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FELM Recommendations

The *Future of the European Labour Market in Construction (FELM)* project, carried out by FIEC and EFBWW with the support of the *European Centre for Social Welfare Policy and Research*, has analysed the impact of third-country national (TCN) companies and workers on the European construction sector.

The project examined the legal framework that allows non-EU workers and companies to access the construction industry, the available statistical data on TCN workers and companies operating in the EU construction sector, and six case studies. Based on these findings, the Social Partners have developed a list of recommendations to address the challenges and opportunities presented by the presence of non-EU workers and companies in the European construction sector.

FELM recommendations, which build on the project's findings and the activities the Social Partners have already carried out, aim to promote a fair and sustainable labour market in construction while ensuring compliance with existing regulations and enhancing social cohesion.

DATA

The availability and quality of data on TCN workers and companies are essential for evidence-based policymaking in the European construction sector. However, currently, there is a significant limitation in the accessibility and comparability of EU-level data on this subject. To address this gap, the FELM project has developed a series of recommendations aimed at improving data collection and monitoring mechanisms to support informed decision-making. Comparable EU-level data on TCN workers and companies are notably limited and/or of poor quality:

- For companies, data are not collected on company characteristics, countries of ownership;
- For workers, data are limited on the nationality of posted and locally engaged workers (with only a few countries recording such data);
- Data is not collected or updated in a timely manner or with regularity;
- Data cannot be broken down by enterprise size, hindering the ability to analyse specific situations of TCN workers and companies, projects, and subcontracting chains.
- Data collected at national level is not (well) aggregated at the European level hindering an EU wide overview of the importance and impact of the phenomenon.

These shortcomings in data collection pose significant challenges to understanding the presence and impact of TCN workers and companies in the European construction sector. It is critical to address these gaps in data collection to develop a comprehensive understanding of the sector and make informed policy decisions to promote a fair and sustainable labour market.

Therefore, FIEC and EFBWW recommend as follows:

- Contract award data from TED¹ could be combined with firm-level data from the Orbis² database to account for both direct and indirect cross-border procurement by TCN firms.
- Member States need to collect more data through prior notification tools, recording the nationalities of posted workers; it should be possible to provide researchers and stakeholders access to disaggregated data. This must be done in accordance with the General Data Protection Regulations and, provided that the worker has access to her/his data any time, and gives consent to use the data for various research objectives.
- To better assess the living and working conditions of TCN workers, a survey needs to be created, tailored to the situations of these workers.
- Improving and harmonising data collection methods (with respect for the rules of the GDPR) is essential to enable the use of comparable data in the European construction sector. More comprehensive data on infringements and sanctions will allow for better analysis and inform enforcement bodies to identify areas where policies are ineffective. The Social Partners call on the *European Labour Authority* (ELA) to take up this role as it would also fall within its mandate to monitor labour crime and fraud patterns and the enforcement strategies of Member States.

FAIR COMPETITION AND PUBLIC PROCUREMENT

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. There has been a growing number of cases in recent years where these companies have been awarded construction projects at **prices that seem to be abnormally low** and which no European contractor could realistically match. These cases highlight the need for a comprehensive strategy EU in favour of a level playing field and fair competition.

To tackle the problem of subsidised bidding, often leading to abnormally low tenders, FIEC welcomes the Foreign Subsidies Regulation (FSR) as it is designed to fill the legislative gap whereby European companies are reversely discriminated against, as EU State Aid regulations only apply to EU Member States subsidies and not to subsidies from non-EU countries. Nevertheless, the instrument has several

¹ TED (Tenders Electronic Daily) is the online supplement to the Official Journal of the EU covering EU public procurement. It publishes 676 thousand procurement notices per year, including 258 thousand calls for tender valued at € 670 billion.

² Orbis is a database by Bureau van Dijk that provides information on private companies across the world. It presents this information in comparable formats and includes data on approximately 400 million companies from all countries.

shortcomings and is therefore unlikely to adequately address the problem of subsidised bidding in public procurement procedures.

FIEC and EFBWW recommend as follows:

- As the vast majority of construction projects concern budgets well below the (still too high) thresholds for the notification procedures of the FSR and will therefore not be covered by them, only the *ex-officio* procedure will offer some possibilities for the European contractors to re-level the playing field. Nevertheless, action (e.g., a market investigation) will remain at the discretion of the Commission, and, as such, **a draft implementation regulation for the *ex-officio* procedure should be presented in a very near future.**
- Considering the shortcomings of the FSR, the EU's legislative toolbox to tackle unfair competition from third-country companies is still incomplete. The development of efficient **trade defence instruments for construction services**, in particular in the areas of anti-dumping and anti-subsidies, is needed.
- Promoting 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. An automatic assessment of abnormally low tenders should be triggered in these instances.
- Convergence in methodology for identifying abnormally low tenders (ALT) and procedures for verification by contracting authorities would make it easier to monitor the application of the ALT clause in the EU. Directive 2014/24/EU and Directive 2014/25/EU should be amended accordingly.
- Both Directives 2014/24/EU and 2014/25/EU authorise the exclusion of third country enterprises from public procurement, as stated in Communication 2019/C 271/02 of the European Commission ("*Guidance on the participation of third-country bidders and good in the EU procurement market*"). Some EU Member States do use this possibility. In Romania or Slovenia for instance, bidders from countries that have not concluded a bilateral/EU-level agreement (e.g., China) are excluded from tenders. Convergence of such exclusion criteria could help restore a level-playing field in the EU Single Market. However, mainstreaming such rules would almost certainly entail a revision of Directive 2014/24/EU and Directive 2014/25/EU.
- Promoting pre-qualification systems to ensure that companies meet the legal, financial and professional requirements of a tender, as used in many EU Member States.

Making environmental and social standards obligatory and prominent in the evaluation and awarding of public tenders across the EU, provided that they are closely linked to the subject-matter of the contract, could help restore a level-playing field in the EU public procurement market by moving away from price-only decisions. This should be according to national legislation and practices with the involvement of sectoral Social Partners.

- **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.

SUBCONTRACTING

The project revealed that subcontracting chains often create a lack of transparency and control over the sub-levels, which may lead to circumvention, abuses and frauds. In such situations, enforcement agencies also face difficulties in establishing liability amongst the various players involved, especially when they come from different countries.

Clients and their main contractors should limit the number of subcontracting tiers in a single contract to what is technically necessary, particularly where it falls within the core activities of the contractor. In certain member states these limits already exist, as well as companies themselves imposing on themselves limits on subcontracting. Liability often becomes problematic when chains are too long. At EU level, the liability in sub-contracting chains is set by the 2014 Enforcement Directive, which establishes direct liability, that is, from one contractor to his direct subcontractor.

FIEC and EFBWW recommend to:

- Develop new initiatives and approaches to better distinguish subcontracting because of the need to attract a particular expertise for specialised projects and subcontracting that is solely aiming at reducing costs and escaping legal and social responsibilities ultimately leading to unfair competition and fraudulent situations.
- Limit the number of subcontracting tiers in a single contract to what is technically necessary may go some way to address issues of assigning liability. Restricting the number of tiers available to contractors would simplify the situation for both workers and companies organising the division of work.
- Have liability covered across the entire subcontracting chain, particularly when the chain involves multiple subcontractors from different countries, as is often the case in the construction sector. At EU level, liability in sub-contracting chains is set by the 2014 Enforcement Directive, which only establishes direct liability, that is, from one contractor to his direct subcontractor.
- Make more information available to companies and contracting authorities to better determine the appropriateness of firms before entering into a sub-contracting relationships and aid in due diligence.
- Introduce tools to improve transparency in the subcontracting chain, leveraging new digital innovations as an effective means to render assignments, including the companies involved, and the documents required to access a tender publicly accessible.

LABOUR ONLY SUPPLIERS AND OTHER INTERMEDIARIES

The use of intermediaries, such as temporary work agencies and recruitment agencies in the countries of origin, has become increasingly common in recent years. The FELM case studies show that the role of such practices, in connection to the precarious status of TCN workers, creates new and more severe issues of precarity and exploitation. This section outlines recommendations for addressing these risks and promoting fair and ethical practices in the use of intermediaries in the construction sector:

- In order to end the practices of fraudulent labour supply agencies and/or other intermediaries (e.g., active in fake postings), we urgently need effective and efficient EU and national enforcement measures (including dissuasive sanctions). At national level, such practices should be covered by criminal law.
- In order to ensure transparency and compliance with project requirements, contractors should, where possible, disclose information regarding any potential subcontractors involved in the project prior to engaging them as part of the process of due diligence.
- Legal research is needed to see in relation to the different criteria –amongst others related to ‘substantial activity’– set in the Enforcement Directive on determining genuine posting activities if, due to the nature of intermediaries’ business and employment relationship with the workers contracted, their activities can be considered as genuine posting.
- In this context new approaches are needed to increase the fight against letterbox companies and criminal intrusion in the real economy.
- Governments need to make social issues related to the construction sector a priority on their agendas.

EQUAL AND FAIR TREATMENT OF MIGRANT WORKERS

TCN workers are at particular risk of being exploited, experiencing unequal treatment, and facing fraudulent practices. To address these concerns, migrant workers must receive full and equal treatment in areas such as wages, working conditions, social security, and access to training and education. These recommendations are based on the findings of the report and the joint Statement issued by EFBWW and FIEC in June 2021, which recognised the importance of fair treatment of migrant workers in the construction sector and addressed issues related to intermediaries and fraudulent practices:

- 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.).

- 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. 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.
- 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
- All 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".
- 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.
- The single permit system should provide safe and legal pathways to enter and work in the EU, including access to relevant information, support, and legal representation. This would reduce the risk of exploitation, abuse, and trafficking.
- Workers who find themselves without valid documentation should have the opportunity to regularise their status and access their rights, including labour rights and social protection. This would prevent them from being subjected to precarious working conditions.
- 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, access to education, training, quality apprenticeships and decent accommodation. Given their particular status, 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.).

INSPECTORS AND INSPECTIONS

This section of the recommendations focuses on inspectors and inspections and the role they play in achieving fair and decent working conditions. Specifically, the recommendations aim to enhance the effectiveness of inspections, ensure that inspectorates are adequately staffed and trained, and successfully prevent human trafficking. Additionally, the recommendations promote the principle of 'equal pay for equal work at the same place,' emphasising the importance of fair wages for all workers in the construction sector. The recommendations are as follows:

- 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.
- Member States should prepare 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 agencies.
- Tailor made protective measures should be put in place for the TCN workers to claim their workers' rights.
- Social Partners at the national and European levels should be involved in policy making and policy evaluation in the fight against human trafficking.
- National inspectors should possess the necessary technical and legal means to monitor and enforce the principle of 'equal pay for equal work at the same place'. Specifically, means that inspectors should be equipped to track and verify whether TCN migrant workers are being remunerated at the same level as their locally engaged counterparts. National and company-level social dialogue can serve as a forum to discuss equal treatment and working conditions.
- National inspectors' IT and data systems must be made capable of communicating effectively with other public institutions, including those databases related to public procurement.
- Promote the use of labour ID cards at construction sites to establish the working relationship between the worker and employer between self-employed and contractor.

ATTRACTIVITY OF THE SECTOR

The shortage of local workers in the EU construction sector has led to a reliance on TCN workers, presenting a challenge for the sector. To address this issue, there is a need to enhance the attractiveness of the construction sector, and this can be achieved through collaboration between the European and national Social Partners, governments, local authorities, schools and training institutes, etc. By working together, they can create more employment opportunities, improve working conditions, and provide better training and career development programmes to attract more local workers to the sector. Ultimately, this will help to reduce the sector's reliance on TCN workers and create a more sustainable and skilled workforce in the construction sector. We recommend:

- Improve access to OSH training for all workers in the construction sector, including apprentices and migrant workers.
- Encourage the creation of more direct jobs in the construction sector, which offer stable and secure employment opportunities for local workers and reduce reliance on subcontractors to fill the gap.

- Promote quality apprenticeships in the construction sector by setting qualitative standards for training, wages, and working conditions. This will help to attract more young and local people to the sector and ensure that they receive high-quality training that prepares them for a successful career in the industry.
- Develop initiatives to increase the participation of young people in the construction sector, such as work-based learning programmes and partnerships with schools and vocational training centres.

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