



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

As the European construction industry is highly affected by the increasing presence of third country national (TCN) workers and companies, EFBWW and FIEC, the European social partners of the construction industry, welcome the ambitions to develop a more efficient and effective EU migration policy for workers and to develop a comprehensive EU strategy to ensure a level playing field and fair competition between all construction companies on the EU Internal Market.

I. Introduction

A. Migration and posting of third country national workers in the construction industry

Within the construction industry, labour mobility is linked to the specific nature of worksites. As such, construction workers move from one building site to another. 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. There are many ways for TCNs to access the EU labour market. The most common for the construction industry are the TCN workers who:

- migrate to the EU as asylum seeker or refugee;
- migrate to the EU – at their own initiative;
- migrate to the EU – at the initiative of a company (most commonly a labour supplier);
- reside (with a legal or illegal status) in an EU Member state and, at the initiative of a company, are temporarily posted to another Member State, to perform a task;
- reside (with a legal or illegal status) in an EU Member state and at their own initiative move from the Member State of residence to another Member State.

These forms of migration are regulated at EU and national level. However, the overall enforcement is a national competence.

The EU enlargement phases significantly increased intra EU mobility of construction workers, including posted workers. These flows led to a serious brain and skills drain of qualified and skilled workers in many Central and Eastern European Countries (CEECs). This resulted in a significant shortage of skilled workers in many CEECs, leading to migration policies to attract workers from outside of the EU. At the same time, the cross-border posting of workers has gradually become a “business model” for temporary “labour supply agencies/companies”. This situation is particularly widespread in the construction sector, which showed the most rapid growth in the past 10 years¹.

Despite the regulations in place, severe labour exploitation of migrant workers in the construction industry and other sectors (such as agriculture, domestic work, transport ...) are found on a massive scale².

Currently, we 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 part of the TCN workers is employed in the EU-host Member State, while others are posted to another EU Member State. Overall, we observe that “labour supply agencies/companies” play an important role in the immigration and employment of the TCN workers in the EU.

Currently, the Member States have the responsibility to regulate and enforce the immigration and employment process of TCN workers on their market. However, the existing EU legal framework (in particular Directive 2009/52 on “employers’ sanctions”, Directive 2011/98 on “single permit”, and Directive 2014/66/EU on intra-corporate transferees) is very fragmented and not always properly enforced. Also, the ‘labour vulnerability and exploitation factor’ seems to be significantly higher for TCN workers. The exploitation is organised in a structural manner and often linked to organised crime.

B. Potential distortive effect of the presence of third country national companies in the European construction industry

The presence and participation of third country companies in the European construction market can have a distortive effect on competition, in particular as regards State-Owned Enterprises (SOEs), mostly from China. The growing number of cases in recent years where SOEs (i.e. mainly Chinese State-owned companies) have been awarded large construction projects at prices which no European private company could realistically match and the current level of interest of such companies in upcoming infrastructure projects, underline the need for an adequate and rigorous legal framework.

The activities of Chinese state-owned construction enterprises in and around the EU have reached new dimensions with the “Belt and Road Initiative” (BRI) and the budgets involved. Recent examples of EU-financed construction contracts awarded to abnormally low tenders submitted by consortia led by Chinese SOEs (e.g. in Croatia, Bulgaria, Sweden) show the need for a comprehensive EU

¹ Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work, Inga Pavlovaite, EU platform Undeclared work, 2020.

² <https://fra.europa.eu/en/news/2019/severe-labour-exploitation-migrant-workers-fra-report-calls-zero-tolerance-severe-labour>

strategy in favour of fair competition in practice. This includes tackling the issue of joint bidding by such companies.

There is also the risk of the acquisition of EU construction companies by SOEs, to secure an easier access to the EU market, as already observed in other sectors (e.g. KUKA in Germany). Moreover, the acquisition of companies managing infrastructures (e.g. ports) also has repercussions on the construction market with these companies becoming de facto contracting authorities.

Having advocated for several years for legislative action addressing above all the problem of subsidised bidding in public procurement procedures, leading to abnormally low tenders, FIEC acknowledges that the approach of the EU and the Member States has recently taken a more favourable direction and welcomes the recent initiatives taken by the European Commission.

II. Joint statement of the European social partners of the construction industry

1. To tackle this problem, there is clearly no silver bullet. FIEC and EFBWW consider that a comprehensive legislative framework should be put in place.
 - An ambitious follow-up of the European Commission's White Paper on **levelling the playing field with regard to foreign subsidies**:
 - o EU State Aid Regulations which apply to EU contractors must apply in the same way to third country contractors active in the Internal Market; Distortions caused by foreign subsidies facilitating the acquisition of EU targets, including infrastructure authorities (e.g. ports), should be addressed;
 - o The EU Public Procurement Framework should be strengthened in order to tackle distortive effects caused by foreign subsidies.
 - The adoption of an ambitious **International Procurement Instrument (IPI)** to ensure reciprocity in public procurement markets ;
 - The development of efficient **trade defence instruments for services**, in particular in the areas of anti-dumping and anti-subsidies;
 - The effective use of the **provisions on abnormally low tenders** in public procurement as explained in the European Commission's guidance on the access of third country bidders ;
 - A strengthened **EU screening of investment by third countries in strategic EU companies**, e.g. infrastructure authorities like ports;
 - **Stricter EU rules regarding the use of EU funds**: be it under direct, shared or indirect management, contracts are only awarded to economic operators originating from the European Union or from a country with which the European Union has concluded an agreement providing for the opening of the EU procurement markets.

2. **TCN workers should 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. Given their specific status, particular attention should be given to **potential necessary future legislative adaptations** or new requirements. Specific attention should also be provided by **enforcement agencies on national and EU level** (ELA, Europol, etc.).


3. The existing European migration Directives, and in particular the **employers' sanctions Directive (2009/52), the single permit Directive (2011/98), and the intra-corporate transferee Directive 2014/66/EU** are currently poorly implemented and enforced in several member states. All EU migration Directives should ensure a general equal treatment of all TCN workers and a better enforcement of the rules tackling cross border social fraud and abuse.
4. **Supplementary enforcement measures** should eradicate the persistent problem of fraudulent practices where TCN workers pay exorbitant **fees** to fraudulent labour supply agencies and /or other intermediaries for an employment within the EU.³
5. All national **Member States should be held accountable** for the access of TCN workers on their territory. Member States have to ensure that proper measures are taken so that all fraudulent practices are properly prevented and, inspected and rules enforced. For this we need full transparency of TCN workers employed on the EU labour market. The EC should closely monitor and follow-up trends emerging from PDA1 use and other statistics related to the **role of specific MS developing a business model as "sending states"**.
6. When **Member States open their labour markets for TCN workers in specific sectors** such as construction, national sectoral social partners should be fully involved in the assessment and evaluation of the labour market situation which is the basis for such a decision.
7. In order to **end the practices of fraudulent labour supply agencies** and/or other intermediaries (e.g. active in fake postings⁴), we urgently need effective and efficient EU and national enforcement measures (incl. dissuasive sanctions). At national level, such practices should be covered by criminal law.
8. The construction industry is a fraud sensitive sector. It therefore requires an adequate framework to **fight against fraudulent practices, including in subcontracting chains**. New measures are particularly needed for labour only suppliers. For different and clearly defined types of intermediaries, different ways forward regarding regulation could be considered. In this respect, we will closely follow the results of the forthcoming studies undertaken by the European Commission in the fields of subcontracting (in the framework of posting) and temporary work agencies in the context of mobility (including a reinforcement of the "substantial activity" requirements).

³ E.g. page 11 of the following report:

https://www.solidar.org/system/downloads/attachments/000/000/841/original/Employment_of_Ukrainian_Workers_through_Polish_visas.pdf?1542195590

⁴ E.g. page 32 of the following report: <https://www.euro.centre.org/downloads/detail/3797>

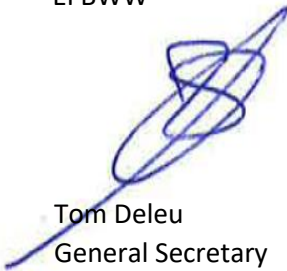
9. The European Labour Authority (ELA) should prioritise the challenges linked to the **exploitation of TCN workers**, develop and implement pro-active joint and concerted inspections and ensure that TCN workers have access to justice. ELA should strengthen its information task to include workers' rights and company obligations.
10. Social dumping and unfair practices on construction sites sometimes lead to unacceptable **discrimination and xenophobic reactions**. EFBWW and FIEC strongly condemn such behaviour.
11. Given the specific nature of social fraud and abuse involving TCN workers, all Member States should sensitise **inspection bodies**, which should be adequately staffed, trained and have cross-cutting competences to tackle social fraud and abuse of TCN workers and/or work closely together with other competent agencies⁵. Many TCN workers work as undeclared workers. Therefore, they are employed under particularly vulnerable and exploitative conditions. For this reason, tailor made protective measures should be put in place for the TCN workers to claim their workers' rights.



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⁵ See FIEC-EFBWW joint statement and recommendations on undeclared work, 24 September 2020