

**LABCIT
COUNTRY
REPORT**

**Kamila Schöll-Mazurek
Artur Schulz
Laura Faiß
Hannah Heyenn**

Polish Social Council

**SOCIAL DUMPING
BY SUBCONTRACTING:
HOW GERMAN EMPLOYERS
IN CONSTRUCTION
AND MEAT PROCESSING
EVADE EU LABOUR
PROVISIONS**

“Testing EU Citizenship as Labour Citizenship: From Cases of Labour Rights Violations to a Strengthened Labour-Rights Regime” (LABCIT) project is co-funded by the Europe for Citizens Programme of the European Union. We start from the position that a decent wage and working conditions are necessary for promoting full citizenship and the democratic participation of all European Union citizens. As such, the project aims to “test” the ability of European citizenship to be extended to work, favoring the respect of social and labor rights which form labour citizenship. We perform the testing through analyzing “extreme” cases of labour violations and exploitation in several EU countries, aiming to understand which existing and new instruments can be used for strengthening the protection of workers’ labour rights.

As part of LABCIT’s activities, the Polish Social Council organised two public hearings with migrant workers, labour rights experts, and local stakeholders. This Country Report investigates migrant labour exploitation in the construction and meat processing sectors in Germany.

“A broken wardrobe, a fridge and that’s it, and two metal plank beds, military style on long legs... There was nothing clean, there were splashes on the walls everywhere, the wallpaper was torn up, the carpet smelled incredibly bad... The heating didn’t work. I think they didn’t turn the heating on until February.”

Worker in the meat processing industry in Leipzig describing living conditions in housing rented through the employer

Short overview

In 2014, the year of the last nationwide census, about 1.6 million people with Polish immigrant background were living in Germany. Of those, 491 000 were Polish citizens, out of which only 223 000 have been in Germany for less than five years (Statistisches Bundesamt 2015). Poland was listed as the source of the most substantial migration influx to Germany with 198 000 migrants in 2014, while Romania was the second largest with 191 000 persons registered (Bundesamtes für Migration und Flüchtlinge [BAMF] 2015). For Polish citizens searching for work abroad, the United Kingdom and Germany have been the most popular destinations since Poland’s accession into the EU.

Vocational education is predominant among post-accession Polish citizens coming to Germany, while those arriving in the UK after 2004 were equally spread between vocational, secondary and tertiary education levels (Fihel 2010). This is attributed to the seven year transition period preceding the opening of Germany’s labour market to Polish workers, which caused the highly educated persons to migrate to other destinations in the EU (Fihel 2010).

German-Polish bilateral agreements on e.g. seasonal work have not been sufficiently used in supporting protection mechanisms on the German labour market or the possibilities for self-employment (BAMF 2010). Before and during this transition period, Polish citizens made up the largest share of seasonal workers in the agricultural sector. However, they are now gradually being replaced by workers from other countries such as Romania (OECD 2013, 58).

The most recent representative survey conducted by the Federal Office for Migration and Refugees on the integration of the five biggest minorities in Germany found the occupations

of Polish citizens within the workforce to be highly segregated (BAMF 2007). Construction (34.3%) and manufacturing (30.5%) are the main sectors of employment, mainly for male workers. Furthermore, men of Polish migration background have the highest self-employed ratio of the five largest national minorities in Germany (15%). The occupations of women with Polish migration background are concentrated in the German service sector, which includes cleaning, nursing and care (37.8%). Trade (14.9%) and hospitality (11.4%) are also significant areas of employment for female Polish migrant workers in Germany (BAMF 2010).

Over the course of the project the Polska Rada Społeczna (Polish Social Council) examined two sectors: the construction sector and the meat processing sector. Both of these sectors are common for unskilled workers from Eastern European countries. In the course of our first phase of hearings in the construction sector, we found that bogus self-employment and nontransparent subcontracting chains to be the most prominent causes of labour rights violations and exploitation, including mainly the evasion of wage payment. In the meat processing industry, we found that hazardous working and living conditions were the main problems that the workers experienced. As these violations are generally common with migrant workers across sectors, the cases we report serve as an example for the various types of labour rights violations EU migrants experience in Germany.

Case 1

EXPLOITATION, FEAR AND ABUSE

– WORKING IN THE MEAT PROCESSING INDUSTRY IN GERMANY

Eleven workers from a plant in one of the biggest companies in the German meat processing industry were interviewed in Leipzig. As is common in this sector, they were employed by a subcontractor. Their jobs were to chop up meat at a conveyor belt or sometimes to slaughter the animals. They described deplorable living and working conditions: run-down apartments, broken or defective work tools and ineffective protective gear. Further, the dependence of the workers on the employer was increased due to the fact that housing was provided by the employer. A job loss also meant a loss of housing. The workers usually were not provided with contracts in their native language (Polish) or were pressured to sign documents without reading them. The wage was described as arbitrarily set at the discretion of the foreman, fluctuating from month to month, averaging between 6€ and 8€ per hour in theory. Unpaid overtime hours, deductions for taking sick days, and deductions by extortion through the foreman meant that the real wage was regularly decreased. This deliberate mechanism is well captured in the words of the one of the employees:

One time I worked 170 hours and got 1200€, then I worked 100 hours and got 1100€. [...] It was never the result of the hours worked and the payment was never adequate to the work we had actually done. [...] For every failure, every offense and if someone was sick, didn't come to work – „Abzug“ [deduction]. He [employer] called it that, “Abzug”, for me that was essentially extortion.

What was particularly striking during the hearings with the workers is the general climate of fear in which the workers lived. The employer was regarded as an almost untouchable authority. Apart from verbal abuse which the employees experienced on a daily basis, they reported being threatened physically or witnessing other employees being threatened and even attacked. For example, one of the workers described the following violent incident: *“The one who quit, they [the employer] beat him up, so when I came home from work, in the hallway, there was blood from the first floor to the exit door.”*

CASE 2

FROM BOGUS SELF-EMPLOYMENT TO OMITTED PAYMENTS IN THE CONSTRUCTION SECTOR IN GERMANY

Nineteen Polish workers shared their experiences of working in the construction sector in Germany. Bogus self-employment and the resulting lack of social security, medical insurance and pensions were described as problematic by the interviewed workers. The participants reported that it was impossible to find work in the building sector without having registered a one-person business (*Gewerbe*). For example, one employee explained that *“They fired me and told me I could come back once I had registered a ‘Gewerbe’.* Everyone in the firm did that.” Firms were described as making a conscious choice of saving expenses through the bogus self-employment of migrant construction workers. The testimonies collected during our hearings revealed that (part of) the remuneration is being paid under the table for undeclared work, as one worker described: *“The owner shows up with a big, black leather bag and he fetches the money from this bag. There are thousands like me.”* In the cases represented by our collaborating lawyer in which construction workers were suing for due payments, the bogus self employment, undeclared work and unofficial payment, contributed to the failure to receive a positive verdict.

Main issues

Both investigated sectors broadly use subcontracting as a strategy to reduce wage costs. Both sectors apply lower labour and social standards for migrant workers in comparison with a regular part of the workforce, thus circumventing labour provisions intended to level the rights of domestic and foreign workers from other EU countries.

■ MEAT PROCESSING SECTOR

On a global scale the meat processing sector is known for employing migrant workers as a low-wage alternative to the domestic workforce (Appelbaum and Schmitt 2009). In the case of Germany, regular jobs in the sector have been replaced extensively since the EU's eastward expansion after 2004 – initially with posted workers (Menz 2010). Given that until 2015 no minimum wage was introduced in Germany, sector agreements between trade unions and employer associations regulated wages instead. The wage agreements did not apply to the subcontracted migrant workers employed by companies outside these associations (Menz 2010). They can only apply for the persons working for the foreign companies as employees in specific sectors (meat processing, construction sector) but not for the legally self-employed persons from abroad. These practices replaced up to 26 000 regular jobs while placing pressure on the wages of the remaining domestic workers in the sector (Czommer and Worthmann 2005). In this situation, the unions entered a decision process regarding their stance towards migrant workers: should they welcome them or fight them, recruit them or even adopt elaborate integration strategies to defend the strength of the union? (Krings 2009).

■ CONSTRUCTION SECTOR

Since the establishment of the European Single Market in 1993, it has been a popular low-wage strategy in the German construction industry to use subcontractors from other countries posting workers to German construction sites (Nienhüser 1999). This legal conduct has since been complemented with illegal practices like bogus self-employment (Ibid.). This trend continued during the protection of the German labour market under the transition rules from 2004 until 2011; this largely prevented the regular entry of new EU citizens into employment relationships in Germany while allowing the operation of self-employment entities from these countries (BAMF 2010).

• BOGUS SELF-EMPLOYMENT

With the full labour market access for citizens of the new EU countries the amount of posted work from these countries has been shown to decline while the bogus self-employment

practice remained a vital element of conduct in the construction sector (Cremer 2013). Self-employment carried out in other EU-countries falls under the Services Directive and is legally not protected by labour rights provisions. Thus mass bogus self-employment in the construction sector excludes these workers from legal provisions meant to ensure their labour rights and equality within the framework of the nation state and the EU. German provisions not applicable but deserved are: the minimum wage as well as social security and pensions.

• SUBCONTRACTING CHAINS

Commonly in the construction sector a subcontractor is hired to perform the task and uses an intermediary to find workers – in our hearings, this was predominantly middle-aged men with a low educational background. The employer paid the workers an advance and then lagged behind on the following payments. Attempts to enforce the payments legally were usually unsuccessful. For example, one of the participants reported that his hiring firm “vanished” entirely. After the workers had finished their job, no one paid them. A further visit to the address their principal contact had given on his business card revealed it to be a letter box address only.

• WORKING HOURS AND PAYMENT

The people working in construction tend to work long hours, which was confirmed by workers in the hearings who worked e.g. up to twelve hours a day. The workers told us they work longer and are being paid less than their German co-workers. In addition, the newly introduced minimum wage is of little use to them, since they are contracted to perform a certain task and are paid a fixed sum for the task and are not paid by the hour. Some of the workers rent their flat from their employers. The workers described a dilemma in choosing between staying and continuing to work for a dishonest contractor, risking further non-payment of wages, or leaving and definitely not receiving the money owed.

• LABOUR INFORMALITY

Undeclared work legally renders the work contracts invalid, thereby leaving the self-employed construction workers without legal grounds for claiming their pay. Apart from the described inherent problems of bogus self-employment, the letter box subcontractor practice leads to further violations of labour rights. Wages are also often paid arbitrarily, usually having little to do with the working hours kept. In case of legal proceedings, it often proves impossible to establish the exact working hours.

In the larger picture, low wage and dumping wage strategies such as the “(ab)use of posting rules, cross-border agency work and the provision of services by (so-called) self-employed

workers can equally function as methods to circumvent rights-based labour migration” (Cremmer 2013). At the same time, this conduct has shown to exert pressure on wages, working conditions and workers’ self-organisation, rendering trade unions helpless (HRW 2009).

Interventions

■ LIMITS TO WORKERS’ RESISTANCE

In general, the workers all displayed little trust and little confidence in official institutions or the official authorities. Negative experiences with the authorities shape their attitudes and beliefs about officials. As a consequence, many violations are never reported to the Police nor to other institutions. Instead, many try to get by on their own, often employing or agreeing to semi-legal practices (such as undeclared work), thus making their situation more vulnerable.

Another option for many is to resign and return to Poland. This is also problematic, since once legal proceedings have been set in motion most people are no longer reachable. Few workers actually file lawsuits or try to sue their (former) employers. In the construction sector, this is usually the result of the employers taking part in semi-legal practices and the workers being scared of getting into trouble with the authorities themselves. In the rare cases that lawsuits were filed the workers were often unsuccessful in reclaiming their pay.

In the meat processing sector most workers reported being afraid of their employer and described verbal abuse and threats of violence. This resulted in many workers refraining from taking any legal steps. Excluded from the regular workers’ councils and hindered from large scale union access partly due to the language barrier, migrant workers faced further obstacles in their fight for labour rights.

■ TRADE UNIONS

For trade unions, the task of representing workers and protecting them from labour rights violations is especially difficult in the German construction sector. B bogus self-employment in the construction sector poses a challenge to trade unions because technically these workers are not employed and therefore do not fall under the unions’ protection. Also, the amount of posted migrant workers, their missing local union affiliation and their limited stay makes their integration in union structures complicated. Additionally, migrant workers in the sector represent low-wage competitors for the German construction workers represented by

the union (Wagner and Lillie 2014). Although the construction union (IG BAU) tries to assist workers posted in Germany, during our hearing, the responsibility for those in bogus self-employment was clearly denied by the IG BAU union representative.

In the context of the meat processing sector, the biggest problem is represented by subcontracting chains. Because regular employees are being replaced by the staff of a subcontractor, wage agreements no longer apply. Until recently, the number of company employees who were members of trade unions was decreasing. The trend was halted when some migrant workers succeeded to form a workers' council at a subcontracting firm in the meat processing sector with the support of the NGG (Nahrung-Genuss-Gaststätten) union in cooperation with the DGB-project Faire Mobilität [Fair Mobility] (Faire Mobilität 2016). This is a development, which demonstrates that German unions are adapting their strategies in face of the influx of EU migrant workers (see also Wagner and Hassel 2015).

The project Faire Mobilität [Fair Mobility] by the German Federation of Trade Unions (DGB) employs counselors with migration backgrounds from the new EU member states to support migrant workers when trade unions or migrant organizations cannot. Their statement and recommendations are attached at the end of the report.

The network Arbeit & Leben [Work and Life] Hamburg uses a regional network approach, bringing together representatives from relevant civil and state actors like the labour bureau, the regional government, unions and migrant organizations (among others) in order to prevent and remedy labour rights violations in the context of EU labour migration.

■ STATE AUTHORITIES

In our direct experience of working on cases of labour rights violations with our lawyers, we have found that often official authorities have little awareness that labour rights violations may actually constitute a breach of criminal law. This was manifested through their insistence to treat issues such as non-wage payment and unsafe working conditions only as questions to be handled between the employer and the employee.

Recommendations

1. We suggest building a network of different organizations (e.g. migrant organizations, trade unions) that work together and complement each other. For example, trade unions often have greater political impact than the usually smaller migrant organizations, while migrant organizations have more resources to help on an individual level, such as supporting those who need help with German bureaucracy. We identified the regional association “Arbeit & Leben Hamburg” as the best example of establishing a working network of relevant actors.
2. As subcontracting is a central underlying problem, it is important that temporary work agencies are only one of the parties liable for violations. In general, the burden of proof regarding working hours should fall on the employer, not on the employees. Employers should be obliged to provide their (potential) employees with contracts in their native language or a translation.
3. As false self-employment is an increasingly widespread phenomenon, one-person businesses need to be better protected by social security measures, e.g. against the bankruptcy of a client. An information campaign on the benefits of employment contracts should be launched, aimed both at (potential) employees and employers. Information should be provided online on the criteria of employment and occupation and measures of gathering evidence thereof.

Statement by DGB-Project Faire Mobilität [Fair Mobility] on the Polish Social Council's Internal Report (Nov. 2015)

The report issued by the Polish Social Council points to the most important aspects of labour exploitation in the German meat industry and goes along with the experiences of Faire Mobilität's advisory centres dealing with working conditions in the meat industry since 2012.

The key problems in this sector are:

- Extreme working hours, exceeding the allowed maximum of working hours per day by far
- "Stolen" working hours on the paycheck - workers are not paid for the entire number of hours worked
- Unfair deductions for rent, working tools or penalties for "misbehavior" or "inadequate" performance at work
- "Double dependence" on the employer, who provides the accommodation for workers
- Immediate dismissals when workers become sick or have an accident at work
- Bullying and discrimination by supervisors

When thinking about how to improve the situation of mobile workers in the meat industry it is important to consider the legal frame of the labour exploitation taking place. With the help of service contracts (*Werkverträge*) the companies have contracted out the biggest share of the production process to subcontractors. While a couple of years ago many foreign subcontractors were hired to provide the work force, recently there has been a shift to subcontractors registered in Germany. As a consequence, most workers are part of the German social insurance system now. Nevertheless, they have usually worse working conditions than directly-employed workers and are not covered by collective agreements and workers' councils (*Betriebsräte*). The companies running the production plants still refuse to take responsibility as employers for the people working on their plants.

One important measure is thus to restrict the use of service contracts in the core areas of production. The government presented a draft law on fighting the abuse of service contracts in November 2015. Although it might help to clarify better whether a service contract accords with the law or not, it does not provide workers' councils with enough rights to deal with service contracts properly.

Other measures proposed in the report are equally important. The access to legal help for

mobile workers has to be improved so that they can claim their rights in court despite language barriers and without the risk of high financial costs. The documentation of working hours by the employer needs to be transparent and accessible to the workers. Support by workers' councils for the workers employed by subcontractors should be strengthened. Mobile workers must further have access to advice from counseling centres which cover the most important languages of origin, help them get to know their rights and explain methods to put them into reality.

Statement from MEP Jutta Steinruck of the Progressive Alliance of Socialists and Democrats in the European Parliament on the Polish Social Council's Internal Report (Jan. 2016)

The Internal Report has shown once more that the current legal regulations under the Posting of Workers Directive are open to interpretation by the Member States. This has created loopholes which temporary work agencies and subcontractors in the construction and meat processing industry are systematically exploiting. The current practice is to tie employees to a contract of employment which is deliberately issued neither in the country of origin nor in the host country, but in the country which charges the lowest social security contributions. I have visited construction sites where employees are placed in accommodation unfit for human habitation, but still have to pay high rents. Employees who draw attention to inadequate health and safety precautions are summarily dismissed or even blackmailed or sued. When these practices are made public, tactics are used to downplay them, and lawsuits against trade union members and charitable associations ensue. The companies gladly accept convictions for promoting undeclared employment, because the profits far exceed the penalty payments. This proliferation of social dumping comes not only at the expense of workers – irrespective of whether they are mobile, migrant or domestic workers, who are deprived of basic social and labour rights. It is also at the expense of companies which abide by the rules.

I very much welcome the practical recommendations of the Report. Yet schoolings and campaigns to inform workers about their basic rights remain ineffective if the legal framework for the cross-border movement of workers is not significantly improved. We must ensure the freedom of movement while safeguarding wages, an effective financing of social security schemes, social standards, occupational health and safety as well as collective bargaining

and the autonomy of social partners in the host countries. The principle of equal treatment for third country nationals is fundamental in order to tackle both the non-discrimination and integration of migrant workers, as well as to avoid social dumping. The shorter the permit to stay and work, the lower the chances for migrants to have their rights recognised and respected or for social dumping to be prevented.

We, the Socialists and Democrats in the European Parliament, have been calling for a full revision of the Posting of Workers Directive in order to codify the principle of equal pay for equal work at the same place, to prevent social dumping, to end the exploitation of posted workers, to introduce an unconditional system of joint and several liability covering all economic sectors and to ensure fair competition. Furthermore, the coverage should be extended to posted workers from third countries whose undertaking is located in a third country.

Labour inspections must be coordinated at the European level and a European labour inspectorate for cross-border cases should be put in place to ensure the enforcement of labour and social legislation in the Single Market. A special focus needs to be on cases of trafficking for labour exploitation.

In 2015, my political group has cleared the path for a platform to prevent, deter and combat undeclared work, as well as to encourage and promote its transformation into declared employment. This can only be the first step towards a common European strategy to prevent a further race to the bottom for social rights. That is why we are calling on the Commission to propose an electronic social-security card to record workers' important employment and social security details. This could be a very useful tool to prevent irregularities. Also, a European Labour Inspectorate for cross-border cases must be established to ensure the enforcement of social and labour legislation in the EU. Through my political work, I will continue to fight to put an end to social dumping and ensure the principle of equal pay for equal work at the same place.

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POLISH SOCIAL COUNCIL

Registration address: Oranienstr. 34, 10999 Berlin

Address for correspondence: Oranienstr. 34, 10999 Berlin

Phone: +49 30 / 6151717

E-mail: polskarada@polskarada.de

www.polskarada.de

ABOUT POLSKA RADA SPOLECZNA E.V.

Since its foundation in 1982, over 100 000 EU citizens have been offered support and counseling by the Polska Rada Społecznae (Polish Social Council). Its staff members have been witnesses of the evolution of migrant politics and integration politics in Germany. They still remember the times when Polish people had the legal status of asylum seekers, as do many refugees now. Their work is important and often insufficiently supported, as is that of many immigrant organizations in Europe. Through their work in consulting, they encounter many problems related to labour rights violations. Employers take advantage of poor language skills, desperation and a financially difficult situation in the country of origin. For this reason the organization aims to strengthen and further develop a network of consultants and a lobby for the improvement of the situation of workers in Germany. It regards the informative-preventative part of the work in the country of origin, the fundamental first step of such work. We invite collaborations and exchange of experiences at the E-mail address: info@testing-eu-citizenship.de



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