

CON3POST POLICY BRIEF: THE POSTING OF THIRD-COUNTRY NATIONALS FROM UKRAINE THROUGH POLAND TO ESTONIA AND FINLAND

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Introduction

Con3Post research highlights severe challenges related to the posting of third-country nationals (TCNs). This policy brief is based on a regional report of the Con3Post project¹ and focuses on the posting of Ukrainian workers through Poland to work in the construction sectors of Estonia and Finland. Most importantly, our study finds that TCN posted workers have multiple vulnerabilities to exploitation and abuse, when compared with intra-European Union (EU) posted workers. This is because of 1) the increased difficulties in monitoring TCN posting as employers use complex systems for hiring these workers, including chain posting (through multiples countries) and letter-box companies; 2) TCN workers often have lower expectations and/or knowledge regarding employment conditions in the receiving countries and 3) their immigration status is often unclear, ensuring they are afraid to ask for help when maltreated. What follows is that these workers often lack of occupational safety and health training and have no accident insurance coverage, do not receiving wages and other employment conditions they should be entitled to, do not ask for help from authorities/unions and fall through the cracks of social security systems. To improve the situation for posted TCNs, and ensure fair functioning of the free movement of labour (and labour as services) in Europe, we propose to increase the cooperation between regulatory actors, provide more resources for inspections, implement better regulations throughout the whole posting chain and lower the barriers for TCNs to know their rights and ask for help in case of problems.

Key words

Labour migration; labour rights violations; multiple vulnerabilities; posting of workers; third-country nationals

Context

The posting of workers who are third-country nationals in the construction sectors of Estonia and Finland has been a growing trend during recent years. This is evidenced by the (imperfect) posting statistics² and also by the observations made by labour inspectors and trade unionists during inspections and site visits (see Kall et al., 2020: 21-24). Furthermore, in 2017 Poland ranked as a main destination country for temporary labour migrants in the world (OECD, 2019) and over a tenth of the

¹ Regional Case Study Report: From Ukraine to Finland and Estonia via Poland: Migration and posting of third country nationals is available here for download: http://www.migracje.uw.edu.pl/wp-content/uploads/2020/07/Con3Post_U_PL-FI-ET_final.pdf

² The lack of reliable numbers is due to the fact that even if companies register that they are using posted workers, neither in Estonia nor in Finland is the company hiring posted workers required to report the nationality of their workers.

statements registered were by the companies operating in the construction sector (Górny et al., 2018). Poland is also the key sending country for posted workers. In 2018, Poland issued 605,785 PDs A1, out of which 238,525 PDs A1 fall under Article 12 of the Basic Regulation, including 2,990 PDs A1 referred to postings from Poland to Finland and 208 from Poland to Estonia (De Wispelaere et al., 2020).

Push and pull factors of the posting of third-country nationals

Regarding pull factors, the construction sectors of Finland and Estonia, but also Poland, experienced growth and tight labour markets during the period under study (2018-19) (see Kall et al., 2020: 17-20). This growth is also related to the demographic changes on the labour market and growing shortages of workers, especially in low-waged sectors. According to the CEDEFOP forecasts³, in the years 2021-2030 there will be a noticeable increase in the absolute number of job openings in occupation “building and related trades workers (excluding electricians)” in Estonia (8,059), Finland (82,974) as well as in Poland (200,073).

Regarding push factors, there exist clear wage and employment condition differences in the construction sectors of the studied countries, with Finland leading the way with the highest ones, followed by Estonia and Poland, and Ukraine lagging behind (see Kall et al. 2020: 17-20). Furthermore, there has been a mass emigration from Ukraine to Poland in recent years which came as a response to unstable political, economic and social situation in the country following the military conflict with Russia. Some companies and employment agencies make use of this situation, making Poland a transit country through which Ukrainian workers are posted to further EU member states. This is possible because Poland has a strong labour export business of labour intermediaries and middlemen, who have recruitment offices not only in Poland but also in Ukraine and contacts with customers in other EU countries. All this makes migration/posting easier for both workers and companies (see Leiber, Matuszczyk and Rossow, 2019).

While Finland and Estonia are not easily open to Ukrainian construction migrants, existing regulations in Poland since 2006 give access to the Polish labour market for a period of six months in a year based on a statement of an employer wishing to hire a foreigner.⁴ According to official data (OECD, 2019), through the constant inflow of Ukrainian migrant workers, Poland has become the top OECD destination country for temporary labour migrants (1.1 million new non-EU workers in 2017). Poland’s simplified procedure for employing foreigners has given many Ukrainians an access to the Polish labour market, from where they can potentially be posted onward into other, otherwise relatively inaccessible, EU labour markets which are mostly open only to highly-skilled professionals.

The Ukrainian workers are sometimes sent forward to other EU countries, such as Finland and Estonia without any actual work occurring in Poland. As follows from the legal provisions, TCN workers may be posted by companies and employment agencies established in Poland to other countries if they have a residence card or a visa for the purpose of work. However, there are no regulations indicating how long a foreigner must be employed by a Polish employer before posting.

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³ <https://www.cedefop.europa.eu/pl/publications-and-resources/data-visualisations/skills-forecast>

⁴ This scheme is open to nationals of six countries (Armenia, Belarus, Russia, Ukraine, Georgia and Moldova), but has been predominantly used by Ukrainian nationals.

Difficulties in monitoring TCN posting

For local labour inspectorates and trade unions, it is more difficult to monitor and enforce labour standards and other rules and regulations, when there are TCN posted workers involved compared with posted workers with EU background or with other migrant workers. This is related to the multiple companies and countries involved in the former case and with the lack of cooperation between the labour inspectorates of EU and non-EU countries.

Generally, posting chains of TCNs are quite long and complex and might involve sending, receiving and transit country rules and regulations. To monitor them, often multiple authorities and social partners from several countries have to be involved. This makes the process time-consuming and less efficient. Some companies and employment agencies seem to take advantage of it by providing different monitoring bodies with different information or adjusting their posting route by avoiding already well developed cooperation practices between authorities. For example, since the cooperation between the Finnish and Estonian inspectorates is already quite extensive and smooth, some Estonian companies set up branches in Latvia or Poland to circumvent the enforcement authorities by sending Ukrainian workers to Finland.

Monitoring TCN posting is challenging, as it often involves multiple companies and countries and the cooperation between the labour inspectorates of EU and non-EU countries is underdeveloped.

Authorities do not have enough competence and resources to manage the situation as quickly and thoroughly as needed and to conduct as many inspections as would be necessary. Although in Finland (contrary to Estonia) there is a strong sectoral trade union in construction, which also negotiates on behalf of TCNs, it is still difficult to enforce the rights of this group of workers, as they are often unwilling to cooperate with the union.

Multiple vulnerabilities of third-country national posted workers

TCNs are often vulnerable as they are involved in a complex chain of companies and it might be difficult for them to understand which rules and regulations are applicable. It is not always obvious who their real employer is, what kind of employment relationship they have, which country they get social security coverage from and whether it is duly paid (or paid at all), as well as what to do in case of work accidents and occupational diseases. They sometimes do not receive proper occupational health and safety training (in a language they would understand), and might be working in more dangerous conditions than local workers.

It is sometimes difficult for posted TCNs to understand who their real employer is, what kind of employment relationship they have, which country they get social security coverage from and whether it is duly paid, as well as what to do in case of work accidents and occupational diseases.

If workers are posted by letter-box companies, they are particularly vulnerable to theft of their wages and social security payments, because such firms find it easy to disappear, making it difficult or impossible to recover debts from them. In Finland and Estonia, the pattern with work accidents was that when these happened to posted TNCs and an investigation followed, the injured posted TCN worker was paid inadequate compensation (sometimes by the main contractor) and sent away, but tracking the actual employer who owes full compensation was impossible. Some measures that could improve the situation from the posted TCNs' perspective include being offered a proper induction

sessions in a language they are familiar with and improved transnational cooperation of authorities in restricting the use of letterbox companies and illegal corporate practices.

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

Even when mistreated, if a third-country national posted worker is not certain that his/her documents are in line with regulations, the worker might be unwilling to ask for help from the union or authorities out of fear of being deported.

Many migrants and prospective migrants from Ukraine rely on friends or family networks in the destination country in gaining access to information and jobs and both formal and informal private labour market intermediaries play an increasingly important role in informing workers about potential employment opportunities abroad. However, Ukrainian migrants may remain unaware about what posting of workers involves and thus be more vulnerable if they become posted to other EU countries. Although there has been some success in informing them about their rights and some of these workers have been turning to unions and labour rights enforcing bodies, it seems that unions and state actors in the receiving/mediating countries need to put even more effort in building trust with TCNs and informing them in the language they understand.

Recommendations for improving the situation of posted TCNs

- Improving site-level cooperation, including fast and effective data sharing between social partners and state actors to improve the monitoring of the construction sites and detecting unlawful practices.
- Initiating legislative and organizational changes aimed at reducing the scale of irregularities related to the posting of workers from Poland, i.e. by checking the minimum wage declared in the documents submitted to social insurance institutions. It is worth considering introducing special certificates for companies posting workers in accordance with legal regulations and employees’ rights. A provision obliging employers to include employment conditions of posted workers in the content of employment contracts would allow labour inspectors to enforce obligations resulting not only from foreign legislation but also from the contract of employment.
- Widening the strength and geographical reach of transnational cooperation in the area of posting, particularly by including the relevant third countries. Carrying out joint control activities with regard to companies posting workers abroad by the competent authorities, in particular labour inspectorates in the sending, posting countries and the third countries.
- Making available more effective monitoring and punitive enforcement tools for dealing with TCN posting. For example, ensuring that labour inspectors have enough resources and real measures to use their statutory competence to control the whole posting chain.

- Lowering the threshold for TCNs to contact authorities and ask for adequate information/help before, during and/or after their work abroad. Initiating regulations and practices that prioritize enforcing the labour rights of the posted TCNs. Posted TCNs should have the right and real possibility to access information about their rights, counselling, and assistance in pursuing cases where they have been mistreated without the fear of being sent out of the country.
- Eliminating language barriers faced by TCNs. The documents and training should also be provided in the language of TCNs' country of origin.
- Improving the collection and availability of data about migration and posting, including collecting citizenship information through posting register to gain a better understanding of the extent of the posting of TCNs and collecting data about different vulnerabilities TCN posted workers are exposed to.

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