The growing number of third country national workers on the EU labour market poses major questions on the functioning of the bloc’s internal market, and is currently the subject of what could be a landmark European Court of Justice case.

This event report looks at the difficulties facing third country workers whose fate is often in the hands of abusive intermediaries, having to work under very precarious labour contracts, and how exploitative labour practices can be combated.
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EU risks becoming like the Gulf over exploitative labour

By Benjamin Fox | EURACTIV.com

The growing phenomenon of labourers coming into Europe from south–east Asia and elsewhere is fuelling a dangerous rise in exploitative labour practices that requires urgent EU action, labour unions and civil society groups have warned.

Panellists at a webinar hosted by the European Federation of Building and Woodworkers and Building Workers’ International on Wednesday (2 June), which focused on the growing trend of exploitative labour practices in the EU, reported that forced and bonded labour was similar to the practices seen in parts of the Gulf region. Some asked if the European Union is “becoming the new Gulf Region”.

A 2019 report by the EU’s Fundamental Rights Agency highlighted cases of severe labour exploitation of migrant workers in construction, forestry and other sectors.

These included cases of workers being paid as little as €5 a day, being forced to pay debts to traffickers and sleep in shipping containers with no water or electricity. It was observed that undocumented workers are amongst the most vulnerable workers.

Third-country labour has emerged, particularly in central and eastern Europe, as a replacement for domestic workers who have moved themselves to western Europe and Nordic countries where the pay is highest.

Estimates indicate that third-country nationals now account for
Sonila Danaj, a researcher at the European Centre for Social Welfare, urged EU policymakers to focus on labour standards enforcement and advance the convergence of labour standards across the bloc.

In particular, trade unions and civil society campaigners have reported that the intermediary system, where a company recruits workers and then posts them to another EU country, is leading to social dumping and social fraud, where workers lack social protection.

The Croatian affiliate of the European Federation of Building and Woodworkers (EFBWW) has reported that 35% of construction workers in the country are non-European, with some coming from regional neighbours Bosnia, Kosovo, and Albania but also from Bangladesh, India, Nepal, Vietnam or the Philippines.

The Czech Republic is currently negotiating a bilateral deal with the Philippines that could involve the posting of 200,000 construction workers, while Poland's agreement with Ukraine involves two million workers being posted, many of them in the construction industry.

Construction industry trade unions are campaigning for an EU ban on intermediaries.

In response, the European Commission has promised to undertake a study focusing on the posting of workers, as well as the role of intermediaries and agencies.

Unions also secured a significant victory on Thursday (3 June) when the European Court of Justice ignored the opinion of its advocate general in the case involving Team Power Europe, a temporary employment agency based in Bulgaria and posting workers to Germany.

In its ruling, the ECJ confirmed that “the performance of the activities of selecting and recruiting temporary agency workers in the member state in which the temporary-work agency is established is insufficient for it to be considered that that undertaking [performs] ‘substantial activities’ there.”

That amounted to a U-turn by the Luxembourg-based court, after the advocate general’s opinion had recommended that Team Power Europe’s selection of workers should be classified as ‘substantial activities’.

Tom Deleu, general secretary of the EFBWW, described the ruling as “an important victory for the workers, for the trade union movement and for the European values.”

“If the court had ruled in favour of the advocate general’s opinion, it would give an important incentive to fraud and to set up letterbox companies, acting as temporary work agencies and posting cheap labour to other member states,” he added.
The EU needs to tackle social dumping and fraud in the construction sector that has been led by an emerging business model of exploitative labour, argues Tom Deleu in an interview with EURACTIV. That means targeting shell companies and a ban on intermediaries.

Tom Deleu, general secretary of the European Federation of Building and Woodworkers, was speaking with EURACTIV’s Benjamin Fox.

What is the scale of exploitative labour facing the EU?

That is the million-dollar question. What is very specific about the construction industry is that it is a very fragmented industry. Once the building is there, the work is done and the circus moves on.

What is similar is that in construction, as also in agriculture and transport, it is very labour intensive and labour costs seem to be an interesting way for employers to reduce costs in terms of building roads, houses and infrastructure.

In that sense we have similarities, mainly with agriculture and transport, in that it is a very fraud sensitive sector because of how the industry is organised and the importance of labour costs in the process.

What we have is that there is a lot of social fraud, undeclared labour, and it’s very difficult to put numbers on that, we are always estimating how large the undeclared or black market...
In some countries it’s up to 20% or 30% of activity. There are Commission studies but they need to be taken with a pinch of salt when it comes to building and construction.

What we have seen, especially since the internal market has been further developed within the EU with the posting of workers, we have seen that a large number of posted workers have been moving from central and eastern countries and the Balkans to the western and Nordic countries. They make up a large number of the workforce now in construction in those countries.

In Belgium, posted workers represent 30% of the total workforce in the construction industry and what has happened recently is that we are seeing more workers coming from outside of the EU.

To be blunt, the construction workers from Romania are in Luxembourg, Belgium and Sweden, so there is a huge lack of workforce in those countries.

We see that countries are negotiating bilateral agreements. We know that the Czech government is discussing an agreement with the Philippines to have 200,000 construction workers. That is almost the total workforce in Belgium. We know that Poland has a bilateral agreement with Ukraine for two million workers, and many of them are in the construction industry. Then once they are in the EU, they can be posted. The system is there, the business model exists.

That is why we ask whether the EU is becoming like the Gulf, because it is the same mechanisms that we see in the Gulf region and Qatar. We have a lot of issues with accommodation and abuse of workers who are in a very precarious situation when they have an accident, or don’t receive the correct wages. They are in a very vulnerable situation. They don’t know who to turn to. This is a huge challenge that is developing at a fast pace. That’s why it’s firmly on the agenda of the European Labour Authority.

We are pushing for new legislation and regulation to protect those workers and also to protect against social fraud and social dumping.

**Is it fair to say that these practices are exploiting loopholes in existing EU law, such as the posted workers directive and on temporary agency work? How can these gaps be plugged?**

We have been addressing these loopholes for more than 10 years. We have the revised posted of workers directive, but that is mainly on the question of equal pay. We still have a huge loophole over social protection that is subject to revision. This process should have been finalised more than three years ago, but it’s still ongoing. There are a lot of legal loopholes when it comes to posting and on top of that there is a business model that has established itself, and is very lucrative. You can find and deliver a cheap and flexible workforce to whoever needs it and when something goes wrong it’s almost impossible to fine or sanction those who organise it.

Therefore, we are calling for more regulation and calling for a ban on intermediaries. We are not against mobile workers or migration. This work should be done by legitimate companies. What we see now are all kind of intermediaries, posting agencies, temporary work agencies, individuals who set up a little business and then post workers to another member state deliver this so-called service.

These was a case with Bouygues where they were fined €30,000. For one of the largest construction companies in the world that is peanuts and the French authorities found that they had saved £12 million in social contributions.

**How receptive has the Commission been? Are they prepared to legislate?**

With the previous Commission there was, for the first time, a change in views and a change in discourse. There are some improvements in the posted workers directive. There are some improvements and we acknowledge that in terms of the right to equal treatment, but when it comes to social security this is still ongoing.

There is still no political will to close this deal in a social way. It is apparently still important to have an internal market which is as free as possible for businesses and individuals but rules and sanctions are still seen as an administrative burden. In our view this is a very neoliberal approach.

At the same time, the Commission has announced a study on subcontracting and that it will look at the Temporary Agency Workers Directive. We see these as positive developments but it remains to be seen what the legislative proposal, if it comes, will look like.

Fifteen years ago in construction there was a ban on temporary agencies. Why? Because construction is a very fraud-sensitive sector but also a very dangerous sector, with

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illegal gangmasters and, in some cases, even linked to the mafia. So in many countries there was a very restrictive framework. What has happened with the opening of the internal market in the EU is that the European Commission has, country by country, obliged countries to get rid of that legislative framework because it was seen as an obstacle.

In our view we need to go back to more strict regulation. With FIEC, the employers’ federation, in many cases we have joint interests because they have an interest in fighting companies that don’t play according to the rules. Until recently, we didn’t have many friends in the Commission on this. This is changed a bit but it’s mainly discourse. Now we want to see practical change.

**Is there a case that gaps in specific directives like health and safety also need to be plugged as well as the overarching approach?**

Some of the big construction sites in Brussels have over 200 workers, but only 15 are Belgians and you have workers from Portugal, Poland or the Ukraine. There are no checks if they are working as construction workers, if they are skilled as construction workers or labourers. There is also the issue with the language. You work with cranes and heavy loads but no one can communicate with each other. And if countries impose requirements that workers have the right skills and language checks they are immediately told by the Commission that this is a hindrance.

Our affiliates go to construction sites, to talk to all workers and explain their rights and try to organise them. The issue is that many of these workers come in subcontracting chains and some of our unions don’t have access to sites.

**There is clearly a very strong role for trade unions here but also about bringing more transparency and information to the sector.**

It all starts there. And then there needs to be an efficient way to deal with abuses. Prevention is key. If we know that there is a huge issue with intermediaries then we have a ban on them. If we have an issue with subcontracting or shell companies, is it so protectionist to say that we don’t want this type of companies?

**There is also a law enforcement side to this in terms of Europol’s role coordinating information exchange...**

We have high hopes for the ELA. We have been lobbying for two decades for such an authority at EU level. Now it needs to be operational and it needs to have an impact on the ground and we have high hopes that this will be the case.

We will do everything to support the ELA and we think it will be a huge support to us to clean up the construction industry. But it is not only about having such an authority.

It’s also about when you catch those who are committing fraud to make them pay. What happens now is that inspection services have identified fraud and taken them to court and a fine has been imposed. It’s long and complex and at the end when you impose a sanction, the company disappears and there’s nobody to fine.

**How can teeth be put into a sanctions regime?**

It starts with getting rid of shell companies. When you have legitimate companies, they will try to reduce costs but if they know the risks of being sanctioned and fined, and that this would impact on their reputation, they will not go that way. A legitimate company would always bear that in mind.

Shell companies need to disappear.

**Is there a case for a sanctions regime that goes beyond fines and includes jail terms?**

The Bouygues case is emblematic because the company was fined. It also shows our basic problem. It’s easy, cheap it’s flexible, it’s lucrative and only one in a million times you might risk getting a sanction. Maybe those not committing it this are the stupid ones. This is ludicrous, it is destroying our industry.

We also want to have a liability system with teeth that makes the main company responsible for what happens in its supply chain, and the client.

One of the perverse realities is that public authorities and governments are one of the biggest clients in the construction sector. Roads, hospitals, stations etc. In the tendering process they want the cheapest price and they don’t really want to know what happens on the site.

In the revision of the public procurement directive, we see that in the national transposition many countries are a bit hesitant, especially when it comes to the social clauses. It’s hypocritical.
Every year, thousands of workers are misled and abused in all kinds of shady working deals. In most cases, these workers are not recruited by a regular construction company but by a so-called intermediary company. A lucrative business model in the internal market. This has to stop and that is why, the EU should ban intermediaries in the context of posting.

When Ivan (not his real name) agreed to leave his homeland Bulgaria to work in Germany as a posted worker via a temporary work agency, he was happy to have a job. He never would have guessed that this job would bring him into problems with social security and that his case would end up in the European Court of Justice. Ivan is not alone. Every year, thousands of workers are misled and abused in all kinds of shady working deals. In most cases, these workers are not recruited by a regular construction company but by a so-called intermediary company. A lucrative business model in the internal market. This has to stop and that is why the EU should ban intermediaries in the context of posting.

Precarisation in the construction industry is spreading. There is an increasing number of posted workers and temporary agency workers to whom the fundamental principle of “equal pay for equal work” does not apply. For many posted workers, the so-called coordination of social security systems proves to be fiction. Intermediaries play a key role. On many occasions – too many in our view – we see that temporary employment agencies (TEAs) are
involved. Numerous times, TEAs seek easy profit, benefit from loopholes in the social security legislation and post workers to countries where these agencies do not have relevant activities. In the worst-case scenario, workers are left alone with no social security protection.

Enabling posting through this abusive business model does not promote free circulation of workers. It encourages cross-border fraud and fosters social insecurity.

This harms:
- Workers and their families
- The confidence in a fair and social European Union, and the confidence in the European institutions, as protectors of people’s rights.
- Companies who make the right choice: direct employment.

The organisation of posting via intermediaries, such as temporary work agencies, should be banned by the European Commission (EC). In the European Pillar of Social Rights (EPSR), the EU signals and recognises the problem with TEAs, saying that “evidence is being gathered on the use of temporary agency work, in particular in the context of cross-border work. This will provide the basis for the Commission to assess the need for legislative or other action at EU level, notably a possible revision of the Temporary Agency Work Directive”. The EPSR cannot be just talk, the EU can no longer ignore this problem. It is time for the European institutions to take action, protect its citizens and foster direct and stable jobs for everyone.

It is in this context that we must look at the emblematic case of the temporary employment agency, Team Power Europe. A Bulgarian worker (let’s call him Ivan) has been placed temporarily with a German employer by Team Power Europe (established in Bulgaria). Since there were no substantial activities in Bulgaria, the Bulgarian authorities refused to consider that Ivan was subject to Bulgarian legislation during the period of assignment.

To clarify this issue, the Bulgarian court asked the European Court of Justice (CJEU) to interpret the applicable legislation. On 10 December 2020, the CJEU Advocate General issued his opinion. The Advocate General considers that it is not necessary that a substantial part of a company’s employee placement activity be performed in the same Member State where it is established, to consider this Member State as the place where it normally carries out its activities. In practice, this would mean that the company can develop its activities under the Bulgarian social security law – known to be more lucrative to posting companies.

We strongly disagree with this opinion. This is not the way. If CJEU follows the arguments of Advocate General, it will be promoting social dumping – contrary to the European Union values and principles. It means that TEAs can be established in any low-social security Member State for the sole purpose of hiring out and posting workers to high-social security MS, and that workers remain subject to the social security legislation of the sending MS for up to 24 months.

We have to stop social dumping! We cannot leave these workers behind.

The EFBWW calls upon the European legislators to use the current revision of the Regulation on the coordination on social security systems in Europe to combat letterbox companies posting workers across Europe using the lowest standards. The vague concept of “substantial activity” should be better defined. Rules need to make clear that substantial activity shall inter alia be measured by the working time of workers at the place of work. This general rule shall also apply to TEAs. If there is no or hardly any activity of the TEA in the country where the company is registered, the social security legislation of the receiving countries shall apply when posting workers.

The EFBWW demands the CJEU to carefully look at this case and take a decision in line with the social model the EU is propagating. The EFBWW calls on the European legislators for a total ban on posting through temporary work agencies and other intermediaries. The time is right!