

Effective penalty measures for tackling undeclared work, including through cost effective administrative actions

Practitioners' toolkit from the thematic review
workshop

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Introduction

1.1 What is the aim of the toolkit

1.2 Who is the toolkit for? How can it help?

1.3 Why are effective penalty measures important for tackling undeclared work?

1.4 Definitions, scope and terminology used

1.5 Structure of the toolkit

1.6 Challenges/obstacles when applying/implementing effective penalty measures

1.0 Introduction

What is the aim of the toolkit?

The aim of the current toolkit is to support enforcement authorities in deepening their understanding of effective penalty measures for tackling undeclared work. The toolkit provides step-by-step instructions, tips and good practices that could be used by Member State authorities. A special focus is placed on:

- ✎ the range and type of penalty measures available for tackling undeclared work, and
- ✎ effective administrative actions for executing penalty measures.

Who is the toolkit for? How can it help?

The toolkit aims to inform policymakers at national level, as well as to inform inspectors and managers within relevant enforcement bodies, on the process of implementing penalty systems for tackling undeclared work, promoting regularisation through a mix of penalties, and notifying and enforcing penalties in cooperation with other public authorities. The toolkit is also intended to be of use to all bodies tasked with sanctioning infringements in the areas of labour, social security, tax authorities, prosecutors, administrative and labour courts, police, etc. The information in the toolkit could also be beneficial for the social partners that initiate the corresponding judicial proceedings to protect the rights of workers.

Why are effective penalty measures important for tackling undeclared work?

To combat undeclared work, EU Member States rely on a combination of penalty measures and alternative sanctioning systems, such as non-compliance and compliance lists, naming and shaming, excluding businesses from bidding on public contracts and receiving licences and subsidies, payment requirements request, fines, and criminal prosecution. Penalty measures are the most commonly applied and successful approach towards tackling undeclared work in the EU.¹ In this respect, aiming for more efficient measures would lead to improvement in the conditions of the labour market and the overall capacity of labour authorities to tackle undeclared work. Specifically, more efficient penalty measures can translate into greater effectiveness in promoting the transition from undeclared to declared work, increasing full-time employment and ensuring its preservation over time, preventing employers from reoffending, and ensuring long-term labour law compliance. These are strategic objectives shared by all labour authorities. However, there is a diversity of penalty systems and approaches implemented across the EU. Labour authorities have to adopt the appropriate penalty measures vis-à-vis the specific challenges in their labour markets in terms of undeclared work.

Definitions, scope and terminology used

An important clarification should be made regarding the guiding terminology used in this toolkit:

- ✎ **“Effectiveness of the penalty systems”** refers to the achievement of the **desired results or impact** of the sanctions, measured by the share of undeclared work transformed into declared work, number and duration of newly signed labour contracts in sanctioned companies, share of the imposed fines that have been collected, decrease in repeat offences, etc. For the purposes of the current toolkit, this term also includes the **efficiency** of the penalty systems, measured by: its simplicity (e.g. the same results being achieved with fewer administrative costs and burdens); the use of the principle of proportionality (more severe sanctions imposed for more severe law infringements); the ability to measure the results after the penalty imposition (and perform cost-benefit analysis); as well as the increase in the number of positive court rulings compared with earlier periods due to the improved evidence-gathering techniques, knowledge and skills of inspectors.
- ✎ **“Penalty measures”** refer to all types of punishments imposed upon a legal or natural person which has violated the law. The approach applied by the authorities in determining, notifying and enforcing the penalties is referred to as the **“penalty system”**.
- ✎ **“Sanctions”**, in law and by legal definition, are penalties or other means of enforcement used to provide incentives for compliance with the legal framework.
- ✎ Both **“Penalties”** and **“sanctions”** can be used interchangeably (or applied at the same time) within the double jeopardy (*ne bis in idem*) principle.² Still, the term “penalty” is more frequently used with regard to a criminal offence. “Sanctions” are usually (but not always) associated with administrative or less severe violations of the legal framework, such as the protection of pregnant employees, vulnerable employees, and others with a special protection. Sanctions are resulting in fines or other disciplinary actions such as preventing employers from competing for public procurement contracts and receiving subsidies.
- ✎ A **“fine”** is a mandatory monetary penalty that is imposed by a court, commission, or other government authority and is paid to the public treasury.

¹ Williams, C.C. and Puts, E., *Organisational characteristics of enforcement bodies, measures adopted to tackle undeclared work, and the use of databases and digital tools*, Platform survey report, 2017, available at: <https://ec.europa.eu/social/BlobServlet?docId=18747&langId=en> [07 September 2022].

² *Ne bis in idem* is a fundamental legal principle also known as the prohibition of double jeopardy. According to this principle, a person cannot be prosecuted more than once for the same (criminal) behaviour.

Scope

This toolkit is oriented towards providing in-depth information on key elements of penalty systems and the rationale behind them. The toolkit also contains step-by-step instructions, tips, and best practices that Member States can use when implementing penalty systems.

Structure of the toolkit

The toolkit in the first section explores how penalty systems could ideally be set up by determining strategic objectives. Section two includes details of the selection process of strategic goals and Key Performance Indicators (KPIs). It also takes an in-depth look into the challenges in the areas of coordination, and procedural and legal changes associated with the involvement of a wide range of public bodies and social partners. In section three, the toolkit lists the crucial steps in the process of determining the mix of penalty measures which could achieve the greatest impact in promoting regularisation, through efficient administrative procedures. In particular, this section highlights the variety of approaches which are most commonly applied by labour authorities across the EU. This section further details the role of automated information systems and the critical considerations for data protection rules. Section four addresses the process of notification and enforcement of penalties in cooperation with other public authorities. Crucial aspects that are also highlighted in this section include the principles and steps taken when it comes to calculating penalties. Lastly, section five of the toolkit covers the follow-up on the enactment of penalty measures.

Challenges/obstacles when applying/ implementing effective penalty measures

The current toolkit aims to address and provide solutions to the multiple challenges facing enforcement authorities when implementing effective penalty measures, including but not limited to:

- \ Measuring the effectiveness of tools/systems;
- \ Ensuring cooperation between institutions, including key aspects such as:
 - \ Motivating political will;
 - \ Enabling data exchange;
 - \ Mobilising capacity and other resources;
 - \ Ensuring collaboration procedures and agreements between relevant national authorities;
- \ Following up on penalties by:
 - \ Developing procedures for labour inspectorates to follow up with tax authorities to check if a fine has been paid;
- \ Helping a labour authority transition from penalty focused solutions to the parallel use of alternative sanctioning systems (e.g. non-compliance and compliance lists, naming and shaming, and preventing enterprises from competing for public procurement contracts and receiving subsidies).

Setting strategic objectives for penalty systems

- 2.1 Choosing strategic goals and KPIs
- 2.2 Coordinating policy and legal changes

2.0 Setting strategic objectives for penalty systems

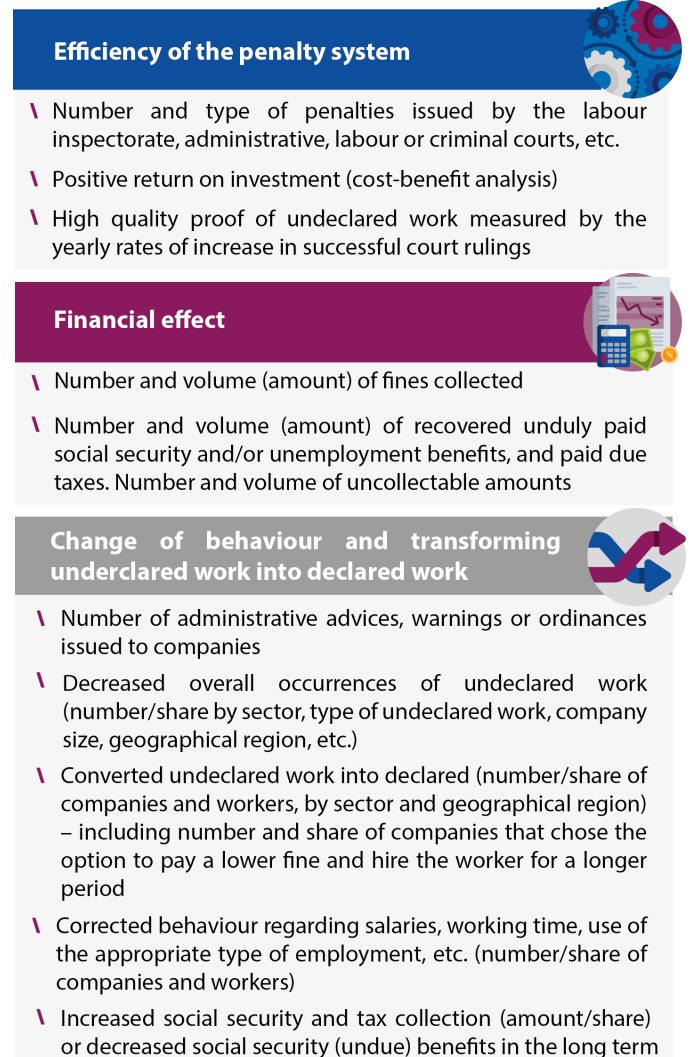
Choosing strategic goals and KPIs

In the framework of developing a more holistic approach³ in tackling undeclared work, national authorities could benefit from the setting of wider key performance indicators (KPI) related to penalty systems, thus going beyond the number and volume (amount) of fines collected. In particular, additional indicators could focus on a) transforming undeclared work into declared work, and b) measuring the efficiency of the applied procedures. The figure below includes a non-exhaustive list of possible relevant key objectives and KPIs with regard to the penalties applied.

A **cost-benefit analysis** could help to assess if the cost of the development and implementation of the applied procedures (human, financial, time) is more or less than the estimated benefits (increased social security and tax revenues, decreased number of undeclared workers, etc.).⁴ It should also be noted that the KPIs evaluating the penalty systems should be part of the **overall KPI system**, measuring the effectiveness of labour inspectorates in achieving their strategic goals, such as:

- ✓ Develop a cross-government joined-up strategy;
- ✓ Join-up operations;
- ✓ Improve cross-government data collection, sharing and analysis;
- ✓ Improve social partner involvement;
- ✓ Implement more effective sanctions;
- ✓ Improve the risk of detection, including developing data mining, matching and sharing;
- ✓ Improve the ease and benefits of engaging in declared work;
- ✓ Improve education and awareness raising campaigns;
- ✓ Modernise the labour inspectorate by improving human resource capacities, customer service and public relations.⁵

Figure 1. Suggested objectives and KPIs of penalty systems



Source: ICF/CSD, based on the toolkit on risk assessments for more efficient inspections as a means to tackle undeclared work (2019),⁶ Key Performance Indicators for concerted and joint inspections (2020),⁷ Developing methodology and Key Performance Indicators (KPIs) measuring the effectiveness of labour inspectorates (publication pending).

³ The holistic policy approach is “where national governments use a whole government approach to tackle undeclared work, by joining-up on the policy and enforcement level of both strategy and operations the fields of labour, tax and social security law, and involve and cooperate with social partners and other stakeholders. This approach involves using the full range of direct and indirect policy measures available to enhance the power of, and trust in, authorities respectively. The objective is to transform undeclared work into declared work in an effective manner.” See: European Labour Authority, European Platform tackling undeclared work, (October 2018). Glossary. Available at: <https://www.ela.europa.eu/en/undeclared-work/glossary> [3 August 2022]

⁴ See also European Platform tackling undeclared work, (2017), Data Mining for More Efficient Enforcement: A practitioner toolkit. Available at: <https://ec.europa.eu/social/BlobServlet?docId=18826&langId=en> [3 August 2022]

⁵ European Platform tackling undeclared work, (October 2022). Developing methodology and Key Performance Indicators (KPIs) measuring the effectiveness of labour inspectorates (publication pending).

⁶ European Platform tackling undeclared work, (2019). Toolkit on risk assessments for more efficient inspections as a means to tackle undeclared work. Available at: <https://ec.europa.eu/social/BlobServlet?docId=20862&langId=en> [27 July 2022].

⁷ European Platform tackling undeclared work, (2020). Key Performance Indicators for concerted and joint inspections. Available at: https://www.ela.europa.eu/sites/default/files/2021-02/Item08_List-of-ELA-KPIs.pdf [3 August 2022].

In this regard, the penalties should not be evaluated as a stand-alone activity, but as a result of the successful implementation of a larger labour rights protection and regulation strategy.

Coordinating policy and legal changes

The participants at the thematic review workshop held in Athens, Greece and online on 7-8 June 2022 noted that, in addition to clarifying goals and KPIs, an important prerequisite for a well-functioning penalty system aimed at regularisation, is obtaining **political support and ensuring good coordination with other authorities**.

Obtaining political support can help strengthen the collaboration with other stakeholders through tripartite dialogue, as well as ensure the needed financial and human resources in the labour inspectorates and other relevant bodies.

Establishing a **managing board** where all authorities are represented equally and have an equal say can help enhance cooperation, mutual learning and understanding in tackling undeclared work through penalties. For example, in Belgium the heads of all enforcement authorities sit on a governing board and agree on the action plan against social fraud and tackling undeclared work, including the enforcement of penalties. In Italy, labour inspectorates at regional level report challenges about health and safety at the workplace directly to the authorities operating at national level who can then form recommendations to policymakers about the design of penalty measures. Fostering such broad consultation and dialogue among all interested parties is highly recommended. A number of good practices are presented in the boxes below.

Box 1. Bureau for Information Exchange (the Netherlands)

To enhance cooperation between different organisations, the Netherlands has created the Bureau for Information Exchange within the Work and Income Sector (BKWI). The BKWI (<https://www.bkwi.nl/>) aims to facilitate cooperation between municipal authorities, the Employee Insurance Agency (UWV), the Social Insurance Bank (SVB), and other bodies responsible for regulating the labour market. The BKWI runs the SUWI-net system, which allows government authorities to exchange personal data related to work and income.

Source: *European Platform tackling undeclared work, (2020). Factsheet on Undeclared Work - SUWI-net. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23235&langId=en> [3 August 2022].*

Box 2. Committee in charge of coordinating actions (Croatia)

Similarly, in August 2014, the Croatian Government formed a committee in charge of coordinating actions for tackling undeclared work. The members of this committee represent different ministries involved in tackling undeclared work (Ministry of Economy, Ministry of Finance, Ministry for Crafts and Entrepreneurship, Ministry of Tourism, Ministry of Agriculture, Ministry of Interior, Ministry for Social Policy and Youth, Ministry of Health, Ministry of Science, Education and Sports, and the Ministry of Labour and Pension System which includes the Croatian Employment Service and Croatian Pension Insurance Fund).

Source: *European Platform tackling undeclared work, (2016). Factsheet on Undeclared Work – Croatia. Available at: <https://ec.europa.eu/social/ajax/BlobServlet?docId=18156&langId=en> [3 August 2022].*

Box 3. National Anti-Fraud Unit (France)

In France, the National Anti-Fraud Unit (DNLF), created in April 2008 by order of the French Prime Minister and the French Minister for Finance, Public Funds and State Reform, is the main organisation in charge of steering and coordinating the different organisations responsible for fighting fraud. Its remit goes beyond undeclared work and covers all kinds of fraud (e.g. tax fraud). The DNLF works alongside the major state-run administrations and social welfare organisations, the Police, Gendarmerie and Customs to achieve its objectives. The Unit's mission includes improving knowledge on fraud practices; ensuring effectiveness and coordination of actions implemented to fight against fraud; contributing to the recovery of tax and social contributions in case of sanctions; coordinating all action at international level; and piloting activities of the 'anti-fraud' operational committee at local level, CODAF (Comité opérationnel départemental anti-fraud). The DNLF organises training programmes on the use of investigative tools, detection of social fraud and illegal labour, and inter-agency cooperation. A working group coordinated by the DNLF meets every two to three months.

Source: *European Platform tackling undeclared work, (2017). Factsheet on Undeclared Work – France. Available at: <https://www.ela.europa.eu/sites/default/files/2021-09/FR%20UDW%20Factsheet%202017%20-%20France.pdf> [3 August 2022].*

Adopting a more holistic approach may require various **legal changes** to ensure the involvement of all relevant bodies, the clarification of their powers and responsibilities, as well as defining the rules on the imposition of the penalties.

TIP

The following types of substantive and procedural provisions are required for the lawful and efficient operation of penalty systems:

- \ Information exchange and data protection rules;
- \ Typification of all labour law offences, and specification of the legal entities or natural persons, which could be held liable;
- \ Laws identifying the bodies responsible for detecting, deciding on and notifying the penalty (for each type of violation), forwarding the case or enforcing the penalty further (in case of non-compliance); the legal base should also clarify the powers and mandates of the relevant authorities, and their possibilities for cooperation with other bodies (nationally and cross-border);
- \ Specific legal provisions regarding which information could be recognised as evidence;
- \ Laws, secondary legislation or internal rules determining the method of calculation of the severity of each penalty, the factors affecting the decision, and the discounts or decrease of the severity of the penalty in case of regularisation;
- \ Legal provisions on the option to appeal the penalty decision.

Promoting regularisation through a mix of penalty measures and use of automated information systems

- 3.1 Using a mix of penalty measures
- 3.2 Automated information systems
- 3.3 Data protection rules to consider

3.0 Promoting regularisation through a mix of penalty measures and use of automated information systems

Using a mix of penalty measures

After setting KPIs, ensuring good coordination and making the necessary legal changes, the next, crucial step is to determine the **right mix of penalty measures** which could achieve the greatest impact in promoting regularisation, through efficient administrative procedures. Using a mix of general or specific penalty measures is highly recommended, instead of focusing on only one type of sanction, since the motivating factors, circumstances, and gravity of the violation, as well as the desired effect, are not always the same regarding the sectors, companies and workers that are concerned. Two considerations should be borne in mind in this respect:

- ✓ Which types of penalties are available to Member States to use? Of them, which are ranked as the most effective?
- ✓ Who are they targeting?

According to the participants at the thematic review workshop, held in Athens, Greece and online on 7-8 June 2022, the **most effective types of penalty measures** include:

- ✓ **Financial sanctions** to deter participation in undeclared work (e.g., fines);
- ✓ **Non-financial sanctions** to deter participation in undeclared work (e.g., business closure, withdrawal of operating licenses); and
- ✓ **Excluding sanctioned employers** from the labour market, public procurement and State-aid/subsidies.

However, several additional types of penalty measures should also be considered and included in the policy mix, where appropriate, as presented in Figure 2 below.

In addition to determining the main types of penalties that would form the penalty mix, the relevant authorities need to also consider the substantive and procedural specifics that could either hinder or expedite the penalties' enforcement. Such considerations include the process of appeals, the statutes of limitations/periods of prescription related to retroactive sanctioning, the use of subcontracting liability, and the procedures for imposing penalties on natural persons.

Sanctioning during an appeal

Each Member State must determine if their penalty system will put pressure on the sanctioned company/individual to pay the fine, even though the company/person might have appealed the case in court. For example, such a penalty system is implemented in Cyprus, in which the amount to be paid regarding the fine increases daily even after an appeal (which pushes businesses to pay even if they hope to prove their innocence and subsequently recoup the money). In that respect, sanctioning procedures have to follow the principle of promptness, which stipulates that a sanctioning process should be completed as fast as possible. Upholding the principle of promptness benefits both parties to the procedure (who receive a timely decision) and the public authorities (who may save on procedural costs and increase the number of cases they can hear within a certain timeframe). Consequently, any process-delaying approaches adopted by the parties violate this concept. The legislation could specify the repercussions of fraudulent acts that seek undue procedural delay, such as impeding the service of a notice. However, the efficient use of the principle of promptness would also require the building up of the necessary capacity, skills, knowledge and procedures within the relevant public authorities.

Figure 2. Other types of effective penalty measures



Source: ICF/CSD. Based on results from Thematic Review Workshop Athens, Greece and online on 7-8 June 2022.

This sanctioning approach increases efficiency in the case of irregularities; however, in the case where the accused party is innocent it increases the administrative and judicial burden. In this context, a Member State that is in the process of developing such a penalty approach could endeavour to balance the system in a way that takes into account any potential negative consequences to both the public and private sector.

Retroactive sanctioning

Another essential question to be asked in the process of developing a penalty system is if penalised employers should be required to pay social security contributions retroactively by recharging them. This process can be applied in parallel to the sanctioning of undeclared work, and it usually includes:

- ✎ Establishing the duration of the undeclared (or under-declared) work, and the amount of social security contributions due to be paid. Ideally, this should be based on relevant documents gathered (e.g. pay-slips signed by the workers), or workers' / witnesses' statements. Thus, the employer would be penalised for the period for which it did engage in the use of undeclared workers and has not paid social security contributions. In case the exact duration of the infringement cannot be established, the authorities are advised to check national legislation for any legal presumptions applicable in such cases (e.g. the law could assume that the worker has been employed for three months with a minimum monthly salary).⁸
- ✎ Establishing if the case concerns social security fraud or an error.⁹ In case of a deliberate law infringement, the usual practice is for the authorities to impose a sanction to the employer, in addition to the obligation to retroactively pay social securities.
- ✎ Establishing other relevant circumstances, e.g. if the workers have received undue unemployment benefits that should also be reimbursed to the state budget.¹⁰

It should also be noted that, after an infraction has occurred, legal actions and prosecution can only be pursued within a certain timeframe. This is commonly known as a "statute of limitations" in common law countries and "periods of prescription" in civil law countries. The purpose of limiting the timeframe within which legal action can be brought is to protect the defendant, who may have lost the evidence that could prove their diligence to allow them to overturn the claim if too much time has passed since the alleged breach. In addition, a plaintiff (a person or a competent institution, such as the labour inspectorate) is expected to act expeditiously and within a reasonable timeframe after the offence has occurred.

⁸ For example, Latvian labour law provides for a presumption that if the employer does not ensure the conclusion of an employment contract in writing and the employer or employee cannot prove the existence of another employment relationship duration, working hours and pay, the employee is considered to have been employed for three months and has a normal working time and a minimum monthly salary. Labour Law in Latvia, Section 41 (3). Available at: <https://likumi.lv/ta/en/en/id/26019-labour-law> [8 February 2023].

⁹ Jorens, Y., Gillis, D., De Coninck, J., (November 2015). Fraud and error in the field of social security coordination. Available at: <https://ec.europa.eu/social/BlobServlet?docId=18644&langId=en> [8 February 2023].

¹⁰ Ibid.

¹¹ European Platform tackling undeclared work, (7-8 June 2022). Learning resource paper: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions. Available at: <https://www.ela.europa.eu/sites/default/files/2022-09/UDW-Learning-resource-paper-TRW-Effective-penalty-measures-2022-EN.pdf> [26 October 2022].

¹² Slovak National Labour Inspectorate, Undeclared work liability. Available at: <https://www.ip.gov.sk/undeclared-work-liability/> [4 August 2022].

¹³ Slov-Lex, (2020). Act No 125/2006 on labour inspection and amending Act No 82/2005 on illegal work and illegal employment and amending certain acts (temporary version of the regulation effective from 21.07.2020 to 31.03.2021). Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2006/125/20200721> [4 August 2022].

TIP

For a full list of the types of penalty measures available for tackling undeclared work, see Annex 1 and the Learning resource paper¹¹ from the thematic review workshop, held on 7-8 June 2022 in Greece and online.

Who are penalty measures targeting?

The **liability** for undeclared work (fraud or abuse of the labour law) can be deemed the responsibility of:

- ✎ The employer (legal entity);
- ✎ The employer (natural persons);
- ✎ The worker (if s/he voluntarily agreed to work undeclared and/or is receiving unemployment benefits);
- ✎ The service provider (subcontracted to perform the activity by the direct employer).

Examples from the Slovak Republic and Latvia are presented in Box 4., showcasing the possibility for penalties to be imposed on workers, as well as on managers and entrepreneurs.

Box 4. Imposing penalties on natural persons – workers and managers (Slovak Republic and Latvia)

In the **Slovak Republic**, undeclared workers may be fined with EUR 331, removed from the register of job seekers and obliged to reimburse unemployment benefits received (if relevant).¹² The labour inspectorate is also authorised to impose a fine on a natural person who is classified as an entrepreneur in the Commercial Code (a person registered in the commercial register or who does business on the basis of a trade license) for violating Act No 125/2006 on labour inspection¹³ (and in particular Art. I § 19 (2) b and (1) b) and the regulations regarding safety and health protection at work. The amount of the fine is the same as for a company - for breach of obligations arising from collective agreements up to EUR 100 000, and, if as a result of this breach there was an occupational accident that caused death or serious injury, a fine of at least EUR 33 000 is imposed. The inspectorate can also fine managers and statutory bodies by up to four times their average monthly earnings if they violate labour law regulations or the rights arising from collective agreements, facilitate the violation or conceal facts important for the labour inspection. Imposing a fine on a senior employee does not affect the employer's responsibility for the same violation. A natural person acting as an employer could be additionally fined for violation of the ban on illegal employment by an amount between EUR 2 000 and EUR 200 000. In case the illegal employment affects two or more workers at the same time, the fine is at least EUR 5 000.

In **Latvia**, natural persons can also be liable. According to Art. 41 of the Latvian Administrative Violations Code¹⁴, in case of violation of labour relations regulations, the possible actions include either a warning, or a fine for the employer – ranging from EUR 35 to EUR 350 for a natural person, and from EUR 70 to EUR 1 100 for a legal entity. For a missing employment contract in written form, the fine (once again for a natural person) could range from EUR 70 to EUR 350, and from EUR 700 to EUR 3 600 for a legal entity. For failure to provide the minimum monthly wage or minimum hourly rate, fines range from EUR 430 to EUR 570 for a natural person, and from EUR 850 to EUR 7 100 for a legal entity.

Source: Slovak National Labour Inspectorate, Slovak Act No 125/2006 on labour inspection and amending Act No 82/2005 on illegal work and illegal employment, Latvian Administrative Violations Code (25 October 2018, amended 3 April 2020).

The **subcontracting liability** is another option that could be introduced through national legislation to comply with EU legal acts and/or through the norms and practices enforced by the competent authorities.

- Article 12 of the Enforcement Directive on the Posting of Workers¹⁵ recommends that Member States, after consulting the relevant social partners, take additional measures to ensure that the contractor of which the employer (service provider) is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration and/or contributions due.
- In some of the EU Member States, joint or several liability is used in the construction sector. For example, in Finland, responsibility is placed on all links in the supply chain – the buyer, developers, and main contractor as well as subcontractors have the obligation to report contract and employee details. The buyer and the main contractor are responsible for collecting this information and filing a monthly report to the Tax Administration. In case a buyer or contractor fails to fulfil the obligation report, a negligence fee is issued. The maximum amount is EUR 15 000. Belgium, on the other hand, places a reporting obligation only on the main contractor and its direct subcontractor (not on all subcontractors down the chain). Data concerning the employees are entered through the Checkin@Work application. In case the non-declaration is not an administrative error, then there is a penalty of 5 % of the total value of the work issued. If the subcontractors have any social security debts, a deduction of 35 % is made on each payment and transferred to the National Social Security Office (NSSO).¹⁶

Automated information systems

Automated information systems are cost-effective tools for checking data during inspections, targeting penalties, issuing and notifying penalty reports, and following up on the results achieved. However, their set-up and maintenance require political support and initial investments, as well as clear data gathering, processing and transfer protocols, according to GDPR regulations. Ideally, such systems gather data from multiple inter-connected national (or even EU-level) registers or databases, allowing for more complex risk, efficiency and impact analysis. Such systems could help in improving the perceived and/or actual risk of detection and are part of the process of modernising the formal institutions, improving the effectiveness of administration, and increasing trust in the government. Awareness-raising campaigns about the system using various media such as television, websites and in newspapers could also inform employers that they are being monitored. All of these approaches, directly or indirectly, have the potential to lead to higher law compliance by employers and employees. The multiple benefits from utilising automated information systems are presented in Figure 3 below.

Figure 3. Functionalities and uses of automatic information systems

For labour inspectorates and other authorities



- Performing risk analysis for better targeted inspections and/or issuing of warnings
- Checking data during inspections
- Automatic issuing and notifying of penalty reports
- Tracking the sanctioning process (e.g. if a fine has been paid, if repeated offence is committed)
- Facilitating the determination of next steps (e.g. if a second inspection is needed)
- Assessing the efficiency and impact of the labour inspectorates' work

For employers and workers



- Facilitating registration / de-registration of workers
- Enabling employees to see data declared by employers
- Informing employees and workers on legal procedures, overtime limits, daily rest time, etc.

Source: ICF/CSD.

¹⁴ Latvian Administrative Violations Code (25 October 2018, amended 3 April 2020). Available at: <https://likumi.lv/ta/en/en/id/89648> [8 February 2023].

¹⁵ 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'). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0067> [5 August 2022].

¹⁶ European Platform tackling undeclared work, (2017). Tackling undeclared work in the construction industry: A learning resource. Available at: <https://ec.europa.eu/social/BlobServlet?docId=18132&langId=en> [5 August 2022].

TIP

Developing a risk assessment methodology is a core element of a labour inspectorate's strategy. It is also one of the main functionalities that the automated systems can provide, later linked with assessing the efficiency of the activities of a labour inspectorate. For more information, see Figure 4. Potential indicators and red flags for effective risk assessment from the toolkit on risk assessments for more efficient inspections as a means to tackle undeclared work¹⁷.

The operation of automated information systems requires human intervention at critical junctures, such as the setting of search parameters, indicators and procedures to ascertain infringements, sending requests for information about complex cases to other authorities, etc. An example on the use of big data and automated systems for detection and notification of an infringement in Spain, as well as the instances when human intervention is needed (although still in the testing stage), is presented in the box below.

Box 5. Use of big data and automated systems for detection and notification of an infringement (Spain)

The Spanish authorities recognised that an IT tool (such as the HLF¹⁸ anti-fraud tool, used for better planning of inspections since 2015) could help to better detect law violations using big data. In 2021, the Spanish Labour and Social Security Inspectorate launched the process of introducing a penalty procedure promoted by automated administrative actions. As of 2022, the procedure is still in its experimental phase.

Human intervention is required for the prior programming of the data mining tool and subsequently in the event that allegations are made to the infringement reports. The General Director of the Inspectorate is responsible for setting the criteria for imposing fines or issuing warnings and advice.¹⁹ However, after the initial setup, the system runs without direct human intervention. The automated infringement reports are sent to offenders within 10 working days from the date of the report. The notifications are accompanied by an invoice discounted by 40 % if the fine is paid within a specified timeframe. A written statement of allegations may be submitted within 15 working days from the day following its notification, accompanied by any evidence deemed relevant, to the body responsible for the investigation. At this stage, inspectors would intervene to verify the facts and to hear appeals from companies.

The developed tool is intended to identify indications of infringements such as the following: abuse of temporary labour contracts; undeclared work (based on cross-checking data retrieved by different public authorities); audit control of subsidies and grants; equal treatment, work related accidents, etc. Human intervention may be needed in most cases to verify the facts, except for the infringements related to the submission of various documents by specific legal deadlines (e.g. social security registration of a newly hired worker and the de-registration after the end of the employment), notwithstanding what has already been said about the programming data extraction tool.

Source: Presentation by Spain at the Thematic review workshop: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022.

Another automatic information system which can be considered as a good practice in supporting the various stages of the process is the Greek ERGANI system.

Box 6. Use of big data and automated systems (Greece)

Greece uses the ERGANI system and the Integrated Information System for the Hellenic Labour Inspectorate and the Social Security Institution to formulate action plans and schedule their inspections in companies or areas with high levels of undeclared work,²⁰ check workers' data²¹ before, during, or after an onsite visit, and check if an employer is a repeated offender when imposing a fine. The system is also used to set up a monitoring mechanism for an employer who accepts and makes use of the provisions of the reduced fine.

Source: Presentation by Greece at the Thematic review workshop: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022, and Factsheet on Undeclared Work – Greece.²²

Another example of good practice concerns the Dutch SUWI-net system, which gathers data from multiple registers, enables cross-checks performed by labour inspectors, and reduces the administrative burden for citizens.

Box 7. SUWI-net (the Netherlands)

The Bureau for Information Exchange within the Work and Income Sector (BKWI) runs the SUWI-net system. Introduced in 2002, it is a combined register that allows government authorities (including tax authorities, the Chamber of Commerce and the Inspectorate SZW, among others) to exchange personal data related to work and income. It thus reduces the administrative burden for citizens, for example when applying for benefits, and supports the Inspectorate in its efforts to tackle undeclared work. The SUWI-net contains data from many different sources, such as the population register, tax and social security data on an individual level, car ownership or the register from the Chamber of Commerce. The Inspectorate can cross-check data, such as data from companies' wage registers and tax and social security data, for instance, to confirm the relationship between a worker and the employer/employment agency. This allows for irregularities to be detected and for inspections to be planned accordingly. The system ensures a highly efficient process for data exchange among public authorities. Up to 600 000 files are sent per month.

Source: European Platform tackling undeclared work, (2020). Fact sheet: SUWI-net. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23235&langId=en> [3 August 2022].

17 European Platform tackling undeclared work, (2019). Toolkit on risk assessments for more efficient inspections as a means to tackle undeclared work Available at: <https://ec.europa.eu/social/BlobServlet?docId=20862&langId=en> [27 July 2022].

18 Herramienta de Lucha contra el Fraude (HLF) in Spanish or Anti-Fraud Tool in English.

19 Labour inspectors have the discretion to give warning and advice instead of instituting or recommending proceedings (Art. 17.2 ILO Convention 81).

20 For example, the system provides information if contracts in a company have turned from full-time into part-time employment.

21 Employers have been obliged to electronically submit information about their employees to ERGANI since 2013.

22 European Platform tackling undeclared work (2017). Factsheet on Undeclared Work – Greece. Available at: <https://ec.europa.eu/social/ajax/BlobServlet?docId=18164&langId=en> [4 August 2022].

Data protection rules to consider

Automated information systems, as well as any institutional cooperation in investigating concrete cases of labour law infringements, rely heavily on the exchange of data between the national authorities. The **micro- (case-related)** level of data exchange is most closely linked to the sanctioning procedure. This is also the level where personal and other (e.g. company) data should be transferred among the relevant bodies, and where data protection concerns may emerge.²³

In that regard, the **General Data Protection Regulation (GDPR)**²⁴ is the main EU legal base related to personal data collection, transfer, protection, and use. As all regulations, GDPR is also **directly applicable in all Member States**. This means that it: a) applies immediately as the norm in all Member States, without needing to be transposed into national law; b) creates rights and obligations for individuals, and they can therefore invoke it directly before national courts; and c) can be used as a reference by individuals in their relationship with other individuals, Member States or EU authorities.²⁵

GDPR applies **only to personal data**.²⁶ Hence, enforcement bodies tasked with tackling undeclared work can freely analyse and share **company data** (e.g., turnover, profit, activities performed, frequency and amounts pertaining to social security and tax payments, etc.), so long as the names or other identifiers of owner(s) and employees are not included.²⁷

The use of **personal data**, calls for labour, social security, tax and customs authorities to consult and understand in detail the full body of applicable national and European regulations, with particular attention to the following key GDPR texts for the purposes of this Toolkit:

- \ **GDPR Article 5 'Principles'**: in this article, the GDPR sets out the most important data protection principles such as fairness, transparency, purpose limitation, data minimisation, actuality of data (need to have updated data), storage (only if necessary), data security and prevention of leakages.
- \ **GDPR Article 6 'Lawfulness of processing'**: according to Article 6.1(e), processing is lawful only where necessary to the performance of a **task conducted in the public interest** or in the exercise of official authority vested in the controller. The GDPR requires the processing to have a legal basis in

either Union law or Member State law. National legislation must make sure that the public interest in tackling undeclared work and the specific authorities vested in enforcement bodies are clearly defined and allow for the collection and exchange of needed data, including across borders. The **enforcement body** (the data controller) must have a mandate to perform this **public task**, not just a definition of the public interest. Within the mandate it must be necessary to process data.²⁸

- \ **GDPR Article 23 'Restrictions'**: the enforcement authorities are required to refer to specific legal texts in the EU or national legislation when first **collecting information from data subjects**, in order to provide justification for the restrictions posed on the data subjects' rights. This justification should refer to the concrete type of public interest protected through the work of the authorities, and their corresponding mandates. For example, the data subjects may be **restricted** in their obligations and rights, if that is needed to safeguard the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (Art. 23, 1(d) GDPR and Art. 8, Directive (EU) 2016/680²⁹); important economic or financial interests of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security (Art. 23, 1(e) GDPR); and the enforcement of civil law claims (Art. 23, 1(j) GDPR). The data subjects have a right to be informed about the restriction, unless that may prejudice the purpose of the restriction (Art. 23, 2(h) GDPR).

²³ The second, meso-level (technical, organisational) is used for risk assessment, increasing efficiency of inspections, improving prevention, and strategic planning. It requires the data transfer of whole data sets or the integration of different datasets (which could be either anonymous or personal). The third, macro-level (societal) is focused on advertising the outcomes of micro- and meso-level actions. It typically does not involve actual transfers of data but the promotion and visibility of the impact of the first two levels.

²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj/9> [9 November 2022].

²⁵ EUR-Lex. Regulation. Available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/regulation.html> [8 February 2023].

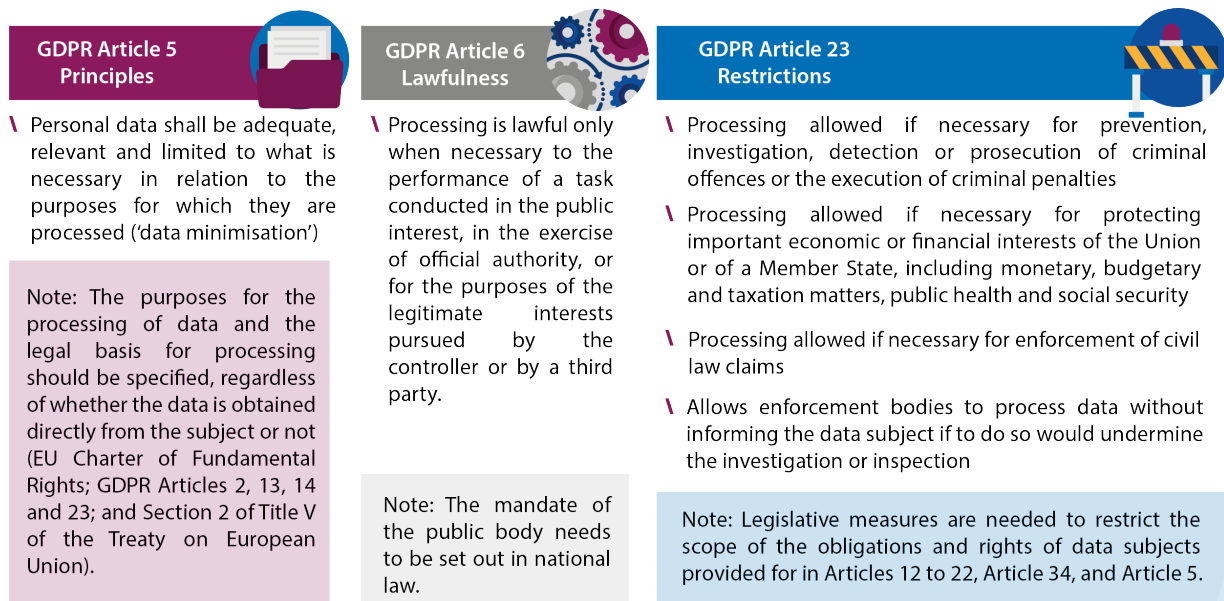
²⁶ By definition, "personal data" means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. See: Article 4 (1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (GDPR).

²⁷ European Platform tackling undeclared work, (2019). Seventh plenary meeting of the European Platform tackling undeclared work. Report on data protection and data exchange. Available at: <https://ec.europa.eu/social/BlobServlet?docId=22541&langId=en> [19 July 2022].

²⁸ Ibid.

²⁹ As criminal offences and roles in the criminal process tend to be well defined in legal terms (including in Directive (EU) 2016/680), in such cases, data protection rules allow for a wider scope of exchange of data and authorities feel more secure about the applicable regulations. See: Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0680> [8 February 2023].

Figure 4. Key GDPR articles relevant to the work of the labour inspectors



Source: ICF/CSD, based on Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Enforcement bodies may also need to process the data for a purpose other than that for which it was collected. This could only be permissible following careful consideration by the controller and performance of a compatibility test (with the support of the data protection officer of the respective enforcement body). The key factors the controller must consider are, in accordance with Article 6.4 of GDPR, the context in which the personal data have been collected, the nature of the personal data, any link between the purposes (primary and secondary purposes), possible consequences of intended further processing (i.e. if the subjects' rights could be harmed) and the existence of appropriate safeguards. Thus, the clear '**purpose of data collection**' is a principle on personal data protection for its further processing and transfer. In that regard, Member States need to have **controllers (including data protection officers)** who are trained and skilled in making decisions on whether, when, what type of data (e.g. selected data fields for single person/entity vs the full database), and for what 'compatible' purposes (e.g. for preventing fraud) data could be further processed or transferred.

In addition to the binding rules of the GDPR, the European Commission and the European Data Protection Board maintain **guidelines for proper implementation of the GDPR**,³⁰ which could be useful to the labour inspectorates and other bodies tackling undeclared work.

³⁰ European Data Protection Board. *Guidelines, Recommendations, Best Practices*. Available at: https://edpb.europa.eu/our-work-tools/general-guidance/guidelines-recommendations-best-practices_en [19 July 2022].

04

Notifying and enforcing penalties in cooperation with other public authorities

- 4.1 Overview of the process
- 4.2 Cooperating with other authorities in the execution of the penalty
- 4.3 Infringement and notification report
- 4.4 Calculating the penalty

4.0 Notifying and enforcing penalties in cooperation with other public authorities

Overview of the process

To ensure an efficient penalty decision and execution, it is recommended that the labour inspectorates and other relevant authorities **build capacity and gather knowledge** about:

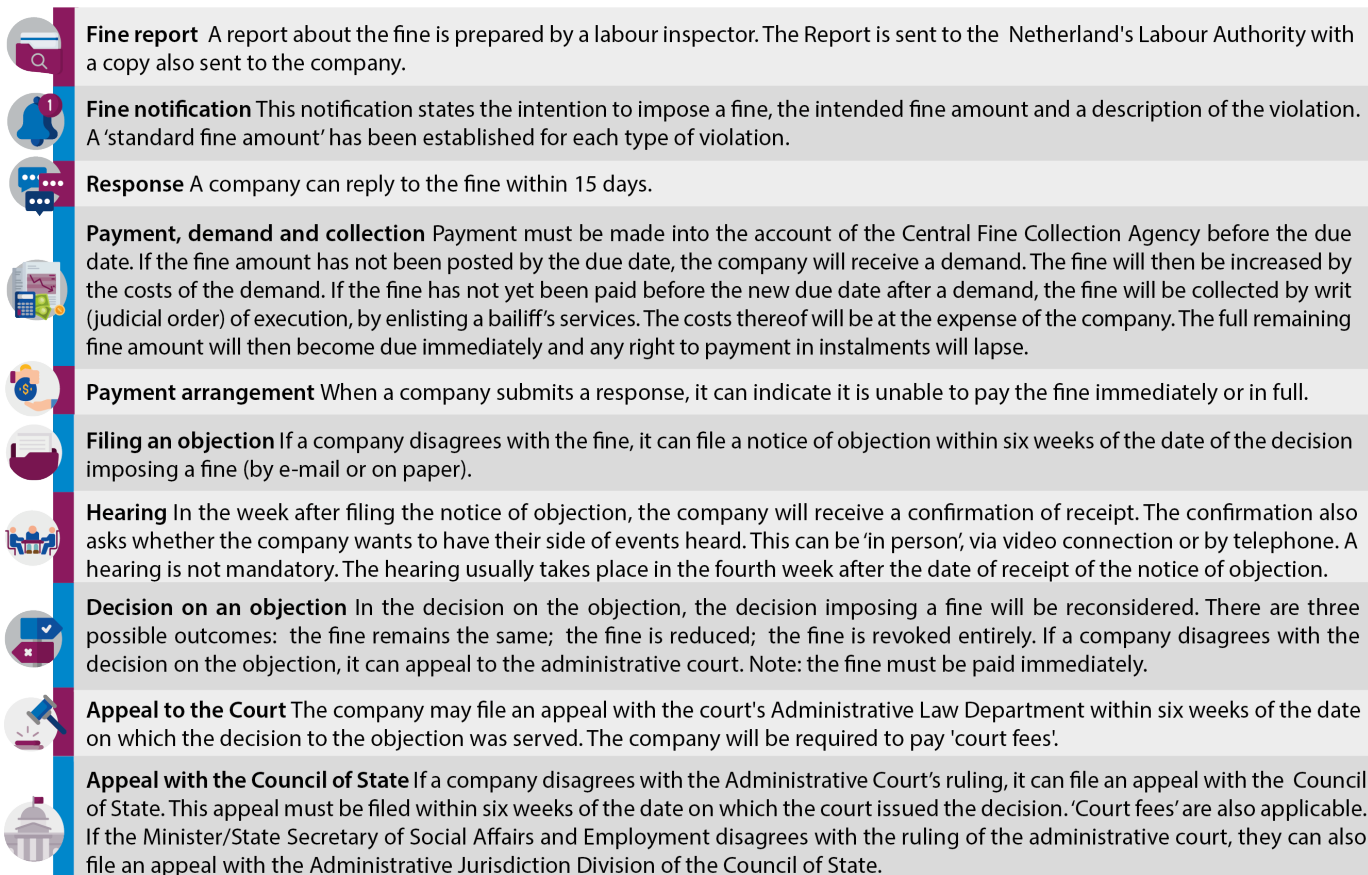
- ✓ Applicable definitions of undeclared work that could lead to sanctioning, together with relevant EU or national legislation.
- ✓ Contact points authorised to sanction legal or natural persons.
- ✓ Procedures (e.g. data sharing protocols, data protection rules, maximum response times, complaints and dispute resolution procedures, rules about avoiding double sanctioning for the same offence, protecting the rights of individuals against unjustified sanctions, etc.).

- ✓ Existing online registers (maintained and accessible by multiple authorities).

The **full process** includes inspection and penalty report preparation, issuing and notification of the penalty, enforcement (e.g. payment of a fine) or objection/appeal. Some differences exist among the Member States, such as the discretionary power of the competent enforcement authorities to decide on the severity of the penalty, the type of public authority responsible for the issuing of the penalty and/or receiving objections and appeals, the deadlines for receiving a response by the employer at each stage of the process, the use of bailiffs, etc.

An example of the main stages of the notification and enforcement procedure from the Netherlands is provided in Figure 5 below.

Figure 5. Main stages of the notification and enforcement procedure in the Netherlands



Source: Dutch Ministry of Social Affairs and Employment. *Fining procedure*. Available at: <https://www.nl labour authority.nl/topics/enforcement-and-penalties/fining-procedure> [23.02.2022]

Cooperating with other authorities in the execution of the penalty

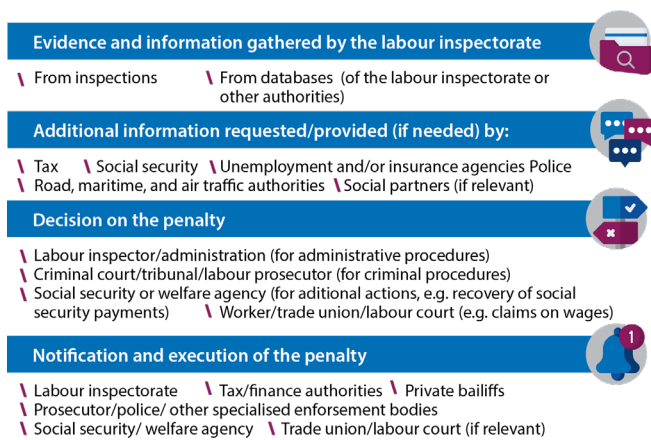
When setting up the full process, special attention should be paid to the establishment of efficient cooperation with all relevant authorities (and social partners, if applicable), thus avoiding an overlap of activities, and a collision in powers and mandates. This could be achieved through setting out clear strategies, laws and regulations, the signing of bilateral agreements and Memoranda of Understandings (MoUs),³¹ establishing joint working groups and personal contacts among the public bodies. It should be noted that bilateral agreements and MoUs are supplementary tools that cannot supersede the EU or national legal base.

Member States use administrative or criminal procedures to sanction undeclared work, which determines the type of sanction:

- \ Administrative sanctions most often refer to monetary fines. Often (but not always) they go together with increased/recovered tax and social security contributions and repayment of salaries. However, these could be complemented by exclusion from public tendering, non-compliance listing and withdrawal of operating licences.
- \ Criminal sanctions usually refer to prison sentences or to criminal monetary fines. These could also be applied in parallel to the freezing of assets, confiscation, deprivation of the right to be employed in a certain job or to hold a certain position, labour law-related sentences or business closure. They are usually connected to more severe cases (organised crime, higher number of workers involved, and other crimes against basic human rights).³²

A short overview of the authorities responsible for information sharing, deciding, notifying and executing penalties in both administrative and criminal procedures (as well as legal suits, e.g. related to claims on wages) is presented in the figure below.

Figure 6. Authorities that could be involved in deciding, notifying and executing penalties and possible stakeholders in information sharing



Source: ICF/CSD, based on European Platform tackling undeclared work (2021). Enhanced learning resource paper: Cross-border sanctions in the area of undeclared work.

31 European Platform tackling undeclared work, (2017). Practitioner's Toolkit: Drafting, Implementing, Reviewing and Improving Bilateral Agreements and Memoranda of Understanding to Tackle Undeclared Work. Available at: <https://ec.europa.eu/social/BlobServlet?docId=18827&langId=en> [25 July 2022].

32 European Platform tackling undeclared work, (2021). Enhanced learning resource paper: Cross-border sanctions in the area of undeclared work. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23574&langId=en> [25 July 2022].

33 See Table 5 of European Platform tackling undeclared work, (2021). Enhanced learning resource paper: Cross-border sanctions in the area of undeclared work. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23574&langId=en> [25 July 2022].

TIP

Keep in mind the following legal considerations when gathering evidence:

- \ **What documents are needed?** The most common documents checked by labour inspectors are work contracts, staff registries, internal company regulations, registries of working hours and overtime, 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). 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 bogus self-employment.
- \ **In what format?** 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. 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.
- \ **What other forms of evidence are needed (besides the documents)?** Additional evidence should clarify the facts of the case: what, who, when, where, how, how long, since when, etc. 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: a) existence/status of labour relationship (hierarchical elements, proven authority of the employer); b) proof of activity, established personally by the inspectors, and not only on paper; c) verified place where the infringement was committed and place where it was established; and d) time and period within which the infringement was committed.
- \ **Are witnesses required?** 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. The possibility to bring the employer and employees as witnesses needs to be clarified at an early stage at national and cross-border level.³³

There should be a clear-cut rule about which types of infringements fall within the labour inspectors' discretionary power limited by and based on the legal framework, and which types of cases should be forwarded (and when) to a prosecutor, administrative, labour or criminal court, and/or to other authorities (tax, social

security, financial police, customs, etc.). Two examples from Poland and Portugal on the range of discretionary powers of the labour inspectors, and the process of forwarding cases to other authorities, are provided in the box below.

Box 8. Range of discretionary powers of labour inspectors (Poland and Portugal)

In Poland, labour inspectors are entitled to impose financial sanctions by way of a punishment ticket ranging from PLN 1 000 (EUR 212) to PLN 2 000 (EUR 424). If a labour inspector decides that the punishment ticket will be insufficient, they can file a motion with a court of law to penalise the persons guilty of the committed offences. The court of law can impose a fine of up to PLN 30 000 (EUR 6 365). In case the offence is minor, a labour inspector can refrain from imposing a punishment ticket or filing a motion with the court of law and use other, 'soft' legal measures, including an instruction, a warning or other means with an educational impact.

In Portugal, after undeclared workers are detected during an inspection, a formal notification is sent to the employer, with instruction to regularise the labour contracts. The worker must be informed about the notification. The employer has 10 days to rectify the situation or to make a statement (providing additional information about the case). In case of non-compliance, the Working Conditions Authority (Autoridade para as Condições de Trabalho - ACT) reports the case to the public prosecutor. Then, a special court can take action to recognise the proper work relationship, and instruct the employer to pay wages and contributions for social security and taxes, for up to six months back. The employer in turn can provide documental evidence to demonstrate that the employment relations (and payments due) relate to a period shorter than six months. Any related sanctions are imposed by the court.

Source: *Presentations by Poland and Portugal at the Thematic review workshop: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022.*

Infringement and notification report

Once a presumption of undeclared work or other law violations is established (e.g. during inspection), several reports and notices are usually produced and distributed to all relevant parties. These can include:

- \\ **Post-inspection report (including infraction notice) and a sanction report** – sent to the department head/director of the labour inspectorate, as well as the public prosecutor's office, and the tax and social security authorities (if the law violation requires further actions by them);
- \\ **Notification of the fine** (or instruction for corrections) – sent to the employer;
- \\ **Follow-up reports** on the progress of the case – sent (or

shared in electronic platform) to the public prosecutor's office and other relevant authorities.

Valuable tips and references to templates of these reports are provided in the box below.



TIP

- \\ A template for a **post-inspection report** is available in Annex 4 of the Practitioners' toolkit on cross-border concerted and joint inspections³⁴ and Table 2 of the Enhanced learning resource paper: *Cross-border sanctions in the area of undeclared work*.³⁵
- \\ **Infringement and sanction report template** is available in Annex 2 of the Enhanced learning resource paper: *Cross-border sanctions in the area of undeclared work*.³⁶

Portugal provides a good practice on sending **notification reports to the sanctioned company**. The notification report in Portugal includes the obligatory elements listed below:

- \\ Includes a reference to the relevant article and law;
- \\ Refers to the statement on the uncovered law violation and attaches a copy of the inspection and sanction report;
- \\ Provides a period of 10 days for the employer to regularise the situation or to issue a statement;
- \\ Informs the employer that all missing labour obligations must be fulfilled, with a list of the main ones;
- \\ Informs the employer that non-compliance implies reporting to other relevant bodies (Public Prosecutor's Office, in the case of Portugal - for the purpose of filing a lawsuit for recognition of the existence of an employment relation and contract);
- \\ Informs the employer that the appropriate administrative offence procedure will be initiated;
- \\ Informs the employer that a dismissal of the employee implies communication to the Public Prosecutor's Office, for the purposes of the suspension of the dismissal;
- \\ The worker must also be informed of the notification.³⁷

A template of the infraction notice is provided in Annex 2 which could support enforcement authorities to design similar notifications.

34 European Platform tackling undeclared work, (2020). Practitioner's Toolkit: cross-border concerted and joint inspections. Available at: <https://ec.europa.eu/social/BlobServlet?docId=22252&langId=en> [25 July 2022].

35 European Platform tackling undeclared work, (2021). Enhanced learning resource paper: *Cross-border sanctions in the area of undeclared work*. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23574&langId=en> [25 July 2022].

36 European Platform tackling undeclared work, (2021). Enhanced learning resource paper: *Cross-border sanctions in the area of undeclared work*. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23574&langId=en> [25 July 2022].


37 Presentation by Portugal at the Thematic review workshop: *Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022.*

Calculating the penalty

EU Member States define their own procedural rules determining their penalty systems, and the legislative architecture can vary widely from one country to the next. However, there are

several accepted principles of good governance that underpin penalty systems. The setting of a penalty system requires the consideration of a multitude of legal procedural principles. The key procedural principles in relation to sanctioning according to the best international standards are presented below.

Figure 7. An example of procedural principles in relation to sanctioning (of occupational safety and health violations)


Procedural principles in relation to sanctioning 	
\ Due procedure principle	\ Principle of non bis in idem (prohibition of double jeopardy)
\ Good faith principle	\ Principle of in dubio pro operario (in case of doubt in the interpretation of the norm, the worker will be favored)
\ Ex officio action principle	\ Principle of presumption of innocence
\ Principle of promptness	\ Principle of proportionality
\ Principle of simplicity, concentration of acts and procedural economy	\ Principle of immediacy
\ Principle of publicity and principle of transparency	\ Principle of verbal proceedings
\ Principle of statute of limitations (periods of prescription and expiration/lapsing of legal action)	\ Principle of mandatory justification of judicial and administrative decisions
\ Principle of veracity/primacy of reality	\ Principle of impartiality
\ Principle of inalienability of rights	\ Principle of non-retroactivity of sanctions
\ Principle of effective judicial protection	\ Adversarial principle
\ Principle of legality	

Source: ICF/CSD, based on ILO (2021). Key principles underlying sanctioning procedures applicable to occupational safety and health violations. Geneva: ILO. Available online at: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_797461.pdf [26 October 2022].

Typifying these principles into law might make it easier for users to find them and use them to defend their rights in disciplinary hearings. It may also help justice administrators apply them more consistently and systematically. Depending on which procedural principles are considered during the process of making a penalty system, the severity of the system and the way penalties are calculated would change. The penalty sanctions (their severity) are determined by lawmakers in the Member States. Factors such as political will, the situation of the economy, the labour market, and the severity of the issue of undeclared work can determine how lawmakers proceed with developing the penalty system.

The labour inspectorates and other relevant authorities must also develop a set of pre-determined factors and considerations (see Figure 8), based on the legal framework, that help them decide on the type and severity of the penalties imposed. Such a system would facilitate the decision of whether a penalty should be replaced with softer measures, such as warnings or when to forward the case to the prosecution, police, tax, or other authorities.

Figure 8. Factors to be considered when deciding on a penalty

Considerations 	Confirmed circumstances 	Penalty 	Follow-up 
\ Type of law violation	Small administrative offence, e.g. missing the deadline for registering and de-registering workers, one partially declared worker, etc.	→ Warnings/ instructions for corrective actions/ training of the company's management	Checking the result achieved: \ If a fine has been paid \ If another type of penalty is successfully enforced
\ Number of workers affected	First-time offender	→	
\ Share of workers affected	Early payment of the fine	→ Reduced penalties	Sharing results with other public authorities
\ The employment status of the affected workers	Regularisation of the labour contracts by a certain date	→	
\ First-time or repeated offence	Repeated offender	→ Progressive penalties	Improving internal procedures
\ Financial damage to the national budget and the workers' income	Larger number (or share) of workers affected	→	
\ Duration of the violation (number of days)	Larger financial damage or duration of the offence (if proven by evidence)	→	Adjusting the factors and considerations leading to different penalties
\ Size of the business			
\ Culpability			
\ Etc.	Large-scale administrative and/or criminal offences (including those combining several types of law violations)	→ Combination of penalties (may need enforcement by different authorities)	Decision if a second inspection is needed

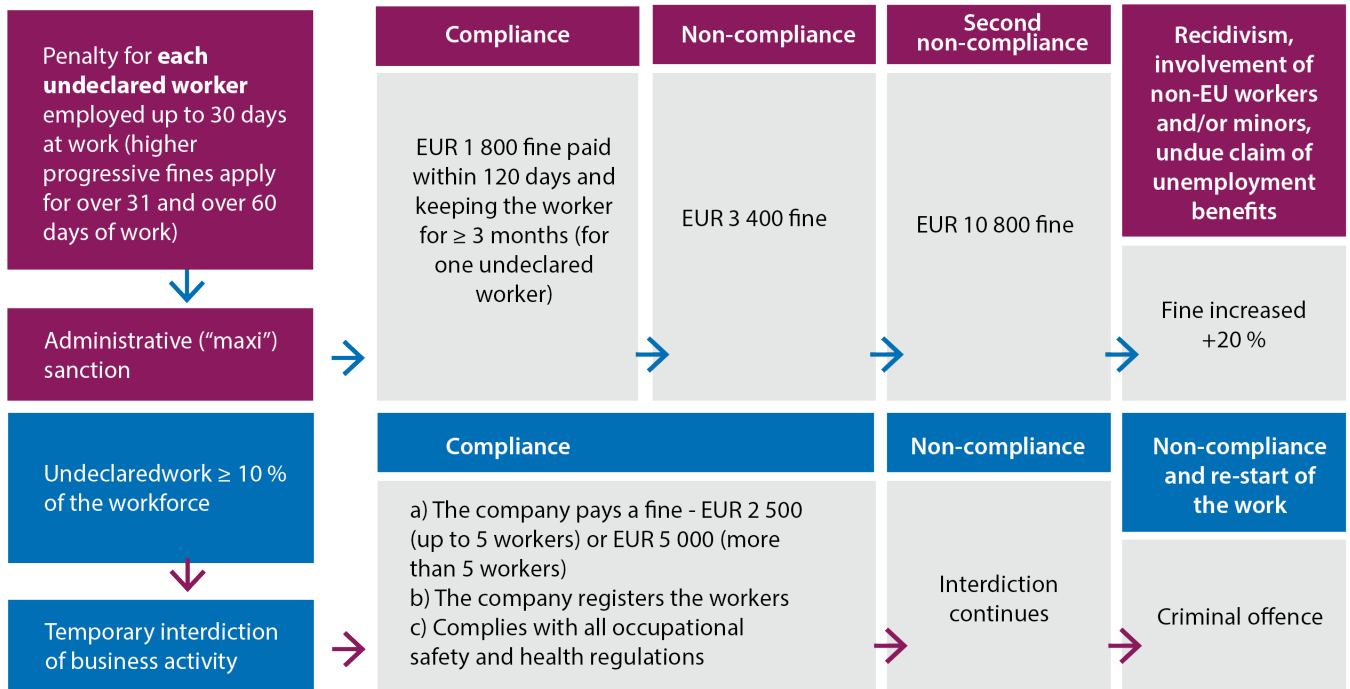
Source: ICF/CSD.

TIP

It is challenging to determine the exact duration of the violation (number of days). Thus, it is recommended for labour inspectors to gather evidence on the likely duration of the undeclared work during an inspection by checking relevant documents and interviewing witnesses (if any). The scope of the witnesses should be expanded to include co-workers and customers.

A good practice example from Italy showcases how the course of action could be determined in each situation, and how fines can be calculated. A short overview of the process applied in Italy is presented in the figure below.

Figure 9. Deciding on the type and severity of the penalties: example of Italy



Source: ICF/CSD, based on the presentation by Italy at the Thematic review workshop: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022.

Reflection on the progressive nature of the fine

Across the EU, a variety of progressive penalty systems exist, based on the legal framework. The nature of progressive sanctioning systems is based on the principle of proportionality.³⁸ The latter stipulates that the type of penalty applied for a particular violation should be proportional to the degree of severity of the violation; that is, the more severe the violation, the more severe the sentence should be, and vice versa.

When it comes to undeclared work, the labour authority and/or the competent law court may consider several variables when determining the exact nature and severity of a penalty, including:

- ✎ The severity of the outcome or behaviour (such as a deadly accident);
- ✎ The degree of "guilty mind" (such as intentional or egregious negligence);
- ✎ Recidivism - a pattern of recurrent offences of varying or identical character;
- ✎ A pattern of persistency (such as an extended time of violation);

✎ The vulnerability of the victims exposed to the infraction.

The use of progressive sanctioning is not necessarily related to the motivation to promote regularisation, to protect the labour and social security rights, or to ensure fair competition amongst employers. Still, in some individual cases, progressive sanctions could be combined with various incentives to achieve greater cumulative effect. For example, in Italy, the companies are charged progressively larger amounts for the greater number of undeclared workers; however, the longer the working contract is signed with the previously undeclared worker, the lower the fine.

Verifying the length of undeclared work

Progressive penalty systems contain a certain caveat: to impose different penalties, labour authorities must produce a concrete evidence, and not only a suspicion of undeclared work. That is particularly the case when the penalty is based on a period of irregularity. Such penalty systems are applied in Italy, Portugal, Cyprus and Belgium, although these countries rely on two different approaches when estimating the period of violation. In the past, the duration needed to be proved by evidence collected by inspectors from the Italian Labour Inspectorate and was often under the scrutiny of the court. This created extra pressure for the inspectors to prove a legal case.

³⁸ ILO (2021). Key principles underlying sanctioning procedures applicable to occupational safety and health violations. Geneva: ILO. Available online at: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_797461.pdf [26 October 2022].

TIP

Should bigger companies receive bigger sanctions?

When developing a penalty system, lawmakers should consider if the size of the fines should be in proportion to the size of the company (e.g. based on annual turnover, revenue, number of employees, etc.), irrespective of the violation. A progressive sanctioning system which considers the size of the company is also in line with the principle of proportionality. The logic behind such a principle is that the purpose of a sanction is to reduce instances of recidivism. However, if fines are fixed (but proportional to the severity of the violation), companies with bigger capacities to pay the penalty experience the penalty differently than smaller companies. Thus, they might be less inclined to stop violations. This implies that bigger companies must receive bigger penalties so that behavioural change occurs.

In **Greece**, data mining, risk assessment, and selection of sites (including economic and geographical areas) to be inspected are performed through the Risk Analysis tool³⁹ of the Integrated Information System of the Hellenic Labour Inspectorate and the ERGANI system. The ERGANI system records real time employment flows, such as work schedules, full or part-time employment statuses, etc. A new and simplified architecture of fines based on the seriousness of the infringement and the number of affected workers was introduced at the end of 2019. The fines are electronically notified through the portal of the Integrated Information System while the collection of fines goes through the tax authorities. The Greek example on how sanctions are decided and calculated is presented below.

Figure 10. Deciding on the type and severity of the penalties: example of Greece

System of administrative sanctions applied since 31.12.2019		Example of the calculation method	
For every part-time declared employee	→ EUR 2 000	Number of affected employees	→ 3
For every full-time declared employee	→ EUR 600	Discount if the fine is paid within 15 days	→ 30 %
For every employee working overtime	→ EUR 1 000	Seriousness of the violation (e.g. part-time declared employee)	→ Very high
		Amount of fine per employee	→ EUR 2 000
		Total amount of the fine	→ EUR 6 000

Source: ICF/CSD, based on the presentation by Greece at the Thematic review workshop: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions, Athens, Greece and online, 7-8 June 2022.

³⁹ European Platform tackling undeclared work, (2018). Risk Analysis Tool of the Greek Labour Inspectorate, Greece. Available at: <https://ec.europa.eu/social/ajax/BlobServlet?docId=20296&langId=en>

05

Follow-up and evaluation

- 5.1 Tracking progress and sharing information with other authorities**
- 5.2 Improving the future procedures and measures. Use and update of KPIs**

5.0 Follow-up and evaluation

Tracking progress and sharing information with other authorities

Once a penalty has been issued to an employer, it is crucial that its implementation and effects are recorded. Follow-up activities such as monitoring and disseminating the results of penalties⁴⁰ are essential for providing feedback and early warning, as well as for targeting inspections more precisely. It is recommended that information exchanges be conducted with all relevant authorities responsible for the sanctioning and collection of penalties. The lack of procedures in place for the labour authorities to follow up with the tax authorities to determine if the fine has been paid is one of the most significant obstacles regarding follow-up.

In Member States, tax authorities or other centralised bodies collect debts or forward cases to debt collectors and judges. Having precise follow-up procedures and agreements can aid in measuring the effectiveness of punitive measures. In the most optimal condition, a digital information system would disseminate the findings or report automatically to the other relevant authorities. Upon completion of the investigations, information on the results is uploaded to the system to validate the effectiveness of the models. Accessible by all relevant agencies (labour inspectorate, tax authorities, financial police, etc.), a single database outlining penalties and collection status would enhance the monitoring and planning of future inspections and sanctions. Additionally, it would be useful to examine the system's impact on the employer, especially any behavioural changes that result in turning undeclared employment into declared employment.

Enforcement authorities frequently conduct a second inspection of an employer who has received a fine to determine whether the employer has complied with the law. In Bulgaria, Cyprus,

France, Greece and Spain, labour inspectorates conduct follow-up inspections based on documentation and assessment of the risk of reoffending and/or the provision of the national laws and regulations. If additional instances of undeclared work are discovered, fines are increased (e.g. Greece, Italy and the Netherlands).

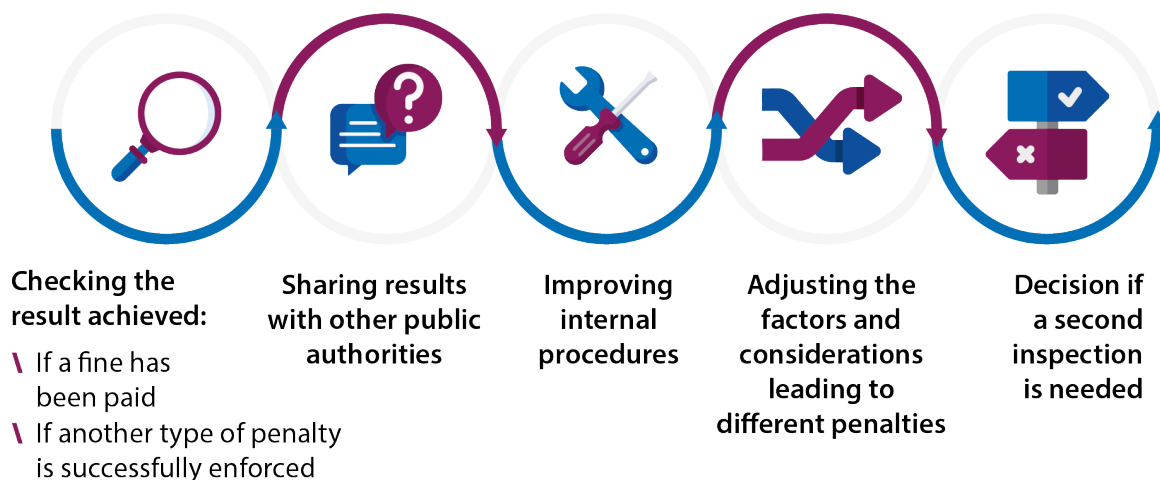
A short overview of the necessary follow-up decisions is presented below.

Further information, including a full list of the benefits and the possible improvements based on regular monitoring and evaluation, is available in the 2021 enhanced learning resource paper Cross-border sanctions in the area of undeclared work.⁴¹

Improving the future procedures and measures. Use and update of KPIs

Key performance indicators (KPIs) could be used more effectively to evaluate the efficacy of punishment systems and to adjust such systems to the ever-changing labour market. Further practical tips will be available in the forthcoming European Labour Authority (ELA) study report Developing methodology and Key Performance Indicators (KPIs) measuring the effectiveness of labour inspectorates. Annex 3 presents two examples from this report – first, a KPI on improving the effectiveness of using fines to transform undeclared work into declared work and, second, a KPI on improving the success of court prosecutions on labour law violations.

Figure 11. Follow-up decisions



Source: CSD/ICF.

⁴⁰ In accordance with Member States' privacy regulations on sanctions, based on GDPR Regulation (EU) 2016/679 and Directive (EU) 2016/680, as well as other relevant provisions in the Member States' national legal framework.

⁴¹ European Platform tackling undeclared work, (2021). Enhanced learning resource paper: Cross-border sanctions in the area of undeclared work. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23574&langId=en> [25 July 2022].

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Annex 1. Types of penalty measures for tackling undeclared work

Sanctions to deter participation in undeclared work

- \ Fines, including:
- \ Progressive fines for repeat offenders
- \ Progressive fines, which increase according to the number of undeclared workers
- \ Reduced penalties for early payment of fines
- \ Fines and other penalties imposed on the undeclared workers
- \ Substituting fines with training for managers and staff
- \ Business closure/withdrawal of operating licenses

Using penalties to transform undeclared work into declared work

- \ Reduced fine depending on the length of the declared contract
- \ Reclassifying the employment relationship (bogus self-employed are employed as declared workers) – jointly or as alternative to economic compensation

Applying penalties to citizens or businesses who buy goods and services from the undeclared economy

- \ Reverse supply chain responsibility (could be combined with making purchasers responsible for information reporting to tax/social security authorities)
- \ Sanctioning purchasers when they intentionally instigate undeclared transactions

Non-compliance and compliance lists*

- \ Listing non-compliant businesses which have recently violated tax, labour or social security law
- \ Listing compliant businesses with no tax, labour or social security law sanctions against them in the recent past

Excluding sanctioned businesses from public procurement and State-aid

- \ Excluding those on 'non-compliance' lists from bidding for public procurement contracts
- \ Excluding non-compliant businesses from access to State-aid/subsidies

Naming and shaming lists*

Making public those businesses, workers and/or self-employed workers who have been sanctioned for operating in the undeclared economy

Criminal prosecution

- \ Criminal fines
- \ Prison sentences
- \ Freezing of assets
- \ Confiscation

Corrective actions, including:

- \ Recovery of social and tax contributions
- \ Payment of wages
- \ Recovery of undue social benefits

* In accordance with Member States' privacy regulations on sanctions, based on GDPR Regulation (EU) 2016/679 and Directive (EU) 2016/680, as well as other relevant provisions in the Member States' national legal framework.

Source: ICF/CSD, based on: Williams, C.C. (2021). *Tackling undeclared work: improving the range of effectiveness of sanction tools*, Stefanov, R., et al. (2021). *Cross-border sanctions in the area of undeclared work: enhanced learning resource paper*, European Platform tackling undeclared work, (2022). *Learning resource paper: Effective penalty measures for tackling undeclared work, including through cost effective administrative actions*.

Annex 2. Suggested template for infraction notice

(Based on the template of the Official report on the inadequacy of labour relations, as according to Article 15, para 1, of Law No 107/2009 in Portugal)

On date _____, due to the following fact _____, and under the article _____ of Law No. _____

Identification of the employer

The employer _____, registered in (city/country) _____, exerting the activity of _____, with the e-mail _____.

Identification of the legal representatives

_____, from (city/country) _____, with the ID _____, exerting the activity of _____, with the e-mail _____.

Identification of the employed

Identified with the name _____, from (city/country) _____, with the ID _____, with the phone number _____, and the e-mail _____.

The facts

On date _____ I verified that the worker _____ was at the above-mentioned place of work, to render their activity of _____ (tasks performed) with the following characteristics:

- i. At the place of the employer rendering of the activity determined, namely _____;
- ii. Making use of the equipment and instruments of work belonging to the employer, namely _____;
- iii. The start and end times for the provision of the service determined by the employer of the activity, in the following way _____;
- iv. Receiving from the employer of the activity, every _____, a fixed amount of _____ as compensation of the performed activity;
- v. Performing management functions in the organic structure of the company, in the department/section _____;

Date of beginning of the provision of services

Proof of the verification of the facts

Testimonies

(Name, ID, address, phone number)

Accompanying documents

In the light of the above, and in compliance with the article _____ of Law No. _____, I verify on my honour the facts listed above.

Inspector

(Signature)

Annex 3. Examples of KPIs

KPI Example 1: Improving the effectiveness of using fines to transform undeclared work into declared work

Strategic Action

Fines can be used to encourage undeclared work to be transformed into declared work. This can be achieved by reducing the penalty if the employer employs the worker/s for at least 12 months (or in the case of a seasonal workers, if the worker is employed for at least three months).

To improve the effectiveness of a labour inspectorate that has implemented a penalty system to incentivise the transformation of undeclared work into declared work, there is a need to evaluate how the system of fines is being implemented and whether employers are being encouraged to reduce the penalties they pay by employing the worker for longer periods.

Performance Measure

% of fines that are being paid at: (i) EUR 10 500 plus three months social security contributions; (ii) EUR 7 000 and employs worker for three months; (iii) EUR 5 000 and employs worker for six months and (iv) EUR 3 000 and employs worker for one year.

Targets

2022 - benchmark figures established.

2023 – reduction by 15 percentage points in proportion choosing (i) and an increase by 15 percentage points in proportion by adopting options either (ii), (iii) or (iv), compared with 2022.

Accountable business units

Labour inspectorate staff given responsibility for evaluating and improving this sanction tool.

Initiatives needed to improve performance and achieve the targets

Having evaluated the first-year figures to provide the benchmark, the first step is to evaluate (i) whether the level of these reductions in the fine are sufficient to encourage employers to continue to employ the worker (and if not, to revisit the sanction reductions) and (ii) whether the worker continues to be employed after the period associated with the fine. The register of employment could be analysed to evaluate the latter.

If a high percentage of workers are not employed after the periods associated with the fine, then the second step is to incentivise more employers to opt for smaller sanctions and longer periods of continued employment. One option is to use simple “word of mouth” recommendations by inspectors to the employer that if they display their commitment to employing the worker legally, they are displaying their willingness to engage in compliant behaviour by doing so. Or, alternatively, it might be communicated to employers that this establishes greater trust in the labour inspectorate regarding their business operations if they reduce the fine and prolong the period of employment. In other words, “soft” actions could be used to “nudge” compliant behaviour towards longer employment periods and reduced fines. These various “soft” actions in terms of language used should be evaluated with regard to what works and what does not. If this is done through notification letters, this could be used as a field experiment to test the effectiveness of different types of notification letters.

Performance measurement framework at regional/local office level and individual level

Increase by 15 percentage points in the proportion adopting options (ii), (iii) or (iv) could be applied to all local offices and/or individual inspectors involved in imposing these sanctions.

KPI Example 2: Improve the means and instruments used as proof of undeclared work to secure higher rates of successful court prosecutions for labour law violations

Strategic Action

Documents produced on proof of undeclared work are of a high quality, as measured by the rates of successful court prosecutions.

Performance Measure

Increase in number of positive court rulings compared with earlier periods.

Targets

2023 – 1 % increase compared with 2022 as a % of court rulings in the year

2024 – 2 % increase compared with 2022

2025 – 3 % increase compared with 2022

Accountable business units

Senior management team composed of labour inspectorate personnel.

Initiatives needed to improve performance and achieve the targets

Training using mentoring of senior labour inspectors on what constitutes high quality documents to enable positive court decisions to be made. Production of a repository/library/knowledge bank of national level "good practice" documents is produced that have resulted in positive court rulings, flagging up the key sections that constitute good practice.

Drawing upon international good practice from the 2023 Platform study on means and instruments used as a proof of undeclared work, and actively participating in the 2023 Platform seminar on the same topic to transfer lessons learned to the national context.

Performance measurement framework at regional/local office level and individual level

Same targets at regional level as national level

Source: European Labour Authority, (2022). *Developing methodology and Key Performance Indicators (KPIs) measuring the effectiveness of labour inspectorates (publication pending)*. *Adi aut volesciant licae simusap iendae quis explanda ditis que ni te aut molore vendam dus sinctur, sundand ebitasp eresto eos similit eat.*