



European Platform
tackling undeclared work

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

Inga Pavlovaite

Background paper for the thematic review workshop on tools
and approaches to tackle fraudulent temporary agency work,
prompting undeclared work

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INTRODUCTION

This discussion paper provides background¹ to inform the thematic review workshop that will be held online on 12 and 13 November 2020. This workshop will bring together Platform members and observers as well as representatives from the European Commission and the European Labour Authority. The workshop is also linked to a small-scale study on the topic, on which a report is upcoming and will be published in the near future.

One aim of this thematic review workshop is to explore the specifics of fraudulent agency work, prompting undeclared work, across the EU and in selected Member States. It will also identify available tools and approaches to tackle the problem, both within the Member States and through cross-border cooperation.

Conclusions of the workshop will feed into a learning resource paper which will look at key steps in understanding, assessing and addressing undeclared work in the temporary work agency context. Workshop participants are therefore encouraged to share their experiences and knowledge, guided by a number of questions listed in this paper.

Overall, the following topics will be discussed during the workshop:

- **State of play and main challenges in defining fraudulent agency work:** to review experiences of participating organisations on the scale and key features of fraudulent agency work;
- **Tools and approaches to tackle fraudulent agency work at national level:** to explore existing solutions for preventing, identifying and sanctioning fraudulent agency work in an efficient and effective way;
- **Working across borders to tackle fraudulent agency work:** to discuss concrete cross-border cooperation examples to tackle fraudulent agency work.

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

1.1 What types of fraudulent agency work will the event address?

The focus of the event is the **fraudulent use of agency work for the purposes of undeclared work**. This excludes other temporary agency activities, which can be illegal, criminal or illegitimate (e.g. use for human trafficking, fake vacancies, abuse of health and safety rules, agencies overcharging fees for employers and workers).

Temporary work agency is defined using the legal definition in the Article 3 of the Directive 2008/104/EC as "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".² Temporary work agencies differ from private employment agencies (which solely provide services such as job matching offers and applications for employment and never become a party to the three-way employment relationship). Temporary agency work refers in this context to work arising out of **the triangular employment relationship** between a temporary work agency, a worker and a "user undertaking" (also referred to as a company, end user, end client or final provider of work).

Across the EU, **most temporary work agencies and user undertakings are compliant** with the legal framework rules and are not involved in facilitating undeclared work. However, some activities delivered through temporary work agencies can be considered susceptible to the risk of undeclared work. This is due to certain characteristics of

¹ This discussion paper is informed by a draft report on this subject under the auspices of the Platform. In its 2019-2020 annual work programme, the Platform has undertaken a report to advance the current understanding of (i) the trends in undeclared work encountered in temporary agency work at both national and cross-border level and (ii) how national authorities and social partners are tackling the issue of fraudulent agency work prompting undeclared work. It will be finalised later in Q4 2020.

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF>

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

It is important to remember that the event will focus on **temporary work agencies and user undertakings that do not comply with existing regulations**.

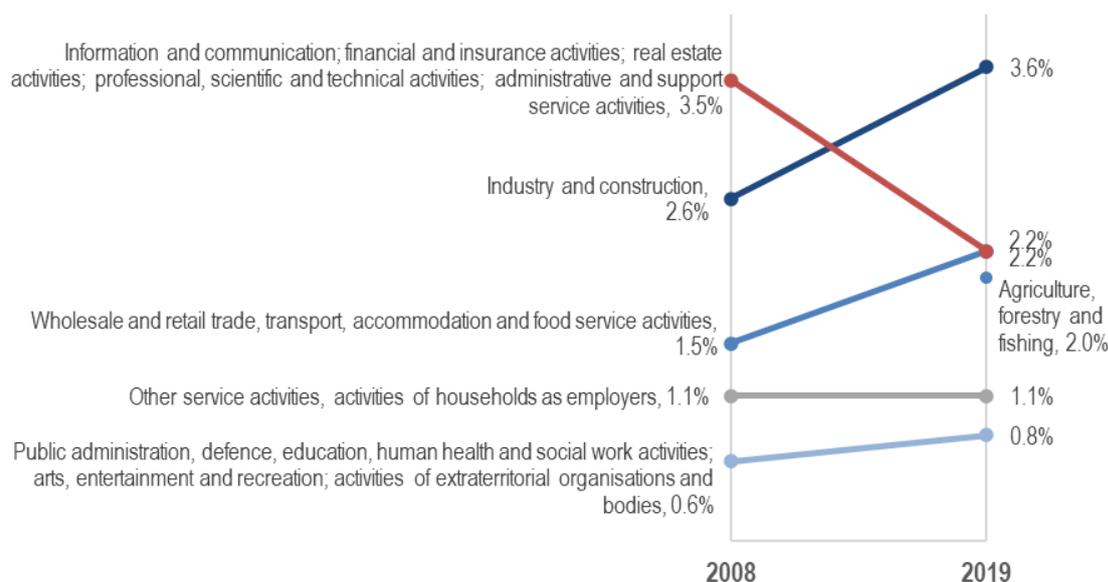
1.2 What are the key characteristics of temporary agency work in the EU?

Over the last decade, the share of workers employed by officially registered temporary agencies has increased (according to Eurostat) and was at 2.1 % in the EU-27 in 2019. However, there are marked differences between countries. In some cases, temporary agency work is a very minor feature of the national labour markets and its potential link to undeclared work is not a priority for enforcement authorities. Temporary agency work is particularly widespread (as a proportion of total employment) in Slovenia, Slovakia, Spain, the Netherlands and Malta. By contrast, it is below 0.5 % of total employment in Greece and Hungary. Temporary agency workers tend to be **younger, lower-skilled and recruited for comparatively lower-skilled tasks** and jobs at the user undertakings/end user.

The **temporary agency industry is fragmented**, with several global private recruitment agency brands, alongside a multitude of smaller, local or regional agencies (with at least 80 000 TWAs existing in Europe, according to World Employment Confederation Europe). This fragmentation presents a considerable challenge for enforcement.

Temporary agency work has a **strong sectoral dimension**. It is particularly widespread in the industry and construction sectors, which showed the most rapid growth in the past 10 years (see Figure 1). By contrast, TAW is infrequently used in public administration and other service sectors. Historical trends in the sectoral use of TAW show marked differences. Significant growth is observed in industry and construction, wholesale and retail, transport, accommodation and food service activities, while declines are evident in the service sectors of ICT, financial, professional and support services.

Figure 1. Temporary agency work as a proportion of total sectoral employment, 2008-2019, EU-27



Source: Eurostat (2019). Temporary employment agency workers by sex, age and NACE Rev. 2 activity [lfsa_qoe_4a6r2], accessed 13/05/2020. Further detailed sectoral breakdowns are not available.

Temporary agency work is regulated at EU/international level (providing a set of minimum rules and standards) and at national level. National legal frameworks have different levels of stringency on temporary agency work, ranging from very flexible to very strict regulations. For enforcement authorities, especially when addressing cross-border issues related to temporary agency work, this implies the need to be aware of different legal frameworks across countries that regulate temporary agency work.

Evidence also points to the **use of temporary work agencies when posting workers in the cross-border context.** 2017 data on the proportion of posted workers via temporary work agencies were available from nine Member States. Of these, the share of posting through TWAs amounted to 27 % in France, 13 % in Austria, 11 % in Belgium, 4 % in Poland and 1 % in Luxembourg.³

1.3 What is the extent of the problem of fraudulent agency work, prompting undeclared work?

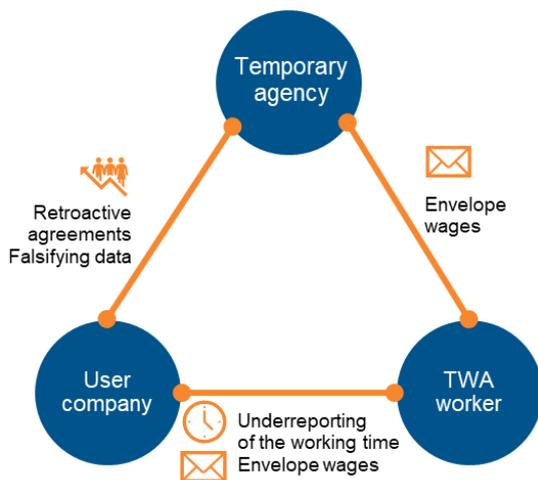
Across the EU, many TAWs and user undertakings operate in compliance with the legal framework rules and are not involved in facilitating undeclared work. This report focuses on TWAs and user undertakings that are **not compliant with the regulations.**

Another important distinction is between FAW prompting undeclared work in the national and cross-border contexts. While no hard data are available, reflections from the stakeholder interviews in the upcoming report conducted in the background of this workshop indicate that FAW for the purpose of prompting undeclared work is indeed a problem, especially in the **cross-border context.** In contrast, the extent and risk of fraudulent agency work prompting undeclared work appears to be lower for work performed exclusively in a national context, possibly due to the prevailing national regulatory frameworks.

From a geographical perspective, FAW prompting undeclared work can occur in both national and cross-border situations. In view of the three-way employment relationship involved in TAW, undeclared work at national and cross-border level can, in principle, occur at several stages of the employment relationship (see Figure 2).

³ European Commission, 2019.

Figure 2. Undeclared work in the three-way employment relationship involved in temporary agency work



Source: ICF (2020).

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

The connection between temporary agency work and undeclared work, and specifically how FAW prompts undeclared work, is an area where little research has so far been undertaken. Nor are there any quantitative or qualitative estimates of the extent of fraudulent agency work prompting undeclared work.

There is **a debate on the relationship between temporary agency work and undeclared work**. While there is research highlighting the advantages of temporary agency work in allowing companies to respond flexibly to labour needs and thus diminishing the need to resort to undeclared work,⁴ other research argues that temporary agency work leads to worse working conditions (e.g. in relation to occupational health and safety issues, wages, access to training or trade union representation) and higher levels of undeclared work.⁵

Poorer working conditions can contribute to the overall vulnerability of temporary agency workers. Such vulnerability can open the door to abuse, in particular undeclared work, other types of social fraud, and non-compliance with occupational health and safety rules or collective bargaining agreements. Such risks may lead to higher rates of exploitation and cases of fraudulent agency work prompting undeclared work.

Without hard data to fully support either perspective, there are indications that **fraudulent agency work prompting undeclared work is a particular problem in the cross-border context**. This is due to the complexity of the employment relationship between worker, agency and end undertaking, which is amplified when they occur across the national jurisdictions. Another key factor in prompting undeclared fraudulent agency work in cross-border situations is the activities of 'letterbox' temporary work agencies, unregistered/unlicensed agencies, and 'phoenix' activities, often across long and complex subcontracting chains involving several entities.

This **complexity of employment relationships** can be illustrated in a sectoral example. Recently, in the context of the COVID 19 pandemic, a spotlight was put on the labour-intensive meat processing industry, its use of temporary workforce via temporary work agencies and the complex chains of sub-contracting used.⁶ The meat processing sector has been very dependent on mobile EU workers from other Member States. Country case

⁴ WEC, 2019; IDEA Consult, 2015; Williams and Renooy, 2014.

⁵ Schömann and Guedes, 2012; European Parliament, 2016.

⁶ EFFAT 2020.

studies by the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) showed that many of the workers normally travel between the countries with meat processing facilities and their own country on a regular basis. Often, they are employed through temporary work agencies, rather than by the user undertaking. For example, in the Netherlands, some 80 % of workers in the Dutch meat industry are from Central Eastern Europe and are employed via temporary work agencies. In addition, in Germany a large proportion of meat processing industry workers were considered to be employed by temporary work agencies. Strong connections exist between the labour intermediary in the departure country and the subcontractor established in Germany, which makes it hard for the workers to establish boundaries between the temporary agency or the employer.

At both national and cross-border level, **the nature of fraudulent agency work prompting undeclared work involves unregistered and undeclared employment of temporary agency workers.** In cross-border cases, fraudulent agency work prompting undeclared work can also occur in the context of posting of workers undertaken by temporary work agencies. In both contexts, different types of undeclared work can exist, including in particular under-declared employment. When all three stakeholders - worker, employer and TWA - are registered workers, employers and TWAs, undeclared work practices mostly takes the form of under-declared employment. However, one or more of these can also be unregistered/unlicensed and when this is the case, undeclared work takes the form of wholly undeclared work and unregistered employment. This can take a number of forms:

- Unregistered worker, licensed TWA and formal employer – where a licensed TWA provides a worker to a user company, which does not register the employee for tax, social security and/or labour law purposes, to make cost savings on the tax and social contributions owed;
- Unregistered worker, unlicensed TWA and formal employer – where an unlicensed TWA (e.g. agricultural gangmaster agency, construction industry labour provider) provides unregistered workers employed on an undeclared basis (e.g. seasonal workers or day labourers picked up from well-known locations each morning) to a formal employer for an undeclared fee and the workers are paid 'cash-in-hand';
- Unregistered worker, licensed TWA and unregistered company – where a licensed TWA provides unregistered workers to an unregistered business on an undeclared basis, for a fee;
- Unregistered worker, unlicensed TWA and unregistered company – where an unlicensed TWA (e.g. construction industry labour provider) provides unregistered workers to an unregistered business for an undeclared fee. All stakeholders collude in failing to declare the transaction for tax, social security and/or labour law purposes.

Fraudulent agency work often involves **other violations of the regulatory framework**, such as breaches of the equality principle (ensuring equal pay and equal working conditions for temporary agency workers and other workers of the same employer), failure to adhere to the posting of workers legal framework or violating occupational health and safety rules.

Questions to prepare for discussion on the problem of undeclared work in the context of temporary agency work

- How extensive is the problem of FAW in your country? Can you give specific examples from your country/sector? How has the issue changed in the COVID-19 context?
- What are the most important types of undeclared and under-declared work prompted by FAW in your country?
- What are the main characteristics in terms of sectors, seasonality of work, types of workers involved?

- Are there specific business models of FAW that favour certain types of undeclared work?
- What are your main challenges to identify specific fraudulent temporary work agencies?

2 WHAT ARE THE TOOLS AND APPROACHES TO TACKLE THE PROBLEM AT NATIONAL AND CROSS-BORDER LEVEL?

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

At both national and cross-border level, the fight against fraudulent agency work prompting undeclared work takes place **within the broader framework of tackling a wide range of potentially fraudulent and abusive behaviours associated with temporary agency work**. The measures tend to tackle multifarious aspects of fraudulent agency work, including – but not limited to – prompting undeclared work. Thus, measures against fraudulent agency work prompting undeclared work are undertaken within a broader approach to tackling social fraud and other violations and fraudulent behaviours encountered in temporary agency work (e.g. disrespect for equal treatment of temporary agency workers in comparison to permanent employees, non-payment of minimum wages, or disregard for occupational health and safety rules). The national solutions found to tackle fraudulent agency work provide the basis for identifying the solutions and preparing the ground for the successful cross-border cooperation to address the fraudulent agency work in the cross-border contexts.

2.1 What are the main tools and approaches adopted at the national level?

National legislators, enforcement authorities and social partners use **a range of measures to tackle** fraudulent agency work at national level.

To start with, national governments have made **legislative changes to deter, prevent and enable the sanctioning** of fraudulent agency work prompting undeclared work. These are part of the overall drive to regulate temporary agency work more effectively and ensure further compliance with existing labour law, social security, tax and occupational safety and health regulations. Effective approaches combine legislative measures with awareness raising among all stakeholders.

The review of available literature found that Czechia, Finland and Germany have made recent changes to their legislative framework regulating temporary agency work, while interviewees for the upcoming report **highlighted legislative changes** in Belgium, the Netherlands and Poland. Examples include:

- In Belgium the law forbids the (direct) hiring-out of a worker (from company A to company B) without the intermediation of a registered and licensed agency, except under certain strict circumstances. This legislation is considered a useful instrument for labour inspectors to combat fictitious subcontractors in the chain, as user undertakings can only hire temporary workers via a registered and licensed temporary work agency. Such licensed and registered agencies are expected to be less likely to engage in fraudulent agency work prompting undeclared work, as well as to be more compliant with the existing regulations.
- In 2017, Poland specified regulations on the maximum length of deployment (18 months within a 36-month period) of a given employee to a specific employer. This clarification reduced the common practice of a company using the same employee over time by contracting a different agency to employ them.

These changes sought to make fraudulent agency work prompting undeclared work less feasible, and included **legislative provisions** establishing joint responsibility for ensuring correct payments across the subcontracting chain, regulating the number of contracts that can be held with an agency, duration of deployments, and size of wages and social security contributions paid in the context of temporary agency work.

Another area of legislative intervention related to establishing **joint responsibility for ensuring compliance across the subcontracting chain**. Indeed, most Member States have measures in place to regulate the system of liability in subcontracting chains. Examples of legislative measures identified in the Netherlands and Finland demonstrate approaches in terms of their comprehensive coverage and range of labour regulations covered (including those aspects relevant to the undeclared work).

Social partners in several Member States have negotiated **collective bargaining agreements** intended to prevent and protect workers from the risk of becoming involved in undeclared work through a temporary work agency. Social partners have also pursued awareness raising to improve the level of knowledge about fraudulent agency work prompting undeclared work. Effective social dialogue measures have been identified as a successful approach to tackling fraudulent agency work. For instance, as a consequence of extensive collective bargaining coverage, in the Netherlands and Germany, collective agreements now cover most of the temporary agency sector countrywide.

Enforcement authorities have pursued **a range of measures to detect and sanction** fraudulent agency work prompting undeclared work. This includes strategic approaches to tackling fraudulent agency work through annual priority setting and resource allocation, joint cooperation with social partners, and the use of sanctions. The measures have so far not been evaluated to assess their effectiveness, although stakeholders consider the concurrent use of several types of measure key to success.

A strategic approach to tackling fraudulent agency work has been reported by the enforcement authorities in Belgium, France, the Netherlands, Poland. This typically involves identifying fraudulent agency work as a specific work priority for the inspectorates, i.e. targeted inspections focused on fraudulent agency work, as well as consistent joint actions with other stakeholders, such as social partners (including the pooling and sharing of knowledge and intelligence, or working on joint identification of risk areas).

Joint cooperation with social partners has been identified in Belgium, France and the Netherlands. In Belgium, concrete tripartite action plans were developed between social partners and labour inspectorates. The deep sectoral knowledge of the social partners improves labour inspectorates' understanding of fraudulent agency work, leading to better targeted actions. This complements the results of official data-mining systems in helping to detect fraudulent agencies. Likewise, in the Netherlands, cooperation with social partners plays an important role in enforcement authorities' work on tackling fraudulent agency work. The social partners check compliance with the collective agreements regulating the temporary agency work sector through their own investigations and using information provided by local trade union members and provide this information to the enforcement authorities. In France, the outcomes of the National Plan refer to reinforced cooperation between services, as well as 'partnership conventions' developed between government and sectoral social partner representatives.

Several enforcement authorities have taken actions to raise their capacity in tackling fraudulent agency work (such as Belgium or Czechia). For example, In Czechia, the State Labour Inspection Office (SLIO/SUIP) strengthened its monitoring activities to detect fraud in the temporary agency work sector. This is a targeted initiative by the Ministry of Labour and Social Affairs (MoLSA), supported by the European Social Fund (ESF).

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

the case of fraudulent contracting work or fictitious temporary agency work (Czechia, France, Hungary, Luxembourg). Under some legal systems (e.g. France, the Netherlands), the administrative sanction may involve the 'temporary suspension' or 'definitive closure' of the employer's activity, notably in the case of unlawful or unauthorised agencies.

Preventive measures and incentives to encourage compliance with the existing TAW regulatory framework were not identified among the Member States considered here. This is largely because the legal framework for temporary agency work in most Member States already provides significant incentives for the use of regular and legal temporary agency work.

A comprehensive approach to tackling fraudulent agency work prompting undeclared work could be further developed, including joining-up operations, as well as data-mining, sharing and analysis, at both national and cross-border level, and considering a fuller range of improved sanctioning and detection, prevention, education and awareness-raising measures.

Questions to prepare for discussion on the national tools and approaches

- Are the current national legal frameworks effective to address fraudulent agency work prompting undeclared work? What are the characteristics of an effective legal framework?
- To what extent is the issue of undeclared work in the context of temporary agency work a strategic priority in your organisation? Are there specific priorities, targets, activities planned in your annual work programme or strategic plans? If not, is it an issue?
- Is there a strong sectoral focus to tackle agencies involved in fraudulent agency work in your country? How is it ensured in practice?
- Are you using risk analysis to identify risky sectors, companies, etc.? How do you do the risk analysis? Are there specific risk-assessment approaches using up-to-date intelligence (including insights and information from sectoral/cross-sectoral social partners)? What types of data mining or matching could be used to identify types of undeclared work?
- How are social partners involved in supporting detection and prevention of FAW? Which forms are most effective? For example, do social partners have formal agreements with enforcement authorities, develop direct mechanisms for reporting violations, share intelligence and experiences?
- What is your experience of implementing detection measures? Do you have specific detection methods and tools specifically developed and applied towards FAW? What are their main features ensuring their effectiveness and which elements are missing?
- What are the main obstacles to efficient enforcement and sanctions? How to overcome them?
- What is your experience of implementing awareness-raising campaigns towards workers exposed/potentially exposed to fraudulent agency work? How effective are they? What are the lessons learnt?

2.2 What are the main experiences of tackling FAW through cross-border cooperation?

Fraudulent agency work (including undeclared work and other forms of social fraud) is also an issue in a cross-border context. However, cross-border cooperation examples to prevention, detection and awareness-raising are **less developed than in the national context**. Cross-border cooperation between enforcement authorities is important in

tackling fraudulent agency work. While this requires time and resources to set up, it has mutually beneficial results for all parties.

Several examples of successful cross-border cooperation in tackling fraudulent agency work have been identified, showing a variety of cooperation formats, including exchanges of information through existing systems and channels (such as the Benelux cooperation platform), joint inspections and institutionalised structures of bilateral cross-border cooperation (such as working groups, regular joint inspections), and study visits. A number of cooperation activities have been funded through the Platform.

The focus of cross-border cooperation is **predominantly on improving the risk of detection and sanctions against fraudulent agency work** (involving undeclared work and other social fraud).

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

Sanctions are an important deterrence measure to tackle fraudulent cross-border activity of temporary work agencies and user undertakings. However, they are not used very often in cross-border contexts and the ability to issue them depends on the degree of cooperation between enforcement authorities across the different legal jurisdictions. Usually, cross-border sanctions relate to fraudulent posting situations and enforcement authorities use the specific Internal Market Information System (IMI) module to cooperate with colleagues in another Member State. Information about sanctions issued to temporary work agencies and/or user companies was not widely available across the sample of countries. Concrete examples in the framework of the Belgium-Netherlands cooperation showcased some examples of sanctions applied to the fraudulent use of temporary agency work in cross-border employment situations. The violations were identified during the course of bilateral cooperation and the ensuing sanctions were enforced in their own territory.⁷

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

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

To some extent, cross-border cooperation has also prompted **education and awareness-raising initiatives**. Cross-border campaigns to inform (potential) temporary agency workers of the risks and costs of working undeclared were identified, initiated by both the sending (e.g. Poland, Romania) and receiving countries (the Netherlands). Such campaigns

⁷ For further information on cross border sanctions in general please see Platform's resource on this topic at <https://ec.europa.eu/social/main.jsp?catId=1495&langId=en>

covered a whole range of subjects relating to workers' rights and obligations, as well as the working conditions when working in another country. The topic of working legally and safely via a temporary work agency was also included in such campaigns, as a separate issue.

By contrast, cross-border initiatives **promoting compliance with the existing regulatory framework** have been developed to a lesser extent.

Questions to prepare for discussion on cross-border cooperation

- Do you consider there is sufficient political attention to the issue of fraudulent agency work and social fraud among cooperating Member States? How important is this to stimulate fruitful cross-border cooperation tackling the complex issue of fraudulent agency work?
- To what extent is there sufficient institutional capacity to engage in joint cross-border cooperation activities and carry out joint inspections? How far do enforcement authorities on all sides have the necessary human and financial resources and capacity to plan, execute, and follow-up the results of the cooperation activities in addressing fraudulent agency work?
- What are the most effective practical ways to develop a cross-border understanding of the different national regulatory frameworks and stakeholders involved?
- How could existing national registration systems (such as for posting of workers, tracking the chain of liability, or others) be used to tackle cross-border fraudulent agency work?
- How should enforcement bodies access and share data on temporary work agencies across borders? How could sharing information about national agency registers, for example, be encouraged?
- What should be considered in joint or concerted inspections of agencies operating across borders?
- How can a more structured, strategic cooperation on the issue be supported?
- What roles and support from the EU-level do you consider would be most useful in this context?

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