

The German Meat Industry and Posted Work: Cost-Cutting, Precarious Working Conditions, and Emerging EU and German National Level Policy Change

for the Australian National University's Centre for European Studies

ANIP3003

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Word Count: 4,400

Executive Summary

The German meat industry has long been known for the precarious conditions under which its production employees are working. The affected workers are almost always posted workers. The recent Covid-19 outbreak at the Tönnies meat factory in Gütersloh and the scandalous working conditions which necessitated the outbreak are only the most recent instance. But this problem is not just limited to Germany and the meat industry. It is an EU-wide problem facing many industries. As such, scholars have been suggesting explanations for how these precarious working conditions can emerge, despite existing EU and national legislative frameworks, investigating places as varied as German, Swedish, and Dutch construction, the aforementioned German meat industry and even Finnish shipbuilding.¹

In my view, the contention emerging from this is how the existing policies on posted work have been undermined to create such precarious working conditions and whether there have been adequate policy responses. To that end, this research seeks to answer those questions using the German meat industry as a case study precisely because it is so scandal-ridden and, thus, at the centre of attention for policy makers. It draws on the relevant pieces of legislation, EU and German government reports and releases, private sector reports as well as evidence found in secondary literature. Considering such a wide range of sources should place its findings and corresponding argument on a solid footing but only for the case studied, of course:

As meat sells through price the meat industry has incentive to cut cost and utilises posted work to replace permanent staff allows the industry to do so. This undermines the policy idea behind posted work which was to allow businesses to accommodate short-term staff shortages and is possible because the relevant legislation only grants posted workers minimum entitlements. Thus, they are cheaper than local workers. Precarious working conditions are the result of those cost minimisation efforts but are enabled by inefficient enforcement of existing rules and posted workers' inherent vulnerability. Enforcement is inefficient because assigning liability for breaches of regulations is difficult due to complex subcontracting chains, while the responsible enforcement agency is facing shrinking resources. Posted workers are exploitable because the prospect of higher wages makes precarious working conditions an acceptable risk and the cost of fighting for their rights is often higher than simply quitting the job. EU and German legislators have recognised these problems but only Germany unilaterally banning posted work in meat production might fix the problem for the meat industry, although none empower posted workers to fight for their rights themselves.

¹ Lillie, Nathan, and Ines Wagner, "Subcontracting, Insecurity and Posted Work: Evidence from Construction, Meat Processing and Ship Building," Chap. 7 In *The Outsourcing Challenge: Organizing Workers across Fragmented Production Networks*, edited by Jan Drahekoupil, 157-74, Brussels: European Trade Union Institute, 2015;

Thörnqvist, Christer, and Sebastian Bernhardsson, "Their Own Stories – How Polish Construction Workers Posted to Sweden Experience Their Job Situation, or Resistance Versus Life Projects." *Transfer: European Review of Labour and Research* 21, no. 1 (2015): 23-36;

Voivozeanu, Alexandra, "Precarious Posted Migration: The Case of Romanian Construction and Meat-Industry Workers in Germany ", *Central and Eastern European Migration Review*, no. 2 (2019): 85-99.

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Acknowledgements

I thank Dr Katarzyna Williams of the Australian National University's Centre for European Studies for her continued guidance and helpful comments throughout the development and implementation of this project.

Table1 Abbreviations list

ECJ	European Court of Justice
TFEU	Treaty on the Functioning of the European Union
ASKG	Arbeitsschutzkontrollgesetz (proposed bill: Law on the control of occupational safety standards)
PWD	Posted Workers Directive
FKS	Finanzkontrolle Schwarzarbeit (federal agency responsible for enforcing wage related regulations regarding posted work)
NRW	North Rhine-Westphalia
DGB	Deutscher Gewerkschaftsbund (German Trade Union Confederation)
EU	European Union
PPE	Personal Protective Equipment

1. Introduction

On June 23rd, 2020 Gütersloh city was locked down. Why? A Covid-19-outbreak at the nearby Tönnies meat factory. Approximately 1,500 factory workers caught the disease within days and the national reproduction value peaked at 3.73.² Interestingly, most infected workers were Bulgarian and Romanian posted workers and the outbreak was most likely caused by their illegally precarious working conditions. This is only the most prominent instance of such scandals in the German meat industry.³ It, therefore, seems contentious how posted work can be misused to systematically violate posted workers' rights in the EU and whether policy makers have responded adequately. This piece will study the German meat industry precisely because it is among the most scandal-ridden industries in Europe regarding working conditions of posted workers which places it at the centre of attention for policy makers. It is divided into three sections:

Firstly, the meat industry undermines EU policy on posted work by utilising posted work permanently to cut cost. After reviewing existing literature, I will show how posted work was introduced to the EU's legislative framework through the PWD to enable businesses to respond to staff shortages flexibly. But the meat industry is exploiting loopholes in the relevant EU and German legislation to utilise posted work as means for reducing labour cost permanently.

Secondly, illegally precarious working conditions are caused by the meat industry's drive to cost cut but enabled by insufficient enforcement and control of labour standards and posted workers' inherent vulnerability. Precarious working conditions include breaches of working hour regulations, wage theft, and hazardous working practices all of which reduce labour cost. Those breaches are only possible because of complex subcontracting chains complicating allocation of responsibility and insufficient controls. Furthermore, posted workers' vulnerability is exploitable because of higher wages in Germany and the cost of fighting for better conditions is often too high.

Thirdly, both EU and German legislators have recognised that the original policy is being undermined and that enforcement and control are lacking. The EU responses to this are cautious, while the Germany's is not. The EU's first response was introducing legally binding guidelines for enforcing the PWD through an Enforcement Directive. This is cautious and unsuccessful as no further restrictions are imposed on businesses. The EU's second response was amending the PWD by tightening regulations for businesses, while failing to address the enforcement issue altogether. The ASKG is Germany's proposed response specifically to conditions in the meat industry after the Tönnies-scandal. It is less cautious than the EU's responses because it addresses the misuse of the posted workers policy and the enforcement problem. ASKG might succeed because of that. All three policy responses share that they do not empower posted workers to improve their situation by themselves.

2. Literature Review

The literature on posted work within the European Union focusses on explaining the precarious working conditions found in it. Explanatory approaches have been quite varied,

² "Lockdown in Gütersloh," Tagesschau, 2020, accessed 27/10/2020, 2020, <https://www.tagesschau.de/inland/lockdown-guetersloh-103.html>.

³ Bosch, Gerhard, Frederic Hüttenhoff, and Claudia Weinkopf, *Corona-Hotspot Fleischindustrie: Das Scheitern Der Selbstverpflichtung IAQ-Report 2020-07*, University of Duisburg-Essen (2020), 2.

although most accounts seem to agree that precarious conditions occur most frequently, when workers from low-income (e.g.: Bulgaria, Romania, Poland, Hungary) are posted to high-income member states (e.g.: Germany, Netherlands, Finland) and that low-skilled jobs pose the highest risk, although they are not necessarily filled by low-skilled workers. Hence, this issue is one that occurs across industries and high-income EU members. Case studies include German, Finnish, Dutch, and Swedish construction, Finnish shipbuilding, and, more recently, the German meat industry.⁴

Differences emerge in explaining emergence and persistence of precarious working conditions. For example, Voivozeanu in her study of Romanian posted workers in the German meat and construction industries proposes a causal mechanism based on Michael J Piore's work. The labour market is divided into a primary sector with stable, well-paid employment where labour laws are applied and respected and a secondary sector with low pay, precarious working conditions, and flexible short-term jobs unappealing to locals. Thus, the latter sector is occupied by posted workers. Posted workers remain in such jobs due to worse pay and working conditions at home and insufficient knowledge of the local language.⁵ Lillie and Wagner add that ineffective enforcement of labour regulations applicable to posted workers and loopholes in EU and national legislation are also exploited.⁶

Other authors such as Tepperová et.al. or Bouali consider intra-European labour migration more broadly. They focus on the labour movements that are covered by free movement of labour. The piece of EU secondary law regulating this (Directive 2004/38/EC) establishes that EU citizens may reside in any other members state for three months without any requirements. Beyond that period, members states may distinguish between economically 'active' and 'inactive' migrants to prevent them from becoming a burden on social security. 'Inactive' migrants are often ineligible for social security payments. Several ECJ rulings validate such policies. Consequently, 'inactive' migrants are pushed to find employment as soon as possible to become 'active.' This added pressure may push them to accept precarious work such as working with agencies who pretend to be posting workers from their home countries, while in reality those workers are just economically 'inactive' in the host country.⁷

This research offers a case study of posted work in the German meat industry while relating it to and evaluating it against the ideas behind the relevant EU and German national level policies. The explanatory focus will not be entirely on the precarious working conditions of posted workers in the industry. Rather, it will consider them in the broader context of the meat industry undermining the spirit of the relevant laws and regulations.

⁴ Lillie and Wagner, "Subcontracting, Insecurity, and Posted Work;" Thörnqvist and Bernhardsson, "Their Own Stories;" Voivozeanu, "Precarious Posted Migration."

⁵ Piore, Michael J, *Birds of Passage: Migrant Labor Industrial Societies*, Cambridge; New York;: Cambridge University Press, 1979.

⁶ Lillie and Wagner, "Subcontracting, Insecurity, and Posted Work."

⁷ Bouali, Celia, "Facing Precarious Rights and Resisting EU 'Migration Management': South European Migrant Struggles in Berlin," *Social inclusion* 6, no. 1 (2018): 166-75;

Tepperová, Jana, Jan Zouhar, and Florian Wilksch, "Intra-Eu Migration: Legal and Economic View on Jobseekers' Welfare Rights," *Journal of International Migration and Integration* 18, no. 3 (2017): 917-36.

3. The German Meat Industry Undermining Posted Work to Save Cost

3.1 EU policy on Posted Work

The EU defines a posted worker as “an employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis, in the context of a contract of services [...] or hiring out through a temporary agency.”⁸ Given the temporary nature of each posting, posted workers remain legally based in their home country and do not become part of the host country’s labour market.⁹ Therefore, posted work does not fall under the framework of free movement of labour as found in the TFEU but rather the freedom to provide services.¹⁰ Posted work is defined and regulated by EU secondary law, namely by the Posted Workers Directive 96/71/EC and the Enforcement Directive on the PWD 2014/67/EU.

The policy behind posted work is to improve businesses’ flexibility in responding to various staff insufficiencies. Posted work allows for the short-term compensation of staff shortages such as insufficient number of workers to meet demand spikes or high sickness rates.¹¹ For example, a meat factory experiences a short-term demand spike for its most popular product. Posted work allows that factory to temporarily hire extra workers EU-wide to accommodate the spike. A business may also be faced with aspects of a contract that includes tasks outside the business’ core competencies.¹² Posted work enables that business to temporarily hire workers with the know-how required. But as the following will show, the German meat industry has not been using posted work to accommodate demand spikes or gain know-how.

3.2. The Meat Industry’s Incentive to Cut Labour Cost

The meat industry has been reducing production cost because the main selling argument for meat is the price: The cheaper the meat, the higher the expected sales.¹³ Consequently, the German meat industry has been consolidating. The number of businesses dropped from 16,359 (1999) to 9,137 (2014).¹⁴ The market is now dominated by few large enterprises (e.g.: VION Food Group, Danish Crown, Tönnies Holding). Production processes have shifted towards industrial mass production with small production steps to be completed by ‘cheap’ low-skilled workers.¹⁵ The average cost of butchering a pig dropping to 1.30€ in October 2020 is the result.¹⁶ Meanwhile, industry-wide revenue has increased by 77% from 19.9 Billion € (1999) to 35.2 Billion € (2014).¹⁷

⁸ "Posted Workers," European Commission, 2020, accessed 20/09/2020, 2020, <https://ec.europa.eu/social/main.jsp?catId=471>.

⁹ Ibid.

¹⁰ EU Directive 96/71/EC, Article 1 (1).

¹¹ "Leiharbeit/Werkverträge," Bundesministerium für Arbeit und Soziales, 2018, accessed 27/10/2020, 2020, <https://www.bmas.de/DE/Themen/Arbeitsrecht/Leiharbeit-Werkvertraege/leiharbeit-werkvertraege.html>.

¹² Ibid.

¹³ Efken, Josef et. al., *Stellungnahme Zur Aktuellen Situation Der Fleischerzeugung Und Fleischwirtschaft in Deutschland*, Johann Heinrich von Thünen-Institut (Braunschweig: 2015).

¹⁴ "Beschäftigungsstatistik. Beschäftigte Nach Wirtschaftszweigen," Bundesagentur für Arbeit, 2019.

¹⁵ Bosch et.al., "Corona-Hotspot Fleischindustrie," 4.

¹⁶ "Schlachtpreise Von Schweinen, Rindern Und Lämmern," Bundesministerium für Ernährung und Landwirtschaft, 2020, accessed 27/10/2020, 2020, <https://www.bmel-statistik.de/preise/preise-fleisch/>.

¹⁷ "Produzierendes Gewerbe, Beschäftigte Und Umsatz Der Betriebe Des Verarbeitenden Gewerbes Sowie Des Bergbaus Und Der Gewinnung Von Steinen Und Erden – Jahresergebnisse," Statistisches Bundesamt, 2016.

3.3 Reducing Labour Cost by Exploiting EU and German Legislation on Posted Work

The PWD provides opportunity to cut labour cost because it only sets out minimum standards and entitlements. The PWD is balancing the protection of workers' rights with ensuring fair competition.¹⁸ Several ECJ rulings on posted work (Laval, Rüffert, Vikings) point out that fair competition must be prioritised.¹⁹ The PWD, therefore, stipulates that only the following rights and entitlements extend to posted workers:

Table2 Rights and entitlements for posted workers to which universally applicable host country laws, regulations, collective agreements and arbitration awards apply

(a)	Maximum work and minimum rest periods
(b)	Minimum paid annual holidays
(c)	The minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes
(d)	The conditions of hiring-out workers, in particular the supply of workers by temporary employment undertakings
(e)	Health, safety and hygiene at work ²⁰

But these are only minimum standards designed to minimise the applicability of national laws, regulations, etc. That is because they are different in each state and having national law apply to a wider range of posted workers' rights and entitlements would distort fair competition. Consequently, posted workers are entitled to lower standards and entitlements than host country workers, especially regarding (b) and (c). As social security contributions are omitted such payments must be made in the country of origin and they are they are lower in Bulgaria and Romania than in Germany.²¹ Hence, posted workers are cheaper, allowing meat factories to save labour cost.

Two loopholes in German labour law provided further opportunity to reduce labour cost. Until 2015 no universally applicable minimum wage for the meat nor any other industry existed.²² As Bulgarian and Romanian average wages continue to be below Germany's,²³ posted workers would be content with less pay than German workers. As a result, posted workers often received as little as 5€ per hour.²⁴ A nation-wide hourly minimum wage which currently is set at 9.35€ was introduced in 2015. This is also the maximum wage posted workers are legally entitled to.²⁵ As the average wage of a German meat worker in production still is 22% higher than a posted worker's,²⁶ hiring posted workers still has a cost advantage for the meat industry.

¹⁸ Janda, Constanze, "Die Durchsetzung Der Rechte Entsandter Arbeitnehmer," *Soziales Recht (Frankfurt am Main, Germany)* 6, no. 1 (2016): 1.

¹⁹ Voivozeanu, „Precarious Posted Migration,” 86.

²⁰ Directive 96/71/EC, Article 3 (1).

²¹ Lillie and Wagner, "Subcontracting, Insecurity, and Posted Work," 165 – 169.

²² Bosch et.al., "Corona-Hotspot Fleischindustrie," 9.

²³ See below (vulnerable because of wage gap)

²⁴ Bosch et.al., "Corona-Hotspot Fleischindustrie," 8.

²⁵ "Was Ist Der Gesetzliche Mindestlohn Und Seit Wann Gibt Es Ihn?" Die Techniker, 2020, accessed 27/10/2020, 2020, <https://www.tk.de/firmenkunden/versicherung/versicherung-faq/mindestlohn/was-ist-der-gesetzliche-mindestlohn-und-seit-wann-gibt-es-ihn-2038062>.

²⁶ *Entwurf Eines Gesetzes Zur Verbesserung Des Vollzugs Im Arbeitsschutz (Arbeitsschutzkontrollgesetz)*, Bundesrat, 2020, 18.

The German meat industry has been undermining EU policy on posted work by replacing expensive permanent production staff with cheaper posted workers. In fact, 23.2% less permanent staff was employed by the meat industry in 2014 than in 1999,²⁷ while 50 to 90% of factory workers were Bulgarian and Romanian posted workers by 2019.²⁸ The meat industry was willing and able to do so because of the incentive to reduce cost and the opportunities provided by EU and German legislation on posted work to reduce labour cost, as outlined above. This change has occurred exclusively in production which requires low-skilled and low-paid workers only. But using posted work to replace rather than complement permanent staff goes against the EU's idea of introducing posted work to accommodate short-term staff shortages.

4. Precarious Working Conditions of Posted Workers

4.1 Posted Workers' Precarious Working Conditions as a Result of Cost-Cutting

Firstly, maximum working and minimum resting periods are regularly violated. A surveillance action by the NRW state government where 30 meat factories were controlled between July and September 2019 found 5,863 such breaches. The most frequent ones were exceedance of maximum working (10 hours) and minimum resting (11 hours) periods, and lack of breaks. At one factory, workers surpassed 10 hours of work every day and one employee had worked for 15 hours without breaks.²⁹ Violating those regulations might not contribute much to saving wage expenditure by itself. But it does, should payment for those overtime hours be withheld.

Image 1: 16-hours working day at a meat factory (Source: Überwachungsaktion)

Indeed, wage theft and illegal wage deductions are common in the meat industry. Voivozeanu mentions one respondent who worked in meat production and received weekly food allowances instead of salary payments for three months without consent. Another paid an illegal fee to get hired and had 250€ deducted monthly for accommodation.³⁰ The NRW surveillance action corroborates these practices and acknowledges their illegality. Unlawful wage deductions for PPE, rent, transport, and training were found.³¹ Delayed salary payments to prevent workers from quitting and other unlawful monetary sanctions including penalties for absences due to illness, postponed wage payments and food allowances instead of pay were also reported.³² Illegally paying workers less than what they are owed further reduces the meat factory's wage bill.

²⁷ „Beschäftigungsstatistik,“ Bundesagentur für Arbeit.

²⁸ "Überwachungsaktion Faire Arbeit in Der Fleischindustrie", Abschlussbericht.: Ministerium für Arbeit, Gesundheit und Soziales des Landes Nordrhein-Westfalen, 2019.

²⁹ Ibid.

³⁰ Voivozeanu, "Precarious Posted Migration," 89 – 92.

³¹ "Überwachungsaktion Faire Arbeit," Ministerium für Arbeit, Gesundheit und Soziales.

³² Lillie and Wagner, "Subcontracting, Insecurity, and Posted Work," 169.

Thirdly, posted meat workers' working environments are frequently hazardous because of cost cutting efforts. Many workers are without adequate work health insurance and threatened by losing their job in case of a work accident.³³ The meat factory saves because it does not have to pay extra for insurance or sick leave, when a sick or injured worker is fired. Considering the 408 breaches of safety regulations recorded, the accident risk is rather high. In one instance, fire doors were found jammed open with emergency exits locked, and hazardous materials inadequately stored.³⁴



Image 2: Blocked emergency exit
(Source: Überwachungsaktion)

4.2 Enablers of Precarious Working Conditions

These violations are the consequence of the meat industry's cost-cutting efforts. But they also point to another problem: Ineffective enforcement of minimum working standards gives the industry opportunity to do so. The enforcement issue is two-pronged: Insufficient enforcement and control of relevant laws and regulations and posted workers' inherent vulnerability.

4.2.1 Lack of Enforcement and Control

Firstly, complex subcontracting structures prevent law enforcement from correctly assigning liability. Oftentimes multiple subcontractors post workers to the production line of the same factory. In one instance, 31 different subcontractors were found operating at one meat factory. Posted workers from different subcontractors rarely work at separate workstations. Instead they may be found at the same workstations using the same tools, making it almost indistinguishable which contractor performs which task.³⁵ But this must be clearly identifiable because German chain liability law divides liabilities between contractor and contracting enterprise: The meat factory remains liable for work safety and social security contributions, while the subcontractors posting workers are liable for breaches of working time and wage payments.³⁶ At the same time, German law requires proof of wage related offences to be "complete and unambiguous."³⁷ As the distinction is difficult to make in practice, breaches often cannot be penalised because liability cannot be assigned correctly and enforcement suffers.

Secondly, meat factories can break labour regulations without punishment because controls are inadequate. Currently, German law does not prescribe how frequently meat factories must be

³³ Lillie and Wagner, „Subcontracting, Insecurity, and Posted Work.”

³⁴ "Überwachungsaktion Faire Arbeit," Ministerium für Arbeit, Gesundheit und Soziales.

³⁵ *Entwurf Eines Gesetzes Zur Verbesserung Des Vollzugs Im Arbeitsschutz (Arbeitsschutzkontrollgesetz)*, 13 – 24.

³⁶ "Überwachungsaktion Faire Arbeit," Ministerium für Arbeit, Gesundheit und Soziales;
Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application and Implementation of Directive 2014/67/Eu of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services and Amending Regulation (EU) 1024/2012 on Administrative Co-Operation through the Internal Market Information System ('the Imi Regulation'), 2019;
Ausgewählte Einzelfragen Zum Gesetzentwurf Der Bundesregierung Zur Umsetzung Der Revidierten Eu-Entsenderichtlinie, Deutscher Bundestag, 2020.

³⁷ "Überwachungsaktion Faire Arbeit," Ministerium für Arbeit, Gesundheit und Soziales, 9.

controlled. Moreover, the agency responsible for monitoring working conditions has been decreasing its staff resources. Consequently, the number of controls has decreased over the past years. The German federal government itself considers the frequency of controls insufficient.³⁸ But without enough surveillance, breaches of working regulations remain undetected and penalties cannot be administered.

4.2.2 Exploitation of Posted Workers' Vulnerability

Posted workers are vulnerable to exploitation in the above ways by the meat industry because Bulgarian and Romanian income levels are below Germany's. An average posted worker in German meat production had a monthly net income of 1,984€ in 2019.³⁹ Remember that posted workers only receive minimum wage. Net average income across the entire economy was 538€ in Bulgaria⁴⁰ and 682€ in Romania in 2019.⁴¹ Given low skill requirements, anyone could theoretically work in meat production. Thus, many Bulgarians and Romanians – low-skilled or not – would have incentive to seek posted work there, even those earning triple the average wage in Bulgaria or double that in Romania. Considering the higher pay, precarious working conditions then appear like an acceptable risk as one of Voivozeanu's respondents from the meat industry acknowledges:

*"In Romania one earns very little in comparison to what one earns [in Germany]. This is why I am here. Otherwise, [...] I would have been in Romania [...] instead of drudging here."*⁴²

The meat industry exploits this willingness by realising those very working conditions knowing that enough posted workers will take the job anyway because of higher income prospects.

Posted workers are also vulnerable to exploitation because they have little incentive to enforce their own rights. Claiming their rights is difficult and costly for posted workers in Germany. While workers' unions can provide counselling, the burden of proof in legal proceedings rests on the posted worker and he must bear the lawyer's legal fees upfront.⁴³ The less costly alternative is leaving the job and finding work elsewhere since the posting will eventually end or the worker can simply quit as the meat factory will have little trouble finding replacement given the income differences outlined above. Given its lower cost, the latter alternative is preferred as another of Voivozeanu's respondents explains:

*"If it is not ok, we leave. [...] I [...] take the first means of transportation back to Romania."*⁴⁴

Help is only sought, if workers have not been paid for months and returning home is impossible or, if working conditions are otherwise extraordinarily precarious as a DGB counsellor

³⁸ *Entwurf Eines Gesetzes Zur Verbesserung Des Vollzugs Im Arbeitsschutz (Arbeitsschutzkontrollgesetz)*,13.

³⁹ *Ibid.*, 18.

⁴⁰ "Average Gross Monthly Wages and Salaries of the Employees under Labour Contract in 2020," Republic of Bulgaria National statistical institute, 2020, accessed 27/10/2020, 2020, <https://www.nsi.bg/en/content/6410/total>.

⁴¹ "The Average Gross Earnings on Total Economy in June 2020 Were 5369 Lei and the Net 3298 Lei," Romania National Institute of Statistics, 2020, accessed 27/10/2020, 2020, https://insse.ro/cms/sites/default/files/com_presa/com_pdf/cs06e20.pdf.

⁴² Voivozeanu, "Precarious Posted Migration," 93.

⁴³ Bosch et.al., "Corona-Hotspot Fleischindustrie," 19 – 21.

⁴⁴ Voivozeanu, "Precarious Posted Migration," 92.

interviewed by Voivozeanu outlines.⁴⁵ Given that posted workers often leave the job rather than fighting for their rights and that they are easily replaced, the meat industry can continue subjecting them to precarious working conditions without fear of consequences.

5. Emerging Policy Change

5.1 Policy Change Before the Pandemic

First, the EU acknowledged the PWD's enforcement problem by introducing an Enforcement Directive (2014/67/EU), although this first response is rather cautious. It introduces common standards for all national enforcement agencies from 2016 to strengthen enforcement of the PWD. For example, a "simple declaration" is now required for each posting which must include information on the "identity of the service provider", number of posted workers, duration as well as beginning and ending of the posting, and workplace address.⁴⁶ But this response is rather cautious because it does not go further to impose new regulations upon those offering or utilising posted work such as the German meat industry. It is also cautious as all enforcement measures by the member states must be "justified and proportionate"⁴⁷ which limits the extent to which the new common standards can apply. This is the consequence of the ECJ's key rulings on posted work prioritising fair competition. Indeed, the Directive specifically states the need to "[ensure] a level-playing field for the service providers."⁴⁸

Some of the measures introduced by the Enforcement Directive do improve enforcement. The simple declaration, for example, assists authorities in carrying out "factual controls at the workplace"⁴⁹ and all members find it useful. It makes posted workers "visible"⁵⁰ since it requires a posting's basic parameters to be submitted to the authorities before the posting. Hence, using the simple declaration's information, especially the service provider's identity, certainly helps in disentangling subcontracting webs and in assigning liability correctly according to German law requirements.

But this cautious attempt had little success in resolving the enforcement issue, at least for Germany's meat industry. The Enforcement Directive likely fell victim to its own cautiousness. It neither removed nor diminished meat factories' incentive to abuse the concept of posted work since the Directive did not change the rules affecting the meat industry in any way. One might object that through applying common guidelines, rights violations are more likely to be caught and penalised, thus, reducing incentive to exploit. But given the directive's limitedness to justified and proportionate measures, it appears as if the guidelines are again little more than minimal standards but this time for enforcement with little overall deterrence to the German meat industry. Indeed, after the Enforcement Directive entered into force in 2016, FKS recorded 1,450 violations of posted workers entitlements in 1,000 controls in the meat industry alone.⁵¹

The EU subsequently amended the PWD taking effect in 2020, thus, recognising that the meat industry has been undermining EU policy behind the PWD systematically by replacing permanent staff with posted workers. To prevent this, the amended PWD considers a posting temporary, if it is twelve months or less. If a posting exceeds this period, all national laws,

⁴⁵ Voivozeanu, "Precarious Posted Migration," 92.

⁴⁶ Directive 2014/67/EU Article 9 (1) (a).

⁴⁷ Ibid., Article 9 (1).

⁴⁸ Ibid., (16).

⁴⁹ Ibid., 9 (1).

⁵⁰ "Report from the Commission to the European Parliament," 13.

⁵¹ *Entwurf Eines Gesetzes Zur Verbesserung Des Vollzugs Im Arbeitsschutz (Arbeitsschutzkontrollgesetz)*, 16.

collective agreements, etc. will apply, even non-universally applicable ones.⁵² This should make it harder for employers to utilise posted work permanently as the original PWD lacked this definition.

Furthermore, the amended PWD seeks to improve working conditions. It does so by expanding the rights and entitlements to which national laws, regulations, etc. apply to include accommodation and reimbursement for travel, accommodation, and catering costs.⁵³ The definition of “rates of pay”⁵⁴ is also expanded to include non-monetary remuneration such as payment-in-kind. These measures, in turn, render this response less cautious because laws and regulations affecting providers and users of posted work are tightened.

Although amending the PWD is less cautious than the Enforcement Directive, it is likely insufficient for returning posted work to its intended purpose. Defining the length of a temporary posting does allow authorities to determine, if the simple declaration is consulted, whether a single worker’s posting was intended to be permanent rather than temporary. Then full workers’ rights would apply and the meat factory’s cost benefit would disappear. This tightening of rules for businesses also makes amending the PWD less cautious. In practice, however, the concept of posted work rather than a single posted worker is used permanently. ‘Old’ posted workers leave the meat factory because working conditions are too poor or because the posting has ended and are replaced by ‘new’ posted workers. The amended PWD does not stop this. It merely prescribes when the exchange happens.

The PWD’s amendments are unlikely to improve working conditions because the enforcement issue remains unaddressed. The PWD now does include better standards for posted workers considering the expanded applicability of national laws, etc. and favourably redefined “rates of pay.” However, the enabler of precarious working conditions were not the previous PWD’s provisions but their ineffective enforcement. Yet, the amended PWD does not include new enforcement measures, even though the existing ones are already inadequate. Therefore, German meat factories’ opportunity to exploit posted workers persists.

5.2 Policy Change During the Pandemic

Germany’s proposed ASKG unilaterally departs from the EU’s cautious responses by addressing the original policy’s misuse and the enforcement issue. It seeks to return posted work to its originally intended use by banning it in meat production.⁵⁵ This makes ASKG appear more radical than its EU-level predecessors because, for the first time, use of posted work is explicitly restricted in a specific industry. Introducing mandatory inspection quotas and compulsory digital recording of working hours should improve enforcement where the Enforcement Directive failed to do so.⁵⁶ ASKG tackling both major issues plaguing posted work, specifically for Germany’s meat industry makes it more all-encompassing than the EU responses but also more targeted and, thus, less cautious.

The Covid-19 outbreak at Tönnies in Gütersloh prompted this unilateral departure from the EU’s cautious approach. The outbreak introduced a sense of urgency for resolving those issues.

⁵² “Ausgewählte Einzelfragen.”

⁵³ Directive (EU) 2018/957 Article 2 (a).

⁵⁴ Directive 96/71/EC Article 3 (1).

⁵⁵ “Arbeitsschutzkontrollgesetz: Mehr Schutz Für Arbeitnehmer,” Die Bundesregierung, 2020, accessed 20/09/2020, 2020, <https://www.bundesregierung.de/breg-de/aktuelles/arbeitsschutzkontrollgesetz-1772606>.

⁵⁶ Ibid.

For the first time, lives and livelihoods of the wider population were threatened through the outbreak and the subsequent lockdown; both of which caused by precarious working conditions at the meat factory. Given that such conditions are widespread in the industry, more outbreaks and lockdowns seemed possible. German labour minister Heil spoke of the meat industry's "irresponsibility" towards workers and the public, when announcing ASKG.⁵⁷ Hence, precarious working conditions affecting the voting public directly for the first time caused this policy shift.

It seems that ASKG has a better chance at fixing both problems surrounding posted work, but only for Germany's meat industry, because it tackles them all. Once posted work is banned in production, the cost benefit of utilising posted workers permanently will be gone but only, if this ban is enforced effectively. The 5% inspection quota being mandatory only from 2026, might then be concerning. But the enforcement agencies will receive more resources in the process and, therefore, be able to increase control frequency gradually. Recording working hours digitally, will allow relevant breaches to be detected more efficiently. But by focussing on the meat industry only, ASKG risks that posted workers are displaced to and more exploitable by other industries.

5.3 Missed Opportunity: Empowering Posted Workers

All three pieces of key legislation empower enforcement agencies or place extra requirements on businesses. But this fails to empower the posted workers themselves. German law does not allow them to file class action lawsuits to fight violations of labour regulations.⁵⁸ If this was allowed, the cost of reporting precarious working conditions would decrease for posted workers, while legal fees could be shared and the chances of succeeding would rise. After all, the bargaining power of several posted workers possibly backed by a union is higher than one worker fighting alone. The only current provision aimed at posted workers directly is found in the Enforcement Directive: A national website on posted work available in all EU languages.⁵⁹ But a website neither fixes the pay gap between Bulgaria, Romania, and Germany nor the high cost of reporting breaches. Posted workers remain vulnerable.

6. Conclusion

In summary, the EU's policy on posted work, embodied by the PWD, intends allowing businesses to accommodate temporary staff shortages. The German meat industry has undermined this policy by replacing its expensive permanent staff with cheap posted workers. There is incentive because meat sells through price. There is opportunity because the PWD only sets out minimum entitlements while requiring social security contributions be paid in the sending country where they are lower. Further, German labour law allows posted workers to be paid less than local workers. Both allow meat factories to reduce labour cost.

But the meat industry's cost-cutting has a more dire consequence: Precarious working conditions including violations of working time regulations, wage theft and hazardous work practices. Ineffective control and enforcement of the relevant regulations enable this. Liability

⁵⁷ "Wir Schützen Die Beschäftigten Und Beenden Die Verantwortungslosigkeit in Teilen Der Fleischindustrie," Bundesministerium für Arbeit und Soziales, 2020, accessed 27/10/2020, 2020, <https://www.bmas.de/DE/Presse/Pressemitteilungen/2020/bundeskabinett-verabschiedet-arbeitsschutzkontrollgesetz.html>.

⁵⁸ *Materialien Zur Öffentlichen Anhörung Von Sachverständigen*. Deutscher Bundestag, 2020, 36 – 40.

⁵⁹ "Report from the Commission to the European Parliament," 5.

is difficult to assign because of complex subcontracting chains, while the frequency of controls has also declined. Posted workers' inherent vulnerability for exploitation is the second enabler. The cost enforcing their rights is often too high, while the risk of precarious working conditions seems acceptable because of possibly higher pay.

EU and Germany policy makers do address the issues facing posted work. The EU's Enforcement Directive is a cautious response because it only tackles the enforcement issue by introducing legally binding guidelines. But these guidelines did not improve working conditions much in Germany's meat industry. The amended PWD tightens regulations for providers and users of posted work and expands workers' entitlements. However, enforcement remains unaddressed. Consequently, the amended PWD will likely have little effect. Germany unilaterally departs from the EU's cautious responses by proposing ASKG which bans posted work in meat production and introduces quotas for controls. This focussed policy shift came after the Covid-19-outbreak at Tönnies where the public was directly affected by precarious working conditions at meat factories for the first time.

But what does the way in which these policies have been made, especially during Covid-19, teach about attitudes towards posted workers? Perhaps it teaches that we have been too selfish. The working conditions at meat factories were well-documented. But after the Tönnies-outbreak the situation suddenly is worth fixing more? This raises the suspicion that the responsible German policy makers are more interested in the voting public's well-being than that of posted workers.

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