Fraudulent Contracting of Work: Construction Sector

Exploring the fraudulent contracting of work in the European Union

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Spain and UK) and Sham companies (Austria, Estonia and Italy)
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Introduction

This report covers the emergence, developments and rationales behind fraudulent forms of employment and contracting work in construction sector. The research has been developed in the framework of the Eurofound project “Inequalities in working conditions: exploring fraudulent forms of contracting work and self-employment in the European Union”. (Eurofound, 2016). The analysis is based on country-specific information from Finland, France, Poland and Spain as well as from the EU-level sources.1

1. Sectoral Background

1.1. Economic background

The construction sector (NACE F) includes construction of buildings, civil engineering, specialised construction activities (demolition, plumbing, etc.) and other specialised construction activities (roofing activities, etc.). It is the largest industrial employer in the EU with a total workforce of around 15 million people or almost 7% of the total European workforce (Eurostat [lfsa_egan2]). Construction activities’ contribution to total gross value added at basic prices lies at 5.4% in the EU-28 in 2015; of the four studied countries, it is highest in Poland with 8.1%, followed by Finland (6.3%), then France (5.4%) and Spain (5.5%)2. The construction sector contributes at around 8.5% to the EU’s GDP in 2015 (FIEC 2017).

Before the economic and financial crisis in 2008/09, construction output in Europe had increased steadily; with the crisis, it began to decline quite dramatically until around 2013. In 2013, construction production recovered somewhat, reaching a level of around 80% of the pre-crisis peak. Since then the production in construction has remained relatively stable3. As of 2016, the construction industry seems to be on a path of economic recovery, with an increase of 2.3% in production in the EU-28 (in February 2016, compared to February 2015). Geographical differences are large; one of the highest increases was registered in Spain (plus 13%), one of the largest decreases in Poland (minus 10.1%). For both 2016 and 2017, positive trends have been forecast (3% in 2016, 2.7% in 2017)4. The construction sector is of pivotal economic importance due to its role as ‘a major consumer of intermediate products and related services'. Hence, the performance of the construction sector directly impacts on the development of the overall economy.

There are over 3 million enterprises in the sector, of which 99.9% are SMEs (91.9% have less than ten employees, 96.9% less than 20 employees and 98.9% less than 50 employees). The average size of construction enterprises in the EU is four workers (employees or not). Small enterprises (less than 50 employees) are responsible for 60% of the production and employ 70% of the sector's working population5. At the same time, multi-national export-oriented companies play a key role in the sector. According to the Deloitte publication “European Powers of Construction” (EPOC), the 50 largest listed European construction companies

1 Interviews with the EU construction social partners – EFBWW and FIEC – and EBC.
generated about 52% of their revenues abroad in 2014. Deloitte also found that big construction companies from France and Spain focus more on intercontinental markets than construction companies from Finland or Poland. Indeed, France and Spain have some of the largest construction companies in Europe based on sales. Spain has 6 companies in the 2015 Deloitte rank while France has 3 (Finland has 2 companies in this rank). In Poland, the Deloitte report highlights that construction companies combine cross-border deals with national infrastructure projects, some of them co-financed by EU funds. In Finland, it is found a weak business cycle for the construction sector combined with a stable growth in renovation construction.

1.2 Employment characteristics and trends

Sectoral employment as a proportion of overall employment has decreased in all studied countries, as well as on EU-average since 2008, with the greatest decrease in Spain (where it was halved). In 2016, sectoral employment is lowest in Spain (just over 6%).

Table 1: Construction (NACE F) employment as proportion of total employment (15-64 years)

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>EU-28</td>
<td>8.43</td>
<td>8.00</td>
<td>7.68</td>
<td>7.42</td>
<td>7.18</td>
<td>6.95</td>
<td>6.84</td>
<td>6.77</td>
<td>6.73</td>
</tr>
<tr>
<td>Spain</td>
<td>12.07</td>
<td>9.94</td>
<td>8.86</td>
<td>7.66</td>
<td>6.60</td>
<td>6.03</td>
<td>5.75</td>
<td>6.03</td>
<td>5.88</td>
</tr>
<tr>
<td>France</td>
<td>7.42</td>
<td>7.33</td>
<td>7.41</td>
<td>7.36</td>
<td>7.26</td>
<td>6.94</td>
<td>6.65</td>
<td>6.45</td>
<td>6.43</td>
</tr>
<tr>
<td>Poland</td>
<td>7.90</td>
<td>8.34</td>
<td>8.20</td>
<td>8.30</td>
<td>8.12</td>
<td>7.68</td>
<td>7.53</td>
<td>7.55</td>
<td>7.58</td>
</tr>
<tr>
<td>Finland</td>
<td>7.37</td>
<td>7.13</td>
<td>7.04</td>
<td>7.13</td>
<td>7.10</td>
<td>7.17</td>
<td>6.92</td>
<td>6.92</td>
<td>7.26</td>
</tr>
</tbody>
</table>

Source: Eurostat [lfsa_egan2]

The construction sector is a labour-intensive industry; about 50% of the turnover is achieved through the labour of the workers. Employment in the European construction industry is characterised by a clear prevalence of male workers and this sex distribution has remained stable since 2008 (about 90% in 2008 and 2016). Within the four studied countries, the share of female workers in the sector is lowest in France with 7% (Eurostat [lfsa_egan2]). Only 8% of the workers were younger than 25 years of age in the construction sector at EU level in 2016 compared with 12% in 2008. From the countries studied, Spain accounts for the lowest number of workers younger than 25 years (2%), recording also the highest drop of younger workers from 2008 to 2016 (from 11% in 2008 to 2% in 2016).

Atypical work is a relatively widespread practice in the sector. Although the vast majority (92%) of employment relationships in the EU are full-time positions, many workers are on fixed-term or temporary employment contracts or work as self-employed.

Table 2 below shows self-employment as proportion of total employment and self-employment without employees as proportion of total self-employment in the construction sector. As shown, self-employment account for 27% of total employment in the EU construction sector while at cross-sectoral level, self-employment account for around 14% of total-employment in the UE. Self-employment is therefore a particularly relevant employment form in the construction sector. That partly reflects the seasonality of construction work and

cyclical economic demand that requires some degree of flexibility for peak and slack periods. According to some authors, self-employment is a legal form of engagement of labour to match contractual or seasonal fluctuations in demand, while minimizing the economic risk of surplus labour during slack periods. Due to this, construction employers would make higher use of this employment form (Behling and Harvey, 2015). The proportion of self-employment in relation to total employment is similar in all the countries studied albeit it is substantially higher in Spain. It is also relevant to highlight the high proportion of self-employed without employees (72% at EU level), a phenomenon especially widespread in Spain (71%) and to a lesser extent in the three remaining countries, where this proportion is lower than the European average.

Table 2: Self-employed as proportion of total employment and self-employment without employees as proportion of total self-employed (2016)

<table>
<thead>
<tr>
<th></th>
<th>% Self-employment in relation to total employment</th>
<th>% self-employment without employees in relation to total self-employed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU 28</strong></td>
<td>26.81</td>
<td>71.84</td>
</tr>
<tr>
<td><strong>Spain</strong></td>
<td>29.09</td>
<td>70.59</td>
</tr>
<tr>
<td><strong>France</strong></td>
<td>22.17</td>
<td>59.58</td>
</tr>
<tr>
<td><strong>Poland</strong></td>
<td>23.60</td>
<td>64.34</td>
</tr>
<tr>
<td><strong>Finland</strong></td>
<td>24.77</td>
<td>60.98</td>
</tr>
</tbody>
</table>

Source: Eurostat [lfsa_egan2] and [lfsa_egan2], own calculations

The following table (table 3) shows a comparison of the development in the numbers of self-employed workers without employees and in total employment in the construction sector between 2008 and 2016. It is evident that there are great country disparities; while sectoral employment numbers have decreased in all four studied countries studied, numbers of self-employed without employees have sharply increased in France, followed by Poland and Finland, whereas they have decreased in Spain, albeit to a smaller degree than total sectoral employment.

Table 3: Change in self-employed workers without employees (own account workers) as compared to change in total employment in construction (NACE F) (15-64 years), relative to numbers of 2008

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>Change 2008-2016 Total employment</th>
<th>Change 2008-2016 Self-employed without employees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU 28</strong></td>
<td>100%</td>
<td>-20,2</td>
<td>-1,7</td>
</tr>
<tr>
<td><strong>Spain</strong></td>
<td>100%</td>
<td>-56,4</td>
<td>-27,1</td>
</tr>
<tr>
<td><strong>France</strong></td>
<td>100%</td>
<td>-11,8</td>
<td>45,0</td>
</tr>
<tr>
<td><strong>Poland</strong></td>
<td>100%</td>
<td>-1,8</td>
<td>36,7</td>
</tr>
<tr>
<td><strong>Finland</strong></td>
<td>100%</td>
<td>-6,1</td>
<td>8,8</td>
</tr>
</tbody>
</table>

Source: Eurostat [lfsa_esgan2] and [lfsa_egan2], own calculations
The share of non-standard employment in its various forms in construction is significantly higher than in most other economic sectors. In this sector, the need for flexibility in employment, such as being able to have rapid access to a workforce, for short term tasks or fulfilling project based work demands, is of particular relevance. Temporary work contracts are fairly widespread in Spain and Poland (around 40% of sectoral employees are temporary employees) and just above the EU-average in France, whereas they are less frequent in Finland (see table 4). Moreover, temporary rate in the construction sector is substantially higher than temporary rate at cross-sectoral level in Poland and Spain, where the latter is already significantly higher than the EU average. In France, it remains just above the cross-sectoral average which is near the EU average, while in Finland, it is clearly below the cross-sectoral average (see table 5).

Table 4: Temporary construction employees (NACE F) as proportion of total construction employees (15-64 years)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>EU-28</td>
<td>18,5</td>
<td>17,2</td>
<td>16,0</td>
<td>15,8</td>
</tr>
<tr>
<td>Spain</td>
<td>48,7</td>
<td>41,1</td>
<td>41,3</td>
<td>42,8</td>
</tr>
<tr>
<td>France</td>
<td>17,3</td>
<td>17,3</td>
<td>16,8</td>
<td>18,0</td>
</tr>
<tr>
<td>Poland</td>
<td>39,9</td>
<td>39,4</td>
<td>39,6</td>
<td>9,8</td>
</tr>
<tr>
<td>Finland</td>
<td>10,5</td>
<td>9,7</td>
<td>10,7</td>
<td>15,8</td>
</tr>
</tbody>
</table>

Source: Eurostat [lfsa_eegan2]

Table 5: Temporary construction employees* (NACE F) and total temporary employees (2016)

<table>
<thead>
<tr>
<th></th>
<th>% temporary rate construction</th>
<th>% temporary rate national level</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU 28</td>
<td>15,8</td>
<td>14,2</td>
</tr>
<tr>
<td>Spain</td>
<td>42,8</td>
<td>26,1</td>
</tr>
<tr>
<td>France</td>
<td>18,0</td>
<td>16,1</td>
</tr>
<tr>
<td>Poland</td>
<td>37,0</td>
<td>27,5</td>
</tr>
<tr>
<td>Finland</td>
<td>9,8</td>
<td>15,6</td>
</tr>
</tbody>
</table>

Source: Eurostat [lfsa_eegan2] [lfsa_etpga]

* According to Eurostat, employees with temporary contracts are those who declare themselves as having a fixed term employment contract or a job which will terminate if certain objective criteria are met, such as completion of an assignment or return of the employee who was temporarily replaced.

A large share of construction workers are migrants; for instance, according to estimates by the Finnish Construction Trade Union (Rakennusliitto) from 2013, of the 100,000 employees in the construction sector and related activities, between 20% and 25% are migrant workers, of which the Estonians are considered to be the largest foreign group, with 10,000–20,000 workers. The majority of them work on a temporary basis in Finland. According to the 2017 study by Eurofound (2017b) on aspects of inequality arising from fraudulent forms of
contracting work [Fraudulent contracting of work: Abusing the posting of workers (Belgium, Finland and Italy)], this group is also composed of posted workers. In Spain, the construction sector attracted in the years prior to the economic crisis an important share of immigrants from the member states joining since 2004 (especially Romania and Poland), generally for shorter stays, and from Latin America and Northern Africa, who used to have longer a permanence in Spain. (Meardi et al. 2012).

**Trends in posting workers**

Construction is the sector most affected by the posting of workers in many European countries. On average, 43.7% of the A1 portable documents were issued for posted workers providing services in the construction sector of the receiving member state. Employers are supposed to file A1 forms with national authorities when they post a worker, in order to exempt that worker from host country social security payments. It has to be noted, however, that data deriving from analysing these forms have serious limitations. The number of postings is indicated, but not the labour market impact (duration, singular or multiple posting of one worker, etc.). Regardless of the flaws of these numbers, statistics on posted workers show their number has been increasing in Western European countries since the 2004 enlargement (Caro et al. 2015).

Poland sends the highest number of posted workers to other Member States, with over 463,000 posted workers in 2015, an increase of 74.4% since 2010. Over half of them are posted to Germany, and 36% of all posted workers from Poland work in the construction sector in the respective receiving countries. France receives the second highest number of posted workers in the EU with over 177,000 posted workers to France in 2015, an increase of 10.7% since 2010. The main countries of origin are Poland (16.9%), Portugal (16.1%) and Spain (15.7%), followed by Belgium and Germany. But France is also among the top sending countries (third within the EU-28 with over 139,000 posted workers in 2015). The main country of destination for posted workers from France is by far Belgium (28.5%). The most common sector for posted workers to France is the construction industry (39.6%), whereas the majority of posted workers from France, works in the manufacturing sector of the receiving countries (45%). Spain is the eighth EU country per number of received posted workers with 54,037, showing, however, a decline of almost 15% since 2010, due to the economic crisis. On the other hand, it is the fifth of the EU-28 countries in terms of sending posted workers (over 125,000, with an increase of almost 107% since 2010. The main country of destination of workers posted from Spain in 2015 was France (31.8%), and the main countries of origin of workers posted to Spain in 2015, were also France (23.1%), followed by Germany (21.9%) and Portugal (19%). Almost a third of those workers posted to Spain were employed in industry (without construction), followed by 28.1% employed in the construction sector. Finland is the twenty-third EU country per number of workers posted to other Member States, and the twelfth per number of received workers (18,618), showing a decline of 7.9% since 2010. The main sector of employment for posted workers in Finland is construction (51.4% of received workers working there). Posted workers are predominantly posted from EU former eastern bloc countries (20.7% from Poland, 17.5% from Estonia, 35.2% from ‘other countries’, but also 16.1% from Germany). Posted workers are – with some rare exceptions –

7 The national numbers below (for 2015) are cited from country factsheets available here: [http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=0&langId=en&mode=advancedSubmit&advSearchKey=PostWork](http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=0&langId=en&mode=advancedSubmit&advSearchKey=PostWork), accessed 26 February, 2017
men and are to be found in the southern part of Finland. According to a recent publication by the European Parliament (Voss et al. 2016), it is likely that the posting of workers during the previous years has been the fastest growing form of cross-border mobility within the EU; over half of all posted workers in Europe are sent to a neighbouring state and the average duration of posting is estimated to lie at below four months, with significant differences between countries.

1.3. Industrial Relations in the Construction sector

At European level, the most important industrial relations body is the European Sectoral Social Dialogue Committee of the construction sector. It was set up in 1999 in response to a joint request by the European Construction Industry Federation (FIEC) on the employers’ side and the European Federation of Building and Woodworkers (EFBWW) on the unions’ side. The ESSDC has not concluded any agreement but has produced several joint positions on different issues (health and safety, bogus self-employment, etc.).

Since 2007, the European Builders Confederation (EBC) has attended SSDC meetings in the FIEC delegation. EBC is not recognised by the European Commission as a European social partner but has requested recognition. It is registered in the joint European Parliament/European Commission Transparency Register of interest representative. Both FIEC and EBC organise national employers’ organisations rather than individual companies, being EBC focused on the representation of crafts and SMEs.

In three of the four countries studied (Spain, France and Finland) collective bargaining in the construction sector is mainly carried out at multi-employer sectoral level (including sectoral and regional agreements in Spain). According to Eurofound (2015), collective bargaining coverage in the construction sector is above 90% in these countries. On the contrary, in Poland there is only single-employer bargaining and collective bargaining coverage in the construction sector is below 10% (Eurofound, 2015). However, the Polish social partners have concluded framework agreements and pacts at national sectoral level.

2. Fraudulent practices, challenges, drivers and impacts

2.1 Main fraudulent practices

2.1.1 Identified at EU level

Representatives from the European social partners (European Construction Industry Federation, FIEC; and European Federation of Building and Woodworkers, EFBWW) and from the European Builders Confederation, EBC, identified several types of fraudulent practices as prevailing in the European construction sector.

Circumventing the Posting of workers regulations

Main fraudulent practices identified by the European social partners interviewed were related to the circumvention of posting workers regulation (Posting of Workers Directive 96/71/EC) as a result of different abuses linked to misuse of employment agencies, subcontracting and self-employment abuses; letter box companies; and the circumvention of working conditions regulations. In some cases, however, frauds such as ‘bogus self-employment’ may occur both, in the framework of cross-border mobility and at national level. As reflected in the literature (Voss et al., 2016; Eurofound 2017b), sub-contracting – often with the involvement of temporary employment agencies - is an extensive practice in the construction sector,
usually built as a complex multi-level network in different Member States. Overall, there is an agreement on the complexity to disentangle and distinguish abusing legal relationships to benefit from social dumping elements from strict illegal practices. As EBC and EFBWW stressed, posting workers through temporary employment agencies is a situation considered and regulated in the PWD, and is legal across Europe. The main issues though are linked with the systematic posting of workers from countries with lower social security contribution to third countries with higher social security costs, putting further pressure on the sector to cut costs. As a result, other companies may be tempted to resort to fraudulent behaviours to be able to compete.

As found in the previous Eurofound study (Eurofound, 2017b), some European employers’ organisations (notably FIEC but also EBC) also stress that abusing of self-employment to disguise posting of workers, is a practice particularly difficult to identify for public authorities. The assumption is that the employment status indicated on the A1 certificate – necessary for determining the applicable social security system - states the nature of the worker’s employment status. This means that the definition of the employment relationship depends on the Member State in whose territory the person concerned normally works, as it is the one responsible for issuing the social protection certificate. As a result, the receiving country has no power to restate/requalified the employment status (Eurofound, 2017b).

Another type of fraud associated to posting is linked to the working conditions experienced by these workers, mainly due to non-respect of regulations. In this sense, attention should be drawn to the observation, raised by the European Commission, that posted workers might earn up to more than 50% less than their local colleagues – particularly in high-wage countries (Eurofound, 2017a). In addition, EU social partners identified different abuses linked to, for instance, deducting from wages accommodation costs, working clothes costs or security equipment costs (FIEC and EFBWW interviews). EFBWW interviewee explained a case of posting workers forced to give back to the employer part to salary once they were in the receiving country (see Box 1 below).

**Box1. Working conditions frauds and posting**

200 Croatian workers are posted to UK by a Croatian company. As soon as they arrived in the receiving country (UK), the manager of the Croatian company asked them to “pay back 50% of their salary”. Most of them paid the salary back in cash. Some of the workers refused to pay and were sent back to Croatia. In Croatia, the company issued a legal procedure against those workers, arguing that they had signed an agreement accepting to pay back to the employer 50% of the salary received in the host country. Court cases are pending, the director of the Croatian company claiming part of the wages paid to the workers.

The EFBWW representative stressed that the workers before leaving their country did sign, under the company pressure, an agreement stating that they would pay back part of the salary. However, given the circumstances in which they are obtained these agreements are illegal.

Source: EFBWW interviewee
**Bogus self-employment**

EU social partners (EFBWW, FIEC) and EBC also agreed to identify *bogus self-employment* as a very relevant fraudulent practice, widespread in the construction sector at national level.

The “Bogus self-employment” issue has been addressed by the European social partners (EFBWW, FIEC) in the framework of the European Sectoral Social Dialogue Committee, which issued, on February 2010, a set joint conclusions and recommendations on self-employment and bogus self-employment in the construction sector. This joint text accepted that there is room in the sector for genuine self-employment but, at the same time, it recognised that although the situation differs significantly from one Member State to the other, bogus self-employment is a problem in the construction sector. It usually results from trilateral relationship between the contractor, an intermediary, and the worker. In these cases, the intermediaries (agencies/gang masters or contractors) provide a labour force where workers have a bogus self-employed status, yet none of the legal, professional, financial, regulatory and administrative knowledge and skills of genuinely self-employed workers. Furthermore, simultaneously the workers are not properly covered by employees’ social insurance and labour rights. This joint text also suggested that, although in most of the countries there are no figures available, a great share of self-employed and potentially bogus self-employed workers are migrants.

**Sham companies**

FIEC also identified the case of *bogus construction companies*. These are companies that are neither construction companies nor temporary work agency. They are manpower companies set up to provide workforce to construction companies. They declare themselves as construction companies but they don’t have their own construction activity. They only provide workers to construction companies at both national or cross-border level.

Conversely to employment agencies, *letterbox companies* are illegal, as they do not carry out significant economic activity in their ‘home’ country; being only created to post workers abroad. As explained by EFBWW representative, usually, one consultant or lawyer can manage between 50 and 100 letterbox companies which have no genuine activity. These companies are generally established in countries with comparatively lower labour and social security costs to take advantage of lower contributions. In some cases, they are built as a complex multi-level network in different Member States, as illustrated with the example included in Box 2.

**Box 2. Subcontracting and posting**

An Irish temporary agency company was providing Polish workers to France through an intermediate company located in Cyprus. Workers were therefore registered in Cyprus but the company was not paying social security contributions neither in Cyprus nor in Poland. Fraud was possible due to the complexity of the subcontracting practice. In this case, the company takes advantage of the complexity of controls and the difficulties to determine the habitual place of work of these workers. Cyprus authorities were made to believe that social security contributions were being paid in Poland, where the workers come from, or Ireland, where the headquarters of temporary agency company are located.

*Source: FIEC interview*
Besides, it is worth noting that the EFBWW stressed that fraudulent practices should not be reduced to a couple of practices usually circumscribed to cross-border mobility (letterbox companies, etc.) or well-known frauds (e.g. bogus self-employment): ‘There are 1000 types of frauds in the construction sector. The system of fraud is always simple: not paying what the person is entitled. You can give them fake contracts, double contracts, contracts with illegal clauses; you can pay money in black or cash under the table, not paying taxes, one part paid officially and one part paid undeclared, etc.’.

Finally, representatives of the three organisations interviewed (the two social partners organisations and EBC) agreed that fraudulent practices are widespread in all the European countries in the construction sector. As stated by EBC representative: ‘There are not countries a lot better or worse than others. There is a lot of fraudulent work in construction in general (Scandinavian countries, Belgium, France, etc.). These phenomena are harmful for the whole construction sector (EBC interview). However, EU social partners also noted that fraudulent practices and their effects vary across EU countries, mainly as they generate different problems depending of some features; such as the differences existing in sending countries (Eastern countries) compared to receiving countries (West and Nordic countries).

2.1.2. Fraudulent practices in Construction in four countries: Finland, France, Poland and Spain

A variety of fraudulent practices were identified as relevant in all four countries studied. **Bogus self-employment**, understood as a practice where workers employed at national level are declared as self-employed simply to reduce social security, labour law and collective bargaining liabilities, was assessed as the main fraudulent practice in the construction sector in Poland, and as very relevant practice in Spain and to some extent in Finland and France.

In Poland, the scale of bogus self-employment is considerable. Experts in economics, sociology and law are unanimous about it, even if they pointed that there are no comprehensive empirical studies on the scale of the phenomenon, its intensity by sector, and especially its causes and consequences in the construction sector as such. For example, Prof. Bugaj (Institute of Economic Studies, Polish Academy of Sciences), stresses the involuntary situation in which individuals qualified as ‘self-employed’ can be. He describes the entrepreneurs in Poland as "a very heterogeneous community, because not all companies (this refers to the phenomenon of "solo-entrepreneurs") have been established voluntarily. This coercion can of course be a result of the employer’s pressure to switch to self-employment, but it can also be the only way to get out of unemployment. Many programmes addressed to the unemployed consisted in encouraging them to start their own business activity, for which subsidies are made available" (FORSAL.PL. 20-02-2015).

In Spain, Bogus self-employment, which also affect the figure of ‘economically dependent self-employment’ regulated in 2007, is spread due to, among other causes, the lack of resources of labour inspectorates to enforce existing regulation, as trade unions denounce (Eurofound. 2017b). A recent report of the ‘Labour Foundation Asturias’ (FLC Asturias 2015) highlights the existence of bogus self-employment in the construction sector as the result of employers’ strategies aiming to save labour costs. They estimate that in this region, between 30% and 40% of self-employment in the construction is bogus self-employment.

In Finland, the number of articles, websites, etc. concerning bogus self-employment may be an indicator of the scale of the phenomenon in the construction industry. But again, no in-depth studies on this subject could be identified. In France, the Assessment of the programme of controls operated in 2015 by the labour inspectorate, focused on three sectors (construction, hotel-restaurant and agriculture) points that on the 13,156 companies (against
2,343 companies in 2013) identified as violating the law (18.9% of the total of inspected companies), 3% were related to misclassification of employees, including bogus self-employment but also bogus trainees or volunteers (7% in 2012). The construction sector represented 44% of the total number of controlled companies.

*Circumvention of posting regulation* was assessed as the main fraudulent practice in the construction sector in Finland and France. On the contrary, in Spain, this fraudulent practice is not especially problematic nowadays. Previous to the economic crisis, the ‘Labour Foundation’ (2006) found cases of Portuguese companies within the construction sector, posting workers to Spain that were not applying the minimum wage as regulated in the construction collective agreement. The union maintained that in the case of many posted workers, the law was not respected and it asked the employers to check on their subcontractors and demand compliance with the law. In addition, a ‘cooperation agreement’ was signed between the Portuguese and Spanish labour inspectorates, to tackle jointly abuses and frauds. Currently, both trade unions UGT and CCOO (informally consulted in a seminar on posting) consider that abusing the posting of workers does not represent the main type of fraud, as since the crisis, the construction activity dropped and, as a result, companies were more oriented to export (i.e. to develop construction projects in intercontinental markets), especially in South America, than to develop national projects hiring European workers.

**Poland**, which, as noted in the first section, is the country that sends the highest number of posted workers to other Member States, lacks studies and empirical analysis on posting. Country expert only could find one study reflecting the *non-respect of payment provisions* (Benio, 2016).

In **Finland**, cases where companies were circumventing *working conditions regulations*, especially in terms of payment (see Box 3) but also related to non-adherence to working time regulation have been discussed. These frauds have been reported in the literature to be common among workers posted from Estonia and Poland (Alho, 2013; Lillie and Sippola 2011). Fraud related to posting has implied also the creation of letterbox companies. In this sense, the Finnish Construction Trade Union and the National Bureau of Investigation (Keskusrikospoliisi, KRP, i.e. a police authority) have pointed to cases where letterbox companies established in Estonia are used for operating in the Finnish construction sector (Alho, 2013; KRP, 2010).

**Box 3. Working conditions frauds and posting in Finland**

In 2015, 186 Polish electricians had been working on the construction of the nuclear power plant Olkiluoto 3, but were employed by a sub-contractor based in Poland. Accordingly, they were regarded as posted workers. They start organising after discovering they earned much less than their Finnish colleagues, and joined the Finnish Electrical Workers’ Union. The Union pursued the Polish company presenting pay claims exceeding 6.5 million euros. The employer dismissed the claim referring to the Polish law, according to which employees are not allowed to assign their pay claims to a union and refusing to pay wages in accordance to the Finnish collective agreement. The Finnish union then took the case to the District Court which, asked the European Court of Justice on how to interpret the concept of ‘minimum rates pay’ in the Posting of Workers Directive but also how to interpret the Polish law on pay claims. The 2015 ECJ ruling (12.02.2015) stated that Finnish wage regulations and collective agreements should apply equally to everyone who works in Finland. The ruling means that from this on all workers, including posted workers, must be payed basic wages, holiday bonuses and all other benefits agreed /decided/ fixed in the general collective agreement of the construction sector.

*Source: Press release, BWI 2015.*
In France, social partners agree to assess the relevance of this fraud, identifying a huge increase of fraudulent forms of posting of workers in recent years. According to information obtained through interviews with social partners and labour inspectorates, the provision of international services generates numerous reports of the labour inspectorate allowing identifying several abuses and irregularities. Cases highlighted concern triangular labour loan situations in which the contract holder enters into contracts for the sublease of employees with several undertakings and whose subordination is transferred to one of them; they also point at situations of circumventing of working conditions regulations, mainly in terms of payment.

In addition, it is worth mentioning the National plan against illegal work 2016-2018 presented on 30 May 2016, in which the Ministry of Labour has specified several forms of complex frauds on which the labour inspectorate and the other control agents have to focus. These concern letter-box company, fraudulent use of cross border temporary workers agencies and the misuse of intra-group posting of workers.

The misuse of intra-group posting of workers is becoming a relevant fraudulent practice according to national authorities. There is a growing tendency among European companies to post workers within branches of the same company or group. In some cases, the groups concerned have a genuine European dimension –having subsidiaries in various EU MS:- conversely, it may occur that a company based in an EU Member State will work directly with a French client, invoicing for its services through a subsidiary or branch, set up in France with no employees (letter-box companies). According to national interviews, it appears that employees involved in these sham constructions are mainly low qualified while usually managers or engineers are the one benefiting of /concerned by intra-group mobility. The analysis of the declarations by companies of posting of workers (Ministry of Labour, Commission nationale de lutte contre le travail illégal, “Analyse des déclarations de détachement des entreprises prestataires de services en France en 2015”, September 2016), shows the following trends: the number of declaration filled up on the ground of intra-group mobility has sharply increased since 2011. Furthermore, ‘it is very likely that this volume is only a partial reflection of the intra-group detachment on the national territory, which is certainly under-reported”, stresses the Ministry of Labour,. The share of such intra-mobility in the total of declarations, increased from 3% in 2012 to 7% in 2015. In 2016, the share of intra-mobility has increased in 2016 by 8,000 declarations.

Other fraudulent contractual cases identified in Spain and Poland, are related to the circumvention of health and safety regulation in the framework of subcontracting chains and multi-level contracting and irregular classification of companies’ activities in sector others than construction.

The “Labour Foundation Asturias” from Spain (FLC. 2015) has identified a fraud that concerns the irregular classification of companies’ activities to benefit from regulation decided in collective agreements negotiated in other sectors. Indeed, this bipartite regional body denounces the existence of companies classifying their activity in a different sector than construction, with the aim of been covered by less strict and expensive collective agreements. As a result, these companies avoid the regulation negotiated through the construction collective agreements in terms of health and safety and vocational training, among other fields, depriving workers of several rights provided by them.
2.2 Main enabling factors and drivers

Several sector characteristics could constitute the drivers to fraudulent practices.

As stressed by the EU social partners’ representatives and national stakeholders (ES) interviewed, the high degree of labour intensity that characterised the construction sector is the most relevant driver explaining fraud. According to EFBWW representative, about 50% of the turnover in the construction sector is achieved through the labour of the workers. This feature leads companies to foster competitive advantages based on lowering labour costs which may include fraudulent practices, as discussed in the previous section. Spanish stakeholder interviewed from a regional paritarian construction body (FLC Asturias) related this sectoral feature to the widespread use of bogus self-employment: ‘we see that companies, in order to be able to be competitive and lowering prices in tendering processes, resort to bogus self-employment practices. Indeed companies consider that applying the collective agreement of the construction sector to all their workers treated as employees, induces ‘high labour costs’. Thus, to be competitive, instead of ‘hiring’ regular workers, companies turn to individual workers considering them (abusively) as “self-employed”’ (President FLC Asturias).

According to the EBC representative, the low level of skills needed for certain professions in the sector has also an impact on undeclared work and fraud, being also a key driver for explaining abuses in posting of workers: ‘posting is not anymore what is should have been: fill skills gap in country A with workers form country B. Posting in the construction is about unskilled workers coming just for a lower price. This factor makes this phenomenon structural in the construction sector and not punctual or episodic’.

Subcontracting was identified as a key enabling factor in Spain, Poland and Finland. In Spain (especially before the economic crisis) and Poland, the effects associated to subcontracting chains and multi-level contracting has been associated to higher rates of labour accidents (Monreal de la Iglesia, 2008) as subcontractors at the bottom of the contracting chain were found to circumvent some elements of health and safety regulation. To handle this situation, new regulation and different control measures were enacted and launched by both, government and social partners (Spain) or social partners (Poland). In Finland, the literature notes that, as a result of the subcontracting system, main contractors are able to avoid the fulfilment of the norms of the Finnish labour legislation through subcontractors who import lower-paid labour force into construction sites (Lillie and Sippola 2011; Mankki and Sippola 2015).

However the importance given to subcontracting in the sector is contested. For instance, the EBC highlights that “subcontracting is not a specificity of the construction sector explaining fraudulent contracting per se”. In his view, subcontracting chains are a way for the general contractors (bigger and medium companies) to cut costs and put pressure on the subsequent elements of the chains. Under certain circumstances (crisis, etc.), small companies and subcontractors may be tempted to resort to fraudulent contracting to save costs (declaring fewer hours than actually performed, etc.). However, EBC does not consider segmentation and multi-clients organisation of the sector as a specific driving factor explaining fraud.

Various external features create a favourable environment enabling fraudulent contracting to develop in the construction sector.

Public tenders play in this regard, a significant role. As noted by EBC representative, features of the public administration tendering system in some countries, contribute to explain abuses and irregularities, for giving prevalence to the price over other criteria such as quality
of the work. As the overall cost of the service plays an essential part in the choice of the contractors, companies consider they are forced to reduce prices, generally transferring this pressure to the workers by lowering working conditions.

The impact of the economic crisis on contractual practices was stressed by the EU social partners (FIEC and EFBWW) and the EBC. In this sense, EBC pointed that the economic crisis has increased competition in public procurements. Given the fall in demand, an increasing number of companies ‘desperate for work’, compete in local public procurements, offering 40-45% reduction of price. Those situations generate two effects that can foster fraudulent practices: first, they push down the average prices on the market; second, they put pressure on the subcontracting chain, as they need to subcontract at local level while they do not have staff or facilitates at this level to perform the work, provoking a displacement of the risks associated to the discounts offered to gain the tender, from the bigger companies to the weaker companies.

Lack of transparent information on regulation is another major factor, potentially also leading to involuntary fraud. According to FIEC, this factor sometimes leads companies to unintentionally circumvent particular aspect of legislation. This specially applies to posting as companies do not always know all legislative aspects and collective bargaining provisions existing in the receiving country. In some cases, companies have not enough resources to carefully read all the legislation and end up not respecting particular provisions (e.g. working time) unintentionally.

Problems to enforce regulatory elements also appear as an important enabling factor. Issues linked with availability and competences of control bodies are key in this regard. The European social partners pointed to a general insufficient number and resources of labour inspectorates at national level to prevent and tackle fraudulent practices, although they also acknowledged improvements on this in some countries (notably France): ‘in almost all the countries there are not enough labour inspectors. Therefore, some companies may be tempted not to apply the adequate regulations, as they can easily figure out that the probability to be controlled and to have to pay a fine is quite low.’ (FIEC interview).

In Spain, problems to enforce regulation were reported in relation to public procurement. The paritarian regional construction body FLC Asturias, critically noted that public administration does not properly monitor the fulfilment of public tendering regulation. This regulation limits subcontracting by requiring a contractor under public contract to perform 40% of the works him/herself. As regulation is not properly monitored, companies can resort to bogus self-employment and other bogus subcontracting chains.

The FIEC representative also stressed how challenging may be to enforce PWD regulation given the lack of means of national authorities to check A1 forms (see Box 4 below).
Box 4. Example of problems to control Posting of workers

A company needed to post workers to a neighbour country quite rapidly. They asked the authority from the home country to provide 20 A1 forms but they needed them very urgently. The person in charge for delivering A1 forms did not have materially the time and human resources to check the information for all the 20 workers, but the civil servant received pressures internally to deliver in any case the 20 A1 form.

So, the national authority checked only three contracts and then issued A1 forms for all the workers without control.

Source: FIEC

Moreover, most control bodies lack direct competences to revisit the employment status as given by a foreign national authority.

In Poland, national debates leaded by trade unions have taken place on the competences and powers of labour inspection body to better tackle bogus self-employment. The Polish inspection body (National Labour Inspectorate, Państwowa Inspekcja Pracy PIP) has no competence if the work relationship under examination bears the characteristics of subordination, to automatically “convert” a civil law contract into an employment contract. Converting the contract requires filing an action with the labour court. Action can be filed by a labour inspector or by the interested party. According to country expert, such a regulation discourages many people from being pro-active and filing a suit. Judiciary claims usually appear ex post, after the relationship between the parties ends, requesting for the civil-law contract to be converted into an employment contract, so as to obtain, for instance, additional payment for overtime work. Trade unions in Poland propose to extend the powers of the PIP, allowing the inspectors to issue an administrative decision “converting” the contract. The current Chief Labour Inspector, Roma Giedrojć, expects legislative changes in this respect (Ekspress gospodarczy, 1-12-2016).

With regard to the circumvention of PWD, representative from EFBWW stressed the problems to control abusing of self-employment to disguise posting of workers: ‘If you are posted as bogus self-employment, even if is for 100% clear that you are a fake self-employed, the receiving member state has no competences to reclassify the employment relationship, due to the so-called mutual trust system between member states’ (EFBWW).

Finally, some cultural factors were identified (EBC, EFBWW, President FLC Asturias from Spain), related to the fact that private contractors (small enterprises, individual clients, etc.) generally focus on the final price, and barely check if employment, social security or tax regulation is being respected.

2.3 Impacts

As previous research underlined (Eurofound 2016 & 2017b), fraudulent contracting of work practices significantly impacts both workers’ rights and business competition. Distinguishing the various abuses is a particularly complex issue in this regard. Non respect of working conditions regulations can be found across both legally used employment relationships and fraudulent ones; in both situations negative impacts in terms of working conditions and business competition can be found.
Regarding workers’ rights, several negative impacts can be seen on different dimensions, such as working time, pay, health and safety, social security rights, etc. All forms of fraudulent contracting of work display negative consequences.

Fraud associated to posting of workers is usually linked to circumventing direct employment and collective bargaining regulations. Thus, negative impacts for workers can be seen on different dimensions of working conditions and rights, such as working time, pay, health, security and safety (Eurofound, 2017b), worsening some consequences existing vis à vis workers legally posted. Negative effects on pay and wages are of a great concern in Finland and France related to the circumvention of PWD. In these countries, posted workers are commonly not paid what they should be according to collective agreements. Circumvention of existing regulation in terms working time is also reported to be quite common among posted workers (Hirvonen, 2012) in Finland. This may imply that workers work more daily or weekly hours or that they are not remunerated for overwork. As previously noted, European social partners also referred to cases of posted workers been forced to pay back part of their salary and cases of companies deducting for instance, accommodation costs from the wages.

Fraud linked to bogus self-employment, which is widespread practice in the European construction sector (including the four countries studied) has negative effects in several dimensions such as social security protection (pensions, unemployment benefits), health and safety protection, employment and job security (compensation for dismissal, etc.), wages and working time. Negative effects on health and safety are of a great concern in Poland and Spain linked to subcontracting chains and multi-level contracting where subcontractors at the lower level circumvent health and safety regulation. Nevertheless, linking fatalities, health and safety breaches, and poor employment practices to bogus self-employment is not straightforward and is difficult to prove (Eurofound, 2017b). Empirical evidences on this relationship were not found in these countries; although in Spain, the high incidence of labour accidents in the construction sector prior to the economic crisis was explicitly associated by the government with long subcontracting practices where subcontractors were not fulfilling health and safety regulation (Monreal de la Iglesia, 2008).

In addition, fraudulent cases were found by the social partners related to the fact that some workers attested to have received basic training in health and safety when this was not true. Generally, bogus self-employment may entail a higher risk of work-related accidents because civil law regulation implies that the self-employed worker – and not the company – is solely responsible for developing a strategy to prevent work-related risks.

The impacts of fraudulent practices on business competition are, as previous research shows (Eurofound, 2017b), particularly difficult to acknowledge and assess. Nevertheless, as FIEC and EBC noted, it appears clearly that companies respecting rules and legislation face problems to remain competitive in the construction sector. As a result, some search for saving costs on wages or training and this generates a negative impact on the sector at large; on workers’ rights and on construction companies’ image and productivity.

Moreover, regarding business competition, the whole issue of posting can be regard as sensitive, as some organisations maintain that even legally used, posting of workers practices may have an impact on regular employment, hitting specially SMEs. For instance, according to EBC there is a clear impact on employment in the sector, coming from legal practices of posting: in Belgium the construction sector has lost 40,000 jobs as a result of these forms of temporary labour mobility, leading to the closing of many SMEs.
3. Combating fraudulent forms of contracting work and employment

3.1 European regulation and proposals on posting from EU institutions and sectoral social partners

At EU level, the most relevant initiatives to prevent and tackle fraud that may affect the construction sector concern the posting regulation. Several discussions -prompted by various EUCJ decisions, including the 2007/08 Laval case-, illustrate some of the key difficulties in monitoring and controlling the posting of workers, mainly in terms of a) duration of posting; b) enforcement of minimum rates of pay, especially as regards decentralised collective bargaining agreements which are not universally applicable; c) definition of establishment based on criteria aiming to determine if there is a genuine link between the undertaking and the sending Member State (Eurofound forthcoming; Eurofound, 2017).

In order to tackle these problems, the European Commission set forth a number of initiatives over the last years, namely the adoption of Directive 2014/67/EU, aimed at supporting cross-border administrative cooperation and at promoting information on, transparency and accessibility of the employment terms and conditions (Voss et al. (2016))

FIEC and EFBWW have provided a joint assessment on the Enforcement Directive in the Proposal ‘Towards a level playing field in the European construction sector’ (27-02-2015), demanding:

- To explicitly recognise, as underlined by the case law of the European Court of Justice, that the fight against social fraud is an ‘overriding reason of public interest’ and that Member States can take the necessary measures in this respect, in accordance with their national traditions and structures.
- To ensure a more balanced implementation and application of the Enforcement Directive, guaranteeing the direct involvement of the national social partners in the implementation phase of the Directive.
- To facilitate and promote, with the appropriate technical and financial support, the development of bilateral or multi-lateral actions/collaborations (e.g. for more strict and efficient controls in the country of origin) between the concerned stakeholders.

It is also worth noting that during the discussion process, FIEC and EFBWW lobbied to modify the initial proposal of the Commission, which aimed to limit the control measures that member states could implement. Both social partners lobbied for the opposite, being finally satisfied with the provisions of articles 9-10 of the Directive (FIEC interview).

EBC provided an overall positive assessment of the Enforcement Directive but demanded:

- the introduction of a public database containing information on subcontractors’ compliance with the host country’s social legislation based on data collected by public authorities and on improved cooperation between Member States (Press release EPSCO).

In line with this demand, EBC stressed that ‘the Enforcement directive is a good idea which, however, has not met its goals because it does not force countries to mutually cooperate, only fostering cooperation on a voluntary basis’.

In addition, in March 2016, the EC put forward a proposal for a ‘targeted revision of the Posting of Workers Directive’, still under discussion. The table 6 below summarises the assessments of the EU social partners on the EC proposal.
Table 6: Assessment of European organisations on EC proposal for a ‘targeted revision of the Posting of Workers Directive’

<table>
<thead>
<tr>
<th>Duration of posting</th>
<th>EBC</th>
<th>FIEC</th>
<th>EFBWW</th>
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<tbody>
<tr>
<td>(proposed Article 2a): workers posted for longer than two years should at least be covered by the mandatory rules of protection, included in the labour law of the host Member State. In order to ensure the “aligning the Posting of Workers Directive with the conditions set by the Regulation on the coordination of social security systems as regards long-term posting, removing the limit of 6 months for posting activities. It should be up to the European sectoral social partners to fix the period according to the needs of their sector. Posted workers should be employed by the construction company at least 6 months before starting any posted activity in another country, to avoid bogus contractual relations. Making clear that 24 months are not a maximum limit for posting; only that beyond there is a presumption of habitual place of work in the host Member State Law applicable: -if no other choice made by parties, following ROME I regulation, Host MS Law applies: -if parties have chosen the law applicable, employees should not be deprived of provisions not to be derogated from by agreement under the host MS law.</td>
<td>Removing the limit of 6 months for posting activities. It should be up to the European sectoral social partners to fix the period according to the needs of their sector. Posted workers should be employed by the construction company at least 6 months before starting any posted activity in another country, to avoid bogus contractual relations.</td>
<td>Making clear that 24 months are not a maximum limit for posting; only that beyond there is a presumption of habitual place of work in the host Member State Law applicable: -if no other choice made by parties, following ROME I regulation, Host MS Law applies: -if parties have chosen the law applicable, employees should not be deprived of provisions not to be derogated from by agreement under the host MS law.</td>
<td>-The time limit derogations proposed by the European Parliament are not acceptable -the proposed time-limit of the Council is a suitable compromise</td>
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<table>
<thead>
<tr>
<th>Remuneration</th>
<th>EBC</th>
<th>FIEC</th>
<th>EFBWW</th>
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<tr>
<td>(proposed Article 3 (1)): posted worker should be treated according to the same rules as local workers and employers will have to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, to posted workers as to local ones. Proposes the inclusion of agreements set at sub-national level.</td>
<td>Proposes the inclusion of agreements set at sub-national level.</td>
<td>minimum rates of pay Defined by national Law or practice of the MS to whose territory the worker is posted</td>
<td>Defined by national Law or practice of the MS to whose territory the worker is posted. Explicitly stating that the provisions of “board, lodging, transportation or other expenses cannot be deducted from the worker’s remuneration”</td>
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<tr>
<th>Sub-contracting chains: (proposed Article 3 (1a)): Member States have the option to oblige companies to subcontract only to providers (national or foreign) that respect the applicable conditions of remuneration.</th>
<th>N/A</th>
<th>To be deleted</th>
<th>To be kept</th>
</tr>
</thead>
<tbody>
<tr>
<td>Already allowed if MS wish so; no need for this provision</td>
<td></td>
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<table>
<thead>
<tr>
<th>Temporary work agencies</th>
<th>EBC</th>
<th>FIEC</th>
<th>EFBWW</th>
</tr>
</thead>
<tbody>
<tr>
<td>(proposed Article 3 (1b)): equal treatment of posted temporary agency workers</td>
<td>Remove TWA from the provision of posted workers</td>
<td>Better legal clarity regarding the position of temporary agency workers in the framework of posting</td>
<td>Strong support of equal treatment for temporary agency workers</td>
</tr>
</tbody>
</table>

As detailed in Table 6, EBC demands a stricter regulation in some of the fields, such as the criteria for posting, where the organization demands *to limit posting to workers hired by companies at least 6 months before starting any posting activity*; or the question of temporary work agencies, where EBC claims to fully remove them from the regulation, rather than requesting ‘better legal clarity’ as FIEC and EFBWW do. The EBC explains its position underlying that its members, small companies in the construction sector, are not involved in posting activities but are mainly the one negatively affected by this form of labour temporary mobility in terms of business competition, especially in some Western countries. Western SMEs in construction advocate for this removal, and Eastern European members of EBC, not concerned by posting, have no problem with that either.

Finally, attention should be drawn to two EU initiatives that have been strongly rejected and criticized by the three European social partners from the construction sector. These initiatives are:

- The ‘EU services card’, previously known as “services passport” as part of the Internal Market Package (COM (2015)550, presented on 28.10.2015 and in the Work Programme 2016 of the European Commission). The EU service card aims to be a simplified electronic procedure that should make it easier for providers of business services (e.g. engineering firms, IT consultants, etc.) and construction services to complete the administrative formalities required to provide services abroad;

Regarding the EU services card, FIEC and EFBWW have jointly stated that it is based on a wrong understanding of the specificities and of the functioning of the construction industry. As noted in a letter send on 9 June 2016 to the President of the EC, construction sector, as opposed to other industries which are based on fixed production units and mobile final products, operate through a production unit (i.e. the company with its workers) that has to move where the final product is produced. Thus, they hold that, benchmarking construction with other sectors and highlighting those differences as a reason for having to propose measures to increase its cross-border mobility is an incorrect approach. Moreover, they state that ‘Services Passport would not provide any useful added value whilst at the same time generating additional problems, facilitating cross-border frauds and disrupt the effectiveness of controls undertaken by labour inspectorates’ (FIEC and EFBWW, 9 June 2016).

In relation to the proposal for a directive on a private limited liability companies, their main concern, expressed in the joint FIEC&EFBWW position (27-02-2015) is that, by adopting the proposed Directive, the EC would open the door for companies, independently of their size, to set up letterbox companies in order to minimise their responsibilities under national law. As stressed by FIEC ‘this initiative would allow any person with one euro to open a company on line anywhere in Europe’. EBC agreed with those positions jointly expressed by FIEC and EFBWW (EBC interview).

Bearing those debates in mind, it is worth noting that FIEC representative stressed that there are some contradictions on the EU policy approach towards fraud, especially regarding the European Commission, which is the starting point of most of the initiatives. One the one hand, they are having several initiatives for fighting against social fraud (e.g. enforcement directive). But on the other hand, they take initiatives that can trigger more fraudulent practices. This contradiction is explained due to the different focus of DG of Employment, which is taking care of social aspects, aiming at preventing fraud and of DG Growth, which is looking at the internal market and freedom of services, considering measures against fraud as obstacles to the internal market development.
3.2 Sectoral regulations and social partners measures at national level

Several measures have been taken in the countries studied to address the complexity of controlling fraudulent practices and enforcement of regulations in the construction sector.

Enforcing regulations

Measures to enforce health and safety regulations

Several initiatives have been developed in Spain to enforce health and safety regulation. Main initiatives include:

- The “Register of Accredited Enterprises”. This is a register that records the national and foreign companies that aim to be contracted or subcontracted to carry out a project within the construction sector. It accredits that the company comply with the requirements for the prevention of risks in the workplace, regulated in the article 4 of the Law 32/2006. That includes:
  - to have adequate infrastructure and resources to carry out the activity;
  - to directly exercise the management and control of the workers, assuming the risks and liabilities associated to the activity;
  - to prove that the staff has the training required in terms of health and safety at the workplace and risk prevention;
  - to prove that the company has an adequate risk prevention organisation.

- The “Professional Training Card” (TPC): The card is managed by the Labour Foundation (FLC), which members are the most representative social partners (CCOO, UGT and CNC) and was approved by the sectoral social partners in the 2006 national collective agreement. It aims to prevent fraud associated to health and safety regulation by encouraging workers to have a personal training card where they have to introduce the data on the training in health and safety they have carried out. Avoidance of fraud is ensured through the request to construction workers, when applying for the TPC, to submit all official documentation attesting of their participation in training, such as the centres where they have completed the training, the contents, the hours etc., being this information validated by the FLC. The FLC keeps track (list) of all approved centres for training in the sector, to maintain their validation with a view to avoid irregularities and frauds in the provision of health and safety training diplomas. The TPC was declared as not mandatory by the Labour Court in 2010, thus stopping the obligation to present it as a mechanism of access in construction works. Nevertheless, it is worth noting that the Labour Court sentence did not annul the mandatory training regulated in the collective agreement, only the obligation of the card. The Court partly gave the reason for the claim filed by nationalist trade unions ELA and CIG which represent workers from the Basque Country and Galicia, respectively. They claimed that it was illegal to reserve the negation of the training accreditation to the sectoral national system, bearing in mind that they are the most representative trade unions in the regions they operate.

In Poland, a permanent Alliance called ‘the Agreement for Safety in the Construction Sector’ was created on 26 August 2010. Under the initiative of the Polish Association of Construction Engineers and Technicians and of the Chief Labour Inspector, six of the largest construction companies ([Bilfinger Berger (currently Porr Infrastructure), Budimex, Hochtief Polska, Polimex Mostostal, Skanska and Warbud]) adopted some common rules in the area of health and safety. Its aim was to improve safety on building sites and reduce the number of accidents at work. Currently, there are 12 companies that are adhered to the agreement. The agreement
has developed the following actions: standards for minimum requirements towards subcontractors; appendix to subcontracting agreements regarding occupational health and safety; guidelines to the safe works manual; periodical trainings for employees; the obligation to use protective glasses on each site; and the Safety Week which is an annual, common initiative for occupational safety on the Polish market. These initiatives and rules are binding only for the Alliance members. It is worth noting that although the activity of the Alliance does not refer directly to fighting *bogus self-employment*, it may be useful for this purpose, indirectly. The health and safety requirements regarding subcontractors, precisely specified by the leading construction companies, help, indirectly to eliminate smaller companies that fail to meet such standards (because they rely on bogus self-employment in their operations) from the market of the large construction contracts.

**Measures to enforce regulation fighting undeclared and fraudulent contracting of work**

Government’s commitment to combat fraud associated to posting of workers has been particularly high in *France*. To this aim, several legislative initiatives have been enacted since 2014. Firstly, attention should be drawn to the ‘Law no. 2014-790 of 10 July 2014 to fight against unfair social competition’ (in French), transposing the Enforcement Directive 2014/67/EU. This law goes beyond the Directive to a certain extent (see EurWork, “*France: New legislation on cross-border posting of workers*”). For instance, the law introduces a system of joint financial liability, which is part of the new rules designed to combat undeclared work included in the Labour Code. They extend joint liability to all contractors’ co-contractors in case undeclared work is discovered. New sanctions are also enforced: a criminal court may register on a blacklist (a specific website created for this purpose) all companies and natural persons who have breached criminal rules relating to undeclared work. Secondly, Decree 2015-364 on 30 March 2015, introduced stricter rules on the posting of workers. Foreign employers now have to nominate a legal representative in France, and the main contractor using the services of a foreign company has more responsibilities to comply with local legislation. Thirdly, the so-called Law “Macron” (loi n° 2015-990 du 6 août 2015 pour la croissance, l’activité et l’égalité des chances économiques) has also reinforced the sanction for abuse of posting workers. According to the new provisions, ‘an employer cannot rely on the provisions applicable to posting of workers when it has in the state in which she/he is established, “solely an administrative management activity” –targeting “letter box” of “empty shells” companies, or when its activity is carried out on the national territory in a regular, stable and ongoing basis’ (LC, art. L. 1262-3). The Law “Macron” made also compulsory that employees wear an ID card in the construction sector. No compliance with this provision may lead to a fine of €2,000 per employees (€4,000 in case of a repeat offence) with maximum amount for the same company of €500,000. Several decrees were published to implement the new legislation.

**Reinforcing controls**

**Measures to reinforce controls on subcontracting process**

In *Finland*, the Act on the Contractor’s Obligations and Liability when Work is Contracted Out (1233/2006), obligates the contractor to check certain aspects of the subcontractor before entering into a contract, but it only covers the first level of a contract (Ollus and Jokinen 2013). In addition, it is worth noting the webpage called *tilaajavastuu.fi* (Contractor’s liability), which offer services that help companies to comply with this Act. Their main customers are businesses in the construction industry, as well as public administration organisations. The webpage offers services either directly or through their partners with electronic services that help fulfil their administrative obligations. The webpage provides
services for the companies such as “The Reliable Partner service” which compiles a report on statutory information, including statutory accident insurances, applicable collective agreements and information on whether tax and employment pension obligations are fulfilled.

In **Spain**, Law 32/2006 on Subcontracting in the Construction Sector imposed new conditions to companies that aim to intervene in subcontracting practices in terms of quality and company solvency (to have real activity and productive infrastructure, assume risks and liabilities, etc.), health and safety and percentage of workers hired with open-ended contracts (at least 30% of the entire workforce). Moreover, the law limited long subcontracting chains, forbidding the third level subcontractor to subcontract work and requesting subcontracting companies to fill a so-called ‘subcontracting book’ reflecting several aspects associated to the subcontracting chain (Monreal, 2008).

**Regulating the posting of workers and strengthening administrative control and monitoring**

In **Finland**, regulations aiming to strengthen administrative control and monitoring include the creation of a construction site register and a system of compulsory tax numbers for all construction workers (national and foreign). All individuals who work on construction sites must have individual tax numbers. This practice means that everyone doing work on construction sites must wear name tags with photos, and also their individual tax numbers that have been entered in the public register. The exact documentation requirements for foreign workers vary depending on the country from which the foreign citizens are coming. These regulations might have reduced the profitability of using posted workers (Sippola & Kall 2016; Kall et al. 2017).

In **France**, Law 786, reforming the Labour code, enacted on 21 July 2016 (*Loi visant à instituer de nouvelles libertés et de nouvelles protections pour les entreprises et les actifs*), made Social ID compulsory from 2017, but technical problems have been delaying its deployment across the country. Previously, this card existed on a voluntary basis, and it was only adopted by a small number of companies (about 10% to 15% of companies asked for it). The ID Card was officially (re)launched on 21 March 2017, with the first wave of implementation starting on 22 March in the regions of South-West of France (Nouvelle Aquitaine and Occitanie) for the French workers and it becomes immediately compulsory for posted workers on the whole French territory (link to press release). By the end of 2017, it is foreseen that the ID card will cover 500,000 companies and over 2 million of employees.

In **Spain**, the Cooperation Agreement Employment and Social Security Inspectorate Spain-Portugal (cross-sectoral) was signed in October 2003, being annually revised since then. By means of this agreement, central authorities of Employment Inspectorate of Portugal and Employment and Social Security Inspectorate of Spain established a framework of permanent collaboration, annually revised, in the following fields:

- Health and safety at the workplace: Both Inspectorates commit themselves to interchange information on labour risk prevention with regard to the companies of the neighbour country that operate in its territory, specially respect to the own prevention services. Moreover, they will inform the Employment and Social Security Inspectorate of sending country on the infractions detected. Thus, the Inspectorate of the sending country will be able to act on them.

- Labour accidents: In case of labour accidents occurred in the territory of a country that affect workers posted by companies from the neighbour country, central authority of Inspectorate where the accident occurred will inform central authority of the neighbour country of the results of the investigation on the accidents and on the
measures taken as a consequence of the labour accidents. Notification will take place immediately

- Interchange of information on workers’ flows: Inspectorates commit themselves to interchange constant information on workers’ flows

- Monitoring and reciprocal interchange on the companies that communicate the labour authority the posting of workers and on the enterprises detected that have posted workers without having noticed to the authority.

Public procurements processes

**Minimum rates in public procurements**

In Poland, the largest organizations of employers and workers in the construction sector signed an agreement on July 2014 on the use and promotion of a minimum rate in public procurement with a view to avoid competition strategies consisting on lowering costs that, as noted in a previous section, may lead companies to transferring this pressure to the subcontractors and workers by lowering working conditions. The minimum rate of 14.29 PLN per hour is to provide a basis for the calculation of bids for the procurements for the signatories to the agreement. The agreement only affects the construction sector.

Social partners’ actions

**Enforcing health and safety regulation**

In Spain and Poland, regulation and social partners’ actions were launched to reinforce fulfilling of health and safety regulation in the framework of subcontracting practices.

**Bilateral and cross-border cooperation between trade unions**

In Poland, cooperation has been officially established between Polish and German trade unions regarding Polish posted workers in the construction sector.

**Social partners supporting labour inspectorate work**

In Spain, FLC Asturias has developed a very innovative practice to combat fraud. This institution created in 1999 the “Commission on Health and Safety and Hiring Prevention” (Comisión de Seguridad y Prevención de Riesgos Laborales y Contratación, COPREVAS). Eight professionals work on a full-time basis, having been appointed respectively by trade unions (4) and employers’ organisations (4). They carry out actions to detect and prevent fraud with a special focus on bogus self-employment. The commission has power to freely enter in all the companies where they can check subcontracting books and conduct interviews with both workers and employers. On the basis of the information they obtain during their daily checking, they inform the regional labour and social security inspectorate once a week, according a cooperation agreement signed with the institution. In 2015, 2,942 construction sites were visited and 3,372 inspections were carried out. Thus, the working conditions of over 8,000 workers were revised (President FLC Asturias).
4. Key policy pointers

As research underlines for combatting fraud (Eurofound, 2017b), actions and initiatives in the construction sector should continue to develop in several areas: clarifying regulations, reinforcing controls and involving social partners.

Acting on regulation

Public procurements: responsible public procurement including labour clauses, requirements on direct employment or minimum rates can be used as means of avoiding competition approaches relying on fraudulent practices. This is especially relevant in the construction sector due to its high degree of labour intensity. As the cost of the service plays an essential part in determining the company that wins the contract, companies reduce prices, generally transferring this pressure to the workers by lowering working condition or resorting to fraudulent practices. As illustrated with some initiatives found (Poland), fostering responsible public procurements may involve public authorities but also employer organisations and trade unions.

Strengthening regulation regarding the position of temporary agency workers in the framework of posting: The extensive role played by the employment agencies in the framework of posting, usually operating through a complex multi-level network in different Member States, triggers abuses and frauds. In line with recommendations forwarded by EU social partners from the construction sector, regulation of temporary agency workers should be re-examined.

Acting on control

Explore opportunities offered by digitalisation of data: As highlighted in the previous Eurofound study (Eurofound 2017b), the ongoing digitalisation of administrative data can prove a powerful ally to make information more easily available. Experienced developed in France, Spain and Finland, illustrate how digital cards connected with personal details of the workers, including different elements (health and safety training, employment status, etc.) may discourage fraud and, in the framework of posting, could make easier to share or access relevant information.

Strengthening monitoring of subcontracting chains and multi-level contracting: Subcontracting practices are very widespread in the constructions sector. Subcontracting strategies are used to save costs, meaning a displacement from several risks from the bigger to the weaker companies. Under certain circumstances (crisis, high pressure to save costs, etc.), subcontractors may be tempted to resort to different fraudulent contracting to save costs (declaring less hours that actually performance, bogus self-employment, circumventing health and safety regulation, etc.). As proved experiences developed in Spain, Finland or Poland, subcontracting regulation may be strengthened through law mechanisms or agreements with a view of preventing abuses and frauds.

Develop and systematise the transnational administrative cooperation to prevent fraud on posting: as highlighted by the European social partners, the transnational nature of the fraud poses a problem of transnational administrative cooperation. The Enforcement Directive aims at reinforcing cooperation between national authorities. However, a greatest effort should be placed on facilitating and promoting the development of bilateral or multi-lateral actions/collaborations. These actions are crucial to prevent, self-employment abuses in the framework of posting.
**Improve resources of labour inspectorates:** enforcing regulation is a recognised challenge in the sector, acknowledged by most of the sectoral stakeholders. Enforcing regulation may be particularly problematic in some companies (notably SMEs) where trade unions or employees’ representative bodies are less widespread. Lack of regular controls may lead some employers to rationally choose irregular or fraudulent practices, as the likely cost of fraudulent actions can be perceived to imply lower costs than the potential benefits to be obtained in terms of, for instance, lowering labour costs. Bearing this in mind, it should be considered the need to improve resources of Control Bodies/labour inspectors with a view to reinforce its dissuasive effect.

**Acting on social partners’ involvement**

**Consider indirect or unwished effects of policies fostering internal market in fraud in particular sectors:** EU social partners’ positions on particular EC initiatives aiming to increase cross-border mobility highlight their potential indirect effects on fraud. EU sectoral social dialogue proves to be useful to consider the risks associated to these kinds of measures in line with sectoral specificities.

**Exploring the possibilities to support control bodies/labour inspectorate work through bilateral social partners’ bodies:** The lack of labour inspectorate human resources to prevent fraud is a problem highlighted by the European social partners which affect most of the countries. As budgetary restriction in many European countries may hinder to increase resources, at least in the short term, social partners could explore how to contribute to enforce regulation and enhance cooperation with labour inspector bodies, as proved for instance by the Spanish experience reported.
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