

All hands on deck in the fight against undeclared work in
complex chains of activity
BELGIUM

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Fighting against UDW in Complex chains

Background

- **No reliable (enough) hard data about UDW** – underground economy: +/- 3,8% GDP (12.9 billion EUR)
- Only concrete/reliable indicators: **results of inspections** (2020: 39% ended with infringements detected)
- Much input by **risk analysis** and datamining

- **Main types** of UDW behaviour:
 - whole or partially undeclared activity (working time) and wages/earnings to Social Security and Tax, of employees or self-employed; employment of foreign workers in an irregular situation, workers with a false status (bogus self-employment, volunteers or trainees) or working in bogus sham constructions, trafficking in human beings, social dumping/abuse of posted workers, and social benefit fraud.

- **The main sectors:** construction sector and the HORECA sector (Hotels, Restaurants and Catering), the meat processing, cleaning, transport and security

- **Most complex forms of UDW in cross-border context?** Multiple subcontractors chain, involvement of letterbox companies and/or fraudulent temporary work agencies (in search of cheap labour, most flexible working conditions/minimal economic cost and lowest social contributions) – the tool is often a set-up of ambiguous and fictitious constructions and (worse): organised (criminal) networks whose business model aims at: domicile fraud, identity fraud, forgery of documents, evasion of social contributions and fraud of social benefits

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Background

- **The red tape** in all these phenomenon:
 - Businesses are in search of cheap labour, most flexible working conditions/minimal economic cost and lowest social contributions
 - their tool (business model) is often a set-up of ambiguous and fictitious constructions exploiting the weakest links in national legislations.

- P.S. Payment by **wage envelopes** has become less of a problem since the **payment of wages in cash is prohibited by law** since the end of 2016

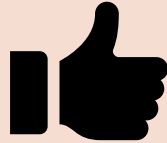
SK

Stand out

BE

Centralisation of Inspections

The Slovak proposal for the creation of a centralised coordinating body on the national level is an **excellent one**.



One could think of a permanent **central steering body** (task force) enacted **by law, accountable** to the government, with **representatives of all authorities** eligible to control a undeclared work hardcore, illegal work and illegal employment and at the **local level**, a past/copy of this central body structure implementing the policy of the central body, A central body :

coordinating actions and cooperation **on all levels** with **full government support** developing a **long term strategy** in common consultation

The Belgian enforcement bodies have ensured a high-level political commitment for their efforts in tackling undeclared work. With this political back-up, they could take action to overcome legal and technical barriers by enacting a special Social Criminal Code, to ensure smooth communication **between** various authorities, receive extra budget, coordinate and steer all actions (at the national and local levels) by a strategic coordinating body (SIIS), to fulfil the engagements stipulated in the annual action plan with the aid of the social security databases and risk assessments. **Systematic cooperation and information sharing** amongst inspection services and Social Security Offices have developed into a **common strategy and an integrated and holistic inspection approach**.

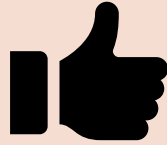
Changing the inspection strategy is a change in the inspection culture. It is encouraging to note the creation of informal working groups in Slovakian inspectorate to discuss the potential changes. This combination of bottom-up and top-down consultation fosters acceptance and motivation of labour inspectors while enhancing their co-ownership of a new inspection strategy.

SK

Stand out

BE

Ad hoc legislative changes in the pipeline, fine, but...is this enough?



What about :
an **institutionalised legal framework** embedding the obligation and right for all enforcement stake holders to cooperate as a general rule, defining their competences, tasks, role to play, engagements , creating a hard-core of UDW related legal provisions with shared competences for all,

Why not let them legally share their findings, information and gathered evidence so that any service can fully exploit them without loss in probative value?

What about National action plans developed by and for all enforcement services with (shared) competence in UDW and with input of social partners (tri-partite partnership agreements for specific economical sectors)?

SK

Different

BE

Inspection protocol and two-stage inspection?

The inspection protocol is **put under pressure** by employers federations who want additional rights before the protocol is definitive. In addition those lobby groups **strive for a second stage** of the inspection.

As for both issues, it seems to us that the proposal is **based on presumptions** of inadequate actions of the individual inspector and a **lack of trust**. This carries the **risk of undermining the impact** of the inspection and could be **counterproductive**.

To raise the trust in labour inspectors, the questions to reflect would be whether there is a **code of conduct, training and guidelines** for inspectors to increase this trust in their initial decisions.

BE: follows a completely different approach.

First: Labour inspectors have the final word when they draw up a report for the infringements. It's a **penal report**. Their recipients are the local labour prosecutor and the service of the administrative fines.

The penal reports are characterised by a presumption of valid evidence. The evidence gathered by the inspector has a legal value of proof until the contrary has been proven by the perpetrator. This counterproof can be developed before criminal court or in an appeal against an administrative fine.

The penal reports generally include the statement of the employer and workers or witnesses as well as all collected evidence (making it a strong report)

SK

Different

BE

Inspection protocol and
two-stage inspection?



Second: before choosing for a penal report to react on found violations, labour inspectors, in line with ILO Convention No. 81 and 129 on Labour Inspection, have a **discretionary power** to provide information and interpretations; to issue warnings; to grant the infringer a term to comply with the regulations; and to draw up **penal reports** (Social criminal code article 21).

Via a warning and the possibility to regularize the violation the employer has a second chance while being avoided to be prosecuted. The question is: whether there is space in the Slovakian Act on Labour Inspection for introducing such a kind of appreciation right (the right to choose the most appropriate response on an infringement) on the part of the inspectors.

SL

Different

BE

Temporary Agency Work operating cross-border

SK struggles with limited possibilities to tackle fraudulent TWA established in other countries and operating in SK. The legal provisions might not be sufficient and even too weak.

BE: Has a strong and effective legal solution to fight abuse of TAW and direct hiring-out from employer A to B. Some examples :

For example: regarding assigning TAW employees to clients/end-users: it is only possible if the TWA has a **license** (under strict and severe conditions). Moreover, the cases where TAW is legally possible is **restricted to 3 special cases**: the replacement of an employee, to meet the demand of a temporary increase of work and to ensure execution of exceptional work defined by law

The formal procedures under which TAW may be used in these cases are very strict also. Furthermore: **only for 100% pure TAW activity** such assignment is allowed (for no other business activity of the TWA).

SK

Different

BE

Temporary Agency work operating cross-border

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Direct hiring-out of an employee from employer A to employer B is **prohibited** sans plus!

Temporary agency workers coming from abroad have to be declared prior to starting their work, in the Posting of workers declaration web application “**LIMOSA**”.

The **end-user** should also be declared. Identification of all parties is not a problem

In case of violations the client/ end-user is always **co-responsible** for payment of wages and social security contributions

A complex case: fighting against bogus LETTERBOX COMPANIES

The case of the Belgian transport undertaking setting up a fictitious subsidiary in the Czech Republic

- A lot of Belgian transport undertakings, faced with shortage on truck drivers and in search for cheaper prices, **set up fictitious subsidiaries** in Hungary, Czech republic, Poland, Slovakia (Bratislava). These subsidiaries are legal persons established in these countries, but without real assets, without real own economic turnover in SK, often without administration, a strawman manager (who had nothing to decide) etc.
- In the Czech case, the Belgian transport undertaking had **no more own employees**. All its **haulage contracts were executed** all over Europe by Czech truck drivers.
- **Employers authority** was fully carried out by the Belgian company.

The case of the Belgian transport undertaking setting up a fictitious subsidiary in the Czech Republic

- It seemed impossible for a single labour inspection to tackle these cross-border phenomenon. LI had not enough investigative power.
- **Judicial authorities have more weight** in tackling complex cross-border cases via cooperation with the police and a framework for **mutual assistance in criminal matters**, such as support via EUROJUST or EUROPOL, the European Judicial Network, and the Carin network (for asset recovery, seizure and confiscation).
- Labour prosecutors may apply a **follow-the-money approach**: using **international letters rogatory** to obtain that information in the context of the judicial procedure, freezing and confiscating all financial return/yield of the fraudulent employer (the so-called: unlawful profit).

The case of the Belgian transport undertaking setting up a fictitious subsidiary in the Czech Republic

- The LI is often **the initiator** as the first instance faced with the presumption of a possible case of bogus Letterbox companies. LI gathers all evidence, information and indicators which point in the direction of such a case which can pop up in ANY kind of cross-border enquiry.
- **Indicators for a red alarm** collected via search in the social documents, interviews with truck drivers, Belgian manager, request via IMI etc. (some examples of indicators found):
 - The **same person** was the owner / manager of **both companies**.
 - Czech company was **located in an apartment block in Prague** (=> google street view and confirmed via an IMI-request).
 - Czech company **administration was done in Belgium** by manager's ex-wife.
 - In Prague was **no garage for maintenance, no parking lot, storage room**
 - All **transport orders** (dispatching) were given from Belgium.
 - All transport, bookkeeping, transport and social documents (labor contracts, tachograph data, time sheets, CMR, etc.) were **kept in Belgium**.
 - All **Czech mail was forwarded** to Belgium by a local person.
 - **Wage calculation** was carried out in Belgium.
 - **Pay slips** were handed out in Belgium.
 - **Wage payments** were carried out in Belgium on Czech bank accounts.
 - Drivers then went home with the **minibus** owned by the Belgian company
 - Drivers **started and stopped** their daily work in the Belgian company
- The question was put on the table and **discussed with the labour prosecutor**
- LI has an **excellent partnership with the labour prosecutors**.

What is the role of the Labour Prosecutor?

- When the labour prosecutor decided to choose this option, he took over the lead and steered all further investigations. The enquiry (before an administrative one changed in nature): it became a criminal investigation extended to the Czech judicial counterparts (mutual assistance in criminal matters).
- As a result, judicial search and interviews were executed in Prague. They confirmed the findings of Li in the Belgian mother company.
- During the investigation the Labour Prosecutor temporarily **seized the money on the accounts of the Belgian mother company** and of the **manager**, which was confirmed by the court (about EUR 85,000 were actual forfeited because of the evaded social security contributions).

What is the legal basis of the action?

BE: The Social Criminal Code (Chapter 10, Articles 230-236) “The infringements concerning forgery, the use of forged documents, incorrect or incomplete statements and concerning swindling in social criminal law” (http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2010060607&table_name=loi)

Example: art. 235. *Swindling in social criminal law*

Shall be punished with a level 4 sanction: every person who, either in order to obtain or to have obtained or to retain or to have retained an undue social benefit, or in order to pay or to have paid no or less contributions than those owed by said or another person, *used false names, false capacities or false addresses, or used any other fraudulent conduct either in order to make the existence of a false person, a false enterprise, a fictitious accident or any other fictitious event believable*, or in order to abuse trust in any other way.

art. 232. *Forgery and the use of forged documents in social criminal law*

Shall be punished with a level 4 sanction: every person who, either aiming to obtain or to have obtained or to retain or to have retained an undue social benefit, or aiming to pay or to have paid no or less contributions than those owed by said person or another person:

1° a) committed forgery either by *means of forged signatures, or by counterfeiting or forging documents or signatures, or by fraudulently drawing up agreements, decisions, contracts or acquittances* or by including them in an instrument, or by adding or forging provisions, statements or facts

What is the outcome?

- The Belgian manager and Belgian company were **convicted** for setting up a letterbox company (CFR art 232 to art. 235 social criminal code).
- It was also proven by the LI that drivers did NOT work 25% in Czech Republic, so they **could not be posted to Belgium** (from a Social Security point of view)
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- On the contrary they **had to be declared to the Belgian social security and tax department (contributions)**
- The employees' **wages** didn't meet the Belgian minimum wages in the transport sector – the company was convicted to pay these due wages with retroactive effect.

What about the transferability?

There are at least 3 preconditions:

1. In the Slovakian legislative provisions on UDW, illegal work and illegal employment should be introduced: the definition , incrimination and sanctions for such violations as **forgery**, the **use of forged documents**, **incorrect or incomplete statements** and **swindling**. Just like they exist in the common law criminal code.
2. The enforcement services , like LI and all others should be empowered with **competence to uncover such violations**.
3. A **collaboration agreement** with the public prosecutor would be needed to align all forces on such a criminal approach (involvement of the Ministry of Justice).

Summary regarding cooperation for the cross-border fight against UDW in complex chains of activity and letterbox companies

What steps need to be taken in order to establish cooperation and involve other national and foreign authorities in the detection of letterbox companies?

- a) One needs a **permanent national coordination body** like the SIIS in BE. This cooperation approach is **embedded in the structures, strategies and inspection plans** of the different inspectorates and social security offices. Cooperation agreements concluded with the **tax authorities** and **other** public authorities
- b) Use **IMI** for primary information (often confirmation of own findings)
- c) **MoU's** of **BA's** may help (better mutual understanding)
- d) For real hard cases: **JUDICIAL mutual assistance** needed! Therefore our criminal approach and relying on the help of the (labour) prosecutor.