

Employment of third-country nationals and the role of temporary agencies in the Polish transport sector

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1. Introduction

Fair remuneration and decent working conditions in road transport and their enforcement are one of the top priorities in European debates about equal rights for workers on the move in Europe. Problematic working conditions, complex sectoral regulations and the difficult question of applying posting regulations to cross-border road transport within Europe are a challenge to inspectorates responsible for controlling compliance and to social partners as they safeguard fair competition and working conditions in road haulage.

The EU-funded project “The Road to Transparent and Fair Remuneration and Working Conditions in the Transport Sector” (TransFair) takes on a sectoral approach, focusing on research, stakeholder cooperation, notably that of transport unions and labour inspectorates, and on improved information to drivers in the European road transport sector.

The TransFair consortium includes two research institutes (FORBA, KU Leuven/HIVA), one non-profit organisation (MKC) and four unions from Austria (vída), Belgium (BTB-ABVV), Poland (NSZZ “Solidarność”), Slovenia (NSDS) and the Czech Republic (OSD). One EU level social partner (ETF), worker advocacy institutions (Arbeiterkammer Wien), including one from Germany (Faire Mobilität), unions, including one from Serbia (catus, ZSSS) and national labour inspectorates from Belgium and Slovenia are involved as associate organisations. The research institute FORBA is in charge of the overall project coordination.

This report was produced as one of the research outputs of the TransFair project. The research outputs comprise one report about the quantitative dimension of the EU cross-border transport industry, compiled by KU Leuven/HIA, one comparative report about minimum wage regulations in cross-border transport in the six countries, Austria, Slovenia, Germany, Poland,

Belgium and Czechia compiled by FORBA, and three country-specific reports about employment of third-country citizens, recruitment of workers via temporary agencies, and/or establishment of letter-box companies.

All reports can be downloaded from the TransFair website: <https://transfair-project.eu/>

This report, written by Dominik Owczarek of NSZZ “Solidarność”, focuses on the Polish transport sector, and the role of third country nationals and temporary agencies for the sector. In the light of driver shortages, many Polish companies recruit drivers from third countries, most of them from Ukraine. They are often registered under business trips regulations to deliver freight services across EU countries. Freight companies are supported by temporary agencies and recruitment agencies who take over the time-consuming and burdensome process of registering third-country nationals. Although relatively new, employment of third country nationals in Poland is growing rapidly. It is key to understanding the dynamics of international road transport. This report explores the position and situation of drivers in international road transport from third countries, mostly from Ukraine, against the background of Polish drivers with regard to the following issues:

- the quantitative employment characteristics of drivers from third countries,
- the work and residence regulations relevant for these drivers,
- the role of temporary employment agencies for recruitment, training and registration of third country drivers,
- working conditions (contracts, remuneration, working time, social infrastructure); and
- the perspective of social partners when they address this group of workers.

2. Research methods and research questions

The key objective of this study conducted under the TransFair project is to describe employment relations and working conditions of workers in Poland' international road haulage sector with a special focus on third-country nationals, as a particularly vulnerable group of workers.

The specific research questions included:

- What is the number of third-country nationals in Poland's road haulage sector in the context of broader employment tendencies in the sector?
- What are the legal procedures allowing third-country nationals to stay and work in Poland and deliver transport services to other EU countries?
- What are the working conditions of third country nationals in the international transport sector, especially in terms of remuneration, contractual relations, working time, social infrastructure?
- What infringements of labour regulations occur/can occur when third country nationals are employed?
- What is the process of recruitment and training of third country nationals in the sector?
- How relevant is the role of recruitment agencies and temporary work agencies in this process?
- How are third country nationals supported in the case of infringements?

In order to gather qualitative data for an in-depth analysis of business and employment practices

specific for the international road haulage sector, two research methods were applied, namely desk research and interviews with stakeholders.

The desk research included a review of the literature and regulations in place and of quantitative data on third-country nationals and the sector. The literature included research reports, social partner statements and reports of inspection institutions (i.e. National Labour Inspectorates). The legislative review included regulations on work and residence permits, business trips, as well as new regulations foreseen within the Mobility Package, including the revision of the posting of workers regulations. In addition, publicly available data sets were analysed in order to outline key tendencies in the road transport sector and in the registration of third-country nationals in Poland.

The field research included nine interviews with the following types of respondents: trade unions, non-governmental organisations supporting third country nationals, freight companies and employers' organisations, academic experts, representatives of public institutions and work agencies (both temporary work agencies and recruitment agencies). Table 1 shows the list of interviews. The interviews were carried out following common guidelines for semi-structured interviews prepared by FORBA (project leader). All interviews were conducted by phone and audio recorded (the recordings are archived for the purpose of this study only). The responses have been anonymised and presented in the report in the general category of the respondent's organisation.

Table 1: List of in-depth interviews conducted in the study

Organisation	Interview profile	Number of interviews
Trade unions and non-governmental organisations	Representatives of sectoral trade unions: The National Section for Road Transport in NSZZ “Solidarność”	2
	All-Poland Alliance of Trade Unions	
Companies and Employers’ organisations	Representatives of sectoral employers’ organisations: Transport and Logistics Poland Labour Mobility Initiative	2
Academic Experts	Lecturer at Law Department, University of Gdańsk	1
Public Institutions	National Labour Inspection Social Insurance Institution	2
Temporary work and recruitment agencies	Representative of training and recruitment agency Representative of temporary work agency	2

Source: the authors

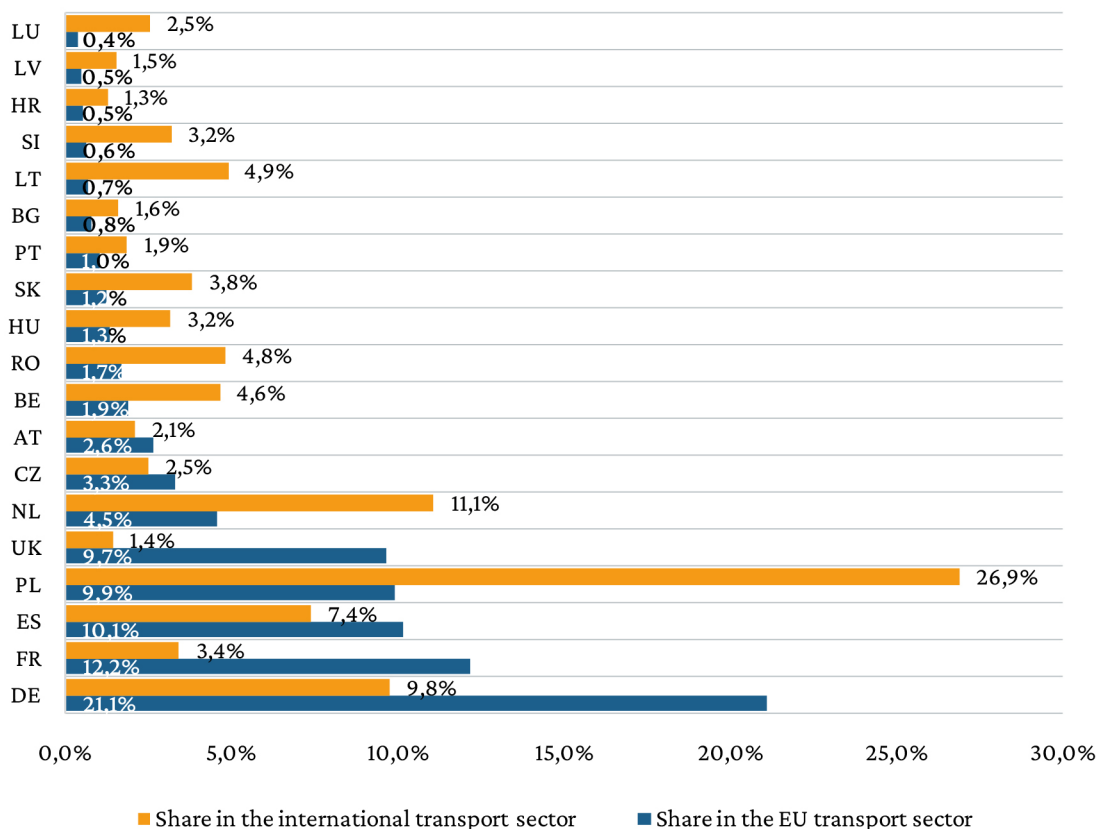
The project originally planned to conduct brief conversations with third country nationals working as drivers in the road haulage sector because they are an important source of information. Unfortunately, due to the outbreak of the COVID-19 pandemic this part of the field work could not be implemented, as the sanitary restrictions had to be respected. The study was conducted between June and August 2020.

3. The road transport market in Poland

Poland plays a significant role in the international road transport sector. While Germany (21.1%), France (12.2%), Spain (10.1%), Poland (9.9%) and the UK (9.7%) have the highest shares in the overall EU road freight transport market in terms of load volumes (including national and international road transport), some countries are overrep-

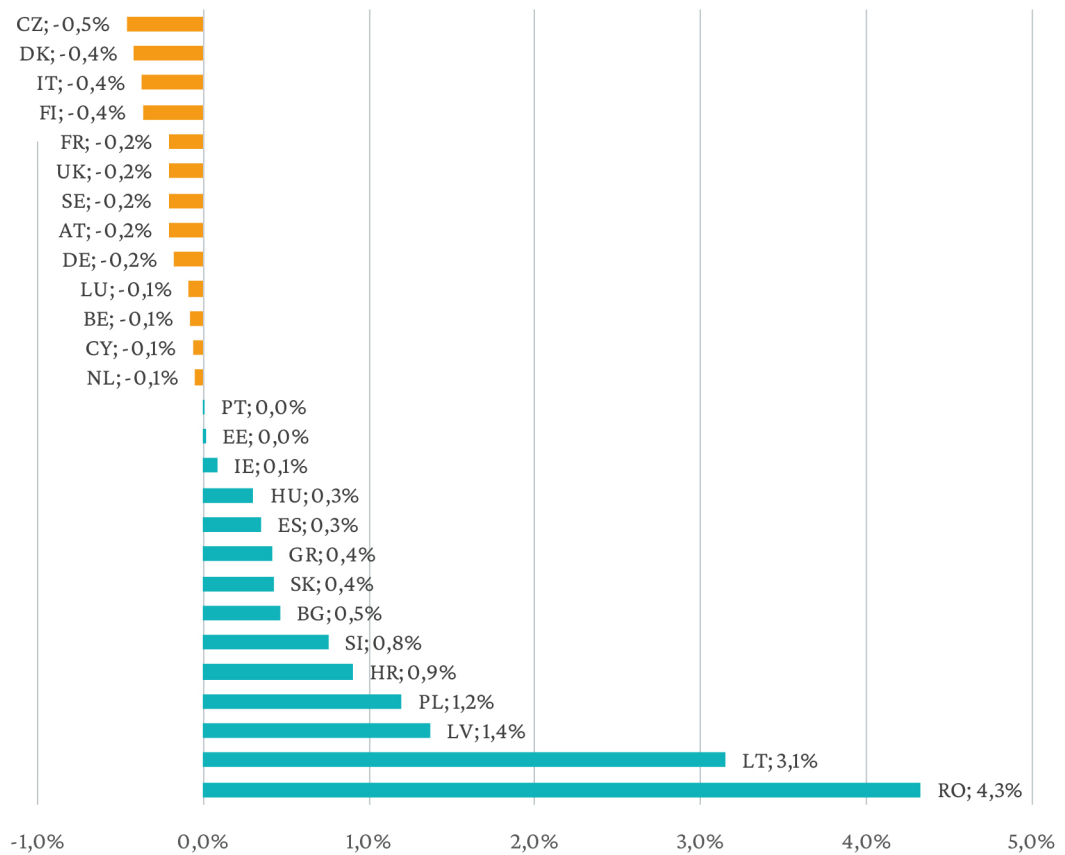
resented in international transport (see **figure 1**). According to Eurostat data, the largest share of international road freight transport belongs to Polish transport companies. Over 26% of all international freight in the EU in 2019 was carried by drivers employed in Poland.

Figure 1: Share of countries in the whole EU road freight transport sector and share of the international road freight transport sector in 2019 in terms of load volumes in thousands of tonnes



Source: the authors' work based on Eurostat data (2019)

Figure 2: Change in volumes of loads (expressed in thousands of tonnes) in the international transport sector between 2010 and 2019



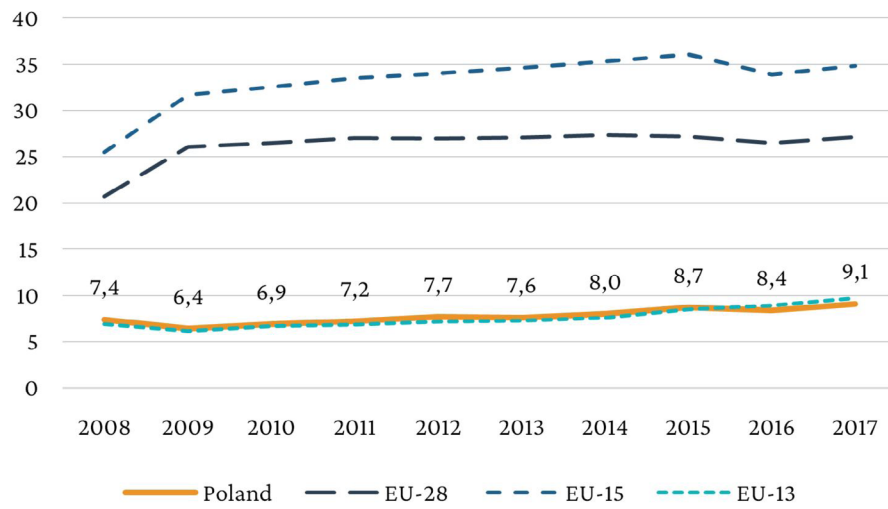
Source: the authors' work based on Eurostat data (2019)

Average personnel cost in Polish international road transport is one of the lowest in the EU-28. At the same time, the largest share of international road freight transport in the EU belongs to Polish transport companies, over 26% of it in 2019 was carried by drivers employed in Poland.

The recent decade has seen some dynamic changes in terms of load volumes in the international transport market between EU member states. According to Eurostat data, load volumes carried by Polish companies have increased by 119% from 143.5 M tonnes in 2010 up to 315 M tonnes in 2019, while the whole EU market has grown by only 21% from 967.4 M tonnes to 1,171.4 M tonnes in that period (figure 2). The highest increase has been observed in Romania (an increase of 433%), Lithuania (314%) and some other countries mainly in Central and Eastern Europe. The highest decrease in the volumes has been observed in the Czech Republic (-46%), Denmark (-42%) and Italy (-38%).

As regards the role of costs, in particular personnel costs in the road transport industry, De Smedt & De Wispelaere show that the average personnel cost in the international road transport sector in Poland is one of the lowest in the EU-28 and almost equal to the EU-13 average over the period 2008-2017 (figure 3). In the same period, the average personnel cost in Poland grew from EUR 7,400 to EUR 9,100, an increase of 23%.

Figure 3: Average personnel cost of companies active in NACE 4941 'Freight transport by road', Poland, EU-28, EU-15, EU-13, 2008-2017, in EUR 1,000



Source: De Smedt & De Wispelaere (2020)

4. Employment in the road transport industry in Poland: trends and challenges

According to De Smedt & De Wispelaere, between 2008 and 2017 employment in road freight transport in Poland grew from over 280,000 to nearly 383,000 people (Table 2. Employment in NACE 4941 Freight transport by road, Poland, 2008-2017). Moreover, the number of employees went up by 68%, from 171,900 in 2009 to 288,300 in 2017. The number of unpaid persons employed, on the other hand, grew by only 14% from 2009 to 2017, while it remained stable from 2008 to 2017, at around 94,000 people. The category of “unpaid persons employed” includes unpaid family workers, working proprietors not receiving a compensation in the form of wages, salaries. The sector has not only gained importance in absolute numbers, but also in terms of Poland’s total employment. In 2009, the sector represented 1.6% of all employment compared to 2.4% in 2017.

A significant change has also been noticed with regard to employment per company size (De Smedt & De Wispelaere 2020): In 2008, only 3.2 employees per company were registered, while in 2017 the average number of employees per company increased to 4.4 persons.¹ However, it is still below the EU-28 average of 5.7 persons in 2017. The numbers show that the sector is dominated by small companies, often run by families.

¹ Eurostat [sbs_na_1a_se_r2]

According to the report (2019) “Transport of the future. The perspectives for the development of the road transport in Poland in the period 2020-2030” prepared by Transport and Logistics Poland (TLP, one of Poland’s key employers’ organisations in the road haulage sector), labour shortages are one of the key challenges for the international road freight transport in Poland.

In 2015, the shortage of workers with skills and certificates in demand was estimated at approx. 100-110,000 drivers, i.e., over 15% of the road transport industry’s total labour supply (600-650,000). Hence, overall demand for drivers amounted to 730,000 drivers. It is estimated that the labour shortage problem is likely to deepen and may amount to nearly 200,000 drivers (20% of labour demand) in 2022.

The report also states that transport companies should prepare for a growing diversity of drivers’ origin. In 2018, drivers from Ukraine accounted for as much as 72% of non-EU drivers working in Poland (see also chapter Employment of third country nationals in Poland – regulations and data). If supplies of Ukrainian employees are exhausted in the near future, carriers may consider recruiting employees also from Central Asia (e.g. Uzbekistan) or South and East Asia (e.g. the Philippines). Despite the fact that shortages

Table 2: Employment in NACE 4941 Freight transport by road, Poland, 2008-2017

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Persons employed	280,904	254,411	271,392	288,636	288,959	292,544	301,884	326,652	355,330	382,740
Unpaid persons employed	93,923	82,477	87,734	93,098	89,362	84,373	84,444	89,279	92,494	94,370
Employees	186,981	171,934	183,658	195,538	199,597	208,171	217,440	237,373	262,836	288,370
Share in total employment	1.8%	1.6%	1.8%	1.9%	1.9%	1.9%	1.9%	2.1%	2.2%	2.4%

Source: De Smedt & De Wispelaere (2020)

of drivers are observed in some foreign markets, employment in Europe remains attractive for third country nationals due to differences in wages. An interviewee for the TransFair study representing an employers’ organisation pointed out:

The current functioning of the international transport sector would not be practically possible without the influx of migrants – mainly from Ukraine, but in recent years also from Asian countries. The local human resources have already been fully engaged on the market and at the same time Polish companies continue to expand. We put a lot of effort into maintaining the development trend by ensuring a constant influx of drivers from outside the EU. Now the Ukrainians are a permanent part of driver teams. Some companies will hire mostly foreigners with only a small number of Polish drivers.

Employers’ organisation representative

According to the TLP report, the implementation of autonomous vehicles might impact significantly on the industry, but it will not fill the shortfall of labour in the short term (TLP, 2019). It is estimated that full autonomy solutions will not appear on the market until 2025. While in the initial phase the implementation of autonomy solutions will involve significant investment, long term it will help to gain a greater cost advantage. Progressing autonomization and digitization in the long term will require more training for staff, including IT specialists, to learn new skills and qualifications. These technological trends will also be an opportunity to increase the attractiveness of work in the transport industry for young and highly skilled people.

Polish transport companies must prepare for a drivers’ growing diversity of origin. In 2018, drivers from Ukraine accounted for as much as 72% of non-EU drivers working in Poland. In the near future, carriers may consider recruiting employees also from Central Asia or South and East Asia.

5. Employment of third country nationals in Poland – regulations and data

As shown in the previous chapter, the demand for and the number of drivers from third countries in Poland has increased significantly in the last decade. Therefore, this chapter summarises and analyses regulations and legal provisions for third country nationals' employment and describes the development of the scale of third country nationals' immigration with special emphasis on the largest migration flow coming from neighbouring Ukraine.

The Act of 20 April 2004 on employment promotion and labour market institutions regulates the employment of third country nationals in Poland. In order to work in Poland, third-country nationals must comply with all of the following conditions:

- they must have a work permit such as: a) a general work permit, b) a seasonal work permit, c) a statement (oświadczenie) on entrusting work to a foreigner or d) a temporary residence and work permit (see details in the next paragraph);
- they must have a residence permit with the right to work (e.g. an appropriate visa);
- they must perform work under the conditions contained in the permit or statement, solely for the benefit of the employer indicated in the document;

- they must sign an appropriate employment contract with the employer.

The following work permits for third-country nationals can be issued (Office for Foreigners, 2020):

- a general work permit entitles a third country national to perform work for up to 3 years². The general work permit is issued by the voivode (executive power at the regional level) in response to an application submitted earlier by an employer.
- a seasonal work permit entitles a third country national to work up to 9 months in a calendar year (12 months) in agriculture, horticulture or tourism. The seasonal work permit is issued by the starost / powiat labour office (secondary level of local government) in response to an application submitted earlier by an employer.
- a statement on entrusting work to a foreigner (oświadczenie) is a simplified procedure to register workers from the group of six "Eastern partnership countries", namely

² A work permit for a foreigner employed in management boards of companies employing more than 25 people may be issued for a period of up to 5 years.

Table 3: Work permits and statements on entrusting work to a foreigner in Poland in the period 2009-2019

	2009	2011	2013	2015	2017	2019
Work permits	29,340	40,808	35,843	61,056	235,626	444,738
Migrants from UA (number)	9,504	18,669	20,416	50,465	192,547	330,495
Migrants from UA (in %)	32%	46%	57%	83%	82%	74%
Simplified statements	188,414	259,777	235,616	782,222	1,824,464	1,640,083
Migrants from UA (number)	180,133	239,646	217,571	762,700	1,714,891	1,475,923
Migrants from UA (in %)	96%	92%	92%	98%	94%	90%

Source: the authors' work on the basis of Ministry of Family, Labour and Social Policy data (2020)

Armenia, Belarus, Georgia, Moldova, Russia and Ukraine and it entitles applicants to perform non-seasonal work without a general work permit for 6 months within a period of 12 months (allowing for circular migration back and forth). Just as the seasonal work permit, the statement is issued by the starost / powiat labour office.

- temporary residence and work permit allow a foreigner who is already legally residing in Poland to apply to a voivode (executive power at the regional level) for both temporary residence and work permit in one procedure.

Poland's migration policy could be considered as liberal for citizens of the Eastern Partnership countries (Ukraine in particular) (Grot & Frelak, 2013; Matyja et al., 2016). By adopting several legislative acts at the national level³, the government created stronger incentives to choose Poland over other potential destinations in the EU. This may lead to various misinterpretations of work and stay regulations of third country nationals or even to gross violations, when workers from this group are delegated to conduct their work in another EU country with a stricter immigration law (Surdykowska & Owczarek 2018). According to the academic expert interviewed for this study:

3 Aliens Act (2013), including further amendments, http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=65077&p_country=POL&p_count=1471
Issues regarding the dismissal from the obligation to have a work permit are regulated by Art. 87 of the Act of 20 April 2004 on the promotion of employment and labour market institutions. Some foreigners are exempt from the obligation to have a work permit in accordance with the Regulation of the Minister of Labour and Social Policy of April 21, 2015 which permits foreigners to perform work in the Republic of Poland without having to obtain a work permit. The act on Pole's Card (2007) regulates the situation of people who are of Polish origin.

The model of migration regulations adopted in Poland is particularly permissive compared to most European Union countries, including countries in Central and Eastern Europe. Particular facilitations apply to the Eastern Partnership countries, thanks to which Poland supplements its work resources with employees mostly from this area. Legalisation of work and stay is relatively simplified, but on the other hand limited to short periods only. Western Europe solved its labour shortage problem by enlarging the EU to the East. The new Member States cannot count on a similar solution. Some countries such as Poland are coping by liberalising migration regulations for third-country nationals.

Academic expert

One example of the liberal approach to regulate (and attract) migrant workers is the adoption of new legislation introducing a new type of civil law contract, namely the contract for help with harvesting. The contract regulates seasonal work of third country nationals in agriculture and horticulture and holds them exempt from occupational health and safety regulations. NSZZ "Solidarność" filed a complaint to the European Commission arguing that the regulation is a serious breach of the Member State's obligation to comply with the Council Directive of 12 June 1989 to introduce measures to improve the safety and health of workers at work. The complaint has not yet been considered and is registered under the number (CHAP (2018) 02706)⁴.

The relevant regulations for drivers from third countries encompass all the above-mentioned

4 <http://www.solidarnosc.org.pl/biura-ekspertkie2/kontrola-prawa/komisja-europejska/item/18427-skarga-w-sprawie-nowego-typu-umowy-cywilnoprawnej-umowa-o-pomocy-przy-zbiorach>

The Polish government created stronger incentives to choose Poland over other destinations in the EU for potential migrant workers. Misinterpretations of third country nationals' work and stay regulations or even gross violations might follow, when such workers are delegated to other EU countries with a stricter immigration law.

Table 4: Types of contracts among workers registered under simplified statements in Poland in the period 2011-2019

	2011	2013	2015	2017	2019
Employment contract	15,136	31,999	118,974	457,699	623,808
Migrants from UA (number)	12,373	25,561	110,555	419,807	403,019
Share of employment contracts among Ukrainians (in %)	19%	12%	14%	24%	27%
Civil law contracts or other contracts	59,416	203,617	663,248	1,366,765	1,188,356
Migrants from UA (number)	54,012	192,010	652,145	1,295,084	1,072,904
Share of civil law contracts and other contracts among Ukrainians (in %)	81%	88%	86%	76%	73%

Source: the authors' work on the basis of Ministry of Family, Labour and Social Policy data (2020)

types of work permit with the exception of the seasonal work permit, which is reserved for certain sectors. Citizens of the “Eastern Partnership countries” may use the simplified and relatively quick procedure of the statement on entrusting work to a foreigner. In practice, the majority of migrants – regardless of the sector – are registered using simplified statements. In 2019, over 1.6 M⁵ simplified statements and less than 0.45 M work permits were issued, the vast majority to citizens of Ukraine (table 3). The number of simplified statements increased by nearly nine times, that of work permits by 15 times in the last decade (2009-2019). In the same period, the number of simplified statements issued for Ukrainians increased by over eight times and by 34 times in the case of work permits. The highest increase has been observed after 2013, when the war with Russia in the eastern regions of Ukraine started and destabilised the Ukrainian economy.

The majority of migrants registered under simplified statements in Poland were employed under civil law contracts (contracts of mandate or contract to perform a specific task). In this case, workers are not covered by the Labour code and do not enjoy full social protection⁶. Among Ukrainian workers, only 19% concluded an employment contract and the rest (81%) were subject to some

sort of civil law contract in 2011 (table 4). There was a slight improvement in the following years: in 2019, 27% of Ukrainian workers were employed under employment contracts and 73% employed under civil law contracts.

⁵ The number of simplified statements should not be equalled with the number of migrants per year, because one migrant might be granted more than one statement.

⁶ Health insurance is not obligatory in the case of the contract of mandate and is not available under the contract to perform a specific task; therefore, neither sick leave nor maternity leave is available for these workers.

6. Employment of third country nationals in the Polish transport sector

The exact data on the number of truck drivers from third countries working in Poland is not available. Available data are aggregated at the level of the transport and logistics sector. According to the Ministry of Family, Labour and Social Policy (2020), over 220,000 simplified statements⁷ and over 70,000 work permits were issued in this sector in 2019 (table 5). The numbers of simplified statements increased by 73 times between 2009 and 2019 with the number of work permits going up 27

times between 2011 and 2019. This extraordinary growth was similar in the case of work permits (28 times) and even higher in the case of simplified statements (nearly 81 times) for Ukrainian workers. Detailed data on forms of employment in the transport and logistics sector is not available.

The above data on the number of work permits and simplified statements issued in the road transport sector indicate a significant and growing share

Table 5: Work permits and statements on entrusting work to a foreigner in the transport and logistics sector in the period 2009-2019

	2009	2011	2013	2015	2017	2019
Work permits	N/A	2,591	3,380	7,957	32,781	70,155
Migrants from UA (number)	N/A	N/A	1,926	5,916	25,458	54,025
Migrants from UA (in %)	N/A	N/A	57%	74%	78%	77%
Simplified statements	3,041	5,897	5,548	29,673	87,082	221,649
Migrants from UA (number)	2,413	4,358	4,009	26,893	76,267	194,747
Migrants from UA (in %)	79%	74%	72%	91%	88%	88%

Source: the authors' work on the basis of Ministry of Family, Labour and Social Policy data (2020)

⁷ ibidem

of workers with these two types of permits in the Polish labour market. An important consequence of this phenomenon is the increase in revenues from social insurance contributions paid both on employment contracts and on civil law contracts for these workers (in the case of the latter, these contributions are proportionally lower). These funds are collected in the Social Insurance Fund, from which current social benefits are paid. Revenues from migrants' remunerations help to reduce the deficit of the Fund leading to a smaller scale of subsidies from the state budget. Third-country workers collect contributions in their accounts, which are subject to annual indexation. In this way, migrants gain the right to claim the transfer of accumulated funds to their national pension systems or payment of these funds in Poland (if the migrant meets the relevant criteria). On the one hand, contributions of migrants are improving the balance of the pensions systems today. On the other hand, in future this will mean also larger expenditures from the system. The latter is often overlooked in the public debate on the system's stability.

6.1 POSTING IN ROAD TRANSPORT

As indicated in Chapter The road transport market in Poland, Polish road transport companies have gained particular importance for providing transport services abroad. Hence, we will take a closer look at the regulations in place for drivers working for Polish companies not in the territory of Poland.

The complex regulations for drivers in international road transport give opportunity for various stakeholders to apply them in line with their own interests. This rhizomatic situation is sometimes abused by unfair companies or states protecting their markets from low-cost business models implemented by transport companies from CEE countries.

As for December 2020, there are various interpretations of the regulations on drivers work in international road transport. The regulations themselves are not fully clear and give opportunity for various stakeholders to apply them in line with their own interests. This rhizomatic situation is sometimes abused by unfair companies or states protecting their markets from low cost business models implemented by transport companies from CEE countries. According to the dominant view represented by Polish employers' organizations, public authorities and legal doctrine, the driver is not a posted worker, unless he/she performs cabotage transport. One can also find positions interpreting cabotage as a regular business trip (delegation) rather than posting, but these are rather rare and extreme views. Some Member States gradually began to change the interpretation of the drivers' status expressed in the actions undertaken by control bodies or in public rhetoric. Drivers in international road haulage started to be treated as posted workers in Germany (since 2015) and

in France since mid-2016. Some other Members States followed this example later on (i.e., Austria). Discrepancies in interpretations will be (partly) liquidated after the regulations included in the Mobility Package have been transposed. These regulations, however, are currently the subject of complaints to the Court of Justice in Luxemburg by some Member States i.e., Poland⁸, Malta⁹, Bulgaria, Cyprus, Hungary, Lithuania and Romania¹⁰. In the near future, Latvia and Estonia also intend to join the complaint.

Pursuant to the provisions of the Mobility Package, the directive¹¹ concerning the posting of workers in road transport will apply only to cabotage (a service consisting in transporting goods within a country other than the carrier's registration country) and to non-bilateral international transport operations under specific circumstances. Other types of international transport, such as transit (passage through a given country located between the country of loading and the country of unloading) and bilateral transport (transport of goods from one country to another country) are excluded from these regulations, which means, inter alia, that the wages of drivers engaged in transit or bilateral transport may be calculated on the basis of the minimum wage and social security regulations in the country of registration of the transport company. This allows transport entrepreneurs from Poland and other Central and Eastern European countries to maintain their competitive advantage based on low labour costs and weaker social security. Including international transport drivers as posted workers is the subject of many controversies that are debated and decided up to the European Court of Justice.

6.2 POSTING OF THIRD COUNTRY NATIONALS

In the case of third country nationals (EU citizens are entitled to work legally in any Member State without issuing a special permit due to the freedom of movement), special permits and documents

- 8 <https://polandin.com/50517117/poland-lodges-complaint-with-eu-court-over-mobility-package>
- 9 <https://www.maltachamber.org.mt/en/malta-files-complaint-against-eu-mobility-package-before-court-of-justice>
- 10 <https://www.euractiv.com/section/economy-jobs/opinion/member-states-take-action-before-eu-court-against-first-mobility-package/>
- 11 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1057&from=EN>. The directive 2020/1057 must be transposed into national law and applied until Feb 2, 2022.

INFOBOX 1: THE VANDER ELST VISA

According to this ruling, companies based in a member state of the European Union are entitled to send third-country nationals to provide temporary services in another EU member state. To do so, they do not need a work permit or other permits that relate to employment law, as there is active freedom to provide services. Nevertheless, a visa procedure for the Vander Elst visa must be carried out before entry if the third country national is subject to the visa requirement for the country in which the service is provided. The ruling covers both posted workers and those sent on a business trip. After the service has been performed, the employee is obliged to return to the country where the company

is registered. Any other work cannot be performed in the host country after completing the contract of service. Obtaining this visa that needs to be applied for by the employer is possible at the embassy office (but not at the consulate) of the country to which the employee is sent. The reply should be issued within 7 days of submission (however, the deadline is often not kept). The European Commission eased these provisions by pointing out that it is enough to submit a notification on performing work by a third country national in the host country before the service starts. However, not all countries followed this interpretation yet (e.g., Germany).

confirming legal stay and work must be presented to controlling authorities in Poland and in the host country. Therefore, posting regulations are applied (together with submitting PD A1 forms). The situation, however, has been complicated by several factors: first of all, while introducing the minimum wage, Germany initially indicated that the regulations also apply to international transport drivers and later, the Commission initiated actions against this interpretation in Germany and France¹², but this initiative has not been conclusive.

Another factor blurring the interpretation of the regulations on delegating third country nationals is the fact that some Member States apply various forms of limiting access of drivers / transport companies (i.e., visa Vander Elst, see the paragraph below), although third country nationals are entitled to provide services in other Members States. The European Commission confirmed that third-country nationals legally employed in one of the Member States are eligible to be posted to another EU country¹³: “It is well-established case law of the Court of Justice of the European Union (CJEU), that the right to post workers covers third-country nationals legally employed by a service provider in the Member State where it is established.” This means that Polish transport companies (as well as

from other EU countries) can in future send their drivers from third countries not only on business trips as part of transit and bilateral transport, but also delegate them to provide cabotage services and non-bilateral transport services. This leads to a situation where, for example, a non-EU citizen performs their work – as part of a delegation for a Polish transport company – in a European Union country where they could not legally work (or even stay) due to more restrictive regulations. Therefore, we can speak of a collision of legal norms: the posting of workers with the provisions on legalisation of stay in another EU country.

Third-country nationals may work in another country to which the worker is sent under the freedom to provide services, if a **Vander Elst visa** is issued (see Infobox 1)¹⁴.

In practice, transport companies in Poland do not use the Vander Elst visa. In its place, a Schengen visa is applied that allows a stay in the Schengen area for 90 days, but a Schengen visa does not give a work permit. This indicates that most transport companies delegate their third-country national drivers to work abroad without the required documentation. The companies hope to be able to avoid control; potential penalties seem to be included in the business model. If authorities discover the lack of a work permit (under Schengen visa), drivers are

Polish transport companies can in future send their drivers from third countries not only on business trips as part of transit and bilateral transport, but also delegate them to provide cabotage services and non-bilateral transport services. This leads to a situation where legal norms can collide: the posting of workers with the provisions on legalisation of stay in another EU country.

12 https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2101

13 https://www.europarl.europa.eu/doceo/document/E-8-2017-004937-ASW_EN.html?redirect

14 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0043&from=DE>

banned from entering the country for up to 2 years. However, no consequences are imposed by host authorities on the employer, because legal regulations do not include such an option. Due to the need to meet labour shortages in certain sectors, e.g., in agriculture, care services, some countries (e.g., Germany) turn a blind eye and conduct selective inspections. According to the employers interviewed in the study inspections are more intense in the road transport sector compared to other sectors. This may indicate that those countries implement some protectionist policies and indirectly hamper foreign companies from providing transport services. As a concluding remark, the application of these regulations seems to be selective both by transport companies and certain EU countries, depending on the respective interest.

Regardless of the work permit form, a PD A1 certificate is required, which confirms legal residence of a third-country national in an EU Member State (Poland in this case) and enables legal movement between Member States. The certificate is issued by local branches of Social Insurance Institutions at the request of an employer, an employee or a self-employed person. The employee must meet two criteria: they must hold a document confirming the legality of stay in Poland (one of the work permit forms described above) and a certificate of tax residence in Poland. In practice, the Social Insurance Institution often refused to issue A1 certificates in the past, if the documents presented did not sufficiently prove that the applicant or his/her family members live in Poland (i.e. rental agreement, energy /phone bills, use of health care services)¹⁵. The approval procedure usually took quite a long time and involved a number of administrative questions to determine whether the above criteria were met. Some of the negative replies from the Social Insurance Institution were overruled by Polish courts. In effect, however, the majority of third-country nationals posted abroad from Poland did not receive a PD A1 certificate due to these procedural difficulties. Various interpretations of the regulations and a large number of applicants caused a serious conflict. For example, an interpretation issued by the vice-minister of labour, Marcin Zieleniecki on October 30, 2017, upheld the right of the Social Insurance Institution to detailed verification of compliance with the criteria¹⁶. Ultimately, under the influence of

parliamentary interpellations¹⁷ and pressure from transport companies, a uniform and favourable interpretation of the provisions was established. As of May 2, 2018, the procedure for issuing PD A1 forms has been significantly simplified. Currently, local Social Insurance Institution branches rarely ask additional questions, and it is a relatively automatic procedure.

The academic expert summed up the regulative landscape in the context of third country drivers in the international road haulage sector as follows:

We are dealing with a very unclear situation and a thicket of regulations that are hard to interpret and understand, especially for small transport companies. Law firms providing services to these companies benefit from this. In addition, some countries apply national laws to protect local markets against the expansion of companies from the East, which constitutes a breach of generally adopted EU legislation and judgments of European courts. This ambiguity in regulations is simply a manifestation of a real clash of interests within the EU.

Academic expert

15 See i.e., opinion expressed by the legal office specialised in the transport sector: <http://dp-translex.pl/aktualnosci/zmiana-przepisow-dotyczacych-wydawania-a1-dla-obywateli-panstw-trzecich/>

16 <http://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=08942342>

17 https://www.podatki.biz/sn_autoryzacja/logowanie.php5/artykuly/zaswiadczenia-a1-dla-kierowcow-zus-musi-weryfikowac-dane_10_38266.htm?idDzialu=10&idArtykulu=38266

7. The role of temporary work agencies

According to all respondents in the study, agencies play a significant role in ensuring the inflow of third country workers employed in the Polish road transport companies. Moreover, the agencies are an important element of the business models of transport companies. Their essential role is to supplement the local workforce with employees from third countries.

In practice, employees come mainly from Ukraine, but the agencies also operate in Belarus, Moldova, Georgia, Armenia, Kazakhstan and Russia. In the face of the gradual depletion of qualified drivers in these countries, increasingly more often agencies plan to expand their activities to Asian countries, e.g., the Philippines, Pakistan and Indonesia. Additionally, transport companies try to recruit employees from countries located in the East of Poland directly using their own resources, i.e., internal HR departments in charge of recruitment from third countries. Agencies primarily focus on attracting workers from the East while workers from local markets are in short supply.

The activities of temporary work agencies and transport companies which recruit drivers from third countries on their own, significantly increase labour supply in this sector. According to the representatives of trade unions, this has a negative impact on the position of local and already established migrant workers trying to negotiate better working conditions. Hence, agencies are perceived as one of the main factors contributing to social dumping in road transport.

7.1 SERVICES OF TEMPORARY AGENCIES

The essence of the added value of a temporary employment agency for Polish transport companies is the delegation of time-consuming and skill-requiring tasks related to the acquisition of drivers. Transport companies can focus on their core business and solve the problem of labour shortages in the face of growing international road transport activities in the country. Specifically, the subcontracted tasks include:

- **Recruitment.** Recruitment agencies and temporary work agencies most often have their branches in the third countries, where they attract candidates by broadly advertising job offers and conducting interviews. The agencies' branches create a database of candidates and present a selection of them as an offer to a potential employer. Interviews take place at the branches' head offices. The recruiter is able to pre-assess the validity of professional certificates, experience and motivation. During the pandemic, face-to-face interviews have gradually been replaced by remote conversations, on-line applications or telephone calls. Sometimes, the practical verification of drivers' qualifications takes place only when they arrive in Poland. The process of hiring and legalising the stay takes place if there is a match between the potential employer and employee.
- **Procedures related to the legalization of stay and work.** Agencies support candidates in completing the formalities necessary to leave

The activities of temporary work agencies and transport companies which recruit drivers from third countries significantly increase labour supply. As oversupply can deteriorate the position of local and already established migrant workers to negotiate better working conditions, agencies are perceived as one of the main factors contributing to social dumping in road transport.

for Poland and start working legally. The type of formalities depends on the specific situation and the country the drivers are recruited from. In Eastern Partnership countries these are mostly the so-called “Statements” enabling a simplified procedure of legalising work and stay in Poland for a short period of time (6 months of work over a 12-month period). Agencies less frequently deal with other forms of legalisation of stay, so the share of third country nationals outside Eastern Partnership countries is very small.

- **Verifying documents** (residence and work permits), **professional qualifications and ability to do the work** (including medical examinations and health and safety training). An important agency service provided to companies is the verification of documents and professional qualifications of candidates, which is intended to provide the employer with an employee ready to start to work without the need to undertake additional formal or training activities.
- **Employee leasing.** The main role of a temporary employment agency is employee leasing, i.e. making workers available to the user company. In this case, this includes all formalities related to the legalization of stay and work as well as the payment of wages, including social contributions and due tax. Some agencies, however, are limited to job placement and recruitment support. These companies gave up employee leasing services due to the complicated legal environment in the international transport sector because unclear regulations may constitute a basis for imposing penalties following a non-compliant behaviour of the agency or transport company. Regulatory ambiguity can also cause an unclear division of responsibility between the agency and the user company. In addition, employee leasing is usually associated with low profit margins, which sometimes leads to fraud aimed at avoiding losses.
- **Training.** Some agencies additionally provide training services to complete the qualifications (for example, by acquiring driving experience in the new trucks and with digital tachographs) or even to acquire the full driver qualification and the appropriate certificate. It should be emphasized, however, that training services are provided rarely and are provided by only a very small number of agencies in the country.
- **Support in resolving relocation issues.** Some agencies also support transport companies in finding a flat (or accommodation) for their employees, and even bringing the driver’s family to Poland.

Temporary agencies’ main activities in the transport sector include accompanying procedures related to the legalization of drivers’ stay and work, the verification of residence and work permits, professional qualifications and ability to perform work, employee leasing, training and support of clients in resolving relocation issues.

7.2 CLIENTS OF TEMPORARY AGENCIES

The cooperation with agencies mainly concerns medium and large enterprises that have the highest demand for drivers. Unfortunately, there are no numerical estimates to clearly indicate the scale of employment of drivers through agencies. Trade unions and experts such as a representative of the NSZZ “Solidarność” indicate that it may be anything from tens of thousands to several hundred thousand annually in periods of economic prosperity in the sector. A representative of employers’ organizations associating large and medium-sized transport companies, however, claims that the role of temporary work agencies is exaggerated. According to him, the business model of medium and large enterprises is less based on hiring through agencies, but rather on outsourcing assignments to micro and small companies, which constitute 75% of entities operating in the sector. When the number of orders in large companies increases, the additional workload is sub-contracted. Transport companies – especially in recent years – recruit and train employees on their own. However, they still benefit from the agency’s support in the field of driver training and acquainting them with the practical aspect of working in the profession (route planning, digital tachograph operation, driving modern trucks, etc.). If they use temporary agencies, large and medium companies often sign framework contracts for mass recruitment (several dozen or even several hundred people), which are implemented in a short time. A large number of potential employees and a short timeframe may have a negative impact on the quality and transparency of the process.

7.3 ASSESSING THE INTEGRITY OF TEMPORARY AGENCIES

The respondents indicated that there is a difference in the operating practices of large and small temporary work agencies. The former already have an established position on the market and are aware of their reputation. It is expressed in the high level of professionalization and quality of the services provided. According to representatives of temporary work agencies and trade unions, smaller recruitment companies provide lower-quality services or even violate regulations. They offer lower prices creating a competitive pressure on professional agencies. Some of them, following inspections carried out by Polish institutions (the National Labour Inspectorate, the Tax Office), are closed down.

When interviewed, representatives of trade unions, temporary work agencies and academic experts claim many violations and deviations from the above-outlined role of temporary work agencies can be observed in practice. Especially small agencies lack transparency, which is reflected in unreliable verification of professional qualifications and (less frequently) work and residence permits. It occurs that drivers from third countries have outdated certificates or even forged documents. Often, these drivers have experience in driving older generation trucks (including older tachographs); starting to work for a Polish company means driving modern trucks which requires additional qualifications. Sometimes, drivers even arrive with zero driving experience and with forged documents, which poses a safety threat to others and the drivers themselves.

In the first years of the influx of migrants from Ukraine, the workers were well-qualified specialists and had all the official permits. Now that this group is smaller, recruitment agencies reach for employees who are simply available and have any connection with the driver's profession. The demand for drivers in Polish companies is so great that agencies are able to verify only partially declared qualifications. Transport companies often offer training or obtaining qualifications once the drivers are in Poland, but the courses are conducted quickly, because companies only care about business which grows each year. As a result, there are many shortcomings in the huge number of recruited employees and the employees coming are not always fully competent.

Temporary work agency interviewee

Some temporary work agencies are dishonest when it comes to social insurance and taxes: amounts due are calculated incorrectly (understated) or are not paid at all. In some cases, drivers are not paid full amounts or not paid at all. When a fraudulent agency closes their business after a short time, it is very difficult to reclaim wages and due taxes and it takes a very long time. Claims are sometimes never settled. Drivers remain unemployed with no protection in the middle of a foreign country and unable to explain why they are in that country without being registered.

The situation of drivers is even worse when dishonest agencies cooperate with dishonest transport companies (mainly small entities operating for a short time "until the first inspection"). Then, many violations can occur in terms of wages and social security contributions, working time, working conditions (e.g. sleeping in cabins), legalisation of work, etc. Such companies are designed

to quickly obtain a large number of high-value orders, which are carried out in a short time while violating many regulations. After some time, the company and the agency disappear along with the money for drivers' salaries, who are most often third-country nationals. Sometimes such practices basically qualify as human trafficking.

The representative of a work agency also described fraudulent offers from transport companies proposed to agencies (he himself received such offers several times, but always rejected them). Companies put pressure on the agency by using their market position to recruit a large group of drivers in return for high salaries. However, the margin per recruited driver is eventually very small. The assignment cannot be carried out with a satisfactory profit without violating the law at the cost of the drivers (in terms of wages, bonuses, allowances, etc.). Agencies may face the loss of an important client if they do not agree to the proposed terms.

Sometimes unfair practices were conducted by letter box companies, which are branches of Western transport companies formally established in Poland (or another CEE country which competes on lower wages), but not fully operating and employing workers in the country of establishment. Loopholes in the EU legislation allow hauliers from Western Europe to set up letter-box companies in low-income Member States, recruit low-paid labour and operate on Western markets at low prices. Obscure employment schemes, and a considerable deficit in cross-border enforcement and controls, enable these operators to circumvent equal pay rules and social contributions. Often assignments are subcontracted to local companies, so the profit is shared between the letter box company and the local subcontractor. The drivers are provided by agencies to such a company, the cars are leased and the transport activity is provided mainly in Western countries while maintaining Polish (lower) wages and social contributions. The most fraudulent letter box companies are pushing this business model to the limit and using drivers from third countries without paying any remuneration (or far below contractual terms). Prosecuting such companies is extremely difficult due to the lack of domicile in the country, and the employees are not citizens of the country in which the control is carried out. Ricardo's report (2017), however, suggests that the detection rate of letterbox companies is around 1% or less in the countries that could provide data (Denmark, Poland, Bulgaria, the Netherlands, Latvia). However, such figures do not capture companies that evade detection. These data are inconsistent

Many violations and deviations from the intended function of temporary work agencies can be observed. Non-compliance is related to withholding payment of wages and social insurance contributions, lack of training, excess working hours or inhuman working conditions.

Obscure employment schemes, subcontracting cascades and a considerable deficit in cross-border enforcement and controls, enable some transport operators to circumvent equal pay rules and social contributions. In such cases, the drivers are provided by agencies, the cars are leased and the transport activity is provided mainly in Western countries while maintaining Polish (lower) wages and social contributions.

with the perception of letter box companies' activities: as much as 43% of respondents of the open public consultation claimed that the setting up of letterbox companies is a widespread practice, whilst only 9% thought this was only a minor issue. Up to 88% of respondents from associations representing road transport workers claimed this was a widespread practice. The issue appears to be of greater concern for stakeholders based in old (EU15) Member States and 57% of respondents based in EU15, versus 16% among those based in EU13.

Evidently, there is no data to offer a clear estimate of the scale of unfair or even fraudulent practices in the sector. The respondents' opinions in the study

differed in this respect: employers' representatives stated that the scale of the infringements was marginal (but confirmed their existence), while union representatives indicated that they were of a structural nature enabling the implementation of this "business" model for a significant part of companies in the sector. The respondents shared the opinion that the largest scale of infringements concerned small agencies that often cooperate with small companies. The larger agencies, however, try to operate fully professionally and legally. It was clear that companies that engage in fraudulent practices and foster social dumping work to the detriment of honest companies and employees, including especially third-country nationals.

8. Social partners' perspective on recruitment of third country nationals in (international) road transport

8.1 EMPLOYERS' ORGANIZATIONS

The position of employers' organizations regarding third-country workers in the international road freight transport sector is clearly positive. In view of the unprecedented development of this sector, attracting non-EU citizens helps to supply qualified labour to Poland (as well as to other Central and Eastern European countries). They expressed the need even more clearly: without the participation of third-country nationals – mainly from Ukraine – the further development of this sector in Poland would be halted. According to the respondents, the growth of freight transport is primarily hampered by regulatory and control constraints and labour shortages. Financial or technical factors do not play a significant role because Polish transport companies have the most modern vehicles.

Haulage companies in Poland work hard to ensure that they keep constant access to drivers from the East. They outsource the recruitment process to specialized companies that also deal with the legalization of stay, work and verification of recruits' vocational qualifications (see Chapter The

role of temporary work agencies). Large companies even have their own specialized units dedicated to acquiring drivers from outside the European Union, which shows the priority of this task. Transport companies are prepared to train recruits in order to upskill them (in terms of both formal aspects and work experience) or even teach them the basics. Trainings are outsourced to external companies or delivered in-house (mostly in large companies) and financed by transport firms. The vast majority of trainings are already held in Poland with the use of the modern equipment (i.e., trucks and tachographs) and conducted by experienced trainers. Respondents from employers' organizations declared that in the first wave of migration from Ukraine after 2013 (due to the outbreak of the war with Russia in eastern Ukraine and the economic crisis it caused in the country) finding qualified and experienced drivers was rather easy. Currently, this resource has already been exhausted and people with less or no experience are recruited. Third country workers, mainly from Ukraine, are highly valued. This is because they want to make money quickly and are more willing to agree to the conditions offered to them. Therefore, the total remuneration of these drivers can be

Without the participation of third-country nationals, the further development of this sector in Poland would be halted, according to employer organisations. Besides regulatory and inspection constraints, shortage of labour is the main factor hampering the growth of freight transport.

higher than that of Polish employees. However, the pay structure is clearly skewed towards additional allowances on top of basic salary which adds up to the statutory minimum wage.

Haulage company organizations actively lobby in the Polish parliament. They lobbied for easier processes of legalizing the stay and work of third-country nationals in order to ensure a continuous influx of labour to the road transport sector, but also to other sectors in the country (e.g., construction, agriculture, production). These activities resulted in the introduction of the procedure of statements on entrusting work to a foreigner (*oświadczenie*) in 2009, which allows citizens of Armenia, Belarus, Georgia, Moldova, Russia and Ukraine to perform work for 6 months within 12 months under relatively easy conditions. Employers' organizations – including those in the international transport sector – continue their efforts to simplify the procedure even further. They claim that it takes too long, requires filling in a complicated form and obtaining the consent of the starost (representative of the local authority at the poviats level). The employers complained that the procedure for legalising stays was even longer during the COVID19 pandemic as public administration bodies were transitioning to working under a sanitary regime.

8.2 TRADE UNIONS

The trade unions' perspective is more nuanced. On the one hand, unions declare that they undertake actions to protect employees and their rights, regardless of nationality and origin. As a consequence, they defend workers from Ukraine and other third countries just like they protect Polish workers (see also Chapter Support addressed to drivers from third countries). Foreigners are present in national sectoral trade unions, including the National Road Transport Section of NSZZ "Solidarność". The Trade Union of Ukrainians in Poland was established and is affiliated with OPZZ. In particular, interventions are undertaken when workers from third countries are discriminated compared to Polish workers. The main assumption is to fight for high labour standards for all employees in the sector.

On the other hand, trade unions see the influx of third-country nationals in wider economic terms, as did Western unions in the past. Due to the constant influx of labour from the East, haulage companies can maintain their business model with low labour costs as their competitive advantage. A steady supply of labour is a barrier to negotiating

better working conditions for local workers. In the case of the dynamically developing road transport sector, the consequences of this process spill over beyond the country's borders, as Polish hauliers are dominating the international road transport market in the European Union. Employees from third countries agree to the lowest wages, overtime work, as well as, sleeping in cabins and low sanitary standards. Unions see this process as a race to the bottom. These factors are also combined with the fact that in Poland taxes and social security contributions are proportionally lower than in most Western European countries. In addition, in Poland and probably in other Central and Eastern European countries, practices that violate the law are more widespread, including undeclared work, letter box companies, etc., with a significant share of temporary work agencies and dishonest transport companies (mainly small entities). According to the interviewee representing trade unions:

Drivers from third countries are ruthlessly used by a large part of transport companies in Poland. Their weaker position – lack of language skills, unemployment in their country, lack of social anchoring in Poland – is taken advantage of by offering them less attractive working conditions. Some migrant workers don't even get what they were promised at the beginning. In addition, the large number of migrants affects working conditions in the entire sector, including Polish workers. It is more difficult for us to fight for higher wages or better social conditions, when there is a constant influx of workers who will perform work under worse conditions.

Trade union representative

The constant influx of migrant workers and increase in labour supply coincide with the practices assessed by trade unions as social dumping. Therefore, unions have numerous propositions aimed at eliminating these fraudulent practices (see Infobox 2).

8.3 SECTORAL SOCIAL DIALOGUE

In terms of sectoral social dialogue, both trade unions and employers in the road transport sector declare that their cooperation has not yet found a common ground. Social dialogue is almost exclusively conflictual and there is a lack of understanding on both sides. This may be an unfavourable factor for the effective organisation of employees who expect a successful resolution of their issues rather than starting a conflict with the employer.

Due to the constant influx of labour from the East, haulage companies can maintain their business model with low labour costs as their competitive advantage. A steady supply of labour is – from a union perspective – a barrier to negotiating better working conditions for local workers.

INFOBOX 2: HOW TO ELIMINATE FRAUDULENT PRACTICES IN INTERNATIONAL ROAD HAULAGE:

- Systematic returns of the drivers to the country of company residence at least for 1 week per 4 weeks (as defined in the Mobility Package);
- Changes in the remuneration structure towards covering a larger part with obligatory social contributions and income taxes (that would call for a national reform of the labour code);
- Providing training to truck drivers at the cost of employers;
- Covering drivers of trucks below 3.5t with the same workers protections as in the case of heavy trucks (partly defined in the Mobility Package);
- Recognising all types of cross-border haulage as being subject to the regulations on the posting of workers, i.e. payment of minimum wages of the country in which the driver is currently present (not foreseen in the Mobility Package, only cabotage and non-bilateral transport is covered);
- Stricter regulations for transport companies i.e. full accountancy, ensuring financial guarantees (including financial guarantees for each driver), employment of drivers proportionally to the number of trucks, equipment standards in the trucks, stricter penalties for violations of remuneration and social contribution regulations, etc. (partly foreseen in the Mobility Package);
- Significant development of social infrastructure along transport routes, including accommodation, sanitary, gastronomic and medical facilities, and provision of secured car parks equipped with technical facilities (snow and water removal, etc.), stands for refrigerators and isotherms trucks.

This is clearly exemplified by the fact that sectoral social dialogue is practically non-existent in Poland. In 2017, a Tripartite Team for Road Transport was established at the Social Dialogue Council. The main reason behind this move was that the European Union was considering legal initiatives to revise the posting of workers Directive and later the Mobility Package. It was important for Poland to formulate its position for the purposes of negotiations conducted by the Polish government in the institutions of the European Union. The inaugural meeting of the team was convened by the Ministry of Infrastructure and Construction and attended by representatives of the government and trade unions (12 representatives of high-level organizations) and representatives of the employers' side (12 representatives of high-level organizations)¹⁸. The team also invited representatives of state authorities: the Chief Road Transport Inspectorate and the Chief Labour Inspectorate. During the entire period of operation of the Tripartite Team for Road Transport, no agreement was reached between the partners, despite intensive

legislative work at the EU level and the accompanying extensive advocacy activities carried out by lobbying organizations representing employers and employees. Given the situation, the Polish government formulated its position on its own and presented it during the negotiations in the EU (i.e. negotiating the revision of the Posted Workers Directive, the Mobility Package). The team is not active in discussing domestic issues in the sector, including issues relating to third-country nationals.

According to the National Labour Inspectorate (2019), there were only 6 company level collective agreements in the transport and storage sectors covering 759 workers. This leads to the conclusion that collective agreements have an insignificant impact on working conditions in the sector.

Sectoral social dialogue in Polish road transport is weak. Up until now, employees and employers' representatives could not agree on the most urgent topics, e.g., the posting of workers in cross-border road transport.

¹⁸ See details here: <http://www.dialog.gov.pl/dialog-krajowy/trojstronne-zespoly-branzowe/zespol-trojstronny-ds-transportu-drogowego-przy-ministerstwie-infrastruktury-i-budownictwa/>

9. Working conditions of third country nationals and major infringements of labour regulations

The driver salary usually consists of a basic salary (the amount of which fluctuates around the minimum wage, PLN 2,600/EUR 600 gross in 2020), per diems and sleeping allowances as well as other bonuses. Due to the growing demand for drivers, the average amount of the basic salary has slightly increased, while a higher increase can be seen in the bonus part.

This chapter will address the issue of third country nationals' working conditions in the road transport sector with respect to the following issues: remuneration, work contracts, working time and social infrastructure. According to the interviewees in the study, working conditions in general do not vary much between Polish and foreign workers. However, there are some significant differences related to the position of migrant workers such as obligations to satisfy the legality of stay and work, language barriers and less support from the social network.

9.1 REMUNERATION

The driver remuneration system is relatively uniform in the international transport sector in Poland. The salary usually consists of a basic salary, the amount of which fluctuates around the minimum wage (PLN 2,600/EUR 600 gross in 2020). The other elements on top of the basic salary are per diems and sleeping allowances, which are paid in line with national regulations on delegations. The latter depends on the rates applicable in the country where the driver is currently staying and the number of travel days. Additionally, in

recent years, employers have offered various types of bonuses and incentive benefits such as: bonus for obeying working time rules, bonus for safe driving, free language courses, vocational training courses, fitness packages and medical packages. Due to the growing demand for drivers, the average amount of the basic salary has slightly increased, while a higher increase can be seen in the bonus part not in basic salary.

The average available salary of an international transport driver oscillates around PLN 7,000-9,000 net (EUR 1,600-2,100 net), when all components are taken together into account, which is approx. 150% of the average wage in the private sector in Poland. Due to the labour shortage, drivers' salaries are clearly higher than those of office workers (often with higher education and speaking foreign languages) employed in the same (transport) companies. The above-described structure of drivers' remuneration is compliant with Polish law and cannot be classified as abuse of an employment relation. However, Haidinger, Turlan, Surdykowska (2017) argue that these practices constitute a profound departure from the principles governing the determination of the basis of the social insurance contribution, and

question whether it is an attempt to conceal a typical employment contract under the peculiar form of an “employment contract for international transport drivers”. There are no distinct figures on the salaries of local and foreign drivers working in Polish transport companies. Compared to drivers working in Western companies, wages in Poland in general are only slightly lower. However, the structure in most EU-15 countries is fundamentally different – a much larger part is the basic salary subject to social insurance, and a smaller part is the bonus part.

Trade unions claim that Polish workers receive slightly higher wages due to their stronger negotiating position, language skills and better organisation, while drivers from third countries are discriminated against in this regard. Their contracts often do not contain provisions on bonuses, and in extreme cases per diems and sleeping allowances are withheld. Representatives of employers’ organizations claim that third country drivers receive higher bonuses because hiring them and retaining them is more difficult. Often, drivers from Ukraine have a better formal education due to the decline of vocational education for drivers in Poland. Representatives of employers in the study, on the other hand, suggest that basic salary of third country drivers may be comparable to or lower than the basic salary of local drivers, while the bonus part is more generous than in the case of local drivers.

Cases of abuse of the coronavirus pandemic by some employers to cut back on allowances were reported: the trade union interviewee representing trade unions in the study referred to a concrete example of a company in the Greater Poland Voivodeship (a region in Western Poland) that announced the withdrawal of bonuses for all drivers amounting to EUR 200 and the suspension of overtime payments, justifying it with the allegedly difficult situation of the company during the pandemic. In fact the number of trips during the pandemic did not fall, and the employer donated funds to purchase an ambulance for a local health centre, attempting to build a positive image of the company in the local community. It cannot be ruled out that the coronavirus pandemic may become a pretext for other unfair behaviours – especially in relation to third-country nationals who have

less resources to counter them. This opinion was expressed by the trade union representative in the study:

The coronavirus pandemic has become an opportunity to worsen the working conditions of drivers. However, it was not always justified by a real decrease in turnover in the company. I assume that dishonest employers may want to take advantage of this circumstance to increase their profit at the expense of the weakest employees, including drivers from third countries.

Trade union representative

One of the key issues related to the structure of the driver remuneration is that only basic salary is covered by social security contributions and income tax. Per diems, sleeping allowances and bonuses are not subject to social insurance. Consequently, social benefits (retirement or disability pension, sickness leave, maternity or parental leave, etc.) are calculated on a low basis. The non-contributory part is the largest part of the salary. This means that drivers get the benefits of a low contribution immediately and can spend it however they want. But the downside is that the common good suffers from underestimated revenues to the public social security system making it less financially stable. Drivers are more likely to be paid the lowest pensions, disability benefits and other benefits in the future. Moreover, low sickness benefits effectively demotivate drivers from calling in sick, which is a particular threat in the case of infectious diseases, including the currently raging COVID-19 pandemic. In order to maintain high wages, drivers decide to drive trucks when they are sick (often with fever and other health problems). In the case of drivers with long experience, many years of refraining from sick leave and proper medical care lead to incomplete treatment of diseases, which, turn into chronic diseases making it impossible for them to continue working in the profession going forward.

Respondents (representatives of trade unions and academics) claim that these practices can be treated as indirect public subsidies for international transport companies and their business model implemented in the European Union

Remuneration practices in road transport can be interpreted as indirect public subsidies for international transport companies at the expense of the common good and public spending on social needs in Poland. Such business strategies contribute to competition on the basis of social standards, fostering a competitive advantage and the conquering of new markets for such companies.

at the expense of the common good and public spending on social needs in Poland. The business model means competing with companies from other countries on the basis of social standards, which gives them a competitive advantage that allows them to gain new markets and maintain the current domination within the EU.

Abuses of employment contracts in Polish road transport take place as a result of a false application of civil law contracts, bogus self-employment or a fraudulent setting-up of the employment contract itself.

Third-country drivers – especially temporary workers – are more likely to accept this model because they can achieve their main goal of earning money in a short time. At the same time, they do not fully contribute to the social security system in Poland, from which the recovery of funds for retirement or disability benefits requires a long administrative journey. Contrary to European Union citizens, third country nationals are not covered by the regulations on the coordination of social security systems, which facilitate the transfer of accumulated funds. These issues are regulated by bilateral agreements that remain outside the relatively efficient structures of EU countries.

Trade unions demand that a greater part of remuneration should be covered by social insurance to ensure a level playing field for all employees and limit indirect subsidies to transport companies from the public domain.

9.2 WORK CONTRACTS AND FRAUDULENT BUSINESS MODELS

Another problem specific to some extent to Poland is the question of the form of contracts concluded between a transport company and drivers.

First, the National Labour Inspectorate has found that civil law contracts are abused and used in place of employment contracts. In 2016¹⁹, as much as 10.5% of inspected contracts should be employment contracts instead of civil law contracts. Workers on civil law contracts are not covered by the same social protection as employees.

Another way to bypass employment is the self-employment of drivers. In the Polish context, they can pay lower social security contributions and, additionally, a flat rate tax. That way they avoid paying higher income taxes because the second income threshold does not apply. Self-employment reduces the labour costs of companies and makes the driver carry the risk and the civil and adminis-

trative liability associated with running a business.

Third, the make-up of the contract is important. Contracts are often presented to third-country nationals in a language that the driver does not understand (Polish, English or other). In such a situation, the driver is not fully familiar with the form of the contract, its content, as well as with the rights and obligations resulting from it. In this case, it is much easier to abuse the law or use different interpretations of contractual provisions. Also, drivers can hardly enforce their rights based on a contract in an unknown language. Sometimes, there are no formal contracts with the drivers and all arrangements are settled verbally. Such undeclared work means a lack of social security contributions and taxes, along with the uncertainty whether the driver will receive any remuneration. According to the National Labour Inspectorate, in 5.7% in 2017 and 6.8% in 2018 employment relations in the inspected companies in the transport and storage sector had no formal employment contract or a civil law contract.

Respondents (trade unions, academics, agencies) reported the existence of unfair business models of companies – particularly small carriers – aimed at circumventing regulations in various ways. The trade union representative mentioned personally interlinked companies that “transferred” employees from one company to another in order to bypass the obligation to employ drivers for an indefinite period and avoid better working conditions for the drivers. Some of these companies are established by third-country nationals. According to the representative of trade unions and the representative of an employment agency other companies intentionally circumvent the law in many ways counting on the weakness of control institutions. They do not pay appropriate salaries and social security contributions, lower the per diems or do not pay them at all, do not conclude the correct contracts with drivers, do not provide accommodation, etc. Such companies close their activities as soon as there is a threat of an inspection to be carried out in Poland or abroad. The representative of work agencies called them “hit and run” companies. Interviewees representing employers’ organizations in the study also criticize such a business model for violating the principles of fair competition. According to the representative of trade unions, in another company the employer has several times fewer trucks than employees (e.g., 10 trucks and 100 employees), which means that employees perform work for some other entity which is not formally registered. In this way, it is very difficult to control working conditions (payment of wages, working time, health and

¹⁹ Subsequent annual reports of the National Labour Inspectorate do not include information on the share of fraudulent civil law contracts in the transport sector.

INFOBOX 3: CIVIL LAW CONTRACTS IN POLAND

Civil law contracts are regulated by the Civil Code, not the Labour Code, therefore employees are not entitled to numerous social protections. In the case of a civil law contract, only a part of social contributions is paid, there are no notice periods or holidays. Until recently the contracts were not covered by the

minimum wage (extremely low rates could be paid) and did not allow workers to associate in trade unions. Regulating work under a civil law agreement puts employees, especially from third countries, in a much worse social position compared to workers on employment contracts.

safety). If a company like this ceases operation, workers have no basis to claim their wages and other rights (e.g. ensuring that they return home from work). In order to counteract such unfair practices, trade unions propose to impose the obligation to establish a financial insurance on each employee, in the same way as in the case of trucks. In the event of unfair practices by the employer, damages are paid from this insurance.

9.3 WORKING TIME

The working time of international transport drivers is regulated in great detail. However, as emphasized by the respondents, these regulations are relatively complex compared to other sectors of the economy and their interpretation is not always clear to employers and workers. Moreover, it is relatively difficult to implement and comply with working time regulations in the practice of a highly mobile worker. In this context, a discussion on compliance with or violation of these provisions can often be difficult and may be subject to various interpretations.

Representatives of trade unions and academia experts point to the practices employed by transport companies who take advantage of this ambiguity and try to interpret it to their advantage. In extreme cases, there are also clear examples of working time violations. This includes violating daily or weekly rest periods or failure to pay remuneration for overtime work. The unions also reported that drivers were forced to take their vacation leave during their regular rest period. The interlocutors indicated that the above-mentioned practices apply to both Polish drivers and third-country nationals. In the case of drivers with a fixed-term work permit (eg. based on so-called “statements”), who concentrate

on earning while limiting their social needs, they are more likely to consent to increasing working hours beyond the regulatory maximum. It is related to the desire to obtain the greatest possible income during the validity of the work permit.

Trade unions welcomed the proposal contained in the Mobility Package ordering drivers to return home for a week’s rest after 4 weeks of work. This allows for proper regeneration and helps to fulfil social roles in the family and local communities. This regulation is also perceived as a form of eliminating competition between employees from Poland and employees from third countries, because the latter group more often agreed to work in a truck for several months without a break. For third-country nationals – especially drivers with fixed-term work permits – the issue of accommodation during this return period is a challenge. As a rule, these workers can return to their countries (Ukraine, Moldova, etc.). Then, they do not have to cover the cost of renting a flat in Poland. However, some of these drivers employed by Polish transport companies return to Poland, where they would need accommodation and cover its cost themselves. This particularly applies to citizens from countries far beyond the borders of the European Union. In such a situation, drivers have to find proper accommodation, and their employers often should support them which includes paying for housing??. However, often such support is lacking, especially with small employers.

9.4 SOCIAL INFRASTRUCTURE

The issue of social conditions in the international transport sector and compliance with health and safety regulations is particularly pressing. The

The working time of international transport drivers is regulated in great detail. However, regulations are complex, difficult to implement and to comply with in the practice of a highly mobile worker. Trade unions welcome the new EU regulation ordering drivers to return home for a week’s rest after 4 weeks of work.

main source of potential problems is the insufficiently developed social infrastructure along transport routes. There is a lack of adequately densely distributed accommodation, catering, sanitary facilities and points with health care services, which equally affects Polish drivers and third-country nationals.

According to EU regulations²⁰, rest cannot be taken in the driver's cabin, but in practice this rule is often violated. In the case of some EU countries (e.g., France), drivers used to travel to neighbouring countries (e.g., Italy, Germany, the Netherlands, Belgium) where rest in a cabin was not prohibited. In addition, during the rest period, the driver – due to the lack of adequate infrastructure – acts as a guard of the truck and cargo, which makes full regeneration difficult. Trade union representatives in the study claimed that the existing infrastructure is also not adapted to the different needs of women and men. It does not provide full comfort, especially for women whose number is growing in this profession.

Especially during the pandemic, the problem related to the lack of access to medical services along transport routes increased. There is a shortage of medical staff at accommodation points, such as paramedics, nurses, sometimes doctors who could perform the first health assessment in the event of health problems or perform simple medical procedures. The lack of such services means that diagnosing a disease takes place very late. In the context of the COVID19 pandemic, this is of particular importance because the road transport sector was one of those that needed to run continuously, and drivers were exposed to the virus. Timely diagnosis of this disease can reduce the spread of the pandemic. Trade unions also reported problems with violating the principles of isolation and maintaining sanitary regime (wearing masks, providing hand sanitizer, etc.), both at accommodation facilities and at national borders. Border and customs services detained trucks as most countries closed their borders in the spring of 2020. The checks were carried out in violation of the rules of isolation and minimizing contact (e.g.: gloves or masks were not worn by the services that asked for passports and documents). Drivers from third countries experienced particular difficulties in crossing borders due to the need to verify documents authorizing them to work and stay in the European Union.

Another issue is related to providing accommodation for longer rest periods (in Poland in this case). As mentioned earlier, some third-country nationals decide to return to Poland (and not to their country of permanent residence), and therefore accommodation is necessary. When looking for accommodation on their own, drivers most often try to find a flat shared with a roommate in order to increase savings. These apartments are often overcrowded. Third-country nationals also face discrimination in the rental market. Due to the lack of housing provided by local governments or the state in Poland, drivers are looking for flats rented by private owners who are less willing to conclude agreements with foreigners. Apartment owners are concerned about difficulties with communication (knowledge of language), as well as debt recovery from a foreigner in the event of possible damage to an apartment. Due to the difficulties in the housing market, large transport companies and (less often) temporary employment agencies help with finding accommodation. They cooperate with entities that specialize in renting flats for foreigners. The standard of these apartments ranges from poor to good housing conditions. As stated by the representative of an employer organisation, more and more often, transport companies cooperate with developers who build housing estates mainly in small towns, where construction areas are less attractively located and therefore cheaper. Due to the large scale of migration, entire housing estates are created, in which migrants live in rotation, including drivers. Such practices may lead to problems of social segregation and ghettoization of space in cities and should become the subject of special attention to local governments that operate spatial development and housing policies. The development of a permanent housing infrastructure dedicated exclusively to migrants may pose a challenge to the social integration of foreigners and create unnecessary tensions in local communities. Third-country nationals sometimes plan to settle in Poland, bring other members of their family (wife, children, parents, etc.) and, in the longer term, more and more often decide to buy a flat and move to the new country. A comprehensive set of social integration measures should be addressed to the latter group, which is currently largely neglected – especially in small and medium towns in the country.

The issues of social conditions and infrastructure in international transport and compliance with health and safety regulations are particularly pressing. There is a lack of adequately densely distributed accommodation, catering, sanitary facilities and points with health care services, which equally affects Polish drivers and third-country nationals.

20 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3A0J.L_.2020.249.01.0001.01.ENG&toc=O-J%3AL%3A2020%3A249%3ATOC

10. Support addressed to drivers from third countries

The vast majority of migrant workers have a peripheral position on the labour market and usually have a weaker stand in employment relations. This is due to the fact that their embeddedness in the Polish society is more precarious, and their social and institutional support is not as extensive as that of local workers. Language skills also play an important role in seeking support. Third country nationals sometimes experience direct discriminatory behaviours. In the case of international haulage drivers from third countries their vulnerable position might be even more threatened by exclusion. In particular, drivers who obtain a work permit for a specified period do not have extensive social capital in Poland (apart from a few key contacts with the employer, agencies, public institutions, etc.) and are probably even less settled in the countries where they operate (mostly in Western Europe). In this context, the dimension of support to drivers from third countries is an important element of social and institutional backup for their work. The types of support related to the profession of driver provided by the employer, trade unions and public institutions are analysed below.

Haulage companies most often recruit drivers on their own due to the labour shortage (so drivers rarely submit their offers to employers). Recruitment takes place directly in the company or is supported by an external agency (including temporary work agencies). Employers or agencies support drivers in obtaining work and residence

permits. Employers often cover training costs on site. It is also clear that the employer is the first point of contact for drivers on the road. In the event of technical, formal or control difficulties, the employer is the first point of information and support. As part of the additional remuneration beyond the contractual obligations, sometimes there are medical and insurance packages, and fitness cards for the driver and their families living in Poland. Companies often organize overnight stays for drivers returning to Poland to rest, and there are even examples of housing estates in small towns built to accommodate migrant workers. It is very rare that all of the above-mentioned forms of support are offered in one set.

On the other side of the employment spectrum, third-country nationals, including international transport drivers, have the right to join trade unions and exercise their basic right to collective representation regardless of the form of employment (employment contract, civil law contract, self-employment). In practice, migrant workers – mainly from Ukraine – are present in the Polish trade unions, however their number is unknown. The respondents from trade unions stated that their share in the total number of unionists is marginal. In many transport companies, 75% of the workforce originate from third countries. Depending on the structure of the trade union, drivers join a unitary union, which is NSZZ “Solidarność”, or a sectoral union that is affiliated with the Trade Union Forum (FZZ) or All-Poland Alli-

Many drivers originate from third countries. Depending on the structure of the trade union, drivers join a unitary union, which is NSZZ “Solidarność”, or a sectoral union that is affiliated with the Trade Union Forum (FZZ) or All-Poland Alliance of Trade Unions (OPZZ) such as the Trade Union of Ukrainians in Poland, which specialises in organising workers from Ukraine.

ance of Trade Unions (OPZZ) such as the Trade Union of Ukrainians in Poland, which specialises in organising workers from Ukraine. The Trade Union of Ukrainians in Poland also supports other third-country nationals who speak Ukrainian or Russian.

The uniform structure of NSZZ “Solidarność” makes it easier to implement the principle of solidarity and defence of workers’ rights regardless of their origin or nationality. A similar policy of organizing foreigners is pursued by British trade unions, e.g. towards Polish employees (Potkańska, Owczarek 2016). In the case of the Trade Union of Ukrainians in Poland, however, we are dealing with a different approach. It was decided that an organization with a national profile should be established, in order to answer the specific and recurring problems of this group of workers, who experience similar problems regardless of the sector, e.g. legalisation of work and stay, form of contracts or lack of a formal contract, no contract in the language known to the worker, violations related to the payment of wages, including paying at least the minimum wage, labour exploitation, sexual harassment of workers, etc.

Polish unions try to organise third-country nationals. Often, foreigners are recruited in companies where a trade union organization already operates. For example, in a large multinational company whose head office is in Western Europe and which has a subsidiary in Poland, a Ukrainian acts as vice-chairman of a trade union operating in the Polish establishment. The company owns around 200 trucks and half of them are driven by workers from Ukraine. Trade union density in the company is very high: 50%. Unfortunately, the level of unionization in the international transport sector as a whole is very low. It is estimated that only 5,000 workers belonged to unions in the best period out of about 600,000-700,000 drivers currently employed in the sector.

Often, drivers from third countries do not know about the existence of unions and the possibility of joining them. Unions are joined more often by employees who have already been active in unions in their countries. Unfortunately, the issue of recognizing membership in foreign trade unions by Polish trade unions has still not been resolved. The interviewees reported that some drivers hold back from joining unions because they are afraid of discrimination on this basis by the employer. This fear is heightened in the case of temporary workers who are in a worse negotiating position in the event of a threat of losing their job. Therefore, they often agree to the working conditions offered to them by the employer. The language is also a signifi-

cant barrier in unionising: third-country nationals often communicate poorly in Polish, and Polish trade unionists rarely speak Ukrainian, Russian or other languages of the Eastern countries. Unions operating in the sector are generally poorly prepared to organise third-country nationals: they do not have enough officers providing services and being able to contact third-country nationals, do not have sufficient instruments such as websites in Ukrainian or Russian or multi-lingual organising materials addressed to the drivers.

However, unions reported that support to third country nationals in the international freight transport sector is growing. First of all, there are information activities on the possibilities and benefits of joining a trade union. In 2018, a leaflet for drivers was prepared by NSZZ “Solidarność” in cooperation with German trade unions, which was developed in several languages: Polish, German, English, Ukrainian, Russian, Belarusian and Romanian. The leaflet was distributed by trade unionists in Poland and Germany in parking lots and accommodation bases for drivers. A year later, NSZZ “Solidarność” also prepared its own leaflet in Russian and Ukrainian, which was distributed in the Mazowieckie region (a region centrally located in Poland with the capital in Warsaw). Currently, as part of the Transfair project, another leaflet is being prepared in cooperation with the German DGB initiative “Faire Mobilität”.

Another form of support is advice provided to drivers. Citizens from third countries may contact representatives of the trade unions of NSZZ “Solidarność”, the Trade Union of Ukrainians in Poland or other organisations by phone or e-mail and ask for advice on a matter related to employment.

Support is also provided in institutions dealing with the legalisation of stay. Support is also available if someone takes a matter to the court. In the event of reporting a violation of the law, trade unions provide information to the competent services: the National Labour Inspectorate, the Social Insurance Institution, the Road Transport Inspection, etc.

The unions also undertake actions aimed at publicising the most glaring violations. They report the cases to local or national media and as a result, the wider public becomes aware of the working conditions of citizens from third countries. Such a strategy builds social awareness and sensitivity in this relatively new topic in Poland. At the same time, social pressure is exerted on dishonest entrepreneurs, who are afraid of losing their good image in the eyes of customers and of possible punish-

The issue of recognizing membership in foreign trade unions by Polish trade unions has still not been resolved. Some drivers, in particular on temporary contracts, hold back from joining unions because they are afraid of discrimination by the employer, and losing their jobs.

ment. One representative of a trade union interviewed for this study stressed:

We support Polish and foreign employees equally. There have been more and more migrants in recent years and therefore we have more reports in this group. We do what we can. Unfortunately, our possibilities are relatively modest due to the small number of members and low revenues from membership fees. We also have difficulty in attracting employees who want to work in a union – young, dynamic, and speaking foreign languages. Our limited resources make the scope of our assistance what it is.

Trade union representative

11. Conclusions

Third-country nationals have quickly become a permanent and significant part of the Polish labour market. The international road transport sector would not function without this group. Estimates indicate that migrant workers may constitute up to 1/3 of all drivers employed in Polish transport companies. Without the massive influx of drivers from the East, transport companies registered in Poland would not have been able to expand into European Union countries and gain new markets due to labour shortages on the local labour market. The employment of drivers from third countries should therefore be considered as one of the fundamental elements of the business model pursued by Polish companies engaged in international road haulage. This business model is based mainly on cheap labour using specific remuneration schemes (minimum wage plus per diems, sleeping allowances and various bonuses), which constitutes a key competitive advantage to the companies and supports their expansion to Western European markets. Moreover, fraudulent practices and violations of working time, regular remuneration payment, paying social contributions and taxes, ignoring obligations to register delegated drivers (visas, A1) are widespread, especially among small so called *hit and run* companies.

Migrants come primarily from Ukraine: it is estimated that they may constitute up to 80% of third-country nationals coming to Poland. Increasingly, however, we can observe the depletion of qualified staff from this country. As a result, employers reach for labour resources from Central and South Asia. Temporary employment agencies play an important role in the implementation of a business model, that relies on the constant influx of migrants. They support transport companies in complicated procedures to legalize stay and work,

verify the competences of candidates, and conduct training courses. Large transport companies recruit third country nationals mostly on their own, and in the event of an excess of orders, establish cooperation with smaller subcontractors. Polish transport companies employ third-country nationals to perform international transport across the European Union. This constellation creates a legal conflict that can be interpreted ambiguously in the face of the complex and not always clear legal provisions: third-country nationals are posted for the provision of transport services to another EU country where they actually would not have the permit to work.

The employment of drivers – both Polish and migrant drivers – is based on a low labour cost model. Drivers' remuneration consists of the minimum wage as well as per diems and sleeping allowances, of which only the first part is covered by social security contributions. Therefore, the retirement and disability pension security are much smaller than they would be if the entire salary was covered by social security. At the same time, low labour costs allow Polish companies to compete with other transport companies and take over the market of international transport assignments in the EU.

Many fraudulent practices prevail in the international transport sector. Compared to other workers, third-country nationals are the most vulnerable to unfair treatment by employers or temporary work agencies. Often, non-compliant employer behaviour is reported in the case of smaller companies and agencies (they constitute the majority of the market), while in large and medium-sized companies it is rare. Some companies and agencies are established with the intention of violating the law,

hoping to avoid control and not be detected. When inspections occur, such companies are dissolved, and employees are left without any support.

The most frequent violations include irregularities in the calculation of wages, income taxes and social security contributions, violations of working time regulations and working conditions (e.g. sleeping in cabins), no contract in the driver's language or no contract at all. Very often, employees from third countries are employed on the basis of civil law contracts that do not provide them with the protection of the labour code, i.e. they are not entitled to an annual leave, notice period, and have a limited scope of social insurance.

The activities of trade unions and public institutions aimed at supporting third-country nationals seem to be insufficient. The standing of trade unions in this sector is weak, and no collective agreements are in place to protect workers. Advisory services and assistance are provided, third country nationals are actively approached to join a trade union. However, it seems that the needs of third country workers far exceed the capacity of the social partners. Public institutions lack resources to effectively control the enforcement of legal provisions. Hence, third-country nationals are to a large extent left to their own devices, their colleagues and their relatives.

Trade unions submit a number of recommendations aimed at improving the living and working conditions of international transport drivers, including citizens from third countries:

- Systematic returns of the drivers to the country of company residence at least for 1 week per 4 weeks (as defined in the Mobility Package);
- Changes in the remuneration structure towards covering a larger part with obligatory social contributions and income taxes (that would call for a national reform of the labour code);
- Providing training to truck drivers at the cost of employers;
- Covering drivers of trucks below 3.5t with the same workers protections as in the case of heavy trucks (partly defined in the Mobility Package);
- Recognising all types of cross-border haulage as being subject to the regulations on the posting of workers, i.e. payment of minimum wages of the country in which the driver is currently present (not foreseen in the Mobility Package, only cabotage and non-bilateral transport is covered);
- Stricter regulations for transport companies

i.e. full accountancy, ensuring financial guarantees (including financial guarantees for each driver), employment of drivers proportionally to the number of trucks, equipment standards in the trucks, stricter penalties for violations of remuneration and social contribution regulations, etc. (partly foreseen in the Mobility Package);

- Significant development of the social infrastructure along the transport routes, including accommodation, sanitary, gastronomic and medical facilities and provision of secured car parks equipped with technical facilities (snow and water removal, etc.), stands for refrigerator and isotherms trucks.

Under the influence of the COVID-19 pandemic, international road haulage is undergoing radical changes. In particular, the first months (March, April and May) brought great uncertainty. With the reintroduction of border controls, trucks waited long hours at the borders. As a consequence, social conditions deteriorated, working time extended and often drivers were irresponsibly exposed to COVID19 when sanitary provisions were not adhered to. The lack of sufficient sanitary infrastructure along transport routes made it impossible to diagnose the infection quickly and posed a threat to the rapid spread of the virus for these highly mobile workers. After the first period of uncertainty, both companies and employees have learned to operate in a new context. International freight transport gradually improved. However, the turnover and volume of transport have not yet returned to pre-pandemic levels. This means that the demand for third-country workers is currently slightly lower. Because international transport is a key sector of the economy, and truck drivers are essential for maintaining basic socio-economic functions, a radical collapse or downturn of the sector (as in tourism) will not materialise, although overall transport volumes have decreased and may decrease further in the coming months. What is more, maintaining the steady inflow of third-country nationals limited by temporary work permits remains problematic under the pandemic circumstances. When borders of some third countries are closed, the flow of migrants can be cut off rapidly. In this context, the question on the prospects for third-country nationals in the international road transport sector cannot be answered at this stage and we must wait for the events to unfold.

To conclude, third country nationals have become a permanent element of the road haulage sector in Poland and are a constitutive element of Polish hauliers' competitive advantage in the EU, mainly

due to the low labour costs. Therefore, they serve a specific business model adopted by Polish transport companies. At the same time, they constitute one of the most vulnerable groups of workers in the sector accepting worse working conditions or less favourable employment forms, for example civil law contracts even signed in an unknown language. As temporary workers holding permits (“statements”) to work 6 months within 12 months period, they are more prone to agree to longer working hours without overtime payments and not taking the rest time they are entitled to. Moreover, finding suitable accommodation is a challenge to some of the drivers as they (as foreigners)

are discriminated in the real estate market. They tend to live in overcrowded and poorly equipped flats aiming to save money that they may bring (or send) home when they return. Due to the weak unionisation of workers in the sector, most of them cannot count on support from trade unions. However, some services are provided by the Transport Section of NSZZ “Solidarność” and the Trade Union of Ukrainians in Poland. The pandemic poses a question about the sustainability of the continuous influx of migrants and, as a consequence, the stability of the road transport sector in Poland. This issue, however, remains to be seen in the upcoming years.

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**Employment of third-country nationals and
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Dominik Owczarek (NSZZ “Solidarność”)

Warsaw, December 2020

