

Securing fair working conditions

Co-enforcement of labour standards through strategic cooperation between Social Partners and Labour Inspection authorities

SPLIN Policy-relevant conclusions

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Introduction

The effectiveness of traditional labour inspectorates' and social partners' instruments to generate and enforce labour standards are limited when businesses make a strategy of depriving workers of their rights, using complex and transnational business models to exploit regulatory loopholes and undermine fair competition. Hence, strategic and innovative practices are needed to make the enforcement of labour standards more effective, especially in sectors with a high incidence of precarious employment and non-compliance.

The **SPLIN** project¹ has explored two different and complementary types of measures aiming to prevent and tackle employers' circumvention of labour regulation:

1. **Co-enforcement actions**, defined as the ongoing coordinated efforts of labour inspectorates and social partners to jointly produce labour standard enforcement, and
2. **Transnational trade union enforcement action**, defined as coordinated efforts led by a transnational trade union to develop and enforce labour standards, implemented in cooperation with national and local trade unions and state authorities.

These measures have been researched in two sectors where the workplace has become fissured as a result of diverse subcontracting strategies, namely in the **construction industry** and **maritime shipping**. In both sectors workers are particularly vulnerable to non-compliant employer behaviour circumventing labour regulations, with detrimental effects on health and safety and working conditions.

In the **construction sector**, **SPLIN identified and analysed several co-enforcement practices** developed in **Austria, Spain and Poland**. They have

been researched following a multiple holistic case study design to understand the differences and the similarities between the co-enforcement practices in terms of institutional context, design and functioning. For data collection, three research methods were used, desk research, semi-structured interviews (39) and direct observation.

In maritime shipping, SPLIN focused on studying the characteristics of the International Transport Workers' Federation (ITF) inspectorate network.

The research compared the implementation of this action in **Finland, Poland and Spain**, paying particular attention to the cooperation between ITF inspectors, national trade unions and state authorities (Port State Control and Labour Inspectorate). Data has been gathered through desk research, semi-structured interviews (14) and direct observation.

Theoretically, SPLIN project has relied on an innovative research line on co-enforcement which incorporates the potential contributions of worker and employer organisations for co-enforcing labour standards jointly with national labour inspection institutions (Amengual and Fine, 2017). Co-enforcement has inferred a number of mechanisms which justify the relevance of this approach and highlight its specificity compared with traditional enforcement approaches: the non-substitutable elements of state and society; strategic enforcement; routinising the flows of information and resources between state and society; and the need for political support within state and social partner organisations.

The policy-relevant conclusions are based on findings from the empirical research of the SPLIN project conducted by Bettina Haidinger and Ulrike Papouschek (FORBA) in Austria, Pablo Sanz de Miguel, Juan Arasanz and Maria Carpile (Notus-asr) in Spain, Dominik Owczarek and Barbara Surdykowska (IPA) in Poland, as well as Sanna Saksela-Bergholm and Nathan Lillie (University of Jyväskylä) in Finland.

¹ All project outputs, i.e., project newsletters, country-specific and comparative reports, can be downloaded from the project website: <http://splin.forba.at/>

Enforcement challenges and social partnership responses in the construction sector

CIRCUMVENTING LABOUR REGULATION IN THE CONSTRUCTION SECTOR

Construction is one of the sectors highly affected by employer abuses and fraudulent practices. This is the result of the interplay between the structural characteristics of the construction sector related to its high degree of labour intensity (Eurofound, 2017); the specificities of the main business models in operation, relying on extensive subcontracting strategies (Behling and Harvey, 2015); and the effects of different European and national regulatory fields (Posting of Workers Directive, public tendering regulation, etc.). Fraudulent employer practices and poor working conditions are also explained by the way employers take into account the segmented labour supply side in their employment systems. In relation to this latter aspect, employers in the construction sector tap on a migrant work force with a view to perpetuate or extend labour flexibility (Meardi et al., 2012).

The SPLIN research has identified several common fraudulent practices as well as national specificities in the three countries studied (Austria, Spain and Poland), reflecting the impact of national institutional frameworks such as labour, tax, and industrial relations regulations that are essentially defined at national level (Eurofound, 2016). Differences are also explained due to the distinct relevance of posted work in each of the countries: Poland and Spain (since 2011) are net sending countries, while Austria is a net receiving country of posted workers. In Spain and Poland, employer demand for a flexible workforce has been principally satisfied through migrant, including undocumented, workers and, to a lesser extent, through posted workers.

A key common fraudulent practice identified in all three countries relates to **bogus self-employment**. Widespread in Poland and Spain, it is assessed by social partners and the Labour Inspectorate as one of the main problems in the sector. In all countries, self-employment in the construction sector reflects a similar business strategy which is aligned with the fissured workplace business model (Weil, 2014). At the same time, some national institutional factors also contribute to understanding the incidence of self-employment. In Poland, bogus self-employment (unlawful civil law contracts) is explained particularly through differences in wage and social security costs between employees and workers with self-employed civil contracts. In Spain, bogus self-employment is explained as result of a regulatory approach which fragments employment relationships by institutionalising intermediate categories (economically dependent self-employment, so-called TRADE) which add more legal uncertainty and enforcement difficulties (Huertas and Prieto, 2016; Sanz de Miguel, 2019). Bogus self-employment is comparatively less problematic in Austria. In this country, social partners and labour authorities are more concerned about the problem of **bogus companies** often found in extended corporate cross-border networks. Like bogus self-employment, it aims to blur liability of the main contractor in several aspects, particularly social security and wages.

Other relevant fraudulent practices identified are: underpayment, misuse of working time regulation, health and safety irregularities, undeclared work and irregular classification in collective agreements.

In Poland, the problem of **underpayment** is particularly linked to civil contractors and self-em-

ployed workers, given the fact that the government regulated a minimum wage for some self-employment contracts. In Spain and Austria, underpayment is related to the incorrect payment of wages, social security contributions, and allowances, supplements and special payments which are regulated in sectoral collective agreements. However, while in Spain it is a fraud which mainly affects local workers, in Austria it mainly affects posted workers.

Misuses or violation of working time regulation were particularly highlighted in Austria and Poland. In Austria, it affects, on the one hand, posted workers who consent to working more than the legally permitted working hours. On the other hand, it is related to abusing part-time work: workers who are registered as part-time workers in fact work longer hours, usually full-time. Presumably, they receive the remaining part of their salary in an undeclared manner. In Poland, Labour Inspection audits have revealed considerable abuses in registering working time, a significant part of which occurred in SMEs.

Circumvention of health and safety regulation is a crucial aspect in construction, given the comparative high number of accidents that this sector records. Again, in Austria this problem was highlighted in relation to posted workers (Hollan and Danaj, 2018). In Spain, a high incidence of labour accidents is associated with extended subcontracting practices where subcontractors, particularly SMEs, were not fulfilling health and safety regulations (Lidon Lopez et al., 2017).

Finally, the problem of **irregular classification** in collective agreements was reported in Spain where different labour standards according to the specific regional and provincial collective bargaining agreements apply. Many companies register their headquarters in provinces where collective agreements have established lower wages and worse working conditions than the provinces or regions where those same companies are actually operating (Eurofound, 2017).

CO-ENFORCEMENT IN THE CONSTRUCTION SECTOR

The co-enforcement actions in construction identified and researched in the three countries display diverse characteristics.

In **Austria**, the **co-enforcement action** is related to **the state delegation of enforcement competences through the Anti-Wage and Social Dumping Act**

(LSDB-G) to a social partner institution (*Baurarbeiter-Urlaubs- und Abfertigungskasse*, BUAK) **with high industry expertise**. BUAK's competences include the right to inspect wages at construction sites, verify suspected cases of wage and social dumping, and call for a formal complaint to the district authority. This augmentation of competences constituted an innovation in the Austrian context, because previously they have been exclusively under the domain of other institutions, namely the financial police and the health insurance providers. It was the result of a joint political strategy between both social partners to improve inspection and compliance in the construction sector.

In **Spain** (Principado de Asturias), the case study shows an example of **long-term cooperation between trade unions and employer organisations** at regional sectoral level **aiming to promote fair competition, improving working conditions, and better enforcement of health and safety standards**. The main outcome of this cooperation concerns the introduction of social partners' delegates in 1999, who were mandated to carry out inspections for enforcing health and safety standards, and labour contractual regulations. Since then, social partners strategically engaged public authorities (particularly Labour Inspectorate) with a view to improve the efficiency of their enforcement actions. This cooperation proved to be beneficial for social partners and public authorities. Thus, **in 2017**, in a context marked by the increase of fraudulent contracting practices, **a formal co-enforcement agreement between the social partners and the state authorities was reached**. **This tripartite agreement institutionalises regular exchange and transfer of information between social partners and the Labour Inspectorate and creates accountability and sustainable coordination mechanisms**.

In **Poland**, **three autonomous (non-binding) agreements containing some co-enforcement elements were analysed**: the Agreement for Safety in Construction (*Porozumienie dla Bezpieczeństwa w Budownictwie*, ASC), the Agreement on Minimum Wages in Construction (*Porozumienie w Sprawie stawki minimalnej w Budownictwie*, AMW), and the Agreement for Occupational Safety in the Operation of Cranes (*Porozumienie na Rzecz Bezpieczeństwa Pracy przy Obsłudze Żurawi*, AOSOC). In all three agreements, **co-enforcement results from the cooperation of the National Labour Inspectorate with social partners regarding certain elements to safeguard labour standards, particularly those related to knowledge sharing and technical advice**. In addition, the National Labour Inspectorate plays a key role in promoting the autonomous agreements.

The comparison of the co-enforcement actions in construction reveals differences and similarities in terms of context, design and functioning.

CONTEXT AND INSTITUTIONAL FRAMEWORK OF CO-ENFORCEMENT

The cases researched **in Austria and Spain both rely on strong social partnership approaches to co-enforcement**. In Austria and Spain, co-enforcement actions are the result of social partners' historical joint efforts in improving enforcement through social dialogue in cooperation with the state. Another relevant feature of these cases is that social partners play a key role in setting labour standards through collective bargaining. On the contrary, the Polish industrial relations context shows a particularly complex institutional environment where sectoral regulation based on social dialogue or collective bargaining is less developed. **In Poland, co-enforcement initiatives have relied on soft-regulatory mechanisms based on non-binding agreements.**

CO-ENFORCEMENT DESIGN COMPARED

First, the Austrian and Spanish experiences show how **social partner actors play both political and operational roles in enforcement policies**. In both countries, social partners or social partner institutions do not only contribute to the design or evaluation of enforcement policies, but also play an active role in ensuring employer compliance with labour standards through inspections in the workplace. On the contrary, in Poland, social partner inspection activities are only superficially defined, and inspection was not the outstanding element of the actions studied.

Second, the cases studied reflect a **strategic enforcement approach** to some extent (Weil, 2018). They focus on a sector with fragmented supply chains and vulnerable workers; and are aimed at sustainable and ongoing compliance through social partner and company involvement for safeguarding labour standards and promoting a fair competition culture.

Third, the success of these experiences is also the result of the **non-substitutable elements that each partner provides** (Fine, 2017). This is particularly related to how the actions benefit from tacit knowledge of social partners on construction industry. That is: the unique trade union capability to share their tacit knowledge of social partners about the construction industry; the unique capacity of the state to set and enforce labour standards; and the powers that employer associations have to establish best practices in relation to several working conditions.

CO-ENFORCEMENT RESULTS

All co-enforcement actions studied have achieved **promising outcomes** in terms of: improving **health and safety compliance and regulations** (Asturias/Spain, Poland); **targeted and efficient inspections of bogus self-employment** (Asturias/Spain) and **underpayment** (Austria); and in terms of **better informing employers and workers about rights, standards, and obligations** concerning health and safety, wages, and other working conditions (Austria, Asturias/Spain and Poland). In this sense, the actions can serve as good and exemplary practices to counteract and reduce fraudulent practices in a highly problematic sector, through different degrees and forms of cooperation between social partners and state authorities.

Enforcement challenges and trade union transnational actions in maritime shipping

CIRCUMVENTING LABOUR REGULATION IN MARITIME SHIPPING

Labour costs are among the highest of structural costs for the shipping companies. Company strategies had sought to reduce the share of these costs through using **Flags of Convenience (FOCs)**. The FOC system is a long-standing practice consisting of registering a ship in a state other than that of the shipowner's in order to circumvent all kinds of regulations and to reduce costs. As a result of the FOC system, the International Transport Workers' Federation (ITF) launched a global FOC Campaign in 1948. Its original aim was to make an end to the FOC system, but today the focus has shifted to wage bargaining and to force shipowners to sign ITF collective agreements (Lillie, 2006).

In addition, attention should be drawn to the **Maritime Labour Convention 2006 (MLC)**, which is the most significant convention ensuring decent working and living conditions for seafarers. The convention came into force in 2013 after its ratification by thirty member states. It provides only minimum requirements, i.e., these should be applied together with the member states standards which can be higher than the ones mentioned in the MLC 2006. Under the MLC, Port State Control (PSC) authorities and occupational health and safety inspectors may conduct a detailed inspection in case they suspect working and living conditions not in line with the terms of the Convention, or in case they receive a complaint from a seafarer (ITF, 2016).

Despite this international regulation based on MLC 2006 and the ITF collective bargaining policy, the FOC system finds its loopholes, and

a lack of enforcement results in various kinds of labour violations, safety violations and fraudulent employer activities, which ITF (and state) inspectors find on international shipping. The type of deficiencies and fraudulent practices found by ITF inspectors include cases related to **problems with ITF agreements, owed wages, absence of proper rest time, falsifying the logbook with regard to working time and free time, breach of contract, non-compliance with international standards, double bookkeeping, and medical deficits**. Some of the FOC ships do not even have adequate food and water supply. In some cases, an **abandonment of the FOC ship** takes place, i.e., the shipowner fails to cover the cost of the seafarers' repatriation once their work contracts have expired. The situation of abandoned seafarers is further exacerbated by the EU visa regulations, which add uncertainty for their repatriation.

TRANSNATIONAL TRADE UNION ENFORCEMENT ACTION IN MARITIME SHIPPING

The ITF inspectorate network is an efficient tool to enforce seafarers' labour rights. The implementation rules of an ITF enforcement have their origin in the FOC campaign. The ITF inspectorates at national level are coordinated by the ITF headquarter in London in collaboration with representatives of the ITF Fair Practices Committee. **ITF inspectors use tools of union organizers and labour inspectors to protect seafarer welfare and ensure the viability of the ITF's wage bargaining strategy**. Currently, there are more than 100 ITF inspectors worldwide who follow the so called FOC campaign with the aim to promote fair working conditions in the international maritime community.

ENFORCEMENT TOOLS: INSPECTIONS AND EMBARGOES

An enforcement action can be comprised of a routine inspection or a more detailed inspection depending on the reason for an inspection. Routinized enforcement comprises annual inspections of FOC ships, control of agreements including Collective Bargaining Agreements (CBA) and ITF agreements, and the inspection of seafarers' occupational working and living conditions. **Routine inspections can result in a negotiation of an agreement** between union and ship owner in case a CBA or an ITF agreement is lacking or not valid. The inspectors may also require shipowners to solve possible problems related to the working and living conditions of seafarers, such as correction of working hours and payment of unpaid wages. **If such problems cannot be solved through negotiation with the shipmaster and the owner, an embargo may take place**, but because of its logistical consequences this is avoided by all partners. In the realization of an embargo, it is common that ITF inspectors ask for external help, such as from other unions belonging to the ITF or from other inspection authorities.

The realization of ITF enforcement actions, as embargoes and ITF inspections, sometimes occurs entirely through the ITF's own resources, but **often also involves diverse forms of "co-enforcement", that is cooperation between ITF inspectorates and their cooperation partners at union or state level**. These include other public authorities such as Port State Control and Labour Inspectorates or unions from other countries and industries belonging to the ITF.

The actors bring different methods and interests to their enforcement activity, but also share many common goals. The ITF is primarily interested in protecting seafarer wage levels and working standards via collective agreements, while Port State Control and Labour Inspectorates have their own slightly different priorities set out in national laws and international agreements. Despite some differences and a – sometimes – lack of communication between the ITF inspectorates and their enforcement partners, there is much overlap in goals where seafarer welfare and safety are concerned. However, there is no overall (global, European or even national) coherent policy of cooperation between the ITF inspectorates and other stakeholders to realize a co-enforcement of labour standards in the maritime sector.

INTER-INSTITUTIONAL AND UNION COOPERATION FOR ENFORCEMENT OF LABOUR STANDARDS

In Finland, the cooperation between ITF inspectors, labour inspectors and port state controllers has remained vague partly because of the diversity of tasks each inspectorate is in charge of: the ITF inspectors focus on ensuring the fair payment of wages and accurate hours of work and rest; PSC is the lead actor for enforcing national regulations and is in charge of giving either approval or disapproval for MLC certificates for FOC ships; the Labour Inspectorate (AVI inspectors) checks on the occupational health and safety of the seafarers (mainly on ships under the Finish flags). Poor communication and cooperation have led to a form of laissez-fair policy, where each partner focuses only on its own tasks with a risk of losing an overview over the entire inspection. On the contrary, **cooperation between ITF inspectors and other transport unions has proved to be an effective way to force shipmasters and/or owners to take responsibility of their FOC ships that lack agreements or pay substandard wages**.

In Poland, cooperation between PSC authorities and ITF inspectors has worked efficiently. However, cooperation between the ITF inspectors and the Polish National Labour Inspectorate (PIP) in FOC ship inspections seldom takes place despite the PIP's responsibility stated in the Maritime Labour Act. The PIP inspectors focus inspections rather on (the few) vessels flying under the Polish flag. As in Finland, **cooperation between ITF inspectors and other union representatives is strong**. ITF inspectors in Poland can rely on the help of dockers in circumstances where a FOC ship lacks an ITF agreement or Collective Bargaining Agreement, or when problems related to occupational work and safety appear. This kind of cooperation is normally an efficient way to realize co-enforcement.

In Spain, important cooperation takes place between ITF inspectors and port officers. Labour and Social Security Inspectorates do not intervene as they do not have – according to the Spanish legislation – competences to enforce the MLC 2006. **The ITF inspectorate in Spain does not have other significant trade union cooperation partners, such as dockers who could help realizing an ITF co-enforcement action**. This is due to seafarers and dockers belonging to separate unions. The main Spanish dockers' unions are not ITF affiliates.

POLICY POINTERS

TRANSNATIONAL COOPERATION

Both maritime shipping and construction rely on a mobile and international workforce: in maritime shipping, this is due to the cross-border character of the trade but also due to shipowners aiming to minimise labour costs. In construction, the posting of workers² and the recruitment of migrant workers are prevalent employment strategies. With a workforce that is related to different national and international regimes of social protection and labour rights, employers can more easily exploit loopholes of regulations and circumvent regulations that are more favourable for workers. This is a phenomenon observed in many industries, notably road transport and slaughterhouse industry, but also in agriculture or the care sector.

The strengthening of transnational cooperation among state labour inspectors from different countries, on the one hand, and between trade unions and state authorities, on the other hand, are a promising response to such challenges. The SPLIN project shows that ITF inspectors have an exemplary model of transnationally coordinated labour inspection which contributes to improving enforcement of labour standards in a sector where transnational business strategies can more easily deprive workers of decent working conditions.

² Notably, maritime shipping is exempted from the posting of workers directive, as was also partly and newly introduced for road transport workers within the mobility package of 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2020%3A249%3ATOC>

TRADE UNIONS AND EMPLOYER ORGANISATIONS CHALLENGE UNFAIR COMPETITION

The SPLIN project has analysed several initiatives in the construction sector which illustrate a social partnership approach aiming to enforce labour standards. While autonomous trade unions' actions are essential, social partnership approaches can be more effective to ensure sustainable and ongoing compliance due to the unique role employers can play in promoting a fair competition culture. An important aspect here is the willingness of employers to contribute to the direct or indirect financing of inspections, that bring about fairer competition and limit the undermining of labour and wage standards.

CO-ENFORCEMENT OF SOCIAL PARTNERS AND STATE AUTHORITIES

SPLIN has gathered evidence that confirms the relevance of co-enforcement approaches to ensure decent working conditions. In the cases studied, cooperation between social partners and state authorities in enforcement policies goes beyond concertation or co-design of specific measures. It entails that social partners or social partner institutions have operative functions and/or contribute to the implementation of enforcement policies jointly with state authorities. Through this process, social partners share resources and relevant information about the labour process and business models with state authorities that in turn enhances the efficiency of enforcement policies.

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