

**ILO/EC Comparative Study on
Labour Inspection Strategies for Combating Undeclared Work in Europe**

The role of the Irish National Labour Inspection System (National Employment Rights Authority -NERA) as part of a strategic policy response to undeclared work

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Executive summary

The purpose of this research is to consider the role of NERA as part of the strategic policy response to undeclared work in Ireland. To that end, this paper sets the context in terms of the problem and challenges in relation to undeclared work in Ireland. It looks at the role NERA plays and the roles of the other main agencies involved in tackling undeclared work, namely the Department of Social Protection and the Revenue Commissioners.

Undeclared work is a problem in Ireland and is currently estimated to represent 8% of annual GDP. Given the economic challenges faced by the country and the recognized link between economic downturn and increased shadow economy activity, it is likely that undeclared work will increase, at least in the short term.

The policy response to tackling undeclared work is most prominent in the areas of social welfare fraud and tax avoidance/evasion. Therefore the primary resources focused on tackling undeclared work come from the State agencies responsible for these areas of enforcement. While it was never envisaged that NERA's role would focus specifically on tackling undeclared work, new responsibilities in terms of enforcing Employment Permits legislation and membership of the Joint Investigation Unit structures and the Hidden Economy Monitoring Group mean that, even though NERA does not play a lead role in tackling the problem from a strategic point of view, it is very involved at the operational level and contributes strategically through its involvement with these main agencies.

This is a time of transition for NERA, with three new pieces of legislation making their way through the Irish legislature which will make some changes its role and some of the laws it enforces. One is the establishment of the Workplace Relations Commission, into which NERA is to be absorbed. This Commission will give its inspectors new compliance and enforcement powers, which, although not focused on undeclared work, may enhance the direct influence NERA will have on encouraging business compliance. The second piece of legislation relates to Employment Regulation Orders. And the third is Employment Permits legislation, due to be enacted by the end of March 2013, which will also introduce changes which are intended to enhance compliance and therefore deter undeclared work in this area.

NERA's involvement with the Department of Social Protection and the Revenue Commissioners will continue in terms of intelligence and data sharing and operational co-operation, and its role may evolve and strengthen over time, but the policy drive and prioritization will continue to come from these other agencies.

While the role of NERA in the fight against undeclared work will remain an operational and supportive role, the legislative changes which are due to take place should, at the very least, place NERA in a more influential position with employers in terms of ensuring compliance with employment law generally; all the while dealing with internal organizational changes, the challenges of the economic environment and diminishing public sector resources.

Methodology

This paper is based on a balance of primary and secondary research and an extensive literature review. In terms of the primary research, the author interviewed a number of people including senior civil servants in NERA, the Department of Social Protection and the Revenue Commissioners. Surveys were also sent to a representative group of employer

and employee organizations. The bibliography attached provides a list of background documentation and many of the websites of the relevant enforcement agencies also provided extensive information.

1. The most prominent features of undeclared work in Ireland

1.1. Undeclared Work in Ireland - Overview

Undeclared work (UDW) in Ireland is regarded as a significant problem by those who have to deal with it. It is estimated to currently represent approximately 8% of GDP, accounting for approximately €14 billion per annum (see 1.3 below) or two thirds of the Shadow Economy¹.

The experience of Irish trade unions suggests that the phenomenon is most pronounced in the construction sector (due primarily to the collapse of that sector brought about by the economic crisis since 2007), the security sector and the hospitality sector. Employers also highlight the construction sector as well as the agricultural sector and domestic services as being problematic. The Revenue Commissioners (Revenue) are concerned at the impact of UDW on tax revenues while the Department of Social Protection (DSP) regards the cash economy generally as a significant locus for UDW.

As Ireland enters its sixth year of recession, all indications are that the incidence of UDW is likely to increase as economic growth remains modest, unemployment remains high (almost 15%), and taxes continue to rise. While there is no single focal point or policy response for combating UDW in Ireland the main Government agents with responsibilities in the broad area of the Shadow Economy are focusing more and more on addressing their particular areas of interest with some cross-agency collaboration. Revenue seek to maximise the Government's tax take (which has fallen from €47 billion to €34 billion in recent years) by focusing on particular elements of the Shadow Economy such as the cash economy, cigarette smuggling and oil laundering²; DSP is focused on reducing the incidence of welfare fraud through its Fraud Initiative and for NERA, labour inspection is currently being reconfigured as part of a new Workplace Relations Commission to focus on an enhanced employment rights compliance model (see Section 2.1.2 below). The main challenge therefore is ensuring a more coherent policy response as the problem grows and resources available to Government diminish.

1.2. The Extent of UDW in Ireland

UDW is neither defined in Irish Law nor specifically targeted and measured by the Irish administration. This paper therefore relies on the definitions used by both the International Labour Office and the European Union, i.e. UDW is generally understood to mean "all economic activities by workers and economic units that are – in law or in practice – not covered, or insufficiently covered, by formal arrangements." It can be broken down into elements of UDW including undeclared wages in a formal enterprise, partly undeclared wages in a formal enterprise; undeclared (or under-declared) payment for goods or services provided to a formal enterprise or household by a self-employed person; or undeclared (or under-declared) payment for goods or services provided by a person to relatives, friends or neighbours.

¹ The terms Shadow, Hidden, Black and Informal Economy are used by the various actors to describe the same phenomenon, i.e. economic activity which falls outside the legally regulated economy. In this paper the term Shadow Economy will be used.

² <http://www.accountancyireland.ie/Documents/digital/2012/February/files/20.html>.

Notwithstanding the absence of a clear definition of UDW, the key actors in Ireland regard it as a significant problem. Employers pointed to unfair advantages gained by those involved in UDW over compliant employers and workers; trade unions highlighted the negative impact of UDW on terms and conditions of employment and Government Departments expressed concerns at the impact of UDW on revenue collecting and welfare fraud. In their responses to the author's Survey on Combating UDW in Ireland (see Appendix A) they described their concerns as follows:

Employers/Business Interests - The Irish Business and Employers' Confederation³ (IBEC) described UDW as "a significant issue for the Irish economy and its business community. It results in reduced tax revenue for the Exchequer and therefore increases the proportionate tax burden on tax compliant businesses. It also provides an unfair competitive advantage to those businesses and workers who are not fully tax compliant ... as a result of the economic downturn Ireland has experienced a sharp increase in UDW and informal economy activity in recent years. Issues around UDW are predominantly focused in a small number of specific sectors in the domestic economy. Sectors such as construction, a range of household services and agriculture related activities are most affected. Ireland also continues to operate a poor model of labour market activation measures which helps to facilitate UDW. The issue of UDW has grown in line with the economic downturn. In particular, about half of the job losses across the economy have been construction related and this has resulted in a sharp increase in informal activity in that sector."

In the context of the above reference to labour market activation measures it is important to mention that there has been a fundamental restructuring of the way in which labour market activation is being configured. The transfer of employment services formerly administered by FAS to DSP means that the linkage between unemployment and activation will be, over time, structurally addressed. The opening of INTREO offices where activation forms a critical part of customer engagement from claim initiation stage is also an important development.

The Small Firms Association⁴ (SFA) highlighted the impact of UDW on the competitiveness of legitimate businesses and expressed concerns at (i) the non-payment of taxes which increases the burden on the legitimate economy, (ii) the lack or absence of health and safety and employment rights protections for workers and (iii) the erosion of job security for workers in such environments.

The concerns of the Restaurants Association of Ireland⁵ were recently highlighted in a newspaper article in terms of practices in the restaurant industry that are the subject of Revenue and DSP investigations.

While a recent report, commissioned by Retail Ireland "Tackling the Black Market and Retail Crime"⁶ concentrates mainly on illegal activities rather than on UDW in the

³ IBEC is Ireland's largest Employer Representative Body representing 7000 Employers.

⁴ SFA is a national organization exclusively representing the needs of small enterprises (i.e. those employing less than 50 employees) in Ireland. The SFA is funded directly through subscription fees from its 8,000 member companies, Source, www.sfa.ie.

⁵ <http://www.independent.ie/national-news/ethnic-eateries-cook-the-books-with-low-wages-3334474.html?service=Print>.

⁶ http://www.retailireland.ie/Sectors/RI/RI.nsf/vPages/Media_and_Events~retail-ireland--tackling-the-black-market-and-retail-crime-20-08-2012?OpenDocument.

sector, it does call for an awareness campaign in order that taxpayers realize that they are paying for the actions of those who do not pay tax or break the law through fraud.

Trade Unions - The Irish Congress of Trade Unions⁷ (ICTU) described UDW as primarily an issue in the construction and security industries where good conditions of employment established by Registered Employment Agreements (REA)⁸ were undermined by unfair competition. ICTU went on to describe how resulting downward pressures on contract prices created a “moral hazard which tempts good employers to cheat and carry out the work in a below the radar fashion.”

ICTU also expressed concern in relation to difficulties ensuring compliance among non-Irish companies who win contracts to work in Ireland, particularly in border areas.

The Services Industrial Professional and Technical Union⁹ (SIPTU) characterized UDW as seriously undermining minimum pay terms and conditions, in for example the Construction Industry, Security Industry, Cleaning Industry and Hotels etc., which are regulated by REAs, Joint Labour Committees¹⁰ (JLC) and Employment Regulation Orders (ERO)¹¹ and also the Statutory Minimum Wage¹² itself. In SIPTU’s experience breaches are most common in the areas of Health and Safety, Working Hours, Holidays, Statutory Payments, Non-Registration for Pension, Sick Pay and Death-in-Service Benefits with the Construction Industry being the worst offender. SIPTU also highlighted concerns in relation to below cost tendering with the intention of exploiting low labour costs and cutting corners on the quality of materials and quality of work undertaken.

Government - DSP stated that the cash economy is the most enduring feature that supports UDW. This operates on many levels from tradesmen being paid cash and claiming social welfare payments to higher end more organized frauds. Under the counter and undeclared income is an enduring feature and detections in this area are still quite pronounced.

⁷ ICTU is Ireland’s single Trade Union Confederation representing 55 Trade Unions and 833,486 Workers (in 2008) Source, ICTU website.

⁸ REAs: Employers and workers in any sector or enterprise can agree minimum rates of pay and conditions of employment and can then have that agreement registered with the Labour Court. When registered with the Court, these agreements are legally binding, not only of the parties to the agreement but also to others who are in the class, type or group to which the agreements are expressed to apply. There are 75 Registered Employment Agreements on the Register maintained by the Labour Court in Ireland, source, www.labourcourt.ie.

⁹. SIPTU is Ireland’s largest trade union representing workers in both the public and private sectors. SIPTU has over 200,000 members; Source, SIPTU website.

¹⁰ JLCs agree the details of EROs – see endnote 11.

¹¹. Employment Regulation Orders were Statutory Instruments setting the statutory minimum pay (including overtime rates and premium rates for night/weekend work) and statutory conditions of employment in certain sectors. EROs were agreed by Joint Labour Committees and promulgated by the Labour Court. The High Court made a ruling in 2011 that the ERO wage setting mechanism is unconstitutional.

¹²

<http://www.employmentrights.ie/en/media/NERA%20Guide%20to%20Minimum%20Pay%20Rates%20July%202011%20-%20Jan%202012.pdf>.

DSP also pointed out that Ireland continues to have a high incidence of cash rather than electronic payments for economic transactions. While this is changing it does remain a factor in sustaining non declaration. This is being addressed by the Irish Central Bank which was requested by the Minister for Finance to take the lead in implementing a National Payments Plan focused on improving the efficiency of Ireland's payment systems' infrastructure by making more use of secure and efficient electronic payment methods and leading to a reduction in cash and paper payment transactions.

Likewise, Revenue recognizes the threat to the Exchequer posed by the shadow economy and in 2011 strongly focused on sectors that traditionally have been susceptible to shadow economy activity with more than 50% of interventions in 2011 related to cash businesses.

1.3. Measuring UDW in Ireland

There are no specific nationally collected data on UDW in Ireland. Revenue, DSP and NERA collect data specific to their own areas of responsibility, e.g. Revenue holds statistics on the yield from inspections related to the shadow economy, DSP maintains statistics in relation to welfare fraud and the related savings to the State and NERA has information on the number of breaches in relation to the Employment Permits Acts (see Section 3.2 and 3.11 below) since they began inspecting under this legislation. There is no specific gathering of information on UDW segregated by sector, occupation, sex, age etc.

The extent of UDW in Ireland can however be estimated by looking at it as a proportion of the Shadow Economy. It is estimated that about two thirds of the Shadow Economy is accounted for by UDW¹³. According to Freidrich Schneider¹⁴, Ireland has a Shadow Economy amounting to 12.7% of GDP. Based on 2011 figures when Ireland's GDP was €159 billion, the Shadow Economy represented approximately €20 billion. Recent estimates by Irish business interests also put the monetary value of the Shadow Economy in the region of €20 billion - for example the Irish Construction Industry Federation¹⁵ (CIF) estimated the value of the Shadow Economy at €19.97billion in 2012 and IBEC¹⁶ estimated the current value at €21 billion. On the basis of the above estimates one may conclude that UDW accounts for approximately €14 billion of Ireland's annual GDP.

In comparative terms, Schneider's 2012 study identifies an average hidden economy of 19.8% across 36 European countries. Ireland therefore fares reasonably well as 7th of the 36. Professor Schneider's statistics are arrived at using the MIMIC (Multiple Indicators and Multiple courses) estimation procedure. This indirect method of measurement, as defined in COM (2007)628, may over-estimate the level of UDW but does provide an indication of international comparisons.

¹³ http://ec.europa.eu/europe2020/pdf/themes/06_shadow_economy.pdf.

¹⁴ Schneider Friedrich, Size and Development of the shadow Economy of 31 European and 5 other OECD Countries from 2003 to 2012: Some New Facts, 2012.

¹⁵ Source: Construction Industry Federation Black Economy Survey, August 2012.

¹⁶ Source - IBEC Survey Response (Question 2).

1.4. Strategic Policy Response

As there is no unified strategic focus on UDW in Ireland, the Irish Government's strategic policy response must be seen in the context of the wider response to the Shadow Economy. This falls largely to the three Government agencies already mentioned - Revenue (tax compliance), DSP (welfare compliance) and NERA (labour inspection). On a day to day basis each pursues its own objectives but they also engage in joint activities. As will be described below, Ireland fits the profile of most EU Members States where there is a balance between prevention and enforcement¹⁷ with prevention becoming more commonplace and greater efforts being exerted to ensure compliance.

1.4.1. Revenue Commissioners

Revenue's focus on the Shadow Economy¹⁸ is on those sectors and activities which pose the greatest risk to the Exchequer. The shadow economy can range from businesses (including professions) understating their sales/income, under declaring cash payments or paying their employees "off the books", to individuals working either in addition to their normal taxed employment or while also claiming welfare payments. Revenue has therefore focused in recent times on the most susceptible sectors. For example, more than 50% of Revenue's interventions in 2011 related to cash businesses. Amongst the areas prioritized were the detection of serious sales suppression in the hospitality sector, checking the compliance of white-collar professionals and streetscape operations in towns and cities. Regarding sales suppression, legislation was enacted in 2011 providing for fines of up to €126,970 and/or imprisonment for a term not exceeding five years. Another cash business where significant compliance issues arose particularly in the area of cash payments was the scrap metal industry. Industry analysis suggested that cash payments in the industry are significant. The introduction of the Value Added Tax (VAT) reverse charge for scrap metal in 2010 eliminated the VAT at risk in the sector. Specific audits completed during 2011 yielded in excess of €1.1m and there are a number of investigations on-going and prosecutions pending.

Streetscape operations involve a team of Revenue officials visiting virtually all of the businesses in a street, shopping centre or village during the course of a day. During the course of 255 streetscape operations in 2011, over 5,700 businesses were visited and assurance checks carried out. These visits resulted in 224 new registrations for business taxes and the discovery of 435 employees who were being paid off the books.

Revenue also addresses the unfair competitive advantage gained by businesses that do not fulfil their tax obligations by focusing its audit and tax compliance programmes on the areas of greatest risk, including risks from the Shadow Economy. Such targets are identified using a combination of risk analysis, intelligence collation and data matching and projects are organized at National, Regional and District level.

¹⁷. Measures to Tackle UDW in the European Union (page 4, 2008), European Foundation for the Improvement of Living and Working Conditions, Dublin, Ireland.

¹⁸ Revenue Annual report 2011(Objective 3.1), <http://www.revenue.ie/en/about/publications/annual-reports/2011/objectives-3.html#objective1>.

Results from 2011 activities in certain sectors are set out in Table 1 below.

Table 1. Summary of Audit Results for Certain Sectors

Sector	No. of audits	Total Yield	Average Yield
Construction	1,833	€58.8m	€32k
Bars	316	€8.1m	€25.6k
Restaurants	297	€8.8m	€29.5k
Legal Activities	142	€4.6m	€32.2k
Landlords/Property Rental	908	€35.1m	€38.6k
Accountants	130	€2.9m	€22k
Doctors	166	€3.9m	€23.3k
Dentists	54	€2.1m	€39k

1.4.2. Department of Social Protection

DSP focuses on policing the Shadow Economy where there is a prevalence of welfare fraud and abuse. This generally occurs where a business or individual has the opportunity to deal largely in cash. In collaboration with other agencies (see Section 4 below) DSP uses a combination of intelligence collation, assurance checks and outdoor operations including inspections and direct investigations. The Irish Government is committed to a zero tolerance approach to welfare fraud (Programme for Government 2011¹⁹). On foot of this commitment DSP initiated its Fraud Initiative 2011 - 2013²⁰ in September 2011. The Initiative aims for greater inter-agency co-operation among public bodies (see Section 4 below), a greater presence of social welfare inspectors on the ground; the targeting of sectors where fraud is more likely to occur; the examination of new ways to recover overpayments; increased penalties for those operating in the hidden economy; greater liaison at national and, in particular, at local level with employers, their representative organizations and businesses generally to ensure good information exchange on emerging fraudulent trends in the labour market; and also to maintain a fair and level playing pitch for all enterprises. The Fraud Initiative has resulted in saving of over €645 million in 2011²¹ and €500 million in first eight months of 2012²².

Within DSP, the Special Investigation Unit (SIU) is responsible for the investigation and reporting on fraud and abuse of welfare schemes. The SIU, which comprises 89 officers, seeks to identify and address high risk sectors and works closely with other compliance and fraud investigation agencies to ensure that social welfare abuse is comprehensively deterred and detected. Specific SIU activities include reviews of eligibility for welfare payments for persons engaged in concurrent working and claiming and high visibility site visits and employer inspections to detect incidences of welfare fraud. A particular high risk area is that of identity fraud and the multiple claiming of

¹⁹ Page 16, http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011-Programme_for_Government_2011.pdf.

²⁰ <http://www.welfare.ie/EN/AboutUs/Documents/FraudInitiative2011.pdf>.

²¹ <http://www.welfare.ie/en/pressoffice/Pages/Over-645-million-saved-through-social-welfare-control-measu.aspx>.

²² <http://www.independent.ie/national-news/social-welfare-probe-finds-fraud-worth-over-500m-3297171.html>.

welfare payments. Cases of multiple claiming are referred, where appropriate, to the Police (An Garda Síochána) for criminal proceedings under the Criminal Justice (Theft and Fraud) Offences Act, 2001.

Challenges identified by DSP

Cultural: UDW it is often perceived as a victimless activity, however there are unquestionably negative economic and societal consequences. It undermines public confidence in the entire employment, tax and welfare systems as well as being unfair to other recipients of social welfare payments and to taxpayers. It is to some degree about changing culture, attitudes or the view that this is an acceptable practice. This is a very important and difficult challenge.

Legislation/Regulation: A particular challenge is whether there is need for further legislative or regulatory changes to ensure that there is appropriate sanction and deterrence. On the higher end of Shadow Economy activity there is a belief amongst representative organizations that this activity should attract very heavy penalties and sanction. A good example of recent regulatory change is found in the new regulatory environment for the Taxi sector in Ireland. Of particular relevance within the terms of reference, was the need for enhanced systems to prevent persons with serious criminal convictions or who are engaging in suspected criminal activity, tax evasion or social welfare fraud from entering, or operating in, the taxi trade.

Operational: One of the most useful structures in addressing UDW is the multi-agency approach. The benefit of joint agency work and intelligence sharing is of critical importance. The continuation of high visibility activity with direct engagement remains the challenge for all related agencies as well as their capacity to resource this.

1.4.3. National Employment Rights Authority (NERA)

The labour inspection system in Ireland has undergone significant changes in recent years and at the time of writing is continuing to evolve. The existing labour inspection agency is NERA which was established in 2007. This development emerged from the changing circumstances in the early to mid-2000s when Ireland experienced an unprecedented economic boom and almost full employment. One consequence was a significant increase in economic immigration (immigration resulted in a 16.8% increase in the population of Ireland between 1996 and 2006²³). Traditionally Ireland was more used to emigration. The trade union movement in particular became concerned that some employers might use the situation to take advantage of vulnerable workers (particularly immigrant workers) who might not be aware of their employment rights and entitlements in Ireland.

The GAMA Case

The most high profile case of this kind occurred in 2004/2005 involving a Turkish construction company (Gama Group/GAMA ENDUSTRI) which was employing mainly Turkish Nationals on infrastructural construction projects in Ireland. Four trade unions – Building and Allied Trades' Union (BATU), SIPTU, Union of Construction Allied Trades and Technicians (UCATT) and Operative Plasterers and Allied Trades Society of Ireland (OPATSI) sought to represent the workers concerned and submitted claims to the Irish Labour Court alleging various breaches of employee entitlements by the employer.

²³ Byrne Elaine, in *Political Corruption in Ireland 1922-2010, A Crooked Harp?* Manchester University Press, 2012, p. 214.

Over time ICTU and individual Trade Unions lobbied through the Social Partnership process for more effective policy responses. This ultimately resulted in an agreement in 2006 between, inter alia²⁴, Government, Trade Union and Employer Representatives as part of the 10-year Framework Social Partnership Agreement 2006-2015 “Towards 2016”, to establish NERA. It was subsequently established on an interim basis, pending enactment of appropriate legislation in February 2007 and is currently in the process of being subsumed into a new Workplace Relations Commission. The objective in establishing NERA was to enhance and expand the existing Labour Inspectorate of the then Department of Enterprise Trade and Employment in order to develop “a comprehensive and responsive system of compliance and enforcement”.

The role of NERA is described in Section 3 below.

1.5. Challenges

It is widely accepted that UDW is a significant issue in Ireland. Addressing the problem is not helped by the fact that there is no official definition or measurement of the phenomenon and that there is no unified approach to combating it. The Irish Government is likely to face challenges in the years to come for the following reasons:

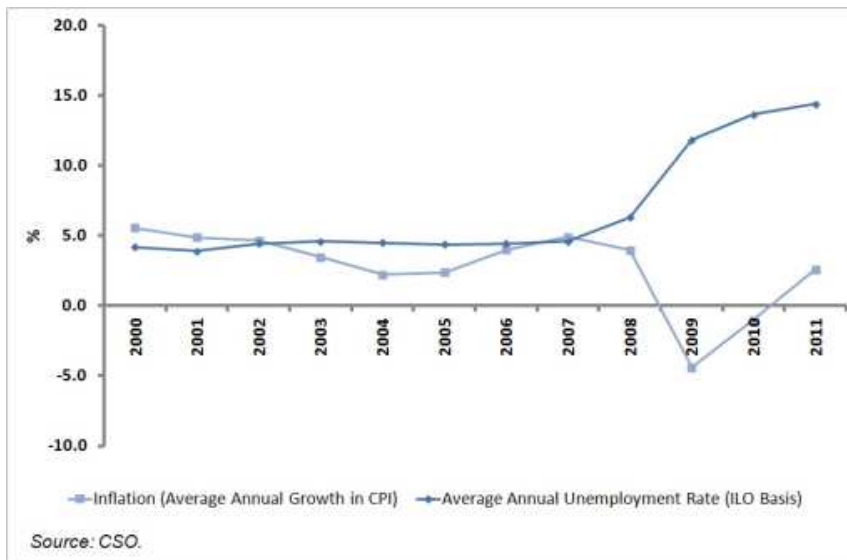
The resources available to Government Departments and Agencies have declined since 2008 and will continue to decline under current Government plans²⁵ (employment levels in the Irish Public Service will have decreased from 320,000 in 2008 to 282, 500 in 2015 representing a cost reduction of 15%).

The depressed economic environment is a fertile ground for the growth of UDW. The European Commission Mutual Learning Programme 2012 Peer Review in Prague²⁶ concluded that generally, UDW is driven by low economic growth, high unemployment coupled with low labour demand, as well as a prevalence of low basic skills. Ireland fits this profile for the most part with persistently low economic growth and high unemployment. Ireland has suffered low economic growth for the past number of years and this is set to continue - between 2008 and 2011 real GDP declined by 4.8% and GNP by 9.5%. Growth in 2012 was approximately 1% and prospects for 2013 are equally modest. Unemployment has risen from an average of 4.5% during the 2000-2007 period to a current level of almost 15% and these are no signs of any alleviation in the short to medium term (Source: http://www.esri.ie/irish_economy/).

²⁴ The negotiating parties included the Government, Irish Congress of Trade Unions (ICTU), Irish Business and Employers’ Confederation (IBEC), Construction Industry Federation (CIF), Small Firms’ Association (SFA), Irish Exporters’ Association (IEA), Irish Tourist Industry Confederation (ITIC) and Chambers Ireland, Irish Farmers’ Association (IFA), Irish Creamery Milk Suppliers’ Association (ICMSA), Irish Co-Operative Organisation Society Ltd. (ICOS), Macra na Feirme, Irish National Organisation of the Unemployed (INO), Congress Centres Network, CORI Justice Commission, National Youth Council of Ireland (NYCI), National Association of Building Co-Operatives (NABCO), Irish Council for Social Housing (ICSH), Society of Saint Vincent de Paul, Age Action Ireland, The Carers Association, The Wheel, The Disability Federation of Ireland, Irish Rural Link, The Irish Senior Citizens’ Parliament, The Children’s Rights Alliance, and Protestant Aid. The text of the Agreement is available at http://www.taoiseach.gov.ie/attached_files-/Pdf%20files/Towards2016PartnershipAgreement.pdf.

²⁵ <http://per.gov.ie/wp-content/uploads/Public-Service-Reform-181120111.pdf> - p. 4.

²⁶ http://www.mutual-learning-employment.net/index.php?mact=PeerReviews,cntnt01,detail,0-&cntnt01template=display_by_year&cntnt01year=2012&cntnt01orderby=start_date%20DESC&cntnt01returnid=59&cntnt01item_id=96&cntnt01returnid=59.



Finally, Ireland has moved from a relatively low tax economy to a relatively high tax economy in recent years. Successive budgets since the economic collapse have widened the tax net to include workers on relatively modest pay levels and a new Universal Social Charge was introduced which had the effect of reducing take home pay for almost all workers. In addition, soon to be introduced property and other charges as well as the elimination of tax breaks on rental income are set to impact the earnings of employees including the self-employed. This is likely to encourage more people to consider engaging in the Shadow Economy and UDW. As the European Observatory²⁷ concluded “the principle reason for engaging in UDW in Ireland is invariably to avoid tax” and pointed out that there was some evidence that Shadow Economy activity declined as the tax burden declined.

This table from a recent ERSI publication²⁸ shows the impact of budgetary policy changes by family type between 2009 and 2012.

Family type	Impact of Policy Changes, 2008-2012 vis-à-vis Wage Indexed Policy	
	Percentage Gain or Loss	
Single, employed		-9.0
Couple, 1 earner		-8.7
Couple, 1 earner with children		-11.4
Couple, 2 earners		-10.8
Couple, 2 earners, with children		-11.7
Single unemployed		-11.1
Couple, unemployed/not at work		-2.2
One parent family		-6.6
Single retired		-1.6
Retired couple		-3.6
Other (ill/disabled)		-3.5
All family types		-8.4

²⁷ European Employment Observatory, Article on UDW from SYSDERM Correspondent (Update of EEO Review: Autumn 2004) Ireland by J.J. Sexton, May 2007, p. 2.

²⁸ Distributional Impact of Tax, Welfare and Public Sector Pay Policies, 2009-2012, Tim Callan, Claire Keane, Michael Savage, John R. Walsh.

2. Legal sources for labour inspection competence on UDW

2.1. Background²⁹

Responsibility for labour inspection currently rests with NERA which does not focus specifically on UDW but rather addresses elements of it almost by default in the pursuit of its objective of addressing compliance with and enforcement of a significant body of employment rights legislation³⁰.

Protection of Young Persons (Employment) Act, 1996 The Organisation of Working Time Act, 1997 Parental Leave Act, 1998 National Minimum Wage Act, 2000 Carers Leave Act, 2001
Redundancy Payments Acts, 1967 to 2003
Employment Agency Act, 1971 Protection of Employment Act, 1977 Protection of Employees (Employers' Insolvency) Payment of Wages Act, 1991 Employees (Provision of Information and Consultation) Act 2006 Employment Permits Acts, 2003 and 2006

In addition to the functions of NERA in the context of UDW, both DSP and Revenue can seek redress for welfare and tax fraud and tax evasion under the respective Social Welfare or Finance Act provisions where criminal proceedings can be taken either summarily or on indictment.

2.1.1. Establishment of NERA

The draft legislation to establish NERA on a statutory basis was the Employment Law Compliance Bill which was initiated in the Irish Parliament (Dáil Éireann) in 2008. The purpose of the Bill was to secure better compliance with employment legislation in accordance with provisions of PART 2, Sections 11 to 16 of the "Towards 2016"³¹ Social Partnership agreement (see section 1.4.3). The main provisions of this Bill were-

- to establish a new statutory office dedicated to employment rights compliance, and with a tripartite Advisory Board;
- to strengthen inspection and enforcement powers and make other necessary provisions to secure compliance with employment legislation;

²⁹ Source of Background information <http://www.djei.ie/employment/compliance/>.

³⁰ It is intended to consolidate and restate all in one single statutory location.

³¹ http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf - pages 91-98).

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- to specify the statutory employment records to be kept by employers for all employees and the high penalties for failure to do so or for other breaches of employment legislation;
 - to foster increased co-operation at workplace level to safeguard employment rights;
 - to support and enhance monitoring and inspection activity in relation to compliance with the REA in the electrical contracting industry;
 - to provide for exchanges of information between statutory enforcement authorities so as to facilitate Joint Investigations of employment suspected of contravening the law;
 - to strengthen the powers of the Minister for Enterprise, Trade and Employment to initiate investigations and publish the outcomes in cases of public interest;
 - to provide for involvement of labour inspectors, for the first time, in the enforcement of provisions of the Employment Permits Acts 2003 and 2006 and to strengthen those Acts as regards records and other obligations of employers.

2.1.2. Workplace Relations Commission

Although the Employment Law Compliance Bill was never progressed into law, legislative work continued until the dissolution of the Dáil in 2011. The new Government decided to undertake a fundamental review of the existing employment law and industrial relations infrastructure by initiating a Workplace Relations Reform Programme designed to deliver a world-class workplace relations service and employment rights framework by merging the activities of NERA, the Labour Relations Commission, the Equality Tribunal and the first instance functions of the Labour Court and the Employment Appeals Tribunal into a new body of first instance - the Workplace Relations Commission (WRC). The existing appellate functions of the Employment Appeals Tribunal were to be incorporated into an expanded Labour Court. The intention from the labour inspection perspective was that NERA would be responsible for promoting maximum compliance with employment law.

At time of writing the legislative programme was still on-going. The Minister for Jobs, Enterprise and Innovation had indicated his commitment to the early enactment of the legislation with a view to having the proposed new Workplace Relations structures in place during 2013.

2.1.3. Compliance Service

The functions undertaken to date by NERA in promoting a culture of compliance with employment legislation will be continued by a proposed Compliance Service of the new WRC. Officers previously referred to as Labour Inspectors or NERA Inspectors will be re-named as Compliance Officers. Compliance Officers will deal with underpayment of national minimum wage; rates of pay due under REAs; rates of pay due under EROs; failure to provide a pay slip contrary to the Payment of Wages Act; failure to detail all deductions from gross pay on a pay slip; unlawful deductions from pay contrary to the Payment of Wages Act; illegal methods of payment; failure to keep records mandated by the Payment of Wages Act; failure to issue a statement of terms and conditions of employment /accurate statement or to amend a statement as required by the Terms of Employment (Information) Acts; various breaches of the Protection of Young Persons (Employment) Act; working without a valid employment permit or employing somebody

without a permit where one is required under the Employment Permits Acts 2003 and 2006. Where the enactment in question is EU derived and provides for the potential award of compensation over and above mere restitution of an underpayment (as for example the Organization of Working Time Act in respect of annual leave), the Compliance Officer should be able to award restitution but a complainant should in the alternative be able seek compensation at a hearing before an Adjudication Officer. Compliance Officers may also be able to use Compliance Notices as a form of statutory notice or direction to an employer to rectify suspected non-compliance with employment legislation. Compliance Officers should also be empowered to issue Fixed Charge Notices in respect of the following examples of non-compliance with employment legislation should the employer in question fail to rectify his or her non-compliance within 14 days of having been advised in writing to do so by a Compliance Officer:

- Failing or refusing to provide an employee with written terms and conditions of employment;
- Failing or refusing to provide an employee with a payslip;
- Failing or refusing to record deductions on a payslip;
- Failing to maintain or produce employment records to a Compliance Officer.

In addition, Compliance Officers will continue to engage with employers and their representative organizations and will continue to inspect individual employers' employment records with a focus on achieving voluntary compliance in the first instance where non-compliance is detected. It is proposed that existing statutory powers of Labour/NERA inspectors will be enhanced by introducing new mechanisms designed to be effective instruments in fostering a culture of compliance. It is expected that the changes, particularly in the area of compliance, will enhance the powers of Compliance Officers.

Judicial decisions (administrative, civil, criminal)

Two particular judicial cases in the recent past have respectively highlighted the limitations of NERA's powers in the area of UDW.

Employment Regulation Order Challenge

EROs are wage and condition setting mechanisms within certain sectors in Ireland which are proposed by JLCs and given effect by an order of the Labour Court. This system was established under the 1946 Industrial Relations Act. A Joint Labour Committee (JLC) is established by the Labour Court and is described as an "independent body which determines minimum rates of pay and conditions of employment for workers in their respective sectors".

In 2008 this system was challenged as being unconstitutional (under Article 15.2.1 of the Irish Constitution) by three plaintiffs in the fast food industry. The plaintiffs sought (a) a declaration from the High Court that Section 42, 43 and 45 of the 1946 Industrial Relations Act – and Section 48 of the 1990 Industrial Relations Act – were unconstitutional and (b) a claim that the catering ERO from 2008 was unreasonable and constituted an unlawful or disproportionate interference with the property rights of one of the plaintiffs.

The constitutional challenge was in relation to the delegation of powers under Article 15.2.1 of the Irish Constitution and the claim that the establishment of EROs was unauthorized. The judge in the case noted that the test is whether that which is challenged as an unauthorized delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself.

The judge noted that "there is at present no touchstone, or policies or principles, against which a party wishing to challenge the legality of an order, can measure or evaluate whether an order was made in accordance with the intent of the Oireachtas". The judge went on to say "This Court in its judgment is not seeking to require that there be legislation specifying in advance how wages and conditions of employment should be determined but rather ascertaining if a policy or principle can be identified for the delegated body as to how such matters are

to be determined.”

The Court was satisfied that the pay and conditions in the ERO “have in effect been determined in an arbitrary and unfair manner”. Since the ERO “was made in the absence of any principles or policies and was in effect therefore arbitrary or subjective”, it could not be enforced where the consequences of failing to comply can include criminal prosecution.

The result is that EROs are no longer enforceable. According to a Department of Jobs, Enterprise and Innovation submission to a Parliamentary Committee “As a consequence of that judgment, NERA has no direct means of achieving restitution for the employee(s) concerned, in circumstances where the employer is not willing to voluntarily co-operate. In many instances the inspector’s role is now reduced to checking whether or not records are in place. In such cases the records may clearly indicate underpayment or non-compliance with employment law but the inspector has no powers to take further action”.

From 12 October 2012, the Aerated Waters and Wholesale Bottling JLC, the Clothing JLC and the Provender Milling JLC were abolished by order of the Labour Court under Section 40 of the Industrial Relations Act 1946. This is part of the reform process of the JLC system announced in the Programme for Government.

New legislation is to be put before the houses of government in Ireland in June 2013. In the interim the Industrial Relations (Amendment) Act 2012 (Commencement) Order was made on 1 August 2012. The Minister made the above mentioned order bringing into effect all provisions of the Industrial Relations (Amendment) Act 2012 from that date.

Employment Rights under an Illegal Contract

The second case is that of a chef working in a restaurant (the detail is provided in the next section) without an employment permit and underpaid as well as deprived of many standard employment rights. The case was taken to the Labour Court and subsequently appealed to the high Court by the employer. The High Court deemed that the award made to the chef by the Labour Court could not be lawfully awarded for breach of rights to the chef in respect of an employment contract that was substantively illegal.

Internal administrative directives (e.g. guidelines, circulars, memoranda, etc.)

One of NERA’s primary roles is to provide information to employers and employees. Their website provides significant resources in this regard³².

They also provide a range of their internal publications which relate to operational matters such as inspection guidelines and their own codes of practice. The textbox below highlights the relevant guidelines in the areas most closely related to UDW.

List of relevant codes of practice, guidelines and notices available from NERA:

Code of Practice Determining Employment or Self-Employment Status of Individuals

Code of Practice for Protecting Persons Employed in Other People’s Homes

Who Can Work-Guidance Leaflet on Who Can Legally Work In Ireland

NERA Inspection Procedures Manual (1 May 2011)

NERA Code of Practice

Terms of Employment

Sample Terms and Conditions Form

Guide to the Organization of Working Time Act, 1997

Code of Practice Concerning the Employment of Young Persons in Licensed Premises

Employment of Children Licence Application Form

Note on Employing a Child by Licence (Theatre)

Note on Employing a Child by Licence (Film/TV)

³² <http://www.employmentrights.ie/en/aboutnera/publicationsdownloads/>.

3. Role of the labour inspection system

3.1. NERA's Primary Role, Scope and Limitations

Professor Paul Teague, Queens University Belfast³³ and Professor Michael Piore, MIT³⁴ would describe the Irish Labour Inspectorate as being organized more like the Anglo-Saxon than the Latin Model, as developed by Professor Piore in 2005. That said, NERA's development and continuing evolution has involved increased compliance through engagement with employer and employee bodies as well as through operational co-operation with other agencies.

Two Models of Labour Inspectorate Systems:

The Anglo-Saxon model is characterized by (i) enforcement of regulations involving a number of agencies; (ii) being complaint-based; and (iii) seeking out violations and threatening to impose or actually imposing sanctions.

The Latin model is characterized by (i) an integrated and unified labour code; (ii) a single agency; and (iii) a high level of discretion enjoyed by labour inspectors who try to achieve multiple objectives simultaneously.

NERA's primary role is to deal with situations where a legal employment contract exists and to ensure that, in such situations, the employer is compliant with legal obligations.

While NERA has responsibility for enforcement of the Employment Permits Acts³⁵ (see below) and encounters situations of UDW in the course of this work, in situations where the worker may legally work in the State, UDW is primarily a matter for Revenue and DSP. NERA involvement is limited to information/intelligence sharing and participating in joint inspections with those bodies.

Under the Terms of Employment (Information) Act 1994 and 2001 employers have to provide a written statement to employees setting out particulars of the employee's terms of employment. In general, the Act applies to any person:

- working under a contract of employment or apprenticeship;
- employed through an employment agency or in the service of the State (including members of the Garda Síochána and the Defence Forces, civil servants and employees of any local authority, health board, harbour authority or vocation education committee.

The Act provides a right of complaint and a right of appeal to High Court level on a point of law.

With respect to UDW, NERA also has a limited role and scope for seeking redress for undeclared workers. Under Irish law a person who is employed under an invalid contract of employment (i.e. an illegal contract of employment) cannot rely on that contract to seek statutory rights. In such situations however the employer may still be prosecuted for breaches of employment legislation and this was highlighted by the Minister for Jobs, Enterprise and Innovation in a Parliamentary reply on 6 December, 2012 [PQ 54849/12] where the Minister stated that he wished "to stress that the judgment (*Hussein v Labour Court* – see below) relates only to the consideration of the enforceability, or otherwise, of

³³ The Labour Inspectorate and the New dynamics of Employment Standard Setting, Paul Teague.

³⁴ Flexible Bureaucracies in Labour Market Regulation, Michael Piore/David W Skinner.

³⁵ The Employment Permits Acts of 2003, 2006.

an employee's rights. It does not mean that unscrupulous employers can employ unauthorized third country nationals without running the risk of significant legal consequences. I would emphasize that an employer who engages in this type of activity is open to prosecution under the Employment Permits legislation and could be found guilty of an offence and liable on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both. Both An Garda Síochána and the National Employment Rights Authority actively pursue breaches under the legislation and welcome information concerning possible breaches”.

The text box which follows outlines the recent case which highlighted the issue of NERA's limited scope for legal redress for employees – Hussein v Labour Court [2013] IEHC 364.

Hussein v Labour Court [2012] 364

In a High Court case in Ireland in 2012, the Judge quashed an €92,000 award to a chef, awarded by the Irish Labour Court. The judge held that the Labour Court could not lawfully have awarded the money, most of it was for back pay, for breach of rights to the chef in respect of an employment contract that was substantively illegal.

The Employment Permits Act prohibited a non-national from being employed without an employment permit and the Oireachtas had declared that a contract of employment involving a non-national was substantively illegal in the absence of a permit.

The judge said the Labour Court could not lawfully entertain an application for relief in respect of an employment contract that was substantively illegal and for this reason its decisions could not be allowed to stand.

He went on to say that the legislation may not have intended that undocumented migrant workers should be effectively deprived of the benefit of all employment legislation by virtue of their illegal status, but that has been the effect of the application of the law.

The judge said the treatment of migrant workers was a vexed one which posed considerable difficulties with regard to the regulation of the labour market and the enforcement of public policy.

The Oireachtas had to regulate the labour market by specifically deterring illegal immigrants from taking up employment as failure to do so could have serious implications for both employment and immigration policy.

The judge said the nature of the legislator's dilemma was well illustrated by the facts in the case before him.

3.2. Enforcement of Employment Permits Acts

In 2012 NERA formally took over the enforcement of Employment Permits Acts 2003 and 2006. In the 2006 Act, provision was made for authorized officers other than Gardaí to enforce the legislation and 3 years ago NERA inspectors were designated as such authorized officers. This provides a clear role for NERA in enforcing legislation in the specific area of UDW.

Legislation is soon to be put before the Irish Parliament to consolidate the Employment Permits Acts and to address the issues raised by the Hussein v Labour Court case. One of the concerns of the case was that the employer benefitted from having an illegal contract because he could not be forced to provide compensation to the employee. The new legislation is likely to address this problem in either or both of the following ways: to provide redress for an employee in this situation and/or to increase the level of deterrence on the employer (possibly by the prosecution - for not getting a work permit for the employee - to be triggered if an employer seeks to use an illegal contract as a defence for not compensating the employee where otherwise appropriate).

It is not yet clear how this legislation will impact directly on NERA inspectors' powers in enforcing employment permit legislation but it is likely to increase compliance

(as it is intended to make gaining work permits easier) and to increase deterrence and as such reduce the incidence of UDW among the migrant working population.

The text box below gives an outline of NERA's record to date in enforcing employment permit legislation.

In response to Parliamentary questions [56128-9-30/12] in relation to work permits, the Irish Minister for Jobs, Enterprise and Innovation made the following written statement:

"The Employment Permits Acts 2003 to 2006 make it a criminal offence to employ a foreign national without an employment permit, or for a foreign national to work without an employment permit. Section 2(4) of the 2003 Act places an onus on the employer to carry out reasonably thorough checks in order to be satisfied that a prospective employee does not require an employment permit, or that one has been obtained.

Officers of my Department, specifically, inspectors of the National Employment Rights Authority (NERA), are authorized to exercise powers under the Employment Permit Acts. If in the course of an inspection NERA finds evidence to suggest that an employee does not have a valid Work Permit, both the employer and employee are advised of the need to regularize the position and of the consequences of failing to do so. An employer failing to rectify matters could be prosecuted. NERA commenced taking proceedings under S.2 of the 2003 Act in 2012. To date, 14 prosecutions against employers have been initiated. No prosecutions against employees have been taken by NERA to date. The Garda Síochána is also an enforcement authority under Employment Permits legislation with prosecution powers. Statistics on Garda prosecutions would be within the remit of my colleague Alan Shatter TD, Minister for Justice and Equality.

NERA seeks to secure compliance with employment law including employment permit law through the provision of education and awareness, inspection of employers' employment records and enforcement where necessary. While every effort is made to secure compliance, some employers either refuse or fail to rectify the breaches identified and/or pay money due to their employees. These employers are referred for prosecution. NERA inspectors now being authorized officers under the Employment Permits Acts have made compliance checks under this legislation an integral element of all NERA inspections. Joint inspections may also be carried out as part of investigations involving the Revenue Commissioners, Department of Social Protection staff and An Garda Síochána.

During the course of 2012 to date, a total number of 4,052 inspections have been carried out.

Separate statistics are not maintained in respect of inspections carried out with An Garda Síochána. Joint investigations are carried out with An Garda Síochána, the Revenue Commissioners and the Department of Social Protection. This figure is collected on an annual basis and the latest figures for 2011 show that 118 such investigations took place. Information exchanged between the aforementioned bodies has helped to uncover non-compliance with employment law, secure payment of wages for employees and save the Exchequer money."

3.3. Participation in Joint Investigation Units

The 2006 Social Partnership Agreement "Towards 2016"³⁶ outlined the role of what was to become NERA. The objective in establishing NERA was to enhance and expand the existing Labour Inspectorate in order to develop "a comprehensive and responsive system of compliance and enforcement".

Provision was made for NERA inspectors to join Revenue and DSP to work in Joint Investigation Units (JIU - see 3.7 and 4.1.1), whose role "will be to address areas where evidence suggests non-compliance exists" (i.e. risk-based enforcement).

³⁶ The 10-year Framework Social Partnership Agreement 2006-2015, involving Government, union and employer representatives.

While no specific role was envisaged for NERA in combating UDW, it was highlighted that “the employment status of workers will be a particular focus of the JIUs”. It was also agreed that NERA (then described as the ODERC³⁷) “will join the Hidden Economy Working Group - also known as the Hidden Economy Monitoring Group (HEMG) - which will be re-launched immediately ... will continue to meet on a monthly basis or as appropriate thereafter”. Arising out of this, a booklet³⁸ was produced under the auspices of the HEMG (see 4.2.3) and is available on the NERA website which helps identify the difference between self-employment and employment status.

It has been recognized, by the former Director of NERA, that “in Ireland NERA only deals with some aspects of the problem here while Revenue and Social Protection deal with significant elements of the hidden economy. The two main initiatives in this regard have been the Hidden Economy Group and the Joint Investigation Units.”

3.4. Have any recent changes taken place extending the responsibility of the labour inspection system to include undeclared work (e.g. Switzerland and Ireland)?

- i. In 2012 NERA formally took over the enforcement of Employment Permits Acts 2003 and 2006. In the 2006 Act provision was made for authorized officers other than Gardaí to enforce the legislation and 3 years ago NERA inspectors were designation as such authorized officers. This has enhanced their role in the specific area of UDW and new legislation may have an impact on their enforcement of these Acts (as consolidated) as mentioned earlier in this section.
- ii. The regionalization of the Hidden Economy Monitoring Group and Joint Investigation Units was a very practical decision in recognition of the benefits of local networking and developing working relationships that facilitate information sharing in an environment that is focused on, amongst other things, risk-based enforcement. NERA’s continuing role in the operation and development of these groups will continue to involve it in combating UDW.
- iii. The changes proposed in the new reform programme (as outlined in section 2.1.2), will consolidate the powers of NERA inspectors (who will be called Compliance Officers) and provide such officers the means, through Compliance Notices and Fixed Charge Notices, to require restitution for employees. It should be noted that this is in relation to the enforcement of all employment legislation and not exclusively in the area of UDW. The new system will be characterized by a number of key principles which aim to promote harmonious workplaces and a culture of compliance with employment law and deal with non-compliance in a more efficient and proportionate manner³⁹.

³⁷ Office of the Director for Employment Rights Compliance.

³⁸ Self-employed booklet: <http://www.employmentrights.ie/en/media/Code%20of%20Practice%20for%20determining%20Employment%20or%20Self-Employment%20status%20of%20-Individuals.pdf>.

³⁹ Source: Blueprint to Deliver a World-Class Workplace Relations Service, <http://www.-workplacelrelations.ie/en/media/Blueprint%20for%20a%20World%20Class%20Workplace%20Relations%20Service%20April%202012.pdf>.

3.5. Statistics on labour inspection activities in combating undeclared work

The following statistics relate to the inspection activity of NERA. These statistics show breaches in various categories some of which may relate to UDW. No separate statistics are recorded in relation to UDW.

Table 2. NERA 2011 statistics

Sector/ Legislation	Cases	No. in Breach	Incidence of breach %						No. of employees	Unpaid Wages €
				SMR	Non Pay	Non display ERO	Records	other		
Agriculture	59	37	63	19	18	1	39	23	1,234	89,420
Catering	494	375	76	21	23	16	27	13	11,696	315,807
Cleaning	43	21	49	21	21	16	27	14	9,307	30,890
Construction	399	167	42	25	14	0	47	14	6,450	269,910
Drapery Footwear	5	2	40	33	33	0	33	0	1,634	45,572
Electrical	4	26	48	27	17	0	40	17	694	21,596
Hairdressing	29	20	69	10	18	14	39	20	209	21,039
Hotels	217	160	74	25	33	5	28	10	12,574	387,705
Mushroom	8	6	75	75	0	0	13	13	189	3,149
National Minimum Wage	1,169	572	49	17	3	3	75	2	32,436	268,234
Retail Grocery	273	194	71	31	20	10	25	15	18,647	392,088
Security	51	27	53	22	28	5	32	13	5,423	60,518
Other	13	13	100	8	3	3	9	7	260	2,335
Totals	2,814	1,620	58	22	18	8	40	11	100,753	1,905,262

Source: NERA website

Table 3. Summary of Inspections and Breaches by Industry Sector: Jan-Sept 2012 Statistics from January to September 2012

Sector	No. of Inspections Concluded	Compliance rate %	Unpaid wages recovered (€)
Agriculture	80	41	12,479
Catering	322	61	102,374
Retail Grocery	87	47	20,528
Hotels	57	37	70,551
Contract Cleaning	22	46	2,907
Security	20	75	1,318
Construction	183	49	99,844
Electrical	30	63	35,226
Other	23	65	89,651

Source: NERA website

Table 4. Summary of Inspections and Breaches by Employment Legislation: Jan-Sept 2012

Legislation	No. of Inspections Concluded	Compliance rate %	Unpaid wages recovered (€)
National Minimum Wage	969	50	224,557
Protection of Young Persons	1,347	100	n/a

Source: NERA website

In 2011 a total of 5,591 inspection cases were completed involving over 100,000 employees. Of these, 56 employers were prosecuted for breaches in employment law. In the period January to September 2012 a total of 3,140 inspection cases were completed involving over 51,000 employees. This compares to 4,199 cases in the same period on 2011. The amount of unpaid wages recovered was €659,435, compared to €1,622,979 in 2011.

In the period January to September, 2012, 57 cases were referred for prosecution (in the same period in the previous year 102 cases were referred). 46 convictions were recorded in cases heard by the Courts over the period resulting in fines of €102,000 being imposed and arrears of wages of over €37,700 being awarded to employees.

Of the total number of inspections in 2011, 118 were joint inspections carried out with Revenue and DSP.

NERA inspectors are authorized officers under the Employment Permits Acts. Compliance checks under this legislation are an integral element of all NERA inspections. Joint inspections may also be carried out as part of investigations involving Revenue, DSP staff and An Garda Síochána.

As part of an initial trial, in a six week period from October to November 2011, 441 Employment Permit inspections were carried out of which 88 employers were found to be in breach of Employment Permit Acts. The nature of the targeted inspections in this area - that most of these inspections take place at night and in the hospitality and service sectors - means that the non-complaint percentage is unlikely to be representative of compliance in all businesses and sectors.

In the period January to September, 2012, 271 employers were found to be in breach of the Employment Permits Acts with 548 people detected working without legal authorization.

3.6. Special undeclared work inspectors or units

There are no special units, within NERA, dealing with UDW and NERA inspectors are required to participate in Joint Inspections where the need arises. NERA Inspectors are part of the State Joint Inspections Unit (JIU) structure carrying out joint inspections which examine employment, taxation and social welfare issues (concentrating on hidden economy and UDW issues) and sharing information with DSP and Revenue.

Section 261 of the Social Welfare Consolidation Act 2005 and section 31 of the Social Welfare and Pensions Act, 2007, which came into operation on 30th March, 2007 provides for the exchange of relevant employment data between Revenue, the Minister for Social Protection and the Minister for Enterprise, Trade and Innovation.

This exchange of information enhances day-to-day inspectorate, prosecution and enforcement activity within NERA, and will continue in the future.

3.7. Specific labour inspection planning and programming on undeclared work

3.7.1. *Is there a specific planning process for addressing undeclared work within the labour inspection system?*

There is no specific UDW planning within the labour inspection system. However, the selection of cases for inspection is based on the level of perceived risk of non-compliance for the individual employment or sector.

The textbox below shows an extract from NERA's case management manual in which the role of inspectors and procedure in relation to information sharing is set out.

An Extract from NERA's Case Management Manual, Procedure Title & Ref: 3.6 Sharing Information
Effective from: May 1st 2011

Purpose

To provide for secure and beneficial exchanges of certain information between NERA, the Department of Social Protection, the Revenue Commissioners and other public bodies.

Procedure

Cases where information should be passed to Revenue and/or the Department of Social Protection include:

- Non-registered employees not on the employer's records;
- Allegations of employee income suppressed;
- Employees registered as self-employed;
- Payments to employees outside payroll e.g. overtime/extra duties paid in cash;
- Large number of employees being paid in cash;
- Identity fraud;
- No employment records;
- Unusual or irregular expenses payments to employees;
- Subsistence used to make up wages;
- Allegation of fraudulent claiming of Social Welfare entitlements;
- Benefits not reflected on the payroll e.g. use of vans/accommodation;
- Large unpaid wages paid to employees (to be done centrally by Inspection Support Unit);
- Any other Revenue/ Department of Social Protection related issues.

Other issues outside of NERA's remit should be directed to the Regional Manager who may refer the matter to the appropriate agency e.g., Department of Enterprise, Trade and Innovation (DETI), DETI Agencies or other State Agencies such as the Health and Safety Authority, Road Safety Authority, GNIB etc."

3.7.2. *Are there any political directives to prioritize inspections focusing on undeclared work?*

Joint Inspection Unit planning involves the pursuit of agreed priorities, involving analysis of information and experience of the JIU agency members in order to select areas of interest. The JIU structure is a key part of both DSP and Revenue's respective strategies, which derive from Government policy. From an operational perspective, NERA's role is identified and outlined clearly in this section of their Case Management Manual.

An Extract from NERA's Case Management Manual, Procedure Title & Ref: 3.7 Joint Investigations
Effective from: March 1st 2011

Purpose

To carry out inspections in cooperation with the Revenue Commissioners and the Department of Social Protection where appropriate.

Procedure

NERA, Revenue or the Department of Social Protection may request a joint inspection.

The following procedure is to be used in cases where a request for a joint inspection is received from Revenue or Department of Social Protection or where NERA is of the view that a joint inspection is necessary.

- ITM decides in conjunction with Regional Manager whether NERA should participate in or request a joint investigation.
- The organization initiating the Joint Investigation (NERA, Revenue or Social Protection) must be noted on file.
- Communicate with the relevant officials with a view to sharing information in advance of the inspection. Identify each agency's desired outcome.
- Gather intelligence and conduct surveillance in advance of the inspection as appropriate.
- Carry out the inspection. Participating agencies retain their individual powers and should only act in accordance with their own legal powers and procedures.
- Liaise with partner agencies to review progress.
- Case to be progressed in line with standard procedures.

3.8. Specific labour inspection budget resources earmarked for undeclared work (e.g. financial or staffing resources)

There are no specific resources set aside to combat UDW; all resources come from the general NERA budget.

3.9. The inspection visit

Are there any specific protocols, procedures, methods or checklists etc. for inspecting cases of undeclared work?

NERA inspectors carry out inspections using agreed case management procedures— including inspection checklists and questionnaires – which deal with the conduct of inspections and the sharing of information procedures to follow in cases of non-compliance. NERA has a Code of Practice and a Guide to Inspections document for employers, both available on their website⁴⁰.

3.10. Training

Is specific training provided to labour inspectors on undeclared work (e.g. either incorporated into existing training; separate training; part of induction training or ongoing professional development)?

⁴⁰ <http://www.employmentrights.ie/en/aboutnera/publicationsdownloads/>.

All NERA Inspectors have completed HETAC⁴¹ training in Employment Law. Specifically in the case of Employment Permits legislation, Inspectors are trained in the content of the Employment Permits Acts 2003 and 2006 and their powers as Authorized Officers under these Acts. Training on forced labour and human trafficking is provided to all Inspectors by the Garda National Immigration Bureau. A briefing document is also given to Inspectors on Immigration stamps and work permissions.

3.11. Campaigns

Does the labour inspectorate carry out any campaigns (e.g. awareness raising, inspection blitzes etc.) to target undeclared work?

3.11.1. Targeted

In general, any coordinated inspections activities which would have a focus on UDW would be carried out under the JIU structure. NERA carries out two types of inspection:

Night inspections: these primarily involve checking compliance with the Protection of Young Persons (Employment) Act 1996 and Employment Permits Acts 2003 and 2006. Where breaches are detected the Inspector will carry out a full inspection at a later date.

Targeted Work under Employment Permits Acts by NERA Inspectors

In the six week period 1 October to 15 November 2011, NERA undertook 441 inspections of employers under the Employment Permits Acts and found 88 employers to be in breach of the law (20%). This included a large number of night inspections, predominantly in the services sector and as such would be regarded as a targeted inspection of UDW.

A Full (or day) Inspection: this involves checking compliance with the various Acts which NERA inspectors are authorized to check.

3.11.2. Awareness Raising

NERA has a dedicated call centre which provides help and information for both employees and employers. In 2011 the call centre received 104,000 calls.

With reference to awareness raising, in addition to the provision of general employment law information in multiple languages, NERA have also produced a leaflet⁴² (which is also available in several languages from the NERA website), detailing who can work legally in Ireland and who is restricted. This leaflet is distributed through the offices of DSP.

In 2011, NERA also provided information by participating in 16 events organized by trade unions, employer bodies, public bodies, educational institutions and civic society groups throughout the country.

⁴¹ Higher Education and Training Advisory Council.

⁴² NERA “Who Can Work?” leaflet, 2011, <http://www.employmentrights.ie/en/media/EP%20-Inspection%20Leaflet%20Final%20Version%20Jul%202012.pdf>.

3.11.3. Burden Reduction/Communication

NERA is a member of the Risk-based Enforcement Group within the Department of Jobs, Enterprise and Innovation. This group is made up of 17 enforcement agencies across government coming together to seek to reduce the administrative burdens on business that enforcement may bring about. In 2011, NERA participated in the development of a Communications Strategy for this group and resulted in a Portal⁴³ for business to assist companies in seeking the information they need to become/remain compliant. This portal was launched in June 2012 by the Minister for Jobs, Enterprise and Innovation and supported by the High Level Group on Business Regulation, which includes representative employer and Union groups.

3.12. Prevention. Are there any actions targeted to prevent undeclared work?

All of the campaigns referred to above are intended to be preventative. The visibility of the agencies in seeking to combat UDW should, by extension, help to prevent it. Both DSP and Revenue routinely announce the areas they will particularly target at the beginning of the year or within the life-cycle of a strategic plan.

4. Collaboration with other institutions/authorities

4.1. Beyond the Labour Inspectorate, what other institutions are involved in combating undeclared work and what are their respective roles (e.g. police, immigration authorities, tax, social security, etc.)?

4.1.1. Joint Investigation Units (JIUs)

The three primary Government actors involved in the combating of UDW in Ireland collaborate in a number of ways (see below) and exchange relevant information under the provisions of the Social Welfare and Pensions Act 2007. JIUs are key vehicles for cross-institutional collaboration. These arrangements have been in place since 1990.

⁴³ <http://www.businessregulation.ie/>.

Table 5. Inspectorate Resources and Joint Inspections in 2011: a comparative snapshot

Inspectorate	Number of Inspectors involved in Joint Inspections	Total inspections	Number which were jointly with other two agencies
NERA	66 ⁴⁴	5,591	118
Department of Social Protection	89 ⁴⁵	1,327 ⁴⁶	575
Revenue	32 ⁴⁷	2,760	753

Work carried out by the JIUs includes monitoring and compliance activity associated with sectors where tax compliance and social welfare fraud and abuse are common. In 2011, DSP and Revenue identified the risk inherent in shadow activity as being a key corporate priority to be tackled. The DSP (Special Investigation Unit) and Revenue work together to combat welfare fraud and cases are referred to An Garda Síochana (Police Force) for prosecution under the Criminal Justice (Theft and Fraud Offences) Act, where the fraud relates to identity fraud or multiple claiming of payments; otherwise DSP and Revenue use their own legislation (see 2.1 above).

Joint Investigations' Activity and Impact 2011 – the Revenue Commissioners

In 2011 Revenue's joint investigation officers carried out a total of 2,760 outdoor checks, site visits/inspections in 2011 and in the main the information gleaned from these unannounced visits have led to 9007 various interventions.

Of the 2,760 outdoor checks, 114 were carried out jointly with NERA, 539 jointly with the DSP and 32 with both NERA and DSP. There were also 44 multi-agency checkpoints - generally full-day checkpoints set up with Revenue, DSP and Gardaí involvement.

On outcomes from this activity – there were 2,274 previously unregistered individuals regularized, 160 as employers, 902 as employees and 1212 as self-employed. There were also 358 re-classified (i.e. had registered as self-employed but have been reclassified as employees).

The total yield from these activities was €3,288,570.

Source: Revenue Planning Unit

4.1.2. The Department of Social Protection

A **High Level Revenue /DSP Liaison Group** meets quarterly with the overall objective of deepening the co-operation between both organisations with a view to tackling

⁴⁴ Note: there are no specific NERA resources assigned to the inspection of breaches relating to undeclared work.

⁴⁵ Note: This is the number of Department of Social Protection inspectors appointed to SIU/JIU inspections.

⁴⁶ This figure refers to employment inspections by DSP only and is made up of the figure 539 and 32 from Revenue data, the additional 4 in NERA statistics and a figure of 750 employment inspections which were not joint inspections, supplied by DSP themselves.

⁴⁷ While Revenue has 1,000 full time equivalents engaged in compliance interventions, there are 32 officers specifically engaged on Joint Investigation work with NERA and the Department of Social Protection.

the shadow economy, improving tax compliance and detecting welfare fraud. The group comprises senior management board members from both organisations. It provides strategic direction on issues of mutual interest and has established a number of working groups to ensure collaborative efforts are directed towards specific issues including that of social welfare fraud and tax compliance.

At an operational level, there are both formal and informal structures at regional and local level where both organisations undertake operations under the aegis of JIUs. In addition, regular contact between investigators provides a platform for enhanced intelligence sharing in compliance and fraud investigation. The following areas were targeted by DSP and Revenue in 2011⁴⁸:

- The transport sector, including couriers, the taxi sector and haulage companies.
- The construction sector, in particular construction projects where public procurement is involved and once-off builds.
- The environmental sector, including clothes recycling, waste management and scrap metal dealing.
- Town and streetscape projects – These projects consist of a visit to all cash businesses in a location to check for tax compliance and to ensure social welfare fraud does not occur.
- Casual trading and markets, including individuals engaged in illicit trading.
- Where intelligence or reliable reports are received about persons engaged in concurrent working and claiming benefits and non-payment of tax, reviews of eligibility are immediately undertaken.

In addition to collaboration with Revenue and NERA, DSP is also engaged in wider **Inter-Agency** and other co-operation to ensure that welfare abuses are comprehensively deterred and detected. This involves:

- **The Police Force (An Garda Síochána⁴⁹)** - where there is significant on-going operational and intelligence contact with an Garda Síochána for the purposes of welfare fraud investigation. Specifically, departmental inspectors are assigned to the Criminal Assets Bureau (CAB) and Garda National Immigration Bureau (GNIB). DSP engages in joint operations with Garda Traffic Units in the context of inter-agency vehicle checkpoints. In the case of serious and organised welfare fraud, the SIU seeks advice and operational assistance from the Garda Bureau of Fraud Investigation.
- **National Transport Authority** - where DSP has on-going contact and undertakes regular joint operations in conjunction with their enforcement officers. Recently there was an investigation involving the Taxi Regulator Enforcement Team and Garda Traffic Corps in night time and daylight operations. A total of eight joint operations took place in one region. Checkpoints are mounted at different locations.

⁴⁸ Source: Department of Social Protection, Press Release, 16 February 2012.

⁴⁹ The name of the Irish Police Force.

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- **Health Service Executive (HSE) and the National Training Agency (FÁS)** - DSP has regular contact and exchanges of information with both the HSE and FÁS, in relation to the control of fraud and abuse.
 - **Local Authorities** – at operational level there is enhanced contact and intelligence sharing for the purposes of control of fraud and abuse between DSP and the local authorities. In this regard, inspectors from DSP work closely on joint investigations with local authority environmental personnel in the area of illegal sites, waste disposal, recycling, car dismantling and scrap collection where hidden economy activity is prevalent. In addition, in the context of local authority public work projects, DSP works with local authorities to ensure that contractors on such projects are compliant and that social welfare fraud is minimised.
 - **The Post Office (An Post) and the Financial Institutions** - DSP works closely with An Post and the other financial institutions, who pay customers on behalf of DSP, to ensure the correct persons are receiving the payment.
 - **Public Sector Procurement Policy**⁵⁰ – the Department of Finance, Public Sector employers and trade unions and the Construction Industry Federation (CIF) agreed under “Towards 2016” to focus on the reduction of UDW by working together to seek to maintain employment standards in the public sector and uphold statutory norms, notably in relation to construction companies tendering for and engaging in public works contracts.

4.1.3 **The Revenue Commissioners**

As well as their involvement in JIUs, the Hidden Economy Monitoring Group and High Level DSP/Revenue Group, Revenue have specific targets of their own:

Revenue’s approach to the shadow economy is underpinned by **close consultation and cooperation with other regulatory authorities** such as DSP and NERA. The primary objective of these activities is to uncover either non-declaration or under declaration of income, fraudulent DSP claims and/or non-compliance with employment regulations.

As mentioned, the **High Level Revenue /DSP Liaison Group** meets quarterly with the overall objective of deepening the co-operation between both organisations with a view to tackling the shadow economy, improving tax compliance and detecting welfare fraud.

By enhancing the scope and depth of the **data exchange programme between DSP and Revenue**, both organisations seek to ensure that claim information submitted for benefits and tax credits is consistent. It will also look to strengthen arrangements to ensure that information held in one organisation and relevant to the other for control programmes, claim validation procedures and debt recovery are systematised.

Automatic access to third party information is of enormous value to Revenue, enabling them to target compliance interventions, to profile sectors and to identify gaps in tax returns.

The Returns of Payments (Government Departments and other bodies) Regulations 2011⁵¹ were signed on 10th June 2011. The regulations require Government

⁵⁰ <http://www.eurofound.europa.eu/areas/labourmarket/tackling/cases/ie002.htm>.

⁵¹ The legal instrument for this being S.I. 273 – Statutory Instrument 273 of 2011.

Departments, bodies established under statute and any other body involved in the disbursement of public funds to submit returns of payment information to Revenue on an annual basis. A total of 265 returns were made in respect of 2010 (the latest figures available). This includes a very broad range of payments ranging from grants to payments to contractors.

The Returns of Payments (Insurance Undertakings) Regulations 2011 were signed on 12th December 2011⁵². The regulations require assurance companies to make annual returns of information to Revenue. The relevant companies are to return details of all payments made in respect of investments. These regulations will help to prevent the type of tax evasion uncovered by the Single Premium Investment Products special investigation which yielded €485.67 million to the end of 2011.

The next phase will mandate returns of information from Hedge Fund companies in relation to fund values.

Recent legislative provisions have enhanced Revenue's ability to tackle duty and tax evasion in the following areas:

The making of returns of transactions by merchant acquirers, and other payment settlement entities, to the Revenue Commissioners.

The more effective investigation of white-collar crime.

Revenue has also considerably increased their capability in the area of cash sales through eAuditing. Their eAudits have identified significant evasion in cash outlets and they continue to build their expertise in this area.

4.1.4. An Garda Síochána

It deals with immigration, forced labour and human trafficking. They also act in support of JIU activity and Employment Permit Inspections.

4.1.5. Immigration Officers

(Officials of the Department of Justice) and members of the Gardaí control the immigration system in terms of immigration permissions to work in respect of students and other classes of immigrants.

The Department of Jobs, Enterprise and Innovation are responsible for the issuance of employment permits and labour market policy.

4.2. How does the labour inspectorate collaborate with these other institutions in combating undeclared work?

4.2.1. Describe the modalities of collaboration (joint planning, regular meetings, joint visits, etc.)

In addition to the above mentioned arrangements, as part of a coordinated State response to issues around the hidden economy and UDW, NERA participates in the activity of the Hidden Economy Monitoring Group (HEMG) and its regional sub groups

⁵² The legal instrument for this being S.I. 641 of 2011.

(see separate paragraph 4.2.3 below). Work in this area involves sharing information and identifying targeting resources on issues such as bogus self-employment, cross border issues, illegal working/work permits, social welfare fraud, excise and tax evasion and other issues.

The Anti-Human Trafficking Unit of the Department of Justice and Law Reform coordinates the Labour Exploitation Working Group dealing with issues such as Human Trafficking and forced labour. NERA, the Gardaí, DSP, the HSE, the International Office for Migration, the Migrant Rights Council of Ireland, employers and other social partners are members of this group.

How is this collaboration structured (formal agreements, ad hoc initiatives, etc.)? Is there a specific inter-institutional body/task force created to combat undeclared work?

4.2.2. Hidden Economy Monitoring Group (HEMG)

The Hidden Economy Monitoring Group was first set up in 1990 at the request of the Central Review Committee of the Programme for National Recovery. It is a formal structure to monitor developments, share experiences and make proposals for combating the hidden economy in Ireland. It is chaired by Revenue, and members of this statutory pillar include DSP, the Department of Jobs, Enterprise and Innovation and NERA. On the non-statutory side, the Group's membership also consists of IBEC, the SFA, the CIF and ICTU.

It operates on the principal of partnership and its terms of reference are "to provide a forum for the exchange of views on the effectiveness of measures introduced in combating the hidden economy between Revenue, DSP, the Department of Jobs Enterprise and Innovation and NERA and representative bodies of employers, unions and industry. The group to prepare a brief report on its activities each year for presentation to the Department of an Taoiseach".

The group met between three and four times a year between 1990 and 2011 and contributed to the establishment of multi-agency investigation units, producing a "Code of Practice for Determining Employment or Self-Employment Status of Individuals", and in 2007 sponsored legislation which provided for the exchange of employment information on the earned income of individuals between the Minister for Enterprise, Trade and Employment (now the Department of Jobs, Enterprise and Innovation), the Minister for Social and Family Affairs (now DSP) and Revenue, the first steps into information exchange.

Examples of achievements of the HEMG include:

A re-launch of an updated Code of Practice for Determining the Employment and Self-Employment Status of Individuals. It was issued to all employers and principal and sub-contractors and was made available in 15 languages.

New procedures to strengthen the employment versus self-employment distinction in the construction, forestry and meat processing sectors with the introduction of a new Form RCT1 with accompanying changes in the legislation and regulations. The new form clearly states the tax obligations of the principal and sub-contractors and sets out the entitlements and treatment of employees and self-employed persons from both a tax and social welfare perspective. These forms were also issued to all contractors and made available in 15 languages. The CIF and Revenue arranged a series of seminars nationwide to explain the new procedures.

In 2011 the group reviewed its own effectiveness and ability to deliver, in accordance with its own terms of reference, and reached the conclusion that it would be better served by operating at a more local level, utilizing resources more familiar with the difficulties

that were being experienced by SMEs locally and using agency resources locally to arrive at workable solutions.

In November 2011 the HEMG devolved its Terms of Reference to four regionally based Liaison Groups with a requirement that all groups meet quarterly and provide briefs twice a year to the HEMG.

Current Position of HEMG

The HEMG Regional Liaison Groups first met between November 2011 and January 2012. Most of the Groups have now had three meetings and report after each one to Revenue's Planning Division.

The four groups are based on a Regional divide similar to the Revenue Regions – Border Midlands West Region, Dublin Region, East & South East Region and South West Region. They are chaired by Revenue staff and have actively sought representation at all meetings from DSP, NERA, Employers Groups, Trade Unions and Industry. The groups are encouraged to identify hidden economy activity and to find and put in place a method of dealing with these problems - using whatever local resources are required.

The groups currently comprise:-

- **Border/Midlands/West** - Revenue, SFA, DSP, NERA, SIPTU, CIF, IBEC.
- **Dublin** - Revenue, ICTU, SFA, NERA, Xpert Digi Taxi Company, CIF.
- **South West** - Revenue, NERA, DSP Cork, DSP Limerick, SFA, IHBMA, SIPTU, CIF.
- **East South East** - Revenue, DSP, NERA, CIF, SFA, SIPTU.

Expanding the Groups

Along with the regular attendees the Groups are contemplating calling in representatives from Local Governments and An Gardaí, to determine the extent of local regulations on casual trading activities and enforcement of those regulations.

In its statement to the Oireachtas Committee hearing on social welfare fraud, in March 2012, DSP outlined the work of the HEMG as follows, "This group provides a formal structure to monitor developments, share experiences and make proposals for combating the hidden economy. In December 2011 and January 2012 four regional sub-groups were established. Each of the groups has identified a number of priority shadow economy sectors, including public service contracts, cross-Border and non-national contractors, one-off housing, illegal fuel smuggling, identity fraud, transient traders, road haulage, market traders and illegal waste collection."

4.3. In particular, is there coordination with other institutions or authorities for gathering data on undeclared work (esp. immigration, tax, social security, statistical offices etc.)?

As previously mentioned, there is legislative provision for the sharing of information between NERA, DSP, and Revenue. In addition, Section 8 of the Data Protection Act 1988 removes data protection restrictions on sharing information if the data is "*required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders or assessing or collecting any tax, duty or other monies owed or payable to the State, a local authority or a health board, in any case in which the application of those*

restrictions would be likely to prejudice any of the matters aforesaid”, this permits the sharing of certain information with Gardai and other State enforcement authorities.

Also the Returns of Payments (Government Departments and other bodies) Regulations 2011⁵³ requires Government Departments, bodies established under statute and any other body involved in the disbursement of public funds to submit returns of payment information to Revenue on an annual basis.

4.4. Describe separately how the labour inspection system collaborates with the judiciary to prosecute cases of undeclared work (e.g. production of evidence, expert testimony, case management, enforcement of decisions etc.)

NERA does not record cases of UDW separately and details given here relate to the resolution of all employment legislation breaches.

It is stated NERA policy to achieve compliance and the employer is given ample opportunity to become compliant before prosecution is contemplated – this has resulted in a low prosecution rate of approximately 1% in the period 2009-2011.

All NERA cases under employment law put forward for prosecution are examined by an internal committee before approval to proceed is given. A panel of solicitors is in place to take prosecutions on behalf of NERA and procedures for the conduct of prosecutions are contained in NERA Case Management Manual and cover a number of parts to the process; section 3.16 Consideration by Legal Proceedings Committee (LPC) outlines the steps to be taken in consulting the LPC and defines the purpose of the procedure as “To ensure that NERA’s decisions to commence legal proceedings are transparent, consistent, impartial, objective and resources are targeted to best effect”. Where a prosecution is successful, the decision of the Court is a criminal matter and the collection of fines and awards imposed by the Court are the responsibility of the Court.

Generally, evidence in the form of records and testimony of the inspector is sufficient for proceedings, however NERA has relied on employee testimony and in one major case provided support to allow witnesses to return to Ireland to testify in a prosecution.

5. Role of the social partners

Since the late 1980’s the Irish Social Partners have collaborated in a series of broad ranging National Agreements which significantly impacted economic and social policy. The Social Partners agreed in “Towards 2016” to the creation of NERA in order to improve enforcement of and compliance with employment rights laws. This contribution from the Social Partners along with the evolving WRC has the potential to influence the battle against UDW. As already described, the main Social Partners collaborate at national and regional level in the HEMG to address the problem of UDW.

⁵³ The legal instrument for this being S.I. 273 – Statutory Instrument 273 of 2011.

List of National Agreements:

Programme for National Recovery, 1987-1990

Programme for Economic and Social Progress, 1990-1993

Programme for Competitiveness and Work, 1994-1996

Partnership 2000, 1997-2000

Programme for Prosperity and Fairness, 2000-2003

Sustaining Progress, 2003-2005

Towards 2016, 2006-2015

5.1. What is the role of workers' and employers' organizations in combating UDW (autonomous measures)?

Workers' and employers' organisations in Ireland have influenced Government policy through the Social Partnership process and the HEMG as described above. In addition these organisations have advocacy and educational roles. For example, IBEC informed the author that they submitted a range of policy proposals to Government on how to tackle UDW while the SFA highlights to members the avenues available to them to report UDW and also highlight the issue through the media. ICTU indicated that it organises workers and fights UDW wherever encountered while SIPTU indicated that it organises workers, educates them on their rights and entitlements, makes representations and pursues claims under labour legislation on their behalf.

5.2. How and to what extent do workers' and employers' organisations collaborate with the labour inspection system to combat UDW?

ICTU has many engagements with NERA (directly and through the HEMG) on the question of UDW but does not regard the Authority as an effective tool for combating UDW. NERA and ICTU would agree that specific responsibility for UDW is not vested in NERA. SIPTU also engages with the NERA but as with ICTU points to the fact that NERA is not responsible for addressing UDW and its related consequences.

IBEC and SFA engage with NERA through the HEMG. IBEC believes that the Government and its agencies (including NERA) are well informed on the nature, scale and recent growth experienced in the informal economy but highlights the allocation of sufficient resources to policing and enforcement, particularly in the context of tax and social welfare compliance as the single biggest obstacle at present.

5.3. Beyond the traditional social partners, are other organizations involved in combating UDW (e.g. civil society)?

A number of civil society organisations are involved in education, dissemination of information and advocacy for the more vulnerable and marginalised sections of Irish society. While their work is not focused specifically on UDW, they help in terms of highlighting the associated problems and encouraging policy responses which address the conditions leading to UDW. Such organisations include:

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- **Citizens Information Board** - this is the statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services.
 - **Free Legal Advice Centres (FLAC)** - is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns on a range of legal issues but also offers some basic, free legal services to the public.
 - **The Migrant Rights Centre Ireland (MRCI)** is a national organisation working to promote justice, empowerment and equality for migrant workers and their families. MRCI has been very vocal on issues relating to the abuse of migrant workers in Ireland and provides resources to assist them and to advocate on their behalf.
 - **Social Justice Ireland** – is an organisation which seeks to influence policy in areas such as social justice and inequality.
 - **Irish Organisation of the Unemployed (INOUE)** – the organisation advocates on behalf of the unemployed, campaigns for full-employment and fair wage rates.

6. Cross-border collaboration

6.1. Are there any agreements with other national labour inspection systems to address UDW (e.g. joint visits or campaigns on cross-border construction projects etc.)?

While NERA does not engage in any cross-border collaboration with other national labour inspection systems, DSP and Revenue do. There is a Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning matters of mutual interest in the areas of fraud in their respective social security systems.

The Cross-Border Operational Forum comprises selected investigators from DSP, the British Department for Work and Pensions (DWP) and the Northern Ireland Social Security Agency of the Department for Social Development (DSD). The remit of the Forum is to liaise at an operational level, under the aegis of the Memorandum of Understanding. At an operational level there is on-going co-operation in both jurisdictions to assist the investigation of cross jurisdictional fraud. Case by case data-matching takes places between DSP and the DSD in Northern Ireland and the DWP in the UK on cases where social welfare fraud or abuse is occurring.

For Revenue, cooperation on particular cases is through what is known as Mutual Assistance arrangements. There is also contact on general issues facing tax administrations, facilitated through the OECD Forum on Tax Administration, IOTA (International Organisation of Tax Administrations). Revenue also receives information through the EU Savings Directive.

As the umbrella organization for trade unions on the island of Ireland, ICTU works to ensure compliance with employment rights law on both sides of the border. In addition, through its involvement in the European Trade Union Confederation and International Labour Organisation, ICTU seeks to combat UDW.

7. Sanctions

7.1. Describe the system of labour inspection sanctions available to combat undeclared work (e.g. warnings, fines, criminal penalties, injunctions etc.)

Currently the system of sanctions available to NERA is as set out in Appendix B. These are the sanctions as identified in the Fines Act of 2010.

Under Section 14 of this Act (Part 3) the Court shall on conviction, in deciding the amount of the fine, take into account the persons financial circumstances. By financial circumstances the Act intends the Court to look at annual income, property owned, liabilities, monies due to the person and any other circumstances the Court considers appropriate. It will be some time before it is known how this particular power of the Court is going to impact on the fines imposed in the cases NERA prosecute.

Convictions in relation to these cases produce a criminal record.

The power of NERA inspectors is set to change in the new legislation (see 2.1.3) with new fixed penalties being introduced. Some offences will also change to administrative/civil offences and may result in greater cooperation from companies who no longer have to be concerned about a criminal record.

The former Director of NERA would consider it too early to assess any impact on UDW as a result of these changes, “It is hard to say what, if any, impact the improved compliance and enforcement mechanisms will have in respect of undeclared work. As you know they are aimed at improving compliance with employment law. Of course the aim will be to bring about a greater culture of compliance and this in turn could also have an impact on undeclared work”.

7.2. Is the use of undeclared work an aggravating factor when imposing labour inspection sanctions?

According to NERA, this is not an aggravating factor. In terms of dealing with undeclared work NERA can exercise their powers under the Employment Permits Acts and, while they cannot impose additional penalties at this point, they can refer the case on to Revenue who may pursue the matter under their powers.

7.3. Are there any special procedures for imposing sanctions related to undeclared work (e.g. expedited procedures etc.)?

There are no special expedited procedures or processes. The pending new legislation and powers will give expedited procedures in terms of fixed penalties but NOT in the case of criminal offences.

8. Data gathering and systems

8.1. Are there specialised data systems/programs to monitor undeclared work within the labour inspectorate (or perhaps another government Ministry/department/agency)?

There are no specialised data systems within NERA to monitor UDW. NERA does keep a record of its Employment Permit investigations; there is no evidence that specific information was kept/held by An Garda Síochána who previously enforced the Employment Permits Acts.

In its 2011 Annual Report, Revenue outlined its approach to data sharing “our approach to the shadow economy is underpinned by close consultation and cooperation with other regulatory authorities such as DSP and NERA. The primary objective of these activities is to uncover either non-declaration or under declaration of income, fraudulent DSP claims and/or non-compliance with employment regulations.

The High Level Revenue/DSP Liaison Group meets quarterly with the overall objective of deepening the co-operation between both organisations with a view to tackling the shadow economy, improving tax compliance and detecting welfare fraud.

By enhancing the scope and depth of the data exchange programme between DSP and Revenue both organisations seek to ensure that claim information submitted for benefits and tax credits is consistent. It will also look to strengthen arrangements to ensure that information held in one organisation and relevant to the other for control programmes, claim procedures and debt recovery are systematised.”

It is clear that the focus of data gathering and sharing, especially for DSP and Revenue, is to assist each other in achieving their objectives (for Revenue maximising revenue and for DSP ensuring the Exchequer is not defrauded) and not necessarily in combating UDW.

9. Conclusions

UDW is neither officially defined nor measured in Ireland. Nonetheless, it is regarded as a serious problem, estimated to account for approximately 8% of annual GDP. Indications are that it will continue to be a problem into the future as economic growth is likely to remain low while unemployment and taxes are likely to remain high⁵⁴.

In Ireland, UDW is addressed in the context of the broader battle against Shadow Economy activity by Revenue, DSP and NERA with some cross agency (outside of these) and cross-border collaboration. This is consistent with the Regioplan⁵⁵ description of the “three pillars” that are involved with UDW (Labour Law, Social Affairs and Finance/Tax). In addition, the main Social Partners and a number of civil society organisations work to address the problems of the wider Shadow Economy and UDW, most notably through the HEMG.

⁵⁴ www.ersi.ie/irish-economy/.

⁵⁵ Joining up in the Fight Against Undeclared Work in Europe, Regioplan, Amsterdam, December 2010 (page ii).

Trends

Cross-agency co-operation is a strong feature of the fight against the Shadow Economy in Ireland. There is broad agreement among enforcement agencies on the sectors in which UDW is more prevalent, namely the construction, security and hospitality sectors and where cash transactions are most likely. As the economy has hit a downturn a number of things have happened, shadow economy activity and social welfare dependency have increased and exchequer revenue has decreased. This has created an even greater focus on addressing the shadow economy and UDW in Ireland.

The agencies who have primary policy and operational responsibility for tackling UDW are DSP and Revenue, and this is not likely to change.

Challenges

Addressing UDW in Ireland would undoubtedly be helped if there was a specific focus on the problem. This would require clearly defining and measuring UDW and assigning lead responsibility for its combating to one specific authority. Such an authority would need to have specific and adequate resources dedicated to the task.

As mentioned in section 1.5, public sector resources, the economic environment, and resultant tax and budget changes in Ireland, will continue to challenge Ireland's ability to combat UDW and reverse trends in this area.

All interested parties point to the challenge faced in relation to public opinion regarding UDW, where it is widely viewed as a victimless crime. The fact that, by its nature, this activity is hidden makes it difficult to find and address and so adds to the challenge.

From an operational perspective the main challenge will be continuing the fight against UDW with ever-decreasing resources. Therefore, what is important is that joint activities are highly visible throughout the business and wider community.

Possible Proposals for strengthening NERA's role in combating UDW

NERA was not established with UDW as a substantial part of its agenda. When it was established, it was envisaged that NERA would work with Revenue and DSP and be part of the HEMG. At the same time its role in enforcement of employment permits was also laid down. All of this has happened and NERA plays a constructive role in combatting UDW, one that is widely accepted as being what it should be.

While the role NERA currently plays in combating UDW is likely to change with its recently acquired functions in relation to the enforcement of employment permits legislation, and as its compliance and enforcement functions are strengthened as part of a new Workplace Relations Commission, the proportionate role it will play as part of the three pillars is not likely to be dramatically different.

If any suggestion could be made to strengthen NERA's role in combatting UDW, and if there could be any appetite to do so, given the many changes that are taking place for NERA and the broader workplace relations bodies, the most likely suggestion would have to involve utilising existing resources in a more focused and coherent way. For example, a possible link between Advisory and Compliance functions of the emerging WRC in terms of developing systems/procedures for compliance in business or sectors could result in an enhanced response by business (see Michael Piore (MIT) references to combining compliance and advice – Anglo-Saxon vs Latin models of inspection).

Appendix A

Employee and Employer Representative Group Survey on Combating Undeclared Work in Ireland

Undeclared work is not defined in Irish Law but within both the ILO and the EU it is generally understood to mean “all economic activities by workers and economic units that are – in law or in practice – not covered, or insufficiently covered, by formal arrangements.” It can be broken down into elements of undeclared work including undeclared wages in a formal enterprise, partly undeclared wages in a formal enterprise; undeclared (or under-declared) payment for goods or services provided to a formal enterprise or household by a self-employed person; or undeclared (or under-declared) payment for goods or services provided by a person to relatives, friends or neighbours

1. Is undeclared work an issue for your membership/organisation?
2. What are the main concerns identified by your membership in relation to undeclared work?
3. What engagement does your organisation have with NERA on undeclared work issues?
4. Is your organization a member of any formal group, working group or body that focusses on addressing the issue of undeclared work in Ireland?
5. Do you feel you have enough opportunity to engage with policy makers and enforcement agencies in seeking to find solutions to undeclared work?
6. Does your organization undertake any autonomous measures to seek to address undeclared in your sector?
7. What would you consider to be the most prominent features of undeclared work in Ireland?
8. Can you identify any trends in your sector (in sectors of your membership) in relation to undeclared work?
9. What do you see as the greatest challenge to combating undeclared work in Ireland?
10. Is there anything in particular that you would propose to strengthen the role of NERA in combating undeclared work?
11. Is there anything you would like to add?

Appendix B

Offences and Fines

	Legislation Breached	Section Breached	Description of breach	Section Outlining Fine	Fine (Pre Fines Act 2010)	Fine from January 4 th 2010
	Industrial Relations Act 1946 and 1969 (as amended)	Section 10(2) IR Act 1969 as amended	Failure to comply with a Labour Court Order made under Sect 10(1) IR Act 1969 (REA'S) on Summary conviction	10(2) of IR 1969 as amended by First Sch. IR Act 1990	As per First Sch. IR Act 1990 €1269.84 €253.95 for continuing offence	Class C €2500 Class E €500
1			Eg. Failure to pay mortality and sick pay insurance			
			Eg. Failure to comply with Labour court order to enter into immediate consultation with CIF			
			Eg. Failure to comply with a Labour Court Order			
			Eg Failure to comply with a Labour Court Order to purchase an annuity re pension and lump sum			
			Eg Failure to comply with a Labour Court Order to pay contributions (construction industry)			
			Eg Failure to comply with a Labour Court Order to pay sick pay contributions (woodworkers)			
2	Industrial Relations Act 1946 & 1969(as amended)	Section 10(3) IR Act 1969 as amended	Failure to comply with an REA on summary conviction	Section 10(3) IR Act 1969	As per First Sch. IR Act 1990 €1,269.84 (Daily default fine only applies in the case of a continuing offence where the continuing offence is prosecuted on indictment. See next box.)	Class C €2,500
			Failure to comply with an REA on conviction on indictment	Section 10(3) IR Act 1969	As per First Sch. IR Act 1990 €1,269.84 plus daily default of €253.95	Class C €2,500 And Class E €500
			Eg. Failure to pay minimum wages			
			Eg Failure to pay annual leave			
			Eg Failure to pay travel expenses (carpenter).			
			Eg Failure to pay premia to Pension/Sick Pay Scheme			

			Eg Failure to pay overtime rates			
			Inspections under the IR Act 1969 (REA's)			
3		Section 12(2)(a) IR Act 1969 as amended	Obstructs or impedes an inspector in the exercise of any of the powers conferred on the inspector by section 12	12(2) IR Act 1969	As per First Sch. IR Act 1990 €634.87	Class D €1000
4		Section 12(2)(b) IR Act 1969 as amended	Refuses to produce any record, which an inspector lawfully requires him to produce.	12(2) IR Act 1969	Ditto	Class D €1000
5		Section 12(2)(c) IR Act 1969 as amended	Prevents, or attempts to prevent a person from appearing before or being questioned by an inspector	12(2) IR Act 1969	Ditto	Class D €1000
6		Section 12(2)(d) IR Act 1969 as amended	Wilfully fails or refuses to comply with any lawful requirement of an inspector under subsection 1 (b) of section 12, note word 'wilfully' removed by IR Act 1990 Sect 55	12(2) IR Act 1969	Ditto	Class D €1000
7	Industrial Relations Act 1946	Section 21 IR Act 1946	Failure to attend before Labour Court having been summoned as witness or being in attendance failed to take oath/produce document/answer question on summary conviction	21(3) IR Act 1946	As per First Sch. IR Act 1990 €253.95	Class E fine €500
8		Section 32(4) IR Act 1946	Removed by Industrial Relations (Amendment) Act 2012			
9	Organisation Of Working Time Act 1997	Section 8(8)(a) OWT Act 1997	Obstructs or impedes an Inspector in the exercise of his powers under Section 8 on summary conviction	34(1) OWT Act 1997	€1904.61 per 34(1) OWT Act 1997 and €634.87 on summary conviction for continuing offence	Class C €2500 Class D €1000
10		Section 8(8)(b) OWT Act 1997	Refuses to produce any record which an Inspector lawfully requires him to produce on summary conviction	34(1) OWT Act 1997	Ditto	Class C €2500 Class D €1000
11		Section 8(8)(c) OWT Act 1997	Produces or causes to be produced or knowingly allows to be produced, to an Inspector, any record which is false or misleading in any material respect knowing it to be so false or misleading on summary conviction	34(1) OWT Act 1997	Ditto	Class C €2500 Class D €1000

12		Section 8(8)(d) OWT Act 1997	Gives to an Inspector any information which is false or misleading in any material respect knowing it to be so false or misleading on summary conviction.	34(1) OWT Act 1997	Ditto	Class C €2500 Class D €1000
13		Section 8(8)(e) OWT Act 1997	Fails or refuses to comply with any lawful requirement of an Inspector under Section 8(3) [(c) production of records,(d) persons to furnish information requested,(e) examine any persons.] on summary conviction	34(1) OWT Act 1997	Ditto	Class C €2500 Class D €1000
14		Sections 25(1) &(3) OWT Act 1997	Failed to keep such records at X in the prescribed form, as will show compliance with the OWT Act 1997 and/or failed to retain them for at least 3 years from their making on summary conviction.	34(1) OWT Act 1997	€1904.61 per 34(1) OWT Act 1997 €634.87 for continuing offence	Class C €2500 Class D €1000
15	National Minimum Wage Act 2000	Sections 14 (a) and 35(1) NMW 2000	Failure or refusal to pay National Minimum Wage	37(1)(a) NMW Act 2000 37(2) 37(1)(b) NMW Act 2000 37(2)	On summary conviction €1,904.61 and/or 6 mths Imprisonment Following summary conviction of a Continuing offence €253.95 On conviction on indictment €12,698.40 and/or 3 years Following conviction on indictment of a Continuing offence €1269.84	Class C €2500 Class E €500 No change Class C €2,500
16		Section 33(7)(a)	Obstructs or impedes an Inspector in the exercise of his powers under Section 33	Ditto	Ditto	Ditto
17		Section 33(7)(b)	Refuses to produce any record which an Inspector lawfully requires him to produce.	Ditto	Ditto	Ditto
18		Section 33(7)(c)	Produces or causes to be produced or knowingly allows to be produced, to an Inspector, any record which is false or misleading in any material respect knowing it to be false or misleading.	Ditto	Ditto	Ditto
19		Section 33(7)(d)	Gives to Inspector information, which is false or misleading in a material respect knowing it to be false or misleading.	Ditto	Ditto	Ditto

20		Section 33(7)(e)	Fails or refuses to comply with any lawful requirement of an Inspector under Section 33 (2) [(c) production of records, (d) persons to furnish information requested, (e) examine any persons.]	Ditto	Ditto	Ditto
21		Section 22(2) NMW Act 2000	Failure to keep records	22(2)	€1904.61 per 22(2) NMW Act 2000	22(2)
	Protection Of Young Persons (Employment) Act, 1996					
22		Sections 4(1) and 4(10)	Employed u.16 between 8pm and 8am on following day	Section 25(1)	On Summary conviction €1904.61 And €317.43 Following summary conviction of a continuing offence	Class E €500
23		Sections 4(2) and 4(10)	Failed to ensure u.16 received min rest of 14 consecutive hours in each 24. <i>re consecutive hours see exception set out at sect 4(3)</i>	Section 25(1)	Ditto	Ditto
24		Sections 4(4) and 4(10)	Failed to ensure u.16 received min rest of 2 days in each 7.	Section 25(1)	Ditto	Ditto
25		Sections 4(8) and 4(10)	Permitted u.16 to work for more than 4 hours without receiving rest of at least 30 consecutive minutes.	Section 25(1)	Ditto	Ditto
26		Sections 5(1)(a) and 5(2)	Failed to require evidence of age before employing u16 or 16-18	Section 25(1)	Ditto	Ditto
27		Sections 5(1)(b) and 5(2)	Failed to obtain written permission of parent/guardian before employing u16 or 16-18	Section 25(1)	Ditto	Ditto
28		Sections 5(1)(c) and 5(2)	Failed to maintain a register or other satisfactory record of u.16 or 16-18	Section 25(1)	Ditto	Ditto
29		Section 6(1)(a) and (7)	Required or permitted 16-18 to work more than 8 hrs in one day or 40 hrs in one week	Section 25(1)	€1904.61 €317.43 continuing offence	Class E €500
30		Section 6(1)(b)(i) and (7)	Required or permitted 16-18 to work between 10pm and 6am next day	Section 25(1)	Ditto	Ditto
31		Section 6(1)(b)(ii) and (7)	Required or permitted 16-18 to work between 11pm and 7am next day knowing the next day was school day	Section 25(1)	Ditto	Ditto
32		Section 6(1)(c) and (7)	Failed to ensure 16-18 received min rest period of 12 consecutive hrs in each 24	Section 25(1)	Ditto	Ditto
33		Section 6(1)(d) and (7)	Failed to ensure 16-18 received min rest period of 16 received min rest of 2 days in each 7.	Section 25(1)	Ditto	Ditto

34		Section 6(1)(e) and (7)	Permitted 16-18 to work for more than 4½ hours without receiving rest of at least 30 consecutive minutes.	Section 25(1)	Ditto	Ditto
35		Sections 12(1) and (2)	Failure to display PYP abstract.	Section 25(1)	Ditto	Ditto
36	Payment of Wages Act 1991	Section 4	Failure to provide payslips statements in writing setting out gross wages and the nature and amount of any deductions.	4(4)	On Summary conviction €1269.84	Class C €2500
37		Sections 9(2) and 9(4)	Without lawful excuse failed to comply with a requirement of an Inspector	9(4)	On Summary conviction €1269.84	Class C €2500
38		Sections 9(2)(c) and 9(4)			38	
	Employment Permits Act 2003 as amended by Employment Permits Act 2006					
39		Section 2(1)	Being a foreign national in employment without a valid employment permit	Section 3	On summary Conviction €3,000 and /or 12 months in prison	Class B €4,000
		Section 2(2)	Employing a foreign national without a valid employment permit	Section 3	On summary Conviction €3,000 and /or 12 months in prison or on indictment €250,000 and /or 10 years	Class B €4,000
	Employment Agency Act 1971					
		Breach of the Act or any regulation thereunder (see Section 10 (1))	Breach of the Act or any regulation thereunder (see Section 10 (1)). There are numerous possible offences under this Act and regulations thereunder. Regard should be had to the original legislation as amended for specific offences.	Section 10(1)	On summary conviction a fine isn't exceeding £50 and for a continuing offence, a further fine not exceeding £10 in respect of each day on which the offence is continued. Amended by Protection of Employees (Fixed Term Work) Act 2003 S. 19 to €2,000 and 1,000 respectively.	Class C

40						
	Protection of Employees (Temporary Agency Work) Act, 2012					
41		Breach of Section 13(1)	Being an employment agency who has charged an individual a fee in respect of making any arrangement for the purpose of that individual's being employed, subsequent to the conclusion of his employment with the hirer, under a contract of employment with that hirer.	Section 13 (2)	N/A	Class A

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