



# **Mutual Learning Programme**

DG Employment, Social Affairs and Inclusion

**Peer Country Comments Paper – Ireland**

## **Coordinating responses to undeclared work: The role and approach of different regulatory agencies**

**Peer Review on “Control and prevention of undeclared work in complex chains of economic activity”**

**Slovakia, 4-5 May 2021**

*Written by Thomas Hastings.*

*April 2021*



**EUROPEAN COMMISSION**

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## **1 Introduction**

This paper has been prepared for the Peer Review on "Control and prevention of undeclared work in complex chains of economic activity" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country and the situation in the Republic of Ireland. For information on the host country policy example, please refer to the Host Country Discussion Paper.

## **2 Situation in the peer country**

Although there is no formal definition of undeclared work in Irish law, the Workplace Relations Commission (WRC) defines undeclared work as 'any paid activities that are lawful as regards their nature but not declared to public authorities', observing that work should be declared across all levels of supply chains (EC 2016; WRC 2021). There are varying estimates of the extent of undeclared work in Ireland. Past appraisals have estimated undeclared work accounts for approximately 2/3rds of the shadow economy (the latter covers 8% of GDP in 2013; Cronin 2013; EC 2016), while the Irish Construction Industry Federation and the Irish Business and Employers Confederation have estimated the value of the shadow economy as between EUR 19.97-21 billion (EC 2016; recent media coverage has also reported a rise in the use of shadow economy in recent years, see McCarthaigh 2020).

Multiple sectors are reliant on complex chains of economic activity that commonly involve undeclared work forms (partially or fully developed forms). Known concentrations exist in the construction industry; the haulage industry; in trade suppliers; the supply of agricultural workers; car washing/valeting services; tourism; meat production; fishing, and domestic/care work which involve labour intermediaries. In relation to tourism, recent research based on the European Working Conditions Surveys (EWCS, 2015) found 37% of employees working in the accommodation and food service sector were unregistered in Ireland (by contrast to a rate of 14% in the EU as a whole; Williams and Hordonic 2020). It is common for intermediary structures to facilitate undeclared work in Ireland. These include (but are not limited to) the use of posted workers, orchestrated bogus forms of self-employment; work channelled through letterbox companies; and the use of trafficked labour/persons.

In the present and future, Brexit is likely to affect chains of economic activity between Northern Ireland and Republic of Ireland which are likely to involve undeclared work. Northern Ireland has a foot in both the EU's single market and customs union; it is part of the UK's customs territory but also aligned with the EU's single market for goods. Customs checks currently mediate supply chains between Northern Ireland and Britain.

## **3 National policies and measures**

### **3.1 Examples of policy measures and practices related to undeclared work occurring in complex chains of economic activity**

Like Slovakia, the Republic of Ireland adopts a multi-agency approach for tackling undeclared work. Action is primarily orchestrated within and across four main agencies:

- the state labour inspectorate (the Workplace Relations Commission: WRC);
- Revenue (Irish Tax and Customs) and their Commissioners;
- and the Department for Social Protection (DSP) and
- the Garda Síochána (police).

The WRC is specifically targeted to improve workplace relations by improving compliance with relevant laws and codes of practice governing the workplace. The regulatory

function of the DSP concerns abuse of social protection funding which often implicates undeclared work and the misuse of work forms. Revenue are concerned with regulating the tax affairs of corporations, a role which is especially pertinent for analysing cases of bogus self-employment<sup>1</sup> (e.g. analysing PAYE transactions). As in the case of Slovakia, these agencies deploy a range of proactive and reactive approaches for tackling aspects of undeclared work, relying in the first instance on third party reporting in identifying cases (telephone and internet)<sup>2</sup>. High-risk sectors such as those outlined above are also proactively targeted for attention.

### 3.2 Inter-agency collaborations

Numerous intra-agency collaborations are in place to assist in cases of undeclared work which are likely to involve more complex chains of activity. A notable example of this is the Hidden Economy Monitoring Group (HEMG), chaired by Revenue, which includes representation from the DSP, the Department for Jobs Enterprise and Innovation and the WRC. Employer and worker groups who have engaged with the HEMG include Irish Business and Employers Confederation, the Construction Industry Federation and the Irish Congress of Trade Unions. Cooperation between state and social partners remains ongoing at both national and local levels (different stakeholders meet more or less frequently: For example actors from Revenue and the DSP liaise/work together informally on a weekly basis).

Social partnership more generally has experienced an upsurge in recent years, marked by the continued rise of the Labour Employer Economic Forum (LEEF), which was first established in 2016. LEEF has played an important role during the COVID-19 crisis, providing a forum for employers and worker groups to discuss and inform economic and employment policymaking (including constructive input on matters such as statutory sick pay and input into a remote working strategy). During the course of pandemic, the Government also established a Regulators' Forum, drawing on the insights and capacities of regulators such as the WRC and the Health and Safety Authority to measure the approximate safety levels of different industries. These insights come with a view to informing government on the readiness of different sectors of the economy/labour market to reopen for face-to-face business (i.e. post-lockdown).

The Department of Employment Affairs and Social Protection and Revenue work together via Special Investigation Units (SIUs) which investigate cases of suspected social welfare fraud. This includes cases of tax/Pay Related Social Insurance (PRSI) evasion, which is often associated with bogus self-employment. In the past the SIU and Revenue Commissioners have combined resources through Joint Investigation Units (JIUs) to investigate social welfare fraud and tax/PRSI evasion (working alongside the Irish police force and the WRC). The SIU employs 114 officers including 20 police officers on secondment. Past efforts to address social welfare fraud and tax evasion have pooled the expertise of senior executives from the DSP and Revenue with a view to investigating social welfare fraud and tax evasion (marking the creation of a High Level Group). These inspections have included foci on cases orchestrated as part of elevated chains of activity.

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<sup>1</sup> A new Oireachtas Committee has discussed the role of new penalties for employers who intentionally misclassify workers as self-employed. Prospective penalties include a ban on government procurement contracts for those found guilty. See: <https://www.rte.ie/news/business/2021/0413/1209709-report-suggests-penalties-for-bogus-self-employment/>

<sup>2</sup> Revenue have suggested that modernised reporting facilities (backed by a new website launched in 2017) help to explain this trend, whereby citizens can now report potential offences instantaneously (this includes space for details on alleged wrongdoings linked to undeclared work and information such as car registration details). See: Gallagher C. (2020) Massive rise in people reporting others for tax evasion. Available at: <https://www.irishtimes.com/news/crime-and-law/massive-rise-in-people-reporting-others-for-tax-evasion-1.4341291?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fmassive-rise-in-people-reporting-others-for-tax-evasion-1.4341291>

The SIU and Revenue Commissioners are experienced in sharing expertise and resources, including use of Joint Investigation Units (JIUs) to investigate social welfare fraud and tax and PRSI evasion. These specialist units also work in collaboration with An Garda Síochána (Irish police force) and labour inspectors of the WRC. The WRC also work with NGOs and civil society organisations, including The Migrant Rights Centre Ireland which promotes and supports migrant worker participation in policy and decision-making arenas through advocacy and campaign efforts.

### **3.3 Tackling undeclared work through cross-border collaborations**

Relations between the North and South of Ireland have benefited from a common EU environment/measures which, among other benefits, has helped to underpin operational police cooperation. This has included a focus on cooperative cross-border monitoring of illicit activity between the two regions. From labour inspection perspective, the WRC and the UK's Gangmasters and Labour Abuse Authority (GLAA) have a strong working relationship marked by the signing of a Memorandum of Understanding in place since March 2016 (ref). The WRC and the GLAA share information pertinent to high-risk sectors which work across the island of Ireland such as seafood/fishing (e.g. cockle picking).

There is also a Memorandum of Understanding between the Government of Ireland and the UK to ensure cooperation and mutual assistance in the administration of social security programmes. Mapping exercises have taken place with a view to charting ongoing cooperation structures in light of Brexit (supported by the Northern Ireland Civil Service, the EC and Ireland)<sup>3</sup>. A UK Government Explanatory note on North-South Cooperation<sup>4</sup> observes that 'Close and effective operational cooperation between Police Service Northern Ireland and An Garda Síochána has been critical to tackling shared challenges and threats, and the relationship has led to excellent disruptive and criminal justice outcomes in both jurisdictions'.

In the past police collaborations have been stunted by the need for a 'Letter of request' to secure mutual assistance on cross-border investigations. Joint Investigation Teams (JITs)<sup>5</sup> offer a solution for overcoming jurisdictional boundaries, bringing together investigation teams from across jurisdictional divide (Ireland is compliant with the EU Framework Decision by the Criminal Justice (Joint Investigations team) Act 2004, and uses the Garda Commissioner as the competent authority for establishing a JIT in Ireland). Members of the JIT can include officers of Customs and Excise; Revenue Commissioners and other persons with expertise. In the UK JITs have proved important in tackling serious crimes including trafficking in human beings, illegal immigration, fraud and money-laundering, though the first JIT covering Ireland was only formed in November 2019 (this was used for investigating an attack on a business executive).

### **3.4 Specific structures facilitating undeclared work: letterbox companies, posted workers, bogus self-employment**

As in the case of Slovakia, there are marked challenges in regulating letterbox ('brass plate') companies in the Republic of Ireland. Brass plate companies have been identified as a fraudulent route for the orchestration of full immigration working permissions for otherwise illegal foreign workers (this begins with initial applications for an employment

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<sup>3</sup> Based on the Good Friday Agreement, six areas of cooperation were established by the North South Ministerial Council (NSMC) covering agriculture, environment, transport, health, tourism, and education.

<sup>4</sup> A new Oireachtas Committee has discussed the role of new penalties for employers who intentionally misclassify workers as self-employed. Prospective penalties include a ban on government procurement contracts for those found guilty. See: <https://www.rte.ie/news/business/2021/0413/1209709-report-suggests-penalties-for-bogus-self-employment/>

<sup>5</sup> Key instruments in this respect included the 2001 Second Additional Protocol to the Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters; and the EU's Convention on Mutual Assistance in Criminal Matters (2000); and the EU Framework Decision 2002/465/JHA. The Council of Europe is also significant in this respect. See Walsh (2019): <https://blogs.kent.ac.uk/criminaljusticenotes/2019/11/24/garda-psni-joint-investigation-team/>



permit, adherence to tax and social insurance requirements for c. 2 years followed by full application). The activity is hard to monitor and address. While it is easy to revoke an employment permit, it has proven difficult to prosecute people by proving a person did not work. Irregularities have included the creation of false pay slips and the correct tax/social insurance being paid despite a lack of wages.

Under incorporation theory<sup>6</sup>, there are minimal territorial requirements on companies who are merely required to register an office in the territory (this may just be a registered mailbox). Section 18(1) of the 2014 Irish Companies Act advises that companies must conduct 'an activity' in the state, though a subsidiary/holding company of any company doing business fulfils this requirement. There is no requirement for registered companies to have economic activity anywhere in the world, and only a minimal (symbolic) capital investment is required to establish a private limited company. Companies are registered by The Irish Companies Registration Office; the person making the submission must declare that the required particulars have been submitted. Prosecutions for supplying false/misleading information are not common.

Also in common with Slovakia there are challenges regulating posted workers who may be implicated in the use of letterbox companies (i.e. for the short-term subcontracting of labour through bogus letterbox companies). The financial benefits of using posted workers commonly include reduced social security contributions which are paid in relation to the 'sending' state. While Ireland utilises the Internal Market Information system, there is a lack of Memoranda of Understanding, which should be developed between countries known to have established sending/receiving patterns.

Letterbox companies are also linked to money-laundering in Ireland which may ultimately finance a multitude of illicit employment activities/transactions in Ireland and elsewhere. The 2018 Amended Criminal Justice Act transposed the Fourth Anti Money Laundering Directive into Irish Law. While Irish law does not define shell/brass plate companies, measures have been taken to improve the regulation of Trust or Company Service Providers linked to their creation (TCSPs, who can act as designated persons). TCSPs should be authorised by the State Competent Authority, requiring them to undergo an authorisation process including a fitness and probity assessment (including vetting by An Garda Síochána)<sup>7</sup>. The 2018 Act furthered the adoption of a Statutory Instrument (No. 110 of 2019) establishing a Central Register of Beneficial Ownership (RBO) of Companies and Industrial and Provident Societies (a requirements of the Fourth Anti Money Laundering Directive. This has been operational since 2019 is intended to improve transparency of company ownership to law enforcement agencies and regulators.

Bogus self-employment has been linked to construction and transport/distribution sectors in Ireland. Complex sub-contracting chains can make the phenomenon difficult to monitor and address. There is no definition of direct employment or self-employment in Irish law (Heyes and Hastings 2017) and there is no offence in law relating to incorrect determination of employer status. Of the main regulatory agencies, Revenue and the DSP (often via court or tribunal) will adjudicate based on criteria set out in a Code of Practice. The monitoring of bogus self-employment is often complicated by the role of labour intermediaries, which can obfuscate the nature of work and autonomy of the worker (as many as 200,000 workers were engaged via intermediaries in 2014).

A consultation was launched into the use of intermediaries and self-employment in 2016. In the past the Irish Congress of Trade Unions has called for a change in the

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<sup>6</sup> EU Member States draw upon different rules that impact the legality of letterbox companies and how/where they are regulated. Under incorporation theory, companies are held to account by the rules of the country where the firm was first incorporated. Alternatively, under 'Real Seat Theory', the place where the central administration and substantial activities of the company take place is key to determining which legal system should regulate the company relationship (Hastings and Cremers 2018).

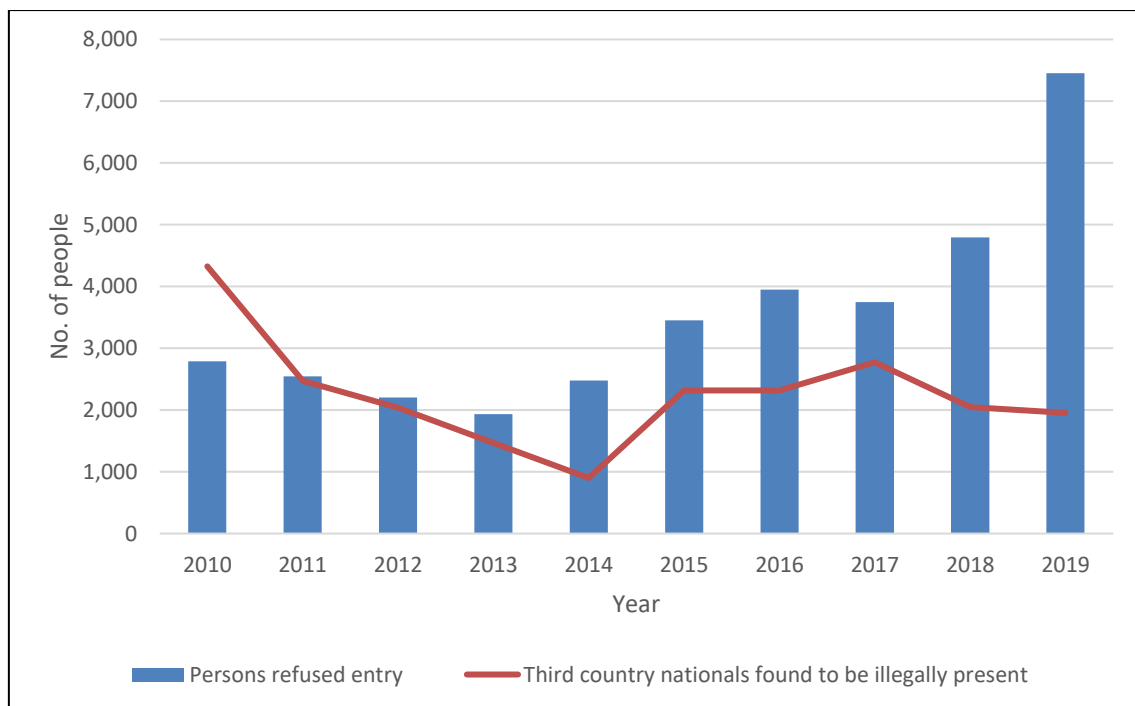
<sup>7</sup> They are also inspected by the Anti-Money Laundering Compliance Unit every three years as part of a risk-based approach.

criteria for determining the principal contractor to prove assets and a business address in the country and a tax record. Irish Congress of Trade Unions has also called for only one principal contractor to be recognised on projects, while advising that no worker without a tax record should be automatically registered as self-employed unless in alignment with the Code of Practice.

### 3.5 Illegal migration and human trafficking

The U.S. Government has criticised the Irish government for failing to meet minimum standards to tackle human trafficking, which informs numerous sectors (e.g. domestic work, restaurants, waste management, fishing, seasonal agriculture and car washing as well as illegal industries). In their *Trafficking In Persons Report* (Department of the State 2018; Department of the State 2020), victim identification, referral and assistance schemes were condemned (concerns were also raised over the lack of specialised accommodation or services for victims), while the report points out that no trafficking conviction has been secured in Ireland since the Human Trafficking Act was amended in 2013<sup>8</sup>. Sea fishers are seen as especially vulnerable to trafficking due to an amended working scheme and the challenge of monitoring these workers *en site*. Out of three tiers, Ireland now sits in the *Tier 2 Watch List* alongside Cambodia, Chad and Uzbekistan among other countries (ibid.). In general intra-agency coordination has been criticised for failing to desist human trafficking, including poor coordination between law enforcement and the Office of the Director of Public Prosecutions. Data on the numbers of third country nationals found to be illegally present has remained relatively constant in the last decade, although the number of persons refused entry has increased in recent years (from under 3,000 people in 2010 to over 7,000 in 2019; see Figure 1).

Figure 1. Third country nationals data (persons refused entry and nationals found to be illegally present)



Source: Eurostat

Several practices are now in place to help address the above enforcement challenge. From the inspectorate side, the WRC has made use of connections with the Irish Naval Service, which have helped in the identification of foreign nationals working on boats

<sup>8</sup> The 2008 Human Trafficking Act was amended in 2013. It criminalised sex trafficking and labour trafficking and included a penalty up to life imprisonment.

(i.e. as part of compliance work with the fishing sector). The WRC have also established links with recruitment agencies (including those based in the UK) with a view to better understanding how these intermediaries monitor worker details and establish 'red flags' in contracting/providing workers (e.g. the use of duplicate phone numbers, duplicate bank accounts etc. may indicate forced labour traits). The government has also increased the number of police and immigration officers in receipt of anti-trafficking training, and has reorganised an anti-trafficking coordination unit<sup>9</sup>.

#### **4 Considerations for future policies and initiatives**

Several initiatives/topics identified in the case of Slovakia are relevant discussion points for the Irish context. From discussions with the WRC in particular, it is clear that cooperation and information sharing (both intra-agency and inter-country agency) is pertinent to addressing undeclared work in both Slovakia and Ireland. Each country utilises cooperation in terms of implementing control activities, and for information/data sharing. Cross-border Memoranda of Understanding are important in Ireland due to the close links with the UK.

In the context of Brexit, it is anticipated that Ireland may experience greater trade/work across supply chains (in particular in the food sector which has made arrangements to avoid the UK). British and other foreign companies are also more likely to base their operations in Ireland now in order to sector EU market access. These are likely to influence multiple industries and result in more economic activity and corresponding flows of workers.

Other issues in the discussion paper include the two-stage inspection for verification of inspection findings. The proposed process is likely to incur additional time which is not practical for the inspectorate. On this point, the WRC conduct many of its investigations (particularly those at night) with two inspectors. While the rationale for paired inspection relates to safety, the doubling of labour provides greater inspection rigour, which mitigates the need for a higher tier of evaluation. Complaints against inspectors' conduct rarely occur and are mainly dealt with at local management level. There is the option of appeal to an Office of the Ombudsman which covers multiple public bodies. On matters of law, complainants can appeal to the High Court. Where an inspectors' findings results in a Statutory Notice is disputed, an appeal can be made to the Labour Court which may confirm the inspectors view, amend this or withdraw the notice. Appeals of Criminal Convictions are handled through the Courts. In both of these instances, the appeal rate is very low (there was only nine appeals of statutory notices in the period 2016-2021, while appeals of convictions are also very rare).

The established approach is understood to work well in normal circumstances (the WRC has conducted a limited number of physical inspections in the context of the COVID-19 pandemic), though as the organisation has just 53 inspectors, it does draw heavily on relatively limited staff resources. The approach is understood to have limited the number of appeals after inspection. In their annual reports the WRC provide a list of employer convictions detailing the company name/sector and the legislation of which the conviction relates. The WRC has powers to fine companies for violations – expressed as a Compliance Notice or a Fixed Payment Notice to an employer<sup>10</sup> – although these sanctions are not made publicly available on a register. Breaches may also result in criminal prosecutions. The WRC may backdate offences up to three years in advance, but typically utilise a 12 month backdate approach at its discretion (monetary settlements with workers involved are a key determinant in this respect).

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<sup>9</sup> <https://www.state.gov/reports/2020-trafficking-in-persons-report/ireland/>

<sup>10</sup> Details on these are available here:

[https://www.workplacerelations.ie/en/complaints\\_disputes/inspections/](https://www.workplacerelations.ie/en/complaints_disputes/inspections/)

From the perspective of the Irish policy debate, it is unclear which measures aimed at improving deterrence and prevention of undeclared work occurring in complex chains of economic activity may be appropriate at the European level. Different inspectorates are likely to operate with contrasting methodologies and ideologies of regulation as suited to their particular labour market situation. One area of difficulty in contrasting definitions of work (e.g. employed, self-employed, worker categories etc.). Directives which ensure an EU-wide defined categories are transposed nationally would help create a level playing-field/consistency of terms could assist in tackling undeclared work channelled through a range of mediums (e.g. letterbox companies, cross border recruitment agencies etc).

## 5 Questions

Particular aspects of the policy measure for which the peer country would like further information or clarification:

- In Ireland the Hidden Economy Monitoring Group (chaired by Revenue) was created to bring multiple regulatory and civil society actors together. Due to the challenge of orchestrating debate across a wide range of stakeholders with competing priorities and views on regulation, organising formal meetings has proved challenging in recent years. Can Slovakia offer any examples for how such a group can be sustained on a formal, ongoing basis?
- The Irish government has devised a Regulator's Forum to pool advice from different agencies with respect to workplace conditions during COVID-19. This advice is used in part as a means of providing an industry health-check with a view to opening up the economy again (e.g. reporting on sectors adhering to health and safety, who are thus more likely to be given permission to open up). Are there equivalent systems in place in Slovakia and have regulators been used in new/different ways during the COVID-19 pandemic? It would be interesting to discuss any good practices which have emerged which may be taken forward in the context of a post-pandemic labour market. In particular, any new practices of working relations that are now in place which can tackle undeclared work over supply chains would be of great interest.

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## Annex 1 Summary table

The main points covered by the paper are summarised below.

### Situation in the peer country

- Ireland is enduring a period of new opportunities and constraints with respect to tackling undeclared work: The COVID-19 pandemic and the impact of Brexit. The latter transition has created new economic opportunities for Irish businesses, which may be more likely to internationalise now. There is also the prospect of UK companies transferring offices/activities to Ireland which will increase the work of regulation agencies inspecting these new entities.
- There are several contentious undeclared work sources which represent 'wicked problems' that are hard for regulatory authorities to address. These include the use of letterbox (brass plate) companies, which are often used in Ireland for residency purposes. Forms of bogus self-employment (particularly in construction) continue to draw criticism from unions and wider civil society.
- Ireland has drawn considerable criticism for its place on a Tier 2 Watch List based on research from the U.S. government with respect to human trafficking. Their status on this list in part reflects a failure to secure a single conviction on charges relating to human trafficking.

### National policies and measures

- Ireland has a well-established set of institutions for tackling undeclared work. These primarily include the Workplace Relations Commission (WRC), Revenue, the Department for Social Protection and the Gardai. These institutions are generally compliance based: in particular the WRC strive to improve transitions into formal, declared work in the economy.
- The institutions have a strong track record of collaboration and information sharing with respect to intra-organisational working, and also cross-border collaborations with the UK in particular. This is particularly the case with respect to the relation with the WRC and the UK's GLAA.
- The WRC remains committed to compliance based approaches to regulation, which encourage a transition to legal, formally compliant working arrangements (i.e. as opposed to the use of punishment/deterrence based regulation with respect to non-compliance).

### Considerations for future policies and initiatives

- There is a need to improve responses to the trafficking of people. While the WRC has relations with relevant authorities (e.g. the Irish Navy), it is An Garda Síochána who have the primary role with respect to catching criminals suspected of human trafficking in Ireland. A stronger relationship between An Garda Síochána and the Office of the Director of Public Prosecutions is required. The national human trafficking unit within An Garda Síochána undertakes useful work advising and assisting on this subject new policies, but ultimately there is a need to demonstrate convictions of those involved in human trafficking. A proactive stance from the Irish government should be considered which involves greater investment in An Garda Síochána and troubleshooting of the problems currently restricting hard convictions in this area.

### Questions

- In Ireland the Hidden Economy Monitoring Group (chaired by Revenue) was created to bring multiple regulatory and civil society actors together. Due to the challenge of orchestrating debate across a broad church of members with competing ideologies and views on regulation, organising formal meetings has

proved challenging in recent years. Can Slovakia offer any examples for how such a group can be sustained on a formal, ongoing basis?

- The Irish government has devised a Regulator's Forum to pool advice from different agencies with respect to workplace conditions during COVID-19. This advice is used in part as a means of providing an industry health-check with a view to opening up the economy again (e.g. reporting on sectors adhering to health and safety, who are thus more likely to be given permission to open up). Are there equivalent systems in place in Slovakia and have regulators been used in new/different ways during the COVID-19 pandemic? It would be interesting to discuss any good practices which have emerged which may be taken forward in the context of a post-pandemic labour market. In particular, any new practices of working relations that are now in place which can tackle undeclared work over supply chains would be of great interest.

## Annex 2 Example of relevant practice

Name of the practice:	Memorandum of Understanding
Year of implementation:	2016
Coordinating authority:	The state labour inspectorate (the Workplace Relations Commission, WRC) and the UK's Gangmasters and Labour Abuse Authority (formerly GLA)
Objectives:	To cement an ongoing cross-border working relationship between the respective state labour inspectorates of the UK and Ireland.
Main activities:	Varied. Data and best practice is shared between the inspectorates in the form of an intelligence gateway. Collaboration is especially relevant for monitoring agencies which supply workers across the Irish/UK border.
Results so far:	Results in direct relation to the Memorandum are hard to measure. Multiple investigations have benefited from information sharing and the Memorandum will remain pertinent in light of Brexit, including seafood/coastal work which is susceptible to forced labour. The prospect of changing work relations on the island of Ireland has underlined the importance of the Memorandum of Understanding.



