

Freedom of movement: protecting vulnerable groups

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The requests of the German Caritas Association (Deutscher Caritasverband e. V., DCV) regarding the planned European Council conclusions “Improving the working and living conditions of seasonal and other mobile workers”

Background¹

Under the heading “A fair Europe” in the Programme for Germany’s Presidency of the Council of the European Union, the German Government describes how the COVID-19 pandemic has had a lasting impact on the daily lives of many Europeans and has exacerbated inequalities as well as exposing abuse.² During Germany’s Presidency of the Council of the EU, the country’s government therefore wants to strive to improve social cohesion and social security. In order to strengthen protection for the rights of mobile, working EU citizens, who often live in particularly vulnerable circumstances as a result of working in another EU Member State, and to ensure that occupational health and safety requirements are met, the German Government has announced that it will propose Council conclusions on this issue. The conclusions are set to be adopted by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) on 13 October 2020.

Forms of work and rights within the right to freedom of movement

EU citizens enjoy freedom of movement within the EU. This means that they can work in any Member State as employees (freedom of movement of workers), as self-employed workers (freedom of establishment, freedom to provide services) or as posted workers (freedom to provide services). They may not be treated unequally to citizens of the country in which they are working based on their nationality. Depending on which right to freedom of movement they utilise, they have different specific rights.

EU citizens who make use of the free movement of workers and who work, or want to work, in another EU state than their home country are hired directly by an employer in their host country (the place in which they actually perform their work). They have the right to enjoy equal treatment with employees who are nationals of the host country in every respect. There may be differences in access to social rights based on legal provisions, in cases where these rights –

¹ On this topic: <https://www.europarl.europa.eu/news/en/headlines/society/20200618STO81511/parliament-calls-for-better-protection-of-cross-border-and-seasonal-workers>;
<https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9738&furtherNews=yes>.

² See Programme for Germany’s Presidency of the Council of the European Union, p. 12:
<https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/06-30-pdf-programm-en-data.pdf>.

such as health insurance – are tied to the place of usual residence, which for temporarily mobile EU citizens is generally their home country.

The freedom to provide services means that businesses may post staff to another EU country. An employer can post staff to another EU Member State regardless of their nationality if the staff were hired in the country in which the employer is located. They will then perform their work in the host country for a client. Service contracts are often used in this context, and chains of sub-contractors sometimes arise, as for example in construction or the meat industry. In agriculture, too, seasonal workers are not always employed directly by the employer in the host country, but sometimes by a business in another EU Member State which then posts them to the host country. The posting of workers is also used as a form of labour migration in the field of live-in care. These workers are often posted to other EU Member States by agencies. In such cases, the live-in carers should have a regular employment contract with the agency which posts them. However, such providers very often do not ensure that occupational health and safety or minimum wage requirements are met, nor do they establish verifiable quality standards. Posted workers are generally subject to the legislation of the country from which they were posted. This country is deemed their place of employment and its provisions apply (wages, social rights such as social security and the enforcement of worker rights etc.).³ In Germany, for example, this means that posted workers – who often come from the southern and (south-)eastern Member States – are not only cheaper than workers employed domestically, but also have fewer rights.⁴ For example, if they lose their job, they are not entitled to claim unemployment benefits or other benefits provided for in Book II of the German Social Code (SGB II). However, they are subject to the relevant minimum standards in the host country, such as payment of the minimum wage or the generally binding collectively agreed rate, or occupational health and safety standards (including working hours). The employer is responsible for compliance with legal provisions and for the employment relationship. However, legal action against the employer is generally only possible in the country in which the worker was hired.⁵

Circumvention of rights

In practice, it is common for posted workers and for EU citizens who are directly employed in another EU country, to have their rights circumvented by their employers or clients. There are many different ways in which this can occur, particularly in areas where checks are more difficult and workers are vulnerable. For example, it is common to hear of cases in which excessive fees for room and board are deducted from foreign workers' wages. Also commonplace are violations of minimum wage legislation and the EU Working Time Directive⁶, which occur when workers regularly work more hours than permitted and than they are paid for, or, for example, when harvest workers are paid by volume at such low rates that they do not make minimum wage.⁷

³ cf. Art. 12–13 Regulation 883/2004.

⁴ This has been improved, but not substantially changed, by the implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Clients in the host country – the de facto employers of the posted workers – are not themselves obliged to inform the posted workers about their entitlements and their rights, let alone to guarantee them.

⁵ Background information on freedom of movement, social rights and problem areas: neue caritas 1/2020, p. 9 et seq.

⁶ Directive [2003/88/EC](#) of 4 November 2003 concerning certain aspects of the organisation of working time.

⁷ On the meat industry, see: <https://www.caritas.de/fuerprofis/fachthemen/caritas/maximale-ausbeutung-in-der-fleischindustrie>; <https://www.caritas-guetersloh.de/aktuelles/nachrichten/detail/caritas-kritisiert-fleischindustrie-pervertiert-das-system-werkvertragsarbeit>; Peter Kossen, Menschen werden angemietet, verschlissen, entsorgt [People are being rented, used up and thrown away], in: neue caritas 15/2019 p. 13 et seq. On live-in care: <https://www.caritas.de/fuerprofis/presse/pressemeldungen/live-in-careworkers-muessen-besser-geschuetzt-und->

Furthermore, it is often extremely difficult for authorities – and workers themselves – to establish the conditions under which they were hired by their employer. While the A1 form is designed to confirm that workers are employed in their home country and pay social security contributions there, it is almost impossible to verify this in the host country, and the form does not provide information on any other aspect of working conditions.

Another violation of workers' rights involves citizens of other EU Member States working in the form of (bogus) self-employment (reference is made here to the freedom of establishment or the freedom to provide services). Self-employed people are not entitled to minimum wage or to protection under the EU Working Time Directive. They are also responsible for ensuring their own social security coverage. It is not always easy to objectively differentiate self-employment from dependent employment. Universally compulsory social security coverage for self-employed people would perhaps reduce the incentive to declare employment relationships as self-employment. Employment relationships designed as (bogus) self-employment are found in many areas including the meat industry, live-in care, logistics and transport.

It has long been common knowledge that EU citizens working in a Member State other than their home country are exposed to poor working conditions in many sectors. This particularly, although not exclusively, affects people who are only temporarily working in another EU country. It is especially difficult for these workers to successfully defend themselves. They often have a poor command of the language of the host country, are unfamiliar with its legal and social systems and are insufficiently informed about their rights and the obligations of employers and clients.⁸

To improve protection for temporarily mobile workers across the EU, the conclusions of the Council should address the following points:

I. Strengthening the rights of posted workers

- Workers who are posted abroad must only be used to fill jobs in the host country which are expected to be temporary, for example until a specific project is completed. This provision is intended to prevent jobs from being filled by a string of posted workers over a period of years.
- Posted workers must be informed about their rights and be in a position to exercise these rights – e.g. by filing complaints concerning their wages or working hours – in the country in which they are providing services as well as in their home country.

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https://www.caritas.de/cms/contents/caritasde/medien/dokumente/dcv-zentrale/migration/neuecaritasinfo/ausgabe32012-migrati/migrationsinfo_3_2012.pdf?d=a&f=pdf](https://www.caritas.de/cms/contents/caritasde/medien/dokumente/dcv-zentrale/migration/neuecaritasinfo/ausgabe32012-migrati/migrationsinfo_3_2012.pdf?d=a&f=pdf). Agriculture and other areas: <https://www.migazin.de/2020/05/05/sklaverei-ausbeutung-menschenhandel-situation-arbeitsmigranten/>; <https://www.labournet.de/branchen/landwirtschaft/erntehelfer-wenn-man-die-leute-anstaendig-behandelt-kommen-sie-auch/>.

⁸ It is doubtful whether anything will be changed by the implementation of Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union, which Member States must ensure by 1 August 2022 (see Art. 7 of the Directive). A range of counselling services, in particular those aimed at migrants, aim to better inform foreign workers about their rights and to provide them with advice and support. More specialised services are also available, such as: the support centre for contract workers in the meat industry run by the Caritas Association for the Gütersloh district (<https://www.caritas-paderborn.de/aktuell-presse/presse/menschenunwuerdig-und-prekaer-d88fb709-2d61-4794-bcd7-2e3234df2956>); the CKD (Caritas Conferences) project for solidarity with Eastern European carers (https://www.ckd-netzwerk.de/cms/contents/ckd-netzwerk.de/medien/dokumente/dicv-freiburg/gelebte-solidaritaet/osteuropaeische_pflegehelferinnen.doc). One example of how live-in carers can be employed legally and fairly is offered by CariFair, run by the Caritas Association for the Archdiocese of Paderborn (<https://carifair.de/>).

- Agencies which send workers abroad must meet quality standards and ensure that legal employment relationships and occupational health and safety standards are in place. This is particularly important in the field of live-in care⁹.

II. Strengthening and protecting the rights of live-in carers

- Like all workers, live-in carers have the right to a regular employment relationship regardless of whether they are posted from another country, (bogus) self-employed, or directly employed in the host country. They must be guaranteed social security coverage as well as occupational health and safety. Breaches of these requirements may not be overlooked with the excuse of difficulties in the care market.
- Universal, compulsory social security coverage for live-in carers should also be introduced for self-employed people and implemented on a general basis regardless of employment status.

III. Strengthening and protecting the rights of all mobile EU workers

1. *Strengthening occupational health and safety (and regulatory bodies)*

- Labour inspection must primarily serve the purpose of protecting workers. The necessary inspection structures should therefore not be expanded with the primary aim of combating unreported employment, tax evasion or welfare fraud. This could be made clear by adding to the duties of the European Labour Authority (ELA), founded in 2019.¹⁰
- The expansion of the ELA, planned for completion by 2024, must involve suitable measures to strengthen checks of the protection of posted workers.
- Comprehensive, cross-border checks of working conditions and compliance with protective standards must be guaranteed.
- The inspection mechanisms must be designed in such a way that the regulations in force cannot be easily circumvented, and in the long term the ELA must be given powers to take unilateral action and be provided with sufficient staff.
- Collaboration between authorities in the host country and the country in which the employer is located must be improved with the aim of detecting and sanctioning violations of standards.

2. *Implementing existing standards and introducing new ones as required*

- Minimum standards should be established for worker protection and maternity protection; a minimum level of remuneration should also be introduced for the solo-self-employed.
- General standards should be established, including for hygiene and health protection (also applies to accommodation provided to the worker).¹¹

⁹ Live-in carers move in with their service users in order to provide them with the care they need during the last years of their lives in a familiar environment.

¹⁰ cf. Art. 4 of Regulation (EU) 2019/1149 of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

¹¹ These could, for example, draw on the Guidelines to ensure the protection of seasonal workers in the EU in the context of the coronavirus pandemic of 16 July 2020 (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1342).

- Wage payments and rent payments should be separated. When workers are posted and at the same time provided with rental accommodation, it must be clear how much rent is being deducted from their wages.

3. *Providing advice/support/assistance with the exercise of rights*

- Accessible professional advice for EU citizens in their native language, both in their home countries and in the host country, to help them assert their rights.
- Low-threshold, non-bureaucratic access to emergency medical care, in particular emergency treatment via the social welfare system for workers who are not insured in their home or host country.
- Low-threshold access to information in workers' native languages on worker protection and rights as well as maternity protection.

4. *Focusing on the continued implementation of the European Pillar of Social Rights (EPSR)*

- Improving conditions for both providers and recipients of long-term care (Art. 5, 6, 9, 18 EPSR).
- Expanding social security systems in the Member States and ensuring coordination between these systems (Art. 12 EPSR).
- Introducing universal basic income systems to prevent poverty in the Member States (Art. 14 EPSR).
- Implementing the European Pillar of Social Rights not just at EU level but also at the level of the Member States, regions and even towns and cities, depending on their legislative powers.

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Eva M. Welskop-Deffaa
Director of Social Policy and Professional Policy
German Caritas Association

Contact:

Dr Tiessler-Marenda, Head of the Department for Migration and Integration, telephone +49 761 200-371

Dr Verena Liessem, Head of the Department for Lifelong Support and Fundamental Issues, telephone +49 761 200-611

Mr Philip Hagedorn, Legal Officer at the EU office of German Caritas, telephone +49 761 200-702