

Con3Post - Posting of Third Country Nationals. Mapping the trend in the construction sector
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REGIONAL CASE STUDY

From Ukraine to Finland and Estonia via Poland:

Migration and posting of third country nationals

Work package 4

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EXECUTIVE SUMMARY

This report gives an overview of the Con3Post project¹ research that analyses a new and understudied phenomenon of posting third country nationals (TCNs) in the European construction sector, with a special focus on the posting flow involving workers from Ukraine being posted to Finland and Estonia through Poland. The research highlights severe regulatory challenges related to the phenomenon. These include posted TCNs being exposed to multiple vulnerabilities that are even more extreme than intra-European Union (EU) posted workers are usually exposed to. These are: lack of occupational safety and health training and having no accident insurance coverage, not receiving wages and other employment conditions the workers should be entitled to, not asking for help from authorities/unions and falling through the cracks of social security systems.

We argue that, although posting of TCNs happens for a variety of reasons (including labour market disparities between the sending and receiving countries, established migration routes and ever increasing migration industry), there is also clear evidence that some companies are trying to gain competitive advantage by avoiding inspections and by opting out of more expensive and difficult ways of hiring migrants. As with conventional posting, this can stem from the availability of undemanding TCN workers, and the possibility to hire them via complex corporate constructions which shield employers from liability for violations and inspections.

TCN posted workers are even more vulnerable to exploitation and abuse than intra-EU posted workers, because of the increased difficulties in monitoring TCN posting, the lower expectations of TCN workers, and their often unclear immigration status. To improve the situation for posted TCNs, and ensure fair functioning of the free movement of labour (and labour as services), we provide multiple recommendations (see Chapter six) at the workplace, sector, country and regional level including extensive cooperation between regulatory actors, more resources for inspections, better regulations throughout the whole posting chain and lowering the barriers for TCNs to know their rights and ask for help in case of problems.

¹ <https://isim.zrc-sazu.si/en/programi-in-projekti/con3post-posting-of-third-country-nationals-mapping-the-trend-in-the#v>

1. INTRODUCTION

Posting of third-country nationals (TCNs), i.e., persons who are not citizens of a European Union (EU) member state (and thus not persons with the right to free movement within the Union)², has become an increasingly important phenomenon. On the face of it, this is not necessarily problematic: a person with a residence permit and employment in one EU country can be posted to another EU country temporarily to perform a service, on the same basis as any other posted worker. Problems emerge, however, when TCN posting becomes a systematic labour recruitment chain, because multiple forms of worker vulnerability intersect, with the result that extreme forms of labour rights abuse can and do occur. Posted workers from EU member states already experience significant labour rights abuses and precarity (for an overview, see Kall & Lillie, 2017); in addition, TCNs have to worry about their work permits, or sometimes – not having one. They are among the most precarious groups in the sending country, if, indeed, they even have a real residence in their sending country.

In TCN posting, as in intra-EU posting, labour rights are difficult to monitor and enforce, as posting schemes can be complex, involving chain-posting through multiple countries. TCNs also face the additional complication of falling under both immigration and posting regulations. In general, posting of workers³ refers to the situation where an employer sends his/her employee to work in another European Union member state for a limited period of time in the context of free movement of services⁴ and was initially designed for intra-EU movement of workers. TCN posting takes advantage of a loophole in the interaction between EU free movement and EU TCN immigration cooperation. Intra-EU free movement is one of the fundamental principles on which the EU is built, and there is a large corpus of EU law regulating intra-EU movements. The regulation of TCN immigration, on the other hand, is largely left to the member states. This means that member states can, in principle, expand TCN immigration for the specific purpose of re-posting those immigrants to other EU states; firms that take advantage of this situation can easily find workers who will accept even lower wages, and will have little recourse to justice if there is a dispute about wages or conditions of work. Even if such re-posting industry is not purposefully designed, it could easily emerge

² https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/third-country-national_en

³ In this report we refer to posting according to the Article 12 and 13 of the Basic Regulation, i.e. the Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁴ <https://ec.europa.eu/social/main.jsp?catId=471>

spontaneously as much of EU posting recruitment on the low end of the labour market involves recruitment of the most precarious workers in sending state societies, and recent TCN migrants certainly fit that description.

This report therefore looks at the case of Ukrainian workers in Poland who are posted from Poland to work in the construction sector of other EU countries. After liberalizing its immigration policy in recent years, Poland has created attractive conditions to pull workers from third countries who, in addition to taking up employment in Poland, are increasingly being sent by employers to other EU countries (Surdykowska & Owczarek, 2018). Despite the growing interest on the topic there is a lack of in-depth analysis of the phenomenon of non-EU nationals (e.g. Ukrainians) being posted through Poland to other EU member states (e.g. to Finland and Estonia). This research contributes to filling this void and brings together the perspectives on the whole posting flow, by focusing on the construction sector⁵, as a good example of a sector where this kind of movement has become evident.

The research design for this study is based on the comparative multiple-case studies approach. The Con3Post project has produced three regional case study reports. Each report covers a sending, receiving and third country perspective. This country report focuses on Ukraine as the third country, Poland as the sending country, and Finland and Estonia as the receiving countries. The main research question we posed for this study is:

- *What are the main characteristics of the trend of posting of third country nationals to work in the EU construction sector?*

The research question is broken down into five thematic questions, each with its own specific sub-questions as outlined below:

1. Regional and EU labour market dynamics and shortages

- *What is the extent of labour and skills shortages in the EU construction sector in general and in the explored regions in particular (sending, receiving and third countries)?*

⁵ We define 'construction' using the Statistical Classification of Economic Activities in the European Community (NACE) classification: NACE F.

- *What are the dynamics of supply and demand of workers in the EU construction sector in general and in the explored regions in particular (sending, receiving and third countries)?*

2. Labour migration and mobility trends

- *What is the extent of recruitment/posting of third country nationals to work in the construction sector in the explored regions and what are the projections for the future?*
- *What are the strategies used to recruit workers from third countries to work in the construction sector in the explored regions?*
- *How are public policies relating to labour migration/mobility and recruitment of workers responding to imbalances in the labour market in general and construction sector in particular?*

3. Labour rights, violations and representation of posted workers who are third country nationals

- *What are the main violations of posted TCN workers' rights in the explored regions?*
- *What are the (policy) responses and other measures in place to safeguard posted TCN workers working in the construction sector in the explored regions?*
- *What are the main channels that TCN posted workers in construction use to acquire information? How can information/communication channels be improved?*

4. Social welfare, occupational safety and health (OSH) and vulnerabilities of posted workers who are third country nationals

- *What are the main vulnerabilities of workers who are third country nationals and are recruited to work in the construction sector in the explored regions?*
- *What are legal mechanisms and practices in place in case TCN posted workers experience work-related accidents or develop occupational diseases? How is their safety and health affected if they are posted by letter-box companies?*
- *What measures can be introduced at the policy level to reduce identified vulnerabilities of TCN posted workers?*

5. Managing transnational workplaces

- *What are the main challenges encountered by managers of transnational workplaces in the construction sector and how are they managed?*

Based on our study we argue that posted TCNs experience multiple vulnerabilities, because they are often involved in a complex chain of companies and are posted through multiple countries. They might lack OSH training, it might be difficult for them to understand from which country they get their social security coverage, what to do in case of work accidents, what their rights are and/or how to enforce them. Although posting of TCNs happens for

several reasons, including labour market disparities between the sending and receiving countries, established migration routes and an ever growing migration industry, there is also clear evidence that some companies are trying to gain competitive advantage by avoiding inspections and opting out of more expensive and difficult ways of hiring migrants. To improve the situation for posted TCNs, and ensure fair functioning of the free movement of labour (and labour as services), there is a need for extensive cooperation, more resources for inspections, better regulations within countries and throughout the whole posting chain as well as the lowering of barriers for TCNs to help them know their rights and ask for help in case of problems.

The report starts by a short overview of previous studies in the field of posting, focusing on posting of TCNs in the studied region and on the construction sector. It is followed by the section presenting the methodological approach employed in the Con3Post project. Next comes the Results section divided into five subsections, starting with (1) regional labour market dynamics and labour shortages; (2) labour migration and posting trends; continuing with (3) labour rights, violations and representation of posted workers who are third country nationals; (4) social welfare, occupational safety and health and vulnerabilities of posted workers; and finishing with a subchapter on (5) managing transnational workplaces. The study is concluded in Chapter Five that also presents the main results of the foresight exercises. The final chapter offers policy recommendations.

2. LITERATURE REVIEW ON POSTING OF WORKERS IN THE REGION

Poland is one of the EU countries making the most extensive use of the possibility to post workers to other European Union countries, which has been repeatedly analyzed in the literature, especially in the area of industrial and labour relations (e.g. Friberg, 2010; Thörnqvist & Bernhardsson, 2015; Wagner, 2015). At the same time, the discussion about the posting of workers to Poland has not received much in-depth empirical analysis. Generally, the discussion on the inflow and outflow of posted workers has been dominated by the legal perspective: most of the publications in this area to date concern the analysis of EU and national law, especially the issues regulating employees' rights to decent employment conditions (Ryszka, 2018) or social rights in the context of exercising the freedom to provide services (Kiełbasa, 2017). In the last few years, a large part of publications in the Polish context have had the nature of guides, in which the authors explain how to effectively and legally post workers to other countries (Skibińska & Sokołowska, 2016; Sekita, 2018; Rycak et al., 2018).

Nevertheless, Leiber et al. (2019) have analyzed the practices of posting workers from Poland to Germany. This work drew attention to the practices of employment and brokering agencies (live-in home care sector), at the same time pointing to the problems and challenges faced by companies recruiting employees in Poland (e.g., lack of workers, or legal uncertainty). Civinskas et al. (2017), taking the perspective of labour inspectorates, have described the semi-legal practices regarding the re-posting of Ukrainians through Poland to the Baltic countries. Furthermore, Trčka et al. (2018) have analysed internships undertaken by companies and employment agencies in Poland regarding the use of the so-called 'Polish visas' based on the example of 'false posting' of Ukrainian workers from Poland to Czechia. Also, Keryk (2018) claims that in construction and services sectors employment agencies in Poland are trying to post Ukrainian workers to other countries, using strategies that lead to non-compliance and violation of many employee rights and so are pushing workers into a precarious situation.

Although in the EU-15 countries the narrative of posting of workers from the Central and Eastern Europe (CEE) to the 'West' is dominated by the social dumping perspective and studies dealing with the use of posting practices to circumvent regulations in the host country prevail (Bernaciak, 2015), researchers from Poland tend to adopt a slightly different optics.

This discrepancy can be explained by the fact that Poland is one of the main beneficiaries of the posting of employees, which is why employers and posting agencies perceive this form of activity as an opportunity for expansion on foreign markets and an increase in economic profits. For example, in his research carried out among 16 entities posting workers to various industries (in total over 20,000 issued PD A1), Benio (2016) emphasizes the high costs Polish employers incur if they duly fulfil all formalities and pay taxes as well as social security contributions, making posted workers a more expensive solution for the recipient of services in a receiving country than hiring local workers. This perspective highlights the fact that, if posting is done according to the regulations, it might make services rather expensive; however, it is clear from the literature that companies sometimes circumvent local rules and regulations to gain ‘competitive advantage’ in posting (see e.g. Lillie et al., 2014).

Finland has received a considerable number of posted workers, particularly in the construction sector ever since 2004, when 10 CEE countries joined the EU. The phenomenon has often been associated with social dumping practices (e.g. Lillie & Sippola, 2011; Lillie, 2012), making it a rather serious issue (both for the practitioners and researchers) in the country with generally high labour standards. Estonia, on the other hand, used to be mainly a sending country of local workers (especially to Finland) and it was only recently that the (re-)posting of workers to Estonia has become an important and growing phenomenon. Nevertheless, from the Estonian perspective, posting has only been studied marginally: a few legal studies were published, focusing on Estonian court cases related to posting from Estonia to Finland and on the working conditions applicable to these posted workers according to court rulings (Haljasmäe et al., 2013; Fornasier & Torga, 2013) and research was made covering the labour inspectorates’ perspective (Civinskas et al., 2017; Kall, 2018).

In the Finnish context, the phenomenon of posting has been studied from the legal perspective (e.g. Tuovinen, 2020), but also from the perspective of worker and union strategies and worker rights and their violations (Danaj & Sippola, 2015; Lillie & Sippola, 2011; Sippola & Kall, 2016) and the construction sector has been the main focus of these studies. Finnish social partners in the construction sector have already for a long time been dealing with the corroding effects that the posting of workers has had on their national industrial relations systems. This has led to the introduction of several regulatory measures (Dølvik & Eldring, 2006; Jorens et al., 2012, pp. 16-17; Sippola & Kall, 2016), safeguarding the generally applicable sectoral level collective agreement that sets wage levels for different

categories of construction workers (also applicable to posted workers), and representing migrant workers.

In the Finnish construction sector the main problems that unionists and inspectors have raised regarding posted workers have been underpayment and illegal (too intense) working hours/periods (Alho, 2018; Ruotsalainen et al., 2018). For example, posted workers are often not paid according to the right collective agreement category or their full working hours are not recorded and compensated (Ruotsalainen et al., 2018). This happens despite the ruling by the Court of Justice of the European Union (CJEU) in the case *Sähköalojen ammattiliittory v Elektrobudowa Spolka Akcyjna* (C-396/13) dealing with Polish posted workers in Finland, which confirmed that posted workers are eligible for the host country pay rates based on skill levels, and also to holiday entitlement and overtime payments set in the generally applicable collective agreements in the host country (Cremers, 2016; Lillie & Wagner, 2015). Studies show that although the Finnish construction union has been rather active in trying to recruit and represent migrant workers, the hypermobility of posted workers makes this group especially challenging to target (Danaj & Sippola, 2015; Lillie & Sippola, 2011). The willingness to join the union seems to increase with the time spent in the host country, taking up more secure job positions and with the efforts unions put in recruiting or organizing posted/migrant workers (Danaj & Sippola, 2015; Danaj et al., 2018).

There have not been any studies that focus specifically on the posting of third-country nationals (TCNs) in the Finnish or Estonian context, but the PROMO project⁶ established that in 2017-18 unionists and labour inspectorates in both countries already saw the importance and complexity of the new phenomenon. They pointed out that the posting of TCNs might bring with it even higher levels of exploitation as workers (who do not speak the local language) are more dependent on their employer who might be the only contact that workers have and/or trust in Finland/Estonia (Alho, 2018; Kall, 2018; Ruotsalainen et al., 2018). However, they also indicated that it is not always easy to distinguish posted TCNs from other types of temporary labour migrants (Alho, 2018; Ruotsalainen et al., 2018).

The available data show an increase in the share of posted workers from Ukraine employed in the construction sector in European countries (Surdykowska & Owczarek, 2018). As noted by Surdykowska and Owczarek (2018) by liberalizing its immigration policy in recent years,

⁶ <https://www.solidar.org/en/projects/protecting-mobility-through-improving-labour-rights-enforcement-in-europe-promo>

Poland has created attractive conditions to pull employees from third countries who, in addition to taking up employment in Poland, are increasingly being sent by employers to other EU countries. A review of the literature proves that despite the growing interest in the topic, there is a lack of in-depth analysis of the phenomenon of non-EU nationals (e.g. Ukrainians) being posted through Poland to other EU member states (e.g. to Finland and Estonia). This research contributes to filling this void and brings together the perspectives on the whole posting flow, by focusing on the construction sector, as a good example of a sector where this kind of movement has become evident.

3. METHODOLOGY

The findings in the reports are based on secondary and primary resources. Secondary resources include academic and grey literature on posting to and from the countries included in the study. Primary resources consist of empirical data collected through Joint Visits (JVs) organized with multiple actors, including representatives of national policy-making institutions, enforcement agencies, social partners and NGOs that have direct experience and knowledge of posting and/or labour migration to and from their country. Each Joint Visit had three parts with different objectives. It started with focus group interviews (FGI), which were the main source of data collection guided by the Con3Post research questions. After the focus group, an international seminar was conducted, where the perspectives of the different stakeholders on the posting trends and issues related to third country nationals were delivered through presentations and discussions open to the public.

Finally, foresight workshops were conducted on the second day, which followed a classic scenario-building methodology using the techniques that are participatory and creative, multidisciplinary, geared to promoting systemic understanding, and aimed at generating insights on the dynamics of change, future challenges and options (Da Costa et al., 2008). The aim of the foresight was to develop scenarios/narratives about plausible futures concerning prospective dynamics of the EU and regional labour markets in the construction sector, supply and demand of skilled labour, and labour migration/mobility/posting dynamics in the region and in each individual country. The guiding question was what could happen in the participants' country/region in the field of our interest by 2035. Scenarios were built around two axes providing the overall scenario logic. The vertical axis represented 'Skill supply and demand on the EU/regional/country level', the two extremes of the axis being a) significant skill shortages and b) no skill shortages. The horizontal axis represented the availability of migrant/posted workers, the two extremes of the axis being a) migrant/posted labour not in supply and b) migrant/posted labour in supply (see Figure 1 below). The participants outlined the drivers for all the four scenarios, but chose to develop one that they deemed most likely to happen.

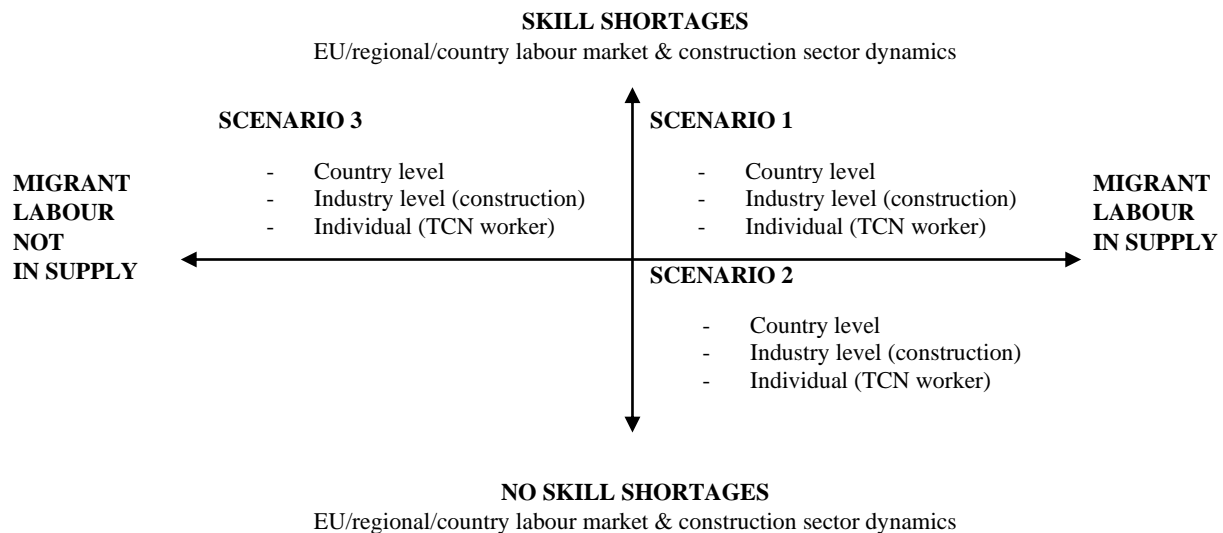


Figure 1: Scenario building

The JVs for this report were conducted in September and October 2019. The details of each JV and its events are presented in the Table 1 below. The data from the Finnish and Estonian perspectives was collected with a focus group discussion, seminar and foresight exercise that took place on 19-20 September 2019 in Helsinki, Finland. Actors that took part in the events included Finnish and Estonian labour inspectorate’s representatives and other state actors dealing with posting of workers issues as well as Finnish social partners in the construction sector, in addition to the researchers and the representative of the European Federation of Building and Woodworkers. During the open seminar there were two roundtables with 10 presentations. The first was entitled ‘Regulating and registering posted work: the complex case of third-country nationals’ and included the following presentations:

- Nathan Lillie (University of Jyväskylä): *Third country national postings in the context of the revised Posted Workers’ Directive;*
- Werner Buelen (The European Federation of Building and Woodworkers): *EU legislation on third-country nationals: need for revisions?;*
- Ville Wartiovaara (The Confederation of Finnish Construction Industries RT): *Improving information provision about posting companies and workers;*
- Annika Karm (Estonian Identity and Status Bureau): *Third country national workers in Estonia;*
- Marjaana Lundqvist (Finnish Centre for Pensions): *How to insure workers in Finland: both national and international rules apply.*

The second roundtable ‘Inspecting transnational workplaces: challenges and good practices’ included the following presentations:

- Olena Fedyuk (Central European University): *Practices of recruitment in Ukraine for the work abroad and trade union attempts to represent third country nationals hired through the temp agencies;*
- Tommi Lehtinen (Finnish Tax Administration): *3rd country labour from Tax Administration's point of view;*
- Anu Ikonen (The Regional State Administrative Agency of Southwestern Finland): *Revised Posting of Workers Directive and its role in inspecting transnational workplaces from labour inspectors' point of view;*
- Nina Kreutzman (The Finnish Construction Trade Union): *The Trade Union at Transnational Workplaces;*
- Eve Kyntäjä (The Central Organisation of Finnish Trade Unions): *Challenges and possibilities of cooperation between the different actors at national and EU-level.*

Table 1: Details of the fieldwork, September-October 2019

	JV1	JV2	JV3
Place and dates	Helsinki 19-20 September 2019	Warsaw 10-11 October 2019	Warsaw 21-22 October 2019
No. of participants in the Focus Group*	12	8	11
Stakeholders participating in the FG	8 labour inspectors, trade unionists, researchers, police and border guard representative	3 representatives from an employment agency, third sector	7 representatives from enforcement agencies, employment agencies, law firms, third sector organisation, trade unions and academia
No. of participants in the Foresight workshops*	7	9	12
Stakeholders participating in the FS	3 trade unionist, labour inspector, researcher	4 representatives from an employment agency, third sector, trade unions, media, academia	8 representatives from enforcement agencies, employment agencies, law firms, third sector organisation, trade unions and academia
No. of presentations in the International Seminar	10	4	6

Note: * including Con3Post team members.

The first series of events in Warsaw took place on 10-11 October 2019. The Ukrainian perspective events gathered representatives from employment agencies, third sector organisations, trade unions, media and academia. The seminar included the following presentations:

- Marta Jaroszewicz (University of Warsaw): *Emigration policy and discourse on emigration from Ukraine;*
- Andrzej Drozd (Polish-Ukrainian Chamber of Commerce): *Foreigners' participation in the Polish labour market - challenges and prospects. Partnership and Employment Campaign;*
- Yuri Kariagin (Intercompany Trade Union of Ukrainian Workers in Poland): *Protection of employee rights, health and safety at work and organisation of the Intercompany Trade Union of Ukrainian Employees in Poland;*

- Kamil Matuszczyk (University of Warsaw): *Employees from Ukraine and posting from Poland in the home care sector.*

The second series of events in Warsaw took place on 21-22 October 2019. The Polish perspective events gathered representatives of enforcement agencies, employment agencies, law firms, third sector organisations, trade unions and academia. The seminar included the following presentations:

- Krzysztof Delert-Urban (Social Insurance Institution): *Social Insurance Institution data regarding the TCNs posted by Polish companies to other Member States;*
- Joanna Torbé (Joanna Torbé and Partners Law Firm, Business Centre Club): *Practical issues faced by employers related to the legalisation of work of posted workers from Ukraine and their insurance;*
- Ewa Podgórska-Rakiel (University of Business and Administration in Gdynia): *Problems of application of company-level collective agreements that are generally applicable to posted workers in the construction sector. Comments in the light of the provisions of the amended Directive;*
- Michał Szypniewski (University of Gdańsk): *Ambivalent objectives of the posting of workers law and the interests of the posted worker;*
- Krzysztof Jakubowski (Association of Employment Agencies): *Employment in Poland and the posting of workers from third countries to the EU: the example of Ukrainian citizens ;*
- Marta Zięba-Szklarska (Labour Mobility Initiative): *Work and pay conditions on selected EU and EEA markets.*

The main limitations of the joint visits regarding data collection were that focus group meetings were rather limited in time and did not make it possible to cover (all) topics thoroughly. Secondly, the perspectives of employers were limited and our events did not include posted third country nationals as participants. Thus, further research could focus on the voices and practices of this group of actors.

4. RESULTS

4.1. Regional labour market dynamics and labour shortages

In 2018 both Poland and Estonia experienced a relatively strong economic growth of around 5% (Table 2). The growth was lower in Ukraine (3.3%), although 2018 was the third consecutive year of economic growth in this country after the recession. In Poland, the overall employment rate was 67.4%, but the figure was much higher for males (74%). In Finland and Estonia the employment rate exceeded 72% and was even higher for males. Finland stood out with a higher unemployment rate (7.4%) than Estonia (5.4%) and Poland (3.9%). The youth unemployment rate was considerably higher in all of these countries and reached around 12% in Poland and Estonia, 17% in Finland and 18% in Ukraine. Other employment situation indicators were also worse for Ukraine with an 8.8% unemployment rate and an employment rate of only 57.1% (Table 2).

Table 2: Overall labour market dynamics (2018)

	Estonia	Finland	Poland	Ukraine
Real GDP per capita (annual growth in %)	15 090 (4.8)	36 890 (1.7)	12 430 (5.1)	(3.3)*
Employment rate, population aged 15-64 (%)	74.8	72.1	67.4	57.1**
Job vacancy rate (%)	1.8	2.2	1.2	No data
Unemployment rate, population aged 15-74 (%)	5.4	7.4	3.9	8.8**
Male employment rate, population aged 15-64 (%)	78.1	73.5	74.0	62.1**
Male unemployment rate, population aged 15-74 (%)	5.4	7.4	3.9	10**
Youth unemployment, population aged 15-24 (%)	11.8	17.0	11.7	17.9**
Gross average monthly earnings**** (in EUR)	1311	3732	1049	300**
Gross minimum monthly wage (in EUR)	500	Not applicable	491.48	140***

Source: Eurostat (2020); * World Bank database (2020); ** State Statistics Service of Ukraine (2019); *** Letych (2019)

Note: **** Single individuals with 100% average wage. The methodology is explained in more detail [here](#).

In Poland, the gross average monthly earnings stood at 1049 EUR, which was a 7% increase from the previous year (in the construction sector the earnings amounted to around 875 EUR, an 8% change on the previous year). However, they were still lower than in Estonia and considerably lower than in Finland. The minimum wage in Poland stood at 491.48 EUR. This was relatively low compared to the ‘Western’ EU member states, but similar to the figures in

Estonia (500 EUR). In 2018, Poland had the highest number of vacancies in the country since 2010 (mainly in manufacturing, trade and construction, in the latter there were 24,500 vacancies) (GUS, 2020). In 2018, the (nominal) average monthly wage in Ukraine stood at 300 EUR, which was a 12.5% change from the previous year, but very low compared to the other countries in the analysed posting flow. At the beginning of 2019, the newly introduced minimum wage stood at circa 140 EUR (Letych, 2019), which was also well below the ones in Poland and Estonia, as can be seen from Table 2.

In Poland, the construction sector grew by 21.5% since 2010, mainly due to a significant increase in the construction of buildings (by 46.6%). The sector also received EU funding for infrastructure and transport (ECSO, 2019a). In 2018, the average working hours in the construction were 40.4 per week (the highest number of all sectors in the economy), with 19.4% of employees working 50 hours or more in the 4th quarter of 2018. 91.8% of persons working in the construction had a written job contract (GUS, 2020). The sector saw increases in costs (building materials and wages) and it struggled with late payments and labour shortages. Construction was expected to grow further due to social expenditure programmes, low interest rates and EU funding (ECSO, 2019a). The expected annual growth rate between 2018 and 2030 is 0.8%, with growing employment opportunities for highly qualified groups of workers.⁷

In 2018, the Finnish construction sector experienced investment, labour productivity, and employment growth, with the sector turnover increasing by 53% between 2010 and 2018 (ECSO, 2019b). The Estonian construction sector was also booming between 2010 and 2018. For example, the total turnover and labour productivity increased considerably and the number of people employed in the narrow construction sector increased from 38,622 to 59,473 (ECSO, 2020). The construction sector in Ukraine rebounded in 2016 after a contraction, reaching a 35.4% growth in 2017 (Timetric, 2018). The sector is expected to expand, with the government heavily investing in modernising roads, energy and residential infrastructure. Additionally, during Con3Post events the experts mentioned regional disparities in Ukraine, with the capital area seeing a booming construction sector and better working conditions.

Participants of the Polish perspective focus group discussed the posting of workers in the construction in the context of the European labour market where countries such as France,

⁷ <https://www.cedefop.europa.eu/en/publications-and-resources/data-visualisations/skills-forecast>

Austria or Germany suffer from persistent labour shortages and seek labour from abroad, while other countries, such as Czechia or Spain, generally prefer to focus on the local labour force. Indeed, Eurostat data estimated the job vacancy rate in the construction at 3% in the whole EU and 3.3% in the Eurozone (compared to 2% in Poland, GUS, 2020). A third sector representative insisted that the real problem was labour shortages and not skill shortages in the different European countries, since specific skills can be learnt. However, during the discussion it became clear that international mobility is easier for those highly skilled. During the events held from both the Polish and the Ukrainian perspective, the participants also pointed to the possible dynamics of labour and skills shortages in the near future with a new law facilitating access to the German labour market. Some voices could be heard predicting a massive outflow of specific professional groups (such as welders) or even a massive outflow of Ukrainians to Germany. However, the experts highlighted possible obstacles, such as the question which skills will be in shortage in Germany, or the recognition of qualifications and language proficiency. Additionally, the migration scenarios could be affected by the economic slowdown in Germany. It is also clear from Table 3 that in 2018 in all of the studied countries there were vacant jobs in the construction sector.

Table 3: Regional labour market dynamics in the construction sector (2018)

	Estonia	Finland	Poland	Ukraine
Total turnover in the broad construction sector (in billion EUR)*	10.9	65	132.2	7.8***
Employment in the broad construction sector (percentage of active population employed in construction)	103 452	309 938	1 805 434 (7.85%)	(2.7%)**
Number of workers in shortage in the construction sector (job vacancy rate in the narrow construction sub-sector)	704 (1.7%)	5 495 (3.1%)	24 673	2 400**
Self-employment in the narrow construction sector	10 800	39 500	309 900	No data
Gross average monthly wage in construction (in EUR)	1245*	3415†	875	No data
Gross hourly minimum wage in construction for the least skilled category (in EUR)	Not applicable	10,73€††	Not applicable	No data

Source: ECSO (2020); * Statistics Estonia (2020), † Statistics Finland (2017), ** UKRSTAT (2019), *** OECD (2018) after UKRSTAT; †† In the Finnish construction sector there are several universally applicable collective agreements (CBAs); this rate is the lowest one from the Finnish Construction Workers' Union's CBA. *Note:* We used the data for the broad construction sector, that, based on European Construction Sector Observatory, includes: manufacturing, construction, real estate activities, architectural and engineering activities, if the data for the narrow construction sector was not available.

However, participants who took part in the Finnish focus group agreed that it is difficult to estimate the extent of labour and skill shortages. Although they emphasised that both among Finnish and Estonian construction companies the dominant discourse is that foreign workers are highly needed at the sites as the workforce is lacking, they also explained that in practice

the companies might just seek cheaper labour (companies that use posted workers actually stand out as companies that have rather bad working conditions). For example, the construction workers in Estonia who have experience working in Finland, might demand much higher standards than Ukrainian or Belarusian workers. Finnish unionists emphasised that young workers in Finland may not be able to find employment due to the inflow of cheap workforce, and, as we see from Table 2, there is a rather high youth unemployment rate in the Finnish labour market.

Nevertheless, the European Construction Sector Observatory's country profile for Finland (ECSO, 2019b) also highlights that labour and skill shortages are a pressing issue that might undermine the development of the sector, although digitalization is seen as one of the alternatives to boost its growth. However, the number of vacancies in the narrow construction sector increased by 180% between 2013 and 2018 and the number of tertiary students in engineering, manufacturing and construction decreased by 25.8% between 2010 and 2017 (ECSO, 2019b). Furthermore, labour and skill shortages are due to the mismatch of qualifications and the location of the local workforce (ECSO, 2019b). In Estonia, the number of vacancies also increased considerably, from 266 in 2010 to 704 in 2018 (which is still lower than the pre-crisis level of 768 in 2008). Contrary to Finland, the number of students in engineering, manufacturing and construction experienced an 18.8% increase between 2010 and 2017 (ECSO, 2020). In Finland, self-employment in the narrow construction sector increased slightly (1.5%) between 2010 and 2018 (ECSO, 2019b). In Estonia, however, the increase was much higher, from 5,800 in 2010 to 10,800 in 2018 (ECSO, 2020).

It can be concluded that all of the studied local construction sectors experienced considerable expansion during recent years and skill and labour shortages are often highlighted as hindering their further growth. However, there are still considerable labour market disparities between the countries studied that also have an influence on the labour migration and posting trends described in the next section.

4.2. Labour migration and posting trends

Poland has long been a country of emigration including large outflows following the country's EU accession in 2004 (GUS, 2017). What is crucial when analysing TCNs posting, Poland has recently become a country of immigration, with mass inflows of temporary and

circular character. In 2006, Poland introduced new regulations which continue to give access to the Polish labour market for a period of six months (out of 12 months) based on a statement from an employer wishing to hire a foreigner (without the need to obtain a work permit). The regulations were designed for nationals of six countries⁸, but have been predominantly used by Ukrainian nationals, especially since the military conflict in Ukraine in 2014.

According to the OECD, Poland ranked a top destination for temporary labour migrants in the world in 2017 (OECD, 2019). Data for 2016 show that over a tenth of the statements registered were by the companies operating in the construction sector (Górny et al., 2018). The Con3Post events' participants noted how limiting the simplified procedure with a maximum of 6 months period of stay is if the employer wishes to test the employee on site in Poland before posting him/her to another country. At the same time, applying for a work permit (required to extend the 6 months period of stay) is a lengthy process, and the waiting period also depends on the region of Poland where the application is made. Finally, it is worth adding here that in 2012 Poland and Ukraine signed an agreement on social security provision, applying to contract workers as well as those self-employed (and their families) who are mandatorily covered by social insurance in Poland and Ukraine. This agreement makes it possible to, among other things, add up insurance periods in the two countries (on the basis of which various entitlements and benefits will be calculated) and avoid double payment of insurance for the same work (European Migration Network, undated).

Regarding migration, the dynamics have been similar in Estonia, although on a much smaller scale than in Poland (see Table 4), as Estonia is a very small country. Estonian law also provides a possibility to use a short-term employment scheme for TCN migrants (working up to 365 days during a 455 day period), and the number of workers using it has been increasing, reaching 21,757 in 2018 from only 8,376 in 2017 (Karm, 2019). It offers a quicker and simpler way for employers to recruit TCNs as it not taken into account when calculating Estonia's annual immigration quota (0.1% of the population). What is different from the Polish system, however, is that these TCNs must be paid at least the Estonian national average wage, with some exceptions such as seasonal work (ERR, 2018; Karm, 2019). This means that using that way of hiring construction employees is potentially more expensive

⁸ Including Armenia, Belarus, Russia, Ukraine, Georgia and Moldova.

than hiring them through some other CEE country, where only the national minimum pay could be mandatory.

Table 4: General and construction sector specific labour migration and posting trends (2018)

	Estonia	Finland	Poland	Ukraine ⁹
General labour migration and mobility trends				
Net migration	7 071*	11 965*	24 109*	No data
Total number of emigrants	10 476*	19 141*	189,974*	No data
Total number of immigrants	17 547*	31 106*	214,083*	30 659*****
Total EU migrants received	6 123*	13 162*	19,175*	No data
Total TCN migrants received	11 422*	17 692*	76,410*	No data
Share of immigrants of working age (15-64 years old) (in %)	88%*	79%*	65%*	No data
Share of emigrants of working age (15-64 years old) (in %)	87%*	84%*	81%*	No data
Main countries of destination	Finland** Germany Russia	Sweden** Estonia United Kingdom	Germany, United Kingdom, Netherlands ***	Poland, Russia, Czech, Italy*****
Main countries of origin	Finland** Russia Ukraine	Sweden** Estonia Russia	Ukraine, Belarus, China, India***	Russia, Moldova, Azerbaijan, Turkmenistan*****
Total number of outgoing posted workers (based on PDsA1 issued under Article 12)	6 915	4 293	238 525	Not applicable
Total number of incoming posted workers (based on PDsA1 issued under Article 12 / based on national registration system)	3 175/ 2 581	19 579	26 714	Not applicable
Labour market share of outgoing posted workers (based on PDsA1 issued under Article 12)	0.8%	0.1%	0.8%	Not applicable
Total number of TCN posted workers	No data	No data	No data	Not applicable
Main countries of destination for posted workers (based on PDsA1 issued under Article 12)	Finland Norway Germany	Sweden Spain Denmark	Germany, France, Belgium	Not applicable
Main countries of origin of posted workers received (based on PDsA1 issued under Article 12)	Germany Poland Austria, Lithuania	Germany Estonia Poland	Germany Italy France	Not applicable
Labour Migration and mobility trends in construction				
Share of outgoing posted workers in construction (Estimated share of individual persons falling under Article 12)	5.1%	0.2%	5.3%	Not applicable
Total number of outgoing posted workers in construction based on PDsA1 issued under Article 12 (% out of all postings)	3 856 (56%)	1 850 (13%)	113 947 (48%)	Not applicable

⁹ With regards to migration statistics, it is difficult to compare the Eurostat data for the EU Member States with Ukraine data, as the latter country does not collect statistical data using the Eurostat methodology. Furthermore, the last census in Ukraine was held in 2001, so the migration figures it provides are out of date. State Statistical Committee of Ukraine in cooperation with international organisations carried out 3 surveys (in 2008, 2012 and 2018) and these provide some information on emigration from Ukraine.

Source: De Wispelaere & Pacolet (2019); * Eurostat (2020); ** Statistics Estonia (2020) for Estonia and Statistics Finland (2020) for Finland; *** OECD 2019, **** State Statistical Committee of Ukraine 2017 data quoted in Jaroszewicz 2018, ***** UKRSTAT 2016

Ukraine has long been a country of emigration. Mass migration from Ukraine in recent years came as a response to the social and economic crisis following the military conflict with Russia and unfinished political transformation. Poland has recently become the main receiving country for Ukrainian migrants, as the wage differences deepened and the quality of life worsened in Ukraine. These migration flows, however, should be seen not as a long-term trend set to continue, since Ukraine itself is facing demographic challenges, with a decrease in the size of working-age population and shortages on the local labour market, particularly in the Western part of the country (Jaroszewicz & Małynowska, 2018). Employment agencies, travel agencies or middlemen have created the migration industry, facilitating the flows of employees and helping them to fulfil the formalities related to entry and employment. Apart from Poland, other important destinations for recent Ukrainian labour migrants are Russia, Czech Republic, Italy, and Belarus, with construction as a major employment sector for both temporary and permanent Ukrainian migrants (IOM, 2016, data for 2014-2015). In terms of immigration to the country, 250,000 foreign nationals held permanent residence permits (data for 2015) and 75,200 foreigners held temporary residence permits (data for 2016), with the majority of migrants coming from the post-soviet countries (80%). Due to the economic crisis, these numbers were on the decrease (IOM, 2016).

Regarding the posting of workers, Poland is the key member state, issuing portable documents A1 (PD A1). In 2018, Poland issued 238,525 PDs A1 under Article 12 of the Basic Regulation. Among these 120,540 PDs A1 referred to postings from Poland to Germany, 2,990 from Poland to Finland, and 208 from Poland to Estonia. Poland also remains a receiving country for posted workers with a total 26,714 PD A1 (with the largest number of 12,757 PDs A1 referring to postings from Germany to Poland). Among the 1.1 million PDs A1 issued to persons covered by Article 13 Poland has issued a third (351,000 PDs A1) (De Wispelaere et al., 2020). For several years now, Finland has been a receiving country of a large number of posted workers relative to the small size of the Finnish economy, especially in the construction sector. While a few years ago Estonia was mainly a sending state in terms of posted workers, currently it plays a dual role of being both a sending and receiving country, while sending still dominates (Table 4).

Although no statistics on posted TCNs are kept, during the focus group both Finnish and Estonian inspectors and unionists emphasised that construction sites have increasing numbers of posted TCNs. The lack of reliable numbers is due to the fact that even if companies register that they are using posted workers (and not all of them do so), neither in Estonia nor in Finland is the company hiring posted workers required to report the nationality of their workers (although the Estonian Labour Inspectorate is proposing to add this information to the registration requirements in summer 2020). Furthermore, there are several schemes to enter the country for the TCNs, including the short-term employment option. In Estonia, a TCN who is a posted worker should be registered in two different employment registers: with the Police and Border Guard Board (PBGB) before the commencement of employment and with the Labour Inspectorate. In practice it seems that there are discrepancies between these numbers, suggesting that not all relevant registrations are made. If we nevertheless look at these ‘imperfect’ statistics, the Estonian PBGB reported 21,757 short-term employment registrations in 2018 (mostly Ukrainians, Belarusians and Russians) out of which 614 were posted workers (Karm, 2019). Tuovinen (2020, p. 65) highlights that precise information about foreign workers is also lacking in Finland, as there is no central authority collecting/integrating the data.

One reason why the posting option is used in Estonian context by some companies might be that when hiring third-country citizens directly from their home country, the employer has to pay them at least the Estonian average wage (around 1,200 EUR in 2018). However, if these workers are posted (e.g., through Poland), this condition does not apply, and posted workers are only entitled to the national minimum wage (500 EUR in 2018). Another reason why the posting of TCNs is used seems to be to make the posting chain longer and more complex, and so - harder to track. For example, because the cooperation between the Finnish and Estonian inspectorates is already quite extensive and smooth, some Estonian companies set up branches in Latvia or Poland to circumvent the enforcement authorities by sending Ukrainian workers to Finland. There is a bilateral agreement between the Estonian Labour Inspectorate (LI) and the Regional State Administrative Agency Southern Finland (AVI), that includes two meetings annually, exchange of information about legislation and companies (with a focus on posting), exchange of inspectors, and joint inspections. The Estonian LI also has a trilateral agreement with Latvia and Lithuania, which involves one meeting annually to discuss common problems in the labour market, and exchange the information on legislation. It also has a bilateral agreement with Poland, which involves one meeting per 2 years, with a

focus on posting (Kall, 2018). There have also been inspector exchanges between Finland and Sweden and Finland and Germany and Estonian and Finnish LIs have taken part in different (EU-funded) projects – all of these activities help to build personal relations and more efficient communication (Alho, 2018; Kall, 2018). This kind of cooperation practices have not yet taken place with Ukrainian inspectorate.

Ukraine has become an important source of posted workers to the EU Member States (Mussche & Lens, 2018). This is made possible by a decisive judgment of CJEU's Case C-43/93 Vander Elst v Office de Migrations Internationales (1994), which provides the basis for the posting of workers who are third country nationals working on the territory of one of the EU countries. The LIMOSA registration system in Belgium provides us with unique data regarding posted TCNs: in 2017, 2,958 Ukrainian workers were posted to Belgium, of which almost 70% had come from Poland (LIMOSA data). Between 2008-2017, there was an almost 30-fold increase in the number of posted workers holding Ukrainian citizenship. At the same time it is worth adding that Ukrainians dominated the group of posted workers from third countries in Belgium (Mussche & Lens, 2018, p. 12).

The sector which receives the most posted workers from Ukraine is construction. According to one of the FGI participants, it acts as a 'sponge', absorbing any potential number of available foreign workers. Turning to data relevant for the posting flow analysed in this report, the PD A1 data also show the trends of posting of TCNs from Poland to other member states. In 2018 among PD A1 under Article 12.1, there were 2,155 documents issued to Ukrainians (a drop from 2,083 in 2017) and 138 to Belarussians (a drop from 121 in 2017). As regards receiving countries, 1,118 postings of Ukrainians were directed to Germany; 323 to Belgium, 264 to France and 126 to Sweden. The construction sector accounted for most postings of Ukrainians, with 1,284 PD A1 issued to Ukrainians in 2018 (SII data presented by Delert-Urban, 2019). In 2018, under article 13.1, there were 17,802 documents issued to Ukrainians (compared to 18,518 in 2017) and 2,326 to Belarussians (compared to 2,438 in 2017). Here the construction sector accounted for only 1,982 documents issued to Ukrainians (SII data presented by Delert-Urban, 2019).

The FGI participants commented on the way Poland is becoming a transit country for Ukrainians, who are employed by the companies based in Poland with the aim of being posted to another country (although this is more the case for care and manufacturing sectors). In the construction sector it is often the case that workers are posted to work on specific

projects, and upon completion return to Poland and remain the employees of the Polish company. For them posting spells are seen as financially beneficial and motivating while being normally employed in Poland. The FGI discussion (from the Polish perspective) also pointed to the fact that while most of the posted workers in the construction are reported as unqualified, in reality they possess work skills. However, it remains easier and faster not to declare these skills; also, declaring higher skills may require higher pay under collective bargaining agreements in the receiving countries such as Germany, Austria or Finland.

To conclude, posting of TCNs seems to happen for several reasons. These include the labour market disparities between the sending and receiving countries (as highlighted in the previous section), established migration routes and an ever growing migration industry, but also attempts by some companies to try to gain a competitive advantage by avoiding inspections and opting out of more expensive and difficult ways of hiring migrants.

4.3. Labour rights, violations and representation of posted workers who are third country nationals

4.3.1. National competent authorities and legislative frameworks

In Poland, the National Labour Inspectorate (NLI) serves as a liaison office regarding the posting directive implementation. However, the NLI can only examine complaints related to employment on the basis of employment contracts. Civil law contracts are controlled only with regard to irregularities in the field of occupational health and safety (OSH) or the conclusion of bogus civil law contracts. If there are any suspicions of violation with reference to foreigners' work, the inspectorates may call border guards,¹⁰ who may inspect the worksite. Regarding the revision of the Posting of Workers Directive to be transposed into national laws by 30 July 2020, the participants at the time of FGI (from the Polish perspective) commented on the lack of action in Poland to prepare the new rules.

The National Labour Inspectorate does not have the authority to impose sanctions on Polish employers posting abroad who violate the law in the receiving country. Foreign institutions can impose sanctions for such violations based on information and evidence provided by the

¹⁰ On 10 December 2018, a new agreement was signed between the Chief of Labour Inspector and the Chief Commander of the Border Guard on the rules of cooperation between the National Labour Inspectorate and the Border Guard (PIP, 2019). This agreement updated the document which set out the principles of cooperation in the scope of undertaking joint actions and initiatives concerning the prevention and combating of illegal work of foreigners, and violation of foreigners' rights related to the performance of paid work.

NLI. The National Labour Inspectorate also has the right to apply to the Social Insurance Institution (ZUS), as well as to the heads of tax offices and other public administration bodies, for information necessary to be provided in response to requests from competent authorities of other Member States. As reported in NLI's annual reports, the exchange of information with ZUS and customs and fiscal administration bodies is quite efficient, although it rarely meets the deadline set out by the Act on posting (10 working days from the date of receiving the application). This means that arrangements in this respect cannot usually be made during an inspection carried out in a Polish company (PIP, 2019, p. 153).

Both in Finland and in Estonia the national competitive authorities dealing with posting issues include labour inspectorates (labour rights, OSH), tax authorities, social security administrations and also police and border guard (who deals with TCNs' rights to stay). In both countries, if the inspectors find out that TCN workers are working illegally in the country, it becomes a police matter and the work is stopped. If the TCNs do not have a right to work, they will most probably be deported and might be banned from entering the country. Companies who use workers without a right to work can be penalized as well. In 2018, Estonia increased the fines for companies who use workers without a right to work in the country (from 3,200 EUR to 32,000 EUR) and made it possible to ban the economic activity of a company who notoriously uses workers without permits (however, it has not yet been practiced).

Thus, the system for ensuring that the rights and responsibilities of posted workers are in line with the law is rather complex, and calls for a considerable amount of cooperation and data sharing. Although cooperation and joint inspections in Estonia and in Finland do take place, the actors who participated in the Finnish joint visit agree that these should be developed further (for example, information sharing should be faster). What is more, posting is clearly a transnational phenomenon calling for cross-border cooperation. The latter is quite well-developed between Estonian and Finnish inspectorates, but lags behind with some other countries, including Poland. This is due to national bureaucracies as well as giving priority to other issues. It is also very limited when the authorities of third countries come into play, since (among other challenges) the EU does not offer sufficient financial and institutional support in this area. For more information on these issues see Alho (2018) and Ruotsalainen et al. (2018) for Finland, and Kall (2018) for Estonia.

In Poland, the laws regulating the posting of workers are based solely on the provisions implementing European directives and regulations. However, according to the labour law experts, the legislative process in this case mostly consists in mechanical duplication of standards contained in the relevant EU Directives and the minimalist approach to the protection of rights of posted workers (Otto, 2020, p. 182). For that reason, the legal framework can be defined as a patchwork¹¹ (ibid.). What is also important is that Polish labour law does not define what the posting of workers is. The legislator only refers to the concept of employee within the meaning of the regulations of the Member State to which the employee is posted.

The Polish Act of 10 June 2016 on posting does not specify the procedure for handling declarations on the posting of employees which do not contain all required data; it also ignores the competence of the labour inspectorates to apply some legal measures (PIP, 2019). Given the above, both NLI (ibid. 2019, p. 149) and lawyers participating in the Polish FGI recommended that the provisions of the Act on posting of employees should be amended to include an explicit regulation stating that medical examinations and occupational safety and health (OSH) training for employees posted to Poland is to be carried out in accordance with the rules applicable to Polish employees. The NLI does not have the real possibility of verifying whether preventive medical examinations – performed by an employee delegated in the sending country – meet the requirements specified in Polish regulations.

In Estonia and in Finland, similarly to Poland, EU directives regarding posting of workers have been fairly directly implemented into law, and so posted workers fall under most rules and regulations applicable to local workers (including remuneration, working time, or OSH). In the Finnish construction sector the generally applicable collective agreement also applies to posted workers, in addition to employment legislation, so in theory TCN posted workers should be entitled to the same employment conditions as the locals. Furthermore, in Finland, the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006) provides additional regulations for subcontracting, which is highly relevant as subcontracting is common in the construction sector.¹²

¹¹ Legal provisions that transposed the Directive 96/71/EC in 2001 into the Polish legal order were originally included in the Labour Code, the Act on the National Labour Inspectorate, and the Code of Civil Procedure (ibid. 2020). The new legislation came into force on 18 June 2016 in the form of the Act of 10 June 2016 on the posting of workers within the framework of the provision of services

¹² It includes provisions stating that the contractor has to request and subcontractor has to provide information on registration with tax authorities and in trade register, and provide proofs of employees having pension insurance and information about healthcare provisions and accident insurance (Tuovinen, 2020).

Although both Finnish and Estonian inspection authorities are generally satisfied with the regulations applicable to posted workers in their countries, it is their enforceability that is more problematic. They highlighted that as much as ensuring that posted EU nationals' working situation corresponds to the national regulations is difficult, the case of TCNs adds further layers of complexity. The authorities do not have enough competence and resources to manage the situation as fast and thoroughly as needed, and to conduct as many inspections as would probably be necessary. For example, in order to know if the TCN is legally posted to Finland through Poland, Finnish authorities would need to cooperate with their Polish counterparts, who should confirm that the TCN indeed worked in Poland as well. In practice, checking if the postings are real often fails to happen due to limited resources. Furthermore, posted workers mostly turn to the inspectorate only when their rights have already been violated, for example, when the company has already left without paying. It seems crucial to find ways for workers to seek advice proactively. Obviously, TCNs will not ask advice if they think they are likely to be deported because they lack work permits; they may also believe this will happen, whether or not this is the case.

As regards Ukraine, in the second half of 2019 the government proposed an amendment to the Code of Labour (1971) liberalising the employment law and reducing the degree of employee protection. The proposed changes included abolition of the weekly 40-hour working time limit and introduction of employment contracts for a specified time period (similar to those used in Poland). In general, the Ukrainian labour market is primarily characterized by 'labour law that is not implemented in practice / not working' (Fedyuk & Volodko, 2018, p. 9).

Until now, all EU countries have established mandatory registration systems for posted workers / posting companies. However, the information that has to be entered into such systems can vary and even if employers comply with the registration requirement, some of them still give a wrong address (or change the initial work location after a while) to prevent labour inspectorates from finding and checking posted workers. Nevertheless, the posting situation is much clearer now than before the registration was required. The Estonian LI is trying to push through an amendment to the posting legislation that will require the posting company to notify the inspectorate if it changes the work location.

4.3.2. Collective representation channels and main violations

In Poland, the “Budowlani” Trade Union¹³, which unites over 10 000 workers throughout Poland (construction and building material workers, housing cooperative members, foresters, environment protection workers, woodworkers, furniture industry workers and others) focuses on posting Polish workers (for example, it has prepared an information flyer in Polish available on its website). It was only recently that the union started to monitor the situation of TCNs posted by Polish companies. In order to protect the rights and interests of economic migrants the Intercompany Trade Union of Ukrainian Employees was established in May 2017 under the umbrella of the All-Poland Alliance of Trade Unions (OPZZ), which coordinated and supported the process of its creation. Moreover, OPZZ (one of the three national trade union organisations in Poland) has made some of the general information on its website available in Ukrainian and Russian. Some basic information in Russian is also available on the website of The Workers’ Initiative Union (OZZ Inicjatywa Pracownicza), which is a grassroots, self-governing trade union operating in several regions of Poland. It is worth mentioning that trade union membership in Poland currently only covers 17% of those employed on the basis of employment contracts, and 11% of all people in employment.¹⁴ Collective bargaining coverage is also low, estimated to be at 30%.¹⁵

In Estonia, the construction sector is to a large extent not covered by any unions and there is no sectoral level union in the country. In Finland, on the other hand, the Construction Trade Union Rakennusliitto (RL) negotiates legally comprehensive sector-level collective bargaining agreements with employers and monitors the fulfilment of those agreements (including with regard to posted workers) through its network of shop stewards. Nevertheless, even the RL finds posting to be a challenge, and particularly so the posting of TCNs. The union’s main aim is to inform (through site visits and shop-stewards in place in some sites, but also through websites and information leaflets) all the workers about the working conditions set in the collective agreement and in the legislation. Both social partners agree that informing workers about their rights and employers about their obligations is crucial for a well-functioning and fair system of posting (Ruotsalainen et al., 2018).

As shown in Polish NLI’s annual reports, in 2018, labour inspectors carried out 204 inspections of the issue of posting of workers from the territory of the Republic of Poland to

¹³ The „Budowlani” union is a member of the All-Poland Alliance of Trade Unions (OPZZ), the International Organisation of Woodworkers and Construction Workers (BWI), and a member of the European Federation of Building and Woodworkers (EFBWW).

¹⁴ <https://www.etui.org/Covid-Social-Impact/Poland/Industrial-relations-in-Poland-background-summary>

¹⁵ <https://www.etui.org/Covid-Social-Impact/Poland/Industrial-relations-in-Poland-background-summary>

work in other European countries, with construction sector entities accounting for 37% of the total entities controlled (PIP, 2019). In most cases (158) control activities were carried out following requests from foreign competent authorities, which were addressed to the liaison office in Poland¹⁶. In 38 cases, inspections were the result of complaints lodged by posted workers. In 28 cases, inspection activities could not be carried out due to lack of contact with the posting company (the FGI participants also highlighted the challenges of controlling letter-box companies). The most common subject of the complaints was the problem of non-payment of remuneration for work and other work-related receivables (in accordance with the regulations of the country of posting) and failure to ensure safe and hygienic working conditions.

In the same year the Polish LI carried out 137 inspections of foreign employers posting employees on the territory of the Republic of Poland (in 133 entities, including 37 from the construction sector). During these inspections, arrangements were made in relation to 151 posted workers from 15 EU/EEA Member States and Switzerland. Violations of regulations were found in 65% of foreign entities inspected (in 2017 - 79%). Irregularities found in the course of control activities mostly concerned the failure to fulfill information obligations towards NLI or the lack of documents necessary in the control process, as well as the failure to provide employees posted to Poland with at least the minimum conditions of employment set out by the Polish law. The most frequently revealed irregularities in the working conditions included violations of OSH, breaches of working time rules, posted workers (in particular from third countries) receiving wages below the minimum rate or the rate resulting from the work permit issued, and not allowing employees their full holiday entitlement.

Participants of the FGI noted that if violations occur (especially with reference to wages), posted workers from Poland seek help from trade unions, labour inspectorates, and other control agencies abroad. According to the lawyers participating in the FGI, claims filed with courts by Polish posted workers are more frequent than those filed by posted foreigners to Poland and by foreign workers in general. They do happen, but posted third country nationals are less familiar with the Polish justice system, and the court route remains a difficult, lengthy and expensive option. What proves more effective in the construction sector, according to FGI participants, are direct measures and tools used by construction workers like

¹⁶ Analysing the data from the Internal Market Information System in the area of posting of workers, Poland scores among the countries with the highest percentage of requests answered by the legal deadline (https://ec.europa.eu/internal_market/imi-net/statistics/2019/08/posting-of-workers/index_en.htm).

work stoppage and barricades on sites that could also be useful for media coverage and publicity.

As the number of posted workers is increasing in Estonia, so is the supervision over posting companies (generally, it does not differ from the supervision of local companies). The Estonian LI report from 2019 indicates that some posting companies still fail to send the posting notification to LI and a new scheme of hiring TCN posted workers has been noted, but no other kinds of frequent violations related to posted (TCN) workers are highlighted (OWE, 2019). Nevertheless, the most frequent problems in Estonian working environment include insufficient training, for example, lack of OSH instructions, proper safety equipment and risk analysis (OWE, 2019). In Finland, the main problematic issues related to posting revolve around tax avoidance by posting companies on the one hand and posted workers having worse working conditions than they are entitled to, on the other (Tuovinen, 2020, pp. 68-69). The participants of the Finnish focus group emphasized that the main problems involve posted TCNs not receiving the wage they are entitled to due to lack of knowledge, willingness to work at a lower rate and/or employer's misconduct. If the foreign worker is not certain that his/her documents are in order, the employer might also be in a better bargaining position, as the worker might be unwilling to ask for help from the union or authorities out of fear of being deported.

In neither Estonia nor Finland do labour inspectorates help to claim unpaid wages or other labour rights violations, because, legally speaking, it is a civil matter. In Estonia, workers have to take the issues to the court themselves. In Finland, the union can make the claim on behalf of the worker or group of workers, if they are union members. While it is rarely the case that posted workers are union members, Finnish unions have been known to take on posted workers' cases nonetheless, allowing the workers to join the union *ex post facto* to be able to make the claim (normally, new union members are not able to access its legal services immediately). However, with a few notable exceptions, where unions have indeed represented posted workers before the court, the violations of posted workers' rights rarely end up in Finnish courts (Tuovinen, 2020). In Estonia, posted workers can also complain to the Labour Dispute Committee, which is much faster in dealing with labour rights violations than courts and some posted TCNs have already used the option. This might be difficult because of language issues and lack of awareness of local regulations, but in Estonia an NGO has supported some Ukrainian posted workers in their claims that have been partially satisfied.

Regardless of the general vulnerable situation of workers in Ukraine, efforts are being made to regulate the situation of workers in the construction sector. For example, in 2017 ‘National collective agreement in the construction and building materials sectors’ was signed between the Ministry for Regional Development, Construction, Housing and Communal Services of Ukraine and PROFBUD - Construction and Building Materials Industry Workers' Union of Ukraine as a introduction of EU and ILO legislation on the protection of workers. This new regulation aimed at improving the working conditions of 650,000 construction workers, including through the introduction of salary increases since 2017.¹⁷ Nevertheless, despite the fact that there are more than one hundred trade unions in Ukraine, experts agree that their position in social dialogue for protection of workers is weak and inadequate (Fedyuk & Volodko, 2018). At the same time, the situation is further complicated by a low level of trust in this type of organization in Ukrainian society and a high level of corruption, which means that workers often do not report their problems or solve them in informal ways (e.g., by leaving work).

Due to the high share of undeclared and informal work in Ukraine, it is challenging to obtain reliable data on labour rights violations, especially in individual sectors. In 2018, 32% of construction workers were employed informally in the formal sector and one in four was employed in the informal sector. Construction remains a sector with persistently high levels of employment informality, putting workers in a vulnerable and precarious situation. It is estimated that between 85 and 90% of all employees (including those employed formally and informally) receive part or whole of their wages as ‘wages in envelopes’, and this is particularly the case in the construction sector (Santos, 2020). This means that the officially published data on the average monthly wages do not reflect the actual ones. Nevertheless, over the last 5 years pay conditions for construction workers have improved, as also noted by the FGI participants. In particular, the wage differences in the construction in Ukraine and Poland are narrowing (while the costs of migration, including family separation and higher living costs in Poland, remain constant).

4.3.3. Channels of information for TCN posted workers

While in Poland law firms often assist the employers in navigating the legal framework of posting, the knowledge of employees on posting and their rights remains limited. The FGI participants also noticed that in Poland, language issues persist not only with reference to

¹⁷ <https://www.bwint.org/cms/news-72/profbud-signs-new-national-collective-agreement-in-ukrainian-construction-sector-793>

litigation but also to the channels of information for TCNs. All Member States have to post information on terms and conditions of employment on their national website on the posting of workers. In Poland, general information on posting is available in Polish¹⁸ and English¹⁹ on the website for entrepreneurs ('Business in Poland'), which is supervised by the Ministry of Economic Development. An important development in this respect is the helpline for foreigners, which was launched by the NLI Counselling Centre in 2018. The helpline provides advice in Ukrainian and Russian on the legal aspects of employment of foreigners and, as was noticed by the FGIs' participants, it has contributed to an increase in the number of complaints lodged by foreigners. A popular source of information among Ukrainian workers is YouTube where they can find videos about working conditions in Poland shot by migrants and professional PR agencies cooperating with Polish employers.

Both Estonian and Finnish stakeholders emphasised that cultural differences and the lack of common language are crucial obstacles that need to be overcome to build trust and to communicate with TCN posted workers. For example, the Estonian Police and Border Guard Board provides information sessions about the rules and regulations to employers employing foreign labour. During these sessions PBGB also highlights to these employers the need to introduce the very basic rules of the society to their employees who might come from a rather different cultural background. In some cases, employers might also intimidate workers not to interact with locals, especially the authorities. Considering the specific type of communities posted TCNs develop in the receiving country, different methods for providing them with information might work. In Estonia and Finland it seems that these workers often live in closed communities and making contact and building trust with the leader of that community might help: that person would be a trusted authority within the community and could inform all the others as well. In Estonia, an NGO has done outreach work towards Ukrainians working there and has managed to build trust and raise these workers' awareness about Estonian rules and regulations. What is important, it has managed to decrease the initial skepticism that Ukrainians, living mostly in separate communities isolated from the Estonian society, displayed towards Estonian authorities. As a result, Ukrainians are now more willing to turn to the labour inspectorate with problems than two years ago. The Finnish LI highlights

¹⁸ <https://www.biznes.gov.pl/pl/firma/cudzoziemcy/chce-delegowac-pracownikow-do-polski/delegowanie-pracownikow-w-ramach-swiadczenia-uslug-na-terytorium-polski-informacje-ogolne41>

¹⁹ <https://www.biznes.gov.pl/en/firma/doing-business-in-poland/posting-of-workers-to-poland/posting-of-workers-in-the-framework-of-the-provision-of-services-in-poland-general-information/posting-of-workers-in-the-framework-of-the-provision-of-services-in-the-territory-of-poland-general-information>

that they could use this kind of ‘success stories’ as well and they should be more active in the social media.

During the inspections at the construction site, in both Estonia and Finland, inspectors distribute small information flyers in multiple languages to the workers/employers. In Estonia, both migration advisors and labour rights/OSH advisors provide consultations via phone, email and also Skype. In Finland, the union also informs workers about their rights during site visits, and in some construction sites the union has a representative and (Finnish) union members who also keep the eye on the situation. Construction workers usually participate in the initial training/induction session that is mainly dedicated to OSH, but depending on the shop steward, employment rights matters can be included as well. The participants of the Finnish focus groups agreed that more content on labour rights should be included in induction sessions. The union also checks accounts, to see, for example, if they match with what the workers say, and with the amounts in the employers’ subcontracts. On bigger sites, there might also be a room with trade union materials. RL also cooperates with the authorities.

Access to information among workers in Ukraine, especially in the context of labour migration and posting, was an important issue discussed during the Con3Post events. Many migrants and prospective migrants from Ukraine rely on friends or family networks in the destination country in gaining access to information and jobs. The Ukrainian and Polish FGI participants also discussed how both formal and informal private labour market intermediaries play an increasingly important role in informing workers about potential employment opportunities abroad (despite the low trust in formal institutions in Ukraine). However, the quality of information obtained by employees in agencies operating locally in Ukraine remains an issue. In this context, the FGI participants discussed an important initiative developed by the Polish-Ukrainian Chamber of Commerce called ‘Partnership and Employment’, under which in cities across Ukraine, local experts explain the procedures to potential labour migrants, warn about potential violations and discuss how to access support. However, these informational actions had limited effects.

Experts pointed out how Ukrainian labour migrants may be unaware of what the posting of workers means. This lack of awareness may also involve lack of knowledge on what requirements must be met, what consequences may result from illegal employment in another member state with a Polish visa (see also Keryk, 2018), and, finally, how the posting of

workers differs from a business trip. An analysis of Ukrainian websites with job offers in the EU suggests that moving Ukrainian workers from one EU Member State to another is one of the employers' strategies. For example, over 330 job offers published at the EuRabota.com portal (out of total of around 91,000; data for January – March 2020) contained the term 'business trip'. For Ukrainian citizens working on the territory of one EU Member State, after having met the requirements of official employment in this Member State (e.g., 1-2 months of employment in Poland), they may be sent by the employer on a business trip to another country, mainly EU-15.²⁰

Furthermore, the term 'posting' in Polish ('delegowanie') can refer to the legal definition set out in the Posting of Workers Directive but it can also refer to national regulations. The Act on the promotion of employment and labour market institutions (2004) allows the 'posting of workers' from third country to an enterprise in Poland in a situation where there are business relations between enterprises in both countries (e.g. a partnership). Such workers may perform specific work for a period of 30 days without work permits or longer if they obtain the relevant documents required to stay and work in Poland. The Polish daily newspaper 'Rzeczpospolita' defines this practice, which is increasingly used by companies in Poland, as 'bypassing offices', meaning that this allows the recruitment of foreign employees without the official procedure of obtaining a work permit.^{21,22}

4.4. Social welfare, occupational safety & health and vulnerabilities of posted workers

One of the most frequent violations, as stated by the FGI's participants, is the phenomenon of third country nationals formally employed in companies registered in Poland, for whom the employers obtained documents legalizing their work in Poland but who never took up employment in Poland, because their aim was only to obtain a 'pass' to other EU/EEA countries. This practice constitutes an abuse of the institution of posting. There are no legal grounds for issuing a work permit or registering a declaration, if the work will only be carried

²⁰

<https://eurabota.com/v/2728275/%D0%BF%D1%80%D0%B0%D1%86%D1%96%D0%B2%D0%BD%D0%B8%D0%BA-%D1%82%D0%B5%D0%BF%D0%BB%D0%B8%D1%86%D1%8F-%D0%BF%D0%BE%D0%BC%D1%96%D0%B4%D0%BE%D1%80%D1%96%D0%B2/>

²¹ <https://businessinsider.com.pl/firmy/przepisy/pracownik-delegowany-z-ukrainy-jakie-formalnosci/dd5jehe>

²² Further, posting can also be understood more broadly as the practice of sending workers between branches of a given company or various organizations located in different countries, including migrations of highly skilled migrants (Konieczna-Salamatin, 2015) and expats who are posted within an internal labour market of a transnational company (Przytuła, 2014; Jurgał-Popiela, 2017).

out abroad in another EU country. Helsinki focus group participants also pointed out that companies might use the lack of capacity of some CEE countries to control companies' operations (and perhaps also possible informal arrangements with some governments) and use these countries through which to recruit TCNs to be sent to other European countries.

The experts also pinpointed that there are no regulations indicating how long a foreigner must be employed by a Polish employer before being posted to another Member State, which becomes problematic in case of short-term employment. The NLI also found that foreign entities were undertaking attempts to circumvent the provisions on posting of workers. This involved providing services by directing persons employed in enterprises in Ukraine to temporary work agencies in Poland in order to further transfer them to an employer-user (agency's customer) in Poland. In that case the agreement between Poland and Ukraine on social security is used to make a 'leap' to Poland.

What is more, the FGI participants described posting of employees from Poland by companies based in the so-called virtual offices (letterbox companies), which, in practice, often escape any effective control. If the controlling activities of ZUS carried out at the request of foreign authorities take place, they often lead to a conclusion that the conditions for issuing the A1 certificate are not met and the person has to be expelled from the Polish social insurance system and reported abroad (which employers often do not do due to the costs involved, thus leaving the posted worker uninsured). The NLI's controls on the posting of workers from Poland confirmed that third country nationals – primarily Ukrainian citizens, who are illegally²³ employed in Poland – are posted abroad without the required work permits or statements, entered in the register kept by the district employment office or a permit or a statement issued to another employer (PIP, 2019). Often they do not have an A1 certificate that confirms one is covered by the Polish social security system.

Some Polish employers still fail to offer posted workers terms of employment that would be not less favourable than those resulting from the provisions of Polish law, or try to bypass the provisions on the posting by having recourse to financially more 'beneficial' regulations on business trips. The amount of social security contributions is determined based on the income defined as 'revenues within the meaning of the provisions on personal income tax'. As a general rule, the daily subsistence allowance, as well as other payments related to a business

²³ The construction and transportation sectors are strongly affected by the problem of undeclared work.

trip, are not subject to income tax and are also not included when calculating contributions for pension insurance.

Some employers try to circumvent the minimum wage rules in force in the given country by paying daily subsistence allowances (instead of statutory minimum wage), which are not recognized by the foreign service as a component of a staff member's remuneration. This practice also applies to the lowest possible pay rate (e.g., the minimum hourly rate in the case of assignment contracts) and the remaining receivables are settled by means of *per diems* for each day of stay abroad (the employer undertakes to pay them in the contract concluded with the employee). According to the lawyers participating in the FGI, this is a thoroughly wrongful practice aiming at lowering the basis for social security contributions but in some cases becoming a business model. It is also an increasingly common practice (aiming at cost reduction) of posting third country nationals (mainly Ukrainians) employed in Poland under civil law contracts for temporary work abroad.

Construction work is particularly dangerous and involves direct risks to workers' health or even lives, as failure to organise the work properly can lead to serious or fatal accidents. There are still many irregularities in the performance of work at heights and using scaffolding without protection. Such situations are the result of ignoring the danger, both in terms of site supervision and on the part of workers. In Poland, the NLI also found that a wrong way was used to secure workers with the use of personal protective equipment, which was due to improperly selected means for the conditions of work and the risks involved (PIP, 2019). It is also not uncommon for workers to have no knowledge of the proper way of using protective equipment, and for workstations not to be properly equipped. The inspections also show incorrectly secured places and hazardous areas, lack of protection of electric cables, incorrect operation of construction machinery, people working without the required knowledge of the hazards involved in the work they perform and ways of protecting against the impact of these hazards. This was due to improperly conducted or missing OSH training.

Both in Finland and in Estonia posted workers are generally in a worse position regarding knowledge and conditions of OSH and work equipment than local workers. The vulnerability of posted TCNs, however, seems to be even higher, also due to the lack of relevant language skills. Furthermore, complex transnational employment chains common in the construction sector make posted TCNs especially vulnerable to OSH, including work accident issues, as it is difficult to track down the company who is responsible for one or the other matter. The

work accidents of posted TNCs are also becoming more frequent. For example, Estonian and Finnish inspectorates who participated in the Finnish focus group interview highlighted a recent work accident case, where Ukrainian workers were hired by Polish company and sent to Estonia. Then the workers were sent to Finland through an Estonian company, although the owners of the two companies were the same. When there was a serious accident at the site in Finland, the Polish company denied all responsibility and disappeared. The main contractor (who was not legally liable) paid a compensation fee to the worker after the accident (to prevent damage to the company reputation) and sent the worker back to Poland. More generally, it is difficult to obtain a negligence fee from a company in such situations if the company representatives are gone from the construction site and the company is actually a letterbox company, failing to receive letters sent by inspectors. Another example was presented by the Estonian LI representative and involved an accident at an Estonian construction site where a foreign worker had his fingers cut off. He was taken to hospital by an ambulance and received first aid, but declined to name his employer. The worker himself was not registered in any Estonian system and disappeared after leaving the hospital. The general pattern seems to be that if an investigation begins, posted TCNs who have had accidents are just paid some kind of compensation and sent away.

Although in Ukraine the number of total industrial injuries decreased from 125,000 in 1992 to 4,400 in 2016 and lethal industrial injuries index also decreased (Pahomov et al., 2018), experts dealing with the labour market in Ukraine are more sceptical and point to the numerous threats construction workers face on a daily basis (Fedyuk & Volodko, 2018). Consequently, they might be used to a rather poor OSH environment when they move to work abroad as well. In the case of foreigners who do not have adequate knowledge of the local language, attention should be paid to the issues concerning the transfer of documents related to taking up and performing work by employers and training of such foreigners in the field of occupational safety and health. In Poland, under the current regulations the entity entrusting work to a foreigner needs only to present the contract under which the foreigner will perform work in a language understood by him/her. This obligation does not include other documents, including health and safety instructions, or information on employment conditions and work regulations.

To sum up, if posted TCNs are involved in a complex chain of companies, it might be difficult for them to understand: who their real employer is, what kind of employment relationship they have, which country they get social security coverage from and whether it is

duly paid (or paid at all), as well as what to do in case of work accidents, etc. Furthermore, insufficient language skills might hamper employees' OSH knowledge, as even if the OSH training is conducted by the company responsible, it is of little use if the workers do not understand the content.

4.5. Managing transnational workplaces

Transnational workplaces provide a challenge to all counterparts. What is more, a characteristic feature of the construction sector is that it predominantly consists of small companies and only a limited number of large players. Consequently the sector has long and transnational subcontracting chains. A representative of the Confederation of Finnish Construction Industries pointed out that the biggest problem remains to be insufficient information about applicable rules and regulations and the biggest challenge is to have reliable and real time data of the posting companies (including the history of their operations) and their employees. He added that although some data is collected, it is not sufficient if only authorities have and share it, since the information should be available for companies as well (Wartiovaara, 2019): improving these two aspects would make the situation more transparent and fair.

There are also challenges in inspecting transnational workplaces as it might be difficult to clarify which company is responsible for which workers; however, both Estonia and (especially) Finland have made efforts to clarify the situation. In Estonia all workers have to be registered by the time their employment commences. There are three different registers for that: one for local workers, one for posted workers (administered by LI) and one for TCNs (administered by the PBGB). Finnish social partners together with the state have established several regulatory measures: compulsory ID-cards with a picture and tax number for construction workers, construction site register as well as different clauses in the collective agreement and legislation that regulate subcontracting (Jorens et al., 2012, pp. 16-17; Sippola & Kall, 2016; Ruotsalainen et al., 2018). For example, the main contractor is responsible of reporting to the tax authorities each month the information about all workers at the sites, and all companies who subcontract have to report the payments made to subcontractors (Wartiovaara, 2019). According to the representative of the Finnish construction trade union Rakennusliitto (RL), these measures have improved the situation (Ruotsalainen et al., 2018).

Furthermore, in the bigger Finnish construction sites with an extensive networks of subcontractors, the shop-stewards are often crucial in monitoring the entire chain. For large sites, the various trade unions active on site, authorities and employers set up cooperation committees to tackle the possible problems that might emerge (Ruotsalainen et al., 2018). Nevertheless, RL sees this as an issue of monitoring the conditions of migrant workers in general, rather than specifically targeting posted workers. Language and other cultural barriers are also highlighted when engaging with the workers and trying to build trust. To remedy this, RL has staff members with migrant background (e.g. Estonian, Russian) as well as a department for foreigners and basic information is available in several languages on their website.

Finnish focus group participants highlighted the fact that it is still often difficult to understand the real contractual relation between all the workers on site and their employers. There are cases where employers claim that foreign workers are self-employed, hence they are beyond employers' responsibility and do not fall under the collective agreement. If Finnish labour inspectors conclude that the workers are indeed employees, not self-employed, then they inform the employer that this is the case and add this suggestion to the inspection report, which is also sent to various other authorities. However, they do not have the power to demand compliance from the employer nor do they follow up to assure the employer has made the change.

The more complex the posting schemes become, the harder it is to make sure that all rules and regulations are followed and some companies seem to take advantage of this. Finnish and Estonian inspection authorities highlight that some companies indeed try to manipulate the system. For example, they take advantage of the fact that several authorities check companies separately and give different information to the authorities in different countries. For example, they inform labour inspectors that workers are not posted (to avoid *per diems* etc.), and at the same time inform the tax administration that they are posted (to avoid social security payment issues). Using shell companies and posting through multiple countries (e.g., Estonian owners establishing a company in Latvia and sending Ukrainian workers through that company to Finland) is also used to cover the tracks. A Finnish Tax Administration representative also lists the following common challenges related to TCNs: they might not have a Finnish bank account, their documents might be missing and they might be reluctant to cooperate with the authorities. To sum up, investigating if the rules and regulations are fulfilled takes time and other resources (Lehtinen, 2019).

To conclude this and the previous section, it seems that all counterparts – including companies, state actors, unions – who are interested in rules and regulations being followed, should continue to work to improve their cooperation, aiming to ensure that also those (posting) companies and workers who deliberately try to avoid rules and regulations will not be able to do so and those who simply are not aware of the existing standards - will be familiar with them.

5. CONCLUSIONS AND OUTLOOK FOR THE FUTURE

Regional and EU labour market dynamics and shortages

It is rather difficult to evaluate the extent of labour and skill shortages in the construction sector. During the period under study (2018-2019) in all of the counties under observation in the posting flow from Ukraine to Finland and Estonia through Poland there were vacant jobs in the sector and the sector experienced investment and turnover growth. Although this might explain the need for foreign labour, there are also local workers who might not be offered employment due to higher expectations / being more expensive than foreign labour (whose labour conditions are often inferior to the standards actually applicable to them). There were also considerable labour market disparities within the region. What is probably more important, however, are the continued huge disparities between the working standards and wages in the region, with Finland leading the way, followed by Estonia and Poland, and Ukraine lagging far behind.

Labour migration and mobility trends

This does not, however, fully explain the ever increasing complexity of schemes some companies seem to use to recruit and post workers. Although data on posted TCNs is lacking, participants of Con3Post events highlighted the fact that posted TCNs in the construction sites of Estonia and Finland are becoming more common. Firstly, the established migration routes and an ever growing migration industry play a role in directing the migration and posting flows. For example, in Ukraine, employment agencies, travel agencies and middlemen have created a migration industry, facilitating the flows of employees, helping them to fulfil the formalities related to entry and employment in Poland and some other EU countries. Secondly, it seems that some companies are trying to gain a competitive advantage by avoiding inspections and opting out of more expensive and difficult ways of hiring migrants, so, in this case, local migration and labour policies also play a role.

For example, in 2006, Poland introduced new regulations which continue to give access to the Polish labour market for a period of six months in a year based on a statement of an employer wishing to hire a foreigner. This scheme has been predominantly used by Ukrainian nationals, especially since the military conflict in Ukraine in 2014. The Ukrainian workers are

sometimes sent forward to other EU countries, such as Finland and Estonia without any actual employment in Poland. Although Estonia also provides a possibility to use a short-term employment scheme for TCN migrants, it is different from the Polish system as companies must generally pay these TCNs at least the Estonian's national average wage. Thus, using this hiring method for the construction sector is potentially more expensive than going through Poland, in which case only the national minimum is mandatory. Furthermore, another reason why the posting of TCNs is used seems to be the aim of making the posting chain longer and more complex, and so harder to track. For example, since the cooperation between the Finnish and Estonian inspectorates is already quite extensive and smooth, some Estonian companies set up branches in Latvia or Poland to circumvent the enforcement authorities by sending Ukrainian workers to Finland.

Labour rights, violations and representation of posted workers who are third country nationals

The main violations regarding TCN posted workers in the region include a lack of proper registration in the receiving country, problems related to work permits and/or employment contracts, insufficient training at the work site. In general, posted TNC workers have worse working conditions than they are entitled to, including wages that are below their skill level. Furthermore, if the foreign worker is not certain that his/her documents are in line with regulations, the worker might still be unwilling to ask for help from the union or authorities out of fear of being deported. One of the most frequent violations in Poland, heightened by the legal uncertainty, is the phenomenon of third country nationals formally employed in companies registered in Poland and in possession of documents legalizing their work (obtained by their employers), who nevertheless never took up employment in Poland, because their aim was only to obtain a 'pass' to other EU/EEA countries.

Although Finnish and Estonian inspection authorities are generally satisfied with the regulations applicable to posted workers in their countries, it is their enforceability that is more problematic. Authorities do not have enough competence and resources to manage the situation as fast and thoroughly as needed, and to conduct as many inspections as would be probably necessary. Although in Finland (contrary to Estonia) there is a strong sectoral trade union, which also negotiates on behalf of TCNs, it is also difficult to enforce the rights of this group of workers, as they are often unwilling to cooperate with the union. Many migrants and

prospective migrants from Ukraine rely on friends or family networks in the destination country in gaining access to information and jobs and both formal and informal private labour market intermediaries play an increasingly important role in informing workers about potential employment opportunities abroad. Although there has been some success, it seems that unions and state actors in the receiving/mediating countries need to put even more effort in building trust with TCNs and informing them in the language they understand.

Social welfare, occupational safety and health and vulnerabilities of posted workers who are third country nationals

TCNs are often vulnerable as they are involved in a complex chain of companies and it might be difficult for them to understand: who their real employer is, what kind of employment relationship they have, which country they get social security coverage from and whether it is duly paid (or paid at all), as well as what to do in case of work accidents and occupational diseases. They sometimes do not receive proper OSH training (in a language they would understand), and might be working in more dangerous conditions than local workers (posted workers might also be accustomed to rather poor OSH environment characteristic in their country of origin). If they are posted by letter-box companies, then ultimately they might not receive their wages and social security coverage at all. In Finland and Estonia, the pattern with work accidents was that when these happened to posted TCNs and an investigation followed, the injured posted TCNs are just paid some kind of compensation (e.g., by the main contractor) and sent away. Some measures that could improve the situation from the posted TCN's perspective include being offered a proper induction sessions in a language they are familiar with and improved transnational cooperation of authorities in restricting the use of letterbox companies and other illegal corporate practices.

Managing transnational workplaces

In Finland, where the construction sector has been re-regulated, the biggest challenge in the transnational worksites still seems to be obtaining reliable and real time data on the posting companies and their employees, which should be available for all actors. This would make competition fairer and inspecting the workplaces easier. Although registration systems for (posting) companies have made the situation better, it might be difficult to clarify which

company is responsible for which workers. In Finland, the requirements for companies in the sector are quite extensive, including compulsory ID-cards with a picture and tax number for construction workers, a construction site register and the main contractor being responsible for several issues on the site. Nevertheless, the more complex the posting schemes become the harder it is to make sure that all rules and regulations are followed and some companies seem to take advantage of this. Some companies use the fact that several authorities check them separately and give different information to different authorities. Another method to cover the dodging companies' tracks is to use shell companies and posting through multiple countries. Thus, all counterparts, both within and across borders (including companies, state actors, unions) who are interested in the rules and regulations being followed, should continue to improve their cooperation.

Results of the foresight exercises

Part of the Con3Post methodology was to use foresight exercises to outline possible future scenarios in the studied field. The foresight workshops gathered a wide range of informed experts from public authorities, unions, third-sector, media and academia with the aim of considering a plethora of voices in developing a future-oriented approach and to share their opinion on how the situation *could* evolve. During this creative team work exercise the participants were encouraged to consider various developments concerning future dynamics of the EU and regional labour markets, supply and demand of skilled labour, and labour migration/mobility/posting dynamics in the region and in each individual country until 2035. The participants were encouraged to choose the most probable scenario and develop it in more detail. We present their joint narratives in the report boxes below (one for each foresight exercise). In all the three foresight workshops participants chose the scenario where the country under consideration will be experiencing skill and labour shortages on the one hand and migrant labour will be in supply, on the other hand.

Scenario for Finland in 2035: *Current migration and social processes continue, but intensify*

There will be skill and labour shortages (in the construction sector), and migrant labour will be in supply. The borders will remain open – but not much more than currently due to the dominance of popular right-wing parties. Migrants will come, there will be some skill shortages in the labour market (also in the construction sector).

Overall, the situation in Finland will be relatively good: legislation will be good enough, companies will be treating people equally, but sectoral differences will stay and labour market will get more segregated: wages will go down for migrant-dominated sectors. The society will be more class-based and exhibit increasing ethnic inequalities. Employers will be satisfied as there will be enough supply of cheap labour. Criminality will increase if people in the low earning jobs cannot support themselves at a comfortable level. Nevertheless, this is not a labour exploitation scenario, just one containing ethnic inequalities. It can be a win-win situation for the welfare state, especially when migrants are compensated decently in the labour market and there will be no social dumping. Society will adjust, if there are more migrants, more facilities can be developed (housing, social services etc.). The state has to put more resources into integration. Given proper possibilities, migrant workers will integrate and prefer more secure employment and legal situation, as no worker actually wants to be exploited.

Finland will be more international, also outside Helsinki region. There might be a possible housing crisis, especially in Helsinki (and housing is becoming really expensive). There will be a need for social housing and in the best case enough will be provided. Posting of workers will not be so relevant any more, direct ways of migrating will dominate. Migrants from third countries (e.g. from Ukraine) will learn more direct ways of coming to work to Finland and might do without intermediaries. Posting might stay relevant if it still provides a possibility for companies to use loopholes to exploit migrants and the local systems.

The foresight exercise was useful in that it pointed to the complex web of issues that posting of workers will be entangled in. The participants referred to a broad range of political, social, economic, cultural and technological factors which will affect the future of posting of workers in the construction sector in the next 15 years. What is more, the participants discussed possible developments at a range of levels, including global, regional, EU, national, local and sectoral situation. Further, they pointed to macro- (country), meso- (associations, trade unions, and enterprises) and micro- (workers) scales describing the future processes in the most probable scenarios. The nature of the discussion in each case really depended on the participants. Talking about the future can be heavily influenced by the current issues, and so the discussion can get fairly practical and political. For example, in the Finnish workshop, quite a heated debate developed between participants about how beneficial the migrant labour is to the country's social security system. It might also be difficult to reach consensus on what exactly the future developments might be (the same participants will sometimes point to multiple possible scenarios).

Scenario for Poland in 2035: *Controlled development with deepening peripheralisation of peripheries and strengthening of the centre scenario*

In this scenario Poland was seen as a country with migrant labour in supply and persistent skills shortages. The consequences of the education system reform will not be seen yet, which will result in shortages of qualified workers. The flows to the country will depend on the global migration situation but are expected to be high. This scenario was built in the context of Poland in Europe, and in particular pointing to the role of Poland as a semi-periphery with low capital and hi-tech but one that is able to use its high-quality human capital as the competitive advantage. The scenario predicts that situation of Poland will not alter dramatically in the next 15 years.

Country-wise, the emigration will coincide with immigration to the country, the latter filling the structural labour shortages. Poland will remain a hub of low and middle skilled workers sent abroad, on the other hand still attracting immigrants (but the migration policies will likely need to change beyond short-term migration options prevalent today). Sector-wise, the financial investments from EU-funded projects in the construction are likely to dry up compared to current situation. The economic crises (likely to happen) will not fundamentally change the structure of employment in the sector, but if jobs are lost in the construction, this may negatively impact the narratives on migration. Employee-wise, there was a doubt if the posted workers status will survive, although it seems to remain a cost-effective option in the time to come.

Regarding opportunities and threats, regulations around posting still leave space for non-compliance. Persistent labour shortages may lead to irregular practices on the labour market. It is difficult to assess the implications of new technologies on the world of work, but the changes are already visible. On the opportunities side, posting to Western member states may result in a transfer of know-how upon return and the learning process (already seen in posting in the care sector).

Among the policies to address identified threats and opportunities, the participants mentioned mitigating the negative effects of emigration and development of new migration policies as well as policies related to how the narratives on migration are shaped. The debate also concerned the re-thinking of the functioning of the education system and the question of recognition of qualifications of the mobile construction workers.

The foresight workshop summaries offer a birds-eye view on the migrant labour supply and skills situation in the analysed countries in 2035. The summaries offer a view that is well-embedded in the understanding of the countries' position in the world / European context and its possible developments in the years to come, at the same time discussing the opportunities and threats which are likely to shape the future trajectories.

Scenario for Ukraine in 2035: *Desirable development in the construction sector in conditions of (not entirely justified) optimism*

The most probable scenario developed during the foresight workshop for Ukraine was looking at the situation in 2035 in which there will be migrant labour in supply and skills shortages in the country.

There was a lot of discussion especially with regards to the migration scenario in Ukraine in 15 years' time, but finally, the participants were convinced that Ukraine will follow the Polish path as a new immigration country. These discussions concluded that Ukraine will be attractive to migrants not *per se* but because other post-USRR destination countries in the region (including Russia and Kazakhstan) will lose their migration pull. Central Asian migration destinations with which Ukraine will compete currently do not fare well on human rights and remain xenophobic. There was a wide consensus about the persistence of skills shortages in Ukraine in 2035.

Under the selected scenario Ukraine will remain quite a stable country, pursuing modest economic growth, with an expectation of no conflict escalation to take place. The situation of Ukraine was likened to the one in Romania a few years prior to the country's EU accession. Sector-wise, while migration to Ukraine is important for IT and agricultural sectors, it is expected that the mere foreigner workers' pool availability in the future will be a stimulus for the development of the construction sector in the country. Employee-wise, many of the workers coming to Ukraine will be young, possibly with previous experience of working in Central Asia. The latter may mean that these workers will bring with them the experience of poor working conditions and may be willing to agree to the similar conditions in Ukraine.

Regarding opportunities and threats, there is an expectation that the country will have to deal with issues which persist today, that is, low levels of trust towards the public institutions and the rule of law as well as corruption. Another challenge relates to securing workers' rights and occupational health and safety. On the positive side, many Ukrainians who have worked abroad may transfer with them the work cultures learnt abroad on the return.

The policies to address the identified threats and opportunities include, in general terms, suitable immigration and integration policies and strategy for fighting corruption. With regards to the labour market, the state should be more involved and control the workers' rights, health and safety standards should be ensured by labour inspections, and training provided in languages known by migrants.

6. POLICY RECOMMENDATIONS

The last chapter proposes several policy recommendations that resulted from the synthesis of the research results. The results are grouped at three different levels depending on which level the changes are necessary:

At the workplace and industry level:

- Eliminating language barriers faced by TCNs. The documents and training should also be provided in the language of TCNs' country of origin .
- Improving site-level cooperation, including fast and effective data sharing between social partners and state actors to improve the monitoring of the construction sites and detecting unlawful practices.

At the national level:

- Improving migration and posting data collection and its availability, including collecting citizenship information through posting register to gain a better understanding of the extent of the posting of TCNs;
- Initiating legislative and organizational changes aimed at reducing the scale of irregularities related to the posting of workers from Poland, i.e. by checking the minimum wage declared in the documents submitted to social insurance institutions. It is worth considering introducing special certificates for companies posting workers in accordance with legal regulations and employees' rights. A provision obliging employers to include employment conditions of posted workers in the content of employment contracts would allow labour inspectors to enforce obligations resulting not only from foreign legislation but also from the contract of employment;
- Changing the permit procedure for TCNs, by reducing queues in offices and waiting time for documents to be issued - this would facilitate posting of the TCNs;
- Enhancing effective and transparent application of EU rules on TCN posting. This includes introducing regulations indicating how long a foreigner must be employed by an employer before he/she can be posted to another Member State. A situation in which a permit or a declaration is issued only with the intention to perform work by a

foreigner outside the territory of Poland should automatically lead to a refusal to issue documents legalizing work for a foreigner;

- Making available more effective monitoring and punitive enforcement tools for dealing with TCN posting. For example, ensuring that labour inspectors have enough resources and real measures to use their statutory competence to control the extent to which an employer posting workers complies with Polish occupational health and safety regulations;
- Lowering the threshold for TCNs to contact authorities and ask for adequate information/help before, during and/or after their work abroad. Initiating regulations and practices that prioritize enforcing the labour rights of the posted TCNs. Posted TCNs should have the right and real possibility to access information about their rights, counselling, and assistance in pursuing cases where they have been mistreated without the fear of being sent out of the country.

At the regional level:

- Widening the strength and geographical reach of transnational cooperation in the area of posting, particularly by including the relevant third countries. Developing cooperation with the competent authorities and institutions of European countries and third countries with an aim of exchanging information. Carrying out joint control activities with regard to companies posting workers abroad by the competent authorities, in particular LIs in the sending, posting countries and the TCs.

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