

## BETTER EUROPEAN RULES FOR SUBCONTRACTING IN THE CONSTRUCTION SECTOR

### Call for action

*The EFBWW urgently calls for a new dedicated European approach for better rules on subcontracting and their enforcement. The European Commission should use the momentum to swiftly make legislative proposals in the following ten priority areas:*

#### 1. Stronger subcontracting rules in public procurement:

EU legislation must ensure that all Member States set rules to limit the subcontracting levels in public procurement projects to a maximum of one or two sub-levels, allow only companies (incl. subcontractors) which engage in collective bargaining to participate in a public contract, and apply full joint and several liability.

#### 2. Limit subcontracting chain vertically and horizontally:

EU legislation must ensure that subcontracting is limited to a maximum of one or two sub-layers. Also, the permitted percentage of employed workers, the number of tasks, and the percentage of the turnover generated down the subcontracting chain must be limited.

#### 3. Full joint and several liability:

EU legislation must ensure unconditional and comprehensive systems of joint and several chain liability in construction in all Member States, including in cross-border subcontracting chains. Due diligence escape clauses must be prohibited.

#### 4. Due diligence:

The Commission must present an EU directive for mandatory human rights due diligence in companies and their supply and subcontracting chains. Workers' rights should be at its centre, with effective remedies, access to justice, and dissuasive sanctions.

#### 5. Digital enforcement tools for workers:

The Commission should present at the latest in 2022 a legislative proposal for a European Social Security Number or Pass which is mandatory in all Member States and allows for digital real-time verification of a worker's status. A European approach to social ID cards in construction must support existing and new systems, enable their digital cross-border interconnection, and respect the autonomy of the social partners involved.

#### 6. Digital company registers:

A new European directive shall introduce minimum standards for digital national company registers and for their digital interoperability, allowing real time enforcement and controls during inspections.

#### 7. Protect posted workers in subcontracting chains:

All relevant EU rules must be revised so that only companies which pursue a real construction business in their home Member State ('substantial activity') are allowed to post workers to another country. Intermediary labour only suppliers must be prohibited to post workers. Posted and migrant workers need easy access to justice. Member States which do not enforce these rules must be sanctioned. Minimum occupational safety and health (OSH) training requirements for all workers must be guaranteed.

#### 8. Strengthen trade union workers' representatives and EWCs:

The EWC directive must be revised in 2022 to fully enable trade union and workers' representatives to monitor and enforce workers' rights in supply and subcontracting chains. EWCs and works councils must get full access to all information regarding the subcontracting and purchasing policies of a company and to worksites for audits.

#### 9. Effective labour inspections and complaint mechanisms:

A new EU directive shall set minimum standards for labour inspections and complaint mechanisms based on ILO Convention No. 81.

#### 10. Same work, same rights, same salary:

European and national legislation must guarantee equal treatment in all public and private procurement, so that the subcontractor applies to his workers the same working conditions and social security rights that the main contractor applies, including the same collective bargaining agreements.

## Construction and subcontracting: from specialisation to social dumping

The European Federation of Building and Woodworkers (EFBWW) is a recognised social partner at EU level and represents the workers in the European internal market for the construction sector. The EU construction industry represents 9.5% of EU GDP (€1,324 billion) and 6.1% of EU total employment (12.7 million workers in about 3.2 million enterprises). Labour costs account for approximately 50% of the industry's turnover making labour a significant competition factor for companies.

A sustainable internal market for construction must be based on fair competition, innovation, productivity, good skills and qualifications, good working conditions, strong collective bargaining, and health and safety for all workers. Direct employment should be the norm. Where workers are not directly employed, full equal treatment - with equal pay for equal work at the same workplace at its heart – must be the unnegotiable principle.

In reality, this is not the case. In construction, we witness high levels of exploitation, fraud, and other labour abuses, especially in a cross-border context. Subcontracting is always a major factor. On the one hand, subcontracting is a normal practice for companies. A construction project implementation often requires different kinds of highly specialised abilities, skills, and knowledge. Specialised companies are subcontracted to perform specialised works. However, this is only one side of the medal.

The other side shows an increasing number of large companies which use the term 'specialised work' for normal, labour-intensive construction work. They outsource these key construction tasks to curb labour costs and open the doors for fraudulent companies who use cross-border subcontracting to make a profit with severe wage competition, exploitation, and social dumping. These companies use subcontracting chains to disguise employment relationships, circumvent tax and social security payments, escape joint and several liability, and hide from controls by labour inspection bodies. These subcontractors often vanish without paying the workers

their wage due after months of working. These companies are often intermediary labour only suppliers, letterbox companies, which do not pursue a real and productive business. Abusive subcontracting is an obstacle to sustainable growth and destroys the social market economy.

### RIVE GAUCHE CASE

In 2014, a main contractor signs a contract with a private investor to build the "Rive Gauche" shopping centre in the city of Charleroi/Belgium. The main contractor gives the project to a subcontractor. The subcontractor subcontracts to several other subcontractors. According to the trade union officials concerned, the price is negotiated at an abnormally low price. The main contractor therefore knew that the various national and European regulations could not be respected in this context.

In July 2015, the FGTB and CSC unions indeed detected numerous irregularities during the visit to the Rive Gauche site: Sectoral hourly wage not respected, non-payment of extras, bonuses (food and accommodation allowance), non-compliance with the regulations on working time in Belgium, bad housing conditions, undeclared work, lack of consent for some contracts, suspicion of incomplete payment of social security contributions to their home social insurance, etc. The file is still under judicial inquiry.

### The risk factors

Large construction companies often make between 50 to 80 % of their turnover through purchasing and subcontracting. There are many projects with up to 100% "real" activity performed by subcontractors. For example, the Dutch multinational Royal BAM (NL) is working with around 35,000 subcontractors. The global player VINCI operates 290,000 sites worldwide with dozens of suppliers for each project<sup>2</sup>. While main contractors are often

multinational companies (MNCs), approximately 97% of the workers are employed by medium sized, small, and micro companies. Cost-saving pressure imposed by clients and main contractors on subcontractors and tight deadlines often lead to situations in which subcontractors avoid complying with the rules: They do not pay the remuneration according to collective bargaining agreements or minimum wage law, disregard rules on overtime, health and safety, accommodation and transport, or other fundamental workers' rights.

The longer the subcontracting chain, the less transparent and the more difficult to control and enforce existing legislation and collective agreements. Long chains are used by criminal companies to circumvent joint and several liability rules. Other risk factors add up: Construction is by nature a project-based business with temporary and decentralised worksites, varying size of sites, and many activities of a short duration. Cross-border labour mobility mainly from low-wage to high-wage countries is a huge and growing factor: More than 40 percent of all postings in the EU take place in the construction business. Mobile workers from other EU countries and increasingly from third countries outside the EU are particularly vulnerable for exploitation and social abuse. Because of their weak position, they are often victims of un- and underdeclared work, fake postings, social security fraud, and disregard of fundamental workers' rights. Bogus self-employment plays a major role: Workers – often without knowing themselves – are declared as micro companies instead of employed workers, thereby disguising the real dependency between workers and their criminal employers.

### Intermediary labour suppliers: Exploitation as a business model

Cross-border subcontracting chains are built around a growing business model of intermediary labour only suppliers (recruitment, placement, temporary work agencies etc.) who use posting in cross-border subcontracting chains to make a profit out of wage, social

security, and tax dumping. Because of existing loopholes in European and national law, such practices are not necessarily illegal, but they certainly are immoral. One example is a new model for social security dumping in which some EU Member States act as gateways to post third-country nationals to high-wage and high-social security countries. Slovenia, for example, introduced a discount on social security contributions for companies who post workers across the EU. This led to a situation in which Slovenia posted more construction workers to other countries than were active on the Slovenian construction labour market. The EFBWW has filed complaints to the European Commission for illegal state aid in the internal market, the process is still pending.

### Lack of controls, lack of cross-border digital enforcement tools

Shady, criminal, and fraudulent companies thrive due to a lack of controls by labour inspection bodies, which – in many EU Member States – suffer a severe lack of resources, manpower, and up-to-date cross-border digital instruments. Companies exploit EU and national legal loopholes and administrative shortcomings – because they exist, because it is easy for them, and because the risk of detection is low. The European labour Authority (ELA) is on its way to become fully functional and still must prove its effectiveness in the fight against cross-border social dumping and fraud. The EU has still not introduced the European Social Security Number (ESSN) as announced in 2018. In the meantime, the [European Parliament is working on digital enforcement tools](#) and the Commission has started a new pilot project for a [European Social Security Pass](#) (ESSP). However, it is still open if this project will lead to a new binding tool for all Member States which allows for real-time digital enforcement.

Now it is time for change! It is time to make the EU internal market socially sustainable. It is time for better rules on subcontracting.

1. EFBWW toolkit for Monitoring and enforcement of workers' rights in supply chains in the construction industry - Strengthening workers' capacities in European Works Councils

## Here are the demands of the EFBWW:

### 1. Public procurement

The EFBWW demands stronger rules on subcontracting in public procurement. With the revision of the EU Public Procurement Directive (2014/24/EU) there is an improved framework for socially responsible public procurement, including a requirement for Member States to ensure compliance with labour law and collective agreements. Unfortunately, many Member States still have a narrow focus on the lowest price when choosing contractors for public construction projects. The European Commission's non-binding 2<sup>nd</sup> edition of the *"Buying Social" Guide for public procurement* of May 2021 enumerates a few good practices regarding subcontracting, namely:

- keeping a register of all (sub-)subcontractors,
- requiring the main contractor to 'flow down' basic social obligations in all subcontracts,
- replacing subcontractors breaching any social obligations,
- and to apply joint and several liability for breaches of social obligations under the contract.

While these recommendations are certainly right and receive full support from the EFBWW, they are not binding as such for all Member States and lack further elements, which should be added.

**The EFBWW calls for binding legislation** to ensure

- that subcontracting levels in public and Public-Private-Partnership projects are limited to a maximum of one or two sub-levels,
- that only companies (including all subcontractors) which engage in collective bargaining and pay wages according to the most favourable collective agreements can win a public contract,
- that full joint and several liability including dissuasive sanctions apply in all public contracts for the whole subcontracting and supply chain,
- and that due diligence escape clauses are prohibited.

### 2. Limiting the subcontracting chain

While subcontracting to hire certain companies to perform specific technical task is a normal procedure, artificially long and non-transparent subcontracting chains should

not be allowed. Instead, direct employment shall be fostered as the norm. Long subcontracting chains – both vertical and horizontal – are neither an economic nor an operational necessity, but a business model chosen to compete on the basis of social dumping. The EFBWW demands binding European standards laid down in an EU directive which should apply both to public and private contracts. The directive should limit subcontracting by allowing only

- a maximum of one or two sub-layers, granting enough flexibility for main contractors to engage with specialised companies while introducing a bottom-line as one decisive measure against social dumping and severe wage competition;
- a limited percentage of workers to be employed in the subcontracting chain, both horizontally and vertically – direct employment through the main contractor must be the norm;

#### BOUYGUES - FLAMANVILLE CASE

In January, Bouygues was convicted by a French court to pay a fine of 29,950 euros for concealed work. Bouygues is one of the biggest construction companies in France. In this case, 460 Polish and Romanian employees were hired via the Irish based temporary works agency Atlanco and posted to France to build a new reactor on the site of the nuclear plant in Flamanville. Between 2009 and 2011, several Polish workers were injured. Contrary to what they expected, they discovered that they were not covered by the social insurance in their home country, but in Cyprus. Their contract was with a fictitious Atlanco office in Cyprus. Atlanco has disappeared from the radar, but it used to operate under many different names (Atlanco, Atlanco Construction Limited, Atlanco Limited, Atlanco Rimec, Atlanco Rimec Group, RIMEC, Rimec Contracting SRL, etc.). The French social security institutions calculated that 12 million euros should have been paid in social contributions for all these workers in France. Compared to that, the fine of 29,950 Euros is nothing for Bouygues. Moreover, in France a company sentenced to a fine of more than 30,000 Euros can no longer participate in public tenders (about 50% of the construction activity). The sad lesson learned: Fraud in the context of cross-border subcontracting chains pays off!

- a limited number of tasks to be performed on the lower levels of the subcontracting chain;
- a certain percentage of the turnover to be generated at the lower levels of the subcontracting chain.

### 3. Joint and several liability

Rules regarding the main contractor's liability towards subcontractors differ from country to country. The EFBWW considers it a duty for Member States to introduce unconditional and comprehensive systems of joint and several chain liability in construction, including across borders, as a central part of new rules on subcontracting in the EU. The EFBWW demands that clients and main contractors always be liable for the actions taken by subcontractors, which would encourage them to carefully select the companies further down the chain and make them refrain from engaging with letterbox companies and shady intermediary labour only suppliers. This would especially help in situations where workers are unable to enforce claims against a fraudulent employer that just disappears when paying salary is due. While the EFBWW also supports the introduction of due diligence obligations, due diligence activities by companies should never be an escape route from joint and several liability. Both systems should be complementary, due diligence escape clauses must be prohibited.

#### DENMARK

In Denmark – a comparatively small labour market – there are more than 600 cases yearly in the labour arbitration system concerning posted and migrant workers in subcontracting chains. The construction collective agreement is violated in many ways, with the consequence that the workers do not receive their due pay and social contributions. Background: The more layers of subcontractors (including gang masters, payroll companies, temporary work agencies, and bogus self-employed), the more violations of the collective agreement. It is unclear how many cases remain undetected. This systematic violation of workers' rights in cross-border subcontracting chains is a serious challenge for the Danish construction labour market.

### 4. Due diligence

The EFBWW calls for a European directive on mandatory human rights due diligence covering companies' activities and their business relationships, including supply and subcontracting chains. Workers' and trade unions' rights should be at its centre, with effective remedies and access to justice. If companies fail to apply due diligence obligations, victims should be able to go to court to claim adequate compensation and to sanction those companies in a dissuasive way. Due diligence obligations shall always be complementary to existing and new joint and several liability frameworks and never replace them or offer an escape clause.

### 5. Digital enforcement tools for workers

The EFBWW – together with our social partner FIEC – calls for effective [European digital enforcement tools](#), which should apply to all workers and companies and make cross-border subcontracting chains as fraud proof as possible.

**A European Social Security Number (ESSN) or Pass (ESSP)** should be presented by the Commission at the latest in 2022. It should enable *real-time cross-border access to and exchange of data during inspections on construction sites*. An ESSN or ESSP must at least:

- Identify the worker concerned;
- Identify the employer and employment relationship;
- Verify the social security status;
- Improve and facilitate prior notification for posting without exceptions;
- Make procedures more secure, fraud-proof, and easy to apply;
- Involve social partners at national and European level at all stages;
- Take into account the specificities of the construction sector.

The EFBWW calls on the Commission to develop as soon as possible a **European approach to social identity cards** to support these effective tools against social dumping in (cross-border) subcontracting chains. Such a European approach must respect systems in place and the autonomy of the involved social partners. We need EU solutions to digitally interconnect existing systems across borders and



EU support for new initiatives of social partners for social ID cards, including financial and technical support. We invite the European institutions to learn from national good practices in construction such as the Finnish Valtti-card, the Belgian Construbadge, the Spanish Professional TPC card, the Italian DURC, the Norwegian Jobbkort and others.

***The EFBWW condemns any attempts by the Commission to weaken or abolish social ID card systems*** in place with the argument that they would hinder the free movement of the internal market. In line with the ‘horizontal social clause’ of Article 9 of the Treaty on the Functioning of the EU, internal market rules must support systems which protect workers, not put them into question.

We monitor the ongoing infringement procedures in the framework of the Posting Enforcement Directive with great concern and demand full transparency from the Commission and the close involvement of the sectoral construction social partners both at national as well as at European level.

## 6. Digital company registers

The EFBWW calls for a new European directive, which introduces minimum standards for national company registers and sets the standards for their digital interoperability allowing real time enforcement and controls during inspections. National company registers should at least enlist a company’s...

- founders;
- legal representatives;
- address,
- initial capital;
- business activities;
- VAT number;
- required certifications and certificates,
- number and identity of its workers.

Those registers should furthermore include a real-time prior notification function for companies engaging to perform tasks on flexible worksites (e.g. small construction sites) to allow for easier controls and for all contractors down a subcontracting chain to guarantee full transparency at all times.

## 7. Protect posted workers in subcontracting chains

The (fake) posting of workers is the major element in cross-border subcontracting chains. The EFBWW demands changes in the posting rules under the Posting of Workers Directive 2018/957/EU (PWD), the Enforcement Directive 2014/67/EU, and Regulation 883/2004 on social security coordination.

***Substantial activity requirement for companies must be tightened:*** Only companies, which pursue a real construction business in their home Member State, must be allowed to post workers to another country. The legal criteria to define “substantial activity” must be solid and leave no loopholes. The criteria should have at its core the working time of the employees of a company, the services rendered, and the place of the turnover. Member States, which do not enforce existing legislation or even facilitate the posting business of companies without substantial activities, must face infringement procedures by the Commission and dissuasive sanctions.

***Intermediary labour only suppliers*** (recruitment, placement, temporary work agencies etc.) must no longer be allowed to post workers at all. Labour supply shortages must be filled by direct jobs in the place of work with full social security coverage and with collectively bargained wages.

***Easy access to justice and recovery of wages*** and other entitlements for posted and migrant workers, including undeclared workers and dependent bogus self-employed, must be guaranteed by EU rules and implemented in the Member States. Companies which make a profit by exploiting workers must face dissuasive financial sanctions and be excluded from any activities under public contracts.

***Minimum occupational safety and health (OSH) training requirements,*** preferably with a transparent training accreditation system, for all workers in the subcontracting chain, subject to strict monitoring, control, and enforcement procedures.

**ANTWERP CASE**

On 18 June 2021, a school building under construction collapsed in the Belgian city of Antwerp. The accident killed five construction workers and left nine severely injured. The main contractor is a Belgian company. All workers concerned were non-Belgian posted workers, some of them coming from non-EU countries. There were four layers of subcontracting with 282 contractors active. How is that possible? In these kinds of cases, posted workers are mostly hired as “individual companies” instead of giving them their real status as employed workers. Bogus self-employment allows the employing company to evade wages according to collective agreements or even just minimum wages. They also do not pay social security contributions. The case is still under investigation. There are many urgent questions: What went wrong? Were all the safety and health measures implemented? What was the workers’ real status? How was the subcontracting chain composed? Who cares financially for the injured and the families of the deceased?

EFBWW has developed a [toolbox for EWCs to monitor and enforce working rights in supply chains of multinational companies](#).

## 9. Effective labour inspections and complaint mechanisms

New digital enforcement technologies can only be effective if independent enforcement authorities are equipped with the necessary competences and resources to carry out inspections. The EFBWW calls for a new EU directive setting minimum standards for labour inspections based on ILO Convention No. 81. It should cover among others the minimum resources and the number of labour inspectors and of inspections carried out. The directive should cover both national and cross-border situations, further empower the ELA, and cover elements such as entry to workplaces without prior notice, examinations, interrogations with workers and employers, and (digital) access to documents. The Directive should also aim at strengthening digital data exchange and cross-checking between enforcement authorities responsible for inspections in different areas such as working conditions, occupational health and safety, social security, taxation, and housing conditions. The initiative must respect the autonomy of social partners when they are entrusted with the control and enforcement of wages and other working conditions. Finally, it should allow victims as well as third parties, including trade unions, to file complaints addressing practical barriers that make complaints mechanisms ineffective or inaccessible, in particular for mobile and migrant workers.

## 10. Equal treatment for all workers

As a general rule, European and national legislation must guarantee equal treatment in all public and private procurement, so that the subcontractor applies to his workers the same working conditions and social security rights that the main contractor applies, including the same collective bargaining agreements. Equal treatment for all workers in the subcontracting chain, including all cross-border and migrant workers, is a matter of fundamental social rights and human dignity.

## 8. Strengthen company trade union workers’ representatives and EWCs

The EFBWW calls for a strengthening of trade union and workers’ representatives on all levels of a company to monitor and enforce workers’ rights in supply and subcontracting chains. They must get full access to all information regarding the subcontracting, outsourcing, and purchasing policies of a company and have the rights for visits and audits on worksites without prior notification of management. To achieve this, the EFBWW calls for a strengthening of workers’ information, consultation, and participation rights (where applicable) and especially for a revision of the EWC directive Directive 2009/38/EC. Purchasing, outsourcing, and subcontracting must be part of information and consultation in EWCs. EWCs must have the opportunity to build trade union networks with national experts and members of national and local works councils, get appropriate training and receive all the information for an analysis of a company’s purchasing policies to identify risk factors. A revised EWC directive must allow for effective legal remedies for EWCs if a company does not respect consultation rights. The



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The EFBWW urgently calls  
for new rules on subcontracting  
and their enforcement

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