

Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU

The situation of temporary cross-border mobile workers and workers in subcontracting chains

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Executive Summary

The free movement of workers is one of the cornerstones of the European single market and is enshrined in the European Union (EU) Treaties.[1] **Intra-EU labour mobility enhances economic efficiency** by enabling the allocation of labour where it is most needed, addressing the challenges of labour shortages and critical skills gaps, as well as supporting industries that require additional workforce during peak seasons. In this way, it helps to mitigate demographic challenges such as ageing populations, thus aiding in sustaining vital sectors like healthcare and caregiving.

This study provides key information about the prevalence, drivers and features of different types of temporary cross-border mobility across the EU within specific economic sectors, namely construction, live-in care, meat processing, agriculture and horticulture, and the hotel-tourism-catering sector. Its **key focus area is identifying typically problematic aspects related to the working conditions of posted workers and other types of temporary cross-border mobile workers** (including, for example, seasonal workers). Crucially therefore, this study does not assess how well temporary cross-border labour mobility functions in the EU in general, nor does it provide an assessment of the national implementation of EU legislation. Rather, it identifies challenges and explores potential additional measures to address these situations and improve the protection of temporary cross-border workers in the EU.

The EU has engaged in policy actions related to the protection of the working conditions of temporary cross-border workers for many years. To that end, the **Posting of Workers Directive** (PWD) (Directive 96/71/EC, amended by Directive 2018/957/EU) as well as the **Enforcement Directive** (Directive 2014/67/EU) aim to ensure fair working conditions, protect the rights of workers and maintain a level playing field for businesses operating across EU borders. The main objective of the PWD is to guarantee that workers temporarily posted by their employer to another EU member state are provided with a set of core labour rights and conditions equivalent to those applicable in the host country. These rights include, among others, remuneration with all its mandatory elements, maximum working periods, minimum rest periods, and health and safety regulations. The PWD also aims to prevent social dumping, where companies exploit wage differentials and undercut local labour standards. The Enforcement Directive complements the PWD by introducing administrative requirements and control measures, increasing provision of information and enhancing cooperation between Member States to effectively enforce the rules and combat abuses related to the posting of workers.

Whilst acknowledging the strong legal basis that these Directives create in terms of protecting workers' rights and ensuring fair competition between companies in the single market, differences in implementation in the national legal frameworks, their application (i.e., the extent to which provisions are complied with), as well as their enforcement impacts the extent to which rights and working conditions are guaranteed to posted workers in practice. The study aims to better understand these and, in this context, focuses on three key situations: i) **posted workers in subcontracting chains**, ii) temporary cross-border mobility of workers involving **temporary work agencies** (posting situations) or **other labour market intermediaries** (non-posting situations) and iii) **posted third-country nationals (TCNs)**.

[1] European Union, Treaty on European Union (Consolidated Version), Article 3(2) available at: http://data.europa.eu/eli/treaty/teu_2012/oj, and European Union, Consolidated version of the Treaty on the Functioning of the European Union, Articles 45-48, available at: http://data.europa.eu/eli/treaty/tfeu_2012/oj.

In terms of methodology used, this study draws on an analysis of qualitative and quantitative information, gathered by way of **desk research of available literature**, **legal research** into EU and national measures and enforcement mechanisms, and **quantitative analysis of available data**, including from the prior declaration tools, Portable Documents A1 (PD A1), and labour inspections. In terms of primary data collection, expert stakeholder interviews and a consultation workshop were conducted.

The legal research and analysis focused on the review of EU and national legal provisions and relevant case law applicable to protecting temporary cross-border mobile workers, of non-legislative measures relating to access to information, enhanced administrative cross-border cooperation, prevention and monitoring measures, and of enforcement mechanisms related to the identified measures. An **in-depth analysis was conducted in nine key sending** (Poland, Spain, Germany and Slovenia) **and receiving countries** (Germany, France, Belgium, the Netherlands, Luxembourg and Denmark).

The analysis results in the identification of several **sectors that are relevant** for posting and non-posting situations: construction, road freight transport, logistics, long-term care/live-in care, hotel-tourism-catering, meat processing, manufacturing (e.g., metal industry, shipbuilding), industrial cleaning, agriculture and horticulture, live performance and aviation. Considering the sectors where most problematic situations are typically encountered, the research then focused on five key sectors: **construction**, **live-in care**, **meat processing**, **agriculture and horticulture**, and the **hotel-tourism-catering** sector. Notwithstanding the significance of posting in road freight transport, this sector was not included in the in-depth analysis due to the very recent nature of legislative changes in the sector,[2] whose impact could not be analysed in the timeline of this study.

On the basis of the evidence gathered from the mapping of the in-depth country analysis and the sectoral situation, a **typology of problematic or potentially problematic situations** involving temporary cross-border mobility was developed. The analysis is presented in the report in the form of **eight case studies**, focusing on: 1) The role of temporary work agencies and labour market intermediaries in temporary cross-border mobility: key legal and enforcement challenges, 2) Non-payment and underpayment in the case of temporary cross-border workers in posting and non-posting situations, 3) Seasonal workers in the agriculture sector, 4) Bogus self-employment in temporary cross-border work, 5) Posted TCNs in the construction sector, 6) Key types of OSH-related violations and enforcement challenges in temporary cross-border work, 7) The role of 'letterbox companies' in complex subcontracting chains involving posted and non-posted workers and enforcement challenges, and 8) Key challenges in the live-in care sector. **Two additional case studies were developed about examples of promising practices** in areas that are key to the improvement of temporary cross-border workers' protection: cross-border cooperation between relevant authorities in the Member States in enforcing existing regulations, and the involvement of social partners.

As the case studies allude to, the **most common problems identified** in the study are linked to non-payment and under-payment, illegal wage deductions, violations of occupational safety and health regulations, poor accommodation, lack of statutory sick pay, missing health and social insurance coverage, and falsified working time documents (e.g., timesheets). They tend to occur in specific sectors, such as construction, agriculture and horticulture, road transport, live-in care and meat processing, which are price competitive and affected by significant labour shortages. They are recurrent in the case of (long) subcontracting chains, which often involve the use of temporary work agencies and other labour intermediaries, as well as the posting of TCNs.

[2] New rules on posting of drivers in road transport (Directive 2020/1057), which were adopted in July 2020 as part of the Mobility Package, with Member States having until 2 February 2022 to adopt and publish the necessary measures.

The **key factors that drive problematic situations** (aside from the structural features of the analysed sectors), include:

- A **highly complex set of regulations at national level** and limited opportunities for employers to receive clear guidance about which rules apply to their specific situation in a cross-border context.
- The **limited control and enforcement of existing regulations**, which enable fraudulent behaviour and allow for such practices to go undetected or unsanctioned.
- The **nature of the work itself, which in some cases is less visible than in others**, and hence renders workers more vulnerable to rights violations. For example, live-in care and work on isolated farms constrain opportunities for labour inspectorates to control the application of existing legislation.
- **Insufficient information exchange and cooperation** between authorities to ensure the enforcement of rules in a cross-border perspective.
- The **prevalence of undeclared work** (including partially declared or under-declared labour contracts, fully undeclared work, and bogus self-employment).

The public debate on the working conditions of temporary cross-border mobile workers has been shaped by the focus on abusive situations detected by labour inspections, leading to a potential overestimation of the scale of the problem. However, **limited comparable statistical data** hinders a systematic assessment of the extent to which existing rules and regulations are breached across sectors and for different types of temporary cross-border workers, also hampering the identification of non-compliant employers.

While there are regulatory measures in place at EU and national levels, their **enforcement depends on complex implementation processes**. As the legal mapping highlights, Member States have taken actions to implement legislative, non-legislative and enforcement measures at national level with the aim of improving working conditions for posted workers and other temporary cross-border workers. To this end, Member States have transposed the PWD and Enforcement Directive into national law. Differences in implementation among Member States may occur due to a 'softer' or 'stronger implementation of the Directive. It may also concern an incorrect implementation of the provisions, given that on 26 January 2023, the Commission sent reasoned opinions to 17 Member States for failing to bring various national provisions in line with the Enforcement Directive. The key challenge in ensuring equal protection for temporary cross-border workers lies in the **limited enforcement of existing legislation and the identification of non-compliant employers**. National authorities, social partners, and NGOs play a crucial role in this process. Actions to enhance enforcement include investment to increase the number and effectiveness of labour inspections, improving recovery mechanisms, and monitoring and evaluating the implementation of regulations. Improved data collection mechanisms, information exchange, cross-border cooperation and coordination among Member States are also vital for effective enforcement.

The study finds that subcontracting is often used to reduce costs and increase profits, leading to lower pay levels and poorer working conditions. The complexity of subcontracting chains, combined with the presence of letterbox companies that evade liability, hampers transparency and accountability. **The effectiveness of subcontracting liability rules depends on the scope that Member States have chosen to implement them at national level** and their enforcement. Some Member States have extended liability beyond the construction sector (applying a sector neutral approach) and others have put in place full chain liability. There is a need for better regulation, implementation, and enforcement at national and EU levels to combat fraudulent subcontracting practices and protect cross-border workers. Preventive, deterrent, and protective measures should be implemented

proportionately and not hinder temporary cross-border mobility. Suggestions for further action include imposing full chain liability, enhancing checks at national level of PD A1 certificates, improving awareness-raising and information strategies, and digitising business registers across the EU to create more transparency in the subcontracting chain.

Indeed, access to clear and transparent information is fundamental to inform not only temporary cross-border workers about their rights, but also companies and labour market intermediaries about their obligations. As shown by one of the promising practice case studies, social partners can contribute significantly to this provision of information. The study finds that information is not always easily accessible, and national websites on posting vary in terms of completeness and clarity. It is recommended that Member States, with EU support, **ensure clear and multilingual availability of information, both on national websites and through other channels** (e.g., information, guidance and support provided by social partners and NGOs). Efforts should be made to improve information flow, develop practical guides and tools (e.g., an EU remuneration calculator), and conduct sustained and targeted information and awareness raising campaigns.

Temporary work agencies and labour market intermediaries play a dual role in facilitating worker-employer relations and matching supply and demand. However, this study has revealed problematic situations involving these actors which are prevalent in sectors that rely on a mobile or temporary workforce (e.g., construction, agriculture and service sectors). **The complexity of the existing regulations involving posted agency workers contributes to non-compliance with legislation**. For example, the principle of equal treatment foreseen in the Temporary Work Agency Directive[3] and the PWD is operationalised differently in practice between the Member States, as it is linked to national legislation and collective agreements, for example those relating to remuneration packages. Due to differences between remuneration packages across countries and employers, it can be difficult for temporary work agencies to determine what all the constituent elements of remuneration are. User undertakings should also inform the temporary work agencies they cooperate with to post workers about the applicable working conditions in terms of remuneration, however this process is not always straightforward. The user undertakings themselves may not be aware of the complex national legislation and collective agreements that apply to posted workers.

Moreover, **bogus self-employment**, linked to these intermediaries in the live-in care sector, for example, **hampers workers' rights and fair competition** and undermines investment in skills. Due to the grey areas that exist between dependent employment and self-employment, labour inspectorates and enforcement bodies face limitations in dealing with fraudulent activities associated with bogus self-employment. Considerable investment in enhancing enforcement and monitoring capacities targeting temporary work agencies and other intermediaries at national level is thus needed, together with improved cross-border data exchanges and reporting mechanisms at national and EU levels. Strengthening legal and administrative actions, better engaging social partners by creating cross-border sectoral networks that can systematically support the work of labour inspectorates to enforce compliance and conducting further empirical studies about the role and importance of temporary work agencies (in posting situations) and also other labour market intermediaries (in non-posting situations) are essential for addressing these challenges.

Finally, it is worth noting that the number of posted TCNs is increasing rapidly, particularly in countries like Slovenia, Poland, Lithuania, Spain, and Portugal, as well as in sectors such as construction, road transport, live-in care, and agriculture. In all sectors, posted **TCNs are more vulnerable to abusive employer or labour market intermediary practices**, including violations of working rights, underpayment, and precarious conditions compared to local workers and EU posted workers. Varying interpretations and applications of EU law

[3] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, available at: http://data.europa.eu/eli/dir/2008/104/oj.

among Member States complicate cross-border cooperation and enforcement. To address these issues, further actions should include better informing posted TCNs about their rights in a coordinated, consistent and accessible manner. Improving transnational cooperation among enforcement bodies, collecting more accurate data about the profile of posted TCNs, clarifying posting conditions, and evaluating the flexible bilateral agreements and permissive entry regimes in some Member States are important further actions to be considered.

Synthèse

La libre circulation des travailleurs est l'une des pierres angulaires du marché unique européen et est inscrite dans les traités de l'Union européenne (UE).[4] **La mobilité de la main-d'œuvre au sein de l'UE renforce l'efficacité économique** en permettant d'affecter la main-d'œuvre là où elle est le plus nécessaire, en relevant les défis posés par les pénuries de main-d'œuvre et les déficits de compétences critiques, ainsi qu'en soutenant les industries qui nécessitent des effectifs supplémentaires pendant les périodes de pointe. Elle contribue ainsi à atténuer les défis démographiques tels que le vieillissement des populations, ce qui permet de soutenir des secteurs vitaux tels que les services de santé et la prestation de soins.

Cette étude fournit des informations clés sur la prévalence, les moteurs et les caractéristiques des différents types de mobilité transfrontalière temporaire au sein de l'UE dans des secteurs économiques spécifiques, à savoir la construction, les soins par des prestataires logés à domicile, la transformation de la viande, l'agriculture et l'horticulture, et le secteur de l'hôtellerie, du tourisme et de la restauration. **Son principal domaine d'action est l'identification des aspects problématiques liés aux conditions de travail des travailleurs détachés et d'autres types de travailleurs mobiles transfrontaliers temporaires** (y compris, par exemple, les travailleurs saisonniers). Il est donc essentiel de noter que cette étude ne fournit pas une évaluation du fonctionnement de la mobilité transfrontalière temporaire de la main-d'œuvre dans l'UE en général. Elle s'attache plutôt à identifier les défis et à explorer les mesures supplémentaires potentielles pour faire face à ces situations et améliorer la protection des travailleurs transfrontaliers temporaires au sein de l'UE.

L'UE met en œuvre depuis de nombreuses années des initiatives politiques liées à la protection des conditions de travail des travailleurs temporaires transfrontaliers. À cette fin, la **directive sur le détachement des travailleurs** (directive 96/71/CE, modifiée par la directive 2018/957/UE) ainsi que la **directive d'exécution** (directive 2014/67/UE) visent à garantir des conditions de travail équitables, à protéger les droits des travailleurs et à maintenir des conditions de concurrence équitables pour les entreprises opérant dans les différents pays de l'UE. Le principal objectif de la directive sur le détachement des travailleurs est de garantir que les travailleurs détachés temporairement par leur employeur dans un autre État membre de l'UE bénéficient d'un ensemble de droits et de conditions de travail fondamentaux équivalents à ceux qui sont applicables dans le pays d'accueil. Ces droits comprennent, entre autres, la rémunération avec tous ses éléments obligatoires, les périodes de travail maximales, les périodes de repos minimales et les règlements en matière de santé et de sécurité. La directive sur le détachement des travailleurs vise également à prévenir le dumping social, une pratique en vertu de laquelle les entreprises exploitent les écarts de salaire et ne respectent pas les normes de travail locales. La directive d'exécution complète la directive sur le détachement des travailleurs en introduisant des exigences administratives et des mesures de contrôle, en augmentant la fourniture d'informations et en renforçant la coopération entre les États membres afin d'appliquer efficacement les règles et de lutter contre les abus liés au détachement de travailleurs.

Même si la base juridique solide que ces directives créent en termes de protection des droits des travailleurs et de garantie d'une concurrence loyale entre les entreprises au sein du marché unique est effectivement reconnue, les différences de mise en œuvre dans les cadres juridiques nationaux, leur application (c'est-à-dire la mesure dans laquelle les

[4] Union européenne, traité sur l'Union européenne (version consolidée), article 3, paragraphe 2, disponible à l'adresse suivante: http://data.europa.eu/eli/treaty/teu_2012/oj, et Union européenne, version consolidée du traité sur le fonctionnement de l'Union européenne, articles 45 à 48, disponible à l'adresse suivante: http://data.europa.eu/eli/treaty/tfeu_2012/oj.

dispositions sont respectées), ainsi que leur application ont une incidence dans la pratique sur la mesure dans laquelle les droits et les conditions de travail sont garantis aux travailleurs détachés. Dans ce contexte, l'étude se concentre sur trois situations clés : i) les **travailleurs détachés dans les chaînes de sous-traitance**, ii) la mobilité transfrontalière temporaire des travailleurs impliquant des **agences de travail temporaire** (situations de détachement) ou **d'autres intermédiaires du marché du travail** (situations de non-détachement) et iii) les **ressortissants de pays tiers (RPT) détachés**.

En termes de méthodologie, cette étude s'appuie sur une analyse d'informations qualitatives et quantitatives, recueillies par le biais d'une **recherche documentaire**, **d'études juridiques** sur les mesures européennes et nationales et les mécanismes d'application, et d'une **analyse quantitative des données disponibles**, y compris les outils de déclaration préalable, les documents portables A1 (DP A1), et les inspections du travail. En ce qui concerne la collecte de données primaires, des entretiens avec des experts des parties prenantes et un atelier de consultation ont été organisés.

Les recherches et les analyses juridiques ont porté sur l'examen des dispositions juridiques européennes et nationales et de la jurisprudence pertinente applicables à la protection des travailleurs mobiles transfrontaliers temporaires, des mesures non législatives relatives à l'accès à l'information, au renforcement de la coopération administrative transfrontalière, aux mesures de prévention et de suivi, et des mécanismes d'application liés aux mesures identifiées. Une **analyse approfondie a été menée dans neuf pays d'origine** (Pologne, Espagne, Allemagne et Slovénie) **et de destination** (Allemagne, France, Belgique, Pays-Bas, Luxembourg et Danemark).

L'analyse permet d'identifier plusieurs **secteurs pertinents** pour les situations de détachement et de non-détachement : la construction, le transport routier de marchandises, la logistique, les soins de longue durée/soins à domicile, le secteur de l'hôtellerie, du tourisme et de la restauration, la transformation de la viande, l'industrie manufacturière (par exemple, l'industrie métallurgique, la construction navale), le nettoyage industriel, l'agriculture et l'horticulture, le spectacle vivant et l'aviation. Compte tenu des secteurs qui présentent généralement les situations les plus problématiques, l'étude s'est ensuite concentrée sur cinq secteurs clés : **la construction**, **les soins à domicile**, **la transformation de la viande**, **l'agriculture et l'horticulture** et le secteur de **l'hôtellerie, du tourisme et de la restauration**. Malgré l'importance du détachement dans le transport routier de marchandises, ce secteur n'a pas été inclus dans l'analyse approfondie en raison de la nature très récente des changements législatifs dans le secteur,[5] dont l'impact n'a pas pu être analysé dans le cadre de cette étude.

Une **typologie des situations problématiques ou potentiellement problématiques** impliquant une mobilité transfrontalière temporaire a été élaborée sur la base des éléments recueillis à partir de la cartographie de l'analyse approfondie des pays et de la situation sectorielle. L'analyse est présentée dans le rapport sous la forme de **huit études de cas** portant sur: 1) Le rôle des agences de travail temporaire et des intermédiaires du marché du travail dans la mobilité transfrontalière temporaire : les principaux défis juridiques et d'application, 2) le non-paiement et le sous-paiement dans le cas des travailleurs transfrontaliers temporaires détachés et non détachés, 3) les travailleurs saisonniers dans le secteur agricole, 4) le faux travail indépendant dans le travail transfrontalier temporaire, 5) les RPT détachés dans le secteur de la construction, 6) les principaux types de violations liées à la SST et les défis d'application dans le travail transfrontalier temporaire, 7) le rôle des « sociétés fictives » dans les chaînes de sous-traitance complexes impliquant des travailleurs détachés et non détachés et les défis d'application, et 8) les principaux défis dans le secteur des soins à domicile. **Deux études de cas supplémentaires ont été élaborées sur des exemples de pratiques prometteuses** dans des domaines essentiels

[5] De nouvelles règles sur le détachement des conducteurs dans le secteur du transport routier (directive 2020/1057), qui ont été adoptées en juillet 2020 dans le cadre du Paquet Mobilité, les États membres ayant jusqu'au 2 février 2022 pour adopter et publier les mesures nécessaires.

à l'amélioration de la protection des travailleurs transfrontaliers temporaires : la coopération transfrontalière entre les autorités compétentes des États membres dans l'application des réglementations existantes et l'implication des partenaires sociaux.

Comme l'indiquent les études de cas, les **problèmes les plus courants identifiés** dans l'étude sont liés au non-paiement et au sous-paiement, aux déductions salariales illégales, aux violations des réglementations en matière de sécurité et de santé au travail, aux mauvaises conditions de logement, à l'absence de prestations de maladie légales, à l'absence de couverture d'assurance médicale et sociale et à la falsification des documents relatifs au temps de travail (par exemple, les fiches de temps). Ces problèmes ont tendance à se produire dans des secteurs spécifiques, tels que la construction, l'agriculture et l'horticulture, le transport routier, les soins à domicile et la transformation de la viande, qui sont compétitifs en termes de prix et affectés par d'importantes pénuries de main-d'œuvre. Ils sont récurrents dans le cas des (longues) chaînes de sous-traitance, qui impliquent souvent le recours à des agences de travail temporaire et à d'autres intermédiaires du travail, ainsi que le détachement de RPT.

Les **principaux facteurs à l'origine des situations problématiques** (outre les caractéristiques structurelles des secteurs analysés) sont les suivants:

- Un **ensemble très complexe de réglementations au niveau national** et des possibilités limitées pour les employeurs d'obtenir des conseils clairs sur les règles qui s'appliquent à leur situation spécifique dans un contexte transfrontalier.

- Le **contrôle et l'application limités des réglementations existantes**, qui favorisent les comportements frauduleux et permettent que de telles pratiques ne puissent pas être détectées ou sanctionnées.

- La **nature même du travail, qui dans certains cas est moins visible que dans d'autres**et rend donc les travailleurs plus vulnérables aux violations des droits. Par exemple, les soins à domicile et le travail dans des exploitations agricoles isolées limitent les possibilités pour les inspections du travail de contrôler l'application de la législation existante.

- **L'échange d'informations et la coopération** entre les autorités **sont insuffisants** pour garantir l'application des règles dans une perspective transfrontalière.

- La **prévalence du travail non déclaré** (y compris les contrats de travail partiellement déclarés ou sous-déclarés, le travail entièrement non déclaré et le faux travail indépendant).

Le débat public sur les conditions de travail des travailleurs mobiles transfrontaliers temporaires a été marqué par l'attention portée aux situations abusives détectées par les inspections du travail, ce qui a conduit à une surestimation potentielle de l'ampleur du problème. Toutefois, le **manque de données statistiques comparables** empêche une évaluation systématique de la mesure dans laquelle les règles et réglementations existantes sont enfreintes dans les différents secteurs et pour les différents types de travailleurs transfrontaliers temporaires, ce qui entrave également l'identification des employeurs qui ne respectent pas les règles.

Bien que des mesures réglementaires soient en place aux niveaux européen et national, leur **application dépend de processus de mise en œuvre complexes**. Comme le souligne la cartographie juridique, les États membres ont pris des mesures législatives, non législatives et d'exécution au niveau national dans le but d'améliorer les conditions de travail des travailleurs détachés et des autres travailleurs transfrontaliers temporaires. À cette fin, les États membres ont transposé la directive sur le détachement des travailleurs et la

directive d'exécution dans leur législation nationale. Les différences de mise en œuvre entre les États membres peuvent être dues à une application plus ou moins stricte de la directive. Cela pourrait également être dû à une application incorrecte des dispositions, sachant que le 26 janvier 2023, la Commission a envoyé des avis motivés à 17 États membres pour avoir omis de mettre différentes dispositions nationales en conformité avec la directive d'exécution. Le principal défi à relever pour garantir l'égalité de la protection des travailleurs transfrontaliers temporaires réside dans **l'application limitée de la législation existante et dans l'identification des employeurs qui ne la respectent pas**. Les autorités nationales, les partenaires sociaux et les ONG jouent un rôle crucial dans ce processus. Les mesures visant à renforcer l'application de la législation comprennent des investissements destinés à augmenter le nombre et l'efficacité des inspections du travail, à améliorer les mécanismes de recouvrement, ainsi qu'à contrôler et évaluer l'application des réglementations. L'amélioration des mécanismes de collecte de données, l'échange d'informations, la coopération transfrontalière et la coordination entre les États membres sont également essentiels pour une application efficace de la législation.

L'étude constate que la sous-traitance est souvent utilisée pour réduire les coûts et augmenter les bénéfices, ce qui entraîne une baisse des salaires et une dégradation des conditions de travail. La complexité des chaînes de sous-traitance, combinée à la présence de sociétés fictives qui échappent à toute responsabilité, nuit à la transparence et à la responsabilisation. **L'efficacité des règles de responsabilité en matière de sous-traitance dépend du champ d'application que les États membres ont choisi de leur assigner au niveau national**. Certains États membres ont étendu la responsabilité au-delà du secteur de la construction (en appliquant une approche sectorielle neutre) et d'autres ont mis en place une responsabilité totale de la chaîne. Il est nécessaire d'améliorer la réglementation, la mise en œuvre et l'application aux niveaux national et européen afin de lutter contre les pratiques frauduleuses de sous-traitance et de protéger les travailleurs transfrontaliers. Les mesures de prévention, de dissuasion et de protection doivent être mises en œuvre de manière proportionnée et ne pas entraver la mobilité transfrontalière temporaire. Parmi les suggestions relatives à des actions futures, nous pouvons citer l'imposition d'une responsabilité totale de la chaîne, le renforcement des contrôles au niveau national des certificats PD A1, l'amélioration des stratégies de sensibilisation et d'information et la numérisation des registres des entreprises dans l'ensemble de l'UE pour renforcer la transparence dans la chaîne de sous-traitance.

En effet, l'accès à des informations claires et transparentes est fondamental pour informer non seulement les travailleurs transfrontaliers temporaires de leurs droits, mais aussi les entreprises et les intermédiaires du marché du travail de leurs obligations. Comme le montre l'une des études de cas sur les pratiques prometteuses, les partenaires sociaux peuvent contribuer de manière significative à la fourniture d'informations. L'étude constate que les informations ne sont pas toujours facilement accessibles et que les sites Web nationaux sur le détachement des travailleurs varient en termes d'exhaustivité et de clarté. Il est recommandé que les États membres, avec le soutien de l'UE, **garantissent la disponibilité d'informations claires et multilingues, à la fois sur les sites Web nationaux et par le biais d'autres canaux** (par exemple, les informations, les conseils et le soutien fournis par les partenaires sociaux et les ONG). Des efforts devraient être faits pour améliorer le flux d'informations, élaborer des guides et des outils pratiques (par exemple, un calculateur de rémunération de l'UE) et mener des campagnes d'information et de sensibilisation soutenues et ciblées.

Les agences de travail temporaire et les intermédiaires du marché du travail jouent un double rôle en facilitant les relations entre les travailleurs et les employeurs et en adaptant l'offre à la demande. Toutefois, cette étude a révélé des situations problématiques impliquant ces acteurs, qui sont courantes dans les secteurs qui dépendent d'une main-d'œuvre mobile ou temporaire (par exemple, les secteurs de la construction, de l'agriculture et des services). **La complexité des réglementations existantes concernant les travailleurs intérimaires détachés contribue au non-respect de la législation**. Par

exemple, le principe de l'égalité de traitement prévu dans la directive sur les agences de travail temporaire [6] et dans la directive sur le détachement des travailleurs est mis en œuvre différemment dans la pratique entre les États membres, car il est lié à la législation nationale et aux conventions collectives, notamment celles qui concernent aux rémunérations. En raison des différences de rémunération entre les pays et les employeurs, il peut être difficile pour les agences de travail intérimaire de déterminer quels sont tous les éléments constitutifs de la rémunération. Les entreprises utilisatrices doivent également informer les agences de travail temporaire avec lesquelles elles coopèrent pour détacher des travailleurs des conditions de travail applicables en termes de rémunération, mais ce processus n'est pas toujours simple. Les entreprises utilisatrices elles-mêmes peuvent ne pas connaître la complexité de la législation nationale et des conventions collectives qui s'appliquent aux travailleurs détachés.

En outre, le **faux travail indépendant**, lié à ces intermédiaires dans le secteur des soins à domicile, par exemple, **entrave les droits des travailleurs et la concurrence loyale** et compromet l'investissement dans les compétences. En raison des zones grises qui existent entre le travail salarié et le travail indépendant, les inspections du travail et les organismes de contrôle sont confrontés à des limitations lorsqu'il s'agit de lutter contre les activités frauduleuses liées au faux travail indépendant. Des investissements considérables sont donc nécessaires pour renforcer les capacités d'application et de contrôle des agences de travail temporaire et d'autres intermédiaires au niveau national, ainsi que pour améliorer les échanges de données transfrontaliers et les mécanismes de communication de l'information aux niveaux national et européen. Pour relever ces défis, il est essentiel de renforcer les mesures juridiques et administratives, de mieux impliquer les partenaires sociaux en créant des réseaux sectoriels transfrontaliers capables de soutenir systématiquement le travail des inspections du travail pour faire respecter la législation et de mener d'autres études empiriques sur le rôle et l'importance des agences de travail temporaire (dans les situations de détachement) et d'autres intermédiaires du marché du travail (dans les situations de non-détachement).

Enfin, il convient de noter que le nombre de RPT détachés augmente rapidement, en particulier dans des pays comme la Slovénie, la Pologne, la Lituanie, l'Espagne et le Portugal, ainsi que dans des secteurs tels que la construction, le transport routier, les soins à domicile et l'agriculture. Dans tous les secteurs, les **RPT détachés sont plus vulnérables aux pratiques abusives des employeurs ou des intermédiaires du marché du travail**, notamment aux violations des droits du travail, aux sous-paiements et aux conditions précaires, que les travailleurs locaux et les travailleurs détachés de l'UE. Les différences d'interprétation et d'application du droit communautaire entre les États membres compliquent la coopération et l'application transfrontalières. Pour résoudre ces problèmes, d'autres actions devraient inclure une meilleure information des RPT détachés sur leurs droits d'une manière coordonnée, cohérente et accessible. L'amélioration de la coopération transnationale entre les organismes d'application, la collecte de données plus précises sur le profil des RPT détachés, la clarification des conditions de détachement et l'évaluation des accords bilatéraux flexibles et des régimes d'entrée permissifs dans certains États membres sont autant de mesures supplémentaires importantes à adopter.

[6] Directive 2008/104/CE du Parlement européen et du Conseil du 19 novembre 2008 relative au travail intérimaire, disponible à l'adresse : http://data.europa.eu/eli/dir/2008/104/oj.

Zusammenfassung

Die Freizügigkeit der Arbeitnehmer ist einer der Eckpfeiler des europäischen Binnenmarktes und in den Verträgen der Europäischen Union (EU) verankert.[7] Die **EU-interne Arbeitskräftemobilität steigert die wirtschaftliche Effizienz**, indem sie den Einsatz von Arbeitskräften dort ermöglicht, wo sie am dringendsten benötigt werden, sich den Herausforderungen des Arbeitskräftemangels und kritischer Qualifikationsdefizite stellt und Industrien unterstützt, die während der Hochsaison zusätzliche Arbeitskräfte benötigen. Auf diese Weise trägt sie dazu bei, demografische Herausforderungen wie die Überalterung der Bevölkerung abzufedern und dadurch wichtige Sektoren wie das Gesundheitswesen und die Pflege zu erhalten.

Diese Studie liefert wichtige Informationen über die Verbreitung, treibenden Kräfte und Merkmale der verschiedenen Arten von vorübergehender grenzüberschreitender Mobilität in der EU in bestimmten Wirtschaftssektoren, und zwar im Baugewerbe, in der häuslichen Pflege, in der Fleischverarbeitung, in der Landwirtschaft und im Gartenbau sowie im Hotel-, Tourismus- und Gastronomiegewerbe. Das **Hauptaugenmerk liegt dabei auf der Identifizierung typischer problematischer Aspekte im Zusammenhang mit den Arbeitsbedingungen von entsandten Arbeitnehmern und anderen Arten von vorübergehend grenzüberschreitend tätigen Arbeitnehmern** (einschließlich z. B. Saisonarbeitern). Entscheidend ist daher, dass in dieser Studie nicht bewertet wird, wie gut die vorübergehende grenzüberschreitende Mobilität von Arbeitskräften in der EU im Allgemeinen funktioniert. Vielmehr werden Herausforderungen aufgezeigt und mögliche zusätzliche Maßnahmen untersucht, um diesen Situationen zu begegnen und den Schutz von vorübergehend grenzüberschreitend tätigen Arbeitnehmern in der EU zu verbessern.

Die EU führt seit vielen Jahren politische Maßnahmen zum Schutz der Arbeitsbedingungen von vorübergehend grenzüberschreitend tätigen Arbeitnehmern durch. Zu diesem Zweck zielen die **Entsenderichtlinie** (Richtlinie 96/71/EG, geändert durch die Richtlinie 2018/957/EU) sowie die **Durchsetzungsrichtlinie** (Richtlinie 2014/67/EU) darauf ab, faire Arbeitsbedingungen zu gewährleisten, die Rechte der Arbeitnehmer zu schützen und gleiche Wettbewerbsbedingungen für Unternehmen zu schaffen, die grenzüberschreitend in der EU tätig sind. Das Hauptziel der Entsenderichtlinie besteht darin, sicherzustellen, dass Arbeitnehmer, die von ihrem Arbeitgeber vorübergehend in einen anderen EU-Mitgliedstaat entsandt werden, auf grundlegende Arbeitnehmerrechte und Arbeitsbedingungen treffen, die denen des Gastlandes entsprechen. Zu diesen Rechten gehören u. a. ein Arbeitsentgelt mit all seinen obligatorischen Bestandteilen, die Höchstarbeitszeit, die Mindestruhezeiten und Vorschriften zu Gesundheit und Sicherheit. Die Entsenderichtlinie zielt auch darauf ab, Sozialdumping zu verhindern, bei dem Unternehmen Lohnunterschiede ausnutzen und lokale Arbeitsnormen umgehen. Die Durchsetzungsrichtlinie ergänzt die Entsenderichtlinie durch die Einführung von Verwaltungsvorschriften und Kontrollmaßnahmen, die verstärkte Bereitstellung von Informationen und die Verbesserung der Zusammenarbeit zwischen den Mitgliedstaaten, um die Vorschriften wirksam durchzusetzen und Missbräuche im Zusammenhang mit der Entsendung von Arbeitnehmern zu bekämpfen.

Auch wenn die solide Rechtsgrundlage anerkannt wird, die diese Richtlinien zum Schutz der Arbeitnehmerrechte und zur Gewährleistung eines fairen Wettbewerbs zwischen den Unternehmen im Binnenmarkt schaffen, wirken sich die Unterschiede bei der Umsetzung in den nationalen Rechtsrahmen, ihrer Anwendung (d. h. dem Ausmaß, in dem die Bestimmungen eingehalten werden) und ihrer Durchsetzung auf das Ausmaß aus, in dem

[7] Europäische Union, Vertrag über die Europäische Union (konsolidierte Fassung), Artikel 3 Absatz 2, verfügbar unter: https://eur-lex.europa.eu/eli/treaty/teu_2012/oj, und Europäische Union, konsolidierte Fassung des Vertrags über die Arbeitsweise der Europäischen Union, Artikel 45–48, verfügbar unter: https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj.

die Rechte und Arbeitsbedingungen für entsandte Arbeitnehmer in der Praxis gewährleistet sind. Die Studie zielt darauf ab, dies besser zu verstehen und, konzentriert sich in diesem Zusammenhang auf drei zentrale Situationen: i) **entsandte Arbeitnehmer in Untervergabeketten**, ii) vorübergehende grenzüberschreitende Mobilität von Arbeitnehmern unter Beteiligung von **Zeitarbeitsfirmen** (Entsendungssituationen) oder **anderen Arbeitsmarktvermittlern** (Nicht-Entsendungssituationen) und iii) **entsandte Drittstaatsangehörige**.

Methodisch stützt sich diese Studie auf eine Analyse qualitativer und quantitativer Informationen, die durch **Literaturrecherche**, **juristische Recherche** zu EU- und nationalen Maßnahmen und Durchsetzungsmechanismen sowie eine **quantitative Analyse verfügbarer Daten**, u. a. aus den Instrumenten zur Voranmeldung, den Mobilen Dokumenten A1 und Arbeitsinspektionen, gewonnen wurden. Im Rahmen der Primärdatenerhebung wurden Interviews mit Experten und ein Konsultationsworkshop durchgeführt.

Die juristische Recherche und Analyse konzentrierte sich auf die Überprüfung der EU- und nationalen Rechtsvorschriften und der einschlägigen Rechtsprechung, die für den Schutz von vorübergehend grenzüberschreitend tätigen mobilen Arbeitnehmern gelten, der nicht legislativen Maßnahmen in Bezug auf den Zugang zu Informationen, der verstärkten grenzüberschreitenden administrativen Zusammenarbeit, Präventions- und Überwachungsmaßnahmen sowie der Durchsetzungsmechanismen im Zusammenhang mit den ermittelten Maßnahmen. Eine **eingehende Analyse wurde in neun wichtigen Entsendeländern** (Polen, Spanien, Deutschland und Slowenien) **und Empfängerländern** (Deutschland, Frankreich, Belgien, Niederlande, Luxemburg und Dänemark) **durchgeführt**.

Die Analyse führt zur Identifizierung mehrerer **Sektoren, die** für Entsendungs- und Nicht-Entsendungssituationen **relevant sind**: Baugewerbe, Straßengüterverkehr, Logistik, Langzeitpflege/häusliche Pflege, Hotel-Tourismus-Gastronomie, Fleischverarbeitung, verarbeitendes Gewerbe (z. B. Metallindustrie, Schiffbau), Industriereinigung, Landwirtschaft und Gartenbau, Live-Darbietungen und Luftfahrt. In Anbetracht der Sektoren, in denen die meisten problematischen Situationen auftreten, konzentrierte sich die Untersuchung auf fünf zentrale Sektoren: **Baugewerbe**, **häusliche Pflege**, **Fleischverarbeitung**, **Landwirtschaft und Gartenbau** sowie **Hotel-Tourismus-Gastronomie**. Ungeachtet der Bedeutung der Entsendung im Straßengüterverkehr wurde dieser Sektor nicht in die eingehende Analyse einbezogen, da in diesem Sektor erst kürzlich Gesetzesänderungen vorgenommen wurden,[8] deren Auswirkungen im Rahmen dieser Studie nicht analysiert werden konnten.

Auf Grundlage der Erkenntnisse aus der Bestandsaufnahme der eingehenden Länderanalyse und der sektoralen Situation wurde eine **Typologie problematischer oder potenziell problematischer Situationen** im Zusammenhang mit vorübergehender grenzüberschreitender Mobilität entwickelt. Die Analyse wird in dem Bericht in Form von **acht Fallstudien** vorgestellt, die sich auf folgende Themen konzentrieren: 1) die Rolle von Zeitarbeitsfirmen und Arbeitsmarktvermittlern bei der vorübergehenden grenzüberschreitenden Mobilität: zentrale Herausforderungen in Recht und Durchsetzung, 2) Nichtbezahlung und Unterbezahlung von entsandten und nicht entsandten vorübergehend grenzüberschreitend tätigen Arbeitnehmern, 3) Saisonarbeitskräfte in der Landwirtschaft, 4) Scheinselbstständigkeit in der vorübergehenden grenzüberschreitenden Arbeit, 5) entsandte Drittstaatsangehörige im Baugewerbe, 6) die wichtigsten Arten von Verstößen im Zusammenhang mit Gesundheit und Sicherheit am Arbeitsplatz und die Herausforderungen bei der Durchsetzung in der vorübergehenden grenzüberschreitenden Arbeit, 7) die Rolle von „Briefkastenfirmen“ in komplexen Untervergabeketten, in die entsandte und nicht entsandte Arbeitnehmer involviert sind, und die Herausforderungen bei

[8] Neue Regelungen für die Entsendung von Kraftfahrern im Straßenverkehr (Richtlinie 2020/1057), die im Juli 2020 als Teil des Mobilitätspakets verabschiedet wurden, wobei die Mitgliedstaaten bis zum 2. Februar 2022 Zeit hatten, die erforderlichen Maßnahmen zu ergreifen und zu veröffentlichen.

der Durchsetzung und 8) die wichtigsten Herausforderungen im Bereich der häuslichen Pflege. In **zwei weiteren Fallstudien wurden Beispiele für vielversprechende Praktiken** in Bereichen **aufgezeigt**, die für die Verbesserung des Schutzes von vorübergehend grenzüberschreitend tätigen Arbeitnehmern von zentraler Bedeutung sind: die grenzüberschreitende Zusammenarbeit zwischen den zuständigen Behörden in den Mitgliedstaaten bei der Durchsetzung der bestehenden Regelungen und die Einbeziehung der Sozialpartner.

Wie in den Fallstudien angedeutet, stehen die **am häufigsten festgestellten Probleme** im Zusammenhang mit Nicht- und Unterbezahlung, illegalen Lohnabzügen, Verstößen gegen Bestimmungen der Gesundheit und Sicherheit am Arbeitsplatz, schlechter Unterbringung, fehlender gesetzlicher Lohnfortzahlung im Krankheitsfall, fehlendem Kranken- und Sozialversicherungsschutz und gefälschten Arbeitszeitunterlagen (z. B. Stundenzettel). Sie treten in der Regel in bestimmten Sektoren auf, wie z. B. im Baugewerbe, in der Landwirtschaft und im Gartenbau, im Straßenverkehr, in der häuslichen Pflege und in der Fleischverarbeitung, die preislich umkämpft sind und in denen ein erheblicher Mangel an Arbeitskräften herrscht. Sie treten immer wieder bei (langen) Untervergabeketten auf, die häufig den Einsatz von Zeitarbeitsfirmen und anderen Arbeitsvermittlern sowie die Entsendung von Drittstaatsangehörigen beinhalten.

Zu den **zentralen Faktoren, die für problematische Situationen verantwortlich sind** (abgesehen von den strukturellen Merkmalen der analysierten Sektoren) gehören:

- Ein **sehr komplexes Regelwerk auf nationaler Ebene** und begrenzte Möglichkeiten für Arbeitgeber, klare Hinweise darauf zu erhalten, welche Regeln für ihre spezifische Situation in einem grenzüberschreitenden Kontext gelten.

- Die **eingeschränkte Kontrolle und Durchsetzung bestehender Vorschriften**, die betrügerisches Verhalten ermöglichen und dazu führen, dass solche Praktiken unentdeckt bleiben oder nicht sanktioniert werden.

- Die **Art der Arbeit selbst, die in einigen Fällen weniger sichtbar ist als in anderen** und die Arbeitnehmer daher anfälliger für Rechtsverletzungen macht. So schränken beispielsweise die häusliche Pflege und die Arbeit in abgelegenen Betrieben die Möglichkeiten der Arbeitsaufsichtsbehörden ein, die Anwendung bestehender Rechtsvorschriften zu kontrollieren.

- **Unzureichender Informationsaustausch und unzureichende Zusammenarbeit** zwischen den Behörden, um die Durchsetzung der Vorschriften in einer grenzüberschreitenden Situation zu gewährleisten.

- Das **Ausmaß von nicht angemeldeter Erwerbstätigkeit** (einschließlich teilweise gemeldeter oder nicht gemeldeter Arbeitsverträge, vollständig nicht angemeldeter Arbeit und Scheinselbstständigkeit).

Die öffentliche Debatte über die Arbeitsbedingungen von vorübergehend grenzüberschreitend tätigen Arbeitnehmern ist von der Konzentration auf missbräuchliche Situationen geprägt, die von Arbeitsinspektionen aufgedeckt wurden. Dies führt zu einer möglichen Überschätzung des Ausmaßes des Problems. Die **begrenzten vergleichbaren statistischen Daten** erschweren allerdings eine systematische Bewertung des Ausmaßes, in dem gegen die bestehenden Vorschriften und Regelungen in den verschiedenen Sektoren und für die verschiedenen Arten von vorübergehend grenzüberschreitend tätigen Arbeitnehmern verstoßen wird, sowie die Ermittlung von Arbeitgebern, die die Vorschriften nicht einhalten.

Zwar gibt es auf EU- und nationaler Ebene Regulierungsmaßnahmen, doch ihre **Durchsetzung hängt von komplexen Umsetzungsprozessen ab**. Wie die rechtliche

Bestandsaufnahme zeigt, haben die Mitgliedstaaten Schritte unternommen, um legislative und nicht legislative Maßnahmen sowie Maßnahmen zur Durchsetzung der Vorschriften auf nationaler Ebene umzusetzen. Ihr Ziel ist es, die Arbeitsbedingungen für entsandte Arbeitnehmer und andere vorübergehend grenzüberschreitend tätige Arbeitnehmer zu verbessern. Zu diesem Zweck haben die Mitgliedstaaten die Entsenderichtlinie und die Durchsetzungsrichtlinie in nationales Recht überführt. Unterschiede in der Umsetzung zwischen den Mitgliedstaaten können auf eine „strenge“ oder „weniger strenge“ Umsetzung der Richtlinie zurückzuführen sein. Auch könnte eine nicht ordnungsgemäße Umsetzung der Bestimmungen in Betracht kommen, da die Kommission am 26. Januar 2023 mit Gründen versehene Stellungnahmen an 17 Mitgliedstaaten gerichtet hat, die es versäumt haben, verschiedene nationale Bestimmungen mit der Durchsetzungsrichtlinie in Einklang zu bringen. Die größte Herausforderung bei der Gewährleistung des gleichen Schutzes für vorübergehend grenzüberschreitend tätige Arbeitnehmer liegt in der **begrenzten Durchsetzung der bestehenden Rechtsvorschriften und der Ermittlung von Arbeitgebern, die die Vorschriften nicht einhalten**. Nationale Behörden, Sozialpartner und NGOs spielen in diesem Prozess eine entscheidende Rolle. Zu den Maßnahmen zur Verbesserung der Durchsetzung gehören Investitionen, um die Anzahl und Wirksamkeit der Arbeitsinspektionen zu erhöhen, die Mechanismen zur Geltendmachung zu verbessern und die Umsetzung der Vorschriften zu überwachen und zu bewerten. Verbesserte Datenerhebungsmechanismen, Informationsaustausch, grenzüberschreitende Zusammenarbeit und Koordinierung zwischen den Mitgliedstaaten sind ebenfalls von entscheidender Bedeutung für eine effiziente Durchsetzung.

Der Studie zufolge dient die Vergabe von Unteraufträgen häufig dazu, die Kosten zu senken und die Gewinne zu steigern, was zu einem niedrigeren Lohnniveau und schlechteren Arbeitsbedingungen führt. Die Komplexität der Untervergabeketten in Verbindung mit der Existenz von Briefkastenfirmen, die sich der Haftung entziehen, erschwert die Transparenz und die Rechenschaftspflicht. **Die Wirksamkeit der Haftungsvorschriften für die Vergabe von Unteraufträgen hängt davon ab, in welchem Umfang die Mitgliedstaaten sie auf nationaler Ebene umsetzen**. Einige Mitgliedstaaten haben die Haftung über den Bausektor hinaus ausgedehnt (sektorneutraler Ansatz), andere wiederum eine vollständige Kettenhaftung eingeführt. Es bedarf einer besseren Regulierung, Umsetzung und Durchsetzung auf nationaler und EU-Ebene, um betrügerische Praktiken bei der Vergabe von Unteraufträgen zu bekämpfen und grenzüberschreitend tätige Arbeitnehmer zu schützen. Vorbeugende, abschreckende und schützende Maßnahmen sollten in angemessener Weise durchgeführt werden und die vorübergehende grenzüberschreitende Mobilität nicht behindern. Zu den Vorschlägen für weitere Maßnahmen gehören die Auferlegung der vollständigen Kettenhaftung, die Verstärkung der Kontrollen von Bescheinigungen (Mobile Dokumente A1) auf nationaler Ebene, die Verbesserung von Sensibilisierungs- und Informationsstrategien sowie die Digitalisierung von Unternehmensregistern in der gesamten EU, um mehr Transparenz in der Untervergabekette zu schaffen.

Der Zugang zu klaren und transparenten Informationen ist in der Tat von grundlegender Bedeutung, um nicht nur vorübergehend grenzüberschreitend tätige Arbeitnehmer über ihre Rechte, sondern auch Unternehmen und Arbeitsmarktvermittler über ihre Pflichten aufzuklären. Wie eine der vielversprechenden Fallstudien zeigt, können die Sozialpartner einen wichtigen Beitrag zu dieser Bereitstellung von Informationen leisten. Aus der Studie ergibt sich, dass die Informationen nicht immer leicht zugänglich sind und dass die nationalen Websites zur Entsendung in puncto Vollständigkeit und Klarheit variieren. Es wird empfohlen, dass die Mitgliedstaaten mit Unterstützung der EU **sowohl auf nationalen Websites als auch über andere Kanäle eine klare und mehrsprachige Verfügbarkeit von Informationen gewährleisten** (z. B. Informationen, Beratung und Unterstützung durch Sozialpartner und NGOs). Es sollten Anstrengungen unternommen werden, um den Informationsfluss zu verbessern, praktische Leitfäden und Instrumente zu schaffen (z. B. einen EU-Vergütungsrechner) und nachhaltige und gezielte Informations- und Sensibilisierungskampagnen durchzuführen.

Zeitarbeitsfirmen und Arbeitsmarktvermittler spielen eine doppelte Rolle, indem sie die Beziehungen zwischen Arbeitnehmern und Arbeitgebern erleichtern und Angebot und Nachfrage aufeinander abstimmen. In der Studie werden jedoch problematische Situationen im Zusammenhang mit diesen Akteuren aufgezeigt, die in Sektoren vorherrschen, die auf mobile oder befristete Arbeitskräfte angewiesen sind (z. B. Baugewerbe, Landwirtschaft und Dienstleistung). **Die Komplexität der bestehenden Regelungen für entsandte Leiharbeitnehmer trägt zur Nichteinhaltung der Rechtsvorschriften bei**. So wird beispielsweise der in der Leiharbeitsrichtlinie[9] und der Entsenderichtlinie vorgesehene Grundsatz der Gleichbehandlung in der Praxis in den einzelnen Mitgliedstaaten unterschiedlich umgesetzt, da er mit nationalen Rechtsvorschriften und Tarifverträgen verknüpft ist, z. B. in Bezug auf die Vergütungspakete. Da sich die Vergütungspakete von Land zu Land und von Arbeitgeber zu Arbeitgeber unterscheiden, kann es für Zeitarbeitsfirmen schwierig sein, alle Bestandteile der Vergütung zu bestimmen. Die entleihenden Unternehmen sollten auch die Zeitarbeitsfirmen, mit denen sie bei der Entsendung von Arbeitnehmern zusammenarbeiten, über die geltenden Arbeitsbedingungen in Bezug auf die Vergütung informieren, was jedoch nicht immer einfach ist. Die entleihenden Unternehmen selbst kennen möglicherweise nicht die komplexen nationalen Rechtsvorschriften und Tarifverträge, die für entsandte Arbeitnehmer gelten.

Darüber hinaus **behindert die Scheinselbstständigkeit**, die mit solchen Vermittlern beispielsweise im Bereich der häuslichen Pflege im Zusammenhang steht, **die Rechte der Arbeitnehmer und den fairen Wettbewerb**. Dies wiederum beeinträchtigt Investitionen in Qualifikationen. Aufgrund der Grauzone zwischen abhängiger Beschäftigung und Selbstständigkeit stoßen die Arbeitsaufsichtsbehörden und die Vollzugsbehörden bei der Bekämpfung betrügerischer Aktivitäten im Zusammenhang mit Scheinselbstständigkeit an ihre Grenzen. Daher sind neben einem verbesserten grenzüberschreitenden Datenaustausch und Berichtsmechanismen auf nationaler und EU-Ebene beträchtliche Investitionen in den Ausbau der Durchsetzungs- und Überwachungskapazitäten für Zeitarbeitsfirmen und andere Vermittler auf nationaler Ebene erforderlich. Die Stärkung der rechtlichen und administrativen Maßnahmen, die bessere Einbindung der Sozialpartner durch die Schaffung grenzüberschreitender sektoraler Netzwerke, die die Arbeit der Arbeitsaufsichtsbehörden bei der Durchsetzung der Vorschriften systematisch unterstützen können, und die Durchführung weiterer empirischer Studien über die Rolle und Bedeutung von Zeitarbeitsfirmen (in Entsendungssituationen) und auch anderer Arbeitsmarktvermittler (in Nicht-Entsendungssituationen) sind für die Bewältigung dieser Herausforderungen von wesentlicher Bedeutung.

Abschließend ist anzumerken, dass die Zahl der entsandten Drittstaatsangehörigen rapide ansteigt, insbesondere in Ländern wie Slowenien, Polen, Litauen, Spanien und Portugal sowie in Sektoren wie dem Baugewerbe, dem Straßenverkehr, der häuslichen Pflege und der Landwirtschaft. In allen Sektoren sind entsandte **Drittstaatsangehörige anfälliger für missbräuchliche Praktiken seitens Arbeitgebern oder Arbeitsmarktvermittlern**, einschließlich Verletzungen von Arbeitsrechten, Unterbezahlung und prekären Bedingungen, als einheimische Arbeitnehmer und entsandte Arbeitnehmer aus der EU. Unterschiedliche Auslegungen und Anwendungen des EU-Rechts in den Mitgliedstaaten erschweren die grenzüberschreitende Zusammenarbeit und Durchsetzung. Um diese Probleme anzugehen, sollten weitere Maßnahmen darin bestehen, die entsandten Drittstaatsangehörigen auf eine koordinierte, kohärente und zugängliche Weise besser über ihre Rechte zu informieren. Die Verbesserung der länderübergreifenden Zusammenarbeit zwischen den Durchsetzungsstellen, die Erhebung genauerer Daten über das Profil der entsandten Drittstaatsangehörigen, die Klärung der Entsendungsbedingungen und die Evaluierung der flexiblen bilateralen Abkommen und der Regelungen für die erleichterte Einreise in einigen Mitgliedstaaten sind wichtige weitere Maßnahmen, die erwogen werden müssen.

[9] Richtlinie 2008/104/EG des Europäischen Parlaments und des Rates vom 19. November 2008 über Leiharbeit, verfügbar unter: http://data.europa.eu/eli/dir/2008/104/oj.

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List of acronyms and abbreviations

Acronym/Abbreviation	Explanation
CJEU	Court of Justice of the European Union
ELA	European Labour Authority
EU	European Union
IMI	Internal Market Information System
LTC	Long-term care
PWD	Posting of Workers Directive
TAWD	Temporary Agency Work Directive
TCNs	Third Country Nationals
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czechia
DE	Germany
DK	Denmark
EE	Estonia
ES	Spain
FI	Finland
FR	France
GR	Greece
HR	Croatia
IE	Ireland
IT	Italy

LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom
UA	Ukraine
BY	Belarus
BiH	Bosnia and Herzegovina

1. Introduction

The report supports the monitoring of the Posting of Workers Directive 2018/957/EU and of its Enforcement Directive 2014/67/EU. It provides key information about the prevalence of different types of temporary cross-border workers across the European Union (EU) and in specific economic sectors and an analytical overview of EU and national legal and enforcement arrangements set up to support temporary cross-border labour mobility.

The report focuses on identifying typically problematic aspects related to the working conditions of temporary cross-border mobile workers, including posted workers[10] in subcontracting chains (also involving temporary work agencies and other labour market intermediaries) and other types of temporary cross-border mobile workers in non-standard employment relationships. It also outlines considerations about further measures needed to ensure the protection of workers in posting and non-posting situations.

The study does not assess how well temporary cross-border labour mobility functions in the EU in general. It rather examines its most problematic aspects to identify existing and potential measures to address these situations and improve the protection of temporary cross-border workers. Existing data gaps pose significant challenges to establishing the scale of non-compliance with and infringements of relevant rules and regulations. This has been the key limitation of this study.

Notwithstanding, the drivers, characteristics and consequences of working conditions violations are important to determine, as they enable an assessment of how good the protection of temporary cross-border mobile workers is and what further actions are needed at various levels to improve the situation. Furthermore, they highlight the serious consequences that infringements have not only for workers, but also their impact on social security, tax and labour law fraud.

The report draws on its findings to reflect on the importance of clear and consistent legislation, supported by effective enforcement mechanisms and pragmatic communication and awareness raising strategies that inform employers, intermediaries and workers about their rights and obligations in highly complex legal settings.

1.1. Background and importance of the study

The free movement of workers and services is key to the single market and one of the cornerstone achievements of the EU. It benefits countries of origin and receiving countries, workers and service providers, enables a better matching of supply and demand across the bloc, provides extended opportunities for training and professional development, as well opportunities for economic operators to conduct business activities in other EU Member States. It is, however, a complex phenomenon, and despite its many proven benefits at all levels, challenges continue to exist. Some of these negatively impact the rights and working conditions of intra-EU mobile workers.

The EU has engaged in policy actions related to the protection of the working conditions of temporary cross-border workers for many years. To that end, the **Posting of Workers Directive** (PWD) (Directive 96/71/EC, amended by Directive 2018/957/EU) as well as the **Enforcement Directive** (Directive 2014/67/EU) aim to create a level playing field for

[10] Posted workers are employees who are sent by their employers to carry out a service in another EU Member State on a temporary basis, in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency.

businesses while protecting the (labour) rights of the posted workers, in areas such as wages, working time, paid annual leave, safety and health at work, posting by temporary work agencies, protective measures of employment for pregnant women or women who have recently given birth and of children and young people and equality of treatment between men and women. In addition, the Enforcement Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of the PWD.

Other policy actions at the EU level taken to **support better working conditions for temporary cross-border workers** include – among others – Regulation 883/2004 on the coordination of social security systems (and implementing Regulation 987/2009); Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals; the Seasonal Workers Directive 2014/36/EU; and Directive (EU) 2019/1152 on transparent and predictable working conditions. These provide an enhanced framework of provisions that support the protection of workers and have contributed to legislative developments at the Member State level.

1.2. Study objectives, scope and duration

The study maps and assesses developments since the adoption of the revised Posting of Workers Directive and the Enforcement Directive, identifying trends and providing indications where there is a need for further actions.

While acknowledging the **multitude of proven benefits of free movement of services** in the EU, this study focuses on mapping sectoral specificities and challenges and provides a comparative analysis of national legal measures and enforcement mechanisms. In so doing, it focuses on identifying and analysing **typically problematic aspects related to the working conditions temporary cross-border mobile workers** (including posted workers, seasonal workers, and live-in carers).

The study's **specific objectives** included an overview and analysis of:

- the key sectors where posting and other forms of temporary cross-border work take place and indications of the scale of this phenomenon, including the prevalence of subcontracting chains;
- the role of temporary work agencies and other labour intermediaries in temporary cross-border mobility;
- the key factors that drive and shape cross-border labour mobility at sectoral level (including contextual factors such as labour market and sectoral characteristics, as well as specific legal and enforcement arrangements related to the posting of workers);
- key measures and legal provisions taken by the EU27 Member States (as countries of origin and/or destination), to ensure workers in posting and non-posting situations are protected (in particular in subcontracting situations, in cases involving temporary work agencies and other intermediaries, and where there is a systematic involvement of posted Third Country Nationals - TCNs);
- the liability provisions (Article 12(2) of Directive 2014/67/EU) implemented in practice;

- typically problematic situations involving temporary cross-border mobility, including their sectoral prevalence, key features, determining factors and implications for the protection of workers in posting and non-posting situations.

Drawing on its findings, the report outlines considerations related to how the working conditions of temporary cross-border mobile workers in different situations can be improved in the future. These focus on the following areas: (long) subcontracting chains, the role of temporary work agencies and other labour market intermediaries, TCNs posted temporarily to other Member States and the implementation of relevant posting rules in their case, the importance of effective enforcement mechanisms and systematic data that identifies the prevalence and characteristics of infringements, and cross-border cooperation and exchange of information.

In so doing, the report also draws attention to **key contextual factors** that influence the functioning of cross-border labour mobility in the EU and the implementation of relevant rules and regulations: competitive strategies to drive labour costs down, high labour demand in the sectors where posting and other types of temporary cross-border mobility are prevalent, and the increasingly important role of (long) subcontracting chains in the EU (and global) economy, ensuring outsourcing of labour costs and flexibility for employers.

1.3. Structure of the report

The report includes the following sections:

- **Section 2** provides a brief overview of the policy context related to the movement of temporary cross-border mobile workers in the EU. It also briefly outlines the methodology of the study and considerations about the selection of economic sectors the research focuses on.

- **Section 3** introduces the different types of temporary cross-border labour mobility in the EU, including posted workers, frontier workers, seasonal workers, and other mobile workers. It also discusses the trends and data gaps in relation to the movement of temporary cross-border workers and linkages between these workers and specific sectors of the economy.

- **Section 4** focuses on the overview of the relevant legislative frameworks and enforcement mechanisms relating to different types of temporary cross-border work across the Member States.

- **Section 5** builds on the analysis in previous sections to identify construction, long term and live-in care, meat processing, agriculture and horticulture*, and* hotel-tourism-catering as the sectors are most affected by: subcontracting situations involving posting or other forms of temporary cross-border labour work; the involvement of temporary work agencies and other intermediaries; and the systematic involvement of posted TCNs. The section assesses the main features of temporary cross-border work in these sectors, focusing on problematic aspects and their drivers.

- **Section 6** complements the sectoral and legal analysis by discussing 8 case studies of typically problematic situations involving workers in posting and non-posting situations in the sectors analysed in Section 5. These include: 1) the role of temporary work agencies and other labour intermediaries in temporary cross-border mobility; 2) non-payment and under-payment; 3) seasonal workers in agriculture; 4) bogus self-employment; 5) posted TCNs in the construction sector; 6) key types of occupational safety and health (OSH) violations and enforcement challenges; 7) the

role of letterbox companies in complex subcontracting chains; and 8) the situation of live-in carers.

- **Section 7** presents two additional case studies identifying examples of promising practices related to the cooperation between Member States and the role of social partners.

- **Section 8** summarises the main conclusions of the report and outlines considerations for further actions that can ensure the protection of the working conditions of temporary cross-border workers.

The **Annexes** include:

- An overview of EU legislative measures, EU case law and national case law (Annex 1).

- Bibliography (Annex 2).

2. Policy context, study objectives and methodology

2.1. Developments in the EU legal and policy context

The **freedom to provide services** is laid down in Article 56 of the Treaty on the Functioning of the European Union (TFEU) and **guarantees the mobility of businesses and professionals in the EU**. Together with the freedom of movement for workers (laid down in Article 45 TFEU), it has been one of the founding principles of the EU.

The **posting of workers** is a topical situation where **additional legal instruments were needed to find the right balance between promoting the freedom to provide services and protecting the labour rights of the workers** concerned. The PWD establishes which provisions of the host state's employment law should be applied to posted workers (self-employed persons are not covered). The Directive distinguishes between three types of postings: between two companies under a 'contract of services', through temporary work agencies, and 'intra-group postings'.

In 2016, the Commission submitted a proposal for a **revised PWD**.[11] Mid-2018, after politically challenging negotiations,[12] the Parliament and the Council reached an agreement on the matter (**Directive 2018/957/EU**).[13] The main amendments are the change to the list of so-called 'hard core provisions', e.g., the replacement of the concept of 'minimum wages' with the concept of 'remuneration'; the introduction of rules for long-term postings (longer than 12/18 months); and amended rules for posted temporary agency workers. These revisions sought to address challenges with the application and implementation of the initial PWD, which were deemed to have enabled situations of non-compliance, abusive practices and circumvention of posting regulations at EU and national levels.[14]

The **Enforcement Directive 2014/67/EU**, on the other hand, aims to strengthen the application of the posting rules and addresses issues linked to tackling fraud, circumvention of rules, access to information, and administrative cooperation between the Member States. With a view to tackling abuses in **subcontracting situations**, Member States should take appropriate measures (in accordance with Art. 12 of the Enforcement Directive), to ensure **subcontracting liability**. This enables Member States to take measures to ensure that in subcontracting chains, the contractor to which the employer is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker. Member States are required to introduce such **sub-contracting liability in the construction sector**, but they may provide for it in any sector. Several Member States indicated that the introduction of these rules increased the effective protection of the workers' rights in subcontracting chains.[15] In July 2021, the Commission opened an infringement procedure against 24 Member States for not complying with some of the provisions of the Enforcement

[11] See: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2488&furtherNews=yes.
[12] This resulted in a 'Yellow Card Procedure' and Hungary and Poland's request before the Court of Justice to annul Directive 2018/957 (*Case C-620/18* Hungary v European Parliament and Council, and *Case C-626/18*, Poland v European Parliament and Council).
[13] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0957&from=EN.
[14] European Parliament, Posting of Workers Directive – Current situation and challenges, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU%282016%29579001_EN.pdf
[15] COM(2019) 426 final, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0426&from=EN.

Directive.[16] In January 2023, the Commission sent reasoned opinions to 17 Member States for failing to bring various national provisions in line with the Enforcement Directive.[17]

As discussed in detail in Section 3, there are several **other types of temporary cross-border workers**, who are not in posting situations and thus not covered by the PWD. These include frontier workers, seasonal workers as well as other mobile workers (who cannot be classified under previous categories). They also benefit from the principle of non-discrimination and equal treatment in respect of employment conditions applicable to posted workers and have also frequently been at the centre of reports about violations of working conditions involving intra-EU mobile workers and TCNs. Various EU and national regulations apply to these temporary cross-border workers (as discussed in Section 4), including those related to the coordination of social security systems within the EU, seasonal work, transparent and predictable working conditions, and irregular work.

2.2. The focus of the study in this context

This study focuses on the working conditions of **posted workers in subcontracting chains,[18] temporary cross-border workers involving temporary work agencies and other intermediaries and posted TCNs**. It also considers other types of temporary cross-border mobile workers as short frequent, or repetitive movements abroad have an important share in total intra-EU labour mobility and are in continuous expansion.[19]

The COVID-19 pandemic has revealed the fundamental importance of all types of temporary cross-border labour mobility in several economic sectors across the EU, but also the challenges confronting these workers. Nevertheless, the topic of the protection of temporary cross-border mobile workers remains insufficiently researched and significant data gaps persist.

Heightened by the COVID-19 pandemic, policy debates at European[20] and national level have focused in recent years on the violations of temporary cross-border mobile workers' working and living conditions. Notwithstanding the existing EU and national legal frameworks, including the recent changes introduced by the PWD, **several groups of temporary cross-border mobile workers might be treated (legally and/or in practice) differently** than local workers and permanent EU movers as regards their terms and conditions of employment, and access to social security in the host Member State. These differences are mainly the result of a different treatment in EU and national law and/or are the result of employers' non-compliance with the legal framework. Moreover, due to the atypical characteristics of the employment models and the complex subcontracting chains that are often involved in temporary cross-border work, it is **challenging to determine the exact labour and social rights of individuals working abroad on a temporary basis**.

Notwithstanding the challenges raised by complex regulations and issues with their enforcement in practice, which contribute to the failure to respect terms and conditions of employment for temporary cross-border workers at times, there are **wider contextual factors** at play that are external to the legal regime related to posting and other types of temporary cross-border labour mobility. They nonetheless shape the characteristics of situations involving cross-border workers in posting and non-posting situations.

[16] See: https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_3440.
[17] https://portal.ieu-monitoring.com/editorial/eu-posting-of-workers-eu-commission-calls-on-17-member-states-to-comply-with-directive/398985
[18] Subcontracting chains involve a client, or principal contractor, externalising single specialities or tasks to other companies or self-employed workers.
[19] OECD, International Migration Outlook 2019, OECD Publishing Paris, available at: https://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2019_c3e35eec-en.
[20] See, for instance, Committee on Employment and Social Affairs – European Parliament, Draft report on impacts of EU rules on the free movements of workers and services: intra-EU labour mobility as a tool to match labour market needs and skills (2020/2007(INI)), European Parliament, Brussels.

As highlighted in this report, these include: the expansion over the past decades of **complex subcontracting** chains in the EU (and globally) as core business models whereby risks are externalised and labour costs are kept at bay; **high price competition** in sectors characterised by high labour demand, labour-intensive and low-paying jobs; the **regulation of different types of private labour market intermediaries** across the EU and the challenges associated to monitoring their activities, which enable loopholes leading to the circumvention of rules; and the overall limited **capacity of national authorities to ensure legislation is enforced effectively**.

In this context shaped by factors specific to temporary cross-border labour mobility as well as external factors, **the study assesses the sectoral specificities and problematic aspects related to the working conditions of temporary cross-border mobile workers in the EU and whether further measures are needed** to ensure the labour rights of these workers are respected (and the principle of equal treatment is applied relative to local workers and permanent movers).

Given the **increase in the number of posted TCNs in recent years**, the study also focuses on identifying and assessing the key problematic situations involving these workers. TCNs who hold a valid work and residence permit in one Member State may be posted across the EU. This has been described as the group of temporary cross-border workers that is currently growing most quickly.[21] TCNs also constitute an important group of seasonal workers in some Member States, mainly in the agricultural sector.[22] Triggered by shortages in labour intensive sectors (homecare, road freight transport, hotels, restaurants and catering) the posting of TCNs has been also a rapidly emerging trend in Central and Eastern European countries.[23]

Notwithstanding the fact that the public debate has focused on the risks of social dumping[24] and cross-border social fraud, temporary cross-border work continues to have **important benefits for sending and receiving Member States as well as for the individuals concerned**. Some of its key advantages include avoiding permanent brain drain, enhanced fiscal transfers through labour tax and revenues, and decreasing unemployment rates for the countries of origin.[25] From the perspective of receiving countries, cross-border workers contribute with skills and knowledge which may otherwise be in short supply, and support the local economy. From the perspective of employers, temporary cross-border work enables flexibility, access to skills that are in shortage at times of peak demand, and increase productivity. For workers, temporary cross-border work can increase income, further develop skills and enhance contributions to social security.

However, there are clear challenges linked to temporary cross-border work, from the perspective of individuals' working conditions, but also wider considerations related to social security, labour law and tax fraud. It is such aspects this study focuses on and thus contributes to a nuanced debate about the costs and benefits of temporary cross-border

[21] D. Lens., N. Mussche, and I. Marx, 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants. International Migration', 2021, available at: https://onlinelibrary.wiley.com/doi/abs/10.1111/imig.12867 . See also the comprehensive project Con3Post on the posting of TCN in the construction sector, available at: https://www.migracje.uw.edu.pl/projects/con3post-posting-of-third-country-nationals-mapping-the-trend-in-the-construction-sector/.

[22] T. Fries-Tersch, L. Siöland, M. Jones,C. Mariotti, and M. Malecka, 'Intra-EU Mobility of Seasonal Workers Trends and Challenges, European Commission', 2021.

[23] E. Voss, & K. Vitals, 'Social Conditions in Logistics in Europe: Focus on road transport, European Transport Workers Federation', European Transport Workers' Federation, 2019, available at: https://www.wilke-maack.de/wp-content/uploads/2020/07/report_social_conditions_in_logistics.pdf.

[24] There is no generally accepted definition of social dumping, but it can be described as "the practice whereby workers are given pay and / or working and living conditions which are sub-standard compared to those specified by law or collective agreements in the relevant labour market, or otherwise prevalent there." See https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/social-dumping_en#:~:text=The%20practice%20whereby%20workers%20are,market%2C%20or%20otherwise%20prevalent%20there.

[25] F. De Wispelaere, 'Intra-EU posting: Costs and Benefits', 2018, available at https://lirias.kuleuven.be/retrieve/505894.

mobility, aiming to propose suggestions for actions that improve workers' situation and enhance the benefits of labour mobility.

2.3. Overview of study methodology and rationale for choice of sectors and problematic situations

The report draws on an analysis of quantitative and qualitative information and has involved several stages:

- The development of the conceptual framework of the study, including defining the concepts of temporary cross-border mobile workers; the main forms of temporary cross-border labour mobility in the EU, and those within the scope of the study; and the scope of the legal analysis;
- Mapping and assessment of legislative and enforcement arrangements taken in the Member States to ensure workers in posting and other forms of temporary cross-border mobility involving subcontracting are protected;
- Mapping and assessment of the sectoral situation involving posting of workers and other forms of temporary cross-border work;
- Assessing typically problematic forms of temporary cross-border labour mobility;
- Assessing how the protection of temporary cross-border mobile workers functions in the EU and what can be improved.

The data collection methods included desk research of available literature and legal research of EU and national measures and enforcement mechanisms; quantitative evidence from data available at the EU and national level (e.g. data deriving from labour inspections); 72 expert and stakeholder interviews with representatives of EU institutions, national labour inspectorates, ministries, and social partners; and a consultation workshop with experts.

The analysis of the **types of temporary cross-border movement** (Section 3) defines the main types of cross-border workers in the scope of this study, outlines their prevalence in specific sectors and identifies the key sending and receiving countries.

The **analysis of legal arrangements, non-legislative measures and enforcement mechanisms** (Section 4) focus on the review and analysis of:

- EU and national legal provisions applicable to protecting workers in temporary cross-border mobility and relevant case law (liability regulation in subcontracting/chains, due diligence, the regulation of temporary agency work and labour market intermediaries);
- non-legislative measures relating to access to information, enhanced administrative cross-border cooperation, prevention and monitoring measures;
- enforcement mechanisms related to the identified measures in practice, infringements and their sanctioning, as well as data gathering/monitoring methods.

An in-depth analysis is conducted in 9 key sending (Poland, Spain, Germany and Slovenia) and receiving countries (Germany, France, Belgium, the Netherlands, Luxembourg and

Denmark). The selection of these countries was informed by the findings outlined in Section 3.

The **sectoral analysis** (Section 5) includes:

- the mapping of the current sectoral situation, i.e., the prevalence of posted workers (including TCNs) and other cross-border workers in different economic sectors; the use of subcontracting chains and labour market intermediaries and problematic situations linked to them;

- the identification of key drivers of problematic situations as well as examples of promising practices (e.g., legislation and enforcement mechanisms; collective agreements; social partner involvement; company practices; and awareness about existing regulations);

- an assessment of how cross-border temporary mobility systems function in the selected sectors and their key features.

The analysis conducted in Sections 3 and 4 results in the identification of **several sectors** that are relevant for posting and non-posting situations: construction, road freight transport, logistics, long-term care/ live-in care, hotel-tourism-catering, meat processing, manufacturing (e.g., metal industry, shipbuilding), industrial cleaning, agriculture and horticulture, live performance and aviation. Considering the sectors where most problematic situations are typically encountered, the research then focused on 5 key sectors: **construction**, **long-term care/ live-in care**, **meat processing**, **agriculture and horticulture**, and the **hotel-tourism-catering** sector. The analysis is presented in Section 5 of this report.

Posted workers are mainly employed in construction and road freight transport. Several recent developments occurred in reference to the **transport sector**, including the new rules on posting of drivers in road transport (Directive 2020/1057),[26] which were adopted in July 2020 as part of the Mobility Package (with Member States having until 2 February 2022 to adopt and publish the necessary measures.). Directive 2020/1057 responded to the need for regulating the situation of drivers in the road transport sector (a specific case of posted workers due to their high level of mobility). The provisions of the PWD and its Enforcement Directive still apply, but the new Directive sets specific administrative requirements and control measures (before, during and after posting) for foreign employers that post drivers – thus seeking to clarify situations where drivers are in a posting situation and ensure compliance with regulations. Notwithstanding the significance of **posting in road freight transport**, this sector **was not included in the in-depth analysis** due to the very recent nature of these legislative changes, whose impact could not be analysed in the timeline of this study.

The in-depth legal (Section 4) and sectoral analysis (Section 5) revealed several **key types of problematic situations** involving temporary cross-border workers in posting and non-posting situations (which are likely to continue and potentially increase in the foreseeable future). Eight such situations were selected for in-depth analysis. The analysis is presented in the form of case studies in Section 6. The case studies focus on:

- The role of temporary work agencies and labour market intermediaries in cross-border mobility

[26] Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1057.

- Non-payment and underpayment in the case of temporary cross-border workers in posting and non-posting situations
- Seasonal workers in agriculture
- Bogus self-employment in temporary cross-border work
- Posted TCNs in the construction sector
- Key types of OSH-related violations and enforcement challenges
- The role of 'letterbox companies' in complex subcontracting chains
- Employment models of live-in caregivers: working conditions and key enforcement challenges

Two additional case studies were developed about examples of **promising practices** in two areas that are key to the improvement of temporary cross-border workers' protection: **cross-border cooperation between relevant authorities in the Member States** in enforcing existing regulations and the **involvement of social partners**.

3. Types of temporary cross-border mobility in the EU: Key trends

Summary of key findings

There are several forms of cross-border intra-EU labour mobility, making it a heterogenous phenomenon. In addition to 'permanent' EU movers, there are, inter alia, posted workers, frontier workers, and seasonal workers. In 2021, there were about 10 million EU movers, 1.9 million posted workers, 1.6 million cross-border workers, and at least 600 000 seasonal workers. Furthermore, around 9.7 million trips for professions reasons were carried out within the EU.

To grasp the concept of labour mobility in its entirety, the use of a broad and exhaustive definition is needed. This is provided by the United Nations Economic Commission for Europe, stating that **international labour mobility includes "all movements of natural persons from one country to another for the purpose of employment or the provision of services"**.[27] This definition does not impose any limitation on the frequency or duration of the employment abroad. Furthermore, it includes all different types of freedoms in the EU: the free movement of workers (Article 45 TFEU), the freedom of establishment (Article 49 TFEU), and the freedom to provide services (Article 56 TFEU). This is important, as cross-border intra-EU labour mobility has many different facets, as shown below.

Persons of working age have increasingly become more mobile in the EU over the past two decades through different forms of intra-EU labour mobility. Therefore, labour mobility in the EU is large in its scope, while also being present in all sectors of activity. This showcases **the added value of free movement, and the benefits of the common labour market in the EU.**[28] Moreover, results from a Special Eurobarometer 'on intra-EU labour mobility after the pandemic', show that 18% of EU-citizens envisage working abroad in the future.[29] Of those who envisage working abroad, a majority (60%) are planning to do so within the next five years.

There are several **key types of temporary cross-border intra-EU labour mobility**: frontier workers who have a job in a Member State other than their Member State of residence, posted workers, seasonal workers, and 'other' mobile workers. The information is mainly based on quantitative data and presents for each type of intra-EU labour mobility the key drivers, its prevalence and evolution, its main flows, and the key sectors of activity. Although it should be acknowledged that the size of migration from TCNs to the EU is significant, this chapter focusses on intra-EU labour mobility. The topic of TCNs is covered in several other sections of this report.

To situate the trends related to temporary cross-border workers in the wider context of freedom of movement of workers in the EU, the section opens with a brief overview about overall intra-EU mobility, looking also at EU movers who have (permanently) moved to another Member State and who are not otherwise covered by this study.

[27] UNECE, Measuring International Labour Mobility, United Nations Economic Commission for Europe, 2018, p. 3.
[28] E. Sjödin & E. Wadensjö, 'Intra-European Labour Migration for a Resilient EU', in A. Bakardjieva Engelbrekt, P. Ekman, A. Michalski and L. Oxelheim (eds.), 'Routes to a Resilient European Union', Interdisciplinary European Studies, 2022.
[29] European Commission, Special Eurobarometer 528: Intra-EU labour mobility after the pandemic, 2022.

3.1. EU movers

EU movers are "persons [who] move their residence to a country of which they are not a citizen, for at least one year".[30,31] There are **several drivers** for the mobility of EU movers.[32] Some specific drivers are mentioned here to get an idea of the diversity of factors which drive EU movers. **Free movement** in itself is an important driver of intra-EU labour mobility.[33] However, other drivers, such as **wage differentials and distance (geographical, linguistic, and cultural)** tend to be even more important. Additionally, **seeking a job abroad** remains an important driver of persons moving abroad.[34]

Drivers can be classified as **pull or push factors**, depending on whether they pull movers towards the country of destination or push persons out of the country of origin. **Pull factors** for EU movers are greater availability of work in the country of destination, availability of jobs corresponding to the mover's field and level of education, and other socio-economic conditions of the receiving country such as economic growth, higher wages, or quality of social security.[35] The gross income advantage of the receiving country over the sending country is a pull factor, as well as social networks of EU movers in the destination country,[36] and cultural similarities between the sending and receiving country,[37] for instance, a common language.[38]

Furthermore, **push factors** are present such as economic crises in the sending country or a high unemployment rate.[39] When there is an expectation of worse economic conditions in the country of origin, greater numbers of people may decide to move abroad.[40] In addition, general life satisfaction seems to be a push factor, as individuals who perceive their income and life standards to be less satisfying have a higher probability of wishing and planning to move abroad. Moreover, **different drivers are possible for different types of EU movers**. For instance, mass mobility is generally defined by push factors, while high-skilled labour mobility is primarily defined by pull factors.[41]

In 2021, the total population in the EU-27 amounted to 447 million persons, of which 264 million persons, or 59%, were of working age (20-64 years).[42] When analysing the group of EU movers, only this last group, the persons of working age, are considered. Overall, in 2021, 89.8% of working age citizens in the 27 Member States live in the same country as their citizenship. The remaining 10.2% consists of a group of EU-27 movers (3.8%) and TCNs (6.4%).

[30] Figures presented in this section are mainly based on E. Hassan, L. Siöland, B. Akbaba, D. Cinova, M. Gasperini, & M. Geraci, 'Annual Report on Intra-EU Labour Mobility 2022', European Commission Directorate-General for Employment, Social Affairs & Inclusion, 2023, p. 19.
[31] "The main EU-wide data sources – the EU-LFS and Eurostat population/migration statistics – count people who live, or intend to live, in a certain country for at least one year." (Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023).
[32] These drivers can be classified under different dimensions: demographic, economic, environmental, human development, individual, politico-institutional, security, socio-cultural, and supranational (see M. Czaika & C. Reinprecht. 'Why do people stay put in environmentally stressful regions? Cognitive bias and heuristics in migration decision-making'. Regional Environmental Change, 22(3), 84., 2022). For an overview of the main motivations see also European Commission, Special Eurobarometer 528: Intra-EU labour mobility after the pandemic, 2022.
[33] H. Rojas-Romagosa, & J. Bollen, 'Estimating migration changes from the EU's free movement of people principle', CPB Discussion Paper 385, 2018a.
[34] S. Migali & M. Scipioni, 'A global analysis of intentions to migrate', 2018, European Commission, JRC, 2018.
[35] Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023.
[36] S. Migali & M. Scipioni, 'A global analysis of intentions to migrate', 2018.
[37] E. Bonin, W. Eichhorst, C. Florman, M. Okkels Hansen, S. Skiöld, J. Stuhler, K. Tatsiramos, H. Thomasen, & K. F. Zimmermann, 'Geographic Mobility in the European Union: Optimising its Economic and Social Benefits', IZA Research Report, 2018.
[38] S. Migali, & M. Scipioni, 'A global analysis of intentions to migrate', 2018.
[39] Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023.
[40] S. Migali & M. Scipioni, 'A global analysis of intentions to migrate', 2018.
[41] Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023.
[42] Based on Eurostat [MIGR_POP1CTZ].

This share differs strongly between Member States. For instance, only 48% of working age persons living in Luxembourg are Luxembourgish citizens. By contrast, more than 98% of persons living in Slovakia, Poland, and Romania have the citizenship of their country of residence. Member States on the periphery of the EU's borders receive more TCNs, while those Member States in the centre of the EU receive a higher share of EU-27 movers.[43] In the analysis which follows, only EU-27 movers of working age are taken into account.

In 2021, there were **10 million EU-27 movers of working age in the EU-27, or 3.8% of the total working age population**. Around 3.3 million of them reside in Germany, 1.3 million in Spain, 1.1 million in Italy, and 898 000 in France. Furthermore, Belgium and Austria are home to more than 500 000 EU movers each. Member States from which the highest number of EU-27 movers come are Romania, with 2.2 million, and Italy with 910 000. Additionally, 529 000 movers come from Bulgaria, 473 000 from Germany, and 326 000 from Portugal.

Eurostat data allows us to analyse the direction of EU movers between EU-27 Member States.[44] **In absolute numbers, the stock of EU movers coming from Romania and going to Italy is highest**, as around 811 000 working age persons residing in Italy are Romanian citizens. Furthermore, approximately 621 000 persons residing in Germany are Polish citizens, 575 000 persons residing in Germany are Romanian citizens, and 504 000 persons residing in Spain are Romanian citizens. Additionally, in relative terms, when comparing the number of EU-27 movers to the total working-age population of a country, important countries of destination are discovered as well. For instance, **42% of the population of working age in Luxembourg concern EU-27 movers**, of which 16.1% are Portuguese citizens, 8.4% French citizens, 3.8% Italian citizens, and 3.2% Belgian citizens. Also in Cyprus, Malta, and Austria more than 10% of the working-age population are EU-27 movers.

Most often, EU movers go **from east to west**. Eastern European countries have been the major sending countries since they joined the EU, while only 7% of EU mobile citizens reside in Eastern Europe, corresponding to 1% of the Eastern European population.[45] For instance, many Romanians moved to Italy and Spain (three times as many as those who moved to Germany and the United Kingdom combined), and many persons from Croatia, Slovenia, and Hungary moved to Austria.[46] Nevertheless, labour mobility should not be narrowed to this direction only. **South-north mobility** is also notable. Especially since 2013, this direction of mobility has increased. Nevertheless, while there is indeed a rapid increase in south-north mobility, east-west mobility is still larger, both in absolute numbers, and in relative terms compared to the total population.

The main sector of activity for EU movers is **manufacturing** with 17% or more EU-27 movers working in this sector.[47] Relatively speaking, compared to nationals, EU movers were most overrepresented in construction, and accommodation and food services.

[43] For instance, while 81% of all working-age movers in Luxembourg are EU-27 movers, more than 85% of movers arriving in Estonia, Latvia, Lithuania, and Slovenia are TCNs.
[44] The breakdown of the stock of EU movers in Estonia, Greece, France, Croatia, Cyprus, Malta, and Poland as Member State of residence by Member State of citizenship are not available for 2021. Therefore, this analysis is not complete and should be regarded with caution. Eurostat [MIGR_POP1CTZ].
[45] A. Parenti and C. Tealdi, 'Cross-Border Labour Mobility in Europe: Migration Versus Commuting', University of Pisa, 2021.
[46] U. Batsaikhan, Z. Darvas ,& I. Gonçalves Raposo, 'People on the move: migration and mobility in the European Union', Bruegel Blueprint Volume XXVIII, 2018.
[47] Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023, p. 13.

3.2. Posted workers

As set out in the PWD (Directive 96/71/EC), a **'posted worker'** is a worker who, "**for a limited period, carries out his or her work in the territory of a Member State other than the State in which he or she normally works**".[48] Posted workers are and remain employed by the sending company throughout their posting and, in contrast to long-term EU movers, who integrate into the labour market of the host country on an extended or permanent basis, the presence of posted workers in the host Member State is strictly related to the execution of the service that they are performing on their employer's behalf.

In contrast to other discussed forms of (temporary) intra-EU labour-mobility, posted work is mainly **employer-driven**, as it falls under the freedom to provide services (**Article 56 TFEU**). Therefore, the main drivers of posting do not come from the worker itself, but primarily from the employer. There is a strong **link between the export and import of services and the use of intra-EU posting,** as the former may require the physical presence of workers. Consequently, the evolution of intra-EU posting may depend on the evolution of cross-border trade of services.

Different types of posting are categorised based on the different drivers of posting.[49] Intra-EU posting takes place for various reasons, both from a sending and receiving perspective. It takes place because of **labour cost differences**, but also because of **quantitative and qualitative labour shortages**. Therefore, not only the need for **flexibility** but also for **expertise** are important drivers of posting. This shows that **posting is a varied phenomenon with many different drivers**. To what extent the above reasons manifest themselves strongly depends on the sector concerned, but also within a specific sector different motives can arise depending on the subsector or profession as well as a shift of the main reasons over time (e.g., from cost-driven towards labour-shortage driven).

The provision of services by **intra-EU posting has several benefits compared to other types of intra-EU labour mobility**. For instance, there are concerns that permanent intra-EU labour mobility may lead to 'brain drain', labour shortages, and a worsening of the demographic outlook in the Member State of origin. Such costs may be reduced when persons are posted temporarily to another Member State. Finally, intra-EU posting can be considered well suited to absorb economic shocks. In such an event, people are temporary moving from high to low unemployment regions in the EU.

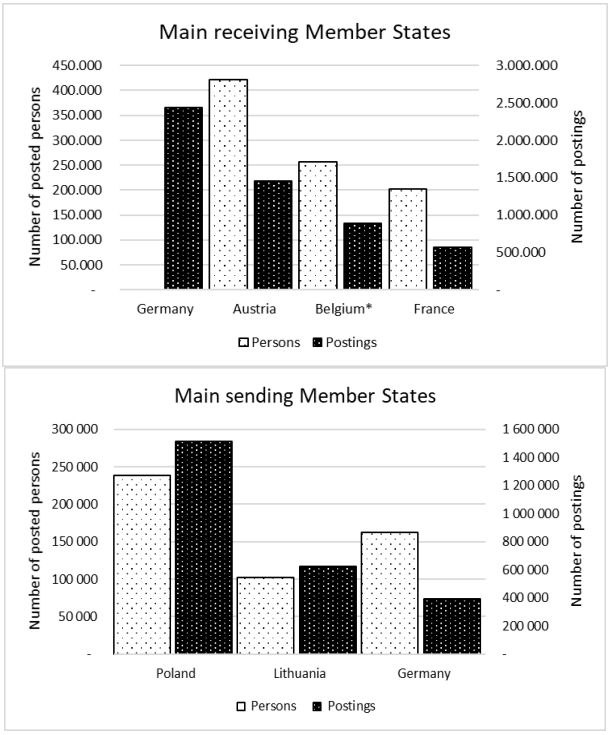
In 2021, based on data from the prior declaration tools in the receiving Member States, there were around **1.9 million *registered* posted workers and 5.9 million postings** in the EU.[50] This is a small increase from 2020, when 1.8 million posted workers and 5.5 million postings were registered. The **main receiving** Member States of posted workers are Germany, Austria, Belgium and France, while the main sending Member States of posted workers are Poland, Lithuania, and Germany (see the figure below). The main flow of postings goes from Poland to Germany.

[48] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Art. 2.

[49] See for instance Lens et al. 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants', International Migration, 2021. The article distinguishes between three types of posting based on different drivers of posting: 'competition posting', 'specialisation posting', and 'expert posting'.

[50] Figures presented in this section are based on F. De Wispelaere, L. De Smedt, & J. Pacolet, 'Posting of workers Collection of data from the prior declaration tools Reference year 2021', European Commission DG EMPL, 2023. Member States' policies on exempting posting undertakings from declaration may have an impact on the number of 'reported' posted workers in the prior declaration tools. In that respect, these data only show the number and characteristics of the 'reported' posted workers. Data from the Portable Document A1 is another relevant data source. See De Wispelaere, F., De Smedt, L., and Pacolet, J., Posting of workers Report on A1 Portable Document issued in 2021, Network Statistics FMSSFE, on behalf of the European Commission – DG EMPL, 2023. However, for various reasons, data from the two data sources are not fully comparable. Therefore, data from the PD A1 is not used in this section.

Figure 1. Main receiving and sending Member States of posted workers, based on number of posted persons and number of postings, 2021

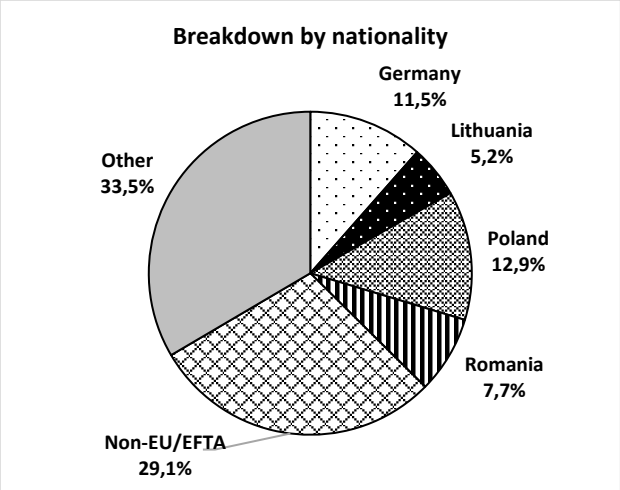


* BE: based on the number of declarations.

Source: F. De Wispelaere, L. De Smedt, & J. Pacolet, 'Posting of workers - Collection of data from the prior declaration tools Reference year 2021', European Commission DG EMPL, 2023.

The **posting of TCNs has been an increasing phenomenon** in recent years. The posting of TCNs does generally not happen directly from outside the EU, but through another Member State. This is possible seeing that TCNs who are legally residing and who hold a valid work permit in one Member State are free to be posted in any other Member State across the EU. **In several Member States, more than one out of five incoming posted workers are TCNs** (mainly in Austria, Belgium, Bulgaria, France, Luxembourg, the Netherlands and Poland). Employers of posted TCNs are mostly established in Poland, Lithuania and Slovenia. TCNs who are posted often come from a neighbouring country of these Member States or have strong historical ties with the country. They often have the Ukrainian, Belarusian and Bosnian nationality. Belgium, France and Austria, among others, are hosting an increasing number of posted TCNs.

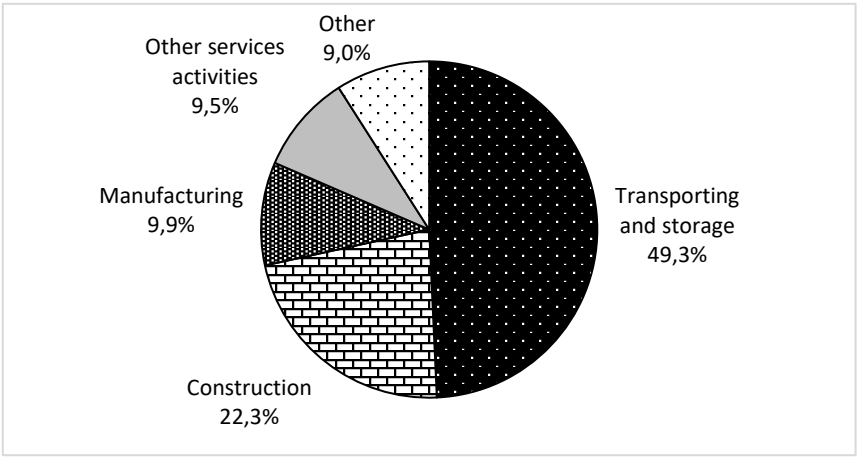
Figure 2. Number of postings in national declaration tools in the EU, by nationality, 2021



Source: De Wispelaere et al., 2023.

Road freight transport, construction, and manufacturing are the most popular sectors for posted workers to be employed in (see the figure below).[51] For instance, the construction sector is the most common sector for Belgium, France, Cyprus, Luxembourg, the Netherlands, and Finland, while the transport sector has the highest share in Germany and Austria. **Intra-EU posting mainly occurs in the context of contract of services.** In most reporting Member States, the importance of intra-group posting and temporary agency posting was (very) low. Only in France and in Italy about 20% of the postings related to temporary agency posting.

Figure 3. Number of postings in national declaration tools in the EU, by sector of activity, 2021



Source: De Wispelaere et al., 2023.

The share of intra-EU posting in the national workforce of the receiving Member State amounted to around 1%. Nevertheless, the impact of posting is more substantial in Luxembourg, Austria, Belgium, and Germany. In addition, the impact on the national workforce differs significantly between **sector of activity**. In the construction sector in

[51] Member States may have exempted certain activities and sectors from the requirement to report in the prior declaration tools. This reality has an impact on the sectoral breakdown. In that regard, certain activities and sectors will be overrepresented.

particular, the impact is relatively high in the case of several Member States, especially in Belgium.

3.3. Frontier workers

Cross-border mobility also includes **workers who live in one country and work in another**,[52] thus not moving their place of residence permanently, but permanently moving their place of work to another EU Member State. A specific type of cross border workers are frontier workers, who **return to their country of residence "as a rule daily, or at least once a week"**.[53] This group of workers is mainly concentrated within a number of border regions (e.g., the Alpine and Greater Region, the Upper Rhine region, the Meuse-Rhine region, the Tri-border region and the Centrope region).

Drivers for frontier workers are higher wages in the receiving country, job opportunities, and lower housing prices. Additionally, both fiscal and social security advantages can be pull factors for frontier workers.[54] Consequently, cross-border workers in general are said to fill labour gaps in many industrial regions, although their potential to ease labour market imbalances is not yet fully exploited.[55] Furthermore, a common language is an important facilitator for cross-border workers and might even outweigh a better economic context in the receiving country (although the opposite can occur as well).[56]

Although the definition of frontier worker is rather clear in legal terms, there is no general EU data on this type of worker.[57] In general, however, one can consider the number of cross-border workers to generate a broad estimation of the number of frontier workers. In 2021, there were around **1.6 million cross-border workers in the EU-27 and EFTA,** a number which picked up again after the COVID-19 pandemic in 2020.[58]

France (424 000), Germany (213 000) and Poland (190 000) are the largest countries of origin, and Germany (378 000), Switzerland (345 000) and Luxembourg (212 000) are the largest countries of destination. In general, cross-border workers make up a very **small proportion of the total workforce**, namely **less than 1%.** Nevertheless, in Switzerland (8%) and Luxembourg (44%), cross-border workers make up a significant part of the workforce. The most important flows of cross-border workers take place in the Alpine region (incl. bordering regions between France, Switzerland and Italy), the Upper-Rhine region (France, Switzerland and Italy) and the Greater Region (France, Belgium, Luxembourg and Germany). Together they account for almost 50% of all flows. Further, the data shows that the majority of cross-border workers in 2021 were male (70%) and a high share is employed in **manufacturing and construction** (46%).

[52] Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2021', 2023., p. 7.
[53] As defined in Article 1(f) in Regulation (EC) No 883/2004.
[54] Y. Jorens, P. Minderhoud, & J. De Coninck, 'Comparative Report – Frontier workers in the EU', European Commission DG EMPL, 2015.
[55] E. Fries-Tersch & V. Mabilia, '2015 Annual Report on Labour Mobility Final Report', European Commission DG EMPL, 2015, available at:
[56] E. Fries-Tersch, T. Tugran, L. Rossi, & H. Bradley, '2017 annual report on intra-EU labour mobility', European Commission DG EMPL, 2018.
[57] The EU Labour Force Survey data (EU-LFS) does not distinguish frontier workers from other types of workers, as the frequency of commuting, an essential part of the definition of frontier workers, is not measured.
[58] It concerns EU-27 or EFTA citizens living in one EU/EFTA country and working in another EU/EFTA country. For more information on cross-border work in the EU/EFTA see Hassan et al., 'Annual Report on Intra-EU Labour Mobility 2022', 2023.

3.4. Seasonal workers

Seasonal workers "**undertake temporary work abroad during seasonal increases in labour demand, without changing permanent residence".**[59] There are many different **drivers** for seasonal work, such as economic, social, environmental, policy-related, and psychological factors.[60] A clear pull factor is the demand for labour on specific occasions, for instance weather conditions, harvesting season, holidays, or cultural festivals.[61] In addition, higher wages and job opportunities are pull factors for seasonal workers.[62] On the other hand, environmental factors such as resource depletion and natural disasters are important push factors for seasonal mobility.

Once more, there is little statistical information about this group, especially when considering intra-EU seasonal workers.[63] A recent report on **intra-EU mobility of seasonal workers** provides us with some interesting insights.[64] Seasonal work often takes place using a fixed-term contract in the country of work (either concluded directly at the workplace or with a temporary work agency), and less frequently under the posting of workers. The report considers the two main sectors in which seasonal work takes place: **agriculture, and accommodation and food services**. It is estimated there are **between 650 000 and 850 000 intra-EU mobile seasonal workers** in the EU27, including posted intra-EU seasonal workers.[65] Out of eight key destination countries (AT, BE, CZ, DE, ES, FR, IT, and NL), the highest numbers of intra-EU seasonal workers are found in Germany, Italy, and France.[66] On the other hand, Romania, Poland, and Bulgaria are identified as the most prolific sending countries in the EU.

The travel restrictions imposed in order to stop the spread of the COVID-19 virus had serious effects on cross-border workers, and seasonal workers in particular. As a consequence, it became clear that seasonal workers play a crucial role in the food supply of the EU Member States,[67] seeing that especially in the agricultural sector, a severe shortage of foreign labour was noted.[68] In March 2020, the Commission published guidelines defining seasonal workers (and especially those in agriculture) as "critical workers" and encouraging Member States to implement fast cross-border procedures in order not to interrupt food chain supplies.[69]

3.5. Other mobile workers

Several forms of intra-EU labour mobility cannot be classified under above categories. For instance, workers who are sent temporarily to work in another Member State, but do not provide services there, are not considered as 'posted workers' under the PWD. This is the case, for example, of workers on business trips when no service is

[59] They are short-term cross-border workers as, by definition, the work they carry out is limited to less than one year.
[60] S. S. Panda & N. R. Mishra, 'Factors affecting temporary labour migration for seasonal work: a review', Management Research Review, 41(10), pp. 1176-1200, 2018.
[61] Fries-Tersch et al., 'Intra-EU Mobility of Seasonal Workers Trends and Challenges, European Commission', 2021.
[62] S. S. Panda & N. R. Mishra, 'Factors affecting temporary labour migration for seasonal work: a review', Management Research Review, 41(10), pp. 1176-1200, 2018.
[63] E. Fries-Tersch, L. Siöland, M. Jones, C. Mariotti, and M. Malecka, M. 'Intra-EU Mobility of Seasonal Workers Trends and Challenges. Final Report March 2021, European Commission, 2021.
[64] L. Siöland, E. Hassan, & M. Geraci, 'Report on seasonal workers and intra-EU labour mobility, European Commission, 2023.
[65] This estimation is based on calculations deriving from national data from eight key destination countries (AT, BE, CZ, DE, ES, FR, IT, NL) referring to different years between 2015 and 2020. Then data were extrapolated to the EU-27. It has to be noted that this estimate largely refers to the agricultural sector, since national data for accommodation and food services could only be estimated for AT, DE, and NL. See Fries-Tersch et al., 'Intra-EU Mobility of Seasonal Workers Trends and Challenges. Final Report March 2021, for the full methodology.
[66] Fries-Tersch et al., 'Intra-EU Mobility of Seasonal Workers Trends and Challenges, European Commission', 2021.
[67] Fries-Tersch et al., 'Annual Report on Intra-EU Labour Mobility 2021', 2022.
[68] M. L. Augère-Granier, 'Migrant seasonal workers in the European agricultural sector', European Parliament Briefing.
[69] https://ec.europa.eu/info/news/coronavirus-seasonal-workers-included-new-guidelines-ensure-free-movement-critical-workers-2020-marzo-30_en

provided. This could be attending conferences, meetings, fairs, following training, etc. These workers are not covered by the Posting of Workers Directive.

Therefore, these types of mobile persons do not fall under one of the categories previously discussed in this report (EU movers, posted workers, frontier workers, or seasonal workers). Consequently, this group of persons is considered as 'other mobile workers'. Tourism statistics can provide a sense of the size of the phenomenon (a proxy for labour mobility) by showing the number of arrivals of persons travelling for business or professional purposes.[70] Eurostat data reports the main purpose of the trip using four categories: personal (leisure, recreation, holidays), personal (visiting friends and relatives), other personal (e.g., pilgrimage, health treatment), and business/professional.[71] The category of 'business/professional' can include a wide range of trips. In 2021, around 9.7 million trips for professions reasons were carried out from EU-27 Member States to other EU-27 Member States, excluding withing the same country. Most of these trips for professional reasons are from/go to Germany and France.

Finally, in 2021, roughly 1.35 million Portable Documents A1 were issued to persons active in two or more Member States, with Poland as the main issuing Member State.[72] Overall, about 42.2% of the forms were issued for persons working in road freight transport.

3.6. Summary overview of different forms of cross-border intra-EU labour mobility

As shown in the sections above, many different forms of (temporary) cross-border intra-EU labour mobility exist. Several of these forms overlap and lack a standardised definition. Therefore, the quantification of this type of labour mobility is severely hampered, not least because EU-wide data is also often fragmented and partial. In sum, **mapping (temporary) cross-border intra-EU labour mobility remains a difficult exercise**.

In the table below three main variables for each type of temporary intra-EU labour mobility are identified, in addition to the quantification. First, the main sending and receiving Member States are identified. Second, the main flows of temporary cross-border workers are determined. Finally, the main sectors in which these workers are active are included. The table below provides a concise overview of the most important findings for each type of (temporary) cross-border mobility.

While there are around 10 million EU movers and 1.6 million cross-border workers, there are also around 9.7 million trips for professional reasons performed, 1.9 million posted workers, and a minimum of 650 000 seasonal workers. This further illustrates **the importance and diversity of temporary cross-border intra-EU labour mobility,** particularly in light of persistent labour shortages in many Member States. The main sending and receiving Member States differ per type of labour mobility. Nevertheless, Poland is a frequently recurring sending Member State, while Germany is a common receiving Member State. Many flows go between neighbouring Member States, which is not surprising.

Finally, the **most prevalent sectors are varied** and sometimes hard to pin down. Many of the sectors in which temporary cross-border labour mobility take place are labour-intensive, such as construction, transport, manufacturing (e.g., pipefitting), and agriculture.

[70] UNECE 2011, The impact of globalization on national accounts, United Nations, New York and Geneva.
[71] Eurostat [tour_dem_ttw], see also https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0692&from=EN.
[72] F. De Wispelaere, De Smedt, L., and Pacolet, J., Posting of workers Report on A1 Portable Document issued in 2021, Network Statistics FMSSFE, on behalf of the European Commission – DG EMPL, 2023. Data based on the number of PDs A1 issued according to Article 13 of Regulation 883/2004.

Table 1. Overview of (temporary) intra-EU cross-border labour mobility

Type of labour mobility	Number	Important sending Member States (of residence)	Important receiving Member States (of work)	Important flows	Important sectors and countries
EU movers	10.0 million (2021)	Absolute figures: RO, IT, BG, DE and PT	Absolute figures: DE, ES, IT, FR, BE and AT Relative figures: AT, LU, CY and MT	RO toIT PL to DE RO to DE RO to ES	• Manufacturing • Construction • Accommodation and food services
Posted workers*	1.9 million posted workers (2021) 5.9 million postings (2021)	Absolute figures: PL, DE and LT	Absolute figures: DE, AT, BE and FR, Relative figures: LU, AT, BE and DE	PL to DE	• Road freight transport • Construction • Manufacturing
** Of which, posted TCNs*		*Posted by PL, LT and SI Nationality: Ukraine (UA), Belarus (BY) and Bosnia and Herzegovina (BiH)*	*Relative figures: AT, FR and BE*	*UA to PL to AT* *UA to PL to BE* *BY to LT to AT* *BiH to SI to AT*	• Road freight transport • Construction • Agriculture
Frontier workers / Cross-border workers	1.6 million (2021)	Absolute figures: FR, PL and DE	Absolute figures: DE, CH and LU Relative figures: LU	FR to CH PL to DE FR to LU	• Construction • Manufacturing
Seasonal workers	650 000 – 850 000 (2020)	Absolute figures: RO, PL and BG	Absolute figures: DE, IT and FR		• Agriculture • Accommodation and food services
Other mobile workers	9.7 million trips for professional reasons (2021)	Absolute figures: DE and FR	DE, FR and BE		• Business trips

Source: Authors' compilation, 2023

4. Overview of EU and national legal provisions and enforcement mechanisms applicable to cross-border workers in posting and non-posting situations

Summary of key findings

- The Member States have implemented a range of legislative measures, non-legislative measures and enforcement mechanisms to reduce the risk of poor working conditions for posted and other workers.

Legislative measures

- The conditions of workers who are posted by temporary work agencies
    - Temporary work agencies must guarantee posted temporary agency workers the terms and conditions of employment applicable to temporary agency workers hired out by temporary work agencies established in that Member State (principle of equal treatment). Member States may derogate from this through collective bargaining.
    - Generally, no differences exist, in law, in the protection between posted workers employed by temporary work agencies and local workers employed by temporary work agencies in the Member States.
    - Registration and licensing obligations are in place to increase traceability and accountability of temporary work agencies. Additional safeguards for temporary agency workers, such as specific rules for subcontracting chains involving temporary work agencies, are in place in some Member States.
- Subcontracting chains and liability provisions
    - Member States use various mechanisms to regulate subcontracting chains, including: (1) imposing a ceiling on the number of subcontracting levels within a subcontracting chain, and (2) liability mechanisms, such as direct subcontracting liability within the construction sector, joint and several liability or subsidiary liability, full chain liability, and direct subcontracting liability in other sectors.
    - The use of due diligence mechanisms has also been observed as potentially providing more protection for workers.
    - Some Member States (e.g., FI, DK) have not implemented direct subcontracting liability, however have implemented alternative measures.
- Role and applicability of collective agreements in these situations
    - Collective agreements can be applied to posted workers and other temporary cross-border mobile workers, depending on the conditions of the collective agreement and the legal tradition and social structure of the Member States.
    - In practice, most Member States apply collective agreements to these workers, however they are often applied at different levels (e.g., universally or generally applicable collective agreements, sectoral collective agreements).

  - Collective agreements can often offer more protections to posted workers than those entailed in the national legislation.

- Systematic involvement of TCNs
  - TCNs are more likely to find themselves in precarious working and living conditions, in comparison to EU posted workers.
  - TCNs can often be seasonal workers and some Member States have measures in place for their protection.

Non-legislative measures

- Member States have implemented non-legislative measures such as the single official national website, have compiled guidelines and information materials, and often provide legal advice to posted workers.
- Cooperation in non-legislative form takes place between Member States (e.g., through the Internal Market Information System (IMI), bilateral agreements, projects), within the Member State (e.g., cooperation between national authorities, national authorities and social partners), and other initiatives at Member State level.
- How social partners are involved:
  - Social partners are involved in various ways: as actors of enforcement, directly or indirectly enforcing posting provisions by, for example, representing posted workers in proceedings, or receiving complaints from posted workers or employees.
  - Social partners are also key in cooperating with national authorities as well as other actors inside or outside of the Member State.

Enforcement mechanisms

- Key enforcement challenges:
  - Lack of respect for terms and conditions of employment, social dumping, illegal work, labour exploitation, unfair competition, omission/falsification of mandatory declarations.
- Instances of undertakings working outside the law and avoiding detection through (1) the use of unlawful/bogus postings, (2) the use of letterbox companies and (3) non-compliance with obligations imposed by national law. As a consequence, the affected workers receive insufficient or no protection during their posting and are not able to benefit from the full extension of their rights. At the same time, enforcement bodies struggle with capacity and competence issues, which affect detection of problematic situations.

Section 4 provides an overview of the provisions (legislative and non-legislative) at EU and national levels, as well as enforcement mechanisms applicable to temporary cross-border mobile workers in posting and non-posting situations.

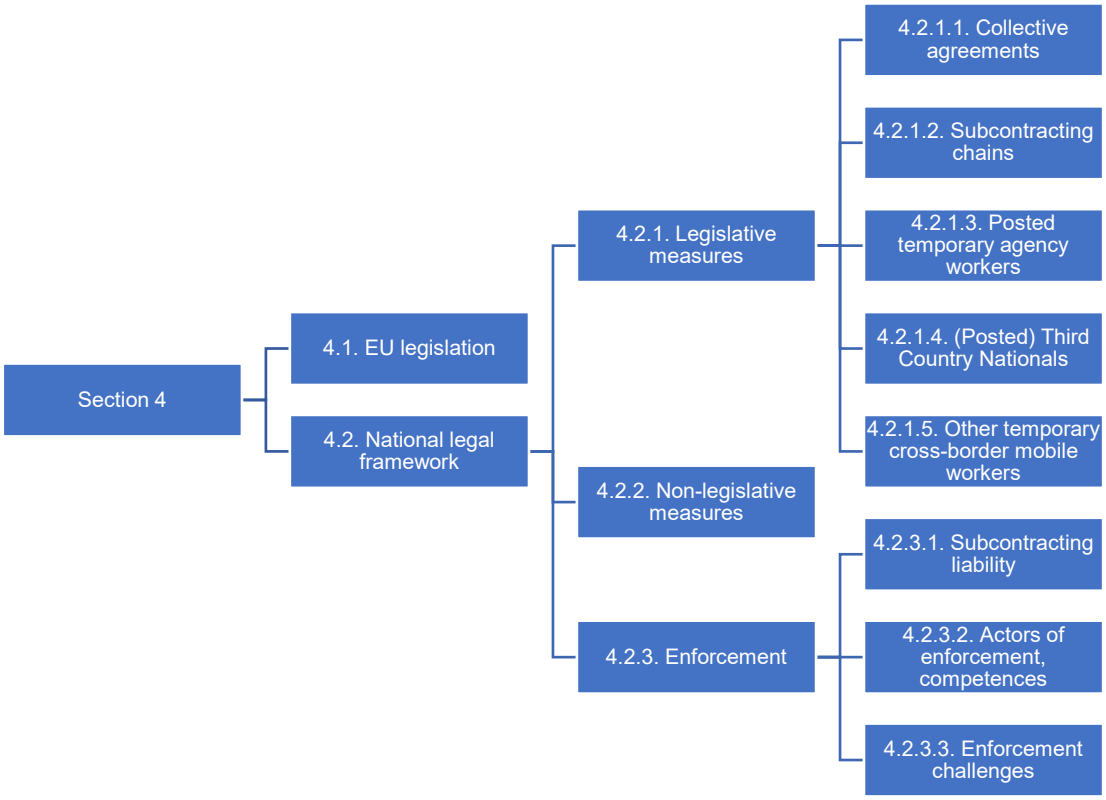
Within this Section, sub-section 4.1 identifies and describes the relevant legal framework at EU level. Sub-section 4.2 considers the national legal frameworks, non-legislative measures and enforcement mechanisms across the 27 EU Member States, which aim to reduce the risk of poor working conditions for posted workers (under Article 56 TFEU) and other temporary cross-border mobile workers (under Article 45 TFEU).

According to the established methodology (Section 2.3), an in-depth analysis has been conducted in 9 main sending (Poland, Spain, Germany and Slovenia) and receiving countries

(Germany, France, Belgium, the Netherlands, Luxemburg and Denmark). These findings are presented in boxes (indicated with) and incorporated throughout Section 4. The in-depth analysis assesses the reasons and arrangements put into place to ensure the protection of workers, and focuses particularly on the role of collective agreements, posted workers in subcontracting chains, posted temporary agency workers and TCNs.

Section 4 follows the following structure:

Figure 4. Overview of Section 4



Through this overview, relevant key sectors and typically problematic situations are identified, which are subsequently analysed in Sections 5 and 6. Annex 1 complements the information analysed in Section 5 by summarising key examples of case law at EU and national level, which are relevant for the protection of cross-border intra-EU workers.

4.1. EU legislation

The cornerstones of the protection of posted workers at EU level are two important pieces of legislation: the PWD and the Enforcement Directive. These Directives form the foundations of the rights and protections attributed to posted workers at EU level and build on the freedom to provide services.[73]

The **PWD** guarantees the rights and working conditions of posted employees, by defining a set of mandatory rules regarding the terms and conditions of employment to be applied to posted workers. These establish that even though posted workers are still employed by the sending company, and subject to the law of the sending Member State, they are entitled to a set of rights in force in the host Member State. The 2018 amended PWD essentially requires

[73] Article 56, Treaty on the Functioning of the European Union.

the application of all the mandatory elements of remuneration[74] and the rules of the receiving Member State on workers' accommodation and allowances or reimbursement of expenses to posted workers, as well as the application of an extended set of terms and conditions of employment of the receiving Member State to long-term postings. The **Enforcement Directive** is an essential part of the posting of workers regulatory framework as it establishes the practical implementation of the rules provided in the PWD. The Enforcement Directive aims at ensuring compliance with the PWD and guaranteeing respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services.

The PWD and the Enforcement Directive are not the only pieces of legislation aimed at ensuring the protection of posted workers. These are accompanied by other relevant legal measures, for example **Directive 2008/104/EC on temporary agency work**[75] which guarantees for those working through temporary work agencies equal pay and conditions with employees hired directly by the user undertaking to do the same work. The PWD extends these conditions to posted temporary agency workers as well. Another relevant piece of legislation is the **Seasonal Workers Directive**[76] which establishes a separate protection regime for TCN seasonal workers and regulates the movement of TCNs who perform seasonal work in the EU Member States.[77] Other legislation exists at EU level which concerns, for example, transparent and predictable working conditions,[78] coordination of social security systems,[79] and minimum standards on sanctions and measures against employers of illegally staying third country nationals,[80] which Member States implement at national level and apply to temporary cross-border mobile workers in non-posting situations. Whilst this legislation goes beyond the scope of this study, it belongs to the acquis which supports the protection of workers and their working conditions.

Moreover, the **jurisprudence of the Court of Justice of the European Union** (hereafter CJEU) has been essential in developing the principles enshrined in the legislation and providing useful clarifications on the application of the rules on posting. For instance, in the *Sähköalojen ammattiliitto ry* case (C-396/13), the CJEU ruled that categorising workers in different pay groups which are universally binding and transparent in a collective agreement should also be applied to posted workers. For a more detailed account of the relevant EU legal acts and key examples of case law, Annex 1 may be consulted.

4.2. National legislative provisions applicable to posted workers and other temporary cross-border mobile workers

Section 4.2 explores the collective agreements and national legislative provisions applicable to posted workers, specifically posted workers in subcontracting chains and posted temporary agency workers, as well as those legal provisions applicable to other temporary cross-border

[74] Instead of just "minimum rates of pay".
[75] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, available at: http://data.europa.eu/eli/dir/2008/104/oj.
[76] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036; (hereinafter: Seasonal Workers Directive). Please note that the legal basis for this Directive is Article 45 TFEU (freedom to provide services).
[77] It should be noted that, according to Recitals 54 and 55, Denmark and Ireland do not participate in the adoption process of the Seasonal Workers Directive, hence its binding force and application is not relevant to those two countries.
[78] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, available at: http://data.europa.eu/eli/dir/2019/1152/oj.
[79] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, available at: http://data.europa.eu/eli/reg/2004/883/2014-01-01.
[80] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, available at: http://data.europa.eu/eli/dir/2009/52/oj.

mobile workers. The national legal framework applicable to these workers is extremely important, as it sets the basis for the protection and rights that these workers are entitled to at the national level. The actions that Member States have taken, at legislative level, to reduce the risks of poor working conditions for these types of workers are outlined in this section.

Analysis conducted on the 9 in-depth countries (BE, DE, DK, ES, FR, LU, NL, SI, PL) zooms in on the key dimensions relevant for posted workers and other temporary cross-border mobile workers, namely collective agreements, subcontracting chains, posted temporary agency work and specific provisions for posted TCNs. The in-depth insights consider receiving structures and sending structures, where the availability of data allows. Poland, Spain, Germany and Slovenia have high numbers of outgoing postings, whereas Germany, France, Belgium, the Netherlands, Luxembourg and Denmark are the Member States receiving most posted workers. These 9 countries are also key sending or receiving countries of other temporary cross-border workers (e.g., seasonal workers, live-in carers).

4.2.1. Collective agreements

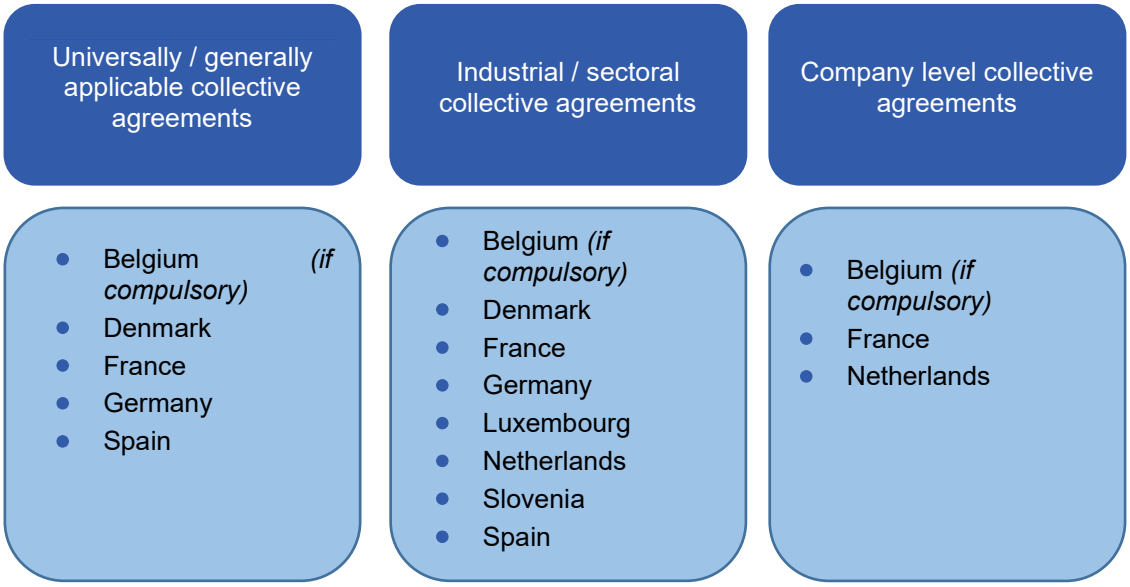
This sub-section outlines the applicability of collective agreements to temporary cross-border mobile workers in posting and non-posting situations and the implications therein. Collective agreements, together with the national legislative measures, comprise the landscape of rights and protections which, if applicable, posted and non-posted workers can avail themselves of.

Initially, it is paramount to define collective agreements: collective agreements are the result of collective bargaining, which entails the negotiations between workers' organisations (e.g., trade unions) and employers or their organisations. Collective agreements regulate the **content of the individual employment contracts** and the **relationship between employers and workers**, and may be concluded at different levels, such as the **regional level, sectoral level, or company level**.

The EU legal framework related to posted workers[81] establishes that generally, it is possible to apply collective agreements to posted workers where those collective agreements are universally applicable,[82] or where an alternative system[83] is in place.[84] Member States can use one or both of these possibilities to apply the standards and the conditions set in said collective agreements to posted workers.

[81] Article 3(8) PWD, as amended.
[82] A universally applicable collective agreement is a collective agreement which must be observed by all undertakings in the geographical area and in the profession or industry concerned.
[83] Generally applicable collective agreements or arbitration awards applicable to all similar undertakings in the geographical area and in the profession / industry concerned; and collective agreements concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.
[84] As per Article 3(8) of the PWD.

Figure 5. Level at which collective agreements are applicable to posted workers



Nevertheless, once workers are posted from the sending country to the receiving country, **posted workers and other temporary cross-border mobile workers will be covered by the collective agreements of the receiving state, should the conditions be applicable**.

Box 1. Collective agreements in the 9 Member States

All Member States considered in the in-depth analysis apply collective agreements to posted workers and other temporary cross-border mobile workers, except for Poland, which does not apply collective agreements.[85] By contrast, in the rest of the selected Member States (BE, DE, DK, ES, FR, LU, NL, SI), collective agreements are applicable to posted workers and other temporary cross border mobile workers, however under different circumstances in each Member State. Given that legal traditions and social structures differ between Member States, whether and the extent to which collective agreements protect posted workers and other temporary cross-border mobile workers varies across the Member States.

In Spain, for instance, collective agreements are applicable *erga omnes* and therefore apply to posted workers, who may benefit from the terms safeguarded under them, if employers apply them as intended. Collective agreements exist at company, sectoral and territorial[86] level in Spain. The 2021 Spanish Labour Reform[87] avoids the priority application of company collective agreements over sectoral collective agreements in remuneration matters. This is beneficial for posted workers and other temporary cross-border mobile workers, as sectoral agreements offer better protection.

In Slovenia, collective agreements are applicable to posted workers and other temporary cross-border mobile workers in specific sectors, such as construction or road passenger transport. Workers in those sectors may benefit from the protections offered by the collective agreements. In Germany, collective agreements that have been declared

[85] Additionally, in Poland, social partners are not involved in drafting legislation either.
[86] This refers to the state, regional or provincial level in Spain.
[87] Real Decreto-ley 32/2021, de 28 de diciembre, de medidas urgentes para la reforma laboral, la garantía de la estabilidad en el empleo y la transformación del mercado de trabajo (Royal Decree- Law 32/2021, of 28 December, on urgent measures for labor reform, the guarantee of employment stability and the transformation of the labor market), available at: https://www.boe.es/eli/es/rdl/2021/12/28/32/con

generally binding throughout Germany are applicable to posted workers. Nevertheless, regional-level collective agreements do not apply to posted workers, if the posting lasts less than 12 months. [88] It should be noted that on average postings in the EU last less than 12 months,[89] and therefore, in practice, the regional collective agreements only apply in those limited cases where the posting is extended beyond 12 months.

In France, collective agreements are largely applicable and apply to posted workers at regional and sectoral level, depending on the activity and choices of social partners. A similar situation exists in Belgium, where collective agreements that have been made compulsory by Royal Decree must be applied to posted workers. On the contrary, in Luxembourg, collective agreements at the sectoral level apply to posted workers, whereas collective agreements at company level do not apply to them.[90] Nevertheless, sectoral agreements in Luxembourg aim to limit potential competition on wages from new entrants into the specific sector,[91] and would therefore offer protection to posted workers and other temporary cross-border workers as regards remuneration. It should, however, be noted that there are many more company level than sectoral collective agreements in place, therefore posted and other temporary cross-border mobile workers would only benefit from collective agreements if they are employed in specific sectors covered by them.

The situation in the Netherlands is more complicated, as 700 collective agreements are in place, concluded at sectoral or company level. Collective agreements in the Netherlands are either approved by social partners ("publicly approved collective agreements" – "ABB") or related to specific 'branches' that do not necessarily need to be publicly approved.[92] Individual employment contracts must refer to the applicable collective agreement in order to be enforced, as this allows enforcers to decide which collective agreements apply in a certain situation. Whilst this may imply that at times posted workers can be covered by collective agreements which grant them more favourable terms, it can often be difficult to determine which collective agreement is applicable.

Lastly, the case of Denmark differs from the rest of the Member States, as the Danish labour market model is built on a division of labour between the state and social partners. The latter have a large influence over employment policy and wage setting, as well as working conditions,[93] and engage in collective bargaining every 3 years. In the Danish Model, wages and working hours are primarily regulated by collective agreements or individual employment contracts, as there is no statutory minimum wage. Nevertheless, neither Danish nor foreign undertakings are legally required to comply with collective agreements or to conclude one. Foreign undertakings can be contacted by trade unions to enter into an agreement for their posted workers or can join an employers' organisation that can negotiate on their behalf. In effect, the state refrains from intervening in the regulation of pay and working conditions as far as possible.

[88] Also 18 months, should be posting be extended.
[89] J. Pacolet & F. De Wispelaere, 'Posting of workers Report on A1 portable documents issued in 2014',European Commission DG EMPL, available at: https://hiva.kuleuven.be/nl/nieuws/docs/posting-of-workers-2014.pdf. See also: https://www.mobilelabour.eu/wp-content/uploads/2020/02/PD-A1-report-Reference-year-2018.pdf.
[90] Article L. 141-1 refers to L. 010-1, Labour Code.
[91] Luxembourg: an instance of eroding stability? By Adrien Thomas, Vassil Kirov and Patrick Thill, in Collective bargaining in Europe: towards an endgame, edited by Torsten Müller, Kurt Vandaele and Jeremy Waddington, ETUI, 2019.
[92] *FNV v. Van den Bosch Transports BV* (CJEU 1 December 2020, case C-815/18): CJEU held, amongst other things, that a foreign subcontractor is bound to comply with a collective labour agreement that is not declared universally binding.
[93] See also: https://workplacedenmark.dk/working-conditions/the-danish-labour-market/.

4.2.2. Posted workers in subcontracting chains

This section presents the legislative framework Member States have in place to protect posted workers in subcontracting chains. The protection of posted workers is particularly challenging in subcontracting chains which are widely used in labour intensive industries.[94]

In terms of **national legal frameworks**, Member States attribute the same **protection to posted workers in subcontracting chains as to local workers in subcontracting chains,** with the exception of those Member States where the applicability of collective agreements may change this (e.g., where only generally binding collective agreements apply to posted workers where posting lasts less than 12(18) months, whereas the regional generally binding collective agreements would apply to posted workers only if the posting lasts longer than 12(18) months).[95] Similarly, **national legal frameworks** of the Member States attribute the same **protection to TCNs in subcontracting chains and local workers in subcontracting chains** with the exception of those Member States where the applicability of collective agreements may affect this or where different levels of protection are prescribed in terms of worker's accommodation.[96] Usually, the applicability of collective agreements results in better conditions for the workers covered by them.[97]

In practice however, compliance with these rules in the field of posting and effective protection of posted workers' rights (e.g., terms and conditions of employment) in subcontracting chains is rendered difficult to achieve.[98] Particularly the intrinsic nature of subcontracting chains characterised by often complex and lengthy tiers affect the working conditions of posted workers, including the aggravation of **social dumping**.[99] Thus, Member States have adopted **mitigating measures** aiming at tackling the risk of non-compliance and ensuring an effective protection of posted workers in subcontracting chains.

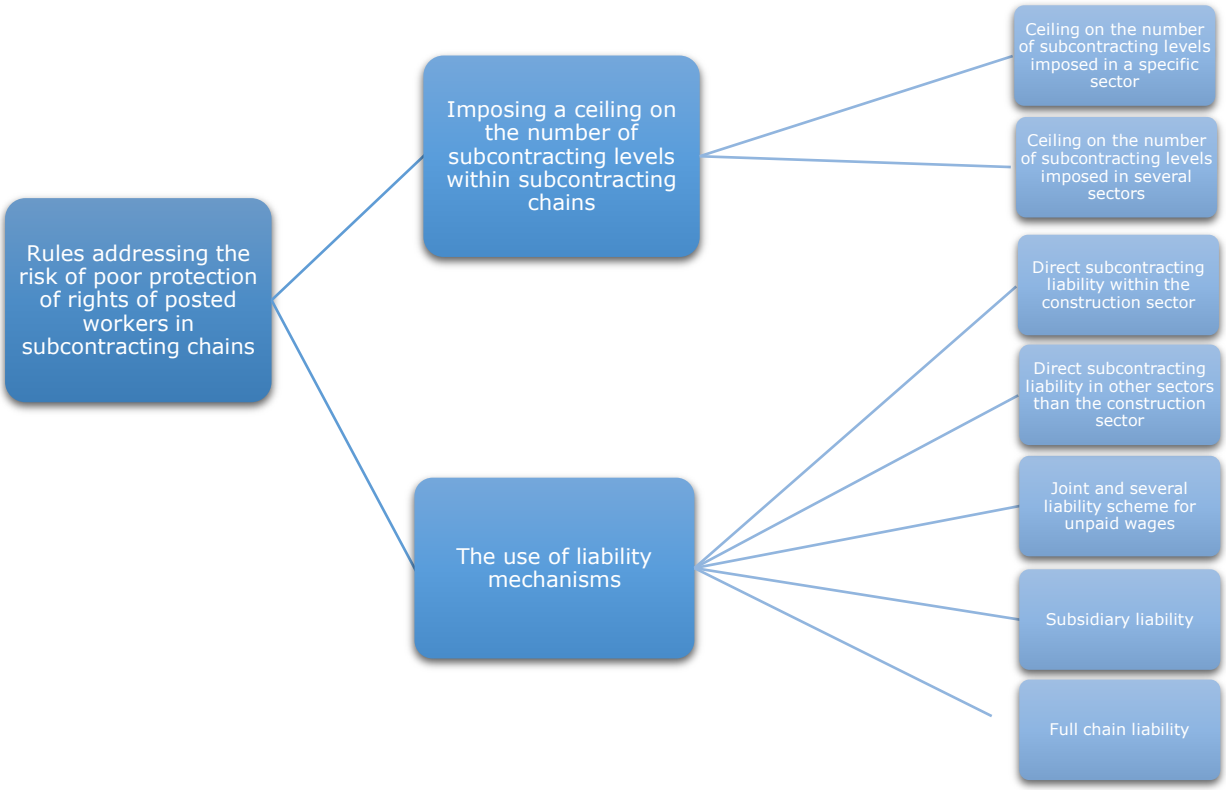
Two key types of rules have been implemented in the Member States **to address the risk of poor protection of the rights of posted workers in subcontracting chains**:

1. **A ceiling on the number of subcontracting levels within subcontracting chains** which can be further subdivided into 2 approaches:
    a. Ceiling on the number of subcontracting levels imposed in a specific sector
    b. Ceiling on the number of subcontracting levels imposed in several sectors

2. **The use of liability mechanisms** which can be further subdivided into 5 forms:
    a. Direct subcontracting liability within the construction sector
    b. Direct subcontracting liability in other sectors than the construction sector
    c. Joint and several liability scheme for unpaid wages
    d. Subsidiary liability
    e. Full chain liability

[94] Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, European Parliament, Liability in Subcontracting chains: national rules and the need for a European Framework', PE 596.798, July 2017, p. 20. Please note that some Member States have prohibited subcontracting chains in specific sectors, for example, for contracts linked to defence and security (FR) and the meat industry (DE).
[95] This information stems from national desk research across the 27 EU Member States.
[96] *Ibid*.
[97] For a more detailed explanation, please consult Section 4.2.1 "Collective agreements".
[98] Recital (36), Enforcement Directive.
[99] Directorate General for Internal Policies, Policy Department for Citizens' Rights and Constitutional Affairs, 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework', available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf.

Figure 6. Overview of the rules addressing the risk of poor protection of the rights of posted workers in subcontracting chains



4.2.2.1. Ceiling on the number of subcontracting levels within subcontracting chains

Applying a **ceiling on the number of subcontracting levels within subcontracting chains** leads to avoid long subcontracting chains which tend to add opacity to whole chains. However, most Member States do not prescribe a maximum ceiling for the levels in subcontracting chains. Desk research has shown that 4 Member States (BE, ES, FR, IT) prescribe a maximum number of subcontracting tiers.

Box 2. Ceiling on the number of subcontracting levels within subcontracting chains

Spain has adopted legislation prescribing a maximum of 4 subcontracting tiers in the construction sector.

Belgium, France and Italy prescribe a maximum number of subcontracting tiers in relation to public contracts. More specifically, in Belgium, in the case of public procurement in fraud-sensitive sectors, a maximum of 2 or 3 levels[100] are prescribed.

This approach has not been followed by Poland, Germany, Slovenia, Luxembourg, Denmark, and the Netherlands, which do not prescribe any limitation to the subcontracting levels regardless the sector.

[100] Whether it is 2 or 3 levels depends on the type of assignment.

4.2.2.2. The use of liability mechanisms

The **use of liability**[101] **mechanisms** imposed on different actors within subcontracting chains enhances the protection of posted workers' rights as well. There are different forms of liability engaging to different degrees the liability of actors within subcontracting chains.

A majority of Member States have introduced subcontracting liability which allows posted workers to hold the contractor of which the employer is a **direct subcontractor** liable for respecting the terms and conditions of employment applicable to posted workers.[102] In line with EU law, and in particular Article 12(2) of the Enforcement Directive, **most of the EU Member States have introduced subcontracting liability within the construction sector**, except for Denmark and Finland.

The Enforcement Directive allows Member States to take "other appropriate enforcement measures" aimed at ensuring effective and proportionate sanctions against the contractor, in a direct subcontracting relationship.[103] Based on this, Finland has adopted an Act[104] which applies to all sectors where subcontracting or temporary work is utilised. It requires that before entering into an agreement, the contractor must ensure that its contracting partners comply with their statutory obligations, which is verified by providing certain required documents, that must be retained for a minimum period of 2 years after the work has ended. Each contractor is responsible for obtaining the reports from their own contracting partners. The contractor has the obligation of requesting the reports and the contracting partner must deliver them to the contractor. Ultimately, failing to comply with the Act can result in the imposition of a negligence fee.

Box 3. The Labour Market Fund for Posted Workers in Denmark

Whereas Belgium, France, Germany, Luxembourg, the Netherlands, Poland, Slovenia, and Spain have introduced a direct subcontracting liability in the construction sector, Denmark has not followed this approach.

Denmark has established a special fund, the Danish Labour Market Fund for Posted Workers[105] which is not sector specific and is funded by contributions from all employers providing services in Denmark, both Danish and foreign. Posted workers who do not receive their remuneration can get compensation from the Fund.

However, they have to fulfil some conditions before being able to receive remuneration from the Fund: they have to be posted from an EU/EEA country, they need to be covered by a Danish collective agreement, they need to have their wage claim upheld in the industrial dispute settlement system, and they need to have unsuccessfully attempted to receive the wage from the employer.

If workers manage to obtain the missing wage paid from the Fund, the employer, as well as the Danish service recipient, are imposed to pay an extraordinary contribution to the

[101] Liability concerns the obligation on a contracting party who fails to fulfil all or part of the obligations under the contract to make good the damage cause to the other party.
[102] In light of Article 3 of the PWD, as amended.
[103] As per Article 12(6) of the Enforcement Directive.
[104] Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä (Act on the Contractor's Obligations and Liability when Work is Contracted Out) 1233/2006, adopted on 22 December 2006 as amended, available at https://finlex.fi/fi/laki/ajantasa/2006/20061233.
[105] The Danish Fund for Posted Workers, available at: https://workplacedenmark.dk/working-conditions/danish-labour-market-fund/; Lov om Arbejdsmarkedets Fond for Udstationerede (The Act on the Labour Market Fund for Posted Workers), available at: https://www.retsinformation.dk/eli/lta/2016/613.

Fund. Foreign employers in violation of the provision of wages are included in a public list, on which they will remain for 36 months after the date of the payment of wages by the Fund.

Additionally, **some Member States have expanded the subcontracting liability to other sectors** than the construction sector. Around half of the Member States opted for applying the provisions on subcontracting liability to all sectors i.e., they adopted a sector neutral subcontracting liability (AT, BE, BG, CZ, DE, FR, HU, IT, LU, MT, NL, PT, SK).



Box 4. Expansion of the subcontracting liability to other sectors

Belgium, France, Luxembourg and the Netherlands adopt a sector neutral subcontracting liability.

Germany adopts a hybrid approach in that regard. Whereas there is a minimum wage liability in all sectors, a general contractor liability for the payment of social security contributions is foreseen in the construction industry, meat industry and parcel services.

Poland, Slovenia, and Spain limit subcontracting liability to the construction sector.

Furthermore, **a majority of Member States** (AT, BE, BG, CY, DE, EE, EL, ES, FR, HR, HU, IE, IT, LU, MT, NL, PL, PT, RO, SE, SK) have put in place a **joint and several liability scheme** for unpaid wages. In that case, when the employer does not pay the worker's wage, the latter can obtain payment of their wage from all the parties that are jointly and severally liable. The Croatian provision, for example, illustrates the joint and several liability scheme: both the contractor and the employer are liable for unpaid compensation for work performed, to which the posted worker is entitled.[106] Hence, the mechanism of joint and several liability holds the employer (posting workers to another country), as well as the contractor, legally responsible towards the posted worker.

An alternative form of liability, the **subsidiary liability**, where the obligation to pay the worker the unpaid remuneration falls on solely the contractor, is included in the legislation of 4 Member States (CZ, LT, LV, SI). With the exception of Czechia, the subsidiary liability in these Member States is limited to the construction sector.



Box 5. Examples of joint and several liability schemes for unpaid wages in EU Member States

In Spain, both contractors and subcontractors are jointly and severally liable and are obliged to monitor compliance with the rules on the protection of workers.

In Germany, contractors and subcontractors are jointly and severally liable for the statutory minimum wage or the minimum wage pursuant to applicable collective agreements.

In the Netherlands, with the implementation of the Bogus Schemes Act in 2015, employees can hold not only the direct employer but all the employer's clients liable for the payment of the wages.

[106] Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni od 1. siječnja 2021. godine (Act on Posting Workers in the Republic of Croatia and cross-border implementation of fines of 1 January 2021), Official Journal No. 128/20, available at https://narodne-novine.nn.hr/clanci/sluzbeni/2020_11_128_2438.html (last accessed on 19 May 2022).

In Belgium, two systems of subcontracting liability coexist: (i) a general system of joint and several liability, and (ii) a specific system exclusively concerning the joint and several liability of the direct contractor in the construction sector.

Slovenia has opted for an alternative liability called subsidiary liability which concerns unpaid wages in the construction sector. According to the subsidiary liability, the user undertaking is subsidiary liable for the payment of wages and other employment benefits to the worker in respect of the period during which the worker performed work for the user. Thus, the liability falls on the sole contractor. In that sense, subsidiary liability is less protective of the posted worker's rights in terms of unpaid wages than the joint and several liability scheme.

Moreover, several Member States have chosen to **expand the scope of the subcontracting liability.** As such, **some Member States** (AT, BE, BG, ES, FR, IT, LT, LU, NL, PL), **have introduced a full chain liability,** i.e., a subcontracting liability that is not limited to one link up the chain.[107]

Box 6. Full versus limited chain liability

Whereas Slovenia limits the subcontracting liability to one link up the chain, Spain, Poland, Luxembourg, Germany, France, and the Netherlands have opted to adopt a full chain subcontracting liability i.e., each of the actors in the chain can be held liable, which extends the posted worker's remedies.[108] However, among those countries opting for a full chain liability, the conditions of its applicability differ. Polish legislation limits it to the construction sector, whereas in Spain, Luxembourg, and France, the full chain liability is foreseen for all the sectors which provides maximum protection to posted workers.

Finally, **liability in subcontracting chains may be limited via provisions on due diligence**, setting out the notion that a contractor will not be liable if due diligence obligations are undertaken. Due diligence obligations potentially add a layer of protection to posted workers, as they require undertakings to comply with certain administrative requirements and control measures in relation to posting of workers,[109] in order to be able to avail of the due diligence defence. Nevertheless, is should be noted that the level of protection to posted workers would possibly vary, as the notion of "due diligence" is defined at national level and is not harmonised throughout the EU.[110]

12 Member States (AT, BG, CY, CZ, EE, ES, FR, HR, HU, IE, NL, SE) have implemented a clause on due diligence, whilst 1 Member State (IT) has limited the ability to avail of the due diligence exemption within the road transport sector only. 12 Member States (BE, DE, EL, LT, LU, LV, MT, PL, PT, RO, SI, SK) do not have due diligence exemptions in place.[111]

[107] This also means that a majority of Member States have implemented subcontracting liability, limit the liability to one link up the chain (DE, SI, CY, CZ, EE, EL, HR, IE, LV, MT, PT, SE, SK).

[108] Belgium has adopted a hybrid regime where full chain subcontracting liability is in place in the construction sector but only (1) if a client, contractor or subcontractor does not have a declaration in writing proving that they have communicated to the other contracting party the address of the Federal Service's website Employment, Work and Social Dialogue in which information relating to remuneration is included and (2) if the other contracting party has not certified that it has paid and will pay the wages due. (art. 35/6/3 of the law on the protection of the remuneration of workers of 12.4.1965 available at: http://www.ejustice.just.fgov.be/eli/loi/1965/04/12/1965041207/justel)

[109] Recital 37, Enforcement Directive.

[110] Article 12(5), Enforcement Directive.

[111] Please note that DK and FI have not introduced subcontracting liability within the construction sector, but have used the provision of the Enforcement Directive allowing Member States to take 'other appropriate enforcement measures', as seen above.

Box 7. Due diligence provisions in subcontracting chains

In France, all companies posting employees to France, as well as subcontractors, have to comply with the due diligence declaration obligation. Moreover, if a French undertaking is informed in writing by one of the control officers about the non-payment of an employee by a subcontractor, it immediately should demand in writing the end of the violation. In case of non-compliance, the undertaking is equally liable.

In Spain, even if there is no specific legislation for corporate due diligence on human rights and the environment, Spanish companies are directly or indirectly required to fulfil due diligence obligations found in EU or Spanish regulations. An obligation or reciprocal good faith between worker and employee is also prescribed by the Statute of Workers.

Moreover, Belgium and Luxembourg do not have explicit due diligence provisions, but in practice contractors may not be liable if they have undertaken certain actions. In Belgium, the subcontractor is not liable if they are in possession of a written declaration, signed by the contractor, in which information on the wage is provided and the subcontractor certifies that the wage is/will be paid;[112] in Luxembourg, if a contractor acts diligently, they will not be held liable. Poland and Slovenia do not have due diligence exemptions in place. Finally, in Germany new legislation on supply chain due diligence came into force in January 2023, imposing due diligence obligations on companies. Companies are now required to establish a due diligence system that identifies, prevents and mitigates human rights and environmental risks in their supply chains.

4.2.3. Posted temporary agency workers

This sub-section outlines the legislative measures applicable to posted temporary agency workers, and the protection that they receive therein.

Temporary agency workers are those workers with a contract of employment (or an employment relationship) with a temporary work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.[113] As such, a temporary work agency is a natural or legal person which concludes contracts of employment (or employment relationships) with temporary agency workers, in order to assign them to user undertakings to work there temporarily under their supervision or direction.[114] Temporary agency workers may be **posted to a user undertaking established in another Member State**, with the result that such a posting falls under the scope of the PWD.

In the context of the current study, **when reference is made to temporary work agencies, it is in their capacity as employers**. This has an **impact on the working conditions** of the workers concerned: whilst Article 5(1) of the Temporary Agency Work Directive (hereafter TAWD) provides for the principle of equal treatment (i.e., the working and employment conditions of temporary agency workers shall be at least those that apply if they had been recruited directly by the undertaking to occupy the same position), Article 5(3) allows Member States to derogate from this principle via collective bargaining. Should the Member States choose to derogate from 5(1), the must, nevertheless, respect the “overall protection of

[112] Please refer to footnote 98 for more information and to Art. 35/6/3 of the law on the protection of the remuneration of workers of 12.4.1965 available at: http://www.ejustice.just.fgov.be/eli/loi/1965/04/12/1965041207/justel).
[113] Article 3(1)(c), Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, available at: http://data.europa.eu/eli/dir/2008/104/oj.
[114] Article 3(1)(b), Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, available at: http://data.europa.eu/eli/dir/2008/104/oj.

temporary agency workers".[115] Pursuant to Article 5(3), several Member States have adopted provisions allowing collective labour agreements deviating from equal treatment of agency workers.[116] Only national provisions in Austria, Ireland and Sweden refer to the need for the collective agreements not to prejudice the overall protection of temporary agency workers, whilst in Denmark this protection has been guaranteed by case law.

In this context, the PWD[117] stipulates that temporary work agencies must **guarantee posted workers the terms and conditions of employment applicable to temporary agency workers** hired out by temporary work agencies established in the Member State where the work is carried out, as per Article 5 of the TAWD.

Member States are also allowed, if they so wish, to guarantee temporary agency workers other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out, in addition to the terms and conditions of employment referred to in the TAWD.

The desk research has shown that all Member States regulate temporary agency work, although through different regulations or laws in each case. In some Member States, the same rules as posted workers apply (e.g., EE, MT), meaning that there are not different rules in relation to posted temporary agency workers in place. In other Member States there are specific acts or laws which regulate temporary agency work (e.g., AT, CY, DE, DK, EL, ES, FI, HR, IE, IT, NL, PL, PT, RO, SE, SI).

Generally, **no differences in the protection between posted workers employed by temporary work agencies and local workers employed by temporary work agencies**, were found **in the law**. No differences were similarly identified in terms of TCN posted workers employed by temporary work agencies relative to local workers employed by temporary work agencies. Concerning differences between rules applicable to posted workers and workers posted by temporary work agencies, in Denmark, a new reform[118] extended rules applicable to posted workers as regards workers' accommodation and the allowance or reimbursement of expenditure to workers posted by temporary work agencies.

The majority of the Member States do not apply additional terms and conditions to these workers (as per Article 3(9) of the PWD, as amended). However, 4 Member States (ES, FI, FR, PT) do. Among these, Portugal prescribes that a temporary work agency that enters into contracts for the posting of workers must (i) provide, in favour of the public employment service, a specific deposit amounting to 10% of the wages for the duration of the contract; (ii) guarantee medical, medication and hospital services whenever they do not receive the same services in the host country; and (iii) ensure the repatriation of the workers. In Finland, a foreign employer posting workers to Finland is required to provide the posted workers with statutory occupational health care for the duration of their work in Finland.[119]

Lastly, in the area of temporary agency work, it is important to consider the occurrence of **civil law contracts**. Civil law contracts are a category of atypical contracts used to contract labour and they are based on civil law and not on labour law, thus not offering standard protections against dismissals or workers' rights. Generally, civil law contracts are much less regulated

[115] Article 5(3), Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, available at: http://data.europa.eu/eli/dir/2008/104/oj; Case C-311/21 TimePartner Personalmanagement, ECLI:EU:C:2022:983, available at: https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-311/21&jur=C.
[116] Austria, Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, Italy, the Netherlands and Sweden.
[117] Article 3(1b), Posting of Workers Directive.
[118] The new reform in the Bekendtgørelse af lov om udstationering af lønmodtagere m.v. nr. 1144 af 14. September 2018, as amended (Udstationeringsloven) https://www.retsinformation.dk/eli/lta/2021/2566; Posting of Workers Act nr. 1144 of 14 september 2018, unofficial translation available at: https://bm.dk/media/7024/consolidation-act-concerning-the-posting-of-workers-etc.pdf.
[119] Act of Posting Workers; Occupational Health Care Act.

than other temporary contracts. In Poland, for instance, civil law contracts are not regulated in the Labour Code and therefore do not provide employees with protections or rights guaranteed in the Labour Code.[120] Moreover, individuals working under civil law contracts are not entitled to paid leave, sick leave, severance pay or maternity leave, whilst the notice period is not guaranteed. The Civil code does not restrict the number of civil contracts a worker can enter into, therefore it is possible that individuals may find themselves entering into multiple civil law contracts over a long period of time.[121]

The desk research has shown that in 4 Member States (AT, EE, PL, SE) civil law contracts may be relied upon to establish a relationship between the posted worker and the temporary work agency. In practice, however, the research indicates that civil law contracts are a frequently used instrument within temporary agency work in Poland. By contrast, in the remaining Member States, civil law contracts are not commonly used.

Box 8. Posted temporary agency workers in 9 Member States

Posted temporary agency workers often provide labour at the lowest levels in the supply chain, frequently under low-pay and flexible employment conditions, being susceptible to fraudulent behaviours by temporary work agencies. An analysis of such situations and their impact on workers is conducted in Sections 5 and 7. To counter fraudulent practices, the Member States have implemented certain requirements in order to improve the traceability and accountability of temporary work agencies, through registration and licensing obligations for these agencies. These are important instruments through which national authorities may keep track and police the activities of temporary work agencies in their Member States. This, in turn, facilitates the protection of the rights granted to posted workers through national legislation. Moreover, some Member States have implemented additional safeguards for posted temporary agency workers which aim to further reduce the risk of poor working conditions.

Sending countries

In terms of the sending countries, temporary work agencies must fulfil administrative requirements (in order to post workers from these countries), with the aim of increasing the accountability of temporary work agencies to enforcement entities and generally improve the traceability of their activities. In 3 Member States (DE, PL, SI) temporary work agencies must be registered. In Germany, there is a special obligation to register with the customs administration for employers who hire labour from foreign temporary work agencies. In Poland, a similar registration requirement applies, providing that temporary work agencies do not have financial debts, were not punished for labour crimes and the business owners did not have previous companies that were liquidated or declared bankrupt. In Slovenia, all temporary work agencies can be found in a public register, with additional requirements to submit statistical data and a report from an independent revisor every year. This requirement is in place to be able to monitor the activities of temporary work agencies on a yearly basis.

Additionally, in 3 Member States (DE, ES, SI), temporary work agencies must obtain special permissions or licences. Specifically, in Spain, temporary work agencies have to fulfil a number of conditions, including special administrative permissions, availability of a minimum organisational structure, the sole involvement in temporary work activities or the fulfilment of salary and social security obligations. With these licencing requirements, Spain seeks to permit the operation of those temporary work agencies that intend to fulfil

[120] European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Lewandowski, P., 'Gaps in access to social protection for people working under civil law contracts in Poland : case study', Publications Office, 2018, available at: https://data.europa.eu/doi/10.2767/809502.
[121] *Ibid*.

the requirements that are set by the national legislation. Moreover, in Germany, temporary work agencies must have a licence that allows the supply of workers as part of their business activities, irrespective of whether the supply of workers is the main or a secondary activity.

In addition to the administrative requirements, additional safeguards are in place for posted temporary agency workers in some Member States. For instance, the Spanish legislation requires temporary work agencies to compare the worker's salary (in accordance with their contract or agreement or foreign law) with the total remuneration established for the job to be performed, pursuant to the Spanish collective agreement applicable to the user company. This remuneration must cover the proportional share of weekly rest, special payments, public holidays, and holidays. The user company should, thus, make sure that the appropriate salary is included in the worker's contract, which has the effect of ensuring that posted temporary agency workers are receiving the appropriate remuneration.

Spanish legislation additionally prescribes that if a temporary work agency posts a worker in the context of a subcontracting chain, the agency assumes full responsibility for the fulfilment of the obligations of the PWD, as amended. Thus, Spanish legislation offers additional safeguards to posted temporary agency workers, especially as regards remuneration and establishes a clear line of responsibility, providing clarity as to the entities that the workers may turn to where obligations are not fulfilled.

Similarly, in Slovenia, there are specific rules for subcontracting chains involving temporary work agencies, aiming to ensure that posted temporary agency workers are able to claim their rights effectively, through a direct line of contact with the agency. The rules stipulate that the user undertaking may post temporary agency workers providing that there is an agreement between the agency and the user undertaking and that the employment relationship between the agency and the posted employee is maintained throughout the posting.

Receiving countries

As with the sending countries, in the receiving countries, administrative requirements are in place to ensure that foreign temporary work agencies posting workers into those Member States are traceable and accountable, vis-à-vis the state, as well as their obligations towards posted temporary agency workers. In two Member States (NL and DK), foreign temporary work agencies posting workers to those Member States must be registered in the respective countries. In France, a special declaration must be made by the foreign temporary work agency posting workers to the Member State. In Denmark, foreign temporary work agencies must be registered[122] in the Register for Foreign Service Providers (RUT) and are required to notify the RUT of the work that will be conducted by the temporary agency worker and to make sure that such worker possesses the health certificates and statutory qualifications to conduct the work. Along with Denmark, other 2 Member States (LU and BE) require a permit or accreditation from foreign temporary work agencies.

In Germany, temporary agency work in mainstream construction is not allowed and has been prohibited since 2017. [123] The high incidence of poor working conditions in the sector,

[122] The duty to register in RUT is sanctioned separately with a fine: VestreLandsretsdom (Western High Court Ruling), 22 September 2014, V.L. S-2220-13 https://at.dk/domme/2014/uforsvarlig-brug-stige-vld-22-09-14/hele-dommen/.
[123] § 1b, Temporary Workers Act, available at: https://www.gesetze-im-internet.de/a_g/__1b.html.

prompted the legislator to prohibit temporary agency work with the aim of tackling these issues.

As regards additional safeguards for posted temporary agency workers, 3 Member States (NL, LU, DK) have some mechanisms in place. For instance, in the Netherlands, the two largest associations of temporary work agencies have concluded collective labour agreements with the unions specifically for temporary agency workers. Nevertheless, there is no guarantee that the collective labour agreements are appropriately balanced to ensure that they do not prejudice the overall protection of (posted) temporary agency workers. Consequently, posted temporary agency workers may find themselves worse off than they would have been, had the collective agreement not been in place, potentially placing workers in more precarious conditions and not necessarily reducing the risks of poor working conditions.

In Germany, the remuneration of temporary agency workers is not standardised, nor is the pay in the companies that use them. The user companies can be in a variety of different sectors and the workers are paid differently: a minimum wage applies in temporary agency work[124] which is negotiated by the social partners and is made binding by law. The minimum wage may not be undercut in the case of posted temporary agency workers. Nevertheless, if temporary agency workers are deployed in user companies covered by (other) minimum wages under the Posted Workers Act, they must be paid according to these minimum wages (which are based on the generally binding collective agreements in the industries concerned). If no collective agreement applies to the employment relationship with the temporary work agency, then the principle of "Equal Pay" applies.[125]

In Denmark, posted temporary agency workers may also be covered by, and benefit from, collective agreements entered into by the most representative parties in the Danish Labour Market (covering the entire Danish area). Despite the fact that Denmark derogates from the principle of equal treatment[126] in the TAWD, established case law imposes the obligation for collective labour agreements to ensure overall protection of (posted) temporary agency workers.[127]

4.2.4. (Posted) Third Country Nationals

This section takes a closer look at posted TCNs. TCNs with a valid work and residence permit in one Member State can be posted freely across the EU.[128]

TCNs are more likely to find themselves in precarious working and living conditions as compared to EU posted workers, as they more often engage in undeclared work and are exposed to **exploitation** and **social dumping**.[129] For these reasons, Member States implement rules around the protection of posted TCNs.

[124] Fifth Regulation on a Wage Floor in Temporary Employment.
[125] It should be noted that since January 2023, there is a new collective agreement for temporary agency work in place: https://ig-zeitarbeit.de/neuer-tarifabschluss-in-der-zeitarbeit/.
[126] In Article 3(1) PWD, as amended. The principle of equal treatment was recently reaffirmed in Case C-428/19 *Rapidsped*, available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=6535EBB5ED8D45A05E3E0FA93B24880F?text=&docid=243861&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1144389.
[127] For example, Case No. AR2014.0103; FV2019.0126 available at: https://arbejdsretten.dk/afgoerelser/afgoerelser/2021/kendelse-af-29-april-2021-i-fv20190126/.
[128] Case C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803.
[129] Counteracting undeclared work and labour exploitation of third-country national workers, available at: https://ec.europa.eu/social/BlobServlet?docId=23573&langId=en.

Box 9. (Posted) TCNs

From the perspective of Member States sending a high number of TCNs, Poland has implemented special provisions for workers from specific third countries. Citizens from Armenia, Belarus, Georgia, Moldova and the Russian Federation, who work for a period not exceeding 6 months within the next 12 months, are exempt from the obligation to have a work permit because the declaration of entrustment of work is sufficient.[130] Further, in relation to the outbreak of the war in Ukraine in February 2022, Ukrainian nationals have been additionally granted a special status in Poland that allows them to work without the need to obtain a work permit or a declaration of entrustment of work. This applies also to those Ukrainian citizens who were legally residing in Poland before the war.[131] Whilst some of these provisions have been implemented as a response to a humanitarian crisis, they facilitate the legality and visibility of workers from these third countries in the EU market, potentially exposing them less to the risks of undeclared work and illegal practices.

Additionally, Member States have obligations in place that ensure that posted TCNs are better protected by making them more visible within the labour system. In Slovenia, prior to posting, employers must obtain an A1 certificate for each posted worker from the competent authority, providing that the employer continues to apply Slovenian social security regulations during the cross-border provision of the service in the posted country. This action may also contribute to combatting undeclared work, as these TCN workers may be traced and should receive the applicable protections before being posted.

As for the receiving perspective, rules in relation to TCNs are stricter in some Member States.[132] For instance, TCNs can be posted to Germany only if they are in the possession of the 'Vander Elst' Visa.[133] This is a type of work permit for third-country nationals who are employed for work by a company in another EU/EEA Member State. This is discussed further in the case study on posted TCNs in the construction sector (section 6.5). TCNs can be posted to the Netherlands only if they are in possession of a work permit. Moreover, foreign employers shall indicate in the notification that the worker's nationality is that of a third country. If the posting is more than three months, the third-country worker shall also apply to the Immigration Service in order to obtain a temporary residence permit. This measure ultimately increases the visibility of posted TCNs and allows them to benefit from (temporary) rights of residence in that Member State.

Examples of infringements in relation to posted TCNs are discussed in Sections 5 and 6 (see in particular the case study on seasonal workers in agriculture and on posted TCNs in the construction sector).

4.2.5. Legal provisions applicable to other temporary cross-border mobile workers (as per Article 45 TFEU)

In accordance with Article 45 TFEU, free movement of workers is secured within the Union, requiring the abolition of discrimination based on nationality between workers of the Member

[130] Art. 87 ust. 3 and Art. 88z of Act of 20 April 2004 on employment and promoting and work market institutions, Journal of Laws 2004 No 99 Item 1001 (Ustawa z dnia 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy), available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001100/U/D20211100Lj.pdf.

[131] Act of 12 March 2022 on assistance to Ukrainian citizens in connection with armed conflict on the territory of this state (Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa), available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220000583.

[132] Please see the European Labour Authority 'Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals', available at: https://www.ela.europa.eu/sites/default/files/2023-04/ela-report-posting-third-country-nationals.pdf

[133] Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationale*, available at : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0043.

States "as regards employment, remuneration and other conditions of work and employment".[134] As such, temporary cross-border mobile workers, who are not posted, fall within the scope of this Article.

One type of temporary cross-border mobile workers, as identified in Section 4, are **seasonal workers**. Movement of TCNs who perform seasonal work in EU Member States is regulated by the Seasonal Workers Directive. When considering the rights of TCN seasonal workers, desk research has identified that, in several Member States (e.g., AT, LU, MT, SI), general rules on the rights of TCNs were relied upon (rather than being covered by specific rules in relation to posting), namely in relation to residence permits and the need for visas to work.

Other specific provisions concerning the protection of rights of the seasonal workers were observed in Greece, where, e.g. in the tourism sector seasonal workers have their re-employment guaranteed during the following season, provided they apply for it within a specific timeline. If the employer denies the renewal of the work contract, the seasonal worker is entitled to compensation.[135] In other Member States, no specific legal framework applicable to seasonal workers exists (e.g., AT,[136] CZ, FI, HU, IE, LT, LV, SI). The Netherlands and France regulate specific fixed-term contracts for seasonal workers: in the Netherlands these contracts may not exceed the duration of 24 weeks; in France, fixed-term contracts must exclusively be used on a non-permanent basis and contain precise mandatory information. In France, seasonal workers enjoy the principle of equal treatment in relation to remuneration, working time and vacation. In Belgium, seasonal workers do not have normal employment contracts, as they have daily ones. Special rules, thus, apply.

The desk research indicates that in some Member States the rules applicable to seasonal workers in relation to working conditions are the same as those applied to posted workers (e.g., DK, HR). Additionally, the desk research has identified **no differences in protection between temporary cross-border mobile workers and local workers** in law, in the majority of Member States. However, collective agreements and their applicability may cause differences in this regard (e.g., DE, IE, SE).[137]

As enshrined in Article 45 TFEU, labour mobility within the internal market is vital for employment advancement and economic growth.[138] Labour mobility is reliant to a certain degree upon the quality of legal and administrative assistance provided by the national authorities and private entities to employers seeking to hire posted or other types of temporary cross-border workers. Within the framework of temporary cross-border mobile work, third actors are often involved in the recruitment and employment process and can be categorised as **labour market intermediaries**. The literature describes them as "private or public entities or institutions mediating between the individual seeking employment and the employer, [mainly] operating either as Employment Placement Agencies (EPAs) or Temporary Work Agencies (TWAs)".[139]

There is no harmonised definition of "labour market intermediaries" across the Member States, however. Some Member States refer to having the possibility, within the national legislation, of establishing employment placement agencies (e.g., BG, CY, ES, HU, IE, PT). In Luxem-

[134] Article 45, Treaty on the Functioning of the European Union.
[135] See also for further details: Hellenic Manpower Employment Organization, "Seasonal Work in Greece: Guide about employment and social security of seasonal workers in Greece", available at: https://www.google.gr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiJ5rTM68_3AhWSHuwKHcGnBdQQFnoECAIQAQ&url=https%3A%2F%2Foaed.gr%2Fstorage%2Feures%2Fseasonal-work-in-greece-en-11.pdf&usg=AOvVaw3UI4uNQADXBmO2Q7jvzs0d.
[136] However, in Austria, the Federal Minister of Labour may set quotas for the employment of seasonal workers if the demand for such workers cannot be met by the available local labour force. Please see, Act Governing the Employment of Foreign Nationals (AuslBG), Chapter II Employment permit, Conditions, paragraph 4(4), available at: https://www.migration.gv.at/fileadmin/downloads/gesetzestexte/AuslBG_englisch_1_10_2017.pdf
[137] Please note that collective agreements are discussed in detail in Section 4.2.1.
[138] Eurofound, 'Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour, 2016, p. 3, available at: https://www.eurofound.europa.eu/publications/report/2016/labour-market-industrial-relations/regulation-of-labour-market-intermediaries-and-the-role-of-social-partners-in-preventing-trafficking.
[139] *Ibid*, p. 1.

bourg, a labour market intermediary is the *Agence pour le développement de l'emploi* (Agency for the development of employment ADEM),[140] which is part of the government administration, offering personalised and free services for jobseekers and employers. In the Netherlands, internet platforms have been identified as a potential new category of labour market intermediaries. In Austria, if live-in care workers are employed on labour contracts, supporting organisations often act as intermediaries, hence being subject to the *Hausbetreuungsgesetz* (Home Care Act).[141] One such organisation in Austria is *DREPT*-Interessenvertretung *der 24-Stunden-Betreuer_innen* (Representative of the interests of 24 hour caregivers in Austria), a self-organised interest group for migrant live-in care workers in Austria, consisting mainly of Romanian care workers and activists working or living in Austria.[142] Fundamentally, the lack of a harmonised definition of labour market intermediaries, as well as the different types of intermediaries may affect the way in which these are regulated at national level, impacting workers' rights. In several Member States, additional types of labour market intermediaries were not identified.

4.3. Non-legislative measures applicable to posted workers and other temporary cross-border mobile workers

This sub-section considers the non-legislative measures put in place by the Member States which are applicable to posted workers and other temporary cross-border mobile workers. Non-legislative measures in the Member States have been established to complement the legal framework that is in place at national level. The aim of these non-legislative measures is to reduce poor working conditions, by improving access to information,[143] implementing monitoring mechanisms,[144] and establishing administrative cooperation across the Member States.[145]

In pursuit of ensuring that posted workers and other temporary cross-border workers are sufficiently protected, and pursuant to the obligations encompassed in the Enforcement Directive, the Member States have sought to improve access to information, by aiming to provide clear, transparent, comprehensive and easily accessible information for posted workers and service providers, in relation to terms and conditions of employment. The Member States have achieved this through actions including (1) implementing a single official national website, (2) disseminating information materials, (3) compiling guideline materials and (4) providing advice to posted workers.

All Member States have established a **single official national website,** where they provide information on the posting of workers. Overall, the single official national website has been implemented positively in the Member States. However, the desk research has shown that the websites of some Member States are not up to date (e.g., AT, EL, IT). The Italian website does not include the latest information on collective agreements, an issue which is also reflected in other Member States. Some websites are reported by national legal experts to lack transparency and intuitiveness (e.g., BG, ES, FI, HR, LV, PT) which is caused by the reliance on hyperlinks when referencing national law. This lack of clarity results in the user searching for specialised help to understand or investing a great amount of time in searching for the necessary information.

[140] Law of 8 March 2017 amending the amended law of 29 August 2008 on free movement of persons and immigration.
[141] Bundesgesetz, mit dem Bestimmungen über die Betreuung von Personen in privaten Haushalten erlassen werden (Federal Act enacting provisions on the care of persons in private households), Federal Law Gazette I No. 33/2007 last amended by Federal Law Gazette I No. 57/2008, available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20005362&FassungVom=2022-05-19 (last accessed 19 May 2022).
[142] See also: https://ltccovid.org/wp-content/uploads/2020/09/Flavia-Matei-DREPT-2020-09-Presentation-LTC.pdf.
[143] As per Article 5 , Enforcement Directive.
[144] As per Article 9, Enforcement Directive.
[145] As per Articles 6-8, Enforcement Directive.

Beyond the single official national websites, **Member States generally aim to inform posted workers about their rights**. Information is also disseminated through the websites of other national authorities and social partners and by other means, such as, for example, the distribution of leaflets by trade unions (e.g., IT). Several Member States rely on the diffusion of information, legal advice services and contact/complaint points to support posted workers.

Another measure adopted in some Member States is the **compilation of guidelines, checklists and templates that might guide both posted workers and posting employers** through the regulatory and administrative requirements of posting (e.g., BE, CY, IE, MT, PT, SE).

The **provision of legal advice** to **posted workers** is available, for example, in Austria, Germany, Slovenia and Italy. In Germany, counselling centres have been set up by the DGB (the German Trade Union Confederation), with the participation of certain trade unions, to help improve working conditions and fair wages in the German labour market, particularly for workers from Central and Eastern European EU countries. In Slovenia, mediation is also available in case of labour law disputes.

When it comes to the **monitoring and collection of data**, as well as the publication of statistics, trends are difficult to identify:

- In several Member States, it was not possible to identify any measures in general (e.g., BG, HU, IE, LT, MT) or measures relating to posted workers (e.g., CZ, FI, HR, SE). Throughout the EU, Member States entrust different national bodies with the role of gathering data, specifically the labour inspectorates or statistics offices. Accordingly, in some Member States, statistics on postings and other information within the labour market derive from the reports of activity of labour inspectorates (e.g., EL, LU, NL, PT, SI, SK).

- Furthermore, Member States rely on the notification of incoming postings (e.g., AT, BE, CY, CZ, DE, FI, FR), the recording of foreign service providers (e.g., CY, DK, RO) and information from PD A1 certificates (e.g., FI, FR) to analyse the cross-border temporary labour market.

The box below outlines the actions that are utilised by the 9 Member States looked at in-depth, to reduce the risks of poor working conditions of posted workers and other temporary cross-border mobile workers in their Member State. Through these non-legislative measures, Member States aim to uncover problematic practices, provide information to posted workers (and other relevant actors) and facilitate cooperation. As non-legislative measures are implemented at the national level, and are more geared towards receiving structures, no strict distinction between sending and receiving Member States is made in the analysis.

Box 10. Cooperation between Member States, cooperation between actors within their own Member State, and other initiatives

Cooperation between Member States

The practice of concluding bilateral agreements is common across all Member States subject to this in-depth analysis. Naturally, this practice facilitates cooperation between the Member States that are parties to the agreement, and in sending and receiving settings. They can support the identification and tackling of precarious situations for posted and other temporary cross-border mobile workers. Often, Member States conclude bilateral agreements with the labour inspectorates (or competent national authorities) of other Member States. Germany, for example, has concluded bilateral agreements and treaties on cooperation in combating cross-border undeclared work and unlawful employment with France and the Netherlands, amongst others. The BENELUX countries have also developed extensive cooperation through joint site inspection visits and agreements.

Moreover, in posting cases Member States' competent authorities can request information, provide support during inspections and inform of illegal practices by virtue of the cooperation that is facilitated through the Internal Market Information System (IMI). The available data shows that the highest number of IMI requests are received predominantly by sending Member States (e.g., SI, PL, DE), whilst the greatest number of IMI requests are made mainly by receiving Member States (e.g., BE, DK, FR).[146] Poland, for example, has cooperated frequently with numerous Member States via IMI, receiving 700 requests in 2020.[147]

Poland also frequently cooperates outside of IMI with Member States to which it posts workers (e.g., BE, DE and the NL). This phenomenon is observed throughout the Member States. Spain, for instance, has close contact with labour inspectorates of other Member States (e.g., France), with which it has also conducted joint inspections. This cooperation and exchange of information often brings to light poor working conditions for posted workers and illegal practices.

Other forms of cross-border cooperation are also in place, which improve cooperation, exchange of best practices and can lead to better handling of situations concerning posted workers and other temporary cross-border mobile workers. Slovenia, for instance, holds one-to-one meetings at regular intervals with other Member States, with which it closely collaborates. In Germany, cross-border cooperation with the relevant authorities takes the form of bilateral dialogues, regular updates on key statutory changes affecting efforts to combat undeclared work, and cooperation in administrative procedures. Moreover, Member States organise joint projects with other Member States. In terms of safety and health at work, Denmark is part of a joint project with the labour inspectorates of the 5 Nordic countries (DK, FI, IS, NO, SE) concerning cooperation, exchange of ideas and information. The project was enlarged to include the Baltic countries (EE, LT, LV) as well, creating the "Nordic-Baltic Project on Undeclared Work", supported by the EU Programme for Employment and Social Innovation (EaSI).[148]

[146] Data available at: https://ec.europa.eu/internal_market/imi-net/statistics/2020/07/requests/index_en.htm.
[147] Reported by the national authority during the interview conducted for this study, in 2022. Such requests refer to the exchange of information or any action that allows cross-border cooperation (e.g. performing an inspection, collecting fines).
[148] Reported by the national authority during the interview conducted for this study, in 2022. Also see Inspection Activities Report: https://www.vinnumalastofnun.is/media/3014/nordbalt-udw-final-inspection-report.pdf

Non-legislative cooperation additionally takes place through multilateral programmes. Examples include the European Platform against undeclared work,[149] the senior labour inspectors committee (SLIC),[150] which operate a Knowledge Sharing Site, and cooperation facilitated by the European Labour Authority.[151] The exchange of information through European level stakeholders[152] has also been reported by employer organisations and trade unions in the stakeholder consultation as being highly useful. Through these programmes and exchanges, Member States may learn from one another and exchange information in relation to the situation of posted workers and other temporary cross-border mobile workers in their Member State.

Cooperation within Member State

The desk research and interviews conducted in various Member States indicate the importance of good cooperation between national authorities and social partners. A variety of relevant stakeholders are included in the exchange of important information concerning posted workers, often with the aim of resolving problems concerning poor working conditions.

Within the same Member State, different national authorities may cooperate in relation to the exchange of information regarding posted workers and other temporary cross-border mobile workers. In Germany, for instance, the Financial Investigation Office for Clandestine Employment (FKS) cooperates closely with revenue authorities, social security authorities and the Federal Employment Agency, amongst others, to exchange information. On occasion, the FKS and Federal Employment Agency may conduct joint inspections in relation to temporary agency work.[153]

In terms of actions of social partners, these often give advice to posted workers (e.g., in SI), receive questions from them (e.g., in PL) and from social partners from other Member States. As discussed in the case study on promising practices involving social partners (see Section 7), in Denmark, for example, the Danish Working Environment Agency (WEA) holds dialogue meetings with employer organisations and trade unions on a regional basis twice a year and on national level every second year, with ad hoc meetings taking place if necessary. In this way, vital exchange of information between the public and private actors takes place, which may inform the actions of these actors in the future. Moreover, employer organisations and trade unions campaign against social dumping and have a key role in the fight against social dumping. They are equally important in providing information to posted workers: a foreign undertaking posting workers in Denmark should consult the social partners in relation to wages and salary conditions. This ensures that posted workers receive the remuneration and conditions that they are entitled to.

Notwithstanding these positive examples, the cooperation between public and private actors is not always effective and often proves difficult. In the Netherlands, for example, it is reported that private actors receive limited information from the public actors. Whilst there is a website where the Labour Inspectorate provides information on inspections and outcomes, some stakeholders perceive it as lacking transparency, not updated frequently and unreliable.[154]

[149] Currently housed under ELA, available at: https://www.ela.europa.eu/en/undeclared-work.
[150] See also: https://ec.europa.eu/social/main.jsp?catId=148&intPageId=685
[151] See also: https://www.ela.europa.eu/en
[152] E.g., ETUC, Business Europe.
[153] Deutsche Bundesregierung, "14th report by the German Federal Government on the impact of the Act to Combat Unlawful Employment (Gesetz zur Bekämpfung der illegalen Beschäftigung)", 2021, p. 28, available at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/14th-report-impact-act-to-combat-unlawful-employment.pdf?__blob=publicationFile&v=2
[154] This issue was emphasised in an interview conducted for this study in 2022, with a representative of an employer organisation.

Other actions at Member State level

Further initiatives have been put in place at the national level, in order to prevent occupational risks for posted workers and establish a direct contact for the provision of information to posted workers. In France, for example, the 2016-2020 Health and Safety at Work Plan[155] was targeted at posted workers and aimed to develop the communication adapted to people with little or no command of French. The Plan conveys simple and understandable messages to posted workers about the main occupational risks (e.g., working at heights, chemical risks, manual handling, use of work equipment) to which many of them are exposed. These messages, in the form of posters, were translated into 8 languages.[156] Another example is Belgium, where the social inspection services of the Federal Public Service Employment, Labour and Social Dialogue (Directorate-General for Supervision of Social Law) have set up the 'point of contact for Fair Competition',[157] which posted workers may contact via email with their queries.

Moreover, specifically in relation to the issues found in the construction sector, Belgium,[158] Denmark, France[159] and the Netherlands are piloting or using a form of ID for workers in the construction sector. The aim is to enable the identification of workers, which will facilitate monitoring on site, as well as contain information on the employer, employee, user company and host organisation, depending on the Member State.

Through these initiatives, Member States aim to improve the provision of information available to posted workers and other cross-border workers and enhance awareness about their rights. This is hoped to contribute to proactive behaviour and actions from the workers, ensuring they can better claim their rights.

4.4. Enforcement mechanisms

As seen in the Enforcement Directive,[160] enforcement mechanisms encourage compliance with the PWD. To this end, the current section explores mechanisms established in the Member States in pursuit of compliance with the legal regulations, in the form of subcontracting liability provisions, the actors of enforcement and actions taken by them. The section also reviews actions Member States take to ensure enforcement with the rules established at national level and outlines the main problems identified by enforcement bodies and challenges regarding enforcement in specific sectors, and the challenges faced by the 9 Member States analysed in-depth.

4.4.1. Subcontracting liability

In case there are breaches of working conditions of posted workers within subcontracting chains, administrative and/or criminal sanctions and/or alternative ways of resolution are foreseen by the Member States.

In terms of **procedures**, these **vary across the Member States**, but **generally rely on the posted workers to initiate the claim**. In most Member States, the posted worker either needs

[155] Ministère du Travail, du Plein emploi et de l'Insertion, Plans santé au travail (PST), available here: https://travail-emploi.gouv.fr/sante-au-travail/plans-gouvernementaux-sante-au-travail/article/plans-sante-au-travail-pst.
[156] Posters, available at: https://travail- emploi.gouv.fr/IMG/pdf/kit_de_communication_sante_et_securite_anglais-2.pdf.
[157] See also: https://www.meldpuntsocialefraude.belgie.be/en/#:~:text=You%20can%20call%20the%20Contact,you%20the%20next%20working%20day
[158] See also: https://www.constructiv.be/nl-BE/Werkgevers/ConstruBadge.aspx.
[159] See also: https ://www.cibtp.fr/carte-btp/accueil.
[160] Specifically, Chapter IV 'Monitoring Compliance' and Chapter V 'Enforcement'.

to present a complaint to the competent authority[161] or bring a claim before the court. In the former scenario, this may lead to an inspection. In other countries, the posted worker can request that the employer immediately remedies the breach (e.g., CZ, IT, RO, SI). It is worth noting that in Denmark and Finland where other appropriate enforcement measures are used in the place of subcontracting liability, the procedure differs. In Denmark, where posted workers fulfil the required conditions stipulated by the Labour Market Fund, the collection of contributions from enterprises is based on notification to the Register of Foreign Service Providers (RUT). The unpaid wages are subsequently paid to the posted worker from the Danish Labour Market Fund.

A panoply of administrative penalties are put in place in the Member States, ranging from the possibility to be temporarily excluded from public procurement procedures (e.g., DE), to the closing of operations (e.g., BE, FR, LU), or inclusion in a public list of companies that breach the applicable provisions (e.g., DE, DK,[162] NL). Most Member States (18) foresee the possibility of imposing administrative fines where a breach is found. However, in some Member States (EE, PL), it is not possible to impose sanctions. In Denmark, higher fees for participation in the Labour Market Fund for Posted Workers are charged if violations occur. The value of the fines varies greatly and fines are increased in case of repeated breach. Belgium, in addition to administrative fines, introduced a criminal fine and, exceptionally, Cyprus allows for the possibility of imprisonment of up to 2 years.

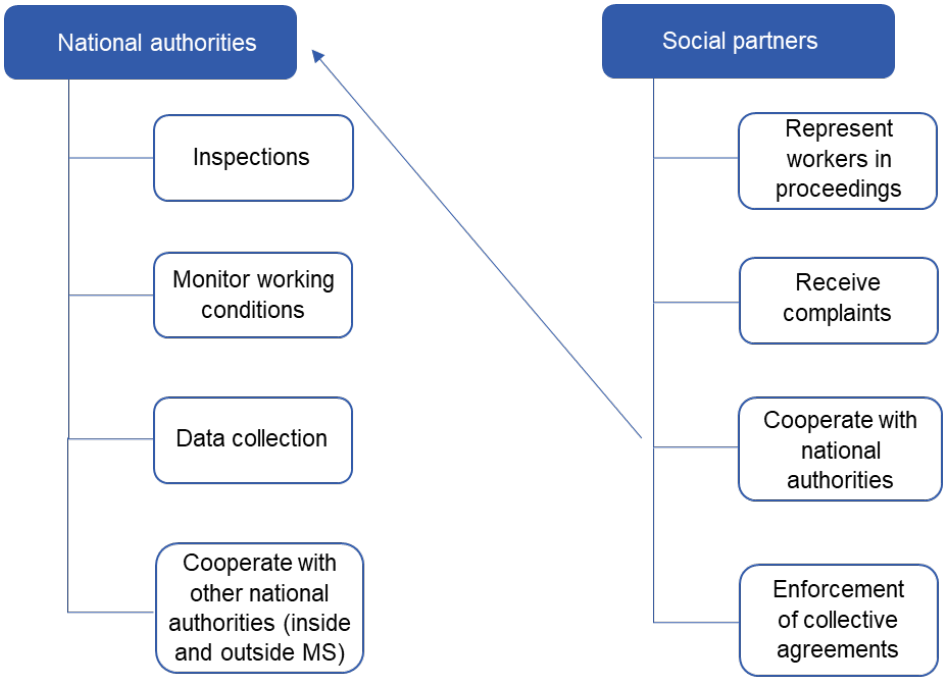
In some Member States, **alternative means of resolution**, before committees, mediators or through negotiation are also foreseen (e.g., IT, LT, SE, SI). Both France and the Netherlands have in place the possibility to issue warning systems, allowing the company in breach to remedy the breach.

4.4.2. Actors of enforcement and competences

Prior to assessing the key enforcement issues in the Member States it is important to identify the “actors of enforcement”. There are two key types of actors of enforcement: (1) national authorities, and (2) social partners.

[161] Many MS provide for the complaint forms through the single official national website. If the posted worker is able to locate the single official national website, identifying the competent authority should not pose a challenge.
[162] In DK for example, the company can be removed from the list only 36 months after the date of payment of wages.

Figure 7. Actors of Enforcement



4.4.2.1. National authorities

The key enforcement actors are typically **national authorities** (either labour inspectorates or Ministries) whose role is to **carry out labour inspections**, **check the working conditions** of posted workers and other temporary cross-border mobile workers, as well as to **monitor and collect data on enforcement**.

Inspections are one of the main tools to monitor compliance with the national legal framework concerning the posting of workers and other temporary cross-border mobile workers. Inspections enable labour inspectorates to check the legality of working arrangements and identify any infringements, ultimately with the aim of "reacting" to a problematic situation, by adjusting inspection priorities, or taking action against non-complying entities. Fundamentally, inspections allow national authorities to verify that posted workers do not find themselves in poor working conditions. The Enforcement Directive obliges the Member States to put in place inspections on their territory in order to control and monitor compliance with the provisions laid down in the PWD.[163]

Generally, the enforcement actors **set the strategy for labour inspections**. **Inspections are triggered** in different ways in the Member States. In order to decide where to carry out inspections and which sectors or companies to target, **risk assessments** are carried out in most Member States.[164] The data collected during inspections in the Member States tend to inform the work and strategic plans of the national authorities for the following years. Risk assessments or strategies are generally based on data collected regarding enforcement,[165]

[163] Article 10, Enforcement Directive.
[164] As per Article 10(1), Enforcement Directive: "Notwithstanding the possibility of conducting random checks, inspections shall be based primarily on a risk assessment by the competent authorities."
[165] Information is also collected from notification systems and company registers. It should be noted that the duty to monitor data may be decentralised and within the competencies of regional bodies as is the case in Spain and Finland.

and which are published by national authorities in their annual reports[166] (e.g., AT, BE, DE, DK, LU, HU, NL, MT, PL, PT, RO, SI, SK).[167]

Box 11. Examples of approaches taken by labour inspectorates

In Germany, national authorities follow a 'risk-based' approach in determining the strategy for labour inspections, particularly in areas affected by undeclared work. In the Netherlands, the Inspection Control Framework (ICF) prioritises inspections regarding unfair work. Furthermore, in Spain and Slovenia, the relevant authorities offer arbitration and mediation services to posted workers. In Denmark, the Working Environment Agency (WEA) is also responsible for running the RUT, which is the notification scheme for service providers regarding the use of posted workers. The Slovenian labour inspectorate similarly keeps a register of temporary work agencies. Moreover, as seen above, the national authorities cooperate with other authorities in and outside the country.

The commencement of inspections is often also triggered by **complaints** (e.g., AT, BE, CY, CZ, DK, EE, FR, HR, IE, IT, LU, LT, LV, MT, NL, PL, SI, SK) from social partners (e.g., DK, FR, NL, HR), foreign authorities (e.g., AT, CY, CZ, PL) – including via the IMI System –, employers (e.g., FI, HR) or employees (e.g., FI, HR). For example, in Malta, workers whose contract was recently terminated or workers with an ongoing contract can file a complaint which may lead to the inspection authority initiating an inspection. [168]

Within the realm of labour inspections, **inspectors possess various powers,** which stem from the competences attributed by law to the competent authorities. In some Member States, labour inspectors are limited to checking safety and health at work (e.g., SE, FI), or working or employment conditions (e.g., IT, EE), or provisions applicable to posted workers (e.g., AT, HR). Often, other authorities are in charge of inspecting social security aspects (e.g. BE, IT), remuneration (e.g., AT), or the legal status of workers or available documentation (e.g., AT, EE). In most Member States inspections can be carried out at workplaces and business premises (e.g., BG, CY, DE, DK, FR, HR, IE, LU, LV, MT, PT, SE, SK), with the exceptional option of inspections in private homes (e.g., ES). Usually, inspectors can request cooperation from other authorities and employers. Additionally, some Member States allow inspectors to issue warnings (e.g., BE, NL, FI) where infringements are identified and either impose preventive measures (e.g., PT) or impose fines (e.g., CZ, FI, HU, LV, NL).

Box 12. Limitations faced by national enforcement authorities

At the same time, the enforcement actors face limitations. Whilst inspections play a vital role in enforcement, the task is not without challenge. In the Netherlands, for instance, the labour inspectorate is only competent to enforce the statutory minimum wage and not those wages established under collective agreements.

As Sections 4, 5 and 6 repeatedly emphasise, another significant key challenge is the limited capacity and lack of human resources of labour inspectorates and similar national authorities to conduct inspections and monitor the applicability of regulations. This directly

[166] In the majority of Member States no figures or specific data on infringements rates were found. Where data on infringement rates was available, the data was most often not disaggregated and, therefore, not specific to posting situations only

[167] Desk research, in some Member States, did not provide any information in relation to the mechanisms to monitor and collect data on enforcement (e.g., EE, EL, IE, LV, SE).

[168] The number of inspections carried out, per year, varies greatly across the Member States. In most Member States, more than 3000 labour inspections were carried out. It is unclear how many of these relate to posting of workers situations as such data is generally not available. Reportedly, Lithuania inspected 61 companies with posted workers. In some Member States more than 20 000 inspections were carried out in a year (e.g., DK, AT, FI, PT, SK, BG, IT, RO, SE).

impacts the scale and depth of the enforcement actions, and the extent to which they incentivise compliance with the legislation and curtail fraudulent practices.

The majority of the identified sectoral challenges appear to happen within the **construction sector,** according to desk research (e.g., AT, BE, BG, CZ, DK, NL). Several issues pertaining to the construction sector were identified through the research and are further discussed in Section 5.1:

- the existence of new business models, not complying with the rules, to which there are still no enforcement tools available (e.g., NL);
- required documentation not available (e.g., BG);
- issues in relation to health and safety conditions (e.g., BG, CZ).
- labour exploitation and illegal employment among posted TCN (e.g., BE).

In line with this, specific measures for TCNs and posted temporary agency workers were identified in the Netherlands through the findings of the Monitor Labour Exploitation (annual preview) and the Bogus Scheme Programme. For example, the working methods of the Labour Inspectorate have been developed, through (re)training inspectors in recognising and reporting signals of labour exploitation. To this end, a new training course on labour exploitation has been developed for less experienced investigators (or those more experienced ones wishing to refresh their knowledge). Moreover, the Monitor Labour Exploitation report states that the labour inspectorate aims to encourage as many companies as possible to register their posted workers in order to tackle labour exploitation.[169]

Box 13. Data related to inspections

As inspections are a vital instrument of enforcement, the number of inspections and infringements found in the Member States should, in theory, shed light on the situation of posted workers. Nevertheless, the desk research and stakeholder consultation revealed a distinct lack of data in relation to inspections and infringements found therein. This is because:

- Data is not disaggregated: it often includes all inspections carried out by the labour inspectorate without identifying the inspections that related to posted workers;
- There is no central data registry to monitor and collect data at national level;
- No specific data is made available in relation to TCNs and posted temporary agency workers.

Nevertheless, some data is available, but it should be considered that it is not necessarily comparable, given that each labour inspectorate sets its own strategy and priorities for labour inspections and data collected therein.[170] The existing data does, however, offer some insights:

[169] Monitor Arbeidsuitbuiting En Ernstige Benadeling 2020-21 (Labour Exploitation And Serious Disadvantage Monitor 2020-21), available at: https://open.overheid.nl/repository/ronl-045864e5a98085d255918bf3dd69cee6b13ecaf6/1/pdf/monitor-arbeidsuitbuiting-en-ernstige-benadeling.pdf, pp. 32-33.

[170] It should also be noted that, the Covid-19 pandemic in 2020 has impacted the numbers identified.

- In Poland, in 2020, 156 inspections were carried out by the labour inspectorate, most commonly in the construction sector.[171]
- In Slovenia, in 2020 10 031 inspections were carried out by the labour inspectorate in the field of labour relations control (this excludes occupational safety and health, occupational accidents and dangerous occurrences). From these inspections, 8 708 offences were identified. This data, however, is not specific to posting.
- In Spain, between 2018 and 2020, 469 185 inspections to control compliance with legal obligations in the field of labour relations were completed. Only 0.3% of this number (1 543 inspections) concerned posted workers. 315 proceedings were opened, affecting 4 000 posted workers. The most frequently inspected sectors were construction, road transport and agriculture.
- In Belgium, in 2020, 2 639 inspections were performed; infringements were found in 1 out of every 4 inspections. Roughly 4% of the inspections carried out by the Belgian labour inspectorate related to the cross-border dimension of social fraud, amounting to some 5 270 inspections in 2020.
- In Luxembourg, in 2020, 4 297 checks were carried out by the Labour and Mines inspectorate in cooperation with the Customs and Excise Administration, exclusively in relation to posted workers. This number includes 780 unexpected checks.[172]

A final limitation with this data, is that once workers are posted from the sending Member State, there is limited follow up and even more limited data collection from the sending country. Consequently, much fewer data are available on the sending structures and it is therefore clear that Member States are focused on the receiving mechanisms in their Member States. Follow-up data and observation of workers that are posted abroad is limited.

4.4.2.2. Social partners

In addition to national authorities, **social partners** are also involved in enforcement in the Member States, directly or indirectly. This is discussed in further detail in the Case study on promising practices involving social partners (see section 7.2). Social partners, including trade unions and employer organisations, often play a role in **representing posted workers in proceedings** (high engagement)**,** in **receiving complaints from posted workers or employees** and in **cooperating with national authorities** (moderate engagement).

Box 14. Levels of engagement of social partners in enforcement

High engagement of social partners in enforcement

In a few Member States (e.g., ES, FR, NL), social partners engage in judicial or administrative proceedings.[173] In Spain, social partners support posted workers or employers by engaging in, with their approval, any judicial or administrative proceedings.

[171] For Poland, the 2022 Action Plan of the National Labour Inspectorate has assumed carrying out 52,000 inspections, including in the construction sector, and for 2020-2024 the Plan includes as one of three key strategies: Strategy of control and preventive actions for the construction sector. Available at: https://www.pip.gov.pl/pl/f/v/252630/Program%20dzialania%20PIP%20na%202022%20rok.pdf.

[172] Inspectorate of labour and mines Luxembourg, 'Annual report 2020', available at: https://itm.public.lu/fr/publications/rapports-annuels/rapport-annuel-2020.html?msclkid=d1a332a8d07e11ecb816144efb7842e5.

[173] By contrast, in 5 Member States (DE, NL, LU, BE, DK), social partners play a role in the legislative process.

In France, trade unions can exercise legal action on behalf of the posted workers, whilst providing information to the worker, specifically on the nature and purpose of the action. Workers can notify trade unions of their opposition within a 15-day period and can intervene in the proceedings. Trade unions may exercise appeal themselves. In the Netherlands, trade unions are accorded a standing in court in relation to collective claims for unpaid wages.

Moreover, in several Member States, social partners may enforce collective agreements and control working conditions. In Denmark, trade unions focus on the protection of workers' rights, so long as there an underlying collective agreement that is applicable. As the Danish WEA is only competent for policing occupational safety and health aspects, whereas all other aspects, such as wages, working conditions, workers' rights are the responsibility of social partners to enforce.[174] Similarly in the Netherlands, some trade unions play a role in the enforcement of collective agreements, however this is limited to the construction sector. In France, trade unions have a right to have access to work places and control working conditions.

Moderate involvement of social partners in enforcement

In all Member States, social partners can submit complaints to the labour inspectorate. In the Netherlands, the trade unions may request the labour inspectorate to investigate. Complaints submitted to labour inspectorates by social partners often form the basis of investigations – in many cases the cooperation between social partners and labour inspectorates is vital for detecting issues and enforcing the law (e.g., in DK, SI). In Denmark in particular, the national authorities have a close relationship with social partners, given their significant role in enforcement.[175]

Other enforcement actions taken by social partners, include agreements with competent authorities. In this sense, social partners in Belgium have concluded a 'Plan for fair competition' with the competent administrations to take concrete measures to tackle social fraud in specific sectors, including construction.[176]

Limited role of social partners in enforcement

By contrast, in Luxembourg trade unions do not take part in the enforcement of measures. It should be noted that in Poland, trade unions do not have a formal role in the enforcement of measures, especially given that there are no universally applicable collective agreements in place. Thus, trade unions in Poland act independently, have no competence to carry out inspections and are involved with workers on a case-by-case basis.

4.4.3. Main problems identified in relation to enforcement and main challenges in specific sectors

The research has identified key problems regarding the enforcement of regulations regarding workers in posted and non-posted situations. Sections 4, 5 and 6 reflect instances of enforcement challenges in key economic sectors and in typically problematic situations.

A common problem among the Member States is related to **remuneration** (including non-payment or underpayment) which was identified in several Member States (e.g. in BE, BG,

[174] Reported during stakeholder interview with national authorities.
[175] Reported during stakeholder interview with national authorities.
[176] See also: https://www.siod.belgie.be/nl/publicaties/protocollen.

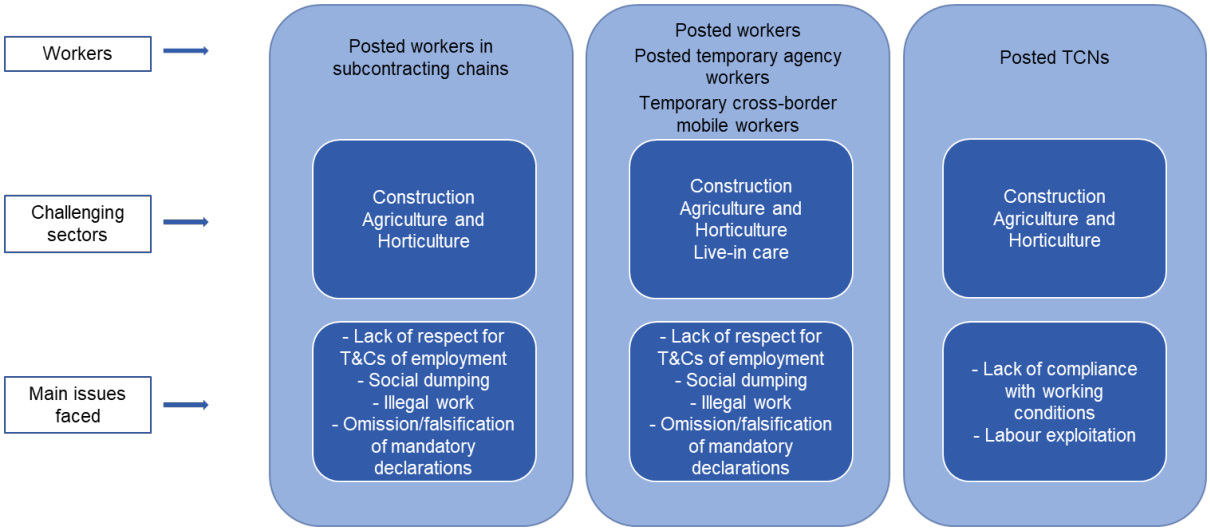
CZ, DE, DK, FI, HU, IT, RO), followed by **not respecting maximum working hours** (e.g. in BE, BG, CZ, HR, HU, IT) and **unlawful posting** (e.g. in BE, BG, DE, NL, SI). Bogus self-employment, undeclared work, and difficulty in identifying the employer or workplace were also reported by national authorities. Of note are also the lack of a 'genuine connection' to the Member State posting workers and problematic accommodation conditions.

The research revealed problems affecting **posted workers in subcontracting chains** in several Member States in the **construction** sector and the **agriculture and horticulture** sector. These issues relate to the failure to comply with **terms and conditions of employment** (e.g., BE, DE, FR, FI, PT, RO) but also to **social dumping** (e.g., DK), **unfair competition** (e.g., ES), and the **omission/falsification of mandatory declarations** (e.g., AT, FR), amongst others.

As for **posted workers, and other temporary cross-border mobile workers employed by temporary work agencies and labour market intermediaries**, the same challenges as posted workers in subcontracting chains can be observed, with the **construction** and **agriculture and horticulture** sectors most affected by these challenges. **Live-in care** is also one of the sectors where desk research revealed breaches in working conditions (e.g., AT, DE, FR, PL). Most issues concern **not respecting terms and conditions of employment** (e.g., BE, DE), **social dumping** (e.g., DK), **illegal work** (e.g., FR), and **omission/falsification of mandatory declarations** (e.g., AT, FR). In particular, evidence available from Bulgaria indicates issues within the **agriculture sector**, where Bulgarian seasonal agriculture workers are increasingly hired directly by local employers, which limits the possibilities for control by the Bulgarian Labour Inspectorate.

Enforcement issues have also been observed in relation to **posted TCNs**. Again, and reflecting the already established trend, the concentration of these challenges is mostly in the **construction and agriculture** sectors. These concern the **lack of compliance with work conditions** (e.g., RO), and **labour exploitation** (e.g., FI, PT). In Portugal, labour exploitation of TCNs happens within fruit production as the employment status of the workers is unclear and many of these are employed through temporary work agencies.

Figure 8. Main challenges identified in key sectors and the issues faced by temporary cross-border workers



Source: Authors' own analysis based on national desk legal research, national legal experts' analysis and professional knowledge, and interviews with relevant stakeholders.

Box 15. Enforcement Issues

The main enforcement issues are cross cutting and affect all types of temporary cross-border mobile workers. The desk research and stakeholder consultations have identified working outside the law and avoiding detection as the overarching issue. Limited monitoring, inspections and a lack of detection of fraudulent practices results in a lack of effective enforcement of the rights of these workers and further aggravates existing problems.

Overarching issue: working outside the law and lack of detection

The overarching issue identified is that of undertakings working outside the law which leads to the lack of detection of any illegal structures or practices. This occurs through practices such as (1) unlawful or bogus postings, (2) the use of letterbox companies and (3) non-compliance with obligations imposed by national law. Examples from the Member States illustrate instances of these three practices.

Unlawful or bogus posting

- In Slovenia, unlawful posting occurs in the following way: companies whose main registered activity is to supply workers to other companies, are not authorised to provide TCN workers to user undertakings. Nevertheless they provide a secondary or additional registered activity, that of a "service" (instead of workers) in order to be able to provide these TCNs to user undertakings within the permitted "registered activities".[177]

- In Germany, temporary work agencies based in the country facilitate the illegal provision of temporary workers through fictitious work and services contracts. Infringements include pretending to perform service or work contracts in order to disguise illegal temporary agency work, concealing the hiring out of individual workers or entire groups of workers by posing workers as self-employed, deceiving user companies by using forged copies of already expired permits for the provision of workers of small and medium-sized temporary work agencies.

- False posting practices are also observed in the agriculture and horticulture sector. In France, there have been reports that false intra-group mobility was being used to circumvent the rules on direct employment by the client. In this arrangement, posted workers were fictitiously posted to empty shell branches of the same (posting) employer hiding the real final client, who was a different undertaking altogether.

Letterbox companies

The operation of letterbox companies is a common problem across the Member States. Experts from Poland and Slovenia explicitly stressed this and explained the practices in their countries:

- In Poland and Slovenia, letterbox companies are usually only uncovered through IMI requests, or requests from the national authorities of other Member States. This means that once the national authorities attempt to inspect the premises of these

[177] Yearly Report of the Slovene Labour Inspectorate for 2022, p. 80, available at: https://www.iusinfo.si/Priloge/PRIPDZ/PRIPDZ101E1994VIIIN3_7_1.PDF#page=26&zoom=100,109,206.

companies (upon the request of other Member States), they discover that they do not exist and the inspections are therefore not carried out.

- The lack of detection by law enforcement of letterbox companies, contributes to the difficulty in quantifying the incidence of this type of practice, the number of posted workers affected, and the extent of illegal practices carried out therein.

Non-compliance with legal obligations

This practice has also been uncovered during the research:

- In Slovenia, desk research and interviews with public authorities indicated that in relation to the posting of construction workers, often the obligation to have worked in that Member State before being posted is not fulfilled. This is also observed in Belgium as a receiving country.
- In Belgium, a high share of foreign temporary work agencies have not acquired accreditation from the Belgian region to which they post workers and where the work is performed. Since 2017, the "accreditation number" of the foreign temporary work agency is requested by LIMOSA, however, in practice only workers posted by foreign temporary work agencies with accreditation are reported under this category.
- There is no obligation for Belgian user undertakings to report foreign temporary work agencies that do not acquire an accreditation number, meaning that there is insufficient incentive for these agencies to acquire the accreditation. This has led to significant underreporting of workers posted by (de facto) temporary work agencies.
- Foreign temporary work agencies must pay a deposit to the Social Fund for Temporary Workers[178] in Belgium, as well as all compulsory contributions, unless they can prove that equivalent obligations apply to temporary work agencies in the country of origin. According to Federgon, the Belgian federation of Human Resources service providers, many foreign temporary work agencies do not comply with this obligation either.[179]

These three practices reveal numerous instances of companies working outside the law, with the consequence of evading detection by enforcement bodies. This means that there is a real risk that illegal practices are perpetuated and continue to harm workers, as well as diminish the positive contributions of temporary cross-border work to the EU's economy.

<u>Consequent issue (1): Limited protection for the workers affected</u>

One significant issue of working outside the law and the lack of detection, is that posted workers are offered (1) insufficient or no protections during their posting, and (2) do not benefit from the full extension of their rights.

Insufficient or no protection

This issue has been detected across the Member States. Posted workers and other temporary cross border workers may find themselves at a higher risk of occupational safety and health-related accidents. For instance:

- Foreign temporary work agencies in Denmark have been reported to be using outdated working methods, carrying out tasks requiring more physical work and

[178] Reported during interview with Employer Organisation, 2022.
[179] See also: https://federgon.be/fileadmin/media/pdf/fr/Federgon_-_Rapport_annuel_2020.pdf.

using a lower level of technological equipment, when compared to that usually used in the Danish Labour market.[180]

Adding to this, the lack of accident insurance is a serious issue faced by posted workers, particularly in accident-prone circumstances:

- As reported in Germany, illegal companies do not offer (sufficient) insurance coverage.[181] In the industries where the risk of accidents is particularly high (such as construction), there is often a lack of accident insurance for those posted workers. In a step to improve working conditions for workers in the construction sector, temporary agency work is forbidden in the sector in Germany since 2017.[182] The growing complexity of subcontracting chains and use of illegal and bogus forms of contracted work and self-employment at construction sites led to many issues, which culminated in the prohibition of temporary agency work in the sector.[183]

Other protections, such as guarantees for maximum working hours and working conditions are compromised by undertakings working outside the law and not providing these for posted workers and other temporary cross-border mobile workers. Thus, problematic working conditions are common, as reported by the Member States, in all the sectors[184] analysed by this study:

- In the Netherlands, poor working conditions have been reported among posted TCN workers.
- In Spain, the non-compliance with the maximum working hours by posted TCN workers has been reported.
- In Belgium, the Netherlands and Poland, the meat processing sector has been reported as being prone to systematic issues related to non-respect of working conditions. Similar problems led in Germany, to legislation which forbids postings and contracts for work[185] in the sector.[186] Nevertheless, it is reported by trade unions that transitional issues still exist.

There are also occasions where workers are pressured to appear self-employed in spite of de facto working in a dependent situation (false self-employment). This is mostly motivated by employers seeking to avoid compliance with employment protection legislation and (potentially) to lower the tax wedge.

- In Poland, France and the Netherlands[187], this is particularly common in the construction sector.[188]

Inability to avail of the full extension of rights

When undertakings do not provide for (sufficient) protections for posted working, this has the negative consequence on workers as they are unable to benefit from the full range of their rights. Underpayment, for example, means that posted workers do not receive their

[180] Reported during desk research and stakeholder interview with national authorities.
[181] Reported during desk research and stakeholder interview with trade union.
[182] § 1b, Temporary Workers Act, available at: https://www.gesetze-im-internet.de/a_g/__1b.html
[183] Eurofound, 'Germany: Compromise struck on new temporary agency work legislation', 2016, available at: https://www.eurofound.europa.eu/publications/article/2016/germany-compromise-struck-on-new-temporary-agency-work-legislation.
[184] Construction, live-in/long-term care, meat processing, agriculture and horticulture and hotel/tourism/catering.
[185] A contract for work ("Werkvertrag") concerns a specific job rather than a period. A freelancer, for example, will produce or repair something, in exchange for a one-off fee. The service is usually provided once.
[186] Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work, (Arbeitsschutzgesetz, ArbSchG), available at: https://www.gesetze-im-internet.de/englisch_arbschg/englisch_arbschg.html
[187] In the Netherlands foreign temporary work agencies are seen to recruit 'platforms' to recruit (bogus) self-employed persons.
[188] Reported during the desk research and stakeholder interviews with national authorities.

full remuneration. It is an issue affecting posted workers, as reported by the Member States:

- TCN posted workers are at a particularly high risk of social dumping and underpayment, as detected by the Belgian Labour Inspectorate, for instance, where TCN workers were found to be paid only 2-3 EUR per hour.[189]
- TCN workers in Denmark have also been reported to be treated unequally as compared to other workers in subcontracting chains, especially in long subcontracting chains.[190]
- The research carried out during the present study has shown that in specific instances, there is a lack of application of the relevant collective agreements, meaning that posted workers are not able to avail of from the full range of rights.
- In Denmark, for example, posting foreign temporary work agencies do not apply collective agreements, due to the fact that they do not understand how the system works and the fact that they do not desire to do so. As such, posted temporary agency workers are not able to fully benefit from their rights.
- Overall poor living conditions are observed in other Member States, including Luxembourg, Germany and Denmark:
- In Germany the right of residence is sometimes exhausted in the hotel-tourism-catering sector. The sector of live-in/long-term care is also particularly prone to poor living conditions, given the difficulty in performing controls.[191]
- Denmark has also reported instances of foreign temporary work agencies not offering workers adequate welfare measures, such as dining areas, a toilet or bathing facilities. Consequently, the workers are not able to benefit from good living conditions whilst being posted.

Due to the operation of many of these practices outside the law, it is difficult to detect them and consequently even more challenging to guarantee the rights of the workers working under these conditions.

Consequent issue (2): Lack of enforcement

Enforcement manifests itself in many forms. This includes: (1) the capacity and (2) competence issues faced by enforcement entities, as well as (3) the ability to enforce a decision, particularly in relation to unpaid remuneration. A lack of enforcement has a direct impact on posted workers' ability to enforce and claim their rights.

Capacity issues of enforcement bodies

- Capacity issues in national labour inspectorates are common across the Member States. Enforcement authorities often struggle with understaffing, limiting their capacity to conduct preventive inspections. National labour inspectorates are frequently unable to complete preventive inspections, meaning that there is a high reliance on complaints from posted workers and trade unions and requests from authorities in other Member States.

[189] Reported during desk research.
[190] Reported during desk research, 2022.
[191] Poland has reported that, as the professional boundaries are blurred, it is challenging to gather the necessary documentation and perform inspections. In Germany, in case BAG, 24.06.2021 - 5 AZR 505/20, the Federal Labour Court dealt with the question of whether foreign care workers posted to a private household in Germany are entitled to the statutory minimum wage for hours worked. The BAG answered in the affirmative, stating that the minimum wage entitlement also applied to periods of on-call duty.

- For instance, in the Slovenian Labour Inspectorate, for instance, in 2021 there were 53 inspectors in the field of labour law, with around 225 795 entities to be controlled, amounting to more than 4 000 inspections per inspector, if controls were to be compulsory for each entity.

Competence of enforcement bodies

Moreover, the issue of competence of national authorities comes up:

- In the Netherlands, as regards the rights of posted temporary agency workers, the labour inspectorate is competent for enforcement up to the statutory minimum wage only. The Foundation for Compliance with the CLA for Temporary Agency Workers in the Netherlands (SNCU) does not have investigative or enforcement competences in case of posting by foreign temporary work agencies.[192] As such, it becomes difficult to enforce a wage that is set by a collective labour agreement for posted temporary agency workers.

Ability to enforce a decision

The inability to enforce a decision is especially prevalent where letterbox companies are involved:

- In Slovenia it is reported that, after years of hearings and related costs incurred, a worker may be able to obtain a final and enforceable decision, which however, cannot be enforced because the property to be seized no longer exists, as the company through which the worker was employed was a letterbox company and no longer exists.[193]

Consequently, the unpaid wages owed to the worker cannot be guaranteed, as there is no possible way for the decision to be enforced.

[192] See also: https://www.sncu.nl/en/ .
[193] Reported in stakeholder interview with national authority.

5. Posted and other temporary cross-border workers in situations involving subcontracting chains and labour market intermediaries in key sectors: Drivers, characteristics and persisting challenges

Sections 3 and 4 point to several key sectors that are particularly relevant for posting and non-posting situations. This section assesses the situation of different types of temporary cross-border workers in five of these sectors: **construction**, **long-term care/ live-in care**, **meat processing**, **agriculture and horticulture**, and **hotel-tourism-catering**.

The selection criteria informing the choice of sectors included:

- the number of temporary cross-border workers in each sector;
- the prevalence of specific forms of cross-border mobility in each sector;
- the occurrence of posting and other types of temporary cross-border work in subcontracting chains;
- the role of labour market intermediaries in relation to posting and other types of temporary cross-border work;
- the systematic or extensive involvement of posted TCNs;
- the challenges in the sector per given form of temporary cross-border mobility and the systematic nature of problems encountered.

As already mentioned the international road **transport** sector was not selected for in-depth analysis, since the new rules on posting of drivers in road transport (Directive 2020/1057) – adopted in July 2021 as part of the Mobility Package – have only started to be applied in 2022 and their impact could not be expected to be captured in this study's timeline.

This section focuses on the **characteristics** of temporary cross-border work at sectoral level, **employment relations** involving subcontracting chains and labour market intermediaries, their main **drivers** and a range of **key issues and practices** resulting in **violations of terms and conditions of employment**.

5.1. Construction

Summary of key findings

Temporary cross-border intra-EU labour mobility is frequently used in the construction sector. Intra-EU labour mobility can be a solution for the labour and skill shortages in the sector. However, the use of temporary cross-border intra-EU labour mobility may bring unwanted effects. For instance, precarious living and working circumstances of posted workers are encountered in the construction sector. Such problematic situations seem to arise especially in the case of subcontracting, the use of placement agencies as well as the posting of TCNs.

5.1.1. Overview of the sectoral context

The construction sector is **one of the largest sectors in the EU**, seeing that in 2021, 6.7% of all employees were employed in this sector.[194],[195] In 2020, an estimated 3.5 million companies were active in the construction sector, employing around 11 million persons.[196] This brings the average number of persons employed per enterprise to 3.1 persons. The sector is mainly characterised by small and medium-sized enterprises (SMEs) as 95% of companies in the EU-27 in 2021 had less than 20 employees.[197] Furthermore, in 2021, 11.1% of the EU-27 GDP was created in the construction sector and total turnover in the sector amounted to € 1 715 billion in 2020.[198]

The construction sector is known to be **cross-border oriented.**[199] Several drivers of cross-border provision of construction services can be identified. For instance, the **enlargement of the EU** has increased export and import of services, as well as **price competition**. Moreover, the construction sector is characterised by both **manpower and skill shortages.**[200],[201] Labour shortages in general can be considered as a global issue, not only in the EU construction sector, caused by the sector's poor image, unclear career paths, lack of training and education, poor work environment, and an ageing workforce to name a few.[202] Skill shortages are an important issue as well, seeing that skilled manpower is one of the critical factors of production in construction projects.[203] As a result, the construction sector seems to be in constant need of manpower, and thus looking for ways to employ workers from abroad.

Data shows that the construction sector is one of the largest sectors of employment for EU mobile and cross-border workers.[204] Compared to nationals, these workers are overrepresented in the construction sector.

[194] Eurostat [NAMA_10_A10_E]
[195] For details about labour costs per economic sector, see Eurostat https://ec.europa.eu/eurostat/web/labour-market/information-data/labour-costs.
[196] Eurostat [SBS_NA_CON_R2]
[197] European Construction Industry Federation, 'Key Figures 2019 Construction Activity in Europe Edition 2020', 2020.
[198] Eurostat [SBS_NA_CON_R2]
[199] E. Sjödin & E. Wadensjö, 'Intra-European Labour Migration for a Resilient EU', 2022.
[200] See the annual report on labour shortages and surpluses in the EU (McGrath, 2022).
[201] For instance, the Belgian construction sector, which is said to be mainly cost-driven, is also facing labour shortages. Roughly 20,000 additional construction workers are needed. About seven out of ten of the (large) Belgian construction companies have one or more vacancies.
[202] A. Ceric, and I. Ivic, 'Construction labor and skill shortages in Croatia: causes and response strategies, Organization, Technology and Management in Construction', 2020, pp. 2232-2244.
[203] B., Akomah, L. K., Ahinaquah, & Z. Mustapha, 'Skilled Labour Shortage in the Building Construction Industry within the Central Region', 2020, Baltic Journal of Real Estate Economics and Construction Management, 8, 2020, pp. 83-92.
[204] E. Hassan, L. Siöland, B. Akbaba, D. Cinova, M. Gasperini, & M. Geraci, 'Annual Report on Intra-EU Labour Mobility 2022', European Commission Directorate-General for Employment, Social Affairs & Inclusion, 2023.

This section zooms in on the importance of posted workers, temporary agency work and subcontracting in the construction industry (sometimes they can be linked to each other) and the challenges that arise for these three dimensions. Chapter 7 then discusses and analyses several of these challenges in more detail. In response to the challenges faced in the construction sector, recommendations have been formulated by the EFBWW in the fight against cross-border social fraud, to be implemented at a European or national level.[205] These recommendations mainly focus on prevention, inspections and sanctioning (for instance, improve cross-border exchange of digital data, efficient tools to control the role of intermediary labour suppliers in the construction sector and where needed exclude them, stronger rules on subcontracting in public procurement, limit the subcontracting chain both vertical and horizontal, full joint and several liability, effective labour inspections and complaint mechanisms etc.).

5.1.2. Posted workers in the construction sector

In the construction sector, the **posting of workers** as a specific form of cross-border labour mobility has become an **increasingly prominent and competitive form of service provision** among EU Member States.[206] Posted workers seem to be employed mainly on **large construction sites**.[207]

The number of posted workers in the construction sector can be estimated by analysing the 'Portable Documents A1' (PDs A1) issued.[208] In 2021, about 26% of PDs A1 issued under Article 12 were granted to persons providing services abroad in the construction sector.[209] This EU-average of 26% lies remarkably higher in several sending Member States. For instance, it is equal to or exceeded 50% in Estonia (54%), Portugal (60%), Romania (54%), and Slovakia (53%) in 2021.[210] For these Member States, sending posted workers to provide services in the construction sector is of great importance. **The main flows of posted workers active in the construction sector** go Poland to Germany, from Slovakia to Germany, from Slovenia to Germany, from Germany to Austria, from Portugal to France, from Poland to France, from Poland to Sweden, from Portugal to Belgium, from Poland to Belgium, and from Slovenia to Austria. Furthermore, in terms of notifications made in the prior declaration tools of the receiving Member States, construction is the most common sector for Belgium, Denmark, France, Cyprus, Luxembourg, Finland, and Sweden.[211]

Box 16. Prevalence of posting in the construction sector in the EU

Incoming posted workers make up a large part of the workforce in the construction sector in several Western European Member States, mainly in Belgium, France, Germany, Austria and Luxembourg (but also to some extent in Denmark and Sweden).

[205] See, for instance, https://www.efbww.eu/campaigns/stop-social-dumping/65-a; https://www.efbww.eu/campaigns/subcontracting-campaign/162-a; https://www.efbww.eu/stream/50f52ca6-9dbc-47dd-91e4-8820dd9b113d; https://www.efbww.eu/campaigns/campaign-3/34-a; M. Houwerzijl., E. Traversa, S. Borelli, M. Mesure, M. M., & W. Buelen.. Putting an end to cross-border social security fraud and abuse, EFBWW: Brussels, 2019.

[206] S. Danaj, E. Zólyomi, R. Kahlert, N. Prinz, & V. Sandu, 'Bridging the gap between legislation and practice in the posting of workers – POW BRIDGE', 2021, p 11.

[207] For instance, Belgian clients of posted workers are in particular active in the subsectors 'Construction of residential and non-residential buildings' (NACE 412).

[208] This document proves that the social security legislation of the issuing Member State applies and confirms that the individual in question has no obligations to pay contributions in another Member State.

[209] De Wispelaere et al., 'Posting of workers Report on A1 Portable Documents issued in 2021', European Commission DG EMPL, 2023.

[210] Furthermore, it surpasses the average of 26% in Czechia (43%), Croatia (46%), Latvia (41%), Lithuania (40%), Luxembourg (43%), Austria (29%), Poland (47%), and Slovenia (41%). (De Wispelaere et al., 'Posting of workers Report on A1 Portable Documents issued in 2021', European Commission DG EMPL, 2023.).

[211] F. De Wispelaere, L. De Smedt, & J. Pacolet, 'Posting of workers Collection of data from the prior declaration tools Reference year 2021', European Commission DG EMPL, 2023.

Posted workers represent about one-fifth of employment in the Belgian construction sector (though one-tenth of employment in the construction sector in FTEs). This shows that the Belgian construction sector has become strongly dependent on posted workers. In some regions in France, posted workers account for 8% of the total workforce employed in the construction sector. Furthermore, some 5% of the workforce in the Austrian construction sector and some 7% of the workforce in the Dutch construction sector are posted workers. Finally, approximately 4.5% of the employment in the German construction sector are incoming posted workers.[212]

From a sending perspective, about one in three workers employed by a Slovenian construction company are posted to another Member State.

The posting of TCNs in the construction sector is of particular importance, and is discussed in more detail in section 6.5.

Posting as cost cutting strategy is one of the main drivers for the use of it in the construction sector.[213] Nonetheless, there are also several other factors at play. In general, it seems that **the nature of the sector aligns with the characteristics of posted work**. The main characteristic of the construction sector is its **high temporality**, limited to the completion of the construction process.[214] Consequently, a flexible labour force is needed, meaning that long-term attachment is often not needed, and posting is ideal to satisfy this demand of **flexibility**. Moreover, posting can provide a **solution to local labour and skill shortages**. When posting workers, specialised expertise that cannot be found on the local labour market can be brought in. Furthermore, due to the financial and economic crisis of 2008, construction companies in some Member States have shifted their horizon from the local economy to the internal market.[215]

Nevertheless, the construction sector is confronted with several **challenges with respect to the compliance with the applicable labour law**. These challenges are mainly caused by the characteristics of the construction sector. For instance, seeing that the sector is highly competitive with fierce price competition, labour costs are one of the main areas in which costs are cut down, leading to **undeclared work.**[216] **Bogus self-employment is particularly prevalent in the construction sector** (see also section 6.4)**.**[217] Furthermore, the high level of cross-border posting in the sector has been found to be intrinsically linked to **cross-border infringements to the applicable labour law.**[218]

Posted workers in the construction sector often find themselves in precarious circumstances, not only in the receiving Member State, but also often from the start in the sending Member State.[219] First, from the sending perspective, it is often the case that low

[212] F. De Wispelaere, L. De Smedt, and J. Pacolet, 'Posted workers in the EU. Facts and figures', Leuven: POSTING.STAT project VS/2020/0499, 2022b.
[213] Lens et al. 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants,' International Migration, 2021.
[214] Á. Romero, M. de las Nieves González, M. Segarra, B. M. Villena, & Á. Rodríguez, 'Mind the Gap: Professionalization is the Key to Strengthening Safety and Leadership in the Construction Sector', International Journal of Environmental Research and Public Health, 16(11), 2019.
[215] See e.g., Dorigatti et al. 'Posted workers from and to Italy. Facts and figures', 2022, Leuven: POSTING.STAT project, 2022 for Italy: "According to our interviewees, the increased presence of small firms abroad, also through posting, is linked to the effects of the 2008 economic crisis on the internal market, which have pushed many businesses of the Italian construction sector to the EU construction market."
[216] European Federation of Building and Woodworkers & European Construction Industry Federation, 'Tackling Undeclared Work in the Construction Industry Toolkit with Concrete Cases from Belgium, France, Bulgaria, Italy, Spain, Romania and Austria', 2020.
[217] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', Publications Office of the European Union, Luxembourg, 2016.
[218] European Federation of Building and Woodworkers and European Construction Industry Federation, 'Tackling Undeclared Work in the Construction Industry Toolkit', 2020.
[219] Defined by Standing (2011, p. 10) as workers missing some of the following seven forms of security: that of the labour market, employment security, job security, work security, skill reproduction security, income security, representation security.

wages in the country of origin, often associated with insecurity and poor working conditions, drive these workers to engage in posted work.[220] Second, when being posted, wages of the posted workers are often lower than those of local workers doing the same job (e.g., posted workers earn on average 30% less than comparable French workers employed at the same workplace).[221] Section 6.2 goes deeper into underpayment as well.

In addition to possible wage problems, comparative research has found that the employers of posted workers in the construction sector are found by labour inspections to be particularly prone to occupational safety and health (OSH) violations,[222] compared with other sectors.[223] Posted workers are entitled to a set of core rights, including minimum rates of pay, maximum work periods, minimum paid annual leave, and health, safety, and hygiene at work. However, a study examining nine Member States found that "the temporary, mobile and transnational character of posting affects the health and safety of posted workers in multiple ways".[224] There is a tradition that many construction workers live on-site in collective accommodation, and it was found that posted workers sometimes face economic vulnerability and an increased dependence on their employer, which may lead them to accept poor working and living conditions. Moreover, cases where injuries have been reported have revealed irregularities in posted workers' health insurance and care.

There is a certain **labour market segmentation of the European construction labour market**.[225] This indicates that posted workers are kept separate from nationals in the host country or other migrants. On the one hand, this is the result of the work-focused and employer-dominated nature of posted construction workers' social world abroad. For instance, as they are often housed on-site, all efforts of posted construction workers are channelled into earning and saving money, resulting in isolation from the broader society.[226] On the other hand, building political, social, and economic resources in host Member States is less necessary/possible for posted workers compared to more permanent migrants in the sector.[227]

Furthermore, **the sector is prone to abuse of the posting rules**.[228] In Belgium in 2021, 76% of inspections in the construction sector found an infringement, while the share was 50% in 2020. In the Italian construction sector, irregularities in the terms and conditions of employment among 60% of the outgoing posted workers were found.[229] The **sharp increase in the number of TCNs posted to several Member States** is also observed by labour inspectors. This reality and other challenges have led to some problematic situations and rights violations. For instance, in some cases, wages are paid far below the minimum wage. Finally, despite more efforts on enforcement, companies keep on finding **loopholes**, for instance by using posted self-employed persons because they do not fall under the PWD.

Labour inspections aimed at enforcing the posting rules take place to a large extent in the construction industry. In France, 59% of controls in 2017 took place in the construction sector,[230] while in Belgium 68% of inspections in 2019 and 57% of inspections

[220] A. Voivozeanu, 'Precarious posted migration: the case of Romanian construction and meat-industry workers in Germany', Central and Eastern European Migration Review, 8(2), 2019, pp. 85-99.
[221] M. Muñoz, 'Posted workers from and to France. Facts and Figures', Leuven: POSTING.STAT project, 2022.
[222] In Belgium, the importance of health and safety at work in case of the posting of workers has come to the fore, unfortunately, due to the deadly accident of five posted construction workers that occurred on 18 June 2021 on a construction site in Antwerp.
[223] Danaj et al., 'Bridging the gap between legislation and practice in the posting of workers – POW BRIDGE', 2021, p. 5.
[224] S. Danaj & E. Zólyomi, 'Occupational Health and Safety of Posted Workers in the EU: a Comparative Report', European Centre for Social Welfare Policy and Research, 2018, p. 6.
[225] E. Caro, L. Berntsen, N. Lillie & I. Wagner, 'Posted migration and segregation in the European construction sector', Journal of Ethnic and Migration Studies, 41(10), 2015, pp.1600-1620.
[226] Oso et al., 2022.
[227] Caro et al., 'Posted migration and segregation in the European construction sector', Journal of Ethnic and Migration Studies, 2015.
[228] For instance, in October 2019, EFBWW together with ETUC submitted ten problematic cases to ELA.
[229] L. Dorigatti, M. Pallini, & M. Pedersini, 'Posted workers from and to Italy. Facts and figures', 2022, Leuven: POSTING.STAT project, 2022.
[230] M. Muñoz, 'Posted workers from and to France. Facts and Figures', Leuven: POSTING.STAT project, 2022.

in 2020 related to cross-border social fraud were carried out in the construction sector.[231] Despite this strong focus on the construction sector, the infringement rate remains very high as shown above.

5.1.3. Temporary agency work in the construction sector

In 2021, 2.5% of employed persons between 20 and 64 years were temporary employment agency workers in the EU-27.[232] While no separate data for the construction sector (NACE F) is available, **the share of temporary employment agency workers in manufacturing industry and construction together lay remarkably higher at 3.4%** in 2021 in the EU--27. In some Member States, the difference between the share of temporary employment agency workers in all sectors and the share in industry and construction is remarkable. For instance, in Spain 4.1% in total is employed as temporary employment agency worker, while the share in industry and construction amounts to 8.7%. Furthermore, in France, 7.4% of persons employed in industry and construction are temporary employment agency workers, while the share only amounts to 2.6% in general.

In Europe, **9% of agency workers are active in the construction sector.**[233] However, in Eastern Europe the share amounts to 2%,[234] in Southern Europe to 1%,[235] and in Central and Northern Europe to 13%.[236] This shows that the share can differ considerably between regions. The main reason for this is the **diverging regulatory framework for temporary employment agency work in the Member States**. For instance, there are sectoral restrictions in place on temporary agency work in the German construction sector, in Spain further restrictions on temporary agency work in the construction sector can be imposed through collective bargaining, and in Greece, in the case of agency workers in construction, the temporary work agency has the duty of submitting a report to the authorities and paying the social security contributions.

However, above figures say nothing about the importance of temporary agency work in temporary cross-border mobility. **Such figures are not available for the construction sector.** In any case, infringements in case of temporary employment agency work within a cross-border context are frequently identified in the construction sector. See also section 6.1 for a general overview of the challenges of temporary agency work in temporary cross-border mobility.

5.1.4. Sub-contracting involving posted workers and other temporary cross-border mobile workers

Subcontracting in the construction sector is very common due to the **fragmented nature of the work**. Seeing that the sector is highly volatile, and a high degree of labour flexibility is necessary, subcontracting has always been important in the construction sector, even increasing over the last two to three decades.[237] Especially in price-sensitive and labour-intensive parts of the sector subcontracting is used.[238,239] A further issue are (overly) **long**

[231] F. De Wispelaere et al., 'Posted workers from and to Belgium. Facts and figures', Leuven: POSTING.STAT project, 2022d.
[232] Eurostat [LFSA_QOE_4A6R2].
[233] World Employment Confederation, 2021a.
[234] Eastern Europe concerns Croatia, Czechia, Estonia, Poland, Romania, and Russia.
[235] Southern Europe concerns Greece, Italy, Portugal, and Spain.
[236] Central and Northern Europe concerns Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden, and Switzerland.
[237] M. Buckley, A. Zendel, J. Biggar, L. Frederiksen, & J. Wells, 'Migrant Work & Employment in the Construction Sector', 2016, Geneva: International Labour Organization.
[238] F. De Wispelaere et al., 'Posted Workers in the EU A Quantitative Comparative Analysis', 'Posted Workers in the EU A Quantitative Comparative Analysis', Leuven: POSTING.STAT project, 2022e.
[239] European Federation of Building and Woodworkers and European Construction Industry Federation, 'Tackling Undeclared Work in the Construction Industry Toolkit', 2020.

chains of subcontractors. There are **several reasons for using subcontracting** such as looking for expertise and know-how which does not belong to the company's core activity, labour shortages, looking for increased efficiency, a traditionally evolved division of labour with partners based on mutual trust, routine, or historical reasons.[240]

In the construction sector in 2017, payments to subcontractors accounted for 23.5% of total turnover, and even for 36.6% in the construction of buildings.[241] In this sector, large companies function as main contractors or as building service providers, while small and medium enterprises (SMEs) assume the role of subcontractors. The use of subcontracting has long been a normal situation in the industry,[242] and it can be considered as one of its permanent and predominant features.[243,244]

Combining subcontracting with posting allows "employers to access alternative regulatory regimes in a legal sense, as well as in an employment relations sense, in that company boundaries and practices, as well as the expectations of the subcontractors' workers relate back to their home country".[245] **Lowering of costs appears to be the main reason for the use of subcontracting involving posted workers**. Because of the high cost pressure in the construction sector, **the use of posting can be found in all layers of subcontracting**, spreading from large companies to SMEs.[246]

Not only has posting benefitted subcontracting, but also the other way around: the use of posting has favoured the lengthening of the subcontracting chain, and the subsequent transition from outsourcing on the national market to outsourcing on the international market, "leading to a transnationalisation of the subcontracting system". Another trend in the construction sector because of the lowering of labour costs is the **change from subcontracting between companies to subcontracting to temporary employment agencies.**[247]

Consequently, the growing number of posted workers, workers recruited through temporary employment agencies, and bogus self-employed persons in subcontracting chains can lead to several problems, one of which concerns occupational safety and health (OSH). It is found that **a reduced attention for OSH** is the result of fierce competition between lower-level contractors for contracts, which puts pressure on work standards[248] and makes that subcontracted workers are often less informed about important policies and procedures.[249] Additionally, subcontracted workers are found to be more vulnerable to OSH risks due to longer hours, intensity of work, economic stress, and their concentration in higher-risk segments of a supply chain.[250]

Not only are there problems regarding OSH, but also regarding undeclared work. Because of long and complex subcontracting chains, **undeclared work and labour exploitation**

[240] J. Cremers, 'In search of cheap labour in Europe: Working and living conditions of posted workers', 2011, p. 177.
[241] Eurostat [SBS_NA_CON_R2], [SBS_NA_IND_R2], and [SBS_IS_SUBC_R2]
[242] N. Lillie and I. Wager, 'Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building', in 'the outsourcing challenge: organizing workers across fragmented production networks', ETUI, 2015.
[243] J. Cremers, 'In search of cheap labour in Europe: Working and living conditions of posted workers', 2011, available at: CLR/EFBWW/International Books, ISBN 978 90 5727 105 2.
[244] G. Alberti, & S. Danaj, 'Posting and agency work in British construction and hospitality: the role of regulation in differentiating the experiences of migrants', 2017, The International Journal of Human Resource Management, 28(21), pp. 3065-3088.
[245] N. Lillie and I. Wager, 'Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building', 2015, p. 158.
[246] R. Cillo, 'Mandatory mobility? The case of immigrant posted workers sent from Italy to Belgium in the construction sector', International Migration, 2021, 59, pp. 156-171, available at: doi: 10.1111/imig.12935.
[247] RIbid.
[248] L. E. Berntsen & N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 37(1), pp. 1714-187, 2014.
[249] S. Choe, W. Seo, & Y. Kang, 'Inter- and intra-organizational safety management practice differences in the construction industry', Safety Science128, 2020.
[250] P. James, D. Walters, H. Sampson, & E. Wadsworth, 'Protecting workers through supply chains: Lessons from two construction case studies', Economic and Industrial Democracy, 36(4), 2015, pp. 727–747.

occur more often.[251] Labour exploitation concerns for instance non-payment of wages, the deduction of fees from salaries, unpaid overtime, no social protection, no health and safety protection for workers, poor accommodation, and social isolation.

As a result of long subcontracting chains, there is a major **lack of transparency and accountability.**[252] This means that supply chains become 'opaque', with firms up the chain only having limited control over what happens in lower-level subcontracts, and firms trying to push business risks down the supply chain.[253] This problem especially arises when cross-border labour such as posting comes into play in the subcontracting chain. For instance, it occurs that companies transfer the recruitment of labour to small subcontractors, leading to multiple levels of recruitment, which hinders compliance to the rules even further.[254] In the worst case, there can be an illegal supply of cheap labour through agencies or letterbox companies (see also section 6.7).

The construction sector is well-known for its problems with complex subcontracting networks. This phenomenon of subcontracting and temporary work agencies **makes enforcement even harder**, especially in cross-border situations involving posted workers. Seeing that there are long chains of interconnected companies, the direct (social) responsibility and liability of the contractor is considerably reduced.[255] As a result, "even well-resourced unions can, at best, improve employment conditions for a limited set of workers and only for a limited period of time".[256] Therefore, the enforcement of rules is particularly hard for subcontracting chains (possibly involving posted workers and temporary employment agencies) as responsibility is often passed on to the next 'link in the chain'.

[251] P. van Nierope, L. Schönenberg, & P. Terziev, 'Counteracting undeclared work and labour exploitation of third-country national workers', 2021, European Platform tackling undeclared work.
[252] European Federation of Building and Woodworkers and European Construction Industry Federation, 'Tackling Undeclared Work in the Construction Industry Toolkit', 2020.
[253] L. E. Berntsen & N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 2014.
[254] J. Cremers, 'In search of cheap labour in Europe: Working and living conditions of posted workers', 2011, 2011 and: European Platform tackling undeclared work, 'Tackling undeclared work in supply chains', Learning Resource Paper, 2023, https://www.ela.europa.eu/sites/default/files/2023-03/Tackling-undeclared-work-in-supply-chains.pdf .
[255] M.S. Houwerzijl, S.S.M. Peters, 'Liability in subcontracting processes in the European construction sector (comparative report)', European Foundation for the Improvement of Living and Working Conditions, 2008.
[256] L. E. Berntsen & N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 2014, p. 171.

5.2. Long-term and live-in care

Summary of key findings

- Live-in care work is particularly common in seven EU Member States: Austria, Cyprus, Germany, Greece, Italy, Malta and Spain. It is a phenomenon that is on the rise: with underdeveloped long-term care systems being a feature of many EU Member States and people increasingly preferring home-care and community-based services, more households are likely to start employing live-in carers when they can afford to do so. Due to the difficult working conditions in the sector, characterised by long hours and relatively low pay, many (predominantly Western) EU Member States are increasingly relying on EU mobile workers and TCNs to provide live-in care services.

- One of the overarching challenges in the sector is that the very nature of live-in care renders it virtually impossible to separate working and recreational time, making it difficult to reduce the health and safety impacts of working too many hours per week. This is compounded by the fact that, if and when abuses of working time occur, enforcement authorities have limited powers to act given that the 'workplace' in question is an individual's home. Temporary cross-border carers are thus rather 'invisible' workers in private households.

- One of the measures to counter the degree of undeclared work is the Austrian solution of regularisation. However, while 99% of live-in care workers in Austria are formally self-employed, the reality is that intermediary (placement) agencies determine most aspects of the employment relationship. This is a problem given that it represents bogus self-employment. Although EU nationals represent the predominant share of temporary cross-border live-in carers, the share of PDs A1 issued to TCNs has been increasing in recent years, and is expected to continue to do so. TCNs are more likely to experience precarious working conditions, are more vulnerable to undeclared work, and tend to be more excluded from social protection and welfare assistance than EU workers.

This section will address temporary cross-border labour mobility in a particular sub-sector of long-term care: the live-in care sector. Work within this sub-sector is largely provided by mobile foreign nationals, including but not exclusively limited to posted workers. We focus on the role of intermediaries in the live-in care sector, as well as third-country nationals working as live-in carers (a relatively small, but growing, segment of the sectoral labour force).

5.2.1. Overview of the sectoral context: the increasing phenomenon of cross-border (live-in) care workers

5.2.1.1. Long-term care

The care sector is currently a priority area for the European institutions. The European Care Strategy, launched in September 2022, sets as a core priority the provision of high-quality, affordable and accessible care services with better working conditions and work-life balance for carers.[257]

The COVID-19 pandemic brought to light the fundamental importance of a well-functioning care system, as well as the vital role that caregivers play. It also bolstered the '**care crisis'** that many countries are experiencing, caused by ageing populations, a shortage of care workers, the inadequate quality and elevated cost of long-term care facilities, overburdened family carers and, at the same time, (the image of) inordinate public expenditure.[258] Indeed, on average, 1.5% of the GDP of OECD countries was spent on long-term care services in 2018, with this percentage as high as 3.9% in the Netherlands and around 3.5% in Denmark and Sweden.[259] In an attempt to counter these issues, **many EU Member States are increasingly relying on EU mobile workers and TCNs to provide long-term care (LTC) work.**

In the **EU27, around 6.3 million people work in LTC**, amounting to around 3.2% of the EU's total workforce.[260] In 2019, 71% of LTC workers in the EU worked in residential care and 29% in non-residential care (the latter representing an increase of 3% since 2009). Sweden, the Netherlands and Belgium have the highest shares of LTC workers compared to their total workforce (7.1%, 6.4% and 5.5% respectively). In **2019, 7.9% of the EU's LTC workforce was made up of foreign nationals**, with more TCNs (4.5%) than mobile workers from within the EU (3.4%).[261] These rates are very similar to those of the EU workforce as a whole, with 8% of foreign national workers. However, they differ considerably to those of the healthcare sector, where only 4.8% of the workforce are foreign nationals.[262] Of these, the share of TCNs is the same as that of mobile workers from within the EU.

The Member States with the highest share of foreign workers in the long-term care sector are Malta (43%), Luxembourg (21%), Ireland (19%) and Austria (14%). In response to the COVID-19 pandemic, and in recognition of the high numbers of cross-border workers active in the sector, the Luxembourgish State offered the possibility of temporary, free accommodation in Luxembourg to frontier workers in the hospital and care sectors who reside in Germany, Belgium or France.[263] Meanwhile Cyprus, Germany, Italy and Norway (all 12%), Sweden (11%) and Belgium (10%) all have above average rates of foreign workers in the sector.[264] There is a significant gender imbalance in the sector: **81% of the EU's LTC workforce was female** in 2019.[265]

[257] European Commission, 'A European Care Strategy for caregivers and care receivers', 07 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5169.
[258] V. Horn & C. Schweppe, 'Transnational mobilities of care in old age', International Journal of Ageing and Later Life, December 2019, p. 11.
[259] OECD, 'Spending on long-term care', November 2020, available at: https://www.oecd.org/health/health-systems/Spending-on-long-term-care-Brief-November-2020.pdf.
[260] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 8, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20028en.pdf.
[261] *Ibid, p. 11.*
[262] *Ibid, p. 11.*
[263] See: https://guichet.public.lu/en/actualites/2020/novembre/20-faq-logement-travailleurs-frontaliers.html.
[264] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 11.
[265] *Ibid*.

5.2.1.2. Live-in care

Although there is no occupational definition of a live-in carer, these workers are "paid professionals, with or without formal care training, whose work primarily involves LTC provision while living in a private residence with the care receiver."[266] Live-in care is therefore a sub-category of long-term care provision; one in which **precarious employment relationships are common and data is difficult to gather**. This is in part due to the volume of unregulated and undeclared live-in care work, as well as the challenge of collecting data or conducting inspections in a private home. As temporary cross-border carers are rather 'invisible' workers in private households and because there are many different channels of recruitment other than posting, it is **extremely difficult to monitor the situation and ensure effective enforcement of provisions**.[267]

Moreover, the very nature of live-in care renders it virtually impossible to separate working and recreational time, making it difficult to reduce the health and safety impacts of working too many hours per week. There are also physical risks involved in working in a home that may be ill-adapted (for example beds which are not designed to be raised and lowered, unlike those in a residential care setting or other facility that can support caring for patients with limited mobility), a high degree of emotional strain due to isolation and often also the nature of the patients' health conditions, and sometimes pressure from the care recipient to extend the scope of work beyond care-giving, for example to housekeeping, cleaning and cooking for the entire family.[268] All of these factors mean that there are **multiple occupational health and safety risks for workers in the live-in care sector**.

5.2.1.3. Prevalence of temporary cross-border live-in care workers

The phenomenon of **live-in care work is relatively common in** seven EU Member States: **Austria, Cyprus, Germany, Greece, Italy, Malta** and **Spain**.[269] Especially in Austria, Germany and Italy, carers tend to live in the household of the person they are caring for, whereas in other countries like the Netherlands, it is more common to find live-out carers.[270]

There is sparse data as to the number of live-in care workers, and even less when it comes to *temporary* cross-border live-in carers. In Austria, data shows that in **2015, there were on average 21 900 cases per month of people using their LTC allowance for live-in care** (compared to only 3,200 cases per month in 2008).[271] At the time, around 5% of the Austrian population received a care allowance,[272] therefore around 432,000 individuals.[273] However, other data which includes estimates of undeclared live-in carers suggests that 'there were 26,500 Slovaks [alone] working as live-in carers in Austria in 2015, which has since declined to around 23,000. Similarly, Croats make up only 2% of registered live-in carers, but the real number of live-in carers may be higher'.[274] Although official estimates of monthly users

[266] *Ibid*, p. 26.
[267] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', 2021, https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[268] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', 2020, p. 13, available at: https://www.eesc.europa.eu/sites/default/files/files/report_on_the_eesc_country_visits_to_uk_germany_italy_poland_0.pdf.
[269] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 26.
[270] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in europäischen Privathaushalten', 2021, p. 1, https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[271] WIFO, U. F. Mühlberger, 'Die Bedeutung der 24-Stunden-Betreuung für die Altenbetreuung in Österreich', Juli 2017, p. 26, available at: https://www.wifo.ac.at/jart/prj3/wifo/resources/person_dokument/person_dokument.jart?publikationsid=60718&mime_type=application/pdf.
[272] *Ibid*, p. 4.
[273] Based on a population in Austria in 2015 of 8,642,699 – available at: https://data.worldbank.org/indicator/SP.POP.TOTL?end=2021&locations=AT&start=2013.
[274] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 27.

of live-in care services based on those using their LTC allowance for live-in care are relatively conservative, other estimates which consider undeclared live-in carers suggest that there are many more individuals involved.

In **Austria**, around **80% of live-in care workers travel to Austria to work on short-term cyclical rotas**, usually ranging from two to four weeks.[275] 95% of live-in carers are women, and three in four are over 45 years of age.[276] The **main countries of origin** of these 24-hour caregivers going to Austria are from **Romania** (42.5%) and **Slovakia** (39.3%).[277] Since 2007, the proportion of Slovakian caregivers has been declining, while the share of Romanians has increased significantly.[278]

Available data indicates that **Germany in particular receives a high number of posted health and LTC workers**, while **Poland is by far the main 'sending' Member State** of health and LTC posted workers to Germany.[279] Contrary to the situation in Austria, live-in migrant carers **typically commute between Germany and their country of origin for periods of between one and three months**.[280] In 2020, 74 876 PDs A1 were issued for outgoing workers posted from Poland in the 'human health and social work activities sector',[281] which includes live-in carers. A further 20 706 PDs A1 were issued for outgoing workers posted from Poland to a temporary employment agency (although this number is not limited to the 'human health and social work activities sector').

However, the available administrative data for both Poland (as a sending Member State) and Germany (as a receiving Member State) seems to underestimate the importance of 'short-term mobile workers' active in the live-in care sector.[282] One of the reasons for this is the **number of undeclared cross-border workers in the sector**; the 'personal services' sector being the most affected by undeclared work.[283]

In **Germany**, it is thought that there are **between 300 000 and 350 000 undeclared live-in carers**.[284] Another estimate suggests that 80-90% of caregivers from Eastern Europe in Germany are employed informally.[285] In **Spain**, meanwhile, an estimated **32% of employment in personal household services was undeclared in 2019**, amounting to around 185 000 workers.[286] Although both Cyprus and Malta also have live-in care workers, many of whom are TCNs, undeclared work is largely avoided in these Member States by policies which grant migrants residence permits for care work.[287]

It is also important to consider the **effects of the COVID-19 pandemic** on the live-in care sector. On the one hand, given that this form of care implies limited contacts with multiple different carers, thus contributing to feelings of safety with regard to the likelihood of catching the virus, some Member States saw increases in the number of live-in carers in

[275] M. Leiblfinger et al., 'Confronted with COVID-19: Migrant live-in care during the pandemic', 09 April 2021, available at: https://journals.sagepub.com/doi/full/10.1177/14680181211008340.
[276] *Ibid*.
[277] M. Leiblfinger & V. Prieler, 'Elf Jahre 24-Stunden-Betreuung in Österreich', Katholische Privat-Universität Linz, 2018, p.13, available at: https://kidoks.bsz-bw.de/frontdoor/deliver/index/docId/1319/file/LiWiRei_9-Leiblfinger-Prieler.pdf.
[278] *Ibid*.
[279] De Wispelaere et al., 2022c.
[280] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 87.
[281] POSTING.STAT conference, Leuven, 20 May 2022.
[282] Using data from the Minimum Registration Portal, over 85% of incoming posted workers in Germany are employed in two sectors – the shipping, transport and related logistics sector and the construction sector. For posted workers from Poland, the main sectors of activity of these outgoing workers are construction and road transport, with human health and social work activities in third place. Source: POSTING.STAT conference, Leuven, 20 May 2022.
[283] ELA, 'Different forms of cross-border undeclared work, including through third-country nationals', September 2021, p. 2, available at: https://www.ela.europa.eu/sites/default/files/2022-01/Study-report-on-different-forms-of-cross-border-UDW.2021_EN.pdf?utm_source=icf&utm_medium=email&keywords=&utm_content=Undeclared%20work%20-%20Platform%20Newsletter%20-%20May%202022&utm_campaign=European%20Platform%20tackling%20undeclared%20work.
[284] V. Horn, & C. Schweppe, 'Gewaltpotentiale und Gewaltschutz in Privathaushalten mit 24-StundenPflegekräften', Zeitschrift für Sozialpädagogik, Vol. 17, No. 4, 2019, pp. 394–413.
[285] European Parliament, EMPL Committee, 'Policies for long-term carers', November 2021, p. 24.
[286] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 25.
[287] *Ibid*, p. 57.

2020 and 2021. In Cyprus, an estimated 14 825 carers were employed by households in 2019, compared to 15 947 in 2020 and 18 754 in the second quarter of 2021.[288] Although many of these carers were TCNs, most lived (semi-) permanently in Cyprus.

On the other hand, in Austria and Germany, where temporary cross-border mobility of live-in carers is much more frequent, **travel restrictions during the pandemic resulted in care gaps for users, and income gaps for workers**.[289] Although Germany took measures to ease travel restrictions for (highly mobile) cross-border care workers, many of these individuals did not have the legal contracts needed to show at the border. Whereas Austrian live-in care workers tended to have (self-employed) documents to show, an issue they encountered was that they needed to travel further into Austria than the stipulated distance permitted over the border under national law.[290] Furthermore, to prevent the collapse of the care system in Austria, special flights and train rides for live-in care workers from Romania and Bulgaria were provided during the COVID outbreak.[291]

5.2.1.4. Drivers and enabling factors

The drivers of temporary cross-border mobility in the live-in care sector need to be examined from both a supply and demand perspective. **From the supply side**, one of the key push factors is a **lack of (attractive) employment opportunities** in the country of origin. Linked to this is the risk of age and sex-based discrimination in the home labour market;[292] a factor that explains the overwhelmingly female live-in carer workforce aged over 45 in Austria. Live-in care work also provides an **easier entry point into a country** than many other professions, given that there are often no formal training requirements (unlike with the formal healthcare sector, for example), and there is no need for the worker to look and pay for accommodation. In Poland, this makes working as a live-in carer more common among migrants who have recently arrived in the country than for those who are already established there.[293] Finally, for many workers, **salaries can be considerably higher** than in their country of origin. For example, "Croatian live-in carers working in Austria or Italy can earn in two weeks what they would earn in three to four months for similar work in Croatia."[294] In fact, some studies have shown that **income appears to be one of the most important determinants of job satisfaction** for live-in caregivers,[295] suggesting that many of these individuals are, first and foremost, labour migrants.[296]

On the **demand side**, there is an increasing need for live-in care services in many Member States, especially those with a higher average GDP. With **underdeveloped long-term care systems** (good quality residential LTC being very costly and frequently associated with long waiting lists) and people increasingly preferring home-care and community-based services, more households are likely to start employing live-in carers when they can afford to do so.[297] According to some academics in Austria, "Without cheap labour from abroad, costs in the Austrian and German elderly care systems would explode".[298]

[288] Eurofound, 'COVID-19 and older people: Impact on their lives, support and care', 2022, p. 51, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21053en.pdf.
[289] *Ibid*.
[290] Interview conducted on 24/05/2022 with a long-term care expert at the European level.
[291] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', 2022, Journal of Ethnic and Migration Studies, p. 2, available at: https://doi.org/10.1080/1369183X.2022.2102971.
[292] M. Leiblfinger et al., 'Confronted with COVID-19: Migrant live-in care during the pandemic', 09 April 2021, available at: https://journals.sagepub.com/doi/full/10.1177/14680181211008340.
[293] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 28.
[294] *Ibid*.
[295] E. Barbiano di Belgiojoso & L. Ortensi, 'Satisfied after all? Working trajectories and job satisfaction of foreign-born female domestic and care workers in Italy', Journal of Ethnic and Migration Studies, 24 April 2018, p. 18, available at: https://doi.org/10.1080/1369183X.2018.1465401.
[296] M. Bahna & M. Sekulová, 'Does the Family Suffer?' in *Crossborder Care: Lessons from Central Europe*, 2019, Palgrave Macmillan, Cham, p. 85, available at: https://doi.org/10.1007/978-3-319-97028-8_4.
[297] Eurofound, 'Forthcoming European Care Strategy must look towards the future', Blog, 05 May 2022, available at: https://www.eurofound.europa.eu/publications/blog/forthcoming-european-care-strategy-must-look-towards-the-future.
[298] A. Heindlmaier & C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', 02 August 2022, p. 12, available at: https://doi.org/10.1080/1369183X.2022.2102971.

However, this **demand is highly dependent on an individual country's national care strategy**. In **Germany** for example, where live-in care is most common in the EU, there is a system whereby those in need of long-term care can benefit from a **care allowance (Pflegegeld)** which can also be used to finance private services for support in the home.[299] The choice of caregiver is thus left to the user, facilitating the live-in care model.

This situation can be contrasted with the one in **Denmark**, where live-in care is uncommon. Given that undeclared work in the LTC sector and in domestic care was common in the 1970s, a benefits system was set up, allowing individuals to choose between registered providers.[300] Moreover, in the early 1980s, the Danish government phased out traditional, large nursing institutions in favour of smaller nursing homes and residential care facilities.[301] Now, the waiting time for residential care must not exceed two months, and the introduction of a 'free choice of provider' rule compels municipalities to ensure a choice of residential facilities providing LTC.[302] These measures reduce the need for live-in carers.

5.2.1.5. Employment models

Live-in care is organised under various employment models. In some Member States, including Germany, live-in carers are often **employed directly** (on an informal basis) by the care recipient.[303] In other Member States, they are usually **self-employed** (for example in **Austria, where 99% of 24-hour caregivers are self-employed**).[304] Reasons behind the dominance of the self-employment model are the lower costs and higher flexibility for the recipients of care.[305] The result of this is that "a (significant) part of the 'posted' self-employed live-in carers may receive remuneration that is (significantly) below the minimum wage of the country of employment."[306]

Box 17. Self-employment of temporary cross-border live-in care workers in Austria

The legal basis for 24-hour care arrangements (live-in care) was introduced in Austria in 2007 through the adoption of the Home Care Act and the amendment of the Code of Trade and Commerce. This allowed people in need of care, or their relatives, to enter into a contract with a self-employed caregiver. However, self-employed live-in carers in Austria are not subject to working time regulations, are excluded from collective bargaining arrangements concerning minimum wages, and are entitled neither to paid holiday nor full social security benefits.

Two of the key characteristics applicable for a 24-carer's work to be deemed as self-employment are that there are no concrete instructions as to how and in what form the contractually agreed services are to be performed, and that the carer has the right to have another carer take over his or her work. However, in the (frequently occurring) case that a care recipient becomes more dependent on their live-in carer, caregivers who are officially self-employed may no longer meet the aforementioned criteria. A consequence of this is that the work may be considered as bogus self-employment, with

[299] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in europäischen Privathaushalten', 2021, p. 36, available at: https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[300] Interview conducted on 24/05/2022 with a long-term care expert at the European level.
[301] Denmark is now the only country in the EU in which the construction of traditional old-age and nursing institutions has been legally banned – see WHO, 'Denmark – Country case study on the integrated delivery of long-term care', 2019, p. 32, available at: https://apps.who.int/iris/handle/10665/352847
[302] *Ibid*.
[303] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 86.
[304] M. Leiblfinger & V. Prieler, 'Elf Jahre 24-Stunden-Betreuung in Österreich', Katholische Privat-Universität Linz, 2018, p.13, available at: https://kidoks.bsz-bw.de/frontdoor/deliver/index/docId/1319/file/LiWiRei_9-Leiblfinger-Prieler.pdf.
[305] *Ibid*.
[306] European Parliament, EMPL Committee, 'Policies for long-term carers', November 2021, p.25.

the caregiver being technically entitled to the status of being employed (and with it a number of financial and social advantages).

On the one hand, the Home Care Act meant that the long-term care system in Austria moved from what was previously a grey economy of care to a system that is legalised. This means that the recruitment of live-in care workers is no longer the domain of informal social networks or commercial agencies operating at the national and transnational level. Now, self-employed live-in carers ('Selbständige Personenbetreuer') have to register with the WKO Austrian Chamber of Commerce, which has the role of statutory industry representative. Thanks to the high proportion of self-employed workers, there is also a lower administrative burden for the care receiver.

On the other hand, rather than significantly affecting (or improving) the working conditions of temporary cross-border live-in care workers in Austria, the 2007 Home Care Act rather legalised existing conditions, which are frequently characterised by high degrees of precarity. Furthermore, given that the overwhelming majority of live-in care workers are self-employed, there is thus no statutory control over the working conditions of these individuals.

Another option is for live-in carers to be **employed by specialised agencies or private employment agencies**, established in either the Member State of residence of the care recipient or in another Member State (this is discussed in more detail in section 5.2.2 below). Consequently, some live-in carers have an employment contract in the Member State where they provide live-in care, while others have an employment contract in their Member State of origin and temporarily provide live-in care through the free movement of services (i.e. posted LTC workers).

The **degree of regulation in the sector varies considerably**, with France, the Netherlands and Sweden having regulated regimes and Austria, Germany and Italy being much less regulated. For example, in **Germany, although there is a legal basis for sanctioning employers** (the 2004 Law Against Illegal and Irregular Employment),[307] **very few inspections are made in the private household sphere**. Instead, "workplace inspections as a measure to detect irregular employment are largely limited to the country's construction and catering industry, two other sectors well known for irregular employment."[308] This is the case in other Member States too, given the difficulties labour inspectorates face in entering private households without a warrant, and the resource intensive nature of such visits when they are allowed.[309]

Meanwhile in **Italy**, where it is estimated that some 75% of live-in care work is done by non-national women (many of them coming from Eastern Europe),[310] the sector is "plagued by many irregularities, such as inadequate recognition of social and labour rights of carers, undeclared work and insufficient public spending on care".[311] Although **a collective bargaining framework covering homecare was negotiated in 2013**, the **agreement exempts workers from certain protections** including sick leave and pay for additional hours worked, as well as limiting maternity leave to 3 months instead of the standard six.[312] In addition, given that wages stipulated by the bargaining framework are too high for many

[307] Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung (Schwarzarbeitsbekämpfungsgesetz - SchwarzArbG) vom 23. Juli 2004, available at: https://www.gesetze-im-internet.de/schwarzarbg_2004/BJNR184210004.html.

[308] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 86.

[309] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 62.

[310] *Ibid.*

[311] EESC, Press Release, 'If we wish to meet our growing demands for live-in care, we must recognise the rights of care workers', 17 May 2018.

[312] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 8.

care receivers to afford, **a large amount of live-in care work falls outside the framework and is unregulated in the informal economy**.[313] Indeed, a European Economic and Social Committee (EESC) conference in Rome in 2018 saw speakers agree that **more than half of the country's live-in care workforce were not legally employed**.[314]

When considering different employment models, it is also relevant to look at the legislative entitlements of this category of workers. Sadly, many live-in carers face **exclusions from social security protections**, including sick leave, payment for extra hours worked, and maternity leave.[315] These exclusions are frequently justified on the basis of the 'specificity of care work', for example the fact that the work takes place in a private household. However, this exclusion has recently been **challenged by the European Court of Justice in Case C-389/20**, who considered that the 'special characteristics' of live-in care work are not enough to justify the full exclusion of this category of workers from social security benefits, deeming it indirectly discriminatory on the ground of sex.[316] This situation is examined in greater detail in section 6.8 in the case study related to the live-in care sector.

5.2.2. The role of intermediaries in the live-in care sector

Although a lot of the work in the LTC and live-in care sectors takes place on an informal basis, there is a parallel, formal market for these workers, with placement agencies operating as the main actors.[317] In **Germany**, for example, in 2017 there were **more than 250 live-in migrant care placement agencies** active in the country, primarily operating at the local or regional level.[318] The number of these agencies has increased significantly in Germany since the EU's 2004 enlargement wave.[319] They frequently work with providers or temporary work agencies in Poland, but also other – predominantly Eastern European – countries, including Croatia, Hungary and Slovakia.

Germany is certainly the Member State where there are the highest numbers of live-in migrant care placement agencies active on the market. In the Netherlands, although there are far fewer live-in migrant carers, most care recipients hire their care workers through placement agencies. As of **2019, there were around 20 such agencies active in the Netherlands**, the majority of which were founded after 2010.

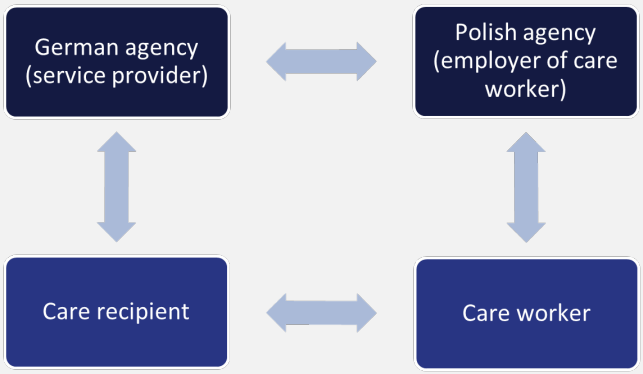
As discussed in the case study on the live-in care sector (see section 6.8), **Austria** also provides an interesting example of the operation of intermediary agencies. As previously mentioned, 99% of 24-hour caregivers in Austria are self-employed. Given this fact, these individuals should be able to agree on their working hours and renumeration directly with the care recipient. However, the reality in practice is that **intermediary agencies determine most aspects of the employment relationship**.[320] These agencies often charge registration and service fees of up to €800, which may be taken in advance or deducted from a care worker's salary in monthly instalments. The working time is generally oriented towards the needs of the care recipient, frequently resulting in 24 hour on-call duty.[321] The

[313] *Ibid*.
[314] EESC, Press Release, 'If we wish to meet our growing demands for live-in care, we must recognise the rights of care workers', 17 May 2018.
[315] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 8.
[316] C-389/20, CJ v Tesorería General de la Seguridad Social (TGSS), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0389.
[317] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 87.
[318] Stiftung Warentest, 'Trautes Heim, da will ich sein', Stiftung Warentest 5/17, 2017, pp. 86–95.
[319] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', 2021, p. 39, available at: https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[320] *Ibid*, p. 29.
[321] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', p. 11.

result of this is that there is a great deal of **bogus self-employment** within the live-in care sector in Austria.

Box 18: The role of temporary work agencies in the case of live-in care workers posted to Germany

Figure 9. Typical posted worker relationships for Polish care workers employed via agencies



Source: Authors' own, based on EESC, 'The future of live-in care work in Europe', 2020, p. 7.

In this model, the live-in carer is rarely formally employed directly by the care recipient, but rather intermediaries (in this case Polish placement agencies and German care service providers) act as employers for live-in care workers and service providers for care recipients.[322] One of the issues with this structure is that there is a **lack of accountability for both the care delivery, and the working conditions of the live-in carer**.[323] These issues relate to work beyond legal working time (e.g. an excessive number of consecutive days, insufficient break or rest periods, statutory minimum wage not being met, etc.). However, the Polish Labour Inspectorate reported in June 2018 that **90% of cases** in which they provide phone counselling services to temporary Polish workers in Germany are related to **lack of payment for hours worked**.[324]

Indeed, in June 2021, Germany's Federal Labour Court ruled that **foreign caregivers posted to Germany to work in a private household are entitled to the statutory minimum wage** for the hours they have worked, including on-call duties.[325] The case concerned a Bulgarian national, residing in Bulgaria, who was posted to Berlin to provide live-in care. Despite her employment contract (issued by a company in Bulgaria) stipulating a working time of 30 hours per week, the applicant claimed to have worked 24 hours a day to provide care or be on call. The Labour Court upheld the claim, estimating a working time of 21 hours per day. This represents an important ruling for live-in carers in recognising their on-call duties.

[322] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', 2020, p. 6, available at: https://www.eesc.europa.eu/sites/default/files/files/report_on_the_eesc_country_visits_to_uk_germany_italy_poland_0.pdf.
[323] *Ibid*, p. 8.
[324] *Ibid*, p. 21.
[325] Bundesarbeitsgericht, Urteil vom 24. Juni 2021 – 5 AZR 505/20, available at: https://www.bundesarbeitsgericht.de/entscheidung/5-azr-505-20/.

Platform work (paid labour that is provided through, on, or mediated by online platforms) is also **emerging in the long-term and live-in care sectors**. This entails the creation of online marketplaces which match those individuals or organisations with care needs ('clients') to individuals or organisations providing care services ('platform workers') in clients' homes in exchange for payment.[326]

An example of such a platform is Curafides,[327] a start-up that originated in Austria in 2016 and has since expanded to Germany, the Czech Republic and Switzerland. A particular focus lies in attracting carers from Eastern and Central European countries to the Austrian market to work as 24-hour caregivers.[328] In addition to providing a matching service between care recipients and caregivers, the platform also provides the possibility for care agencies to present themselves.

Although platform work **offers a number of possibilities** in the sector, one of these being that **platform workers on care platforms can often set their own pay**, there are a number of challenges associated with the phenomenon. One such issue is the heightened **risk of undeclared work**, with scarce data currently existing as to the scale of undeclared work in the long-term and live-in care sectors.[329]

In this regard, UNI Europa has reported that in the care sector, the **visible extent of undeclared work mediated through fraudulent labour market intermediaries** at the national and cross-border levels **is only the 'tip of the iceberg'**.[330] In addition to the challenge of assessing the extent of the issue, it is difficult to reach vulnerable mobile workers in this sector, as many of them are unregistered and, due to the nature of the work, are isolated in people's homes, as well as reluctant to come forward with grievances about their working conditions due to various factors (including limited language knowledge, lack of knowledge of applicable legislation and redress mechanisms, and dependency on the income provided by the care services they offer).

5.2.3. TCNs as live-in carers

As mentioned in section 5.2.1.3 , Poland is the main sending Member State of posted workers in the long-term and live-in care sectors. Of the **74 876 PDs A1 Poland issued in 2020** under Articles 12 and 13 of the Basic Regulation in the 'human health and social work' sector, **97.3% of these were issued to EU nationals, including Polish citizens**.[331] [332] **Of the 2 025 PDs A1 issued to TCNs, 90.6% of these (1 836) were issued to Ukrainian nationals**. **The share of PDs A1 issued to TCNs has been increasing in recent years**,[333] and is expected to continue to do so.

However, the numbers above only indicate the share of TCN's posted legally. As previously discussed, **a significant proportion of live-in care work is undeclared**, and this is particularly true for TCNs, who may find themselves working informally without a contract and suffering from a lack of regular migration options.[334] In the specific case of **TCNs temporarily rendering services in Germany** (for example those who are posted), a

[326] European Parliament, EMPL Committee, 'Policies for long-term carers', November 2021, p. 27.
[327] See: https://curafides-pflege.business.site/.
[328] EESC, 'Towards the "Uber-isation" of Care? - Platform work in the sector of long-term home care and its implications for workers' rights', 2020, p. 12, available at: https://www.eesc.europa.eu/sites/default/files/files/qe-02-20-092-en-n.pdf.
[329] European Parliament, EMPL Committee, 'Policies for long-term carers', November 2021, p. 31.
[330] European Platform tackling undeclared work, 'Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work', Learning resource paper from the thematic review workshop on fraudulent temporary agency work prompting undeclared work, 12-13 November 2020, p. 5.
[331] POSTING.STAT conference, Leuven, 20 May 2022.
[332] It should be noted that the majority of PDs A1 were issued under Article 13 of Regulation 883/2004 as opposed to Article 12.
[333] POSTING.STAT conference, Leuven, 20 May 2022.
[334] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', 2020, p. 9, available at: https://www.eesc.europa.eu/sites/default/files/files/report_on_the_eesc_country_visits_to_uk_germany_italy_poland_0.pdf.

"**Vander Elst visa**" is required.[335] When granted, the visa is only valid for rendering the service specified in the application. This application must include the service contract between the employer posting the individual and the third party in Germany, as well as the planned start and end date of the deployment to Germany, the place of deployment, a short description of the services to be rendered, and proof of health insurance valid in both the sending country and Germany for the whole period of the stay.

This issue was the subject of a case before the European Court of Justice in 2006,[336] where the **Commission sought a declaration from the Court that by subjecting TCN workers posted by service providers in other EU Member States to the requirement to obtain a work visa, Germany had infringed Article 49** of the EC Treaty relating to the freedom to provide services. One of the requirements for the issuance of the visa was that the TCN worker must have been employed by the service provider for a minimum of one year prior to the posting. This latter point was deemed by the Court to be a clear restriction of the freedom to provide services, and the Court held that Germany had indeed failed to comply with its obligations under Article 49.

The law as it now stands in Germany is that TCN employees can be posted from other Member States to Germany without the need for an additional visa if the TCN holds long-term residence in another Member State, and if the temporary activity in Germany does not last longer than 3 months within a period of 12 months. If this is not the case, however, a Vander Elst visa is required; a clear additional administrative burden for TCNs and their employers.

Equally, given that temporary cross-border **TCNs** in the LTC and live-in care sectors are **more likely to experience precarious working conditions,** are **more vulnerable to undeclared work,** and tend to be more excluded from social protection and welfare assistance than EU workers,[337] it is important to consider the **intersecting inequalities** between employment in the live-in care sector as a temporary cross-border worker, TCN status, and also gender. A 2020 study has shown a **high incidence of workplace stress among live-in migrant carers** in German households, based around the need for constant availability, issues with insomnia, communication difficulties and interpersonal conflicts.[338] Failing to fully acknowledge the mental health risks of working in the sector **predominantly affects women**, there being vast greater numbers of female workers employed in the LTC and live-in care sectors than males.[339]

5.2.4. How temporary cross-border mobility functions in the live-in and long-term care sector

Although live-in care work is "only" a prevalent phenomenon in seven EU Member States based on available data, it is **an important sector to consider in the context of temporary cross-border mobility due to the specificities of the sector, which make it somewhat hidden**. Although we have an idea of scale in countries such as Germany and Austria, the amount of unregulated and undeclared live-in care work, together with the home

[335] Deutsche Vertretungen in Polen, 'Visa for third-country nationals for temporarily rendering services in Germany ("Vander Elst"-Visa)', January 2021, available at: https://polen.diplo.de/blob/488744/3badc8ebe31039cb43f2a9d0ebd27788/vanderelst-eng-data.pdf.

[336] Commission of the European Communities v. Federal Republic of Germany, Case C-244/04, Judgment of the Court (First Chamber) of 19 January 2006, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62004CJ0244.

[337] ELA, 'Different forms of cross-border undeclared work, including through third-country nationals', September 2021, p. 2, available at: https://www.ela.europa.eu/sites/default/files/2022-01/Study-report-on-different-forms-of-cross-border-UDW.2021_EN.pdf?utm_source=icf&utm_medium=email&keywords=&utm_content=Undeclared%20work%20-%20Platform%20Newsletter%20-%20May%202022&utm_campaign=European%20Platform%20tackling%20undeclared%20work.

[338] B. Schilgen et al, 'Arbeitsplatzbezogene Belastungen und Ressourcen von ausländischen 24-Stunden-Betreuungskräften in deutschen Privathaushalten – eine qualitative Studie', February 2020, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7906836/.

[339] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 60.

environment being difficult to regulate, render **monitoring and enforcement extremely challenging** across the Member States. This is particularly the case where the household/care recipient is the employer, the work of temporary cross-border workers being frequently undeclared and outside the remit of inspectorates.

One of the measures to counter the degree of undeclared work is the **Austrian solution of regularisation**. By having to register with the WKO Austrian Chamber of Commerce, a relatively clear picture can be made of the situation involving self-employed live-in carers. That said, there is no evidence that regularisation has led to an improvement in the working conditions of temporary cross-border workers in the sector, which are frequently precarious in nature; rather, it has legitimised existing conditions. Although the Austrian model may be an attractive solution in some ways, there is a more structural issue in that such a precarious form of temporary cross-border work is so common in certain EU Member States (Austria, Cyprus, Germany, Greece, Italy, Malta and Spain). Despite Germany having one of the highest per capita health expenditures in the world,[340] it has more live-in carers than any other EU Member State. Given that so much public money is put into the sector, **access to home and community care in EU Member States must be improved**. This is in line with EU action in the field, with one of the key focuses of the 2022 European Care Strategy being the provision of quality, affordable and accessible care services across the European Union.[341]

Moreover, the risk of not prioritising reform in this sector is that live-in care could become problematic in other Member States too, with more households employing temporary cross-border live-in carers if they can afford to do so. **Russia's invasion of Ukraine** and the ongoing war, which has led to millions of Ukrainian refugees having crossed borders, **increases the urgency of this concern**. A significant number of Ukrainians are already providing domestic and live-in care services,[342] in particular being posted from Poland, with many more refugees likely to end up working in this precarious sector.

Finally, it is **important that live-in care workers become more 'visible'**, in order to reduce the phenomenon of abuses going unnoticed. Given that enforcement authorities such as labour inspectorates have very little remit when it comes to the private household, it is **perhaps advantageous for the role of trusted intermediaries in the sector to be strengthened**. The first step in this process is that agencies that provide live-in care workers must meet certain quality standards.[343] In this regard, social security, health and safety at work and decent working conditions must be guaranteed. These agencies (perhaps in addition to providers of ambulatory care, as well as organisations such as Caritas, who are involved in the placement and support of live-in carers) could then conduct checks on a voluntary basis to ensure that their workers are sufficiently protected. This would come with certain financial implications, both in terms of the checks themselves and investment in training individuals to look out for certain signs / indications that abuses of working conditions are occurring. It would also require the creation of a contact point to provide live-in carers with a recourse, outside of the household in which they work. Despite the costs involved, this measure would help to ensure high-quality care standards and the protection of social security, health and safety at work for live-in carers.

[340] See: https://www.statista.com/statistics/236541/per-capita-health-expenditure-by-country/.
[341] European Commission, 'A European Care Strategy for caregivers and care receivers', available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10382.
[342] Eurofound, 'Forthcoming European Care Strategy must look towards the future', Blog, 05 May 2022, available at: https://www.eurofound.europa.eu/publications/blog/forthcoming-european-care-strategy-must-look-towards-the-future.
[343] See: https://www.caritas.eu/live-in-care-workers-need-to-be-better-protected-and-accompanied/.

5.3. Meat processing

Summary of key findings

- The meat processing sector is characterised by a few very large meat companies and a high number of small and micro enterprises. The European meat market is considered to be largely saturated and business growth is often only possible by squeezing out the competition. As a consequence, there is a general trend towards fewer and larger companies. Meat processing is a competitive and price driven sector. Attempts to cut labour costs exist in many Member States. Low pay coupled with other poor working conditions make work unattractive for many workers. In many countries, the sector is therefore shifting to workers who have fewer opportunities to find work elsewhere.

- External flexibilisation plays a major role in the meat processing sector in many Member States, but the forms of employment are diverse: subcontracting (with or without posting), temporary agency work (with or without posting) or self-employment are being used in specific Member States. In addition, the workforce in the sector consists of cross-border mobile workers including TCNs, as well as workers with a migrant background who are already in the country.

- Statistical and other quantitative data on the extent of subcontracting in the sector or on posting can be seldom found. Based on available data, in Austria, Belgium, France, Italy, Ireland, and Spain, the meat sector utilizes subcontracting practices to a substantial degree. Posting occurs in Austria, Belgium and France while the subcontractors in the other countries seem to be local companies. Temporary work agencies play a role in Belgium, Ireland and the Netherlands. In Belgium temporary agency work involves posted workers while in Ireland or the Netherlands, local agencies are contracted. The industry's workforce in high-income countries partially consists of cross-border or migrant workers from Central and Eastern EU Member States and third countries.

- Whether employed through subcontracting practices, as temporary agency workers, posted workers or (bogus) self-employed, the working, employment and housing conditions of meat workers are problematic. Low wages, undefined working hours and zero-hours contracts, no overtime or statutory sick pay, poor accommodation (for which workers usually pay excessive rents), falsified timesheets and second-class health and safety conditions are common.

- The German meat industry was characterised by particularly difficult working conditions. After numerous attempts to regulate the situation and as a response to those specific circumstances, it was possible to improve the situation by banning subcontracting and temporary agency work in the sector altogether.

5.3.1. Overview of the sectoral context: the competitive and cost-driven environment in meat processing

The meat processing sector is characterised by a few very large meat companies and a high number of small and micro enterprises. The ten largest companies dominate almost all markets around the world and have a presence in all the main meat-producing regions.

While major market players come from Brazil, the USA, China, and Japan, European firms also have revenues in the billions.[344]

According to Eurostat, the meat industry (processing and preserving of meat and production of meat products) in the EU 27 is made up of 33 885 companies (2019, EU-27).[345] The **highest number of companies exist in Germany (9 452)**, followed by **France (4 519), Spain (3 450) and Poland (3 134)**. Most other European countries have significantly fewer than a thousand companies in the sector. Many companies are small and medium-sized businesses. The share of companies with 0 to 9 employees is 67%. While companies with 250 persons employed or more account for only 1.5% of all companies. In 2019 the number of **employees in the sector reached almost one million workers** (945 825, EU 27). In 2020 the highest number of employees were to be found in Germany (219 418), France (126 222, data for 2019), Spain (115 042), and Poland (111 781). In the other European countries, the number of employees is much lower. Germany ranks first in Europe for pork production (ahead of Spain), France for beef (ahead of Germany) and Poland for poultry (ahead of France).[346]

Globally, per capita meat consumption is increasing. However, it is decreasing in some European countries such as Belgium, Germany, Greece, and the Netherlands.[347] The reasons for this are the increasing proportion of consumers who are critically questioning meat consumption (whether it be due to animal welfare considerations, ecological footprint concerns or disapproval of poor working conditions in the sector) and increasingly turning to alternatives in the form of plant-based products. In 2020, meat consumption in Europe also dropped significantly due to the loss of sales in the food service sector (especially in restaurants) because of the lockdowns[348].

The **European meat market is considered to be largely saturated** and business growth is often only possible by **squeezing out the competition**. Important markets with increasing export opportunities for European companies are China, Japan, Mexico and countries in southern Africa.

In addition to pressure from global competition, the pressure from retailers in the food value chain as the main sales channel leads to high price and cost pressure for meat companies. As a consequence, there is a **general trend towards fewer and larger companies**. However, in most countries, a parallel but much smaller trend of small-scale production focusing on quality, eco-friendly production and animal welfare is also visible.[349]

5.3.2. Poor working conditions as a result of cost-cutting

Competition based on costs and price led to the **adoption of a low-cost business model in the past, which had an impact on working conditions**, especially labour costs. Meat processing plants are usually labour-intensive. Many jobs involve highly repetitive and monotonous tasks, but also ones which are dangerous and carry a high risk of injury. In addition, the work environment is cold and noisy. At least for the lower-paid positions, no lengthy training is required. Working arrangements can be extremely flexible, as meat companies face just-in-time demands from large retailers. **Wages are often lower than in**

[344] S. Sharma, 'Meat Atlas 2021: Facts and figures about the animals we eat', Heinrich-Böll-Stiftung, Friends of the Earth Europe and BUND, 2021, available at: https://eu.boell.org/en/MeatAtlas.
[345] Eurostat, 'Annual enterprise statistics by size class for special aggregates of activities', 2022, available at: https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.
[346] S. Stracke, 'Branchenmonitor Schlachten- und Fleischverarbeitung', Hans-Böckler-Stiftung, 2021, available at: https://docplayer.org/105928031-Branchenmonitor-schlachten-und-fleischverarbeitung.html.
[347] Statista, ‚Entwicklung des jährlichen Fleischkonsums in Europa in den Jahren 2010 bis 2020 (in Kilogramm pro Kopf)', 2022, available at: https://de.statista.com/statistik/daten/studie/768884/umfrage/entwicklung-des-jaehrlichen-fleischkonsums-pro-kopf-in-europa/.
[348] S. Stracke,'Branchenmonitor Schlachten- und Fleischverarbeitung', Hans-Böckler-Stiftung, 2021, available at: https://docplayer.org/105928031-Branchenmonitor-schlachten-und-fleischverarbeitung.html.
[349] Eurofound, 'The Future of manufacturing - Meat processing workers: Occupational report', Dublin, 2018, available at: https://euagenda.eu/upload/publications/untitled-178347-ea.pdf.

other sectors of the economy. In addition, there were mass infections in meat processing factories during the COVID 19 pandemic (see the box below).

Box 19: Mass infections in meat process factories during the COVID pandemic

Workers in the meat industry were particularly affected by COVID 19 in many European countries, but also in Australia, Brazil and the USA. The reasons for the mass infections at meat processing sites are seen in the working conditions, including a lack of social distancing, as workers often work in close proximity to one another on the processing chain, with companies not having increased the distance between workplaces. In addition, foreign workers often live together because housing is directly linked to their work contract and their wages are too low to find accommodation elsewhere. It was reported that some companies also lacked the necessary data to be able to trace the outbreak. Other health and safety measures adopted to protect workers during this emergency period were not implemented, for example protective equipment was not provided. On the production sites, insufficient ventilation contributed to the spread of the virus. Moreover, certain parts of meat processing plants are inevitably very cold and the virus transmits more easily in colder temperatures. Workers showed up for work despite being sick with COVID for fear of losing their job.

Source: EFFAT, 2020[350]; McSweeney, E./ Young, H., (2021)[351]

Low pay coupled with other poor working conditions make work unattractive for many workers. Not surprisingly, turnover rates are high and there is a **labour shortage resulting from less-attractive working conditions** in many European countries.[352,353,354] The sector is therefore shifting to workers who have fewer opportunities to find work elsewhere. These include EU migrant workers and TCNs. These workers often have difficulties to get a foothold in the primary labour market in the host country and therefore must resort to other forms of employment. They remain in such jobs due to worse working conditions in their country of origin or very high unemployment.[355356] Precarious conditions of workers in the meat processing sector are especially visible in higher-income Member States.

5.3.3. The forms of employment for cross-border or migrant workers

External flexibilisation plays a major role in the meat processing sector in many Member States, but the **forms of employment are diverse**: subcontracting (with or without posting), temporary agency work (with or without posting) or self-employment are being used in

[350] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.

[351] E. McSweeney and H. Young, 'The whole system is rotten': life inside Europe's meat industry', in: The Guardian, 28.09.2021, available at: https://www.theguardian.com/environment/2021/sep/28/the-whole-system-is-rotten-life-inside-europes-meat-industry.

[352] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.

[353] EFFAT, 'Hungry for fairness: raising standards in the meat sector: EFFAT's 10 demands for action at EU level, adopted by the Executive Committee on 10 September 2020', Brussels, European Federation of Food, Agriculture and Tourism Trade Unions, 2020, available at: https://effat.org/wp-content/uploads/2020/09/Hungry-for-fairness-raising-standards-in-the-meat-sector-10-demands-EN.pdf.

[354] Eurofound, 'Future of manufacturing: Meat processing workers occupational report', Dublin, 2018, available at: https://euagenda.eu/upload/publications/untitled-178347-ea.pdf.

[355] A. Voivozeanu, 'Precarious posted migration: the case of Romanian construction and meat-industry workers in Germany', in: Central and Eastern European Migration Review, 8(2), 2019, pp. 85-99.

[356] E. McSweeney and H. Young, 'The whole system is rotten': life inside Europe's meat industry', in: The Guardian, 28.09.2021, available at: https://www.theguardian.com/environment/2021/sep/28/the-whole-system-is-rotten-life-inside-europes-meat-industry.

specific Member States. In addition, the workforce in the sector consists of cross-border mobile workers, as well as workers with a migrant background who are already in the country. The subcontracts are usually onsite work contracts, which differ from conventional subcontracting in that they are carried out on the client's premises and in core value adding processes. In meat processing, cases of subcontracting chains with several tiers or chain posting were not mentioned in the interviews, country case studies or the analysed literature (except for Italy).

The available **statistical data** on the number of posted workers or the share of cross-border workers in other forms of employment does not include a sectoral breakdown with enough detail to provide numbers for these types of workers specifically in the meat processing industry in EU Member States. Statistical and other quantitative data on the extent of subcontracting in the sector or on posting were also seldom found at the country level. Based on the results of the literature available, interviews and country case studies conducted in the framework of this project, it can be concluded that in Austria, Belgium, France, Italy, Ireland, and Spain, the meat sector utilises **subcontracting practices to a substantial degree**.

Posting occurs in Austria,[357] Belgium[358] and France,[359] while the subcontractors in the other countries seem to be local companies. Temporary work agencies play a role in Belgium,[360] Ireland and the Netherlands.[361] In Belgium temporary agency work involves posted workers while in Ireland or the Netherlands, local agencies are contracted. Some 80 per cent of the workers – mostly from Central and Eastern Europe – in the Dutch meat industry are employed via temporary work agencies.[362] Self-employment with regard to posting plays a role in Belgium.[363] The data on the reported incoming posted workers in Belgium is collected via the LIMOSA (Cross-Country Information System for Migration Research at the Social Administration) data base. The data shows that in the meat processing sector, posted workers employed in Belgium are mainly Polish (34%), Brazilian (20%), Romanian (19%), Portuguese (7%), and French (4%).[364] Interestingly, a case study on a Belgian meat processing company that relies on posted workers showed that posting affects the company's ability to manage personnel. [365] The case study came to the conclusion that there was a high level of turnover among Eastern European posted workers employed by foreign subcontractors, making it necessary to constantly train new workers. In addition, the workers failed to meet quality standards in the production process.

Some information is available for Germany before subcontracting was prohibited: In 2012, approximately 38% of the workers known to be working in meat processing in Germany

[357] Result of the country case study.
[358] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.
[359] *Ibid*.
[360] Result of the country case studies.
[361] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.
[362] *Ibid*.
[363] F. De Wispelaere, L. De Smedt, M. Munoz, D. Gillis and J. Pacole, 'Posted Workers from and to Belgium: facts and figures,' POSTING.STAT: Enhancing the collection and analysis of national data on intra-EU posting, 2022, p. 33, available at: https://hiva.kuleuven.be/en/news/docs/ZKD9978_POSTING_STAT_Belgium_Posted_workers_from_and_to_Belgium_facts_and_figures.
[364] F. De Wispelaere, L. De Smedt, M. Munoz, D. Gillis and J. Pacole, 'Posted Workers from and to Belgium: facts and figures,' POSTING.STAT: Enhancing the collection and analysis of national data on intra-EU posting, 2022, p. 33, available at: https://hiva.kuleuven.be/en/news/docs/ZKD9978_POSTING_STAT_Belgium_Posted_workers_from_and_to_Belgium_facts_and_figures.
[365] A. Theunissen, P. Zanoni, and K. Van Laer, 'Fragmented Capital and (the Loss of) Control over Posted Workers: A Case Study in the Belgian Meat Industry'; in: Work, Employment and Society, 2022, available at: https://journals.sagepub.com/doi/pdf/10.1177/09500170211059733.

were posted workers.[366] By 2013, approximately 70% of the workforce in the four largest meat companies were posted workers.[367] The meat sector was the biggest receiver of posted workers after construction. After the Law for the Protection of Workers' Rights in the Meat Industry (*Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft, GSA-Fleisch*) was adopted, introducing a general contractor liability for the meat industry according to information from the federal government, contracting companies accounted for 63% of the industry's workforce in 2019; 7.5% of the workforce were temporary workers.[368] The German trade union NGG points out that the share of contract workers at that time was 90% in some companies and up to 30 contract companies were active at each site. In contrast, postings played a limited role in this setting: data from the Minimum Wage Registration Portal shows that posted workers in the meat industry only accounted for 0.23% of all postings in 2020, and for 0.02% in 2021.[369]

Literature on other Western European countries generally points to a **high proportion of foreign workers in the sector**. To deal with labour shortages, governments issue work permits to TCNs to be employed in the industry. For example, in Italy workers in the sector come from Eastern European Member States and non-EU countries such as Albania, Ghana, Ivory Coast and China.[370] In France, workers in the meat-processing sector seem to a large extent to come from Central and Eastern Europe, but also from African countries.[371] In Ireland, the sector depends on migrant workers particularly from Brazil and South Africa. There are also many cross-border and migrant workers coming from Central and Eastern Europe.[372] In Denmark, non-Danish employees in the sector come from Poland, but also Myanmar, Sri Lanka, and Vietnam.[373] Poland is both a sending country of workers to other EU Member States, and a receiver from non-EU countries such as Ukraine (at least before the war started) or Belarus.[374] In Germany, there are indications that more and more people from Kosovo, Georgia, Ukraine and Belarus are being employed in meat processing – however also here no concrete data exist.[375] About a third of Spain's meat sector workforce are migrants, mostly from north Africa and Eastern Europe.[376]

[366] B. Wagner and A. Hassel, 'Posting, subcontracting and low-wage employment in the German meat industry,' in: European Review of Labour and Research, 22(2), 2016, pp.163-178.
[367] V. Bogoeski, 'Chain liability as a mechanism for strengthening the rights of posted workers: the German chain liability model', in 'Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)', VS/2016/0222, funded by European Union Programme for Employment and Social Innovation 'EaSI' (2014-2020), 2017.
[368] S. Stracke, 'Branchenmonitor Schlachten- und Fleischverarbeitung', Hans-Böckler-Stiftung, 2021, available at: https://docplayer.org/105928031-Branchenmonitor-schlachten-und-fleischverarbeitung.html.
[369] C. Albrecht, Y. Giesing and B. Rude, 'Posted Workers in Germany – Developments and New Legislations', CESifo Forum 3/2022, Volume 23, 2022, pp. 12-13, available at: https://www.cesifo.org/DocDL/CESifo-Forum-2022-3-albrecht-rude-giesing-posted-workers-germany.pdf.
[370] S. Battistelli, P. Campanella, D. Dazzi and D. Freddi, 'Structural characteristics and industrial relations in the pork value chain: the case of Italy', in: Piera Campanella, Davide Dazzi (ed.), "Meat-up Ffire: Fairness, freedom and industrial relations across Europe: up and down the meat value chain", 2020, pp. 139-194.
[371] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.
[372] *Ibid*.
[373] S. Navrbjerg, 'Structural characteristics and industrial relations in the pork value chain: the case of Denmark,' in: Piera Campanella, Davide Dazzi (ed.), 'Meat-up Ffire: Fairness, freedom and industrial relations across Europe: up and down the meat value chain', 2020, pp. 75-101, available at: https://series.francoangeli.it/index.php/oa/catalog/download/496/303/2399-1.
[374] I. Buchowicz, I. Florczak, H. Kinowska, M. Otto, Ł. Sienkiewicz, 'Structural characteristics and industrial relations in the pork value chain: the case of Poland', in: Piera Campanella, Davide Dazzi (ed.) "Meat-up Ffire: Fairness, freedom and industrial relations across Europe: up and down the meat value chain" 2020, pp. 249-25, available at: https://series.francoangeli.it/index.php/oa/catalog/download/496/303/2399-1.
[375] Interview conducted for this study with German trade union representative for the meat processing sector, in June 2022.
[376] J. Rankin, "EU 'failing to stop meat industry exploiting agency workers", in: The Guardian, 5.10.2021; available at: https://www.theguardian.com/global-development/2021/oct/05/eu-failing-to-stop-meat-industry-exploiting-agency-workers.

5.3.4. How temporary cross-border mobility functions in the meat processing sector

Whether employed through subcontracting practices, as temporary agency workers, posted workers or (bogus) self-employed, representatives from the trade union side point out that the working, employment and housing conditions of a large proportion of meat workers are problematic: low wages, poor accommodation (for which workers usually pay excessive rents), falsified timesheets and second-class health and safety conditions.[377] A Guardian article on working conditions in the meat industry lists undefined working hours, zero-hours contracts and no overtime or statutory sick pay as further problems. In addition, workers have to pay agencies high costs for overcrowded housing, and housing and pay are generally insecure.[378]

EFFAT notes that **illicit practices** exist for all these forms of employment, including illegal posting of workers or use of temporary agency work, bogus self-employment and the use of letterbox companies.[379] Some temporary work agencies use a "phased" contract system, where agencies can keep workers on the lowest pay for extended periods. In the Netherlands, for example, workers allege they are often let go before they are legally due a pay increase or pension contributions, then rehired on a similar contract. [380]

Furthermore, **ineffective enforcement and control** of relevant regulations on minimum working standards lead to infringements going unchecked.[381] In addition, leeway concerning collective agreements is misused, with workers in subcontracting being paid according to the less-favourable agreements (see the box below):

Box 20. The circumvention of standards by less-favourable collective bargaining agreements or workers' cooperatives.

In Spain the companies that act as subcontractors in the meat industry are mainly multiservice companies. These companies are covered by a collective agreement, which is lower than the collective bargaining agreement that applies to the Spanish meat sector. Sometimes temporary work agencies establish multiservice companies to avoid employer's obligation to ensure equal treatment as per the Temporary Agency Workers Directive.

Similarly in Belgium, some workers are paid according to the less-favourable collective agreements for logistics or the food commerce sectors. In addition, temporary workers are sometimes placed in the lowest wage groups or work under a less-favourable collective agreement than the core workforce.

[377] NGG and DGB, 'Für faire Arbeitsbedingungen in der Fleischindustrie', 2021, available at: https://www.faire-mobilitaet.de/fleischindustrie/++co++081535ae-d0dd-11ea-a2d9-001a4a160123.

[378] E. McSweeney and H. Young, "'The whole system is rotten": life inside Europe's meat industry', in: The Guardian, 28.09.2021, available at: https://www.theguardian.com/environment/2021/sep/28/the-whole-system-is-rotten-life-inside-europes-meat-industry.

[379] EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level.', EFFAT report, 30 June 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.

EFFAT, 'Hungry for fairness: raising standards in the meat sector: EFFAT's 10 demands for action at EU level, adopted by the Executive Committee on 10 September 2020'. Brussels, European Federation of Food, Agriculture and Tourism Trade Unions, 2020, available at: https://effat.org/wp-content/uploads/2020/09/Hungry-for-fairness-raising-standards-in-the-meat-sector-10-demands-EN.pdf.

[380] E. McSweeney and H. Young, "'The whole system is rotten': life inside Europe's meat industry", in: The Guardian, 28.09.2021, available at: https://www.theguardian.com/environment/2021/sep/28/the-whole-system-is-rotten-life-inside-europes-meat-industry.

[381] A. Weltin "The German Meat Industry and Posted Work: Cost-Cutting, Precarious Working Conditions, and Emerging EU and German National Level Policy Change", Australian National University's Centre for European Studies, 2020.

In Italy, the dominant business model is based on workers' cooperatives, to which tasks in slaughtering and meat processing are outsourced. Companies in the meat processing sector in Italy do not commission the cooperatives themselves, but interpose a so-called consortium (Consorziata), which bears the responsibility for the orders and commissions various subcontractors. The consortium then retains a large part of the payment of the contracting company, so that the workers ultimately performing the work are often paid low wages. According to trade unions, workers' co-operatives can cost meat companies up to 40% less than their directly employed counterparts. Other working conditions are also precarious. It is common, that the consortium only consists of one or two people. The cooperatives involved in the meat processing sector in Italy can be seen as mainly bogus workers' cooperatives, fraudulently set up by meat companies to make use of their labour flexibility and tax advantages. In fact, Italian cooperatives were originally meant as a form of establishing solidarity amongst workers, shared decision-making and special rights in cases of economic hardships. Spain also had a similar model of cooperatives operating with bogus self-employment before it was banned.[382]

With regard to posting in the Austrian meat industry, a decision of the ECJ on the prohibition of replacement regarding the posting of workers is worth mentioning. In 2018, the ECJ (Case No.: C-527/16) ruled that the repeated use of posted workers to fill the same job, even if different employers (and employees) carry out the postings, does not constitute a posting within the meaning of the Posted Workers Directive. The decision is based on a case where the Austrian company Alpenrind had meat cut and packed in its slaughterhouse in Salzburg by workers posted to Austria by various Hungarian companies. For the workers A1 certificates were issued, according to which the Hungarian social security regulations applied. However, the court decision ruled that due to the non-replacement condition, the Austrian social security system applied to these workers.

It is important to note, however, that there are differences between the higher-income countries regarding employment and working conditions in the meat processing: **in many Western and also Northern European countries there are extensive collective bargaining agreements in the meat industry**, which provide protection for at least some of the workers, mainly those who are directly employed. Often, the underlying industrial relations systems have shaped actors' responses to the use of migrant and cross-border labour. This is in particular the case in Denmark.[383]

5.3.5. Regulatory change in Germany and its impact on problematic practices

In Germany, the meat industry tried relatively early – in the context of the eastward enlargement of the EU in 2004 and in combination with the EU PWD of 1996 – to reduce labour costs through a combination of posted work, temporary agency work and the use of self-employed foreign subcontractors. Many subcontractors were based in Central and Eastern Europe, but the work was performed on-site in Germany. This resulted in the replacement of the core workforce with a flexible low-cost employment layer. With only a few exceptions, collective agreements did not apply to this external workforce, as there was also no statutory minimum wage in Germany and, until mid-2014, the meat processing

[382] A. Riesco-Sanz, "Food Sector: Bogus Cooperatives and Bogus Self-Employment in the Subcontracting Chain of the Spanish Meat Industry", in: ETUC, "Securing Workers' Rights in Subcontracting Chains: Case studies", Brusssels, 2021, pp.62-87; available at: https://www.etuc.org/sites/default/files/2021-10/Securing%20workers%20rights_EN_LR.pdf.

[383] S. Navrbjerg, "Structural characteristics and industrial relations in the pork value chain: the case of Denmark," in: Piera Campanella, Davide Dazzi (ed.), "Meat-up Ffire: Fairness, freedom and industrial relations across Europe: up and down the meat value chain", 2020, pp. 75-101; available at: https://series.francoangeli.it/index.php/oa/catalog/download/496/303/2399-1.

sector was also not one of the minimum wage-sectors listed in the German Posting Law (*Arbeitnehmerentsendegesetz*).

For a long time, there was no wage floor at all for these workers, so they often received the conditions and pay of the sending country, thus extremely low hourly wages. In those years, low pay rates, excessively long working times, a poor quality of accommodation made available by the meat processing companies, and a lack of social security coverage (including unemployment, sick and pension benefits) characterised the working conditions in German meat processing. In addition, meat processing companies contracted work to a chain of subcontractors, involving a web of letterbox companies to abdicate responsibility. In 2014 and 2015 there were **two voluntary commitments** made by German employers to change these practices. Besides a code of conduct, a voluntary commitment stipulated that employers should stop using posted workers by July 2016 and conclude subcontracts with German firms or German subsidiaries of foreign companies instead.[384] As a result, large meat processing companies in Germany stopped using posted workers and used migrant workers from subcontractors (from Eastern European countries) with a home base in Germany instead.

However, the conditions for the workers in the meat industry barely changed and another attempt to strengthen the protection of workers was launched in 2017 by the Law for the Protection of Workers' Rights in the Meat Industry (*Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft, GSA-Fleisch*), which introduced a general contractor liability for the meat industry and required the contracting company to check that subcontractors comply with the minimum wage and also pay social security contributions. Despite the new regulation, working conditions did not improve. On the contrary, while earning the same amount of money, namely the industry-level minimum wage, and due to the introduction of electronically recorded working hours, the employees were conducting the same workload in less time. Housing conditions were also still extremely poor. In order to combat the ongoing malpractices in the meat industry and in connection with major COVID 19 outbreaks at large meat processing plants, the Occupational Health and Safety Enforcement Act (*Arbeitsschutzkontrollgesetz*) came into force on 1 January 2021. The Act provides amendments to various laws and generally prohibits the use of subcontracting (including temporary agency work) in slaughtering, cutting and meat processing in companies with more than 49 employees.

[384] K. Jaehrling, I. Wagner and C. Weinkopf, “Reducing precarious work in Europe through social dialogue”, in: IAQ-Forschung, 2016-03, University Duisburg-Essen, 2016, available at: https://www.researchgate.net/publication/311102911_Reducing_precarious_work_in_Europe_through_social_dialogue_The_case_of_Germany

Table 2. The German Occupational Health and Safety Enforcement Act (Arbeitsschutzkontrollgesetz)

Area	Contents	Laws
Employment relationships	Ban on contracts for work and services (from 1.1.2021). Ban on temporary agency work (from 1.4.2021) in the areas of slaughtering, cutting and meat processing. For a transitional period of three years, by way of derogation, the following may be permitted by collective agreement under certain conditions in meat processing (but not in slaughtering and cutting): • Maximum of 8% temporary agency workers; • Maximum temporary employment period of the individual temporary worker for 4 months. • Same pay and working conditions as for permanent employees from the first day of work apply.	Law for the Protection of Workers' Rights in the Meat Industry (Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft, GSA-Fleisch)
Working time	Obligation to record working time electronically. Clarification that set-up time, changing time and washing time are part of working time.	Act to Combat Clandestine Work (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG)
Inspections	Annual minimum inspection quota of 5 % per federal state for establishments in the meat industry. Establishment of a federal office for health and safety at the Federal Institute for Occupational Safety and Occupational Medicine (BAuA).	Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSch)
Penalties	The fines for violations of the Working Hours Act were doubled to EUR 30,000.	Working Time Act (Arbeitszeitgesetz, ArbZG)
Accommodation	Minimum requirements for community accommodation (also outside the premises of the company).	Workplace Regulation (Arbeitsstättenverordnung, ArbStättV)

Source: Erol and Schulten 2021, p. 17[385]

[385] S. Erol, T. Schulten, „Neuordnung der Arbeitsbeziehungen in der Fleischindustrie: Das Ende der „organisierten Verantwortungslosigkeit“?“ Hans-Böckler-Stiftung, Report No. 61, 2021, available at: https://www.wsi.de/fpdf/HBS-007924/p_wsi_report_61_2021.pdf.

In addition, **since January 2023 a sector-wide minimum wage of EUR 12.80**, negotiated through collective bargaining, has been in force for the meat industry. The overall opinion in Germany is that the Occupational Health and Safety Enforcement Act (Arbeitsschutzkontrollgesetz) has **triggered a structural change in the industry**. The **legal situation of workers has improved**. External workers have been taken over by the meat processing companies; many have been able to use this opportunity to negotiate higher wages and more attractive conditions. However, there are still some points of criticism:[386,387]

- The definition of the meat processing industry is based on the Posting of Workers Act, which does not include administration, goods receiving, spice room, packaging, etc. According to the NGG, companies now try to restructure to not fall under the regulations.

- Recruitment companies in Eastern European Member States and elsewhere are still responsible for transport, on-the-job training, personnel accounting, distribution to accommodation, etc. at many locations, despite the fact that workers are now direct employees at the plants. The accommodation situation has also not yet been clarified in many points.

- Working time recording is not always clear, especially when it comes to the starting time (before the changing room) and the recording of the beginning and ends of breaks as well as wayside times within the production site.

5.3.6. Conclusions: Understanding different approaches to regulation

Several conclusions can be drawn from the sectoral study of the meat processing industry. First, it must be recognised that **a variety of different forms of employment in the meat processing sector exist in Europe**. In addition, the workforce in the sector consists of cross-border workers, as well as workers with a migrant background who are already in the country. Germany has reacted to malpractices with a complete ban on subcontracted and temporary work, but **the extent to which such a ban is practicable for other countries must be examined**. However, other attempts to regulate the sector in Germany, such as the introduction of a minimum wage, subcontractor liability and industry self-regulation, do not appear to have led to changes.

Trade unions have a list of demands in terms of legislative amendments. According to EFFAT, amendments should address the misuse of subcontracting and other business practices to escape employer liability, illegal labour brokering and gangmaster practices, the use of bogus cooperatives, workers forced to work as self-employed, wage dumping and illegal wage deductions and the lack of decent housing conditions for cross-border and migrant workers.[388] EFFAT's ten demands for action at EU level also include an EU initiative on subcontracting focused on regulating the use of subcontracting in the meat sector instituting a system of full chain liability covering both cross-border and domestic situations. It states that the initiative should also aim to tackle the use of less-favourable collective bargaining agreements.[389]

The German Meat Industry Association (Verband der Fleischwirtschaft, VDF) rejects general accusations of the entire industry by trade unions and others. For example, they point out that

[386] NGG, KWA – Evangelischer Verband Kirche-Wirtschaft-Arbeitswelt, „Abschlusserklärung der Vierten bundesweiten Initiativen- und Betriebsrätekonferenz Fleischindustrie", Rheda-Wiedenbrück, 20. November 2021, available at: https://www.kwa-ekd.de/wp-content/uploads/2021/11/Abschlusserklaerung-Vierte-Initiativenkonferenz-Fleischwirtschaft_Rheda-201121_fin.pdf.
[387] Interview conducted for this study with German trade union representative for the meat processing sector, in June 2022.
[388] EFFAT, "Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level'.
[389] EFFAT, "Hungry for fairness: raising standards in the meat sector: EFFAT's 10 demands for action at EU level, adopted by the Executive Committee on 10 September 2020".

official investigations in some German federal states regarding Covid-19 outbreaks come to the conclusion that this is not a general industry problem of the meat industry.[390]

Overall, the research carried out for this study has shown that **the degree to which working conditions in the sector are challenging varies across Europe and the strategies and business concepts of the employers regarding the use of subcontracting differ greatly**. A one-size-fits-all-approach in Europe for controlling and regulating employment relationships may thus not be feasible.

[390] Verband der Fleischwirtschaft, „Fleischwirtschaft legt der Bundesregierung 5-Punkte-Plan vor“, 2020, available at: https://www.v-d-f.de/news/pm-20200518-0137.

5.4. Agriculture and horticulture

Summary of key findings

- Despite a decreasing overall workforce, the agri- and horticulture is an important sector for the European Union with about 9 million workers and employees in 2021.
- Though there is a strong trend towards concentration, agriculture and horticulture still is characterised by a high share of micro and small farms, often family owned.
- In terms of employment development, the sector is characterised by a (strong) reduction of the national workforce employed in agriculture and a steady increase in the number of foreign workers, whereby the number of third country nationals shows stronger growth than workers from other EU Member States.
- Drivers of cross-border mobility are related to the seasonal nature of many activities in agriculture and horticulture as well as related to the agriculture and food value chain that is characterised by a strong pressure on production costs.
- The organisation of cross-border mobility in agri- and horticulture has very specific features whereby direct recruitment and employment by farms and employers as well as informal organisation by foremen, private intermediaries and agencies as well as online platforms and social media are most prevalent. Formalised subcontracting and registered temporary agency work are not relevant.
- Key problematic aspects of cross-border mobility in agriculture are related to the short-term nature of seasonal work and the largely informal character of recruitment: Lack of transparency of the employment status and wage entitlements, often missing coverage by health and social insurance, unlawful wage deductions for accommodation or brokerage fees, working time documentation, as well as quality of accommodation or sanitary infrastructure.

5.4.1. Overview of the sectoral context

The **agriculture** sector is estimated to have employed around 9.1 million people in 2021[391], which equals about 4.4% of total employment in the EU-27. However, in terms of workforce, **agriculture is a shrinking sector**: its share of total EU-27 employment has decreased by 3.8 percentage points since 2000. One of the key characteristics of employment in the agricultural sector is the fact that a high share (64.8%) of the workforce is self-employed and only about one-third of the workforce are employed.

It should be noted that a characteristic trend of employment in the agriculture sector in the last decade has been the steady decrease of nationals working in the sector that contrasts to a slight increase of employees from and an increase of employees from other EU Member States and an even stronger increase of the number of employees from third country nationals.392This structural feature relates to the subsistence or semi-subsistence function of farming for many farm owners: in 2016 (latest data available[393], there were more than 10 million farms in the EU, and by far most of these were very small, run as family farms. **In 2016 on**

[391] Eurostat [NAMA_10_A10_E]
[392] See Nori, M. and Farinelia, D. (2020). Migration, Agriculture and Rural Development. See also EU Commission: Report on seasonal workers and intra-EU labour mobility.
[393] Eurostat Eurostat [ef_m_farmleg]

93% of farms in the EU, the only workers on the farm were family workers (the farmer and his/her family members). Family farms are the dominant type of farm in all EU Member States but there are relatively sizeable shares of non-family farms in France (27.3%) and Estonia (21.0%).[394] In 2016, one third (32.7%) of the EU's farms were located in Romania followed by Poland (13.5% of the EU-28 total), Italy (10.9%) and Spain (9.0%).[395]

The agriculture sector is characterised by a **strong trend towards concentration**. According to Eurostat figures, the number of farms decreased by about 4.1 million between 2005 and 2016, and most of these were small or very small farms. The only size segment that experienced growth were farms with more than 100 hectares of farmland. As the overall land used for agricultural production did not change during this period, this figure indicates an ongoing process of mergers and takeovers.[396]

While **horticulture** only accounts for about 2% of all farms in the EU,[397] the production output of this sector is much higher, accounting for 14% of the total value of the EU's agricultural production in 2018. Horticulture is an important sector for many EU Member States, such as in the Mediterranean region and in some northern and eastern European countries. Moreover, all EU Member States produce at least a few types of fruit and vegetables. Apples and tomatoes are the main products of the richly diversified produce of the EU's fruit and vegetable farms. Mostly small-sized with relatively high labour input, these farms earn incomes ranging from average (for fruit specialists) to very high (for horticulture specialists, including flower and ornamental plant production).[398]

With regard to **terms and conditions of employment**, the agriculture sector differs from the overall workforce in the EU in a number of aspects. In terms of working status, as mentioned above, the proportion of family workers is significantly higher than the average for the whole EU workforce, at more than 15% compared to just 1%. The levels of self-employment are also significantly higher than the average for the whole EU workforce, at 53.7% compared to 14.1%).[399] Further differences are related to working hours: the proportion of workers working 49 hours per week (21.7%) or more is three times higher than the proportion in the total EU workforce (7.5%). Illustrating the seasonal character of large parts of agri- and horticulture, a further characteristic of employment is the comparatively high share of short-term employment: In 2020 **having a short-term contract of up to three months was 3.6 times as common in the agriculture workforce**.[400]

Research conducted by the European Platform of Undeclared work[401] has highlighted a concentration of problematic aspects of employment in agriculture. For example, the proportion of employees without a written contract is three times higher than in the overall EU workforce. Also, the issue of a comparatively high share of dependent self-employment has been highlighted by the European Platform as well as by EU agencies such as Eurofound (European Working Conditions Survey)[402].

These characteristics contribute to agriculture being characterised in a recent position paper from the European trade union federation organising agricultural workers, EFFAT, as "one of

[394] Eurostat, Farms and farmland in the European Union – statistics, Eurostat 2018: Farms and farmland in the European Union – statistics.
[395] Eurostat. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Farms_and_farmland_in_the_European_Union_-_statistics#Farms_in_2016
[396] Eurostat, 'Key figures on the European Food chain', 2021 Edition, available at, https://ec.europa.eu/eurostat/web/products-key-figures/-/ks-fk-21-001.
[397] *Ibid*.
[398] See also: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635563/EPRS_BRI(2019)635563_EN.pdf
[399] See: Eurostat, 'Key figures on the European Food chain', 2021 Edition, available at, https://ec.europa.eu/eurostat/web/products-key-figures/-/ks-fk-21-001., p. 19
[400] *Ibid*, p. 19.
[401] C.C. Williams & A. Horodnic, 'Tackling undeclared work in the agricultural sector', 2018:
[402] Eurofound, 'Sixth European Working Conditions Survey – Overview Report', 2016, available at: https://www.eurofound.europa.eu/publications/report/2016/working-conditions/sixth-european-working-conditions-survey-overview-report.

the most precarious and challenging sectors of the economy", which relies to a large extent on EU seasonal, as well as third country, migrant workers, including undocumented.[403]

5.4.2. Seasonal workers and other forms of temporary cross-border labour mobility

Agriculture and horticulture in the EU depend heavily on migrant workers as labour shortage is a major problem in this sector, and in particular when it comes to seasonal work. According to a study published in 2021 by the EU Commission, there are around 650 000 – 850 000 EU citizens that carry out seasonal work in another EU country, most of which in agriculture.[404]

1. As highlighted in recent research on seasonal work,[405] measuring the extent of this type of work is challenging for a number of reasons: Seasonal workers that are EU nationals benefit from free movement and are not recorded in official statistics and also data on third-country seasonal workers cannot be used as a proxy as the share of EU and non-EU seasonal workers differs significantly between Member States.

2. In addition, there is an unknown number of undeclared seasonal workers. It is estimated by the European agricultural workers trade union EFFAT that around one-third of the EU agriculture workforce are not recorded

According to a study of the European Migration Network (EMN)[406], seasonal workers from non-EU countries mostly originate from the neighbouring regions of the receiving Member States. In 2018, the Ukraine was the most frequent country of origin across the Member States, followed by Bosnia and Herzegovina, Serbia, North Macedonia, Moldova and Belarus.

In some Member States, key countries of origin of seasonal workers are outside the European continent, namely from Africa and South America. In France, the top five countries of origin for seasonal workers in 2018 were Morocco, Mali, Guinea, Tunisia and Ivory Coast. In Spain the main country of origin in 2018 was Morocco.

There is limited data available on the age of seasonal workers. According to the EMN research, **the majority of seasonal workers are young**, between 18 and 39 years old. Only a small percentage of seasonal workers are 50 or older. Reliable data on the gender distribution of seasonal workers is not available.

Due to their short stay in the host country, **mobile seasonal workers and TCNs are more exposed to labour market changes, face language and cultural barriers and are often unaware of their rights and obligations.** This has led to a significant share of these workers being trapped in undeclared work.

In the agricultural sector, **undeclared work** is driven by the seasonal character of the production processes as well as specificities of the value-chain of production: Products are not typically delivered directly to the consumer but sold to manufacturing industries or to retail businesses. Competition in the retail food and food processing industries results in pressure on agricultural and horticultural producers to keep production costs low while maintaining high quality. This is achieved mainly by decreasing labour costs, using technological innovations and increasing productivity but also illegitimate labour practices such as undeclared work,

[403] EFFAT 2021: Towards inclusion and equal treatment for all mobile and migrant workers; EFFAT Demands for action. Adopted at the EFFAT Executive Committee on 1 June 2021, p. 3.
[404] European Commission, 'Intra-EU Mobility of Seasonal Workers: Trends and Challenges. Final Report March 2021'. It should be noted that the figure in intra-EU seasonal workers are based on calculation of eight countries only.
[405] EU Commission: Report on seasonal workers and intra-EU labour mobility.
[406] European Migration Network, 'Attracting and protecting the rights of seasonal workers in the EU and United Kingdom', Synthesis Report, 2020, available at: https://home-affairs.ec.europa.eu/system/files_en?file=2020-12/00_eu_seasonal_workers_study_synthesis_report_en_1.pdf.

bogus self-employment, gang mastering and trafficking. This includes country-specific forms, for example the well-documented forms of exploitation such as the "Caporale" system in Italy.[407]

Illegal or criminal practices affect native and foreign workers alike but due to their migration status, EU and particularly (due to their unsecure residence status) **non-EU foreign workers are found to be particularly vulnerable and disproportionately affected**. While undeclared work in the agriculture sector affects both EU and third country nationals, participants in a workshop organised in 2019 by the European Platform of Undeclared Work[408] highlighted that TCNs are more vulnerable to multiple forms of rights violations and trafficking.

EFFAT estimates that 40% of agricultural workers are internal EU or third country migrants.[409] Differentiating between EU mobile workers and TCNs, moreover, it is estimated that 20% of migrants working in agriculture are from third countries and 80% are EU mobile workers. In some Member States and regions, a large proportion of these migrants are engaged in undeclared work. They not only suffer from a lack of access to social security but also access to information about their rights and a lack of support to help them to improve their situation. According to stakeholders at national level, there is also evidence that suggests a specific gender dimension[410] where women are more at risk of being employed without a formal contract and with lower wages.

5.4.3. The role of labour market intermediaries and subcontracting

According to stakeholder interviews and national evidence,[411] EU and third-country seasonal workers are most likely to be recruited and employed either directly be farmers or via informal channels. **Labour market intermediaries, including fraudulent agencies, however, also play an important role in providing users in agriculture and horticulture with seasonal workers from the EU and non-EU countries**. Temporary work agencies play a major role in organising short-term cross-border labour in countries such as Slovenia, Slovakia, Spain, the Netherlands and Malta.[412] As with other sectors, high cost pressures on economic actors in agriculture and horticulture incentivise cost-cutting strategies, which result in the use of intermediaries in the supply chain and the prevalence of undeclared work.

In Germany for example, it has been reported that most of the 275,000 seasonal workers in agriculture have been recruited through the following three channels:[413]

1. Personal contacts and private networks: Workers who have had a good experience in a company recommend it to others. Often workers from the same locality take up work in a company in Germany as a group. Companies also specifically use their foremen to recruit workers in their region of origin.

[407] See for example: Eurispes and UILA, 2014: Undeclared work, Survey on undeclared work in agriculture, (Sommerso, Indagine sul lavoro sommerso in agricoltura) Rome. Also: FLAI CGIL, Osservatorio Placido Rizzotto 2014: Agromafie e Caporalato, Secondo Rapporto.
[408] C.C Williams, 'Tackling undeclared work in the agricultural sector, with a focus upon seasonal workers and horticulture', 24 January 2019, Brussels, Belgium.
[409] Interview with EFFAT, May 2022. See also: Williams, Colin C. 2019: Tackling undeclared work in the agricultural sector: a learning resource, p. 3.
[410] There is a lack of data on the gender distribution of seasonal workers in general and no data for agriculture exist. However, a recent study on third-country seasonal workers revealed that there seem to be significant differences between EU Member States. While on average the distribution between men and women seems to be quite equal, data from Spain for 2019 indicate that 88% of third country seasonal workers are female. See European Migration Network 2020: Attracting and protecting the rights of seasonal workers in the EU and United Kingdom, p. 11.
[411] In particular EFFAT. See also: Palumbo, L; Corrado, A; Triandafyllidou, A. 2022: Migrant Labour in the Agri-Food System in Europe: Unpacking the Social and Legal Factors of Exploitation, *European Journal of Migration and Law 24 (2022)*, p. 179–192 On Germany see: Initiative Faire Landwirtschaft (2023): Saisonarbeit in der Landwirtschaft. Jahresbericht 2022
[412] R. Stefano & D. Minerva, 'Tackling undeclared work among seasonal (including mobile) workers: Developments, trends and good practices', 2021, p. 4.
[413] See Initiative Faire Landwirtschaft (2023): Saisonarbeit in der Landwirtschaft. Jahresbericht 2022, p. 10.

2. Agencies: In the countries of origin, such as Romania, there are informal placement agencies that place seasonal workers in German companies. These agencies are often criticised. The Romanian government tried to regulate the placement by law in 2021, but many of the agencies continue to work informally.[414]

3. Digital: Recruitment is increasingly taking place digitally, on the one hand via social media such as Facebook, on the other hand via private placement portals, the seriousness of which is to be assessed very differently.

In the placement of seasonal workers from third countries, state placement agreements between Germany and the countries of origin Georgia and the Republic of Moldova play a special role. However, so far, they only cover a small proportion of workers. Apart from these placement agreements, placement takes place through informal channels.

Job placement via the European Employment Services (EURES) platform does not seem to play a major role in the placement of seasonal workers.[415]

Informal intermediaries, be they foremen or intermediaries, often charge a fee, sometimes directly from the workers, sometimes from the employer, who in turn deducts it from the wages.

The evidence from the organisation of seasonal work in agriculture in Germany seems to also match the experience of other countries, in particular when it comes to the prevalence of informal ways of recruitment and different forms of labour intermediaries that are not formal temporary work agencies.

Case law suggests that fraudulent practices are quite widespread where agencies or intermediaries aim to avoid declaration to the public authorities. For example, some fraudulent agencies regularly change their company status or names of owners in order to evade regulations in countries such as Germany, Belgium and Norway or as mentioned above, Romania.

As discussed in the case study on seasonal workers in the agriculture sector (see Section 6.3), some of the existing practices undermine the working conditions and rights of seasonal workers and encourage undeclared work. In Italy, many find seasonal work through the ‘caporalato’ practice,[416] which is a form of illegal intermediation between farmers and workers. As a result, there is limited legal and social protection for the workers which leads to precarious working conditions and few avenues of redress.

5.4.4. How temporary cross-border mobility functions in the agriculture and horticulture sector

Seasonal work provided by cross-border mobile workers either from other EU countries or from outside the EU has long been a constant feature of the workforce in the EU agriculture sector. Cross-border mobile workers are important and likely to continue due to significant labour shortages in both agriculture and horticulture. Direct relationships by employing farms, informal intermediaries, agencies as well as increasingly social media play a key role in organising seasonal work within and across borders.

While evidence of precarious forms of employment and working conditions in the sector has long been highlighted by the social partners in the agricultural sector, the COVID-19 pandemic as well as research conducted under the umbrella of EU institutions such as the Platform for Undeclared Work or the ELA have raised awareness of the situation of EU workers and

[414] Ibid.
[415] Ibid.
[416] Ibid.

seasonal TCN workers in this sector. Further, migrant seasonal workers are at high risk of facing multiple forms of rights violations and trafficking.

Key challenges in this sector relate to the difficulties in carrying out workplace inspections due to limited access (size and dispersion of workforce, lack of access to premises) and the prevalence of verbal contracts. Inspectors may face communication and language issues. The lack of data related to identifying undeclared work in the agricultural sector is another key challenge. Further challenges relate to undocumented or intransparent working time, lack of health insurance and underpayment.

In addition to a fragmented landscape in terms of the implementation of the Seasonal Workers Directive, trade unions have in particular highlighted the need for a stronger framework relating to subcontractors as well as user company liability.

5.5. The hotel-tourism-catering sector

Summary of key findings

- There is limited data available on temporary cross-border workers employed in the hotel, tourism and catering sector, partially due to the challenge of distinguishing between temporary cross-border workers as opposed to workers generally, and also due to available statistics focusing only on one sub-sector (i.e. accommodation, 'travel and tourism' or 'food and beverage'). whether it be the extent of subcontracting that takes place, the number of intra-EU seasonal workers, or the prevalence of TCNs employed in the sector.
- That said, the European Parliament notes in a 2017 report on the issue of subcontracting chains that the phenomenon has been widely reported in the hotels sector. As in other sectors, subcontracting practices have been found to lead to a worsening of working conditions, as the responsibility of employers can be blurred. It can also undermine the rights of workers to information and consultation and to collective representation, as workers are likely to be working for smaller, subcontracted, companies.
- While the number of temporary cross-border TCN workers employed in the hotel, tourism and catering sector remains largely unknown, as in other sectors, TCNs are particularly vulnerable to violations of working conditions due to concerns surrounding obtaining or retaining a visa.

5.5.1. Overview of the sectoral context

5.5.1.1. Prevalence of temporary cross-border workers

There are no EU-wide statistics as to the number of temporary cross-border workers employed in the hotel, tourism and catering sector. This is partially due to the challenge of separating the data specifically applicable to temporary cross-border workers as opposed to all persons employed in the sector, but also the fact that the sector has a number of component parts: accommodation, 'travel and tourism' and 'food and beverage'.

Considering the travel and tourism sub-sector, in absolute terms, Germany had the highest employment level in tourism industries (2.6 million people), followed by Italy (1.7 million) and Spain (1.6 million).[417] In terms of tourism industries as a share of the total non-financial business economy, **Greece had the highest share (27.8%)**, followed by Cyprus and Malta.[418]

The **share of female workers employed both in 'selected tourism industries'**[419] **and accommodation is around 60%**.[420] The **workforce in the sector is fairly young**, as it is an

[417] Eurostat, Statistics explained, 'Tourism industries – employment', data extracted in January 2022, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tourism_industries_-_employment&oldid=552036#In_2019.2C_the_tourism_industries_employed_over_12.5_million_people_in_the_EU.
[418] *Ibid*.
[419] Taken here to mean the three industries that rely almost entirely on tourism: accommodation, travel agencies/tour operators, air transport.
[420] Eurostat, Statistics explained, 'Tourism industries – employment', data extracted in January 2022, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tourism_industries_-_employment&oldid=552036#In_2019.2C_the_tourism_industries_employed_over_12.5_million_people_in_the_EU.

industry through which it is relatively easy to enter the labour market. The fact that it is frequently used by people who are also engaged in education and/or training means that the turnover of the workforce is high. Although the figures above relate to all workers, not solely temporary cross-border workers, they can be understood to apply also to mobile workers.

In **2020, around 13% of the labour force in tourism industries was made up of foreign citizens**, 6% coming from other EU Member States and 7% from non-EU countries.[421] The share of foreign citizens increases for certain sub-sectors; for example, 15% of workers in the accommodation sub-sector were foreign citizens. What is not known is whether these workers reside permanently in the country in which they work, or whether they are temporary cross-border workers. However, **temporary employment (whether or not cross-border) is common in the tourism sector** (18% of workers have a temporary job, as opposed to 12% of employed people in the non-financial business economy).[422] There are, however, large differences between Member States, with more than 30% of tourism work contracts in Greece, Italy, Cyprus and Poland being temporary.

In terms of the features of the work itself, **working hours are long and typically based on shift work**. This means that **much of the work deviates from standard working times**. Historically, the sector has witnessed high levels of non-compliance with working time regulations, particularly in the field of youth employment.[423] **Hourly earnings are also below the average for the economy as a whole**, which can be explained by the relatively young labour force, high proportion of temporary contracts and low job security. This is the case particularly in the accommodation sub-sector, where gross-hourly earnings in 2018 were €11, compared to €15.70 for the EU economy as a whole.[424]

5.5.1.2. Drivers and sectoral constraints

From a **supply perspective**, the hotel, tourism and catering sector offers dynamic **opportunities for professional mobility**, with workers being able to gain a diverse experience in another country. It is for this reason that much of the workforce is relatively young, as the sector provides an interesting opening to the labour market.

From a **demand point of view**, parts of the sector (particularly the 'travel and tourism' sub-sector) are very seasonal in nature, with periods of high and low demand. This depends on factors such as weather conditions (e.g. ski tourism), but also school holidays and cultural or regional events/festivals. It is also a sector in which there are comparatively high **relative labour shortages** (i.e. where positions are difficult to fill, based on the conditions being offered). This means that the externalisation of services across borders (with a general pattern of workers coming from low-wage countries towards high-wage countries) is a commonplace practice.

The **COVID-19 pandemic has undoubtedly exacerbated these labour shortages** and the difficulties of recruiting and retaining workers, with hospitality businesses being forced to close, and many workers being laid off. Similarly, there was no longer a demand for intra-EU seasonal workers in the sector. The result of this were severe shortages in the sector. In **France, 300 000 job vacancies were to be filled at the start of the 2021 season**.[425] In Austria, the number of employees in the tourism sub-sector fell from 230 000 in 2019 to 132 000 during

[421] *Ibid*.
[422] Eurostat, 'Share of employees by economic activity and permanency of the job, EU, 2020', available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tourism_industries_-_employment&oldid=552036#In_2019.2C_the_tourism_industries_employed_over_12.5_million_people_in_the_EU.
[423] Eurofound, 'Working conditions – the dark side of tourism', 2012, available at: https://www.eurofound.europa.eu/publications/article/2012/working-conditions-the-dark-side-of-tourism.
[424] Eurostat, 'Hourly labour cost (2016) and gross hourly earnings (2018), by economic activity, EU, (euro)', available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tourism_industries_-_employment&oldid=552036#In_2019.2C_the_tourism_industries_employed_over_12.5_million_people_in_the_EU.
[425] EFFAT, Position Paper, 'Fight labour shortages in hospitality-tourism by improving the attractiveness of jobs', 23 May 2022.

the pandemic, with 50 000 employees missing for the 2021 winter season alone.[426] A representative from the Austrian trade union, Vida, mentioned that in order to improve the image of the sector, companies would need to ensure better salaries, more flexible working hours, more days off, as well as training and career progression opportunities.[427] Otherwise, people will continue to switch sector.

5.5.2. Subcontracting

There is not a great deal of information available on the incidence of subcontracting in this sector, nor the extent to which cross-border workers are involved in such practices. However, the European Parliament notes in a 2017 report on the issue of subcontracting chains[428] that **the phenomenon of subcontracting chains has been widely reported in the hotels sector,** among others. Some data relating to individual Member States reflects this trend for some parts of the hotel, tourism and catering sector. For example, in Spain, it is reported that the sub-sector of outsourced catering services has increased its share of the overall industry, growing by 2.36% between 2013 and 2014.[429]

From interviews carried out with sectoral stakeholders, there was a view from the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) that **subcontracting and the existence of subcontracting chains are a problematic issue for this sector**. This takes the form of companies subcontracting certain types of services, such as hotels that engage in outsourcing housekeeping services, which largely entails the cleaning of rooms, and also the provision of catering services. Another form of subcontracting in the sector involves **high levels of franchising**, particularly in the fast-food part of the sector, and in the hotels sector.

The view from EFFAT is that subcontracting can lead to a **worsening of working conditions** as this can blur the responsibility of employers. It can also **undermine the rights of workers to information and consultation and to collective representation,** as workers are likely to be working for smaller, subcontracted, companies. EFFAT also noted that subcontracting is often linked to higher pressure, with incidences of outsourced workers being given unrealistic targets, for example in terms of the number of hotel rooms that they have to clean in a day, and also incidences of relatively low pay and lower levels of working conditions compared to directly employed workers.

The trade union view is that working conditions for subcontracted workers can be improved through collective agreement, and there is an example of a national collective agreement in the catering sector in Spain,[430] which is reported to have resulted in the **improvement of working conditions for outsourced workers** in this sector, particularly in the case of workers with few regular working hours.

In order to analyse in more depth the situation of the contracting out of services in the context of the privatisation of many parts of public service sector, a two-year European project entitled Workers' influence on outsourcing, tender processes and transfer of employment contracts: watch the gap! was carried out by EFFAT, ETF, EPSU, UNI Europa and Syndex, with the final report issued in February 2021.[431] The aim of this project was to analyse the implementation

[426] Kurier, 'Fachkräftemangel: Fünf Unternehmer erzählen, wie sie damit umgehen', 20 November 2021, available at: https://kurier.at/wirtschaft/karriere/fachkraeftemangel-fuenf-unternehmer-erzaehlen-wie-sie-damit-umgehen/401810884.
[427] *Ibid*.
[428] European Parliament, 'Liability in subcontracting chains: National rules and the need for a European framework', July 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf.
[429] R. Muñoz de Bustillo Llorente & F. Pinto Hernández, 'Reducing precarious work in Europe through social dialogue. The case of Spain', 2016, available at: https://documents.manchester.ac.uk/display.aspx?DocID=48965.
[430] Resolución de 24 de febrero de 2016, de la Dirección General de Empleo, por la que se registra y publica el Convenio colectivo estatal del sector laboral de restauración colectiva (BOE, 22/March/2016). Reported in: R. Muñoz de Bustillo Llorente & F. Pinto Hernández, 'Reducing precarious work in Europe through social dialogue. The case of Spain', 2016, available at: https://documents.manchester.ac.uk/display.aspx?DocID=48965.
[431] UNI Europa et al., 'Workers' influence on outsourcing, tender processes and transfer of employment contracts: watch the gap!', February 2021, available at: https://www.etf-europe.org/wp-content/uploads/2021/04/Syndex-Report-EN-02-2021-final_0.pdf.

of EU legislation with regard to workers' rights in the context of transfers of undertakings in a range of sectors, including contract catering and cleaning and security services. One of the key conclusions of this project was that **sub-contracting has increased significantly over the past two decades**, and in the view of the researchers often **at the expense of workers' rights and jobs**. EFFAT, EPSU, ETF and UNI Europa ask the European Commission to carry out an updated impact assessment of the European Directive 2001/23/EC on safeguarding employees' rights in the event of transfers of undertakings in order to help European Sectoral social dialogue Committees in relevant sectors, including the hospitality and catering sectors, to address this issue in an efficient manner.

5.5.3. Intra-EU seasonal workers

As with temporary cross-border workers employed in the hotel, tourism and catering more generally, the specific group of EU citizens living in one Member State and carrying out seasonal work in another Member State (**'intra-EU seasonal workers'**) is **infrequently studied**.[432] When it is, figures are usually combined with those for the agriculture sector. However, national data for intra-EU seasonal workers has been estimated for three EU Member States **in the accommodation and food sub-sector: 35 000 of these workers in Austria, 94 500 in Germany and 3 200 in the Netherlands**.[433]

In general terms, **posting constitutes the exception rather than the rule among seasonal workers**.[434] In the accommodation and food services sub-sector, data from PDs A1 issued according to Article 12 indicates that in 2019, only Austria (2 406), Belgium (1 ,166) and France (1 024) sent more than 1 000 posted workers.[435] However, data for several sending countries (DK, DE, EL, ES, IE, IT) is not available for this sector. The main receiving countries were Germany (1 455 workers), Italy (835) and Denmark (815).[436] In total in **2019, there were only 7 546 workers posted according to Article 12 in accommodation and food services** (for the Member States where this sectoral information was available). This number includes posted third-country nationals, the precise number of which it is not possible to determine from the available statistics.[437]

Data for 2020 also indicates the number of persons, declarations and postings registered in the national declaration tools by sector of activity. For accommodation and food service activities, **France reported the largest share of each**, with 5 695 out of a total of 5 983 persons across 9 Member States, 4 047 out of a total of 4 388 declarations across 13 Member States, and 10 595 postings out of a total of 11 881 posting across 12 Member States.[438]

In the context of the COVID-19 pandemic, the **European Commission published guidelines on seasonal workers** in the EU.[439] In order to protect seasonal workers, the guidelines stipulate that once in employment, these workers are "subject to the laws and relevant collective agreements of the host Member State and **must be treated the same as nationals as regards their working conditions** including remuneration, dismissal and occupational safety and health. They also have the right to access the same social and tax advantages as

[432] European Commission, DG EMPL, 'Intra-EU Mobility of Seasonal Workers – Trends and Challenges', March 2021, available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&.
[433] *Ibid*, p. 34.
[434] European Commission, DG EMPL, 'Intra-EU Mobility of Seasonal Workers – Trends and Challenges', March 2021, p. 25, available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&.
[435] *Ibid*, p. 84.
[436] *Ibid*, p. 83.
[437] *Ibid*, p. 17.
[438] European Commission, 'Posting of workers, Collection of data from the prior declaration tools, Reference year 2020', June 2022.
[439] European Commission, Communication, 'Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak', 16/07/2020, available at: https://ec.europa.eu/info/sites/default/files/guidelines_on_seasonal_workers_in_the_eu_in_the_context_of_the_covid-19_outbreak_en.pdf.

nationals."[440] These guidelines represent an important step forward in the protection of the rights of seasonal workers in the hotel, tourism and catering sector.

However, one of the challenges of seasonal work in the hotel, tourism and catering sector is undeclared work. The most common undeclared practices relate to **unregistered work, under-reported working hours, underpayment, withholding wages or improper deductions from wages** for food, transport or accommodation.[441] Again, data is very limited as to the extent of undeclared work in the sector, with estimates only being possible for two EU Member States. In Austria, it is thought that an additional 20% of the 35 000 intra-EU seasonal workers in the accommodation and food services sub-sector are undeclared (7 000 workers), while in Germany, the figure stands at 12 285 undeclared workers (an additional 13%).[442]

Measures are being taken to address this issue, with the European Platform tackling undeclared work having recently organised a **seminar on 'Tackling undeclared work in the HORECA sector'**,[443] to explore existing practices, tools and approaches that deal with undeclared work. This involved labour and social security inspectorates, ministries of labour, European level and national social partners and representatives from EU agencies.

Moreover, the Commission's 2020 Guidelines on seasonal workers call on Member States to take necessary steps to tackle undeclared work of seasonal workers and to make extensive use of the European Platform tackling undeclared work, including engaging in cross-border cooperation, conducting better risk analysis for more effective inspections, and also taking preventative measures.[444] In relation to the issue of decent housing conditions for seasonal workers, the Guidelines acknowledge that while "the Seasonal Workers Directive includes rules on accommodation [applicable to TCN seasonal workers], and the revised PWD makes host country rules on the conditions of accommodation, where they exist, applicable to posted seasonal workers, there is **no Union act in place to guarantee accommodation conditions for other seasonal workers**."[445]

5.5.4. TCNs in the sector

As previously mentioned, it is **very difficult to determine the number of TCNs active in the hotel, tourism and catering sector**. What is known, however, is that the issues faced by many workers in the sector are exacerbated for TCNs.

In hotels, **tasks undertaken by TCNs are often cleaning services and laundry**, mostly carried out by female workers.[446] There are reports of exploitative working conditions: long hours, few breaks, a high workload, no safety instructions and inappropriate accommodation.[447] An example of this is Ukrainian workers holding Polish visas, working on a seasonal basis in Czech hotels with payments made to them based on the speed of

[440] *Ibid*, p. 2.
[441] European Platform tackling undeclared work, 'Platform seminar: Tackling undeclared work among seasonal (including mobile) workers: developments, trends and good practices', Online seminar, 16 March 2021.
[442] European Commission, DG EMPL, 'Intra-EU Mobility of Seasonal Workers – Trends and Challenges', March 2021, p. 38, available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&.
[443] See: https://www.ela.europa.eu/en/events/platform-seminar-tackling-undeclared-work-horeca-sector.
[444] European Commission, Communication, 'Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak', 16/07/2020, available at: https://ec.europa.eu/info/sites/default/files/guidelines_on_seasonal_workers_in_the_eu_in_the_context_of_the_covid-19_outbreak_en.pdf.
[445] *Ibid*.
[446] European Platform tackling undeclared work, 'Counteracting undeclared work and labour exploitation of third-country national workers', November 2020, p.39, available at: http://www.eurodetachement-travail.eu/datas/files/EUR/UDW_and_labour_exploitation_among_TCN.PDF.
[447] *Ibid*.

cleaning.[448] As in other sectors, **TCNs are therefore particularly vulnerable to violations of working conditions** due to concerns surrounding obtaining or retaining a visa.

Moreover, Eurofound reports that "the fraudulent contracting of work in certain cases seems to significantly involve migrant workers, such as those involved in seasonal work in agriculture and tourism."[449] For example, the Belgian labour inspectorate has found that, while TCNs are mostly found in very small scale undertakings, **when illegal work in larger scale undertakings occurs, it is often in the hotel sector**, particularly the provision of cleaning services.[450] In the experience of the inspectorate, it is **most common for TCNs to be employed illegally in labour situations not requiring a high level of qualification**, including in restaurants, night shops and cleaning services.[451]

In **Italy**, the 'quota system'[452] allowing non-EU citizens to enter Italy permits entry according to single entry work permits (only in the tourism, construction and transport sectors), **seasonal work permits** (in only tourism and agriculture) and permits for self-employment.[453] One of the issues with this system is that the official process requires a work permit application to be submitted by an Italian employer to 'the One-Stop-Shop for Immigration in the Prefettura where the job will take place'[454] concerning an (unknown) TCN while the individual is still in his or her home country. This **requirement is "unrealistic and not respected"**,[455] leading to a situation whereby an individual has to come from a third country to Italy on a tourist visa, (unofficially) obtain a work permit there, return to their country of origin and then be officially granted the permit once they are in their home country.[456]

The seasonal work permit is valid for between 20 days and nine months, depending on the specified duration of employment.[457] However, a second issue is that, unlike the single entry work permit, if a TCN holds a seasonal work permit in Italy and loses the job, the TCN also loses the right to reside regularly and temporarily, and is obliged to leave the country.[458] This leads to a situation whereby **TCNs tend not to denounce any violation of their working or OSH rights, and accept dangerous working conditions for fear of bringing attention to themselves and losing their job**.[459]

5.5.5. How temporary cross-border mobility functions in the hotel-tourism-catering sector

More than for the other sectors examined in detail in this report, there is not a great deal of information available on temporary cross-border workers employed in the hotel, tourism and catering sector, whether it be the extent of subcontracting that takes place, the number of intra-EU seasonal workers, or the prevalence of TCNs employed in the sector.

[448] M. Trčka et al., 'Employment of Ukrainian Workers with Polish Visas in the Czech Republic: From the Main Patterns of Labour Exploitation towards Points of Intervention', 2018, pp. 27-28, available at: https://www.solidar.org/system/downloads/attachments/000/000/841/original/Employment_of_Ukrainian_Workers_through_Polish_visas.pdf?1542195590.
[449] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', 2016, p. 12, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1639en.pdf.
[450] European Migration Network, 'Illegal employment of third country nationals in Belgium', July 2017, p. 16, available at: https://emnbelgium.be/sites/default/files/publications/FINAL%20BE%20study%20Illegal%20Employment%20of%20TCNs_1.pdf.
[451] *Ibid*.
[452] See: https://integrazionemigranti.gov.it/en-gb/Altre-info/e/4/o/6///id/7/Recruitment-of-foreign-workers-resident-abroad.
[453] ETUI, Seminar on 'Challenges associated with short-term labour mobility: third-country nationals, posted workers, seasonal workers, and refugees', 13-14th June 2022.
[454] See: https://immigration-portal.ec.europa.eu/italy-seasonal-worker_en#:~:text=Your%20future%20employer%20must%20submit,quota%20for%20non%2DEU%20workers.
[455] *Ibid*.
[456] *Ibid*.
[457] See: https://ec.europa.eu/immigration/italy-seasonal-worker_en.
[458] ETUI, Seminar on 'Challenges associated with short-term labour mobility: third-country nationals, posted workers, seasonal workers, and refugees', 13-14th June 2022.
[459] ILO, 'Towards a fair deal for migrant workers in the global economy', 92nd session, 2004, para. 208, available at: https://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf.

That said, several challenges can be identified, notably that subcontracting and the existence of subcontracting chains are a problematic issue for this sector, that undeclared work is a problem that is being addressed, and that TCNs are especially vulnerable to the already challenging working conditions in the sector, including long, atypical hours and below average wages. These generally poor working conditions mean that few people with alternative employment opportunities are willing to work in the sector. For this reason, it is of fundamental importance to ensure that all jobs in the sector provide decent working conditions, wages that workers can live on, adequate social protection, and the respect of workers' rights.[460]

[460] EFFAT, Position Paper, 'Fight labour shortages in hospitality-tourism by improving the attractiveness of jobs', 23 May 2022.

6. Typically problematic situations related to the working conditions of posted workers and other temporary cross-border workers

This section complements the sectoral and legal analysis in Sections 4 and 5 by discussing 8 case studies of typically problematic situations involving workers in posting and non-posting situations. These include: 1) the role of temporary work agencies and other labour market intermediaries in temporary cross-border mobility; 2) non-payment and under-payment; 3) seasonal workers in agriculture; 4) bogus self-employment; 5) posted TCNs in the construction sector; 6) key types of occupational safety and health (OSH) violations and enforcement challenges; 7) the role of letterbox companies in complex subcontracting chains; and 8) the situation of live-in carers.

6.1. Case study 1: The role of temporary work agencies and labour market intermediaries in temporary cross-border mobility: key legal and enforcement challenges

6.1.1. Introduction

One of the study's key objectives is to analyse the situation of cross-border workers in posting and non-posting situations involving temporary work agencies and other labour market intermediaries.

Agency work can play a role in reducing unemployment, supporting labour market transitions, meeting flexibility needs for employers and workers alike, and matching demand and supply in certain segments of the labour market and across borders within the EU. In certain conditions, it can provide a stepping-stone type of job experience that enables access to the labour market and further transitions into permanent employment. Existing research indicates this does not tend to happen, however, but also emphasises that not all workers are looking to leave temporary agency work, due to the flexibility it offers (notwithstanding limitations to job security).[461] National legislation in some Member States does allow the possibility for temporary agency workers to enter into permanent employment relationships with temporary work agencies, however, which may support transitions into permanent employment.

Despite the positive role that temporary work agencies and labour market intermediaries can play, there are also problematic issues linked to their involvement in cross-border work across key sectors and Member States. While the amended PWD defined several new provisions on posted temporary agency work (in essence, to ensure equal treatment with local temporary agency workers) there is a real risk that these are not applied in practice.

Complementing the analysis in the report, this case study assesses the role of temporary work agencies and labour market intermediaries in problematic situations involving different types of temporary cross-border mobility, discusses enablers of this phenomenon and the

[461] S. Fuller and N. Stecy-Hildebrandt, 'Career pathways for temporary workers: exploring heterogeneous mobility dynamics with sequence analysis', Social Science Research, 2015, 50: 76–99; O. Reichenberg and T. Berglund, 'Stepping up or stepping down?: the earnings differences associated with Swedish temporary workers' employment sequences', Social Science Research, 2019, 82: 126–36.

key types of legal and enforcement challenges, and reflects on further actions to ensure improvements in the situation of cross-border workers.

6.1.2. Overview

Agency work is a complex phenomenon, as the regulations governing it, its share and role in different sectors of the economy, its characteristics, and the labour market context in which it operates are highly diverse across the EU. The challenges in regulating this field at the EU level have been reflected in the lengthy policy debates that eventually led to the adoption of the EU Directive on Temporary Agency Work (2008/104/EC).[462] The Directive sets out a framework applicable to the working conditions of temporary agency workers and aims to guarantee a minimum level of protection. It also aims to contribute to job creation and to participation and integration in the labour market (Article 2).

The Directive on Temporary Agency Work **defines temporary work agencies as employers**: they are "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction" (Article 3.1.b). In cases where they do not employ workers directly, agencies are referred to as **labour market intermediaries** at EU level. In reality, however, the same agency can be a temporary work agency as per the definition included in the Temporary Agency Work Directive, as well as a labour market intermediary, in cases in which it only provides placement services for employers, without establishing an employment contract/ relationship with the workers.

The situation is even more complex when considering that despite the existing EU-level legal definition included in the Temporary Agency Work Directive, in practice across the Member States there are many terms used to refer to temporary work services and the respective agencies/ intermediaries that provide them. There are also many types of labour intermediaries. In the literature as well, one of the most common terms used to generally discuss services that intermediate between user undertakings (clients) and workers is 'temporary work agencies' (although not necessarily as per the definition in the Directive), or 'temporary employment agencies'. In many cases when these situations are discussed, it is not clear whether these agencies are merely acting as intermediaries or establishing direct employment contracts/ relationships with the workers.

Temporary cross-border work within the EU has increased over the past two decades, along with the role of temporary work agencies in the posting and placement of cross-border workers. The revised PWD[463] – among other changes – aims to address challenges related to the treatment of temporary agency workers in posting situations: it states that the same terms and conditions that apply to temporary workers hired in the country where the work is conducted should also apply to posted workers. These changes are recent, and the evidence of their impact is therefore limited.

Due to the Temporary Work Agency Directive and the PWD, **the fact that temporary work agencies establish direct employment relationships with workers has – in theory – an impact on their working conditions**, given that the agencies are subject to the same obligations as other employers in ensuring the equal treatment of temporary agency workers (including in cross-border situations). The directive (Article 5.3) also allows Member States to authorise derogations to this principle via collective bargaining. Ten Member States (AT, BG, DK, FI, DE, HU, IE, IT, the NL and SE) have adopted provisions allowing

[462] See: https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=207 and https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0104&from=EN.

[463] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0957&from=EN.

collective labour agreements deviating from equal treatment of temporary agency workers. Only national provisions in Austria, Ireland and Sweden refer to the need for these collective agreements to be appropriately balanced to ensure that they do not prejudice the overall protection of temporary agency workers. And in Denmark such overall protection has been granted by case law. While temporary work agencies are bound by the rules established in the Temporary Work Agency Directive and the PWD, in the case of workers recruited through labour market intermediaries, working conditions may be less favourable both in theory and in practice.

The evidence is, however, limited as to the extent of the impact of these legal provisions – alongside national regulations – and whether they offer the intended protection for workers. The challenges in understanding the extent and range of problems that affect the working conditions of temporary cross-border workers are compounded by the lack of systematic data on the infringements for which temporary work agencies (as employers) are responsible, relative to those committed by labour market intermediaries; as well as the often reported lack of awareness of workers about their contractual conditions and a clear understanding of who they enter into an employment relationship with.

The **challenges** involved in understanding the functioning of temporary agency work, as well as its benefits and problematic aspects **increase in a cross-border work context**. Agency work involves a three-sided relationship between the worker, the agency and the company for which the work is conducted. On the one hand, there is an employment relationship (the temporary agency worker and the agency) and, on the other hand, there is a commercial relationship (between the temporary work agency and the user undertaking). In cases involving subcontracting chains, there are more than three actors involved, which adds further uncertainty about who is responsible for ensuring that workers' rights are protected. In a cross-border setting, the actors involved in recruiting and using workers' services can often be in different countries (sometimes more than two) and operate under complex legal systems.

Temporary work agencies are also an important intermediary in placing other types of temporary cross-border workers (e.g. seasonal workers), but also in recruiting self-employed people working in sectors such as live-in care. In cross border situations concerning posting and non-posting situations alike, the **involvement of temporary work agencies has often been linked to patterns of circumvention of relevant employment and/or social security legislation, which result in violations of workers' rights.** The role of temporary work agencies (and other labour market intermediaries) thus remains a matter of concern in cross-border work contexts.

A complex legal system regulating temporary agency work in different countries adds to existing challenges in enforcement, as regulations are often difficult to navigate for businesses and workers, but also paradoxically appear to enable loopholes to circumvent them.

Posted agency workers are sent to carry out work in the context of a contract of services with a temporary work agency established in one Member State on a temporary basis, **to a company ("user undertaking") that is established or operating in another Member State**. The workers are therefore posted by the temporary work agency, with which there is a direct employment relationship, and the agency should comply with the provisions included in the revised PWD. In **chain posting**, further complexity is added. In such situations, a temporary work agency established in one Member State posts workers to companies that use the workers' services in another Member State (a commercial relationship is established between the temporary work agency and the user undertaking in this case). But these companies can further send the same workers to yet another Member State (a third one) through a service contract.

An example of how temporary agency posting works is the following: a temporary work agency established in one Member State posts workers to a second Member State, but the company that uses the workers' services is actually established in a third Member State. Even in such cases, however, it is the temporary work agency in the sending country that is responsible for posting and the obligations set out in the revised PWD. The rights that apply in theory are those which are more favourable to the workers (either in the initial country of posting, or in the second one). Certain practices, however, may result in situations where the least favourable rights are applied to the workers in reality. This outcome may be driven by actual intention to circumvent the legal regulations, but may also be triggered by the lack of or limited awareness of the temporary work agencies and the user undertaking(s) about the relevant rules that apply in different countries, particularly in situations where sectoral and/or regional collective agreements are also applicable.

In **non-posting situations**, temporary work agencies and other labour market intermediaries are one of the key intermediaries between labour demand and supply. They have an **important role in recruiting and placing seasonal workers** in the agriculture and horticulture sector, **as well as in the live-in care sector**. These sectors are often affected by in-country labour and/or skills shortages across the EU, which drives the need to recruit from abroad (either from other EU Member States, or from third countries). Since the need for such workers may be seasonal, the reliance on temporary work agencies is further increased due to the occasional yet recurrent need for these skills, which supports employers' need for flexible work and enables costs to be cut.[464]

6.1.3. Key problematic aspects

Data about infringements involving temporary work agencies and other labour market intermediaries **is not readily available**, but the existing evidence points consistently towards some recurrent problematic situations. These are discussed below and include various types of legal and enforcement issues that result in working conditions violations with serious implications for temporary cross-border agency workers, in relation to guaranteeing equal pay and working conditions.

These problematic areas are recurrently encountered in specific economic sectors (e.g., construction, live-in care, agriculture, the meat sector, logistics, and other service sectors) **and primarily in relation to low- to middle-skilled jobs.** These situations tend to affect cross-border **workers from EU Member States in Central-Eastern Europe and TCNs** the most. These groups are over-represented (relative to EU workers from older Member States in the West, North and South of Europe) in low- and medium-skilled jobs in the sectors mentioned above.

The main **drivers** include: the structure, characteristics and labour/skills needs of the sectors themselves; national regulatory frameworks that encourage the use of temporary agency work by being permissive as regards requirements to set up these agencies; the blurred boundaries that characterise employment relationships in which labour market intermediaries are involved in cross-border work; cost-cutting strategies; as well as a weak bargaining position of the (temporary cross-border) workers relative to their employers.

The **presence of subcontracting chains** is a **common indicator of situations in which infringements** may occur in temporary cross-border work, as the complexity of employment relationships facilitates non-compliance with regulations. The incentives for behaviours that circumvent regulations is propelled by sectoral structures and characteristics, which drive competitive business strategies to enhance profits, reduce liability, and cut costs linked to taxes and social security payments. These **problematic situations often involve both larger and smaller economic actors**. Temporary work

[464] See: https://www.weceurope.org/uploads/2019/07/2013_WECEU_Study-TAW-Role-Labour-Transitions.pdf.

agencies and other intermediaries are often involved in subcontracting chains, and their purpose is to recruit workers for the users of their services, while not having their own activities in the respective sectors. The remaining differences between economic contexts and the cost of labour across the Member States contribute to maintaining this system, as well as the limited enforcement capacities of national authorities.

In these situations, **temporary work agencies and other labour market intermediaries play a key role in the recruitment, placement and posting of temporary cross-border workers, supporting quicker demand-supply matching.** The characteristics of (long) subcontracting systems enable opportunities for non-compliance with the law, for operations to be conducted under the radar and not picked up through monitoring mechanisms, and for breaches of employment terms and conditions to occur.

6.1.3.1. Key legal challenges

Member States implement rules applicable to workers posted by temporary work agencies which are consistent with EU legislation. No significant differences in the protection of posted temporary agency workers and local temporary workers were found in the national legal provisions assessed for this study. Notwithstanding, the regulatory system around temporary (cross-border) agency work and its implementation is highly complex, and enforcement is often problematic. This is augmented by the wide range of types of labour market intermediaries that operate across the Member States and the resulting difficulties in monitoring their activities and obtaining an accurate understanding of which types of intermediaries are more prone to bypassing the rules. This situation creates opportunities for agencies/intermediaries to take advantage of any legal ambiguities, as well as the limited oversight and reduced enforcement capacities available in the Member States.

Rules applicable to posted agency workers are different across the Member States and subject to national regulatory frameworks. In some Member States, the same rules as for other posted workers apply (e.g., EE, MT), whilst in many other Member States temporary agency work is regulated by specific legislative items (e.g., AT, CY, DE, DK, EL, ES, FI, HR, IE, IT, NL, PL, PT, RO, SE, SI). In some other cases, the relevant legal provisions are part of the labour code (e.g., BG, CZ, DE, FR, HU, LT, LU, LV, NL, PT, RO, SK), often in addition to specific legislation. In several other Member States (e.g., AT, EE, DE, PL, SE), civil law contracts are used to establish employment relationships between posted workers and temporary work agencies. This has been problematic in some situations because civil law contracts do not offer the standard protection against dismissals or offer paid leave.[465]

In some countries, the **conditions for the establishment of a temporary work agency and other labour market intermediaries are permissive**, which enables them to be easily set up and to operate. For instance, temporary work agencies can operate in Poland on the condition that they are registered as temporary work agencies. They can be established by anyone, provided that they do not have financial debts, have not been punished for labour crimes and have not had any previous companies which have been liquidated or declared bankrupt.

An appropriate level of sanctions and enhanced labour inspection activities can effectively incentivise compliance and dissuade illicit behaviour. Penalties in the form of **administrative or criminal sanctions** in the case of infringements of regulations linked to temporary cross-border mobility (and affecting infringements carried out by temporary work agencies) exist across the Member States. Penalty levels vary depending on the country and the type of infringement: there tend to be low levels of financial sanctions for

[465] According to desk research conducted for the study, confirmed by the consulted legal experts.

minor infringements, but sanctions can reach significant levels for more serious breaches. For example, in Poland, fines can be as low as EUR 200 – 400 but a higher sanction is possible in principle (up EUR 6400) if applied through the courts. In Germany, fines can be much higher and reach up to EUR 500,000 (e.g., violations of the Minimum Wage Act (MiLoG), the Posted Workers Act (AEntG), the Temporary Employment Act (AÜG) and the Act on Securing Workers' Rights in the Meat Industry (GSA Fleisch)).[466]

Sanctions and fines have often been criticised as too low to make a difference.[467] However, administrative penalties and sanctions that are too high may not be considered proportional to the infringement, as illustrated by a case law example (C-205/20 Bezirkshauptmannschaft Hartberg-Fürstenfeld).[468] A recent example which shows the extent of sanctions that can be applied in cases of infringement, however, is the **Terra Fecundis case**. Severe financial sanctions (over 80 million euros in damages) and prison sentences were imposed by the Marseille court (in June 2022) on the Spanish temporary work agency Terra Fecundis, for the illegal posting and undeclared work on agricultural farms in France of over 25,000 workers (most TCNs from Ecuador) and the non-payment of social security contributions during 2012-2015.[469]

The revised PWD and the Enforcement Directive (Article 12) aim to create the conditions for stronger cross-border enforcement of financial and administrative penalties. Evidence about the impact of the revised provisions is limited to date, but the examples identified in this study indicate that significant **challenges** remain. Many **are linked to the enforcement of existing legislation**, but they may also indicate a need for legal actions to ensure that administrative and criminal sanctions are indeed adequate and proportional. Some significant barriers to understanding **whether the existing penalties and sanctions in the law are sufficient** to dissuade unlawful practices include:

- limited data about the type of penalties applied, in which sectors, and for what type of workers;
- the low share of labour inspections conducted to control compliance with posting regulations and others affecting temporary cross-border workers out of the total inspections conducted to check compliance with employment and social security law;
- the financial value of penalties that are applied in relation to infringements (and whether they can be considered proportionate but also incentivise compliance);
- the difficulty of enforcing sanctions given the often volatile functioning of (smaller) temporary work agencies and other labour market intermediaries, which can be set up, dismantled and then set up again elsewhere relatively easily.

As part of the wider contextual factors that contribute to the increasing demand for temporary cross-border workers and the role of temporary work agencies and other labour market intermediaries in their recruitment and placement, there are also **other policies, measures and provisions that can impact the use of temporary cross-border agency work** and may contribute to problematic situations directly or indirectly. These are

[466] Information based on desk research conducted by legal experts in the Member States.
[467] Stakeholder interviews with representatives of trade unions, conducted June 2022.
[468] In this case, a fine of EUR 54,000 had been issued by an Austrian administrative authority on a company based in Slovakia that had posted workers to Austria, for failure to comply with obligations included in the Austrian employment law, specifically in relation to wage and social security records. The Court of Justice of the European Union decided in June 2022 that in conformity with EU law, administrative penalties for non-compliance should be proportional. See https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-03/cp220043en.pdf.
[469] S. Robin-Olivier, 'Posting of workers in the European Union: an exploitative labour system', European Law Open, Cambridge University Press, 2022, available at https://www.cambridge.org/core/journals/european-law-open/article/posting-of-workers-in-the-european-union-an-exploitative-labour-system/6E5C77B02FD2A7841FADECCFC05A3CC6#fn9.

discussed in detail elsewhere in this study (see for instance Section 5.2 on live-in care), in particular the references to Germany's care allowance (Pflegegeld) and Austria's Home Care Act[470] and how labour market intermediaries consistently recruit and place self-employed live-in carers in the patients' homes, playing an active and constant role in the relationship between the workers and the clients.

Recurrent examples of practices involving labour market intermediaries which are linked to violations of working conditions indicate that the legal regimes that are in place may not be sufficient in preventing such situations. There are certainly many examples of situations in which posting activities or the placement of other temporary cross-border workers are within legal bounds and do not lead to violations of rights or working conditions. It is not possible to estimate the share of posting and other temporary cross-border work that results in infringements, but it is certain that there is a variety of practices and business models that systematically circumvent regulations and expose workers (in particular those in low-skilled work in labour-intensive sectors) to precarious situations. Equally, as shown in other sections of this report, organisations representing employers and temporary work agencies emphasise that the **complexity of the legal system regulating temporary cross-border work may lead to inadvertent non-compliance**. This is particularly the case of smaller companies and temporary work agencies that do not have branches in more than one Member State and thus cannot access legal information about other countries' legislation internally, as would be the case with larger multinational companies or agencies.[471] This does not diminish the negative impact of such practices on working conditions, but can be addressed through tailored and more widespread and effective efforts to enforce the existing legislation.

These practices were widespread before the adoption of the PWD. The recent nature of the revised Directive (which entered into force on 30 July 2020) makes its impact to date is difficult to estimate, but **the research conducted for this study indicates that at least some of the incentives that contributed to the development of these practices remain** and are strongly linked to the functioning of the key sectors where workers in posting and non-posting situations work in low- and medium-skilled jobs, the high demand for intermediaries such as temporary work agencies, the increasing demand for temporary work, and the pull incentives for workers from countries with lower wages to engage in temporary cross-border work.

6.1.3.2. Key enforcement challenges

There are several enforcement challenges related to temporary cross-border work where temporary work agencies and other labour market intermediaries are involved. **Their main driving factor is overall the difficulty to identify and establish infringements**, e.g. in cases when fraudulent practices exploit differences and/or weaknesses in legislation (e.g., choosing the least favourable legal regime for the worker if it is more favourable for the employers) and in national and cross-border data exchanges and enforcement frameworks.

- **Monitoring and labour inspections related to temporary work through agencies and other labour market intermediaries**

Monitoring the activities of temporary work agencies and other labour market intermediaries – in general and in a cross-border context – is a difficult endeavour. The gaps in knowledge about the inner workings of the system creates huge challenges to tackling the root causes of the observed problems. The complex employment relationships that are usually formed when temporary work agencies and labour market intermediaries are involved make monitoring and enforcement even harder, especially as labour inspectorates have **limited**

[470] Home Care Act, Federal Law Gazette I No. 33/2007, available at: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2007_I_33/BGBLA_2007_I_33.pdfsig.
[471] Interview conducted for this study with an organisation representing temporary work agencies, February 2023.

mandates and capacity to conduct inspections, and in some cases only do so when a complaint is lodged. In cross-border work contexts, inspections are also often limited to checking administrative requirements (e.g., the posting notification) and are only carried out on the territory of one Member States, rather than taking a cross-border approach.

In some sectors which also often experience infringements, **carrying out workplace inspections is challenging due to limited access to premises, the dispersion of the workforce and the mobile nature of the workers** (e.g. in the live-in care, construction and agriculture sectors). Labour inspectors also face communication issues, as many cross-border workers do not speak the local language. This renders monitoring and ensuring the enforcement of existing legal provisions very difficult.[472] Notwithstanding, **ineffective monitoring and enforcement** of relevant regulations result in recurrent infringements[473] and favour the further development of practices that reinforce the status quo. In **Spain**, for example, a key barrier to effective inspections is the **lack of a national database, as well as differences between the posting period stated in the notification document and the actual period of posting**. Many of the inspections carried out on posted workers are unsuccessful (at a rate of 5 unsuccessful inspections out of every 6 inspections) for these reasons.[474]

Complex subcontracting networks make enforcement of regulations even harder in cross-border situations.[475] Given the often **long chains of interconnected companies and temporary work agencies or other labour market intermediaries, responsibility and liability are blurred and responsibilities are passed to other actors in the chain, which can often be based abroad.**[476]

Examples from the Member States illustrate the **potential size of the problem**. In Belgium, for example, in 2020, infringements were identified in half of the inspections carried out in relation to cross-border social fraud, showing an increase of the infringement rate of 14 percentage points compared to 2019.[477] In 2021, the rate increased further (infringements were found in 66% of the inspections conducted) and shows that the problem is more extensive in a cross-border context than in the national context.[478] Extensive violations were also found in inspections focusing on labour law aspects related to posting (40% of inspections in 2019).[479]

In Poland, in 2018, the Labour Inspectorate identified irregularities in 83% of the 360 temporary work agencies that were inspected, including the fact that some were operating outside the law, missing written agreements between them and the user undertaking relating to the employment conditions of the workers, the payment of remuneration, and undeclared work.[480]

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[472] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', 2021, available at: https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.

[473] Lillie and Wagner 2015; Weltin 2020.

[474] Interview with a representative of a public authority in Spain conducting activities relevant to identifying infringements of posting regulations, 2022.

[475] *Ibid.*

[476] Houwerzijl and Peters, 2008.

[477] F. de Wispelaere et al., 'Posted workers from and to Belgium: Facts and Figures', POSTING.STAT, 2022, available at: https://lirias.kuleuven.be/retrieve/656943#:~:text=Based%20on%20recent%20figures%20published,national%20dimension%20of%20social%20fraud.

[478] SIOD-SIRS (Belgium), 'Jaarverslag sociale fraudebestrijding 2021 – Rapport annuel Lutte contre la fraude sociale 2021', SIOD-SIRS, Brussels, 2022, available at https://www.siod.belgie.be/sites/default/files/2022-02/Jaarverslag%20Sociale%20Fraudebestrijding%202021%20-%20Summary%20_S.pdf ; 'Annual report of the Direction générale Contrôle des lois sociales du Service public fédéral Emploi in Belgium', 2018, Travail et Concertation Sociale, available at https://emploi.belgique.be/sites/default/files/content/publications/FR/Rapport%20annuel%202018.pdf; Strategic plan 2022 – 2025 (Belgium), 'Lutte contre la fraude sociale et le dumping social - Gouvernement De Croo I', available at https://www.siod.belgie.be/sites/default/files/2022-01/SIOD_StrategischPlan_2022_25_FR_0.pdf

[479] F. de Wispelaere et al., 'Posted workers from and to Belgium: Facts and Figures'.

[480] I. Pavlovaite at al., Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work, European Platform tackling undeclared work, 2021, pp. 26-27, at https://ec.europa.eu/social/BlobServlet?docId=23627&langId=en

Inspections to detect abusive working conditions for posted and other cross-border workers effectively facilitate the identification of violations and can take measures to remove them. For example, in Belgium, as part of actions days against labour exploitation organised with the support of Europol in May and June 2021, the focus was on detecting labour exploitation among posted TCNs in the construction sector. The Inspectorate of the National Social Security Office (NSSO) organised these actions, in close cooperation with the specialised unit from the Directorate-General for Supervision of Social Laws.[481] Similar activities, if organised frequently and systematically across the EU, and targeting all types of cross-border work, would support counteracting similar practices.

Preventive inspections would also support the tackling of infringements and disincentivise companies from engaging in illicit practices, but they are not common in the Member States. Staff shortages are once again highlighted as one of the key reasons why labour inspectorates focus on reactive rather than preventive inspections. In **Slovenia**, for example, the labour inspectorate is divided into the health, labour, and social departments. Around 40 inspectors are working on posting, making it difficult to carry out preventive inspections (in addition to inspection carried out in cases of reported infringements).[482]

The box below outlines some examples of challenges in enforcing existing regulations.

Box 21. Challenges in tackling infringements involving temporary work agencies and other labour market intermediaries in cross-border contexts

In Belgium, in order to post agency workers, a foreign temporary work agency should have accreditation from the Belgian region in which the work is performed. There might nevertheless be a high number of foreign temporary work agencies without an accreditation. Since the end of 2017, the 'accreditation number' of the foreign temporary work agencies is requested in LIMOSA and thus only agency workers posted by a foreign temporary employment agency with an authorisation are reported under this category. The number of reported posted agency workers was much higher before 2018, which may indicate that many of these 'agency workers' were posted by foreign temporary work agencies without an authorisation (and many could continue to be).

In Germany, following debates around labour inspections and the need to improve their effectiveness, on 18 July 2019, the Act to Combat Unlawful Employment and Benefit Fraud entered into force. The Act gives the Unit for the Financial Control of Undeclared Work (Finanzkontrolle Schwarzarbeit – FKS) additional responsibilities and powers, significantly reinforcing its staff (by creating 3,500 additional posts by 2029), creating new administrative offences liable for fines, and enhancing cooperation and data exchange between the participating authorities. In order to carry out the inspections, the authorities can enter the business premises of the employer, the client of services, or the hirer of the employer. Private homes are excluded, however, thus making it highly challenging to verify working conditions of live-in carers.

In Poland, the difficulty in accessing private homes intersects with the challenges in tackling letter box companies (which have often been associated with fraudulent practices in cross-border work), as some are based in private houses, therefore making it challenging to contact the company owners and conduct proper inspections.

Source: Authors' assessment based on desk research and stakeholder interviews

[481] See: https://www.onss.be/actualites/2021/06/16/lonss-coordonne-des-controles-communs-dans-le-secteur-de-la-construction-divers-constats-de-fraude-et-dexploitation; and https://www.rsz.be/nieuws/2021/06/16/rsz-coordineert-gezamenlijk-onderzoek-in-de-bouwsector-diverse-vaststellingen-uitbuiting-en-fraude

[482] Interview with a representative of a public authority in Slovenia conducting activities relevant to identifying infringements of posting regulations, 2022.

- **Infringements related to terms and conditions of employment**

Problematic aspects related to temporary work involving temporary work agencies and other labour market intermediaries (in posting and non-posting situations) **that are usually reported in the literature or through labour inspections are related to:** low wages or non-payment of hours worked, failure to respect minimum wage levels and maximum working hours, poor/unhygienic accommodation (for which workers may be paying excessive rents), falsified timesheets, inadequate health and safety conditions, failure to pay social security contributions, and falsified A1 Portable Documents.[483] Violations of working conditions also occur in situations where workers voluntarily agree to a wage that is below the minimum wage with their employer; employees assert, for fear of losing their job, that they are paid certain wages although they are in fact paid less; concealment of the scope of application of the relevant collective agreements in order to circumvent sector-specific minimum wages; bogus self-employment; or excessive salary deductions for accommodation, transport and meals.[484]

One of the key types of problematic situations is related to the **non-payment of actual time worked**. In many cases, these situations go unreported and/or unsolved, but some of them are taken to court. For example, in June 2021, Germany's Federal Labour Court ruled that **foreign caregivers posted to Germany to work in a private household are entitled to the statutory minimum wage** for the hours they have worked, including on-call duties.[485] This was a noteworthy ruling, which formally recognised live-in carers' on-call duties and their much longer working hours, relative to what is formally included in their contracts. In some cases, these situations are resolved (often just temporarily) as a result of worker protests. In the case of the **building of the Rive Gauche shopping centre in Charleroi** (**Belgium**), workers from Egypt and Romania protested openly in 2016 and 2017 and requested their salaries be paid. Egyptian workers climbed onto a crane and threatened to jump during their protest. The building site was temporarily closed and the employers paid the workers' salaries voluntarily.[486] In addition, court cases were initiated in relation to **doubtful subcontracting practices**, which involved large construction companies in Belgium and a range of smaller subcontractors, including temporary work agencies and other temporary labour market intermediaries, many of which ceased to operate when suspicions about their activities were raised, only to be replaced by others.[487]

There are recurrent examples of situations in which **workers in posted or non-posted situations are dependent on the temporary work agency or the labour market intermediary that recruits them** for information about their contracts, payment, health insurance, rights and obligations, which increases the likelihood of their isolation from other sources of information. This risk is enhanced when the recruited workers do not speak the language of the host country, which is often the case in low- and medium-skilled jobs in the sectors on which this study focuses. For example, there are documented cases of intermediaries using targeted recruitment strategies for workers from Moldova and Ukraine, for work in Finland.[488] The dependency on the temporary agency also contributes to the workers not having contact with the company for which they provide services and potentially

[483] Für faire Arbeitsbedingungen in der Fleischindustrie!; NGG; DGB; 2020, available at: https://www.faire-mobilitaet.de/fleischindustrie/++co++081535ae-d0dd-11ea-a2d9-001a4a160123.

[484] Deutsche Bundesregierung, '14th report by the German Federal Government on the impact of the Act to Combat Unlawful Employment (Gesetz zur Bekämpfung der illegalen Beschäftigung)', 2021, p. 25, available at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/14th-report-impact-act-to-combat-unlawful-employment.pdf?__blob=publicationFile&v=2 (last accessed on 10 May 2022).

[485] This case involved a Bulgarian national who was posted to Berlin to provide live-in care. The Labour Court ruled in favour of the plaintiff, estimating a working time of 21 hours per day, while the employment contract (issued by a company in Bulgaria) indicated a working time of 30 hours per week. Bundesarbeitsgericht, Urteil vom 24. Jun 2021 – 5 AZR 505/20, available at: https://www.bundesarbeitsgericht.de/entscheidung/5-azr-505-20/.

[486] S. Borelli, 'Securing workers' rights in subcontracting chains', Rive Gaughe Report, University of Ferrara (Italy), in ETUC, 2021, pp. 8-27, at https://www.etuc.org/sites/default/files/2021-10/Securing%20workers%20rights_EN_LR.pdf.

[487] *Ibid.*

[488] Q. Ndomo and N. Lillie, 'Secure Mobility: Uncovering Gaps in the Social Protection of Posted Workers – SMUG', August 2022, available at https://jyx.jyu.fi/bitstream/handle/123456789/82455/SMUG%20final%20report%20_%2001082022.pdf?sequence=1

also not with labour inspectors, as relations tend to be mediated through the agency. In situations where there are violations of working conditions, this dependency increases the risk of problematic employment relations and reduces the opportunities for the workers to lodge complaints with the relevant authorities.

Case law has supported the tackling of violations in some cases. For example, in Denmark, in a case (case FV2010.0139) involving Lithuanian temporary agency workers posted to Denmark, the ruling found a significant risk of abuse and circumvention of labour rules enabled by using temporary agency workers. The court decision led to the hired Lithuanian workers being remunerated in accordance with the Danish collective agreement in force at the user company. Effective enforcement of Danish collective agreements by posting companies would contribute significantly towards enabling better (equal) working conditions with local in the view of stakeholders interviewed for this study in Denmark. The **key barrier** is the limited capacity to enforce the application of these agreements through long **subcontracting chains**.[489]

- **The activities performed by temporary work agencies and labour intermediaries**

One of the situations that is often reported as problematic in connection with cross-border work involving temporary work agencies and other intermediaries is related to **the nature of the activities performed by these agencies in the country where they are formally established** (i.e., have a registered office). Assessing whether **"substantial activities"** are being conducted is not straightforward and can result in situations where working conditions violations occur. Regulations and case law indicate that a temporary employment agency should "carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State" where the agency is established.[490]

One of the most often reported situations of non-compliance is when **agencies and other intermediaries do not conduct substantial activities on the territory of the Member State in which they are formally registered and from which they supposedly post workers**.

In Belgium, for example, there is evidence of Brazilians posted by Portuguese labour intermediaries. These individuals do not work in Portugal and were already living in Belgium before 'posting' occurred, on the basis of falsified documents. Individuals in these situations are at high risk of exploitation. TCNs are even more at risk if their status in the EU is irregular. The company that posted these workers also shows no activities in Portugal.[491]

The lower the levels in the subcontracting chain where labour intermediaries are involved, the more difficult it is to detect them and hold them accountable for infringements. One such example occurred in Belgium, where more than 440 subcontractors were identified by the Belgian Labour Inspectorate on a construction site in Brussels.[492] Some of the issues included temporary work agencies and other intermediaries operating without licenses and in connection to letterbox companies. The subcontracting chain included a recruitment agency from Portugal and a letterbox company established in Romania that did not perform economic activities there, which posted Romanian and Bulgarian workers to Belgium. Inspections found that the workers' wages were not

[489] Interview with representative of a trade union in Denmark, conducted in 2022.
[490] CJEU, 3 June 2021, Team Power Europe.
[491] See: https://www.siod.belgie.be/sites/default/files/2022-01/SIOD_StrategischPlan_2022_25_FR_0.pdf.
[492] I. Pavlovaite at al., Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work, European Platform tackling undeclared work, 2021, pp. 23-24, at https://ec.europa.eu/social/BlobServlet?docId=23627&langId=en

compliant with the regulations, but the letterbox company was promptly disbanded and the payment of lost wages was not fully possible.[493]

The ECJ ruling in the **TeamPower Europe** case (C-784/19) was a key decision. According to existing regulations, a worker posted by a temporary work agency established in a Member State to a user undertaking established in another Member State is subject to the social security system of the sending Member State, if there is a existence of a direct relationship between the temporary work agency and the worker during the posting period; and if the temporary work agency habitually carries out its activities in the Member State where it is established. In this case, the temporary work agency was established in Bulgaria and posting workers to other Member States, including Germany. The ECJ ruling indicated that a temporary work agency established in a Member State must carry out a significant part of its activities in the territory of that Member State, but simply selecting and recruiting temporary agency workers for posting purposes does not qualify. This ruling is an important step towards curbing the establishment of letterbox companies which act as temporary work agencies (due to their direct employment contract with the workers).

- **Lengthy court proceedings**

In many cases, **cross-border workers face multiple risks**, as existing evidence shows a **tendency for temporary work agencies to overlay work and accommodation contracts** in labour-intensive sectors. In cases where employment violations occur, the workers are also at risk of becoming homeless if they take action against their employer. Such pressures further reduce incentives for workers to lodge complaints, for fear of losing their livelihoods. The Box below summarises a court case in **Germany** and illustrates the vulnerable position of the workers, even when the ruling is in their favour.

Box 22. The 'Mall of Berlin' case

Various subcontracting companies, involving temporary work agencies, were involved in the construction of the shopping and residential complex 'Mall of Berlin' (which opened in 2014). Violations of working conditions linked to hundreds of workers from Eastern Europe (primarily Romania) were brought forward, including working beyond the maximum number of hours allowed, under- and non-payment, lack of written employment contracts and inadequate and high-priced sleeping quarters, or no accommodation at all.

Most of the court cases brought against the subcontractors were successful, but many declared bankruptcy or went underground, thus making it impossible to collect the payment of the wages sanctioned by the court. A similar situation occurred with regard to the owner of the construction project that had subcontracted work: according to the Minimum Wage Act – MiLoG and the Posted Workers Act - AEntG, this company was also liable if a subcontractor had not paid the wages of its workers, but it filed for insolvency and, due to the particularities of the case, was not deemed to be a "developer", which was necessary for the court case to proceed.

Source: Authors' summary based on desk research

Similar situations were revealed by the research conducted for this study **in Slovenia**. Administrative and court procedures are very lengthy, thus diminishing the chances for an effective redress for workers even when complaints are lodged. The literature indicates recurring examples where cross-border workers file claims, leading to court cases that may take years of hearings and lead to high costs being incurred by plaintiffs. When the final

[493] More details about this case are available in ibid., pp. 23-24, at https://ec.europa.eu/social/BlobServlet?docId=23627&langId=en

and enforceable judgment is obtained, this is often too late, as the companies or labour market intermediaries in question no longer exist and thus cannot be held accountable.[494]

- **Illegal use of temporary agency work**

Problematic situations have often been flagged in relation to illegal posting of workers and bogus self-employment, which often in reality involves temporary work agencies or intermediaries.[495] Case law indicates that fraudulent practices are rife in cases where agencies or intermediaries aim to avoid declaration of posting situations to the public authorities. Some fraudulent agencies frequently change their company status or owners in order to evade regulations (e.g. this has been reported as a practice in DE, BE, NO).

Bogus self-employment is a common practice used to circumvent national legislation applying to posted workers or other temporary cross-border mobile workers. This practice is encountered across sectors, predominantly in labour-intensive sectors.

In Germany, for example, this is one form of illegal posting or undeclared work and leads to violations related to minimum wage requirements and social security protection. The trade authorities have also identified an increase in business registrations by non-resident individuals, for example from Romania, Poland and Latvia. German business people make their office available to foreign business people (often several at a time) for use as a permanent establishment and support them in dealing with the authorities. It seems likely that this involves bogus self-employment as the activities registered simultaneously include acting as an intermediary providing workers in the area of home help, care and qualified work from Eastern Europe, and the performance of business registrations on behalf of clients, the provision of on-demand offices services and co-working offices, and similar services. Then, only foreign nationals register as commercial home help service providers at the same business address.[496] Practices encountered in Germany involve pressure on workers to present themselves as self-employed persons or members of a partnership such as a civil-law partnership (Gesellschaft bürgerlichen Rechts) or a general partnership (offene Handelsgesellschaft). [497]

Measures to counteract clandestine employment have been taken in Germany, including through the recently (May 2021) approved Accessibility Reinforcement Act (Barrierefreiheitsstärkungsgesetz) and an amendment to section 7a of the German Social Code Book IV (Sozialgesetzbuch IV, SGB IV) on employment status determination assessments (the latter came into force on 1 April 2022). The new inquiry process aims to bindingly determine whether a person is a dependent employee liable to insurance contributions or is self-employed.

A key phenomenon that is on the rise is **fictitious posting** of TCNs. In Poland, for example, this happens when a company is established in Poland and posts TCNs to other countries, but these individuals do not fulfil the requirements of posting, as they have not had any professional activity in Poland before posting. The labour inspectorate and other relevant authorities can tackle these situations by removing work permits and notifying the competent foreign authorities about the suspicion of fake posting. The legal framework in

[494] N. Rogelja et al., 'Napotitve delavcev iz slovenije: nekatere specifike in problem', 2016, available at http://twohomelands.zrc-sazu.si/uploads/articles/1475074433_Rogelja_Toplak_Jevsnik_Mlekuz_DD_TH_44.pdf.

[495] Sectoral study; 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level', EFFAT report, EFFAT, 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf

[496] Deutscher Bundestag, ‚Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Beate Müller-Gemmeke, Brigitte Pothmer, Corinna Rüffer, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN - Drucksache 18/9470: Entsendungen - Umsetzung der Durchsetzungsrichtlinie, BT-Drs. 18/9597 vom 9. September 2016', 2016, p.22, available at: https://dserver.bundestag.de/btd/18/095/1809597.pdf, (last accessed on 9 May 2022).

[497] Deutsche Bundesregierung, "14th report by the German Federal Government on the impact of the Act to Combat Unlawful Employment (Gesetz zur Bekämpfung der illegalen Beschäftigung)', 2021, pp. 29-31, available at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/14th-report-impact-act-to-combat-unlawful-employment.pdf?__blob=publicationFile&v=2 (last accessed on 10 May 2022).

Poland in relation to the employment of certain TCNs from neighbouring countries (including Ukraine, Belarus, Armenia, Moldova) simplifies the procedures required to legalise their work in Poland. This can in practice result in service providers abusing these regulations to fictitiously post TCNs workers abroad. As is often the case, these practices involve several actors, including temporary work agencies or other labour intermediaries, some of whom are based in third countries.[498]

6.1.4. The scale and impact of the problem

On average, temporary agency work has been on the rise over the past two decades and this trend is likely to continue. In relative terms, however, it represents a relatively low share of total employment in the EU 27 (2.5% of employed persons between 20 and 64 years in 2020).[499] It nonetheless contributes to the rising trends in the share of the workforce that is engaged in temporary/non-standard work. There is very little reliable data however about the market share of other labour market intermediaries.

Subcontracting is especially common in price-sensitive and labour-intensive sectors (e.g. construction, shipbuilding, meat industry, manufacturing, cleaning, etc.). Posting via temporary work agencies is frequent, as is also the recruitment of other forms of temporary cross-border workers (e.g. seasonal workers) through these agencies or other intermediaries.

The existing data and other information that is available about agency work shows that there are **clear sectoral patterns and that the role of temporary work agencies is more significant in some countries than in others**. EU-wide data does not indicate specifically which agencies conduct cross-border activities, but the general data shows that in Europe, 9% of agency workers are active in the construction sector[500]. However, in Eastern Europe[501], the share amounts to 2%, in Southern Europe[502] 1%, and in Central and Northern Europe[503] 13%. In some countries, such as Germany, Spain and Greece, there are sectoral restrictions in place on temporary agency work in the construction sector[504].

Seasonal work is often conducted through fixed-term contracts in the country of work (concluded directly at the workplace or with a temporary work agency), and less frequently under the posting of workers regulations. Seasonal work is most common in agriculture, forestry, and fishing, and accommodation and food services. There are between 650,000 and 850,000 intra-EU seasonal workers in the EU-27, including posted intra-EU seasonal workers.[505] This estimation excludes those involved in undeclared work, however, which indicates that the real number may be significantly higher. **Live-in care jobs** are predominantly carried out by migrant women, but there is limited data on the real number of live-in care workers,[506] also due to the tendency towards informal employment in this sector. Approximately 6.3 million people work in the formal long-term care sector, or about

[498] Interview with representative of a public authority in Poland with relevant competencies in inspections related to temporary cross-border work, 2022.
[499] Eurostat [LFSA_QOE_4A6R2]. No data is available for Bulgaria, Estonia, and Cyprus, while for Sweden data on the industry and construction sector is not available.
[500] World Employment Confederation, 2021a.
[501] Eastern Europe concerns Croatia, Czechia, Estonia, Poland, Romania, and Russia.
[502] Southern Europe concerns Greece, Italy, Portugal, and Spain.
[503] Central and Northern Europe concerns Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden, and Switzerland.
[504] *Ibid.*
[505] This estimation is based on calculations deriving from national data from eight key destination countries (AT, BE, CZ, DE, ES, FR, IT, NL) referring to different years between 2015 and 2020. Then data were extrapolated to the EU-27. It has to be noted that this estimate largely refers to the agricultural sector, since national data for accommodation and food services could only be estimated for AT, DE, and NL. See Fries-Tersch et al. (2021) for the full methodology.
[506] A. Rogalewski and K. Florek, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', 2020, available at: https://www.eesc.europa.eu/sites/default/files/files/qe-03-20-090-en-n.pdf.

3.2% of the total workforce in the EU.[507] This figure does not capture a potentially large number of live-in carers that are working informally and who can be involved with temporary work agencies during recruitment stages.

Quantifying the exact scale of the problems affecting cross-border temporary agency workers (and the share of workers that are affected) is very difficult, however, as there is very limited comparable data available and labour inspections do not have systematic coverage across sectors, countries and types of cross-border work. **This phenomenon is encouraged by a set of factors that are unlikely to diminish in the foreseeable future, and which are not directly linked to the legislation in place to regulate posting or other forms of temporary cross-border work**. This includes, as mentioned previously, the increasing need for flexible/temporary work in labour-intensive sectors; labour/skills shortages in specific sectors, which benefit from a low-paid, temporary workforce that provides flexibility to employers; the limited appeal of low-skilled jobs in construction, live-in care or agriculture for local workers; and broader policies promoting the role of labour market intermediaries.

An **accurate estimation of the degree to which** the involvement of temporary work agencies and other labour market intermediaries is linked to non-compliance with working conditions for temporary cross-border workers (in terms of the number of people impacted) is not possible with the existing data. But such an estimation is critical for deciding effective and proportionate policy and enforcement actions. The **seriousness of the breaches of rights and working conditions** should also be considered, alongside their scale, however, as the examples of violations of working conditions that have been identified by labour inspections and court cases throughout Europe indicate that these tend to have very serious consequences for workers' livelihoods and should not be discounted regardless of the scale of the phenomenon.

6.1.5. Conclusions and recommendations

The situation of posted and other types of temporary cross-border mobile workers has been addressed by EU initiatives such as the revised PWD and the Enforcement Directive, the Temporary Agency Work Directive, the 2020 Guidelines on Seasonal Workers, and the creation of authorities such as the European Labour Authority.[508] At national level, measures have been taken in the past years to strengthen the implementation of the regulatory framework, its harmonisation to EU policies, and the improvement of cross-border information systems.

Extensive policy debates and actions over the past two decades have contributed to setting up a legal framework that lays down the conditions for the freedom to provide services within the EU as a fundamental freedom leading to economic growth and guaranteeing the mobility of businesses and workers within the EU. Within this framework, there is increasing attention on ensuring that the protection of workers is on a par with (and a fundamental part of) the freedom to provide services. The revised PWD for example calls for stricter requirements for employers (e.g. the prior notifications of posting, preservation of relevant documents), enhanced scrutiny, and administrative and criminal sanctions for failure to comply.

An evaluation of the impact of the revised PWD and the Enforcement Directive will contribute to showing the extent to which its key objective of enabling equal treatment has been met. There are, however, other types of temporary cross-border workers who are not covered by the Directives and who are often at the centre of practices that lead to non-

[507] Eurofound, 'Long-term care workforce: Employment and working conditions', Publications Office of the European Union: Luxembourg, 2020.
[508] For example, the Campaign "Rights for all Seasons" of the European Labour Authority, ELA in 2021.

compliance with legal regulations (e.g. non-posted seasonal workers in several sectors, live-in carers, as well as other cross-border workers in service sectors).

Complex legal regimes at EU and national levels regulate cross-border work, which strive to ensure a solid legal framework of protection for workers. The regulatory framework in place, however, also enables loopholes that can be used to circumvent it. The use of subcontracting chains and agency work in cross-border settings is one key mechanism that enables cost-cutting (in terms of recruitment, hiring and social security coverage) and provides the necessary flexibility to address business fluctuations and challenges caused by high turnover and labour/ skills shortages.

Many examples of practices that evade compliance with legal regulations protecting working conditions have been identified through labour inspections, court cases, research and media inquiries. **They do not indicate that these situations are the norm of posting and other types of cross-border work**, but they do raise serious concerns about the possible scale and severity of the breaches of cross-border workers' rights and working conditions (many of which are estimated to go unreported and thus reinforce the existing practices). Their mere existence indicates that there are parts of the enforcement mechanisms and potentially legal frameworks that can be misused (or misunderstood) by employers and labour market intermediaries, to the disadvantage of some of the most vulnerable workers.

These concerns that should be addressed through **more effective and extensive enforcement efforts at national level, more efficient cross-border cooperation systems and potentially legal reviews of existing legislation at the national level** (should these prove necessary). In view of already complex legal frameworks, the first step would be to **invest considerably in enhancing enforcement and monitoring capacities at national level** (particularly labour inspections), to **improve cross-border data exchanges** through the use of comparable data, and to create **mechanisms to facilitate the reporting of infringements by workers, trade unions, and other organisations** representing workers' interests. The importance of EU-level mechanisms that support the monitoring of activities of temporary work agencies should also not be underestimated, as financial support and a platform at EU level would bring together and incentivise national efforts. In the past, the European observatory on cross-border temporary agency work was such a tool, whose main aims and activities could be revived and updated as part of the ELA's activities.

Equally, further consideration should be given to the power of **preventive inspections**, rather than focusing only on situations where a complaint is lodged. **Swift legal and administrative actions resulting in sanctions** that are proportional to the violations and provide higher incentives to respect the law rather than break it would go a long way towards reinforcing the effectiveness of the existing legal framework before considering further regulatory actions. In the longer term, once the information about infringements is more systematic and active steps are taken to apply existing regulations, **further legislative changes can be considered**, to address any remaining barriers.

The **role of social partners and relevant organisations that have access to information on the ground about infringements should be better capitalised**, for example through cross-border sectoral networks that can systematically support the work of labour inspectorates to enforce compliance (e.g. through the frequent provision of information about cases of breaches of rights and working conditions, and raising awareness about the negative impact and consequences of undeclared work and unlawful employment). Improved coordination of the actions taken at EU, national and local levels by different stakeholders can also be facilitated through frequent meetings of these dedicated networks. Learning from pilot projects on data sharing in cross-border cooperation aimed at detecting and tackling social fraud should be used to inform approaches at scale (e.g. the project

developed in Benelux countries starting 2015).[509] The **European Labour Authority** (ELA) has an essential role in encouraging this coordination and facilitating mutual learning and exchanges between national authorities and stakeholders, for the purposes of enforcing EU rules on labour mobility and social security coordination.

Finally, employers' (including temporary work agencies') limited awareness and understanding of the existing rules and regulations that apply in a cross-border context is a reality which calls for **further efforts to provide clarity about the application of the rules in general, and also provide tailored assistance**. In this respect, the relevant national authorities (supported by the ELA) could consider setting up specialised assistance services for employers, to provide tailored support with understanding the application of rules to their particular situations (e.g. how remuneration packages are defined in the receiving Member State and which elements are included).

[509] Benelux Cross-border cooperation in detecting and tackling social fraud and error – pilot project in the Construction sector, available at https://www.ela.europa.eu/sites/default/files/2021-09/GP%20fiche%20Benelux_0.pdf.

6.2. Case study 2: Non-payment and underpayment in the case of temporary cross-border workers in posting and non-posting situations

6.2.1. Overview

This case study focuses on the situations of non-payment or underpayment that may arise for posted workers. The underpayment (or even non-payment) of posted workers has recurrently been one of the key violations of the working conditions applicable to workers in posting and non-posting situations. The underpayment of posted workers gives posting undertakings **an unfair competitive advantage** over local companies and other posting undertakings and means that the workers concerned are not paid what they are legally entitled to. Further, it can create a downward pressure on the wages of the local workers.

The rights and working conditions for posted workers are regulated by Directive (EU) 2018/957.[510] Included in this Directive are rules on the remuneration of posted workers (self-employed workers fall outside the scope of the Directive).

One of the major changes in the revised PWD is the change from the concept of 'minimum rates of pay' to '**remuneration**'. Posted workers are now entitled from day one to all the elements of remuneration of the host Member State rendered mandatory by law or by collective agreement made universally applicable.[511] As a result of this amendment, all wage elements have to be taken into account, including supplements to wages such as overtime rates, allowances for working at night, allowances for working on Sundays or on public holidays, holiday remuneration, end-of year-bonuses and 13th month bonuses.[512] It should be noted that the amounts paid by the employer (or the reimbursements made) concerning travel, board, and lodging are not part of remuneration.

This change in the concept of remuneration aims to bring posted workers' wages closer to those that apply to local workers but also to other groups of mobile workers who make use of their freedom of movement (announced by the Commission under the slogan of "**equal pay for equal work in the same workplace**"). The revised PWD aims to increase the protection of the posted worker by introducing a stronger social dimension, while at the same time preserving legal certainty for undertakings providing services in the internal market.[513] For example, it eliminates to a large extent wage competition between posted workers and local workers, and thus reduces risks of unfair competition. It would also entail a wage increase for posted workers, and in particular those being posted from a low-wage to a high-wage Member State.

Nevertheless, questions can arise around whether the introduction of this new concept of remuneration has eliminated all the problems associated with this element of posted workers' employment conditions. As is seen in the next paragraph, the underpayment (or even non-payment) of some groups of posted workers has always been a troubling reality. Therefore, this case study focuses on the challenging situations in relation to underpayment that can still arise for posted workers, even with the introduction of this remuneration concept. In the

[510] Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
[511] However, some provisions of the Directive are not applicable to a short-term posting or allow host Member States not to apply their rules to postings of short duration. For instance, there is a mandatory exception in cases of initial assembly and/or first installation of goods when the posting does not exceed eight days. In these cases, the rules of the Directive on minimum paid annual leave and remuneration do not apply (the exception does not concern the construction sector).
[512] European Commission, 'Practical Guide on Posting', 2019.
[513] P. Van Nuffel, and S. Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services', European Papers 3(3), 2018, pp. 1401-1427.

absence of data and information about how the revised PWD has affected posted workers' remuneration in practice, the **change from 'minimum rates of pay' to 'remuneration' may increase the risk and level of underpayment**. Therefore, measures are needed to avoid this risk as far as possible.

6.2.2. Analysis of the problem

The main problem with regard to the underpayment of posted workers is the **underpayment itself**. When the remuneration of a posted worker is lower than that of a local worker, this goes against the principle of equal treatment. Moreover, the underpayment of posted workers creates **unfair competition**.

If the risks of 'underpayment' are to be assessed, it is first necessary to know the minimum level of the remuneration to be paid. Any amount below this threshold is then considered to be an underpayment. However, this threshold is not so easy to determine. Indeed, one of the underlying problems of underpayment is the **understanding of the concept of 'remuneration'**.[514] The PWD does not actually define remuneration, but states that only the elements of remuneration mandatorily applicable[515] to all workers in the geographical area or sector are to be considered as remuneration.[516] Consequently, the remuneration to be paid to a posted worker differs between Member States as well as between sectors of activity. As a result, it can be a **burdensome task for employers to accurately determine the remuneration** level to be applied. This has been repeatedly emphasised by employer organisations and experts interviewed for this study.

Further, **'underpayment' may occur under various forms and is often not limited to merely paying less than the wage one is entitled to.** Beyond just 'undercutting' the hourly wage, it can for instance mean not paying overtime rates or allowances for working at night or on Sundays; paying part-time wages for full-time work; wrongly classifying skilled work as unskilled to apply a lower pay grade. Another tactic is to pay the full remuneration but afterwards subtracting substantial fees, for example for accommodation, which is not allowed. Not only should the payslip be controlled, but also the hours worked, and the social security contributions paid, among others, seeing that underpayment can also occur through interference with these elements. For example, there is a risk that for the same monthly remuneration posted workers have to work (many) more hours compared to local workers employed at the same workplace.[517]

Furthermore, there is an **issue of enforcement**, as it is a complex task for inspection and enforcement authorities to find out whether the correct remuneration was paid, and if all other conditions in relation to remuneration are met. For example, checks should include not only the payslip (difficult enough), but also the hours worked and the social security contributions paid, among other things, given that underpayment can also result from interference with these elements. The expert workshop organised as part of this study confirmed this illegal practice. Moreover, even if the wage requirements may seem to be respected on paper, underpayment can also occur if overtime is not paid and deductions are made, e.g. for recruiting costs, with the result that workers start their position with a debt. Such practices and reductions are illegal and should also be examined when examining the pay component.

The drivers of underpaying posted workers should also be considered. It is possible that employers are **not aware**[518] **or are not informed** about the applicable remuneration in relation

[514] The notion of 'underpayment' may also be defined as the difference in remuneration between a posted worker and a local worker. Although this is probably too broad of an approach.
[515] "Mandatorily applicable are considered those elements, which are stated by national law or by collective agreements made universally applicable or that otherwise apply to all local workers in the geographical area or sector concerned" (European Commission, 'Practical Guide on Posting', 2019, p.12).
[516] European Commission,' Practical Guide on Posting'.
[517] Remark made by Jan Cremers at the ETUI-conference 'Challenges associated with short term labour mobility' (June 2022).
[518] For instance, the lack of knowledge about the rules was clearly reflected by the results of an online survey organised within the frame of a study for the live performance sector as only one out of four of the respondents was aware of the recent

to posted workers. Moreover, determining the applicable remuneration is a complex task, as noted above. In this regard, single official national websites might fail to provide the necessary information and clarity. Moreover, given that national courts have already experienced problems in determining the previous 'minimum rates of pay' concept, it is not yet clear whether they will find it easier to determine the 'remuneration' of the host Member State.[519] Finally, **malicious intent** of the employer is also possible, in light of the fact that underpaying posted workers gives the employer a competitive advantage.

When the amended PWD is compared with the old version, **there are still risks of underpayment after the revision of the PWD**. Indeed, the change from 'minimum rates of pay' to 'remuneration' implies that additional elements of remuneration should be taken into account. Furthermore, a difference in the assessment should be made between workers posted by a temporary work agency versus all other posted workers. Directive 2018/957/EU lays down specific rules for posted temporary agency workers. The temporary work agency must guarantee to its posted employees the terms and conditions of employment which apply pursuant to article 5 of Directive 2008/104/EC on temporary agency work, i.e., in principle at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job.

6.2.3. Quantifying the scale of the problem

Large differences between the wage applicable in the sending and in the receiving Member State increase the risk of underpayment. For instance, when a posted worker is supposed to receive five times the wage they would receive at home, it is 'easy' to only pay the posted worker three or four times the wage, as they would probably still be willing to accept this wage. In that regard, there might be a practice of paying posted workers more than they would receive in the sending Member State, but less than the mandatory remuneration in the host Member State. Posted TCNs are particularly vulnerable to such practices. Estimates show that posted workers from Lithuania (96% of posted persons from Lithuania are at high risk as the minimum wage in the host Member State is more than double compared to the minimum wage in Lithuania, the Member State of origin), Bulgaria (95%), Poland (94%), Croatia (93%), Hungary (93%), and Romania (93%) are potentially at risk, as they should receive more than double the wage they would normally receive in the Member State of origin.[520,521]

There is no exhaustive view on the extent to which non-payment and underpayment occurs in case of posting situations in the EU. It is estimated that around 10% (upper bound) of all individuals posted to Austria were underpaid in 2019, with an upper bound of around 10% of posted persons being underpaid.[522] Furthermore, data for 2019 suggest that posting companies were almost 15 times more likely to underpay their workers than companies located in Austria.[523] In Belgium, € 20.3 million of additional wages and allowances were claimed in 2021 to posting undertakings involved in cases of underpayment or non-payment of their workers.[524] This figure is the 'tip of the iceberg' as a high number of underpayments are not

amendment of the Posting of Workers Directive (F. De Wispelaere et al., 2021, p.12). This knowledge/ awareness gap may result into a regulatory compliance gap. Not least because the sector is not being considered a priority for labour inspectorates. For instance, only one out of five respondents to the online survey indicated that they had already came into contact with the competent labour inspectorate.

[519] M. Bernaciak and Z. Rasnača, 'Not as simple as it should be? Why the judicial enforcement of posted workers' rights needs improvement', LSE European Politics and Policy (EUROPP) Blog, 2020.

[520] F. De Wispelaere, L. De Smedt, and J. Pacolet, 'Posted workers in the EU. Facts and figures', Leuven: POSTING.STAT project VS/2020/0499, 2022b.

[521] These percentages are based on the number of PDs A1 issued under Article 12 BR by the Member State of origin (data 2020) and the monthly minimum wages (data 2020, Eurostat [earn_mw_cur]).

[522] Geyer et al., 'Posted workers from and to Austria. Facts and figures', Leuven: POSTING.STAT project, 2022.

[523] S. Danaj & L. Geyer, ;'Posted Workers to Austria: An Unstoppable Trend?', 2022.

[524] F. De Wispelaere, L. De Smedt, & J, Pacolet, 'Cross-border healthcare in the EU under social security coordination Reference year 2020', European Commission DG EMPL, 2022a.

detected by labour inspectorates. Underpayment can go as far as non-payment of wage or an hourly wage of only € 2 as data from Belgium show.[525]

The occurrence of underpaying posted workers also **differs between sectors of activity**. For instance, in 2019, inspections in the Austrian construction sector revealed that 36% of posting construction companies were suspected of underpaying their workers, while this share only amounted to 1% for non-posting construction companies located in Austria.[526] Nevertheless, these data do not show the extent of the underpayment (whether posted workers are paid 5% less than they should earn or 50%). That the construction sector is prone to underpayments also becomes clear from other evidence. For instance, in October 2019, EFBWW together with ETUC submitted ten problematic cases to ELA.[527] Finally, such risks may occur also in other price-sensitive sectors such as agriculture and horticulture, and live-in care. In that respect, sectors considered prone to undeclared work can also be considered prone to underpayment of posted workers, seasonal workers, etc.

In addition to differences between sectors, there are differences between types of posted workers in terms of (under)payment. It is found that **especially posted third-country nationals (TCNs) are vulnerable to underpayments**. For instance, in Belgium cases have been found by the inspection services in which posted TCNs were paid far below the minimum wage (sometimes to be qualified as 'labour exploitation'[528]).[529] In 2019 in France posted Moroccan and Senegalese workers earned € 4 less than Spanish workers and Bosnians being posted to France earned about € 2 less than Slovenians.[530] Nevertheless, posted workers being paid less than local workers does not necessarily mean that posted workers are underpaid, as they can also be paid less but still enough, for instance the minimum wage. For example, it was found that almost 25% of posted workers to France were paid the minimum wage in 2019, while this was the case for 75% of posted workers in the agriculture sector.[531] However, posted workers are still paid 30% less than French workers at the same workplace, even after accounting for potential differences in workers' age and hours worked at the French firm.[532] Although this indicates that there are substantial pay differences between national and posted workers, it does not provide proof of underpayment per se, which is a crucial nuance to keep in mind, as being paid less does not equal being underpaid.

When looking at underpayment, investigations should consider not only the wage itself, but also **social security contributions**, as the circumvention of social security is a significant problem as well.[533] Thus, underpayment has to be looked at not only from the labour law perspective, but also from the social security law perspective, an issue which is often forgotten. It can be the case that either the level of social security contributions paid by employers is incorrect, or the timing of the payment is not correct. For example, in Belgium, some € 15.3 million claims in 2021 were related to unpaid social security contributions within a cross-border context.[534] A specific case in this regard is Slovenia. In this Member State, the law stipulates that social security contributions need to be calculated based on the wage that would have been paid for comparable work in Slovenia, instead of on the actual wage earned of the posted

[525] See also: https://www.myria.be/files/MYRIA_Jaarlijks_evaluatierapport_2020_Mensenhandel_en_mensensmokkel-3.3_RSZ-inspectiedienst.pdf
[526] Geyer et al., 'Posted workers from and to Austria. Facts and figures', Leuven: POSTING.STAT project, 2022.
[527] https://www.etuc.org/en/pressrelease/eu-labour-authority-failed-act-its-first-worker-abuse-cases
[528] E.g., in July 2022, more than 50 underpaid and undocumented workers have been found working on a construction site of Borealis at the port of Antwerp (BE). They received € 650 per month. This is just a quarter of what they should have been paid. See also J. Davies, 'Labour Exploitation and Posted Workers in the European Construction Industry', in N. Lord, E. Inzelt, W. Huisman, and R. Faria (Eds.), European White-Collar Crime Exploring the Nature of European Realities, 2020.
[529] F. de Wispelaere et al., 'Posted workers in the EU. Facts and figures', 2022b.
[530] M. Muñoz, 'Posted workers from and to France. Facts and Figures', Leuven: POSTING.STAT project VS/2020/0499, 2022.
[531] This concerns data from before the implementation of the amended PWD.
[532] This observation is not new. Already ten years ago, in the Impact Assessment of the Commission on the revision of the legislative framework on the posting of workers in the context of provision of services (SWD(2012) 63 final) (2012: 20), it was stated that "In France, a report delivered by the French Senate in 2006 estimated wage differences between foreign posted workers and French workers to be around 50%. In Denmark, a study of the construction sector indicated that, in the mid-2000s, workers from Eastern European countries were paid on average 25-28% less than Danish building workers."
[533] Questionnaire Germany.
[534] Questionnaire Belgium.

worker.[535] This results in an unfair competitive advantage for Slovenian companies as their labour costs will be lower, paying social security contributions on a lower wage than was actually earned. Although this is advantageous for Slovenian companies, it means that the Slovenian state itself loses an estimated € 49 million in social security contributions compared to when the wage of the host country is taken into account.[536] Furthermore, this is disadvantageous for the posted worker, seeing that their old age pension base is to be calculated on the basis of the same, lower level of a comparable wage. Therefore, this can also be seen as a kind of underpayment of the posted worker. The EFBWW, later assisted by the Austrian trade union GBH and the German DGB, has submitted a formal complaint against Slovenia for this policy of (wrongly) calculating social security contributions. However, on 22 March 2023, the National Assembly approved a new Act on the Transnational Provision of Services. The second paragraph of Article 144 of Pension and Disability Insurance Act (ZPIZ-2) will be deleted, thus abolishing the lower basis for calculating social security contributions. This amendment will enter into force on 1 January 2024.

The **government of the Netherlands** initiated the **monitoring and evaluation of the implementation of the revised PWD**. The first monitoring report and the evaluation covers the period from March 2020 up to the end of December 2021. The research included desk research and interviews with social partners, analyses of the registration data of the postedworkers.nl reporting desk and draws on the results of a survey targeting employers and posted workers from Belgium, Germany, Poland, Romania and Spain. In the Netherlands, since 1 March 2020, the freedom to provide services is part of the Employment Conditions Act related to posted workers in the European Union (WagwEU), which includes a notification requirement for cross-border employment. Employers who bring posted workers to the Netherlands should submit a notification, which is a prerequisite for posted workers to enjoy employment protection as per the existing legal provisions. The monitoring tool and the evaluation report focus on the notification duty. The evaluation, however, also investigated the implementation of various provisions linked to the remuneration of posted workers, subcontracting and key types of infringements. Initial findings highlight the challenges involved in monitoring the implementation of the existing legislation and providing a reliable quantitative assessment, such as measuring the effects of the revised PWD in relation to workers' remuneration or identifying all responsible actors in subcontracting chains. The report also noted the likelihood that several postings may go unreported, the limited awareness of employers about their obligations, the limited awareness of posted workers themselves about the contents of their remuneration package, as well as the challenges involved in raising the awareness of companies or temporary work agencies based in other countries about the Dutch legislation.

In **Sweden**, a similar endeavour took place during 2022 – 2023. The government commissioned a special investigator to evaluate and present proposals for possible amendments to the Contractor Liability Act (applicable to wage claims), which entered into force on 1 January 2019. The Act implements Article 12 of the Enforcement Directive concerning the posting of workers. Subcontracting liability is applicable in Sweden to the construction and civil engineering sectors and requires that user undertakings may be liable to pay wages that a subcontractor (acting as employer) has not paid to a worker. The results of the inquiry (based mainly on consultations with social partners, including small companies) indicate that the Act supported worker representatives in ensuring workers are paid.[537] The report also indicates that user undertakings are more careful about using subcontractors and considering whether to limit their number, and have also adjusted their administrative procedures. However, due to the implementation of other initiatives that have sought to reduce abusive practices in the construction and civil engineering sectors, it was not possible to determine to what extent the observed changes can be attributed to the 2019 Act. Proposals

[535] M. Vah Jevšnik, S. Cukut Krilić, and K. Toplak, 'Posted workers from Slovenia. Facts and Figures', Leuven: POSTING.STAT project, 2022.
[536] Estimation for 2020.
[537] Government of Sweden, Review of contractor liability (Översyn av entreprenörsansvaret), May 2023, available at https://www.regeringen.se/contentassets/282bbee54e60444aa302b0d1842245e2/sou-2023_26_webb.pdf

for legislative amendments to the Act include the application of its provisions to cover the wages of posted agency workers. However, the report does not recommend the extension of subcontracting liability to other sectors (e.g., transport, healthcare, social care), because long subcontracting chains are not as frequently encountered in these sectors. The report acknowledges the lack of quantitative data on the cases in which the provisions of the Act have been implemented as one of its limitations. Impact of the problem

The underpayment of posted workers gives advantages to posting undertakings, as they **gain an unfair competitive advantage over local companies and other posting undertakings.** Moreover, practices of underpayment also erode the objectives of the amended PWD. Recital 4 of Directive (EU) 2018/957 states that "More than 20 years after its adoption, it has become necessary to assess whether Directive 96/71/EC still strikes the right balance between the need to promote the freedom to provide services and **ensure a level playing field** on the one hand and the need to **protect the rights of posted workers** on the other." Such a level playing field for companies as well as "equal pay for equal work in the same workplace" for posted workers will not be achieved if underpayments continue. Finally, the underpayment of posted workers may also have a negative impact on local workers. If employers underpay posted workers, this can create **downward pressure on the wages of the local workers**, because they are becoming less competitive.[538]

6.2.4. Conclusions and recommendations

One of the main issues that needs to be addressed is the **understanding of the concept of remuneration**. Under the PWD, the host Member States do not have an obligation to provide the actual remuneration to be paid to the posted worker.[539] Nevertheless, they have the obligation to provide the information on the terms and conditions of employment, including the constituent elements of remuneration to be applied to workers posted to their territory. Afterwards, it is the responsibility of the employer to establish the correct remuneration in each individual case, based on this information provided.

An essential tool in this regard is the **single official national website**, which, under the Directive, should be set up by each Member State. The information on this website must be accurate and up-to-date, and the information on the terms and conditions of employment, in accordance with national law and/or practice, should be published without undue delay and in a transparent manner. Moreover, if this is not the case, this circumstance will be taken into account when determining penalties in the event of infringements of the national provisions adopted pursuant to the PWD.[540] This means that when information on the single official national website on the terms and conditions of employment is unavailable or incomplete, courts can take this into account when determining the proportionality of penalties in cases of infringement of the posting rules.[541]

Therefore, it is of utmost importance that the information provided on this official website is clear, complete and easily accessible. However, it was found that the way in which Member States have developed their website varies greatly. Some only provided information in their mother tongue, or only provided part of the information needed by the posting undertaking, for instance there is no information available on social security law, tax law, or the applicable collective agreements. Furthermore, stakeholders report that the official website might be useful for employers and consultants, or social secretariats, but (posted) employees themselves will rarely go look for information through this channel.

[538] L. Geyer et al., 'Posted workers from and to Austria. Facts and figures'.
[539] European Commission, ''Practical Guide on Posting'.
[540] *Ibid*; M. Rocca, 'Stepping Stones Over Troubled Waters. Recent Legal Evolutions and the Reform of the Posting of Workers Directive', 2019, in J. Arnholtz and N. Lillie (Eds.), Posted Work in the European Union The Political Economy of Free Movement, New York: Routledge.
[541] F. de Wispelaere et al., 'Cross-border employment in the live performance sector, Exploring the social security and employment status of highly mobile workers'.

Therefore, besides the single official national website, the provision of information should take place through **different other channels** such as public authorities, other companies/colleagues, employers' organisations or workers' organisations.[542] Posted workers are indeed found to be mostly informed by the client company, an affiliated company, or they search for information inside the community of posted workers.

A next step in the information process could be that collective agreements are also easily consultable in all or at least several official EU languages (for instance, based on the **template developed by ELA**).[543,544] A final step could be the development of an **EU remuneration calculator** (for instance, by ELA or the social partners in a specific sector, who possess key knowledge about sectoral agreements and remuneration packages).[545]

Further, the **importance of Directive (EU) 2019/1152 on transparent and predictable working conditions** should be highlighted. Article 7.2 of this Directive states that "Member States shall ensure that a posted worker covered by Directive 96/71/EC shall in addition be notified of: (a) the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State; (b) where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging; (c) the link to the single official national website developed by the host Member State pursuant to Article 5(2) of Directive 2014/67/EU of the European Parliament and of the Council."[546] However, it is hard to say whether this will happen in practice. In any case, **it is important that the worker concerned is informed about the remuneration they are entitled to, ideally through various reliable channels.** It is a crucial step in terms of them being able to enforce their rights.

Participants at the expert workshop suggested that **local user undertakings should have more responsibility,[547] as they know the exact terms and conditions that need to be applied**, including collective agreements. In this regard, Article 12 of the Enforcement Directive, might (in some cases) be the 'secret weapon' for sending companies to obtain information by the user undertaking. For instance, mechanisms, such as those in the Netherlands, where user undertakings have an obligation to inform about applicable collective agreements, could be considered. In terms of information provision, two crucial elements cannot be overlooked: language and personal contact. First, language can be considered as the most important aspect when transferring information. This can be a challenge certainly in posting situations with many nationalities present. Second, personal contact is one of the most important information channels concerning posting information, be it through information sessions, a reliable intermediary, or a contact person.

It was noted by one of the participants at the expert workshop that at the beginning stages of the PWD, 'package deals' between collective actors of different Member States were completed (e.g., the package deal between the Netherlands and Belgium in the construction sector).[548] These deals made an overall comparison between levels of pay between the Netherlands and Belgium for the construction sector. The participant suggested that these package deals could be a helpful tool to address underpayment besides providing better information.

[542] A good example is the website designed by the European Federation of Building and Woodworkers which provides concise information on wages, working conditions and rights of construction workers for all the European Member States in all the European languages. See: https://www.constructionworkers.eu/en/al.
[543] See: https://www.ela.europa.eu/sites/default/files/2021-01/ELA-Approach-to-presenting-collective-agreements.pdf.
[544] Within the frame of a research project on the live performance sector, this template has been applied to the two collective agreements applicable to the live performance sector in France. See: https://hiva.kuleuven.be/nl/nieuws/docs/collective-agreements-in-the-live-performance.pdf.
[545] Input from Hilde Thys (Agoria and Ceemet).
[546] See also a report of an Expert Group on the transposition of Directive (EU) 2019/1152.
[547] Which is already the case for temporary agency posting.
[548] For more information about this package deal, see M. Houwerzijl and F. Pennings, 'Double Charges in case of Posting of Employees: the Guiot Judgment and its Effects on the Construction Sector', European Journal of Social Security, 1999, Vol. 1, No. 1, pp. 91-112.

Finally, in addition to focusing on measures that might prevent underpayment, such as the provision and exchange of information so that the concept of remuneration is clear, it is also necessary to consider measures to discover and sanction underpayment. Hence, **enforcement (both in terms of number of inspections and in sanctioning)** is also of critical importance. It makes sense to focus on the main flows at risk, namely postings from low-wage Member States to a high-wage Member States as well as posted TCNs. Furthermore, **transnational exchange of information** might be useful. For example, a red flag could be that social security contributions remain unchanged when a worker is posted abroad, on the basis that in most cases, the posted worker will earn more in the receiving Member State and will therefore have to pay more social security contributions.[549]

[549] Unless there is a ceiling installed on taxable earnings and the posted worker earns above this ceiling both before being posted and during the posting. Additionally, this might not be the case in Slovenia, where the social security contributions are calculated based on the wage that would have been paid for comparable work in Slovenia, instead of on the actual wage earned of the posted worker. Therefore, a difference in social security contributions might also not be noticed when comparing the social security contributions before the posting versus during the posting.

6.3. Case study 3: Seasonal workers in the agriculture sector

6.3.1. Overview

This section provides an introduction to seasonal work in the agriculture sector: how many workers there are, where they come from and their basic working conditions.

By definition, the agriculture sector is very seasonal, with periods of high and low demand. Given the high degree of labour intensity of much of the work in the sector, tasks such as tending, harvesting and packaging require high numbers of agricultural workers for a limited period of time.[550] There is a growing reliance on temporary hired workers to carry out the majority of these labour intensive operations,[551] and so it is unsurprising that **the agriculture sector is the one with the highest number of seasonal workers**.

Seasonal workers may be defined as "a group of mobile workers who retain their main place of residence in their home country and move temporarily to another Member State to carry out an activity dependent on the passing of the seasons."[552] It is **estimated that between 800,000 and 1,000,000 seasonal workers are hired each year in the EU**, with the vast majority of these in the agri-food sector (the rest are work the accommodation and food services sector).[553] EU Member States with the highest numbers of seasonal workers recruited each year are Italy (370,000), Germany (300,000), France (276,000) and Spain (150,000).

6.3.2. Intra-EU seasonal workers in the agriculture sector

Of the 800,000 to 1,000,000 seasonal workers employed annually in the EU, it is **estimated that between 650,000 and 850,000 of these are intra-EU seasonal workers.**[554] Although these figures include seasonal workers in the accommodation and food services sector, given that national data for this sector is only estimated for Austria, Germany and the Netherlands (amounting to a total of 132,700 workers), the vast majority of these 650,000 to 850,000 intra-EU seasonal workers are active in the agriculture sector.[555] Furthermore, **most of the posting of intra-EU seasonal work relates to agriculture (67%).**[556]

Key destination countries for seasonal workers in the agriculture sector are **Austria, Belgium, Czechia, France, Germany, Italy, the Netherlands and Spain**. It is estimated that there around 700,000 seasonal workers hold the nationality of another EU Member State in these eight key destination countries.[557] Prior to the outbreak of COVID-19, Germany received around 300,000 seasonal workers per year, who were employed in agricultural, horticultural and forestry work.[558] "Between 1991 and the early 2000s, Polish seasonal workers constituted

[550] European Parliamentary Research Service, 'Migrant seasonal workers in the European agricultural sector', February 2021, p. 2, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI(2021)689347_EN.pdf.
[551] ILO, 'Migrant Workers in Commercial Agriculture', 2016, p. 35, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538710.pdf.
[552] European Labour Authority, 'Action Plan on Seasonal Workers', June 2021, available at: https://www.ela.europa.eu/sites/default/files/2021-06/Action-Plan-Seasonal-Workers.pdf.
[553] European Parliament, 'Bold measures needed to protect cross-border and seasonal workers in EU, MEPs say', 19/06/2020, available at: https://www.europarl.europa.eu/news/en/press-room/20200615IPR81233/bold-measures-needed-to-protect-cross-border-and-seasonal-workers-meps-say.
[554] European Commission, 'Intra-EU mobility of seasonal workers: Trends and challenges', 15/06/2021, p. 34, available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&.
[555] *Ibid.*
[556] *Ibid.*
[557] *Ibid.*
[558] Open Society European Policy Institute, 'Are agri-food workers only exploited in Southern Europe? Case studies on migrant labour in Germany, the Netherlands, and Sweden', 15 July 2020, p. 5, available at: https://www.opensocietyfoundations.org/publications/are-agri-food-workers-only-exploited-in-southern-europe#publications_download.

the vast majority of foreign seasonal workers in Germany. However, from 2006 their share rapidly decreased to about 60% in 2010 while the share of workers from Romania increased from about 8% in 2004 to nearly 35% in 2010".[559] Today, **many of the intra-EU seasonal workers in Germany still come from Central and Eastern Europe.**

Although no longer an EU Member State, it is interesting to look at the origin of seasonal workers employed in the agriculture sector in the United Kingdom. In 2017, when the UK was still a Member State, around 75,000 seasonal workers were thought to be employed every summer in the sector, with 98% of them originating from another EU Member State.[560]

6.3.2.1. Third-country national seasonal workers

In 2014, the **Seasonal Workers Directive** was adopted in order to harmonise the rules for admission, residence and rights of third-country national (hereinafter 'TCN') seasonal workers.[561] Under the Directive, a seasonal worker is defined as "a TCN who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that TCN and the employer established in that Member State".[562]

Based on the Seasonal Workers Directive, EUROSTAT collects statistics on seasonal workers who migrate from non-EU countries to work in the EU. The **number of TCN seasonal workers across all sectors differs greatly between Member States**, with **more than 46,000 in Poland compared to around 300 in Latvia in 2019**.[563] As of 2020, Germany, Luxembourg, Malta and the Netherlands had not admitted any TCN seasonal workers, despite having transposed the Directive.[564,565]

The working conditions for TCN seasonal workers also differ considerably between Member States. As of the end of 2020, **11 Member States had a legally defined gross minimum wage for these workers** (BG, CY, CZ, EL, HU, IT, LU, LT, MT, PL and SI).[566] This ranged from a minimum salary of €312 per month in Bulgaria, to €2,142 per month in Luxembourg. Equally, there is a **wide variation between Members States in terms of the length of validity of permits for TCN seasonal workers**. When considering permits from 1 to 90 days, 91 days to 5 months, and 6 to 9 months, Poland (by far the primary issuer of such permits) has a relatively even distribution between the three categories.[567] However, over 91% of the permits issued by Finland and more than 98% of those of Bulgaria have a length of validity of 1 to 90 days, whereas in Spain and Croatia, the vast majority were valid from 91 days to 5 months. Conversely, 62% of the permits issued by Estonia and almost 58% of Italian ones were valid from 6 to 9 months.

When looking at the agriculture, forestry and fishing sector specifically, there is a lack of data in many Member States concerning authorisations for the purpose of seasonal work under the

[559] *Ibid*, p. 5.
[560] House of Commons, 'Briefing Paper: Migrant workers in agriculture', 4 July 2017, p. 6, available at: https://researchbriefings.files.parliament.uk/documents/CBP-7987/CBP-7987.pdf.
[561] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, available at: https://eur-lex.europa.eu/eli/dir/2014/36/oj.
[562] *Ibid*, Article 3(b).
[563] European Migration Network, 'Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom', 2020, p. 9, available at: https://home-affairs.ec.europa.eu/system/files_en?file=2020-12/00_eu_seasonal_workers_study_synthesis_report_en_1.pdf.
[564] *Ibid*, p. 9.
[565] As mentioned in the previous sub-section, Germany relies on intra-EU labour migrants to undertake seasonal work in the agriculture sector.
[566] European Migration Network, 'Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom', 2020, p. 9.
[567] Eurostat, 'Authorisations for the purpose of seasonal work by status, length of validity, economic sector and citizenship[migr_ressw1_1] Last update: 12-09-2022', available at: https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.

Seasonal Workers Directive. Between 2018 and 2021, Poland reported 5,477 such authorisations, Estonia 1,274, Italy 630 and Latvia 200.[568] However, this **data is missing for so many Member States that it is difficult to draw conclusions as to the number of TCN seasonal workers in the agriculture, forestry and fishing sector**. Moreover, as will be explored in more detail in the following section, undeclared work, particularly among TCNs, is thought to be extremely high. This means that, even in those countries where data exists, the numbers above are likely to be underestimations of the real number of seasonal TCN workers in the agriculture sector.

6.3.3. Analysis of the key challenges

Some of the challenges in the sector are explored in this section, namely undeclared work, sub-standard living and working conditions, and recruitment through informal practices.

6.3.3.1. Undeclared work

As already noted, undeclared work is a considerable challenge in the agriculture sector. Two of the key **sector-specific drivers** of undeclared work are:

- Significantly **different levels of bargaining power and economic imbalances in individual trade relations** between food processers and retailers on the one hand, and agricultural producers on the other.[569]
    - For example, "a survey by the Italian Competition Authority shows that 57% of agricultural producers often or always accept retroactive unilateral changes [to contract terms], because they are afraid of commercial retaliation in case of refusal of the changes."[570]
- The **labour intensiveness of the sector and severe cost pressure** from large conglomerates in the food processing industry and food retailers to keep production costs low.
    - Prior to measures to counter this, employing seasonal workers on a declared basis in Croatia was often very expensive given that agricultural employers were generally required to pay for a full month's work, whereas the actual number of working days was more limited.[571] The result of this was that many employers turned to undeclared work solutions.

Undeclared work can have **different characteristics, including having no written contract of employment, being in dependent self-employment, or receiving envelope wages**. Section 6.3.4.2 considers the scale of these challenges within the agriculture sector; although it should be noted that disaggregated statistics looking at seasonal workers specifically are not available.

In order to improve the situation in the sector, in 2020 the European Commission adopted Guidelines on seasonal workers in the EU.[572] In these Guidelines, Member States are called

[568] *Ibid.*
[569] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector', September 2018, p. 32, available at: https://www.ela.europa.eu/sites/default/files/2021-10/Tackling%20undeclared%20work%20in%20the%20agricultural%20sector%20report.pdf.
[570] *Ibid.*
[571] European Platform Undeclared Work, 'Fourth Plenary meeting of the European Platform tackling undeclared work: Final report on a preventative approach, focusing upon service vouchers and awareness raising', March 2018, p.4, available at: https://ec.europa.eu/social/BlobServlet?docId=20206&langId=en.
[572] European Commission, 'Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak', 17 July 2020, available at: https://ec.europa.eu/info/sites/default/files/guidelines_on_seasonal_workers_in_the_eu_in_the_context_of_the_covid-19_outbreak_en.pdf.

on to "**take the necessary steps to tackle undeclared work of seasonal workers and to make extensive use of the European Platform tackling undeclared work**. Actions under the Platform such as tripartite partnerships and cross-border cooperation, better risk analysis and data mining for more effective inspections, combined with preventive measures such as listing of compliant companies may effectively contribute to fighting undeclared work of seasonal workers."[573]

Cooperation is a key element: in order to tackle undeclared work in the sector, there is recognition that **a holistic and multi-stakeholder approach is needed**. The fields of labour, tax and social security law need to be joined together both strategically and operationally, with cross-border and intra-national cooperation needed between these authorities, as well as between state authorities and social partners.[574]

At national level, **demand-side incentive schemes** have been introduced in certain Member States to tackle undeclared work. In **Croatia**, for example, the government introduced a **service voucher scheme** in 2012 for seasonal and occasional work in the sector, with the aim of encouraging agricultural employers to use the service voucher as opposed to relying on undeclared work.[575] The scheme allows the unemployed and pensioners to work for up to 90 days per year in various agricultural jobs, with rights such as maximum working hours, minimum rest breaks and a minimum daily wage. As well as tackling undeclared labour, the system thus has the dual benefit of helping to secure fair working conditions for seasonal workers in the sector (something that will be discussed in more detail in Section 6.3.5 below).

6.3.3.2. Entitlements, working and living conditions

Another major challenge facing seasonal workers in the agriculture sector is that of **weaker ties to social security systems and protection**. In some cases this is due to the fact that workers are not entitled to such rights owing to the nature of their contract, while in other instances, they may face practical barriers in accessing benefits related to the transfer of such benefits from their country of residence to the place of work.[576] One stakeholder interviewed for this study underlined that while many workers in the sector struggle to understand their social security rights, the same is also true for employers, who may be unaware of how to comply with national and EU level obligations regarding the social security entitlements of employees recruited on a seasonal basis.[577]

An example of **contractual social security limitations** can be found in Germany, where those employed in 'marginal employment' (meaning that which is less than 70 days in a calendar year) are exempt from mandatory social security contributions, according to the German Social Code.[578] Employment of seasonal migrant workers almost entirely relies on this '70-day regulation'.[579] Although this means that both employers and employees initially face savings as that they do not have to pay these contributions, it is estimated that "a significant number of cases would actually have to be subject to contributions"[580] due to workers staying longer than 70 days. In these instances, employees lose out on their potential right to a pension in Germany.

[573] *Ibid*, p. 3.
[574] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector: a learning resource from the Agricultural Seminar of the European Platform Undeclared Work Brussels, 24th January 2019', 2019.
[575] European Platform Undeclared Work, 'Fourth Plenary meeting of the European Platform tackling undeclared work: Final report on a preventative approach, focusing upon service vouchers and awareness raising', p. 4.
[576] European Commission, 'Intra-EU mobility of seasonal workers: Trends and challenges', p. 50.
[577] Interview conducted for the purposes of this study, February 2022.
[578] Sozialgesetzbuch (SGB) - Viertes Buch (IV) - Gemeinsame Vorschriften für die Sozialversicherung (Social Code - Book IV - General Rules for Social Security), Bundesgesetzblatt, 2006-01-26, vol. 4 , pp. 86-137, availabe at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=77191&p_lang=en.
[579] Open Society European Policy Institute, 'Are agri-food workers only exploited in Southern Europe? Case studies on migrant labour in Germany, the Netherlands, and Sweden', p. 6.
[580] *Ibid*.

In addition to challenges in relation to social security coverage, "labour inspectors repeatedly report violations of seasonal farm workers' rights as regards **working hours, remuneration, living conditions, and health and safety standards in the workplace**."[581] Given that much of the work in the sector is extremely labour intensive, requires working outdoors in all kinds of weather conditions and frequently involves atypical working hours with very early starts, there are a multitude of job-related risks that go along with this. The **European Labour Authority is drawing attention to the need to promote fair and safe working conditions for seasonal workers**, including through its awareness raising campaign, 'Rights for all seasons'.[582] They have published guidance for mobile seasonal workers,[583] and for employers,[584] in all 24 official EU languages.

A recent study from October 2022 found that **payment-related issues are the most frequent problem cited when seasonal migrant workers reached out to counselling centres**.[585] Irregularities with payment were found to occur due to several practices that are widespread among famers, including untransparent documentation and compensation of working hours, as well as paying out a significant amount of the overall wage only immediately prior to a worker's return to their home country.[586] **Language barriers** are something that only exacerbate these difficulties related to a lack of transparency.

Equally, wages in the sector are often very low, and minimum wages are not always respected. Although a lot of seasonal agricultural work is low-skilled, "in Member States where a general or a sector-specific minimum wage exists, […] in reality, **seasonal workers are often paid significantly below that level**."[587] In Spain, when the national minimum wage (SMI) was increased in 2020, salaries in the agriculture sector were raised to €7.41 per hour.[588] However, a 2020 report found that despite the SMI, in the city of Lleida, there is an unwritten agreement that workers are paid €6 per hour instead.[589]

Moreover, in the same city, a collective bargaining agreement related to agriculture and livestock stipulates that workers who live further than 75km from their place of work must receive accommodation.[590] However, a 10% discount is then applied to payslips for accommodation costs. This practice is one which poses a risk to seasonal workers: given that they are usually unable to check the accommodation in advance, they **risk ending up in sub-standard accommodation while having unreasonable sums deducted from their salaries**.

This practice has recently been the subject of debate in the Netherlands, where it has been found that temporary labour migrants (not exclusively in the agriculture sector) are being employed in the Netherlands and housed just over the border in Germany in **unacceptable living conditions**.[591] This follows on from Dutch reports of Ukrainian workers, employed on three-month contracts in the horticulture industry, specifically in plant nurseries in the province of Westland, who face numerous **penalty clauses in their contracts**.[592] For example, workers

[581] European Parliamentary Research Service, 'Migrant seasonal workers in the European agricultural sector', p. 6.
[582] European Labour Authority, 'Rights for all seasons: European Labour Authority supports fair work for seasonal workers', 15 June 2021, available at: https://www.ela.europa.eu/en/news/rights-all-seasons-european-labour-authority-supports-fair-work-seasonal-workers.
[583] European Labour Authority, 'Rights for all seasons: your guide to fair seasonal work', available at: https://www.ela.europa.eu/sites/default/files/2021-08/ELA_leaflet_A42folds_ready%20to%20print.pdf.
[584] European Labour Authority, 'Seasonal work: a guide for employers', available at: https://www.ela.europa.eu/sites/default/files/2022-03/ela-infographic-seasonal-work-guide-EN.pdf.
[585] V. Bogoeski, 'Continuities of exploitation: seasonal migrant workers in German agriculture during the COVID-19 pandemic', 28 October 2022, p. 14, available at: https://doi.org/10.1111/jols.12389.
[586] *Ibid*.
[587] European Commission, 'Intra-EU mobility of seasonal workers: Trends and challenges', p. 53.
[588] B. Güell, 'Agricultural seasonal workers in times of Covid-19 in Spain', December 2020, available at: https://www.researchgate.net/publication/349427832_Agricultural_seasonal_workers_in_times_of_Covid-19_in_Spain.
[589] *Ibid*.
[590] *Ibid*.
[591] NRC, '"The Netherlands earns the money and we have the problems», says the German mayor', 5 September 2022, available at: www.nrc.nl/nieuws/2022/09/05/nederland-deserved-het-geld-en-wij-zit-met-de-gedrag-zegt-de-duitse-burgemeester-a4140820.
[592] RTL nieuws, 'Oekraïense arbeiders in Westland uitgebuit: 'Verwerpelijk'', 02 June 2022, available at: https://www.rtlnieuws.nl/nieuws/nederland/artikel/5312575/oekraiense-werknemers-westland-uitgebuit.

can be fined €500 if they contact their employer reporting labour issues, have to forfeit 20% of their salary if they want to stop working before the end of their three-month contract, and can be deported to Ukraine if they violate the rules.

A factor that compounds the issues mentioned above is that **enforcing policies against labour exploitation remains a key challenge across the EU**. In Germany, it has been reported that despite labour violations in the agriculture sector being frequently mentioned in reports by the German Federal Criminal Police Office, "the number of cases in which charges are pressed or perpetrators are sentenced for labour exploitation is fairly small, suggesting that unreported incidents are widespread."[593] Part of the reason for this is that farms are often very isolated, with access to workers proving to be a challenge for labour inspectorates. However, it is precisely in these isolated situations that occupational safety and health (OSH) violations can go undetected, and unreported. Given that seasonal agricultural workers are usually accommodated in the place that they are working, they risk losing not only their work but also their place to live if they report violations.

6.3.3.3. Recruitment issues

A third key concern regarding seasonal workers in the agriculture sector is the manner in which they are recruited. As mentioned in the course of interviews conducted for this study, **a high level of recruitment in the sector occurs by way of private contacts and informal networks, or through labour market intermediaries**.[594] In the case of seasonal workers who are recruited by private employment agencies acting as intermediaries between clients and workers, the reality is that "power relationships are often skewed to the detriment of workers."[595] In **Italy**, for example, where around 500,000 migrants work in the agricultural sector, it is estimated that 40% are irregular workers, many finding seasonal work through the '**caporalato' practice**.[596] This system constitutes a form of illegal intermediation between farmers and workers. The caporale is often a former worker made responsible by the farmer for the recruitment and transport of the labour force, who takes a fee that is normally deducted directly from the wages of workers.[597] As reported by the European Parliament:

> "In many cases migrant workers [who are part of the caporalato practice] enjoy no legal or social protection, are forced to accept extreme working and living conditions and are underpaid. They live under the threat of losing their jobs, being repatriated or suffering physical or psychological violence. Women in particular are at risk of being exploited and sexually abused."[598]

During the COVID-19 pandemic, there were many challenges in recruiting seasonal workers due to EU-wide travel restrictions. In some instances, job offers were published on social media channels, the challenge with this being that there was **no legal security behind the recruitment**. [599]

The COVID-19 pandemic required other drastic measures to be taken in order to preserve food security. In Germany, for example, during the first pandemic harvest season, **80,000 seasonal farmworkers were flown in from Central and Eastern Europe** – one of the only exceptions to the EU-wide travel ban.[600] This decision to transport, house, and provide canteen facilities for workers in such close proximity to one another, "at a time when the 'social

[593] Open Society European Policy Institute, 'Are agri-food workers only exploited in Southern Europe? Case studies on migrant labour in Germany, the Netherlands, and Sweden', p. 10.
[594] Interview conducted for the purposes of this study, February 2022.
[595] European Parliamentary Research Service, 'Migrant seasonal workers in the European agricultural sector', p. 6.
[596] *Ibid*.
[597] S. Meret & S. Goffredo, 'Subverting neoliberal slavery: migrant struggles against labour exploitation in Italy', 25 March 2017, available at: https://www.opendemocracy.net/en/can-europe-make-it/subverting-neoliberal-slavery-migrant-struggles-agains/.
[598] European Parliamentary Research Service, 'Migrant seasonal workers in the European agricultural sector', p. 6.
[599] Interview conducted for the purposes of this study, February 2022..
[600] Fair Farming Initiative, 'Initiative Faire Landarbeit Bericht 2020: Saisonarbeit in der Landwirtschaft', 2020, p. 8, available at: https://igbau.de/Binaries/Binary15315/InitiativeFaireLandarbeit-Bericht2020.pdf.

distancing' measures for the majority of the population applied in the strictest manner, raised serious **ethical concerns** about the treatment of an entire category of workers."[601]

Another example of questionable recruitment practices of seasonal workers in the agriculture sector has been reported in north-east Germany (specifically Mecklenburg-Western Pomerania and Brandenburg). A significant part of the seasonal workforce there comes from Ukraine, **officially recruited either as part of a holiday job or a study-related internship**. However, investigations by the PECO Institute found that the registered student internships often have neither an organisational nor content-related connection to the course in Ukraine.[602]

Certain Member States have put in place measures to fight against informal practices like those mentioned above. For example, the Spanish Trade Union Confederation of Workers' Commissions (Confederación Sindical de Comisiones Obreras) has drafted an **agreement to combat fraud in the recruitment of Spanish seasonal workers** in France, and has published a guide to better inform seasonal workers about their rights.[603]

In **Finland**, meanwhile, recent **amendments to the national Seasonal Workers Act** will strengthen the position of seasonal workers by making it possible for them to change employer more easily.[604] Prior to this change, temporary cross-border seasonal workers were bound to the employer registered in their seasonal work permit. At the same time, employers will benefit as they will be able to hire familiar employees more easily, thus reducing their administrative burden of having to notify authorities of the arrival of each seasonal worker separately.

6.3.4. Scale of the phenomenon

Multiple data gaps exist in relation to the number of seasonal workers in the agriculture sector, making it very difficult to assess the extent of undeclared work.

6.3.4.1. Data gaps as to the number of seasonal workers in the sector

As previously discussed, it is difficult to provide a precise number of intra-EU seasonal workers in the agriculture sector, as existing data combines the agriculture and accommodation and food services sectors. Although monitoring of the Seasonal Workers Directive allows for the collection of some country-specific data on seasonal workers who migrate from non-EU countries to work in the EU, this **data is not comprehensively disaggregated per sector** either.

6.3.4.2. Extent of undeclared work in the sector

It is also a challenge to estimate the proportion of intra-EU and TCN seasonal workers engaged in undeclared work, although reports acknowledge the "**large proportion of migrant seasonal workers engaged [in] undeclared work**."[605] When looking at agricultural employees in the EU in general (therefore not necessarily seasonal workers), according to a 2018 study conducted for the European Platform tackling undeclared work, 15% of the agricultural workforce (and **32% of all employees in the agriculture sector) had no written**

[601] V. Bogoeski, 'Continuities of exploitation: seasonal migrant workers in German agriculture during the COVID-19 pandemic', p. 2.
[602] Initiative Faire Landarbeit, 'Saisonarbeit in der Landwirtschaft Bericht 2021', Oktober 2021, pp. 7-8, available at: https://igbau.de/Binaries/Binary16991/2021-InitiativeFaireLandarbeit-Saisonarbeitsbericht.pdf.
[603] European Commission, 'Intra-EU mobility of seasonal workers: Trends and challenges', p. 50.
[604] Ministry of Economic Affairs and Employment of Finland, 'Improvements to seasonal workers' right to change employers and to employers' amount of administrative work', 08/04/2012, available at: https://tem.fi/en/-/improvements-to-seasonal-workers-right-to-change-employers-and-to-employers-amount-of-administrative-work.
[605] European Parliamentary Research Service, 'Migrant seasonal workers in the European agricultural sector', p. 7.

contract of employment.[606] This is in comparison to 5% for the overall EU workforce. One half (50.8%) of EU employees in the agriculture sector with no written contract were located in just two Member States: Poland (38.1%) and Italy (12.7%).[607]

Moreover, in 2018, 27% of the EU's agricultural workforce was in dependent self-employment (23 percentage points higher than the EU-average) and **9% of agricultural employees in the EU received envelope wages**[608] (compared with an EU-average of 5%).[609] The only sector with a higher proportion of employees receiving envelope wages was the construction sector (10%).

6.3.5. Impact

Given that Member States remain responsible for determining the number of admissions of TCN seasonal workers by way of the Seasonal Workers Directive on the basis of the demand for seasonal work in a given year, it is very difficult to assess how seasonal work will evolve in the coming years. Estimating the total numbers of seasonal workers also becomes more complex given that there are **several other legal pathways through which TCNs can enter EU Member States to conduct seasonal work**. Some Member States have bilateral agreements in place with non-EU countries to facilitate the entry of seasonal workers. For example, France has concluded a number of agreements with countries including Morocco, Tunisia[610] and Senegal. In 2022, 797 work permits were received concerning the migration of Senegalese workers to France, 32% of which (255 permits) were for seasonal workers.[611] The main sectors concerned were hotels and catering, and IT.

Similarly, it is difficult to determine how the challenges associated with seasonal work in the agriculture sector are likely to develop. However, given that many of the key drivers identified are structural in nature, the expectation is that the challenges will remain.

It is relevant to consider the impact of some of the measures that have been taken to address the key challenges in the sector. For example, in Croatia the perceived outcome of the service voucher scheme was a decline in undeclared work, as measured by a **reduction in the number of complaints received** by those working in the sector.[612] However, another study[613] suggests that in the years following the introduction of the scheme in 2012, there was a **reduction in the use of seasonal vouchers** due to a shift of such work back into the undeclared economy[614] 'This is due to a low perceived risk of being caught since the agricultural high-season coincides with the tourist season, at which labour inspections are primarily aimed.'[615] Additionally, there were criticisms of a lack of information targeted both at agricultural employers and seasonal workers on the benefits of the scheme.[616]

[606] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector', September 2018, p. 15, available at: https://www.ela.europa.eu/sites/default/files/2021-10/Tackling%20undeclared%20work%20in%20the%20agricultural%20sector%20report.pdf.
[607] *Ibid*, p. 1.
[608] I.e. Cash-in-hand wages.
[609] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector', p. 1.
[610] European Migration Network (EMN), 'Attracting and protecting the rights of seasonal workers in the EU and United Kingdom', December 2020, p. 11, available at: https://emnbelgium.be/sites/default/files/publications/Seasonal_workers_study_synthesis_report_en.pdf.
[611] See: https://sn.ambafrance.org/L-Office-francais-de-l-immigration-et-de-l-integration-OFII-3179.
[612] European Platform Undeclared Work, 'Fourth Plenary meeting of the European Platform tackling undeclared work: Final report on a preventative approach, focusing upon service vouchers and awareness raising', p. 4.
[613] C. Williams et al., 'Preventative Policy Measures to Tackle Undeclared Work in Croatia', Zagreb: Croatian Ministry of Labour and Pension System, 2017, p. 77, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3003538.
[614] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector', p. 61.
[615] Ibid.
[616] C. Williams et al., 'Preventative Policy Measures to Tackle Undeclared Work in Croatia', p. 77.

6.3.6. Conclusions and recommendations

It is **estimated that between 800,000 and 1,000,000 seasonal workers are hired each year in the EU,** the agriculture sector being the one in which the vast majority of seasonal workers are found. It is thought that around 80% of these workers are intra-EU seasonal workers, with the remaining portion being TCNs. However, these figures are likely to be significant underestimates of the true number of seasonal workers in the agriculture sector, as data is missing for many EU Member States, and the number of undeclared workers is thought to be high.

As **undeclared work** is a phenomenon that is more prevalent in the agricultural, forestry and fishing sector than in many other areas of the EU economy, there is "a strong rationale for an emphasis to be placed upon this sector when seeking to tackle undeclared work."[617] **National enforcement authorities have a key role** to play in this regard. Given the relatively low efficacy of workplace inspections in the agriculture sector (due to a large cluster of the work in many Member States taking place in remote regions, often with poor accessibility),[618] the European Platform tackling undeclared work recommends that authorities should rely more on notification letters based upon data mining to identify risky agricultural holdings.[619] For seasonal workers in particular, '**service vouchers'** (e.g. vouchers purchased by employers in the agricultural sector, which can then be used to pay for seasonal and occasional workers) are a potentially useful tool, although again, the use of these must be properly enforced.

As noted by Eurofound, **seasonal workers are often treated less favourably** than permanent workers concerning legal entitlements, benefits offered by employers and other employment conditions.[620] **Collective bargaining agreements** can help to ensure that workers receive a fair minimum wage and that their rights in terms of working hours, leave, etc. are met. Although the Seasonal Workers Directive sets out conditions for non-EU citizens which ensure that they will not be exploited during their stay, the rights of many TCN workers are not fully respected in practice. The European Trade Union Confederation, among others, calls for an assessment of the transposition of the Directive in order to ensure that it adequately protects TCN seasonal workers.[621] Furthermore, **awareness raising campaigns** like the European Labour Authority's '**Rights for all seasons'** are important in drawing attention to the need to promote fair and safe working conditions for seasonal workers and for providing information to workers about the potential risks to which they are exposed.

Finally, **recruitment of seasonal workers through informal means, including dubious practices of labour market intermediaries,** constitutes a challenge in the agriculture sector. This practice was particularly common during the COVID-19 pandemic, when cross-border mobility was severely restricted. In order to remedy this, one recommendation is to **further promote the use of the EURES platform** for such vacancies, along with providing toolkits for employers to assist them in providing all the necessary information for a vacancy.[622] Moreover, it is important to ensure that the information on EURES and the vacancy notices are translated into more languages, in order to have maximal reach. Another recommendation is for **better enforcement** of regulations, including monitoring and inspection of activities conducted by temporary work agencies and other labour market intermediaries.

[617] European Platform Undeclared Work, 'Tackling undeclared work in the agricultural sector', p. 68.
[618] European Parliament, 'The EU farming employment: current challenges and future prospects', October 2019, p. 65, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629209/IPOL_STU(2019)629209_EN.pdf.
[619] *Ibid*, p. 68.
[620] Eurofound, 'Seasonal worker', 01 December 2021, available at: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/seasonal-worker.
[621] ETUC, 'ETUC Comments on the Commission Guidelines on Seasonal Workers', 08 September 2020, available at: https://www.etuc.org/en/document/etuc-comments-commission-guidelines-seasonal-workers.
[622] Interview conducted for the purposes of this study, February 2022.

6.4. Case Study 4: Bogus self-employment in temporary cross-border work

6.4.1. Overview

'Bogus self-employment' is a term used to describe **the practice of disguising direct subordinated employment as self-employment**.[623] Given that differentiation between an employee and a self-employed person has consequences for the regulations, policies, rights and principles that apply to an individual, this is a fundamental distinction to draw.

In all EU Member States**, the distinction between employment and self-employment is based on the concept of 'subordination'.**[624] However, **the legal definition of subordination varies considerably between Member States, with European law playing a limited role in harmonising the definition of this notion;**[625] no definition of bogus self-employment has yet been agreed at European level. In 2000, the OECD noted the phenomenon of those "who declare themselves (or are declared) as self-employed simply **to reduce tax liabilities, or employers' responsibilities**".[626] In Ireland, the practice is understood as referring to "situations where a worker, who is acting as an employee, is misclassified as self-employed largely **for PRSI [Pay Related Social Insurance] purposes**".[627]

The two definitions above clearly point to some of the factors motivating bogus self-employment. The key factor relevant for temporary cross-border workers is employers who wish to **circumvent restrictions resulting from a standard employment relationship** and employment regulations, stemming from the transposition of the Posted Workers Directive.[628] Self-employed workers are not employees and are therefore not covered by provisions relating to issues such as minimum rates of pay, maximum working hours or minimum rest periods or minimum paid annual leave. They are also insured in their home country rather than the one in which they work; in practice these individuals are often affiliated to a cheaper social security regime than the one of the country in which they are providing a service.

In order to address the question of bogus self-employment, in 2014 the European Commission issued a proposal for a 'decision on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work'.[629] Today, the **European Platform tackling undeclared work** is a permanent working group at the European Labour Authority (ELA), working to enhance cooperation between Member States' relevant authorities and other actors involved to fight undeclared work more effectively and efficiently.[630]

Bogus self-employment is by its nature difficult to recognise and to quantify. **Very little data is available** as to the likely number of individuals subject to bogus self-employment in the EU as a whole, let alone for temporary cross-border workers affected by the phenomenon.

[623] Eurofound, 'Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)', Dublin, 2017, p.2, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1717en1_0.pdf.
[624] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', Publications Office of the European Union, Luxembourg, 2016, p. 13, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1639en.pdf.
[625] *Ibid*, p. 14.
[626] OECD, *OECD Employment Outlook*, Paris, June 2000, p. 156.
[627] Houses of the Oireachtas, Joint Committee on Social Protection, Community and Rural Development and the Islands, 'Examination of Bogus Self-Employment', June 2021, available at: https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_social_protection_community_and_rural_development_and_the_islands/reports/2021/2021-06-16_report-on-examination-of-bogus-self-employment_en.pdf.
[628] F. Muller, 'Cross-border mobility of 'bogus' self-employed workers: a lack of legal framework coupled with protection of economic rights', Université de Strasbourg, September 2014, p.3.
[629] Proposal for a decision on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work, COM/2014/0221 final.
[630] See: https://www.ela.europa.eu/en/undeclared-work.

However, a 2020 report for the European Platform tackling undeclared work estimates that the prevalence of bogus self-employment in the EU varies from a lower bound estimate of **0.5% to a higher bound estimate of 4.3% of total employment**.[631] It also appears that there is a north-south divide in the EU, with bogus self-employment being more prevalent in southern European Member States.[632]

In the **Netherlands**, estimates from the Stichting Econmisch Onderzoek Rotterdam (SEOR) put the level of bogus self-employment at up to **15% of the total number of those who are self-employed**[633] (equating to around 112,000 individuals). Meanwhile, a Eurofound article from 2012 cited research conducted by the Czech Research Institute for Labour and Social Affairs, which estimated that **in 2007, between 13% and 26% of those describing themselves as self-employed in Czechia should have been classed as employees**.[634] 15 years on, there are no more up-to-date estimates.

In **Portugal** meanwhile, although there are no estimates of the total number of people involved in bogus self-employment, the Authority for Working Conditions (ACT) is reported to have conducted nearly half a million labour inspections in 2017 aimed at uncovering practices of bogus self-employment.[635] Unofficial data disclosed by the Portuguese press revealed approximately **330 case of bogus self-employment, leading to 294 formal complaints** filed by ACT with the Public Attorney's Office.

6.4.2. Analysis of the key sectoral challenges

Given that self-employment implies the non-application of employment protection legislation, "the bogus use of self-employment appears to be significant in competitive markets with narrow profit margins".[636] Some of these sectors are outlined below. The construction and live-in care sectors have been highlighted due to the focus this study places on these sectors, while media, arts and entertainment and aviation were both sectors that emerged as being somewhat problematic in terms of bogus self-employment both through desk research and during the course of interviews conducted for the purposes of this study.

6.4.2.1. Construction

The construction sector has historically been home to a large number of self-employed workers: in 2005, around 14% of construction workers in the EU were self-employed, with this percentage being as high as 40% in Greece and 29% in Poland.[637] According to the latest Eurostat figures, the construction sector accounted for 11.8% of the total proportion of self-employed people in the EU in the third quarter of 2021.[638] In the same period, the sector (specifically 'craft and related trades workers') was the one with the highest number of people working outside of their country of origin, with 215,100 workers.[639] It is therefore clear that **the construction sector has a high number of self-employed people who conduct cross-border work.**

[631] C. Williams, M. Llobera & A. Horodnic, 'Tackling undeclared work in the collaborative economy and bogus self-employment', March 2020, p. 22, available at: https://www.ela.europa.eu/sites/default/files/2021-09/Report%20UDW%20in%20collaborative%20economy%20and%20BSE.pdf.
[632] *Ibid*, p. 24.
[633] C. Aerts, 'Tackling false self-employment in the Netherlands: A comparative study between the Netherlands and Belgium', Tilburg University, October 2019.
[634] Eurofound, 'New regulations aim to fight bogus self-employment', 26 February 2012, available at: https://www.eurofound.europa.eu/publications/article/2012/new-regulations-aim-to-fight-bogus-self-employment.
[635] U. Menéndez, 'Recent developments in employment disputes in Portugal', The Law Reviews, 27 February 2019, available at: https://www.lexology.com/library/detail.aspx?g=da11d99f-8dc3-4a6f-8262-52affa8986e5.
[636] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', p. 14.
[637] Y. Jorens, 'Self-employment and bogus self-employment in the European construction industry', 2009, available at: https://biblio.ugent.be/publication/1144944/file/1201538.pdf.
[638] Eurostat, 'Employment in detail – quarterly statistics', data extracted in February 2022, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_in_detail_-_quarterly_statistics&oldid=553470.
[639] *Ibid*.

Social partners consulted for the purposes of a 2017 study on behalf of the European Platform tackling undeclared work agreed that **construction is the sector most affected by bogus self-employment.**[640] One of the reasons behind this is that bogus self-employment is a phenomenon that is traditionally found in labour-intensive, manual sectors. More recently it has spread from traditional blue collar sectors into new industries, including aviation, journalism and transportation.[641] A Eurofound report from 2017 found that in the UK (when it was still an EU Member State), bogus self-employment in the construction sector, especially in large companies, had become "endemic".[642]

Statistics at the European level estimating the number of people involved in bogus self-employment in the construction sector are not available. However, some Member States have tried to produce estimates. In 2013, the Dutch Ministry of Economic Affairs commissioned a study looking at four sectors of the economy. There the percentage of bogus self-employed construction workers was estimated to be between 3% and 5%.[643] However, these figures are contested: the Bouwend Nederland, a body which represents the construction industry, has claimed that 98% of TCN self-employed workers in the Dutch construction sector are actually in bogus self-employment.[644]

6.4.2.2. Live-in care

Live-in care work is particularly common in seven EU Member States: Austria, Cyprus, Germany, Greece, Italy, Malta and Spain. A recent report from the European Platform tackling undeclared work notes that there is "**a considerable amount of bogus self-employment, especially in live-in care provision**."[645] It also points to the **role of intermediary agencies**, whose activities in setting rates for care workers amount to being a significant source of bogus self-employment in the sector.[646]

Unlike in other countries, Austria has a legalised system of self-employed live-in migrant carers, as set out under the Home Care Act[647] and the amendment of the Code of Trade and Commerce. This model means that **99% of 24-hour caregivers in Austria are self-employed**,[648] although according to ELA, "the caregivers are **almost always bogus self-employed** and more than 90% are women".[649] Legally speaking, these care workers have a trade licence for the independent business of personal care: two of the key characteristics applicable for a 24-hour carer's work to be deemed as self-employment being that there are no concrete instructions as to how and in what form the contractually agreed services are to be performed, and that the carer has the right to have another carer take over their work.[650] However, in the (frequently occurring) case that a care recipient becomes more dependent on their live-in carer, caregivers who are officially self-employed may no longer meet the aforementioned criteria. This expansion in the scope of their tasks, combined with care workers' lack of discretion as to how to organise their own working time, means that their position is frequently one of bogus self-employment.

[640] J. Heyes and T. Hastings, 'The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment', European Platform Undeclared Work, June 2017, available at: https://www.ela.europa.eu/sites/default/files/2021-09/Study%20Practices%20of%20enforcement%20bodies%20detecting%20preventing%20bogus%20self%20employment.pdf .
[641] *Ibid*, p. 48.
[642] Eurofound, 'Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)', p. 5.
[643] J. Heyes and T. Hastings, 'The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment', p. 8.
[644] Y. Jorens, 'Self-employment and bogus self-employment in the European construction industry', p. 149.
[645] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', March 2022, p. 23, available at https://www.ela.europa.eu/sites/default/files/2022-03/UDW_Study_report_on_PHS_2022.pdf.
[646] *Ibid*, p. 29.
[647] Home Care Act, Federal Law Gazette I No. 33/2007, available at: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2007_I_33/BGBLA_2007_I_33.pdfsig.
[648] M. Leiblfinger & V. Prieler, 'Elf Jahre 24-Stunden-Betreuung in Österreich', Katholische Privat-Universität Linz, 2018, p.13, available at: https://kidoks.bsz-bw.de/frontdoor/deliver/index/docId/1319/file/LiWiRei_9-Leiblfinger-Prieler.pdf.
[649] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 28.
[650] See: https://www.bmdw.gv.at/en/Topics/Enterprise/Trades/Personal-care-services.html.

6.4.2.3. Media, arts and entertainment sectors

It is estimated that in the EU-27, around **45% of 'performing artists, authors, journalists and linguists' are self-employed**.[651] The share is much higher in certain EU Member States: 62% of all artists and writers were self-employed in the Netherlands in 2019, 60% in Italy, 58% in Czechia, and 53% in Germany and Ireland.[652]

The sector has, especially in the past decade, been the subject of concerns in relation to bogus self-employment. A Eurofound report from 2016 cites the media, arts and entertainment sectors as being those "where bogus self-employment seems to be greatly present".[653] This is due to the fact **that many people active in these sectors fall in between subordination and independence**; they are "semi-dependent or economically dependent workers who are difficult to characterise as employees or self-employed persons according to the traditional definitions of these two legal categories."[654] In Italy, for example, labour reforms introduced forms of employment between dependent and autonomous work: so-called *parasubordinati*, defined as "those who perform a continuous, coordinated and mainly personal form of collaboration with the same employer".[655] In many countries, the legal uncertainty and technical difficulty in classification tends to mean that an employment relationship is categorised as 'self-employment'.[656]

6.4.2.4. Aviation

In the aviation sector, the phenomenon of bogus self-employment has 'flourished' in the past decade. In a study published in 2019, 6,000 pilots, 2,200 cabin crew, 9 labour inspectorates, 12 employment ministries and 27 airlines were consulted about the employment and working conditions of aircrew in Europe.[657] It was found that around **9% of pilots are self-employed**, whereby this percentage varies significantly depending on the country, the type of carrier and the business model. For example, pilots working for low-cost carriers were most likely to be affected, with 59% of the surveyed self-employed pilots working for Ryanair.

In order to assess the degree of bogus self-employment in the aviation sector, self-employed pilots were asked about (i) the extent to which they were free to work with more than one air carrier, and (ii) the flexibility they had to decide when and how many hours they fly. A large majority – 90% - of self-employed pilots disagreed with the first statement, and 93% with the second.[658] This can be considered as an indication that "**the self-employment schemes that these pilots have in place are not in line with the criteria required to be genuinely self-employed** and therefore place them in the position of an economically dependent worker."[659]

[651] F. De Wispelaere, Y. Jorens, M. Rocca et al., 'Cross-border employment in the live performance sector: exploring the social security and employment status of highly mobile workers', HIVA – Research Institute for Work and Society, 2021, p. 80, available at: https://hiva.kuleuven.be/en/news/newsitems/Cross-border-employment-in-the-live-performance-sector.
[652] *Ibid*.
[653] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', Publications Office of the European Union, Luxembourg, p. 11.
[654] *Ibid*, p. 14.
[655] International Federation of Actors (FIA), EFJ, FIM and UNI Europa, 'Tackling Dependent and Bogus Self-Employment in the Live Performance and Media Entertainment Sectors', Discussion Note prepared for Workshop 3, 'Improving social rights and working conditions for atypical workers', Ljubljana, Slovenia, 26 & 27 January 2016, p. 4, available at: https://fia-actors.com/fileadmin/user_upload/News/Documents/2016/January/FINAL-Discussion-Note-Ljubljana.pdf.
[656] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', Publications Office of the European Union, Luxembourg, p. 14.
[657] European Commission, DG MOVE, 'Study on employment and working conditions of aircrews in the EU internal aviation market', January 2019, available at: https://www.eurocockpit.be/sites/default/files/2019-06/Study%20on%20employment%20and%20working%20conditions%20of%20aircrew%2C%20EU%20Commission%202019.pdf.
[658] *Ibid*, p. 106.
[659] *Ibid*, p. 107.

6.4.3. Impact

6.4.3.1. Impact on working conditions and workers' rights

Given that employees traditionally enjoy more employment rights than those who are self-employed, bogus self-employment has negative implications for elements such as a person's wage and salary protection, working hours, supplementary pensions, remuneration during periods of sick leave and special leave and protection against dismissal. Additionally, "the **voice of self-employed people may not be heard** and does not play an important role, contrary to employees who through the worker's committees of the company are in a position to negotiate on working conditions."[660]

This misclassification is frequently deliberate, with workers being falsely categorised as self-employed in order to enable employers to circumvent labour laws, collective agreements, employment tax and other employer liabilities that are part of a 'standard', dependent contract of employment.[661] There are **clear monetary implications associated with the avoidance of employer contributions.** In Ireland, a submission by the Irish Congress of Trade Unions in 2016 estimated that the avoidance costs of employer contributions to Pay Related Social Insurance amounted to a loss for the Exchequer of "approximately €600 million in recent years."[662]

Another example of precarity related to bogus self-employment can be found in the aviation sector, where a 2019 study reported that up to **6% of all pilots have been involved in 'pay-to-fly' schemes.**[663] As defined by the European Cockpit Association, these schemes are "an aviation industry practice whereby a professional pilot, whether in training or not, operates an aircraft in commercial service, i.e. on a regular revenue-earning flight – as any other qualified crewmember – but instead of receiving a salary they pay for the cost of gaining flight experience."[664] This particular situation has been subject to a prohibition in France. French labour law requires that work for the benefit of a third party is either carried out as an employee, or as a self-employed individual. Given that a pilot involved in such a scheme is performing regular tasks without pay, and indeed paying for that experience, the pilot is considered to be an employee. However, **France is the only EU Member State to have put into place a ban on these schemes;** in other Member States, pay-to-fly schemes remain a challenge, and one that can be found alongside bogus self-employment.

6.4.3.2. Impact on business competition

Bogus self-employment may be viewed as a form of social dumping, in which employers rely on migrant workers as a source of cheaper labour than would normally be available to them in their place of work. A study by Eurofound focusing on bogus self-employment in Czechia, Spain and the UK found that in the UK, there was **a degree of undercutting in the use of bogus self-employment.**[665] This not only negatively affects competition in the labour market, but also undermines investment in skills, training and apprenticeships at a societal level.[666]

[660] Y. Jorens, 'Self-employment and bogus self-employment in the European construction industry', p. 26.
[661] C. Williams, M. Llobera & A. Horodnic, 'Tackling undeclared work in the collaborative economy and bogus self-employment', p. 18.
[662] Houses of the Oireachtas, Joint Committee on Social Protection, Community and Rural Development and the Islands, 'Examination of Bogus Self-Employment', p. 5.
[663] European Commission, DG MOVE, 'Study on employment and working conditions of aircrews in the EU internal aviation market', pp. 74-75.
[664] Definition of the European Cockpit Association – see European Commission, DG MOVE, 'Study on employment and working conditions of aircrews in the EU internal aviation market', p. 70.
[665] Eurofound, 'Fraudulent contracting of work: Bogus self-employment (Czech Republic, Spain and UK)', p. 10.
[666] *Ibid.*

The **aviation** sector provides a clear example of how the use of bogus self-employment provides carriers using this model with an unfair competitive advantage over socially compliant carriers. Due to unfair gains resulting from this practice, for example the avoidance of employer contributions, **some carriers are able to price dump within the market**. Indeed, in the above-mentioned 2019 consultation of pilots in Europe, 19% of consulted pilots in the low-cost sub-sector identified themselves as self-employed, higher than any other sub-sector (e.g. freight, charter, business aviation).[667]

6.4.3.3. Sanctions targeting the issue

Certain Member States have put into place measures to actively combat this form of fraudulent contracting of work. These are mainly 'deterrence' measures: **Czechia, Finland, France, Germany, Ireland, Luxembourg, Portugal and Sweden** all have in place **sanctions to requalify bogus self-employment** into the appropriate form of contractual relationship.[668]

Although 'positive sanctions' (i.e. compliance measures) are much less frequently adopted, in 2015 **Italy** introduced a labour market reform[669] amounting to an "**amnesty regarding possible fines and compensations for paying lower salaries and contributions** if the employer transformed an existing self-employed contract (including those suspected as being bogus self-employment) into an open-ended subordinate employment contract by the end of 2015."[670]

Meanwhile, in **Germany, Ireland, Poland, Slovenia and Slovakia, trade unions have campaigned for regulatory reforms to tackle bogus self-employment** specifically, in addition to other fraudulent forms of contracting work.[671] Portugal and Romania have both introduced legislative measures to combat bogus self-employment: **Portugal** through Law 63/2013, which created a **specific procedure for the prosecution of bogus self-employment,**[672] and Romania through a 2015 revision to the definition of 'self-employed'.[673] Finally, the Slovenian Labour Inspectorate has carried out targeted inspections specifically on bogus self-employment in sectors such as construction, bars and restaurants, food retail, transport, education and health.[674]

6.4.4. Conclusions and recommendations

Given that one of the major drivers for misclassifying dependent employees as self-employed is to circumvent labour laws and collective agreements, "**Member States require clear legal definitions** of dependent employment, self-employment and bogus self-employment."[675] As of 2019, only 85% of EU Member States (excluding Luxembourg and Romania) had a legal definition of self-employment, with only 50% having a definition of dependent employment and 25% of bogus self-employment.[676] Without clear definitions, misclassification continues to remain likely.

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[667] European Commission, DG MOVE, 'Study on employment and working conditions of aircrews in the EU internal aviation market', p. 102.
[668] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', pp. 23-24.
[669] Legislative Decree No. 81 of 15 June 2015, Organic Regulations of Employment Contracts and Revision of the Norms Concerning Labour, in Accordance with Article 1, Paragraph 7, of Law No. 183 of 10 December 2014, available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-06-15;81.
[670] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', p. 25.
[671] *Ibid*, pp. 29, 31, 32, 33, 34.
[672] European Commission, 'Factsheet on Undeclared Work – Portugal', available at: https://ec.europa.eu/social/ajax/BlobServlet?docId=18174&langId=en.
[673] Eurofound, 'Exploring the fraudulent contracting of work in the European Union', p. 33.
[674] *Ibid*, p. 33.
[675] European Platform tackling undeclared work, Ninth plenary meeting of the European Platform tackling undeclared work, 'Report on tackling undeclared work in the collaborative economy and related to new forms of work', October 2020, p. 4, available at: https://www.ela.europa.eu/sites/default/files/2021-09/Thematic%20report%20UDW%20Plenary%205-6%20Oct%202020_final_0.pdf.
[676] *Ibid*, pp. 4-5.

Another important consideration is **monitoring and enforcement**. Labour inspectorates and enforcement bodies face limitations in dealing with fraudulent activities associated with bogus self-employment, precisely because of the grey area that exists between dependent employment and self-employment. In 2019, only 78% of labour inspectorates in responding countries and 52% of social security/insurance authorities possessed the legal competence to tackle bogus self-employment.[677] In order to be effective, **enforcement bodies need to be sufficiently resourced to conduct their activities and to cooperate with one another in a more systematic manner,** sharing information and, where relevant, conducting joint inspection activities specifically aimed at bogus self-employment.[678] The work of the European Platform tackling undeclared work in enhancing cooperation between actors is crucial in this regard.

The effectiveness of enforcement authorities is further hampered by the **lack of precise data about the extent of bogus self-employment.** To improve the situation, the Irish Joint Committee on Social Protection, for example, recommends that the Irish national Department of Social Protection, in conjunction with the country's Central Statistics Office, "develops a framework for collecting data on areas of employment where there is a potential or known risk of bogus self-employment in the medium to long-term".[679] This kind of data collection is important in concentrating the focus area of enforcement actions.

Deterrence and incentive measures are also important to actively combat this form of fraudulent contracting of work. Several Member States, including Czechia, Finland, France, Germany, Ireland, Luxembourg, Portugal and Sweden, have sanctions in place to requalify bogus self-employment into the appropriate form of contractual relationship; a potential 'good practice' example for other Member States. In Ireland, there are discussions about extending the scope of these sanctions, for example by increasing the period employers are required to pay backdated Pay Related Social Insurance contributions that have previously been avoided from six months to six years.[680]

[677] *Ibid*, p. 5.
[678] J. Heyes and T. Hastings, 'The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment', European Platform Undeclared Work, p. 20.
[679] Houses of the Oireachtas, Joint Committee on Social Protection, Community and Rural Development and the Islands, 'Examination of Bogus Self-Employment', p. 3.
[680] *Ibid*, p. 4.

6.5. Case Study 5: Posted TCNs in the construction sector

6.5.1. Overview

In June 2021, a joint statement of the European social partners of the construction sector (FIEC-EFBWW) was made on TCN[681] workers and companies in the EU construction market.[682] This joint statement explains that "despite the fact that there are no official figures on the number of TCN workers, over the years, many studies have observed **a steep increase of TCN workers in the EU construction industry**." Reasons why TCNs come to the EU include economic discrepancies and wage disparities between third countries[683] and EU/EFTA Member States, as well as political and economic instabilities in third countries.[684]

This case study does not address the different migration schemes of TCNs (employed in the construction sector). The focus is rather on the group of TCNs who migrate to the EU and who are subsequently **posted to another EU Member State** in order to provide services **in the construction sector**. Direct postings from a third country to the EU (mostly on the basis of a bilateral agreement) are also outside the scope of this case study. This case study first analyses and quantifies the main problems, and then discusses their impact and possible solutions.

The **Vander Elst case**[685] as well as subsequent cases of the Court of Justice of the EU (CJEU)[686] make it possible for TCNs to be posted freely across the EU on the condition that they hold a valid work and residence permit of the Member State from which they are posted.[687] Unlike TCNs migrating to Member State B, TCNs posted from Member State A to Member State B do not need a 'single permit' from Member State B, nor will they be subject to a 'labour market test'[688] in this Member State.

The consequences of the so-called 'VanderElst' route are highly contentious in academic and political debate (it is even called "**the hole in the wall of fortress Europe**"[689]) not least due to a huge increase of the number of posted TCNs as well as due to the high number of infringements to their terms and conditions of employment identified by labour inspectorates, such as underpayments, labour right violations and precarious working conditions. It has for example been found that posted TCNs to the EU have outnumbered

[681] Any person who is not a citizen of the EU or the EFTA.
[682] See: https://ec.europa.eu/social/BlobServlet?mode=dsw&docId=12147&langId=en.
[683] Any country outside the EU/EFTA.
[684] S.C. Krilić, K. Toplak, and M.V. Jevšnik, 'Posting of Third Country Nationals. Mapping the trend in the construction sector', ZRC SAZU, 2020; see also S.Danaj, 'The posting of third country nationals via EU Member States', Training module 3 - EU labour mobility regulatory framework (FMW, PoW), ELA - 28 January 2021; S. Danaj and L. Geyer, 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria', Policy Brief 2020/6, 2020, for an overview of 'push' and 'pull' factors. See for instance: "The principal pull factors are the relatively better employment opportunities – in terms of both pay and employment conditions – in richer European countries. Up until the outbreak of the COVID-19 crisis, the discouraging economic conditions in Bosnia and Herzegovina were contrasted by high labour demand in Slovenia and Austria, especially for construction workers. In the case of Slovenia, other pull factors include the aforementioned historical ties, geographical proximity, and the relatively simpler migration procedures in place."
[685] Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803.
[686] For instance, Case C-18/17 *Danieli* or Case C-477/17 *Balandin*.
[687] N. Mussche and D. Lens, 'The EU Free Movement of Services and the growing mobility of Third-Country Nationals as posted workers', Working Paper No.18.13, University of Antwerp, 2018 ; European Commission, 'Practical Guide on Posting', 2019, doi: 10.2767/664838.
[688] Mechanism that aims to ensure that migrant workers are only admitted after employers have unsuccessfully searched for national workers, EU citizens (in EU Member States this also means EEA workers) or legally residing TCNs with access to the labour market according to national legislation.
[689] D. Lens, N. Mussche, and I. Marx, 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants?' International Migration, 2021, 60, pp. 160-176.

TCNs entering through the classic national migration route of work permit and visa.[690] However, the phenomenon of posted TCNs seems to be **concentrated in a number of sending Member States** (e.g., Slovenia, Poland, and Lithuania, and to a lesser extent Spain and Portugal) **and receiving Member States** (e.g., Austria, Belgium, France, and the Netherlands) as well as in **specific sectors of activity** such as construction, road transport, live-in care, and agriculture.[691] Therefore, in this case study the focus is on the posting of TCNs in the construction sector,[692] with Slovenia (this mainly concerns Bosnian posted workers) and Poland (this mainly concerns Ukrainian posted workers) taken as examples of main sending Member States of posted TCNs active in the construction sector and Belgium as an example of a main receiving Member State.

6.5.2. Analysis of the problem

The main problems relating to posted TCNs in the construction sector concern the situation for the posted TCNs themselves. Whereas most employers claim that posting TCNs has become necessary to fill labour and skill shortages, other stakeholders argue that it mostly concerns the recruitment of cheap migrant workers. Posted TCNs often find themselves in a **more vulnerable position**[693] than local workers, other mobile workers, and even other posted EU workers. Consequently, there is a risk of 'double segmentation', first between locally hired and posted workers, and second between EU and TCN posted workers. This more vulnerable position is caused by the fact that TCNs are often posted through multiple countries, they have a weak or unclear migration status, they are frequently interwoven into a complex chain of companies, they might lack training, it can be difficult to understand from which country they receive their social security, and they might be unaware of their rights and how to enforce them.[694] Moreover, employment criteria for temporary residence permits can bind TCNs to their employer of the host Member State, a dependence that might make them quite vulnerable to exploitation and willing to accept lower wages (called a '**double dependence**': for a single permit and employment).[695] The reality of multiple layers of vulnerability was confirmed by several participants at the expert workshop.

An important example of their vulnerable position are **wage underpayments.** TCNs are a group of workers that is likely to accept a 'remuneration' below what should be paid but still much higher than the salary they are used to receiving. Research indicates that Moroccan and Senegalese workers posted from Spain to France earn € 4 less per hour than posted Spanish workers.[696] Similarly, posted Bosnians from Slovenia to France were paid € 2 less than posted Slovenians to France. In October 2019, the European Federation of Building and Woodworkers (EFBWW) together with the ETUC submitted 10 problematic cases to ELA.[697] One of the cases reads as follows:

> "A company registered at an accountancy office in Slovenia has posted 391 workers, almost all of whom are Bosnian, to Germany since 2011. It is believed the workers are not receiving the minimum wage or paid holiday. Despite that the workers fear losing the work because they are heavily dependent on the jobs. The

[690] *Ibid.*
[691] F. De Wispelaere, L. De Smedt., and J. Pacolet, 'Posted workers in the EU. Facts and figures', Leuven: POSTING.STAT project VS/2020/0499, 2022.
[692] The posting of TCN workers in the construction sector mainly concerns low-and medium skilled workers (Cörvers et al., 2021; Lens et al., 2021). It is even stated to be a requisite for construction companies to remain competitive (Lens et al., 2022).
[693] See for examples e.g., S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector'; Q. Ndomo, and N. Lillie, '(In)Secure Mobility: Posted workers' acquiescence, social insurance, and economic rationality, Secure Mobility: Uncovering Gaps in the Social Protection of Posted Workers (SMUG)', 2022.
[694] D. Lens et al., ''A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants?'.
[695] S. Danaj, 'The posting of third country nationals via EU Member States',
[696] M. Muñoz, 'Posted workers from and to France. Facts and Figures', Leuven: POSTING.STAT project VS/2020/0499, 2022.
[697] See: https://www.etuc.org/en/pressrelease/eu-labour-authority-failed-act-its-first-worker-abuse-cases.

company has not registered any economic activity in Slovenia and the unions believe this is a case of bogus posting."[698]

Furthermore, there are also cases of **labour right violations and precarious working conditions** regarding posted TCNs in the construction sector.[699,700] These workers are regularly exposed to high occupational safety and health (OSH) risks on construction sites, while often being abandoned to their fate in the case of injury and especially illness. These OSH risks are frequently the result of a complete lack of training or superficial training in the third country, a lack of equipment and protective gear they sometimes have to pay for themselves, as well as language barriers to understanding warning signs and information, and poor and crowded accommodation.

Disguising direct employment by posting is also particularly relevant for TCNs. These individuals are hired under fraudulent schemes and portrayed as being posted workers, despite neither the employer nor the individual having any real connection with the alleged posting country.[701] **Fraudulent posting** involving migrant workers seems to occur frequently in construction. For example, the Portuguese syndicate reports that clandestine work within the construction sector is on the rise, with increasing numbers of workers from other EU Member States and TCNs arriving in Portugal.[702]

The high vulnerability of this group of workers is partly due to the fact that **posted TCNs are less inclined to seek help or report their employers**, seeing that they are not only dependent on their employer for their employment, but also for the renewal of their work and residence permit in the sending country.[703] In addition, unfavourable experiences with institutions that provide collective protection in their home country might lessen the likelihood of posted TCNs searching for help when they find themselves in a vulnerable position. Finally, even though there are EU mechanisms for control and enforcement, the vulnerable position of posted TCNs in the construction sector is often disguised. This is caused by the many levels of subcontracting, cross-border mobility, and temporary service provision in the construction sector specifically.

Second, the posting of TCNs (in the construction sector) seems to have become a **'business model'** for companies, in which TCNs are never employed in the Member States where they gained access to the EU but are immediately posted to another Member State, as they are "hired to be posted".[704] Being hired to be posted is allowed regarding the terms and conditions of employment, as long as there is an employment relationship during the whole period of posting between the worker posted and the employer posting the worker.[705] However, in contrast to labour law, this is more difficult under social security law, as there the posted worker only remains affiliated to the sending Member State when they are already subject to legislation of that Member State, which means that in practice it concerns at least one month before the start of the posting. This business model (i.e., 'posting industry') for profit maximisation entails companies which have become active in providing services through the posting of TCNs in the EU.[706] For instance, there are **intermediaries/**

[698] See: https://www.etuc.org/en/pressrelease/eu-labour-authority-failed-act-its-first-worker-abuse-cases.
[699] S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector'.
[700] See also S. Danaj & L. Geyer 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria', p. 5: "Posted workers from third countries, moreover, are even more likely than other posted workers to not have their labour rights guaranteed. In other words, being posted creates the risk of being exploited and of suffering from dangerous working conditions and being a posted third country national further exacerbates those risks."
[701] P. van Nierop, L. Schönenberg, and P. Terziev, 'Counteracting undeclared work and labour exploitation of third-country national workers', European Platform tackling undeclared work, 2021.
[702] Legal desk research conducted in Portugal, 2022.
[703] S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector'; S. Danaj & L. Geyer, 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria'.
[704] F. De Wispelaere et al., 'Posted workers in the EU. Facts and figures'.
[705] European Commission, 'Practical Guide on Posting'.
[706] S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector';

gang masters who recruit TCNs (without having 'genuine activities' in the Member State of establishment).[707,708]

It would be interesting to better understand what makes the 'man in the middle' situation actually interesting when it comes to TCNs. As such TCNs could also be recruited directly without the need to be posted. The problem might be connected to the fact that free movement is regulated at EU level, while the **access of TCNs to the EU labour market is regulated by Member States**.[709,710] An important aspect in the posting of TCNs in the EU are flexible bilateral agreements between EU Member States and third countries. In that regard, **flexible 'entry' rules in Slovenia and Poland** give specific groups of TCNs not only access to the labour market of these Member States, but actually also to the complete European labour market by the freedom to provide services. Indeed, Slovenia has signed an agreement with Bosnia and Herzegovina, whereas Poland has created a special migration regime for the nationals of Ukraine, Belarus, Russia, Armenia, Georgia, and Moldova by allowing them to work in the country through 'declarations on entrusting work'.[711] It is therefore relatively common to find Bosnian workers posted from Slovenia and Ukrainian workers posted from Poland.

Finally, one can argue that the Vander Elst case has **eroded the migration sovereignty of Member States**.[712] Many Member States have tried to enforce conditions and restrictions on posted TCNs, but the CJEU has repeatedly condemned these processes.[713] As a result, this means that the posting of TCNs can be seen as a parallel entry channel in an otherwise relatively locked gate to the EU for less privileged workers.[714] Some Member States, such as Slovenia and Poland, accordingly, act as a 'gate opener' for TCNs. However, Germany still requires incoming TCNs posted from another Member State to obtain a 'Vander Elst visa'[715], contrarily to the judgments of the CJEU.[716] However, this does not exclude that TCNs are still being sent to Germany without applying for such visa.

6.5.3. Quantifying the scale of the problem

The joint statement of the European social partners of the construction sector (FIEC-EFBWW) states that they "observe a sharp increase of TCN workers who migrate to work in an EU Member State. Most of these workers enter the EU labour market on the basis of an employment and residence permit, issued by a host EU Member State. A large proportion of TCN workers is employed in the EU host Member State, while others are

[707] See Danaj & Geyer (2020: 4): "Over the years, Slovenia has seen growing numbers of consultants, law firms and letterbox companies which specialise in facilitating the posting of workers, often third-country nationals, from Slovenia to other EU countries like Austria. A representative of an Austrian trade union and a representative of the Austrian financial police describe these companies as a whole 'posting industry' providing a 'full service' to companies looking to hire posted workers from Slovenia."

[708] See also Q. Ndomo, and N. Lillie, '(In)Secure Mobility: Posted workers' acquiescence, social insurance, and economic rationality, Secure Mobility: Uncovering Gaps in the Social Protection of Posted Workers (SMUG)' p.18: "The other type of common intermediary in the recruitment of posted workers in the construction sector in the EU is the temporary work agencies. These are especially active at the lower end of the labour market, and in the posting of third country nationals. Useful in sustaining the practice of recruitment for direct posting, these agencies tend to serve only as nominal employer, and have only a weak relationship with the worker."

[709] However, Directive 2011/98/EU on a single permit for third-country nationals to reside and work in the EU (i.e., the Single Permit Directive) is a key instrument in EU immigration policy. See: https://eur-lex.europa.eu/eli/dir/2011/98/oj.

[710] Moreover, there is ambivalence concerning the special rules for Ukrainians to enter the EU labour market. The special rules provide opportunities but can also lead to vulnerability and labour exploitation, which has already been observed (remark made at the expert workshop). See: https://www.ela.europa.eu/en/support-people-fleeing-ukraine.

[711] For more information, see M. Vah Jevšnik, S. Cukut Krilić, and K. Toplak, 'Posted workers from Slovenia. Facts and Figures', Leuven: POSTING.STAT project, 2022 (Slovenia), and M. Kiełbasa, M. Szaraniec, M. Mędrala, and M. Benio, 'Posted workers from and to Poland. Facts and Figures', Leuven: POSTING.STAT project VS/2020/0499, 2022 (Poland).

[712] N. Mussche and D. Lens, 'The EU Free Movement of Services and the growing mobility of Third-Country Nationals as posted workers', Working Paper No.18.13, University of Antwerp, 2018.

[713] ELA commissioned a study on how Member States apply this case law in practice.

[714] D. Lens et al., 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants?' .

[715] See: https://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Residence-title/Nationals-of-third-countries/uebersicht_aufenthaltstitel.html?nn=206562&faqCalledDoc=206566.

[716] C-244/04 Commission v Germany (https://ec.europa.eu/commission/presscorner/detail/en/IP_02_563), C168/04 Commission v Austria and C-219/08 Commission v Belgium. See also VG Potsdam, decision of 02 November 2020 (re 8 L 660/20).

posted to another EU Member State. Overall, […] 'labour supply agencies/companies' play an important role in the immigration and employment of the TCN workers in the EU."

To quantify the posting of TCNs in the construction sector, Slovenia and Poland are taken as the main example of sending Member States, and Belgium as receiving Member State.

An important question is whether there is an overrepresentation of outgoing posted TCNs compared to the share of TCNs in the labour market of the Member State of origin. This exercise[717] is performed for Slovenia (the legislative changes coming into force in January 2024 (see Section 6.2) may have an impact on below figures) and Poland based on four indicators:

- First, Slovenia issued a total of 38 444 work permits in 2020, of which 36 383 or 94.6% for nationals from Bosnia and Herzegovina.[718] This is the result of the bilateral agreement between Slovenia and Bosnia and Herzegovina, which states, among others, that after a year of being employed on the Slovenian job market, the national of Bosnia and Herzegovina gains free access to the labour market in Slovenia.

- Second, the share of TCNs in the Slovenian labour market can be calculated. In 2020, they made up almost 10% of total employment in Slovenia, and even 39% in the Slovenian construction sector.[719]

- Third, out of all the workers posted abroad from Slovenia, 60% were TCNs in 2020. In the construction sector specifically, of all postings, 19% related to Slovenian nationals, while 81% related to TCNs, of which 49% to Bosnia and Herzegovina nationals.

- Fourth, it is estimated that over 40% of all TCNs employed in Slovenia were posted to another Member State in 2020. This figure contrasts with only 2% of Slovenians of working age who were posted to another Member State.

Therefore, it can be stated that there seems to be **an overrepresentation of posted TCNs from Slovenia compared to their share in the Slovenian labour market. This is especially the case in the construction sector (81% vs 39%).** Partly because of this reality, many construction companies and workers appear to actually be operating in other Member States. For instance, it is estimated that three out of 10 construction workers are posted to another Member State. Moreover, it appears that 60% to 90% of the Slovenian construction companies generate 75% or more of their income from abroad.

In Poland, almost 2 million 'declarations of entrusting work to a foreigner' and 502 300 work permits were issued to TCNs in 2021. Out of these 2 million declarations, 1.6 million were issued to Ukrainian citizens.[720] It is estimated that TCNs correspond to around 16% of total employment in the Polish construction sector. Further, some 11% of the outgoing posted workers active in the construction sector are TCNs. This seems to suggest that not an abnormally high percentage of TCNs are posted compared to their share in the Polish construction sector.

On the other side, the **quantification** can also be looked at **from the receiving side**. For example, in Belgium, 26% of incoming posted workers are TCNs.[721] Of all posted workers in the Belgian construction sector in 2021, 9.3% originate from Ukraine and 3.5% from Brazil.[722] Two important routes for posted workers in the construction sector are indeed from

[717] F. De Wispelaere et al., 'Posted workers in the EU. Facts and figures'.
[718] M. Vah Jevšnik et al., Posted workers from Slovenia. Facts and Figures'.
[719] *Ibid.*
[720] M. Kiełbasa et al., 'Posted workers from and to Poland. Facts and Figures'.
[721] F. De Wispelaere et al., 'Posted workers in the EU. Facts and figures'.
[722] De Smedt, 2022.

Ukraine through Poland to Belgium, and from Brazil through Portugal to Belgium. Furthermore, around 53% of posted TCNs in Belgium deliver services in the construction sector, indicating that the posting of TCNs is especially prevalent in the construction sector.[723]

6.5.4. Impact

The phenomenon of posted TCNs has recently been increasing and it is expected to **grow even further in the future** as an important intra-EU mobility channel.[724] Further, the posting of TCNs is more widespread than previously recognised.[725] The future growth of posted TCNs is likely to be particularly the case in the construction sector. One of the main problems in this sector is the mismatch between demand and supply of workforce with construction sector skills, causing both manpower and skill shortages.[726,727] These shortages are certainly one of the main problems, seeing that even with a modest price markup, mobile workers in the EU might not be available and employers will have to look for TCNs. Furthermore, since the construction sector is a labour-intensive and price sensitive sector, posting in this sector is seen as a cost cutting strategy.[728] And as was noted above, there are wage differences between posted TCNs and other mobile workers or posted EU workers, which indicates that posting TCNs in the construction sector is often cheaper than employing other EU mobile workers. These factors enable the conclusion that the posting of TCNs in the construction sector is not expected to diminish in the foreseeable future. Therefore, it is very important that several solutions are analysed and further actions are taken to ensure a better protection of working conditions for TCNs and the curtailment of infringements.

6.5.5. Conclusions and recommendations

As there are different problems concerning posted TCNs in the construction sector, as discussed in this case study, multiple solutions are also necessary.

First, to counter the problem of the vulnerable position of posted TCNs, these workers should be **better informed about their labour rights**.[729,730] Often, language barriers and cultural differences are key obstacles in this regard to build trust and communicate with posted TCNs in both the sending and receiving Member State.[731] For example, in the Belgian strategic plan 2022-2025 of the Social Information and Investigation Service (SIRS/SIOD) it is noted that TCNs are an important risk group, and they should therefore be properly informed about their rights and obligations.[732] A good example is the website

[723] D. Lens et al., 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants?'.
[724] M. Vah Jevšnik et al., Posted workers from Slovenia. Facts and Figures'.
[725] D. Lens et al., 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants?'.
[726] See the recent report on labour shortages and surpluses (McGrath, 2021). A total of 28 occupations, employing 14% in the EU workforce in 2020, were classified as shortages – and 19 occupations were classified as shortages of high magnitude. The list of shortages is dominated by just four groups of occupations; healthcare related occupations; software professionals; construction, and engineering craft workers. These four occupation groups account for 21 of the 28 identified shortage occupations and for 64% of the total employment in the 28 occupations.
[727] The Belgian construction sector, which is said to be mainly cost-driven, is also facing labour shortages. Roughly 20 000 additional construction workers are needed. About seven out of ten of the (large) Belgian construction companies have one or more vacancies.
[728] D. Lens, I. Marx, and N. Mussche, 'Posted work: what is it economic importance in Belgium?', 2022.
[729] S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector'; S. Danaj & L. Geyer, 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria'.
[730] See also Q. Ndomo, and N. Lillie, '(In)Secure Mobility: Posted workers' acquiescence, social insurance, and economic rationality, Secure Mobility: Uncovering Gaps in the Social Protection of Posted Workers (SMUG), p.18: "In some focus group discussions by stakeholders and experts, they noted that often, not enough information is made available to posted workers. In other cases, it was felt that there is plenty of information in various languages and presented through multiple media, such as websites, brochures, workplace information sessions, and even personal contacts with union representatives. However, posted workers rarely availed themselves of this information."
[731] K. Kall, A. Brzozowska, N. Lillie, K. Matuszczyk, and J. Salamońska, 'Regional Study From Ukraine to Finland and Estonia via Poland: Migration and posting of third country nationals', University of Jyväskylä and University of Warsaw, 2020.
[732] Legal desk research conducted in Belgium, 2022.

designed by the European Federation of Building and Woodworkers[733] which provides concise information on wages, working conditions and rights of construction workers for all the European Member States in all the European languages.[734] Informing these workers can be the responsibility of both the employers, the trade unions[735], as well as the sending and receiving Member State. Coordination between these different actors is important and necessary, to ensure as many workers as possible are reached and that the content of the information provided is as accessible as possible.

The literature notes that one of the issues is the "workers' passivity, which means that "the workers' role in terms of monitoring and enforcing their own employment conditions was fairly passive."[736] Measures could be put in place to **turn** such **passive attitudes into a more critical attitude** regarding the wages and working conditions to which the posted TCN is entitled. "Segregation and exploitation are not inevitable consequences of posted working" and workers' individual decisions and personal circumstances of migration can help curtail abusive practices.[737] As discussed above however, the vulnerable posted TCN status, often prevents complaints, as workers are economically dependent on their employer and fear losing their income as well as their status in the country if they lose their jobs.[738]

To improve the position of posted TCNs in the construction sector, it is not only a matter of focusing on the posted TCNs, as the construction sector itself must deal with several issues. It is characteristic of this sector to have **many levels of subcontracting** due to the fragmented nature of the work, more so than in other industrial sectors.[739] As a result, there is a major **lack of transparency and accountability**,[740] which makes enforcement even harder. Therefore, **enforcement of the posting rules**[741] in this sector in general and specifically concerning TCNs is critical.[742] Moreover, there is a need to **improve transnational cooperation** among enforcement bodies.[743]

There is also **a need to clarify the conditions under which TCNs belonging to the labour market of a Member State can be legally posted to another Member State**, as Member States have developed varying practices (see for example Germany). It can be examined whether it is expedient to transpose the **conditions under which TCNs can be posted within the EU** into European legislation, for example in a Directive.[744,745] This would not be something new, as such proposal was already prepared once in 1999 by the Commission.[746] Such a Directive could also provide for specific control mechanisms and sanctions and include guarantees for the safeguarding of the rights of these workers.

[733] See : https://www.constructionworkers.eu/en/al
[734] Legal desk research conducted in Italy, 2022.
[735] However, "the hyper-mobility of both workers and firms, as well as the sheer size of the construction labour force at particular sites, makes it impossible for local unions to maintain labour standards for all workers employed there. At best, they can manage to improve conditions for a limited set of workers, through active and well-resourced efforts" (L. Berntsen, and N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 2016, 37(1), p.184.
[736] *Ibid,* p.185.
[737] J. Davies, 'Labour Exploitation and Posted Workers in the European Construction Industry', In European White-Collar Crime, Bristol University Press, 2020, p. 168.
[738] S. Danaj and L. Geyer, 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria', p.6.
[739] Legal desk research conducted in Denmark for this study, 2022.
[740] European Federation of Building and Woodworkers and European Construction Industry Federation 2020, Tackling Undeclared Work in the Construction Industry Toolkit with Concrete Cases from Belgium, France, Bulgaria, Italy, Spain, Romania and Austria.
[741] However, Danaj (2021) defines 'human resources challenges' (insufficient personnel, TCN language barriers) and 'cross-border collaboration challenges' two of the biggest challenges in enforcing rules.
[742] S.C. Krilić et al., 'Posting of Third Country Nationals. Mapping the trend in the construction sector'.
[743] S. Danaj & L. Geyer, 'Here, not to stay – The posting of third-country nationals between Bosnia and Herzegovina, Slovenia, and Austria'.
[744] Suggested during expert interviews conducted for this study in 2022.
[745] See also S. Danaj, 'The posting of third country nationals via EU Member States', last slide: "The solution could be to find a way to re-regulate or restrict TCN posting."
[746] European Commission (1999), Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services (1999/C 67/09). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999PC0003(01)&qid=1675861207418&from=EN

Finally, **an evaluation of the flexible bilateral agreements in some Member States** (e.g., in Slovenia and Poland) seems particularly relevant, as this phenomenon is highly concentrated in a number of sending Member States. For instance, additional conditions could be added to ensure that TCNs are first integrated in the labour market of the Member State concerned (and thus meet the needs of the labour market) before they can be posted to another Member State.

6.6. Case Study 6: Key types of OSH-related violations and enforcement challenges in temporary cross-border work

6.6.1. Overview

The research conducted for this study has repeatedly identified OSH-related violations, both at the place of work and at the location of residence, for workers in posted and non-posted situations, across countries and sectors. This case study provides further analysis about the key types of OSH-related violations revealed by our sectoral and country-level research, focusing on TCNs as well as potentially other workers in the scope of the study.

Dealing with OSH-related challenges involves a range of key stakeholders, such as EU policymakers, national governments, enforcement authorities and social partners. This case study examines the situation in individual EU Member States and sectors, based on available data.

6.6.2. Analysis of the key challenges

The health and safety of those engaged in temporary cross-border work is a policy concern at EU and national level, and something that is linked to the monitoring and enforcement of regulations and legislation governing the working conditions of these workers in many sectors across the EU.

Key issues of concern, which this case study attempts to address, include:

- posted workers often carry out tasks which are of higher risk than non-posted workers;
- subcontracting and self-employment among posted workers can diffuse responsibility for OSH; and
- communication can be difficult, due to language barriers and cultural misunderstandings;
- there are a range of OSH issues related to the accommodation of posted workers;
- psychosocial risks can be higher for posted workers, and this can be linked to accommodation and the intrinsic nature of postings. However, enforcement authorities often do not address this issue. Overall, it should be noted that the focus when talking about OSH risks for posted workers tends to be on physical risks rather than psychosocial risks, although it is clear that psychosocial risks are present; and
- posted workers may not always be given the best and most up-to-date equipment;

From the literature, there is limited evidence that relates specifically to the OSH challenges as relevant to posted and cross-border workers. Danaj and Zólyomi (2018) in their review of the literature as part of the POOSH project note, for example, that “although there is an extended literature on OSH and a growing one on posting, both strands hardly intersect”[747]. However, this study goes on to give an overview of the specific vulnerabilities of cross-

[747] S. Danaj. and E. Zólyomi ‘Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors’, Vienna: European Centre for Social Welfare Policy and Research, 2018, p.21.

border workers in terms of OSH. It notes that there is a negative correlation between precarity and migration and OSH vulnerabilities, citing studies[748] that show that there is a higher incident of workplace accidents, including fatalities among migrant workers, compared with host country workers.

The types of jobs in which cross-border workers are engaged also plays a role, with migrant workers tending to work more frequently in physically demanding and hazardous jobs, which are also more likely to be associated with poor working conditions. These workers are also more likely to experience discrimination, bullying, social exclusion and have limited access to services such as social security and sick pay. Below, some of the key problematic situations that create OSH challenges for posted workers and other types of cross-border workers are explored.

6.6.2.1. Subcontracting

The practice of subcontracting poses a number of indirect OSH risks, as highlighted by the literature in this area. For example, one study notes that the growing number of posted workers, workers recruited through temporary work agencies oo other intermediaries, and bogus self-employed persons in subcontracting chains can cause a number of problems, one of which concerns OSH. In particular, this study notes that reduced attention to OSH could be a result of fierce intra-firm competition between lower-level contractors for contracts in the construction sector, which in turn puts pressure on working conditions standards[749] and means that subcontracted workers can be less well-informed about significant and relevant OSH policies and procedures[750].

Other studies point to the risk that subcontracted workers could be more vulnerable to OSH risks due to longer hours, intensity of work, economic stress, and their concentration in higher-risk segments of supply chains[751]. The literature also notes that long and complex subcontracting chains can harbour practices such as undeclared work and labour exploitation[752]. For example, labour exploitation can take the form of non-payment of wages, the deduction of fees from salaries, excessive or involuntary overtime, little or no social protection, compromised health and safety protection for workers, poor accommodation, and social isolation.

6.6.2.2. Language competence

One central issue that is linked to potential OSH-related challenges is that of the language skills of posted workers. These workers may not possess the necessary language skills of the host country to enable them to understand safety briefings or read OSH-related information about procedures and processes. If they have limited interaction with host country workers, they may also not understand the host country's safety culture. This can then lead to a greater risk of work-related accidents and injuries.

[748] J. Benach, A. Vives, M. Amable, C. Vanroelen, G. Tarafa, C. Muntaner, 'Precarious Employment: Understanding an Emerging Social Determinant of Health', Annual Review of Public Health, 2014, 35, pp. 229–253; EU-OSHA, 'Literature Study on Migrant Workers' EU-OSHA - Bilbao, 2007, available at: https://osha.europa.eu/en/publications/literature_reviews/migrant_workers.

[749] L. Berntsen & N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 2014, 37(1), pp. 1714-187, available at: https://doi.org/10.1177/0143831X14537357.

[750] S. Choe, W. Seo, & Y. Kang, 'Inter- and intra-organizational safety management practice differences in the construction industry', Safety Science, 2020, 128, available at: https://doi.org/10.1016/j.ssci.2020.104778.

[751] P. James, D. Walters, H. Sampson, & E. Wadsworth, 'Protecting workers through supply chains: Lessons from two construction case studies'Economic and Industrial Democracy, 2015, 36(4), pp. 727–747, available at: https://doi.org/10.1177/0143831X14532296. or: European Platform tackling undeclared work, 'Tackling undeclared work in supply chains', Learning Resource Paper, 2023, https://www.ela.europa.eu/sites/default/files/2023-03/Tackling-undeclared-work-in-supply-chains.pdf

[752] P. van Nierop, L. Schönenberg, & P. Terziev, 'Counteracting undeclared work and labour exploitation of third-country national workers', European Platform tackling undeclared work, 2021.

There are, however, some initiatives that aim to improve the language skills of posted workers. In the cleaning sector, for example, an interviewee from the European Cleaning and Facilities Services Industry (EFCI) noted that this organisation devotes a significant level of resources to providing posted workers with at least the skills they need in terms of language to protect their health and safety[753]. The box below highlights some good practice examples that aim to overcome language barriers for non-national workers.

Box 23. Good practice examples on overcoming language barriers

Trade unions in Italy attempt to overcome language barriers in the case of non-nationals through the use of union officials of immigrant origin who speak the same languages used by posted workers and who have received specific training relating to the posting of workers. These officials offer assistance and protection to posted workers by providing:

- general information on working conditions in Italy through trade union;
- delegates in the workplace;
- general information on working conditions through leaflets in various languages;
- information on posting regulation through provincial or regional union officers who have specific training on these issues;
- legal assistance in disputes with employers or in the case of labour disputes. In addition, Italian trade unions cooperate with the trade unions of the sending countries in order to collect information on employers and non- payment of social contributions.

Source: Cillo, R., 2021, Bridging the gap between legislation and practice in the posting of workers: Italy Country report, available at: https://www.euro.centre.org/downloads/detail/4004 , p. 23

This website for the construction sector[754] also offers information in 30 different languages regarding: working conditions in the receiving countries.

In Austria, the Posting of workers platform,[755] a website dedicated to providing information for companies and employees concerning posting to Austria, is accessible in several languages. In addition to English, the website is available in the languages of the main source countries including Slovakian, Slovenian, Polish, Hungarian and Czech. The platform offers information covering a wide range of specific topics relevant to posting: labour law, minimum wage, collective agreements, formal requirements, enforcement as well as sections with special rules that apply in posting and hiring workers in the construction and transport sector. Working time, annual leave and occupational health and safety are found under the Labour Law heading. Links to the main institutions and authorities involved in posting can also be found for further information and assistance.

Source: Danaj, S. and Zólyomi, E. (2018). Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors. Vienna: European Centre for Social Welfare Policy and Research, p.44

[753] Interview with an industry representative, conducted in February 2022.
[754] https://www.constructionworkers.eu
[755] http://www.entsendeplattform.at or http://www.postingofworkers.at

6.6.2.3. Housing

A number of other issues can have some impact on the health and safety of posted workers. For example, posted workers are living and working in a location which is not their native country, which can create stress due to isolation and loneliness. Posted workers are therefore exposed to risks that are intrinsic to their posting situation and which for the host country workforce would not usually be considered to be work-related risks in the same way. This means that these types of risks are unlikely to be picked up by labour inspectorates.

Further, **housing itself can be a key consideration in terms of having an indirect impact on OSH**: poor housing can have a negative impact on the physical and mental health of workers. In Belgium, for example, housing was held by one stakeholder interviewee to be a challenge in the case of TCNs coming from Poland, largely Ukrainians[756]. Danaj and Zólyomi (2018)[757] also found that lack of affordable and adequate housing is an issue that can affect the health of posted workers. This in turn could make these workers more susceptible to work-related accidents and injuries.

Housing costs are likely to be high in the host country, and posted workers are likely to lack knowledge about the local housing market. This means that they are more vulnerable to practices such as the deduction of accommodation costs from their salaries, a practice that was highlighted in Belgium and Spain. Accommodation provided by employers can be of poor quality and overcrowded, leading to issues such as lack of sleep, which in turn increases the risk of work-related accidents. This research interviewed workers in the transport sector, some of whom stated that they were obliged to sleep in their vehicles due to employers not covering accommodation costs.[758] This lack of quality sleep could have an impact on the concentration levels of drivers.

6.6.2.4. Out-of-date equipment

There are also issues related to the use of **equipment that is old and contains a low level of technology**. For example, as noted by research carried out for this study, in Denmark, the Danish Working Environment Authority highlights that foreign companies operating in Denmark are more likely than their Danish counterparts to use outdated working methods, in addition to relying more heavily on physical work and a lower level of technological equipment. This in turn creates a greater risk of work-related injuries and accidents.

The Danish Working Environment Authority also highlighted examples of foreign workers in Denmark not being offered facilities such as proper dining areas, toilets and washing facilities, in addition to living in poor conditions. These types of issues are found by the Authority to be particularly prevalent in the construction sector, among airport staff, those involved in the transport of good, cleaning, IT and in catering[759].

6.6.2.5. Sectoral challenges

On a sectoral basis, there are OSH-related challenges in all of the sectors covered by this study. Below, issues that are specific to individual sectors are examined.

[756] Interview with an academic expert, conducted in February 2022.
[757] S. Danaj. and E. Zólyomi 'Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors'.
[758] *Ibid.*
[759] See: https://at.dk/om-os/faelles-myndighedsindsats-mod-social-dumping/arbejdstilsynets-erfaringer/.

Construction is arguably the sector with the most **prominent challenges to the health and safety of posted workers and other cross-border workers**, given the high-risk nature of the work. The desk research carried out for this study found that there were health and safety-related challenges in the construction sector, particularly in countries such as Bulgaria and Czechia. During our research, we also found comparative studies highlighting that some employers of posted workers in the construction sector are found by labour inspections to be particularly prone to labour law and occupational safety and health (OSH) violations[760], compared with other sectors.[761]

Stakeholders interviewed for this study and relevant studies have highlighted many labour rights violations regarding the posting of TCNs in all sectors, but especially in the construction sector, as, they noted that irregular and exploitative employment practices can often be transferred from the country of origin to the sending and receiving EU Member States, as a result of subcontracting chains.[762] For example, "TCN posted workers are exposed to high OSH risks on construction sites and are commonly abandoned to their fate in the case of injury and especially illness".[763] This vulnerability is particularly pronounced in the case of posted TCN workers as they are even more 'cloaked' by the posting employment, characterised by subcontracting, cross-border mobility, and temporary service provision, in comparison with other posted workers.[764]

The POOSH study, examining nine Member States, found that "the temporary, mobile and transnational character of posting affects the health and safety of posted workers in multiple ways".[765] This study examined the tradition that many construction workers live on-site in collective accommodation, finding that posted workers in this sector sometimes face economic vulnerability and an increased dependence on their employer, which may lead them to accept poor working and living conditions.[766] Moreover, cases where injuries to construction workers have been reported have revealed irregularities in posted workers' health insurance and care.

Subcontracting is also a common practice in the construction sector, and this can exacerbate health and safety issues in that employers situated further down the subcontracting chains may not be as engaged in health and safety issues. One of our stakeholder interviewees confirmed that subcontracting was a common practice in the sector, and one that can range from subcontracting to subsidiaries of larger companies, to self-employed individuals[767].

In the live-in care sector, the very nature of the work in this sector renders it **virtually impossible to separate working and recreational time**. This in turn makes it difficult to mitigate the health and safety impacts of practices such as working too many hours per week. There are also physical risks involved in working in a home that may be ill-adapted to the needs of workers, for example beds which are not designed to be raised and lowered, unlike those in a residential care setting or other facility that can support caring for patients with limited mobility. Further, workers in this sector may suffer from a high degree of emotional strain due to isolation and also the nature of the health conditions of those for whom they are caring. There may also sometimes be pressure from the care recipient to extend the scope of work, for example to housekeeping and cooking. All of these factors

[760] In Belgium, the importance of health and safety at work in case of the posting of workers has unfortunately been a focus, due to the fatal accident of five posted construction workers that occurred on 18 June 2021 on a construction site in Antwerp.
[761] S. Danaj, E. Zólyomi, R. Kahlert, N. Prinz, & V. Sandu, 'Bridging the gap between legislation and practice in the posting of workers – POW BRIDGE', 2021, available at: https://www.euro.centre.org/projects/detail/3633.
[762] S. Cukut Krilić,, K. Toplak, and M. Vah Jevšnik, 'Posting of Third Country Nationals: A comparative study', 2020, Ljubljana: ZRC SAZU.
[763] *Ibid*, p. 66.
[764] S. Danaj, L. Geyer, S. Cukut Krilić,, K. Toplak, and M. Vah Jevšnik, 'From Bosnia and Herzegovina to Austria via Slovenia: migration and posting of third country nationals in the EU', 2020.
[765] S. Danaj. and E. Zólyomi 'Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors', p. 6.
[766] *Ibid.*
[767] Interview with an industry representative, conducted in February 2022.

mean that are multiple occupational health and safety risks for workers in the live-in care sector.

It is also important to consider the **effects of the COVID-19 pandemic** on the live-in care sector. Given that this form of care implies limited contacts with multiple different carers, thus contributing to feelings of safety with regard to the likelihood of catching the virus, some Member States saw increases in the number of live-in carers in 2020 and 2021. In Cyprus, for example, an estimated 14,825 carers were employed by households in 2019, compared to 15,947 in 2020 and 18,754 in the second quarter of 2021.[768] Although many of these carers were TCNs, most lived (semi-) permanently in Cyprus.

The **meat processing sector** has received much attention in recent years in terms of the working conditions of its workforce, particularly in Germany. Practices such as subcontracting, the hiring of temporary agency workers, posted workers and (bogus) self-employed workers have contributed to significant challenges in relation to the working conditions employment and housing conditions of a large proportion of meat sector workers. Specific issues relate to low wages, poor accommodation, for which workers are reported to pay excessive rents, falsified timesheets and below-standard health and safety conditions[769]. During the COVID-19 pandemic, there were mass infections in meat processing factories in Europe and beyond. See the box below for details of OSH-related challenges in the meat sector.

Box 24. OSH challenges in the meat sector

Workers in the meat industry were particularly affected by COVID-19 in many European countries, but also in Australia, Brazil and the USA. The reasons for the mass infections at meat processing sites are seen to lie in the working conditions, and a number of elements have been identified as factors that contributed to the spread of the virus. Firstly, there was a general lack of social distancing, as workers often work in close proximity to one another on the processing chain, and companies did not increase the distance between work stations. In addition, foreign workers often live together because housing is directly linked to their work contract and their wages are too low to find accommodation elsewhere.

Other health and safety measures adopted to protect workers during this emergency period were not implemented: for example, protective equipment was not provided. On the production sites, insufficient ventilation also contributed to the spread of the virus. Moreover, certain parts of meat processing plants are inevitably very cold and the virus transmits more easily in colder temperatures. Finally, it is reported that many workers came to work despite being ill with COVID-19 for fear of losing their job or for not being able to manage on sick pay.

Source: EFFAT, 'Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level', 2020, available at: https://effat.org/wp-content/uploads/2020/09/Covid-19-outbreaks-in-slaughterhouses-and-meat-processing-plants-State-of-affairs-and-demands-for-action-at-EU-level-7.09.2020.pdf.

However, Germany has recently enacted new legislation, the Occupational Health and Safety Enforcement Act (Arbeitsschutzkontrollgesetz), which came into force on 1 January 2021 and which is aimed at countering some of the main challenges in this sector. For details of this legislation, which is reported to have done much to change the culture in the German meat processing sector, see the section on regulation below.

[768] Eurofound, 'COVID-19 and older people: Impact on their lives, support and care', 2022, p. 51, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21053en.pdf.

[769] Für faire Arbeitsbedingungen in der Fleischindustrie!; NGG; DGB; 2020, available at: https://www.faire-mobilitaet.de/fleischindustrie/++co++081535ae-d0dd-11ea-a2d9-001a4a160123.

Agriculture is also a sector with high levels of injuries and accidents due to the nature of the work, and in particular work carried out using a variety of machinery. Literature consulted for this study points to specific OSH issues in relation to older workers who have been farming in the same way for decades, using old tools and/or techniques which can result in enhanced risk of accident and injury.

The practice of **self-employment** in agriculture is also reported to have serious implications for OSH. For example, Jakob et al 2021 note that self-employment in this sector, which accounts for nearly 90% of all employment in the sector, leads to serious under-reporting of accidents.[770]

Most seasonal workers are employed on fixed term contracts rather than on a posted basis in the agriculture sector. However, seasonal workers in general may be at greater risk in terms of health and safety as they are potentially more likely to be cross-border workers. In Spain, for example, there are concerns about the lack of protection for seasonal workers in the countryside, and especially female workers in the agricultural sector[771]. In Germany, most seasonal workers are employed on a mini-job basis, which is exempt from social security, although according to an interview carried out with the DGB trade union confederation in Germany for this study, there are practices of misclassification of workers, meaning that these workers are often not covered by health insurance.

In the **hotels, tourism and catering sector**, seasonal work is very common, linked to the seasonal nature of the sector. A report by EU-OSHA[772] confirms that this sector employs a high number of migrant workers, through seasonal or casual work. It noted that the jobs that these workers carry out are in general more precarious than those carried out by host country natives, and that migrants more often work in unhealthy environments, and take on jobs that are more dangerous. Factors that contribute to poor health and safety for these worker in this sector include poor language skills, low levels of education, a lack of knowledge of their employment rights, a lack of knowledge in terms of who to ask in the case of a problem, low levels of pay and difficulties in validating qualifications.

A large proportion of these seasonal workers are reported to be TCNs, who can be placed in a precarious position. In Italy, for example, a seasonal work permit is valid for between 20 days and nine months, depending on the specified duration of employment.[773]

However, if a worker holds a seasonal work permit as a TCN in Italy and loses their job, they lose the right to reside regularly and temporarily, and are obliged to leave the country.[774] This leads to a situation whereby TCNs tend not to report any violation of their working or OSH rights and accept dangerous working conditions for fear of bringing attention to themselves and losing their job.[775]

Working patterns in this sector are also linked to OSH issues, for all workers, including TCNs and seasonal workers. For example, regular non-rotating shift patterns can have a detrimental effect on the physical health of workers in the sector. Further OSH risks include

[770] M.C. Jakob, D. Santa, K.A. Holte, I.J. Sikkeland, B. Hilt and P.Lundqvist, 'Occupational health and safety in agriculture – a brief report on organization, legislation and support in selected European countries', 2021, Lublin : Institute of Agricultural Medicine.

[771] D. Carrascosa Bermejo & O. Contreras Hernández, 'Posted from and to Spain', 2022, available at: https://hiva.kuleuven.be/en/news/docs/posted-workers-from-and-to-spain-facts-and-figures, p. 75.

[772] EU-OSHA, Protecting workers in hotels, restaurants and catering, 2008, Available at: https://osha.europa.eu/en/publications/report-protecting-workers-hotels-restaurants-and-catering

[773] See: https://ec.europa.eu/immigration/italy-seasonal-worker_en.

[774] ETUI, Seminar on 'Challenges associated with short-term labour mobility: third-country nationals, posted workers, seasonal workers, and refugees', 13-14th June 2022.

[775] ILO, 'Towards a fair deal for migrant workers in the global economy', 92nd session, 2004, para. 208, available at: https://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf.

those related to noise, ergonomic factors, temperature, psychosocial stress factors, including lack of autonomy, and long working hours[776].

6.6.3. Role of EU regulation

There is a large body of legislation covering OSH at European level. This comprises principally the OSH Framework Directive 89/391/EEC and specific Directives on workplace requirements (Directive 89/654/EEC), the use of work equipment (Directive 2009/104/EC), health and safety signs at work (Directive 92/58/EEC), minimum standards for personal protective equipment (Directive 89/656/EEC), risks from explosive atmospheres (Directive 99/92/EC), and Directives relating to exposure to chemical agents and chemical safety, physical hazards and biological agents and Directives relating to workload, ergonomic and psychosocial risks.

In addition there are a range of sector-specific and worker-related provisions that have relevance for OSH in the workplace. Danaj and Zólyomi (2018) note that "OSH is considered as one of the most developed and successful policies in the EU throughout the decades, which has seen impressive transformation from the technical standards of the early times prescriptive approach to the more current goal-oriented and social dialogue approaches[777]". However, they also note that more needs to be done in particular in terms of enforcement.

The main challenges from a regulatory point of view appear to be related to how these Directives are enforced in Member States and particularly in relation to posted and cross-border workers. For example, the research has found that there are **challenges around reporting accidents and the harmonisation of this in EU Member States**. The Framework Directive 89/391 provides for the obligation to report work accidents to the authorities, and posting companies do report accidents, but only to the authorities of the country of origin rather than also to those in the host country.

There is also no harmonisation of this aspect in the legislation or administrative practices in Member States. The research carried out for this study found that some Member States require that all companies report accidents in all cases and to all companies, while others require reporting only to companies that are covered by their social security system (Germany, Italy and Spain, among others). Even in countries where a declaration is required of all companies in any state (e.g. France), there is reported to be a general failure to comply with this obligation, as was revealed in a campaign by the Senior Labour Inspectors Committee (SLIC) in 2018.

There are examples of new legislation being enacted in individual Member States in order to counter specific challenges. In Germany, for example, new regulations targeted the specific problems in terms of working conditions of workers in the meat processing sector. The Occupational Health and Safety Enforcement Act (*Arbeitsschutzkontrollgesetz*) can be seen as an important milestone in ending the exploitative practices sometimes associated with contract work and temporary agency work in terms of subcontracting, and in improving working conditions in the longer term. This legislation and its implications for OSH are summarised in Table 3 below. It is reported that this legislation has triggered a structural change in the meat processing industry in Germany.

[776] ILO, Hotels, catering & tourism - Occupational safety and health. Briefing note, September 2011, available at: https://www.ilo.org/global/industries-and-sectors/hotels-catering-tourism/WCMS_162190/lang--en/index.htm.

[777] S. Danaj. and E. Zólyomi 'Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors'.

Table 3. The regulations of the German Occupational Health and Safety Enforcement Act (Arbeitsschutzkontrollgesetz)

Area	Contents	Laws
Employment relationships	• Ban on contracts for work and services (from 1.1.2021). • Ban on temporary agency work (from 1.4.2021) in the areas of slaughtering, cutting and meat processing. For a transitional period of three years, by way of derogation, the following may be permitted by collective agreement under certain conditions in meat processing (but not in slaughtering and cutting): • Maximum of 8% temporary agency workers; • Maximum temporary employment period of the individual temporary worker for 4 months. • Same pay and working conditions as for permanent employees from the first day of work apply.	Law for the Protection of Workers' Rights in the Meat Industry (Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft, GSA-Fleisch)
Working time	• Obligation to record working time electronically. • Clarification that set-up time, changing time and washing time are part of working time.	Act to Combat Clandestine Work (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG)
Inspections	• Annual minimum inspection quota of 5 % per federal state for establishments in the meat industry. • Establishment of a federal office for health and safety at the Federal Institute for Occupational Safety and Occupational Medicine (BAuA).	Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSchG)

Source: Erol and Schulten 2021, p. 17[778], [779]

6.6.4. Challenges related to enforcement

Enforcement of existing legislation is a key issue in terms of tackling health and safety-related challenges. There are, however, a number of difficulties linked to enforcement of legislation in relation to posted workers in the individual Member States. As noted elsewhere in this report, a **lack of human resources** was systematically pointed out as a challenge in relation to inspections. In the case of TCNs specifically, and as pointed out elsewhere in this report, the biggest cited challenge was the **lack of a clear procedure for enforcement**.

[778] S. Erol and T. Schulten, Neuordnung der Arbeitsbeziehungen in der Fleischindustrie: Das Ende der „organisierten Verantwortungslosigkeit? - Hans-Böckler-Stiftung, Report No. 61, 2021, available at: https://www.wsi.de/fpdf/HBS-007924/p_wsi_report_61_2021.pdf.
[779] *Ibid.*

Interviewees also cited enforcement as one of the main challenges in terms of protecting the health and safety of posted workers. In Belgium, for example, enforcement tends to be concentrated on the larger workplaces where there are complex issues relating to non-compliance with social security law, labour law, and the residence rights of TCNs.[780] Nevertheless, Danaj, S. and Zólyomi, E. (2018) highlight a good practice example of national multidisciplinary inspection taskforces in Belgium, which comprise a range of actors and which undertake proactive inspections. For details, see the box below.

Box 25. National multidisciplinary inspection taskforces in Belgium

Proactive inspections based on specific campaigns of monitoring are carried out periodically by multidisciplinary taskforces which include the labour inspectorates, the federal and local police, the inspection services of the Regions responsible for the control of work permits, and the financial police. Additionally, based on the characteristics of the specific case, these taskforces might include the transport unit (cellule transport), which monitors and controls the compliance with the regulations applicable to the sector transport, the Covron unit, which monitors and controls the cross-border companies and foreign companies active in Belgium that employ posted workers, the "travail transfrontalier GOTOT" unit, which monitors and controls whether posted workers are employed under the statutory conditions concerning social security.

Based on centralized monitoring, the labour inspectorates can identify the companies to be controlled through the LIMOSA and DIMONA databases. The LIMOSA database allows access to data on mandatory registrations of posted workers (both subordinated and self-employed). The DIMONA database allows access to data related to the mandatory communications of any entry and exit of service of a worker to the National Social Security Office (Office national de sécurité sociale).

If during the controls social inspectors detect situations not complying with the existing regulation, they provide indications to regularize the situation, whether the company is employing Belgian workers or posted workers, they set a time limit within which the offenders must regularize their situation and, if this does not happen, they can issue a report (Pro Justitia) and apply administrative or criminal sanctions. Furthermore, if workers' health and safety are highly at risk, inspectors can order production shutdowns.

Source: Danaj, S. and Zólyomi, E. (2018). Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors. Vienna: European Centre for Social Welfare Policy and Research.

On a sectoral level, stakeholders and experts interviewed for this study reported that in agriculture, for example, inspection is very limited, with few inspection bodies and limited numbers of staff, making it difficult to enforce health and safety legislation adequately[781].

There are particular challenges surrounding so-called **letterbox companies**, as national labour inspectorates have no powers to control enforcement of legislation in other countries. This means that health and safety legislation can more easily be violated for workers involved in these types of business models[782]. Danaj and Zólyomi (2018) found that specifically in Austria, Belgium, Germany, Slovakia and Slovenia letterbox companies were reported to be an issue, as workers whose posting involves these types of virtual companies

[780] Interview with an academic expert, conducted in February 2022.
[781] Interview with an academic expert, conducted in February 2022.
[782] Interview with an expert in posted workers, conducted in February 2022.

will find it harder to make claims in relation to non-payment of ways, social security contributions and other costs[783].

Related to the difficulties surrounding enforcement is the fact that many posted or cross-border workers in a vulnerable situation may be **reluctant to come forward with concerns**. In Denmark, for example, the Danish Working Environment Authority reports that foreign employees and employers interact with the enforcement authorities to a limited extent only. The Danish Working Environment Authority therefore focuses on creating a solid framework for dialogue during inspections[784].

There are also issues around posted workers **not being aware of the structures and mechanisms that are in place** for raising OSH-related complaints and starting grievance procedures, or just not feeling that they can make use of them, due to issues such as a fear of employer reprisals, language barriers or a precarious employment situation.

Linked to this is the fact that posted workers are less likely to belong to a trade union or have access to collective representation than host country workers, due to their employment being temporary in nature and the fact that they may not be as familiar with or trust the social partners and institutions of the host country. This means in turn that they have lower levels of protection from potential exploitation and any OSH-related violations.

6.6.5. Scale of the phenomenon

There is little information available overall on the number of accidents and injuries suffered by posted workers and cross-border workers. This is linked to the diverse and unharmonised reporting arrangement as characterised in the previous section. This is confirmed by various studies, one of which notes that "TCN posted workers are exposed to high OSH risks on construction sites and are commonly abandoned to their fate in the case of injury and especially illness"[785]. Relevant information by sector is set out below.

- **Agriculture:** In terms of working status, the proportion of family workers in this sector is significantly higher than the average for the whole EU workforce, at more than 15% compared to just 1%. Further, levels of self-employment are also significantly higher than the average for the whole EU workforce, at 53.7% compared to 14.1%).[786] Further, the proportion of workers working 49 hours per week (21.7%) or more is three times higher than the proportion in the total EU workforce (7.5%). In terms of non-standard employment, in 2020 having a short-term contract of up to three months was 3.6 times as common in the agriculture workforce (8%) as in total employment in the EU (2.2%).[787] All of these factors increase the OSH risk for workers in this sector in terms of working in relatively insecure employment or, as a self-employed worker, not being subject to monitored OSH procedures. Quantitative analysis of the 2015 European Working Conditions Survey (EWCS)[788] reveals that the dependent self-employed workers and employees with no written contract in agriculture are subject to worse working conditions than the rest of the agricultural workforce. The sector relies to a large extent on EU seasonal, as well as third country, migrant workers, including many

[783] Danaj. and E. Zólyomi 'Occupational Health and Safety of Posted Workers in the EU: A Comparative Report. POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors'.
[784] Source: https://at.dk/om-os/faelles-myndighedsindsats-mod-social-dumping/arbejdstilsynets-erfaringer/.
[785] S. Cukut Krilić at al., 'Posting of Third Country Nationals: A comparative study', 2020, Ljubljana: ZRC SAZU', p. 66.
[786] Eurostat, 'Key figures on the European Food Chain – 2021 Edition', 15/12/2021, available at: https://ec.europa.eu/eurostat/web/products-statistical-books/-/ks-fk-21-001, p.19.
[787] Eurostat, 'Key figures on the European Food Chain – 2021 Edition', 15/12/2021, available at: https://ec.europa.eu/eurostat/web/products-statistical-books/-/ks-fk-21-001, p.19.
[788] Eurofound, '2016: Sixth European Working Conditions Survey – Overview Report', 2016.

who are undocumented.[789] There are no consistent figures in relation to the number of accidents and injuries among posted workers in this sector, although EFFAT notes that the sector is characterised by "an extremely high incidence of accidents and illnesses and low participation in education and training programmes"[790].

- **Construction:** The construction sector is known to be cross-border oriented. In general, it can be said that in this specific sector, intra-EU labour mobility has had a significant importance[791]. Incoming posted workers make up a large part of total workforce in the construction sector in a number of Western European Member States, mainly in Belgium, France, Germany, Austria and Luxembourg, but also to some extent in Denmark and Sweden[792]. In particular, posted workers represent about one-fifth of total employment in the Belgian construction sector, although one-tenth of total employment in FTEs. This shows that the Belgian construction sector has become strongly dependent on posted workers. Bogus self-employment is particularly prevalent in the construction sector.[793] About one-fifth of all undeclared work takes place in the construction sector, and in Austria, Luxembourg, Slovenia, and Cyprus it even concerns more than 30% of all undeclared work[794]. This points to an increased OSH risk in this sector, as posted workers who are working on the basis of the status of bogus self-employment or who are undeclared are less likely to be subject to OSH procedures, checks and processes.

- **Long-term and live-in care**: In 2019, 7.9% of the EU's long-term care (LTC) workforce was made up of foreign nationals, with more TCNs (4.5%) than mobile workers from within the EU (3.4%).[795] The Member States with the highest share of foreign workers in the long-term care sector are Malta (43%), Luxembourg (21%), Ireland (19%) and Austria (14%). In response to the COVID-19 pandemic, and in recognition of the high numbers of cross-border workers active in the sector, the Luxembourgish State offered the possibility of temporary, free accommodation in Luxembourg to frontier workers in the hospital and care sectors who reside in Germany, Belgium or France.[796] Meanwhile Cyprus, Germany, Italy and Norway (all 12%), Sweden (11%) and Belgium (10%) all have above average rates of foreign workers in the sector.[797] In the case of live-in care, as temporary cross-border carers tend to be 'invisible' workers in private households and because there are many different channels of recruitment other than posting, it is extremely difficult to monitor the situation and ensure effective enforcement of provisions.[798] Live-in care is organised under various employment models: in some Member States, including Germany, live-in carers are often employed directly on an informal basis by the care recipient.[799] In other Member States, they are usually self-employed (for example in Austria, where 99% of 24-hour caregivers are self-employed).[800] Reasons behind the dominance of the self-employment model are the lower costs and higher

[789] EFFAT, '2021: Towards inclusion and equal treatment for all mobile and migrant workers. EFFAT Demands for action', Adopted at the EFFAT Executive Committee on 1 June 2021, p.3.
[790] *Ibid*, p.3
[791] E. Sjödin & E. Wadensjö, 'Intra-European Labour Migration for a Resilient EU', 2022, in A. Bakardjieva Engelbrekt, P. Ekman, A. Michalski and L. Oxelheim (eds.), 'Routes to a Resilient European Union', Interdisciplinary European Studies.
[792] See the EU report on prior declaration tools for reference year 2019: "the relative impact of intra-EU posting in the construction sector amounts to 24% in Luxembourg, 16% in Belgium, 7% in Denmark, 5% in Austria, 5% in Sweden, 5% in France."
[793] Eurofound, '2016: Sixth European Working Conditions Survey – Overview Report'.
[794] J. Cremers, C. C. Williams, J. Hawley-Woodall, & N. Nikolova, 'Tackling undeclared work in the construction industry: A learning resource', European Platform Undeclared Work, 2017.
[795] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p.11.
[796] See: https://guichet.public.lu/en/actualites/2020/novembre/20-faq-logement-travailleurs-frontaliers.html.
[797] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p.11.
[798] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', 2021, available at: https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[799] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 86.
[800] M. Leiblfinger & V. Prieler, 'Elf Jahre 24-Stunden-Betreuung in Österreich', Katholische Privat-Universität Linz, 2018, p.13, available at: https://kidoks.bsz-bw.de/frontdoor/deliver/index/docId/1319/file/LiWiRei_9-Leiblfinger-Prieler.pdf.

flexibility for the recipients of care.[801] These types of employment models increase the general OSH risks for posted workers working in this sector.

- **Meat processing**: The available statistical data on the number of posted workers or the share of cross-border workers in other forms of employment does not include a sectoral breakdown with enough detail to provide numbers for these types of workers specifically in the meat processing industry in EU Member States. Based on the results of the literature available and interviews and country case studies conducted in the framework of this project, it can be concluded that in Austria, Spain, Ireland, France, and Italy, the meat sector utilizes subcontracting practices to a substantial degree.[802] This sector has been characterised by poor working conditions, inferior health and safety provision and precarious working. Precarious conditions of workers in the meat processing sector are especially visible in higher-income Member States. One of the reasons behind this is that migrant workers often have difficulties in gaining a foothold in the primary labour market and therefore must resort to other forms of employment.

- **Hotels, tourism and catering**: In 2020, around 13% of the labour force in tourism industries was made up of foreign citizens, with 6% coming from other EU Member States and 7% from non-EU countries.[803] The share of foreign citizens increases for certain sub-sectors; for example, 15% of workers in the accommodation sub-sector were foreign citizens. What is not known is whether these workers reside permanently in the country in which they work, or whether they are temporary cross-border workers. Overall in this sector, working hours are long and typically based on shift work. This means that much of the work deviates from standard working times. Historically, the sector has witnessed high levels of non-compliance with working time regulations, particularly in the field of youth employment.[804] All of these factors increase the OSH risks for the posted workers in this sector.

6.6.6. Impact

There is little information available on the overall trends in terms of the OSH challenges for posted workers. In Germany, however, it is clear that the number of posted workers in the **meat processing sector** has increased rapidly in recent years, and with it, the likelihood of OSH violations (although no such statistics exist). In 2012, approximately 38% of the workers known to be working in meat processing in Germany were posted workers.[805] By 2013, approximately 70% of the workforce in the four largest meat companies were posted workers.[806] Recent legislation has made a significant difference to how the previously problematic meat processing sector was organised and there has been a subsequent improvement in the working conditions and consequently a decrease in OSH risks for workers in this sector.

[801] *Ibid.*
[802] P. Campanella and D. Dazzi (ed.): 'Meat-up Ffire: Fairness, freedom and industrial relations across Europe: up and down the meat value chain'; 2020; pp. 249-257; available at: https://series.francoangeli.it/index.php/oa/catalog/download/496/303/2399-1.
[803] *Ibid.*
[804] Eurofound, 'Working conditions – the dark side of tourism', 2012, available at: https://www.eurofound.europa.eu/publications/article/2012/working-conditions-the-dark-side-of-tourism.
[805] B. Wagner and A. Hassel, 'Posting, subcontracting and low-wage employment in the German meat industry', European Review of Labour and Research, 2016, 22(2), pp.163-178.
[806] V. Bogoeski, 'Chain liability as a mechanism for strengthening the rights of posted workers: the German chain liability model. In 'Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)', VS/2016/0222, , 2017, funded by European Union Programme for Employment and Social Innovation 'EaSI' (2014-2020).

In the **construction sector**, the posting of workers as a specific form of cross-border labour mobility has become an increasingly prominent and competitive form of service provision among EU Member States.[807]

In terms of the policy implications of these impacts, the view from many of the stakeholders interviewed for this study was that tightening the legislative framework around posted workers, including health and safety provisions, is not necessary. Rather, more progress would be made by **more effective enforcement of existing legislation and regulations**. In particular, the Member States should enforce existing EU legislation correctly and encourage employers to abide by this.[808]

Linked to enforcement is the issue of **bogus self-employment**, which stakeholders agreed was a factor that needs to be addressed in a health and safety context, in order to ensure that cross-border workers are adequately protected.

A further view was that there is a need for **more coordination between Member States and more social partner participation at EU-level** through the social dialogue process, which is organised on a sectoral basis.[809]

6.6.7. Conclusions and recommendations

It is clear from the research undertaken for this study that **posted workers and cross-border workers are more exposed to OSH risks than host country workers**. These risks are particularly pronounced in sectors such as construction and to some extent agriculture, due to the nature of the work in these sectors.

One of the main policy issues is around **enforcement of the existing legislation framework**. This is something to which all actors could contribute, including national enforcement authorities, social partners, and regional bodies. However, it is recognised that enforcement is difficult given factors such as a lack of enforcement resources, and that risk factors are often highest among groups of posted workers who are not visible.

Reporting of accidents is also a key issue. As has been seen in this case study, posted workers can be reluctant to come forward to report incidents, for a range of reasons connected with their employment status and position and knowledge of the host country's culture and institutions. Awareness-raising campaigns, potentially organised by the social partners or other trusted bodies, could play a role in increasing reporting rates. Enforcement bodies could also play a role in ensuring that employers report incidents correctly and accurately.

There are also issues around **international harmonisation of accident reporting**. Although EU regulation requires accidents to be reported by companies to the relevant authorities, this is the case only to the authorities of the country of origin rather than also to those in the host country. EU policy could play a role here in encouraging or even obliging accident reporting to the authorities of the host country.

Employment practices that can contribute to precarity among posted workers include subcontracting, particularly where this leads to long subcontracting chains, fixed term contracting, and illegal practices, such as a lack of a written employment contract, bogus self-employment and undeclared work. These can all increase OSH risks and are difficult and complex issues to resolve, as their drivers are multiple and varied. Nevertheless, the experience in Germany, where specific legislation to regulate the meat processing sector

[807] S. Danaj, E. Zólyomi, R. Kahlert, N. Prinz, & V. Sandu, 'Bridging the gap between legislation and practice in the posting of workers – POW BRIDGE', 2021, available at: https://www.euro.centre.org/projects/detail/3633.
[808] Interview with a national minitry, conducted in February 2022.
[809] Interview with an industry representative, conducted in February 2022.

has been enacted, shows that regulation can make a difference in some situations. Overall, however, actions such as targeted inspections and enforcement and coordination of enforcement efforts at national level, could contribute to the reduction of these practices.

Practical issues such as obliging employers to **provide adequate housing and up-to-date equipment** will all help to reduce OSH risks among posted workers. Inspection authorities can play a role in the case of housing, as can the social partners, and in particular trade unions, via targeted campaigns. Issues such as modernising the equipment used by workers are more difficult to address, as this relies on levels of investment on the part of employers. However, governments could exert pressure on employers to modernise and offer schemes to help employers to renew their equipment.

There are already some initiatives in place to address **language competence**, as a lack of this is a recognised risk factor for OSH. Trade unions have been very active in this regard, and should be encouraged to continue their work. Good practices could be widely disseminated to inspire similar actions, such as the setting up of translation websites or targeted help and advice from native speakers of the languages spoken by posted workers.

6.7. Case Study 7: The role of 'letterbox companies' in complex subcontracting chains involving posted and non-posted workers and enforcement challenges

6.7.1. Overview

Subcontracting **occurs especially in price-sensitive and labour-intensive sectors such as construction, the meat industry, and manufacturing**.[810] For instance, in 2017, more than € 330 billion was paid to sub-contractors in the EU who were active in the construction sector, representing about 24% of total turnover of the EU construction sector.[811] This case study mainly focuses on the construction sector, as in this sector the posting of workers and subcontracting frequently go hand in hand.[812]

Subcontracting is not a harmful practice per se. It can be useful when the range of required capabilities for a project is too diverse to be possessed by a single general contractor, which is why subcontracting is often used in the construction sector. A construction project often requires different kinds of highly specialised abilities, skills, and knowledge, causing specialised companies to be subcontracted to perform specialised works.[813] Furthermore, subcontracting is used to resolve labour shortages and to look for increased efficiency and flexibility. As construction work must be largely carried out on-site, companies cannot outsource production to less expensive locations. Therefore, in this sector, competition is based on labour costs and materials.[814] In that regard, **subcontracting in the construction sector has become the strategy to increase profits by lowering costs**.[815] It is seen as a risk management strategy, as it allows the separation between power and profits on the one side and risks and responsibilities on the other.[816] As a result, **long complex subcontracting chains** are set up, often involving subcontracted posting undertakings.

De facto subcontracting frequently leads to irregular practices of not respecting the applicable terms and conditions of employment (including occupational safety and health (OSH) regulations), sometimes even leading to 'labour exploitation' and 'human trafficking'. **Posted workers in subcontracting chains are in a vulnerable situation**. This problem has been addressed by Article 12 of the Enforcement Directive (i.e., Directive 2014/67/EU) by defining rules on '**subcontracting liability**'.[817,818] Article 12 allows Member States to take measures to ensure that in subcontracting chains, the contractor to which the employer is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker to cover at least the unpaid net remuneration corresponding to the minimum rates of pay. Member States are required to introduce such subcontracting liability in the construction sector. They are also allowed to do so in any other sector, and to allow for more tiers than only the direct contractor, and with a broader scope than minimum rates of pay. Finally, Article 12(6)

[810] F. De Wispelaere, L. De Smedt, and J. Pacolet, 'Posted workers in the EU. Facts and figures', Leuven: POSTING.STAT project VS/2020/0499, 2022.
[811] Eurostat [sbs_is_sc_r2]
[812] N. Lillie and I. Wagner, 'Subcontracting, insecurity and posted work: evidence form construction, meat processing and ship building', in J. Drahokoupil (Ed.), The outsourcing challenge Organizing workers across fragmented production networks, 2015, pp. 157-174.
[813] A. Heinen, A. Müller, and B. Kessler, 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework', Directorate General for Internal Policies Policy Department for Citizens' Rights and Constitutional Affairs, 2017.
[814] J. Davies, 'Labour Exploitation and Posted Workers in the European Construction Industry', in N. Lord, E. Inzelt, W. Huisman, and R. Faria (Eds.), European White-Collar Crime Exploring the Nature of European Realities, 2020, pp. 163-174.
[815] Heinen et al., 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework'.
[816] European Trade Union Confederation, 'Securing Worker's Rights in Subcontracting Chains Case studies', 2021.
[817] See also Recital 25 of Directive (EU) 2018/957: "With a view to tackling abuses in subcontracting situations and in order to protect the rights of posted workers, Member States should take appropriate measures, in accordance with Article 12 of Directive 2014/67/EU, to ensure subcontracting liability."
[818] Furthermore, Article 8 of Directive 2009/52/EC of 18 June 2019 (i.e., the Employers Sanctions Directive) is providing sanctions against illegally staying third-country nationals.

stipulates that instead of the liability rules, Member States may take other appropriate enforcement measures which enable effective and proportionate sanctions against the contractor in situations where workers have difficulties in obtaining their rights.

Some companies in these subcontracting chains can then turn out to be **letterbox companies** (LBCs). These companies do not perform any economic activity but are set up to lower labour costs or create fiscal optimisation strategies. Indeed, it was found that the use of LBCs in subcontracting and posting arrangements is common in the construction sector, as well as in other price-sensitive sectors.[819,820] Article 4(2) of the Enforcement Directive provides a non-exhaustive list of elements which Member States may use when making an overall assessment to determine whether an undertaking 'genuinely performs substantial activities' in the Member State of establishment.[821]

Subcontracting chains may become increasingly long and complex with the involvement of LBCs, causing several additional problematic situations. Nevertheless, it is important to keep in mind that one can occur without the other. Moreover, one should be careful to conclude that the absence of LBCs in complex subcontracting chains eliminates the risk of irregularities. After analysing the problem of subcontracting and LBCs, and their joint occurrence in the construction sector, a quantification and impact of these phenomena is attempted. Finally, some solutions are proposed.

6.7.2. Analysis of the problem

As this case study covers LBCs in complex subcontracting chains involving posted workers, there is not one main problem, but a myriad of problems to analyse. Therefore, the issues with the different phenomena (subcontracting and LBCs) are first discussed separately, before bringing them together.

Subcontracting chains can already cause problems in a national context, as they **create a separation between the worker and the end-user**. However, in a transnational context involving posting, this risk is further amplified.[822] In long and complex subcontracting chains, **undeclared work and underpayments** may occur more often,[823] and there is **less attention paid to OSH considerations**.[824] Furthermore, workers (to a large extent third-country nationals, TCNs) at the bottom of subcontracting chains often experience **poorer working conditions**, such as lower wages, higher work intensity, increased job insecurity, and a higher reliance on non-standard employment contracts.[825] It can be concluded that **the further down in the subcontracting chain, the worse the situation becomes**. The risk of 'social dumping' is particularly visible at the lower levels of the subcontracting chain.[826]

[819] K. McGauran, 'The impact of letterbox-type practices on labour rights and public revenue Four case studies on the use of letterbox companies and conduit entities to avoid labour laws, social premiums and corporate taxes', European Trade Union Confederation, 2016.

[820] *Ibid* - To illustrate with an example, a typical scenario is described : "The general contractor subcontracts parts of a contract to other companies, which themselves work with subcontractors or temporary work agencies. The first subcontractor, at the top of the subcontracting pyramid, might recruit workers from abroad, typically from Eastern Europe, and in reality, the workers are employed by the top of the pyramid. To avoid regulatory control, however, this first subcontractor passes on the contract to another subcontractor, and they pass them on to other subcontractors. As a result, there are several levels of subcontractors, who in reality, however, are letterbox companies owned by a proxy, and they are in effect owned by top of the pyramid."

[821] See M. Houwerzijl, F. Henneaux, and E. Traversa, 'A hunters game: How policy can change to spot and sink letterbox-type practices', ETUC project, 2017, p.43: "Currently, Art. 4(2) and Art. 4(3) PWD Enforcement Directive are not formulated strong enough to make companies comply with such preconditions for bona fide posting."

[822] A. Lo Faro, 'Posting from a letterbox: transnational mobility of workers, social dumping and the economic fundamental freedoms' veil, in A-C. Hartzén, A. Iossa, and E. Karagerogiou (Eds.), Law, Solidarity and the Limits of Social Europe, 2022, pp. 22-42.

[823] L. Berntsen, and N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites', Economic and Industrial Democracy, 37(1), 2014, pp.1714-187; S. Choe, W. Seo, and Y. Kang, 'Inter- and intra-organizational safety management practice differences in the construction industry', Safety Science, 2020, 128.

[824] P. van Nierop, L. Schönenberg, and P. Terziev, 'Counteracting undeclared work and labour exploitation of third-country national workers', European Platform tackling undeclared work, 2021.

[825] N. Lillie and I. Wagner, 'Subcontracting, insecurity and posted work: evidence form construction, meat processing and ship building'.

[826] Questionnaire Belgium.

In (long) subcontracting chains, there is a major **lack of transparency and accountability**.[827] Those companies at the top of the chain only have limited control over what happens below in the chain, and they try to push business risks downward in the subcontracting chain.[828] This is **an issue of liability**, which is mentioned in Article 12 of the Enforcement Directive. However, Article 12 is relatively easy to circumvent by establishing an LBC.[829] Additionally, its effectiveness is hampered by an 'escape clause' in Article 12(5) where it states that Member States themselves may 'provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable'. Seeing that any definition of due diligence is lacking in this Article, this results in a wide margin of interpretation and therefore legal uncertainty.[830]

Nevertheless, all the tools seem to be present in the Enforcement Directive to lay down strict rules on subcontracting liability at the national level. Indeed, the possibility is offered by Article 12(4) to define more stringent liability rules under national law with regard to the scope and range of subcontracting liability. However, there are few Member States that take advantage of this freedom provided by the legislator. The report of the Commission on the application and the implementation of the Enforcement Directive stipulates that "most Member States limit the liability to the direct contractor."[831] Moreover, 16 Member States have introduced the option of a due diligence defence. In that respect, **it can be argued that the problem lies in the transposition of Article 12 by Member States (and its enforcement) rather than the content of Article 12 itself**.

Another problematic issue concerning subcontracting chains is enforcement. The lack of transparency and accountability mentioned above **makes enforcement very difficult (mainly because of difficulties in identifying and contacting the liable company and individuals)**. The direct (social) responsibility and liability of the contractor is considerably reduced because of the long subcontracting chain.[832] The longer the chain, the harder it becomes to enforce existing legislation and collective agreements (again, mainly because the liable companies and individuals are difficult to identify and contact). This reality will also affect the **recovery of unpaid wages**.[833]

Regarding LBCs, an important issue is the **lack of an official definition** of the phenomenon. This is the case because an LBC can occur in different forms, depending on its aim and which sector in which it is 'active'.[834] For instance, an LBC used for tax avoidance will look different to one used for circumventing social security law.[835] In this case study, in the context of subcontracting chains in the construction sector, an LBC can be understood as a company formally established in a (low wage) EU Member State (or the Member State with the most favourable legislation) without any substantial activity in this Member State.

Setting up a (virtual) company is very easy in several Member States and may allow companies to take advantage of lower costs in the country of establishment (called

[827] European Federation of Building and Woodworkers and European Construction Industry Federation, 'Tackling Undeclared Work in the Construction Industry Toolkit with Concrete Cases from Belgium, France, Bulgaria, Italy, Spain, Romania and Austria', 2020.
[828] L. Berntsen, and N. Lillie, 'Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites'.
[829] A. Heinen et al., 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework'.
[830] *Ibid*.
[831] Only ten Member States (Austria, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain and Sweden) provide for the possibility to claim unmet payments also from parties that are not in a direct contractual relationship with the posting employer.
[832] M. Houwerzijl and S. Peters, 'Liability in subcontracting processes in the European construction sector', European Foundation for the Improvement of Living and Working Conditions, 2008.
[833] See for instance, Eurodétachement, 'Synthesis 'Transnational workshop: Addressing posting complex cases of fraud. Which practices, which lessons to be learnt?', 12 September 2019, 'Boosting transnational cooperation on posting of workers: "the deployment of virtual offices, a frequent change of ownership, often combined with the impossibility to find a legal representative at the address of registration, hinder the organisation of inspections as written demands return undelivered".
[834] K. McGauran, 'Ending regulatory avoidance through the use of letterbox companies', ETUI Policy Brief, 3, 2020.
[835] S. Morel, C. Mathonet, P. Gounev, F. De Wispelaere, L. De Smedt, and E. Schuster, 'Letterbox companies: overview of the phenomenon and existing measures', Brussels: Publications Office of the European Union, 2021.

'law/regime/forum shopping')[836] without performing any activities there. Setting up an LBC creates a permanent cost-saving business model.[837] While the LBC posts workers abroad, it does not carry out any significant economic activity in its home Member State, and it takes advantage of the lower social security contributions and taxes.[838] Whereas 'legal' law shopping still seems to be interesting because of differences in social security rates and corporate taxes in the EU (and because of the applicable coordinating EU rules), this is not the case for wages and working conditions, especially since the amendment of the PWD. Wherever the company is based, it will have to respect the terms and conditions of employment applicable in the host Member State (including all the elements of remuneration of the host Member State rendered mandatory by law or by collective agreements made universally applicable). Thus, **the establishment of an LBC to exploit wage differentials between the country of establishment and the host country is, by definition, unlawful**.

Given that LBCs are specifically designed to stay hidden, it becomes **difficult to identify them,** especially within a long and complex chain of subcontracting.[839] It makes tracing the persons liable for unpaid wages (and in some cases for 'human trafficking') even more difficult if one is confronted with an LBC. For instance, workers have a contract with an LBC, typically low in the subcontracting chain.[840] When an inspection occurs, the contract is merely shifted towards another link in the chain, and the company under inspection files for bankruptcy. Thus, an **LBC conceals the status of the actual employer.** In the combination of subcontracting chains and LBCs, the actual employer of the posted worker is very difficult to detect.

Intermediaries (without the formal status of 'temporary work agency') represent a specificity. They use posting in cross-border subcontracting chains to make a profit from wages, social security, and tax dumping.[841] For instance, in Germany, temporary work agencies are forbidden to operate in the construction sector. However, employers then turned to intermediaries which only supply labour, recruitment services and payroll management.[842] A 'real' subcontractor then engages labour from this intermediary for flexibility and cost reduction. The question then arises whether these intermediaries (or gang masters/'labour-only subcontractors') can be considered an LBC, for which it should be investigated whether or not they have a substantial activity.

A problematic situation with these intermediaries is that they often vanish without paying workers their wage after months of employment.[843] This common practice is called **"disappearing subcontractors"**. This means that undertakings, often LBCs, are founded in a Member State with the most favourable wages, taxes, and social contributions.[844] This subcontractor then hires workers to post them abroad. After the workers start the project, the subcontractor gets paid, but refuses to pay the workers. When workers start to claim their wages, the subcontractor disappears or goes bankrupt,[845] and cannot be held liable. This shows once again that control and enforcement become increasingly difficult in these complex networks.

In general, it is clear that problematic cases of subcontracting chains and LBCs worsen the situation for the (posted) workers involved, as they facilitate irregular practices whereby paying

[836] J. Cremers, 'EU company law, artificial corporate entities and social policy', Brussels: ETUC, 2020; N. Rennuy, 'Shopping for social security law in the EU', Common Market Law Review, 2021, 58(1).
[837] K. McGauran, 'The impact of letterbox-type practices on labour rights and public revenue Four case studies on the use of letterbox companies and conduit entities to avoid labour laws, social premiums and corporate taxes'.
[838] E. Voss, M. Faioli, J.P. Lhernould, and F. Iudicone, 'Posting of Workers Directive – current situation and challenges', European Parliament, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2016.
[839] L. De Smedt, and F. De Wispelaere, 'Road freight transport in the EU. In search of a balance between the economic and social dimension of the internal market', Leuven: HIVA-KU Leuven, 2020.
[840] K. McGauran, 'The impact of letterbox-type practices on labour rights and public revenue Four case studies on the use of letterbox companies and conduit entities to avoid labour laws, social premiums and corporate taxes'.
[841] European Federation of Building and Woodworkers, 'Who's the boss? Stop exploitation in subcontracting chains', 2022a.
[842] N. Lillie and I. Wagner, 'Subcontracting, insecurity and posted work: evidence form construction, meat processing and ship building'.
[843] European Federation of Building and Woodworkers, 'Who's the boss? Stop exploitation in subcontracting chains', 2022a.
[844] A. Heinen et al., 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework'.
[845] It was remarked at the expert workshop that that letterbox companies use bankruptcy as a 'business model' to escape liability and responsibility.

taxes or social security contributions is avoided. The main issue is the **enormous complexity,** as the large network hinders control and enforcement.

6.7.3. Quantification of the scale of the problem

Quantifying the occurrence of LBCs in subcontracting chains is nearly impossible. Furthermore, in the context of cross-border service provision and posting, there is a **lack of data** as to the extent of subcontracting.[846] Finally, empirical evidence about the size (number of tiers) and profile of these subcontracting chains is missing. Although such data is available in a number of Member States, including Belgium[847] and Italy[848], it has never been systematically analysed.

As there is no universal definition of LBCs, it is once again complicated to quantify them. The main mission in identifying an LBC is determining **whether the company has any substantial activity** in the Member State of establishment. This has been found to be particularly **difficult to establish in practice**.[849] Nevertheless, certain indicators may help in this regard (for instance, Article 4(2) of the Enforcement Directive provides a non-exhaustive lists of elements which Member States may use when making an overall assessment to determine whether an undertaking 'genuinely performs substantial activities' in the Member State of establishment).[850] Moreover, when **multiple companies are located at the same address**, it could indicate that no substantial activities are taking place at this address. In that regard, some remarkable data for construction companies established in Slovenia can be reported: it appears that 60% to even 90% of Slovenian construction companies generate 75% or more of their income from abroad.[851] Moreover, 12 addresses were found in Slovenia where 10 or more construction companies were located, with one address even housing 37 construction companies.

In addition, **real-life cases can also provide an insight into complex subcontracting chains in the construction sector**, with or without the involvement of LBCs, where serious violations were identified (sometimes even human trafficking).[852] A recent example (from July 2022), concerns a case at the Borealis site in the port of Antwerp, Belgium. Belgian inspection services discovered a possible case of human trafficking at the construction site, involving at least 170 Turkish, Bengali, Ukrainian, and Filipino workers.[853] These workers were housed in terrible conditions, were paid very low wages (some as low as € 2 per hour), were not covered by social protection, and had expired Hungarian work permits.[854] Almost all the problems discussed above were encountered in this case, which concerns an entire network of subcontractors. Currently, the Belgian competent institutions are trying to gain insight into the companies and individuals who are behind the entire structure.[855]

[846] E. Voss et al., 'Posting of Workers Directive – current situation and challenges'.
[847] E.g., data from the 'Declaration of works' and 'presence registration (checkinatwork)': https://employment.belgium.be/en/themes/international/posting/concept-and-formalities/formalities/specific-formalities-case
[848] See below.
[849] Questionnaire France.
[850] Notably, a) the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional license or is registered with the chambers of commerce or professional bodies; b) the place where posted workers are recruited and from which they are posted; c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other; d) the place where the undertaking performs its substantial business activity and where it employs administrative staff; e) the number of contracts performed and/or the size of the turnover realized in the Member State of establishment, taking into account the specific situation of, inter alia, arriestablished undertakings and SMEs.
[851] F. De Wispelaere et al., 'Posted workers in the EU. Facts and figures.
[852] For such an overview, see for instance, Eurodétachement, 'Synthesis 'Transnational workshop: Addressing posting complex cases of fraud. Which practices, which lessons to be learnt?'; M. Houwerzijl, et al. 'A hunters game: How policy can change to spot and sink letterbox-type practices'.
[853] De Kamer, 'Gemeenschappelijke vergadering van de commissie voor justitie en van de commissie voor sociale zaken, werk en pensioenen', 30 August 2022.
[854] European Federation of Building and Woodworkers, 'Another case of severe exploitation of migrant construction workers: is the EU becoming the new Qatar?', 2022b.
[855] De Kamer, 'Gemeenschappelijke vergadering van de commissie voor justitie en van de commissie voor sociale zaken, werk en pensioenen'.

6.7.4. Impact of the problem

The impact of LBCs in subcontracting chains is felt by different actors, as explained above. It concerns individuals having to work in poor conditions, but also governments losing out on taxes or social security contributions. When such an illegal construction is detected, the (letterbox) company in the chain generally immediately ceases its activities to avoid prosecution. The workers concerned are sometimes seen again a few months later, working for another subcontractor.[856]

As this system is so embedded in the construction sector, it is not expected to decrease in the near future. The European construction sector is even expected to grow further, as will the problems that come with it, which calls for a serious reflection on how to counter these issues.[857] Furthermore, as both subcontracting chains and LBCs are ways to cut costs, companies will not automatically stop making use of these structures. Therefore, in the next section, some possible solutions are proposed to tackle LBCs in subcontracting chains, and all the issues that accompany this structure.

6.7.5. Conclusions and recommendations

A recent publication by Cremers and Houwerzijl proposes several actions for tackling abusive subcontracting: measures for enhanced liability (e.g. mandatory joint and several full chain liability), practices for ensuring decent work, standards for increased transparency (e.g. a limitation of the number of subcontracting levels), and tools for effective enforcement and access to justice (e.g. dissuasive and effective sanctions).[858] However, many of these measures depend on (political) willingness and administrative capabilities.[859]

Rules on **joint and several liability** may have three important objectives.[860] First, there is a **preventive effect**. It forces the client and contractor(s) to properly select their subcontractors and to verify that they comply with their obligations. Second, the **deterrent effect** makes sure that those who profit from activities performed by workers involved in the subcontracting chain without respecting labour regulations are punished. Third, this type of liability ensures there is a **guaranteeing effect**. Workers can address the client and the contractor(s) when their employer does not fulfil their obligations. For instance, as mentioned before, when subcontractors suddenly 'disappear' because of bankruptcy or company closure, workers are still able to address other links in the chain because of this full chain liability. In addition, the rules on joint and several liability should generally avoid escape clauses in order to be truly effective.

At EU level, the **Employers Sanctions Directive 2009/52/EC** provides – at least in theory – the most far-reaching subcontracting liability measures.[861] Furthermore, subcontracting liability is mentioned in Article 12 of the Enforcement Directive. The **ambition could be to define specific rules on full joint and several liability**.[862] However, there are doubts as to the political feasibility of this suggestion.[863] Moreover, Member States still have the possibility to

[856] Questionnaire Belgium.
[857] J. Davies, 'Labour Exploitation and Posted Workers in the European Construction Industry'.
[858] J. Cremers and M. Houwerzijl, '*Subcontracting and social liability*', Tilburg University, ETUC project, 2021, p.5.
[859] See A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', Journal of Ethnic and Migration Studies, 2022: "the demand for cheap labour by economies and societies of destination has an impact on the willingness to see rights guaranteed" … "Control authorities may receive signals from superiors to turn a blind eye on several spots, or staff may not be topped up – which links over to capabilities of enforcement actors."
[860] Heinen et al., 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework'; European Trade Union Confederation, 'Securing Worker's Rights in Subcontracting Chains Case studies'.
[861] Article 8(2) of the Employers Sanctions Directive establishes a full chain liability. However, according to Heinen (2017) liability is seriously diminished and watered down by several 'loopholes' (e.g., Article 8(3) establishes an escape clause).
[862] See for instance the campaign of EFBWW (European Federation of Building and Woodworkers, 2022a, 2022b).
[863] See Heinen et al., 'Liability in Subcontracting Chains: National Rules and the Need for a European Framework', p.51: "However, it must be taken into consideration that the concept of liability in subcontracting chains is a highly controversial matter within the Union. The concept of more stringent liability up to a full chain liability, which was demanded by some trade unions, has

define more stringent liability rules (Article 12(4) of the Enforcement Directive).[864] A good practice regarding subcontracting liability is seen in Germany, where a posted worker may take the claim directly to the top of the subcontracting chain, without the need to go through each tier of the chain. Another example is identified in the construction sector in Italy, where the collective agreement states that before the start of work, companies must communicate to the territorial building authorities the complete list of companies involved in contracts and subcontracts, including foreign companies sending workers abroad.[865] Consequently, officials of the building authorities can check whether the companies are registered and have paid their contributions. When irregularities are found, the construction agency officials can deny the company the "document of contribution regularity", which is essential to be able to start work, and report the case to the labour inspectorates.

A European legal initiative concerning subcontracting liability concerns **a directive proposed by the European Commission, laying down rules on corporate due diligence obligations** (including on climate change), directors' duties, civil liability and protection of persons reporting breaches.[866] It is intended to promote human rights in global supply chains and decent work worldwide. The rules would apply to larger companies, with an important element being how these companies should integrate due diligence into their policies, as well as monitor its effectiveness.[867]

In addition to liability, **limiting the number of links in the subcontracting chain** is another often heard proposal. Trade unions in the construction sector call for limiting subcontracting chains both vertically and horizontally.[868] However, the question remains whether this is achievable in a sector such as the construction sector, being highly fragmented with small companies. Furthermore, the question arises to what extent the **State** itself can/should set an example by imposing **'social clauses' in public procurement**[869] or by limiting the number of subcontracting chains.[870]

Creating a **'solidarity fund'** could be another option. In Denmark, for example, there is a 'Labour Market Fund for Posted Workers'.[871] If workers posted to Denmark who are covered by a Danish collective agreement have problems receiving their wage from their employer, the worker can get the missing wage paid from this fund. The fund is financed by contributions from all Danish employers. Posting undertakings also contribute to the fund.

A proposal concerning both subcontracting chains and LBCs is that only companies pursuing a real economic activity in their home Member State, thus suppressing possible LBCs, are allowed to post workers to another Member State.[872] Therefore, legal criteria to define 'substantial activity' must be solid and leave no loopholes, having at their core the working time

proven to be too ambitious as some Member States were reluctant to implement a liability scheme in subcontracting scenarios into their national legal system. Keeping in mind the different interests of the western (receiving) and eastern (sending) member states, this is not surprising. The Enforcement Directive is an act of compromise."

[864] One of the participants at the expert workshop argued that Member States, when defining more stringent rules in subcontracting chains, must apply them to all situations (not just cross-border situations) in a non-discriminatory manner. According to the expert, this may explain their reluctance to introduce new rules.

[865] Questionnaire Italy.

[866] S. Spinaci, 'Corporate sustainability due diligence Could value chains integrate human rights and environmental concerns?' European Parliamentary Research Service, 2022.

[867] See for instance Art. 7: "A company would be required to take the following actions, where relevant: (b) seek contractual assurances from a business partner with which it has a direct business relationship, that it would ensure compliance with the company's code of conduct and, as necessary, prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company's value chain (contractual cascading). The contractual assurances would have to be accompanied by the appropriate measures to verify compliance." (S. Spinaci, 'Corporate sustainability due diligence Could value chains integrate human rights and environmental concerns?' p.7).

[868] European Federation of Building and Woodworkers, 'Who's the boss? Stop exploitation in subcontracting chains', 2022a; European Federation of Building and Woodworkers, 'Another case of severe exploitation of migrant construction workers: is the EU becoming the new Qatar?', 2022b.

[869] See Directive 2014/24/EU on public procurement.

[870] B. Verbrugge & D. Gillis (2021). Public Procurement and Human Rights, HIVA – KU Leuven. See also "Section 5.6 Procurement: A Remedy Against Social Dumping?" In Y. Jorens, Y. (2022), Cross-border EU Employment and its Enforcement: An Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions. Cham: Springer International Publishing.

[871] See: https://workplacedenmark.dk/working-conditions/danish-labour-market-fund/.

[872] European Federation of Building and Woodworkers, 'Who's the boss? Stop exploitation in subcontracting chains', 2022a.

of the employees of a company, the services rendered, and the place of the turnover. This would eradicate the so-called 'labour only subcontractors'.

The fight against LBCs seems to have become a European priority by the European Commission's DG Taxation. At the end of **December 2021, an initiative to fight against the misuse of LBCs** (i.e. shell entities) for improper tax purposes was announced (COM(2021) 565 final).[873] This would require Member States to ensure that undertakings meet several criteria, as specified in Article 6(1). More stringent provisions in the fight against LBCs could also be stipulated in Regulations 987/2009 and 883/2004 on the coordination of social security systems. Finally, having consistent and aligned concepts (e.g. 'genuine establishment', 'substantial activities', 'effective and stable establishment', 'centre of main interest') and using similar indicators for assessment could be beneficial.[874] The fight against fraudulent LBCs should be seen within a broader context of the fight against cross-border social fraud (underpayments of wages and social security contributions, non-respect of working conditions, etc). In that respect, the identification of it can be a tool to identify and tackle such abuses.

A solution that always comes up when discussing infringements in cross-border mobility is more stringent enforcement.[875] This requires more inspections. **As long as the benefits of committing violations outweigh the financial penalties, rogue companies will continue to exist**. Furthermore, a transnational context requires transnational enforcement. In this regard, cooperation between EU Member States is essential (by concerted and joint inspections, and by exchange of information).[876] Where a complex multi-level network in several Member States involving (posted) workers both from within and outside the EU is involved, it is almost impossible for one Member State alone to carry out controls or inspections, without cooperation from other Member States. The support of ELA, but certainly also of Europol, could be particularly helpful in this regard.

Finally, it was noted at the expert workshop that it would be useful to enhance the possibility of trade unions' access to workplaces and **to designate a coordinator who has an overview of all the different entities in the chain**.[877]

[873] See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:565:FIN.
[874] M. Houwerzijl et al. 'A hunters game: How policy can change to spot and sink letterbox-type practices'.
[875] One of the comments at the expert workshop was that enforcement should be linked to more stringent rules and should have a transnational dimension.
[876] J. Cremers and T. Hastings, 'Developing an approach for tackling letterbox companies. A learning resource from the Seminar of the European Platform Tackling Undeclared Work: How to identify and tackle fraudulent letterbox companies', European Commission: Brussels, 2018; European Trade Union Confederation, 'Securing Worker's Rights in Subcontracting Chains Case studies'; Eurodétachement, 'Synthesis 'Transnational workshop: Addressing posting complex cases of fraud. Which practices, which lessons to be learnt?'. For instance, to check the identity and regularity of foreign firms is extremely complicated.
[877] See also Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction site.

6.8. Case Study 8: Key challenges in the live-in care sector

6.8.1. Overview

The aim of this case study is to complement the findings included in the main report, providing additional information concerning the key challenges in the sector. These are especially important to highlight given the particularities associated with live-in care work, especially the isolated nature of the work in private homes, and the tendency for long, atypical working hours.

As a sub-category of long-term care (LTC), live-in care workers are "paid professionals, with or without formal care training, whose work primarily involves LTC provision while living in a private residence with the care receiver."[878] The phenomenon of live-in care work is **particularly common in seven EU Member States**: Austria, Cyprus, Germany, Greece, Italy, Malta and Spain.

Employment models for live-in care vary significantly between these seven countries: in Germany, live-in carers are often employed directly (on an informal basis) by the care recipient,[879] whereas in Austria, 99% of 24-hour caregivers are self-employed.[880] **Another variable is the degree of regulation in the sector**, with Austria, Germany and Italy being three examples of Member States with relatively unregulated regimes. A consequence of this is that very few inspections are made in the private household sphere, and so it is extremely difficult to monitor the situation and ensure effective enforcement of legal provisions, where they exist.[881]

In terms of drivers behind temporary cross-border mobility in the live-in care sector, it is necessary to look at both supply and demand factors. From a supply perspective, one of the key push factors is a **lack of (well-paid) employment opportunities in the country of origin**. The vast majority of live-in carers originate from Central-Eastern European countries, with increasing numbers of workers being third-country nationals (TCNs). However, any estimations as to the number of TCNs working in the sector are likely to be underestimates, with a significant proportion of live-in care work being undeclared. This is particularly true for TCNs, who may find themselves working informally without a contract and suffering from a lack of regular migration.[882] There is a clear gender dimension here, with the overwhelming majority of the live-in care workforce being female (95% of live-in carers in Austria, 91% in Spain, and 87% in Malta).[883]

On the demand side, the **lack of adequate, affordable and easily accessible formal LTC services in many Member States** results in unmet care needs. Relative labour shortages are a significant issue in the sector due to unattractive working conditions, increasing reliance on a migrant labour force. Given the fact that ageing populations are expected to lead to a significant increase in the demand for LTC (with the number of people potentially

[878] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 26.
[879] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 86.
[880] M. Leiblfinger & V. Prieler, 'Elf Jahre 24-Stunden-Betreuung in Österreich', Katholische Privat-Universität Linz, 2018, p.13, available at: https://kidoks.bsz-bw.de/frontdoor/deliver/index/docId/1319/file/LiWiRei_9-Leiblfinger-Prieler.pdf.
[881] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', 2021, https://wien.arbeiterkammer.at/service/studienundzeitschriften/studien/gesundheitundpflege/Transnationale_Betreuungskraefte_20210420.pdf.
[882] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', 2020, p. 9, available at: https://www.eesc.europa.eu/sites/default/files/files/report_on_the_eesc_country_visits_to_uk_germany_italy_poland_0.pdf.
[883] Eurofound, 'Long-term care workforce: employment and working conditions', 2020, p. 10.

in need of LTC in the EU-27 projected to rise from 30.8 million in 2019 to 33.7 million in 2030 and 38.1 million in 2050),[884] many more households are likely to start employing live-in carers when they can afford to do so.[885]

In terms of patterns of work for temporary cross-border workers in the sector, in Austria, around 80% of care workers travel to Austria to work on short-term cyclical rotas, usually ranging from two to four weeks.[886] In Germany, the situation is different in that live-in migrant carers typically commute between Germany and their country of origin for periods of between one and three months.[887]

This case study explores in more detail some of the key challenges within the live-in care sector, as well as the reasons behind why live-in care has developed as a phenomenon in certain EU Member States.

6.8.2. Analysis of the key challenges

Some of the challenges in the sector are explored in this section, namely the precarity of live-in care work, social security considerations and enforcement challenges.

6.8.2.1. Precarity of live-in care work

Precarious employment relationships in the live-in care sector are common, although regulation of the sector and the employment models for live-in care vary significantly between Member States. Generally speaking, the live-in care workforce is characterised by a high degree of feminisation and a large share of third country nationals (TCNs) and EU cross-border mobile workers, who carry out their work in an isolated manner in a private household.[888]

Although the work is **emotionally and physically demanding,** there is a lack of value placed on live-in care work, resulting in low wages and social security contributions.[889] The very nature of live-in care renders it virtually impossible to separate working and recreational time. Additionally, the workplace may be ill-adapted, and live-in care workers often experience a high degree of emotional strain due to isolation, the nature of the patients' health conditions, and the pressure from the care recipient to extend the scope of work, for example, to housekeeping and cooking. For instance, Polish labour inspectorates in contact with Polish live-in care workers in Germany reported issues related to inadequate living conditions, lack of heating, violence and harassment, and lack of payment for hours worked.[890]

The vulnerability of live-in carers is heightened by their **dependency on their direct employer or the intermediary agency**. For example, in a 2020 study for the EESC, it was reported that in Italy, "when workers fall ill, they are often dismissed, and two weeks later lose their health insurance and end up with no wage, no home and no healthcare."[891] TCN

[884] European Commission, 'Long-term care report', 2021, p. 12, available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8396.
[885] Eurofound, 'Forthcoming European Care Strategy must look towards the future', Blog, 05 May 2022, available at: https://www.eurofound.europa.eu/publications/blog/forthcoming-european-care-strategy-must-look-towards-the-future.
[886] M. Leiblfinger et al., 'Confronted with COVID-19: Migrant live-in care during the pandemic', 09 April 2021, available at: https://journals.sagepub.com/doi/full/10.1177/14680181211008340.
[887] V. Horn et al., 'Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making', International Journal of Ageing and Later Life, 2019, 13(2): 83–113, p. 87.
[888] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', 2022, Journal of Ethnic and Migration Studies, p. 13, available at: https://doi.org/10.1080/1369183X.2022.2102971.
[889] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p.9.
[890] *Ibid*, p. 21.
[891] *Ibid*, p. 24.

live-in carers are in an especially vulnerable position in relation to immigration policies, when their work permit depends on a particular employer. This restricts their freedom of movement, disincentivises them from lodging formal complaints, and, in some instances, places them at **risk of deportation** if they interact with labour monitoring and enforcement bodies.[892]

In **Austria,** employment agencies (Vermittlungsagenturen) play a major role in live-in care, especially in the case of self-employed carers. Although legally self-employed persons should agree on working time and remuneration directly with the care recipients, in practice, the **intermediary agencies determine most aspects of the employment relationship**.[893] For this reason, it can be considered that there is a great deal of **bogus self-employment** within the live-in care sector in Austria. These agencies often charge registration and service fees of up to €800, which may be charged in advance or deducted from a care worker's salary in monthly instalments. The working time is generally oriented towards the needs of the care recipients, frequently resulting in 24 hour on-call duty.[894] In general, the contractual arrangements between agencies and caregivers in Austria may include a range of unfavourable conditions for the latter, such as disproportionate high agency fees, clauses that give agencies the power of attorney, confidentiality obligations, competition clauses and the exclusions of liability of agencies, of which the latter two are illegal.[895] Some agencies require the power of attorney to register or deregister the carer's business and to transfer social security contributions collected from the carer to the relevant public institution. Often, this is done in untransparent or incorrect ways, with carers having to pay social security arrears or realising that the agency has kept part of the contributions. The power imbalance between agencies and caregivers combined with the freedom of contract can strongly disadvantage transnational carers, especially if they lack language skills and legal knowledge.[896]

Many of the situations where live-in care is required involve challenging physical and/or mental health conditions, where the patients are often either partially or fully immobile, and thus highly dependent on their carers for any type of movement or activity (during the day or night). Since costs are almost always an issue to the persons that need care as well as their families, and public funding of home care is limited, employing two or more carers to provide support over the 24 hour cycle is almost never a feasible alternative.

Even in countries where live-in care workers are present to a lesser extent, such as the Netherlands, public authorities such as the 'Inspectorate SZW' have decided to pay special attention to the phenomenon of live-in care work, acknowledging that the isolation and dependency experienced by live-in care workers, as well as the risk of them not being able to freely dispose of their time, renders them particularly vulnerable.[897]

6.8.2.2. Social security considerations

Live-in care workers and domestic workers **may be excluded from social security protections** to which other workers are entitled, such as sick leave, pension contributions, unemployment benefits, pay for extra hours or maternity leave.[898] The explicit exclusion or lower protection of these workers from protective legislation has been described by

[892] *Ibid*, p. 28.
[893] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', p. 29.
[894] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', p. 11.
[895] Federal Ministry Republic of Austria: Social Affairs, Heath care and consumer protection, '24-Stunden-Betreuung Verträge mit Vermittlungsagenturen und Personenbetreuer:innen – was Sie wissen sollten', Available at: https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=329.
[896] Durisova S., Die Organisation der Ausbeutung.Soziale und arbeitsrechtliche Benachteiligung der Pflege- und Betreuungskräfte im Rahmen der 24-Stunden-Pflege, unter besonderer Berücksichtigung der Rolle von Vermittlungsagenturen, 2017, p 2, 57, 73-74, availbale at: https://unipub.uni-graz.at/obvugrhs/download/pdf/2287178.
[897] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten, p. 135.
[898] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 8.

literature as 'legislative precariousness'.[899] This exclusion is often justified by the **'specificity' of domestic work**, such as the nature of the activity and the fact that it takes place in a private household. However, this exclusion has recently been challenged by the Court of Justice of the European Union, which considered that the 'special characteristics' of live-in care work are not enough to justify the full exclusion of this category of workers from social security benefits, deeming it indirectly discriminatory on the ground of sex.[900] The Court held that exclusion was disproportionate, as it went beyond what was necessary to combat illegal work and promote employment in the sector.[901]

Domestic workers, including live-in carers, in Spain (where the aforementioned case originated) were traditionally registered under a special social scheme, under which they were not covered in case of sickness and received very low pension contributions. Moreover, only if the number of working hours exceeded 20 per week was the employer required to pay social security contributions. In practice, many contracts for live-in carers included fewer hours than those worked in reality, to avoid social contribution payments. These arrangements (often done with the agreement of the carer) involved the cash in hand payment of additional hours, but also left the workers vulnerable to their employer's one-sided decisions (e.g. not paying the extra hours worked). Arguments against reforming the system included the consideration that unemployment protection would be unfeasible in practical terms due to the impossibility of enforcing labour inspections in private homes, as well as the desire to avoid overregulation, as it could encourage households to choose informal working arrangements over formal ones.[902] **As of 2011,**[903] **domestic workers were granted similar social security benefits to other employees**, except for **unemployment insurance**,[904] which was only guaranteed by a new decree which entered into force in **October 2022**.[905]

In Italy**,** domestic workers whose employers are affiliated with the two employer organisations DOMINA or FIDALDO benefit from the terms and conditions regulated by the **collective bargaining framework** negotiated in 2013.[906] However, the collective agreement does not entitle domestic workers to certain protections such as sick leave, pay for extra hours, and maternity leave is limited to three months as opposed to the usual six months granted to other workers. Additionally, a large number of live-in carers fall outside the framework or are employed in an irregular way.[907]

The situation of live-in caregivers in Austria is different, where those who are classed as 'employees' are covered by generous legal provisions regarding wages and working hours. In practice, however, **99% of live-in care workers are self-employed** and thus neither entitled to continuous payment of wages in the case of illness, nor to paid leave. A caregiver who falls ill is entitled to benefits in kind, but needs to pay 20% of the contribution. In general, caregivers themselves must pay the compulsory contributions for pension, accidents and illness insurance, which tend to be withheld and transferred by the placement agency.

[899] V. Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour', 2012, p. 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115016.
[900] C-389/20, CJ v Tesorería General de la Seguridad Social (TGSS), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0389.
[901] *Ibid*, para. 70.
[902] M. León, 'Migration and Care Work in Spain: The Domestic Sector Revisited', Social Policy and Society', 2010, (9)409-428, p. 415, available at https://www.researchgate.net/publication/232026186_Migration_and_Care_Work_in_Spain_The_Domestic_Sector_Revisited.
[903] Real Decreto 1620/2011, de 14 de noviembre, por el que se regula la relación laboral de carácter especial del servicio del hogar familiar, Official Gazette, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2011-17975.
[904] ILO, 'Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention', 2011 (No. 189), p. 126, available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_802551.pdf.
[905] Real Decreto-ley 16/2022, de 6 de septiembre, para la mejora de las condiciones de trabajo y de Seguridad Social de las personas trabajadoras al servicio del hogar, available at: https://www.boe.es/boe/dias/2022/09/08/pdfs/BOE-A-2022-14680.pdf, https://www.thelocal.es/20220907/spains-domestic-workers-and-carers-to-get-landmark-labour-benefits/.
[906] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten, p. 19.
[907] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 8.

Lastly, self-employed live-in careers are not entitled to unemployment benefits unless in the case of voluntary self-insurance. [908]

6.8.2.3. The isolated situation of live-in caregivers in private households: legal and enforcement challenges

There are various reasons for enforcement issues when it comes to cross-border mobile workers, such as staff shortages, limited resources, language barriers and short-term stays. Furthermore, live-in care work is often unregulated and undeclared, and data collection is challenging in the case of private households acting as employers. Whilst information on undeclared work in the LTC sector is usually provided by control bodies, such as labour inspectorates, when it comes to live-in care, labour inspectors cannot systematically inspect private households. Moreover, the lack of a common occupational definition of a live-in carer is a challenge for data collection at transnational level, heightened by an unclear demarcation between domestic and care work and the informal nature of the sector.[909]

Two factors that are particularly relevant for enforcement issues in the live-in care sector are **1) the demand for live-in care work with low labour costs** and **2) the isolation of foreign workers**.[910] Heindlmaier and Kobler argue that these two factors need to be considered together with the **capabilities** of enforcement actors, such as unions and labour inspectorates, and their **willingness** to enforce social and labour rights.

Firstly, the demand for live-in care work is very high. This was clearly emphasised by the COVID-19 pandemic, which brought to light the demand for and significance of these **'essential workers'**. For example, to prevent the collapse of the care system in Austria, special flights and train rides for live-in care workers from Romania and Bulgaria were provided during the COVID outbreak.[911] Consequently, the **high demand for lower-cost labour in essential sectors can reduce the willingness** of control authorities to carry out inspections and enforce labour and social rights, especially if this would raise financial costs for citizens. When combined with the difficulties enforcement authorities face in identifying private employers of domestic workers, the limited mandate of the authorities when it comes to self-employed workers and the difficulties of conducting inspections in private households, live-in care is not necessarily a sector which is a priority intervention area for enforcement bodies.[912]

Second, the **isolation of mobile workers also hampers the capability of enforcement actors** to conduct inspections, and of labour unions to reach live-in carers. Live-in carers who are mobile workers tend not to have a relationship with the community in which they work, and rarely leave their homes in order to save as much money as possible.[913] In Italy, live-in caregivers are frequently called on to perform additional household services, such as gardening and caring for multiple family members and their basic medical needs. The heavy workload combined with the limited possibility to leave the house adds to the isolation of live-in care workers and their physical and psychological burden.[914] The imbalance of power between carers and their employers is compounded by their vulnerable situation, as many of the carers are EU mobile workers or TCNs who are alone in the host country and with limited (or no) social networks they can rely on. Losing their jobs also means losing their

[908] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', p. 29.
[909] *Ibid*, p. 7.
[910] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', p. 4.
[911] *Ibid*, p. 2.
[912] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', March 2022, p. 2, available at: https://www.ela.europa.eu/sites/default/files/2022-03/UDW_Study_report_on_PHS_2022.pdf.
[913] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', pp. 2-6.
[914] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', p. 129.

homes, which is a key deterrent to lodging claims against violations of working conditions, even more so in cases where they are working informally.

Furthermore, conducting inspections in the case of individually isolated workers is very cost and time intensive for **enforcement bodies**, who tend to focus on sectors where they can observe a large number of workers in a limited time. **Private households** are specially protected from state intervention and control by public authorities.[915] The obligation of the state to ensure the respect for privacy (e.g. Art. 8 of the European Convention on Human Rights), usually requires the consent of the homeowner or a judicial authorisation for labour inspectors to access households[916], leaving indirect or unofficial controls often as the only option.

For example, in Germany, virtually no inspections in private households are carried out, as they are only possible in presence of the explicit consent of the tenant or a judicial warrant whilst in Austria, given that the overwhelming majority of live-in care workers are self-employed, there is thus no statutory control over the working conditions of these individuals.[917]

Similarly, in Poland, labour inspectorates have no authority to inspect private homes and may only summon the employer to the inspectorate's office, in the presence of a complaint from an employee.[918] Ireland has developed a successful model to tackle undeclared work based on specific rules and procedures, including risk assessments and complemented by preventive activities, such as information campaigns and outreach to target communities.

The Irish Labour Inspectorate uses data from different sources, crosschecking also information from tax offices, employment permit applications and social protection data and analysing recruitment websites of employment agencies to identify high-risk employers. Inspections can be announced or unannounced, and require a judicial warrant, which can be approved within one day, if the judge has all the relevant information. Such measures are especially important considering that a complaints based systems seem to be ineffective, due to fear of employer's retaliation or deportation. [919]

Trade unions and other representation bodies have difficulties reaching out to live-in carers, who are rarely members of the competent trade unions in the country where they work. Many live-in care workers may also be reluctant to engage with trade unions and enforcement bodies out of fear of retaliation or even deportation in the case of an insecure residence status. In Italy, TCN live-in carers are more likely to accept precarious working conditions without reporting them, as five years of regular employment are needed to be granted a standard residence permit. Until then, a TCN's work permit is linked to the length of their employment contract, needing to be renewed biannually on the condition that the person requesting the renewal is employed at least for 20 hours per week.[920]

6.8.3. Scale of the phenomenon

As mentioned, the isolated situation of live-in carers in private households makes it very difficult to estimate the number of workers in the sector, especially those employed on a

[915] Eurofound, 'Long-term care workforce: employment and working conditions', p. 62.
[916] European Labour Authority, Tackling undeclared work in the care and personal and household services sector Learning resource paper from the Platform seminar, p 4, available at: https://www.ela.europa.eu/sites/default/files/2022-06/UDW%20in%20PHS_%20Learning%20resource%20paper_0.pdf
[917] A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', p. 13.
[918] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 29.
[919] European Labour Authority, Tackling undeclared work in the care and personal and household services sector Learning resource paper from the Platform seminar, p 12, available at: https://www.ela.europa.eu/sites/default/files/2022-06/UDW%20in%20PHS_%20Learning%20resource%20paper_0.pdf.
[920] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', pp. 20-21.

temporary cross-border basis. In the EU's non-residential long-term care workforce as a whole, numbers increased from 1.6 million in 2014 to 1.9 million in 2019.[921] However, a considerable proportion of live-in care workers may not be included in this statistic, as **undeclared work in the sector is rife**. In Germany, it is thought that there are between 300,000 and 350,000 undeclared live-in carers.[922] Another estimate suggests that 80-90% of caregivers from Eastern Europe in Germany are employed informally.[923] In Spain, meanwhile, an estimated 32% of employment in personal household services was undeclared in 2019, amounting to around 185,000 workers.[924]

In addition to considering the overall scale of live-in care work in the EU, it is interesting to explore **why temporary cross-border workers are employed as live-in carers in a subset of Member States**, and to a very limited or non-existent extent in others.

One of the key factors here is that **demand is highly dependent on an individual country's national care strategy**. In Scandinavian countries, where temporary cross-border workers are not relied upon for the delivery of live-in care, municipalities play a key role in care provision. In Sweden, elderly care is largely funded by municipal taxes and government grants. The municipal cost of elderly care in Sweden in 2020 was SEK 135.3 billion (EUR 12.4 billion).[925] In Denmark too, municipalities maintain responsibilities for long-term care policies, including the level, content and regulation of service delivery, and the organisation of the public provision of services.[926] Moreover, the introduction of a free choice of home-care provider in 2003 compelled municipalities to ensure a choice between at least two providers of LTC.[927] This can assume different modalities, including residential care, community services and home care. Importantly though, **following a needs assessment, eligible care recipients receive permanent home care free of charge**, and "municipalities are also responsible for funding the necessary home adaptation and the extra expenses incurred for medication or nursing supplies."[928] Through this well-developed model, reliance on temporary cross-border workers for the delivery of long-term, live-in care is not necessary.

This can be contrasted to the situation in Member States where temporary cross-border workers make up the majority of live-in carers. In Germany for example, where live-in care is most common in the EU, there is a system whereby **those in need of long-term care at home can benefit from a care allowance** (Pflegegeld) and can be used to finance private services for support in the home.[929] This means that the choice of caregiver is left to the user. However, affordability is an issue: "almost half (49%) of EU households needing long-term formal home-based care do not have it because they cannot pay for it".[930]

Given the unattractive working conditions live-in carers face, characterised by low pay, high work intensity, occupational health and safety risks due to ill-adapted homes, atypical working hours, shift work and difficult social environments, there is a **distinct shortage of caregivers in many Member States**, particularly those with higher average wages. A model whereby temporary cross-border workers (usually from Central and Eastern Europe, or TCNs) provide live-in care services is therefore very attractive for both the care recipient, who can offer a lower wage than to a fellow national, and to the state as a whole, as labour and skills shortages are addressed. It is also somewhat attractive to the caregivers

[921] Eurofound, 'Long-term care workforce: employment and working conditions', p. 8.
[922] V. Horn, & C. Schweppe, 'Gewaltpotentiale und Gewaltschutz in Privathaushalten mit 24-StundenPflegekräften', Zeitschrift für Sozialpädagogik, Vol. 17, No. 4, 2019, pp. 394–413.
[923] European Parliament, EMPL Committee, 'Policies for long-term carers', November 2021, p. 24, available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/695477/IPOL_ATA(2021)695477_EN.pdf.
[924] Eurofound, 'Long-term care workforce: employment and working conditions', p. 25.
[925] See: https://sweden.se/life/society/elderly-care-in-sweden.
[926] WHO, 'Denmark – Country case study on the integrated delivery of long-term care', 2019, p. 3, available at: https://www.euro.who.int/__data/assets/pdf_file/0010/424648/Denmark-country-case-study-on-the-integrated.pdf.
[927] *Ibid*, p. 3.
[928] *Ibid*, p. 31.
[929] L. Maihuber & B. Allinger, 'Transnationale Betreuungs- und Pflegekräfte in euorpäischen Privathaushalten', p. 36.
[930] EIGE, 'Gender Equality Index 2022: The COVID-19 pandemic and care', 24 October 2022, available at: https://eige.europa.eu/publications/gender-equality-index-2022-covid-19-pandemic-and-care.

themselves, who can earn more working in a household in Austria or Germany than in a hospital in their home country.[931]

The consequence of the high demand for live-in care workers from Central and Eastern Europe in other Member States often results in a **trickle-down effect, whereby labour shortages then emerge in the care and health sectors of sending countries**.[932] An example of this is in Poland, by far the main 'sending' Member State of health and LTC posted workers to Germany,[933] where many Ukrainians, usually undeclared, are now providing live-in care services.[934] This situation results in the risk of 'brain drain', or indeed 'care drain', in countries which were traditionally sending countries. The impact of the care drain metaphor will be examined in the section below.

6.8.4. Impact

While it is important to consider temporary cross-border mobility of live-in carers as a by-product of ageing populations and the social and welfare policies of Member States, it is also interesting to consider **the impact that this particular type of cross-border movement has on the carers themselves, and the country from which they originate**. Using the example of Slovak 24-hour live-in carers in Austria, a 2019 study by Bahna and Sekulová found that the **vast majority (94.5% in 2016) of care workers did not have a family member in Slovakia needing care or special assistance similar to the one they provided in Austria**.[935] Indeed, interviews for the study found that the majority of live-in carers had grown children and either entered care work only after their own parents had passed away, or left care work in Austria when their own parents needed assistance back home.[936]

That said, the interviews in the aforementioned study found that a small minority of care workers had young children back home. Surprisingly, even where this was the case, those live-in carers with children back in Slovakia under the age of 15 did not evaluate their job consistently less enthusiastically than those without dependent children.[937] One possible explanation for this is that in Austria, 80% of care workers travel there to work on short-term cyclical rotas, usually ranging from two to four weeks.[938] This pattern of very short-term temporary cross-border mobility was found to suit at least some of the interviewed care workers,[939] meaning that they were less affected by problems experienced by transnational families in other cases. Also**, income appears to be one of the most important determinants of job satisfaction**,[940] suggesting that many temporary cross-border live-in carers are, first and formerly, labour migrants.[941]

When looking at the impact of measures taken to address some of the challenges in the sector, it is interesting to consider examples of legislative measures and landmark decisions, but also advocacy work and projects to raise awareness of and support for live-in care workers.

[931] M. Bahna & M. Sekulová, *Crossborder Care: Lessons from Central Europe*, 2019, Palgrave Macmillan, Cham, available at: https://link.springer.com/book/10.1007/978-3-319-97028-8.
[932] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 29.
[933] De Wispelaere et al., 2022c.
[934] Eurofound, 'Forthcoming European Care Strategy must look towards the future'.
[935] M. Bahna & M. Sekulová, 'Does the Family Suffer?' in *Crossborder Care: Lessons from Central Europe*, 2019, Palgrave Macmillan, Cham, p. 69, available at: https://doi.org/10.1007/978-3-319-97028-8_4.
[936] *Ibid*, p. 69.
[937] *Ibid*, p. 80.
[938] M. Leiblfinger et al., 'Confronted with COVID-19: Migrant live-in care during the pandemic'.
[939] M. Bahna & M. Sekulová, 'Does the Family Suffer?' in *Crossborder Care: Lessons from Central Europe*, pp. 81-82.
[940] E. Barbiano di Belgiojoso & L. Ortensi, 'Satisfied after all? Working trajectories and job satisfaction of foreign-born female domestic and care workers in Italy', Journal of Ethnic and Migration Studies, 24 April 2018, p. 18, available at: https://doi.org/10.1080/1369183X.2018.1465401.
[941] M. Bahna & M. Sekulová, 'Does the Family Suffer?' in *Crossborder Care: Lessons from Central Europe*, p 85.

The recent **Spanish decree guaranteeing the right to unemployment support** for domestic workers and providing that domestic staff can no longer be dismissed without justification[942] is likely to improve the working conditions of 370,000 to 600,000 domestic workers in Spain, including live-in carers, the overwhelming majority of whom are female.[943] It will not, however, have an impact on the estimated 200,000 domestic workers who are working without an employment contract in the informal economy.[944]

Since the introduction of **inspections in private households in Ireland** in 2011, 250 inspections have been carried out, and 229 infringements have been identified in the domestic work sector. The most common type of infringement, around 70% concerned working time. The fact that since 2018 the number dropped due to a priority shift on other sectors and the limited capacity of the inspectorates is an important reminder that adequate attention and funding is necessary for enforcement measures to be effective.[945]

Moreover, the full impact of the aforementioned case (**C-389/20**, CJ v Tesorería General de la Seguridad Social (TGSS)) referred by the Spanish Court to the Court of Justice of the European Union (CJEU) has yet to be seen. The case **already recognises the gendered dimension of domestic work**, ruling that since 95.53% of the total workers enrolled in the Special Social Security Scheme for Domestic Workers in Spain are women, their exclusion from social security places them at a particular disadvantage compared to male workers, and is indirectly discriminatory on the grounds of sex. The ruling has the potential to be a **powerful precedent to further promote domestic workers' (including live-in carers') rights** under labour law and social security systems.[946]

For example, several EU Member States, including Austria, Germany and Italy, have prevented the application of the **Working Time Directive** to domestic workers. Austria has done so, for example, by categorising live-in carers as self-employed, rather than dependent workers. No relevant case from Austria has reached the CJEU until now, although "there are strong indications that this represents bogus self-employment, and such a person would be categorised as a worker under EU law."[947] As in case C-389/20, **EU equality legislation thus has the potential to challenge some of these long-standing exclusions**.

Finally, **bottom-up approaches, awareness raising, and advocacy campaigns** can also have a positive impact for live-in care workers. For example, **CuraFAIR**[948] operates as a central contact and networking point for 24-hour caregivers in Austria. Its advisors support live-in carers with social and legal issues, help them to understand services provided by institutions (e.g. social security agencies, the tax office, trade unions, etc.) and offer help in cases of abuse and violence. In addition, the **Interest Association of 24-hour-caregivers** (Interessensgemeinschaft der 24-h-Betreuer_Innen, (IG 24)) is a self-organised, grassroots organisation of migrant live-in caregivers, working to reveal and end rights violations in 24-hour care work. To date, it has reached over 11,000 care workers and has won the

[942] Real Decreto-ley 16/2022, de 6 de septiembre, para la mejora de las condiciones de trabajo y de Seguridad Social de las personas trabajadoras al servicio del hogar, available at: https://www.boe.es/boe/dias/2022/09/08/pdfs/BOE-A-2022-14680.pdf.

[943] The numbers vary depending on the source and method of calculation. See for example: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_856397/lang--en/index.htm, https://www.thelocal.es/20220907/spains-domestic-workers-and-carers-to-get-landmark-labour-benefits/.

[944] See: https://www.thelocal.es/20220907/spains-domestic-workers-and-carers-to-get-landmark-labour-benefits/.

[945] European Labour Authority, Tackling undeclared work in the care and personal and household services sector Learning resource paper from the Platform seminar, p 12-13, available at: https://www.ela.europa.eu/sites/default/files/2022-06/UDW%20in%20PHS_%20Learning%20resource%20paper_0.pdf.

[946] E. Chieregato, 'The first CJEU decision on domestic workers: the role of EU equality law in challenging unjustified exclusions from labour rights and social protections', 8 March 2022, European Law Blog, available at: https://europeanlawblog.eu/2022/03/08/the-first-cjeu-decision-on-domestic-workers-the-role-of-eu-equality-law-in-challenging-unjustified-exclusions-from-labour-rights-and-social-protections/.

[947] European University Institute, 'Domestic Workers, EU Working Time Law and Implementation Deficits in National Law – Change in Sight?', 2021, p. 15, available at: https://cadmus.eui.eu/bitstream/handle/1814/70620/LAW_%202021_03.pdf?sequence=1&isAllowed=y.

[948] See: https://www.volkshilfe-ooe.at/die-volkshilfe/stuetzpunkte-bereiche/fluechtlings-und-migrantinnenbetreuung/sonderprojekte/anlaufstelle-fuer-24-stunden-betreuerinnen/.

'SozialMarie Prize for Social Innovation' for its lobbying and media work and initiatives to tackle issues in the sector.[949]

6.8.5. Conclusions and recommendations

This study has highlighted a **combination of factors contributing to the challenges that temporary cross-border live-in carers face**. It has been argued that the difficulties enforcement authorities face in identifying private employers of live-in carers, the isolation of these workers, and the protection afforded to the private household from systematic labour inspections **reduces the effectiveness of traditional forms of enforcement**. Collecting evidence on enforcement legislation of EU member states and sharing good practice examples of cases where legislation allows labour inspection in private households, should be supported and encouraged. [950]

Ireland's approach to enforcement in the domestic work sector can serve as a good practice example of how **physical visits of households can be carried out, where useful and appropriate, whilst protecting the inviolability of the home**. National enforcement authorities should be encouraged to apply a holistic approach, acknowledging that compliance and enforcement of domestic workers' rights is broader than access to households. At the same time further regulation is needed to allow for inspections under certain conditions ensuring that the constitutional protection of private homes does not remove employers' obligations to respect the rights of live-in carers.[951] Furthermore, even in the presence of national legislative reforms, the ratification of international labour standards or landmark rulings, a systematic approach linked to the **care strategy of a country** and its immigration and enforcement system is needed to guarantee the rights of these individuals in practice.

As people are living longer, the need for long-term care is increasing, and **adequate funding for national care services** is essential. As discussed, the countries where live-in care work is not prevalent include those that invest heavily in the care system, particularly through funding by municipal taxes and government grants. Where there is a choice between providers of long-term care, and particularly when eligible care recipients receive permanent home care free of charge, reliance on temporary cross-border workers for the delivery of long-term, live-in care is not necessary. The provision of quality, affordable and accessible care services across the European Union is a key focus of the 2022 European Care Strategy.[952]

Given the prevalence of TCN live-in care workers and the need to address exploitation and avoid pushing workers further into irregular and clandestine employment, the **enforcement of employment standards must be separated from immigration enforcement**. In other words, migrant workers need to be able to file a complaint without fearing deportation.[953] Moreover, contact points, support provided to care-workers in their mother tongue and anonymised avenues to inform representation bodies and enforcement authorities of labour law violations should be ensured.

[949] See: https://www.sozialmarie.org/de/projects/8537. See also: European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 29.
[950] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 65 ELA, available at: https://www.ela.europa.eu/sites/default/files/2022-03/Study-report-on-personal-and-household-sector.2021_EN.pdf.
[951] *Ibid*, see also European Labour Authority, Tackling undeclared work in the care and personal and household services sector Learning resource paper from the Platform seminar, p 12 -13, available at: https://www.ela.europa.eu/sites/default/files/2022-06/UDW%20in%20PHS_%20Learning%20resource%20paper_0.pdf
[952] European Commission, 'A European Care Strategy for caregivers and care receivers', 07 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5169.
[953] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', p. 6.

In terms of legislative measures, the **ratification of the ILO's Domestic Workers Convention**[954] should be encouraged and promoted. This is in line with the Council of the European Union's Decision of 2014.[955] The Convention sets labour standards for domestic workers and makes special mention of women and girls, as well as migrants and members of disadvantaged communities as the main demographic in this sector. Currently only eight Member States have ratified it: Belgium, Finland, Germany, Ireland, Italy, Malta, Portugal and Sweden. Following on from ratification, it is **fundamental that the provisions of the Convention are applied**; there have been criticisms that although Italy was one of the first countries to ratify it in 2012, "this has not resulted in appropriate legislation at the state level to adapt to the principles expressed."[956]

It is important to recall that **self-employed persons** and independent contractors are not 'domestic workers' under the ILO's Convention and are largely excluded from the mandate of labour inspectors. Whilst self-employment can serve to reduce undeclared work in the live-in care sector, it can also create other challenges such as precarious working conditions, bogus self-employment and under-declared work.[957] Measures to **encourage formal employment** should be considered to prevent live-in care workers from falling outside the scope of protective legislation and leading them to accept unfavourable conditions due to the unequal bargaining power between them and the employer or employment agencies. Finally, given the gendered nature of the live-in care workforce, **overarching gender equality policies** should form part of the solution challenges in the sector. These policies should include integrated policy approaches to address work-life balance and access to benefits, pay and pensions.[958] The recent decision of the European Court of Justice in Case C-389/20 is an important reminder that EU equality law can be used to challenge unjustified exclusions from labour rights and social protections for live-in carers, serving as a powerful precedent to further promote these individuals' rights.

[954] ILO, C189 - Domestic Workers Convention, 2011 (No. 189), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189.
[955] European Commission, Press release, 'Working conditions: time for Member States to implement the ILO domestic workers convention', 28 January 2014, available at: https://ec.europa.eu/commission/presscorner/detail/es/IP_14_82.
[956] EESC, 'The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on "The rights of live-in care workers"', pp. 24-25.
[957] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 34, 38- 39
[958] European Platform tackling undeclared work, 'Tackling undeclared work in the personal and household services sector', p. 64.

7. Promising practices in addressing key challenges related to the working conditions of temporary cross-border workers

This section discusses examples of good practices that are implemented to address challenges related to working conditions in the Member States, focusing on cooperation between national authorities in enforcing rules and the role that social partners can play for a better protection of posted and other temporary cross-border workers.

7.1. Promising practices involving cooperation between Member States in enforcing rules in situations involving temporary workers in posting and non-posting situations

7.1.1. Introduction

Intra-European labour mobility entails a transnational dimension of enforcement. In that respect, "with the growing numbers of services and workers crossing borders, **administrations have to rely on other Member States' willingness and capacity to engage in enforcement** in order to ensure the application of agreed standards in their territory or for their citizens".[959,960,961] This case study focusses on promising practices of such cooperation between Member States. After discussing different types of cross-border cooperation and their (in)formal implementation, the obstacles to cooperation are discussed, as well as enabling factors for future cooperation between Member States.

Several questions arise in relation to transnational cooperation between Member States.[962] First, there is the question of **which enforcement actors** should be involved. Should the scope be limited to only the competent public administrations and their inspection services (i.e. with the authority to act as 'police patrol') or should other actors such as trade unions (i.e. with the authority to act as a 'fire alarm') also be involved in transnational cooperation?[963] In addition, one might ask what the **content of the transnational cooperation** should be and for which legal matter. Here, the content may vary greatly depending on the specific phase within the 'enforcement chain' (prevention, detection, control, sanctioning and recovery). Finally, there is the question about **how such transnational cooperation should be formalised, as well as at what level** (bilateral, multilateral, or European). For instance, at EU-level, reference can be made to three relevant bodies: the Senior Labour Inspectors Committee (SLIC)[964], the Administrative

[959] M. Hartlapp, 'Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe, West European Politics', 2014, 37:4, p. 807.
[960] About the 'willingness' and the 'capabilities' of enforcement actors in enforcing labour rights see A. Heindlmaier and C. Kobler, 'Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced', Journal of Ethnic and Migration Studies, 2022.
[961] For instance, inspecting workplaces with a high number of posted workers or seasonal workers can be more effective when both receiving and sending state officials are involved.
[962] In a first instance, cooperation at a national level is essential. For instance, think about information exchange between national enforcement actors or joint inspections.
[963] Heindlmaier and Kobler (2022) define two types of enforcement actors: 'police patrol' executed by control authorities and 'fire alarm' set off by interest representation (e.g., trade unions).
[964] In 1982, national labour inspectorates formed this network which was in 1995 turned into a formal advisory committee for the Commission (95/319/EC) (J. Cremers, 'The European labour authority and enhanced enforcement', 2018a; J. Cremers,

Commission on the Coordination of Social Security Systems, and the European Platform tackling undeclared work.[965] The principal role of all three is to promote enhanced cooperation between national competent authorities. The recently established European Labour Authority (ELA)[966] can also be added to this list.

Both the PWD and the Enforcement Directive (Directive 2014/67/EU) highlight the importance of transnational cooperation, as well as provide tools to develop such cooperation.[967] For instance, the importance of transnational cooperation is acknowledged in Recital 28 of Directive (EU) 2018/957:

> "The transnational nature of certain situations of fraud or abuses related to the posting of workers justifies concrete measures aiming to reinforce the transnational dimension of inspections, inquiries and exchanges of information between the competent authorities or bodies of the Member States concerned. To that end, in the framework of administrative cooperation provided for in Directives 96/71/EC and 2014/67/EU, in particular Article 7(4)[968] of Directive 2014/67/EU, the competent authorities or bodies should have the necessary means for alerting on such situations and exchanging information aiming to prevent and combat fraud and abuses."[969]

Different types of cross-border cooperation Cross-border cooperation between Member States in enforcing rules is mostly expressed through the **exchange of information** as well as through **concerted and joint inspections**. This case study therefore elaborates on these two types of cooperation. However, transnational cooperation may also occur in other ways, for instance during the recovery of wages, social security contributions and financial administrative penalties.[970]

7.1.2. Information exchange

Information exchange between Member States can be considered one of the most useful forms of transnational cooperation in enforcing labour rules.[971] For instance, in a

'Towards a European Labour Authority. Mandate, Main Tasks and Open Questions', Friedrich-Ebert-Stiftung, 2018b; M. Hartlapp, 'Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe').

[965] See also Recital 27 of Directive (EU) 2018/957 "In the context of combating fraud related to the posting of workers, the European Platform to enhance cooperation in tackling undeclared work (the 'Platform'), established by Decision (EU) 2016/344 of the European Parliament and the Council, should, in accordance with its mandate, participate in the monitoring and the evaluation of cases of fraud, improve the implementation and efficiency of administrative cooperation between Member States, develop alert mechanisms and bring assistance and support to reinforced administrative cooperation and information exchanges between the competent authorities or bodies."

[966] See Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344. See e.g., Recital 17 of Regulation (EU) 2019/1149: "With a view to ensuring the fair, simple and effective application and enforcement of Union law, the Authority should support cooperation and the timely exchange of information between Member States".

[967] The principle of 'sincere cooperation' is a general principle enshrined in Article 4 (3) TEU that requires from all authorities in the Member States, to take all appropriate measures to ensure the fulfilment of the obligations arising out of Union Law.

[968] "Where there are facts that indicate possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay."

[969] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Recital 28.

[970] See also Recital 40 of Directive 2014/67/EU: "Effective enforcement of the substantive rules governing the posting of workers for the provision of services should be ensured by specific action focusing on the cross-border enforcement of imposed financial administrative penalties and/or fines. And Recital 42 "If it emerges that the service provider is indeed not established in the Member State of establishment or that the address or the company data are false, the competent authorities should not terminate the procedure on formal grounds but should investigate the matter further in order to establish the identity of the natural or legal person responsible for the posting."

[971] In social security legislation (outside the scope of this study) as well, information exchange is explicitly mentioned. Decision No A1 of 12 June 2009 lays down the rules for the application of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004. Three phases are defined in this procedure. First, when there is doubt about the validity of a Portable Document A1, or there is a dispute relating to the (provisional) determination of the applicable law, the inspection services send a reasoned request to the competent institution(s) in the other Member State concerned. They ask them to provide the necessary clarifications concerning its decision and, if necessary, to withdraw the PD A1. Second, if no agreement is reached, the competent authorities of both Member States appoint a central contact person, who is tasked with reaching

transnational workshop organised by EuroDétachement within the frame of the project "boosting transnational cooperation on posting of workers",[972] the following was stated: "The inspection body's investigation usually begins with an analysis of available data. In some cases, **the identification of the undertakings concerned indicates the probability of a complex case**. […] This requires a major investment in time and resources which is difficult to assess beforehand. It involves **a greater need for information exchange on either side of the border**."

The exchange of information between Member States can occur either before, during, or after the period of temporary labour mobility. For example, information exchange between Member States before a posting mainly has a preventive character, notably avoiding the occurrence of infringements. In that respect, information exchange can be useful for each stage of the enforcement chain (prevention, detection, control, sanctioning, and recovery). The direction of information exchange can be from the receiving Member State to the sending Member State, as well as vice versa. Finally, transnational exchange of information can take place between public authorities (including inspection services), but it is possible that exchange of information takes place through trade unions, both between one another or towards the competent public authority (including inspection services). The table below below shows a non-comprehensive overview of the content of information that can be exchanged transnationally.

Table 4. Content of transnational information exchange, breakdown by stage of the enforcement chain (non-exhaustive overview)

Prevention	Information on the terms and conditions of employment of posted workers. E.g., information about the remuneration to which the posted worker is entitled in accordance with the applicable law of the host Member State. This can be useful for the implementation of Article 7(2) of Directive (EU) 2019/1152 on transparent and predictable working conditions.
Detection	E.g., the reporting of facts that indicate possible irregularities.
Control	E.g., information about the posting undertaking (e.g., the place where the undertaking has its registered office and administration), subsidiaries, natural persons; verification of 'genuine activities' of posting undertakings, the verification of the status of TCNs.
Sanctioning	E.g., information about the posting undertaking, subsidiaries and natural persons
Recovery	E.g., information about the posting undertaking, subsidiaries and natural persons

Source: Authors' own elaboration

7.1.3. Concerted and joint inspections

The Regulation establishing a European Labour Authority (ELA) defines the terms 'concerted inspections' and 'joint inspections' (see Article 8.2 of Regulation (EU) 2019/1149). **Concerted inspections** "are inspections carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory and supported, where appropriate, by the staff of the Authority." Consequently, these types of inspections make it possible to investigate cases along the entire supply chain with, for instance, subcontractors located in different Member States. **Joint inspections** "are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States and supported, where appropriate,

an agreement on the matter. Third, if still no agreement is reached after this second phase, the parties concerned may go to the Administrative Commission, with the possibility of a referral to a Conciliation Board if both parties to the dispute and the Administrative Commission agree.

[972] EuroDétachement, 'Boosting transnational cooperation on posting of workers', 2019.

by the staff of the Authority." These inspections mainly occur between national labour inspectorates, but can also involve other enforcement bodies, such as tax authorities, the police, but also social partners. Concerted and joint inspections are probably most needed in sectors with a high number of EU-movers, seasonal workers, or posted workers, such as the transport sector, the construction sector, the meat processing industry, and the agriculture sector.

According to a study from Eurofound,[973] a regulatory framework for joint cross-border labour inspections exists either in the form of statutory provisions or on the grounds of a bi/multi-lateral agreement in 17 EU Member States and the United Kingdom,[974] while in 18 EU Member States[975] and the United Kingdom, there is a practice of joint cross-border labour inspections and evidence gathered in their course.[976] These numbers indicate that **the occurrence of concerted and joint inspections is still not a practice in every Member State**.

Essential elements needed to perform successful cross-border inspections are intercultural awareness, networking and teamwork, as well as knowledge of specific IT systems, languages and legal backgrounds. Undoubtedly, the success of an inspection depends on the skills and resources of the enforcement bodies involved. When performing concerted and joint inspections, it is important to follow certain steps in order to optimise the process. **Before the inspection** takes place, capacity needs to be built, support from decision-makers and practitioners is needed, and labour inspectors must be motivated, making sure that the importance of cross-border operations is understood. Next, the relevant procedures need to be clarified before the inspection, meaning the steps, roles, and procedures. This can be achieved by drawing up a 'roadmap', 'cooperation agreement', or 'common strategy'.

During the inspection, other national authorities, as well as social partners or existing EU agencies such as Europol (the European Union's law enforcement agency), Eurojust (the European Union Agency for Criminal Justice Cooperation) or ELA, can assist. For instance, they can provide economic analysis, legal advice, data and other forms of technical support (e.g. logistical arrangements, translations, IT, software tools, etc.). Finally, when the **inspection is done**, there should be follow-up in the form of information sharing, debriefing and liaison sheets, the preparation of post-inspection reports, logging the inspection data into an online system, or learning from past inspections. This last step is particularly important to follow, as it can lead to achieving two important objectives: increased capacity of inspectors and other relevant authorities to assess and address the risks of new and complex cases of intra-EU posting, and altered behaviour of employers and employees (e.g., increases in formally declared workers in the inspected company or sector). These inspections can empower labour inspectorates and improve the scale of inspections by combining resources, staff, and knowledge. Furthermore, when inspectorates cooperate, it can improve their inception work and risk assessment, as they can consult one another's findings.

[973] C. Welz, I. Biletta and R. Rodriguez Contreras, 'Joint cross-border labour inspections and evidence gathered in their course', Eurofound Working Paper, 2019.
[974] Only a small minority of eight Member States have an explicit legislative basis in place catering for the possibility of joint cross-border inspections of labour inspectorates or similar bodies (AT, BE, DE, IE, LU, PL, PT, and RO). These Member States also have bilateral agreements in place. In 9 Member States and the UK the basis of joint inspections could only be found in bilateral agreements: BG, EE, EL, ES, FR, LT, LV, NL, and SK. The Member States with the most bilateral agreements in place are BG (seven), FR (nine), and SK (five). Nine Member States do not provide any legal basis for joint cross border inspections at all (CY, CZ, DK, FI, HR, HU, IT, MT, and SE).
[975] AT, BE, BG, DK, EE, EL, ES, FI, FR, HR, IE, LT, LU, LV, NL, RO, PT and SE.
[976] C. Welz et al., 'Joint cross-border labour inspections and evidence gathered in their course'.

7.1.4. Tools to facilitate cross-border cooperation: bilateral agreements, Memoranda of understanding, and the Internal Market Information System

It is certainly a reality that transnational cooperation, and in particular transnational exchange of information, can have an informal character (e.g., informal exchange of information between civil servants/labour inspectorates). Although informal cooperation is important and has a role to play, formal cooperation is of great importance as well. Informal cooperation works better if it is supported and underpinned by formal arrangements, as the cooperation becomes less personal and can develop structurally with support by hierarchy. Bilateral agreements and memoranda of understanding are typical examples of formal arrangements. Moreover, beyond these direct arrangement, the IMI is an example of a platform which contributes to a formal exchange of information.

7.1.4.1. Bilateral agreements and Memoranda of understanding

The activities of the national competent authorities relevant for cross-border labour mobility (including their inspection services) end at the border, as their mandate of control and enforcement is limited to the national territory.[977] For instance, the competence to check the reliability of documents and, if necessary, to withdraw these documents, is missing. In that regard, activities beyond national borders need legal backing.[978] One way to 'formalise' information exchange between Member States is to include it in an agreement. This can also happen at sectoral level; for instance the bilateral conventions signed by social partners and intermediary bodies in the construction sector in Italy, Austria, Germany, and France are reported to be effective in avoiding social dumping.[979]

Two tools that can help in this regard are Bilateral Agreements (BA) and Memoranda of Understanding (MoU). Within these agreements, Member States may arrange to exchange information on irregularities discovered, wages, working conditions and labour law infringements, and initiate joint and concerted inspections. An interesting instrument for Member States to help set-up BAs and MoU is a toolkit including a 21-step plan, which can be used by policymakers, public authorities, social partners, external experts, and evaluators.[980] They define BAs and MoU as follows:[981]

- **Bilateral Agreements (BAs)** are concluded between Member States/EEA countries in written form and governed by European and/or international law. BAs are agreements between two Member States/EEA countries which describe in detail the specific responsibilities of, and actions to be taken by, each of the parties, with a view to accomplishing their goals in the area of undeclared work. BAs create legally binding rights and obligations.

- **A Memorandum of Understanding (MoU)** is a less formal instrument than a BA, often setting out operational arrangements under a framework agreement on an international level. MoUs entail general principles of cooperation describing broad concepts of mutual understanding, goals and plans shared by the parties. They are

[977] J. Cremers, 'The European labour authority and enhanced enforcement', 2018a.
[978] SLIC, 'Consensus paper on cross-border enforcement', 2012.
[979] EEPOW, 'EEPOW Peer Review Key massages Bilateral and multilateral cross-border practices: the Italian approach to preventing social dumping and enhancing access to the European labour market', 2019.
[980] R. Stefanov and D. Mineva, 'Practitioner's toolkit: drafting, implementing, reviewing and improving bilateral agreements and memoranda of understanding to tackle undeclared work A practitioner toolkit from the thematic workshop of the European Platform Undeclared Work', European Platform Undeclared Work, 2018.
[981] R. Stefanov and D. Mineva, 'Practitioner's toolkit: drafting, implementing, reviewing and improving bilateral agreements and memoranda of understanding to tackle undeclared work A practitioner toolkit from the thematic workshop of the European Platform Undeclared Work, p.5.

usually non-binding. MoUs can cover agreements between enforcement bodies of different Member States/EEA countries.

An MoU is the best tool to use when parties would like to declare their willingness for cooperation without entering into a legally binding agreement. There is no parliamentary approval needed, and they do not need strict provisions for its enforcement. When legally binding rights and obligations need to be created, the activities are prompted by EC legislation or international law, and there is a necessity to describe in detail the foreseen actions and division of responsibilities, a BA is the best solution.

There is an established tradition of BAs and MoUs, notably in the area of posting, but also on undeclared work. Article 21(2) of the Enforcement Directive[982] recognises the function of such agreements or arrangements in institutional cooperation, and requires Member States to inform the Commission of the bilateral agreements and/or arrangements they apply, making the text publicly available.[983] These agreements may complement the information exchanged by IMI.[984] However, **to our knowledge, neither an overview of all bilateral agreements nor their content is publicly available**.

Information for 2018 shows that **18 out of the 25 Member States responding to a survey reported having BAs or MoUs**, with France (13) and Belgium (10) reporting the most.[985] The most frequent signatories were labour inspectorates or Ministries of labour, with tax administrations being less involved in BAs and MoUs. Furthermore, 96% of BAs/MoUs cover information exchange, 71% cover best practice exchange, 60% cover exchange of experts or training, and 53% joint operations. 85% of the BAs/MoUs reported related to the posting of workers, over two thirds covered labour law, and over half covered social security fraud. Furthermore, almost one third of the BAs/MoUs referred to health and safety regulations. The Impact Assessment of the European Commission on the establishment of ELA[986] presents several examples of bilateral cooperation (e.g., between Belgium and Poland, France and Italy, Finland and Estonia, and Spain and Romania). Finally, on the website of the 'EuroDétachement' project, an overview is provided of the bilateral agreements concluded between Member States.[987]

7.1.4.2. The Internal Market Information System (IMI)

Another tool for administrative cooperation is the **IMI**. Through this system, Member States can transmit and respond to reasoned requests for information from competent authorities. One of the aims of IMI is to support administrative cooperation and mutual assistance between the competent authorities of the Member States concerning the application and enforcement of the PWD.[988] The tool can be used by labour inspectorates to request and exchange information.

In the **third quarter of 2020, 1 414 posting information exchanges were recorded in IMI**. This number has been growing over the years, from 826 posting information exchanges

[982] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').
[983] *Ibid*, Article 21(2).
[984] Recital 49 of Directive 2014/67/EU States that "in order to facilitate better and more uniform application of Directive 96/71/EC, it is appropriate to provide for an electronic information exchange system to facilitate administrative cooperation and competent authorities should use the IMI as much as possible. However, that should not prevent the application of existing and future bilateral agreements or arrangements concerning administrative cooperation and mutual assistance."
[985] C.C. Williams and E. Puts, '2018 European Platform Undeclared Work Survey Report: obstacles to tackling undeclared work at the cross-border and national levels, bilateral and national agreements, and complaint reporting tools', European Platform Undeclared Work, 2018.
[986] European Commission, Impact Assessment on the establishment of ELA, 2018, p.131.
[987] See: http://www.eurodetachement-travail.eu/Default.asp?rub=&lang=_en# (under 'Administrative cooperation' and 'Bilateral agreements').
[988] Art. 21.1 of Directive 2014/67/EU states that "The administrative cooperation and mutual assistance between the competent authorities of the Member States shall be implemented through the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012."

in the third quarter of 2017.[989] In 2020, the majority of these requests (41.5%) were information requests, followed by notifications of a decision (25.7%), and requests to send documents (20.8%). Requests to recover penalties or fines (6.9%), urgent requests (5.1%), and communication of irregularities (0.1%) were less common. **Two Member States stand out in terms of sending requests on posting: Austria**, with 2 349 requests in the first three quarters of 2020, and **Belgium**, with 840 requests. In addition, Germany and Denmark each sent more than 100 requests. On the contrary, Lithuania, Greece, and Slovenia each sent less than ten requests in the first three quarters of 2020. From the receiving side, Slovenia (787), Poland (487), Slovakia (441), and Romania (428) received the highest number of posting information exchanges during the first three quarters of 2020. In contrast, Liechtenstein, Malta, Norway, and Sweden each received fewer than ten requests.

While the IMI system is a valuable system to exchange information, request additional documents, and cooperate on an administrative level, it is important to go further than this. To build stronger cooperation between Member States, **other mechanisms are necessary**, as discussed in the following sections.

7.1.5. Obstacles to cross-border cooperation

For Member States to learn from good practices of cross-border cooperation, it is also essential to talk about possible obstacles. For instance, in a report of 2018 on cross-border cooperation, it was stated that several Member States "already have bilateral cooperation agreements, including the possibility of joint cross-border inspections, but there are still barriers preventing such cooperation from being widespread, limiting its effectiveness. These include **legal barriers, financial constraints, differing organisational mandates and areas of responsibility,[990] language differences and an unwillingness to cooperate**."[991,992] Moreover, "some of the problems are related to the **lack of trust and lack of knowledge of the foreign organisations** they are interacting with"[993].

Another important issue is **data**. There are not only **GDPR[994] and data protection** rules to take into account,[995] but often also legal, procedural, or institutional barriers which arise regarding the exchange of information, both within and outside the Member State.[996,997] For instance, it was found that the use in national courts of evidence gathered during joint cross-border inspections in another Member State is possible in 14 Member States, while 18

[989] See: https://ec.europa.eu/internal_market/imi-net/statistics/2020/10/posting-of-workers/index_en.htm.
[990] For instance, a number of stakeholders highlighted in the Impact Assessment on the establishment of ELA (2018) that issues around cooperation and coordination between Member State authorities are primarily caused by specific and complex national administrative landscapes and the lack of streamlined procedures, often with implications for institutional capacity.
[991] M. Čaněk, K. Kall, N. Lillie, N., Wallace, A., and B. Haidinger, 'Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers', project "Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)" VS/2016/0222, 2018.
[992] See also European Commission, 'Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority', SWD(2018) 68 final, p.15): "While bi-/ or multilateral cooperation agreements have the advantage of being tailored to the specific needs of the involved Member States, they also bear the risks of non-institutionalisation and non-systematic approaches. An assessment of existing agreements in the field of undeclared work pointed to key barriers, such as the lack of cooperation and enforcement mechanisms, the volatility of political investment in cooperation, and technical barriers to the exchange of information (e.g., differing legal competences between the contracting authorities, languages, and data collection methods)."
[993] M. Čaněk, et al., 'Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers', p.4.
[994] General Data Protection Regulation, see: https://gdpr-info.eu/.
[995] Article 6(8) of the Enforcement Directive states that the information shared by and with the competent authorities in the context of Directive 2014/67 "shall be used only in respect of the matter(s) for which it was requested."
[996] R. Stefanov, D. Mineva, and P. Terziev, 'Cross-border concerted and joint inspections in the fight against undeclared work, Learning resource paper from the thematic review workshop on cross-border concerted and joint inspections' Lisbon, Portugal, 28 February–1 March 2019, European Platform Undeclared Work, 2019a.
[997] C.C. Williams and E. Puts, '2018 European Platform Undeclared Work Survey Report: obstacles to tackling undeclared work at the cross-border and national levels, bilateral and national agreements, and complaint reporting tools'.

Member States accept using this evidence in administrative proceedings.[998] Possible solutions regarding data issues are to train and appoint data protection officers in relevant enforcement bodies, to use guidelines (e.g. the European Data Protection Board guidelines), and to use secure IT systems such as IMI for data transfer. A growing interest for the use of databases, e-tools and further ways of data sharing has been observed in Member States.

Another issue is that there is **different national legislation in each Member State,** which can hinder cooperation between them. For instance, considering the possibility for labour inspectors from another Member State to participate in inspections, Polish legislation, just like in most other countries, allows the presence of foreign authorities during inspections, but they do not have the right to issue legal remedies or to apply sanctions.[999] These legislative differences between Member States can of course hamper good cooperation.

An obstacle specific for **concerted and joint inspections** is that they are **often infrequent and ad hoc**. Annually, labour inspectorates only engage in these types of inspections once or twice. This is the case due to limited human and financial resources, inadequate skills and knowledge, and insufficient IT and databases. This shows the need for more information and resource sharing and more strategic cross-border inspections.

A more general issue is that **cooperation between Member States does not always align with the main pattern of cross-border mobility**. Member States mainly cooperate with their respective immediate neighbouring countries. Consequently, collaboration between West-East and North-South is rather weak, despite these being the main axes of labour mobility within the EU. There are some strong clusters of cooperating countries, for instance between the Nordic states and Baltic states (NO and FI with EE, LV and LT), as well as between Belgium, France and the Netherlands. However, no joint and/or concerted inspections takes place between some of the Member States with the largest flows of working-age movers, although ELA is working on this. There are significant gaps in cross-border cooperation between non-bordering Member States.

In the end, none of the obstacles mentioned above matter if no cooperation between Member States takes place. Indeed, the most important difficulty is for cross-border cooperation to occur at all. For instance, the Impact Assessment of the EC on the establishment of ELA[1000] pinpoints **insufficient capacity of national authorities to organise cooperation with authorities across borders** (see the synthesis of the results of the FreSsco study on the capacities of labour inspectorates in cross-border cases)[1001], although this is essential for effective and efficient handling of cross-border issues. Indeed, the majority of the controlling and monitoring actions still happen at national level.[1002] A recommendation could be to look at indicators such as the number of incoming posted workers and their share in total employment for instance to get an idea of how many inspections should be focused on national employment and cross-border employment. For example, in 2020 in Belgium, about 5% of the inspectors within the labour inspectorates focused on the fight against cross-border social fraud, while 4% of the inspections related to this dimension of social fraud. In France, 5% of the interventions in 2020 were aimed at controlling the posting of workers, while only 0.3% of the total inspections in Spain were aimed at controlling compliance with the labour and social security obligations of incoming

[998] C. Welz, I. Biletta and R. Rodriguez Contreras, 'Joint cross-border labour inspections and evidence gathered in their course'.

[999] R. Stefanov, D. Mineva, and P. Terziev, 'Cross-border concerted and joint inspections in the fight against undeclared work, Learning resource paper from the thematic review workshop on cross-border concerted and joint inspections', 2019a.

[1000] European Commission, Impact Assessment on the establishment of ELA, 2018.

[1001] The Impact Assessment of the EC (2018) states that "Information on the administrative capacities and processes of cross-border cooperation is scant. To date, there is no comprehensive report providing an overview of the control activities of national administrations on companies and workers in cross-border situations, on the required administrative effort (e.g., dedicated staff, working days to process a case), the difficulties encountered, and the needed capacities)". Similar conclusions were made in the POSTING.STAT project (De Wispelaere et al., 2022).

[1002] F. De Wispelaere, L. De Smedt, and J. Pacolet, 'Posted workers in the EU. Facts and figures', Leuven: POSTING.STAT project VS/2020/0499, 2022 ; Y. Jorens, F. De Wispelaere, and J. Pacolet, 'Fraud and error in the field of EU social security coordination Reference year 2020, Network Statistics FMSSFE', EC-DG EMPL: Brussels, 2021.

posted workers. Only 0.4% of Polish inspections checked incoming and outgoing posted workers. Only Luxembourg saw a share higher than 16% of the labour inspectors focusing on enforcing posting rules. This lack of cross-border inspectors focussing on enforcing the posting rules can also be attributed to **a general need for more labour inspectors**. Considerations about the extent to which the number of inspectors and inspections should be increased are dependent on existing needs at Member State level (e.g., the scale of temporary cross-border work and problematic situations).

Often, Member States will first focus on their own territory, and only think about cross-border cooperation afterwards (if there are still resources available). Tackling cross-border social fraud is often not high on the radar of national enforcement authorities. This can of course be a rational decision if it is found that the need for action is higher in terms of national fraud and more investment is needed in this area as opposed to focussing on cross-border fraud. However, to enforce posting rules, it is **essential that a cross-border component is included in national strategies**. In this regard, the establishment of ELA is certainly a step in the right direction to highlight the importance of cross-border cooperation.

Finally, it should be kept in mind that formal arrangements are only as good as the underlying political will. Therefore, when setting up formal arrangements, it should not only be about the formality on its own, but **political will and personal relations need to be taken into consideration.**

7.1.6. Future of cross-border cooperation

Seeing that many cross-border cooperation practices appear to be effective and necessary in preventing social dumping and enhancing access to the European labour market, it is imperative to continue this cooperation in the future. The importance of cross-border cooperation should be recognised, and funding[1003] made available to guarantee its sustainability. Direct contacts between Member States can be facilitated thorough multilateral bodies that exist, such as the Senior Labour Inspectors Committee (SLIC), the Administrative Commission on the Coordination of Social Security Systems, and the European Platform tackling undeclared work, and more recently of course, ELA. Although specific funding for specific topics can strengthen cooperation, it is of utmost importance that **cross-border cooperation becomes part of the national practices**. Cross-border cooperation should be part of the routine functioning of the national authorities, especially since it becomes even more important with the increasing occurrence of cross-border mobility. Increased cross-border mobility brings with it long subcontracting chains of postings and the involvement of TCNs, to name a few, which complicates enforcement even further. Seeing that much of the fraud is linked to complex and country specific rules such as social security, better coordinated legislation would facilitate the life of enforcement authorities.

ELA is certainly an important solution in this regard, as its establishment represents an important milestone for cross-border cooperation. ELA performs eight different tasks, of which two are especially relevant for this case study: 1) facilitating cooperation and the exchange of information between Member States and 2) coordinating and supporting concerted and joint inspections.[1004] Although ELA cannot carry out inspections on its own,

[1003] See for instance the call 'Posting of workers: Enhancing administrative cooperation and access to information' within the frame of the Employment and Social Innovation (EaSI) programme. Of course, this is project-based funding, and this does not make the support sustainable. Therefore, structural changes are necessary like making cross-border cooperation a part of national practices.

[1004] See e.g., Article 7 of Regulation (EU) 2019/1149 on 'Cooperation and exchange of information between Member States': "The Authority shall facilitate the cooperation and acceleration of exchange of information between Member States and support their effective compliance with cooperation obligations, including on information exchange, as defined in Union law within the scope of this Regulation." And Article 8 of Regulation (EU) 2019/1149 on 'Coordination and support of concerted and joint inspections': "At the request of one or more Member States, the Authority shall coordinate and support concerted or joint inspections in the areas within the Authority's competence. The Authority may also, on its own initiative, suggest to the authorities of the Member States concerned that they carry out a concerted or joint inspection."

it can propose to Member States to carry out inspections (based on complaints, data provided by social partners, a risk analysis, etc.). For instance, **in June 2022, ELA coordinated joint inspections in 8 countries with the participation of 18 Member States**.[1005]

ELA has the possibility to be an important step forward regarding cross-border cooperation for several reasons. First, it can provide **conceptual, logistical, technical support and legal expertise**, as well as interpretation services and translation of inspection-specific documentation. Second, ELA continues to develop an **inspections registry** accessible to relevant national authorities. This will mean that key information can be viewed online about inspections that have been carried out or are planned in specific Member States and sectors, all whilst fully respecting data protection rules. This tool can be especially useful for Member States to learn from one another. Third, ELA will also promote the use of established tools and procedures to facilitate the planning, execution, and follow-up of inspections, including the effective and timely handling of cases submitted by national social partners. In sum, **ELA can be an important facilitator to cross-border cooperation between Member States** to enforce posting rules. Nevertheless, it cannot be forgotten that without the support and the acceptance of national authorities, the power of ELA remains limited. Thus, ELA itself cannot ensure better cooperation and enforcement of the rules, but it can be a promotor to help countries to improve in this regard.

Finally, useful lessons can be learned from the transnational workshop organised by EuroDétachement. First, **transnational cooperation in posting helps public authorities to 1) adapt their organisation** and 2) adopt frameworks and tools to simplify information exchange/access to data. [1006] Furthermore, there are **two key drivers of action**: 1) the role of a key actor combined with transnational coordination and 2) a broad scope of stakeholders who capitalise on a wider network. The transnational dimension can be made possible thanks to coordination by actors including Eurojust or Europol. Lastly, **taking action on complex fraud implies involving stakeholders at transnational level**. Being able to rely on a trusted existing network of actors who have developed working practices over time boosts efficiency and simplifies the exchange of information, which is essential for the investigation to progress.

[1005] See: https://www.ela.europa.eu/en/news/18-eu-member-states-participated-road-transport-inspections-8-countries-organised-ela-week.
[1006] Eurodétachement, Synthesis 'Transnational workshop: Addressing posting complex cases of fraud. Which practices, which lessons to be learnt?', 12 September 2019, 'Boosting transnational cooperation on posting of workers, 2019.

7.2. Good practices involving social partners regarding the protection of posted workers or other temporary cross-border workers

7.2.1. Introduction

The posting of workers and other forms of cross-border work in the European Union are an issue of strong concern for social partners at national as well as European level: For employers, cross-border labour mobility such as posting of workers plays an important tool to improve business efficiency and provide companies with the possibility to deal with temporary gaps in labour and skills supply or to acquire contracts in other Member States.[1007]

While employer organisations regard the freedom of movement and of providing services across borders as important in the development of the single market, they differ as regards the needs of regulation. From the perspective of employer organisations in general, the current regulatory framework – for example on posting, subcontracting or cross-border temporary agency work – ensures a level playing field between companies and equal minimum standards for posted and host country workers.

While also sectoral employer organisations in major sending countries of temporary cross-border mobile workers share this opinion, employer organisation in receiving countries and here in particular in sectors that are very much affected by problematic forms for posting and other forms of temporary cross-border labour mobility are more critical and have highlighted loopholes in legal regulation and the need for action in order to avoid social fraud and wage dumping.[1008]

Amongst trade unions at EU and national level, there is quite a unanimous position that the current legal framework of cross-border mobility is not sufficient and equal treatment of workers is not secured efficiently.[1009] Trade unions still see the risk of "social dumping" and “labour crime”, as well as a pressures towards a downward social convergence.[1010] Trade unions at European level have a unified approach to the issue of cross-border mobile work and are generally pushing for more efficient and better regulation.[1011] The responses of individual trade unions in the EU Member States in terms of dealing with mobile workers seem to be shaped by a complex interplay of national industrial relations systems, sectoral dynamics and regulation.[1012]

[1007] See for example the position of BusinessEurope: https://www.businesseurope.eu/policies/social/labour-markets-and-social-policy/equal-opportunities/posting-workers

[1008] B. Surdykowska and D. Owczarek, “Posted workers regulations as a cohesion test in the enlarged European Union: divergent interests of trade unions, employers’ organisations and governments”, Friedrich-Ebert-Stiftung, Institute of Public Affairs, Bratislava and Warsaw, 2018.

[1009] In 2021, the Executive Committee of the European Trade Union Confederation, ETUC has adopted a resolutione on the topic: ETUC Resolution on Fair Labour Mobility and Migration.Adopted at the Executive Committee Meeting of 22 March 2021

[1010] B. Furåker and B. Larsson, “Revision of the EU Posting of Workers Directive, Social Dumping and Trade Unions’ Position”, in: Trade Union Cooperation in Europe. Palgrave Pivot, Cham, 2020, pp. 109-139, available at: https://link.springer.com/chapter/10.1007/978-3-030-38770-9_4.

[1011] More recently European trade unions have been promoting strongly for a European framework on subcontracting in order to fight the crime and abuse of legal rules and provisions. See ETUC (2022): Securing workers rights in subcontracting chains. At the end of 2022, the EFBWW has also initiatied a compaign on the topic of "labour crime" in the context of posting of construction workers via subcontracting: See: EFBWW EXECUTIVE COMMITTEE REPORT ON MAJOR ABUSES, LABOUR CRIME AND SUBCONTRACTING

[1012] J. Hardy, L. Eldring and T. Schulten, “Trade union responses to migrant workers from the “new Europe”: A three sector comparison in the UK, Norway and Germany”, in: European Journal of Industrial Relations, 18(4), 2012, pp. 347-363, available at: https://journals.sagepub.com/doi/10.1177/0959680112461464 (non-open access).

By contrast, employer organisations often argue against regulation and bureaucracy. Nevertheless, discrepancies can be found between employer stances, mostly at the sectoral level, but also between employers in the high-wage countries and those in low-wage countries; the former criticise the competitive advantages of the latter companies and claim that they are losing their position in European and local markets as a result.[1013] This topic is also characterised on the employer side by a division between law-abiding and non-law-abiding companies.[1014]

Embedded in these divergences between and within the groups of actors, our examples of good practices in the context of social dialogue show that cooperation works when it creates added value for employers and trade unions. Therefore, the creation of a level playing field for all businesses must go hand in hand with the effective implementation of equal treatment and social rights of mobile workers.

Concretely, this often means the promotion of the transnational provision of services in a climate of fair competition and legal certainty and putting into place equal minimum conditions of employment according to national laws and/or collective agreements. This case study shows that the social partners can be involved through exerting political and legal influence, concluding collective agreements, but also pursuing other types of non-legislative measures, such as supporting workers and companies and the labour inspectorate in the fight against illegal employment practices. In addition, social partner initiatives in this field can also be linked to the exchange of information as well as problem-solving activities that focus on specific problems.

Overall, social partners can be an important facilitator. Setting up such initiatives to support the protection of working conditions is necessary because the capacity of inspection services is limited. Moreover, trade unions can be an important actor in the fight against cross-border social fraud. They can be 'whistle-blowers' for the inspectorates, reporting infringements and thus supporting the identification of problematic situations.

7.2.2. The role of the social partners and bipartite as well as tripartite social dialogue

In many Member States the social partners are closely involved in policy dialogue. They are often invited to hearings on draft legislation in order to give their opinion. In addition, trade unions and employers influence policies and draft legislation through interaction with parliaments, ministries and political parties.

Further, in some Member States, tripartite committees or councils that are composed of employers' associations, trade unions and government representatives are established. The national research carried out for this study shows that the social partners in many countries have issued opinions on the PWD 2018/957/EU and the Enforcement Directive 2014/67/EU. For example, in **Belgium** the National Labour Council – which is equally divided between representatives of the most representative employers' associations and trade unions – has issued an opinion on the implementation of PWD in national legislation.[1015] The main function of the National Labour Council is an advisory one, consisting of delivering opinions to the legislature on general issues of a social nature.

Particularly interesting against the background of social partnership initiatives in political and legislative processes are also the various joint statements and positions in the **construction sector:** the EU-level social partners in the construction sector, EFBWW and

[1013] B. Surdykowska and D. Owczarek, “Posted workers regulations as a cohesion test in the enlarged European Union: divergent interests of trade unions, employers’ organisations and governments”, p. 9.
[1014] *Ibid.*
[1015] Nationale Arbeitsraad, “Advies Nr. 2.147”, 2019, available at: https://cnt-nar.be/sites/default/files/documents/ADVIES/advies-2147.pdf.

FIEC, agreed on joint statements regarding the enforcement of the PWD in 2011, 2012 and 2013 and developed joint proposals regarding a level playing field in the European construction sector (in 2015). These demand "an effective and efficient implementation" of the Enforcement Directive (2014/67/EC) in order to support the fight against fraudulent practices, and call for the direct involvement of the national social partners in the implementation phase of the Directive as well as the development of bilateral or multi-lateral actions (for example for stricter and more efficient controls in the country of origin) between the relevant stakeholders.[1016]

Other joint actions developed by these social partners include a joint report on the need for uniform European social security identity cards for all workers (2015),[1017] recommendations for tackling undeclared work and social fraud (2020)[1018] and a joint statement on TCN workers and companies in the EU construction market (2021).[1019] The joint statement on TCNs calls for, among other things, a "comprehensive legislative framework" to create a level playing field with regard to third country companies and TCN workers "to be entitled to receive full equal treatment related to the application of collective bargaining agreements, wages, working conditions, health and safety standards, access to social security and protection systems and benefits (including the portability of acquired rights, e.g. with regard to pensions), access to educational, training and labour market facilities (according to the Posting Directive) and decent accommodation."[1020]

7.2.3. The impact of collective bargaining agreements

According to Directive 96/71/EC (as revised by Directive 2018/957/EU) remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted including collective agreements which, in that Member State, have been declared universally applicable or otherwise apply. Through collective bargaining agreements, social partners can directly influence and shape the working conditions of posted and other cross-border mobile workers. The national research for this study shows that generally binding collective agreements exist in many countries. In France, nearly all collective agreements have even been declared generally binding. In the Netherlands, the collective agreement for the Construction Industry (CAO Bouw & Infra) contains separate paragraphs and special provisions on Contract of Employment under Foreign Law, Subcontracting and Engaging Temporary Agency Workers and Payrolling Company Workers.

In Denmark, trade unions may take industrial action to support the demand for payment of wages or salaries in accordance with a collective agreement against a foreign company posting workers to Denmark as stipulated by the Act concerning the posting of workers (see the box below).

[1016] EFBWW and FIEC, "Joint Position: Towards a level playing field in the European construction sector: Joint proposals of the EU sectoral social partners EFBWW and FIEC", 2015, available at: https://www.efbww.eu/stream/91225452-a752-4ee1-9e83-faf0a6dc9bc6.
[1017] EFBWW and FIEC, "Social identity cards in the European construction industry",2015, available at: https://www.efbww.eu/publications-and-downloads/reports-and-studies/nunc-auctor-elit-sit-amet-accumsan-pretium/36-a.
[1018] EFBWW and FIEC, "EFBWW - FIEC joint statement – tackling undeclared work & social fraud – construction sector: Joint statement by the European social partners in the construction sector: Concrete recommendations for tackling undeclared work and social fraud in the construction sector", 2020, available at: https://www.efbww.eu/stream/113072d9-02b4-468e-9b98-3a8341b1c17c. See also the information on the joint social partners project on the topic: https://www.efbww.eu/eu-projects/running/nullam-erat-magna-eleifend-ut-metus-vel/2-a
[1019] EFBWW and FIEC "Joint Statement of the European social partners of the construction industry (FIEC-EFBWW) on third country national workers and companies in the EU construction market", 2021, available at: https://www.fiec.eu/application/files/4816/2322/1187/2021-06-09-_FIEC-EFBWW_joint_statement_-_third_countries_TCN_FINAL.pdf.
[1020] *Ibid*, pp. 3-4.

Box 26. Consolidation Act concerning the Posting of Workers in Denmark - use of collective industrial action

6 a. (1) To ensure that posted workers will receive wages that are equal to the rates which Danish employers are obliged to pay for the execution of corresponding work, industrial action against foreign service providers may be taken in the same manner as against Danish employers in support of a demand for the conclusion of a collective agreement. […]

(2) A condition for the initiation of industrial action as described in subsection (1), is that the foreign service provider in advance has been presented with provisions in the collective agreements concluded by the most representative social partners in Denmark and covering the entire Danish area. These collective agreements must indicate with the necessary clarity the rate of pay that is payable under the collective agreements.

Source: Posting of Workers Act nr. 1144 of 14 September 2018 as amended in Consolidation Act of the Ministry of Employment nr. 2566 of 13 December 2021, Unofficial translation: https://bm.dk/media/7024/consolidation-act-concerning-the-posting-of-workers-etc.pdf

7.2.4. Providing information and advice

Posted and mobile workers are not usually members of trade unions in the host countries and these local trade unions might also not be willing or able to represent them. Research for the project "**Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)**" (2017-2018), which examined national labour protection systems for posted workers, looked at practices and challenges in relation to enhancing "posted workers' economic democracy" in Austria, Czech Republic, Italy, Norway and Finland. The project report points out that, due to the difficulty in understanding local legal rulings and guidelines, posted workers are exposed to a particular risk of mistreatment in the host countries, which leads to "their rights disregarded and unenforced; their interests […] ignored; and their voice unheard in collective action".[1021] However, the project also highlights the role of trade unions in terms of influencing the conditions of posted workers in the countries examined in this research, and notes that legislation needs to be adapted to better represent posted workers.

At a sectoral level, in the **construction sector**, Houwerzijl et al. examined trade union support for cross-border mobile workers.[1022] This publication lists examples of trade union support from several sending and host countries (Belgium, Bulgaria, France, Italy, the Netherlands, Portugal, and Romania). Further, posted workers in **Germany** receive help from the counselling centres of the Fair Mobility project (see the box below).

Box 27. The German trade union project "Fair Mobility"

The Fair Mobility project (Projekt faire Mobilität) is part of the Fair-Labour-Mobility.eu initiative and aims to improve working conditions and enforce fair wages especially for workers from Central and Eastern European countries who are working in Germany . The political responsibility for the project lies with the German Trade Union Federation DGB. The project is supported by a number of German trade unions, the Federal Ministry of Labour and Social Affairs and the Federal Ministry of Economics and Energy. It is 90% funded by the Federal Ministry of Labour and Social Affairs and 10% by the DGB. The project maintains 12 counselling centres throughout Germany, which offer

[1021] *Ibid.*
[1022] M. Houwerzijl, E. Traversa, S. Borelli and M. Mesur, "Putting an end to cross-border social security fraud and abuse", published by the European Federation of Building and Woodworkers (EFBWW), 2018, available at: https://www.efbww.eu/stream/563cabfd-e081-4409-95ea-9760a44dd070.

workers information, advice and support on labour law. Workers from Central and Eastern Europe are offered this mostly in their native languages. In addition, the project informs the public about the working conditions of posted workers and offers training for works councils and other interested parties on the subject of fair working conditions. The counselling centres cooperate with the local trade unions and counselling centres of other regional organisations. In the past, the fair mobility project had a specific focus on "problematic" sectors, but currently the counselling services are available to workers in all sectors. The Fair Mobility project has a complementary nature of providing information and advice for mobile workers. It should not be regarded as a tool that may substitute functions and responsibility of public authorities.

Source: DGB 2022

The research undertaken for this project on the national **legal frameworks** identified relevant trade union activities in which trade unions provide information and advice to cross-border mobile workers. This work is usually targeted at improving access to information and strengthening awareness and transparency regarding rights. In **Poland**, for example, there is a trade union for the largest group of TCNs in the country - the Trade Union of Ukrainian Workers. This trade union focuses on combatting undeclared work and the labour exploitation of Ukrainian workers in the Polish labour market through advocacy, awareness-raising and legal support.[1023]

Employers' associations serve as a point of contact for their members on questions of interpretation and practical implementation of rules and regulations (e.g., on posting and cross-border service provisions, temporary agency work, company law, health insurance and other social security regulations). An interview with the **German employers' association BDA** revealed that the number of inquiries is connected to legislative processes, with inquires increasing significantly after new legal regulations are introduced.[1024] In addition, the employers' associations also collect and voice opinions on legal questions and implementation issues.

As a joint approach, the project **"ENACTING - Enable cooperation and mutual learning for a fair posting of workers"**, funded by the European Union, had the goal of increasing mutual cooperation among trade unions (both confederations and sectoral trade unions) and employers' associations in the **transport and construction sectors** in order to find more effective ways to inform and support workers and companies on the fair posting of workers.[1025] The project, which was carried out by a transnational partnership involving ANITA, ANCE, Belgian Ministry of Labour, CARTEL ALFA, EFBWW, FILCA CISL, FIT CISL, and IG BAU, published Guidelines for social dialogue within posting of workers that included a guide for collective bargaining at workplace level and in supply chains, a practical checklist for trade unionists at workplace level in terms of dealing with issues related to posted workers, and a position paper on the state of application of Directive 2014/67/EU with a focus on specific sectors in Belgium, Germany, Italy and Romania.

During COVID-19, a **Handbook on protecting posted workers in the construction sector during COVID-19 (EMEcs)** was published with support from social partners outlining measures implemented in different countries at sectoral level to ensure **support for posted workers**, including: the dissemination of COVID-19-related information among workers with little or no knowledge of the local language; information about access to social protection for posted workers; protocols to adjust work organisation; measures to ensure social distance and safe transport; compliance with hygiene requirements; guidance on

[1023] P. van Nierop, L. Schönenberg and P. Terziev, "Counteracting undeclared work and labour exploitation of third country national workers", European Commission, 2021, pp.46-47, available at: https://ec.europa.eu/social/BlobServlet?docId=23573&langId=en.

[1024] Interview conducted for this study with German Confederation of German Employers' Associations (BDA), in June 2022.

[1025] Enacting Social Dialogue Working Group, "Guidelines for social dialogue within posting of workers", Project "ENACTING – Enable cooperation and mutual learning for a fair posting of workers", with financial support of the European Union, 2016, available at: http://www.adapt.it/enacting/2_2_7_Enacting%20Guidelines%20for%20Social%20Dialogue.pdf.

using personal protective equipment.[1026] The handbook shows the types of approaches used by social partners (including employers) to reach posted workers in the challenging context of the pandemic, including through information provided in their own language or through drawings.

Problems with regime shopping, non-compliance with legal provisions and fraudulent or criminal practices in the context of posting, seasonal work and other forms of temporary cross-border mobile work challenge both workers and employers and therefore often form the basis of cooperation between the social partners in their social dialogue. Often, these issues have been approached in the social dialogue from the angle of **undeclared work**. For example, a Eurofound study outlines the actions taken by the social partners and governments to tackle the fraudulent contracting of work. This also considers cross-border contracts for work and the posting of workers.[1027] The study shows that the approaches of the social partners mainly focus on increasing compliance, notably by providing information and organising awareness campaigns. Furthermore, in some cases, trade unions also engage in initiatives aimed at improving the detection capabilities of public authorities, for example through developing reporting systems by workers involved in alleged fraudulent contracting of work (the Netherlands, Slovenia). On the employer side, the study concludes that employer associations, although they condemn fraudulent contracting of work and support the initiatives aimed at combating this, seem in general to be less active, especially when unilateral actions are taken into consideration. However, there are examples of employer associations being involved in joint actions, particularly at the sectoral and local levels, as well as in government-driven initiatives.

The European Platform tackling undeclared work, since 2021 operating as a permanent working group of the ELA, enables different actors, , including social partners and enforcement authorities, to exchange information and good practices, learn from each other and develop knowledge and evidence and engage in closer cross-border cooperation and joint activities, including the publication of a toolkit of good practice of cooperation between social inspectorates and social partners.[1028] Within the framework of the Platform's work, the Rights for All Seasons – campaign on Seasonal Workers focused on cross-border seasonal workers. The main goal of the campaign was to promote declared seasonal work and tackle undeclared seasonal work. As part of the work programme of the platform, an analysis was carried out of measures undertaken by enforcement authorities, NGOs and social partners to address undeclared work and labour exploitation.[1029] In terms of specific measures carried out by the social partners, the study lists:

- Cooperation between the Latvian Free Trade Union Confederation (LBAS) and the labour inspectorate to exchange information and prevent and investigate violations of labour rights, including violations of migrant workers' labour rights.

- Good working relations between the French trade union CGT and the labour inspectorates.

- A commission in Italy to tackle the caporalato system[1030] and labour exploitation in agriculture. The commission - which consists of representatives of several

[1026] The handbook Protecting posted workers in the construction sector during COVID-19: limits and promising practices EMEcs EU Handbook, 2022, developed under the European market environment in the construction sector - Enhancing the free movement of posted workers in EU' project. Available at https://emecs-project.eu/wp-content/uploads/2022/11/EU-Handbook.pdf

[1027] Eurofound, "Exploring the fraudulent contracting of work in the European Union", Publications Office of the European Union, Luxembourg, 2016, pp. 26-27, available at: https://www.eurofound.europa.eu/publications/report/2016/industrial-relations-law-and-regulation/exploring-the-fraudulent-contracting-of-work-in-the-european-union .

[1028] European Platform tackling undeclared work and European Labour Authority, Successful approache of cooperation between Labour Inspectorates and Social Partners, 2021

[1029] P. van Nierop et al., "Counteracting undeclared work and labour exploitation of third country national workers'.

[1030] Within the caporalato system, farmers outsource to recruiters/gangmasters (caporali) the recruitment, transport, and control of workers in the field. Payment and working time are negotiated informally, remuneration is often on piece-rate basis and consistently below the minimum wage, and collective provincial contracts and working time regulations are

> ministries, municipalities, the National Labour Inspectorate and the National Institute of Social Security - works together to develop joint actions against labour exploitation with NGOs and the social partners. As part of these joint actions trade unions provide insights from workplaces, while employer associations provide information on the complex supply chain in agriculture. The aim of this cooperation is to set up management and information systems and to strengthen the implementation and monitoring capacity of national and local institutions.[1031]

In Sweden and Denmark the social partners play a strong role in the regulation of the labour market by collective bargaining and have the competence and responsibility to ensure compliance with the applicable wages and working conditions.[1032]

At EU sectoral level, the EU-funded social partner project **Tackling Undeclared Work in the Construction Industry (TUWIC)** aims to facilitate the implementation of a holistic approach on undeclared work in the construction sector.[1033] The project gives an overview of national measures to tackle undeclared work in Austria, Belgium, Bulgaria, France, Italy, Romania and Spain in the construction sector and shows that in each of these countries, trade unions, employer federations and enforcement authorities work together in a range of policy initiatives to tackle undeclared work. According to the social partners at the European level in the construction industry, EFBWW and FIEC, this project "exemplifies what can be achieved through tripartite cooperation and how social partners can play a leading role in transforming undeclared work into declared work."[1034] In the framework of this project, the EFBWW and FIEC also agreed on concrete recommendations for tackling undeclared work and social fraud in the construction sector.[1035]

In terms of a more general approach, in Belgium cooperation agreements between the social partners and the Belgian government have been concluded for various sectors: these 'plans for fair competition' are agreements between the social partners and the relevant administrations and include concrete measures to tackle social fraud in the sectors concerned.[1036] These plans currently exist in sectors such as construction und road transport.

Further examples of good practice have been identified in the project **Fair working conditions: exploring the contribution of cooperation initiatives between Social Partners and Labour Inspection authorities (SPLIN)** (2019-2021).[1037] This project lists joint actions by labour inspection authorities and social partners to enforce labour standards in the **construction** and **international maritime sectors**. For example, in Austria, the Bauarbeiter-Urlaubs- und Abfertigungskasse (BUAK, Construction Workers' Leave and Severance Pay Fund), a social partnership institution, was given wide-ranging powers to implement the Wage and Social Dumping Combat Act (Lohn- und Sozialdumping-Bekämpfungs-Gesetz) in the construction industry. These powers include the right to

largely not complied with. ; F. Bagnardi, "Caporalato (Italy)", 2022, available at: https://www.in-formality.com/wiki/index.php?title=Caporalato_(Italy).

[1031] P. van Nierop, L. Schönenberg and P. Terziev, "Counteracting undeclared work and labour exploitation of third country national workers", pp. 46-47.

[1032] EFBWW and FIEC, "Tackling Undeclared Work in the Construction Industry: Toolkit: with concrete cases from Belgium, France, Bulgaria, Italy, Spain, Romania and Austria". 2020, p.4, available at: https://www.efbww.eu/publications-and-downloads/reports-and-studies/toolkit-of-the-efbww-and-fiec-to-tackle-undeclared-work-in-the-c/737-a.

[1033] *Ibid.*

[1034] *Ibid*, p. 14.

[1035] EFBWW and FIEC, 'EFBWW - FIEC joint statement – tackling undeclared work & social fraud – construction sector: Joint statement by the European social partners in the construction sector: Concrete recommendations for tackling undeclared work and social fraud in the construction sector'.

[1036] SIOD, "Protocollen," 2022, available at: https://www.siod.belgie.be/nl/publicaties/protocollen.

[1037] Forba, "Fair working conditions: exploring the contribution of cooperation initiatives between Social Partners and Labour Inspection authorities (SPLIN)", 2021, available at: https://www.forba.at/en/forba_projekt/fair-working-conditions-exploring-the-contribution-of-cooperation-initiatives-between-social-partners-and-labour-inspection-authorities-splin/.

monitor wages at construction sites, to investigate suspected cases of wage and social dumping and to report suspected cases to the district authorities.[1038]

7.2.5. Access to legal representation

Providing equal rights to representation in the justice system and access to criminal justice is a challenge for many cross-border mobile workers. Workers often do not know where to find information, advice and legal support, who has this right, who bears the responsibility of representing them, or how to pursue a case. In addition, the process of pursuing employment rights is usually extremely time-consuming.[1039] However, trade unions in host countries sometimes advocate on behalf of cross-border mobile workers even though they are not members of the trade union and therefore not subject to the legal protections that some unions offer to their members. There are several such examples of case law involving trade unions with regard to cross-border mobile workers.[1040] Examples include:

- A case by the Dutch trade union FNV brought against a Dutch shipyard that had underpaid Romanian workers hired through a string of service contracts. The court requalified the service contracts as contracts applicable to the collective bargaining agreement for the metal and steel processing industry (and a penalty of €10,000 daily in case of non-compliance);1041

- The CJEU judgment in case C-784/19 involving EFBWW and IndustriAll, the company Team Power Europe and a temporary work agency based in Bulgaria that was posting workers to Germany.[1042] Here the ruling decided that, as the temporary agency workers did not perform any work in Bulgaria, the social security legislation of Germany applied to the workers.[1043]

- A 2021 judgement of the Federal Labour Court of Germany (Az. 21 Sa 1900/19)1044 in a case regarding the rights of posted workers in the sector of live-in elderly care. The court ruled that continuous caregivers in German households must be paid 24 hours a day and are entitled to minimum wage while on standby. The plaintiff, a Bulgarian national who was sent to Germany by her Bulgarian-based employer, was supported by a counselling "Fair Mobility" centre and the German trade union ver.di.

7.2.6. Conclusions

Social partners and in particular trade unions are directly affected and concerned by problematic situations of cross-border labour mobility that results in violations of the terms and conditions of employment of temporary cross-border mobile workers. This is not only

[1038] B. Haidinger, U. Papouschek, “BUAK Construction Workers’ Holiday and Severance Payment Fund – social partner strategies to enforce employment standards in the Austrian construction sector,” SPLIN, Austrian report – construction sector, 2021, available at: https://www.forba.at/wp-content/uploads/2019/03/SPLIN-Report-Construction-FORBA-AT-EDITED.pdf.

[1039] B. Haidinger, F. Iannuzzi, D. Sacchetto, N. Lillie and K. Kall, ‘Enhancing Economic Democracy for Posted Workers’.

[1040] See also: ETUI, "Posting of Workers before National courts", 2020.

[1041] Rechtbank Noord-Nederland, “Beweerde (onder)aanneming is in feite uitzending; Op Roemeense werknemers op Groningse werf is de CAO Metalelektro van toepassing”, 2015, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNNE:2015:1076.

[1042] “Judgment of the Court (Grand Chamber) in Case C-784/19”, 3 June 2021, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=242031&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3749862.

[1043] EFBWW, “Team Power Europe case: CJEU decision is a strong victory for workers,” press release, 03.06.2021, available at: https://www.efbww.eu/publications-and-downloads/press-releases/team-power-europe-case-cjeu-decision-is-a-strong-victory-for-wor/1185-a. EURACTIV, “EFBWW and IndustriAll Europe deeply concerned about opinion”, press release, 18.12.2020, available at: https://pr.euractiv.com/pr/efbww-and-industriall-europe-deeply-concerned-about-opinion-210783.

[1044] LArbG Berlin-Brandenburg 21. Kammer, „24-Stunden-Betreuung - Arbeitnehmerentsendung - gesetzlicher Mindestlohn - orde public - widersprüchliches Verhalten“, Aktenzeichen 21 Sa 1900/19, available at: https://gesetze.berlin.de/bsbe/document/JURE200014629.

due to their goal to improve working conditions in a global scale, fight precarious working conditions and solidarity of workers across border but also due to the fact that such forms put pressure on wages and working conditions of the workforce in the host countries.

Whereas the prevention of "social dumping", as well as the protection of workers' rights, are important concerns for trade unions, employer associations often emphasize the advantages of the economic freedoms of the EU internal market and a European common labour market. But here too voices can be heard pointing to illegal practices and unfair competition that must be prevented.

Embedded in these divergences between and within the social partners, examples of good practices in the context of social dialogue show that cooperation works when there is added value for both social partners. This added value is primarily based in issues that are linked with the creation of a level playing field for all businesses and the social protection of workers. The activities of the social partners include legislative and non-legislative measures, for example by involvement in policy making and regulatory processes.

However, as shown in this case study, there is quite a variety of different practices and types of social partners action and involvement that addresses cross-border mobile work.

Certainly, one of the most effective and binding forms of regulation covering whole economic sectors is collective bargaining and the conclusion of binding collective agreements. But there are other types of actions and practice that highlight the important role of social partners – trade unions – as regards the fight of problematic temporary forms of cross-border labour mobility:

- Trade unions are important actors of public awareness raising as regards problematic forms of cross-border mobile work and the lack of protection of workers.
- Trade unions play an important role to provide information and advice on workers rights in host countries and other forms of support to cross-border mobile workers from other EU Member States as well as other countries.
- Trade unions are also supporting posted workers in case of access to legal action before courts. Providing equal rights to be represented in the justice system and access to criminal justice is a challenge for many cross-border mobile workers.
- Employers' federations represent the user and posting companies and provide direct advice on the application and implementation of legal and other regulations in practice.
- Social dialogue outcomes, i.e. joint recommendations or initiatives of employer organisations and trade unions have also highlighted needs of regulation and legal initiatives to address problematic practices such as regime shopping, non-compliance or unfair competition. The approaches of the social partners mainly focus on increasing the commitment to compliance, notably by providing information and organising awareness campaigns.
- Furthermore, social partners engage in initiatives aimed at improving capabilities of public authorities in supervision and monitoring of rules, controls and sanctioning of illegal and fraudulent practice. In many countries, social partners cooperate with the public authorities when it comes to remedying violations, and/or form joint issue-specific bodies, e.g. to combat undeclared work.

Finally, and not least key activities at EU level such as the establishment of the “European Platform tackling undeclared work” and the creation of the European Labour Authority (ELA)

have been developed on the basis of initiatives of social partner organisations at EU and national level, in particular the trade union movement.

Against this, both the involvement and participation social partners engagement in legislative and non-legislative initiatives addressing the issue of temporary cross-border work within the EU and from third countries should be acknowledged and supported by European and national governments.

8. Conclusions and considerations for further actions relating to the protection of temporary cross-border workers

The freedom of movement of workers is one of the cornerstones of the EU, guaranteeing individuals the right to move, reside and work in another Member State and benefit from equal treatment on a par with nationals of that Member State. The Single Market also gives businesses and professionals the freedom to provide services within the EU.

Temporary intra-EU mobility is increasing within the EU. This includes posted workers, seasonal workers and cross-border workers.[1045,1046] In contrast to other forms of (temporary) cross-border labour mobility, posted work – which falls under the scope of the PWD and its Enforcement Directive – is driven by employers who make use of their freedom to provide services and send workers abroad on a temporary basis. Although 'posting comprises a minor share of the EU labour market in terms of absolute volume, it concentrates in certain places and sectors which can accentuate the effects of its overall small volume.'[1047]

Evidence abundantly shows the benefits of intra-EU labour mobility, for example in addressing labour shortages in receiving countries, reducing unemployment levels in sending countries, enabling access to broader employment and skills development opportunities for workers, as well as facilitating access to skills and economic opportunities for employers.[1048] While the demand for skills in EU labour markets has evolved in the past decades, including following the COVID-19 pandemic, intra-EU movers are likely to continue to be (alongside non-EU nationals) the pool of skills of first resort for EU economies.

Intra-EU labour mobility is an important mechanism to support competitiveness and efficiency in the EU's internal market. **Ensuring fair and decent working conditions for intra-EU workers**, including for temporary cross-border workers, **is equally important**, however, and this seeks to safeguard freedom of movement and its intended benefits. This has been a key issue on the EU agenda in the past decades, but there is **recurrent evidence documenting cases of inappropriate working conditions involving temporary cross-border workers**. These problematic aspects continue to raise questions about whether Europe's mobile workers are adequately protected in law and in practice.

EU legislation on the protection of working conditions and equal treatment has expanded considerably in the past decades. The PWD and the Enforcement Directive are two of many legal instruments in safeguarding social rights for intra-EU mobile workers, alongside others.[1049]

Regulation 593/2008 (the so-called Rome I Regulation) is an important instrument in labour relations as it generally determines the applicable labour law.[1050] The PWD establishes certain

[1045] Furthermore, in 2021, there were approximately 10.2 million 'permanent' EU movers of working age in the EU. European Commission, 2022 Annual Report on Intra-EU Labour Mobility, 2023, https://ec.europa.eu/social/BlobServlet?docId=26778&langId=en

[1046] Moreover, in 2021, around 9.7 million trips for professions reasons were carried out within the EU.

[1047] A. Kyriazi, 'Making and breaking coalitions for a more 'Social Europe': The path towards the revision of the posted workers directive', European Journal of Industrial Relations, 2023, p.2.

[1048] https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-empl_march2016_en.pdf

[1049] Other key examples include: Regulations 883/2004 and 987/2009 on the coordination of social security systems; Directive 2008/104/EC on temporary agency work; Directive (EU) 2019/1152 on transparent and predictable working conditions;[1049] Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals; Directive 2011/98/EU on a single permit for third-country nationals to reside and work in the EU; Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work; and Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction site.

[1050] In Article 8, this Regulation sets specific conflict of laws rules for cross-border labour relations. If the parties have not opted for a specific legislation to be applied to the employment contract, the contract will be governed by the law of the country in

overriding mandatory rules in the area of employment contracts that have to be respected.[1051] In that respect, the PWD provides additional protection compared to the Rome I Regulation for employees covered by the personnel scope of the PWD, although this protection is not yet equal to that of a 'standard mobile worker'. Further, the European legislator and the European Court of Justice distinguish the situation of posted workers from that of 'standard' mobile workers.[1052] This approach has implications for the transnational social rights of posted workers and may foster differences in their social rights compared to local workers and other groups of mobile workers who make use of their freedom of movement under Article 45 TFEU (e.g., frontier workers, seasonal workers).[1053]

The various regulations and directives, together with other ongoing EU legal initiatives[1054], have assisted the **development of national legislation on the protection of working conditions of intra-EU cross-border workers**, reinforcing equal treatment between mobile workers and local workers. Differences in implementation in the national legal frameworks, their application (i.e., non-compliance), but also their enforcement nonetheless impact the extent to which rights and working conditions are guaranteed in practice. Limited enforcement actions, large gaps in labour costs between Member States, and the structural features of labour intensive and cost-competitive sectors have continued to give rise to business practices based on avoidance or evasion mechanisms.

I**n practice, differences in the protection of temporary cross-border mobile workers in the EU (relative to local workers) continue to exist**. The most common problems identified are linked to non-payment and under-payment, illegal wage deductions, violations of occupational safety and health regulations, poor accommodation, lack of statutory sick pay, missing health and social insurance coverage, and falsified working time documents (e.g., timesheets). These issues tend to **occur in specific sectors**, such as construction, agriculture and horticulture, road transport, live-in care and meat processing, which are price competitive and affected by significant labour shortages. Across countries, these sectors increasingly use intra-EU workers, posted TCNs, as well as other migrant workers who are already in EU Member States. Business models that use temporary and subcontracted staff (with or without posting) are very common, and often represent strategies to reduce labour costs.

The range of infringements illustrated in this report indicate that while existing rules and regulations are comprehensive and complex, **their enforcement is limited across the Member States**, which results in some cases in posted workers and other temporary-cross border workers being unable to benefit from the full range of their rights. Whilst Member States have legislated to establish administrative requirements (e.g., the registration of foreign temporary work agencies in their country), it remains difficult to detect those undertakings that work outside the scope of the law. Equally, fraudulent practices, such as bogus self-employment or letterbox companies, might go undetected.

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which the employee 'habitually' carries out his/her work. The application of these rules would entail, for a situation where a worker is normally employed in the Home State and only temporarily posted to a different Member State, the application of the (lower) employment conditions of the Home State. However, Article 9 of the Rome I Regulation includes a deviation from this scheme, by the use of 'overriding mandatory provisions'.

[1051] See also Recital 34 of the Rome I Regulation: "The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services".

[1052] Posted workers "return to their country of origin after the completion of their work *without at any time gaining access to the labour market* of the host Member State."

[1053] The consequence of this position is that the question of what protection under labour and social security law can be invoked by posted workers must be answered in the light of the principles underlying the free movement of services, in particular the right of their employer to temporarily provide services in another Member State without hindrance (Verschueren, 2021).

[1054] For instance, a proposal for a Directive on corporate sustainability due diligence has recently been adopted by the Commission (COM(2022) 71 final).[1054] It is intended to promote human rights in global supply chains and decent work worldwide. The rules would apply to larger companies, with an important element being how these companies should integrate due diligence into their policies, as well as monitor its effectiveness.[1054] The fight against letterbox companies also seems to have become a European priority. At the end of 2021, an initiative to fight against the misuse of LBCs (i.e. shell entities) for improper tax purposes was announced by the Commission (COM(2021) 565 final) – see https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:565:FIN.

The following sub-sections present **conclusions and proposals for further actions at national and EU level to ensure the protection of temporary cross-border workers** in relation to: the enforcement of existing regulations, the role of (long) subcontracting chains, access to clear and transparent information, the role of temporary work agencies and other labour market intermediaries, posted TCNs, and the role of social partners.

8.1. Enforcement of existing regulations

The public debate about the working conditions of temporary cross-border mobile workers has been influenced by the strong focus on case law and examples of abusive situations detected by labour inspections (which mostly take place on the basis of a risk assessment and mostly in high risk sectors). This increases the probability that the perception of the number of problematic situations is overestimated. **A further challenge is that limited comparable statistical and other quantitative data is available**. This impedes a clear and systematic cross-country and cross-sectoral assessment of the extent of violations of working conditions, also hampering identification of the key characteristics of non-compliant employers (companies, as well as temporary work agencies).

There is a comprehensive and complex regulatory system in place at EU and national level to facilitate temporary cross-border work. **However, the extent to which these measures are enforced as intended depends greatly on the complex process of implementation, application, and enforcement.**[1055] Although the Enforcement Directive contains several provisions to successfully implement and develop each of these steps at national level, Member States have broad discretion to develop the enforcement chain regarding infringement to the posting rules. Member States can take several actions within the enforcement chain, such as prevention, detection, control, sanctioning and recovery (as discussed in Section 7.1). They are most effective when implemented together, as otherwise if one of these actions fails, the others are also of little use. For example, there may be very strict sanctions foreseen in the national law but if there are hardly any inspections and/or hardly any recovery made, the utility of sanctions in practice decreases significantly. The Commission can verify whether sufficient efforts are being made by Member States regarding the implementation of the Enforcement Directive, and if necessary, launch infringement procedures.

This report shows that the **key challenge in ensuring equal protection for temporary cross-border workers remains the limited enforcement of existing legislation** and the extent to which control and redress mechanisms within the Member States and cross-border cooperation manage to identify employers that break the rules and effectively apply the necessary sanctions.

National enforcement authorities and regulators, as well as social partners and non-governmental organisations are **key actors** in implementing actions to improve the protection of temporary cross-border workers. EU-level authorities (including but not limited to the European Labour Authority) also have a key role in supporting national actors in tackling rights violations and fraudulent practices.

Several key types of enforcement action points are important to consider. These are discussed below.

[1055] See also Rennuy (2020: 219): “There is relatively little insight into how European legislation is applied in practice, that is, how regulators enforce it and how the regulated comply with it. The same holds for the practical implementation of the posting rules, …”.

8.1.1. Increase the number and effectiveness of labour inspections

Commitments to monitor the working conditions of temporary cross-border workers have been made by EU Member States, but the number of labour inspectors and inspections focusing on the enforcement of the posting and other relevant rules for temporary cross-border workers have remained limited.[1056]

As shown in this report, some of the key drivers of fraudulent practices involving temporary cross-border workers include the demand for cheap labour in the countries of destination, the highly complex legal framework involving cross-border work, the features of the sectors where these are prevalent, and the isolated situation and limited rights awareness of the mobile workers themselves.

Structural features of key economic sectors, the lack of human resources of enforcement bodies and the intricacies of the legal environment may reduce the effectiveness of control mechanisms (e.g., labour inspections), but the workers' isolation in some sectors also hinders the capabilities of the control authorities and trade unions to reach mobile workers. Labour inspectorates may have no legal authority, for example, to access the workplace of live-in carers when their workplace is a private home in some countries, as discussed in this report (Section 5.2 and Section 6.8 on live-in carers).

Temporary cross-border work entails a transnational dimension of enforcement. In this respect, public administrations (and their labour inspectorates) have to rely on other Member States' willingness and capacity to engage in the enforcement of the posting rules.

Possibilities for further actions at Member State and EU level

- **An increase in the number of labour inspectors and the number and frequency of inspections** is needed to check compliance with the law across sectors in relation to the working conditions of temporary cross-border workers. This would ensure that a sufficient number of inspections can be carried out (relative to the number of temporary cross-border workers and sector concentration in each Member State), including preventive inspections. An increase in human resources would also help to increase the scope of the inspections (e.g., to focus on investigating compliance with working conditions alongside administrative requirements). This objective could be reached through the checking of documents and practices related to key terms of employment, e.g., remuneration, working time, rest periods, OSH conditions and training, and sickness benefits.

- **Ensuring effective inspections throughout the subcontracting chain** is necessary to identify employers and subcontractors (including temporary work agencies and other labour intermediaries) that do not comply with their obligations regarding working conditions and sanction them appropriately. Given the prevalence of cross-border subcontracting chains in key economic sectors, the ELA is already implementing activities to facilitate effective cross-border inspections, which should be continued and further developed in agreement with the Member States.[1057]

[1056] Despite the fact that in Article 10(1) of the Enforcement Directive clearly states that "Member States shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, taking into account the relevant provisions of this Directive and thus guarantee their proper application and enforcement."

[1057] These activities include tools and procedures for concerted and joint inspections, training material, communication material and the activities of the Working Group in Inspections. For more details, see https://www.ela.europa.eu/en/concerted-and-joint-inspections.

- **More targeted inspections**, focusing on cases where compliance monitoring is necessary **in a cross-border perspective** in both origin and sending countries of posted workers would further support cross-border cooperation and administrative processes. The ELA Working Group on Inspections is a good vehicle to continue to discuss such situations and agree on concrete cross-border actions.

- There is a need for further **transparency from national labour inspectorates** on the types, size, number and results of enforcement activities concerning different types of temporary cross-border mobility. Such measures, any difficulties in implementing them and the identified solutions should be discussed and agreed in the fora facilitated by the ELA as part of its activities. These measures would support the development of the role and competencies of labour inspectorate and increase their public accountability for the work they conduct, and the results achieved.

- **Capacity building of competent authorities** to enhance skills and technical knowledge is imperative in sending and receiving Member States, to combat the infringement of the posting and other rules relevant to temporary cross-border workers. Training and awareness-raising activities can be implemented in relation to: the statutory requirements linked to different types of temporary cross-border workers, including the required administrative procedures required for sending and receiving countries and the penalties that can be imposed; the provision of full, correct and up to date information about the workplace, work activities, work period, accommodation (if relevant); and in general in relation to the rights and obligations of employers and workers in a cross-border perspective.

- In the case of **temporary cross-border workers in isolated situations**, such as private households where these workers provide care services, alternative monitoring mechanisms can be piloted and learnings can support national and EU-level decisions in the future. For example, if domestic employers do not allow labour inspectors to access their homes, alternative meeting locations can be suggested. The involvement of other organisations in ascertaining whether working conditions are respected and in supporting ways to tackle undeclared work is also desirable. For example, non-governmental community care organisations could visit private households to observe the living and working conditions of workers and provide information to workers about where they can receive counselling. Such initiatives (and their evaluation) would nonetheless require the involvement and the financial support of government authorities.

- **Concrete actions taken by public authorities at Member State level to enhance enforcement efforts** should include **more systematic cooperation with social partners** (through sustained networks and other communication channels) aimed at identifying situations where violations occur. The European Platform Tackling Undeclared Work is a good example of cross-border cooperation, enabling the exchange of information and good practices.[1058] It should continue its role of an observatory of complex fraudulent practices in cooperation with national liaison officers as well as European and national-level social partners, also with a view to proposing concrete solutions.[1059]

- **(Cross-border) cooperation** between labour inspectorates and other relevant actors (e.g., social partners) is necessary both in the prevention and detection of

[1058] ELA "European Platform tackling undeclared work", 2022, available at: https://www.ela.europa.eu/en/undeclared-work. Other interesting examples exist within ELA, such as the Working Group on inspections, or Posting 360 (Forum on the posting of workers).

[1059] See EFBWW and FIEC 2020: Joint statement by the European social partners in the construction sector: Concrete recommendations for tackling undeclared work and social fraud in the construction sector.

cross-border social fraud. Due to the link with other phenomena, such as labour exploitation and the use of letterbox companies, expertise from and collaboration with other enforcement bodies is required. A long-term strategy for cross-border cooperation is needed to systematically address the situation of temporary cross-border workers. Such a strategy would provide the conditions for long-term commitment, capacity building, knowledge of how other labour inspectorates operate and the flexibility needed for effective cross-border cooperation in concrete situations.

- The **coordination and reinforcement of cross-border cooperation efforts by EU actors** (such as the ELA, Eurojust or Europol) **is critical**. ELA in particular, given its mandate, should intensify its activities and strategic role in the field of joint inspections, its cooperation with Europol, and its mediation and capacity building activities. The recently launched ELA Posting 360 Mutual Learning and Understanding Programme[1060] provides a vehicle to discuss challenges, share solutions, and agree on actions to reinforce cross-border cooperation, exchange of information, improvement of data, and enforcement of posting rules. A range of instruments can support these objectives, including peer learning activities, staff exchanges, training programmes, and logistical and technical support for bilateral and multilateral cooperation. Similar fora should ensure that exchanges and cooperation aiming to protect the equal treatment of other types of temporary cross-border workers are also prioritised (for example, the ELA Working Groups on Inspections and Information).

8.1.2. Improve recovery mechanisms

Recital 38 of the Enforcement Directive states that "it is a matter of concern that there are still many difficulties for Member States to recover cross-border administrative penalties and/or fines and therefore the mutual recognition of administrative penalties and/or fines needs to be addressed."[1061]

When imposing the payment of un(der)paid wages (and additional financial sanctions), the question arises of whether it is possible to recover this in practice. The last step in the enforcement chain – recovery – often remains underused, even though this is a crucial step (see Sections 6.7 and 7.1 for further details). **In the case of limited or slow recovery of un(der)paid wages and financial penalties within a reasonable timeline, impunity remains.** Moreover, incentives for workers to lodge complaints are considerably reduced if enforcement mechanisms are perceived to be ineffective and too slow.

The **IMI is a key instrument in supporting the cross-border enforcement of penalties and fines**. Nonetheless, it is not used to its full potential by the Member States and the number of requests to recover a penalty/fine is (very) low,[1062] showing the under-usage of administrative cooperation for the cross-border enforcement of financial and administrative penalties.[1063] Challenges thus persist, and redress mechanisms, including judicial proceedings and recovery mechanisms, remain slow across the EU.

[1060] The European Labour Authority, together with the European Commission, launched the Posting 360 Mutual Learning and Understanding Programme on 13 March 2023. See https://www.ela.europa.eu/en/news/enhancing-cross-border-cooperation-area-posting-workers-ela-launches-posting-360-programme.

[1061] See also Recital 39: "The disparities between the systems of the Member States for enforcing imposed administrative penalties and/or fines in cross-border situations are prejudicial to the proper functioning of the internal market and risk making it very difficult, if not impossible, to ensure that posted workers enjoy an equivalent level of protection throughout the Union."

[1062] The current data indicates that only Austria issues requests to recover penalties/ fines. See the information on 'Posting information exchanges by sending Member State – 2020 Q1-Q3' in IMI – Exchanges in the area of Posting of Workers, at https://ec.europa.eu/internal_market/imi-net/statistics/2020/10/posting-of-workers/index_en.htm.

[1063] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and

Possibilities for further actions at Member State level

- Steps could be taken by Member States to **make progress on improving the effectiveness and efficiency of recovery mechanisms** (ideally at the time when the infringer is still providing services in the host country). Such steps involve, for example, immediate collection of the financial penalty, seizure (i.e., the process of taking possession of any goods by the labour inspectorate) until the fine is paid, or not allowing workers to be posted if the company still has outstanding fines. Furthermore, enhanced cross-border collaboration is essential for the recovery of un(der) paid wages and financial administrative penalties. Member States should also make public the share of fines and recoveries which succeed cross-border and the share which does not. Discussions about challenges, solutions identified and exchange of lessons learnt following different approaches can be continued and deepened through the various activities and working groups implemented by the ELA.

- **The ELA can contribute to increasing the use and efficiency of the IMI** in supporting the cross-border enforcement of penalties and fines through actions such as reviewing the challenges associated with its use in the Member States, increasing the user-friendliness of the system, and continuing to support exchanges between the Member States to identify gridlocks and solutions.

8.1.3. Sustained efforts at national level to monitor and evaluate the implementation of the PWD and Enforcement Directive provisions

The complex legal frameworks that regulate the posting of workers require the development of appropriate monitoring and evaluation mechanisms, to assist authorities at national level to assess the implementation process and the impact of existing regulations. Such mechanisms are to date, however, very limited at national level.

The case study on 'underpayment and non-payment of temporary cross-border workers' (Section 6.2) identifies the example of **the monitoring and evaluation programme initiated by the government of the Netherlands**.[1064] The first monitoring and preliminary evaluation reports (published in 2023) note the possible underreporting of posted workers due to non-compliance with the notification duty, as well as difficulties involved in monitoring the implementation of the existing legislation (such as measuring the effects of the revised PWD in relation to workers' remuneration or identifying all responsible actors in subcontracting chains). While not without its challenges, this type of exercise is a critical and necessary addition to the work of labour inspectorates and to improving data collection and quality.

One particular area in which monitoring and evaluation efforts are needed is around the application of some of the **new provisions in the PWD in relation to workers' 'remuneration'**. This concept was introduced by the revised PWD, replacing the provisions related to the 'minimum rates of pay'. However, the Directive does not define the notion of remuneration. Consequently, it can be a **burdensome task for employers to determine what**

amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), SWD(2019) 337 final, p. 19, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0426&from=EN

[1064] Evaluation of the obligation to notify the Working Conditions of Posted Workers Act in the EU (WagwEU) and Monitoring of the Revised Posting of Workers Directive, 2023. Available at https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z01359&did=2023D03198

should be understood under this notion in the receiving state (as it varies according to the Member State and at times, the sector and employer concerned).[1065]

The elements of remuneration packages are defined by national law or practice, as well as sectoral or regional collective agreements and can include the salary, overtime pay, allowances for irregular hours, shift work allowances, work on Sundays and public holidays, etc. Violations of workers' rights can occur not only in situations of non-compliance with national legislation, but also where national rules for posted workers are different to (less advantageous than) those established by sectoral or regional collective agreements, which are then not applied to posting situations.

Underpayment of posted workers is an important problem as it causes unfair competition and results in violations of workers' rights. The existing data on underpayment is very limited and thus significantly hindering an assessment of what further actions are needed. There was also very limited information available during this study's timeline about changes that have been made to enable remuneration uplifts for posted workers in response to the revised PWD provisions in the Member States, and whether the revisions have resulted in (more) equal treatment between local and posted workers. Stakeholders interviewed for this study indicated limited awareness of the impact of the revisions, but emphasised the legal complexity of collective agreements and the challenges for employers and temporary work agencies to understand which provisions apply in general to posted workers, but also in particular to the remuneration issue. This reality raises barriers in reaching the key objective of the revised PWD, notably "equal pay for equal work in the same workplace".

Possibilities for further actions at Member State and EU level

- Member States, supported by the ELA, could take **concrete steps to develop monitoring and evaluation frameworks to support systematic and comparable data** collection and analysis related to the implementation of the PWD and Enforcement Directive, alongside reinforcing the enforcement data collected by labour inspectorates. The learnings can then be used to expand the monitoring system to regulations governing other types of temporary cross-border workers. Regular monitoring and evaluation reports can make an essential contribution to increasing public trust and identifying challenges and developing measures to further assist the implementation and enforcement of existing rules and regulations through targeted measures (e.g., communication campaigns, increasing the number and effectiveness of labour inspections, etc.). The ELA working groups provide an appropriate setting for **agreeing a roadmap on how to set up such monitoring and evaluation frameworks, provide expert support, build capacity and share learnings**.

8.1.4. Improve data collection mechanisms, data quality, and cross-border information exchange and administrative cooperation

Accurate data would help decision-makers and practitioners to understand the scale and patterns of the problems, and avoid recurrent infringements on the protection of temporary cross-border mobile workers and on the social and economic benefits of intra-EU mobility.

[1065] See for instance following remark: "It is quite impossible for a foreign company to understand what is the collective agreement and the remuneration to apply to posted workers without being helped by an Italian consultant" (Dorigatti et al., 2022: 44).

This can be achieved through **enhanced publication of data at Member State level, through coordination of information** and the further development of cross-border cooperation through structures (networks) that share knowledge and lessons learnt, as well as through the IMI. **Improving national IT tools and data collection mechanisms** is a prerequisite to facilitating more effective and faster data and information exchange.

Information exchange between Member States is one of the most useful forms of transnational cooperation (and mutual assistance) in enforcing labour rules (see section 7.1 on promising practices involving cooperation between Member States in Section 7).[1066] The exchange of information between Member States can take place either during or after the period of temporary labour mobility. The direction of information exchange can be from the receiving Member State to the sending Member State, as well as vice versa. The transnational exchange of information can take place between public authorities (including inspection services), but it is also possible that information exchange takes place between and through trade unions, towards the competent public authority (including inspection services).

The ambition to **collect more and better data** was clearly mentioned in the revised PWD.[1067] However, a number of questions remain un(der)explored, for example on the actual terms and conditions of employment of posted workers, or the impact of the revised PWD on the evolution of the wages paid to posted workers.

Moreover, there is **hardly any empirical evidence about the size (i.e., number of tiers) and profile of the subcontracting chains across sectors**, nor is there data on the main characteristics of temporary work agencies that post workers. This is a significant gap that limits the current understanding about how these systems function under the current legal framework and their impact on workers' rights.

With regard to the **enforcement of the posting rules**, there is no data available at EU level, covering all Member States, for a number of basic indicators, such as the 1) number of labour inspectors involved; 2) number of inspections; 3) outcome of these inspections; 4) main types of infringements; and 5) recovery of un(der)paid remunerations and financial sanctions. Data for these indicators are only (partially) available for some Member States. Therefore, the conclusion that the lack of statistics indicates a lack of problems[1068] should be avoided, as the information about infringements (including undeclared work, bogus-self employment, etc.) in this report shows.

Finally, there might be a **biased perception about the level of infringements of the posting rules and other regulations applicable to other temporary cross-border workers**. Case law inherently focuses on fraudulent practices and does not provide a good observation post for forms of non-problematic posting. Moreover, inspections will mostly take place on the basis of a risk assessment (by the labour inspector, by data matching or data mining, or based on a complaint), and mostly in 'risk sectors' (e.g., the construction sector). Non-randomised inspections will yield higher infringement rates and may therefore also assist in a distorted view of the actual scale of infringements related to intra-EU posting.

Possibilities for further actions at Member State and EU level

- Steps could be taken to **collect data and information** on the aspects outlined above within a **reasonable timeframe** and with due consideration given to

[1066] See, for instance, Article 6 of the Enforcement Directive.
[1067] Recital 5 of Directive (EU) 2018/957 states that "Sufficient and accurate statistical data in the area of posted workers is of utmost importance, in particular with regard to the number of posted workers in specific employment sectors and per Member State. The Member States and the Commission should collect and monitor such data."
[1068] Well reflected by following citation from Heindlmaier and Kobler (2022: 13): "Interestingly, the number of controls of brokering agencies for the placement of live in care workers is not statistically recorded by the Financial Control of Undeclared Work Unit. This suggests that brokering agencies are rarely monitored and that controls in the live-in care sector are de facto non-existent. In sum, there is a lack of willingness for police patrol in the live-in care sector."

additional **administrative burden at Member State level**, to ensure as far as possible that comparable data is gathered and analysed to determine trends and inform further measures.

- The first step is to collect the relevant data across the Member States and particularly in the sectors where the research has revealed indications of problematic practices. This involves **agreement on key indicators and their definition** (e.g., what constitutes an infringement), so that the data is comparable across the Member States. Some of the relevant data could be collected by the labour inspectorates (e.g., key characteristics of workers in situations where violations are most often identified, main types of infringements and the type of employers and subcontractors involved). Guidance at the EU level, provided by the ELA, would be critical for the success of such an endeavour.

- The Commission could also support data collection at national level based on comparative methodologies, to complement the data gathered by labour inspectorates. In order to estimate the real extent of infringements in case of intra-EU posting and other cross-border workers, **other research methodologies** (in addition to the analysis of labour inspection results) **are also suitable**. This could involve an overall mapping of service subcontracting in the EU, which would help estimate the scale of cross-border subcontracting across sectors. The digitisation of company registers across the EU (see Section 8.2 below) and the ability to link data on companies and their subcontractors would enable this information to be gathered, analysed and monitored. It would also facilitate the information transfer between EU Member States. Smaller scale mapping of services could be conducted in selected Member States intially, where company registers are accessible in a digital format, to assess the potential of this endeavour and its challenges.

  Another option could bean EU-level survey of economic actors involved in posting (workers, self-employed, posting undertakings, clients). This method would gather data from several types of sources and contribute to a broader understanding of the phenomenon from the perspective of different actors. It should be supplemented with qualitative data collection methods (such as interviews or focus groups) to provide further context to the quantitative results and contribute to an in-depth understanding of the incentives and barriers to respecting the legislation. Notwithstanding the added value of such data at the EU level, this method would likely face some important limitations, such as the inability to capture representative samples and to obtain answers from user undertakings and subcontractors that knowingly break the law. Smaller scale surveys can be piloted in specific countries or sectors initially, to identify challenges and adjust the metholdogy for data collection at a larger scale.

  These methodologies could be commissioned as part of national or EU-level research initiatives. Quantitative research (analysed in the framework of national and/or EU level studies) on the use of subcontracting chains (ideally targeted to relevant sectors, including the construction sector) will add value to the limited empirical evidence currently available (e.g., published by Eurostat) and to the ongoing debates regarding their use in a cross-border context. This type of data could represent a baseline to inform decision-making, but a long-term approach to collect longitudinal data is necessary to enable an understanding of the phenomenon over time, and in relation to any key changes in EU and/or national legislation.

- While **data collection should take place at national level, EU institutions can provide conceptual and practical assistance** in ensuring data collection approaches are consistent and compatible at the EU level and support cross-border cooperation and analysis.

- In support of the monitoring of the PWD, data collection on several **qualitative and quantitative indicators of problematic forms of temporary cross-border mobility** can be considered and undertaken through the different methodologies outlined above, once agreement on common definitions of these indicators has been reached:
    - types of temporary cross-border labour mobility and sectors
    - forms of temporary cross-border labour mobility and sectors most confronted with infringements to the labour rules (based on labour inspection data)
    - the number of labour inspections carried out to control the application of posting rules (and other rules applicable to temporary cross-border workers)
    - the profile of workers in situations where violations are most often identified (e.g., country of origin and destination, type of job, occupation, sector, type of employment relationship, socio-demographic profile)
    - main types of infringements, the type of employers and subcontractors involved, their place of residence, the size of the company, the number of subcontractors used
    - recovery of un(der)paid remunerations and financial sanctions (based on labour inspections data)
- **Transnational exchange of information can be formalised in various ways**, for instance through bilateral or multilateral agreements, memoranda of understanding, and the IMI. Transnational exchange of information can also have an informal character (e.g., informal exchange of information between civil servants/labour inspectorates). The prerequisite for information exchange to be successful is for it to be continuous, frequent, efficient, and based on mechanisms that translate into concrete actions.

8.1.5. Enhanced role for trade unions and employer organisations in enforcement

Preventing pressures for downward social convergence, as well as enforcing the protection of workers' rights are important concerns for social partners (trade unions and employers alike).[1069] Problems related to regime shopping, non-compliance, and unfair competition challenge both workers and employers and are often topics of concern in social dialogue. Cross-border mobile workers are often not part of the membership base of local trade unions.[1070] In many Member States, the social partners are highly involved in policy making and in regulatory processes and can play an important role in ensuring working conditions are respected and/or improved.

Collective agreements at national and/or regional levels sometimes cover posted workers and other temporary cross-border workers or have an impact on the use of these forms of

[1069] B. Furåker and B. Larsson, "Revision of the EU Posting of Workers Directive, Social Dumping and Trade Unions' Position", in: Trade Union Cooperation in Europe. Palgrave Pivot, Cham, 2020, pp. 109-139, available at: https://link.springer.com/chapter/10.1007/978-3-030-38770-9_4.

[1070] J. Cremers, "Economic freedoms and labour standards in the European Union", in: Transfer - European Review of Labour and Research (ETUI), 22(2), 2016, pp. 140-163, available at: https://pure.uvt.nl/ws/portalfiles/portal/12577008/Transfer_European_Review_of_Labour_and_Research_2016_Cremers_149_62.pdf.

employment. Collective bargaining and joint action at cross-sectoral and sector level has proved to be an efficient instrument to define certain standards and support the effective implementation of equal pay principles. Examples from the Nordic countries but also from Belgium, France and Italy show the strong role of sectoral collective agreements in providing both a level playing field from the perspective of companies in receiving countries as well as from the perspective of equal pay and decent working conditions.

The case study on the role of social partners in the protection of working conditions (see Section 7.2) has shown that **social partners also participate in initiatives aimed at improving the detection capabilities of public authorities**. This has taken place through initiatives such as the development of systems facilitating workers involved in alleged fraudulent contracting of work to report these issues. In many countries, social partners cooperate with the public authorities when it comes to remedying violations, and/or form joint issue-specific bodies, for example to combat undeclared work.

In particular, social partners have first-hand knowledge of critical developments on the ground, incidences of problematic practices of posting and other forms of temporary cross-border mobility, new emerging risks and other issues that need to be addressed by policy measures or legal action. A notable example here is the meat sector in Germany, where persisting problems have resulted in campaigns of social partners and other stakeholders (churches, NGOs, employers) that contributed to the enacting of effective measures against problematic practices of subcontracting and agency work.

Social partners also play a role in enforcement and compliance monitoring, including by active participation of trade union officers and shop stewards involved in inspections, reporting rights violations to public authorities and labour inspectorates. Furthermore, trade union-led or joint social partners projects or campaigns are important for informing cross-border workers about their rights, alerting media about irregular practices and other forms of public awareness raising as well as putting pressure on politicians. Trade unions provide legal support and representation to help workers to report abusive working conditions and claim compensation in civil and criminal procedures, including through trade union cooperation across borders.

Possibilities for further actions at Member State and cross-national level

- Actions could be taken to **make collective agreements more easily accessible** in all or at least several official EU languages (for instance, based on a template developed by ELA). This process would **require social partners to have a leading role** (with support from national and regional authorities and at EU level), including in making the content of collective agreements more easily accessible and understandable in a cross-border setting. This could be achieved through the publication of guidance on key provisions regarding the equal treatment of temporary cross-border workers in the content of collective agreements and national/ regional legislation from a cross-border perspective.

- **Employer organisations, alongside national authorities, can have a leading role in supporting employers with information about the correct implementation of provisions**. Employer organisations can also **support national authorities with key information** about the needs for information of employers in different sectors, which are engaged in temporary cross-border work.

- **The sector-specific and general insights that social partners have should find stronger consideration in EU and national policy-making and enforcement processes**. The recently launched ELA Posting 360 Mutual Learning and

Understanding Programme[1071] can be such a vehicle for matters concerning posted workers, but the situation of other types of temporary cross-border workers should also be addressed more systematically.

- **In contexts where there is a more limited culture of cooperation and weaker traditions of tripartite social dialogue, it is important to nurture the participation of social partners** in cross-border and EU-level initiatives and peer learning activities and thus encourage their involvement in identifying challenges and formulating and implementing measures.

8.2. The protection of temporary cross-border mobile workers in subcontracting chains

Subcontracting is an established business model in the sectors in which temporary cross-border mobile workers and posted TCNs are prevalent. **Failure to respect the applicable terms and conditions of employment in subcontracting chains has been evidenced repeatedly**. In the construction sector, for example, subcontracting has become a practice used to increase profits by lowering costs. It also leads to overall lower pay levels and downward wage pressure. Long and complex subcontracting chains are established, creating a separation between the individual (posted) worker and the end user. Due to the lack of transparency and accountability in these chains, practices such as undeclared work, underpayments, a lack of attention to OSH considerations and labour exploitation become increasingly likely.

Although Article 12 of the Enforcement Directive defines rules on subcontracting liability, they can be entirely undermined if, for example, a letterbox company is established in the chain. Letterbox companies do not perform any economic activity but are set up to lower labour costs or create fiscal optimisation strategies. Complex subcontracting in combination with letterbox companies leads to a lack of transparency and accountability, which systematically hide poorer working conditions for temporary cross-border workers. As letterbox companies are difficult to identify, enforcement becomes difficult.

This research has shown that **liability rules are an important tool through which posted workers may claim their rights** (e.g. unpaid remuneration). All the necessary tools seem to be present in the Enforcement Directive to lay down strict rules on subcontracting liability at the national level. The possibility is offered by Article 12(4) to define more stringent liability rules under national law with regard to the scope of subcontracting liability. However, for some stakeholders, the provisions in Article 12 do not go far enough and this has prompted debates about the need to define specific rules on full joint and several liability. However, there are doubts about the political feasibility of this suggestion.[1072]

The **effectiveness of subcontracting liability rules depends on the scope that Member States have chosen to implement them at national level**. For example, whilst the Enforcement Directive stipulates that subcontracting liability exists for one link up the chain, some Member States allow for full chain liability, which ultimately offers better protection to

[1071] The European Labour Authority, together with the European Commission, launched the Posting 360 Mutual Learning and Understanding Programme on 13 March 2023. See https://www.ela.europa.eu/en/news/enhancing-cross-border-cooperation-area-posting-workers-ela-launches-posting-360-programme.

[1072] See Heinen et al, 2017:51 “However, it must be taken into consideration that the concept of liability in subcontracting chains is a highly controversial matter within the Union. The concept of more stringent liability up to a full chain liability, which was demanded by some trade unions, has proven to be too ambitious as some Member States were reluctant to implement a liability scheme in subcontracting scenarios into their national legal system. Keeping in mind the different interests of the western (receiving) and eastern (sending) member states, this is not surprising. The Enforcement Directive is an act of compromise.”

workers. Moreover, the extension of subcontracting liability beyond the construction sector is a practice adopted by a number of Member States, which enables workers in other sectors to also benefit from subcontracting liability. Nevertheless, more evidence would be required to conclude that full chain liability leads to improved working conditions or less instances of unpaid remuneration.

The longer subcontracting chains become, the more opaque they are and the more difficult it becomes for workers to claim their rights. Capping the number of levels in the subcontracting chain can help prevent this, as this would mean that subcontracting chains would be less complex and therefore easier to identify the responsible entities. Nevertheless, few Member States have currently implemented this form of protection. **Stronger liability rules** include:

- Extending liability rules to the **full chain** can be more protective as each of the actors in the chain can be held liable. In practice, this extends remedies available to posted workers. Similarly, extending both full chain liability and a ceiling on subcontracting levels to all sectors (not only construction) can maximise the protection available for posted workers.

- **Due diligence provisions** can add a layer of protection for posted workers, as they require undertakings to comply with certain requirements and control measures in order to avail of the due diligence defence. However, it should be acknowledged that the effectiveness of the liability rules might be hampered by the use of due diligence provisions as an 'avoidance route' (Article 12 (5) of the Enforcement Directive). Nevertheless, 'due diligence' can be considered as an interesting mechanism of 'self-regulation' between the private actors involved. Here, the actors involved (i.e., the client, the main contractor, the sub-contractor), take responsibility, for example by organising preventive inspections. In that regard, self-regulation may complement enforcement by inspectorates.

Weaker liability rules include limiting subcontracting liability to one link up the chain only, limiting it to future unpaid wages (and not to unpaid wages due prior to the period of joint and several liability), or confining the liability scheme to one sector only. These arrangements ultimately grant lesser protections to posted workers in subcontracting chains.

There is **room for improvement in the regulation and implementation at national level, and enforcement of the liability rules across Member States and sectors**. Long-term solutions involving more effective regulations and enforcement are necessary to deter fraudulent and abusive subcontracting practices for all types of cross-border workers and across sectors.

Solutions should have a 1) **preventive effect**: avoiding the occurrence of problems (e.g. by implementing measures that force the client and the main contractor to verify that subcontractors comply with their obligations); 2) **deterrent effect**: ensuring that those who profit from activities performed by workers involved in the subcontracting chain without respecting labour regulation are sanctioned; and 3) **protective effect**: workers can address the client and the contractor(s) when their employer does not fulfil their obligations. For instance, when subcontractors suddenly 'disappear', workers are still able to address other contractors in the chain. **These measures should, however, be proportionate and avoid deterring entirely subcontracting or temporary cross-border mobility**.

Finally, according to Article 71 of Directive 2014/24/EU on public procurement, in the context of subcontracting, '**observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities** acting within the scope of their responsibility and remit'.[1073] This means that

[1073] Directive 2014/24/EU of 26 February 2014 on public procurement, Article 71, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024.

competent national authorities must also ensure that subcontractors of Member States' suppliers comply with social clauses when goods are purchased or services provided by way of public procurement. This avoids a situation whereby a contractor could submit a cheaper offer by outsourcing the service to subcontractors. Appropriate measures to ensure observance of obligations by subcontractors could include a system of direct payment to the subcontractor, or joint and several liability.[1074] An international illustration of how public procurement can be adjusted to support better working conditions is Norway's 2017 Public Procurement Act, which is one of initiatives aiming to ensure that the public sector – as a key purchaser of services – checks whether its suppliers comply with the legislation and ensure decent and fair working conditions for workers.[1075] In practice, implementation varies across municipalities.

It should be generally noted that the aforementioned provision does not create a legal obligation and Member States are left to decide whether or not to use the possibilities offered by the Directive. This **voluntary approach has led to slow and uneven progress, something that should be strengthened in order to better guarantee the rights of workers**.

Possibilities for further actions at Member State and EU level

- Seek to **strengthen the enforcement of existing regulations** through more frequent and extended monitoring and inspections and proportionate – yet dissuasive – sanctions.
- There are differences in the extent to which the posting conditions are checked before issuing a Portable Document (PD) A1, as well as the methodology used for this. **Improving and harmonising checks at national level of PD A1 certificates** would contribute to a better predeparture assessment.
- **Enhance awareness-raising and information strategies** targeting temporary cross-border workers, employers and subcontractors. In cooperation with national actors, social partners, EU institutions such as the ELA could significantly support such activities.
- The **digitisation of business registers across the EU** could create more transparency in the subcontracting chain. Digitisation would increase transparency and facilitate the identification of employers and subcontractors and the checking of their activities in their country of establishment. Through digital company registers, regulatory oversight and audit would be significantly facilitated and would contribute to a much faster exchange of information across borders.
- Consider **more stringent rules at national level** (in light of the possibilities offered by Article 12(4) under national law) with regard to the **scope of subcontracting liability**, while ensuring that such provisions remain justified and proportionate This could include, for example:
    - **Imposing full chain liability**, regulated at national level and evaluating the extent to which this leads to better enforcement of working conditions and pay.

[1074] Y. Yorens, *Cross-border EU Employment and its Enforcement*, Springer, 2023, p. 432-433.

[1075] The Ministry of Labor and Inclusion and the Ministry of Trade and Fisheries of Norway, Evaluation of how public procurement contributes to promoting seriousness (Evaluering av hvordan offentlige innkjøp bidrar til å fremme seriøsitet), 2022.

  - **Extending joint and several liability** to other terms and conditions of employment as set out in the PWD (e.g., to compensation for overtime work from the contractor, or to the provision of housing by the employer).[1076] Since joint and several liability entails that a worker may pursue his/her claim against any party as if they were jointly liable, increasing the number of obligations that entities can be liable for may be a disincentive for engaging in posting of workers. However, an extension of obligations beyond unpaid wages may also encourage entities to carry out "due diligence" procedures the other companies they cooperate with and select them more carefully – thus encouraging access to the market to companies who comply with regulations.

- Art. 12(5) of the Enforcement Directive mentions that Member States may provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable. The due diligence provision in the Enforcement Directive is optional, however. The more Member States implement such due diligence provisions, the more employers will need to undertake checks of activities of key subcontractors, thus ensuring the enforcement of subcontracting liability **and promoting transparency in (long) subcontracting chains**. More employers would be aware of the regulations that apply throughout the subcontracting chain and cooperate (or even alert) compliance monitoring and enforcement authorities when regulations (including collective agreements) are not applied throughout the subcontracting chain.

- Consider a mandatory approach for Member States to include a **social clause when procuring goods or services**, and in the context of subcontracting, for this to include a system of direct payment to the subcontractor, or joint and several liability.

8.3. Access to clear and transparent information for employers, labour intermediaries and workers

It is necessary and important to inform not only temporary cross-border workers about their rights, but also companies and labour market intermediaries about their obligations. This is a critical first step in the enforcement chain. **Insufficient information is an impediment to exercising one's rights and duties**, which endangers workers' rights and leads to an incorrect application of the existing rules. Access to clear information facilitates the transformation of knowledge gaps or gaps in awareness of compliance, and ultimately ensures a system that enables employers to post workers and facilitates other forms of temporary cross-border work.

The research conducted for this study shows that information is not always clear and easily accessible. There is still much room for improvement in how well companies, temporary work agencies, other labour market intermediaries and their workers are acquainted with their rights and obligations.

Another helpful tool for improving access to information is the **single official national website on posting**. The study nonetheless found that the way in which Member States have developed their national websites where this type of information is available varies greatly and the information published on them is sometimes incomplete and/or too complex to understand.

[1076] *Ibid*, p. 424.

The case study on the **role of social partners** (Section 7.2) shows that trade unions and employer organisations can contribute significantly to enabling access to information and advice on labour issues to cross-border workers (e.g. the German trade union project "Fair Mobility").[1077] Due to their direct access to workplaces, social partners also play an important role in reporting and documenting problematic cases to assist authorities and labour inspectorates in the identification of risks and conducting risk assessments. This study has shown that cross-border workers are too often dependent on their employers (companies or labour intermediaries) and have little access to other sources of information (especially if their local language knowledge is limited).

Moreover, **local employers should have more responsibility to provide accurate and complete information to labour intermediaries and workers** about the exact terms and conditions that need to be applied. This, however, requires that they themselves are properly informed and can navigate the complex legal system regulating temporary cross-border mobility. As this report shows repeatedly, **awareness and understanding of the applicable rules and regulations** is often raised by employer and temporary work agency representatives as a key challenge in implementing the existing rules.

Possibilities for further actions at Member State and EU level

- **Member States, with EU level support, notably from the ELA, should ensure that information is made available**, in a clear and understandable manner, and that easy access to it is provided **to employers and subcontractors**. Information should be made available regarding the terms and conditions of employment to be respected in situations involving different types of cross-border workers. This information should be made available in multiple languages, rather than simply the language of the receiving country.

- The **information on the single national website on posting must be accurate and up-to-date**, and the information on the terms and conditions of employment, in accordance with national law and/or practice, should be published in a clear, complete and transparent manner and ideally accessible in several languages (to facilitate readability for workers and companies from abroad).

- Besides the single official national website, the provision of information can take place through various other channels, such as **information, guidance and support (in the national language of the person/company concerned) provided by social partners and non-governmental organisations**, which can have a key role in supporting the dissemination of accurate information and counselling on rules, rights and procedures to lodge complaints.

- Further efforts are needed to improve the information flow, add clarity about the application of the rules in general, provide an overview of the relevant legislation and also tailored assistance. **Relevant national authorities (supported by the ELA) and social partners could consider setting up specialised guidance services for employers**. These could provide tailored assistance services that explain the applicable rules to the particular situations of employers (including temporary work agencies). Such support services would cover laws as well as collective agreements (which is where the systematic involvement of the social partners would be critical). While the level of investment in such services might be high at the beginning, it could with time lead to the development of more automatised processes, which would increase efficiency and reduce further financial investment. For example, based on a range of concrete situations employers face and the clarifications provided by personalised assistance in a first stage, practical

[1077] More information about the German trade union project "Fair Mobility" is available at: https://www.faire-mobilitaet.de/

guides can then be developed and updated. These could include concrete examples of situations involving temporary cross-border workers in different sectors and regions, indicating which rules and collective agreements apply in cross-border settings and providing answers to the most frequently asked questions.

- **Simplifying administrative procedures can improve the compliance and decrease administrative burden related to the posting of workers**. This can be achieved, for example, through additional investments in digitisation. Negotiations are ongoing at European level between the Commission and Member States regarding a so-called 'e-declaration' at European level that could replace the 27 different prior declaration tools.

- In addition to practical guidance on the application of rules and regulations, the **development of an EU remuneration calculator** would support employers to take into account all dimensions of the remuneration package applicable to temporary cross-border workers in posting (and non-posting) situations. Based on a mapping of remuneration packages in the Member States and at sectoral level, the calculator would include elements such as the basic salary, allowances and benefits. An example of a calculator for posted workers already exists in Switzerland.[1078] Lessons learnt from its design and use could be used to inform the development of an EU remuneration calculator.

- **Sustained and targeted information and awareness raising campaigns** coordinated across countries of origin and destination would increase access to vital information and redress mechanisms and encourage workers to report violations. Cooperation between trade unions, employers and government authorities as well as sustainable funding is critical in ensuring the effectiveness and success of such initiatives.

- **Communication to and with posted workers** could also be further improved. First, language can be considered as the most important aspect when transferring information. This can be a challenge certainly in posting situations with many nationalities present. Second, personal contact is one of the most important information channels concerning posting information, and can be improved through information sessions, a reliable intermediary, or a contact person. A variety of communication channels should be used, including printed materials (leaflets, posters), communication sessions, as well as materials posted on social media channels. Printed and digital materials should be done in the variety of languages appropriate to the diversity of workers' national backgrounds. These activities can be large actions implemented at national, regional or local levels implemented by government authorities, trade unions or other relevant organisations, as well as small-scale activities in enterprises or on specific (construction) sites.

- **Awareness raising campaigns** such as the ELA's 'Rights for all seasons' are important in drawing attention to the need to promote fair and safe working conditions for seasonal workers and for providing information to workers about the potential risks that they are exposed to. Equally, the **EURES platform** could be further utilised to help with the placement of seasonal workers, to remedy the current problem of recruitment of these workers through informal means, including dubious practices of labour market intermediaries. For this to have most effect and maximal reach, the provision of toolkits to assist employers in providing all the necessary information for a vacancy, as well as vacancy notices being translated into several languages, should be foreseen.

[1078] https://entsendung.admin.ch/app/lohn_berechnen?navId=lohn_berechnen

8.4. The role of different types of labour market intermediaries in temporary cross-border mobility and problematic aspects

Temporary work agencies and other labour market intermediaries can have a positive role in facilitating relations between workers and employers and more effectively matching demand and supply. However, their role can also be problematic in several situations involving temporary cross-border workers.

As discussed in Section 4, the fact that **temporary work agencies act as employers** (as per the EU Temporary Work Agency Directive) **impacts the working conditions of the workers concerned**. The principle of equal treatment is to be applied for posted agency workers (i.e., the employment conditions of temporary agency workers shall be at least those that apply if they had been recruited directly by the undertaking to occupy the same position). However, Member States can derogate from this principle via collective bargaining. In cases where other labour market intermediaries (i.e., not temporary work agencies as defined by the EU directive) are involved, there is a **higher risk of non-compliance with terms and conditions of employment because their operation is less strictly regulated** and not subject to the same requirements as temporary work agencies (as direct employers).

This study shows that all Member States regulate temporary agency work. Generally, no differences in protection between posted workers employed by temporary work agencies and local workers employed by temporary work agencies, were found in the law. However, **in practice, this research has revealed problematic situations involving temporary work agencies and other labour market intermediaries (that are not employers)**, linked to non-compliance with rules on the posting of workers, as well as other types of temporary cross-border workers. The evidence indicates there is a prevalence of such occurrences in specific sectors that rely on a mobile or temporary workforce (e.g., construction, agriculture, service sectors).

This report has highlighted various situations in which the involvement of labour market intermediaries and temporary work agencies has been associated with irregular practices resulting in non-compliance with terms and conditions of employment (see in particular Section 6.1). The situation is highly complex on the ground, as although the legislation distinguishes between temporary work agencies (as employers) and other labour market intermediaries, this is a grey area in practice. It is very challenging to determine which company should be considered a ‘temporary work agency’ and which should not (e.g., based solely on their ‘official qualification’ versus what occurs in practice (e.g., a high number of intermediaries involved in subcontracting chains). When applying the PWD, the temporary work agency should respect the same terms and conditions of employment that would apply if these posted temporary agency workers had been recruited directly by the user undertaking to occupy the same job. These conditions are stricter than for agencies that act only as intermediaries (i.e., they do not enter in a direct employment relationship with the workers in order to assign them to user undertakings to work). In practice, the posting undertaking benefits from not being considered a temporary work agency as per its definition in the Directive on Temporary Agency Work and the PWD. This can give rise to evasive behaviours, which are difficult to identify in particular in long subcontracting chains. **The complexity of the existing regulations involving posted agency workers contributes to non-compliance**. For example, the principle of equal treatment foreseen in the Temporary Work Agency Directive and the PWD is operationalised in practice differently across the Member States, as it is linked to national legislation. Determining what falls under the ‘remuneration’ package foreseen in the PWD is, for example, a highly complex undertaking for temporary work agencies as well as ‘regular’ employers.

There are indications that even for agencies or intermediaries that endeavour to respect the legislation, **it is challenging to determine what conditions they should comply with** in a

cross-border perspective. This is particularly the case in relation to legislation in countries that differ from those in which they are based, and in particular, where different collective agreements are in place across sectors and/or regions. This situation appears to be more challenging for smaller temporary agencies/ labour intermediaries (similarly to small companies), which do not have branches in other Member States. This is due to more limited resources and networks available to support the gathering of information about existing regulations and their implementation. There are, nonetheless, cases where the **complex legislation and limited control and enforcement create the space for some temporary work agencies and labour market intermediaries to evade complying with or to abuse regulations** (and continue to operate nonetheless).

Bogus self-employment is a practice that is particularly significant in competitive markets with narrow profit margins and is at times linked to the involvement of temporary work agencies and other labour intermediaries. This phenomenon not only results in clear restrictions to individuals' working conditions and rights, but also has significant financial implications associated with the avoidance of employer social security contributions. Further, this has a negative influence on competition and undermines investment in skills, training and apprenticeships. In terms of monitoring and enforcement, **labour inspectorates and enforcement bodies face limitations in dealing with fraudulent activities associated with bogus self-employment**, due to the grey area that exists between dependent employment and self-employment.

Possibilities for further actions at Member State and EU level

- **Invest considerably in enhancing enforcement and monitoring capacities targeting temporary work agencies and other intermediaries at national level** (particularly labour inspections), **improve cross-border data exchanges** through the use of comparable data, and **create mechanisms to facilitate the reporting of infringements** by workers, trade unions, or employers themselves. These efforts should be linked to actions taken to ensure that temporary cross-border workers' rights are respected in (long) subcontracting chains. As discussed in sections 8.1.3. and 8.1.4., it is necessary to improve data collection systems in labour inspectorates and other relevant government authorities at national level, to capture information about the characteristics of fraudulent agencies and support the identification of problematic situations.

- At the EU level, **efforts to improve mechanisms to support the monitoring of the activities of temporary work agencies and intermediaries** should be intensified. For example, a platform at EU level where these aspects could be discussed would bring together and incentivise national efforts. In the past, the European observatory on cross-border temporary agency work was such a tool, the main aims and activities of which could be revived and updated as part of the ELA's current activities and working groups.

- **Increase the number and frequency of preventive and cross-border inspections at Member State level**, targeting subcontracting chains in which temporary work agencies and other labour market intermediaries are involved, rather than focus only on situations in which a complaint is lodged. Bilateral cooperation can be an effective mechanism to pilot new approaches to detect fraudulent agencies and other intermediaries that operate in a cross-border context, apply sanctions and conduct effective recovery – which can then be implemented in other contexts. Bilateral cooperation can build strong networks between inspection authorities in the Member States and facilitate the information flow (including through a more frequent use of the IMI). Such instances of cooperation would also improve knowledge about the

other countries' regulations, enforcement operations and procedures, and the nature of fraudulent agency work in a cross-border context.

- The effectiveness of the legal framework in place would be improved through **swift legal and administrative actions** resulting in sanctions that are proportionate to the violations and provide higher incentives to respect the law. These are necessary to tackle situations when agencies dissolve quickly following inspections that identify problematic aspects, which impedes effective sanctions and recovery mechanisms.

- The **information from pilot projects on data sharing in cross-border cooperation** aimed at detecting and tackling social fraud should be **used to inform approaches at scale** (e.g., the project developed in 2015 in Benelux countries).[1079] The ELA has an essential role in encouraging this coordination and facilitating mutual learning and exchanges between national authorities and stakeholders, for the purposes of enforcing EU rules on labour mobility and social security coordination.

- The **role of social partners can also be better capitalised** in such situations, by **creating cross-border sectoral networks that can systematically support the work of labour inspectorates to enforce compliance** (e.g., through the frequent provision of information about cases of breaches of rights and working conditions, and raising awareness about the negative impact and consequences of undeclared work and unlawful employment).

- In relation to **bogus self-employment, deterrence and incentive measures should be used to actively combat this form of fraudulent contracting of work**. Several Member States (including Czechia, Finland, France, Germany, Ireland, Luxembourg, Portugal and Sweden), have sanctions in place to requalify bogus self-employment into the appropriate form of contractual relationship. Learnings from these measures should be discussed in an EU level forum (e.g. the ELA's Working Group on Inspections) and support further initiatives and more effective enforcement.

- A study that aims to collect further empirical evidence about the role and importance of temporary work agencies (and other labour intermediaries) in posting is needed, as there is still little evidence about this specific type of posting. The key areas where the knowledge base should be further developed regard: the characteristics of fraudulent agencies and other labour intermediaries (e.g., whether they are registered, they have substantial activities in the country of establishment, pay social security contributions); how they take advantage of the existing regulations (and collective agreements) and distinctions between the Member States; the prevalence and nature of problematic situations; and which types of regulations tend to inhibit or incentivise fraudulent behaviour. The study could also support the collection of empirical evidence about the application of the new provisions introduced by the amended PWD in relation to posted temporary agency workers and assess its effects, in particular in situations involving complex cross-border subcontracting chains.

[1079] Benelux Cross-border cooperation in detecting and tackling social fraud and error – pilot project in the Construction sector, available at https://www.ela.europa.eu/sites/default/files/2021-09/GP%20fiche%20Benelux_0.pdf.

8.5. Posting of TCNs

Based on available information, the phenomenon of posted TCNs (those who migrate to the EU and who are subsequently posted to another EU Member State in order to provide services) is increasing fast, driven by current labour shortages. It seems to be concentrated in a number of sending Member States (one could even speak of a 'hub'), such as Slovenia, Poland and Lithuania, and to a lesser extent Spain and Portugal, and a few receiving Member States, such as Austria, Belgium, France and the Netherlands. It is also concentrated in specific sectors of activity such as construction, road transport, live-in care, and agriculture. TCNs in all sectors are, however, more likely to be vulnerable to irregular employer or labour intermediation practices.

Given that their work permit is often linked to their residence permit, TCNs are less inclined to report any violation of their working rights, including those related to OSH, and may accept lower pay and dangerous working conditions for fear of bringing attention to themselves and losing their job. Posted TCNs are in a more vulnerable position compared to local workers but even compared to EU posted workers. Risks related to underpayment of wages and precarious living and working conditions (see Sections 6.2 and 6.5) seem to be higher for this group of workers.

Different interpretations and applications of EU law and the Court of Justice of the European Union case law in different national contexts facilitates non-compliance and raises additional challenges for cross-border cooperation and enforcement,[1080] as Member States have developed varying practices.

Possibilities for further actions at Member State and EU level

- Posted TCNs should be **better informed about their labour rights** (e.g. through communication campaigns and legal assistance) in their own languages. This is a joint responsibility of employers, trade unions, as well as the sending and receiving Member States. These actions could **incentivise posted TCNs to actively enquire about their rights and submit complains** when they suspect that their rights are being abused.

- Coordination of these actions is important, to ensure consistency and provide information that is accessible and timely. The ELA's working groups can provide the medium to discuss and agree common approaches, in particular to ensure that **communication campaigns reach TCNs across borders**. The website designed by the European Federation of Building and Woodworkers[1081] could serve as an example for other sectors, as it provides information on wages, working conditions and rights of construction workers in the Member States and in various EU and non-EU languages.

- **Transnational cooperation and information exchange** could be improved among enforcement bodies as well as national level enforcement activities (as discussed in Section 8.1). Given the varying applications of EU law and case law relevant to TCNs in the Member States, enforcement authorities would benefit from clear guidance on these varying practices. This could be achieved through the

[1080] This is also emphasised in a recent report. European Labour Authority (2023). Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, https://www.ela.europa.eu/sites/default/files/2023-04/ela-report-posting-third-country-nationals.pdf

[1081] See: https://www.constructionworkers.eu/en/al

development of a handbook that summarises the legal framework and provides examples of practical situations, on an ongoing basis.[1082]

- Equally, the systematic collection of **more accurate data about the profile of posted TCNs** such as nationality and the type of posting[1083] (e.g., through existing tools such as the prior notification tools) could also contribute to more precise and comparable information about their situation at the EU level.

- **Clarify the conditions under which TCNs belonging to the labour market of a Member State can be legally posted to another Member State**, as countries have developed varying practices. At EU level, discussions could be conducted to discuss the feasibility of transposing the conditions under which TCNs can be posted within the EU into European legislation.[1084,1085] Such a proposal could also provide for specific control mechanisms and sanctions and include guarantees for the safeguarding of the rights of these workers.

- **An evaluation of the flexible bilateral agreements and permissive entry regimes in some Member States** (e.g., in Slovenia and Poland) could be carried out, as posting of TCNs is concentrated in a small number of sending Member States. Additional conditions could be added to ensure that TCNs are first integrated in the labour market of the Member State concerned (and thus meet the needs of the labour market) before they can be posted to another Member State.

[1082] European Labour Authority (2023). Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, p. 122, https://www.ela.europa.eu/sites/default/files/2023-04/ela-report-posting-third-country-nationals.pdf

[1083] "Posting between two companies under a service contract ('contract of services'), posting of workers within the same group ('intra-group posting') and posting through temporary work agencies". See Frederic De Wispelaere et al., Posting of workers - Collection of data from the prior notification tools - Reference year 2019, at https://ec.europa.eu/social/main.jsp?catId=738&furtherPubs=yes&langId=en&pubId=8416

[1084] Suggested during expert interviews conducted for this study in 2022.

[1085] See also S. Danaj, 'The posting of third country nationals via EU Member States', last slide: "The solution could be to find a way to re-regulate or restrict TCN posting."

Annexes

Annex 1: Overview of legal measures at EU level, EU case law and national case law

This annex complements Section 4 by providing a summary of key examples of case law at EU and national level. It also lists key EU directives and regulations that are relevant for the protection of cross-border intra-EU workers.

EU measures:

1. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

2. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work

3. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

4. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance

5. Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

6. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance)

7. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union

8. Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012

9. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

10. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

11. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

12. Regulation (EU) 2019/1149 establishing a European Labour Authority

Overview of case law at EU level

1) Webb (C-279/80)

In Webb, the Court of Justice (CJEU) was asked to assess whether the supplying of manpower could be considered as a 'service' within the meaning of Article 60 (now Article 57) of the Treaty. According to the Treaty, 'service' means a service which is normally provided for remuneration, in so far as it is not governed by the provisions relating to freedom of movement for goods, capital and persons. When an undertaking hires out, for remuneration, workers who remain in the employ of that undertaking, where there is no contract of employment between them and the user, its activities constitute an occupation which satisfies the conditions of Article 60 (now Article 57) of the Treaty. As such, this constitutes a 'service' within the meaning of the Treaty.

Moreover, according to Article 59 (now Article 56), any restrictions to the freedom to provide services should be prohibited in respect of nationals of Member States who are established in another Member States, unless duly justified by general reasons of interest and only if the restrictions are imposed to all persons or undertakings operating in that Member State. The CJEU, however, recognized that the provision of manpower is a particularly sensitive matter, which allows Member States to put in place legislation as to regulate this service. In particular, in light of the differences among Member States, the provision of manpower can be subject to a system of licensing in order to retain control on the national labour market.

2) SECO (C-62-63/81)

Two undertakings based in France carried out some works in Luxembourg, temporarily seconding third-country national workers. For the entire duration of the work, those workers were affiliated with French social security. According to the Luxembourgish Social Insurance Code, all employees working in Luxembourg are compulsorily affiliated for the purpose of pension, and have to pay half of the contribution, while the remaining one contribution is up to the employer. The French undertakings obtained an exemption for the employees' share of insurance contributions but were held liable by the competent Luxembourgish institution for the employer's share of those contributions. The undertaking contested the requirement provided by the Luxembourgish legislation as it was discriminatory and likely to impede the freedom to provide services.

The case was referred the Court of Justice, which agreed with the undertakings. The freedom to provide services implies that when a service provider performs its activities in another Member State, the service shall be provided under the same conditions as imposed by the host Member State. This implies the abolition of all direct and indirect discrimination. In the case at stake, the legislation obliges the employer, established in another Member State, to pay a share of social security contribution which he already pays in the Member State where he is established, for similar contributions in respect of the same workers and the same periods of employment. In such a case, the national legislation makes it more onerous for the employer established in another Member State to perform the service in that Member State. It should also be noted that legislation which requires employers to pay social contributions for their workers which is not related to any social security benefit, may not be justified in light of the general interest in providing workers with social security. Furthermore, the Court refused to accept the Luxembourgish argument according to which, as Member States are free to refuse or allow third-country nationals to enter their territory to work, they may also attach to the work permit any conditions or restrictions. In the opinion of the Court, Member States cannot use the power to limit the entry of third-country nationals to impose a discriminatory burden on undertakings established in another Member State.

3) Rush Portuguesa (C-113/89)

Rush Portuguesa was a company registered in Portugal (which was not yet, at the time of the case, an EU Member State), which won a contract in France and, in order to carry out the works, brought its Portuguese workforce from Portugal. The French Labour Inspectorate, after inspection, imposed a fine to the company for having employed foreign workers without a permit. Rush Portuguesa contested that the fine infringed its freedom to provide services within the Community and that freedom of movement of workers was not at stake. On the contrary, the French authority maintained that the freedom to provide services did not extend to all the employees of the service provider, since employees remained subject to the arrangements applicable to workers from non-EU countries under the transitional provisions of the Act of Accession as regards freedom of movement of workers.

The questions referred to the CJEU were thus related to the relationship between the freedom to provide services and the derogations from the freedom of movement of workers. The freedom to provide services precludes a Member State from prohibiting the service provider established in another Member State from moving freely in its territory with his staff and precludes any restrictions such as the obligation to obtain a work permit. The derogations from the freedom of movement of workers, on the other hand, pursuant to the Act of Accession, apply when Portuguese workers access the employment market of another Member State and serve the purpose of avoiding the risk that the employment market of the host Member State may be disrupted. The situation is however different when there is a temporary movement of workers who are sent to another Member State to carry out construction or public work as part of a provision of services by their employer, as the situation in the present case. In fact, as the CJEU noted, such workers return to their country of origin after the completion of the work without gaining access to the labour market of the host Member State. Moreover, the CJEU explained that Community law does not preclude Member States from extending their legislation or collective labour agreements to any worker who is employed, even temporarily within their territory, no matter the country of establishment of the employer, nor are Member States prohibited from enforcing those rules by appropriate means. Therefore, it follows that the Portuguese undertaking, providing services to another Member State, may move with its own labour force for the duration of the work in question. In such a case, the authority of the host Member State may not impose on the service provide any conditions relating to the recruitment of manpower in situ of the obligation to obtain a work permit for the Portuguese work-force.

The CJEU established the principle that domestic labour law may be extended to posted workers.[1086]

4) Vander Elst (C-43/93)

The issue in the present case is that Moroccan workers, regularly employed in Belgium, posted in France to carry out work for one month, were found by the French authorities not to have work permits in France. The short-stay visa provided by the employer was not considered sufficient. According to French legislation, the penalty consisted in the payment of a special contribution.

It should be recalled that the Treaty requires the elimination, against a person providing a service, of all discrimination on the ground of nationality and the abolition of any restriction liable to impede or make it difficult the provision of the services, even if applied without distinction to all services providers. Any national legislation which makes the provision of a service on the national territory by an undertaking established in another Member States subject to an administrative licence or to a payment of a fee constitutes a restriction and has

[1086] Bielinski, Filip and Karla Žeravčić, "Posted Workers in the EU: Lost Conflicting Interests and Single Market Objectives", Croatian Yearbook of European Law and Policy, 2020, available at: https://www.cyelp.com/index.php/cyelp/article/view/413 (last accessed on 02/03/2022).

to be duly justified by overriding reason in the general interest. In the situation at stake, the CJEU noted that the Moroccan workers were lawfully resident in Belgium, with a lawful work permit. Moreover, the short-stay visa constituted a valid documentation to remain in France for the duration of the work, meaning that the national legislation of the host Member State concerning the immigration and residence of foreigners had been complied with. Finally, it furtherly noted that the French work permits were a mandatory requirement for third-country nationals to work in France when hired by an undertaking established in France, for the purpose of regulating the access to the French labour market. The workers, being hired by a Belgian company and only temporary posted in France, were not seeking to enter the French labour market.

The CJEU thus concluded that it is prohibited for a Member State to require an undertaking established in another Member State to obtain work permits for a third-country national who is lawfully employed in the Member State of origin and has valid documents permitting them to remain in the host Member State as long as necessary to carry out the work, if they return to the Member State of origin after the completion of the work.

5) Wolff & Müller (C-60/03)

The CJEU ruled that Member States are required to apply appropriate measures to guarantee the payment of the statutory minimum wages applicable in the host country. If national regulations give rise to additional administrative and economic costs and burdens, the national regulation affects the freedom to provide services in a negative manner. National rules can, however, be justified, if they are grounded in overriding requirements concerning the public interest. In this case, the German provision offered the posted worker the advantage of being able to hold a second debtor liable, who is connected to the employer and is able to pay and thus is appropriate to ensure the protection of posted workers. If a provision has the objective of preventing unfair competition, having a restriction on the provision of services may be justified provided that there are overriding requirements based on public interest.

6) Belgium v Commission (C-433/04)

This case relates to a Belgian legislation on the withholding obligation and on joint liability. According to the Belgian Government, these rules are part of a broader system for the prevention of tax fraud. Contrarily, the Commission considered both measures as unjustified and disproportionate.

As settled by case law, no obstacles should be placed on the freedom to provide services. However, a national legislation impeding this freedom might be justified if it falls within a non-harmonised area at Community level, it is applicable without distinction to every persons and undertakings in a Member States and it relates to overriding public interests. The CJEU has previously held that the prevention of tax avoidance and the need for effective fiscal supervision can be considered as sufficient justification. Nevertheless, the need to combat tax evasion does not suffice to justify the application of the withholding obligation and joint liability generally and on a precautionary basis to all service providers who are not established and not registered in Belgium. Some of those providers could, in fact, in principle not be liable for the taxes and deductions whose recovery the measures are designed to ensure. Additionally, less restrictive means exist of ensuring the recovery of taxes and deductions. Consequently, providers not registered and not established in Belgium might be deterred from having access to the Belgian market in order to provide services there, or principals and contractors might be deterred as well from using the services of those providers.

For all these reasons, the CJEU considered the measures at stake as an unjustified restriction to the freedom to provide services.

7) Laval (C-341/05) and Viking Lane (C-438/05)

The two cases are similar and are often considered together, as they illustrate the issue of the interface of two opposite stances: the protection of the social rights of workers and the guarantees of the fundamental freedoms of the internal market.[1087] Viking concerned the right of establishment, while Laval relates to freedom of establishment and posted workers.

In the Laval case, a Latvian construction company (Laval) posted workers to Sweden to work for a Swedish branch. Sweden did not transpose the Posting Workers Directive, thus the Latvian posted workers were paid less than their Swedish counterparts. Fearing that the posting of cheap labour would threaten the position of Swedish construction workers, the Swedish trade unions tried to convince Laval to enter into the collective agreement applicable to the category. The negotiations were unsuccessful and the Swedish trade unions took collective action by blocking all Laval sites, causing its bankruptcy. Latvia brought action against Sweden and the case was referred to the Court of Justice, which considered it together with the Viking case.

The Viking case concerned a ferry company (Viking Line) operating a ferry between Finland and Estonia under the Finnish flag, which employed its workers under a collective agreement applicable in Finland. As the ferry was operating at a loss, Viking Line wished to reflag it as Estonian and tried to enter into collective bargaining with Estonian trade unions. However, the Finnish trade union objected and started industrial action. The issue of whether Viking Line could rely on the right to freedom of establishment to challenge actions taken by a trade union was finally referred to the CJEU.

According to the opinion given by the Advocate General, the blocking of the Laval working site could have been considered acceptable because it was motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and it was not carried out in a disproportionate manner. However, the CJEU did not follow the AG's opinion. It considered that the right to take collective action must be recognised as a fundamental right, part of the general principles of the Community law and taking actions against social dumping may constitute a reason of public interest. Nevertheless, it has to be exercised in a manner compatible with Community law. Since the blocking of the working site is seen as a restriction of the freedom to provide services and of the freedom of establishment, it could have been considered lawful only if it was sufficiently justified and proportionate. The issue of determining if the industrial action was justified and proportionate was left to national courts.

The CJEU came to the same conclusion in the Viking case and it furtherly provided guidance on how to assess whether the collective action was justified and proportionate. The CJEU held that the right to take collective action for the protection of workers is a legitimate interest, which might, in principle, justify a restriction of the fundamental freedoms. However, it should be up to national courts to verify whether other less restrictive means were available and if those have practically been exhausted.

8) Commission v Luxembourg (C-319/06)

The Commission considered that Luxembourg failed to fulfil its obligations under Article 3(1) and Article (10) of Directive 96/71, as the national Law of 20 December 2002 was found to be incompatible with Community law. In particular, that law was said to: (1) require undertakings established in another Member State which posted workers to Luxembourg to comply with terms and conditions of employment going beyond the requirements of Article 3(1) and 10 of the Directive, (2) fail to ensure that posted workers are afforded any other rest period (daily rest period) entitlement apart from the weekly rest period, (3) lack clarity by requiring undertakings posting workers to Luxembourg to make available to the Labour and Mines Inspectorate prior to the commencement of work on demand and within as short a period as possible the basic information necessary for monitoring purposes, and (4) restrict freedom to

[1087] *Ibid.*

provide services by requiring undertakings whose registered office is outside the territory of the Grand Duchy of Luxembourg or which do not have a permanent establishment there to keep the documents necessary for monitoring purposes with an ad hoc agent resident in Luxembourg.

In relation to the first argument, it should be recalled that Article 3(1) sets out an exhaustive list of matters in respect of which the law of the host Member State shall apply, while Article 3(10) provides that Member States may require of undertakings which post workers to their territory, terms and conditions of employment on matters other than those referred to the first subparagraph of Article 3(1), in the case of public policy provisions. Luxembourg contested that the Law of 20 December 2020 contained provisions under the national public policy. However, the public policy exception is a derogation from the main principle of Article 3(1), and for this reason, it shall be interpreted strictly. It constitutes also a restriction to the freedom to provide services, which, as a fundamental principle of the Treaty, can be restricted only by overriding requirements relating to the public interest and applicable to all persons and business. The requirements in place in Luxembourg (i.e., the automatic adjustment of rates of remuneration to the cost of living, the rules on part-time and fixed time work, the imperative provisions in respect of collective agreements) were not considered by the CJEU to constitute public policy exceptions within the meaning of Article 3(10).

Moreover, in relation to the third and fourth complaints, the CJEU found that both requirements had the effect to dissuade undertakings wishing to post workers in Luxembourg to exercise their freedom to provide service. The national law of Luxembourg was consequently found incompatible with Community law.

9) Rüffert (C-346/06)

This case concerns the definition of 'universally applicable collective agreements' (Article 3(8) of the PWD).

Lower Saxony had a rule that obliged public authorities to award contract works only to undertakings paying at the least the remuneration laid down in the local collective agreement. A company that won the public tender contract only agreed to pay half of the amount that was stipulated in the applicable collective agreement. The was referred to the CJEU which decided that the collective agreement fell outside the scope of the Directive as it had not been declared universally applicable pursuant the Directive. Germany did not, in fact, have a system for declaring collective agreements universally applicable and this agreement was not generally applicable to all similar undertakings in the geographical area and in the profession/industry concerned (as stated in Article 3(8)).

With this decision, the CJEU narrowed the specific types of collective agreements falling within the scope of the Directive, excluding the application of agreements which are generally binding only de facto to posted workers.[1088]

This case is quite sensitive as it also relates the possibility of Member States to use public procurement as a tool for non-economic objectives. The CJEU, however, specifically stated that minimum wages' provisions contained in collective agreements which have not been declared universally applicable are not applicable to posted workers.[1089]

[1088] Costamagna, Francesco, "The Revision of the Posted Workers Directive as a Meaningful Way to Curb Regulatory Competition in the Social Domain?", Sant'Anna Legal Studies, STALS Research Paper 2/2019, available at: https://ssrn.com/abstract=3422858, (last accessed on 02/03/2022).
[1089] *Ibid.*

10) Sähköalojen ammattiliitto/ESA (C-396/13)

A Polish company (ESA), with a Finnish branch, hired, under Polish law, workers that were subsequently posted in the Finnish branch. ESA did not pay the minimum remuneration required under Finnish collective agreements, therefore workers addressed their claims to the Finnish trade union (Sähköalojen ammattiliitto).

The case was referred to the CJEU for a preliminary ruling. The subject-matter of the proceedings related to the determination of the scope of the concept of 'minimum rates of pay' pursuant to Directive 96/71. There were no doubts, according to the CJEU, that, as prescribed by Article 3(1) of Directive 96/71, the minimum rates of pay are governed by the law of the Member States in which the workers are posted, therefore, in the present case, Finland.

Furthermore, the CJEU was also requested to determine if the minimum rates of pay, as considered in the Directive, could cover some additional elements as provided in the national legislation (i.e., basic hourly pay according to pay groups, guaranteed piecework pay, holiday allowance, flat-rate daily allowance and compensation for daily travelling time). The CJEU, recalling the main objectives of Directive 96/71, the need to ensure a fair competition between national and trans-national undertakings and the aim to guarantee the minimum protection of posted workers, noted that Directive 96/71 has not provided for an harmonisation of rules, but it gives some information concerning the content. In fact, Article 3(1) refers to the national law or practice of the Member State in which workers are posted for the definition of the minimum rates of pay. Therefore, subject to the specifications provided in Article 3, it is up to Member States to define the elements of the minimum rates of pay, as long as this does not have the effect of impeding the freedom to provide services. After an examination of the various elements referred to by the national court, the CJEU concluded that the reimbursement of the cost of accommodation and the meal voucher daily allowance are not to be considered as elements of the minimum wage, while daily allowance and the pay for the minimum annual holidays are parts of the minimum wage. In relation to compensation for day travelling time, it could be considered an element of the minimum wage, provided that the daily journey to and from the place of work is more than one hour's duration, which is up to the national court to verify. Lastly, the CJEU expressed its opinion on the Finnish system based on a calculation of the minimum wage for hourly work and/or for piecework which is based on the categorisation of employees into pay groups, noting that nothing in the Directive precludes its application, provided that the relevant rules applicable to the system are binding and transparent, which is for the national court to verify.

11) Bundesdruckerei GmbH v Stadt Dortmund (C-549/13)

In the present case, similarly to the one above, the CJEU ruled out the possibility to apply rules on minimum wages in case of cross-border provision of services, as it was considered incompatible with the fundamental freedom to provide services.[1090]

The case concerned a German law providing that the successful tenderer for a public contract should guarantee a minimum wage also for workers employed by a subcontractor established in another Member State (in this case, Poland) and who would carry out the work exclusively in that State. The law constituted a restriction of the freedom to provide services, as it was likely to constitute an additional economic burden for the undertaking in question, which would render less attractive the provision of services in the other Member State. Such restriction, however, might have to in principle be justified by the objective of protecting employees, but as it was only applicable to public contracts, it was considered not appropriate for the achievement of that objective.

[1090] *Ibid.*

12) Regiopost case (C-115/14)

The case concerns a German undertaking participating in a public tender in a German city. However, the case was referred to the Court of Justice, which confirmed its jurisdiction, as it related to a matter of interpretation of a national law in light of Article 56 TFEU.

The matter, in fact, concerned the interpretation of Directive 2004/18, on procedures for the award of public work contracts. The CJEU was asked to determine if a national legislation requiring tenderers and subcontractors to pay their workers a minimum wage should be considered contrary to Article 26 of Directive 2004/18. Article 26 stipulates that special conditions related to the performance of the public work contract are admissible, provided that these are compatible with Community law and are indicated in the contract notice. The CJEU noticed that, in order to verify if the special condition at stake is compatible with Community law (e.g., it is not discriminatory), it is necessary to determine whether, in cross-border situations, the minimum conditions of Directive 96/71 are observed. It should be noted that minimum wage is not the same everywhere, thus there might be Member States with lower minimum wage, which could be impeded from having access to the public contract of the host Member State. However, the CJEU noted that the requirement, as laid down in law and thus generally applicable to any public contracts in the specific region (contrary to the ruling in Rüffert, see above), conferred a minimum social protection for workers and therefore could be justified by the objective of protecting workers.

13) Danieli (C-18/17)

Danieli is an Italian company, which accepted an order from an Austrian company for the construction of a wire rod mill in Austria. Danieli wished to hire out four Croatian workers and a Russian and a Belarusian to perform this work. The company was part of a group of companies, which included another Italian and a Croatian company. The Italian company was the direct employer of the Russian and Belarusian workers, while the Croatian one was the employer of the Croatian workers. Danieli made a request for posting to Austria its workers, but the competent Austrian authority did not authorise the posting on the basis that Article 1(3)(a) of Directive 96/71 requires “an employment relationship between the undertaking making the posting and the worker during the period of posting” and that a work permit was thus required. Since all the workers were not directly employed by Danieli, this requirement was missing.

The case reached the CJEU, which was asked to determine if it was possible to require a work permit for Croatian posted workers employed by a Croatian company, where the posting involves their hiring-out to a company established in Italy (being no employment relationship between the latter company and the posted workers) with a view to provide services in Austria. The same question was asked in relation to the third-country national posted workers.

The CJEU firstly noted that Article 1(3)(c) of Directive 96/71 could be considered relevant for the case. According to the case-law, this provision of the Directive can be held applicable when three conditions are satisfied: (i) the hiring-out of manpower is a service provided for remuneration and the worker remains in the employ of the undertaking providing the service; (ii) the hiring-out is characterised by the fact that the movement of workers constitutes the very purpose of the provision of the services by the undertaking providing the service; (iii) the user undertaking maintains the control and discretion over the employees hired out. In the situation at stake, it was evident that the Croatian workers remained contractually bound by the Croatian undertaking, which posted them to Danieli against payment. In the same way, it was also evident that the provision of services agreed by the Croatian company and Danieli was the posting of workers for the purpose of performing work in Austria and that during their posting to Austrian, the posted workers carried out their tasks under Danieli’s control and direction. Therefore, the CJEU confirmed that the operation envisaged in the present case constitutes a provision of services involving the temporary movement of workers pursuant Article 1(3)(c) of Directive 96/71. However, it should be noted that at the time of the case at stake, Croatia was

in the process of accessing the European Union. According to its Act of Accession, Member States could restrict the free movement of workers for the purpose of regulating their national labour market. In light of this, the CJEU concluded that Austria was entitled to require a work permit for the Croatian posted workers.

Furthermore, the CJEU provided guidance also in relation to the posting of the third-country nationals. It recalled that any administrative requirements making the provision of services more difficult for a service provider established in another Member State constitute a restriction to the freedom to provide services. However, since the posting of third-country nationals in the framework of the cross-border provision of services has not been harmonised at EU level, such measures could be justified if there is a general objective of public interest. A valid justification could be the need to avoid disturbances on the national labour markets. Nevertheless, posted workers who are hired out by a user undertaking for the purposes of conducting work for a specific period and that return to their country of origin after the completion cannot constitute a disturbance for the national labour market. Moreover, requiring a work permit for those posted workers, goes beyond what is necessary to achieve the objective of keeping control on the labour market, as there are less intrusive measures that could achieve the same goal. On this basis, the CJEU concluded that no restrictions to the posting of the two third-country nationals could have been imposed.

14) Dobersberger (C-16/18)

The Austrian Federal Railways awarded for a period a contract for the provision of services to an Austrian undertaking, which, however, subcontracted the work to an Hungarian undertaking. All workers employed for the purpose of that contract were Hungarian and carried out the main part of the work in Hungary (as they start and finish their shift in Hungary), with the exception of some checks that needed to be carried out on trains. The director of the Hungarian undertaking, as the employer of Hungarian workers posted in Austria in order to carry out checks on train, was found not compliant with Austrian legislation.

The CJEU was requested to determine if Article 1(3) of Directive 96/71 also covers the provisions of on-board services for passengers on trains carried out by workers established in the Member State of posting (Hungary) in performance of a contract with a railway undertaking established in the host Member State (Austria) when these services are provided in international trains, which also travel through the host Member State. Moreover, it was asked if Directive 96/71 also covers situations, as the one in the present case, where the undertaking providing the service has a contract not with the recipient undertaking but with another undertaking based in the host Member State, which, in turn, is in a contractual relationship with the recipient undertaking (situation of subcontracting chain).

The CJEU recalled that, pursuant to Directive 96/71 workers cannot be considered as posted if the performance of their work does not have sufficient connection with the territory of the host Member State. In the case at stake, where workers carry out only a very limited part of their work in Austria, and they start and finish their shifts in their Member State, workers cannot be regarded as ‘posted’, therefore Directive 96/71 shall not apply. Therefore, the CJEU concluded that Directive 96/71 does not apply to employees of an undertaking established in a Member State who provide on-board, cleaning or food and drink services on international trains crossing the Member State of the railway operator concerned, where those workers carry out a significant part of the work inherent in those services in the territory of the Member State in which their undertaking is established and where they begin or end their shifts there.

In light of this, it was irrelevant whether the provision of services is covered, in the context of a subcontracting chain, by a contract concluded with an undertaking established in the same Member State as that of the railway operator which is contractually linked to the latter. Nor is it relevant if the undertaking assigns workers to supply services who have been hired out to it by an undertaking established in the same Member State as its own.

15) Hungary v Parliament and Council (C-620/18) and Poland v Parliament and Council (C-626/18)

Hungary and Poland brought actions in front of the CJEU seeking the annulment of Directive 2018/957. Directive 2018/957 amended, inter alia, Article 3(1) of Directive 96/72/EC, which regulates terms and conditions of employment of posted workers. In light of the new provisions, posted workers are entitled to the 'remuneration' fixed by the legislation of the host Member States, instead of the 'minimum rates of pay'. Moreover, where the effective duration of a posting exceeds 12 or 18 months, all the terms and conditions of employment of the host Member States would become applicable to the posted workers. Consequently, Hungary and Poland contested the revision of the Posted Workers Directive, relying on the choice of a wrong legal basis (namely Article 53(1) and 62 TFEU) and on the infringement of Article 56 (freedom to provide services) and the Rome I Regulation.

Regarding the first ground, the CJEU held that the revision is an amendment of existing legislation (the PWD 96/71/EC), thus the legislator could rely on the same legal basis, which allows, in particular, the adoption of directives seeking to make it easier to exercise the freedom to provide services. It is open to the EU legislature to tweak and adjust the balance inherent in the PWD, by enhancing the rights of posted workers in the host Member State so that competition between the undertakings posting workers to that Member State, and the undertakings established in that State, could develop on a more equal and level playing field.

Secondly, the CJEU found that no infringement to Article 56 occurred. The Directive does not remove any competitive advantage which might be enjoyed by services providers in some Member States, as it has in no way the effect of eliminating all competition based on costs.

Thirdly, the CJEU recalled that, in order to challenge a piece of legislation with an action of annulment, the law in question shall infringe the EU Treaties or the EU general principles of law or it is vitiated by a misuse of powers. However, it shall be noted that the EU legislature has a broad discretion in an area such as the posting of workers, which involves political, economic and social aspects. Therefore, the CJEU held that no manifest error was committed by the EU legislator when regulating the consequences of a posting for more than 12 months.

Lastly, in relation to the alleged violation of Rome I Regulation, despite the rule providing that the individual employment contract is to be governed by the law of the country in which the employee habitually conducts the work, Article 23 provides for an exception. This provision regulates that where provisions of EU law lay down rules on the law applicable to contractual obligations, these should apply.

16) FNV v Van den Bosch (C-815/18)

The ruling confirmed that transport workers can also be posted workers, correcting the position that it held in Dobersberger (C-16/18). The test of 'sufficient connection to the territory of the receiving state' needs to be applied and the workers need to fulfil the conditions before they can benefit from the protection of the host state.

The CJEU clarified that this test requires 'an overall assessment of all the factors that characterise the activity of the worker concerned', such as the nature of the activity, the degree of connection between the activity and the territory of the 'host' Member State, and the proportion of this activity in the entire transport service. For example, a driver who merely transits through a country cannot be considered posted to it.

17) Team Power Europe (C-784/19)

Team Power is an undertaking established under Bulgarian law which provides temporary employment and work placement services (i.e., temporary work agency) and which posts workers to Germany. Concluding a contract of employment with a Bulgarian citizen, it was agreed that the employee's duties were to be specified by the hirer company but that Team

Power would cover his salary. The issue arose from the refusal of the administrative authority to issue a certificate confirming that the employee was subject to Bulgarian social security law during the period of posting. According to the competent authority, in fact, the two cumulative conditions were not met: no direct relationship between the employee and the employer was maintained, and the employer could not be considered to pursue a significant proportion of its activity in Bulgaria (as its main source of revenue was to post workers in Germany).

The Court of Justice was thus called to determine whether, in order to assume that a temporary work agency normally carries out its activities in the Member State in which it is established, the agency has to perform a substantial part of the employee assignment activity for hirers established in the same Member State. In order to do so, the CJEU had to interpret the concept of 'the normal carrying out of activities'. The activities should be 'significant activities' and not 'purely internal management activities'. A typical activity of a temporary work agency is to supply staff to a user or hirer undertaking, but this activity implies selecting, recruiting and hiring of workers. According to the CJEU, all the activities which concern the selection of workers to be supplied, are to be considered 'significant activities' for a temporary work agency. Therefore, in the present case, Team Power Europe was carrying out its substantial activities in the sending State, i.e., Bulgaria, as that was the location of its staff and organisational structure. Consequently, the proportion of workers that the agency posts to another Member State in relation to those who are assigned to undertakings established in Bulgaria is irrelevant. Nevertheless, the CJEU recalled that this should not constitute fraud or abuse of rights, which could undermine the right of posted workers to benefit from the social security. In fact, in this case, accepting that Team Power Europe carried out a substantial part of its activities in the Member State where it is established, would have entailed the risk of encouraging temporary agencies to choose the Member State in which they wish to establish on the basis of the most favourable social security legislation.

Therefore, the CJEU concluded that, in order to be considered as 'normally carrying out activities' in a certain Member State, a temporary work agency must conduct a significant part of its activities, related to making temporary agency workers available to user undertakings, established and operating in that Member State.

18) Rapidsped (C-428/19)

The applicants in the main proceedings were international transport vehicle drivers who had been posted from Hungary to France on a regular basis. The applicants brought a claim before the Gyulai Törvényszék (Gyula High Court, Hungary) against their employer, arguing that their wage during the posting was much lower than the applicable French minimum wage and thus their employer was in contravention of Article 3(1) of Directive 96/71/EC. The Court of Justice was thus called to answer the following: (1) whether the Directive needs to be interpreted as applicable to the transnational provision of services in the road transport sector; (2) whether Article 1(1) of the Directive read in conjunction with Articles 3 and 5 be read to mean that a breach by an employer established in one Member State of a different Member State's laws regarding the minimum wage may be relied upon against the aforementioned employer by workers posted by the initial Member State before a court of that State; (3) does the second paragraph of Article 3(7) need to be read to mean that a daily allowance which covers expenditure incurred during the posting of workers abroad must be deemed a part of the minimum wage; (4) and lastly whether Article 10 of Regulation No 561/2006 needs to be interpreted in such a manner to prevent a road haulage undertaking from granting drivers a bonus calculated based on the savings made in the form of reduced fuel consumption concerning the journey made.

In relation to the first question, referring to the above mentioned case FNV v Van den Bosch (C-815/18), the CJEU confirmed that the Directive is applicable to the transnational provision of services in the road transport sector.

Furthermore, the CJEU recalled that, in order to guarantee a minimum protection for posted workers, whatever the law applicable to the employment relationship, Member States need to ensure that all workers are equally treated. Thus, Articles 3(1) and Article 6 read together in conjunction with Article 5 of that Directive must be interpreted to require that a breach by an employer established in one Member State of a different Member State's legislation regarding minimum wage can be relied upon against the employer by the workers that have been posted from the first Member State before the Court of that Member State, provided that that court has jurisdiction, which is up to national courts to determine.

The second subparagraph of Article 3(7) makes it clear that a daily allowance is 'specific to the posting' being part of the minimum wage if it is not paid to workers in reimbursement of expenditure actually incurred on account of the posting. In the present case, the allowance differs according to the period of posting, it consist in a lump-sum and thus seems to aim at providing compensation for the disadvantages of the posting more than covering the actual costs of posting. However, the CJEU does not have all the information for conducting an assessment in this regard. It is thus up to the referring Court to make sure that such allowance constitutes an allowance specific to the post and forms part of the minimum wage, provided that it is not paid in reimbursement of expenditure incurred by way of the posting, in the form of travel, board or lodging or provided it does not correspond to an allowance which changes the relationship between the service provider by the worker and the consideration they receive in return.

Regarding Article 10(1) of Regulation (EC) No 561/2006 has to be interpreted as not preventing in principle a road haulage undertaking from issuing drivers a bonus based on the savings made in the form of reduced fuel consumption regarding the journey made. Such bonus would either way, violate the prohibition enshrined in that provision, if instead of it being related for the sole purpose of saving fuel, it rewarded said saving based on the distances travelled and/or the amount of goods carried in such a manner to encourage the driver to behave in a way that could threaten road safety or violates Regulation No 561/2006.

19) Bezirkshauptmannschaft (C-219/20)

A Slovakian company posted workers to a company established in Austria. Following an inspection, the Austrian authority imposed a fine on the Slovakian company for failure to comply with a number of obligations laid down by Austrian employment law in respect to posted workers. In particular, the legislation regulated penalties in case of underpayments covering several pay periods and laid down a limitation period for the administrative offence of five years, which required the retention of evidence of payment of wages for several years.

The Court of Justice was firstly referred to (C-219/20), in order to determine if Article 5 of Directive 96/71, in conjunction with Article 47 of the Charter, should be interpreted as precluding national legislation providing for a five-year limitation period for failure to comply with obligations relating to the remuneration of posted workers. The national court considered the five-years period as particularly long for such offence, additionally requiring the considerable burden to retain all the proofs of payment. The CJEU noted that Article 5 allows Member States to determine the appropriate penalties and do not lay down any limitation. However, Member States have the duty to respect the principle of equivalence in respect of similar domestic situations and to comply with the principle to an effective remedy (Article 47 of the Charter). The right of an effective remedy implies that both parties should have equal opportunity to present their case in the same circumstances. In a situation of cross-border nature, as the one at stake, proceedings are likely to be longer and the work of national authorities more complex, which therefore requires a longer limitation period. In light of what provided for in Directive 96/71, and of the importance attributed to the minimum wage, service providers can reasonably expect to be obliged to retain evidence of payment of wages to posted workers for several years. In these circumstances, the CJEU concluded that such national limitation was not in contrast with EU law.

20) Staatssecretaris van Justitie en Veiligheid (C-540/22) – case status: open, preliminary question asked

The applicants, 44 Ukrainian nationals, holding a Slovak temporary residence permits were posted by a Slovak company to the Netherlands to carry out the work for the Dutch client. The Slovak company informed the Dutch authorities that the duration of the Ukrainian nationals' work would exceed the duration of the Schengen circulation right (90 days out of 180). In addition to that, the Slovak company was also required to apply at for residence permits Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service; "IND") for the purposes of cross-border provision of services at the for each of mentioned posted workers and to pay the required fees. However, the period of validity of the residence permits granted was limited to the period of validity of the applicants' Slovak residence permits. Therefore, it was shorter than the duration of the work for which the applicants were posted. The Ukrainian posted workers claimed that the State Secretary caused an unjustified restriction on the freedom to provide services by firstly, requiring the application for residence permit based upon already provided information that resulted in duplication of the procedures. Secondly, by the fact that the required residence permit was not linked to the duration of the right of residence in the Member State in which the service provider is established, but to the probable duration of the provision of services in the Netherlands. The State Secretary responded that his actions were motivated by the need to protect the Dutch nationals in the labour market in the Netherlands. Moreover, according to State Secretary, residence permits provide legal certainty as they prove the lawfulness of the posting of the workers process.

Rechtbank Den Haag, zittingsplaats Middelburg (Netherlands) referred the following preliminary questions to the Court of Justice: (1) whether the free movement of services guaranteed by Articles 56 and 57 TFEU include a right derived therefrom of residence in a Member State for third-country workers who may be employed in that Member State by a service provider established in another Member State (2) if not, where the duration of the provision of services exceeds three months, does Article 56 TFEU preclude an application having to be made for a residence permit for each individual worker in addition to a simple obligation to declare on the part of the service provider (3) if not, does Article 56 TFEU preclude: a) a provision of national law that the period of validity of such a residence permit may not exceed two years, irrespective of the duration of the provision of services b) the limitation of the period of validity of such a residence permit to the period of validity of the work and residence permit in the Member State in which the service provider is established c) charging a fee per (renewal) application which is equal to the fee payable for a regular work permit for a third-country national, but five times higher than the fee payable for proof of lawful residence for a Union citizen.

Table 5. Overview of national case law[1091]

Country	Judgements concerning the non- respect of the legal provisions applicable to temporary cross-border workers employed (posting situation and non-posting situation) by temporary work agencies and/or other labour market agencies	Judgements concerning the non-respect of legal provisions applicable to posted workers in subcontracting chains	Judgements concerning the non-respect of legal provisions applicable to posted third-country nationals	Other
BE	Unpublished case law based on Nevens (2019): 1) Corr Oost-Vlaanderen (Gent) 6 maart 2019, nr. 2019/713, GE69.98.417-18 2) Corr Oost-Vlaanderen (Gent) 19 december 2018, nr. 2018/3685, 16RG7706 3) Arbrb. Antwerpen (Turnhout) 16 oktober 2017, nr. 16/878/A 4) Arbeidshof te Brussel - arrest nr N-20161021-4 (2015/CB/7) dd. 21 oktober 2016[1092] 5) Corr. Oost-Vlaanderen (Gent) 4 mei 2016, nr. 2016/1456, GE69.98.2152/2015	Unpublished case law based on Nevens (2019): Arbeidshof te Brussel - arrest nr N-20161021-4 (2015/CB/7) dd. 21 oktober 2016[1093]	Unpublished case law based on Nevens (2019): Corr. Oost-Vlaanderen (Gent) 4 mei 2016, nr. 2016/1456, GE69.98.2152/2015[1094]	Not identified.

[1091] Compiled based on information gathered by national legal experts through desk research in the 27 Member States, consulting national websites. The list of cases does not include those which are relevant to social security. The list may not be exhaustive.
[1092] Arbeidshof te Brussel - arrest nr N-20161021-4 (2015/CB/7) dd. 21 oktober 2016 https://www.stradalex.com/nl/sl_src_publ_jur_be/document/ArbeidsH_N-20161021-4
[1093] 'Belgische rechtspraak over de Detacheringsrichtlijn nr. 96/71 en de ROME I-verordening nr. 593/2008', in H. Verschueren (ed.), Nieuwe ontwikkelingen in het Europees recht vanuit Belgisch en Nederlands perspectief, die Keure: Brugge, pp. 97-146. Available at: https://www.diekeure.be/nl-be/professional/10170/detachering
[1094] Nevens, K. (2019), 'Belgische rechtspraak over de Detacheringsrichtlijn nr. 96/71 en de ROME I-verordening nr. 593/2008', in H. Verschueren (ed.), Nieuwe ontwikkelingen in het Europees recht vanuit Belgisch en Nederlands perspectief, die Keure: Brugge, pp. 97-146. Available at: https://www.diekeure.be/nl-be/professional/10170/detachering

DE	**BAG, 24.06.2021 - 5 AZR 505/20**: Minimum wage for posted foreign care workers: the Federal Labour Court (Bundesarbeitsgericht, BAG) dealt with the question of whether foreign care workers posted to a private household in Germany are entitled to the statutory minimum wage for hours worked. The BAG answered in the affirmative, stating that the minimum wage entitlement also applied to periods of on-call duty.	**Mall of Berlin case:** the scope of the German liability regulations is still an object of contested court interpretation	Not identified	Not identified
DK	**FV2016.0202 Malerforbundet i Danmark mod Danske Malermestre for One4 All ApS**[1095] Concerning underpayment, Polish workers were not subcontractors but in reality under the instruction and control of the receiving entity, which was evidenced with explanations provided by the Polish painters and by the daily manager of the receiving entity before the Court as well as to the DWEA during a control visit. **FV2010.0139** Lithuanian temporary agency workers were posted to work at Danish plant nurseries, where they worked alongside domestic workers and under the instruction of the receiving entity. The Court found that the significant risk of abuse and circumvention by using temporary agency workers in this field of work weighs more heavily than the consideration for the employment contract of the temporary work agency. The hired Lithuanian workers had the right to be	**FV2016.0202 Malerforbundet i Danmark mod Danske Malermestre for One4 All ApS**[1096] Concerning underpayment, Polish workers were not subcontractors but in reality under the instruction and control of the receiving entity, which was evidenced with explanations provided by the Polish painters and by the daily manager of the receiving entity before the Court as well as to the DWEA during a control visit. **FV2017.0114, Malerforbundet i Danmark mod Danske Malermestre for Quick Service, Skovlunde**[1097] Concerning underpayment, the control visit indicated that the workers were under the instruction of the receiving entity, and as the Polish posting entity could not produce the subcontractor agreements, the workers were viewed as hired by the receiving entity.	**VestreLandsretsdom (Western High Court Ruling), 22 September 2014, V.L. S-2220-13**[1100] The duty to register in RUT (Register for Foreign Service Providers) is sanctioned separately with a fine. The issue of the lawfulness of the RUT surfaced for the first time in 2018 as a separate claim. Until then, fines for breach of registration were not challenged separately but as part of an overall fine for breach of the applicable Danish legislation. In the Western High Court Ruling of 2014, the posting entity was fined for failing to register at the RUT. Earlier, posted workers in Denmark were required to carry a work permit, which is no longer the case according to the Danish Aliens Act (Udlændingeloven).	Not identified.

[1095] https://www.arbejdsretten.dk/media/1214331/fv2016.0202.pdf
[1096] https://www.arbejdsretten.dk/media/1214331/fv2016.0202.pdf
[1097] https://arbejdsretten.dk/afgoerelser/afgoerelser/2017/tilkendegivelse-af-13-december-2017-i-fv20170114/
[1100] VestreLandsretsdom (Western High Court Ruling), 22 September 2014, V.L. S-2220-13., https://at.dk/domme/2014/uforsvarlig-brug-stige-vld-22-09-14/hele-dommen/

	remunerated under the Danish collective agreement in force at the user entity. **FV2019.0126 Fagligt Fælles Forbund for medlemmerne A og B mod DI Dansk Byggeri for Tømrer- og Snedkerværkstedet Løsning A/S** The Construction collective agreement covers the posting of temporary workers from temporary work agency and not the hiring out of workers for a temporary work in another entity in the sector, performed under direction and control.	**FV2017.0097, Fagligt Fælles Forbund mod Dansk Byggeri for CC Fliser ApS[1098]** Underpayment can also take place with regards to the collective agreement of the posting entity (arms and legs workers). **FV2013.0014.CO-I for Dansk El-Forbund DI overenskomst I for ThyssenKrupp Elevator A/S[1099]** The arbitrator found no legal basis in the collective agreement to establish liability for a Danish receiving entity for underpayment of posted workers. This was in line with Article 3 of the Posted Workers Directive, as establishing liability for the receiving entity was viewed as establishing a barrier for the principle of free movement in the Treaty on the Functioning of the European Union (TFEU) Article 56. **FV2013.0157 Faglig Fælles Forbund mod Dansk Byggeri for Tækkefirmaet Segall** To sum up, the issue of circumvention of collective agreements by 'fake' or bogus constructions of posting contracts is part of the debate on social dumping. In order to uphold Danish working conditions, the court assesses the contract as well as all other available information, including the relationship at the workplace, in		

[1098] https://arbejdsretten.dk/afgoerelser/afgoerelser/2017/tilkendegivelse-af-27-september-2017-i-fv20170097/
[1099] https://arbejdsretten.dk/afgoerelser/afgoerelser/2013/kendelse-af-12-august-2013-i-fv20130014/

		order to classify the situation as a genuine posting or as hired-in workers.		
ES	**Terra Fecundis case – Bogus posting:** French Courts condemned Terra Fecundis for fraudulently using the European posted workers clauses.	Not identified	**TSJ Cataluña** (Social Chamber) of 11 June 2019[1101]: The French company was obliged by the French Inspectorate to hire the posted workers directly. There were third-country nationals involved, who first needed to obtain work and residence permits in France.	**TSJ Galicia** (Social Chamber), of 1 July 2020[1102]: The ruling involves posting of workers from Portugal to Spain. A Portuguese company was issued a very serious administrative sanction for non-payment of the minimum wage, since the Portuguese company did not consider the higher salary established in the sectoral collective agreement applicable in Spain.
FR	**Vueling**, the Court of Appeal (Paris Court of Appeal, criminal chamber, 31 January 2012)[1103]: crew and technical staff of Vueling were not falling under the scope of posted workers, therefore Vueling did not exercise a temporary activity.	**Paris Employment Tribunal, 31 January 2012**: conduct constituted the offence of undeclared work.	Not identified	**CA 14 January 2011, No. 10/01143**: disguised employment, exploitation of vulnerable persons, accommodation under conditions contrary to human dignity, unfair remuneration
LU	Not identified.	Not identified.	Not identified.	Court of Appeal, October 27, 2016, No. 40954 of the roll: regardless of the qualification given by the parties to a contract, the judge always remains free to assess the nature of the agreed contractual relationship. Thus, it is not because a contract is called 'open-ended employment contract' that the qualification of secondment contract cannot be retained.

[1101] TSJ Cataluña (Social Chamber) of 11 June 2019, available at: https://www.poderjudicial.es/search/AN/openDocument/2cf5208ff4d36ea1/20190814
[1102] TSJ Galicia (Social Chamber), of 1 July 2020, available at: https://www.poderjudicial.es/search/AN/openDocument/a7b9d54b43c678d8/20200917
[1103] Sup. crim. ch.. 11 March 2014, No. 12-81461.

				Ruling 43145 of 1 of June 2021[1104]: concerns the amount of the fine which was imposed on the private company for not following the provision of the Labour Code regarding posted workers.
NL	1) **Contrain v. SNCU** (ECLI:NL:GHSHE:2021:3776)[1105]: 2) **FNV v. Van den Bosch Transports BV** (CJEU 1 December 2020, case C-815/18): CJEU held that the PWD applies also to road transport sector; a foreign subcontractor is bound to comply with a CLA that is not declared universally binding; there must be a sufficient connection with the host member state for the definition of posting to apply.	1) **Dutch Postal Service (Post NL) case** (ECLI:RBNNE:NL:2020:4471)[1106]: a construction whereby persons with a minor intellectual disability, working in a publicly subsidised bureau to gain some work experience, were contracted in through an intermediate organisation, to work under supervision of Post NL to sort out mail against payment well below the level required by the applicable CLA. The court pierced through this artificial subcontracting scheme 2) **AFMB Ltd (of Cyprus) v. the Dutch Social Insurance Bank** (SVB)[1107] : under EU law, it is not necessarily the formal contracting party that is to be regarded as the employer, but the entity exercising effective control, and that bears the wage costs (subject to further findings of fact that are for the referring court to make). Merely inserting a new contracting entity abroad between the former employer and employee with the aim to secure cost advantages (as was the case here) will not 'pay'.	Not identified.	ECLI:NL: GHSHE:2021:1519[1108]: A case involving a Lithuanian temporary work agency posting specialised ship-building workers to user companies in the Netherlands through intermediate subcontractors, also raised the issue of evasion of social security costs

[1104] Administrative Tribnunal, ruling 43145 of 1 of June 2021, available at https://juricaf.org/arret/LUXEMBOURG-TRIBUNALADMINISTRATIF-20210601-43145
[1105] Contrain v. SNCU (ECLI:NL:GHSHE:2021:3776; https://uitspraken.rechtspraal.nl)
[1106] Dutch Postal Service (Post NL) case (ECLI:RBNNE:NL:2020:4471), available at https://uitspraken.rechtspraak.nl
[1107] AFMB Ltd (of Cyprus) v. the Dutch Social Insurance Bank (SVB), judgment of 16 July 2020, case C-610/18
[1108] ECLI:NL: GHSHE:2021:1519; available at https://uitspraken.rechtspraak.nl

PL	Not identified.	Not identified.	Not identified.	Not identified.
SI	**Case no. VSRS Sklep VIII Ips 183/2016** of 07 March 2017[1109]: it is not possible to terminate the need for work of the plaintiff under the terms of the employment contract if the defendant at the same time finds that the plaintiff cannot provide work for the user, and sends new employees to this same user to conclude an employment contract for the performance of work such as, which according to the employment contract, the plaintiff could also perform.	**VSL sklep II Cpg 1374/2015**, Judgement of 07 December 2015[1110]: in cases where an employee who is otherwise employed by one employer is posted to work by another employer (user), the employee is liable for the damage caused at work, both the employer and the user	Not identified.	Not identified.
AT	**VwGH, judgment of 22 August 2017, Ra 2017/11/0068, AT:VWGH:2017:RA2017110068.L00.** A Hungarian company was contracted by an Austrian one to process car parts, whereby it was also responsible for compliance with safety and accident prevention regulations. According to the contract, the Hungarian company was invoiced on the basis of the services actually rendered and on an hourly basis, assuming full warranty liability for the work pieces delivered and being responsible for	**VwGH, judgement of 11 November 2021, Ra 2020/11/0182, AT:VWGH:2021:RA2020110182.L00 1111** In a decision from 2021, the VwGH had to clarify who, in the case of hiring out of workers in subcontracting chains, is subject to the legal obligations as a user undertaking to keep the necessary documents available pursuant to Section 22 of the LSD-BG. An employer established in Slovenia had hired out workers to an	Not identified.	**VwGH, judgement of 30 January 2020, Ra 2017/11/0093, AT:VWGH:2020:RA2017110093.L00[1112]** As a result of the decision in the Dobersberger case, the VwGH denied a violation of the national requirements for the implementation of the PWD with regard to workers who provided on-board service on trains, arguing a lack of a

[1109] Case no. VSRS Sklep VIII Ips 183/2016 of 07 March 2017, available at http://www.sodnapraksa.si/?q=id:2015081111404831&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=2015081111404831

[1110] VSL sklep II Cpg 1374/2015, Judgement of 07 December 2015, available at http://www.sodnapraksa.si/?q=id:2015081111391306&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=2015081111391306

[1111] VwGH, judgement of 11 November 2021, Ra 2020/11/0182, AT:VWGH:2021:RA2020110182.L00, available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29690b6c-61f2-4bbb-94e7-c1bc8f06dbd2&Position=1&SkipToDocumentPage=True&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=&BisDatum=11.05.2022&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=drittstaaten+lsd-bg&Dokumentnummer=JWT_2020110182_20211111L00 (last accessed 19 May 2022).

[1112] VwGH, judgement of 30 January 2020, Ra 2017/11/0093, AT:VWGH:2020:RA2017110093.L00, available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=ed3ec561-7028-48a7-a7f3-11fdf3e51489&Position=1&SkipToDocumentPage=True&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=&VonDatum=&BisDatum=13.05.2022&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=entsendung+hinreichende+verbindung+eugh&Dokumentnummer=JWT_2017110093_20200130L00 (last accessed 19 May 2022).

	their timely completion. Its workers carried out their work in a separate building on the premises of the Austrian company, but under the supervision of the Hungarian company. It was disputed whether the agreement was to be qualified as a ('genuine') contract for work and services, or whether the true subject matter of the contract was merely the cross-border transfer of the respective workers. The VwGH ruled that the previous line of case law on Section 4 of the AÜG, according to which the fulfilment of only one element of hiring-out of workers led to a corresponding classification, could not be upheld in light of the ECJ case law mentioned above. It is rather necessary to take into consideration each element indicating whether the movement of workers to the host member state is the very purpose of the supply of services on which the contractual relationship is based on.	Austrian company (S). The latter in turn hired out the workers in question to another company (L) in Austria. L employed the workers on a construction site in Austria. It was disputed whether the obligation to keep documents available pursuant to Section 22 LSD-BG applied to L, although the workers had been provided to it by an undertaking established in Austria within the process subcontracting. The Administrative Court answered in the affirmative. He stated that pursuant to Section 22(2) of the LSD-BG, the user undertaking in Austria was obliged to keep the necessary documents available, if the worker was hired out across borders at any point in the supply chain.		posting to Austria, as there was no sufficient connection.
BG	**Supreme Court of Cassation, ruling No 173 of 6 March 20181113** This case concerned the question of whether the regime of Article 121, paragraph 3 of the Labour Code applies when carrying out transport services in different Member States for a period of less than 30 calendar days spent on the territory of each of them. The case concerned the appeal a posted driver of a heavy goods vehicle, a Bulgarian national. He was posted by a Bulgarian employer to provide transport services for a company based in Belgium. The Court clarified that only companies in the merchant navy were expressly	Not identified.	Not identified.	Not identified.

[1113] Supreme Court of Cassation, ruling No 173 of 6 March 2018, available at http://domino.vks.bg/bcap/scc/webdata.nsf/Keywords/C4FC919452283D87C2258248002DB186 (lastly accessed on 17 May 2022).

	excluded from the scope of the Directive with regard to seafarers. Other modes of transport remained within its scope. Consequently, if the other prerequisites of Article 121(3) of the Labour Code were met, the posting of drivers for more than 30 calendar days to countries of the European Union, to countries party to the Agreement on the European Economic Area or to the Swiss Confederation was covered by the PWD. Accordingly, the national law rules stemming from EU law on the posting of workers were applicable. Therefore, the Supreme Court of Cassation concluded that the applicant's remuneration for the time during his services in Belgium had to be formed in accordance with the minimum rates for the same work in Belgium.			
CY	Not identified.	Not identified.	Not identified.	Not identified.
CZ	Not identified.	Not identified.	**Judgement of the Czech Supreme Administrative Court in Brno ref. no. 5 Azs 459/2019 dated 16 October 20201114;** **Judgement of the Czech Supreme Administrative Court in Brno ref. no. 5 Azs 129/2020 dated 20 November 20201115** There are several cases of the Czech Supreme Administrative Court which in each of them point to a very similar practice of invoking regulation on cross-border posting of workers, who are third-country nationals, in order to	Not identified.

[1114] Judgement of the Czech Supreme Administrative Court in Brno ref. no. 5 Azs 459/2019 dated 16 October 2020, available at: https://www.nssoud.cz/files/SOUDNI_VYKON/2019/0459_5Azs_1900014_20201016123343_20201103144025_prevedeno.pdf
[1115] Judgement of the Czech Supreme Administrative Court in Brno ref. no. 5 Azs 129/2020 dated 20 November 2020, available at https://www.nssoud.cz/files/SOUDNI_VYKON/2020/0129_5Azs_2000016_20201120131811_20201202120026_prevedeno.pdf

			avoid requirement of obtaining work permits. It needs to be mentioned that the Employment Act provides with an exception that a work permit (or some its equivalents under Czech law) is not required for an employee who has been posted to the Czech Republic as part of the transnational provision of services by an employer established in another EU Member State. The Czech case law then limits this exception only situation pursuant to Article 1 (3) (a) of the PWD, as amended. The practise used in the referred cases was that companies established in another EU Member state (primarily Poland) were hiring employees from third countries with whom they concluded employment contract and acquired for them work permits issued in this other EU Member State. These employees were then posted to a Czech company working in the Czech Republic (based on the services agreement concluded between the Czech and the Polish company) claiming that the third-country employees do not need work permits in the Czech Republic invoking the exception under the Employment Act (it is in general more difficult to obtain work permits in the Czech Republic than in Poland). However, the Czech Supreme Administrative Court ruled in number of occasions that the company from another EU Member State acts as a temporary work agency to which the exception under the Employment Act does not apply and that the parties tried to circumvent the requirement of obtaining work permits in these cases.	

EE	Not identified.	Not identified.	Not identified.	**Supreme Court, case: 2-17-458, 13 February 2019, A.F. vs OÜ Baagest,** **Supreme Court, case: 3-2-1-176-14, 04 March 2015,** **Supreme Court, case: 3-2-1-179-12, 16 January 2013** According to the case law of the Supreme Court (Riigikohus) the daily allowance should be viewed as a part of remuneration. Although the PWD does not give any strict regulation on this point, the case law of Estonian Supreme Court does not determine the daily allowance as a separated compensation.
EL	Not identified.	Not identified.	Not identified.	Not identified.
FI	Not identified.	**Decision TT 2019:100 of 28 October 2019 of the Labour Court** Concerns a dispute regarding workers posted by a Polish company to work at the Olkiluoto nuclear power plant in 2010-2014. The claimant, a Finnish eclecticists' trade union, claimed unpaid salaried on behalf of the workers in the amounts of EUR800,000 and EUR700,000. The dispute stemmed from the claimant's and the defendant's different understanding as to what was the collective agreement that applied to the workers in question. The Labour Court sided with the interpretation of the trade union.	Not identified.	Not identified.

		TT:2009-90 of 9 October 2009 In this decision so-called wet lease agreement had been concluded between a Finnish airline and a Spanish airline, under which the Spanish airline had leased an aircraft and its crew for the use of the Finnish airline. The aircraft crew was employed by a Spanish airline and was subject to Spanish legislation and collective agreement. According to the lawsuit by a Finnish trade union, the Finnish airline had acted in violation of the collective agreement concerning cabin crew. The company had not included in the wet lease agreement a condition required by the collective agreement, under which the subcontractor undertakes to comply with the collective agreement in question and Finnish labor and social legislation. The decision of the Labour Court held, first, that the agreement between the airlines concerned subcontracting within the meaning of the collective agreement. However, it was concluded that the application of the collective agreement would have constituted a restriction on the freedom to provide services contrary to Article 49 of the EC Treaty. Accordingly, the defendant company was not required to include in the wet lease a substantive clause demanding the application of the Finnish collective agreement.		
HR	Not identified.	Not identified.	Not identified.	Not identified.
HU	In most cases brought before the Curia, the legal situation is similar. The	Not identified.	Not identified.	Not identified.

	Hungarian employer hires Hungarian employees to work abroad, usually in Germany. The work must be carried out for the benefit of a foreign client, under the direction of the Hungarian employer. Parties typically agree on the details of the work abroad a separate document at the same time as the employment contract (posting agreement). The subject of the lawsuit is mostly unpaid wages, but there are also cases concerning the termination of illegal employment or the employer's liability. A common feature of these cases is that neither the parties nor the courts invoke the law of the State of posting, the courts adjudicate the dispute solely on the basis of Hungarian law. Examples: Mfv.I.10 047/2015/03; Mfv.I.10 057/2009/04; Mfv.II.10 166./2015/3; Mfv.I.10 343./2014/5; Mfv.I.10 344/2012/5; Mfv.II.10 388/2014/8; Mfv.I.10 568/2016/10; Mfv.II.10 609/2013/07; Mfv.II.10 752/2013/4.			
IE	**Gama Endustri Tesisleri Imalat Montaj A.S. case** A parent Turkish company (Gama Endustri Tesisleri Imalat Montaj A.S.) posting Turkish workers to its Irish	Not identified.	Not identified.	**McGowan & Ors -v- Labour Court & Ors [2010] IEHC 501 (30 June 2010)** The applicants (electrical contractors) sought to

	subsidiary (Gama Construction Ireland Ltd.). In February 2005, it came to light that Gama was paying the Turkish workers, who had come to Ireland to work on a number of public projects, rates far below the REA minimum rate (Registered Employment Agreement, which governs the pay rates and conditions of workers in the sector) and, indeed, below the national minimum wage. These workers were accommodated offsite by their employers and spoke little or no English." An inspection by the Department of Jobs, Enterprise and Innovation (DJEI) uncovered "a complex tale of destroyed work records and workers' money being paid, in some cases without their knowledge, into Irish, Turkish, and Dutch bank accounts. The inspectors found that Gama did pay workers less than the minimum construction rate, that workers not covered by the REA (caterers, for example) were paid less than the national minimum wage, and that while work records appeared to have been compiled on an informal basis, they had been destroyed. It also came to light that Gama had benefited substantially from a scheme whereby exemption from payment of social insurance for a period not exceeding 52 weeks can be granted in respect of the temporary employment of people who are not ordinarily resident in the state. Gama had employed 1,324 of the 1,867 workers covered by the scheme since it began in 2003." "The company took legal action to restrain the publication of the DJEI's report. The Supreme Court held that the powers under which the inspectors had operated did not permit them to produce a general report, which could be circulated or published generally, but that a private and limited			challenge a Registered Employment Agreement (REA) on grounds of invalidity and for unconstitutionality. The Court upheld the validity of the REA and specifically noted that the REA system was compatible with the Laval judgment. The Court reiterated that, in light of the existence in Ireland of universally applicable collective agreements, such as the REA, posted workers in Ireland in the electrical industry would enjoy the same terms and conditions as those to which domestic workers were entitled, meaning that foreign contractors from low wage economies could not undercut Irish contractors. The Court concluded that the cancellation of the REA would remove the protection for domestic contractors against being undercut by posted workers from low wage countries. Although the case was appealed again to the Supreme Court, where the REA system was declared unconstitutional, there was no reference at all to posted workers, the matter being one of Irish constitutional law. **Naisiunta Leictreach Contraitheoir Eireann v The Labour Court & ors**

	circulation of the inspector's report to the relevant statutory authorities (with a prosecutorial function in relation to the matters identified) was permissible. As a result, the report has never been made public and the information available has come from media or trade union sources." "The Gama dispute, which eventually involved three trade unions and a protracted series of unofficial, and official, industrial action, was finally resolved in August 2005 through the intervention of the Labour Relations Commission (LRC), the State's third-party mediation and conciliation service, and the Labour Court. At this point, almost all of the original 600 workers had returned to Turkey, with only 83 left in Ireland. Following a Labour Court Recommendation, Gama agreed to pay these employees EUR 8,000 per year of service to cover overtime worked			**(Approved) [2020] IEHC 303 (23 June 2020)**[1116] This case concerned the validity of a sectoral employment order (SEO) made pursuant to the Industrial Relations (Amendment) Act 2015, purporting to regulate the remuneration of electricians working in the construction industry. The impugned legislation prescribed (i) minimum rates of remuneration; (ii) the requirements for a pension scheme (including a minimum daily rate of contribution to the scheme by an employee and an employer respectively); and (iii) the requirements for a sick pay scheme. The High Court, finding for the Applicant, held that the purported SEO was not legally valid and that the underpinning legislation, Chapter 3 of the Industrial Relations (Amendment) Act 2015 was unconstitutional. In relation to posted workers, the High Court held that "the making of a sectoral employment order also presents difficult choices as to how to resolve the potentially conflicting objectives of (i) promoting fair competition and the freedom to provide services within the European

[1116] Naisiunta Leictreach Contraitheoir Eireann v The Labour Court & ors (Approved) [2020] IEHC 303 (23 June 2020), available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2020/2020IEHC303.html&query=(N%E1isi%FAnta)+AND+(Leictreach)+AND+(Contraitheoir)+AND+(Eireann)

				internal market, and (ii) ensuring appropriate terms and conditions of employment for domestic workers and posted workers from other EU Member States."
IT	Not identified.	Not identified.	Not identified.	Not identified.
LT	Not identified.	Not identified.	Not identified.	Not identified.
LV	Not identified.	Not identified.	Not identified.	**Supreme court of the Republic of Latvia, judgement in a matter No SKC-2053/2016 (C24186212) of 30 December 2016[1117]; Supreme court of the Republic of Latvia, judgement in a matter No SKC-952/2015 (C37108212) of 27 February 2015[1118]; Supreme court of the Republic of Latvia, judgement in a matter No SKC-2425/2014 (C28469512) of 30 September 2014[1119]** There have been three judgements of the Supreme Court of the Republic of Latvia, in essence, stating that posting of Latvian employees abroad is a type of business trip, thus, the employees in addition to agreed work remuneration are entitled also to daily allowances.

[1117] Supreme court of the Republic of Latvia, judgement in a matter No SKC-2053/2016 (C24186212) of 30 December 2016, available at https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/294264.pdf (lastly accessed on 23 May 2022).
[1118] Supreme court of the Republic of Latvia, judgement in a matter No SKC-952/2015 (C37108212) of 27 February 2015, available at https://www.at.gov.lv/downloadlawfile/2933 (lastly accessed on 23 May 2022).
[1119] Supreme court of the Republic of Latvia, judgement in a matter No SKC-2425/2014 (C28469512) of 30 September 2014, available at https://www.at.gov.lv/downloadlawfile/2981 (lastly accessed on 23 May 2022).

MT	Not identified.	Not identified.	Not identified.	Not identified.
PT	Not identified.	Not identified.	Not identified.	Not identified.
RO	**Romania, Timis County, Civil Section 1, CIVIL SENTENCE No. 1672 / PI, Public meeting from December 7, 2018**[1120] According to prev. art. 95 para. (2) The Labor Code, the temporary work agent may conclude with the temporary employee an employment contract of indefinite duration, situation in which in the period between two missions the temporary employee is at the disposal of the temporary work agent. Temporary employment contract no. xxxxxx /30.06.2017 was concluded for an indefinite period, so that the defendant, in his capacity as a temporary work agent, cannot rely on the case provided in art. 95 para. (4) of The Labour Code as a reason for termination of the employment contract, because in this situation, even if the user gives up the services of the temporary employee, the latter continues to hold the status of employee of the temporary employment agent. The dismissal of the temporary employee by the temporary work agent is regulated in art. 100 of the Labour Code, the temporary work agent having the obligation to comply with the legal regulations regarding the termination of the individual employment contract for reasons not related to the employee's	**Timisoara Court, Decision no. 15327/2021**[1121] On the occasion of the verification of the documents, it was found that the employer did not send in the register the element provided in art. 3 paragraph 2 letter m of H.G. no. 905/2017, respectively the date on which the transnational secondment begins and the date on which it ends, defined by Law no. the activity of the employee seconded in the space of the European Union for the employees seconded transnationally in the verified period, violating the provisions of art. 4 par. 1 letter d) of H.G. nr.905 / 2017. The deed of the employer regarding the non-transmission of the data provided in art. 3 par. 2 .lit.m) according to art.4 par. I letter d) constitutes a contravention according to art.8 par. 2 letter d) of H.G. no. 905/2017 (A) and the contested report was drawn up in this respect - PVCSC _____ no. _____ / 14.07.2021. Also, for the deficiency found, a measure was ordered to the company's management, within the limits and in compliance with the provisions of Law no. 108/1999	Not identified.	**Oradea, Court of Apeal, Decision no. 449/019**[1122] The Court finds that the Court of First Instance wrongly established that sums of money were legally granted as a subsistence allowance, since during the period that the usual place of work of the respondent-applicant's employees was in Italy, and not in Romania, at the employer's headquarters. Consequently, the condition of the temporary character of the performance of the activity in another place / country is not fulfilled, Even if the respondent's employees travelled from Romania to Italy to work for a period of one month to three months, respectively for a limited period, it is not sufficient to retain the existence of the transnational posting, which also presupposes that the company's employees work regularly in Romania.

[1120] Romania, Timis County, Civil Section 1, CIVIL SENTENCE No. 1672 / PI, Public meeting from December 7, 2018, available at https://sintact.ro/#/jurisprudence/532908105/1/sentinta-nr-1672-2018-din-07-dec-2018-tribunalul-timis-contestatie-decizie-de-concediere-litigii...?keyword=munca%20temporara&cm=SREST (last accessed on 13 June 2022).

[1121] Timisoara Court, Decision no. 15327/2021, available at https://sintact.ro/#/jurisprudence/535820423/1/sentinta-nr-15327-2021-din-02-dec-2021-judecatoria-timisoara-plangere-contraventionala-civil?keyword=detasare%20transnationala&cm=SREST (last accessed on 13 June 2022).

[1122] Oradea, Court of Apeal, Decision no. 449/019, available at https://sintact.ro/#/jurisprudence/533354500/1/decizie-nr-441-2019-din-21-mai-2019-curtea-de-apel-oradea-anulare-act-administrativ-contencios...?keyword=detasare%20transnationala%20lucratori%20straini&cm=SREST (last accessed on 13 June 2022).

	person (other than the disciplinary ones), in compliance with the provisions of art. 76 of the Labour Code regarding the content of the dismissal decision and of art. 75 of the Labour Code regarding the right to notice of at least 20 working days. The court notes that by Decision no. 18 of June 13, 2016, the panel for resolving certain legal issues, admitted the notification formulated by the Iaşi Court of Appeal - Labour and Social Insurance Litigation Section, regarding the pronouncing of a preliminary decision, and established the following that the dismissal decision can be revoked until its communication to the employee, the act of revocation being subject to the communication requirements corresponding to the act it revokes (dismissal decision).	republished, with deadline according to annex 2 to the Control PV no. _____ / 14.07.2021 - attached to this (02.08.2021 The claims of the legal petitioner of the REVISAL application for the transmission of the data provided by law are also erroneous, this offering the express possibility to the employers to fulfil their legal obligations by operating all the elements required by law. In order to prove this aspect, it has generated and submits to the present a report of a fictitious secondment in the REVISAL program which contains the data of the secondment as they are required by HG500 / 2011 to be operated.		
SE	Not identified.	Not identified.	Not identified.	Not identified.
SK	Not identified.	Not identified.	Not identified.	Not identified.

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