



European Platform  
tackling undeclared work

# **Cross-border sanctions in the area of undeclared work**

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cross-border sanctions in the area of undeclared work

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## INTRODUCTION

Sanctions are an important deterrence measure for tackling undeclared work across Europe. Member States' authorities impose and enforce sanctions at national level through well-established practices and apply these practices also in cases involving cross-border undeclared work. However, sanctions related to undeclared work are rarely enforced at cross-border level<sup>1</sup> mainly due to legal differences, limited practice and different procedures among participating enforcement bodies.

This paper presents the key learning points from the discussions at the Thematic Review Workshop of the European Platform tackling undeclared work held on 28 and 29 January 2020 in Paris (hereafter the workshop). It seeks to build on the main aims of the workshop, namely:

- To explore the approaches and possible solutions to apply cross-border sanctions more effectively in the area of undeclared work (labour law, tax and social security contributions); and
- To formulate recommendations for national capacity-building and concrete support at EU level provided by the Platform and the European Labour Authority.

The paper will further inform the development of a toolkit on cross-border sanctions, which will provide more in-depth practical knowledge on the topic.

The first section of the paper sets out the context, including the situations when cross-border sanctioning is needed, which are the responsible authorities, and what challenges they face. It also explains the key steps of the process, and the difference between administrative and criminal sanctions. The second section covers the possible solutions to establishing efficient cross-border collaboration, with a focus on the EU legal base, bilateral agreements and follow-up procedures. The third section provides recommendations which could be taken forward at national and EU level to further enhance the frequency and efficiency of cross-border sanctions.

## 1. STATE OF PLAY: CROSS-BORDER SANCTIONS IN THE AREA OF UNDECLARED WORK

### 1.1 What is cross-border undeclared work?

Undeclared work can be defined as 'any paid activities that are lawful as regards their nature but not declared to public authorities, taking account of differences in the regulatory systems of the Member States'<sup>2</sup>. Definitions of undeclared work however vary across Member States. For example, in the Netherlands, unfair competition covers illegal employment and human trafficking; in Denmark, foreign enterprises operating in the country are sanctioned if they fail to register in the national database; while in France it is punishable not to wear identification cards at construction sites.

In the cross-border context, the violations related to undeclared work are defined in EU legislation as well as the national legislation of the country where these infringements have been committed and detected. For the purposes of this paper various forms of undeclared work are considered: under-declared employment, unregistered employment, undeclared or bogus self-employment. Those types result in different national labour, social security and tax infringements.

The paper focuses primarily on sanctions for cross-border undeclared work within the EU, so unregistered economic activities by employers or workers from two or more Member

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<sup>1</sup> European Platform tackling undeclared work, (2019). Annual Platform Survey. Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions.

<sup>2</sup> European Platform tackling undeclared work, glossary.

States/EEA Member States. While cross-border undeclared work may also involve third countries, these do not fall within the focus of this paper.

More specifically, the paper explores the cases where the nationality and/or country of residence of the worker or employer differs from the country where the infringement is detected and sanctioned. From the employer side, this can cover:

- Companies registered in other EU/EEA Member States;
- Companies employing workers from other EU/EEA Member States;
- Subcontractors (or their local offices) registered in other EU/EEA Member States;
- CEO's / managers legally responsible for the above categories;

From the workers side it can include:

- Unregistered mobile workers;
- Posted workers;
- Cross-border commuters;
- Foreign seasonal workers;
- Hired-out employees by foreign temporary work agencies; and
- Workers or self-employed working simultaneously in more than one Member State.<sup>3</sup>

In most incidents, cross-border sanctions are imposed on legal entities or companies. In rare cases, workers are also fined for working undeclared while receiving unemployment benefits<sup>4</sup>.

## 1.2 When are cross-border sanctions needed?

Over 17.5 million Europeans live or work in a Member State other than that of their nationality, and companies operate across borders in the EU/EEA on a daily basis. Ensuring fairness for companies and workers to operate on a level-playing field across borders is critical to a well-functioning internal market. Research suggests that in 2017 more than 700 000 people could have been engaged in some form of cross-border undeclared work.<sup>5</sup> Numbers from the latest Eurobarometer survey on undeclared work in the EU suggest that this figure might be increasing with raising labour mobility and the growth of new forms of work.<sup>6</sup> When prevention measures fail, deterrence i.e. sanctioning those who operate outside of the rules (whether wilfully or unknowingly) is another option available to Member States.

Cross-border sanctions are required in particular when the nationality and/or country of residence of the offender (this can be a company, a legal person, a responsible manager, and in rare cases – a worker, recipient of social benefits) is not established or has no domicile in the Member State issuing the sanction. This can be illustrated in the following example:

- Undeclared work was detected in Member State A in a company that is registered with its headquarters in Member State B. The power to sanction infringements

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<sup>3</sup> European Platform tackling undeclared work, (2020). Thematic review workshop on cross-border sanctions in the area of undeclared work, 28 and 29 January 2020, Paris; European Platform tackling undeclared work, (2020). Follow-up online workshop: Cross-border sanctions in the area of undeclared work, 11 June 2020.

<sup>4</sup> European Platform tackling undeclared work, (2019). Annual Platform Survey. Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions.

<sup>5</sup> European Platform tackling undeclared work, (2019). Cross-border actions tackling undeclared work.

<sup>6</sup> See European Commission (2020). Special Eurobarometer 498 Undeclared work in the European Union. Although the data shows the level of engagement in undeclared work has stayed at roughly the same share in 2019 compared to 2017, the increased mobility flows have likely resulted in higher number of cases of undeclared work across the EU. Available at:

<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2250>

committed on the national territory of Member State A belongs only to the authorities of this state (territoriality principle). The same is valid for the effective execution of a sanction.

- As a general rule, the authorities of a Member State have no competence (jurisdiction) to enforce a sanction in another country. Authorities in Member State A cannot execute/enforce a sanction (fines, seizures, confiscations, imprisonment etc.) in Member State B, where the offender resides. Authorities in Member State A therefore rely on collaboration with Member State B where the company resides.

Depending on the type of undeclared work violations detected in Member State A, labour, social security and tax authorities may initiate procedures for different types of sanctions.

### 1.3 What are the different types of cross-border sanctions?

The participants at the workshop noted that most cross-border sanctions imposed are administrative fines, usually relating to posting issues. For other types of infringements, sanctions include more severe penal (criminal) charges, such as imprisonment, permanent or temporary business closure, exclusion from public tendering, withdrawal of operating licenses or freezing of assets. For example, in the Netherlands, the labour inspectorate can impose fines and suspend work activities whilst cooperating with the Public Prosecutor's Office for Financial, Economic and Environmental Offences. Sanctions could also be made public in order to encourage future compliance ('naming and shaming').

Some Member States use both administrative and criminal procedures to sanction undeclared work (e.g. Belgium, France and Italy). The national legislation of the Member State where the violation is detected determines all the specifics of the sanction. The possible differences in the type of the sanction and its severity is illustrated in the Belgian example below.

**Table 1. Overview of labour and social security law sanctions in Belgium, applicable to both national and cross-border cases<sup>7</sup>**

	Criminal		Administrative
Initiator	Labour inspectorate, Labour Prosecutor <sup>8</sup>		Labour inspectorate
Decision & (notification)	Criminal tribunal/court		Legal Studies and Litigation Department (Ministry of Labour)
Appeal	Criminal tribunal/court		Labour tribunal/court
Type / category of offence <sup>9</sup>	Prison sentence	Criminal fine Recovery: Tax Authority	Administrative fine Recovery: Tax Authority
1	-	-	80 - 800 EUR
2	-	400 - 4.000 EUR	200 - 2.000 EUR
3	-	800 - 8.000 EUR	400 - 4.000 EUR

<sup>7</sup> Article 101 of the Belgian Social Criminal Code: all infringements mentioned in Book 2 of the Code cover all labour law and social security infringements and can lead to a sanction of one of the 4 levels/categories depending on the gravity of the infringement. They are applicable for nationals and foreigners.

<sup>8</sup> Also referred to as the 'The Labour Auditor', a public prosecutor investigating and prosecuting criminal offences in matters of social and labour law.

<sup>9</sup> Severity of infringement (1 being the least, 4 being the highest).

4	6 months – 3 years	4.800 – 48.000 EUR	2.400 – 24.000 EUR
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Source: Presentation from Belgium at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.

### 1.4 Who are the responsible authorities?

Authorities responsible for the notification and execution of the sanction vary between Member States. They can be courts, prosecutors and/or the labour inspectorates, sometimes supported by the police or bailiffs.

The administrative sanctions are usually issued by an administrative court or labour inspectorate with respective legal powers. The decision to sanction can be appealed in front of a labour tribunal or a court. On the other hand the collection of the fines could also be performed by tax authorities or bailiffs.

Courts or prosecutors, with the support of the police, are responsible for the notification and execution of criminal sanctions in tackling undeclared work. This relies on cooperation procedures between the police and the judicial system in different countries. In such cases, (labour) enforcement authorities notify and transfer the case to police, prosecution (specialised or general) and/or the courts.

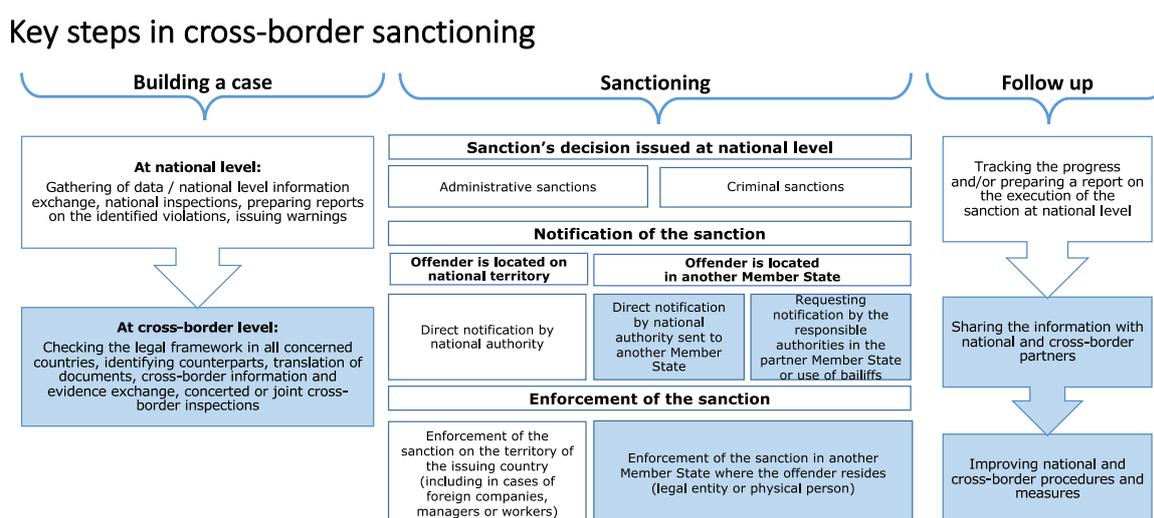
### 1.5 What is the current experience of cross-border sanctioning?

Key steps of national and cross-border collaboration procedures include:

- Collecting relevant information and evidence to determine an infringement and to decide on a sanction – building a case;
- Collaborating at national and cross-border level to enforce a sanction;
- Following up on a sanction.

The figure below presents the key steps of the sanctioning process, highlighting the main cross-border elements in blue.

**Figure 1. Key steps in cross-border sanctioning**



Source: CSD/ICF.

These procedures are illustrated by examples of administrative and criminal sanctions below, as well as the recovery of social security and re-payment of salaries.

#### Administrative sanctions including the recovery of fines

As mentioned above, most Member States apply administrative sanctions for undeclared work, at national and cross-border level. Once national authorities have sufficient evidence to build a case, it is processed by legal experts, prosecutors or courts. For instance, lawyers at the Dutch labour inspectorate analyse inspection reports and establish the type and severity of a violation, further to which a fine is imposed and collected - directly or through a bailiff.

Examples shared during the workshop show that the authorities often attempt first to collect administrative fines or recover social and tax contributions themselves. For example, enforcement bodies in Spain, Denmark, Sweden and the Netherlands send notification letters of intended sanctions directly by mail to a non-compliant national or foreign company. If needed, they request necessary details (such as the address of a company, VAT number, etc.) from foreign partners.

If fines are not paid by the notified companies on a spontaneous basis or cannot be notified directly, enforcement bodies request support from their counterparts in the country of the company's registration.

The most common experience of cross-border sanctioning amongst national authorities relates to the circumvention of posting of workers<sup>10</sup> rules. Having a dedicated Internal Market Information system's (IMI) module for the posting of workers was highly appreciated by the thematic review workshop participants. This module empowers the authorities to send requests for information from other Member States, as well as for notification and/or enforcement of administrative penalties and fines. The IMI also provides for clear procedures, roles and responsibilities. The Posting of Workers Directive 96/71 and its Enforcement Directive 2014/67 further facilitates the process by setting the rules for administrative cooperation and obliging Member States to nominate responsible authorities (see section 2.2). In a cross-border setting, Member States use mostly the IMI posting module to ask a foreign enforcement body to notify or enforce a sanction. IMI is usually accessible to the authorities responsible for collecting fines in posting situations. For that reason, it is important that Member States identify the most relevant bodies who have legal powers to collect a fine. Another option for requesting cross-border support is the use of e-mails or other communication channels.

Some examples of notification and execution of administrative fines are presented in the boxes below.

#### **Examples from Belgium, France, and the Netherlands on the use of administrative sanctions**

In **Belgium**, the Directorate of Administrative Fines at the Public Service of Employment, Labour and Social Dialogue can issue administrative fines for infringements of labour and social security law. Administrative fines are applied by a labour tribunal or labour court and can vary from EUR 80 to EUR 24 000. This procedure is applied only if the

<sup>10</sup> European Platform tackling undeclared work, (2019). Annual Platform Survey. Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions.

<sup>11</sup> Project CIBELES Final Report, (2011). Convergence of Inspectorates Building a European Level Enforcement System. A Project for Setting Up EUROSOSH (A European Network for Enforcement).

infringements are not prosecuted by a labour prosecutor or the labour prosecutor has not reached a settlement with the accused. Notification and recovery of cross-border fines are implemented mainly in relation to non-compliance with Posting Directive 96/71/EC or Enforcement Directive 2014/67/EU.

In **France**, the Regional Directorate of the Labour Inspection (DIRECCTE) notifies administrative sanctions in national and cross-border cases of non-compliance with posting obligations, previous provisions for suspension of services or failure to pay previous fines. The employer is then invited to respond in an adversarial procedure. DIRECCTE issues collection permits via the 'CHORUS' tool,<sup>12</sup> shared by different government services, and the General Directorate of Public Finances is responsible for collecting the fines. Administrative seizures have however been very limited if the debtor is located outside the country.

The decision of the Directorate can be challenged before an administrative judge, including fast-track proceedings. The amount of the fine imposed by the final decision can then reach up to EUR 4 000 per employee within a limit of EUR 500 000 in total. Breach of working conditions' standards may also result in the administrative suspension of international service provision for up to one month, while failure to pay previous fines results in the same sanction for up to two months. Undeclared work could also be sanctioned upon a decision by the prefect, through administrative closure for a period of up to three months. For a refusal to pay back unduly claimed public employment support (e.g. tax breaks for employing special risk groups of workers), the sanction of business closure can last up to five years.

In the **Netherlands**, Lawyers in the Fine, Periodic Penalty Payment and Collection Department of the inspectorate assess inspection reports. If they decide to fine, they send notification letters to the company's address or to the home address of the person concerned. The inspectorate always checks the address with the relevant Chamber of Commerce. Then the Dutch Collection Agency, sends a 'giro collection form'<sup>13</sup> for online payment of the fine with the option of paying in instalments for larger fines. However, the agency cannot collect fines in cross-border cases, so the Inspectorate contracts a bailiff office to send the payment request to a foreign company.

*Source: Presentations from France, Belgium and the Netherlands at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

### Criminal sanctions

Criminal sanctions are applied only in some Member States in both national and cross-border contexts, and are used less frequently compared to administrative fines. For example, in Belgium 25 % of the total infringements on labour and social security law are prosecuted by labour prosecutors (criminal procedures) and 75 % result in administrative fines.

Criminal procedures operate under more uniform rules in the EU/EEA, benefit from more legal possibilities for cross-border mutual assistance, and have greater preventive and behavioural impact. For this reason, some countries such as Belgium rely on legal aid requested by EU-level bodies like EUROPOL (in relation to large organised crime cases), EUROJUST, the European Judicial Network, and the Carin network (for asset recovery, seizure and confiscation). However, it often takes time to assess the enforceability of the sanctions in the judicial system.

Some examples of the use of criminal sanctions, as well as the benefits of requesting support by EUROJUST, are presented in the boxes below.

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<sup>12</sup> CHORUS is an inter-ministry tool launched in 2007 and fully introduced in the public authorities in 2011 in order to optimise public accounting. It allows fast recovery of fines and sets up a chain of sanctions and procedures. DIRECCTE is also obliged to impose financial sanctions through the platform. By linking data on fines and the posting declarations, the control agent is able to identify cases of unpaid sanctions by a foreign company.

<sup>13</sup> An interbank money transfer.

### **Example from France on the use of criminal sanctions in fraudulent posting**

In France, undeclared work facilitated by fraudulent posting is punishable by criminal sanctions (which could be complemented by business closure or exclusion from public procurement).

The criminal sanctioning process is based on an offence report prepared by an authorised control officer in the labour inspectorate, police, tax, social security or unemployment insurance authority. The decision on the sanction is pronounced by a judge, and can also be appealed, which can lead to the suspension of the sanction. The judge is also responsible for notifying foreign courts, if the case concerns another Member State.

An important aspect of the sanction procedure is that the end-client (person buying the services of the subcontractor) has the responsibility to check posting declarations with each subcontractor. In case the client does not perform this check, they are jointly liable for the payment of taxes, social security contributions and wages. Upon an alert by a control officer, the client must also end the contract.

Offenders may receive a prison sentence of one to three years and a penal fine of up to EUR 45 000 (or five times more if it concerns a legal person). The sanction is increased to five years and EUR 75 000 if it concerns a minor or a vulnerable person and to ten years and EUR 100 000 in case of organised crime offense. Additional sentences may include: prohibition to exercise an economic activity for more than five years, exclusion from public procurement for up to five years, confiscation of property used to commit the offense or 'black-listing' the company on the website of the Ministry of Labour for up to one year. Yet, failure to register a worker to the social insurance authority can result only in a criminal fine of EUR 1 095 (value for 2020).

*Source: Presentation from France at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

### **Recovery of social security and re-payment of salaries**

The recovery of social security contributions increases the effect of the administrative and/or criminal sanctions and remedy unfair advantages. According to the Annual Platform Survey, most countries (61 %) differentiate between sanctions and the recovery of unpaid social security contributions. However, this is much less common in Eastern and Central European countries (40 %).<sup>14</sup> The recovery of unpaid social contributions has its own specifics, because they involve different administrative processes and are treated differently within the law.<sup>15</sup>

Similar to the sanctions imposed by labour inspectorates, tax authorities and/or criminal courts, social security authorities may also demand refunds of social security contributions, unduly paid benefits and payment of wages (e.g. France, Belgium and Spain). However, for the latter, a judicial lawsuit can be initiated by the worker, eventually with the help of a lawyer, trade unions or non-governmental organisation (NGO). The need of such external support points towards the insufficient support of workers in many cases.

A number of Member States have signed bilateral agreements, in order to either gain electronic access to social insurance and pension data of EU citizens in other countries<sup>16</sup> or to facilitate the recovery procedures.<sup>17</sup> The countries could also use the Electronic

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<sup>14</sup> European Platform tackling undeclared work, (2019). Annual Platform Survey. Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions.

<sup>15</sup> Ibid.

<sup>16</sup> European Commission, (2018). Annex II to the 2018 report "Fraud and error in the field of EU social security coordination".

<sup>17</sup> Directorate-General for Employment, Social Affairs and Inclusion and HIVA-KU Leuven, (2020). Recovery procedures. Compendium of national procedures for the recovery of foreign debts according to Article 78 of Regulation (EC) No 987/2009 and of all designated institutions responsible for recovery matters and their contact information.

Exchange of Social Security Information (EESSI)<sup>18</sup> for ensuring better tackling of social security infringements. Member States also hold training and awareness-raising workshops for employers, employees engaged nationally or abroad, and public servants on how to correctly apply the social security regulations.<sup>19</sup>

### **Example from Spain on the recovery of social security payments and wages**

In Spain, the labour inspectorate is responsible for initiating social security infringement and recovery proceedings against the employer, regardless of where the companies are established. The inspectorate is also responsible for infringements regarding the non-payment of salaries or discrimination on the grounds of workers' origin or nationality.

In cases of fraudulent posting, the inspectorate asks the competent social security authority to request the withdrawal of A1 forms by the respective authority in the other Member State (according to Article 5 of Regulation 987/2009). At the same time, a resolution by the inspectorate is approved to stand by the proceeding until the withdrawal request is arranged or until the requested cooperation has been rejected. If salaries are not paid back, the labour authorities can initiate a judicial lawsuit.

*Source: Presentation from Spain at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

## **1.6 What are the main challenges for enforcement authorities?**

There are very few examples of sanctioning of undeclared work which has been fully enforced across borders<sup>20</sup>. Participants at the workshop noted that very few sanctions, mainly administrative (i.e. non-criminal) fines, have been successfully implemented in cooperation with another Member State.

Participants identified several challenges that enforcement bodies face while executing sanctions of cross-border undeclared work-related infringements:

- Labour law violations, social security or tax evasion or non-compliance to register workers or economic activity are regulated primarily at national level. This results in different authorities, infringements and types of sanctions being involved. Enforcement bodies are often unaware of their respective counterparts' areas of competence or the legal procedures used in other countries. For example, what is an administrative infringement in one Member State, may be considered criminal violation in another, or not be recognised as an infringement at all. There is also limited evidence of holistic approaches being used in a meaningful way to sanction across borders;<sup>21</sup>
- There is a lack of established procedures to operate across borders and limited understanding about which authorities are involved, and which procedures to follow regarding the most complex cases, for instance when dealing with letterbox companies or complex subcontracting chains which operate across many different countries (often involving also non-EU based companies);
- If cross-border collaboration is initiated, partners may not be able to proceed with the sanctioning across borders because of different rules and formal evidence or data sharing requirements. Authorities face particular challenges for information exchange, when a case is launched as an administrative procedure, however later

<sup>18</sup> European Commission, DG Employment, Social Affairs & Inclusion. Policies and Activities. Available at: <https://ec.europa.eu/social/main.jsp?catId=869>

<sup>19</sup> European Commission, (2017). Fraud and error in the field of EU social security coordination.

<sup>20</sup> According to the 2019 Annual Platform Survey, requested sanctions in the past two years vary from two in Iceland to around ten in Belgium and the Netherlands, and nearly 20 in Sweden. The number of requests received ranged from four in Germany and Portugal, to over 30 in Hungary and 36 in Poland.

<sup>21</sup> See also: ILO, (2013). Labour Inspection and Undeclared Work in the EU, Labour Administration and Inspection Programme (LAB/ADMIN), Working Document Number 29. and Project CIBELES. Final Report, (2011). Convergence of Inspectorates Building a European Level Enforcement System. A Project for Setting Up EUROSH (A European Network for Enforcement).

it evolves into a criminal investigation (e.g. based on the uncovering of new incriminating evidence). Administrative procedures in general offer greater possibilities and channels for information exchange than criminal procedures, as the latter often demand strict requirements regarding the evidence and its secure transfer.<sup>22</sup> Moreover, criminal procedures may also necessitate the legal power of the relevant authorities to summon the employer and the employees as witnesses to courts.<sup>23</sup> Furthermore, in both proceedings, there are also often language barriers;

- Bilateral or multilateral agreements are usually limited to exchange of information, and rarely include any procedures regarding sanctions. Moreover, the signatories may lack sufficient remit to ensure effective enforcement of sanctions, even if such provisions are foreseen;
- Cross-border sanctioning can require translation, travel costs, the motivation and ability of professionals to work across borders. Once initiated, the process to effectively enforce a cross-border sanction can be lengthy (offender-companies might have disappeared in the meantime);
- At national level, sanctioning in the area of undeclared work includes several actors which have different responsibilities for initiating, deciding, notifying and collecting sanctions. Labour inspectorates, which are mainly involved at the beginning of the procedure, face challenges in following-up if a sanction's decision has been notified and enforced across borders (a task usually performed by courts, prosecutors or bailiffs). This poses challenges to the monitoring of the sanctions' impact on reducing undeclared work in both concerned countries.

## 2. POSSIBLE SOLUTIONS FOR ENFORCING CROSS-BORDER SANCTIONS

This section covers possible solutions to enhance cross-border collaboration to sanction cross-border undeclared work:

- A focus of national procedures to enforce cross-border sanctions more efficiently;
- The role of the EU legal base in facilitating cross-border sanctioning;
- Bilateral agreements as a basis for cross-border sanctioning;
- Clearly established procedures for information exchange;
- Monitoring procedures and follow-up.

### 2.1 Efforts at national level to enforce cross border sanctions successfully

Given the complexity of enforcing both criminal and administrative sanctions in another country, enforcement bodies often focus primarily on national solutions for effective sanctioning. This includes national collaboration or the commitment to short processing times, as illustrated in the examples below.

#### **Cooperation and fast processing: Examples from Denmark and France**

The Danish Working Environment Authority (WEA), the police and the Attorney General work jointly while sanctioning undeclared work. Those authorities aim to issue administrative or criminal sanctions within 14 days to foreign companies that have violated the law. Within the timeframe, most companies are likely to be still operating in Denmark.

<sup>22</sup> European Platform tackling undeclared work, (2019). Report on data protection and data exchange. Plenary session on 24-25 October 2019.

<sup>23</sup> European Platform tackling undeclared work, (2020). Toolkit on cross-border concerted and joint inspections.

In France, professional secrecy cannot be used as a justification to withhold information between control officers of different enforcement authorities, which enables information exchange and sanctioning on national level. The labour inspectorate, the police, gendarmes, tax, social security, unemployment insurance, road, maritime, and air traffic authorities can exchange information freely, if it is necessary to determine a legal violation.

*Source: Presentations from Denmark and France at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

As noted above, many Platform members notify and try to collect administrative cross-border fines themselves. This approach seems efficient for some cases: in France, Belgium and the Netherlands around half of foreign companies pay instantly, without the need for further procedural steps, which is an efficient approach for the enforcement authority. This spontaneous payment can be enhanced by stronger wording in notification letters or through offering options to pay the fine in instalments, staggering the financial impact for companies. Another practice is to mention both the main contractor and the client/sub-contractor located in the country enforcing joint liability.

## 2.2 The role of the EU legal base in facilitating cross-border sanctioning

The existing EU legal base can facilitate cross-border sanctioning if appropriately transposed and implemented. The key principles set in EU legislation related to punishable infringements, information exchange, mutual assistance and/or mutual recognition of the sanctions, could greatly facilitate cooperation between Member States, especially if correctly transposed into national law. More specifically, the EU legal base provides definitions for what constitutes a violation (e.g. fraudulent posting of workers, abuses of social security coordination systems, tax obligations and working conditions), and thus sets the basis for harmonised regulations across Member States.

### EU legislation relevant to defining infringements

Directive 96/71/EC on Posted Workers<sup>24</sup> provides a common legal 'entry point' to identify possible infringements related to fraudulent posting. Violation of any of the requirements listed in Article 3 *Terms and conditions of employment* could invoke sanctions in both concerned countries.<sup>25</sup>

Other EU Directives also provide basis for setting unified national definitions on a number of labour-related violations such as: employers' obligations,<sup>26</sup> occupational safety and health,<sup>27</sup> breaches of the labour conditions in temporary work agencies<sup>28</sup> and human trafficking.<sup>29</sup>

<sup>24</sup> Directive 96/71/EC lists the main workers' rights: a) maximum work periods and minimum rest periods; b) minimum paid annual holidays; c) minimum rates of pay, including overtime; d) setting of conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; e) health, safety and hygiene rules; f) protective measures with regard to pregnant women, children and young people; g) equality between men and women and non-discrimination.

<sup>25</sup> Some national provisions defining infringements are already closely connected with EU-based rules, e.g. the Belgian LIMOSA register or the Danish RUT register are both applicable to posted workers and referring to Directive 96/71/EC.

<sup>26</sup> Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Available at: <https://eur-lex.europa.eu/eli/dir/1991/533/oj>.

<sup>27</sup> Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01989L0391-20081211>.

<sup>28</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0104>.

<sup>29</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036>.

In addition, EU legislation clarifies the procedures for cross-border cooperation, including cases of sanctioning undeclared work infringements. This includes, among others, the principles of mutual assistance (requests for information, for notification of sanctions, for precautionary measures or for recovery) and mutual recognition of the sanctions (automatic enforcement in another Member State).

Requests for notification or enforcement, accompanied by a certified final decision, could be transmitted successfully through IMI. For example, the Dutch Inspectorate SZW was unsuccessful to collect a fine from a Czech company. Then, a request was transferred through IMI to the Czech labour inspectorate which executed the sanction.<sup>30</sup> A list of relevant EU legislation, which sets procedures for cross-border cooperation in the area of sanctioning is presented in the box below.

### **EU legislation setting procedures for cross-border cooperation and sanctioning**

The Enforcement Directive 2014/67<sup>31</sup> describes the procedural rules for exchange of information, notification and enforcement of sanctions imposed on foreign service providers and the recovery of administrative fines in another Member State.

Regulation (EC) No 987/2009<sup>32</sup> and Regulation (EC) No 883/2004<sup>33</sup> provide for the cross-border rules applicable to the recovery of social security contributions, as well as enforcement of penalties and sanctions, in cases related to posted workers, workers working simultaneously in two or more Member States, posted self-employed, as well as the withdrawal of A1 forms.

The mutual recognition of financial penalties in criminal matters is provided by the Council Framework Decision 2005/214/JHA.<sup>34</sup> The listed offences in Article 5 however do not refer directly to undeclared work, although there can be an indirect overlap, for example in cases of forgery of administrative documents. According to the *CIBELES project* participants,<sup>35</sup> FWD 2005/214 is not consolidated legal instrument with which to execute fines promoted or imposed by labour inspectorates, nor can it be fully applied except in a few Member States. The Decision is still in a process of transposition and it is also doubtful that it could be applicable to administrative decisions. Only the representatives of France, Malta and Germany in the *CIBELES project* have indicated that execution of fines is being carried out by FWD 2005/214 rules, but only regarding fines that can be appealed before criminal courts.

Council Act 2000/C 197/01<sup>36</sup> could also be used as a basis for establishing national level procedures for mutual assistance in criminal matters.

Directive 2010/24/EC<sup>37</sup> concerning mutual assistance (but not mutual recognition) for the recovery of claims relating to taxes, duties and other measures, is also relevant. This

<sup>30</sup> European Platform tackling undeclared work, (11 June 2020). Follow-up online workshop: Cross-border sanctions in the area of undeclared work.

<sup>31</sup> The Enforcement Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

<sup>32</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland)

<sup>33</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) (currently revised under Regulation (EU) 2019/1149)

<sup>34</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

<sup>35</sup> Project CIBELES. Final Report, (2011). Convergence of Inspectorates Building a European Level Enforcement System. A Project for Setting Up EUROSH (A European Network for Enforcement).

<sup>36</sup> Council Act 2000/C 197/01 of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

<sup>37</sup> Directive 2010/24/EC of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

Directive however excludes compulsory social security contributions and criminal penalties.

Cross-border cooperation on undeclared work in the area of taxes can be further enhanced by transposing Council Directive 2011/16/EU.<sup>38</sup> It lays down the procedures for administrative cooperation and exchange of information concerning all taxes related to income from employment.

*Sources: see related footnotes.*

A successful example of an investigation involving EUROJUST is presented below.

### **Successful action in EU social fraud case**

Three Belgian and three French transport companies were alleged to have established subsidiary companies in the Slovak Republic and Portugal, while continuing to operate in Belgium and France. Their objective was to employ drivers at lower cost and with fewer social benefits.

In 2017, an investigation was run by the Federal Public Prosecutor's Office in Belgium and by the French Public Prosecutor's Office and the Central Office for Fighting against Illegal Labour of the national Gendarmerie in France.

This complex case of serious organised social fraud involved the contravention of EU regulations concerning cross-border employment of personnel from 2010 to the present, with an estimated evasion of social contributions amounting to between EUR 8 and 9 million.

EUROJUST supported two coordination meetings between Belgium and France. The joint teams then held multiple interviews and searched 44 houses and premises. As a result, four arrests were made (in Belgium, France, Portugal and Slovak Republic; two on the basis of European Arrest Warrants issued by the Belgian authorities). Several cars, 20 trucks, documents, computers, jewellery and computer data were seized as a result of the cooperation.<sup>39</sup>

*Source: Presentation from Belgium at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

## **2.3 Clearly established procedures for information exchange**

Member States often need to request information or evidence from a partner country, in order to successfully build their case at national level, or to be able to reach the responsible persons residing abroad. Such information could relate, for example, to the address of the company, VAT number, the activities performed, the social security contributions paid or the actual working conditions. The gathering of this information or evidence may necessitate either checks in national databases, or a visit to the worksite or company's head office. In case the initial violation is detected during a joint or concerted inspection, secondary checks could be necessary.

The IMI module on posting<sup>40</sup> provides a convenient, fast and secure tool for information exchange, allowing Member States to request further information about a case, which could potentially lead to a sanction. According to the 2019 Annual Platform survey, a third of the Member States applied cross-border sanctions related to undeclared work following information exchange in the IMI posting module. As cross-border sanctions could relate to

<sup>38</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

<sup>39</sup> Eurojust website, (20 March 2017). Successful action in EU social fraud case.

<sup>40</sup> European Platform tackling undeclared work, (2019). Annual Platform Survey. Tackling undeclared work in the collaborative economy and bogus self-employment, data exchange and data protection, and cross-border sanctions.

a number of violations, not strictly limited to posting of workers, the possibility of developing an IMI module for undeclared work is currently being considered.

It is important that any evidence exchanged between the Member States contains all necessary details, and is in the appropriate format, in order to be accepted by the court. The successful implementation of this procedure depends largely on the knowledge the countries possess on each other's legal systems, as well as on their internal capacities to perform checks. Evidence gathered from inspections could also be used in courts (in 14 Member States, according to the 2019 Annual Platform Survey<sup>41</sup>), while 18 Member States accept this evidence only in administrative proceedings. Legal provisions for evidence gathered abroad do not exist in nine Member States (Cyprus, Denmark, Germany, Greece, Hungary, Malta, Portugal, Sweden and Slovakia).

#### 2.4 Bilateral agreements as a basis for cross-border sanctioning

Lastly, bilateral agreements and memoranda of understanding identify the partner authorities and relevant contact points for each type of violation or sanction. They can also spell out the relevant national pieces of legislation for sanctioning undeclared work and how they correspond between the agreement parties. For example, a bilateral agreement allows Irish labour inspectors to present cases to an UK court. The cases below illustrate agreements on procedural rules which may lead to better sanctioning.

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<sup>41</sup> Eurofound, (2019). Industrial relations. Joint cross-border labour inspections and evidence gathered in their course.

### **Example from Norway on the use of bilateral agreements for information and evidence exchange**

The Norwegian Labour Inspectorate has bilateral agreements with Estonia, Lithuania, Romania, Bulgaria, Poland and Latvia. The authority uses the IMI or e-mails to request further information on cases identified in national inspections or from inspections held abroad. The partners exchange information on wages and working conditions, or labour law irregularities identified during inspections. When necessary, the partner countries organise joint and concerted inspections. Thus, the sanctions issued in Norway are based on evidence gathered in both concerned countries and can result in sanctions in both countries.

For example, the cooperation between Norway and Lithuania uncovered minimum wage offences and underdeclared working time of Lithuanian workers posted to the fish industry in Norway. As a first step the Lithuanian Labour Inspectorate provided time sheets, pay slips and an overview over employees in the different companies. They confirmed the Lithuanian employees worked more hours than the company had reported to the Norwegian authorities.

As a result, the companies were obligated to change the way they registered working hours, and to prove they pay minimum wages. However, the companies shut down in Norway before the administrative fines from the Norwegian Labour Inspection were collected and cases were reported to the police. In Lithuania, investigations were taken up by the tax authorities and are still ongoing.

### **Example from Spain on the use of bilateral agreements for notification of sanctions**

The labour inspectorates of Spain and Portugal notify cross-border administrative fines based on a bilateral agreement. The agreement includes sanction proceedings against registered companies. To do so, information is exchanged between the Portuguese and Spanish labour inspectorates on a daily basis via different channels, such as email and telephone. In addition, a detailed technical handbook supports the Spanish Labour Inspectorate with relevant legal provisions and regulations that Portuguese companies must comply with.

*Source: Presentation from Spain at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

## **2.5 Monitoring procedures and follow-up**

Monitoring the sanctioning process at all its stages is important in order to evaluate its efficiency in reducing undeclared work, as well as for the future improvement of the applied procedures.

The role of the labour inspectorates however is usually limited to the beginning of the process – i.e. the detection of the violation, and the preparation of a detailed report on the uncovered law infringements. This report, along with recommendations for further actions, is then transferred to the respective court or other public body with legal powers to issue a decision on a sanction. Thus, the labour inspectorates face challenges to follow-up on the number of sanctions stemming from the same case (labour, social security or tax-related), the severity of these sanctions, or their actual notification and enforcement. In this regard, many enforcement bodies have identified the need to establish enhanced national and EU level cooperation procedures between and within all authorities involved in the process.

A good example on follow-up procedures presents the Dutch inspectorate, which monitors the collection of administrative fines as showcased in the box below.

### **Example from the Netherlands on monitoring the collection of administrative fines on national and EU level**

The Labour Inspectorate SZW in the Netherlands has an established procedure to notify infringements and collect administrative fines relating to undeclared work. In the inspectorate, the Department of Fines, Periodic Penalty Payments and Collection notifies and collects fines, with the help of the Dutch Collection Agency for national fines and the bailiff office for foreign fines. The status of national and cross-border fines is monitored in an online database which allows the inspectorate to track monthly and yearly progress. It also provides information on the amounts of irrecoverable fines.

In the last ten years, around 75% of all fines were collected successfully. Nearly 60% of cross-border fines were collected from foreign companies, who paid instantly after the first notification of the Dutch inspectorate.

If cross-border fines are not paid immediately after direct notification by the inspectorate, applicable cases can be transferred to IMI and request the collection of the fine abroad. For this procedure all appeal timeframes must have passed, otherwise the collection could be significantly delayed. If a case is only partly covered by IMI, a bailiff's office collects the fine not covered by IMI.

The collection of cross-border (as well as national) fines however depends on the type of infringement. For example, in cases related to occupational safety and health violations, about 97 % of the fines are collected, while only about 29 % of fines for minimum wage and holiday allowance violations are collected successfully. This is because fines for occupational safety and health violations are low, while the fines for minimum wage and holiday allowance violations are higher.

*Source: Presentation from the Netherlands at the thematic review workshop: Cross-border sanctions in the area of undeclared work, 28 – 29 January 2020, Paris, France.*

## **3. CONCLUSIONS AND RECOMMENDATIONS**

Sanctioning across borders is a complex challenge. It can involve multiple actors and stakeholders from a range of enforcement bodies and Member States. It can lead to lengthy procedures and requires legal knowledge, translation and travel costs, and the motivation and ability of professionals to work alongside their counterparts from other Member States.

Few 'good practices' on the use of sanctions to further tackle undeclared work across borders exist. However, there are promising approaches, such as collaboration at national level and EU-level, backed up by EU legislation, established information exchange, bilateral agreements and the follow-up of sanctions. The appointment of liaison officers and the establishment of legal departments at the labour inspectorates can greatly contribute to the achievement of these goals.

Participants at the workshop proposed several concrete recommendations and capacity-building measures which could be taken forward at national and EU level to further enhance the frequency and efficiency of the cross-border sanctions. At national level these could include:

- Further developing a holistic approach to national and international cooperation, with clarity on roles, competences and responsibilities. This includes better cooperation between national authorities initiating, notifying and collecting fines in order to monitor enforcement and to evaluate the efficiency of a sanction;
- Taking advantage of existing resources to conduct pilot projects, for instance, use of the staff exchange / joint activity programme of the Platform;
- Ensuring sufficient resources are allocated for cross-border sanctions (e.g. costs for travel and translation) and ensuring training is provided to individuals involved;

- Further developing risk assessment processes to identify cases of cross-border undeclared work, for instance by developing common online registers which can 'talk' to each other (see for example Estonia and Finland who joined data exchange systems named X-Road and Suomi.fi or the Danish Register of Foreign Service Providers at national level);
- For criminal sanctions, requesting legal aid and/or secure information (and evidence) exchange by EUROJUST, EUROPOL, the European Judicial Network or the SIENA tool.

At EU level, support with cross-border sanctions could consist of:

- Encouraging Member States to identify the situations and the types of undeclared work which may need to be sanctioned across borders, and creating effective targeting and sanctioning strategies;
- Developing legal guidance on how existing legislation could be used for cross-border sanctioning;
- Developing common templates, handbooks and guidance which can be used at operational level, including examples of good practice;
- Ensuring sufficient training of inspectors or responsible individuals for the tools and templates, procedures and evidence once established (e.g. on the use of IMI, collection of evidence, relevant legislation for various procedures, etc);
- Developing a knowledge platform informing users about the applicable legislation, types of sanctions and competent authorities in each Member State combined with guidance on what evidence is accepted by the courts;
- Further developing data and information exchange systems so that they are 'fit for purpose' (e.g. taking forward proposals on the creation of an undeclared work module within the IMI system).
- Explore using the Electronic Exchange of Social Security Information (EESSI) for ensuring better tackling of social security infringements.

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