The presentation focused on the Employment Contract Act § 1 (2) establishing a presumption of employment when the work is performed for another person and, under the circumstances, can be expected to be done only for remuneration. It was mentioned that 241 contracts were misclassified in 2023. One of the challenges discussed was that if there are inspections, employers terminate the contracts and proceedings end.

Questions sought clarification on how it works in Belgium to have legal presumptions which apply to labour but not to social security and vice-versa. Questions also sought clarification on the functioning of the Administrative Committee for the Regulation of the Employment Relationship and its composition.

Working Group Discussion III: sharing learning on legal presumptions established by law on (i) unregistered employment, (ii) under-declared employment, and the misclassification of a dependent employment relationship as self-employment



During the working group discussion, participants shared their experiences regarding the legal presumptions applicable to undeclared work.

- ▶ A round table took place where participants presented the legal presumptions applicable to undeclared work in their respective countries. It emerged that a few countries such as Portugal are in the process of elaborating legal presumptions specifically applicable to tackling undeclared work performed through digital platforms.
- ▶ In **Greece** legal presumptions apply to executive managers. The rationale behind it is that the employees should have a high position to be deprived from some rights such as the right to have overtime.

Closing remarks



Comprehensive conclusions were made covering each of the three sessions of the thematic review workshop.

ELA wrapped up the workshop by drawing attention to the key outcomes and referring participants to the Study on 'Methods and instruments to gather evidence of undeclared work' to get more information about the topic.

Further information: The Thematic Review Workshop was an integral part of a larger mutual learning process among Platform members and observers and provided opportunities for exchange and collaboration. The information from the event will be fed into a Learning Resource Paper.