



Methods and instruments to gather evidence of undeclared work

**Learning resource paper
from thematic review
workshop**

25-26 October 2023



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1.0 Introduction

1.1 Aims and objectives of the thematic review workshop

This learning resource paper builds on discussions at the thematic review workshop on methods and instruments to gather evidence of undeclared work. The workshop, held in Prague on 25-26 October 2023, brought together 27 participants from 15 different countries, representing labour inspectorates, social security institutions, social partners, and other governmental organisations. The event was also attended by representatives of the European Labour Authority (ELA), thematic experts and members of the Platform support team. The workshop enabled participants to exchange good practices, identify key aspects that could be transferred to different settings and to explore how the challenges involved could be overcome.

The aim of the workshop was to fill in the existing knowledge gap on the methods and instruments used to gather evidence of undeclared work. The workshop built on the 2023 European Platform tackling undeclared work (henceforth 'the Platform') study on 'Methods and instruments to gather evidence of undeclared work'.¹

The objectives of the thematic review workshop were to:

- ▶ Identify the **types of evidence** gathered by labour inspectors and enforcement authorities to prove the different types (i.e., unregistered employment, under-declared employment, or bogus self-employment²) of undeclared work in the Member States that might be transferable;
- ▶ Identify the common **challenges** when gathering evidence to prove the different types of undeclared work, including how these challenges have been overcome in other Member States;
- ▶ Explore the common **reasons for appeals** and/or **lack of success** in proving the existence of undeclared work in court; and
- ▶ Share good practices on the **legal presumptions** applicable to tackle undeclared work established by law in the different Member States.

This learning resource paper is structured as follows. Section 1 outlines the background of the theme. Section 2 examines the types of evidence commonly gathered to prove undeclared work and reports the country-specific aspects that were shared during the workshop. Section 3 outlines the main challenges in gathering evidence to prove undeclared work and the strategies to overcome these challenges. Section 4 explores some of the legal presumptions applicable to tackling undeclared work in different countries and examines the potential for sharing good practices between Member States. The concluding Section 5 summarises the key findings of the workshop and develops suggestions on how tackling undeclared work could be improved.

1.2 Background to the theme of the workshop

Until now, knowledge has not been systemically gathered from Member States on the issue of the means and instruments used as proof of undeclared work. Not only has there been limited opportunity for understanding the evidence types used and challenges involved, as well as how these challenges have been overcome but

¹ Stefanov, R., Yordanova, M., Mineva, D., Gerganov, A., Kostova, T. (2023). [Methods and instruments to gather evidence of undeclared work](#). European Platform tackling undeclared work, Bratislava.

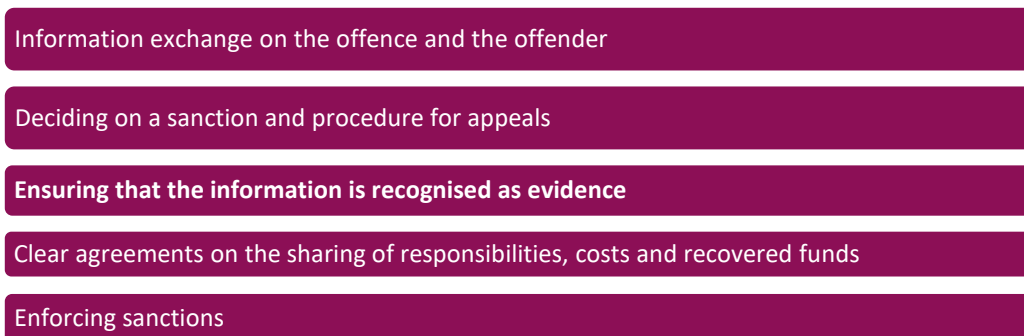
² In this learning resource paper, the misclassification of a dependent employment relationship as self-employment is referred to as 'bogus self-employment'.



importantly, there has been no opportunity for mutual learning on the legal presumptions used in different Member States in relation to different types of undeclared work. The legal presumptions could provide multiple opportunities for Member States to identify interesting/good practices in other Member States that could be transferred to their own. For example, a legal presumption is applied in Greece where if a part-time verbal/written contract is not declared in ERGANI³ within eight days, it is presumed by law as a full-time contract. In Spain, if the contract is not in a written form, the employment contract will be presumed to be for an indefinite period of time and on a full-time basis, unless evidence to the contrary is provided. However, these legal presumptions have been seldom, if ever, documented by the Platform since its formation, despite the potential value for Member States of learning about what others do for transfer to their own Member State. Until now, related previous work that has briefly touched upon this broad topic are three-fold.

First, there has been the Platform thematic review workshop and subsequent 2021 learning resource paper on [Cross-border sanctions in the area of undeclared work](#).⁴ This outlined what constitutes effective administrative processes for executing penalty measures, albeit in the context of cross-border sanctions. The report notes that the role of labour inspectorates is usually limited to the beginning of the sanctioning process (i.e., the detection of the violation and the preparation of a report on the infringements). Still, labour inspectorates, social security inspectorates and tax authorities have powers to impose less harsh, usually administrative sanctions. For more severe cases, the sanction decision is ultimately taken by administrative, labour or penal courts, which determine the sanction, as well as the legal entity or natural person on whom the sanction will be imposed. Those authorities also provide the option to appeal the decision, according to the national legal base. Depending on the type of sanction, courts, prosecutors and/or the labour authority - sometimes supported by the police or bailiffs (in both national and cross-border situations) - are then responsible for notification and execution of the sanction.⁵ This identified the following key stages where effective administrative actions are required (see the figure below).

Figure 1. Key stages where effective administrative actions are required



Source: ICF/CSD.

The current learning resource paper focuses upon this third stage, namely ensuring that the information is recognised as evidence. The 2021 learning resource paper identifies the following legal considerations related to the gathering of evidence in relation to (cross-border) sanctions.

³ IT information system that records all employment flows in Greece.

⁴ Stefanov, R, Mineva, D., Schoenberg, L. and Vandenbroek, P. (2021). [Cross-border sanctions in the area of undeclared work: enhanced learning resource paper](#). European Platform tackling undeclared work, Bratislava.

⁵ *Ibid.*



Table 1. Legal considerations when gathering evidence

Considerations	Further details
What documents are needed?	<p>The most common documents checked by labour inspectors are work contracts, staff registries, internal company regulations, registries of working hours and overtime,⁶ payslips and timesheets, payments of social security contributions, portable documents A1, permits and licences (e.g. of temporary work agencies). In addition, any other (paper or digital) information may also prove useful, such as emails, texts, personal notes (e.g. to prove cases of envelope wages).</p> <p>Fiscal documents and commercial contracts are also collected to compare, for example, the declared workforce with the size of deliveries to clients, or to identify the owner and subcontractors and any possible misclassification of a dependent employment relationship as self-employment (i.e. bogus self-employment).⁷</p>
What format?	<p>The format of the documents relating to imposed sanctions must comply with the legislation in the Member State where the sanction is issued and ideally in the Member State where it is ultimately enforced.</p> <p>Some examples of potential differences in acceptable evidence format include: paper or electronic signatures, stamps (including timestamp), record number, date of extract, certificate of authenticity or conformity, print-out of the response to an IMI request, an official report to the prosecutor or authority competent for sanctions, a receipt of the notification to the offender.</p>
What other forms of evidence are needed?	<p>Additional evidence should clarify the facts of the case: what, who, when, where, how, how long, since when, etc.</p> <p>Circumstances uncovered during on-site visits should also be verified (e.g. observations by inspectors, photos, video, audio, surveillance recordings, signatures of inspectors/witnesses/ employees/managers, physical objects seized, official documents in legally accepted formats). These could relate to:</p> <ul style="list-style-type: none"> • Existence/status of labour relationship (hierarchical elements, proven authority of the employer); Use of uniforms with the “logo or name of the employer”, use of Documents with the “logo or name of the employer”, use of employers’ tools instead of own tools, reach a determine amount of money per year in the contracts (providing of services, facilities, etc...) with the supposed employer. <p>Proof of activity, established personally by the inspectors, and not only on paper (see also CJEU case C55/18);</p> <ul style="list-style-type: none"> • Verified place where the infringement was committed and place where it was established; and • Time and period within which the infringement was committed.
Are witnesses required?	<p>Witnesses could also be asked to provide statements / testimonials / interviews - either by the labour inspectorate (if it has such authority) or through cooperation by relevant law enforcement bodies at national level or abroad. Interviews on the spot with employers and employees confirm the labour inspector’s own findings and make a stronger case.</p> <p>The possibility to bring the employer and employees as witnesses needs to be clarified at an early stage at national and cross-border level.⁸</p>

⁶ CJEU [case C55/18](#): requirement to set up a system enabling the duration of time worked each day by each worker to be measured.

⁷ ILO (2013). [Labour inspection and undeclared work in the EU](#).

⁸ *Ibid.*



Source: CSD/ICF, based on CJEU cases C 692/19; C55/18; C-610/18; C29/10 and C29/10.

Second, there has been the Platform thematic review workshop and subsequent learning resource paper on [Effective penalty measures for tackling undeclared work, including through cost effective administrative actions](#).⁹ Again, this touches upon, but does not directly address, the issue of the means and instruments used as proof of undeclared work. It highlights the need for clear rules and procedures to avoid the risk of collision with other national authorities when imposing a fine. One of the major lessons was that automated electronic systems and digital databases can (a) perform information (and evidence) sharing between relevant authorities, b) generate automated infringement reports and help send notification for corrective actions to a company; c) check if a fine has been paid (including to the tax authorities, debt collectors, bailiffs, etc.), and d) assess the impact of the penalty system, in particular if it has changed the behaviour of employers and led to a transformation of undeclared work into declared work. However, this report does not directly assess the means and instruments used as proof of undeclared work (i.e., legal considerations when gathering evidence for sanction decisions), including acceptable evidence types accepted in the litigation process, and neither does it consider the legal presumptions established by law and how they are applied in the court in practice in different Member States.

Third, there has been the March 2022 ELA Cooperation Support Unit unpublished report entitled **Overview on responsibilities, inspection competences and legal frameworks in Member States**. This arose out of a request by ZOLL (the German Customs Office) to implement a questionnaire on the responsibilities, inspection competences and the legal frameworks of the Member States in the fight against undeclared work and unlawful employment. This questionnaire was developed particularly for cross-border cooperation in the planning of concerted and joint inspections, and for the exchange of information in general. The data collection was undertaken through the National Liaison Officers, who collected the requested information regarding the responsibilities and competences of the individual authorities in connection with the fight against undeclared work and unlawful employment, as included in the questionnaire. The questions asked related to, among others:

- ▶ What powers do the authorities listed above have in the administrative procedure? This explicitly concerns the powers in administrative proceedings, which are to be clearly distinguished from any powers in investigative proceedings for a criminal or regulatory offence. In particular, information is requested as to whether the following inspection powers exist (addition possible).
 - ▷ The possibility of carrying out inspections not based on a specific suspicion
 - ▷ The right to enter business premises and properties in the context of inspections (also without prior notice)
 - ▷ The power to carry out identity checks
 - ▷ The power to inspect carried documents
 - ▷ The power to check means of transport (also from moving traffic)
 - ▷ The possibility to inspect business documents
 - ▷ Duties of cooperation of the checked persons
- ▶ What are the legal bases for the powers mentioned in the previous question?

The last question collects evidence on the legal bases for the powers to impose fines but in nearly all cases, the responses simply state the name of the legal texts that provide such powers. However, this survey also does not

⁹ Stefanov, R., Mineva, D., Terziev, P. (2022) [Effective penalty measures for tackling undeclared work, including through cost effective administrative actions](#). European Platform tackling undeclared work, Bratislava.



provide any detail on the acceptable evidence types accepted in the litigation process, or the legal presumptions established by law and how they are applied in the court in practice.

2.0 Types of evidence gathered to prove undeclared work

The workshop expanded on the findings of the Platform study¹⁰ revealing the kinds of documents and information collected to prove undeclared work, and their acceptability as proof for administrative and/or criminal sanctions in cases of unregistered employment, under-declared employment, or misclassification of a dependent employment relationship as self-employment (i.e. bogus self-employment).

The overall conclusion from the discussions during the workshop was that while the legal framework varies from country to country, **the most important aspect to prove undeclared work is to build a strong case**, collecting sufficient documents containing information on facts, including information and documents provided by the parties (e.g., employers, employees), and information on facts recorded at the workplace. The box below provides a practical example of this procedure and its main steps.

Box 1. Key steps in the process of gathering evidence in Czechia and Latvia

The Czech State Labour Inspection Office and Regional Labour Inspectorates are authorised to inspect whether employers observe all obligations arising out of the applicable legal regulations (on labour relations, safety at work, employment), to require removal of any defects found during the inspection, and to impose sanctions.

A team of inspectors carries out an unannounced inspection at the workplace, and documents observed circumstances through photos or video-recordings (to be later used in court). The team of inspectors also interviews (interrogates) relevant persons, and gathers evidence (documents, company contracts, employment contracts, records of hours worked and remuneration paid, etc.) from the worksite, as well as from available public registers. An important element of the inspection is the process of recording the clothing of the workers (as an indication that they indeed work for the inspected company), as well as the chips / logs for entrance and exit from the building. Other public bodies such as Police, Labour Offices, Czech Social Security Administration, Department of Asylum and Migration Policy at the Ministry of Interior, Trade and Tax offices, and the Customs support the main inspection team in its tasks. When needed, the inspection team could also seek support from trade unions, NGOs, employment agencies and the ombudsman. The Czech State Labour Inspection Office and Regional Labour Inspectorates can impose fines not only for the main law infringement, but also for lack of cooperation. The fine for the latter, however, should be further increased.

Similarly, the Latvian State Labour Inspectorate has the obligation and the power to interview employers, employees and other persons regarding matters of employment relationships; to request accounting, registration and other documents; to verify the documents in accordance to the national regulatory acts; to request copies of such documents; to photograph, make audio and video recordings during the on-site inspection; and to request that employers, employees and other persons present a personal identification document or a driving licence, or an employee's certificate. A good practice presents the possibility to obtain

¹⁰ Stefanov, R., Yordanova, M., Mineva, D., Gerganov, A., Kostova, T. (2023). [Methods and instruments to gather evidence of undeclared work](#). European Platform tackling undeclared work, Bratislava.



video recordings made by building owners (e.g. shopping centres), body cameras and drones. Photos provided by immigration officers are compared with the photos taken by labour inspectors during on-site visits. In addition to the typical types of documents gathered, the Latvian State Labour Inspectorate also collects correspondence between employer and employee, documentation of the use of cash registers, and documents registering visitors to the area. The work schedule is usually used to prove the dependence of the work relationship and combat bogus self-employment.

An important success factor is the use of IT tools and registers, such as the database of the State Revenue Service (data on salaries before tax, working hours, type of contract), database of the Office of Citizenship and Migration Affairs (place of residence, spouse, children, parents), Building Information System (persons involved in construction and labour protection coordinators), Road Traffic Safety Directorate Register (vehicles and their owners/users), Rural Support Service Electronic Application System (seasonal agricultural worker's status and wage), Cadastre Register of the State Land Service (address, cadastral number, area composition), Enterprise Register (information on legal entities), and the electronic information of work equipment accounting devices (operator of the equipment e.g. tachographs, the driver of the vehicle, working hours, etc.).

The types of evidence commonly used in the Member States to prove undeclared work are as follows:

- ▶ **Closed-circuit television (CCTV) and audio recordings, videos and photos** are used as additional evidence in some countries (e.g., Czechia, Greece, Latvia, Lithuania). In Greece, photos can be taken only under certain conditions (e.g., when inspectors need to prove the identity of the worker). In Czechia labour authorities can take photos or make videos or recordings without any prior authorisation. This allows the Czech labour inspectors to use these instruments to prove undeclared work and these are normally accepted in courts.
- ▶ **Drones** are used with great success during inspections in Lithuania, as demonstrated with a video during the workshop.
- ▶ **Company uniforms** and/or use of employers' **equipment** are good indicators of an employment relationship.
- ▶ **Digital cards and chips** that record entrance and exit from the workplace (which are legally required, e.g. for construction sites) are used in some Member States to facilitate more efficient and effective physical workplace inspections since such cards enable to more easily check and verify the identity of the workers and the identification of the employer. These cards also enable the initial check of worker status when inspectors visit workplaces. For this, however, the inspectors need to have direct and immediate access to real-time databases. Such access makes the inspections more effective in detecting and preventing undeclared work.
- ▶ **Working time schedules** (found printed at the workplace or submitted electronically to the authorities by employers) are among the most effective ways of proving under-registered employment and are used in several Member States.
- ▶ **Bank transfers** could also be used to access relevant information; however, the procedures are rather complicated and, on some occasions, require cross-institutional collaboration.
- ▶ **Inspectors' statements** are a strong instrument to prove undeclared work especially in countries where the burden of proof lies on the employer and the statements are considered true unless proven otherwise.
- ▶ **Employee's testimonies** are also an important type of evidence to prove undeclared work despite the challenges stemming from people sometimes changing their statements.



Box 2. Delivery platforms and misclassification of a dependent employment relationship as self-employment (i.e. bogus self-employment)

Proving undeclared work is particularly challenging in the case of delivery platforms where bogus self-employment often takes place. The workshop shed light on the country-specific requirements to gather evidence of undeclared work when delivery platforms are concerned:

- ▶ 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.
- ▶ Packing and route tracking data could be used to detect undeclared work in the case of delivery platforms.
- ▶ As company uniforms and/or equipment can indicate an employment relationship, these could be helpful to establish an employment relationship in the case of delivery platforms. However, in most countries, other attributes of dependence are required for the employment relationship to be proven.
- ▶ Proving bogus self-employment (misclassification of a dependent employment relationship as self-employment) usually requires collecting additional evidence. A set of criteria such as the existence of a workplace, whether the equipment is provided by the employer, or whether the worker performs work for other entities are all factors used to prove the existence of an employment relationship.

IT tools and information gathered through databases, registries and other interlinked systems are undoubtedly crucial in facilitating the detection of undeclared work. A good example from Slovenia is presented in the box below.

Box 3. The Slovenian Fiscal Cash Register

The Slovenian Fiscal Cash Register, whose purpose is the prevention of tax evasion and fraud, is used successfully to detect unregistered employment. Every business subject using cash transactions in Slovenia must issue and validate an invoice for every performed transaction in the 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 if the employee's tax number is incorrect or does not exist or if the person making the cash register transaction is not registered as the company's employee (i.e. if the person is registered as an employee of another company, a self-employed, or not employed). If undeclared work is detected during an on-site inspection following the alarm, the Financial Administration, which receives all information from the Fiscal Cash Register, issues a written decision prohibiting that employment, a penalty notice, a fine, and/or a notification to Labour Inspectorate (in case of under-declared employment).

In addition, under the Postal Order pilot project, initiated in 2018, the Financial Administration receives annually information from the Post of Slovenia. It then analyses the data, to detect any taxpayers who receive a large number of payments via postal orders without having a registered activity. In particular, suspicion raises cases when the sender of a shipment is also the addressee of the money order or the recipient of the payment in cash. The Fiscal Administration checks in parallel if the same person (taxpayer) is also advertising work (e.g. in the social media) that has not been properly notified or registered. To prove the existence of undeclared work or undeclared profit, the Fiscal Administration could even make a



concealed purchase (using the so-called 'secret customer' technique). If a law infringement is proven, the Fiscal Administration issues a written decision prohibiting undeclared work and/or a fine (penalty notice).

3.0 Challenges in gathering evidence to prove undeclared work

Several challenges are faced by labour inspectors and enforcement authorities when gathering evidence to prove undeclared work, such as limited capacity of public authorities, concealing tactics (preventing access to the worksite, hiding evidence, refusing access to documents, delaying the provisions of information) used by those engaged in undeclared work, and legal challenges.

► Limited capacity of public authorities

Authorities often face difficulties in accessing private properties (especially on construction sites), and in establishing the place, day, and time of work in remote work settings (mainly due to lack of working time registries). They also face challenges accessing information stored in computer equipment due to lack of digital competences or legal powers. Some authorities also face problems accessing information held by other national public bodies or by bodies in other Member States (e.g., needed to detect and prove cross-border bogus self-employment).

Box 4. The challenge of cross-border bogus self-employment

During the workshop, several countries (e.g., Belgium) mentioned that with the increase of workers moving across the EU, cross-border bogus self-employment has become more pronounced. Other countries are expecting to face the same challenge in the near future. Foreign workers registered as self-employed are often in a dependant relationship with an employer in the host country which is particularly difficult to prove. In addition, PayPal disguises the identity of the sender and recipient of the payment, especially if the account is registered in a third country. Labour inspectors in Finland, Greece and Belgium do not have automatic access to the bank transfers' data (due to privacy rules), although such assess could be obtained through cooperation with the Financial Police in Greece. The situation is more complex in Belgium, where the labour inspectors need to approach the European Prosecution with a request for granting access to bank information in prominent cases. Even if the dependant relationship is proven successfully, the authorities still face obstacles in imposing sanctions. The specific challenges related to the posting of workers require better cross-border cooperation among relevant authorities. Depending on the type of sanction, courts, prosecutors and/or the labour authority - sometimes supported by the police or bailiffs (in both national and cross-border situations) - are then responsible for notification and execution of the sanction.¹¹

► Concealing tactics used by employees

Employees are often afraid to cooperate with inspectors or law enforcement authorities due to various factors such as feeling guilty about working under-declared, receiving undue unemployment benefits, fear of retaliation and of losing their work permits, language barriers, or lack of awareness of who the actual employer is. As a result, the workers do not reveal to the inspectors what their actual salary or full working time is. The most frequent phrase most inspectors hear from employees is 'Today is my first day at work', for concealing the actual starting time of

¹¹ *Ibid.*



their work relationship. Such statements are among the reasons for the existence of legal presumptions on the duration of the detected undeclared work.

Additional problems when gathering evidence of undeclared work emerge when the worker is not on site or does not appear to be working during an inspection. In cases workers are found with cash amounts, they declare that these are 'deposits'. In Czechia, third-country workers sometimes show false IDs from EU countries, false voting documents or false drivers' licenses.

► **Concealing tactics used by employers**

Employers may use tactics aimed at stalling inspections, such as delaying access to work sites, requesting extensions to provide documents or information or refusing to provide the required documents. Often employers obstruct inspectors' tasks by not explaining to the inspectors how the used algorithms/applications and computer programmes work, or by falsifying the content of work registers outright. On occasions employers use social media (e.g. Viber, WhatsApp groups) to alarm each other about potential inspections, when an inspection takes place at their premises. At the same time, labour inspectors usually do not use the messages from social media as evidence of a concealing tactic or a dependent work relation, due to privacy concerns and difficulties to prove that the messages are authentic / have not been altered (e.g. in Spain). This issue is further exacerbated when the fine for non-cooperation is considerably lower than the fine for the actual violation.

Employers may also use schemes to hide the actual nature of business and labour relationships, e.g., letterbox companies, temporary work agencies, non-transparent supply chains. For example, a new phenomenon of 'disguised employment' has emerged in Czechia, namely the practice of employers to conclude employment contracts with their employees and pass them over to another employer. A similar problem exists in Finland where workers on the construction site have been presented to the main contractor as employees of different sub-contractors. Companies also use fake uniforms or uniforms of other companies (both in normal employment relations and in bogus self-employment circumstances) to hide who the actual employer is.

Another problem observed in Czechia and in other Member States is that the employment contracts are often either not kept at the workplace or are concluded orally.

In Slovenia, companies sometimes do not use the Fiscal Cash Register (do not issue invoices), thus hiding both the identity of the worker at the cash register and the turnover. A new method to hide the payment of wages in Slovenia consists in sending postal items with redemption fees by postal money orders, where the sender of the shipment is also the addressee of the money order or the recipient of the cash payment. Since 2018, the Financial Administration of Slovenia has been checking taxpayers who receive a large number of payments via postal orders and do not have a registered activity.

Box 5. Light entrepreneurship and the case of Finland

In Finland, the most common way of masking an employment relationship as self-employment is forcing 'light entrepreneurship' on workers, especially foreign workers working through digital platforms (food delivery companies) or in the construction sector. Foreign workers are at the greatest risk of being exploited as they do not understand Finnish language or labour laws. By getting employees to work as light entrepreneurs, employers absolve themselves from all responsibilities that come with the employment relationship (paid vacation, holiday payment, paid sick leave, occupational health care, accident insurance, evening/night overtime payments, etc). A further challenge is that employers often engage lawyers who instruct them on how to disguise the characteristics of an employment relationship. Other challenges are that gathering evidence as proof of misclassification of employment as self-employment is



done always on a case-by-case assessment and that service companies often get away, as inspections focus on the main employer. A good practice is the mobile app '[Work Help Finland](#)', which provides information about rights and responsibilities for employees in Finland. It is intended for foreign workers coming to Finland and who are already residing in Finland. The application also helps workers to find the key agencies that can assist if workers suspect that they have been mistreated.¹²

► Legal challenges

The legal challenges most often faced by national authorities when collecting evidence to prove undeclared work are as follows: **witnesses change their testimony** in front of the courts and the courts accept the new testimony rather than the inspectors' statements; and/or **employers present new evidence in court** that was not provided during the investigation. Similarly, the **statement of false information** (e.g., that the detected undeclared work has been performed for a **shorter period than the actual worked time**) hinders the application of legal presumptions.

Additional specific **legal challenges** include the requirement to prove **all attributes of dependent work** in Czechia, or the fact that inspectors could observe **only a limited amount of undeclared or illegal work (e.g., a few hours)** which is not sufficient for a legal action. In Spain, full-time employment is often disguised as part-time employment and overtime is often either not reported or reported as '**complementary hours in excess**'. To counter this practice, the legal system foresees limitations of overtime to maximum eighty extra hours annually (for full employment), while complementary hours (for part-time employment) can be undertaken only if the employee has signed a complimentary hours agreement. These agreements are valid only when the employee has already worked more than 10 hours weekly. **Non-declaring overtime and hiding payments as bonuses** or balances is a problem in Czechia and Luxembourg. All these legal challenges result in **overly long court cases**, including appeals.

Finally, companies employ various tactics to avoid legal consequences. A frequently applied scheme is that, in case of an initiated investigation or court case, the company shuts down and passes the workers to another firm, which in turn subcontracts them to a third company.

4.0 Legal presumptions applicable to tackling undeclared work

Several legal presumptions exist in the Member States which are applicable to undeclared work. Legal presumptions are facts assumed to be true under the law. They reverse the burden of proof, typically from the labour inspectorate to the employer. **Legal presumptions are used when there is a legitimate reason to suspect undeclared work**, allowing institutions to provide initial evidence, which employers must then contest. Employers charged with criminal offenses are presumed innocent until proven guilty, and statutory presumptions are typically rebuttable.

In **Lithuania**, in case of fully 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**.¹³ Only 8-10% of these State Labour Inspectorate's decisions are appealed in the courts. The authorities however experience challenges when using the legal presumption, as employers and employees often confess the violations while specifying a period of work

¹² European Labour Authority (January 2023). [Work Help Finland Mobile App](#).

¹³ [Lithuanian Employment Act](#) (1991, amended 1997, abolished by the Labour Code 2002, in force since 1 January 2003).



shorter than three months. The presumption also does not apply when the State Labour Inspectorate or the worker proves that a higher remuneration was paid. To overcome this challenge, the Government is considering changing the Employment Law to oblige the employer to notify the territorial office of the social institution about any illegal employment, indicating the actual start of (illegal) work. The employer will also be obliged to pay the worker the agreed salary for the period actually worked, which would be no less than three minimum monthly salaries.¹⁴

Box 6. Legal presumptions applicable to undeclared work in Belgium and Estonia

Several legal presumptions apply to undeclared work in **Belgium** for the purpose of labour law and/or social security law. Work is presumed to have been performed in execution of an employment contract if more than half of the nine listed criteria are met:

- ▶ absence of any **financial or economic risk** on the part of the person performing the work (in particular, the absence of personal and substantial investment with one's own resources, or of personal and substantial participation in the profits and losses of the enterprise);
- ▶ lack on the part of the person performing the work of **responsibility and decision-making power over the company's financial resources**;
- ▶ lack, on the part of the person performing the work, of **decision-making power over the company's purchasing policy**;
- ▶ absence on the part of the person performing the work of **decision-making power over the company's pricing policy**, except where prices are set by law;
- ▶ **absence of an obligation of result** regarding the agreed labour;
- ▶ guarantee of **the payment of a fixed fee**, regardless of the operating results or the extent of the services provided by the person performing the work;
- ▶ not being an employer of personally and freely recruited personnel, or **not being able to recruit or substitute personnel** for the performance of the agreed work;
- ▶ **not pretending to be a business to other persons**, or working primarily or habitually for only one co-contractor;
- ▶ working in premises of which one is not the owner or tenant, or **working with equipment** provided, financed or guaranteed by the co-contractor.

A rebuttable presumption is also established for **seven specific sectors**: the construction industry; the surveillance and monitoring services sector; the sector of transportation of persons and goods; the cleaning industry; the sector of agriculture; the horticultural business sector, and activities conducted through a digital platform. **Portugal** is also in the process of elaborating rules specifically applicable to tackle undeclared work performed through **digital platforms**.

When the nature of an employment relationship is unclear, the parties can submit a request before the commencement of the work to the **Administrative Commission for the Regulation of the Employment Relationship**, established within the Belgian Federal Public Service Social Security. The decisions of this

¹⁴ Presentation by the Lithuanian State Labour Inspectorate during the thematic review workshop 'Methods and instruments to gather evidence of undeclared work', 25-26 October 2023, Prague, Czechia.



committee are binding on all institutions involved however it may not intervene in cases where an investigation or dispute is pending.

Presumptions **for social security** exist for a few professions such as **artists, sportsmen, pharmacists, and trade representatives**. The social security system for employees also applies to those working under **similar conditions** to those of an employment contract, i.e., as soon as they perform work within the definition given by the legislator. The performance does not necessarily need to be carried out under terms of subordination. Similar conditions exist for **trustees, domestic workers, personal carriers, goods carriers, doctors in training to be specialists, foster parents, and personal assistants**.¹⁵

In **Estonia**, the Employment Contracts Act establishes presumptions for the existence of an employment relationship, as well as its duration and terms. If a person does work for another person and, according to the circumstances, it can be expected that the work is done against remuneration, an **employment contract** is presumed to exist (§1, para 2).¹⁶ Failure to comply with the formal requirement (i.e., the employment contract must be in a written form) does not invalidate the employment contract. If the information on working conditions was not provided to the employee before the commencement of work, the employee may request it at any time. The employer is required to provide the information within two weeks of receiving the request. (§6, para 9). The Act also contains a presumption for the unspecified period of the employment contract - a fixed-term employment contract may be for up to five years if it is justified by good reasons arising from the temporary fixed-term characteristics of the work (§9). The Estonian Labour Inspectorate uncovered **451 misclassified contracts** in 2023. However, the authorities face **challenges** in applying this legal presumption, as after inspections, employers terminate the contracts and the legal proceedings end.¹⁷

According to the decision of the Estonian Supreme Court case 2-18-6908/47¹⁸, in order to disprove the presumption set forth in §1, para 2 for the existence of an employment contract, the alleged employer must prove above all that the employee was not subject to his management and control and was largely independent in choosing the way, time and place of work. To identify the nature of the disputed contractual relationship, it is necessary to compare the features characterising the contracts, by taking into consideration:

- ▶ who organized and managed the work process;
- ▶ who paid for work tools, materials, equipment etc;
- ▶ was periodic remuneration paid;
- ▶ whether the employee had to be ready to work for the alleged employer;
- ▶ whether the employee acted for several employers or received all or a substantial part of his income from the alleged employer;
- ▶ how the parties interpreted the disputed relationship outside of that dispute, e.g., in dealings with other persons or in the performance of their other duties.

¹⁵ Presentation by the Belgian National Social Security Administration during the thematic review workshop 'Methods and instruments to gather evidence of undeclared work', 25-26 October 2023, Prague, Czechia.

¹⁶ [Estonian Employment Contracts Act](#) (2008, amended 2016).

¹⁷ Presentation by the Estonian Labour Inspectorate during the thematic review workshop 'Methods and instruments to gather evidence of undeclared work', 25-26 October 2023, Prague, Czechia.

¹⁸ Judgement of Estonian Supreme Court of 20 May 2020, [Case 2-18-6908](#).



In **Spain**, the Status of Workers Act¹⁹ establishes presumptions on the existence of an employment relationship, as well as its duration and terms. A contract is presumed to be concluded for an indefinite period unless the text of the contract proves otherwise.²⁰ A **part-time contract** must be formalised in writing. The contract shall include the number of working hours per day, week, month or year, and the mode of distribution as provided for in a collective agreement. If these requirements are not met, the contract shall be presumed to have been concluded on a full-time basis, unless proof can be provided to the contrary, e.g., that the services are partial (Status of Workers Act, Article 12, para 4). Temporary contracts concluded fraudulently are presumed to be open-ended (Article 15, para 3). In addition, the Labour and Social Security Inspection System Regulator Act (Law 23/2015)²¹ establishes a presumption of **certainty of inspection verifications**. Article 23, para 1 provides that the facts established by the officials of the Labour and Social Security Inspection and formalised in the infraction and liquidation reports, observing the pertinent legal requirements, are presumed to be certain, without prejudice to the evidence that interested parties may provide in defence of their respective rights or interests.^{22,23}

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.

5.0 Key findings and practical suggestions

Based on the discussions at the thematic review workshop, the survey²⁴ and desk research, several suggestions on the **collection of evidence**, on **possible legal improvements**, and on the **effectiveness of legal presumptions** to prove the existence of undeclared work can be made.

5.1. Suggestions on the collection of information to prove undeclared work

► Enhanced cooperation

- ▷ **More inspectors and officials across different authorities** should be engaged in inspections to cover more ground and check a wider range of circumstances (i.e., control all exits, access private territory, and expand the pool of collected evidence admissible in court). In particular, it is recommended that labour inspectors team up with **social security, tax, occupational health and safety inspectors, as well as police officers**.
- ▷ All relevant authorities need to establish **better cooperation mechanisms**, including exchange of information maintained in their databases and registers. This could improve risk assessment systems, leading to an easier detection of possible violations. Enhanced cooperation could also facilitate establishing the place, day and time of work performed at home or online.

¹⁹ [Royal Legislative Decree 2/2015 of October 23, 2015, approving the revised text of the Status of Workers Act](#) (*Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*).

²⁰ *Ibid.*

²¹ [Spanish Labour and Social Security Inspection System Regulator Act](#) (*Ley 23/2015, de 21 de julio, Ordenadora del Sistema de Inspección de Trabajo y Seguridad Social*).

²² *Ibid.*

²³ Presentation by the Spanish Labour and Social Security Inspectorate during the thematic review workshop 'Methods and instruments to gather evidence of undeclared work', 25-26 October 2023, Prague, Czechia.

²⁴ The survey on 'Methods and instruments to gather evidence of undeclared work' was completed in mid-June 2023 and consisted of two parts – one section with closed questions (short version of the survey) and another section with open questions (long version of the survey). A total of 14 countries contributed to the survey. The short survey was completed by Cyprus, Denmark, Estonia, Germany, Greece, Slovakia, Slovenia, and Sweden. The full survey was completed by Belgium, Czechia, Finland, Iceland, Lithuania, and Spain. The full results of the survey are presented in the 2023 Study on [Methods and instruments to gather evidence of undeclared work](#), European Labour Authority, Bratislava.



► **Technical solutions and trainings**

- ▷ It is recommended to **interconnect fiscal cash registers with databases holding employees' labour data** to trigger automatic warnings when irregularities are detected. Using **cross-linked registers with a 'red flag' type of system** to outline potential irregularities can support inspectors' efforts and improve the efficiency of their work. This system could also be used to detect taxpayers who receive a large number of payments via postal orders without having a registered activity.
- ▷ **A database with information on self-employed shared at the EU level** could help address cross-border bogus self-employment.
- ▷ It is further advised to use **interpreters and online support/solutions** to translate information received by other authorities or witnesses.
- ▷ The reluctance of the workers and employers to provide information could be countered by **asking 'smart' questions** during inspections that do not outright accuse the interviewed persons and/or such that do not reveal their real purpose.
- ▷ Witness statements and transcripts of interviews should be **digitalised so that the original statements are read as primary evidence** and any changes of the statements at a later date could be challenged in court.
- ▷ **New procedures likely need to be put in place to inspect teleworking** as a specific type of employment.
- ▷ Engaging **specialised IT personnel and/or training inspectors on the use of IT** is also needed. For example, it is crucial to ensure access to information held in electronic devices, as well as methods to determine the validity and authenticity of the information obtained.

► **Awareness**

Wider awareness and information campaigns could help to increase cooperation from witnesses (employees and employers).

5.2. **Suggestions on possible legal improvements and increasing legal capacity**

- The **procedures** of labour, social security, tax and OSH inspectors **to enter (private) places of work and collect data** (including personal data and confiscation of computers) could be improved.
- **Legal procedures** allowing the collection, verification of authenticity, and use by courts of video surveillance and CCTV recordings, audio recordings, bank or credit advice, and ATM cards **could be eased**.
- The legal basis could be reviewed to re-consider whether **(not) all attributes of dependent work should be proven** (or whether a subset suffices). In addition, policymakers could consider equalising or matching the social or tax contributions for dependent and self-employed persons in certain sectors (e.g., with manual labour).
- **Strengthening the legal departments of labour inspectorates** (with the support of other public bodies and/or social partners) could lead to an easier identification of the actual nature of business and of labour



relationships (including complex cases involving letter-box companies, temporary agency employment, non-transparent supply chains of contractors).

- ▶ All countries could have **better and more effective sanctions**, including sanctions on those who do not maintain the appropriate records and information. It is also recommended to increase the fine for non-cooperation, and to list non-compliant companies from public procurement and state aid. For example, Latvia, Lithuania, Slovakia and Spain have publicly available non-compliance lists aiming to prevent companies from violating the law. Slovenia keeps its non-compliance lists not public. Belgium has an internal 'suspicious companies' list that is based on data mining and analytics and is very effective for better targeting inspections; the country also keeps a list of companies with debts to social security.
- ▶ The need for **lawyers to be present to defend workers** has been identified. This includes both the possibility for the worker to have a lawyer after a labour law issue has been raised, as well as the possibility for the workers to consult with legal experts in advance on the available course of action against their employers.
- ▶ **Cooperation of inspectors with legal experts/advisors is needed to untangle complex subcontracting chains.**
- ▶ Labour inspectors could use '**secret customer**' tactics. A good example is represented by Lithuania where undercover inspections are allowed. Slovenia also uses undercover inspections: however inspectors need to inform the people involved when the undercover action is over.
- ▶ The legal basis could be revised, and/or trainings made, and guidelines issued to enable authorities to use **e-mails and WhatsApp conversations as evidence in court.**

5.3. Suggestions to enhance the effectiveness of legal presumptions

Several **suggestions** can be made to enhance the **effectiveness of legal presumptions**.

- ▶ **More uniform criteria (considerations) pointing to the existence of a (dependent) employment relation could be formulated across the Member States.** Without prejudice to the autonomy of individual countries and without seeking a binding EU-wide solution, recommendations could be formulated for the adoption of common criteria when the existence of an employment relationship shall be presumed (e.g. type and form of employment contract, duration, provision of work, agreed remuneration, duties of the parties, who organises and manages the work process, who pays for the tools, materials and equipment, etc.).
- ▶ **Promote Member States' good experiences in applying presumptions of employment** with the view to updating the existing legislative frameworks. Research, including extensive information on good practices in the implementation of laws, could be disseminated through the Platform, facilitating the transfer of workable legislative solutions and successful enforcement practices.



- ▶ **Continue the debate on the potential adoption of the proposed Directive on improving working conditions in platform work (2021),^{25,26}** considering amendments by the European Parliament's Employment Committee²⁷ in 2022. The new Directive is expected to unify efforts of individual Member States, introducing clear and stronger rules against employment misclassification by setting up a clear legal presumption of employment relationship for workers in digital labour platforms, complemented by a reversal of the burden of proof (e.g., a platform will be considered an employer unless it proves otherwise).

²⁵ [Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. COM/2021/762 final.](#)

²⁶ The proposed directive was presented by the European Commission in December 2021, and the Council adopted its position on the proposal on 12 June 2023. The proposal introduces two key improvements for platform workers: it helps to determine the correct employment status of people working for digital platforms, and it establishes the first EU rules on the use of AI in the workplace. European Council (2023). [EU rules on platform work.](#)

²⁷ European Parliament (12 December 2022). [Digital workers: better working conditions and protection of rights. Press release.](#)



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