



SECURING WORKERS' RIGHTS IN SUBCONTRACTING CHAINS

Case studies

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INTRODUCTION

The investigation and assessment of European subcontracting chains carried out in order to draft the Report for the European Trade Union Confederation (ETUC) has resulted in an excellent occasion to reveal the diversification of strategies pursued by private companies in order to externalise risks, also by extending and complicating the subcontracting chain, and their capacity to take full advantage of the existing national norms.

The results are based upon the study of six cases, selected together with the ETUC steering committee, which differ in a number of features, such as the applicable legal framework and the various grades of transnational scope of the subcontracting chain. In this latest respect, Italtpizza and H&M represent the two extremes. While in the first case the business model has involved only companies established and operating in one specific Italian province, where Italtpizza is based and has its production site (even though the involvement of foreign workers was found to be significant), the assessment of the H&M model, to the contrary, has required a proper international approach, although the company is formally established in Sweden.

Also the Spanish meat industry case is limited to one country, i.e. Spain, where subcontracting chains have been put in place in the context of large groups of companies. This experience raises the major issue of the possibilities opened by the relevant national legal framework to raise the company's profit by weakening the workforce, both in terms of social cohesion and economic and normative employment conditions.

The transnational posting of workers within the internal market has been addressed by means of two analogous cases in the construction sector, which concern different EU Member states, namely Vinci and Rive Gauche. They have provided excellent examples of the role that domestic law still has in protecting and enforcing workers' rights, by showing, among other things, the threat that a not sufficiently effective national legal framework can pose to the concrete enforcement of such rights, as well as the persistent problems raised by the posting of workers regime, also in terms of workers' organisation.

The freight transport sector, with its inherent transnational character, has been addressed by analysing a Dutch road transport group, which represents an emblematic case of the extensive use made of subcontracting practices in this sector (e.g. a massive involvement of letterbox companies and the ability of large groups to exploit the different national regimes by opening subsidiaries of dubious character in eastern European countries). However, the case could not be published due to the on-going judicial proceeding.

All case studies have been conducted by following the same methodology. The shared aim was to identify the relevant subcontracting schemes and investigate on possible abuse and/or fraudulent behaviour. In order to achieve this objective, a first phase of assessment of statistical data and applicable normative framework and collective agreements has preceded the fieldwork. This preliminary study has been necessary to address each case on an informed basis and, at the same time, contextualise the impact of subcontracting in the analysed sector.

In the second phase of the research project, semi-structured in-depth interviews to key informants, such as national and/or European trade union representatives, labour inspectors, employers' associations and company representatives, have been conducted. Each specific report is based on both relevant documents collected and interviews with different actors¹. Unfortunately, the response level of the relevant actors has not been homogeneous and, while in some cases it has been possible to interview labour inspectors or even the business management, in others the analysis has been forcefully based exclusively on trade union representatives' responses and available material².

In particular, only in one case (Italtpizza), the main company involved accepted to be interviewed; in the other cases, the companies have refused to talk with us, claiming not to have anything to say on facts on which a criminal proceeding is pending (Rive Gauche, Racing Arena), or simply not replying to the several mails sent (H&M).

In the Spanish meat industry case, we have contacted the most representative employers' associations of the sector (ANICE and FECIC). Both associations accepted to be interviewed. However, after having read the report,

¹ The list of the people interviewed is included in each report.

² All of the interviews have been conducted in the in the language of the interviewee (or in English when feasible) by the research team, on the grounds of a template previously agreed with the ETUC, and properly recorded.

ANICE (the biggest employers' association in the Spanish meat sector) informed us that it did not want to appear in the report whose content was – for ANICE – not acceptable and its position was – according to ANICE – misinterpreted.

As regards the interviews, the hardest case was the one on H&M in Bangladesh that has been prepared without any access to direct sources, notwithstanding the several mails sent to key informants. However, the comparison between the data and the studies provided by H&M with secondary sources (as reports concerning H&M and Bangladesh) has shown that the company uses partial information that can be interpreted favourably to promote its image.

Overall, the researches have succeeded in assessing the subcontracting chains, by identifying the undertakings involved and the relationships and arrangements that exist among them. Similarly, the study has nearly always managed to identify the employers of the workers concerned, despite the many layers of undertakings that characterise the structure of a subcontracting chain. In order to properly reconstruct each business practice, the applicable legal frameworks have been assessed in depth, not only from the labour law perspective strictly speaking. Such analysis, applied to the specific practice addressed, has allowed to evaluate the effectiveness of the relevant legal framework in enforcing workers' rights or, to the contrary, its capacity of encouraging social dumping practices.

The reports also devote some space to discuss the extent of involvement of the workers' representatives in each subcontracting practice and the difficulties met by the trade unions to organise the workers in such a fragmented and dispersive business organisation. In some cases, it has been even possible to broadly classify the structure of the workforce, however, given the scarce availability of the companies to participate in the study, it has been generally difficult to collect reliable data.



CONSTRUCTION SECTOR

RIVE GAUCHE REPORT

Silvia Borelli - University of Ferrara, Italy

The Rive Gauche case is a ‘dépêche-va’ case. People familiar with the many studies of Berntsen, Lillie, Wagner and many others on posting of workers in the construction sector will almost not learn anything new³. In this case, as well as in the previous ones, subcontracting practices combined with posting of workers have the effect of saving labour-cost, fragmenting workers’ community, making controls much more difficult and separating power and profit from responsibility⁴.

The Rive Gauche case is an example of the grotesque landscape of the construction sector in Europe where well-known companies do (almost) not engage any construction workers but are capable of performing significant construction work; where the (supposed-to-be) company managers are keen to delegate their powers to a person that they trust (i.e. the real boss) but then they do not know anything of the contracts signed by this trusted person; where many people are suspected of several workers’ rights’ violations but the project director declares publicly that «the construction work goes on very well»⁵.

The Rive Gauche case presents also a subcontracting structure that has the effect of ultra-fragmenting the workers’ community while spreading racist stereotypes. Not only the workers have been engaged by (apparently) different employers, but activities on the construction site have been distributed according to the workers’ nationalities and the workers have been accommodated according to their country of origin. These divisions have hindered collective actions and have exacerbated tensions between foreign workers and local workers.

In the Rive Gauche case we have few heroes, as the Belgian judge that obstinately cancels the ‘silent’ companies from the business register and the Belgian trade unionists that constantly involve media to sensibilise the general public on workers’ exploitation, and many survivors, as the workers that have given-up fighting for their unpaid salaries in order to keep hope for a new job.

Notwithstanding the many workers’ rights’ violations, the Rive Gauche case appears as a happy-ending story: the shopping centre was inaugurated on the 9 March 2017 and, according to some publications, it is the «symbol of renovation of Charleroi»⁶. Probably, none of the many costumers that have, since then, strolled inside the mall, have memory or have ever heard of the workers’ exploitation during its construction. Nobody is appalled anymore.

The present report is based on several interviews with some personalities involved in the case⁷ and on the deep analysis of the documents of the inquiries run by the *Auditorat du travail* of Charleroi, still pending before Belgian judges⁸. Therefore, the facts reported correspond to what has emerged from the interviews and the documents contained in the dossier but they have not yet been acknowledged by a definitive court decision. The Rive Gauche case concerns Belgium and Italy; therefore, the report focuses mainly on the construction sector and relevant legislation in these two countries.

³ Berntsen L., Lillie N., Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites, in *Economic and Industrial Democracy* 2014, p. 1-17; Eldring L, Fitzgerald I and Arnholtz J (2012) Post-accession migration in construction and trade union responses in Denmark, Norway and the UK. *European Journal of Industrial Relations* 18(1): 21–36; Kahmann M (2006) The posting of workers in the German construction industry. *Transfer* 12(2): 183–196; Lillie N and Sippola M (2011) National unions and transnational workers: The case of Olkiluoto 3, Finland. *Work, Employment and Society* 25(2): 292–308; Meardi G, Martin A and Riera ML (2012) Constructing uncertainty: Unions and migrant labour in construction in Spain and the UK. *Journal of Industrial Relations* 54(1): 5–21; Thörnqvist C and Woolfson C (2013) When tender turns tough: Posted workers and the tendering regime in the Swedish construction industry. *Construction Management and Economics* 30(7): 525–533; Wagner I (2014) Rule-enactment in a pan-European labour market: Transnational posted work in the German construction sector. *British Journal of Industrial Relations*. *Epub ahead of print* 7 January 2014. DOI: 10.1111/bjir.12053; Wagner I and Lillie N (2014) European integration and the disembedding of labour market Regulation: Transnational labour relations at the European Central Bank construction site. *Journal of Common Market Studies* 52(2): 403–419; I. Wagner, Berntsen L., Restricted rights: obstacles in enforcing the labour rights of mobile EU workers in the German and Dutch construction sector, in *Transfer* 2016, Vol. 22(2) pp. 193–206.

⁴ For another example of subcontracting practices that have entailed the circumvention of social law and the saving of labour cost in Belgium see the decision of the Tribunal of Brussels n. 2020/2185 of 19.5.2020.

⁵ <https://www.rtl.be/info/video/588108.aspx>

⁶ <https://revue.knauf.be/fr/le-centre-commercial-rive-gauche-symbole-du-renouveau-de-charleroi/>

⁷ The list of interviews can be found in the Annex.

⁸ In Belgium, the *Auditorat du travail* is competent to investigate cases in which the social criminal code has been infringed; it participates then to the criminal trial as a public prosecutor (see Clesse E., *Droit penal social*, Larcier, 2019, p. 651). The author thanks Charles-Eric Clesse, Jean-François Dascotte, Karin Zidelman and Paul Dhaeyer for having authorised the consultation of the dossiers Rive Gauche I and Rive Gauche II.

SECTION 1:

CHARACTERISTICS OF THE SUBCONTRACTING PRACTICE

1.1. An overview of subcontracting practices in the construction sector

Subcontracting is a very widespread practice in the construction sector. As underlined in a Eurofound study⁹, often, big companies do not directly hire the staff needed for the construction work, but subcontract to other companies, provoking a displacement of the risks associated to the discounts offered to gain the contract from the former to the latter. According to Carlo Briscolini (regional secretary of the FGTB, a Belgian trade union), currently in the construction sector, in order to be profitable a company needs «good managers, good lawyers and good commercial agents, but it needs less construction workers. It has to find contracts and to manage a subcontracting chain»¹⁰. Sometimes, these subcontracting companies are just «manpower companies set up to provide workforce to construction companies. They declare themselves as construction companies but they don't have their own construction activity. They only provide workers to construction companies at both national or cross-border level»¹¹.

Therefore, subcontracting strategies are very often used to lower the price of services provided, save costs and win the competition against other companies: as the construction sector is a labour-intensive one, this means that, through subcontracting, labour costs are reduced. But how?

As already mentioned, subcontracting to a different company an activity means to externalise the risks linked to this activity: the contractor is not liable in case salaries are not paid or if a work accident happens. If a subcontractor goes bankrupt, the contractor can use the 'screen' of the legal personality to avoid any liability. Of course, «in countries and industries where subcontracting chain liability exists, contractors can be held liable for non-compliance with the labour law and social security contributions of their subcontractors when the latter fail to fulfil their obligations»¹². However, chain liability provisions vary from country to country, and in Belgium they are extremely weak (see below). Consequently, subcontracting practices are nowadays a risk-management system: an entrepreneur creates several different companies and fragments his/her activities among them so that risks linked to these activities are externalised¹³. Often, these companies are controlled by the same (physical or legal) person. Therefore, the legal personality has become a means to separate power and profit from responsibility.

Moreover, the client and the main contractor (that are usually well-known companies in the sector) have often a stronger bargaining power than subcontractors and can unilaterally impose contractual conditions to them. Consequently, the subcontractor(s) has(have) to find a way to fulfil the client and the main contractor's requests in term of cost and timing, and this boosts further subcontracting, often to letterbox companies and/or to foreign companies based in countries where labour cost is cheaper.

The economic and financial crisis has worsened this phenomenon; in fact, many construction companies based in countries more affected by the crisis, where construction sites are stuck and new building projects have become rare due to the shortage of public and private investments¹⁴, are keen to sign contracts for performing their activities elsewhere and, for this purpose, they offer low-cost services.

⁹ P. Sanz de Miguel, *Fraudulent Contracting of Work: Construction Sector*, European Foundation for the Improvement of Living and Working Conditions, 2017, p. 13 and 23.

¹⁰ See the interview with Carlo Briscolini. See also *Détachement des travailleurs : Améliorer les collaborations entre les partenaires sociaux et les autorités publiques en Europe. Synthèse générale*, p. 26.

¹¹ P. Sanz de Miguel, *Fraudulent Contracting of Work: Construction Sector*, European Foundation for the Improvement of Living and Working Conditions, 2017, p. 8.

¹² Lillie N., Wagner I., *Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building*, in Drahokoupil J. (ed.), *The outsourcing challenge: organizing workers across fragmented production networks*, ETUI, Brussels, 2015, p. 162.

¹³ On the necessity to limit the subcontracting chain see Čaněk M., Kall K., Lillie N., Wallace A., Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 6.

¹⁴ Between 2008 and 2017, public investments in Italy lost 10,7 billion € (Cicciomessere R., De Blasio G., *Edilizia, una crisi inarrestabile. Gli effetti della crisi del settore edile negli anni 2008-2018*, Osservatorio Statistico dei Consulenti del Lavoro, 2019, p. 4).

According to a study done by the *Osservatorio statistico dei Consulenti del Lavoro*, between 2008 and 2017, 3,4 million jobs were lost in the construction sector in Europe, 539.000 of which were in Italy¹⁵. This job loss has involved mainly Italian workers (498.000). In the same period, undeclared work and under-declared work in the construction sector in Italy raised from 11,4% in 2008 to 15,8% in 2016. This means that currently in Italy illegality is very widespread in the sector, and that the consequences of this situation are mainly suffered by migrant workers.

The construction sector in Belgium has not suffered the same crisis. According to the data provided by the ONSS, from 2012 until 2017, the total number of workers in the sector has constantly increased. However, mainly the number of posted workers and local and posted self-employed workers grew¹⁶.

Another important information concerning the construction sector in Italy concerns the role of organised crime (mafia). Recent researches on Veneto (the Italian Region where Gruppo Bison is established) have shown that the economic and financial crisis has worsened the elements and dynamics that have facilitated the spread of mafia in the region¹⁷. In particular, illegality has increased in labour-intensive and low-technological sectors (as the construction sector)¹⁸.

Subcontracting to a foreign company presents other additional advantages for the main contractor. First of all, social contributions for the posted workers are paid in the country of origin, i.e. the contractor can enjoy the lower social security costs offered by some Member States. Moreover, notwithstanding the recent improvement, labour law and collective agreements in force in the host country are applicable to posted workers in so far as it is allowed by the Posting of Workers Directive and Article 56 TFEU; in particular, posted workers can never benefit from the host country's legislation on termination of the employment contract (art. 1 § 1a Directive 96/71 inserted by the Directive 2018/957) and this can prevent them from enforcing their rights. The lack of enforcement of workers' rights in case of posting is a problem widely discussed by labour scholars¹⁹. This problem is even more serious in the construction sector where many workers are third-country nationals fearing to lose their work permit and/or have precarious working conditions.

Posting of workers is a widespread phenomenon in the construction sector in Belgium (as well as in other European countries)²⁰. Facing the competition with posted workers, Belgian trade unions lament not to be able anymore to train local workers, and thus the number of young workers in the construction site has constantly diminished and there is a progressive ageing of the local construction workers; consequently, there is no feasible alternative to posting of workers in the sector²¹. This entails tensions among workers: posted workers may be considered by local workers as enemies, and racism spreads, creating situations difficult to manage by trade unions²².

1.2. Client, Contractor and Subcontractors in the Rive Gauche case

The Rive Gauche case concerns a large construction site in Charleroi. In 2014, the client (Groupe St. Lambert Promotion) signed a contract with an association *momentanée* to which Valens s.a. and Duchene s.a. participated (hereafter: Valens-Duchene). Under this contract, the association *momentanée* was engaged to build a large shopping centre in Charleroi.

¹⁵ Cicciomessere R., De Blasio G., Edilizia, una crisi inarrestabile. Gli effetti della crisi del settore edile negli anni 2008-2018, Osservatorio Statistico dei Consulenti del Lavoro, 2019, p. 3. It should be noted that, from 2015 on, in many European countries the situation has improved and some jobs have been created in the construction sector; however, in Italy, only in 2017 there was a small job growth (+5000 workers).

¹⁶ See the data presented the 20.2.2020 in the context of the European Project TUWIC.

¹⁷ Belloni G., Vesco A., *Come pesci nell'acqua. Mafie, impresa e politica in Veneto*, Donzelli, 2018, p. 28 ff. According to Banca d'Italia (Economie regionali. L'economia del Veneto, 2013, p. 31), between 2007 and 2011 Veneto lost 5,7% of its GDP, a percentage much higher than the Italian one (-1,2%). This was caused mainly by the high presence of industrial and construction sectors in the Region, two sectors very affected by the crisis.

¹⁸ Pantalone M., *Crisi economica e propensione all'illegalità in Veneto*, in *Crisi economica e comportamenti illegali*, ed. G. Bertin, Franco Angeli, Milan, 2018.

¹⁹ Posted workers are often reluctant to address local trade unions or other authorities, due to their weak integration in the host country, the language barriers and sometimes the perception of trade unions in their country of origin (Danaj S., Sippola M., Organizing posted workers in the construction sector, in Drahoukoupil J. (ed.), *The outsourcing challenge: organizing workers across fragmented production networks*, ETUI, Brussels, 2015, p. 224 and 230).

²⁰ P. Sanz de Miguel, *Fraudulent Contracting of Work: Construction Sector*, European Foundation for the Improvement of Living and Working Conditions, 2017, p. 5; Lillie N., Wagner I., *Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building*, in Drahoukoupil J. (ed.), *The outsourcing challenge: organizing workers across fragmented production networks*, ETUI, Brussels, 2015, p. 165; Van Overmeiren F., *Undeclared Labour in the Construction Industry*, European Institute for Construction Labour Research, 2006.

²¹ This problem has been mentioned also in Brachini N. and Galossi E., *Studio di caso sul settore edile*, Ride project, 2014, p. 4.

²² See the interview with Carlo Briscolini.

Valens and Duchene are two important and well-known Belgian *sociétés anonymes* active in the construction sector, both belonging to the French group Eiffage²³. The Eiffage group has more than 70.000 workers all around the world and it is present in more than 50 countries²⁴. Both Valens and Duchene are wealthy companies: the former's turnover in 2018 was of 97,701 million € (+ 6,3% compared to 2017); the latter's turnover in 2018 was of € 116,519 million € (+ 7,3% compared to 2017)²⁵. For both companies, the staff cost represents only a small part of the total costs (15,7% for Valens s.a.; 20,43% for Duchene s.a.); the biggest amount of costs is due to raw material purchase (65,9% for Valens s.a.; 61,23% for Duchene s.a.). According to an FGTB study, in 2018, the hourly labour cost for Valens' employees was of € 48,22; in the same period, one hour of work brought to the company € 64,57²⁶. Similarly, in 2018, the hourly labour cost for Duchene's employees was of € 42,03 and one hour of work brought to the company € 50,35²⁷.

Valens-Duchene mainly contracted out construction work in the Rive Gauche site. In fact, only the site managers and few other employees necessary to supervise the activities on the site were directly engaged by Valens and Duchene²⁸. On 26 March 2015, Valens-Duchene signed a contract with Consorzio edile. Consorzio edile is an Italian consortium, created in 1983 as an organisation aiming at coordinating the activities of its members (17 companies in 2018)²⁹. However, Consorzio edile is also an entity that can operate externally, i.e. it can sign contracts with or perform activities in favour of other companies. From the 1 January 2002 until 9 August 2017, Gianpietro Secchiati was the president of the consortium³⁰; in the same period, Aldo Bison was the technical Director of the consortium. In reality, the Consorzio edile was administered by Aldo Bison; in fact, on 19 January 2009, Secchiati signed a proxy in favour of Gruppo Bison s.r.l. that allowed the CEO of the latter (Aldo Bison) to carry out any activity concerning the Consorzio³¹. On the basis of this proxy, Mr Bison negotiated the contract with Valens-Duchene and signed it on behalf of Consorzio edile³². Moreover, Bison's wife (Anna Basso) and his daughter (Lara Bison) were hired by Consorzio edile to manage its commercial activities: they sent the invoices to Valens-Duchene and asked the subcontractors to hand out invoices when Mr Bison ordered it³³. Therefore, Aldo Bison decided when (and if) to pay the subcontractors³⁴. Moreover, Fabio Bison (Aldo Bison's son) was employed by Consorzio edile and present in the Rive Gauche site³⁵.

Consorzio edile's headquarters is in Jesolo (Venice, Italy). In 2016, it had also a Belgian subsidiary (Edil 2004) whose office (in Gosselies) resulted empty³⁶. This subsidiary was managed by Giuseppe Bison, Aldo Bison's brother³⁷.

Gruppo Bison is a limited liability company with a paid-up share capital of € 10.000. The company aims at finding business opportunities in the construction sector for (apparently) other companies. In reality, Gruppo Bison is suspected to have acted as the 'safe' of a constellation of companies *de facto* controlled by Aldo Bison: he negotiated contracts for other companies that then had to pay a fee for the services provided by him³⁸. Notwithstanding the huge number of construction sites managed by Gruppo Bison and advertised on its website (among which Rive Gauche and other sites in Belgium)³⁹, in 2018 the company did not have any employee and during the Rive Gauche case it had only one employee, Mario Giannetti (Mr Bison's son in law)⁴⁰.

²³ Valens has been created in 1983; its company's number in the Banque Carrefour des Entreprises is 0424.905.926. Duchene was founded in 1956; its company's number is 0405.619.851.

²⁴ According to C.E. Clesse, the Eiffage Group does not have enough workers to perform all its projects around the world. Therefore, subcontracting is a widespread practice in the group.

²⁵ Notwithstanding the high turnover, the paid-up share capital of Valens is € 8000 and of Duchene is € 6000.

²⁶ Paulet L., Analyse IEF de VALENS S.A., service d'études, La Centrale Générale – FGFB, 14.2.2020.

²⁷ Paulet L., Analyse IEF de Entreprises générales Louis DUCHENE S.A., service d'études, La Centrale Générale – FGFB, 14.2.2020

²⁸ See the interview with Carlo Briscolini.

²⁹ See the contract between Valens-Duchene and Consorzio edile in the dossier Rive Gauche I.

³⁰ Secchiati worked for Bison from 1982 until May 2018. According to him, the assembly that removed him from the presidency of Consorzio edile never took place (see the interview with Secchiati on 21 January 2019 in the dossier Rive Gauche I).

³¹ Visura of the Consorzio edile provided by the Italian Company Register on 21 January 2019. The author thanks Manuela Paraschivoiu of Fillea Cgil Lazio for having provided the information from the Italian Company Register.

³² See the interview with Aldo Bison on 28 January 2019 (dossier Rive Gauche I). According to a declaration of Secchiati, he was not at all aware of the contract signed by Bison for the Consorzio Edile (interview on 21 January 2019, dossier Rive Gauche I)

³³ See the interview of Aldo Bison on 28 January 2019 (dossier Rive Gauche I).

³⁴ See the interview with P. Dhaeyer.

³⁵ See the dossier Rive Gauche I.

³⁶ See the interview with Paul Dhaeyer.

³⁷ See the dossier Rive Gauche I.

³⁸ 1% or 2% of the turnover (interview with Aldo Bison on 28 January 2019 in the dossier Rive Gauche I). See also the interview with C.E. Clesse and J.F. Dascotte and the interview with Mr Giannetti on the 18.4.2016 in the dossier Rive Gauche I.

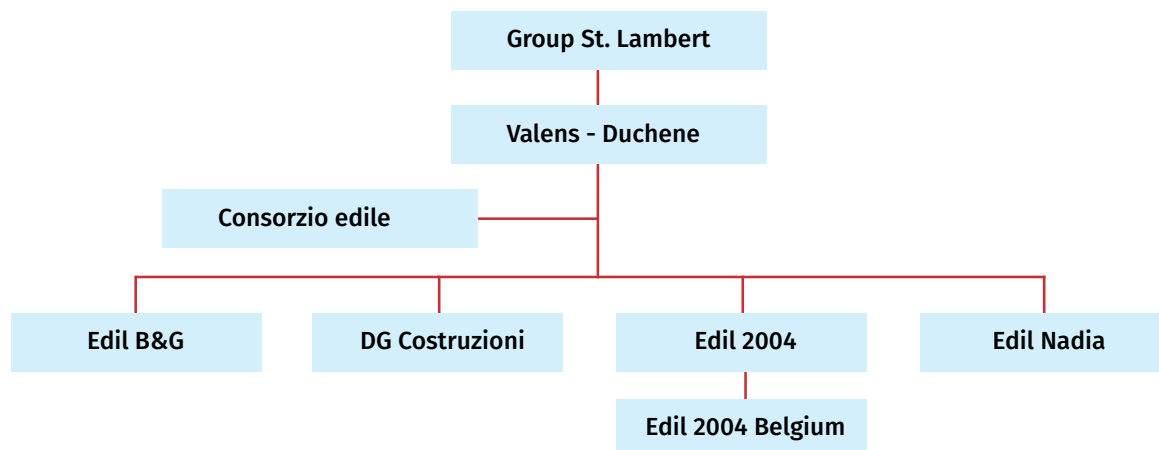
³⁹ <https://www.gruppobison.com/realizzazioni/>

⁴⁰ Visura of the Gruppo Bison provided by the Italian Company Register on 21 November 2019.

Conorzio edile did not directly hire workers to perform its activities in the construction site but subcontracted them to other companies: DG Costruzioni s.r.l., Edil B&G s.r.l., EdilNadia di Nadia di Bouraouya s.r.l. and Edil 2004 s.r.l. According to the interviews, all these companies were members of the consortium in 2016⁴¹. However, none of them was part of the consortium anymore on 21 November 2019⁴². Moreover, the relationship between Conorzio edile and the subcontracting companies was not clear⁴³: Mr. Bison declared that there was no contract between the Conorzio edile and the subcontracting companies; however, Conorzio edile signed an agreement to assign the construction work to DG Costruzioni on 26 March 2015 and an agreement with Edil B&G on the 22 February 2016⁴⁴; none of these agreements appear in the dossier. According to the subcontracting companies' managers (i.e. the persons that were declared to be the manager on the Business register), they were demanded by Mr Bison in order to work in the construction site⁴⁵.

Valens-Duchene was aware of the subcontracting chain. In fact, the contract between the *association momentanée* and Conorzio edile prohibited the latter to subcontract without the authorisation of the former; moreover, only one level of subcontracting was admitted and the subcontracts should have sent to Valens-Duchene for controls (Article 20 co. 1 and 2)⁴⁶. However, neither Valens nor Duchene provided these contracts during the inquiry.

Subcontracting structure in the Racing Arena case



All the subcontracting companies were formally administered by third-country nationals⁴⁷. DG Costruzioni is a limited liability company with a paid-up share capital of 10.000 €; CEO is Driton Gjyliqi, born in Yugoslavia (nowadays Kosovo). The company was registered in 2011 and it is still present in the Italian business register, even if since 2013 it has not submitted its budget. In the first half of 2016 it employed 160 people while in the second half of the same year it did not have any worker⁴⁸.

Edil B&G is a limited liability company with a paid-up share capital of 10.000 €; CEO is Alina Luciana Morari, born in Romania, partner of Gani Jahaj (Serbian) in 2016. On 6 April 2016 the company was cancelled from the Italian Business Register. From the information collected, it was not possible to determine the number of its employees in 2016. In the declaration released to the Auditorat du travail on 28 April 2016, Mr Jahaj explained that the real headquarters of Edil B&G and DG Costruzioni was in Rovato (Brescia, Italy) and that Alina Morari was in charge of the administration for both companies. Mr Jahaj was employed by DG Costruzioni from 2013 to 2015 and in 2015 he was engaged by Edil B&G.

According to the control done by Belgian social inspectors on 13 March 2017 (dossier Rive Gauche I), in 2016 DG Costruzioni and Edil B&G posted in Belgium 205 workers. Applying the Belgian national collective agreement for construction work (Commission paritaire 124), the social inspectors calculated that € 587.966 were due to the workers as remuneration and € 141.775 as lodging expenses⁴⁹.

⁴¹ See the interview with C.E. Clesse and J.F. Dascotte.

⁴² Visura of the Conorzio edile provided by the Italian Company Register on 21 November 2019.

⁴³ See the interview with C.E. Clesse and J.F. Dascotte.

⁴⁴ See interview with A. Bison on 28 January 2019 (dossier Rive Gauche I).

⁴⁵ See the interview with Jahaj on 28 April 2016 (dossier Rive Gauche I).

⁴⁶ See the contract between Valens-Duchene and Conorzio edile in the dossier Rive Gauche I.

⁴⁷ See the interview with C.E. Clesse and J.F. Dascotte.

⁴⁸ The visura provided by the Italian Company Register does not report the number of employees in 2017, 2018 and 2019.

⁴⁹ The calculation was done on the basis of payrolls sent by Italian labour inspectors via IMI.

Our research on the Italian Business Register and on the database Aida did not provide any information on Edil 2004⁵⁰ and EdilNadia di Nadia di Bouraouya, a concrete evidence of the fact that subcontracting practices make it extremely difficult to identify the companies present on the site. According to the interviews contained in the dossier Rive Gauche I, Edil 2004 employed in the Rive Gauche site 25 workers, mainly technical staff, included Mr Secchiati that worked for Edil 2004 in Belgium from 2013 and 2016⁵¹. Applying the Belgian national collective agreement for construction work (CP 124), Belgian social inspectors calculated that € 36.950 were due to these workers as remuneration⁵². Edil Nadia di Bouraouya should instead pay € 19.661 as remuneration and € 10.689 as lodging expenses to its 28 posted workers⁵³.

The subcontracting companies in the Rive Gauche site were thus very 'volatile': they were easily created and could cease to operate without any notice; their share capital was low and the number of their employees varied quickly. Moreover, according to the interviews collected during the investigation done by the Belgian labour inspectors, all the subcontracting companies were managed by Aldo Bison⁵⁴. In fact, all their CEOs reportedly constantly referred to Mr Bison the work progress, what happened in the construction site and any problems incurred. Mr Bison was allegedly present regularly on the site (once per month) and provided instructions to the coordinating staff⁵⁵. Moreover, many workers reportedly indicated him as the employer⁵⁶.

According to the interviews collected, the workers in the site had different supervisors, on the basis of their nationality⁵⁷. The Egyptians were controlled by Mr Jahaj who received the orders from Mr Bison and Mr Giannetti who was the technical coordinator and the person in charge of contacts with Valens-Duchene, together with Luca Catozzo, Costante Azzolini and Secchiati (all engaged by Edil 2004)⁵⁸. Once instructions were received from Valens-Duchene, Mr Giannetti, Mr Catozzo, Mr Azzolini and Mr Secchiati decided the number of workers necessary on the site, the working time, and the instructions to give to the workers⁵⁹.

Finally, it should be underlined that none of the companies involved in the Rive Gauche case have been investigated in procedures concerning mafia. Nevertheless, in some interviews suspicion of mafia has been raised⁶⁰. No tangible evidence supporting this suspicion has been found in information provided so far. Consequently, this suspicion may actually result from two tendencies that have been pointed out by several researches: the generalised alarmism according to which mafia is everywhere⁶¹, and the 'paradigm of otherness' according to which mafia is «a foreign body that attacks an economic and social context considered otherwise healthy»⁶². Both these tendencies, detected in the analysis on mafia in the north of Italy, could be present in a country (as Belgium) where public authorities hardly know the origin and the characteristics of mafia and thus do not have the necessary means to fight against it.

1.3. Subcontracting: a never-ending story

The Pandora's box opening moment of the Rive Gauche case happened on 14 April 2016 when seven Egyptian workers climbed on a crane, threatening to jump down if their salaries were not paid. Alerted by the trade unions and by media, the *Auditorat du travail* arrived immediately on the place to block the construction site. In order to avoid any bad publicity, Valens-Duchene intervened and, on the same day, paid the seven Egyptians on the crane and the two compatriots that organised the protest (one Egyptian remained on the ground to negotiate with the inspectors and the contractor; another Egyptian was recovered in Charleroi hospital after a

⁵⁰ Currently, in the Italian Business Register is recorded a company called Edil 2004 s.r.l. that started its activities in 2018 and has its headquarters in Salerno. A company Edil 2004 s.r.l. based in San Donà di Piave (Venice) appears on Dun & Bradstreet website: https://www.dnb.com/business-directory/company-profiles.edil_2004_srl.dbc136d0da11e1cb869bd25863510d02.html

⁵¹ See the interview with Giannetti on 18 April 2016 and with Secchiati on the 21 January 2019 (dossier Rive Gauche I).

⁵² Control performed by Michel Roulet on 13 March 2017 (dossier Rive Gauche I).

⁵³ Control performed by the social inspectors on 23 January 2018 (dossier Rive Gauche I).

⁵⁴ See the declaration of Secchiati on 28 April 2016 and on 21 January 2019 (dossier Rive Gauche I). See also the interview with C.E. Clesse and J.F. Dascotte and with Carlo Briscolini.

⁵⁵ Interview with Secchiati on 21 January 2019 (dossier Rive Gauche I).

⁵⁶ See the interview with C.E. Clesse and J.F. Dascotte. See also the interviews with Besnik Nimanaj on the 19.4.2016 and Luca Catozzo on 21 April 2016 (dossier Rive Gauche I).

⁵⁷ See the interview with Carlo Briscolini.

⁵⁸ See the interview with Secchiati on 28 April 2016 (dossier Rive Gauche I). Mr Giannetti managed also other construction sites for Gruppo Bison in Belgium (interview of Mr Giannetti on 18 April 2016 in the dossier Rive Gauche I).

⁵⁹ Interview of E. Franc on 4 June 2019 (dossier Rive Gauche I).

⁶⁰ See the interview with the judge Paul Dhaeyer.

⁶¹ Visconti C., «La mafia è dappertutto». *Falso!*, 2016

⁶² Belloni G., Vesco A., *Come pesci nell'acqua. Mafia, impresa e politica in Veneto*, Donzelli, 2018, p. 16.

work accident)⁶³. The success reported by the Egyptians boosted the protest of other workers that the following day addressed the *Auditorat du travail*, lamenting not having been paid for several months⁶⁴. On 20 April 2016, DG Costruzioni sent to Mrs Basso the list of the non-paid workers to whom money was transferred between 25 April 2016 and 18 May 2016 (in total € 423.787)⁶⁵.

During the Pandora's box opening moment of the Rive Gauche case, the key-role played by Aldo Bison was evident: on 14 April 2016, Mr Jahaj and Mr Secchiati immediately contacted him, and he ordered them to pay the Egyptians and to find a solution in order to avoid the blocking of the construction site⁶⁶; then Mr Franc (Valens-Duchene's site manager) contacted Aldo Bison to solve the problems with 'his' workers; alarmed for the imprisonment of Giannetti and Jahaj⁶⁷, Bison ordered to pay the workers; finally, on 28 April 2016 Bison signed the agreement to terminate the contract between Consorzio edile and Valens-Duchene. On the basis of this agreement, Consorzio edile was obliged to pay the wages claimed by 77 DG Costruzioni and Edil B&G's workers (listed in an annex of the agreement) by 4 May 2016. Moreover, Consorzio edile was obliged to release Valens and Duchene from any obligation linked to workers' payments. Finally, Aldo Bison and Gruppo Bison were jointly liable for the payment of a penalty (€ 500.000) that Consorzio edile had to pay to Valens-Duchene.

It is important to underline that Valens-Duchene decided to terminate the contract with Consorzio Edile immediately after the Pandora's box opening moment in order to avoid any joint liability for the payment of remunerations (see below). The *association momentanée* subcontracted then the construction work to other companies. The last document in the dossier Rive Gauche I concerns a denounce of a Portuguese worker posted by Universo metódico construcções PT (a Portuguese subcontracting company) that complained against the non-payment of wages⁶⁸. In fact, a second dossier has been open on the Rive Gauche site by the *Auditorat du travail*.

The dossier Rive Gauche II concerns a subcontractor of Valens-Duchene (AB Construction s.a.r.l.), a limited liability company registered in France. As Consorzio Edile, AB Construction did not have any workers but outsourced all the activities on the Rive Gauche site to other companies. The business strategies chosen by Giuseppe Bonelli (CEO of AB Construction) to reduce labour costs were two: on one side, AB Construction subcontracted to Romanian and Portuguese companies created *ad-hoc* to fictitiously post their workers in Belgium; on the other side, AB Construction subcontracted to Belgian companies, usually managed by Romanians, created in order to hire Romanian workers as self-employed and to provide them to AB Construction⁶⁹. All the contracts signed by AB Construction and the subcontracting companies had the same content: they did not specify which construction work should be performed and the price was established according to the work from time to time required.

Both posted and independent workers were employed for a short period; they were not aware of their status and often were not paid. However, they had the badges to access the construction site and all other formalities were respected. In fact, a Romanian consultant working in Belgium fulfilled all the administrative obligations for the network of companies managed by Bonelli.

The 'Pandora's box opening' moment of the Rive Gauche II case happened on 7 June 2016 when some Romanian workers that had not been paid protested and a group of eight persons beat them on the street, causing severe bruises for which they were recovered in the hospital. The following day, Bogdan Sanduleac and Nicolae Parvu, two Romanians that managed the subcontracting company that had engaged the beaten workers, went to the hospital offering them money to convince them not to denounce anything. Some workers refused the offer and decided to collaborate with the *Auditorat du travail* of Charleroi in the inquiry.

In this case, as well as in Rive Gauche I, the chiefs of the networks of companies (Aldo Bison and Giuseppe Bonelli) are suspected of trafficking of human beings. In Rive Gauche II, the *Auditorat du travail* decided also to open an inquiry on Valens-Duchene for illegal labour supply; in fact, several people declared that its construction managers provided the orders in the site⁷⁰.

⁶³ The Egyptian workers were employed by Edil B&G and DG Costruzioni. Valens and Duchene paid them € 108.000 (between € 8.000 and € 23.000 to each worker). See the dossier Rive Gauche I.

⁶⁴ See interview with E. Clesse and J.F. Dascotte.

⁶⁵ See the Annexes 3 and 4 of the documents provided by C. Briscolini and the dossier Rive Gauche I.

⁶⁶ See the interview with Secchiati on 21 January 2019 (dossier Rive Gauche I).

⁶⁷ On 18 April 2016, the investigating judge ordered the pre-trial detention for Giannetti and Jahaj.

⁶⁸ https://www.rtb.be/info/regions/hainaut/detail_chantier-rive-gauche-a-charleroi-des-portugais-remplacent-les-kosovars?id=9295299

⁶⁹ The Romanians workers were mainly recruited online. The engagement of bogus self-employed people makes controls more difficult; in fact, the proof of bogus self-employment is difficult to provide (see the interview with Carlo Briscolini).

⁷⁰ Interview with Marian Ovidiu Teleanu on 23 February 2017 (dossier Rive Gauche II).

Finally, it should be mentioned that in December 2019 a new case of illegal posting of workers and trafficking of human beings was denounced in Charleroi. The main contractors of the new Charleroi hospital (s.m. Gilly 2024, Franki s.a. and Jan De Nul n.) subcontracted to a Romanian company (Hidroconstructia s.a.) that engaged Romanian workers, apparently respecting Belgian collective agreements; in reality part of the wages was transferred on a Romanian bank account of the company and the workers could not claim anything because the Romanian company had asked them to sign a dismissal form when they were engaged, so that they could be fired in any moment⁷¹. Also in this case, after discovering the fact, the contractor decided to terminate the contract and to sign a new contract with a different subcontractor (apparently another Romanian company)⁷². Another clear demonstration that the 'wash-out' solution established by the Belgian law on joint liability does not guarantee workers' rights but boosts new subcontracting practices that unscrupulous entrepreneurs and creative consultants suggest, again and again.

SECTION 2:

THE NORMATIVE FRAMEWORK IN THE RIVE GAUCHE CASE

2.1. Posting of workers and trafficking in human beings in Belgium

In Rive Gauche I, subcontracting companies posted in the site several workers. In Belgium, posting of workers is regulated by the Law on working conditions, wage and employment in case of posting of workers in Belgium of 5 March 2002⁷³. This law indicates the factual elements that shall be examined in order to assess whether a posted worker temporarily carries out his or her work in Belgium (Article 2)⁷⁴. From this rule, it can be deduced that posted workers that are engaged in Belgium by an employer that has never employed them in another country, are bogus posted workers.

In Rive Gauche I, some workers interviewed by the *Auditorat du travail* declared that they were engaged in Belgium by Bison to work on several construction sites and had never worked in Italy⁷⁵. Moreover, Edil Nadia di Bouraouya was apparently created in order to post workers in Rive Gauche and other construction sites in Belgium⁷⁶. On the basis of these statements, it cannot be considered a company that genuinely performed substantial activities in a Member State other than Belgium (Article 2 of the Law of 5 March 2002).

In case of bogus posting of workers, the third-country nationals present in the Rive Gauche site would be in Belgium without a valid work permit (since they have an Italian work permit)⁷⁷. Their employer could be therefore accused of violation of the Belgian legislation on third-country workers' employment (art. 175 Belgian Social Criminal Code). In this case, the Belgian legislation establishes also a sanction for the client and the contractor. However, the latter cannot be held responsible if they have a written declaration of the contractor or subcontractor stating that s/he will not employ any irregular third-country person. A client or a contractor can anyway be sanctioned if s/he knows that his/her contractor/subcontractor employs irregular third-country nationals. The evidence of this knowledge can be provided by a notification of Belgian Labour Inspectors (Art. 175 § 3/1, 3/2 and 3/3 Belgian Social Criminal Code).

Moreover, in case of employment of irregular third-country nationals, Articles 35/9, 35/10 and 35/11 of the Belgian Law on the protection of workers' remuneration of 12 April 1965 oblige the client, the contractor or the subcontractor to pay the remuneration due to these workers if they are aware of the fact. Also in this case, the evidence of knowledge can be provided by a notification of Belgian Labour Inspectors.

A main problem to apply these rules in Rive Gauche is that the Labour Inspectors did not notify anything to Valens-Duchene. Consequently, there is no proof of the latter's knowledge of the irregular migrants' employment.

⁷¹ https://www.rtf.be/info/societe/detail_perquisition-et-debut-d-une-instruction-pour-dumping-social-sur-le-chantier-du-grand-hopital-de-charleroi?id=10393251

⁷² https://www.rtf.be/info/regions/hainaut/detail_chantier-du-grand-hopital-de-charleroi-des-ouvriers-roumains-inquiets?id=10390146

⁷³ The Law was amended by the Law on posting of workers of the 12 June 2020.

⁷⁴ See Article 4 § 3 of the Enforcement Posting of Workers Directive.

⁷⁵ See the interviews with Sukhwinder Singh on 19 April 2016 and Luca Catozzo on 21 April 2016 (dossier Rive Gauche I).

⁷⁶ See the interview with Sukhwinder Singh, team-leader of Edil Nadia di Bouraouya, on 19 April 2016 (dossier Rive Gauche I).

⁷⁷ In case of posting, third-country workers are not required to have the work permit in the Host country (EC), *Danieli*.

It should also be mentioned that a third-country national irregularly staying in Belgium has to return to his country of origin. In this case, the Immigration Office can issue a return decision (i.e. issue an order to leave the Schengen territory) and can also adopt an entry ban or dispose the detention of the third-country national (Articles 7 and 74/14 of the Immigration Act of 15.12.1980). This rule does not apply if a worker is identified as a victim of trafficking in human beings; in this case, s/he can receive a residence permit and a work permit, under certain conditions⁷⁸.

In the Rive Gauche case, no worker was subject of a return decision. However, the possibility to be expelled from the Schengen territory prevents third-country nationals from denouncing bogus posting. Indeed, third-country nationals that are involved and denounce a bogus posting of workers, lose their status of regular migrants and become irregular migrants, risking sanctions and expulsion. And this is a problem that the EU legislator cannot ignore anymore.

An employer who posts workers in Belgium has to comply with working and employment conditions and wages that are established by laws, regulations and *erga omnes* collective agreements and violations are punishable under criminal law (Article 5 of the Law 5 March 2002). Information collected, including under-paying workers and infringing the Belgian working time regulation, suggests non-compliance with these rules. However, the alleged violations committed in Rive Gauche were so serious that the labour inspectors suspected also a trafficking of human beings. In fact, workers not only were exploited in the construction site, but were accommodated in precarious conditions⁷⁹. Moreover, the case concerns migrant workers some of whom were contacted in their country of origin by the compatriots who apparently managed the subcontracting companies, but in reality were in charge of finding the workforce for Gruppo Bison.

Trafficking of human beings is punished by Article 433 quinquies of the Belgian Criminal Code: a person commits a traffic of human beings if s/he engages, transports, transfers, hosts or controls another person in order to force her to work in conditions unrespectful of human dignity. Employers and intermediaries can be both responsible for this crime; moreover, a victim can be an employee or any other person performing a work or a service⁸⁰. The sanction is higher if the trafficking person exerts an authority on the victim (Article 433 sexies of the Belgian Criminal Code).

2.2. What is a Consortium? And why are so many companies needed?

In Italy, different enterprises can sign a contract to create a common organisation (called consortium) to regulate and perform one or more phases of their economic activities (Article 2602 of the Italian Civil Code). Therefore, the consortium contract aims at serving other subjects to enhance and make them more functional. In this sense, the consortium is instrumental to other enterprises: it presupposes other business organisations which are served by the consortium (Italian Minister of Labour, consultation n. 16/2009). However, a consortium can have an external activity, i.e. it can carry out activities with third parties in the interest of the company members.

A consortium that can perform external activities is considered as an autonomous legal entity, separated from its company members (Article 2612 of the Italian Civil Code). According to Article 2615 of the Italian Civil Code, for the obligations assumed in the name of the consortium by the persons who represent it, third parties can assert their rights exclusively on the consortium fund. Differently, for the obligations assumed by the consortium bodies on behalf of individual consortium members, the latter are jointly and severally liable with the consortium fund. Consequently, many companies established in Italy and operating in the construction sector join a consortium to participate to public procurement and sign public or private contracts for which their financial liability is usually limited to the value of their contribution to the consortium fund.

Gruppo Bison is suspected to take advantage of this regulation by setting up a risk management system to avoid any responsibility for the economic activity it performed. Based on testimonies provided in the file, Aldo Bison *de facto* controlled the consortium and signed contracts for its members. The consortium only was liable for the signed contracts. Workers were hired by the consortium members that were liable in case of workers' rights violations. Finally, the consortium and its members had to pay a fee for the services provided by Bison.

⁷⁸ Vanden Broeck P., *Illegal employment of third country nationals in Belgium*, Study of the Belgian contact point of the European Migration Network, 2017, p. 60 ff.

⁷⁹ In particular, the Egyptians were hosted in three apartments, two of which were far away from the site. To avoid difficult daily transfers, they decided to gather in the apartment close to the site. See the interview with GABALLA Ahmed Gadgaballa on 29 April 2016.

⁸⁰ See Clesse E., *Droit penal social*, Larcier, 2019, p. 493.

Similarly, Belgian law forbids workers' supply (Article 31 § 1 Law 24.7.1987). This infringement takes place when a (legal or physical) person hires and provides workers to another than then exerts on them the power to direct and control⁸¹.

In Italian labour law, the main technique to react to these fictitious legal structures is the principle of primacy of facts. According to this principle, the employer should be identified on the basis of a case-by-case examination of all relevant circumstances and by using objective criteria⁸². Therefore, a judge can disregard any contractual arrangement that may have been agreed between the parties, and qualify as employer the person that has de facto exerted the power of direction (see Italian Court of Cassation n. 21115/2009).

Another important means to face the de-responsibilisation generated by the fragmentation of an economic activity in several different legal entities is the joint liability. In Italy, Article 29 § 2 of the Legislative Decree n. 276/2003 establishes a chain liability for the contractor and any subcontractor who are jointly obliged to pay wages and social security contributions due in relation to the period of execution of the contract, within the limit of two years from the termination of the contract. This rule is applicable also in case of contracts signed by a consortium: when the service envisaged in the contract is performed by a company member of the consortium and the relationship between the former and the latter is not clear, the main contractor is anyhow liable for the payment of wages and social contributions of workers performing the service (Tribunal of Milan n. 2928/2018 of the 16.11.2018).

In Belgium, joint liability regulation is much more limited than in Italy (see below). In order to find out a fraudulent subcontracting chain, Mr Dhaeyer suggested to investigate the economic reason that has induced a company to contract out⁸³. In fact, a company can outsource to access expertise which it does not have internally, or it can outsource to externalise risk to less powerful companies, to weaken worker representation, to save labour-cost, and to make controls more difficult⁸⁴. For labour intensive services, the non-feasibility of the price established in the contract (see below) is a clear evidence that subcontracting was mainly due to cost-saving reasons and it should therefore be investigated.

Mr Dhaeyer also undertook a preventive action against the fraudulent use of legal personality. He reported that in Belgium there are criminal organisations that buy 'sleepy' companies (i.e. companies that have ceased to operate) and re-sell them to people that then use these companies for illegal workers supply, or to transfer workers from a company to another in order to avoid joint liability for workers' rights violations (see below). A clear example of the fraudulent use of legal personality is the Casucci case, decided by the Tribunal of Charleroi (on 25 January 2019) and the Court of Appeal of Mons (on 19 June 2019). Alfonso and Jonathan Casucci managed a constellation of companies that hired workers without paying social contributions; when the social debt became important, the company failed and workers were transferred to a new company. This system has allowed the Casucci brothers to circumvent joint liability on social contributions (Article 30 bis of Belgian Law 27.6.1969) and not to pay almost € 3 million of social contributions.

In his position as President of the Business Court, Mr Dhaeyer asks every year to the Belgian business register the list of companies that did not deposit their annual budget and orders to cancel them from the register⁸⁵.

2.3. Who is the employer?

One of the main problems in the Rive Gauche case concerns the detection of the employer. Being a case of posting of workers, it is necessary first to determine which law is applicable. In fact, neither the PW Directive nor the EPW Directive clarify who is the employer of a posted worker⁸⁶. According to the Rome I Regulation, the

⁸¹ See the decision of the Tribunal of Brussels n. 2020/2185 of 19.5.2020 that has condemned the main contractor for illegal workers' supply, being this company the real employer of all the workers present in the construction site.

⁸² This is also the approach followed by the Advocate general in his opinion on AFMB (26.11.2019, C-640/18, § 40).

⁸³ See Drahoukoupil J., Introduction, in Drahoukoupil J. (ed.), *The outsourcing challenge: organizing workers across fragmented production networks*, ETUI, Brussels, 2015, p. 9.

⁸⁴ Lillie N., Wagner I., *Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building*, in Drahoukoupil J. (ed.), *The outsourcing challenge: organizing workers across fragmented production networks*, ETUI, Brussels, 2015, p. 163.

⁸⁵ <https://economie.fgov.be/fr/themes/entreprises/banque-carrefour-des/contenu-de-la-bce/radiation-doffice-suite-au-non>

⁸⁶ See however the opinions of the Advocate general in AFMB (26.11.2019, C-610/18, § 37-40).

problem should be solved by applying the *lex loci laboris* (i.e. the law of the Home State); the law of the Host State can however be applied if it is regarded as overriding mandatory provision (Article 9 Reg. Rome I).

In Rive Gauche I, several crimes have been contested; therefore, rules on conflict of criminal law should be applied. In this field, the main principle is the *lex loci delicti commissi*, i.e. the law of the place where the delict was committed is applicable⁸⁷.

The Belgian criminal law provides a substantial notion of employer according to which the employer is the person that behaves as employer (e.g. gives orders to workers) and is considered as employer, regardless of the content of the contract of employment (Court of Appeal of Mons, 10.12.2014, in *Droit penal de l'entreprise*, 2015/1, p. 79 ff.). In particular, Article 16 of the Belgian Social Criminal Code defines as employer the person that exerts authority on workers. Therefore, Belgian judges evaluate facts from which they deduce that a person has behaved as employer, even if the contract of employment has been signed by a different person (Cass. 22 April 2015 in www.juridat.be)⁸⁸.

As mentioned above, various evidence in the Rive Gauche I dossier suggests that Aldo Bison may have been the real employer of the posted workers⁸⁹.

SECTION 3:

WORKERS AND WORKING CONDITIONS IN THE CASE. *DIVIDE ET IMPERA*

From the analysis of the dossier Rive Gauche, it seems that scientific management strategies were put in place to break workers' community. As already clarified, the subcontracting companies were, on paper, managed by third-country nationals, in charge of finding the staff (often compatriots) to be employed in the construction site. The activities were divided according to the workers' nationality and the workers had different supervisors. Moreover, workers from the same country were hosted in the same apartment⁹⁰. Many workers did not speak French and only some of them were able to communicate in Italian⁹¹. Having different countries of origin, different languages, different employers (at least on paper), the workers' community was very fragmented and segregated from the host society; on the construction site, workers clustered mainly on the basis of their nationality. In fact, the crane-climbing protest was organised by a group of Egyptians, the nationalities that suffered the worst working and living conditions⁹².

The few Belgian workers on the site were managers or supervisors engaged by Valens and Duchene⁹³; the few Italian workers were trusted persons of the Gruppo Bison. The remaining activities were performed by Romanians, Egyptians, Kosovars, Albanians⁹⁴, some of them previously employed by Bison⁹⁵. The 'ganging' techniques adopted in Rive Gauche boost workers' 'ghettoisation' and contribute to developing xenophobic behaviours while destroying any form of collective organisation (see below)⁹⁶.

During the inquiry, an Egyptian worker reported that he could not find a job in Italy and thus was happy to work in Belgium, when contacted by Jahaj (the person designed to engage employees for Edil B&G and DG Costruzioni)⁹⁷. Other workers present in the Rive Gauche site were displaced by Bison from a construction site

⁸⁷ In order to solve conflict of jurisdiction, the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings obliges the competent authority of a Member State that «has reasonable grounds to believe that parallel proceedings are being conducted in another Member State», to contact the competent authority of that other Member State to confirm the existence of such parallel proceedings (Article 5). In the Rive Gauche case, no investigation has been run by Italian authorities, so that the Belgian authority is competent.

⁸⁸ See Clesse C.E., *Droit penal social*, Larcier, 2019, p. 273.

⁸⁹ See the interview with P. Dhaeyer.

⁹⁰ See the dossier Rive Gauche I.

⁹¹ According to Carlo Briscolini, a knowledge of the local language in the construction site is often very important in order to guarantee workers' health and safety.

⁹² See the interview with C. Briscolini.

⁹³ See the interview with C.E. Clesse and J.F. Dascotte.

⁹⁴ Between 95 and 108 workers were employed on the site according to Jahaj (interview of 28 April 2016, dossier Rive Gauche I).

⁹⁵ See the interview with GABALLA Ahmed Gadgaballa on 29 April 2016.

⁹⁶ See the interview with Carlo Briscolini.

⁹⁷ See the interview with GABALLA Ahmed Gadgaballa on 29 April 2016.

in Liège⁹⁸. Some workers had arrived from Egypt, were passed by Italy just to get the work permit and were then immediately posted in Belgium⁹⁹. Many workers were engaged for few months with fixed-term contracts and transferred from a subcontracting company to another¹⁰⁰. Since in Italy, the renewal of work permit requires the existence of a contract of employment, third-country workers were extremely dependent on Bison's job offers. These workers depended also on him for working and living arrangements in Belgium.

3.1. Overtime, non-payment and other violations

Since June 2015, the workers had to work several extra hours in order to finish the construction work on time (i.e. to respect the deadlines established in the contract between Valens-Duchene and Consorzio edile)¹⁰¹. The overtime was often not remunerated because Valens-Duchene provided only down payments to Consorzio edile and the latter did not transfer enough money to its subcontractors¹⁰². Moreover, in March 2016 Edil B&G did not receive any payment and consequently could not pay its workers¹⁰³.

This situation was well-known to Aldo Bison who already in August 2015 asked Giannetti to verify the exact amount of overtime; in November 2015, Giannetti communicated to Bison the result of his inquiry. However, Bison, pressed by Valens-Duchene to respect the deadlines established in the contract¹⁰⁴, ordered Secchiati and Giannetti to go on with the overtime in order to finish the construction on time¹⁰⁵.

Facing the workers' discontent, at the end of March 2016, Jahaj requested from Valens, Duchene, Edil B&G, DG Costruzioni and Consorzio edile a meeting. On 7 April 2016, Emmanuel Franc (Valens – Duchene's site manager) informed Giannetti that many workers had not been paid. As already mentioned, the Pandora's box opening moment happened on 14 April 2016 when the seven Egyptians climbed on the crane.

3.2. Which social protection for posted workers?

The *Auditorat du travail* has referred that all posted workers were declared via the Limosa system and had the A1 form¹⁰⁶. However, it is still not clear if the social contributions were really paid in Italy because the ONSS (the Belgian social security institution) did not receive any answer from the INPS (the Italian social security institution). Therefore, a European Investigation Order (n. 247/18) was sent on 25 June 2018 to the International Judicial Authority of Venice (dossier no. 034/18)¹⁰⁷.

The difficult communication among Italian and Belgian social security authorities could have caused serious problems when a Kosovar worker (Nazmi Gjocaj, employed by DG Costruzioni) had a work accident and the Charleroi hospital threatened to dismiss him because he could not prove the Italian insurance¹⁰⁸. The problem was solved thanks to FGTB's and CSC's intervention: the two Belgian trade unions went to the hospital with the television to report on the case; after the TV programme, the Charleroi hospital decided to guarantee all the needed assistance to the worker¹⁰⁹.

In order to facilitate the exchange of information on social security issues, Mr Clesse, Mr Dascotte and Mr Dhaeyer claimed for a European database of the A1 forms and an interconnection of national social security databases¹¹⁰.

⁹⁸ See the interview with Besnik Nimanaj on 4 May 2016 (dossier Rive Gauche I).

⁹⁹ See the interview with C. Briscolini. See also Brachini N. and Galossi E., *Studio di caso sul settore edile*, Ride project, 2014, p. 7.

¹⁰⁰ See the interview with C. Briscolini and the positions of Badawi Mahmoud Awad Medhat and Khalaf Nabil in the documents provided by INPS (Italian social security Institute).

¹⁰¹ According to Jahaj (interview of 28 April 2016, dossier Rive Gauche I), on 31 March 2016, 80.000 work hours more than the amount established in the contract between Consorzio edile and Valens-Duchene were provided. GABALLA Ahmed Gadgaballa declared that he worked from 7 am to 11 pm (interview on 29 April 2016, dossier Rive Gauche I). See also the interview with C. Briscolini.

¹⁰² See the interview with C. Briscolini.

¹⁰³ See the interview with Jahaj on 28 April 2016 and Secchiati on 21 January 2019 (dossier Rive Gauche I).

¹⁰⁴ The Rive Gauche shopping centre should have been inaugurated in November 2016 but already in March 2016 a delay was announced (<https://www.lalibre.be/regions/hainaut/charleroi-le-centre-commercial-rive-gauche-n-ouvrira-pas-en-novembre-56e01eb535708ea2d3664055>). On the pressure that the main contractor can do on the subcontractor(s) in order to respect the established deadlines, also threatening to resign the contract(s), see the decision of the Tribunal of Brussels n. 2020/2185 of the 19.5.2020.

¹⁰⁵ Interview with Secchiati on 21 January 2019 (dossier Rive Gauche I).

¹⁰⁶ See the interview with C.E. Clesse and J.F. Dascotte.

¹⁰⁷ A European Investigation Order is a means to obtain evidence located in another Member State in criminal investigation (see Directive 2014/41).

¹⁰⁸ https://www.rtb.be/info/regions/hainaut/detail_chantier-rive-gauche-a-charleroi-un-macon-kosovar-hospitalise-sans-couverture-social-e?id=9279512

¹⁰⁹ See the interview with C. Briscolini.

¹¹⁰ Clesse and Dascotte have also highlighted that in their activities they discover many A1 forms illegally modified by the employer (that changes its duration or the construction site) or not released by the competent authority. Moreover, according to Clesse, «the retro-active effect of the A1 form is a door open to fraud».

If the suspect of bogus posting of workers will prove to be grounded, the ONSS should ask to INPS to withdraw the A1 forms in order to inscribe the workers to the Belgian social security system. However, it could also happen that the ONSS does not demand anything¹¹¹: in fact, the ONSS is aware that it could not receive any social contributions (especially if social contributions had not been paid in Italy) and that it should anyway provide social benefits, due to the principle of automaticity¹¹². If this scenario turns out to be true, the cost of bogus posting would be entirely suffered by workers that would be deprived also of the due social treatments.

3.3. Giving-up the fight

As mentioned above, the main problem in the Rive Gauche case concerned the non-payment of remunerations. Demanded by the Belgian authorities to prove the workers' payments¹¹³, in March 2017 Mr Bison's lawyer presented several documents signed by almost all workers employed in the Rive Gauche site, in which they declared to have received all the wages and the lodging expenses, calculated according to the Belgian collective agreements, and that their employer did not owe them any money for their work in Rive Gauche¹¹⁴. Unfortunately, it was not possible to interview any worker to verify if these declarations corresponded to the truth or were released only to keep the possibility to be employed by Gruppo Bison. As already mentioned, many workers were third-country nationals whose work permit in Italy depends on the existence of a contract of employment. The vulnerability of these workers has been denounced by many researches¹¹⁵. Again, nothing new¹¹⁶.

Doubting of the truth of the workers' declarations, the Belgian social inspectors accused Bison of infringement of Article 5 Law 12.4.1965 and Article 162 of the Belgian Social Criminal Code that oblige to pay the remuneration by bank transfer, and asked Italian Labour Inspectors via IMI to verify if the documents provided were valid and if the social contributions on the remuneration had been paid. The answer was not yet available in the dossier when consulted (29 November 2019), another evidence of the long time required for transnational inquiries¹¹⁷.

It should also be mentioned that, according to Article 2113 of the Italian Civil Code, «renunciations and transactions, which have as their object the worker's rights deriving from mandatory provisions of the law and collective agreements, are not valid». However, in order to void a renunciation, a worker has to sue the employer before a judge. This did not happen in the Rive Gauche case.

¹¹¹ See the interview with C.E. Clesse and J.F. Dascotte.

¹¹² According to this principle, a worker has the right to receive a social benefit even if the employer has not paid any social contribution.

¹¹³ See the request of Caroline Vandeloise (social inspector) to Bison's lawyer on 13 January 2017 and on 21 February 2017 (dossier Rive Gauche I).

¹¹⁴ See the documents sent by Mr Van Cutsem on 29 March 2017. Similar declarations were sent by the lawyer of Edil Nadia on 29 November 2017.

¹¹⁵ *Détachement des travailleurs : Améliorer les collaborations entre les partenaires sociaux et les autorités publiques en Europe. Synthèse générale*, p. 8; FRA, *Protecting migrant workers from exploitation in the EU: workers' perspectives*, Publications Office of the European Union, Luxembourg, 2019; FRA, *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, Publications Office of the European Union, Luxembourg, 2015.

¹¹⁶ The vulnerability of the third-country persons was evident also during the precautionary arrests ordered by the investigating judge: Giannetti was released after few days; Jahaj instead remained in prison longer and was address with an order to leave the Belgian territory, then suspended by the Belgian Council for disputes relating to foreigners (Conseil Contentieux des Etrangers, decision no. 167 167 of 3.5.2016 in the case no. 188041/III).

¹¹⁷ See the interview with P. Dhaeyer.

SECTION 4:**WORKERS' REPRESENTATIVES AND TRADE UNIONS
IN THE RIVE GAUCHE CASE**

Subcontracting practices produce very bad effects on workers' communities. Indeed, the economic activity is fragmented among different legal entities and this hampers the presence of worker representatives (e.g. preventing to reach the required thresholds to establish a work council). Moreover, workers engaged by different employers, even if employed in the same construction site, are difficult to organise, since they can benefit from different working conditions (including different collective agreements)¹¹⁸ and can therefore have different interests. In the construction sector, the fragmentation of the workers' community is emphasised also by the widespread presence of precarious workers, the high percentage of migrants and the short duration of the construction sites. This phenomenon is obviously increased in case of posting of workers that do not speak the same language and are usually not well integrated in the host country¹¹⁹.

In the Rive Gauche case, there was neither a workers' representative on site, nor in the subcontracting companies due to their small number of workers¹²⁰. Notwithstanding the absence of workers' representatives, FGTB and CSC organised on 24 June 2015 a 'surprise site visit' to investigate on what was happening on the site¹²¹. Two strategies were adopted in this action: on one side, shop stewards able to speak the workers' languages were employed and informative leaflets translated into these languages were distributed; on the other side, TV reporters were involved in order to disseminate the outcomes of the inquiry. This "name and shame" strategy is usually used by Belgian trade unions to raise awareness at large scale on workers' exploitation¹²². However, the bad publicity is often of short duration: in this case, when the shopping centre was opened in March 2017, only Mr Briscolini (FGTB) and Mr Moreau (CSC) remembered the several workers' rights' violations in the construction site¹²³.

After having ascertained that many workers had not been paid and that the Belgian working time regulation had not been respected, on 3 July 2015, FGTB and CSC informed Valens-Duchene and Group St. Lambert and denounced these facts to the municipality and the *Auditorat du travail*¹²⁴. However, Valens-Duchene replied that «they were surprised because the competent authorities performed several controls in the construction site and no irregularity has been denounced»¹²⁵. Similarly, the *Auditorat du travail* did not perform any control and did not activate the notification to activate the joint liability¹²⁶.

During the Pandora's box opening moment, CSC and FGTB had a key role: they were alerted one day before the Egyptians' idea to set up a protest and on 14 April 2016 they immediately arrived on site; they calculated the unpaid wages and participated in the negotiations with labour inspectors, Bison, and Valens-Duchene. FGTB decided also to participate to the criminal trial¹²⁷, asking for compensation for damages caused by violations of the Belgian legislation on working time (Articles 138-146 Belgian Social Criminal Code), remuneration (Article 3-18 Belgian Law on wage's protection of 12 April 1965), posting of workers (Belgian Law on posting of workers of 5 March 2002) and trafficking of human beings (Article 433 quinquies Belgian Criminal Code).

A positive aspect of the Rive Gauche case concerns the good cooperation among Belgian and Italian trade unions. Mr Briscolini (FGTB) and Mr Moreau (CSC) received from Giovanni Facca (Fillea Cgil) workers' payslips

¹¹⁸ According to the control performed by Michel Roulet (social Inspector) on 1 March 2017 (dossier Rive Gauche I), Gruppo Bison belongs to the *Commission paritaire* (CP) 200, DG Construzioni, Edil B&G, Edil 2004 and Edil Nadia di Bouraouya belong to the CP 124.

¹¹⁹ Berntsen L., Lillie N., Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites, in *Economic and Industrial Democracy* 2014, p. 2 and 15; Caro E., Berntsen L., Lillie N., Wagner I., *Posted Migration and Segregation in the European Construction Sector*, in *Journal of Ethnic and Migration Studies*, 2015, 41(10), pp. 1600-1620.

¹²⁰ See interview with Giovanni Facca (Fillea Cgil, Italian trade union in the construction sector) on 7 January 2020. In Italy, a workers' representative can be created in establishments that employ more than 15 workers or in companies with more than 60 workers (Articles 19 and 35 of the Law 300/1970).

¹²¹ During a 'surprise action' trade unions enter in the construction site without pre-announcing their action and gather information on workers' conditions. On the necessity to avoid informing in advance the employer about the inspection see FRA, *Protecting migrant workers from exploitation in the EU: boosting workplace inspections*, 2018, opinion n. 9).

¹²² C.E. Clesse and J.F. Dascotte reported that sometimes additional audits on the subcontracting chain are sometimes set up by main contractors or by clients to avoid negative publicity on the mass media.

¹²³ https://www.rtbfb.be/info/regions/hainaut/detail_le-bout-du-tunnel-pour-rive-gauche-a-charleroi-mais-a-quel-prix?id=9544572

¹²⁴ See mail written by C. Briscolini.

¹²⁵ See the mail exchange in the Rive Gauche I dossier.

¹²⁶ See the interview with C. Briscolini.

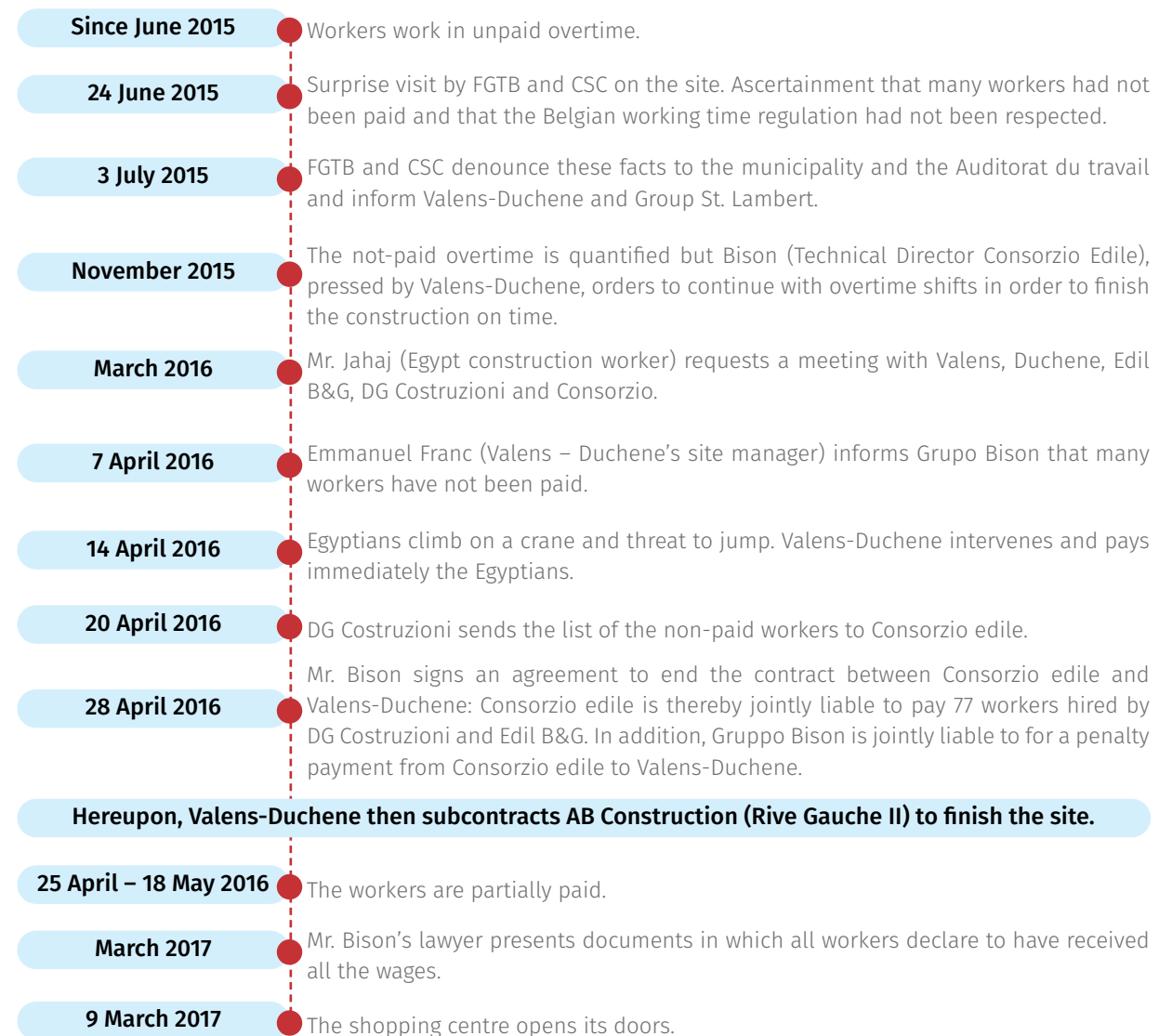
¹²⁷ According to Article 8ter of the Belgian Law on posting of workers (Law of 5.3.2002), trade unions can take a legal action in every case posted workers' rights' have been violated. The trade unions do not need the agreement of any posted worker.

and the Italian collective agreements. Moreover, through Inca Cgil¹²⁸, FGTB and CSC received workers' documents available on the INPS database.

A negative aspect of the case is that none of the workers involved was member of a trade union before the Pandora's box opening moment and none of them became member after that moment¹²⁹. Only 7 workers (all Egyptians) participated to the criminal trial, demanding a compensation for the damages. No one knows where the other workers live or work now: after having provided the declaration to Bison's lawyer, they disappeared from the inquiry and none of Belgian and Italian trade unions involved in the case had any contact with them anymore.

Finally, it should be mentioned that recently Belgian social partners have strengthened the control on subcontracting practices in construction sites, setting up an 'alert system'. On the basis of the Statute of union delegation adopted on 19 November 2015, every month the employer has to communicate to union delegates information concerning subcontractors (their identity, the duration of the contracts, the place where they operate, the activities they perform, the number of workers engaged, the precarious employment contracts used) (Article 15). Moreover, Belgian trade unions train their delegates on the techniques to approach workers on the construction site and to acquire useful information for possible future inquiries¹³⁰. This training is fundamental to overcome the difficulties faced by trade unions when contacting posted workers, detected by many studies¹³¹.

Timeline of the Rive Gauche case



¹²⁸ Inca Cgil has a network of offices to assist workers abroad including one in Belgium.

¹²⁹ According to Giovanni Facca (interview on 7 January 2020), two family members of the exploited workers contacted once Fillea but the trade union could not intervene because no worker asked for help.

¹³⁰ See the interview with C. Briscolini.

¹³¹ Détachement des travailleurs : Améliorer les collaborations entre les partenaires sociaux et les autorités publiques en Europe. Synthèse générale, p. 9 and 13.

SECTION 5:

REMEDIES AND SANCTIONS:
WHAT IS THE ROLE OF THE MAIN CONTRACTOR?

The subcontracting scheme in the Rive Gauche site and the many alleged violations inevitably raises the question on the role of the main contractor. Were Valens and Duchene aware of what happened in the site? Did they do something to prevent irregularities?

A first aspect concerns the price established in the contract between the *association momentanée* and Consorzio edile. As explained by the judge that investigated on the case¹³², it is necessary to verify the “feasibility” of the price established in the contract between the contractor and the subcontractor. In fact, in many cases, the contractor knows that the price does not allow the subcontractor to respect labour and social security law, i.e. the price is “manifestly unreasonable”. In other cases, the price is “feasible” but someone else gets part of the money. According to Paul Dhaeyer, the first hypothesis is very difficult to prove¹³³. This is mainly due to the fact that many violations of Belgian labour law are punished with a criminal sanction; therefore, it is always necessary to prove negligence or wilful misconduct.

The people interviewed on the Rive Gauche case had different opinions on the feasibility of the price. Mr Dascotte did not find any anomaly in the contract between the *association momentanée* and Consorzio edile. According to the *Auditorat du Travail*, the Rive Gauche case belongs to the group of cases in which the price is “feasible” but someone (Gruppo Bison) got a large amount of money¹³⁴. This opinion is supported by the statement of Mr Franc, according to whom Valens-Duchene received several offers, even cheaper ones than the one of Consorzio edile, and decided to subcontract to the latter because they appreciated the quality of Gruppo Bison’s construction work¹³⁵. Differently, Mr Briscolini considered the price established in the contract between Valens-Duchene and Consorzio edile not feasible¹³⁶. Consequently, FGTB decided to demand to Valens and Duchene a compensation for the non-payment of the wages (Article 162 Belgian Social Criminal Code) for which the latter is considered co-responsible with Gruppo Bison (Article 109 of the Belgian Social Criminal Code).

Mr Dhaeyer has also explained that the judges often do not investigate on the main contractor in order to avoid ‘mammoth dossiers’ that could be too complex to process and therefore increase the risk to remain without result¹³⁷. The ‘mammoth dossiers’ are also problematic because they could prevent a labour inspector to reach the annual target of inspections¹³⁸.

Another mechanism to make the main contractor responsible for what happens in the subcontracting chain is the joint and several liability. The Belgian legislation on joint liability in the construction sector (art. 35/6/3 of the Law on the protection of workers’ remuneration of the 12.4.1965) regulates only a pro-future liability and allows a ‘wash-out’ solution¹³⁹. According to this regulation, a client, a contractor or a subcontractor is jointly liable for the payment of wages of workers employed in the construction work only if s/he does not have a written declaration proving that s/he has informed the contractual counterparty of the website of the *Service federal Emploi, Travail et Concertation sociale* where information on wages is provided, and the contractual counterparty has not certified that s/he has paid and will pay the due wages. However, a client, a contractor

¹³² See the interview with Paul Dhaeyer.

¹³³ In the Casucci case (Tribunal of Charleroi, decision of 25 January 2019 and Court of Appeal of Mons n. 339/19 of 19 June 2019), the hourly wage established in the main contracts was between 26 and 28 €, largely below the legal hourly wage (€ 45). However, neither the Tribunal of Charleroi nor the Court of Appel of Mons have condemned the main contractors.

¹³⁴ See the interview with C.E. Clesse and J.F. Dascotte.

¹³⁵ Interview with Emmanuelle Franc on 4 June 2019 (Dossier Rive Guache I).

¹³⁶ According to the analysis done by FGTB, the contract between Consorzio edile and Valens-Duchene established a labour cost of € 18,08 per hour (See Annex 7 of the documents provided by C. Briscolini and the interview with him). On the basis of the Belgian National Collective Agreement for the construction sector (CP 124), the hourly labour cost should vary between € 35 and € 40.

¹³⁷ See the interview with Paul Dhaeyer.

¹³⁸ According to Marianne Thomas (a Belgian judge), each year a Belgian labour inspector has to perform 100 inspections (procès-verbaux) and this result can be reached more easily by managing small dossiers (<https://medor.coop/nos-series/mon-travail-mon-enfer/une-claque-historique-pour-un-g%C3%A9ant-de-la-construction/?full=1#continuer-a-lire>).

¹³⁹ Belgian law establishes also three other regimes on joint liability: a general regulation on joint liability with regards to wages (Art. 35 Law of 12.4.1965), a joint liability concerning illegal employment of third-country nationals (Article 35/7 ff. of the Law of 12.4.1965), and a joint liability for social contributions (Article 30 bis of the Law of 27.6.1969). See Gratia M., *Lutte contre la fraude sociale et mécanisme de responsabilité solidaire: synthèse à l’actualité*, in *Orientations 2013/4*, p. 2.

or a subcontractor can be held jointly liable for wages' payment if s/he knows that her/his contractual counterparty does not pay all or part of wages due to her/his workers. In this case, the liability of the client, the contractor and the subcontractor starts only 14 working days after the moment in which s/he has known of the non-payment, i.e. the liability applies only to future wage debts. Usually (but not necessarily), this moment corresponds with the moment in which the client, the contractor or the subcontractor receives the notification of the social inspector that communicates the infringement. During these 14 days, in order to avoid any liability, the client, the contractor and the subcontractor can end the contract, transfer the workers to a new company (sometimes owned by the same person that owned the previous subcontracting company), and sign a new contract with this company. For this reason, the client and the main contractor often ask to insert in the contract a clause according to which s/he can terminate the contract in case the contractor or the subcontractor does not pay her/his workers.

Due to this 'wash-out' solution, «the lack of case law regarding the liability scheme» in Belgium is not surprising¹⁴⁰. According to Clesse, «the joint liability works in Belgium only if it is applied to an idiot that does not understand anything»¹⁴¹. In his opinion, as well as in Paul Dhaeyer's and Carlo Briscolini's opinion, the Belgian regulation on joint liability should be reformed in order to strengthen the liability of the main contractor for what happens in the subcontracting chain. However, a main problem to reform joint liability in Belgium is due to the fact that many workers' rights' violations are punished with a criminal sanction; therefore, in order to condemn a client, a contractor or a subcontractor as joint liable for an infringement committed by a contractor or a subcontractor, his/her wilful misconduct or negligence has to be proven¹⁴².

In the Rive Gauche case, Valens-Duchene was addressed by the labour inspectors on 14 April 2016 (when the Egyptians climbed on the crane); on the 28 April 2016 they terminated the contract with Consorzio edile. In fact, Article 15 of the contract between Valens-Duchene and Consorzio edile expressly regulated the possibility for the contractor to terminate the contract in case of workers' rights violations committed by the subcontractor, obliging also the latter to pay a penalty¹⁴³. Moreover, Article 19 co. 7 allowed the contractor to pay workers engaged by Consorzio edile or other subcontracting companies, in case it was informed of the latter's violations of the duty to pay the remuneration. Valens-Duchene were then authorised to deduct from the invoices of Consorzio edile what was paid to workers (Article 19 co. 8).

The termination of the contract between Valens-Duchene and Consorzio edile did not prevent the occurrence of new issues concerning workers' pay and working conditions and reproduced, again and again, subcontracting practices: in fact, Valens-Duchene contracted out to a different company that posted workers on the site that then complained not to be paid¹⁴⁴. Therefore, the Belgian law on joint liability not only does not protect workers' rights, but increases the possibility of their infringements multiplying the subcontracting practices.

5.1. The monitoring system on the construction site

In the Rive Gauche site, Valens-Duchene implemented the check-in-at-work system established by the Belgian Law on health and safety at work (Articles 31bis- 31sexies of the Law of the 4 August 1996). According to this system, in order to enter in the site, each worker has to have a card (ConstruBadge) through which s/he signals her/his presence there. This card is an individualised worker certification tool, which contains visible and safely stored electronic data that aim at attesting information to identify the worker and its employer¹⁴⁵. In the Rive Gauche site, each worker reportedly had the card¹⁴⁶.

The Belgian Law on health and safety at work imposes also to all companies present in the workplace, an obligation to cooperate in implementing the safety and health provisions, to coordinate their actions in matters of the protection and prevention of occupational risks and to exchange information (article 7 Law 4.8.1996)¹⁴⁷. Moreover, the contractor has to provide information on occupational risks to subcontractors, to coordinate the

¹⁴⁰ Rocca M., Vrijssen A., *Climbing the chain: the Belgian system of joint liability for the payment of wages*, in *Labour and Social Security Journal*, 2020, p. 14.

¹⁴¹ See the interview with E. Clesse and J.F. Dascotte.

¹⁴² See the interview with P. Dhaeyer. Mr Dhaeyer suggested to introduce a full joint liability in case of evident fraud, e.g. when the price established in the contract is so low that a reasonable person can detect the workers' rights violation. In case of evident fraud, the burden of proof of wilful misconduct or negligence would be partially reversed, i.e. the contractor would have to demonstrate his/her good faith.

¹⁴³ See the contract between Valens-Duchene and Consorzio edile in the dossier Rive Gauche I.

¹⁴⁴ See the dossier Rive Gauche II.

¹⁴⁵ See Briganti F., Machalska M., Steinmeyer H.D., Buelen W., *SOCIAL IDENTITY CARDS in the EUROPEAN CONSTRUCTION INDUSTRY*, 2015, p. 11.

¹⁴⁶ See the Interview with E. Franc on 4 June 2019 (dossier Rive Gauche I).

¹⁴⁷ This article implements Article 6 § 4 of the Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work.

subcontractors' actions and to verify that the subcontractors respect their health and safety obligations and that their workers are appropriately trained (Article 9 § 1 Law 4.8.1996).

As noticed by the investigating judge, many workers in the Rive Gauche site were not trained to do their job and the quality of the work provided was very low¹⁴⁸. Moreover, Clesse and Dascotte noticed that some workers did not have the work equipment and some work accidents were not denounced.

The Belgian Law on health and safety at work imposes also to insert in contracts and subcontracts a clause that obliges the contractor or the subcontractor to adopt the necessary health and safety measures in case the subcontractor or the sub-subcontractor infringes on his/her obligations (Article 9 § 2). This possibility was expressly mentioned in the contract between Valens-Duchene and Consorzio edile (Article 12 co. 3)¹⁴⁹.

In this contract, Valens-Duchene also asked Consorzio edile to communicate the list of workers present in the construction site (Article 19 co. 2) and to provide copies of the Limosa form, the A1 form and the work accident insurance for each workers present in the site (Article 19 co. 6). These obligations were imposed to respect legal requirements. In fact, the Law obliges the client and the contractor to verify that the contractor or the subcontractor have correctly done the Limosa declaration (Article 137 program Law of 27.12.2006). The contractor has also an obligation to communicate to the ONSS the list of subcontracting companies (*Déclaration unique de chantier*)¹⁵⁰. Instead, the issuing of the A1 forms is linked to the necessity to avoid the joint liability for payment of social contributions established by Article 30 bis of the Law on workers' social security of 27 June 1969. This article considers the client and the contractor joint liable for the payment of the social contribution due by the contractor or the subcontractor if the latter had social debts when they signed the contract. In order to check the existence of social debts, the client and the contractor have to consult a database on social security. The rule does not apply in case of posting, if the posting enterprise provides an A1 form¹⁵¹. In order to strengthen the regulation on joint liability in case of posting, Clesse, Dascotte and Dhaeyer suggested to set up the inter-connection of national social security databases, so that it would be possible to check in real time if a foreign company has paid social contributions.

For avoiding joint liability for payment of social contributions, Valens-Duchene required Consorzio edile not to subcontract to companies that have social and fiscal debts (Article 20 co. 2 of the contract) and to provide a declaration that attested that Consorzio edile and its subcontractors did not have social or fiscal debts¹⁵². The contract specified also that, in case of social or fiscal debts charged to Consorzio edile, Valens-Duchene was authorised to withdraw the corresponding amount from its invoices and that Consorzio edile was obliged to do the same in case of social or fiscal debts of its subcontractors (Article 19 co. 4 of the contract).

The fact that, in Rive Gauche, all the formal requirements to monitor the site were reportedly respected but several violations have anyway happened clearly proves that these requirements are useful but not sufficient¹⁵³. According to Carlo Briscolini, «when large companies violate workers' rights, usually they respect the administrative requirements».

¹⁴⁸ See the interview with P. Dhaeyer.

¹⁴⁹ See the contract between Valens-Duchene and Consorzio edile in the dossier Rive Gauche I.

¹⁵⁰ Buelens J., *L'occupation de main-d'œuvre étrangère dans le secteur de la construction*, Universiteit Antwerpen, 2007, p. 70-71.

¹⁵¹ Gratia M., *Lutte contre la fraude sociale et mécanisme de responsabilité solidaire: synthèse et actualité*, in *Orientations* 2013/4, p. 2. The Belgian regulation on joint liability for social contributions has been modified after that the European Court of Justice considered the system non-consistent with Article 56 Tfeue (9.11.2006, C-433/04).

¹⁵² See the contract between Valens-Duchene and Consorzio edile in the dossier Rive Gauche I.

¹⁵³ See the interview with C.E. Clesse and J.F. Dascotte.

SECTION 6:

THE INTERVENTION OF THE PUBLIC AUTHORITIES

The Rive Gauche case does not concern public procurement. Therefore, the municipality was not a key player in the case. It should anyway be noticed that, due to the media coverage of the case and the importance of Rive Gauche for Charleroi, almost 48 hours after the crane-climbing, the municipality released a declaration denouncing the workers' rights violations in the site¹⁵⁴. The bad publicity triggered by the event induced the mayor to react publicly in order to maintain the 'good image' of the city.

As already mentioned, during the Pandora's box opening moment of the Rive Gauche case, the *Auditorat du travail* and the Belgian judges reacted rapidly and took all the necessary actions to investigate on the subcontracting practice. However, two shortcomings have been underlined: on one side, trade unions lament that the *Auditorat du travail* did not intervene as of 2015 when alleged workers' rights violations were first denounced¹⁵⁵ and that the main contractor did not verify what was happening in the construction site after their denounce¹⁵⁶; on the other side, the inquiry (started in 2016) has not yet ended because part of the documents requested through the European Investigation Order has not yet arrived from Italy. Therefore, if and when someone will be sanctioned, it will be very late¹⁵⁷.

ANNEX I:

LIST OF PEOPLE CONTACTED FOR THE RIVE GAUCHE CASE

- **Fabrizio Carpino**, Confederation of Christian Trade Unions (CSC), contacted on 15 October 2019 (voice message). No answer.
- **Marc Moreau**, Confederation of Christian Trade Unions (CSC), contacted on 15 October 2019. In Africa until 1 November 2019 and then unavailable for personal reasons.
- **Carlo Briscolini**, Fédération Générale du Travail de Belgique (FGTB), interview on 4 November 2019.
- **Charles-Eric Clesse**, Auditorat du Travail, interview on 27 October 2019.
- **Jean-François Dascotte**, Auditorat du Travail, interview on 27 October 2019.
- **B. Cols**, Valens s.a., contacted on 17 February 2020 and on 18 February 2020. No answer.
- **P. Gobelet**, Duchene s.a., contacted on 17 February 2020. No answer.
- **A. Delaisse**, Duchene s.a., contacted on 18 February 2020. He preferred not to declare anything because of the ongoing inquiry.
- **F. Pistoia**, Avvocato di Edil B&G 2015, DG Costruzioni e Jahaj, contacted on 17 February 2020 and on 18 February 2020. No answer.
- **Giovanni Facca**, Fillea Cgil Veneto. Interview on 7 January 2020.
- **Vincenzo Maffeo**, Fillea Cgil Veneto, contacted several times in December 2019 and January 2020. No answer.
- **Karin Zidelmal**, Tribunal of Charleroi, short interview on 22 January 2020.
- **Paul Dhaeyer**, Business Court of Bruxelles, interview on 16 December 2019.

¹⁵⁴ https://www.rtb.be/info/regions/hainaut/detail_charleroi-le-chantier-rive-gauche-a-l-arret-en-attendant-une-solution?id=9275808. See the interview with C.E. Clesse and J.F. Dascotte.

¹⁵⁵ https://www.rtb.be/info/regions/hainaut/detail_le-chantier-rive-gauche-a-ete-bloque-par-des-syndicalistes-a-charleroi?id=9015056

¹⁵⁶ See the interview with C. Briscolini who mentioned also that the low number of labour inspectors does not allow them to intervene in every referred case. On the low number of labour inspectors in Belgium see also the interview of C.E. Clesse in <https://medor.coop/nos-series/mon-travail-mon-enfer/une-claque-historique-pour-un-g%C3%A9ant-de-la-construction/?full=1#continuer-a-lire>

¹⁵⁷ C. Briscolini declared also that the sanctions are often lower than the amount of money the companies saved through workers' rights violations. According to the *Auditorat du travail*, in this case no precautionary measures were taken because, at least on the paper, workers' wages were paid. **27**



CONSTRUCTION SECTOR

RACING ARENA REPORT

Silvia Borelli - *University of Ferrara, Italy*

Giulia Frosecchi- *University of Florence, Italy*

The Racing Arena case concerns subcontracting in the construction sector. As in Rive Gauche, workers posted in the construction site were not duly paid and had to provide a considerable amount of extra-hours. The Racing Arena stadium was inaugurated on 19 October 2017 and is now a prominent building close to the Grand Arche de la Défense in Nanterre.

Both in Rive Gauche and in Racing Arena, the main concern regards the role and the responsibility of the main contractor and the client. On this point, however, the two cases present several differences: in fact, French labour law establishes a monitoring system (*a devoir de vigilance*) that, once respected, rule out any joint liability of the main contractor and the client. Moreover, French legislation sets up an intertwined relationship between the commercial contract and joint liability entailed by labour legislation on subcontracting, according to which a worker can address the main contractor or the client as long as they have a debt towards their employer. Consequently, also in Racing Arena, the posted workers have not (yet) succeeded in recovering their wages. As written by the workers' lawyer, « Cette affaire illustre encore, si besoin en était, les effets néfastes des opérations de sous-traitance en cascade dans lesquelles des entreprises donneuses d'ordre bénéficient d'une flexibilité maximum en ne supportant aucun engagement vis-à-vis des salariés qui sont, en définitive, les seuls à subir les effets de la dépendance économique dans laquelle se trouve le sous-traitant »¹⁵⁸.

This report has been based on several interviews (list annexed) and on the analysis of the main document of the trial currently pending before a French Labour Court.

SECTION 1:

CHARACTERISTICS OF THE SUBCONTRACTING PRACTICE ANALYSED

The main contractor of the subcontracting chain under assessment is a *groupement d'entreprises* whose agent was SAS GTM *Bâtiment*¹⁵⁹, a subsidiary company of *Vinci Construction SAS*. Vinci is a renowned large construction company¹⁶⁰, which “designs and constructs buildings and infrastructures”. It counts more than 71.000 employees, who work for projects based all over the world. Indeed, 48% of Vinci's revenue is generated outside France¹⁶¹.

Consistently with a widespread tendency, Vinci frequently subcontracts numerous phases of the construction process to various companies¹⁶². The subcontracting practice is so widespread in the construction sector that, habitually, the first question the labour inspectorate asks in a building site is how many subcontracting levels there are: the more are the levels of subcontracting, the easier is to pursue fraud and illegal work. Consequently, labour inspectors tend to control more those sites where the subcontracting chain is very long. However, in France there is no legal limitation as regards the extent of the subcontracting chain¹⁶³.

The labour inspector interviewed has also stated that several companies engage in construction works that they are unable to carry out without the support of other companies, i.e. subcontractors and contracted workers. Besides, some companies use always the same subcontractor(s), a clear indicator of a potential fraudulent practice, according to the interviewed labour inspector¹⁶⁴.

The case analysed in this report concerns the construction of ARENA92, a multi-use stadium located in Nanterre, Paris (France). In order to build this large stadium, SAS RACING ARENA¹⁶⁵ (the client) contracted out to a *groupement d'entreprises* whose agent was GTM *Bâtiment*¹⁶⁶. The building site was enormous and several subcontracting companies were involved¹⁶⁷. In particular, GTM *Bâtiment* subcontracted to SAS Castel & Fromaget

¹⁵⁸ Conclusion of the workers' lawyer before the Conseil de Prud'Hommes of Nanterre.

¹⁵⁹ <https://www.gtm-batiment.fr/>

¹⁶⁰ Emilie Thivet-Grivel (Interview 18.11.2019) talks about Vinci as a “giant company”.

¹⁶¹ From its website: <https://vinci-construction.com/en/>.

¹⁶² For instance, see a controversial subcontracting reported by French newspapers: https://www.lemonde.fr/economie/article/2016/11/23/vinci-choisit-un-sous-traitant-turc-pour-la-facade-de-la-tour-saint-gobain-la-profession-reagit_5036199_3234.html.

¹⁶³ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

¹⁶⁴ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

¹⁶⁵ Sas Racing Arena is a private company which owns the site.

¹⁶⁶ The agreed fee was 250.000.000 € (“Arguments and facts presented by Castel & Fromaget in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel).

¹⁶⁷ Emilie Thivet-Grivel, Interview 18.11.2019.

a considerable part of the construction process, establishing a very short period to end the construction work and a high penalty (€ 36.043,49) in case of delay¹⁶⁸. Castel & Fromaget is a company specialised in metal construction projects, which belongs to the group Fayat Metal¹⁶⁹.

Considering the undisputed need for the subcontractors to mobilise exceptional resources, including human resources, the first subcontractor could resort to further subcontracting. On 20 August 2015, Castel & Fromaget subcontracted to Coner Costruzioni the welding and installation of the steel structure. This subcontract was strongly intertwined with the contract between Castel & Fromaget and GTM Bâtiment: in fact, Castel & Fromaget could modify, terminate or void it without any indemnity for Coner in case GTM modified, terminated or voided the contract with Castel & Fromaget¹⁷⁰. The subcontracting agreement specified also that Coner Costruzioni would have performed the contract by posting its own employees in the French territory¹⁷¹. Moreover, Coner Costruzioni was obliged to transmit to Castel & Fromaget the documents attesting its compliance with fiscal and social obligations every six months and the posting documents, and to name a contact person on the French territory¹⁷².

Coner Costruzioni is an Italian limited liability company based in the North of Italy, founded in 2002 and still active¹⁷³. It is properly registered in the Italian Business Register and has performed a number of construction contracts in various countries, since its establishment. In particular, according to the information collected, it is specialised in industrial buildings, as well as structures as bridges and stadiums¹⁷⁴. Coner Costruzioni has several quality certificates, including the legality rating, a quality label provided in Italy to companies that respect the law¹⁷⁵.

In brief, the subcontracting chain is composed by a client (Sas Racing Arena), one contractor (GTM Bâtiment), one first-level subcontractor (Castel & Fromaget) and one second-level subcontractor (Coner Costruzioni). The issues related to the workers' rights arose in relation to this last company and its employees posted from Italy.

Considering the profiles of the companies concerned, we can exclude the involvement of letterbox companies in the case at stake¹⁷⁶; similarly, we can exclude that Coner Costruzioni is economically dependent from Castel & Fromaget. However, the subcontracting chain becomes more complex in light of the connections that exist between some of the companies and important groups in the construction sector, i.e. GTM Bâtiment is a subsidiary of Vinci and Castel & Fromaget belongs to Fayat Metal.

The subcontracting practice, as regards the aspects we are investigating, has taken place over nearly one year and a half from the signature of the subcontract between Castel & Fromaget and Coner Costruzioni. In particular, the workers posted by Coner Costruzioni have worked at the construction site from 25 November 2015 to 30 January 2016¹⁷⁷. On 4 December 2015, the French labour inspectors controlled the site and communicated to Coner Costruzioni, as well as to Castel & Fromaget the detected violations (7 January 2016). Besides being worried about Coner's lack of action with regard to the labour inspectors' notification and a work accident caused by Coner on 22 January 2016, Castel & Fromaget was also dissatisfied as regards the performance of the contract by the Italian company¹⁷⁸. Therefore, Castel & Fromaget has terminated the contract with Coner Costruzioni via regular mail on 5 February 2016. On the 2 March 2016, GTM Bâtiment also terminated the contract with Castel & Fromaget due to the latter's serious infringements, asking for a considerable compensation for damages (€ 85.644.723). In order to avoid any further legal problem with GTM Bâtiment, Castel & Fromaget signed a transaction agreement in which it was obliged to pay to GTM a high penalty (€ 2.200.000).

In short, GTM Bâtiment did not pay Castel, who in turn did not pay Coner, who in the end did not pay the workers; GTM asked for damages' compensation to Castel who asked for damages' compensation to Coner; in

¹⁶⁸ The agreed fee was 18.021.745 €. Previously, GTM Bâtiment had contracted the work to an Italian company (Cordioli) whose contract was terminated due to several infringements (Arguments and facts presented by Castel & Fromaget in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel).

¹⁶⁹ <https://metal.fayat.com/en/subsidiaries>.

¹⁷⁰ Arguments and facts presented by Coner costruzioni in its conclusions before the Tribunal of Commerce of Paris as reported by Mrs. Thivet-Grivel.

¹⁷¹ Arguments and facts presented by Castel & Fromaget in its conclusions, as reported by Mrs. Thivet-Grivel.

¹⁷² Arguments and facts presented by Castel & Fromaget in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel.

¹⁷³ Coner costruzioni has regularly presented its budget until 2018 (Visura of the Italian Business Register).

¹⁷⁴ <https://www.conercostruzioni.it/it/>.

¹⁷⁵ <https://www.agcm.it/competenze/rating-di-legalita/>

¹⁷⁶ See also Pauline Bidaud, Interview of 23.10.2019.

¹⁷⁷ Decision of the Conseil des Prud'hommes de Nanterre, référé, 6 December 2016. See also Pauline Bidaud, Interview of 23.10.2019.

¹⁷⁸ According to Castel & Fromaget, it sent to Coner Costruzioni several letters to denounce the latter's delay, violations of safety rules and French law on posting of workers (Arguments and facts presented by Castel & Fromaget in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel).

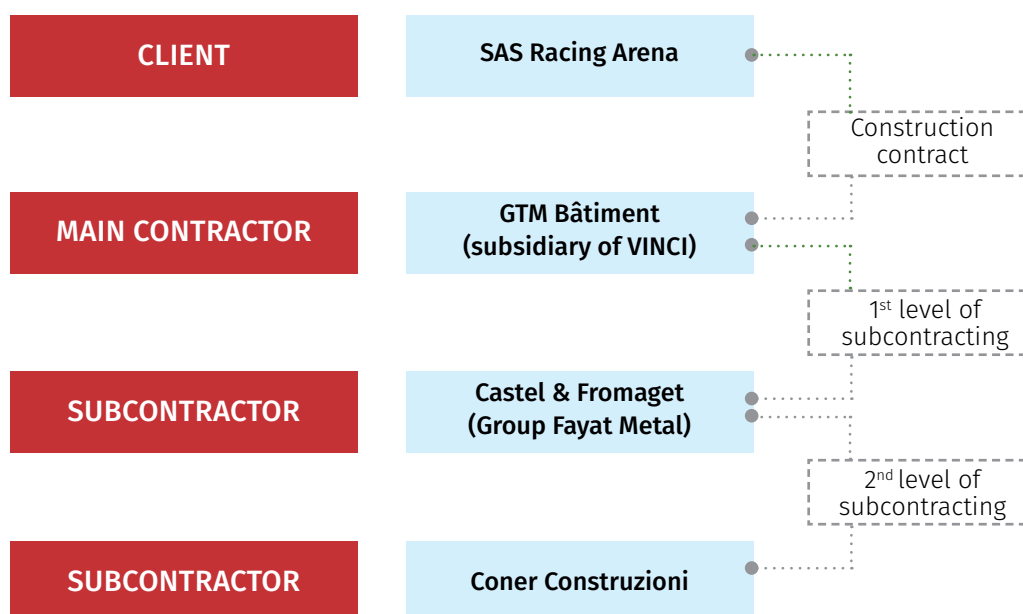
the end, GTM was the only one to receive a certain amount of money as penalty. Once sued by the workers, Coner argued that, because of the sudden termination, it had no economic resources to pay the outstanding salaries¹⁷⁹. Moreover, Coner claimed that, from November 2015 on, Castel & Fromaget did not pay any invoice¹⁸⁰.

The posted workers concerned were reportedly around 20¹⁸¹, all of them metal welders, and Coner Costruzioni was their formal and effective employer. Nevertheless, according to the workers' lawyer, Castel & Fromaget has participated in the recruitment of the workers to be employed by Coner for the purpose of the Racing Arena subcontract, selecting those workers who had already been employed in building sites of Castel & Fromaget by another Italian company (subcontractor)¹⁸². According to the labour inspector interviewed, cases in which the same workers are exploited by a client or a contractor in several construction sites, being engaged by different employers, were difficult to find out¹⁸³. However, a database recently set up (SIPSI 2) allows now to crosscheck information concerning posted workers, posting employers, clients, contractors, building site, etc. Therefore, in future, it will be possible to verify if a contractor or a client moves the workers from one site to the other, through different subcontractors that hire these workers. A paradox is that this kind of control is not possible for workers hired in France since, in case of subcontracting, no information on their client and contractor is collected by labour inspectors. SIPSI 2 can also be employed to blacklist companies that have repeatedly committed infringements.

Only four of the workers posted by Coner have initiated legal proceedings against Coner, that is their employer, before the Conseil de Prud'hommes (French Labour Court), as well as against Sas Racing Arena, GTM Bâtiment and Castel & Fromaget in view of the joint and several liability (see Section 5)¹⁸⁴. These workers met their lawyer by chance: they went to the Tribunal in Nanterre to complain about being paid; there they met Emilie Thivet-Grivel who decided to help them¹⁸⁵.

Three more Romanian workers and a Senegalese worker contacted then Mrs. Thivet-Grivel lamenting not to be fully paid for the activity performed¹⁸⁶.

Subcontracting structure in the Racing Arena case



¹⁷⁹ Emilie Thivet-Grivel, Interview of 18.11.2019.

¹⁸⁰ Arguments and facts presented by Coner costruzioni in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel.

¹⁸¹ The numbers are not certain, Pauline Bidaud (Interview of 23.10.2019) talks about "around 20", Emilie Thivet-Grivel (Interview of 18.11.2019) of "around 12 beyond the four suing the company".

¹⁸² Emilie Thivet-Grivel, Interview of 18.11.2019. See also her conclusion for the workers before the Conseil de Prud'Hommes of Nanterre.

¹⁸³ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

¹⁸⁴ Conclusions for the workers before the Conseil de Prud'Hommes.

¹⁸⁵ Emilie Thivet-Grivel, Interview of 18.11.2019.

¹⁸⁶ See the documents provided by Mrs. Thivet-Grivel.

SECTION 2:

NORMATIVE FRAMEWORK

The main problem in Racing Arena concerns the violation of the French legislation on posting of workers (Articles L1261-1 ff. of the French Labour Code).

According to Article L1261-3, a posted worker is someone who habitually works outside France and who for a limited period performs his/her activities on the French territory upon his/her employer's request.

A first problem in the case examined concerns the fact that Coner engaged the workers in order to post them in the Racing Arena site (see Section 3)¹⁸⁷. Consequently, they could be considered as workers employed in France, instead of workers posted therein.

Before posting workers to France, a company has to fill and send an online declaration (called SIPSI) to the Labour Inspectorate of the place where the service is performed (Article L1262-2-1 § I)¹⁸⁸. The posting company also has to nominate a contact person in France (Article L1262-2-1 § II). In case of posting in the construction sector, the employer has to provide to each worker a professional identity card (called BTP card) (Articles L8291-1 and R8293-2)¹⁸⁹.

All these obligations were fulfilled by Coner Costruzioni: formal requirements are certainly useful to monitor posting of workers but are not sufficient to prevent workers' rights violations. Besides, in big construction sites, the companies are aware that labour inspectors control first the fulfilment of formal requirements and that their control can be deeper if the formal requirements are not respected¹⁹⁰.

Article L1262-4 determines the working conditions that have to be applied to workers posted in France¹⁹¹. These include rules on wage and working time established by law and by the *erga omnes* collective agreements, i.e. the collective agreements "extended" to all workers engaged by companies established in France and performing the same main activity as the posting company (Article R1261-2)¹⁹².

The French Labour Code applies several administrative sanctions in case of violation of the legislation on posting of workers (see Articles from L1264-1 to L1264-4).

In Racing Arena, a decision adopted by the Conseil de *Prud'hommes* in an urgent judicial proceeding condemned Coner Costruzioni to pay to posted workers the wages calculated according to French collective agreements¹⁹³. However, the court could not decide on the working time violations since they require a deep analysis in the ordinary trial. Moreover, the court did not consider neither the main contractor nor the client jointly liable for the payment of wages (see Section 5).

Therefore, one year after their complaint, the workers obtained a favourable decision but, on one side, the French court could not fully decide the case and, on the other side, only Coner Costruzioni was condemned. Besides, this decision has not been enforced because of the complexity and the cost of an executive procedure against a foreign company¹⁹⁴. Indeed, in order to execute a French court decision in a different country, it is necessary to fulfil a complex procedure and to address a foreign executing judicial authority. Considered that the case was still pending (see Section 5) and that only one worker paid part of the legal fee, the workers' lawyer decided not to pursue the executive procedure¹⁹⁵. Basically, in order to receive the unpaid salaries from a foreign company, the workers could be requested to pay more than the amount of these.

¹⁸⁷ Arguments and facts presented by Coner Costruzioni in its conclusions before the Conseil de Prud'Hommes, as reported by Mrs. Thivet-Grivel.

¹⁸⁸ <https://www.sipsi.travail.gouv.fr/#/auth/login>

¹⁸⁹ <https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/article/employeurs-vos-formalites-prealables-obligatoires>

¹⁹⁰ According to Ferreux-Fagno (interview of 16.1.2020), the violation of formal requirements is an indicator of a possible fraudulent practice.

¹⁹¹ Article L1262-4 has been modified by the *ordonnance* n. 2019-116 of 20.2.2019 that has implemented the Directive 2018/957. For more information see <https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/article/salaries-detaches-vos-droits>

¹⁹² In France, collective agreements can be 'extended' to all companies of the corresponding sector by a decision (*arrêté d'extension*) of the Labour Minister.

¹⁹³ *Ordonnance de référé* of 6.12.2016. This decision was taken according to Article R1455-5 and R1455-6 of the French Labour Code that regulate a faster judicial proceeding for adopting measures that are urgent and not seriously contested. Besides this urgent judicial proceeding, the workers' lawyer filed also a legal action on the merits that has been suspended by the Conseil des Prud'Hommes until the Commercial Court solves the commercial litigation between the companies (see Section 5).

¹⁹⁴ Emilie Thivet-Grivel, Interview of 18.11.2019.

¹⁹⁵ See Mrs. Thivet-Grivel's mail.

SECTION 3:

WORKERS AND WORKING CONDITIONS IN THE CASE ANALYSED

All of the workers involved in the judicial proceeding are male, and all of them were workers posted from Italy. Three out of four were Senegalese nationals residing in Ravenna (Italy)¹⁹⁶, while the fourth worker was a Romanian citizen¹⁹⁷, residing in Romania¹⁹⁸. All of them were engaged by Coner in November 2015, just few days before their posting to France, with a fixed-term contract of employment¹⁹⁹.

According to the claimants and the trade union delegate interviewed, Coner Costruzioni has violated the labour legal framework. Overall, it has not respected the legal maximum weekly working time, the weekly rest period, the minimum salary, paid leave, and travel and lodging allowances established in the French collective agreement for the construction sector and it has delayed salary payments.

In particular, from the conclusion presented by the workers' lawyer, we can deduce that the workers have received their salaries with considerable delay, especially those of November and December 2015. Furthermore, the January salary has never been paid²⁰⁰.

Moreover, the workers allege that they have performed overtime work widely beyond the maximum legal working time. Indeed, they had to work 6 days per week, 10 hours per day (Monday - Saturday 7 am - 6 pm), hence, 58 weekly hours of work, which means that they have exceeded the maximum weekly working time set, by French law, at 48 hours²⁰¹. As mentioned in the conclusion presented by the workers' lawyer, in France the burden to prove the effective working time performed by workers is for the employer (French Court of Cassation, Social Chamber, 13.2.2002, n. 00-40.836; 2.6.2004, n. 02-46.811; 9.4.2008, n. 07-41.418)²⁰². Therefore, if an employer wants to contest the working hours claimed by workers, s/he has to provide evidence of the real working time (French Court of Cassation, Social Chamber, 24.11.2010, n. 09-40.928; 30.9.2015, n. 14-17.748). In Racing Arena, the working time was monitored via a badge that each worker used to enter in the site. However, GTM Bâtiment reportedly refused to communicate the registered hours for Coner's workers²⁰³.

Based on information provided, it cannot be said whether Castel & Fromaget has made use of the Italian company posting workers from Italy to lower the labour costs or, worse, abuse of the internal market regulation. As pointed out by one of the interviewees²⁰⁴, the French labour market suffers of a lack of workers and companies specialised in metal welding, which often justifies the recourse to foreign companies. We could also add that the obligation for the sending company to apply the salary set by the national collective agreement applicable *erga omnes* in the hosting country reduces the margin of social dumping. On the other hand, besides the violations of French norms by Coner alleged by workers, considering that only a minimum floor of norms of the hosting country has to be respected by the posting company, a certain amount of social dumping is nearly unavoidable. Moreover, as noted by the labour inspector, usually, the Italian posting companies tend to apply to the workers posted in France the Italian working conditions (completely), especially as far as concerns salary and the working time. The difference between the two legal frameworks is remarkable. Indeed, while in Italy the ordinary weekly working time is of 40 hours, in France it is of 35 hours, therefore, from the 36th hour the company should pay overtime²⁰⁵.

¹⁹⁶ Emilie Thivet-Grivel, Interview of 18.11.2019.

¹⁹⁷ Pauline Bidaud, Interview of 23.10.2019.

¹⁹⁸ Conclusions for the workers before the Conseil de Prud'Hommes.

¹⁹⁹ Ordonnance de référé of the Conseil de Prud'Hommes of Nanterre, 6.12.2016.

²⁰⁰ Emilie Thivet-Grivel, Interview of 18.11.2019.

²⁰¹ Conclusions for the workers before the Conseil de Prud'Hommes. Emilie Thivet-Grivel, Interview of 18.11.2019.

²⁰² L 3171-4 of French Labour Code.

²⁰³ Conclusion of the workers' lawyer. Emilie Thivet-Grivel, Interview of 18.11.2019. Guillaume Ferreux-Fagno (interview of 20.1.2020) underlined that the badge could have been used by a different worker; moreover, in the Racing Arena site there were several entrances. For this reason, he considered not valuable the control of the working time through the badge system.

²⁰⁴ Emilie Thivet-Grivel, Interview of 18.11.2019.

²⁰⁵ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

Timeline of the Racing Arena case

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- A vertical timeline with a red dashed line and red circular markers. Each event is preceded by a light blue rounded rectangle containing the date. The events are as follows:
- 25 November 2015** ● Coner Construzioni hires workers.
 - 4 December 2015** ● Labour inspection detects violation of maximum weekly working hours and missing remuneration for overtime (French law & collective agreements).
 - 7 January 2016** ● Labour Inspectorate reported the findings to Coner and Castel & F.
 - 5 February 2016** ● Castel & F. ends contract with Coner, since Coner did not correct the violations. Now, Castel & F. is no longer liable nor subject to administrative sanction by law.
 - February 2016** ● Four workers appeal to the Conseil de Prud'hommes against Coner Costruzioni (for wages and working time).
 - 17 March 2016** ● Labour inspectorate informs Castel & F. and GTM (not Racing Arena) about the missed payment of wages to Coner's workers.
 - 4 April 2016** ● Castel & F. informs the Labour inspectorate that Coner had not reacted to its letter (= devoir de vigilance fulfilled => Castel & F. not liable).
 - 6 December 2016** ● Conseil de Prud'hommes condemns Coner to pay the wages according to French law and collective agreements. Judgement is not enforced, too costly for workers.

TODAY: Workers remain unpaid.

SECTION 4:

HOW TO FACE SUBCONTRACTING CHALLENGES: WORKERS' REPRESENTATIVES AND TRADE UNIONS IN THE CASE ANALYSED

The role of trade unions in this case is quite peripheral, consistently with a general difficulty of workers' organisations to overcome the obstacles created by the fragmentation of the workforce in subcontracting chains and, even more, to establish a relationship with posted workers who rarely speak the language of the hosting country²⁰⁶. Moreover, posted workers, especially in subcontracting chains, are intrinsically very mobile workers, frequently change building site and rarely maintain any contact with the previous workplace²⁰⁷. Therefore, even if trade unions of the hosting country manage to establish a contact with these workers, it is complex to create a long term relationship which allows to pursue a judicial proceeding²⁰⁸.

Only the Fédération Nationale Construction et Bois (CFDT) was involved in the case at stake. However, not even they have had direct contacts with the workers. In fact, the workers contacted the lawyer first. The lawyer then contacted the trade union, who paid the legal expenses and made a (failed) attempt to put pressure on Vinci and Castel & Fromaget²⁰⁹.

The CFDT decided also to participate to the trial, asking for damages' compensation according to Article L2132-3 of the French Labour Code. This rule allows trade unions to intervene in a trial to defend the collective interest of the sector(s) they represent (in this case, the construction sector and, in particular, the posted workers in the sector)²¹⁰.

The only workers' bodies at company level we could be sure about, are the *comité de groupe d'entreprises* and the European Work Council in Vinci²¹¹. However, these bodies were not involved at all in the protection and support of the posted workers' concerned and there was no workers' representative specifically for the subcontracting chain²¹².

In order to involve client's or contractor's workers' representatives, from 2017 on, each French company that employs more than 300 workers has to inform its *comité social et économique* on the workers posted by the company outside France and on the use of workers posted by other companies in France (Article L2312-30). Moreover, each French company has to register posted workers in its *registre unique du personnel*. This register can be controlled by the *comité social et économique*, as well as by labour inspectors (Article L1221-15). However, these rules do not apply to our case since it took place before their enforcement.

A problem raised by the labour inspector interviewed concerns the fact that in French labour law some rules required a company collective agreement, for example to authorise night work. If a foreign company presents a collective agreement, the labour inspectors are not able to control the representativeness of the signing trade union(s), if the workers' representative is rightly formed, if the agreement has been signed according to the correct procedure, etc.

²⁰⁶ As in the case at stake, see Guillaume Ferreux-Fagno, Interview of 16.1.2020.

²⁰⁷ Pauline Bidaud (interview of 23.10.2019) also raises the doubt that Coner's employees may have worked also for another building site in Paris, but there is no certainty over this information.

²⁰⁸ Pauline Bidaud (interview of 23.10.2019) considers essential to train trade unionists to approach posted workers and to deal with long and complex subcontracting chains.

²⁰⁹ Pauline Bidaud, Interview of 23.10.2019; Emilie Thivet-Grivel, Interview of 18.11.2019.

²¹⁰ Trade unions can enforce Article 2132-3 in every case where a mandatory social rule has been violated (French Court of Cassation, Social Chamber, 9.7.2015, n. 14-11.752). French representative trade unions can also engage, on behalf of posted workers, in any judicial or administrative proceedings with the objective of implementing law on posting. The concerned worker(s) has(have) to be informed and has(have) 15 days to oppose to the trade union's action. The concerned worker(s) can also intervene in the proceedings and eventually terminate it (Article L1265-1).

²¹¹ <http://www.ewcdb.eu/company/2609>

²¹² Pauline Bidaud, Interview of 23.10.2019. It is also quite rare to find workers' representatives at subcontracting chain-level, see Guillaume Ferreux-Fagno, Interview of 16.1.2020.

SECTION 5:**DUE DILIGENCE, REPORTING, REMEDIES AND SANCTIONS****5.1 Duty of vigilance and joint liability in subcontracting chain**

According to French labour law, the client and the contractor(s) have a *devoir de vigilance* on the companies involved in the subcontracting chain, which entails a duty to supervise if the subcontractors have respected their obligations²¹³.

- 1 First of all, before the posting, the client and the contractor(s) have to verify if his/her (sub)contractor has sent the compulsory preliminary declaration (SIPSI) and has nominated a contact person in France. In case the declaration has not been done, the contractor has to fill and send it within 48 hours from the moment in which the posting has started (Article L1264-4-1 § I).

In case of a subcontracting chain, the client is obliged to verify if the preliminary declaration has been done by each direct or indirect subcontractor that s/he has accepted (Article L1264-4-1 § II), according to Article 3 of the French Law on subcontracting (Law n. 75-1334 of the 31.12.1975)²¹⁴.

The client and the contractor(s) also have to obtain from his/her (sub)contractor a declaration attesting that the latter has paid the sanction(s) applied for the violation of the law on posting of workers (Article L1262-4-1 § III and R1263-12)²¹⁵.

As mentioned above, Coner Costruzioni fulfilled the duty of preliminary declaration and nominated the contact person in France, so that both obligations were respected.

- 2 The client and the contractor(s) that have been alerted by a labour inspector that a direct or indirect subcontractor has infringed the duty to pay the wage established by French law and erga omnes collective agreements, have to address the concerned subcontractor and his/her direct contractor and to request them to immediately end the breach(es). Within seven days, the posting employer and his/her direct contractor have to inform the client and the contractor on the measures adopted to cease the infringement(s). The client and the contractor must communicate to the labour inspectors the measures adopted or the refusal of the subcontractor to take any measure. The client and the contractor(s) are jointly liable with the subcontractor for the payment of wages only if they do not respect the abovementioned obligations (Articles L3245-2, R3245-1 and R3245-2)²¹⁶.

Moreover, if the subcontractor refuses to end the breach(es), the client and the contractor(s) have an 'apparent' choice: either they terminate the subcontract or they are jointly liable with the employer for the payment of wages and indemnities due to posted workers (Article L1262-4-3 and Articles from R1263-15 to R1263-19).

In the Racing Arena case, Castel & Fromaget and GTM Bâtiment were informed by labour inspectors of the non-payment of wages on 17 March 2016. The former sent a letter to Coner Costruzioni on 21 March 2016 while GTM contacted Castel & Fromaget and Coner Costruzioni on the 22 March 2016. Castel & Fromaget communicated then to the labour inspectorate that Coner Costruzioni did not answer to its letter (4 April 2016).

Consequently, the Conseil de Prud'hommes considered that both GTM Bâtiment and Castel & Fromaget fulfilled their obligations and could not be held liable for the payment of posted workers' wages²¹⁷.

²¹³ <https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/article/donneurs-d-ordre-maitres-d-ouvrage-en-france-vos-obligations>

²¹⁴ A contractor has to communicate to his/her client the nature and the amount of each service that s/he wants to subcontract and the name of the subcontractor(s) (Article 5 of the Law n. 75-1334). Moreover, a contractor that wants to execute his/her contract through one or more subcontractors has to agree each subcontractor and the conditions of payment established in each subcontract with the client (Article 3 of the Law n. 75-1334). Therefore, the contractor provides the client with a dossier with the relevant documents for each subcontractor. The client can be held liable of illegal work if s/he can realise from these documents that there is a fraud (fraude flagrante: interview of Ferreux-Fagno, 20.1.2020).

²¹⁵ This obligation has been inserted by Law n. 2018-771 of 5.9.2018 implementing the Directive 2018/957.

²¹⁶ The client and the main contractor have the burden to prove the fulfilment of their obligations.

²¹⁷ Ordonnance de référé of 6.12.2016.

In its defence before the Conseil de Prud’Hommes, Racing Arena affirmed that it was never informed by the labour inspectors of the violations suffered by Coner Costruzioni’s workers; consequently, it could not be held liable for the infringement of the *devoir de vigilance*²¹⁸.

- 3 In case of violation of certain rules (listed in Article L8281-1) by a direct or indirect subcontractor, the client and the contractor(s), informed by labour inspectors, have to address the subcontractor and ask him/her to immediately end the breach(es). Within 15 days, the subcontractor has to inform the client and the contractor on the measures adopted to cease the infringement(s). In the following seven days, the contractor has to communicate to the labour inspectorate the measures adopted by the subcontractor or the fact that the latter has not replied or has refused to take any measure. If the contractor does not fulfil his/her obligation an administrative sanction is applicable but s/he is never jointly liable with the employer for the infringement(s) (Article L8281-1).

The latter point was raised by Castel & Fromaget in its defence before the French Labour Court: even if the claimants demonstrate that Castel & Fromaget did not fulfil the abovementioned obligations, only an administrative sanction can be applied²¹⁹.

In the Racing Arena case, French labour inspectors did a first control in the site on 4 December 2015. After this control, the inspectors ordered to Coner Costruzioni to respect French legislation on maximum weekly working time and on additional pay for overtime. This communication was sent also to Castel & Fromaget (7 January 2016) who on the 12 January 2016 demanded Coner Costruzioni to fulfil the labour inspectorate’s requests. Not having received any answer from Coner, Castel & Fromaget urged Coner Costruzioni to end its breaches within 8 days²²⁰. Facing Coner’s incapacity to set up any corrective measure, on 5 February 2016, Castel & Fromaget terminated the contract with the company. Therefore, according to the Conseil de Prud’Hommes, Castel & Fromaget has respected its duty of vigilance²²¹.

- 4 The client and the contractor(s) are also obliged to intervene when posted workers are hosted in conditions unrespectful of human dignity. In this case, the client and the contractor, once informed by a labour inspector, shall order to the concerned subcontractor (direct or indirect) to cease the infringement(s). Within 24 hours, the client and the contractor have to inform the labour inspectorate of the measures adopted. If the subcontractor does not end his/her infringement(s), the client and the contractor are obliged to guarantee to posted workers a decent accommodation (Articles L4231-1 and R4231-3)²²².

In Racing Arena, no violation of the rules on posted workers’ accommodation was claimed.

- 5 The French Labour Code charges also the client and the contractor(s) with several obligations concerning health and safety at work (Article R1262-11) and work accidents (Article L1262-4-4).

In the Racing Arena case, no claim on health and safety was raised.

5.2 Duty of vigilance and joint liability in case of illegal work

French legislation on illegal work establishes several obligations for the client and the contractor:

- 1 First of all, before signing the contract and then regularly, the client and the contractor have to verify that the (sub)contractor has provided the documents required to avoid undeclared or under-declared work (Articles L8221-3 and L8221-5)²²³. If the client/contractor does not fulfil this obligation, s/he is jointly liable with the (sub)contractor for the payment of taxes, social contributions and salaries (Article L8222-2). The joint liability applies also when the client/contractor benefits from services provided by a person knowing that s/he is responsible of undeclared or under-declared work (Article L8222-2)²²⁴. According to Ferreux-Fagno, when the price established in a contract is so low that the (sub)contractor cannot respect the French legislation on wages and social contributions, the client/ contractor cannot claim to be unaware

²¹⁸ Arguments and facts presented by Racing Arena in its conclusions before the Conseil de Prud’Hommes, as reported by Mrs. Thivet-Grivel.

²¹⁹ Arguments and facts presented by Castel & Fromaget in its conclusions before the Conseil de Prud’Hommes, as reported by Mrs. Thivet-Grivel.

²²⁰ Arguments and facts presented by Castel & Fromaget in its conclusions before the Conseil de Prud’Hommes, as reported by Mrs. Thivet-Grivel.

²²¹ Ordonnance de référé of 6.12.2016.

²²² The conditions that a decent accommodation in the construction sector has to respect, are established by Articles from R4534-146 to R4534-151.

²²³ The rule is applicable only to contracts whose fee is more than € 5,000 VAT excluded (Article R8222-1). When the (sub)contractor is established abroad, the obligations whose respect has to be verified are those which have equivalent effect in his country of origin and those which are applicable to its activity in France (Article L8222-4).

²²⁴ The person responsible for undeclared or under-declared work can be a direct or an indirect contractor.

of the violation of the rules on undeclared or under-declared work committed by the (sub)contractor²²⁵; consequently, the client/contractor can be held jointly liable for the payment of taxes, social contributions and wages. Moreover, the client and the contractor can be held jointly liable if, informed by a labour inspector, a trade union or a professional association that a (sub)contractor does not respect the obligations established in Articles L8221-3 and L8221-5 on undeclared and under-declared work, s/he does not order to the (sub)contractor to end the infringement (Article L8222-5)²²⁶.

As already mentioned, Coner Costruzioni presented to the labour inspectors all the required documents for the posted workers; therefore, the legislation on undeclared and under-declared work was not relevant in the case.

- 2 A company that contracts out a service to another company that engages the workers necessary to perform this service is jointly liable for the payment of wages due to these workers if their employer does not fulfil his/her obligations and does not have a *fonds de commerce* (Articles L8232-1 and L8232-2). The elements that form a *fonds de commerce* are listed in Article L142-2 of the French Commercial Code (the brand(s) and the commercial name; the right to lease; the customs; the commercial furniture; the patents; the licenses; the industrial designs; the intellectual property rights). Basically, only letter-box companies do not have a *fonds de commerce*. The burden to prove that the employer has a *fonds de commerce* is for the company that has contracted out.

Since Coner Costruzioni had (and still has) a *fonds de commerce*, the Conseil de Prud'Hommes did not consider Castel & Fromaget as jointly liable for the payment of wages due to the posted workers²²⁷. Racing Arena contested as well that this rule concerns only the direct contractor and thus cannot be applied to the client²²⁸.

5.3 Client and contractor's duties in the construction sector

French legislation establishes also specific rules for the construction sector. In this sector, the client has to communicate to posted workers all information on the rules that regulate their posting in France. This information shall be put up in a place easily accessible and shall be translated in all languages spoken by the posted workers (Article L1262-4-5). This rule was introduced by the Law n. 2016-1088 of the 8.8.2016 and thus was applicable at the time of the Racing Arena case.

The construction workers that have been employed in a construction site enjoy also a direct action against the (legal or physical) person for whom the construction has been built in so far as the latter has a debt towards their employer in the moment of the workers' action and within the amount of this debt (Article 1778 of the French Civil Code mentioned by Article L3253-23 of the French Labour Code).

Another relevant rule is the Article 1341-1 of the French Civil Code according to which a creditor can enforce his/her debtor's rights if the debtor's lack of action harms the creditor's interest.

In the present case, the person for whom the construction has been built was Racing Arena. Consequently, neither Castel & Fromaget, nor GTM Bâtiment, Vinci SA or Vinci Construction Sas can be addressed according to Article 1778 of the French Civil Code²²⁹. Moreover, due to the commercial disputes among GTM Bâtiment and Castel & Fromaget (solved through a transaction agreement)²³⁰, Castel & Fromaget and Coner Costruzioni (pending before the Tribunal of Commerce of Auch)²³¹, and Coner Costruzioni and Racing Arena (pending before the Tribunal of Commerce of Paris), the Labour Court decided not to examine if Castel & Fromaget still has a debt towards Coner Costruzioni, for which Racing Arena can be held liable according to Article 12 of the French

²²⁵ Ferreux-Fagno (interview of 20.1.2020) spoke of "explicit fraud".

²²⁶ <https://www.urssaf.fr/portail/home/les-risques-du-travail-dissimule/les-risques-du-travail-dissimule/le-recours-a-un-cocontractant-so.html>

²²⁷ Ordonnance de référé of 6.12.2016.

²²⁸ Arguments and facts presented by Racing Arena in its conclusions before the Conseil de Prud'Hommes, as reported by Mrs. Thivet-Grivel.

²²⁹ Ordonnance de référé of 6.12.2016. The workers' lawyer complained that it was extremely difficult for her to understand the roles in the subcontracting chain.

²³⁰ On 10 February 2016 GTM Bâtiment contested to Castel & Fromaget several infringements. On the 24 February 2016 GTM Bâtiment terminated the contract with Castel & Fromaget, asking for damages' compensation. On 25 October 2017, the two companies signed an agreement to end their dispute; according to this agreement, Castel & Fromaget paid € 2.200.000 to GTM Bâtiment (see Section 1).

²³¹ Coner Costruzioni demanded the payment of € 1.507.129,74 for the services provided to Castel & Fromaget that asked from the former the payment of € 4.342.094,99 for its infringements. According to Castel & Fromaget, several infringements that caused the termination of its contract with GTM Bâtiment, were due to bad performances of Coner Costruzioni (Arguments and facts presented by Castel & Fromaget in its conclusions before the Tribunal of Commerce of Paris, as reported by Mrs. Thivet-Grivel).

Law on subcontracting (Law n. 75-1334 of 31.12.1975). This rule guarantees to the subcontractor a direct action against the client if the contractor does not pay the fee agreed in the subcontract. This action concerns only the payment of services performed for the client and is limited to the amount of money that the client still has to pay to the contractor (Article 13 of the Law n. 75-1334). Accordingly, Coner Costruzioni sued Racing Arena before the Commercial Tribunal of Paris to receive the remuneration that Castel & Fromaget has not paid. However, on the basis of the transaction agreement signed by Castel & Fromaget and GTM Bâtiment, one can seriously doubt that Racing Arena still has a debt towards Castel & Fromaget. Moreover, since Castel & Fromaget contested the fee demanded by Coner Costruzioni²³², the Labour Court decided to suspend the trial and to wait for the final decision on the commercial dispute. According to the workers' lawyer, this was a deliberated legal strategy pursued by Racing Arena in order to freeze the process before the Labour Court and exit from the dispute. Indeed, only some days before the Labour Court's hearing Racing Arena demanded the suspension, not allowing the workers' lawyer to duly prepare a defence²³³. Consequently, for obtaining this final decision, the workers still have to wait for several years²³⁴.

To sum up, French legislation on joint and several liability «falls into the water»²³⁵, i.e. can be easily ruled out through the fulfilment of a duty of vigilance. Moreover, French law does not establish any joint and several liability for groups of companies. Therefore, in the present case, Vinci and Fayat Metal could not be addressed in any way.

Notwithstanding the shortcomings of French law on joint and several liability, currently the debate in the country is focused mainly on the duty of vigilance and, in particular, on the implementation of the Law n. 2017-399 on the duty of vigilance of the holdings and the contractors. As explained by Pauline Bidaud, many companies have set up a *plan de vigilance* without consulting the trade unions²³⁶. These plans belong thus to the risk management systems put in place by companies to supervise their subcontracting chain while limiting their responsibilities. According to the workers' lawyer, the duty of vigilance is a *trompe-l'œil*: it creates the illusion that companies control their subcontracting chains; in reality, they just set up procedures not to be liable for the risks generated by their economic activities.

²³² According to the decision of the Tribunal de grande instance of Toulouse, Judge of the execution (24.1.2017, n. 17/00023), the Corner's demand to adopt a caution measure towards Castel & Fromaget in order to preserve the fee not yet paid, cannot be admitted because it was not clear if the contested infractions are attributable to Corner Costruzioni or to Castel & Fromaget.

²³³ See Mrs. Thivet-Grivel's mail.

²³⁴ Emilie Thivet-Grivel, Interview of 18.11.2019. The lawyer communicated that the Tribunal of Commerce of Auch had already decided the case but the sentence was appealed by Castel & Fromaget and that the Tribunal of Paris would have decided the case at the beginning of 2020. We were not able to have any of these decisions.

²³⁵ Pauline Bidaud, Interview of 23.10.2019.

²³⁶ Pauline Bidaud, Interview of 23.10.2019.

SECTION 6:

THE ROLE OF PUBLIC AUTHORITIES

French labour inspectors intervened several times in the Racing Arena site. The first objective pursued by the inspectors was to provide information to the foreign companies present in the site. In fact, according to Ferreux-Fagno, some companies – as, in his opinion, Coner Costruzioni – do not know French labour law²³⁷.

When the labour inspectors discovered the infractions committed by Coner Costruzioni, they immediately informed the latter, as well as Castel & Fromaget and GTM Batiment (Article L1263-3). As clarified in Section 5, the inspectorate's notification is necessary to entail the duty of vigilance in the subcontracting chain. For this reason, Racing Arena, not addressed by the inspectors, could not be charged of the *devoir de vigilance* according to Articles L3245-2.

A problem detected in Racing Arena is that the posted workers never addressed the labour inspectors. In Ferreux-Fagno's opinion, posted workers never talk with the authorities because they risk to be 'blacklisted' by their employers: posted workers, even when exploited, usually gain more than in their country of origin; therefore, they usually prefer to keep their job than to denounce their employer. Besides, in case of posting, controls are much more difficult and much longer: labour inspectors have to collect and verify several documents²³⁸. During this time, the company can be closed, transferred or go bankrupt. Moreover, when a company is not anymore in the French territory, the control becomes practically impossible. Consequently, in this case the labour inspectors usually close the inquiry, as it happened in Racing Arena after the departure of Coner Costruzioni.

Finally, it should be mentioned that Coner Costruzioni complained that one posted worker sued the company also before an Italian judge (Tribunal of Pordenone) that, on the 10 October 2016, adopted an injunction ordering Coner Costruzioni to pay him²³⁹. The concerned worker did not inform the lawyer who assisted him in Italy of the trial already pending in France. When the Italian lawyer was contacted by her French colleague, she tried to acquire information from the worker who, in the meantime, had disappeared²⁴⁰. However, both decisions taken by the Italian and the French judges were not implemented by Coner Costruzioni; consequently, the trial is still ongoing in France and, due to the intertwining with the commercial proceedings, probably it will last for several years.

In short, in order to recover a small amount of money (in Racing Arena case: € 3000/4000), a worker has to wait for almost ten years and to pay a lawyer and other legal costs. For posted workers, the access to justice is even more difficult since they are not resident in France and consequently cannot benefit from the aide *juridictionnelle* granted there²⁴¹. Moreover, the *assurance de garantie des salaires* is not applicable to foreign companies that do not pay social contributions in France²⁴². Consequently, the right to an effective remedy and fair trial (Article 47 Charter of Fundamental Rights of the European Union) is still far from being really guaranteed to posted workers.

²³⁷ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

²³⁸ Guillaume Ferreux-Fagno, Interview of 16.1.2020.

²³⁹ Arguments and facts presented by Coner costruzioni in its conclusions before the Conseil de Prud'Hommes, as reported by Mrs. Thivet-Grivel.

²⁴⁰ See the mail of Sandra Troisi.

²⁴¹ <https://www.service-public.fr/particuliers/vosdroits/F18074> According to Emilie Thivet-Grivel, this benefit is very low and does not take into consideration the real legal costs.

²⁴² This insurance guarantees the payment of wages in case of bankruptcy but it does not cover the legal costs that, in these cases, are usually very high. The insurance is financed through the social contributions paid by French companies (<https://www.service-public.fr/particuliers/vosdroits/F2337>).

ANNEX II:**LIST OF CONTACTED PERSONS FOR VINCI CASE**

- **Pauline Bidaud**, FNCB CFDT, interview on 23 October 2019.
- **Emilie Thivet-Grivel**, workers' lawyer, interview on 18 November 2019.
- **Guillaume Ferreux-Fagno**, labour inspector, interview on 20 January 2020.
- **Nathalie Jouve**, Coner Costruzioni's lawyer, contacted via mail on 18 November 2019 and then in January 2020. No answer.
- **Patrick Goudalle**, trade union's delegate in Vinci, contacted via mail several times starting from October 2019 and phoned on 7 January 2020. No answer.
- **Angelo Canarezza**, Djibril DIA's Lawyer, contacted on 4 December 2019. No answer.
- **Sandra Troisi**, Ibrahim DER's Lawyer, contacted on 4 December. Answered via mail.
- **Massimiliano Burelli**, Filcams Cgil Pordenone, contacted via mail on 11 December 2019. Answered via mail (he does not have any information).



FOOD SECTOR

ITALPIZZA REPORT*

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Giovanni Orlandini - *University of Siena, Italy*

* The Report is based on interviews carried out with: Antonio Montanini, personal advisor of Italpizza's president, responsible for Italpizza industrial relations; Matteo Balestra, CFO Consorzio Aviva; Umberto Franciosi, Flai-Cgil;; Roberto Benaglia Cisl; Simone Carpeggiani, Si Cobas. The following actors did not reply to our emails, or they could not release interviews, neither in person nor via Skype, therefore it was not possible to have their views: Labour Inspectorate Modena; Confindustria-Emilia; Ultrasporti-Uil; Evologica; Co.fa.mo.

ABBREVIATIONS:

- **c.c.:** Civil Code
- **CCNL:** Contratto Collettivo Nazionale di Lavoro – National Sector-level collective agreement
- **d.lgs.:** legislative decree
- **RSA:** Rappresentanze sindacali aziendali (trade union representatives)
- **RSU:** Rappresentanze sindacali unitarie (worker representation body)
- **Fai-Cisl:** Federazione Agricola Alimentare Ambientale Industriale Italiana - Cisl
- **Filcams-Cgil:** Federazione Italiana Lavoratori Commercio Turismo e Servizi - Cgil
- **Filt-Cgil:** Federazione Italiana Lavoratori Trasporti - Cgil
- **Fiscat-Cisl:** Federazione Italiana Sindacati Addetti Servizi Commerciali Affini Turismo - Cisl
- **Flai-Cgil:** Federazione Lavoratori Agroindustria – Cgil
- **INL:** Ispettorato Nazionale del Lavoro
- **MISE:** Ministero dello Sviluppo Economico
- **Uila-Uil:** Unione Italiana dei Lavoratori Agroalimentari - Uil
- **Uiltrasporti-Uil:** Unione Italiana dei Lavoratori Trasporti - Uil

SECTION 1:

CHARACTERISTICS OF THE SUBCONTRACTING PRACTICE IN ITALPIZZA

Italpizza produces frozen pizzas, it is based in the Modena province (Emilia Romagna, Italy) and it was incorporated in the early 1990s by Cristian Pederzini. Since the late 1990s, the company has progressively increased the practice of outsourcing contracts, this has ultimately resulted in the current structure of the company, which has been adopted in 2015. The company cannot be considered a proper example of subcontracting chain, since the outsourcing practice is mostly direct. Indeed, since 2015 Italpizza outsources: the production cycle, the packaging, the logistics and the cleaning²⁴³. Actually, all phases of the pizza production, which include kneading, baking, putting the topping and freezing; as well as all of the ancillary activities, are contracted-out. It is only the administrative work and the product development (e.g. pizza recipes²⁴⁴) that are not outsourced. A framework agreement, signed in July 2019, has stipulated that the workers employed in the production cycle (hence, not all of the contracted workers) will be internalised by 2022, as outlined below.

²⁴³ As confirmed by all of the actors interviewed.

²⁴⁴ Montanini's interview, 28 November 2019.

1.1 Timeline of the contracting practice

The outsourcing practice within Italpizza has undergone a significant evolution since the end of the 1990s. At the turn of the century Giuseppe Cremonini joined Italpizza. He brought with him the outsourcing model that was already widely used in the meat industry in the Modena area, and implemented this in the Italpizza's business model. At this point, the outsourcing practice mainly covered logistics, packaging and cleaning²⁴⁵.

In order to understand the nature of the outsourcing practice within Italpizza, it is important to bear in mind that outsourcing has covered two macro-areas: 1) the accessory activities, which generally include packaging, handling or logistics and cleaning; and 2) the production cycle.

Around 2003/2004, the packaging and logistics phases are outsourced to various cooperative consortia, in particular to Powerlog, a consortium specialised in labour intensive services²⁴⁶. Outsourcing to a consortium means that the organisation can subcontract to its member cooperatives, thus permitting a relatively uncontrolled expansion of the subcontracting chain. It was not possible to collect detailed information on Italpizza's outsourcing practice before 2008.

In 2008, Powerlog went bankrupt²⁴⁷. In May 2008, the Cremonini share is sold to Bakkavor (UK) and Pederzini, who still owns the 10% of Italpizza's stock, is appointed as CEO of the company²⁴⁸. Subsequently, on 1 August 2008 Italpizza reaches an agreement on an outsourcing contract with LogItalia, a Consortium that operates through the member cooperatives. Therefore, the service is not performed by the company that has signed the contract (LogItalia), but by its member cooperatives (which are not identified in the outsourcing contract). This contract outsourced to LogItalia product handling and packaging, and it was deemed to expire, at the latest, on 31 December 2010²⁴⁹.

It was not possible to reconstruct the outsourcing practices between 2011 and 2015 in category 1), but it is certain that in December 2015, the cooperative Logicamente was the Italpizza's contractor for the following services: packaging, cold rooms management and internal logistics. Logicamente did not apply the same collective agreement it applied to direct workers to contracted workers. The latter were applied the conditions set out in the *Merci e Logistica* collective agreement²⁵⁰.

As far as the production cycle is concerned, the 21 December 2011 Italpizza (transferor) and Trasmec Log srl (transferee) concluded a rental agreement for the business unit named "*sala impasti*", which is where the majority of the production cycle is done. At the same time, Italpizza contracted Trasmec Log srl to carry out the production activity related to the transferred business unit. Following an agreement signed by Flai-Cgil, Fai-Cisl, Uila-Uil and the companies concerned, the collective agreement applicable to the transferred workers remained the Food-Industry collective agreement (that is the CCNL applied to direct workers employed by Italpizza). This is the first outsourcing contract that involved the production cycle, of which the authors have proof²⁵¹.

In 2014, Pederzini acquires once again the 51% of the company²⁵² and in 2015 the Italpizza brand is launched. Subsequently, Italpizza outsourced the whole production cycle to Service Plus srl²⁵³. However, none of the interviewees have mentioned Service Plus srl, on the contrary, they have – consistently – said that the Commissione Biagi had certified the outsourcing contract between Italpizza and Evologica²⁵⁴ (refer to Section 5 on *Certificazione Biagi*). This raises doubts over the role of Service Plus srl in the effective management and organisation of the production cycle. At that stage, Service Plus was still applying the Food Industry CCNL, while Evologica was applying the *Merci e Logistica* CCNL to its employees²⁵⁵.

On 29 December 2015, Filt-Cgil, Fit-Cisl, Ultrasporti and Evologica, Logicamente and Service Plus (that is all the companies involved in the Italpizza outsourcing, albeit in different areas) have concluded a site level

²⁴⁵ Already in the early 2000, Flai-Cgil began to report the Italpizza outsourcing practice to the Modena Labour Inspectorate, which, however, proceeded to assess the business practice only many years later (See Section 6).

²⁴⁶ Franciosi's interview of 27.01.2020.

²⁴⁷ <https://www.rassegna.it/articoli/powerlog-fallisce-per-appalti-pericolosi>

²⁴⁸ Franciosi, Relazione provvisoria su "caso Italpizza", of 13 January 2019 (our translation). An analogous version is given by Montanini, 28 November 2019.

²⁴⁹ See outsourcing contract of 05.12.2011.

²⁵⁰ See Framework Agreement of 29 December 2015.

²⁵¹ Agreement of 21 December 2011.

²⁵² The interviews confirm the news published by "la Repubblica" on 4 September 2015, "Pederzini riacquista la Italpizza e si lancia verso i supermercati".

²⁵³ See Certification by Marco Biagi Foundation.

²⁵⁴ Montanini's and Franciosi's.

²⁵⁵ See Framework Agreement of 29 December 2015.

agreement, which reduced the contracting companies within Italpizza to two: Logicamente and Evologica. Indeed, Italpizza outsourced directly to Evologica the production cycle. Evologica committed to employing, with permanent contracts, all the workers previously employed by Service Plus srl. The same agreement provided that both contractors had to apply the *Pulizie Servizi Integrati e Multiservizi CCNL* (one of the cheapest collective agreements) to the contracted workers. This contractual change implied a worsening of the working conditions, especially in financial benefits, even if the agreement provided for a progressive absorption of the pay discrepancies.

In July 2017, Evologica and Logicamente conclude a *Contratto di rete* (network contract) (Refer to Section 2).

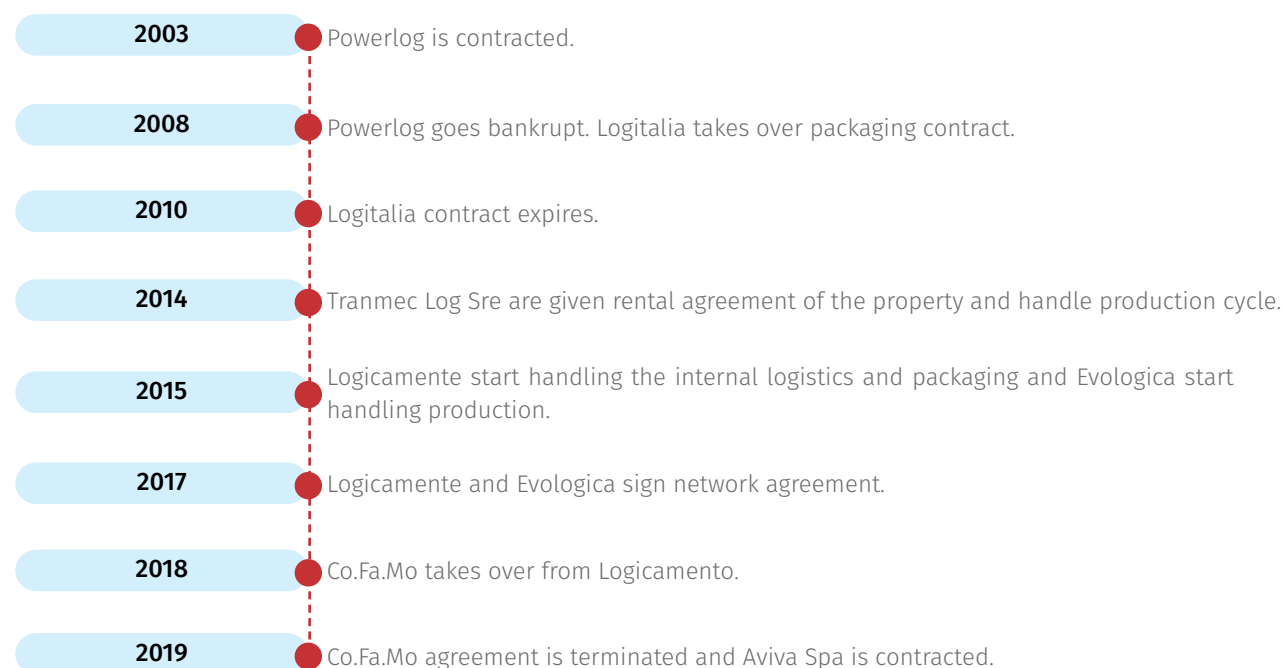
On 1 January 2018, Co.f.a.mo. soc. Coop. (another cooperative) substitutes Logicamente in the outsourcing contract for the packaging, logistics and cleaning services²⁵⁶.

At the beginning of 2019, following some doubts over the regularity of Co.f.a.mo.'s behavior²⁵⁷, Italpizza decides to terminate the contract with the cooperative and to contract Aviva spa. As a consequence, the company entered into a negotiation period with the trade unions over the transfer of workers to the new contractor, and their rights.

On 14 November 2019, the workers' representatives (*RSA - Rappresentanze Sindacali Unitarie*) of Evologica, Co.f.a.mo. and Italpizza, together with the respective trade unions concluded an agreement with the management of the companies involved (Italpizza, Aviva spa, Co.f.a.mo. and Confindustria Emilia). This agreement covered the change of contractor and the conditions for workers. The agreement has been approved in a ballot, where the employees of Co.f.a.mo. were called to vote. (97 for and 70 against²⁵⁸). Therefore, on 1 December 2019, Aviva spa succeeds Co.f.a.mo. in the outsourcing scheme²⁵⁹.

Italpizza has committed, in a collective agreement signed on 14 July 2019, to internalise the workers currently employed by Evologica, by 1 January 2022. This will entail the application of the Food Industry CCNL. Evologica has committed to progressively increase the remuneration of its employees taking as parameter the minimum pay levels provided for by the Food industry CCNL. A joint commission will evaluate the proper application of the collective agreements for the packaging logistics and cleaning workers²⁶⁰.

Timeline of the contracting practice



²⁵⁶ <https://www.cisl.it/notizie/dal-territorio/13859-emilia-romagna-italpizza-ennesimo-cambio-appalto-ma-l-accordo-di-luglio-tutela-i-lavoratori.html>

²⁵⁷ Montanini's interview, 28 November 2019.

²⁵⁸ Referendum results of 25 November 2019. According to Montanini the high number negative votes is due to the Si Cobas campaign against the content of the agreement (Interview 28 November 2019), see also <http://www.cgilmodena.it/italpizza-approvato-referendum-accordo-riorganizzazi-one-societaria-contrattuale-addetti-logistica/>

²⁵⁹ See site-level Agreement 14 November 2019; for comments from Flai Cgil: <http://www.cgilmodena.it/italpizza-siglata-lipotesi-di-accordo-sindacale-per-i-circa-300-lavoratori-della-logistica/>

²⁶⁰ Framework agreement 14 July 2019.

1.2 Present structure: companies involved in the outsourcing practice and their main features

The current operational structure, as of January 2020, is based on one main company (Italpizza) and two contractors. Evologica has an outsourcing contract for the whole production cycle, while Aviva spa has the contract for the packaging, logistics and cleaning services²⁶¹. Therefore, there are currently two outsourcing contracts, not a proper subcontracting chain. Between Aviva spa and Evologica a *Contratto di rete* (network contract) has been signed, which is similar to the *Contratto di rete* which was previously in force between Evologica and Co.f.a.mo.²⁶².

On 14 July 2019 a framework agreement, signed between the companies and the social partners (refer to section 4), provides for the internalisation of the whole production cycle. Therefore, as mentioned above, if the agreement is respected, by 2022 only the workers employed in packaging, logistics and cleaning will still be contracted workers, presumably under Aviva spa (if the contractor does not change in the meantime).

Evologica and Aviva spa are not letterbox companies, as even Co.f.a.mo., being both registered and active in Italy. However, the data collected about the approximate number of workers employed by Evologica and Aviva spa in Italpizza, and the information available in the companies' chamber of commerce registration documents as regards the total number of employees of the two companies, which substantially coincide with those employed in Italpizza, suggest that the two companies exist and work exclusively in function of the contracts with Italpizza²⁶³.

Aviva spa has been recently founded. Even though according to some of the interviewees²⁶⁴ it was already in business way before signing the contract with Italpizza, from the registration documents it emerges that the company has been incorporated on 4 September 2019. According to the Flai-Cgil delegate interviewed, Aviva spa has likely been created ad hoc to substitute Co.f.a.mo. in the packaging, logistics and cleaning outsourcing contract²⁶⁵.

As unanimously confirmed by the interviewees, the workers employed in the above-mentioned services within Italpizza (all of them contracted workers) are about 250²⁶⁶, while the registration documents of Aviva spa show that the company has no employee (possibly it has not been updated yet). However, according to the information collected by Flai-Cgil²⁶⁷, the Co.f.a.mo. workers who have moved to Aviva spa are 252, 50 of which have a temporary contract²⁶⁸. If this information is confirmed, it would transpire that Aviva spa, for the time being, could not have other outsourcing contracts in force.

Evologica has been founded on 26 September 2011. Its outsourcing contract with Italpizza ended in 2015. It transpires from the interviews, that around 600 Evologica's employees are working for Italpizza. According to the registration documents of the company, on 30 June 2018 Evologica had 560 employees. Therefore, it is once again presumed that Italpizza is the sole contractor of Evologica, even though according to Italpizza management the cooperative has a wide business beyond Italpizza²⁶⁹.

Formally, Evologica had been the employer of the staff at the baking cycle and Aviva spa is the employer of the staff at the packaging, logistics and cleaning services, all of whom were employed by Co.f.a.mo. until 1 December 2019 (on the Labour Inspectorate intervention; the legitimacy of the employment relationships; the legitimacy of the outsourcing, see forward).

²⁶¹ Montanini's interview, 28 November 2019.

²⁶² The contract between Evologica and Co.f.a.mo. had been registered on 14 July 2017. Balestra has confirmed that a "Contratto di rete" between Evologica and Aviva spa has been signed to facilitate the business management (See, written answers by Matteo Balestra).

²⁶³ On the contrary, Montanini argues that they are both active in the market, besides the Italpizza outsourcing (Interview 28 November 2019).

²⁶⁴ Montanini's interview.

²⁶⁵ Franciosi's interview of 27 January 2020.

²⁶⁶ It was not possible to have the exact number, maybe also because it varies from year to year; the latest clear data (284) comes from the CGIL website, in a news on the latest agreement approved by workers on 25.11.2019: <http://www.cgilmodena.it/italpizza-approvato-referendum-accordo-ri-organizzazione-societaria-contrattuale-addetti-logistica/>.

²⁶⁷ E-mail of Franciosi, 27 January 2020.

²⁶⁸ E-mail of Franciosi, 27 January 2020.

²⁶⁹ Montanini's interview, 28 November 2019. The information could not be confirmed by Evologica, as they did not answer to the request for interview.

1.3 The contracting practices in Italpizza in context

At present, in Italpizza there is no subcontracting chain, but only two diverse outsourcing contracts.

In the frozen-pizza sector it is not usual to outsource the production cycle, since the production is standardised, one can see this from the big multinationals with factories in the Italian territory, such as Nestlè in Benevento, Roncadin in Friuli and Barilla,²⁷⁰. The Italpizza anomaly is reportedly due to the necessity of the company to maximize the flexibility of its workforce, given the peculiarity of the company business, which is handmade frozen pizzas on an industrial scale. This has two main features, first, the orders are not always homogeneous, as far as concerns number and types of pizzas ordered and, therefore, the pizzas are less standardised, also in their shape. Second, the processing is handmade (laying of the dough, topping, etc.) and the topping varies frequently. As a consequence, there is a great need of low-skilled labour and the automation is scarce, since it would be very complex to adapt a machine to the many variations of the product (even if the company is initiating a process of automation).

The Italpizza practice, outsourcing in the food-industry, has been transposed from a business model already existing in the meat industry. Indeed, Italpizza begins to outsource phases of the production cycle and other segments of the company's activity following the arrival of Cremonini, who was originally involved in the meat industry in the Modena province, and reportedly brought the meat-industry outsourcing business model to the frozen-pizza company²⁷¹.

It is noteworthy that, the new contractor (Aviva spa) is a *società per azioni* (joint stock company) not a cooperative, as the previous subcontractors. This is consistent with the general recent tendency of the Italian system, where main companies prefer to contract to traditional companies, rather than cooperatives. This is primarily due to the negative reputation that cooperatives have acquired over the latest decade, which includes business reliability.

SECTION 2:

LEGAL FRAMEWORK

2.1 Normative legal base of outsourcing

The outsourcing strategy of Italpizza finds its legal ground in the norms related to the transfer of part of undertaking (article 2112(5) c.c.) and subcontracting (Article 29 d.lgs. 276/2003).

Article 2112(5) c.c. stipulates that the measures on transfer of undertaking (implementing Directive 2001/23) shall apply also to a “*part of undertaking, understood as a functional independent division of an organized economic activity, identified by the transferor and the transferee at the moment of the transfer*”. The norm allows for the outsourcing of part of the production cycle, due to the automatic and imperative simultaneous transfer of workers to the transferee. The workers transferred to the transferee company would benefit from the application of the collective agreements applied by the previous employer until their expiry, “*unless [the collective agreements] are replaced by other collective agreements applied in the assignee's company*” (Article 2112(3) c.c.).

The transfer must be preceded with an information and consultation process, which must involve the workers' representatives at company level, of both the transferor and the transferee (or, in their absence, the trade unions' local structures) (Article 47, law 428/90).

Article 29(1), d.lgs. 276/2003 establishes the requirements for a genuine contracting out, in order to distinguish it from the illegal placement of workforce (that is a supply of workforce from a subject who is not authorized as an Agency according to Article 4, d.lgs. 276/2003). These requirements are necessary to ascertain the genuine nature of the contractor, which must have the “*organization of the necessary means*” to carry out the contracted

²⁷⁰ Franciosi' interview of 27 January 2020 (partially confirmed by Montanini, 28 November 2019).

²⁷¹ Montanini's interview, 28 November 2019; Litterature on the meat industry in the Modena province: Dorigatti L. Ridotte all'osso. Disintegrazione verticale e condizioni di lavoro nella filiera della carne, Meridiana, 2018, 93.

activity and must undertake the “*business risk*” in the performance of the contract. In order to allow the outsourcing of labour-intensive services or of activities which, anyway, entail a little use of instruments or goods, Article 29 specifies that the contractor can also just exercise the “*power of organization and direction towards the workers used in the outsourcing*”, if this is justified by the “*necessities of the work or service object of the contract*”. In the absence of such requirements the contractor’s employees (or those of the subcontractors, whether they exist) can request to the Courts to ask for the establishment of the employment relationship with the main company (Article 29(3-bis) d.lgs. 276/2003).

According to Article 2112 c.c., the entering into a contract by a new contractor constitutes a transfer of undertaking (with permanence of the contracts of employment in force) if the new contractor acquires a substantial part of the workforce and he does not provide “*its own organizational structure*”, such as to integrate a “*specific company identity*” (Article 29(3)) (consistently with the case law of the Court of Justice on Directive 2001/23)²⁷².

If the contracting is lawful, the main company is jointly liable to uphold the remuneration obligations of the contractor’s employees (and those of the subcontractors, if they exist) as well as for the obligations towards the social security institutions, for two years from the expiry of the contract (Article 29(2) d.lgs. 276/2003).

On the grounds of these norms, Italpizza has progressively contracted out the whole production cycle (production, packaging and logistics), by outsourcing these phases to other companies (mostly cooperatives), while keeping the administrative staff (See Section 1).

2.2 The collective agreement applied by the contractor

The outsourcing of the whole production cycle has allowed for the application of a collective agreement other than the one of the Food-Industry to be applied to the contracted workers both in the production and logistics activities. On the other hand, the direct employees of Italpizza are still subject to the Food-Industry collective agreement. This was possible because of the features of the Italian collective bargaining and industrial relations system.

The Italian trade union system is not regulated by law, as it is based on the principle of collective autonomy (expression of the trade union freedom ex Article 39(1) Constitution) and on the general principles of civil law on contracts (in particular, the principle of contractual freedom ex Article 1322 c.c.). The collective agreement (at sector level) is not generally binding (*erga omnes*) and its application depends on the whether or not the employer is a member to the signatory employers’ organisation. A company which is not member of any of the organisations that have signed a collective agreement, is free to choose the applicable collective agreement or even whether or not to apply a collective agreement at all. In any case, every employer has a duty to pay social security contributions based on the remuneration established by the collective agreement of the relevant sector (i.e. the collective agreement consistent with the activity actually performed by the company) signed by the trade unions (Article 1(1), d.l. 338/89). Moreover, the prevailing law recognises the workers’ right to receive, at least, the minimum remuneration as set out by the relevant collective agreement, in view of the fundamental right to a fair remuneration (Article 36 Constitution). However, such right concerns only the minimum rates of pay (not all of the elements that constitute the remuneration) and the application of a collective agreement signed by the trade unions comparatively more representative is not questionable, even if it is not strictly related with the activity performed.

A special norm applies to workers who are shareholders of cooperatives (par. 2.3). This has been introduced in 2007 in order to contain the wage dumping, which was becoming widespread. Indeed, such workers have the right to receive “*overall economic treatments not lower than those established by collective agreements signed by the employers’ and employees’ organizations comparatively more representative at national level, for the respective sector*” (art. 7.4, Decree-Law 248/07 converted into Law 31/08). Therefore, this norm limits cooperatives from “*regime shopping*”, as the cooperatives cannot apply collective agreements signed by not representative trade unions, and it requires them to fulfil the whole economic benefits stipulated in the relevant CCNL, and not only the minimum rates of pay (as established by the case law based upon art. 36 of the Constitution).

Therefore, Italpizza applies the Food-industry collective agreement to its employees, while (since 2015) the contractors have used the so-called *Multiservizi* collective agreement to their contracted workers. This resulted in a reduction of salaries and an increase in working time flexibility.

²⁷² ECJ 11.3.1997, C-13/95, *Suzen*.

Both collective agreements are signed, on the trade union side, by Cgil, Cisl and Uil, i.e. the Confederations that are considered “*comparatively more representative*”. From the employer’s side, the Food industry collective agreement is signed by the business organisation of the food industry companies to which Italpizza belongs, and which is member of Confindustria (the business confederation of medium/large companies in the industrial sector). The *Multiservizi* collective agreement has been signed by the main confederations of the cooperative companies (Legacoop and Confcooperative). The cooperatives that have been contracted by Italpizza have most likely been members of these confederations (Evologica still is). However, as aforementioned, if the employer is not member of any confederation, he is free to choose any collective agreement.

Indeed, not even the special norm on the economic treatment of cooperative worker members (art. 7.4, Decree-Law 248/07) prevents the cooperatives from applying the *Multiservizi* CCNL, given that it is, anyway, a collective agreement signed by the more representative trade unions.

The company level collective bargaining occurred mainly to manage the commencement of the new contractors and to regulate the switch to a new and different collective agreement, similarly to what happened in relation to the framework agreement of December 2015 and the framework agreement of July 2019.

The ongoing context: the 2019 framework agreement

The conditions of employment within Italpizza are going to change if the 2019 framework agreement will be correctly implemented.

The trade unions who signed the July 2019 framework agreement considered it a success ²⁷³. It defines a medium-long term process, which aims to increase the working conditions and build constructive industrial relations in Italpizza. The agreement is composed by 6 paragraphs and a safeguard clause. Even if it confirms the application of the *Multiservizi* CCNL until 31 December 2021, the agreement provides for an improvement of the economic conditions. Indeed, with this agreement, Evologica commits to pay to its employees a one-time 580,00 euros sum in addition to the August wage, as well as to gradually increase the remuneration of its employees, starting from 1 January 2020, in order to progressively align their pay levels to those set by the Food Industry CCNL. Moreover, Italpizza undertakes to internalise the production process from 1 January 2022, thus taking over some of the activities currently performed by Evologica; this will apply the Food industry CCNL to the workers concerned.

A one-off payment in addition to the August wage is guaranteed also to the Co.fa.mo’s workers, this also amounts to 580,00 euros.

Finally, the safeguard clause guarantees that the agreement will also apply in event of a change of contractors, since Italpizza commits to promoting the proper and effective application of the agreement (refer also Section 3 and Section 4 on the July framework agreement,).

2.3 The nature of the contracting companies and their contractual relationships

The greater flexibility in the management of the workforce has been possible not only thanks to the collective agreement applied to workers, but also to the legal form of the contracting companies (cooperatives). Whereas cooperative companies have a mutualistic aim, they can operate in the market (articles 2511-2548 c.c.). In Italy, the cooperatives are widespread in labour-intensive sectors, partly because of the advantages offered by the legal framework as regards to the employment relationships (in addition to other fiscal and contribution benefits). The law on employment relations in cooperatives (Law 142/2001) attributes the same rights given to the employees also to worker-shareholders of the cooperative, however their working conditions are normally lower than the medium standards. This is due to the aforementioned possibility to apply less favourable collective agreements and to the possibility that cooperatives have to depart from some norms set by law and collective agreements (through the “internal regulations” of the cooperative, adopted by the shareholders’ assembly).

²⁷³ That is, especially, the view of Fai-Cisl and Flai-Cgil, see interviews. Fai-Cisl considers this agreement the pin of the new industrial relations system within Italpizza.

Indeed, Article 6, Law 142/01 allows for the cooperative's internal regulations to provide special rules as regards the employment relationship of the worker-shareholders, different from those set by the applicable CCNL. The regulation has to refer to the CCNL applied to the workers, but the regulation can amend its normative part (for instance, on working time, sick leave, probationary period), with the only exception of the principles of “*transparency and non-discrimination*”²⁷⁴. In case the cooperative is in financial difficulties, the assembly can adopt a “*crisis plan*” aimed at safeguarding employment, which reduces the remuneration laid down by the CCNL and provides “*forms of support, also economic, from the worker-members, to solve the crisis, in proportion to availability and financial capacity*”²⁷⁵.

The peculiar contractual relationships among the cooperatives have also had a significant impact on the management of the workforce and the workers' mobility within the production site. Indeed, in order to allow higher mobility of workers within the production site, on 14 July 2017, the cooperatives (Evologica and Co.fa.mo.) had reportedly signed a *Contratto di rete* (Network contract) pursuant to Law 33/2009; a similar contract has been concluded between Evologica and Aviva spa. The *Contratto di rete* allows for the promiscuous use of the staff: Article 30(4-ter), d.lgs. 276/03 allows a company to use a worker formally employed in another company of the network. Indeed, this contract allows companies a partially shared business management and to mutually share their employees as needed (*codatorialità*), a practice not otherwise allowed under the Italian legal system. Therefore, thanks to the *Contratto di rete*, the workers employed for the logistics services (now employed by Aviva spa) can be lawfully employed in the production cycle (that is in the Evologica business organisation). This had occurred previously between Co.fa.mo. and Evologica.

To the same end, the outsourcing contracts were previously concluded with consortium of cooperatives²⁷⁶, and they were implemented by the cooperative's members of the Consortium (see Section 1). The use of the network contract may be explained by the better guarantees that the law offers in this case, with reference to possible violations of the law on contracting out; which makes this type of contract more appealing especially when there are only two contractors (as in this case). Overall, the network contract is an effective instrument to promote business growth of integrated companies²⁷⁷.

2.4 Legitimacy of the outsourcing and potential violation of labour norms

According to the trade unionists that have been interviewed (particularly Cgil and Si Cobas), Italpizza's outsourcing practices raises concerns as to their lawfulness and compliance with the relevant norms on contracting out (Article 29(1), d.lgs. 276/2003). From this perspective, on the one hand, it would be necessary to demonstrate that the cooperatives concerned do not have a real and autonomous business organisation, but they would just provide the workforce, as an Agency does. On the other, it would consequently be necessary to demonstrate that both the production staff and the packaging and logistics staff are, in fact, employees of Italpizza, since the cooperatives' managers receive and transmit to the workers only decisions and directives of the Italpizza's management.

However, the scenario presented by some the trade unionists involved seems to be disconfirmed by the certification obtained by Italpizza in 2015 from the Marco Biagi Foundation, Modena²⁷⁸. The certificate confirms the genuine character of the contract concluded between Italpizza and Service plus (the formal contractor responsible for the pizza layering phase) and of the subcontracting to Evologica (the cooperative to which Service plus had subcontracted the topping phase) (refer to Section 1).

The certification has been decisive in respect to the inspections carried out by MISE (*Ministero dello Sviluppo Economico - Ministry of Economics*) in Evologica, in 2017, following a complaint from CGIL, in order to exclude the unlawfulness of the outsourced operations²⁷⁹. Indeed, the certification from the Biagi Commission validates

²⁷⁴ This is the opinion of the Ministry of Labour (see note n. 3/2013); the scope of application of the regulation, with reference to employment conditions, is questionable as the law on this point is not clear.

²⁷⁵ Benaglia particularly stressed on this point as a source of detriment of workers' rights. See, Benaglia's interview, 28 October 2019.

²⁷⁶ The Consortium of cooperatives is regulated by the decree (D.L.C.P.S.) 14/12/1947 n. 1577 (so called *Legge Basevi*), modified by Law 17 December 1971, n. 127, they must be composed by at least three cooperatives and they are characterized by a joint organizational structure.

²⁷⁷ Balestra's written answers.

²⁷⁸ The *Certification* is a procedure that makes it possible to ascertain that a contract of employment or a contract of outsourcing is stipulated in compliance with the legal conditions (articles 75-81, legislative decree 276/03). Special public and private bodies (Commissions) identified by law are competent to certify contracts. The certified act maintains its effects between the parties and towards third parties (i.e. the contract is presumed to be lawful) until a contrary decision by the Court before which it can be appealed.

²⁷⁹ MISE, Inspection report, 03 August 2017.

the outsourcing in respect of the Inspection services (Article 79, d.lgs. 276/2003). Moreover (as the Ministry also noted), the outsourcing of the production phases to the cooperative, and the subsequent application to the contracted workers of the *Multiservizi* CCNL, had been approved by the same applicant trade union (CGIL), in the agreement of 2015 (even if by a different sector Cgil trade union) (refer to Section 1).

However, doubts still remain over the legitimacy of the outsourcing contracts, which have been concluded over the years in the production site. Even the *Commissione di certificazione* specifies that it has certified “the genuine character of the model and not of its execution”. This means that the unlawfulness of the certified contracts is not excluded if the cooperatives’ workers have been, in fact, managed and directed by Italpizza in the execution of their activity (as supported by the Trade unionists interviewed). In particular, if workers received orders directly from Italpizza²⁸⁰, this could be considered a presumption of exercise of directive power by Italpizza. Moreover, the recipes and the know-how are of Italpizza²⁸¹, which may suggest that Evologica may not organise its activity autonomously.

The way in which Italpizza has completely outsourced its activities (other than the administrative and development ones) in 2015 is fairly unusual. The document of the *Commissione di certificazione* shows that Italpizza concluded a labour-intensive service outsourcing contract simultaneously to a rental contract of the machineries used for the pizzas’ production. The rental of the client’s equipment from a contractor is, in principle, legitimate but it becomes an indicator of illegitimacy of the outsourcing practice if the equipment at stake constitutes the core business of the client²⁸².

Moreover, even the certification raises concerns, given that it certifies the genuine character of both the outsourcing to Service plus, and the subsequent subcontracting between Service plus and Evologica; subcontracting that, to our knowledge, had not yet been signed, hence, theoretically, not certifiable at that time²⁸³. Notwithstanding the fact that the certification concerned other contracts than the current one (i.e. the one between Italpizza and Evologica), it was precisely Evologica that made use, at a later stage, of the certification in order to avoid the Labour Inspectorate controls and subsequent claims.

Formally, it does not seem possible to question the genuine nature of the cooperatives involved in the outsourcing practice of Italpizza, given their regular constitution and their membership to relevant cooperative organizations (e.g. Legacoop). However, without further elements, some cooperatives’ autonomy and ability to operate on the market independently is questionable. Even Evologica appears to employ its entire staff in the execution of the contracts with Italpizza (refer to Section 4).

The legitimacy of the transfer of the part of undertaking ex Article 2112(5) c.c., has never been contested, nor sanctioned. The use of Article 2112(5) c.c. to facilitate outsourcing practices is legitimate and does not violate EU law²⁸⁴. However, the arrangements under which the outsourcing process has been made, over the years, are not completely clear, also due to the lack of precise information (especially for the period preceding 2011). The 2011 transfer of the residual production activity of pizza (which resulted in the complete outsourcing of all Italpizza’s core business, including machineries and workers) has occurred though the rental of the business unit to a company (Trasmec log), which we assume has subsequently become Service plus. Evologica, which according to the certification was already subcontractor, has subsequently taken over the rental contract (in December 2015). Evologica performs labour intensive services and currently has access to the machinery of Italpizza through a rental contract of goods signed with the main company (as certified by the Commissione Biagi). Therefore, it seems that, in some of the outsourcing phases, a transfer of workforce to Evologica has occurred without a simultaneous transfer of assets (neither from Service plus nor from Italpizza); this separation between workers and machinery in a transfer of part of undertaking raises concerns as to its compatibility with Article 2112(5) c.c. (and directive 2001/23/EC).

To our knowledge, the trade union information and consultation rights, ex Article 47, l. 428/90 (in case of the transfer of undertaking) have been respected and, in particular, the transfer of business unit that occurred in 2011 has been regulated in a company level collective agreement concluded with the food trade unions of

²⁸⁰ Franciosi’ interview.

²⁸¹ Montanini’s interview, 28 November 2019.

²⁸² Tribunale di Roma 7.3.2007, n. 6269.

²⁸³ In the sense that in none of the interviews it was asserted that the contract had been signed.

²⁸⁴ ECJ 6.3.2014, C-458/12, *Amatori*.

Cgil, Cisl and Uil (Flai-Cgil, Fai-Cisl, Uila-Uil respectively)²⁸⁵. However, the fact that a collective agreement at company level has been concluded does not ensure that the business transfer or the subsequent outsourcing was legitimate.

The “formal” legitimacy of the outsourcing contracts implies that the decision to apply a different CCNL to the contracted workers cannot be contested, as this is allowed by the constitutional principles on trade union freedom (Article 39 Constitution) and business freedom (Article 41 Constitution), and legitimised by the framework agreement from 2015.

Article 4 of the current Food Industry CCNL (applied by Italtpizza) prohibits contracting out “activities carried out by the company and directly related to processing activities” and establishes the obligation to include clauses in the contract that require the contractor to comply of “an economic and regulatory treatment globally equivalent to that established by the CCNL” applicable to the activity carried out. However, this clause was included in the CCNL only in July 2020; while the previous CCNL required contracting companies to “respect the confederal contractual rules of the commodity sector to which they belong”; which justified the application of the “*Multiservizi*” CCNL.

These kinds of obligations laid down by the collective agreements are anyway not binding if they are not transposed into the single outsourcing contract. The workers concerned can claim the application of a provision of a CCNL only if it is transposed in the contract between the companies²⁸⁶; otherwise the CCNL clause can be used, at most, by the signatory trade unions in order to ascertain an anti-trade union behaviour of the company (ex Article 28, L. 300/1970)²⁸⁷. This is the consequence of the private law feature of the collective agreements in the Italian legal system, which makes its clauses binding only for the organisation that have signed it.

The application of the *Multiservizi* CCNL to the workers employed in the production cycle has caused the violation of the contribution obligations, given that, as already mentioned, the contribution base has to be calculated by taking, as reference, the remuneration level provided by the collective agreement connected to the activity effectively performed by the worker. This violation has been attributed to Evologica and Logicamente (substituted by Cofamo in 2018) and Italtpizza (in light of the joint liability rules ex Article 29(2), d.lgs. 276/2003) by the Modena Labour Inspectorate, for the years 2016-2018. At the same time, the Labour Inspectorate has reported violations concerning acceding the maximum weekly working time (48 hours) and the overtime pay (250 hours/year), provided by d.lgs. 66/2003 (implementing directive 93/104/EC and 2000/34/EC)²⁸⁸.

Therefore, the unpaid contributions and the violations of the maximum working time appear to be the only violations of the Italian legal framework attested by the competent authorities to the companies involved in the outsourcing practice.

²⁸⁵ Report of the meeting at the headquarters of Italtpizza s.r.l on 21 December 2011.

²⁸⁶ The obligations taken by a company toward the employees of the contractor are considered legally binding as “obligations in favour of a third part” under Article 1411 c.c.

²⁸⁷ Article 28 of Law No. 300/70 provides for a special injunction that can be adopted by a labour court to contrast the employer’s behavior that is detrimental to the interests or rights of the union. The violation of the CCNL should integrate such anti-union conduct; but this does not determine the consequent nullity of the contract.

²⁸⁸ Parliamentary question of 16 September 2019 (<http://webtv.camera.it/evento/13520/469684>).

SECTION 3:

WORKERS AND WORKING CONDITIONS

Independently from the possible violation of legal norms, the working conditions within the production site and the peculiar features of the workforce raise a number of criticisms.

The most visible peculiarity in the workforce is that the majority of the contractors employ third country nationals. According to Italpizza more than 90% of the workers contracted by Evologica and Cofamo (now Aviva spa) come from just under 40 different non-EU countries²⁸⁹. Women are predominantly employed in the cleaning service and the production cycle (the actual percentage is not available).

These worker profiles have had a significant impact on trade union organisation within Italpizza, in this respect, these elements have been even more relevant than the different economic and normative conditions applied to direct workers (white-collars) and contracted workers (blue-collars).

The poor unionisation and the contractual weakness of the workers is at the basis of most of the problems emerged in relation to the working conditions. These problems have been raised by all of the trade unionists interviewed and they are partially recognised also by the Italpizza management. The latter justify the employment of – mostly – third country workers by saying that it is difficult to find Italian workers available to work with the labour conditions applied in the companies²⁹⁰. However, according to the company these working conditions reflect the low skill activity performed and they are not due to unfair nor illicit behaviour.

Notwithstanding the absence of precise data, the trade unionists claim that there are in particular problems linked to an excessive use of working time flexibility and low salaries²⁹¹. Specifically, the trade unions highlight that working days often exceed 12/13 hours, the working time is not stable and it is frequently communicated in the evening of the day before. Furthermore, breaks and resting times are not respected and there is a habitual use of overtime²⁹². The production line consists of 3 shifts, but these are, allegedly, frequently changed and the compensatory rest for night shifts is reportedly not always respected²⁹³.

According to the trade unionists, the extreme time flexibility is the outcome of 1) the potential disrespect of binding norms, and 2) the special regime provided for by the regulations of the cooperatives (ex Article 6, l. 142/01) (refer to Section 2), which does not guarantee a definite number of hours per week.

According to Fai-Cisl, in such cases, the worsening of the working conditions is due to the cooperatives' regulations²⁹⁴. Indeed, the regulations are approved without an effective control by the workers and they weaken the trade union's action, reducing the scope and effectiveness of collective agreements. However, it was not possible to have access to the relevant regulations, in order to evaluate if, and to what extent, they have provided for different standards from those established by the collective agreement applicable to cooperatives.

This has an impact on the monthly remuneration and weakens workers' power²⁹⁵. The same delegates also raised concerns as to potential missed payment of hours of work (which do not reflect those reported in the pay cheque), as well as potential payments in the form of "transfer" or "reimbursement of expenses" that would have resulted in avoiding payment of taxes and contributions²⁹⁶ (this praxis seemed to be confirmed by the sanctions given by the Labour Inspectorate)²⁹⁷.

The majority of the workers are contracted full-time. Part-time work is, apparently, not used by the contractors. According to Cgil this is due to the fact that part-time work would necessarily imply the need to resort to supplementary working time, which is not economically convenient for employers²⁹⁸. However, it cannot be

²⁸⁹ Montanini's interview, 28 November 2019.

²⁹⁰ Montanini's interview, 28 November 2019.

²⁹¹ In the opinion of trade unionist interviewed, the usual range of salaries is between 700 to 1100 euro for a month (possibly higher due to overtime).

²⁹² Franciosi, Relazione provvisoria su "caso Italpizza", of 13 January 2019.

²⁹³ https://gazzettadimodena.gelocal.it/modena/cronaca/2018/11/29/news/italpizza-protesta-si-cobas-turni-con-16-ore-di-lavoro-1.17511372?refresh_ce (interview with Avv. Marina Prospero).

²⁹⁴ Benaglia's interview, 28 October 2019.

²⁹⁵ Franciosi's interview of 17 October 2019. It has not been possible to get neither the regulations nor the Statutes of the Cooperatives in order to have a confirmation of this statement.

²⁹⁶ Franciosi, Relazione provvisoria su "caso Italpizza", of 13 January 2019.

²⁹⁷ Parliamentary question of 16 September 2019 (<http://webtv.camera.it/evento/13520/469684>)

²⁹⁸ Franciosi's interview of 17 October 2019.

excluded that this practice may change in Aviva spa, which cannot benefit from the high flexibility guaranteed by the cooperative business form.

The arduous working conditions are evidenced by the high turnover rate, confirmed by all of the interviewees; however, they were not able to provide specific turnover data²⁹⁹. According to Italpizza, the turnover is due to the repetitive and alienating character of the activities performed, rather than to the bad working conditions³⁰⁰.

Some trade unions denounce retaliatory behaviours at the detriment of workers who have joined trade unions' actions, such as dismissals or demotions³⁰¹ (on dismissals and transfers/demotions refer to Section 4).

The end of the employment contracts, however, have been mostly due to resignations, rather than dismissals. The outsourcing practice, in itself, does not seem to have caused issues related to employment stability. Indeed, the re-employment of workers should be guaranteed when a new company succeeds to the previous contractor, since the employment protection guaranteed in case of transfer of part of undertaking applies - given that no special elements of discontinuity can be identified (ex Article 2112 c.c. and Article 29(3) d.lgs. 276/2003). The trade unions and the company assert that there has been employment continuity, in the sense that many workers have kept working there, notwithstanding the various changes of contractors.

On the other hand, the number of contracted workers, employed by the cooperatives, has grown over the years, thanks to the competitiveness of Italpizza in the Italian market. In few years, the brand spread in the main supermarkets, given the undeniable quality of the product, obtained precisely thanks to the low production costs.

Most of the workers have reportedly permanent contracts, and the variations of the fixed-term employees depend on the activity peaks, which cannot be managed by resorting to overtime work (which has been anyway reduced following the inspections). The latest relevant data concerning Evologica (third semester 2019) shows that the 72% of the employees have permanent contracts (28% fixed-term contracts and there are no autonomous workers)³⁰².

SECTION 4:

HOW TO FACE THE SUBCONTRACTING CHALLENGES: WORKERS' REPRESENTATIVES AND TRADE UNIONS

4.1. Trade union involvement and main practices and strategies

Italpizza has started attracting media attention in autumn 2018, when a grass root trade union, named Si Cobas, has organised the first confrontational collective actions to shed light on the outsourcing undertaken by the producer of frozen pizzas³⁰³. The actions called by Si Cobas were deemed to uncover alleged unlawful outsourcing practices and the reported non-observance of working time regulation and economic treatment, which caused massive violations of workers' rights (this view is also partially shared by some Cgil trade unionists).

However, the Italpizza "case" was not new to trade unions of the most representative confederations (Cgil, Cisl, Uil), as demonstrated by some company level agreements signed by these unions over the years. Practices and actions differ considerably among trade unions, also in their interactions. Due to space constraints, this section summarises the main events, and concisely reviews the various strategies, with a focus on the latest years, without reporting in detail and/or assessing the numerous steps undertaken by the different trade unions.

²⁹⁹ Flai-Cigl and Fai-Cisl confirm the high rates of turnover, but without being able to provide any data. See Interviews to Franciosi and Benaglia.

³⁰⁰ Montanini's interview, 28 November 2019.

³⁰¹ Retaliatory behaviours are denounced particularly by Si Cobas and by Flai-Cgil (Carpeggiani's and Franciosi's interviews). Italpizza explains demotions with temporary organizational needs (Montanini's interview, 28 November 2019).

³⁰² Updated data comes from the inscription of "Evologica Società Cooperativa" in the Chamber of Commerce of Bologna.

³⁰³ <https://gazzettadimodena.gelocal.it/modena/cronaca/2018/11/29/news/italpizza-protesta-si-cobas-turni-con-16-ore-di-lavoro-117511372>; https://rep.repubblica.it/pwa/generale/2019/06/11/news/italpizza_sulla_via_emilia_il_far_west_dei_diritti-228558927/; <https://jacobinitalia.it/italpizza-quando-lunita-sindacale-si-fa-nella-lotta/>; <https://www.internazionale.it/reportage/annalisa-camilli/2019/08/01/italpizza-modena-appalti>

Overall, from the documents at our disposal, we can deduce that the food-industry sector trade unions of Cgil, Cisl and Uil were already conducting collective bargaining with the company in 2011. The trade unions web pages also show that they have always had an eye on the company. The 2015 company level agreement (see Section 1) demonstrates that a form of collective bargaining (even if sporadically) was going on between the trade unions and the companies. Up until the Si Cobas' case arose, the company had not experienced any collective action from the workers³⁰⁴ and the organising capacity of trade unions was nearly null³⁰⁵. The action initiated in autumn 2018 by Si Cobas was considered excessively radical by the other trade unions. It was only the regional section of Flai-Cgil, supported by the minority group within Cgil, that partially shared the Si Cobas action, until the opening of the negotiations in *Prefettura* (See Section 6), which did not include the grass root trade union. Italpizza management recalls that, during this phase of intense action from the grass root trade union, there was one occasion where a number of workers, who did not in strike, made a counter-protest, coordinated by the RSA of Uiltrasporti, asking for the interruption of the collective action that was underway at the company's gates³⁰⁶.

Before 2018, the most significant trade union activities within Italpizza were represented by the (few) agreements concluded in relation to the changes of contractor and by some of the trade unions' attempts to denounce the alleged illegal outsourcing and to organise workers³⁰⁷. The first agreement at our disposal is the 2011 framework agreement (refer to Section 1), signed by the companies and the sector trade unions of Cgil, Cisl and Uil. The second relevant step, where the trade unions were involved, is the 2015 agreement that decide upon the application of the CCNL *Multiservizi* to the whole contractors' workforce.

The turning moment in the Italpizza (and contractors) industrial relations, is the first action called by Si Cobas on 28 November 2018 in front of the factory in the Modena province. Since then a number of protests, as strikes and blockades have been organised by the grass root trade union. This second type of action (the blockade), attracted the political and media attention on Italpizza, but it was also highly criticised as it consisted in blocking the track's access and, hence, stopping the whole production with just – relatively – few demonstrators, furthermore it was argued to have serious public order repercussions³⁰⁸. These protests were aimed to assure the internalisation and the application of the Food-Industry collective agreement, that, as said, is the most protective one.

During these first protests³⁰⁹, at the end of January 2019, 13 Si Cobas members had been fired or transferred by the cooperatives due to their trade union activity, and subsequently reintegrated at their workplace³¹⁰.

In the meantime, Uiltrasporti was negotiating a collective agreement at company level with Evologica, with the aim to regulate working time flexibility within the production cycle³¹¹. However, the agreement, signed on 10 February 2019 was voted down in the workers' ballot and was therefore not applied³¹².

After the drastic actions mentioned above, the *Prefettura*, in order to restore the public order, called upon the companies, all the trade unions and the employer's organisations to set up a meeting (refer to section 6). However, the companies refused to sit at the table with Si Cobas, which has been eventually excluded from the consultation process. Neither Uil nor Cisl accepted the root union as a partner at the table.

³⁰⁴ Montanini's interview, 28 November 2019.

³⁰⁵ Franciosi's interview of 17 October 2019. Benaglia explained that until spring 2019, only very few Italpizza's workers were Cisl members. In most of the cases, these workers went to the trade union once the employment relationship was over to claim for their unpaid wages. In any case the trade union had managed to properly enter in the company, before the spring 2019 (Benaglia's interview, 28 October 2019).

³⁰⁶ Montanini's interview, 28 November 2019.

³⁰⁷ Particularly, Flai-CGIL (Franciosi's interview of 17 October 2019).

³⁰⁸ As it came out clearly from the interviews, the Italpizza management is very critical of this type of actions, as the Confederated trade unions, who do not share this type of strategy, while Si Cobas defend the blockades, as the only way to force the company to take the claims seriously (Carpeggiani's interview, 25 October 2019).

³⁰⁹ Si Cobas has kept organizing actions up until the end of 2019, also in relation to the change in contractor, from Co.fa.mo. to Aviva spa and against the Confederations' strategies and policies (Carpeggiani's interview 25 October 2019 and Si Cobas website).

³¹⁰ That is the version of Si Cobas (Carpeggiani's interview, 25 October 2019), confirmed by Franciosi's interview of 27 January 2019, but interpreted differently by the management of Italpizza, who denies any disciplinary intent linked to those events. See <https://video.repubblica.it/edizione/bologna/spostati-per-punizione-la-protesta-dei-lavoratori-all-italpizza/325841/326457?ref=twlv&fbclid=IwAR3hjr5ehBKg00QT-62jaCZbeul3ssPDqBu957TXyOCz-ni-qojenMbmGY>

³¹¹ The contract has been concluded in accordance with Article 8, Law 148/2011, which allows a wide margin of derogation to decentralized collective bargaining, if justified by the need to overcome a business crisis.

³¹² The Flai-Cgil, Fai-Cisl did not share the Uiltrasporti position and were against the agreement. However, not even Flai-Cgil campaigned against it, as it was still in a phase in which it was not able to communicate with the workers, while Si Cobas extensively campaigned against the agreement (Interviews to Franciosi and Si Cobas).

At an initial stage, the regional Flai-Cgil supported the Si Cobas request to be accepted in the negotiation process and in May 2019, both these unions called a joint-strike. However, after three days of joint strike, the Modena section of CGIL withdraw from the action and joined the negotiation process, while Si Cobas continued the action³¹³.

The *Prefettura* intervention, caused by the Si Cobas actions, triggered the process that led to the framework agreement of July 2019.

The signatory parties of the framework agreement of 17 July 2019 are: Cgil; Cisl; Uil; Flai-CGIL; Filcams-Cgil; Filt-Cgil; Fisasciat-Cisl; Fai-CISL; Uila; and Uiltrasporti. The Confederations had an important role in coordinating the negotiations and harmonising the various points of view³¹⁴. Only a minority of the signatory parties have had an active role in the industrial dispute and relations. As a matter of fact, the Si Cobas controversial actions have paved the way for trade unions to reach an agreement that is suitable to progressively increase workers' protection (refer to Section 3), especially as regards workers employed in the production cycle, since there was a general fear of an escalation of tension within (and especially at the gates of) the company.

Following the framework agreement, Cgil, Cisl and Uil have created some form of coordination. For instance, following the July 2019 framework agreement, the trade union assemblies are organised jointly. The assemblies are attended also by Flai-Cgil and Filt-Cgil, even if these trade unions do not have an RSA within Italtpizza.

This new industrial relations' context has facilitated the negotiation of the agreement for the change of contractor in the packaging, logistics and cleaning area. The Confederations did not take part in the negotiation of this second agreement, so that signatory parties are: Filcams-Cgil, Flai-Cgil, Filt-Cgil; Fai-Cisl, Fisasciat-Cisl; Uiltrasporti; Uila. The agreement on the change of contractor, and its consequences on the workforce, was approved by the ex-Co.fa.mo workers in a ballot.

From the interviews, it has emerged that the involvement in the industrial relations within Italtpizza (and contracting companies) differs from trade union to trade union. Moreover, trade unions from the same Confederation do not always share the same approach or strategy. For instance, apparently Flai-CGIL has always been way more active in industrial disputes and organising work than Filt-Cgil.

As far as judicial strategies are concerned, even if some attempts have been made, they have surely not characterized the industrial dispute at stake. Moreover, the Italian legal system does not allow trade unions to act on behalf of workers. Trade unions can only financially and technically (in the sense of providing an advocate and take care of translations, if needed) assist the workers who want to have access to judicial redress. In the Italtpizza case, Si Cobas' workers have recently initiated various individual judicial proceedings to claim past salaries and contributions due, as well as the illegitimacy of the outsourcing³¹⁵. Among the most representative trade unions, Flai-Cgil made some attempts to support workers in their claims before the Court, especially with the aim to uncover the alleged illegitimacy of the outsourcing practice, but they finally gave up³¹⁶.

Flai-Cisl is acting at a different level. Its strategy is focused on the re-negotiation of the Food Industry CCNL. Indeed, the trade union succeeded in including in the 2020 sector-level agreement the obligation for the contractors and subcontractors to apply the collective agreement inherent to the activities effectively performed by the contractors' and subcontractors' workers, signed by most representative trade unions. Such a clause within the Food Industry CCNL should avoid the application of the *Multiservizi* CCNL to workers employed in the production line³¹⁷.

4.2 Workers' representation

In Italy, the system of workers' representation within the company is based upon Article 19, Law 300/1970 and on the rules set by the social partners through inter-sectoral collective agreements. According to Article 19 (in companies with more than 15 employees), only the trade unions that have signed the collective agreement applied by the company, or have participated to the negotiation of that agreement thus showing that they are truly representative, (Constitutional Court n. 231/13) can constitute an RSA (which represents a single trade union).

³¹³ <http://www.cgilmodena.it/vertenza-italpizza-segretario-fiom-cgil-cesare-pizzolla-posizione-assunta-categoria/>; <https://sicobas.org/2019/05/24/italpizza-5-giorno-di-sciopero-la-cgil-lo-sospende-i-lavoratori-e-le-lavoratrici-s-i-cobas-continuano-la-lotta/>

³¹⁴ Franciosi's interview of 27 January 2019.

³¹⁵ Carpeggiani's interview of 25 October 2019.

³¹⁶ Franciosi's interview of 17 October 2019.

³¹⁷ Benaglia's interview, 28 October 2019.

Moreover, on the grounds of the inter-category agreement of 14 January 2014 signed by Cgil Cisl, Uil and Confindustria (the so called T.U. *sulla rappresentanza*) it is possible to organise a ballot to elect an RSU (*Rappresentanze Sindacali Unitarie*), which represents the whole company workforce. The agreement is applicable only to the organisations that have signed the T.U. *sulla rappresentanza* or subsequently acceded to it. Some of the so-called autonomous trade unions (not confederated) have not signed nor acceded to the T.U. (Si Cobas is among them).

Therefore, the application of the CCNL “*Multisevizi*” by the contractors, implies that only the trade unions that have signed that collective agreement can appoint an RSA or call for an RSU ballot (while for the direct employees, the same reasoning applies, but the parameter is the food industry collective agreement).

In this case, the sole workers’ representative structures at company level are RSA.

Before the industrial conflicts started in 2018, Ultrasporti already had an RSA in the cooperatives. While before July 2019 Cgil, in particular Filcams-Cgil, organised unofficial assemblies to appoint its first RSA³¹⁸.

At the time of drafting this report, in Evologica there are 2 RSA Filcams-Cgil and 3 RSA Uil-Trasporti, while Cisl has no representatives and few members; in Aviva spa (ex Co.f.a.mo.) there is only 1 RSA, Filcams-Cgil; while Si Cobas has no official RSA³¹⁹.

However, as far as Cgil trade unions are concerned they cooperate quite closely, for instance, even if Flai does not have an RSA in Evologica and Aviva spa (which by law it could not have since the legitimacy to appoint an RSA is linked with the collective agreement applied), it is equally involved, through the Filcams representative³²⁰.

The numbers of the trade union membership have consistently varied in the latest years. The first trade union that has been able to organise workers employed in the Italtpizza subcontracting is Si Cobas, other than a few exceptions of workers who were members of the other trade unions even before 2018³²¹. The trade unionists interviewed justified the lack of members within Italtpizza (and contractors) mainly due to: 1) the large majority of workers were (and are) foreigners, mostly third country nationals (refer to Section 3), who were not able to speak, nor understand Italian, they were carriers of different cultures and very connected among themselves through clan-systems; and 2) the company’s policy is, reportedly, not union-friendly. A further element that hinders long-term and stable unionisation is the high rate of turnover among certain workers (refer to Section 3)³²². Si Cobas also met the same difficulties, which it partially overcame by strengthening its physical presence in the factory and by increasing its legitimacy within the immigrants’ communities. In November 2018 it unionised the first workers³²³. As a consequence, at the turn of 2018 to 2019, the contracting companies’ unionised workers were mostly Si Cobas members.

The events that have succeeded the drastic protests organised by the grass root trade union, resulting in the intervention of the *Prefettura* and the signature of the framework agreement of July 2019, have changed the scene.

It was only possible to collect membership data from Cgil and Si Cobas. In Italtpizza unions report 5 Flai-Cgil members, in Evologica 136 Filcams-Cgil members, in Aviva (ex Co.f.a.mo.) 134 Filcams-Cgil members³²⁴.

Other data has been provided by the CEO of Consortium Aviva. According to this source, in Evologica in 2018 there were 141 unionised workers (82 Uil; 49 Cgil; 10 Cisl), while in 2019 they increased to 173 (119 Cgil; 44 Uil; 10 Cisl). In Aviva spa, in 2019, there were 112 unionised workers (98 Cgil; 9 Uil; 5 Cisl)³²⁵. Si Cobas has now around 60 members between Evologica and Aviva spa (Co.f.a.mo)³²⁶.

³¹⁸ By law, there is no need to organize a worker’s assembly to select the RSA, as they are formally appointed by the trade union that has signed the collective agreement applied in the respective company (Article 19, Law 300/1970), but Cgil and its trade unions, thus including Flai, wanted the RSA to be appointed, in fact, by the workers (Franciosi interview of 27.01.2020).

³¹⁹ See Franciosi’s email of 27 January 2020.

³²⁰ Franciosi’s interview of 27 January 2020. During the interview, the Fai-Cisl representative stated that there was surely an ongoing process to constitute an RSA Fisascat-Cisl, but it was not established yet (Benaglia’s interview, 28 October 2019).

³²¹ For instance, as isolated case, Flai-Cgil succeeds in organizing few workers after the Powerlog crack, seen above. (Franciosi’s interview of 27.01.2020).

³²² Franciosi’s and Benaglia’s interview (Benaglia Interviews, 28 October 2019).

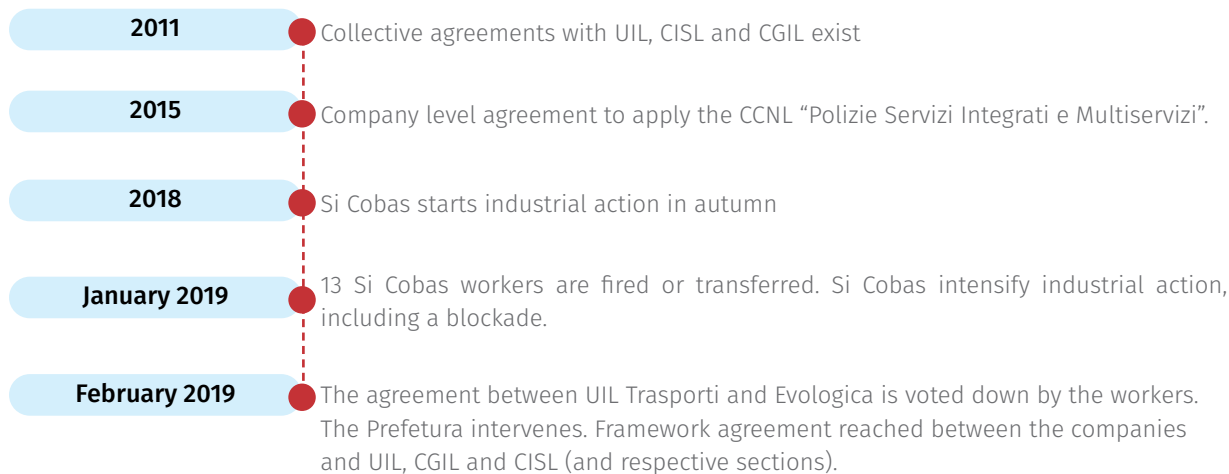
³²³ Carpiagnani’s interview. At the end of 2018, Si Cobas had at least 48 members in Evologica and at least 60 in Cofamo, see “Membership Si Cobas” (2018).

³²⁴ Email of Franciosi of 27 January 2020.

³²⁵ Balestra’s written answers.

³²⁶ Carpeggiani’s interview, 25 October 2019.

Timeline of agreements



SECTION 5:

DUE DILIGENCE, REPORTING, REMEDIES AND SANCTIONS

The joint and several liability mechanism is the main instrument that guarantees compliance with contracted workers' rights in the Italian legal system. It is provided by the norms on transfer of undertaking and on contracting out. Transferor and transferee are jointly responsible for all of the credits the transferred workers enjoy at the moment the transfer takes place (Article 2112(2) c.c.). The main company is jointly responsible with the contractor (and eventual sub-contractors), until two years after the contract expires, for wages (included the severance pay) and social security contributions for the duration of the contract (Article 29(2) d.lgs. 276/2003).

The joint and several liability mechanism has been activated against Italpizza by the social security institutions, following the inspections that have reported the missing contribution payments by the two contracting companies (amounting to over 500,000 euros). However the joint liability has not been activated with regards to the civil sanctions (around 200,000 euros for the unpaid contributions and the violation of working time limits), as the latter must be paid just by the employers (as for the administrative sanctions)³²⁷.

To our knowledge, the joint and several liability has not been activated by the contracted workers; or, at least, no judicial actions based on Article 29(2) c.c. have emerged. This, according to the Italpizza management, is due to the fact that any credit not paid by the contractors has been regularly paid by Italpizza³²⁸. This should have occurred also when new companies replaced others in the outsourcing contracts, in the event of potential failures by previous contractors (as in 2008). However, Si Cobas argues that some trade unions have signed agreements renouncing workers' credits. These agreements have reportedly been subsequently approved by workers individually (this kind of waiver is legitimate and effective under Article 2113(4) c.c.)³²⁹. On the other hand, with the same agreements the companies committed to guarantee the employment levels. These events have also been reported by Cgil, which has not signed the agreements (i.e. Flai). However, the Flai trade unionist points out that in 2008 an agreement had been reached that guarantees Italpizza will pay the workers all of the past credits due by the contractors (which had gone bankrupt)³³⁰.

The Italpizza case confirms that the joint and several liability is surely a fundamental instrument to protect the credits of contracted workers: even if it has not been activated by the workers, it has likely influenced Italpizza's choice to take care, progressively, of the contractors' debts (in full or in part). The full effectiveness of this instrument is conditioned by the specific context in which the workers operate and by their degree of

³²⁷ Parliamentary question of 16 January 2019.

³²⁸ Montanini's interview, 28 November 2019.

³²⁹ As laid down by Article 2113(4) renounces and transactions by a worker about credits related with the contract of employment, if not done before the tribunal or a trade union member, can be nullified by a Court.

³³⁰ Franciosi's interview of 17 October 2019.

awareness as regards the available legal instruments. It is not certain whether most of the immigrant workers who have accepted the settlement agreements, which have removed the company's responsibility, were in fact aware of the possibility of suing Italtpizza for their credits.

The trade union bargaining aimed at ensuring the payment of salary arrears can constitute an effective way to substitute the legal action of single workers, while allowing a quicker and certain compliance by the company; but it can also legitimise the waiver of workers' credits.

According to Cgil and Si Cobas, Italtpizza has been concerned with various judicial actions initiated by the workers fired by the cooperatives, in order to obtain the declaration of illegitimacy of the outsourcing and the subsequent internalisation of workers by Italtpizza (Article 29(3), d.lgs. 276/2003)³³¹. However, no judgment or decision has been released. This is due (according to the trade unionists) to the fact that the individual proceedings concluded with economic transactions, accepted by the workers, and also because of the long length of the proceedings, which is characteristic of the Italian judicial system.

Therefore, notwithstanding the numerous problems denounced by the trade unions, there are no Labour Courts' judgments that ascertain illicit behaviour or non-compliance towards workers, nor Italtpizza and its contractors have been sanctioned, other than for the missed contributions and violations on working time.

On the other hand, two – different – mechanisms of certification have been activated: one by the company and the other by the trade union.

Between 2008 and 2011, Flai Cgil has activated the SA8000 certification, which is targeted at producers that sell their products to Coopitalia supermarkets (such as Italtpizza). The monitoring system has triggered investigations in the production site, as well as audits of the parties involved, thus including workers and Flai Cgil³³². According to Cgil, these inspections have caused the contractors to apply the Food-industry CCNL to the workers employed in the pizzas' production (even if only temporarily, given the application of the Multiservizi CCNL in 2015) (refer to Section 1). The Coop monitoring system has also, reportedly, highlighted the practice of moving of workers between main company and contractors, which is an indicator of the potential unlawfulness of outsourcing, according to Article 29(1), d.lgs. 276/2003. According to the Flai trade unionist this inspection has had an important role in inducing Italtpizza to outsource also the remaining direct workers in the production cycle, by renting the business unit³³³.

The Commissione di Certificazione della Fondazione Universitaria Marco Biagi suggested to the Italtpizza management to outsource the whole production cycle, in order to avoid the risk to be accused of unlawful outsourcing³³⁴. Italtpizza has then asked the Biagi Commission to certify the contract that outsources the whole production cycle, according to articles 75 ff., d.lgs. 276/2003. The Commission has, thus, recognised full legitimacy of the contract (and connected subcontract) signed by Italtpizza, as not violating Article 29(1), d.lgs. 276/03.

The value and usefulness of the monitoring mechanisms and certifications is obviously controversial. According to Italtpizza management, the certification is an instrument useful to guarantee the fairness of the outsourcing process, and it demonstrates the will of the company to fulfil its legal obligations³³⁵. According to some of the trade unionists interviewed (especially Cgil, and even more from Si Cobas), the certification has been exploited by Italtpizza to legitimise pre-emptively the whole outsourcing system, thus hampering effective controls/inspections on the contracts' execution³³⁶.

³³¹ Franciosi's and Carpeggiani's interview (Carpeggiani's Interview 25 October 2019).

³³² Franciosi, Relazione provvisoria su "caso Italtpizza" of 13 January 2019.

³³³ Franciosi's interview of 17 October 2019.

³³⁴ Montanini's interview, 28 November 2019.

³³⁵ Montanini's interview, 28 November 2019.

³³⁶ Franciosi's (of 17 October 2019) and Carpignani's interviews.

SECTION 6:

HOW TO FACE SUBCONTRACTING CHALLENGES:
PUBLIC AUTHORITIES' INTERVENTION IN THE ITALPIZZA CASE

In this case, the public authorities' most significant role was in the conciliation actions undertaken in order to settle the industrial and social conflict brought about at Italtpizza.

According to the information that we have been able to collect, the Labour Inspectorate has officially intervened only once, despite the several requests that have been made by Cgil trade unions since the early 2000³³⁷. The only Labour Inspectorate report at our disposal refers to a notification sent by Flai-Cgil Modena on 09.12.2016 on the legitimacy of the collective agreements, and the respective economic and normative conditions, applied by Evologica and Logicamente.

Following an assessment on 13 December 2018, the Inspectorate concluded that "some irregularities committed by the cooperatives have emerged". The irregularities concerned administrative violations, such as unpaid social security contributions of workers employed having specific tasks, INAIL insurance risk violations, disregard of the maximum weekly working time and exceeding the maximum yearly limit of overtime³³⁸. As a result of its evaluation, the Inspectorate obliged the cooperatives to pay the arrears and some administrative sanctions³³⁹.

One year earlier, an inspection from the MISE (*Ministero dello Sviluppo Economico*), triggered by a claim submitted by Cgil, had certified that Evologica did not commit any violation in relation to the economic treatment of their employees. It went on to specify that there is no right to equal treatment between direct and indirect/contracted workers in an outsourcing contract and the contracting company is free to choose the applicable collective agreement³⁴⁰ (See section 2).

As already mentioned above, the *Prefettura* is surely the public authority that has had the most significant impact on the evolution of the industrial relations' system within Italtpizza, by promoting a meeting between companies and social partners to handle the tense situation and, hence, drive the parties to reach an agreement on working conditions within the outsourcing system. Indeed, the meeting requested by the *Prefettura*, following the Si Cobas actions, has launched and facilitated the conclusion of the framework agreement of July 2019.

First, on 11 December 2018, the Modena *Prefettura* has convened the companies (Italtpizza, Evologica and Cofamo) and Si Cobas to "assess the working issues related to the Italtpizza factory". On the one hand the public authority condemned the illegal actions of Si Cobas, such as the blockades, while, on the other, it stimulated the parties to find a solution to a number of issues raised by Si Cobas, thus putting the responsibility on Italtpizza for the working conditions of its contractors. In particular, the reintegration of the 13 Si Cobas members in their former work³⁴¹. As a result, in January 2019 Italtpizza has certified that 12 workers had been effectively reintegrated by the cooperatives, while the thirteenth had a temporary employment contract, which had regularly expired on 31 December 2018. In the same letter the company has specified the regularity of the working conditions within its contracting companies³⁴². The dialogue between the companies and Si Cobas within the *Prefettura* continued until March 2019, when an official report demonstrating the commitment of the trade union to stop any conflictual action in response to the obligation undertaken by the companies to solve given irregularities was made³⁴³.

³³⁷ Franciosi' interview of 27 January 2019.

³³⁸ For details see the answer to the Parliamentary Question of 16 January 2019.

³³⁹ Labour inspectorate report attached, Ispettorato territoriale del lavoro di Modena, 13.12.2018. See also Interrogazione Italtpizza, 16 January 2019; <https://gazzettadimodena.gelocal.it/modena/cronaca/2018/12/19/news/modena-caso-italpizza-le-coop-hanno-violato-i-diritti-dei-lavoratori-1.30008492>. Once contacted for an interview on the Italtpizza case, the Modena Labour inspectorate has refused upon the argument that there is an open administrative proceeding on the company and, therefore, it could not release interviews. However, it is impossible to understand the scope of this proceeding.

³⁴⁰ MISE, Inspection report, 03 August 2017.

³⁴¹ Report of the meeting at the Prefettura of Modena of 11 December 2018.

³⁴² Italtpizza letter to Prefettura di Modena, 17.01.2019. See also the answer from Prefetto di Modena,

³⁴³ Vd, Report Prefettura of 14 March 2019. However, Si Cobas newly organized industrial actions in the following months in relation to other issues.

Second, the Prefettura pushed for the social partners and companies involved to meet at the Confindustria Emilia Area Centro (Modena), the regional branch of the employers' organisation. Following the intervention of the Public Authority, Italpizza invites Cgil, Cisl and Uil to the negotiation table³⁴⁴. The company refuses to admit Si Cobas to the negotiation, since the management considers it an illegal organisation (on the evolution and outcomes of this process, see above)³⁴⁵.

Given the extensive impact of this case on the public opinion, it is no surprise that the political groups of the Municipality of Modena have also intervened, mainly in order to condemn the episodes of violence and in support of the Italpizza model³⁴⁶.

Last, it is noteworthy to mention that, several times, during the Si Cobas actions, the police intervened in riot gear and there have been clashes between workers and policemen. In the same context, also expulsion orders (from the Modena province) have been released against some Si Cobas delegates engaged in the action. Eventually, all of them have been withdrawn by the Administrative Tribunals³⁴⁷.

³⁴⁴ Letter from Italpizza of 21 February 2019.

³⁴⁵ Montanini's interview, 28 November 2019.

³⁴⁶ See Gruppo consiliare cambiamo Modena 10 January 2019; Mozione Consiglio comunale Modena 24 January 2019; Comunicato comune di Modena 08 July 2019.

³⁴⁷ See TAR Reggio Emilia 15 January 2020, orders No. 986, 989 /2019; Consiglio di Stato 24 October 2019, Judgement No. 7764/2019.



**FOOD
SECTOR**

**BOGUS COOPERATIVES AND
BOGUS SELF-EMPLOYMENT
IN THE SUBCONTRACTING
CHAIN OF THE SPANISH MEAT
INDUSTRY**

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SECTION 1:

SUBCONTRACTING IN THE SPANISH MEAT INDUSTRY
AND RISE OF BOGUS WORKER COOPERATIVES³⁴⁸

The European Union's meat industry is made up of almost one million workers and more than 33,600 companies, with its production representing 1.5% of the GDP of the EU-28. Spain, with some 100,000 workers and almost 3,700 active companies, is the European Union's second largest meat producer by number of tonnes produced (14.6% of the total), and the third largest by value of its production (11.3% of the total)³⁴⁹. The Spanish meat sector is also an expanding industry that has witnessed significant growth over the last decade: from 2008 to 2017, at the height of the economic crisis, the industry's production value grew by 33.4%, almost 10,000 jobs were created, and the number of hours worked went up by 13% (cf. Table 1, Annex II). As in many other industries, the weight of subcontracting in the Spanish meat industry has grown substantially in recent decades, going up by 33% from 2008 to 2015, measured in terms of company expenditure. However, what is most significant about the subcontracting model in the Spanish meat industry is the increased outsourcing of work that forms part of the industry's core activities. We are mainly referring to slaughtering and cutting activities, which are considered to be of lower added value, barely automated, subject to significant variations in demand, and carried out under hard working conditions. In recent years, the outsourcing of these activities has grown significantly in the meat industry: up by 68% from 2008 to 2015, far exceeding the growth of subcontracting expenses connected to ancillary activities (19%) and own personnel (1.3%) (cf. Table 2, Annex II).

All the social partners interviewed (trade unions, employers' organisations and the Labour Inspectorate), coincide in pointing out that the subcontracting of core activities does not take on particularly complex forms in the Spanish meat industry. Generally speaking, there is a main contractor who enters into commercial service agreements to outsource activities to a varying number of companies, which act as subcontractors for the main contractor. Most of these outsourcing activities do not require subcontracting chains with several tiers, or the participation of companies located outside of Spain, or the temporary transfer of workers from other EU countries. In fact, the great majority of companies that use this model are Spanish-owned and operate from within the territory. This also applies to allocated workers, although here one should point out that there is a significant number of foreign immigrant workers. The companies that act as subcontractors in the meat industry are characterised by having different formats and legal statutes (multiservice companies, temporary work agencies, individual self-employed workers, etc.). However, due to their extension and impact, the so-called "*cooperativas de trabajo asociado*" or worker cooperatives stand out especially (cf. Tables 3 and 4, Annex II).

The appearance of the first worker cooperatives in the Spanish meat sector dates from the nineteen eighties, and its use became extended throughout the nineties. The different social partners interviewed coincide in pointing out that the first cooperatives emerged from the grouping of specialised workers (slaughterers, ham cutters) who carried out activities on a freelance basis in the industry and who, via this organisational model, attempted to improve their capacity for negotiation with companies using their services. However, these associated worker models soon realised their limited capacity for action vis à vis meat contractors, and saw how from an early date the principles and values of the cooperative movement (democratic participation of workers in their management, improvement of working conditions, etc.) became distorted. Worker cooperatives, whose operation was regulated by a specific legislation that excluded them from the basic protection mechanisms of salaried employment (labour law protection, collective bargaining, trade union representation ...), were quickly adopted –if not directly promoted– by the meat industry contractors themselves, which saw in them a way of flexibilising the use of the workforce without significantly increasing labour costs.

³⁴⁸ For a more detailed explanation of the fieldwork carried out and the sources used in this chapter, see Annex I at the end of this paper.

³⁴⁹ Cf. Eurostat: Annual detailed enterprise statistics for industry (NACE Rev. 2, B-E) [sbs_na_ind_r2]; Annual enterprise statistics by size class for special aggregates of activities (NACE Rev. 2) [sbs_sc_sca_r2]; Slaughtering in slaughterhouses - annual data [apro_mt_pann] and GDP and main components (output, expenditure and income) [nama_10_gdp].

"[The meat industry] is a very complex game where companies need models that are highly flexible (...). Someone designed a model based on subcontracting certain lines, which was based on workers' cooperatives made up of self-employed workers. In fact, this was the industry's great solution, because it offered extraordinary flexibility"
(Representative of the employers' organisation, FECIC)

"Cooperatives are something made up by the meat companies themselves. (...) They say to people working as salaried workers: 'we are going to outsource all of our slaughter or cutting activities, so if you want to keep your job, you'll need to become a member of the cooperative"
(Union representative, CCOO)

For employers' organisations, subcontracting via worker cooperatives was one of the industry's legitimate organisation models, one whose legality was accredited for employers' organisation representatives in different favourable rulings by courts, and from which all parties benefitted³⁵⁰. In their view, on the one hand, companies benefitted because they improved their competitiveness by attaining greater flexibility in the use of labour, without the costs and restrictions that would have applied had the collective bargaining agreement been enforced³⁵¹. On the other hand, the workers who were cooperative members also benefitted, because in exchange for that flexibility and at least until the onset of the economic crisis of 2007, they obtained, in the view of the employer's organisation, higher compensation than that agreed through the collective bargaining agreement³⁵². For their part, however, the trade union organisations saw in this subcontracting model from the very start a way of impinging on the basic rights of workers, of making employment precarious, and of the employer eluding its responsibilities. Years later, the Labour Inspectorate also backed these arguments based on an extensive intervention in the industry, which we will examine in due course.

"Companies were doing well with it, workers were doing well with it, the model was good. But unions didn't do so well with it, because it didn't fit into their model: because they were self-employed workers they couldn't do any union action, they had no members [in the cooperatives], they couldn't hold union elections, etc. So, there was a part of the meat industry workers' collective that remained somewhat outside of union control"
(Representative of the employers' organisation, FECIC)

"When the main contractors are asked why they outsource, they will say it's all about flexibility, but what they understand as flexibility is that there is a set of regulations established by law, by the collective bargaining agreement, that they do not want to comply with. It's that simple"
(Union representative, UGT)

Despite the rejection of this model and the progressive trade union mobilisation, the use of worker cooperatives in the Spanish meat sector grew and developed, and reached a significant turning point in 2001. That year, the *Labour Chamber of the Supreme Court (Ruling of 17 December 2001, appeal 244/2001)* rejected that the use of worker cooperatives by meat companies constituted, as suggested by the trade unions, a case of illegal assignment of workers (a severe infraction of the Spanish labour law)³⁵³. This ruling –and other subsequent rulings that were based on it– granted the model a certain legal security and many companies that were

³⁵⁰ See, for example, ANICE press release of 27 March 2018: "ANICE defiende el uso correcto de las formulas de contratación de servicios que recoge la normativa laboral". Available here [access 9 July 2020]: www.anice.es/anice-laboral/ano-2018/anice-defiende-el-uso-correcto-de-las-formulas-de-contratacion-de-servicios-que-recoge-la-normativa-laboral_22793_257_35079_0_1_in.html. See also ANICE press release of 3 August 2018: "ANICE considera legitima la utilización de cooperativas de trabajo asociado en la industria". Available here [access 9 July 2020]: www.anice.es/anice-considera-legitima-la-utilizacion-de-cooperativas-de-trabajo-asociado-en-la-industria/notas-de-prensa-de-anice/anice-considera-legitima-la-utilizacion-de-cooperativas-de-trabajo-asociado-en-la-industria_23448_79_31686_0_1_in.html.

³⁵¹ See, for example, the interview with the President of ANICE, Alberto Jiménez: "El cambio de criterio sobre las cooperativas de trabajo ha puesto en riesgo al sector", published in *Alimarket*, 18 September 2018. Available here [access 9 July 2020]: www.alimarket.es/alimentacion/noticia/284819/alberto-jimenez-anice---el-cambio-de-criterio-sobre-las-cooperativas-de-trabajo-ha-puesto-en-riesgo-al-sector. See also: Iñaki de las Heras, "Trabajo multa con más de 200 millones a empresas cárnicas", *Expansión*, 13 September 2018, available here [access 9 July 2020]: www.expansion.com/empresas/distribucion/2018/09/13/5b997ba922601d27518b45ff.html.

³⁵² See the interviews with employers' organisations representatives.

³⁵³ The ruling of the Supreme Court of 2001 proposed that there cannot be an illegal assignment of workers when dealing with a worker cooperative, because no third party is unduly profiting (cooperative workers, as owner members of the cooperative, would be the ultimate beneficiaries of their own assignment to another company).

outsourcing via other models gradually moved on to worker cooperatives. From that moment, the use of worker cooperatives in the meat industry only grew, and further intensified with the onset of the economic crisis in 2007 (with far more precarious conditions for members of cooperatives, as recognised by employers' organisations representatives). With the onset of the crisis, the meat industry, less affected in its activity than others, attracted a great deal of labour from other industries. Many meat companies took advantage of this influx and the overall deterioration of the Spanish labour market, to exert pressure regarding the industry's working conditions and thus improve its competitiveness (and economic results).

Currently, the Spanish meat industry has around 300 worker cooperatives and their relative weight within the sector's business fabric has remained quite stable throughout the last decade (around 8% for the whole industry, although their presence in the slaughtering and cutting segments is much higher) (Instituto Nacional de Estadística, *Directorio Central de Empresas*, 2019). The Spanish meat industry also has worker cooperatives that are capable of allocating a high number of workers, and which have grown in size in recent years. For instance, *Servicarne* –until recently the industry's largest cooperative– has had a total of more than 31,000 working members since it was established. In 2018 it had around 5300 active members (compared to the 3850 active members it had in 2013). Likewise, *Trabajadores Asociados de la Industria Cárnica*, the industry's second largest cooperative, has had almost 21,000 members since it started, with 2800 active members in 2017 (compared to 1400 in 2008)³⁵⁴. The impact of worker cooperatives is therefore much greater than one would expect given the relatively low number of existing cooperatives. For instance, the trade union representatives who were interviewed here estimate that workers allocated through worker cooperatives represent around 20% of the total workers employed in the meat industry. That is to say there are approximately 20,000 workers who are unequally distributed within the sector: not widely present in some segments (such as those concerned with exporting processed meat products), but clearly a majority in others (such as companies mostly focussing on slaughtering and cutting) (cf. Tables 3 and 4). The number of regularisations of "bogus self-employed workers" (12,000 in 2018 and some 8,000 in 2019) carried out by the Labour Inspectorate in the meat industry worker cooperatives would seem to confirm this estimate by trade union partners³⁵⁵. The very fact that the industry's collective bargaining agreement has long made reference to the need to limit the use of worker cooperatives is a sign of the extent to which these are present in the meat industry³⁵⁶.

³⁵⁴ Inspección Provincial de Trabajo y Seguridad Social de Barcelona (Provincial Labour and Social Security Inspectorate of Barcelona), *Informe sobre las actuaciones llevadas a cabo en la Empresa Servicarne (O.S.: 8/0019368/16)*, of 2 July 2018, p.17; Organismo Estatal de Inspección de Trabajo y Seguridad Social (State Agency for Labour and Social Security Inspection), *Settlement report no. 252018009800623 of 16 August 2018*, p. 56; Labour Court, number 3 of Badajoz, *Ruling 96/19 of 13 March 2019*, p. 11; Comisiones Obreras, "Documento resumen de la campaña de lucha de CCOO Industria contra la precariedad, el fraude y la explotación en el sector cárnico" of 18 November 2019.

³⁵⁵ Comisiones Obreras, op.cit., 2019, p. 4.

³⁵⁶ For example, *Resolution of 19 March 2019, of the Directorate-General for Employment, by which the State collective bargaining agreement for the meat industry is registered and published*, BOE, no. 86, of 10 April 2019, p. 37.344; *Resolution of 25 January 2018, of the Directorate-General for Employment, by which the Collective bargaining agreement for the poultry slaughtering industry is registered and published*, BOE, no. 39, of 13 February 2018, p. 17.819.

SECTION 2:

OPERATION OF THE SUBCONTRACTING MODEL THROUGH BOGUS WORKER COOPERATIVES: THE CASE OF *SERVICARNE* AS THE TIP OF THE ICEBERG

Aside from these questions regarding the quantitative extension of the phenomenon, it is important to understand what exactly is involved in the operation of these worker cooperatives, and what their relationship is with the client companies. For this, we can analyse the case of the cooperative *Servicarne* which, founded more than 40 years ago, is one of the industry's oldest cooperatives and up until recently the largest, present in Spain's leading meat companies. Its relevance in the meat industry has attracted the involvement of trade unions, the Labour Inspectorate and the Courts of Justice, generating around it a significant volume of information that is very useful when trying to understand the role played by worker cooperatives in the meat industry. According to the Labour Inspectorate, in the case of *Servicarne*, meat companies subcontracted all or part of their core activities to the cooperative by means of a commercial agreement, with the cooperative acting as a subcontractor –which was, in theory, independent– of meat companies. Based on the orders of their clients (who increasingly were operating on the basis of providing fresh produce almost daily and “just in time”), the managers of meat companies used to inform the heads of worker cooperatives of the volume of production that would need to be reached. This volume was established on a daily basis by the meat company itself, according to its needs and without any commitment on its part as regards the production amounts subcontracted to the cooperative. Variations in the production volume expected by the client company would have determined the variations in the number of cooperative members that ended up being allocated³⁵⁷. The meat companies paid the cooperative, on the basis of the meat production obtained by the cooperative workers (measured almost always in pieces or kilos) and on the basis of previously agreed fees with the managing team of the cooperative³⁵⁸. Members of the cooperative, operating under a self-employment social security regime, were only remunerated when they were allocated. Therefore, their inactivity –voluntary or forced– did not imply any economic cost for the cooperative or, of course, for the meat company.

This mechanism for the allocation and use of labour created a model of “à la carte work” thanks to which companies could have at their disposal, at their will and with total flexibility, a large volume of workers: “*In a bogus cooperative, workers enter and leave with staggering ease. They just need to say, ‘Don’t come in tomorrow’, because workers have no rights*” (Representative of the Provincial Labour Inspectorate of Barcelona). The Labour Inspectorate has observed that the activity of these “self-employed” workers was allocated, determined and controlled by the meat company at its facilities on a daily basis, without the need to formally recognise them as part of the company's organizational structure. In fact, the main contractors were who exercised the control and the organization of the production activity of the worker cooperatives at all times: from selecting the workers who would be integrated or would remain in the cooperatives as members³⁵⁹, to organising the production, quality and working pace of cooperative members³⁶⁰.

According to the Labour Inspectorate, the internal operation and organization of the cooperative, on the other hand, were far from being participative, horizontal and democratic, as required by the principles of the international cooperative movement³⁶¹. Members of the cooperative were not informed or consulted as regards the agreements established with the clients, or as regards any other relevant decisions. Only 2% of members attended annual meetings, and the great majority of them were unaware of their rights as “owner” members of the cooperative³⁶². Member registrations were not really voluntary, but rather a consequence of the fact that cooperatives were often the only way of finding employment in this industry. Terminations also did not tend to respond to a personal decision of the affected member, but rather they depended on the fluctuations in the demand for labour in meat companies³⁶³. The workers in the cooperative lacked autonomy as regards

³⁵⁷ Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 18.

³⁵⁸ Ibid., p. 35-37.

³⁵⁹ Ibid., p. 18.

³⁶⁰ Ibid., p. 34 and 38.

³⁶¹ See the *Statement on the Cooperative Identity* promulgated by the International Co-operative Alliance in 1995 (<https://www.ica.coop/en/cooperatives/cooperative-identity>).

³⁶² Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 73-74.

³⁶³ Ibid., p. 18-19.

working conditions and tasks, which were defined unilaterally and beyond their control. The members of the cooperative were also subjected to a strict disciplinary regime that generated a very high level of sanctions (which affected approximately 10% of the workforce every year, compared to the average of 0.15% registered in the industry)³⁶⁴.

According to the Labour Inspectorate, *Servicarne* did not operate internally as a cooperative, nor as an independent corporate organisation that was separate from the client company. Thus, for instance, the cooperative did not have its own work centres, machinery or equipment to carry out the work commissioned³⁶⁵. Also, the cooperative did not have staff dedicated to tasks like production organisation, purchasing planning or commercial activities. The only organisational work carried out by the cooperative was centred around administrative tasks relating to staff management (collection of member fees, payroll payments, registrations and terminations, application of the disciplinary regime...) ³⁶⁶. Furthermore, *Servicarne* did not assume any corporate risk, but instead would have invoiced the meat companies (and would have remunerated its members) on a monthly basis only based on the work carried out and according to a price scale that had been previously established (and which was different) with each client meat company³⁶⁷.

The example of *Servicarne*, which in the opinion of trade union representatives, can be extended to many cooperatives in the industry, was evidence of the use by meat companies of an organisation (with the appearance of a cooperative) whose purpose was to manage and outsource labour used by client companies. Furthermore, according to the conclusions of the Labour Inspectorate, the contribution of the cooperative to the production process was to put at the disposal of the meat companies the number of workers that they required at any given time, managing their paychecks, registrations and de-registrations on the Social Security self-employment contribution regime. That is to say, in short, these cooperatives carried out the tasks that would have been carried out by the staffing departments of any company, and did not carry out any other productive function as a company. This situation led the Labour Inspectorate to conclude that, despite its formal appearance, *Servicarne* did not work as a real cooperative, nor carried out an independent corporate activity as regards the meat companies, but instead acted fraudulently³⁶⁸. “[*Servicarne*] does not provide a service to the client company, but is rather within the client company, and is a part of it”³⁶⁹. In the view of the Labour Inspectorate, *Servicarne* would have constituted an illegal intermediation, a case of fraudulent interposition between client companies and cooperative workers with the aim of avoiding the application of labour regulations and thus avoiding the costs and responsibilities implied by said regulations for meat companies³⁷⁰. Furthermore, by determining the presence of the qualities of dependence and subordination in the relationship that binds the members of the cooperative and the client companies, the Labour Inspectorate has considered that the members of the cooperative were, in fact, *bogus self-employed workers*³⁷¹.

The intervention of the Labour Inspectorate in the case of *Servicarne* have thus led to the recognition of the status of cooperative members as salaried workers of the meat companies, proceeding to their registration as employees of said companies under the *General Regime* for Social Security contributions. The Labour Inspectorate also required notification to client companies of their duty to settle unpaid Social Security contributions (for up to 4 years before) for a value of approximately 200 million euros³⁷². Finally, the intervention of the Labour Inspectorate regarding the cooperative led to it requesting the suspension (“disqualification”) of *Servicarne* as a worker cooperative³⁷³. This disqualification was administratively approved by the *Dirección General de Trabajo Autónomo* [General Directorate of Self-Employment] of the Ministry of Labour in April 2019 (*Disqualification file resolution, ref. MPL/MPL, of 30 April 2019*)³⁷⁴, but has been legally contested by the managers of the cooperative, which means that *Servicarne* continues to operate today as long as there is no final judgement on the case. The *Servicarne* case is undoubtedly relevant due to the size of the cooperative, its impact on the sector, its presence in the main Spanish meat companies and the intervention of the Labour Inspectorate. However, its operation and characteristics are far from being exceptional according to our trade union interlocutors. Many of their characteristics were present, to a greater or lesser extent, in many other cooperatives (and meat companies)

³⁶⁴ Ibid., p. 20-28 and 52.

³⁶⁵ Ibid., p. 30.

³⁶⁶ Ibid., p. 32-33.

³⁶⁷ Ibid., p. 35-36.

³⁶⁸ Ibid., p. 72-73.

³⁶⁹ Ibid., p. 78.

³⁷⁰ Ibid., p. 79 and 84.

³⁷¹ Ibid., p. 85.

³⁷² Ministry of Labour, *Informe Anual de la Inspección de Trabajo y Seguridad Social 2018*, p. 93

³⁷³ Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 90-91.

³⁷⁴ See, for instance, https://issuu.com/leonoticiasdiariodigital/docs/resolucion_descalficacion_servicar or https://elpais.com/economia/2019/05/02/actualidad/1556826727_472578.html.

of the sector: *Trabajadores Asociados de la Industria Cárnica*³⁷⁵, *Serveis d'Escorxador Clavial*³⁷⁶, *Agrupación de Desarrollo Agropecuario*³⁷⁷, *Workman*³⁷⁸, *Auga Sociedad Cooperativa*³⁷⁹, *Copergo Sociedad Cooperativa*³⁸⁰, etc. Therefore, in reality we are facing a pattern that appears to be repeated and widely extended throughout the Spanish meat industry –an industry where part of its members seem to have let their competitive strategy rely on the allocation of a large number of workers, moving away from the guarantees of the salaried employment statute, which is reflected in the working and employment conditions of the industry.

SECTION 3:

THE IMPACT OF BOGUS WORKER COOPERATIVES ON WORKING CONDITIONS IN THE MEAT INDUSTRY

Most workers in Spain's meat industry are –to a greater or lesser extent– covered by employment regulations and protection mechanisms contained in the salaried workers' statute: employment contract, collective bargaining and union freedom, workers' representation, labour law protection, protection against the main contingencies faced by salaried workers, etc. In the meat industry, this general regulatory framework is further complemented by two sectoral collective bargaining agreements: the *Collective bargaining agreement of the poultry and rabbit slaughtering industry* and, especially, the *State collective bargaining agreement of the meat industry*, which constitutes the industry's reference agreement due to the number of companies and workers it includes³⁸¹.

However, this regulatory framework is not applicable to members of worker cooperatives, whose working conditions are essentially determined by Law 27/1999, of 16 July, on Cooperatives, by regional legislation regarding cooperatives in cases where the organisation's activities are limited to a Spanish region (*Comunidad Autónoma*), as well as by the statutes of the cooperatives themselves and the decisions of their governing boards. The result of the above is that, save for some exceptions, the operation of worker cooperatives is excluded from labour legislation and the protection mechanisms recognised within it. The "social economy" is supposed to provide a collaborative work context that offers other guarantees to the members of cooperatives: starting by the fact that members are simultaneously workers and managers of the organisation that employs them and allocates them – they are ultimately co-owners of their jobs. However, as we have seen, the reality of the cooperative phenomenon in the meat industry usually differs radically from this hypothetical scenario of parallel guarantees. Furthermore, Spanish legislation allows worker cooperatives to choose under what Social Security regime to register their working members³⁸². Meat industry cooperatives have mostly opted to include their workers under the *Special Self-Employment Regime*, thus binding them to a self-employed workers' statute which in Spain, as in other parts of Europe, offers significantly fewer guarantees than the salaried workers' statute. As a result, members of these cooperatives systematically have worse employment conditions and lower protection levels than other meat industry workers, with both of these factors benefitting the companies that use them (see Table 5, Annex II): "*If you compare the cost of a worker who is under the national collective bargaining agreement, and the cost of a worker from the cooperative, on equal terms, the latter can be 30% to 40% lower. (...) In the context of bogus cooperatives, given that labour law does not apply, there is no way of guaranteeing even minimum rights for workers*" (Representative of Provincial Labour Inspectorate of Barcelona).

For instance, members of cooperatives have a far more precarious connection to their employment than the rest of the workers in the industry. The trial period (6 months) during which cooperative workers may be fired without any reason or motive (and without the right to any compensation) is much longer than that specified in

³⁷⁵ Labour Inspection and Social Security Consortium of Catalonia, *Report number 25/0000950/18 of 31 October 2018*; Labour Court, number 3 of Badajoz, *Ruling 96/19 of 13 March 2019*.

³⁷⁶ Labour Inspection and Social Security Consortium of Catalonia, op.cit., 31 October 2018.

³⁷⁷ Labour Inspection and Social Security Consortium of Catalonia, *Report number 172018000008389, of 20 April 2018*.

³⁷⁸ Provincial Labour and Social Security Inspectorate of Valencia, *O.S. 46/0001780/18 of 27 January 2018*.

³⁷⁹ Provincial Labour and Social Security Inspectorate of Zaragoza, *Settlement report no. 502019008029115*.

³⁸⁰ Provincial Labour and Social Security Inspectorate of Zaragoza, *Settlement report no. 502019008031539*.

³⁸¹ *Resolution of 19 March 2019, of the Directorate-General for Employment, by which the State collective bargaining agreement for the meat industry is registered and published*, BOE, no. 86, of 10 April 2019; *Resolution of 25 January 2018, of the Directorate-General for Employment, by which the Collective bargaining agreement for the poultry slaughtering industry is registered and published*, BOE, no. 39, of 13 February 2018.

³⁸² *Royal Decree 84/1996, of 26 January, by which the General Regulations on the inscription of companies and the registration, de-registration and amendment of details of workers on the Social Security system is approved*, BOE, no. 50, of 27 February 1996, p. 7349-7374.

the industry's collective bargaining agreements (2 months for most categories) (cf. Table 5, Annex II). If to this we add the geographic mobility imposed on members of cooperatives, or the discretion with which the sanctioning regime is applied, it helps explain the high mobility and turnover registered among cooperative workers³⁸³. For example, from 2012 to 2016, *Servicarne* renewed around one third of their staff every year, proving that this type of mechanism is used by the meat industry to cover their short-term labour needs, with complete flexibility and almost at no cost³⁸⁴. The duration of a working day, on the other hand, is not previously established in the cooperative's regulations, and is adjusted in a flexible manner to the needs and schedules of the client companies³⁸⁵. It is frequent for workers of cooperatives to be given the worst shifts (nights, weekends), without the salary remuneration specified for said purposes in the industry's collective bargaining agreement³⁸⁶. Working hours vary frequently and, often, a working day is extended until the client company's work is completed, which often entails working more than 8 hours per day (these additional hours are not remunerated as "overtime"), and the total number of worked hours is much higher (around 25%) than the annual maximum established in the collective bargaining agreement (1770 hours)³⁸⁷. Furthermore, cooperative workers do not have any paid vacations, and any breaks during their working hours are not remunerated either³⁸⁸.

Remuneration of cooperative workers does not contemplate any annual distribution of surplus and is significantly below that of salaried workers³⁸⁹. In the *Servicarne* case, for example, even if we go by the figures provided by the governing boards of the cooperatives, we can see how the gross income of cooperative workers is lower (by 7%) than the minimum income established by the collective bargaining agreement for employees at meat companies, and that is despite the fact that the number of hours worked at cooperatives is much higher. The differences in income also increase to 23% when we look at the net salaries received, i.e. when we deduct from the gross income a whole series of expenses that must be paid by cooperative members (fees, payment for basic clothing and safety equipment, Social Security self-employment contributions, etc.). In addition to this, the Social Security contribution basis of members of cooperatives is approximately half that of salaried workers at meat companies, which has significant repercussions in terms of social protection. Average pensions of members of cooperatives, for instance, are 41% lower than those of the salaried workers at meat companies, and unemployment benefits (for which only 5% of self-employed cooperative workers contribute to their Social Security payments) are 49% lower, with a maximum duration of one year, compared to 2 years for salaried workers (cf. Table 5, Annex II).

Lastly, as regards health and safety in the workplace, cooperative workers are also less protected than salaried workers at meat companies. For instance, in 2016 the cooperative *Servicarne* registered a workplace accident rate of 117.5 accidents per 1000 workers, whereas the industry figures for that same year were 63.0 accidents per 1000 workers³⁹⁰. However, the intervention of the Labour Inspectorate with regard to the cooperative also proved that only a small percentage of the accidents that occurred (11% in 2016) were declared as workplace accidents, and estimated that the real figure for accidents at this cooperative must be 3 or 5 times higher than the figure declared³⁹¹. Despite this, only 4% of the members of the cooperative were covered against professional contingencies (a cover that, in the case of self-employed workers, is voluntary in nature). The rest of accidents that are not declared – the great majority – are processed as common illnesses, their management costs being passed on to the Public Health System³⁹².

³⁸³ Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 43 and 52. See also the interviews with trade unions representatives.

³⁸⁴ Ibid., p. 17 and 41

³⁸⁵ Ibid., p. 44; Labour Inspection and Social Security Consortium of Catalonia, *Report number 25/0000950/18 of 31 October 2018*, p. 3; Labour Inspection and Social Security Consortium of Catalonia, *Report number 8/0024672/18 of 31 October 2018*, p. 3; Labour Inspection and Social Security Consortium of Catalonia, *Report number 172018000008389, of 20 April 2018*, p. 5-6; Provincial Labour and Social Security Inspectorate of Valencia, *O.S. 46/0001780/18 of 27 January 2018*, p. 11 and 14.

³⁸⁶ See the interviews with trade unions representatives.

³⁸⁷ Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 45; State Body for Social Security and Labour Inspection, *Settlement report no. 162018009800709 of 25 July 2018*, p. 125; State Body for Social Security and Labour Inspection, *Settlement report no. 132018009801310 of 23 July 2018*, p. 172; Provincial Labour and Social Security Inspectorate of Valencia, *O.S. 46/0001780/18 of 27 January 2018*, p. 12.

³⁸⁸ Provincial Labour and Social Security Inspectorate of Barcelona, op.cit., p. 4-5; Labour Court, number 3 of Badajoz, *Ruling 96/19 of 13 March 2019*, p. 13; Provincial Labour and Social Security Inspectorate of Valencia, *O.S. 46/0001780/18 of 27 January 2018*, p. 5-6.

³⁸⁹ See Table 5, Annex II. Also: Provincial Labour and Social Security Inspectorate of Valencia, *O.S. 46/0001780/18 of 27 January 2018*, p. 12-13; Labour Inspection and Social Security Consortium of Catalonia, *Report number 172018000008389, of 20 April 2018*, p. 7; Labour Inspection and Social Security Consortium of Catalonia, *Report number 25/0000950/18 of 31 October 2018*, p. 4-5; Labour Inspection and Social Security Consortium of Catalonia, *Report number 8/0024672/18 of 31 October 2018*, p. 4-5; Labour Court, number 3 of Badajoz, *Ruling 96/19 of 13 March 2019*, p. 22-23.

³⁹⁰ Provincial Inspectorate of Employment and Social Security of Barcelona, op.cit., 2018, p. 61.

³⁹¹ Ibid., p. 60-61.

³⁹² Ibid., p. 61. See also the interviews with trade unions and Labour Inspectorate representatives.

Precarious and unsafe working conditions in cooperatives

| | WORKER COOPERATIVES | MEAT COMPANIES |
|--|---|--|
| Collective bargaining | None | Entitled and covered |
| Union representation | None | Entitled |
| Trial period | 6 months : Workers can be fired anytime without compensation | 2 months (for most categories) |
| Working hours | Variable working hours defined according to the needs of the client company: <ul style="list-style-type: none"> • Worst shifts (night shifts, weekends) • No remunerated breaks during working hours • Often more than 8 hours a day, without overtime pay | <ul style="list-style-type: none"> • 1770 hours per year, maximum 9 hours per day. • Breaks within working hours are recognised and remunerated. |
| Salary (2017) | Gross salary: Self-employed workers in cooperatives receive 7% less than salaried employees of meat companies Net Salary: Self-employed workers in cooperatives receive 23% less than salaried employees of meat companies | |
| Paid holidays | None | 30 days per year |
| Paid leave | Most leaves are not remunerated | As established in the Workers' Statute plus any improvements of the collective bargaining agreement |
| Fringe benefits | None | Bonuses for night shifts, hazardous/ arduous work, length of service. |
| Unemployment | Benefits for self-employed workers in cooperatives are 49% lower to those of the salaried workers of meat companies | |
| Retirement pension | The pensions of self-employed workers in cooperatives are 41% lower than the pensions of salaried workers of meat companies. | |
| Occupational accident rate (2016) | <ul style="list-style-type: none"> • 117.5 accidents per 1000 workers [The Labour Inspectorate estimates that the real accident rates are 3 or 5 times higher than those declared] | <ul style="list-style-type: none"> • 63.0 accidents per every 1000 workers |

Despite the weight of the data, the social partners interviewed here hold different positions when it comes to assessing the impact of this outsourcing model on the working conditions and rights of meat industry workers. On the one hand, representatives of employers' organizations defend the legality of an outsourcing model which, in their view, is positive for all parties (flexibility in exchange for greater remuneration)³⁹³. From their point of view, the only negative impact that this model has on the working conditions of cooperative members is if they are remunerated less than what is specified in the collective bargaining agreement. They see this situation as a new development, attributable to the context of the economic crisis that started in 2007. They see it as the result of "malpractice" contrary to industry practices, of "improper" actions carried out by a reduced number of companies which, with their behaviour, have ended up breaking a company "toy" that until now had worked for everyone. They consider we are looking at a negative –yet controlled and reversible– effect, a delimited effect that should not lead to questioning the legitimacy and usefulness of the outsourcing model implemented.

"In 2007, with the onset of the crisis, some companies said (...) 'with such an extraordinary offer of workers, why pay 50% more, if these guys don't want it, these others will' (...). The malpractice of some companies started to shake up the model (...) the unions had arguments they didn't use to have (...). Some tried to take advantage of the model and get so much yield out of it that they ended up breaking their toy"

(Representative of the employers' organisation, FECIC)

For its part, the Labour Inspectorate coincides in pointing out that the Spanish meat industry is not in itself a fraudulent industry. It also does not question the use of worker cooperatives or other forms of outsourcing in the meat industry, provided these are within the limits of legality. The problem for the Labour Inspectorate lies in that its interventions showed that many of these "cooperatives" were not, in fact, acting as such, but rather as interposed companies that served to elude the responsibilities and obligations of client companies –the real employers of the workers allocate through these bogus cooperatives. This type of situation detected in the meat industry ("bogus cooperatives" that allocate "bogus self-employed workers") has a negative effect, not only on the employment rights and working conditions of members of cooperatives, but also on the sustainability of the Social Security system and on the competition conditions within the industry (damaging those companies that do assume their responsibilities as employers). From the point of view of the Labour Inspectorate, the outsourcing model via (bogus) worker cooperatives is not legal, or in accordance with the law, not for the fact that it resorts to cooperative models, but rather because, in many cases, the mobilised organisations are not acting as independent cooperatives of the client companies.

"We aren't talking of cooperatives –we are talking of bogus cooperatives. We are only interested in them when this kind of fraud comes into play. Why? Firstly, because we need to respect the rights of workers. Secondly, because there should be fair competition in the market. And thirdly, because this has economic consequences on the sustainability of the Social Security system"

(Representative of the National Office for Fraud Prevention of the Labour Inspectorate)

"In most cases these are not real cooperatives, but rather bogus cooperatives. That is, in theory a legitimate contracting model has been used, because the employer can subcontract whatever they deem fit but the problem is it's done in such a way that does not respect the minimum legal criteria established"

(Representative of the Provincial Labour Inspectorate of Barcelona)

Lastly, the main industry unions have perceived the use of the (bogus) worker cooperatives as not only an illegal model for organising the meat industry (bogus cooperatives and bogus self-employed workers), but also as a model that should be rejected in itself for impinging on the basic rights of workers and allowing employers to elude their responsibilities. They see it as a mechanism for making the use of labour flexible and precarious, which is excluded from the mechanisms of negotiation and protection recognised under labour law, and which, in that regard, provides a great deal less in terms of guarantees. The subcontracting problem in the meat industry would thus not only be limited to the single issue of remuneration, or even to the fraudulent use

³⁹³ See, for example, Iñaki de las Heras, *op. cit.* 13 September 2018; ANICE *op. cit.* 27 March 2018 and 3 August 2018. See also the interviews with employers' organisations representatives.

of the worker cooperative model, although this undoubtedly worsens the issue. The problem lies in the very practice of subcontracting the industry's core activities (be it under formulae of bogus cooperatives or others); in the trend of employers managing a significant number of workers allocated in the production process from outside the main organization. These practices, many of them currently considered "legal" within the Spanish legal framework, are what weaken the rights of workers and make employment progressively more precarious.

"If I subcontract, I have workers towards whom I do not need to take on any responsibility. Any problem they have is not my company's problem, I simply subcontract a service, and my production has to come out one way or the other (...). When you have workers on a payroll you need to negotiate the annual working hours with the work council, and this does not happen in a subcontracted company, because you pay for a certain number of hours, or an activity, and how these hours are supplied is up to the subcontracted company. (...) From the moment in which companies can subcontract under worse conditions than those in the collective bargaining agreement, it then becomes a case of blackmail against the workers of the main contractors. (...) And if, to top it off, your subcontracting is done illegally, then ..."
(Union representative, UGT)

Aside from these assessments, what seems evident is that the model of bogus worker cooperatives allowed a very flexible use of labour and a significant reduction in labour costs. Companies that resorted to this model achieved a significant competitive advantage as regards their competitors, many of which ended up emulating the system. The meat industry thus seemed to be doomed to fall into a spiral of progressive deterioration of employment, a spiral in which salaried work (and its protection mechanisms) ran the risk of being completely replaced by workers who were much more unprotected. The meat companies assumed no responsibility for these workers, whose costs for allocation and use were directly assumed by the workers themselves or, ultimately, by society as a whole. The impact of the use of bogus cooperatives in the meat industry implied not only a negative impact on workers' rights, but also on Social Security accounts (i.e. on the sustainability of the social protection systems). It was a model that also threatened to expand not only to other companies in the industry, but also to other industries. All of this led to an intensification of the trade union mobilisation in the sector that connected with other mobilisations that were happening around the use of bogus self-employed workers in what has been termed *platform capitalism*. The meat industry also witnessed different attempts to regulate the cooperative phenomenon, and especially, a broad intervention by the Labour Inspectorate against bogus cooperatives and bogus self-employed workers in the meat industry.

SECTION 4:

MOBILISATION AND ACTIONS IN THE FACE OF CHALLENGES POSED BY BOGUS WORKER COOPERATIVES IN THE MEAT INDUSTRY

The outsourcing of core activities via bogus worker cooperatives, as we have seen, has spread relentlessly in the meat industry throughout the last two decades. Having seen the failure of the strategy of legal mobilisation against bogus cooperatives (recurrent rejection of the argument of *illegal assignment* of workers based on the 2001 ruling of the Supreme Court), the main unions tried to set in motion other initiatives that limit their negative impact on the meat industry. Since the start of the 00s, for instance, an attempt was made, with little success, to use the industry collective bargaining agreement as a way of regulating the use of cooperatives in the industry. Collective bargaining agreements included statements of intention in favour of limiting the use of cooperatives, and even more specific agreements by which meat companies committed to progressively reduce the use of members of cooperatives (to a point where these would not exceed 15% of their workforce, for example) or not to use cooperatives simultaneously with other flexibilisation formulae, such as temporary hiring or irregular working hours. Many of these agreements and statements are still maintained today in the collective bargaining agreements that are in force³⁹⁴, but the trade union organisations have not been able to guarantee compliance with them, as some of the union representatives interviewed have recognised self-critically. Beyond these difficulties of union action, the truth is that these agreements were inserted in what are known as the *obligation clauses* of the collective bargaining agreements (of lower legal effectiveness) and did not provide for any monitoring instrument. Compliance with these agreements thus depended to a greater extent on the will of the parties, a will which, in light of the persistence and the spread of the cooperative phenomenon in the meat industry, seems not to have been very firm on the part of the companies. On the other hand, the impossibility of legally obliging worker cooperatives (or other subcontracting formulae that have started to crop up in the industry, such as *multiservice companies*) to apply the collective bargaining agreement in force, or the fact that the industry collective bargaining agreement barely has any effects on the actors that determine the industry's employment conditions (such as retail distribution chains), made evident the current limitations of collective bargaining in regulating and controlling the subcontracting chains of the meat industry. For the sector's union organisations, although separate mobilisation strategies have been maintained, it was also made evident that one needs to broach the problem of subcontracting at a higher level (transcending the context of sectoral collective bargaining), involving a larger number of actors (Ministry of Employment, Labour Inspectorate, Regional Governments, political parties), and applying more diversified and ambitious union strategies (mobilisations and strikes combined with negotiation processes, media pressure on the meat product distribution chains, continuous claims before the Labour Inspectorate, search for political alliances to promote legislative reforms, etc.).

One of these proposals, which emerged in the context of the recent negotiation of the collective bargaining agreement (2018), was the creation of a tripartite *Round Table*, under the supervision of the Ministry of Labour, which would deal specifically with the regulation of subcontracting in the meat industry³⁹⁵. The country's political instability and the consequent paralysis of the Ministry of Labour has meant, however, that the *Round Table* has barely had a chance to hold meetings. Furthermore, there are also discrepancies among unions as regards the opportunities and implications of an initiative of this kind. Thus, whereas some trade union organisations saw in it an opportunity to reach an agreement to regulate subcontracting in the sector, others feared a manoeuvre of the employers' organisations to buy time and try to paralyse the intervention then being carried out by the Labour Inspectorate against bogus cooperatives. As a result of all of the above, this attempt at a tripartite dialogue has not produced any noteworthy results, and the search for a dialogue-based solution to the problem of subcontracting in the meat industry (the need for which is shared by all parties) has been put on hold while the country's political situation is stabilised, and the consequences (administrative and legal) of the recent intervention by the Labour Inspectorate are digested and clarified.

³⁹⁴ Resolution of 19 March 2019, of the Directorate-General for Employment, by which the State collective bargaining agreement for the meat industry is registered and published, BOE, no. 86, of 10 April 2019, p. 37344; Resolution of 25 January 2018, of the Directorate-General for Employment, by which the Collective bargaining agreement for the poultry slaughter industry is registered and published, BOE, no. 39, of 13 February 2018, p. 17819.

³⁹⁵ Ibid.

Another path for action also explored, also with little success to date, is legislative reforms. In recent years, there have been certain parliamentary initiatives that have tried to reform the Cooperatives Law in force³⁹⁶. Some regional parliaments have approved regional regulations regarding cooperatives that seek to adjust state regulations to the specific nature of the cooperative phenomenon in each region. In certain cases, such as Catalonia, which concentrates around 40% of the Spanish meat industry, the approved law (*Law 12/2015, of 9 July, on Cooperatives*), attempted to correct some of the shortcomings of the state regulations, making it necessary, for instance, for worker cooperatives registered in Catalonia to apply to working members the same working conditions specified in the industry's collective bargaining agreement. Despite this, the new Catalan regulations have received significant criticism, not only from representatives of employers' organisations, but also from union representatives and the Labour Inspectorate (mainly due to their poor efficiency and the possible perverse effects deriving from their application). Thus, for instance, it has been pointed out that the regulations are not being applied, and that the comparison of work conditions, when it has been made, has most often been limited to a question of perceived salaries, with many other compensations and rights covered in the collective bargaining agreement being ignored³⁹⁷. At the same time, it has been noted that it is very simple to avoid applying the regulations: registering cooperatives that function in Catalonia as state-wide cooperatives, passing on salary equalisation costs to cooperative members, etc.³⁹⁸ Finally, there have been reports that the regulations impose significant obstacles to the true cooperative movement, and that, without meaning to, they could even end up "laundering" the operation of certain organisations which, as bogus cooperatives, should be expelled from the industry and not simply regulated in some of their dimensions³⁹⁹.

Lastly, as regards the different paths of action explored, the intervention of the Labour Inspectorate was, according to all of our interlocutors, the most determining factor of the changes recently applied in the meat industry. As a result of union complaints, and given the scope (and progressive degradation) that the phenomenon had acquired, the Labour Inspectorate started to become much more sensitive to the risks and challenges of subcontracting practices (bogus cooperatives and bogus self-employment), which did not only affect the meat sector⁴⁰⁰. For instance, the *Plan Director por un Trabajo Digno 2018-2020* (Master Plan for a Dignified Job, 2018-2020) of the Labour Inspectorate, made one of its priority lines of action the fight against bogus cooperatives and bogus self-employment, which has been implemented in the meat industry with the start-up of an ambitious national campaign against this trend. The Labour Inspectorate, after having established that there were cases of illegal intermediation in which supposed cooperatives were acting as fronts for client companies who were looking to avoid their responsibilities as employers, proceeded to register on the client companies' Social Security *General Regime* all of the workers from these bogus cooperatives (thus giving these workers access to the rights and protections recognised to employees)⁴⁰¹. This led to the regularisation of some 12,000 bogus self-employed workers in the meat industry in 2018, and a further 7,800 in 2019, leaving approximately 1,200 workers that have yet to be regularised, from some 10 companies that still use the bogus worker cooperative model, according to union estimates⁴⁰².

The main (bogus) worker cooperatives of the meat industry have been rendered practically inoperative. *Servicarne*, following the last regularisation processes in the companies of the *Vall Companys group* (December 2019), now has barely one hundred cooperative members (compared to the 5,300 members it had at one point in 2018)⁴⁰³. Furthermore, as we saw in April 2019, the Ministry of Labour, at the request of the Labour Inspectorate, withdrew from the cooperative the licence to continue operating as such (a decision which was appealed before the courts, thereby allowing it to continue operating for the time being)⁴⁰⁴. *Trabajadores Asociados de la Industria Cárnica*, the industry's second largest cooperative, approved its dissolution as a cooperative in April 2019, which also happened with *Clavial* (the third largest) and *Workman* (the fourth)⁴⁰⁵. Others, such

³⁹⁶ In February 2018, for instance, the parliamentary group *Unidas Podemos* presented at the national Parliament a draft law for amending the Cooperatives Law, which proposed that all cooperatives acting as subcontracted companies should include their members under the *General Regime* of the Social Security system, and apply to them the *Estatuto de los Trabajadores* (the Spanish Labour Code) and the relevant collective bargaining agreement. The proposal was not developed due to the parliamentary deadlock, which led to several elections being held.

³⁹⁷ See, for example, the interview with UGT-FICA trade union representative in Catalonia.

³⁹⁸ See, for example, the interview with Labour Inspectorate representative in Barcelona.

³⁹⁹ See, for example, the interview with Labour Inspectorate representative in Barcelona.

⁴⁰⁰ Proof of this are the recent figures for regularisations of "bogus self-employed workers" recorded in Spain (not only in the meat industry): from 1,103 in 2016 and 1,845 to 2017 to 18,851 in 2018. Cf. Ministry of Labour, op.cit., 2018, p. 66.

⁴⁰¹ See the interviews with Labour Inspectorate representatives.

⁴⁰² Comisiones Obreras, op.cit., 2019, p. 4. See also the interview with the representative of Comisiones Obreras.

⁴⁰³ Comisiones Obreras, op.cit., 2019, p. 4-5 and Comisiones Obreras Industria "Nota de prensa" (Press release) of 5 December 2019.

⁴⁰⁴ https://elpais.com/economia/2019/05/02/actualidad/1556826727_472578.html

⁴⁰⁵ Comisiones Obreras, op.cit., 2019, p. 4-5.

as *Auga Sociedad Cooperativa*, are still active, but they have changed their statutes so that members are included under the Social Security *General Regime* according to Comisiones Obreras. Despite the fact that the Labour Inspectorate has not imposed sanctions as such, its intervention in work centres has involved notifying client companies of their duty to pay Social Security contributions with a retroactive effect of 4 years and 20% surcharge, amounting to a total of 200 million euros for *Servicarne* alone, as it involves some fifty meat companies in total⁴⁰⁶.

In the more specific case of Catalonia, where the bulk of the competencies as regards Labour Inspection are transferred to the regional government, the Labour Inspectorate campaign took the form of interventions in 120 work centres of 110 companies of the meat industry, as well as in 26 worker cooperatives. As a result of said interventions, 7,263 workers who provided their services as cooperative members within the *Special Self-employment Regime* of the Social Security system were registered as employees under the Social Security *General Regime*, and then fell under the State Collective Bargaining Agreement of the Meat Industry. Up to September 2019, the Social Security system in this region collected a total of 8.1 million euros for unpaid contributions from the meat industry, and furthermore, the activity of all bogus worker cooperatives linked to the meat companies inspected was halted⁴⁰⁷. However, the intervention of the Labour Inspectorate in Catalonia (which is accountable to the regional government except for matters concerning Social Security) sparked something of a controversy. The representative of the Provincial Labour Inspectorate of Barcelona (which is accountable to the Ministry of Labour and not the regional government) criticised that the intervention in Catalonia had used different criteria than other interventions carried out in other parts of Spain, making it possible for many Catalan companies to regulate the situation of their “bogus self-employed workers” without having to face large settlement payments, which has distorted industry competition and led to often opposing positions between different employers’ organisations⁴⁰⁸.

In any case, it is undeniable that the intervention of the Labour Inspectorate in the Spanish meat industry as a whole, coupled with union mobilisation and pressure, has meant that many companies in the industry, regardless of their strategies in the courts, choose to sit down at the table with trade unions to negotiate the regularisation of their “bogus self-employed workers”. Thus, this intervention has had reach and impact, and has allowed the heads of the Labour Inspectorate to conclude that, while we are awaiting the resolution of the ongoing legal proceedings, the problem of the bogus worker cooperatives in the meat industry is resolved at this point in time.

“For us, to a large extent, the phenomenon [of the bogus cooperatives] in the meat industry has been dealt with. I don’t know about other industries, but in the meat industry, to a large extent, it has been halted, at least going forward; looking back it isn’t, because it is still in court”
(Representative of the Special Directorate of the Labour Inspectorate)

⁴⁰⁶ The *Servicarne* case is fully in the courts today (with 48 ongoing legal proceedings) due to the disagreement of companies with the conclusions and interventions of the Labour Inspectorate. For the moment, only four cases have been resolved, three of which have sided with the client companies of *Servicarne*, and one with the General Treasury of Social Security and the Labour Inspectorate, although it is still early to say how the multiple legal proceedings that are still ongoing will be ruled. For information about the intervention of the Labour Inspectorate across Spain, see: Ministry of Labour, *Informe Anual de la Inspección de Trabajo y Seguridad Social 2018*, p. 93; Comisiones Obreras, op.cit., 2019; Comisiones Obreras Industria “Nota de prensa” (Press release) of 5 December 2019.

⁴⁰⁷ Labour Inspection and Social Security Consortium of Catalonia, *Actuaciones en el sector cárnico en Cataluña*, 19 September 2019.

⁴⁰⁸ See the interview with Labour Inspectorate representative in Barcelona.

SECTION 5:

BEYOND BOGUS WORKER COOPERATIVES: THE CHALLENGES FACING SUBCONTRACTING IN THE MEAT INDUSTRY

In general terms, the intervention of the Labour Inspectorate has been strongly questioned by the main employers' organisations. Although with slight differences in their positions, these organisations have defended the legality of the existing subcontracting model, advocating only for the incorporation of measures to avoid the most severe abuses registered. The proposal from employers' organisations basically consists in incorporating a series of self-limitations on the use of worker cooperatives, whether it be by means of the collective bargaining agreement (seeking a formula that provides legal efficiency and guarantees to the agreements reached) or by means of one-off legal reforms (such as regulating the subcontracting of self-employed workers in cooperatives by means of the *Self-Employment Statute Law*)⁴⁰⁹. The existing subcontracting model would thus be safeguarded, regulating what the employers' organisation perceives to be its most pernicious effects: members of the cooperative receiving lower income (and therefore, future benefits). The solution would consist in aligning the members of the cooperative with the *Social Security General Regime* (or directly including them in it), and applying the collective bargaining agreement, at least as regards remuneration aspects (leaving other problems untouched, such as the deregulation of the working hours, the extreme flexibilization of the use of labour, the lack of protection as regards occupational risks, etc.).

"Are we going to scrap the model? Well no, the model has been proven to be good, it's efficient, and it works for everyone, if we do it right. What we need to do is regulate the model and provide protection"
(Representative of employers' organisation, FECIC)

For employers' organisations, the recent intervention of the Labour Inspectorate in the industry represents an unjustified shift in the approach (with a motivation that is more "ideological" than "technical") as regards a subcontracting model that has been known and in force for decades in the meat industry⁴¹⁰. From their point of view, this is a model whose legality has been guaranteed by the favourable rulings accumulated over the years, and which is now strongly disrupted by the legal insecurity generated as a result of the intervention of the Labour Inspectorate –one that questions the legality of the model, but which has been appealed by the meat industries. Employers' organisations consider that the reform of the subcontracting model in force has not been negotiated, putting at risk, as they see it, the viability of many companies that are not able to assume the payments deriving from the Inspectorate's intervention⁴¹¹.

Union representatives, for their part, have a very positive view of the recent intervention of the Labour Inspectorate, as they believe it has made it possible to halt the abuses of bogus worker cooperatives:

"We have not put an end to subcontracting the core activity, but the model of the cooperative is about to become extinct, and that was the greatest problem"
(Union representative, CCOO)

The coupling of the intervention of the Labour Inspectorate with pressure from the unions has made it possible to regulate most of the bogus self-employed workers that existed in the industry, and to reduce to a minimum the existence of bogus worker cooperatives. Having been included in the *Social Security General Regime*, most of these bogus self-employed workers registered a significant improvement in their working and employment conditions, benefitting from a whole series of rights (collective bargaining agreement, social protection, union representation, etc.) from which they were excluded before. But does this mean that the problem of subcontracting in the meat industry has been solved? The union representatives interviewed do not believe it does.

⁴⁰⁹ See the interviews with employers' organisations representatives.

⁴¹⁰ See, for example: ANICE *op. cit.* 27 March 2018 and 3 August 2018; Iñaki de las Heras, *op. cit.* 13 September 2018. See also the interviews with employers' organisations representatives.

⁴¹¹ See, for example: ANICE *op. cit.* 27 March 2018 and 3 August 2018. See also FIAB-ANICE-PROPOLLO press release of 27 February 2018 "Evaluación del impacto de las acciones iniciadas por la inspección de trabajo", available here [access 9 July 2020]: www.anice.es/industrias/ano-2018/impacto-de-las-actuaciones-de-la-inspeccion-de-trabajo_22134_236_30159_0_1_in.html.

Firstly, many of the factors that push companies to seek these highly flexibilised (and precarious) organizational models in the meat industry have not been resolved, nor do they depend exclusively on the meat industry (operation of retail distribution chains, regulation of commercial working hours, impact of free trade agreements, etc.). In this regard, there is a risk of returning to a similar situation to what existed before the intervention of the Labour Inspectorate. The employers' representatives recognise that many companies in the industry have opted to regularise the situation of their bogus self-employed workers, given the uncertainty and the fear generated by the intervention of the Labour Inspectorate, but many of them would also support going back to the traditional subcontracting model once any uncertainties regarding its legality are clarified legally. The employers' organisations recognise that it would be hard to return to the same starting point, but they do believe it is possible that there will be a certain recovery (with adjustments) of a model that is also present in other European countries⁴¹². Thus, despite the fact that the presence of bogus self-employed workers and bogus cooperatives has been significantly reduced in the sector, the future of this industry is still uncertain and will greatly depend on the direction that the ongoing legal proceedings will take.

"A regularisation process has started, and there has been a multiplicative effect with these interventions by the Labour Inspectorate, but it is certainly not finished, by any means. (...) In many cases, instead of incorporating members of cooperatives into the personnel of the main contractors, what they have done is transform the cooperative into a subcontractor"
(Representative of the Provincial Employment Inspection of Barcelona)

On the other hand, as this representative of the Labour Inspectorate points out, the regularisation of bogus self-employed workers has not always been made effective by absorbing them into the workforce of the main contractors, as might have been desirable, but rather via different kinds of subcontracting (multiservice companies, commercial companies, etc.). These formulae are especially advantageous in contexts such as the Spanish market, where since the labour reform of 2012, company agreements are above industry bargaining agreements:

"Now [following regularisation] there may be even more subcontracting via multiservice companies than in the past, because there has been, not a replacement effect, but some companies have said: 'if the focus is on cooperatives, then I will channel it to multiservice companies'"
(Union representative, CCOO)

In some cases, the mobilised subcontractors have even been created ad hoc by the meat companies, which have used them as "fronts" so that they can continue using a large group of workers without assuming any responsibility towards them as employers. The members of the cooperative then went on to become employees of the new commercial company created and subcontracted by the meat company, carrying out the same functions they had carried out previously and holding the same jobs they had at their (bogus) worker cooperatives⁴¹³. Although all of these scenarios undoubtedly indicate an improvement in general terms compared to bogus cooperatives, and give more rights to their workers, the working conditions to which these subcontracted workers are subjected are not quite comparable to the client companies for which they work.

"Working conditions should in theory be the same because the commercial company should apply the collective bargaining agreement, but the truth is that these [subcontracted] people are unprotected – because there is a high turnover, they are temporary workers, they do not have an internal union organisation (...). There is a series of negotiations that the collective bargaining agreement states that legal representatives should carry out with the main contractor (negotiation of bonuses, calendars, holidays...), but given that [often de facto] there is no legal representation of workers in subcontracted companies, then they simply aren't negotiated, and that leads to poorer working conditions"
(Union representative, UGT)

⁴¹² See the interviews with employers' organisations representatives.

⁴¹³ This has been the case of the regularisation process of 1,600 bogus self-employed workers from different cooperatives that formed the bulk of the Catalonia staff of one of the main Spanish meat groups (*Grupo Jorge*) (cf. Tabla 4). These bogus self-employed workers were then integrated into a commercial company (*Axparia Trade*) created and subcontracted by the meat company itself during the regularisation process. This was a case of illegal assignment of workers, where UGT-FICA union pressure led to the meat company rectifying, and finally accepting to include these workers as members of their personnel. Regarding this case, see: *Labour Inspection and Social Security Consortium of Catalonia, Reports no. 25/0000950/18 and 8/0024672/18 of 31 October 2018*.

The situation makes trade union organisations positively value the progress that has been made, but also call for a global solution to the subcontracting phenomenon in the meat industry⁴¹⁴. A solution that would require, among other factors, reforms not only in the state-wide cooperatives law (for instance, incorporating measures to expedite interventions against “bogus cooperatives”), but also in the Spanish Workers’ Statute (restricting the use of subcontracting to specialised activities that the company cannot carry out).

SECTION 6:

FINAL CONCLUSIONS

The case of the Spanish meat industry constitutes a clear example of the progressive process of emptying (of functions, resources, workers and rights) registered by companies in many European industries. It is a process of transformation of the employment world, which aspires to build a “company without workers”, where the allocation and use of people’s production capacities do not imply their formal and stable integration in the company. In short, it aspires to fully exercise the functions of an employer without assuming any of the obligations and responsibilities that said statute implies. Cases such as the meat industry under study here show that subcontracting and outsourcing of production activities (including core activities) are an essential part of this strategy, and remind us that resorting to formulae and statutes of employment (such as “bogus self-employment”) that offer less protection than that afforded to salaried workers, are not exclusive to so-called platform capitalism.

The case of the meat industry in Spain has allowed us to highlight the negative impact of subcontracting on the working conditions and rights of workers, both subcontractors and, in the medium term, all salaried workers: loss of purchasing power and lower protection levels, extension and deregulation of working hours, higher accident rates and health risks, precarious relationship between workers and their jobs, etc. In the case of the meat industry, this negative impact has undoubtedly been aggravated by the (allegedly fraudulent) use of labour formulae that eschew the protection mechanisms of salaried work (such as the bogus worker cooperatives we have analysed). However, as we have seen, the negative impact of subcontracting extends beyond this specific model for outsourcing activities, whose legality is being questioned today in Spain. The debate about the purpose, the impact and the regulation of subcontracting should therefore be extended equally to other less extreme formats that may even be considered legal under the current European regulatory framework. In this regard, this analysis of the Spanish meat industry has also made evident that the resolution of the problems associated to subcontracting is complex and requires the involvement of different actors and institutions at different levels. Neither union action on its own, nor collective bargaining, will provide a global, lasting response to the challenges posed to workers’ rights by subcontracting practices. Despite the above, this case study has made evident the extent to which the simultaneous and decided intervention of labour authorities and union organisations can improve the situation of an industry.

⁴¹⁴ See the interviews with trade union representatives.

ANNEX III:**SOURCES USED AND FIELD WORK CARRIED OUT**

The bulk of the information used in this paper stems from two essential sources: the in-depth interviews made of key informants (see the table further below for more detailed profiles) and the documentation (provided by the trade unions) generated by the intervention of the Labour Inspectorate in the Spanish meat industry (2017-2019). The in-depth interviews were all carried out in Spain (except for the interview of the representative of the European trade union) between November and December in 2019. The industry's most representative union and employers' organisations were selected, as well as the areas of the Labour Inspectorate that have played a more decisive role in the intervention in the meat industry. All of the interviews were recorded with the prior consent of the interviewees, their content transcribed and subsequently analysed following the usual practices of qualitative analysis techniques of this kind. As regards the documentation of the Labour Inspectorate (intervention reports, settlement reports, etc.) only part of the existing information has been analysed. These reports are based on surprise visits to the work centres made by inspectors, on the analysis of abundant documentation requested from the companies regarding their operation, and on the interviews of workers and company managers carried out on-site. In cases as important for our study as that of the cooperative *Servi-carne*, the Labour Inspectorate visited all of the work centres where it was present, which facilitated a global vision of its operation (making it possible for there to be a subsequent request to the Ministry of Labour for its disqualification as a cooperative). Both types of materials have been complemented with the analysis of court rulings (where many aspects of the operation of the meat industry are detailed), of documents (by academics, unions and employers' organisations) regarding the meat industry, as well as of statistics regarding the sector from Eurostat and the Spanish *Instituto Nacional de Estadística*. The tables of annex II provide more details regarding the use of these sources.

| EUROPEAN TRADE UNION | | | |
|--|---|--|------------|
| E1 | EFFAT | Deputy Secretary General (European Federation of Food, Agriculture and Tourist Trade Unions) | 21/11/2019 |
| DOMESTIC TRADE UNIONS (SPAIN) | | | |
| E2 | Comisiones Obreras | Sectoral Secretary of the Food Industry, Federación Estatal de Industria | 23/10/2019 |
| E3 | Comisiones Obreras | Sectoral Secretary, CCOO-Industria, Cuenca (Castilla La Mancha) | 5/12/2019 |
| E4 | Unión General de Trabajadores | Sectoral Secretary of Food, Beverages and Tobacco, Federación de Industria, Construcción y Agro (FICA) | 29/11/2019 |
| E5 | Unión General de Trabajadores | Sectoral Secretary of Food, Beverages and Tobacco, Federación de Industria, Construcción y Agro (FICA-CATALUÑA) | 8/11/2019 |
| E6 | Unión General de Trabajadores | Sectoral Secretary of Food, Beverages and Tobacco, Federación de Industria, Construcción y Agro (FICA-PAÍS VALENCIANO) | 21/11/2019 |
| NATIONAL EMPLOYERS' ORGANISATIONS (SPAIN) | | | |
| E7 | Federación Empresarial de Carnes e Industrias Cárnicas (FECIC) | Secretary General, FECIC | 11/11/2019 |
| E8 | The Spanish Asociación Nacional de Industria de la Carne en España (ANICE) has also been interviewed for this research. They finally refused to appear in this report because they feel their position concerning the outsourcing model is misunderstood and they do not agree with the conclusions of the report. | | |
| LABOUR AND SOCIAL SECURITY INSPECTORATE (SPAIN) | | | |
| E9 | Labour and Social Security Inspectorate | Director, Special Directorate of the Labour and Social Security Inspectorate, Ministry of Labour | 5/11/2019 |
| E10 | Labour and Social Security Inspectorate | Director, National Office for Fraud Prevention of the Labour and Social Security Inspectorate | 5/11/2019 |
| E11 | Labour and Social Security Inspectorate | Labour Inspector (Barcelona) | 3/12/2019 |

ANNEX IV:

SUPPORTING DATA ON THE MEAT INDUSTRY

Table 1. Basic data on the Spanish meat industry, 2008-2017

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| Enterprises (number) | 4,153 | 4,099 | 4,035 | 4,062 | 3,910 | 3,297 | 3,455 | 3,657 | 3,714 | 3,661 |
| Production value (million euro) | 19,015 | 18,087 | 18,744 | 20,209 | 20,400 | 21,400 | 21,684 | 23,867 | 23,591 | 25,358 |
| Production of meat (thousand tonnes) | 5,684.2 | 5,338.9 | 5,466.8 | 5,588.8 | 5,573.6 | 5,481.8 | 5,758.4 | 6,052.7 | 6,471.7 | 6,597.3 |
| Value added at factor cost (million euro) | 3,664.5 | 3,540.8 | 3,609.2 | 3,604.6 | 3,582.8 | 3,424.0 | 4,171.2 | 3,919.7 | 3,960.3 | 4,120.9 |
| Persons employed (number) | 86,871 | 83,909 | 83,344 | 83,277 | 80,812 | 81,020 | 83,250 | 85,450 | 91,098 | 96,576 |
| Employees in full time equivalent units (number) | 81,852 | 79,745 | 78,559 | 78,514 | 75,425 | 72,949 | 78,010 | 81,144 | 86,102 | 91,162 |
| Personnel costs (million euro) | 2,277.0 | 2,218.2 | 2,238.0 | 2,326.1 | 2,192.4 | 2,227.4 | 2,234.5 | 2,350.7 | 2,483.3 | 2,649.3 |
| Hours worked by employees (thousands) | 151,089 | 146,106 | 143,347 | 143,017 | 137,535 | 133,539 | 143,588 | 148,550 | 152,532 | 162,155 |
| Share of personnel costs in production (%) | 12.0 | 12.3 | 11.9 | 11.5 | 10.7 | 10.4 | 10.3 | 9.8 | 10.5 | 10.4 |

Source: Eurostat, Annual detailed enterprise statistics for industry (NACE Rev. 2, B-E) [sbs_na_ind_r2]; and Production of meat.

Table 2. Evolution (gross and relative) of costs for staff and outsourced activities in the Spanish meat sector, 2008-2015. Unit: thou. euros and percentage

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
|---|------------------|------------------|------------------|------------------|------------------|------------------|------------------|----------------------|
| Staff costs | 2.297.133 | 2.246.274 | 2.265.737 | 2.349.065 | 2.214.503 | 2.225.021 | 2.238.392 | 2.326.545 |
| Costs of work carried out by other companies | 627.493 | 615.943 | 695.974 | 726.088 | 667.827 | 644.555 | 781.432 | 1.052.009 |
| Costs of external services (*) | 1.589.897 | 1.590.239 | 1.666.720 | 1.700.413 | 1.736.418 | 1.700.457 | 1.670.939 | 1.898.050 |
| TOTAL outsourcing costs (*) | 2.217.390 | 2.206.182 | 2.362.694 | 2.426.501 | 2.404.245 | 2.345.012 | 2.452.371 | 2.950.059 |
| | 2008-2009 | 2009-2010 | 2010-2011 | 2011-2012 | 2012-2013 | 2013-2014 | 2014-2015 | 2008-2015 (%) |
| Staff costs | -2,2 | 0,9 | 3,7 | -5,7 | 0,5 | 0,6 | 3,9 | 1,3 |
| Costs of work carried out by other companies | -1,8 | 13,0 | 4,3 | -8,0 | -3,5 | 21,2 | 34,6 | 67,7 |
| Costs of external services (*) | 0,0 | 4,8 | 2,0 | 2,1 | -2,1 | -1,7 | 13,6 | 19,4 |
| TOTAL outsourcing costs (*) | -0,5 | 7,1 | 2,7 | -0,9 | -2,5 | 4,6 | 20,3 | 33,0 |

Source: Author's own using data from the Spanish National Statistics Institute, Estadística Estructural de Empresas: Sector Industrial report (2008-2015).

(*) Costs of external services: in order to be able to estimate the cost of outsourced works only, the following costs are not included: "leases and fees", "insurance premiums of non-social policies", "banking services and similar" and "utilities (electricity, water, etc.)". Based on the data from the Estadística Estructural de Empresas report, we know that, in 2016 and 2017, these costs represented 26% of the total of "Costs of external services" in the "Food Industry" (of which the meat industry is the most relevant). An estimate is made for the meat sector, deducting for each year 26% of the total cost of external services.

Table 3. Examples of outsourcing relationships (description of tasks and number of workers involved) in the Spanish meat industry (Grupo Vall Companys, 2018-2019)

| CÁRNICAS FRIVALL. SOCIEDAD LIMITADA (CUENCA). GRUPO VALL COMPANYS. | |
|--|--|
| Main contractor | <p>Tasks: Only Administration, Sales, Quality, Human Resources and Maintenance activities. Production tasks completely outsourced.</p> <p>TOTAL EMPLOYEES MAIN CONTRACTOR: 42</p> |
| Subcontracted companies | <ul style="list-style-type: none"> • SERTRADEC PRODUCTION MEAT, Sociedad Limitada (commercial company, meat industry): no. of workers not specified. Tasks: cutting, shipments, freezing and packing, packaging. • COPERGO (Worker cooperative): 30 cooperative member workers. Tasks: ancillary slaughtering jobs • AUGA SOCIEDAD COOPERATIVA (Worker cooperative): 9 cooperative member workers. Tasks: Pallet handling work • GLOBAL CARNE (Worker cooperative): 46 cooperative member workers. Tasks: main slaughter line • SERVICARNE (Worker cooperative): 300-400 cooperative member workers. Tasks: cutting room, shipments, freezing and packing, packaging. <p>TOTAL SUBCONTRACTED WORKERS: around 500</p> |
| CÁRNICAS CINCO VILLAS, SOCIEDAD ANÓNIMA (ZARAGOZA). GRUPO VALL COMPANYS. | |
| Main contractor | <p>Tasks: except for the slaughtering in the morning shift, employees mostly work on commercial and administrative activities.</p> <p>TOTAL EMPLOYEES MAIN CONTRACTOR: 98</p> |
| Subcontracted companies | <ul style="list-style-type: none"> • SERVICARNE (Worker cooperative): 115 cooperative member workers. Tasks: slaughter room (mainly afternoon shift). • COPERGO (Worker cooperative): 530 cooperative member workers. Cutting tasks and shipments. • POLMARK SERVICIOS EXTERNOS, Sociedad Limitada (multiservice commercial company): no. of workers not specified. Tasks: washing boxes, packaging, filleting, freezing and hygiene maintenance of facilities. • AUGA SOCIEDAD COOPERATIVA (Worker cooperative): 60-70 cooperative member workers. Tasks: Pluck processing and ancillary services. <p>TOTAL SUBCONTRACTED WORKERS: more than 715</p> |
| FRIMANCHA INDUSTRIAS CÁRNICAS, SOCIEDAD ANÓNIMA (CIUDAD REAL). GRUPO VALL COMPANYS. | |
| Main contractor | <p>Tasks mostly (130 workers) in the Administration, Sales, Quality and Maintenance Departments. Production tasks: 15-20 employees in the cooked meat products room (where the work is considered more complex, given the industrial procedure it requires). Production jobs include: Production Manager, Head of Meat Products in cooked products and Logistics Manager.</p> <p>TOTAL EMPLOYEES MAIN CONTRACTOR: 150</p> |
| Subcontracted companies | <ul style="list-style-type: none"> • SERVICARNE (Worker cooperative): 200 cooperative member workers. Tasks in slaughterhouse, meat products and consignments sections. • CURTIVAL, Sociedad Anónima (commercial company, textile industry): 2 employees. Tasks: treatment of hides and cow leather <p>TOTAL SUBCONTRACTED WORKERS: 202</p> |

| AVÍCOLA DE LLEIDA, SOCIEDAD ANÓNIMA (LÉRIDA). GRUPO VALL COMPANYYS. | |
|--|--|
| Main contractor | <p>Tasks: supervision of subcontractors, quality control and office work.</p> <p>TOTAL EMPLOYEES MAIN CONTRACTOR: 51</p> |
| Subcontracted companies | <ul style="list-style-type: none"> • SERVICARNE (Worker cooperative): 166 cooperative member workers. Tasks: slaughtering of animals, cutting and deboning. • ADAPTA FACILITY SERVICES, Sociedad Limitada (commercial company, meat industry): 132 workers. Tasks: cutting. • APSALABO, Sociedad Limitada (multiservice commercial company): 36 workers. Tasks: labelling. • SERVEIS ESCORXADORS DEL SEGRIA (SERESSE), Sociedad Anónima (commercial company part of the same business group, Vall Companys): 45 workers. Tasks: slaughtering and classification of animals. <p>TOTAL SUBCONTRACTED WORKERS: 379</p> |

Source: author's own based on the reports from the State Body of Labour Inspection and Social Security, Settlement reports no. 132018009801310 (pp. 106-107), 162018009800709 (pp. 57-58) and 252018009800623 (pp. 107-108); Provincial Labour and Social Security Inspectorate of Zaragoza, Settlement reports no. 502019008029115 (p. 22), 502019008031539 (p. 78) and 502018009802014 (pp. 83-84).

Table 4. Examples of subcontracting relationships (description of tasks and number of workers involved) in the Spanish meat industry (Grupo Jorge, 2018)

| GRUPO JORGE WORK CENTRE LOCATED IN BARCELONA |
|--|
| <p>Main contractor LE PORC GOURMET, Sociedad Anónima, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • TRABAJADORES ASOCIADOS DE LA INDUSTRIA CÁRNICA-TAIC (worker cooperative) for the slaughter of pigs • SERVEIS D'EXCORSADOR CLAVIAL/OFICICAT (worker cooperative) for the loading of carcasses. <p>TOTAL SUBCONTRACTED WORKERS: around 326</p> |
| <p>Main contractor RIVASAM INTERCONTINENTAL, Sociedad Anónima, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • AUGA SOCIEDAD COOPERATIVA (worker cooperative) for the cutting of pig carcasses, freezing and loading of produce • SERVEIS D'EXCORSADOR CLAVIAL/OFICICAT (worker cooperatives), for packing, freezing and packaging of pork products <p>TOTAL SUBCONTRACTED WORKERS: around 827</p> |
| <p>Main contractor PRODUCTOS PORCINOS SECUNDARIOS, Sociedad Anónima, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • ASERVEIS D'EXCORSADOR CLAVIAL/OFICICAT (Worker cooperatives) for skinning of entrails. <p>TOTAL SUBCONTRACTED WORKERS: around 198</p> |
| TOTAL SUBCONTRACTED WORKERS IN THE WORK CENTRE: 1351 |
| GRUPO JORGE WORK CENTRE LOCATED IN LÉRIDA |
| <p>Main contractor FORTUNE PIG, Sociedad Limitada, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • TRABAJADORES ASOCIADOS DE LA INDUSTRIA CÁRNICA-TAIC (worker cooperative) for the slaughter of pigs <p>TOTAL SUBCONTRACTED WORKERS: around 73</p> |
| <p>Main contractor RIVASAM INTERCONTINENTAL, Sociedad Anónima, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • TRABAJADORES ASOCIADOS DE LA INDUSTRIA CÁRNICA-TAIC (worker cooperative) for the cutting of pig carcasses. <p>TOTAL SUBCONTRACTED WORKERS: around 157</p> |
| <p>Main contractor PRODUCTOS PORCINOS SECUNDARIOS, Sociedad Anónima, commercial company, meat industry, part of Grupo Jorge</p> <p>Subcontracted companies</p> <ul style="list-style-type: none"> • SERVEIS D'EXCORSADOR CLAVIAL /OFICICAT (worker cooperatives) for: stripping of entrails, packing of pluck and cleaning of large intestine. <p>TOTAL SUBCONTRACTED WORKERS: around 35</p> |
| TOTAL SUBCONTRACTED WORKERS IN THE WORK CENTRE: 265 |

Source: author's own based on reports from the Labour Inspection and Social Security Consortium of Catalonia, Reports number: 25/0000950/18 and 8/0024672/18

Table 5. Comparison of working conditions and protection levels for workers in the Spanish meat industry

| | WORKER COOPERATIVES | MEAT COMPANIES |
|---|--|---|
| Gross salary (2017) (*) | Poultry sector: €9-12 /hour. Meat sector: €10-15 /hour. €1623 /month (12 pays), €19481 /year | €11,88 /hour, €1752 /month (12 pays), €21024 /year |
| | Self-employed workers in cooperatives receive 7% less (€1543) than salaried employees of meat companies | |
| Net salary (2017) (*) | Amounts deducted monthly: -Income tax withholding (**) -Mandatory cooperative fee: € 50 /month -Work clothes, hand tools and others: around €30 /month -Self-employment Social Security contributions: 29.8% of contribution basis, €267/month (with minimum contribution basis) -Additional accident cover (***) : 2.2% of contribution basis, around €20 /month -Additional cover for termination of activity (unemployment) (***) : 2.2% of contribution basis, around €20/month APPROXIMATE SALARY: €1269 /month (12 pays), €15224 /year | Amounts deducted monthly: -Income tax withholding (**) -Contribution to the General Regime of the Social Security system: 6.35% of the contribution basis, around 111.39 € /month [The employer pays for the rest of the contributions to the worker's social security, 28.6% of the contribution basis] APPROXIMATE SALARY: €1641 /month (12 pays), €19692 /year |
| | Self-employed workers in cooperatives receive 23% less (€4468) than salaried employees of meat companies | |
| Fringe benefits | None | Bonuses for night shifts, hazardous/ arduous work, length of service. |
| Social Security contribution basis | €893.1 /month | Contribution basis depends on the salary of each worker. The minimum contribution basis is 1752 €/month |
| | Contribution bases of self-employed workers of cooperatives are 49% lower (€859 /month) than those of salaried employees of meat companies | |
| Occupational accident protection | In order to have this protection, self-employed workers need to pay an additional contribution to Social Security (2.2% of the contribution basis). Most (95%) of the members of the cooperative do not pay for this insurance. The cover amount would be 75% of the contribution basis, that is, with the minimum contribution basis (the most common among self-employed workers): €669 gross/month, €22.3 /day. For members without cover, the cooperative pays 26.5 €/day for a maximum of a year in the case of "evident" accidents. The rest of workplace injuries (most) are processed as common illnesses (with 10 days of benefit, by decision of the head of the team) | Salaried workers in the industry have 100% of this risk covered. The benefit is 100% of the contribution basis as from the first day. In the case of the minimum contribution basis considered: € 1752 gross/month, €58.46 /day. |
| | Protection for self-employed workers in cooperatives is 62% lower (€1083 /month) to that of salaried workers in meat companies | |

| | WORKER COOPERATIVES | MEAT COMPANIES |
|---|--|--|
| Occupational accident rate (2016) | 117.5 accidents per 1000 workers [The Labour Inspectorate estimates that the real accident rates are 3 or 5 times higher than those declared] | 63.0 accidents per every 1000 workers |
| Protection for common illness or non-occupational accident | Between the 4th and 20th day of sick leave, workers receive 60% of the contribution basis (€535.86 /month, €17.8 /day). As from the 21st day of sick leave, cover is 75% | Between the 4th and 20th day of sick leave, workers receive 60% of the contribution basis (€1052.4 /month, €35.08 /day). As from the 21st day of sick leave, cover is 75%. In certain cases, the collective bargaining agreement establishes a salary supplement of €10.4 /day |
| | The protection of self-employed workers of the cooperatives is 49% lower (€516 /month) to that of salaried workers of meat companies | |
| Unemployment | order to have this protection, self-employed workers must make an additional Social Security contribution (2.2% of the contribution basis). The duration of the benefit depends on the days for which they have contributed to Social Security. The minimum is one year of Social Security contributions (eligible to receive the benefit for 2 months) and the maximum protection (eligible to receive the benefit for 1 year) is reached after the worker has been contributing to Social Security as a self-employed worker for 6 years. Benefit amount: 70% of the contribution basis for the first six months (€625,2/month), 50% for the rest (€446.5 /month). | Salaried workers in the sector have this risk covered, like all salaried workers under the General Regime of the Social Security system. The duration of the benefit depends on the number of days worked. The minimum is one year of Social Security contributions (4 months of benefit) and the maximum protection (2 years of benefit) is reached after 6 years of contributing to Social Security as an employee. Benefit amount: 70% of the contribution basis for the first 6 months (€1226.4 /month), and 50% for the rest (€876 /month). |
| | Benefits for self-employed workers in cooperatives are 49% lower (601.2 €/month) to those of the salaried workers of meat companies | |
| Dismissal compensation | No cover | Depends on whether the cause of the dismissal is objective or not |
| Wage guarantee fund | No cover | Covered |
| Retirement pension | Depends on contributions made to the Social Security system. The current average would be around €712.97/month (12 pays) | Depends on the contributions made to the Social Security system. The current average would be €1214.34/month (12 pays) |
| | The pensions of self-employed workers in cooperatives are 41% lower (€501.37 /month) than the pensions of salaried workers of meat companies | |
| Trial period | 6 months | 2 months (for most categories) |

| | WORKER COOPERATIVES | MEAT COMPANIES |
|------------------------------|---|--|
| Working hours | Variable working hours defined according to the needs of the client company. They tend to have the worst shifts (night shifts, weekends) and have no remunerated breaks during working hours. Often the working day ends whenever the work that the meat company has planned ends (exceeding 8 hours per day, without these hours being remunerated as "overtime"). | 1770 hours per year, maximum 9 hours per day. Companies have 120 hours per year as a maximum to alter the daily working hours (extending them by a maximum of 2 hours or reducing them by a maximum of 3 hours). Breaks within working hours are recognised and remunerated. |
| Paid holidays | None (except for the Heads of Teams, but never 30 days) | 30 days per year |
| Paid leave | As established in the Cooperatives Law (very basic). Most leaves are not remunerated | As established in the Workers' Statute plus any improvements of the collective bargaining agreement |
| Training | None | According to the annual training plan of each company |
| Union representation | None | Entitled |
| Collective bargaining | None | Entitled |

Source: Author's own based on: Provincial Labour and Social Security Inspectorate of Barcelona, Informe sobre las actuaciones llevadas a cabo en la empresa Servicarne (O.S.: 8/0019368/16), of 2 July 2018, pág.39-62 and Comisiones Obreras Industria, "Rueda de prensa 27 de diciembre de 2017".

(*) Although the industry's unions have provided examples of paychecks of cooperative workers which show amounts lower than these (which is also confirmed by the Labour Inspectorate), the salary calculations (patronage dividends) of cooperative members have been made based on the information provided by the Governing Board of the cooperative Servicarne. The data referring to salaries in meat companies refer to minimum salaries included in the industry's collective bargaining agreement, with real salaries tending to be higher.

(**) The comparison does not take into account Income Tax withholdings, given that the amounts to be deducted do not only depend on the workers' remuneration, but also on the family/personal circumstances (young children, type of household, other available incomes, etc.)

(***) Additional cover for accidents and termination of activity is not mandatory for self-employed workers in cooperatives (most do not tend to pay for these). However, they are taken into account in the calculation to make the comparison more accurate, given that salaried workers are covered for these contingencies.



RMG SECTOR

LABOUR CONDITIONS IN RMG: THE CASE OF H&M IN BANGLADESH

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SECTION 1:

GLOBAL VALUE CHAINS AND LABOUR RIGHTS:
SOME PREVIOUS REMARKS

The global garment industry employs up to 75 million people, most of them women. Garment-related trade amounts to over €2.86 trillion globally (European Parliament, 2017). As the European Commission has remarked, the EU is the major import destination due to the size of the market combined with high per capita consumption rates. The main clothing exporters from non-EU countries to the EU in 2019 were – in descending order China (€27 billion, or 32% of total extra-EU clothes), Bangladesh (€16 billion, 19%) and Turkey (€10 billion, 12%), followed by India (€5 billion, 6%), Cambodia (€4 billion, 5%), Vietnam (over €3 billion, 4%), Morocco and Pakistan (both €3 billion, 3%).

The growth of the global garment industry is deeply related to the expansion of the global supply chains (GSC) or global value chains (GVC)⁴¹⁵. In fact, as the WTO Global Value Chain Report (2019) states, “more than two-thirds of world trade occurs through global value chains (GVCs), in which production crosses at least one border, and typically many borders, before final assembly”. TNC-coordinated GVCs account for some 80 per cent of global trade.

The concept of GVC was introduced in the early 2000s. GVCs are typically coordinated by Transnational Corporations (TNCs), with cross-border trade of inputs and outputs taking place within their networks of affiliates, contractual partners and arm’s-length suppliers. It allows to understand the behaviour of Transnational Corporations, their increasing fragmentation of production across countries and the inter connections of economics as well as the specialization of countries in tasks and business functions rather than specific products⁴¹⁶. Fragmenting its productions throughout GVC, transnational corporations have become large, flexible, mobile businesses that engage intensively in subcontracting and outsourcing.

According to the World Trade Organization (WTO), the phenomenal growth in GVC-related trade across the globe over the last two decades has been fuelled by reductions in transportation and communication costs and declining trade barriers. It cannot be denied that the emergence of global value chains has offered developing countries new opportunities to integrate into the global economy with a crucial impact on employment. However, main studies about the question also recognise that despite the benefits regarding trade and investment, even the quantity of jobs created, this phenomenon has contributed to distributional effects that mean that “the benefits of trade have not always accrued to all”⁴¹⁷.

In fact, the strategy of structuring production along lengthy value chains is aimed at other objectives hardly compatible with promoting of decent work. GVCs structure allows TNC to displace downwards costs, risks, obligations and responsibilities, while concentrating the main benefits in the parent company⁴¹⁸. It also allows TNC to take advantage of differences in labour standards and employment conditions and so, the strategy of

⁴¹⁵ The ILO uses the term of “global value chain”. It refers to the “cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery. This definition includes foreign direct investment (FDI) by multinational enterprises (MNEs) in wholly owned subsidiaries or in joint ventures in which the MNE has direct responsibility for the employment relationship. It also includes the increasingly predominant model of international sourcing where the engagement of lead firms is defined by the terms and conditions of contractual or sometimes tacit arrangements with their suppliers and subcontracted firms for specific goods, inputs and services”. ILO, Report IV. *Decent work in global supply chains*, International Labour Conference 105th Session, 2016. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

European Union documents use the term “value chain”. It describes the full range of activities that firms and workers perform to bring a product/good or service from its conception to its end use and beyond. This includes activities such as design, production, marketing, distribution and support to the final consumer. A value chain can be contained within a single geographic location or even a single firm (think about a fruit that is grown, packaged, sold and consumed within a single country). A global value chain is divided among multiple firms and geographic spaces. For example, a computer uses labor and materials from multiple suppliers in different countries, is assembled in another country, and was designed and will ultimately be sold in other places. The GVC Initiative is particularly interested in understanding value chains that are divided among multiple firms and spread across several locations, hence the term “global value chain.” European Commission, *Sustainable garment value chains through EU development action*. Commission Staff Working Document 24.4.2017 SWD (2017) 147 final, Brussels, 2017.

⁴¹⁶ De Backer, K., Miroudot, S. (2014) Mapping Global Value Chains, Working Paper Serie. NO 1677 / May 2014. European Central Bank. Available at: <https://www.ecb.europa.eu/pub/pdf/scpwp/ ECBWP1677.pdf>

⁴¹⁷ OECD (2019) Global value chain development report. Available at: <https://www.oecd.org/dev/Global-Value-Chain-Development-Report-2019-Technological-Innovation-Supply-Chain-Trade-and-Workers-in-a-Globalized-World.pdf>

⁴¹⁸ ILO, Report IV. *Decent work in global supply chains*, op. cit.

dumping of social, environmental, and human rights may be used by companies to reduce social (labour) or environmental costs and thus increase their profits⁴¹⁹.

Moreover, and as a crucial point, in most cases production is outsourced to a large number of small and medium enterprises (SMEs), usually located in free trade zones (FTZs) or special economic zones (SEZs) in developing countries. These zones offer “fiscal incentives, relief from customs duties and tariffs; business-friendly regulations with respect to land access, permits and licenses or employment rules; and administrative streamlining and facilitation”⁴²⁰. As the “United Nations Conference on Trade and Development (UNCTAD)” has remarked, “we are seeing explosive growth in the use of special economic zones (SEZs) as key policy instruments for the attraction of investment for industrial development”. According to this organization, there are some 5,400 zones across 147 economies today, up from about 4,000 five years ago, and more than 500 new SEZs are in the pipeline⁴²¹.

Obviously, this de-territorialisation has the effect of evading and avoiding labour regulations, a consequence that may be sought by TNCs. Structuring GVCs, TNCs may also seek to evade established regulatory frameworks and legal jurisdictions governing labour, environmental, fiscal and other matters, as well as the mechanisms to guarantee rights, which are still developed at the national level. This strategy not only frees TNCs from national legislation but it also allows parent companies to avoid the obligations that may arise from the activities of trade unions, especially collective agreements. Thus, all these practices come under the broad and somewhat vague concept of dumping, usually categorised as social or fiscal, but also applicable both to the environment and to human rights.

Some scholars have described the phenomenon and the current impossibility of regulating GVC (thus, transnational corporations' activities) as a “governance deficit”⁴²². In fact, in terms of regulation and responsibilities, the GVC are a sort of “dead angle” of Law where neither national nor international institutions or legal mechanism are capable to regulate the principal subjects of current global economy. Moreover, it is already obvious that the construction of this “blind spot” may be one of the aims of the “deterritorialization” and “decentralization” of the TNC. On the one hand, the very structure of GVCs allows them (the parent companies) to elude and evade the power of any given state to apply sanctions beyond the reach of its own jurisdiction; on the other hand, the TNCs' capacity to move production seeking the lowest standards of human rights protection in the broadest sense, forces states, especially the weakest, in a permanent race to the bottom as they compete to attract foreign investment. If we add corporate capture⁴²³, the state's inability to respect, promote and protect human rights is a foregone conclusion.

The garment value chain is one of the most complex production models globally⁴²⁴. This global market is driven by large buyers, such as manufacturers, retailers and brands, setting up multi-layered, decentralised sourcing and production networks across a variety of countries, often located in the developing world.

It is well known that the garment sector is an important economic and employment driving force in many low-income countries. The garment sector provides employment opportunities to some 60 million workers worldwide⁴²⁵ and strongly contributes to export revenues, supporting export-led industrialisation. However, it is also true that this contribution is based in previously mentioned “social dumping strategy”. In this sense, the European Commission has recognized that garment production is mostly placed where there is insufficient or not protection under the legal and regulatory frameworks and that the sector has persistent structural problems “linked to the fragmentation of labour-intensive, low-skill production across many factories and international locations”⁴²⁶.

⁴¹⁹ Guamán Hernández, A., Luque González, A. (2019) “Cadenas de suministro, Derechos Humanos, Empresas Transnacionales e industria textil: de los AMI a un Instrumento Internacional Jurídicamente Vinculante” Cuadernos de relaciones laborales, Vol. 37, Nº 2, 2019 (Ejemplar dedicado a: Digitalización, robotización, trabajo y vida), págs. 393-418; Guamán, A., González, G., (2018) Empresas Transnacionales y Derechos Humanos. Bomarzo, Albacete; Guamán, A. (2020) “The corporate architecture of impunity: Lex Mercatoria, market authoritarianism and popular resistance”, State of Power 2020, TNI. Available at: <https://www.tni.org/en/stateofpower2020>

⁴²⁰ UNCTAD, World Investment Report (2019) https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf

⁴²¹ Ibidem

⁴²² ILO, *Workplace compliance in global supply chains* (2016) Sectoral Policies Department, Geneva: ILO, 2016.

⁴²³ European Commission, *Sustainable garment value chains through EU development action*. Commission Staff Working Document 24.4.2017 SWD (2017) 147 final, Brussels, 2017. <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1677.pdf>

⁴²⁴ We are using the word “garment” or “apparel” indistinctly.

⁴²⁵ ACTRAV-ILO “Trade Unions in Bangladesh: Promoting Safe and Healthy Workplaces in the Ready Made Garment (RMG) Sector. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_615874.pdf

⁴²⁶ European Commission, *Sustainable garment value chains through EU development action*. Commission Staff Working Document 24.4.2017 SWD (2017) 147 final, Brussels, 2017. <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1677.pdf>

It should be remembered that the global garment industry was regulated by the Multifibre Arrangement (1974) which allotted export quotas to developing countries⁴²⁷ and ended in 2005. The hypercompetitive context after the end of quotas raised the asymmetries between buyers and suppliers and exacerbate the predatory purchasing practices, the squeeze on prices and lead times and other sourcing practices which encouraged labour informality⁴²⁸, “low wages below ‘living wages’, lack of regular contracts, long working hours, trafficking in human beings, forced labour, child labour, lack of enforcement of collective bargaining and freedom of association rights, poor building safety, harmful impact of hazardous chemicals used in garment production and in general poor occupational safety and health protection, the precarious position of many women employed in the industry, or unsustainable use of resources and poor water, energy and waste management”⁴²⁹.

Moreover, practices such as multiple subcontracting are widespread. Subcontracting makes efforts to control the production and working conditions more complex, as these smaller subcontractors may be informal and not registered⁴³⁰.

One of the most recent topics deals with the impact of “automation” in the apparel industry. Both ILO and WTO state that the use of robotics in that sector has remained low. There is some evidence in support of this. The most important one is that “the current cost structures for sewing machine operators are in many cases still more advantageous to employers”⁴³¹. The garment industry “has historically been a pool of low cost labor from a global perspective, contamination is not an issue, and whereas the task is repetitive, it changes often”⁴³².

The following sections are devoted to analysing the main characteristics of labour relations in the ready-made garment industry, focusing the attention on a specific firm (the H&M Group) and a single country, Bangladesh. The main objective of this is to assess the subcontracting practices and their impact in labour rights as well as to evaluate the existent legal framework and the tools and mechanism that have been launched to improve working conditions and strengthen the companies’ liability. To this end and as secondary goals this research is aimed to assess the particular subcontracting practices and organisational framework of H&M; the legal frame applicable to the firm and its practices (mostly in Bangladesh); the composition of the work force and its working conditions; the main strategies set in place at the national and mostly international levels by unions and social movements in order to denounce abuses, achieve better employment conditions and defend labour rights; and finally the effective liability of the parent company for abuses committed throughout its global value chain and the role of public authorities, both national and supra national.

⁴²⁷ Arrangement Regarding International Trade in Textiles, better known as the Multifibre Arrangement (MFA), was adopted in 1973. Administered by the General Agreement on Tariffs and Trade (GATT), the MFA was renewed three time.

⁴²⁸ Anner, M. (2019) “Predatory purchasing practices in global apparel supply chains and the employment relations squeeze in the Indian garment export industry”, *International Labour Review*, Vo. 158.

⁴²⁹ European Commission, *Sustainable garment value chains through EU development action*. Commission Staff Working Document 24.4.2017 SWD (2017) 147 final, Brussels, 2017. <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1677.pdf>

⁴³⁰ European Commission, *Sustainable garment value chains through EU development action*. Commission Staff Working Document 24.4.2017 SWD (2017) 147 final, Brussels, 2017.

⁴³¹ ILO (2018) *World employment and social outlook trends*, International Labour Office, Geneva. Available at: https://www.ilo.org/wcmsp5/groups/public/-/-dgreports/-/-dcomm/-/-publ/documents/publication/wcms_670542.pdf

⁴³² Global Value Chain Development Report (2019) <https://www.oecd.org/dev/Global-Value-Chain-Development-Report-2019-Technological-Innovation-Supply-Chain-Trade-and-Workers-in-a-Globalized-World.pdf>

SECTION 2:

HENNES & MAURITZ (H&M)

Hennes & Mauritz (H&M) is a clothing retailer founded in 1947 in Sweden. In 2018 H&M realized 19.89 billion Euros in revenues. H&M Group defines itself as the “employer to 177,000 colleagues” in 59 countries, having 4,968 stores in 71 markets and e-commerce in 47 markets⁴³³. Moreover, according to the Sustainability report (2018) H&M “contributes” to create 1.6 million of jobs in the world, among their suppliers.

2.1. A brief description

All the products sold by H&M are made in 4317 supplier factories⁴³⁴ around the world according to the H&M Group Supplier List (Feb. 2020⁴³⁵). The company does not own any factories, all its suppliers are “independent” and are placed, mainly, in countries with low level of labour standards. Suppliers are graded in three different categories⁴³⁶.

H&M Group first-tier factories are either owned (commonly performing the final manufacturing) or subcontracted (usually performing specific tasks such as washing or dyeing) by the suppliers.

According to the previously mentioned list⁴³⁷ there are 3986 first-tier manufacturing supplier factories and they account for 100% of the commercial products volume produced for the H&M group. Moreover, the firm has published the name of 331 second-tier processing factories that provide the suppliers with fabrics and yarns. These are fabric yarn mills and tanneries making about 65% of the product volume for the H&M group⁴³⁸. There are 20 local production offices, working with the suppliers with sustainability experts and developers.

These factories (suppliers and subcontractors producing for H&M) employ about 1.6 million workers⁴³⁹, 62% of whom are women.

Countries with largest number of manufacturing suppliers (thus, workers) are Bangladesh, China, Ethiopia, India, Indonesia, Italia, Myanmar, Portugal, Pakistan, Turkey or Vietnam. The processing factories are mainly in the same countries⁴⁴⁰. It should be kept in mind that Ethiopia, India Myanmar and Turkey are countries which have been mentioned in the 2018 Report of the Committee on the Application of Standards as individual cases⁴⁴¹, due to their breach of some ILO standards such as the minimum age convention (C. 138 for Ethiopia); Labour Inspection Convention, 1947 (No. 81, for India); Forced Labour Convention, 1930 (No. 29, for Myanmar); or the Freedom of Association and Collective Bargaining Convention, 1948 (No. 87, for Turkey). Moreover, Bangladesh has, among others, some recent observations from the The Committee of Experts on the Application of Conventions and Recommendations (CEACR)⁴⁴² that will be explained in the following sections.

⁴³³ H&M Sustainability Report (2018)

⁴³⁴ H&M define business partners as any business that supplies us with goods and/or services, acts on behalf of its business or collaborates with the Group. That means business partners include suppliers (commercial and non-commercial), vendors, consultants, landlords, agents, service providers, and organisations. The biggest group of business partners is the commercial goods suppliers. H&M Sustainability Report (2018)

⁴³⁵ H&M, Supplier List. Available at: <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html#cm-menu>

⁴³⁶ The categories are: platinum or gold. They are the strategic partners and preferred suppliers. They make around 60% of H&M Group products. “They benefit from long-term partnerships including incentives such as joint capacity planning up to five years ahead. (...) Only suppliers with the best performance in all areas, including sustainability, can become such strategic partners”. Silver: silver suppliers are suppliers that the Group has long-term oriented and close relations with. The Group provide them, for example, joint capacity planning up to one year ahead. Other companies are supplier and factories that have just started working with (for less than a year) H&M or that the Group just have placed a test order with. This also includes suppliers that make products that H&M order very rarely and therefore cannot build long-term relationships and where consequently its influence is weaker. H&M, Supplier List. Available at: <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html#cm-menu>

⁴³⁷ H&M, Supplier List. Available at: <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html#cm-menu>

⁴³⁸ H&M, Supplier Map. Available at: <https://hmgroup.com/sustainability/people/Suppliermap.html>

⁴³⁹ H&M, Sustainability Report 2018 (p. 65). It indicates that these jobs are created among tier 1 and 2 suppliers. Comparing these data and the H&M Sustainability Report 2014 (p. 10) is evident that data have not changed between 2014 and 2018. There are not more workers but there is more production.

⁴⁴⁰ With data from 2015, the supplier compliance divides the production countries per region: Far East: Cambodia, China, Indonesia, Myanmar, South Korea, Taiwan, Thailand, Vietnam. South Asia: Bangladesh, India, Pakistan, Sri Lanka. EMEA: Bulgaria, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, France, Germany, Great Britain, Greece, Italy, Kenya, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain, Sweden, Tunisia, Turkey, USA. Vid. H&M, Supplier Compliance. Available <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-compliance.html>

⁴⁴¹ International Labour Conference, Report of the Committee on the Application of Standards, 108th Session, Geneva, June 2019. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711293.pdf

⁴⁴² Comments adopted by the CEACR to Bangladesh. Available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUN-TRY_ID:103500

2.2. Internal sustainability policies of H&M Group: main actions and results according to H&M' published data

"We are working with our suppliers to achieve our ambition that everyone in our supply chain has access to a fair job. Although the concept of a fair job sounds simple, many of the production markets in which we operate are developing countries and they either lack or face challenges in implementing the legislation that would make fair jobs available to all. This creates an industry-wide challenge. H&M group directly contributes to 1.6 million jobs, and the textile industry has helped many people and countries out of poverty. H&M group has been working for many years to ensure that all jobs within our supply chain are fair jobs"⁴⁴³

To become a supplier (H&M group business partner⁴⁴⁴), firms should sign two main documents, the Code of Ethics⁴⁴⁵ which replaced the previous Code of Conduct on 1 February 2016, and the Sustainability Commitment⁴⁴⁶. All first-tier factories are covered by these two commitments⁴⁴⁷.

The Code of Conduct is mostly related to bribery and corruption. The Sustainability Commitment is the document that deals with labour conditions throughout H&M supply chain. It sets out some "requirements and aspirational ambitions" which apply to sub-contracting and home-working to produce goods or services for H&M. These requirements include health and safety, discrimination, diversity and equality, recognised employment, fair living wages and benefits, working hours, freedom of association and collective bargaining, child labour and young workers, as well as forced, bonded, prison and illegal labour⁴⁴⁸. The compromise also requires that subcontractors report of where production and services for H&M takes place.

According to the document, which must be signed by both parties, H&M reserves the right to request sustainability performance data from Business Partners and to conduct unannounced visits to facilities. Moreover, subcontractors may also be subject to "assessments conducted by assessors representing organizations of which H&M is a member". However, H&M could concede an exemption from assessment, unannounced visits and/or direct disclosure of sustainability performance data. The document does not provide any special reason for this possible exception. The document also states that "*Non-transparency is regarded as a violation of this Sustainability Commitment. Unwillingness to cooperate or violations of this Sustainability Commitment and/or local law, may lead to reduced business and ultimately termination of the business relationship with H&M*".

The document describes some requirements (vid. Annex A) related to the following questions: health and safety; discrimination, diversity and equality; recognized employment; fair living wage and benefits; working hours; freedom of association and collective bargaining; child labour and young workers; forced, bonded, prison and illegal labour. Regarding these conditions, the compromise establishes that "H&M does not accept any non-compliance for minimum requirements (marked in bold above). In case we detect non-compliance, we thoroughly follow up and carry out in-depth analyses of each individual case".

According to the sustainability report, the compliance with the above-mentioned requirements are followed up through the Sustainable Impact Partnership Programme (SIPP), which is integrated into regular supplier reviews. It consists of five major components: minimum requirements, verification, self-assessment, validation, capacity building and case handling⁴⁴⁹. However, the supplier compliance which is currently published at the website, uses data from 2015 and applies the old auditing system (with no information about who is carrying out the auditing processes)⁴⁵⁰.

⁴⁴³ H&M Sustainability Report (2018). The report specifies that these jobs are created among tier 1 and 2 suppliers.

⁴⁴⁴ H&M define business partners as any business that supplies them with goods and/or services, acts on behalf of its business or collaborates with the Group. That means business partners include suppliers (commercial and non-commercial), vendors, consultants, landlords, agents, service providers, and organizations. The biggest group of business partners is the commercial goods suppliers. According to H&M, 100% of them have signed the Code of Ethics. H&M Sustainability Report (2018)

⁴⁴⁵ Code of Ethics – Business Partner Commitment. Available at <https://hmgroupp.com/content/dam/hmgroupp/groupsite/documents/masterlanguage/CSR/Policies/Code%20of%20Ethics%20-%20Business%20Partners.pdf>

⁴⁴⁶ Sustainability Commitment, H&M Business Partner. Available at https://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/Sustainability%20Commitment/Sustainability%20Commitment_en.pdf

⁴⁴⁷ H&M, Supplier Compliance. Available at <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-compliance.html>

⁴⁴⁸ Sustainability Commitment, H&M Business Partner, op. cit.

⁴⁴⁹ H&M Sustainability Report (2018)

⁴⁵⁰ Supplier Compliance Report (data from 2015, check on March 2020) <https://web.archive.org/web/20181004152358/http://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-compliance.html>

According to the company, the results, achieved with the old methodology, are extremely positives. For South Asia, the compliance with all the requirements is at 90,6 on average and 100% regarding child labour, forced labour and young workers requirements.

Some results should be read carefully. The fundamental requirement (with the old methodology) was specified in the question "Are workers in the factory free to join or form a union?", question which is 100% positive. However, the answer to the questions "Is there a trade union represented in the factory?" or "Is the factory covered by a collective agreement?" were affirmative in only 6% and 3% respectively for South Asia. Far East and Europe have higher ratio.

H&M has published that, according to the data validated by the country teams, 370 of the manufacturing factories reported a worker-endorsed union, and 1342 reported one or more independent workers' committees at the end of 2019⁴⁵¹. These numbers are higher than the percentages published at the sustainability report, probably because among the 4,317 suppliers of H&M, those placed in Europe and Far Est have better trade union presence.

However, the sustainability report of the Group also contains the following information:

- *"The goal set in 2013 was to have workplace dialogue programmes at supplier factories covering 50 percent of the production volume by 2018. This goal has been exceeded. Today 73 percent of the group's production volume is made in factories that have democratically elected worker representatives in place. This covers 594 factories and about 840,000 workers"*⁴⁵².
- *"Our industrial relations and workplace dialogue programmes reached 594 factories in 2018 (2017: 458, 2016: 290, 2015: 132). Our 2018 programmes included factories in China, Bangladesh, Cambodia, India, Indonesia, Turkey, Ethiopia, Myanmar, Pakistan and Vietnam. In total, we reached 840,000 workers"*⁴⁵³.
- *"Factories producing 73% of our product volume implemented democratically- elected worker representation"*⁴⁵⁴.
- *100% of its tier 1 supplier factories in Bangladesh had democratically-elected worker representation by December 2017.*

As we will see later, only 3.5-4% of Ready Made Garment (RMG) factories in Bangladesh have union presence⁴⁵⁵ and there are still a number of practical as well as political and legal challenges that prevent workers from exercising their full freedom of association. It is thus questionable whether with this low ratio of trade union presence, all the tier 1 supplier factories of H&M in Bangladesh had democratically-elected worker representation who were union representatives.

Concerning working hours and the question "are the regular working hours within legal limits?", 95% of the workers (for South Asia) affirmed that they were but when it refers to with monthly overtime hours and legal limits the compliance is as low as 17%⁴⁵⁶.

As for wages, the question "Does the basic salary corresponds to at least the legal minimum wage for regular working hours?" is at 99%. However, the document also shows that affirmative answers when it refers to payment for over time and social security are less than at 88% and 80%, respectively. Finally, even if the question "Are all basic safety requirements met?" has a compliance rate of 100%, the follow-up question, "Are all additional safety requirements met?" has a compliance rate of only at 37 %⁴⁵⁷.

⁴⁵¹ H&M, Supplier list. Available at (check on March 2020): <https://hmgroupp.com/sustainability/leading-the-change/supplier-list.html>

⁴⁵² H&M Sustainability Report (2018), p. 70.

⁴⁵³ H&M, Annual Report, 2018

⁴⁵⁴ Ibidem

⁴⁵⁵ ACTRAV-ILO "Trade Unions in Bangladesh: Promoting Safe and Healthy Workplaces in the Ready Made Garment (RMG) Sector. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_615874.pdf

⁴⁵⁶ Ibidem.

⁴⁵⁷ Ibidem.

Regarding wages, in 2013, the Group made a commitment to help enable a lasting transition to “fair, living wages” for garment workers and defined its Fair Living Wage Roadmap (FLWR), with some goals set for 2018⁴⁵⁸

The Sustainability Report (2018) states that “(t)he goal set in 2013 was for supplier factories covering 50 percent of the production volume to have implemented improved wage management systems by 2018. This goal has been exceeded. Today 67 percent of the product volume is made in factories that have implemented improved wage management systems. This covers 500 factories and about 635,000 workers”⁴⁵⁹. These data have been revised by the Ethical Trading Initiative (ETI) and other NGO, which have questioned the analysis and results (we will come back to this point in the following sections).

The sustainability report also maintains that “that the only lasting and viable way to achieve substantial and sufficient increases in the minimum wage for all workers is through fair negotiations between workers, trade unions and employers”. Thus, H&M does not base its policy in the imposition of specific wage levels by the global brand but supporting (allegedly) the negotiation at an industry level. Then “Instead of imposing specific wage levels, brands should ensure that our purchasing practices facilitate the payment of a living wage and enable collective bargaining. Brands also need to advocate governments because they can set the necessary legal framework, ensuring the right to freedom of association and enabling collective bargaining”⁴⁶⁰.

These data have face criticism from different organizations and campaigns as the Clean Clothes Campaign (from now CCC), which will be commented in the following sections.

It is important to remember that H&M ensures that the negotiation of prices with suppliers is done by “isolating the labour cost”⁴⁶¹. That means, according to the report that H&M excludes the labour cost from its price negotiations with the supplier.

⁴⁵⁸ About the strategy: Ethical Trading Initiative, Review of H&M group’s Roadmap to Fair Living Wage. December 2018. Available at: https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI-HM%20FLWR%20Review_0.pdf

⁴⁵⁹ H&M, Sustainability Report, p. 70

⁴⁶⁰ H&M, Sustainability Report, p. 74

⁴⁶¹ Ibidem, p. 76

SECTION 3:

READY MADE GARMENT SECTOR IN BANGLADESH: THE CASE OF H&M

The economic development in Bangladesh has followed a neoliberal trajectory since the imposition of structural adjustment policies during the 1980s⁴⁶². The insertion into global value chains and the promotion of Export Processing Zones and the support of the expansion of the readymade garment (RMG) sector, together with keeping miserable salaries and low labour right standards⁴⁶³ have been an instrument to achieve this “development”⁴⁶⁴.

Export processing zones have been a key element to attract foreign investment and to reinforce the growth of our sector⁴⁶⁵. The Bangladesh Export Processing Zone Authority was created in 1980, and two EPZ were created, in Chittagong and Dhaka, in 1983 and 1993. Today there are nine EPZ in the country and only 100% export-oriented industries are entitled to set up factory in the EPZs.

Deeply related to these EPZs, the garment sector began to growth in late 1982, when there were only 384 garment factories in the country. In 2013, the number of factories reached 5,876, falling to 4,621 in 2019⁴⁶⁶.

Besides the 4,621 registered garment factories, it was estimated (according to 2014 data) that there were at least 2,000 unregistered subcontractors in Bangladesh, paying below minimum wage with virtually no compliance with codes of conduct or even local and national regulations”⁴⁶⁷.

Among these factories, the sector employs around 4.2 million workers⁴⁶⁸ in the country⁴⁶⁹. According to the World Bank, around 80 percent of the garment workers are female⁴⁷⁰. Recent ILO studies reflects a lowest rate (55%-60% women).

⁴⁶² Banerjee, S. B. & Alamgir, F. (2018). Contested Compliance Regimes in Global, Production Networks: Insights from the Bangladesh Garment Industry. Human Relations

⁴⁶³ For instance, through networks of subcontractors in a supply chain, Polo shirts made in Bangladesh for \$5.67 each are sold in Canada by global retailers for \$14, with some workers being paid 12 cents for every shirt they make. Vid Saxena, S., Labowitz, S. (2015) Monitoring working conditions at factories won't stop future tragedies, Contributed to the globe and mail, available at: <https://www.theglobeandmail.com/report-on-business/rob-commentary/monitoring-working-conditions-at-factories-wont-stop-future-tragedies/article25898737/>

⁴⁶⁴ As Banerjee and Alamgir tell, in the latest 70' “the country's military regime, introduced large-scale political and economic reforms and launched major infrastructure projects. A key element in the country's industrial policy was private sector development and export-oriented growth and as a result the RMG sector grew rapidly over the next few decades”. Banerjee, S. B. and Alamgir, F. (2018). Contested Compliance Regimes in Global, Production Networks: Insights from the Bangladesh Garment Industry. Human Relations. Available at: <https://openaccess.city.ac.uk/id/eprint/19471/1/HRfinal.pdf>

⁴⁶⁵ Debapriya Bhattacharia (1998) “Export processing zones in Bangladesh: Economic impact and social issues” Bangladesh Institute of Development Studies. International Labour Office, Geneva. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_126103.pdf

⁴⁶⁶ The data have been published by the Bangladesh Garment Manufacturers and Exporters Association (BGMEA), they are available at <http://www.bgmea.com.bd/home/pages/TradeInformation>

⁴⁶⁷ Labowitz, S., Baumann-Pauly, D. (2014), “Business as Usual is Not an Option Supply Chains and Sourcing after Rana Plaza”, Centre for Business and Human Rights. New York University Stern School of Business. Available at https://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf.

⁴⁶⁸ ACTRAV, Trade Unions in Bangladesh: Promoting Safe and Healthy Workplaces in the Ready Made Garment (RMG) Sector. Available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_615874.pdf. Some sources cite at least 7,000 factories including indirect exporting factories, and over 5 million workers, v. gr. Labowitz, S., Baumann Pauly, D. (2015). Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers. NYU STERN. Centre for Business and Human Rights. Other sources indicate 4,4 million, vid. <https://rmgbd.net/2019/12/unilever-bgmea-to-improve-livelihoods-of-rmg-workers/>

⁴⁶⁹ According to the Labour Force Survey 2016-17, Bangladesh' total estimated population was 161.3 million, of which 80.3 million were female. The total population aged 15 or older living in urban areas reached 32.0 million. In rural areas, the total population aged 15 or older was 77.1 million. The labour force participation rate is 58.2 per cent, at 80.5 per cent male and 36.3 per cent for females. The participation rate of the population aged 15 or older by area was slightly higher in rural areas (59.3 per cent) than in urban areas (55.7 per cent). The employment to population ratio is 55.9 per cent (44 on account workers and 39.09 employee), at 78 per cent male and 34 per cent female. 20 per cent of the employment is place in the industry sector. 47.6 per cent of workers do more than 50 working hours per week. See: Bangladesh Bureau of Statics (2018) Labour Statics in Bangladesh, an empirical analysis. Available at <https://www.ilo.org/surveydata/index.php/catalog/2047>; and Bangladesh Bureau of Statics (2018) Labour Force Survey (2016-2017). Available at <https://www.ilo.org/surveydata/index.php/catalog/2047/overview>

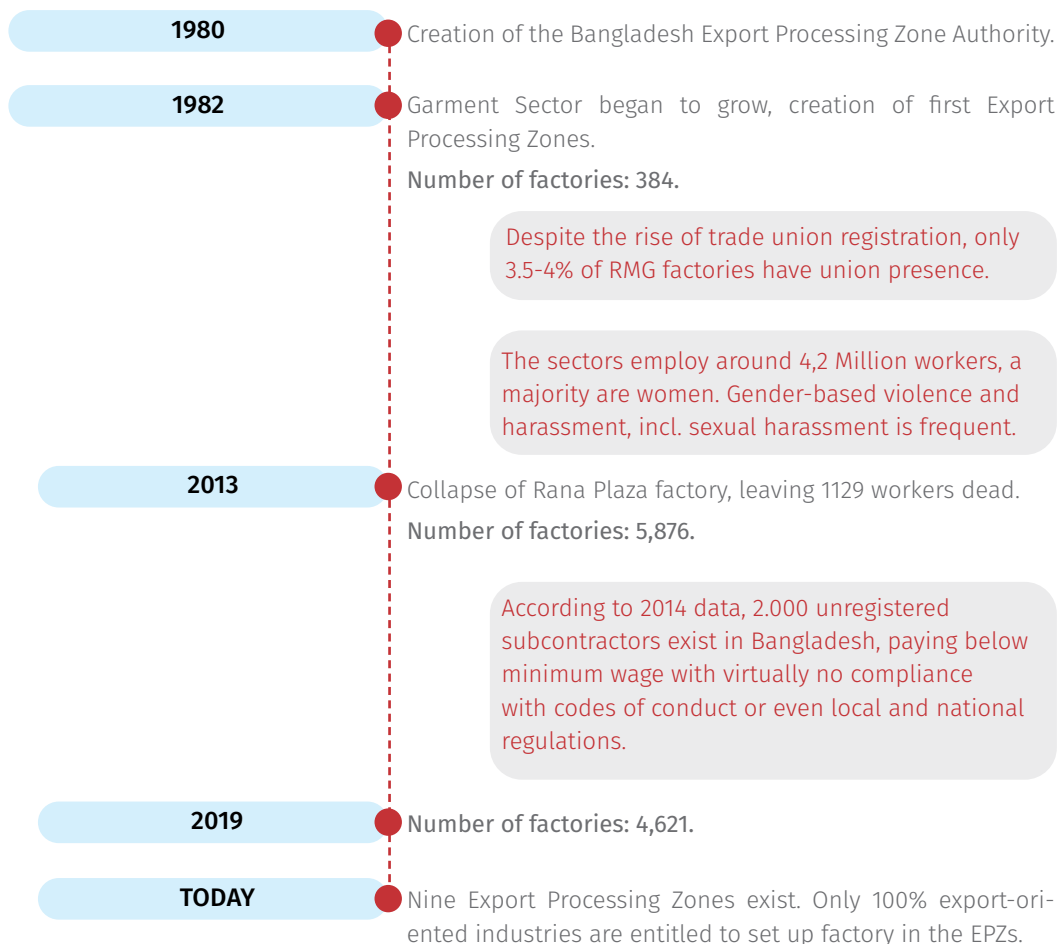
⁴⁷⁰ As the report of the Work Bank has remarked, “Female garment workers constitute a highly vulnerable group, with few support systems in place that provide them adequate training or social services. For these women, their first few months in the city and at the factory are the most hazardous, deterring many women who are in desperate need of work from joining the industry.” World Bank. 2017. Bangladesh. Available at <http://documents.worldbank.org/curated/en/375181507886096515/Bangladesh-Country-snapshot>; in the same line, Banerjee and Alamgir said that “The migration of woman from rural areas to urban centres and their interpellation into global production networks represent a new class of labour requiring new forms of surveillance, disciplining and regulation as well as a gradation of citizenship rights”. Banerjee, S. B. & Alamgir, F. (2018),

It should be underlined that according to the Labour Force Survey, about 91 per cent of the total population in Bangladesh is employed in the informal sector. About 82.1 per cent of the female labour force is employed in the informal sector, compared to about 85 per cent of the male labour force. It is also fundamental to underline that unions represent less than 5 per cent of all factories⁴⁷¹.

The RMG sector is now the biggest contributor to the country's export earnings (it accounts for 75 to 80 percent) and it is also the second largest exporter of ready-made garments (RMG) after China. Bangladesh is also the largest importer of cotton in the world, sourcing mainly from the US, India, Pakistan, Australia, and Uzbekistan⁴⁷².

After the Rana Plaza disaster, some international initiatives were set up, mostly regarding safety issues. Among them, it should be highlighted the "Bangladesh Sustainability Compact", a strategy that brings together the European Union (EU), Bangladesh, the United States (US), Canada and the International Labour Organization (ILO). Its goal is to improve "working conditions and the respect of labour rights in Bangladesh's ready-made garment (RMG) industry to ensure that industrial disasters such as the Rana Plaza tragedy are not repeated"⁴⁷³. The reports about this program will be used, together with many other documents provided by civil society organizations and trade union, to describe the RMG sector in Bangladesh and the performance of H&M in the most accurate way possible.

The Ready Made Garment sector in Bangladesh



⁴⁷¹ Bangladesh. Available at <http://documents.worldbank.org/curated/en/375181507886096515/Bangladesh-Country-snapshot>

⁴⁷² Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

⁴⁷³ The Compact is built on short and long-term commitments related to three inter-linked pillars: 1) respect for labour rights; 2) structural integrity of buildings and occupational safety and health; and 3) responsible business conduct. See: European Commission (2018) *Bangladesh Compact Implementation - Technical Status Report*. Available at: https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157426.pdf

3.1. Working conditions in the subcontracting chain of RMG sector in Bangladesh

As said before, H&M does not own any factory and all its productions is made by its suppliers. In Bangladesh, H&M works with 1904 suppliers⁴⁷⁴. Among them:

- 582 are 1st tier manufacturing supplier factories;
- 1263 are processing factories subcontracted by the 1st tier manufacturing suppliers;
- 57 are the most important mills that provide the suppliers with fabrics, yarn and tanneries.

Among these suppliers, and according to some sources, there are around 4.2 million of workers in the RMG in Bangladesh⁴⁷⁵, 60.8 percent of whom are women⁴⁷⁶. There are no available (open) data about the number of workers employed by the H&M suppliers, so, the following sections will take general data of the sector, except when specific information about H&M is accessible.

a) Wages in the RMG sector in Bangladesh

Bangladesh does not have a minimum wage act. The Minimum Wage Board was established in 1959 under the Ministry of Labour and Employment (MOLE). It proposes to the government the minimum wages in 38 out of the 42 economic sectors. The minimum wage of the ready-made garments (RMG) industry has been revised more frequently than other industries⁴⁷⁷. Since it was founded, the Board has increased the minimum wage for the garment sector three times: in 2010, 2013, and 2018.

Immediate after the collapse of Rana Plaza, the Government took various steps in order to improve overall workplace safety, which we will comment in the following sections, and established an increase of 77% of the minimum wages for the workers in the readymade garments industry.

In September 2018 the Bangladeshi government announced a new minimum wage for garment workers, which has fixed the minimum monthly wage at 8,000 Tk (95 US Dollars), affecting close to 4 million workers and establishing 7 worker grades. While garment factory owners proposed a 6,000 TK, workers demanded up to 18,000 TK as a minimum wage⁴⁷⁸.

In protest of the sub-poverty wage workers from dozens of factories (which amounted tens of thousands of people) took the streets in largely peaceful strikes. According to different sources⁴⁷⁹, the protests were met with violent and repressive responses by factory owners and police.

ITUC denounced violent repression by the police of several workers' protests, using rubber bullets, tear gas and water cannons, and the raiding of homes and destruction of property, as a result of which one worker was killed and more than a hundred injured, as well as the filing of false criminal complaints against hundreds of named unionists and thousands of unnamed persons⁴⁸⁰. Inter alia, the trade union denounced injuries to ten garment workers during a protest over non-payment of wages in Gazipur in September 2018; and repression of export-processing zones (EPZs) workers for attempting to exercise their limited rights permitted under the law.

On 13 January, and after negotiations in a tripartite committee, which included representation of workers, owners, and government, a small additional wage increase for workers in pay grades above the minimum was announced.

⁴⁷⁴ H&M, Supplier List. Available at: <https://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html#cm-menu>

⁴⁷⁵ Vid. Foot Note 50

⁴⁷⁶ Vid. the note published by RMG Bangladesh "Unilever, BGMEA to improve livelihoods of RMG workers" in February 2019. Available at <https://rmgbd.net/2019/12/unilever-bgmea-to-improve-livelihoods-of-rmg-workers/>

⁴⁷⁷ Direct Request (CEACR) - adopted 2019, published 109th ILC session (2020) Equal Remuneration Convention, 1951 (No. 100)

⁴⁷⁸ In early 2018, the IndustriALL Bangladesh Council (IBC) put forth the following demands to the Wage Board (claimed to have studied cost of living, inflation trends & min. wages etc. in major garment producing countries): a. A threefold increase to Tk 16,000 taka (\$192) citing Tk 19,000 was minimum needed for basic living expenses and needs; b. Job grades be streamlined from 7 to 5, on which pay is based; c. Promotion criteria – (absent today) 5th grade promoted to 4th after 1 year of work. Subsequently after every 2 years of continuous work, workers should be promoted to upper grades; d. 10% annual increase in payment e. Piece rate workers - rates to be agreed prior to work starting (current practice - paid according to production of each unit; rate decided only after completion of certain amount of work (often leads to disputes); f. Restrict training for apprentice workers to 3 months, instead of 6 with wage increase from US\$50 to US\$120 for them. See: Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

⁴⁷⁹ V. gr. Fair Wear (2018) op cit; <https://laborrights.org/2019-crackdown-your-favorite-brand-complicit> and <https://cleanclothes.org/news/2020/a-year-after-crackdown-on-wage-protests-in-bangladesh-hundreds-of-workers-still-face-retaliatory-charges>

⁴⁸⁰ While the social partners provided a list of 12,436 workers dismissed from 104 factories, after primary verification by the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) and the Bangladesh Knitwear Manufacturers and Exporters Association (BKMEA), it was found that 94 factories were involved and 4,489 workers were terminated from 41 factories. Vid. Observation (CEACR) - adopted 2019, published 109th ILC session (2020). regarding Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

During and after the strikes, thousands of workers lost their jobs in acts of retaliation. According to the Clean Clothes Campaign and International Labor Rights Forum, there were “at least 33 cases filed under Bangladesh’s penal code, cumulatively targeting thousands of garment workers. Almost all cases were filed by factories producing for major international brands, including C&A, H&M, Next, Primark, Mango, Marks & Spencer, and Inditex”.

The organizations previously mentioned urged the brands to “require their suppliers to immediately withdraw all baseless criminal complaints against workers, reinstate the terminated or forcibly dismissed workers with full back pay, and to put an end to the blacklisting”. Several brands, including H&M, Primark, and Next, have engaged with their suppliers to address the repression⁴⁸¹. As a result of campaign efforts, the charges filed by 14 factories have now been dropped. At least 20 other cases are still underway, however, with reportedly no sign yet of the buyers taking sufficient action to press for the dismissal of the charges⁴⁸². Among the cases there are some H&M suppliers: 6 factories that pressed trumped-up criminal charges against workers; 5 factories that filed a petition to withdraw their charges; 5 factories whose charges were dismissed in court; 500-600 workers still facing charges, according to the International Labor Rights Forum.

Beyond the labour unrest related to wages, it is necessary to analyse the specific outcomes of the H&M group’s Roadmap to Fair Living Wage in Bangladesh in the light of the reports of different social organizations.

As we already mentioned in previous sections, H&M does not impose minimum wages but improves wage systems at factory level through improving fair negotiations between workers, trade unions and employers. The brand also states in its Annual Report (2018) that the basic salary corresponds to at least the legal minimum wage for regular working hours in the 99% of cases.

This strategy has been reviewed by the Ethical Initiative⁴⁸³. The review, published in December 2018, indicates that “H&M Group’s move to take action on a critical apparel industry issue – and from a systemic perspective – is widely regarded as a positive step and many respondents recognised the leadership role that H&M group has taken. The company was the first in its industry to develop a strategic plan to address the living wage issue and share it publicly”. However, it also states that “while we acknowledge the complex and inherently long-term nature of H&M group’s Fair Living Wage strategy and the incremental rise in wages for some workers, our study indicates that (even in its top-performing factories) some workers in H&M group supplier factories still report that, at this stage, wage levels are too low to cover their living costs.” (...) “we do concur that there has been (to date) a lack of robust data demonstrating the impact of the FLWR on wages levels”.

The report echoes the critics published by the CCC⁴⁸⁴. This campaign published an analysis of the wages of workers in H&M group’s supply chain, showing that there are still workers receiving between 10% and 50% of a living wage or working up to 80 hours a week. The campaign considers, inter alia, that⁴⁸⁵:

- *H&M is far away from securing workers at its supplier factories a living wage.*
- *Wage increases in H&M supplier factories over the last few years are largely due to the increased legal minimum wages. What factories pay above the legal minimum has contributed far less, or has even decreased (India).*
- *Because H&M does not account for inflation, real wages at H&M supplier factories have increased considerably less than one may think when first looking at H&M’s wage data.*

⁴⁸¹ According to the press state published by the International Labour Rights Forum: “This national and international activism has led to all 65 workers jailed on these charges being released and factories to start withdrawing cases filed against striking workers. CCC and ILRF have received definitive confirmation that eight criminal cases, which together had charged at least 1,329 workers, have been dropped by the court after the factories that filed the cases asked for the dismissal of cases. Several other factories have already filed for dismissal, with court decisions still pending or not yet confirmed. CCC and ILRF will continue campaigning in support of the hundreds of workers who are still facing charges and for those who lost their jobs and have not been reinstated or received the severance owed to them”. Available at: <https://laborrights.org/releases/year-after-crackdown-hundreds-workers-still-face-retaliatory-charges>

⁴⁸² <https://laborrights.org/2019-crackdown-your-favorite-brand-complicit>

⁴⁸³ Ethical Trading Initiative, Review of H&M group’s Roadmap to Fair Living Wage. December 2018. Available at https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI-HM%20FLWR%20Review_0.pdf

⁴⁸⁴ Vid. Musiolek, B. (2018) H&M: fair living wages were promised, poverty wages are the reality. Clean Clothes Campaign. Available at: <https://turn-aroundhm.org/static/hm-wages-september2018-summary-f523b0075e381f822e6fd6fbff1331cb.pdf>; and Hachfeld, D. (2018) Is H&M making progress towards living wages?. Clean Clothes Campaign. Available at: <https://turnaroundhm.org/wage-analysis-short-nov-2018-fb6e32f63366994f262c23e-def12032c.pdf>

⁴⁸⁵ Hachfeld, D. (2018) Is H&M making progress towards living wages?. Clean Clothes Campaign. Available at: <https://turnaroundhm.org/wage-analysis-short-nov-2018-fb6e32f63366994f262c23e-def12032c.pdf>

- *In the period 2015-2017 wage progress slowed down substantially compared with the previous two years. In the case of India (Bangalore) real wages at H&M suppliers even dropped (by 4%).*
- *If things continue at the 2015-2017 pace, wages at H&M supplier factories in Bangladesh and India (Bangalore) will never reach a living wage level, and in Cambodia it will take another 20 years.*
- *Average wages presented are for machine operators as most common category. Higher paid line managers are excluded. There are also workers (such as helpers) who earn less than machine operators.*
- *In-kind benefits, bonuses and overtime are reportedly excluded but we got no details on how this is done.*
- *The presented wage figures do not include any inflation adjustment.*
- *The data is collected through H&M's own "Sustainable Impact Partnership Programme" (SIPP). SIPP is based on self-reporting by suppliers and validation by H&M.*
- *The collected data is from representatively-selected factories in each country/region. Details of the sample are not clear.*
- *Countries for which data is published are the priority sourcing markets.*
- *In order to assess to what extent the human right to a living wage is respected in H&M supplier factories, the lowest paid wage would have to be known, but H&M does not publish this data.*

For its part, Fair Wear main audit findings relating wages in RMG sector in Bangladesh are the following⁴⁸⁶:

- *Audits found that in most cases the factories pay a legal minimum wage to workers, but the wage level is below estimates of the living wage by local stakeholders.*
- *Nonetheless, minimum wage violations do occur. Audits found that workers were paid at a lower grade level than they should have been entitled to based on their actual work duties.*
- *Payslips are not given to workers at time of payment in some factories. In other factories, where payslips were provided, it only mentioned the calculation of legal working hours, but did not include excessive overtime hours worked. As a result, workers do not understand how wages are calculated.*
- *In some cases the factories were not transparent regarding wage records. The payment sheet provided by the management did not match the workers' statement regarding overtime hours, work on weekly days off, or amount received.*
- *Some factories delay paying workers' wages, especially overtime is often paid late.*
- *Some factories do not pay earn leave, maternity leave, or benefits to workers according to legal requirements.*
- *Audits also revealed that some factories do not pay an overtime premium to workers according to legal requirements.*

Some of the proposals contained in the report of the Ethical Initiative agreed with CCC, indicating that in the short to medium term "H&M group can and should pay suppliers more, in order to help at least some workers realise their right to living wages and alleviate in-work poverty". However, the Ethical Initiative also indicates that "While recognising the need to raise workers' wages urgently, the majority of interviewees agreed that a 'just pay more' policy would not be sustainable or scalable if implemented."

⁴⁸⁶ Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

The main recommendations of the report are the following:

- *Ensure H&M group's 'fair, living wage' definition is complete and consistent*
- *Focus on improving the basic rate of pay for all workers and particularly for women*
- *Review H&M group resources devoted to the FLWR*
- *Clearly articulate how the FLWR components help to raise wage level*
- *Consolidate and integrate FLWR approach*
- *Accelerate improvements in purchasing practices*
- *Establish an effective monitoring and evaluation system that measures not only actions and outputs but also the outcomes of the actions*
- *Monitor progress against relevant benchmarks and comparison groups*
- *Calculate the real cost of living*
- *Monitor impact of improved purchasing practices*

b) Working hours in the RMG Sector in Bangladesh

The Labour Act 2006⁴⁸⁷ states that workers in any establishment are allowed to work for eight hours a day, six days a week, with two hours allowed for overtime work. Regular working hours can be up to 48 hours in a week, with extra time, the total working hours of such worker shall not exceed 60 hours in a week, and on the average 56 hours per week in a year. Every worker of a factory shall be entitled to one day off per week. Workers must receive twice the hourly remuneration of regular work. Women will not be required to work between the hours of 10pm to 6am without their consent.

According to the Labour Force Survey (2016-17)⁴⁸⁸: “the average hours worked per week was 48 hours, with male workers reporting longer hours of work per week, at 52 hours, then their counterpart female, at 38 hours per week (...) By industry manufacturing is at 55 hours per week on average”. The survey found that around half (49.8 per cent) of the employed persons worked more than 48 hours per week. By sex, the proportion of male workers working more than 48 hours (63.5 per cent) was much higher than that of female workers (18.7 per cent).

Fair Wear main audit findings relating working hours in the RMG sector in Bangladesh are the following⁴⁸⁹:

- *Overtime is not voluntary and not announced in advance. Management does not consult with workers (plan) before announcing overtime. Workers are unaware that overtime work should be voluntary.*
- *Some factories are not transparent regarding overtime records, e.g. some factories do not share the record of actual hours worked, which are maintained separately, with the auditor.*
- *Excessive overtime is a common finding, sometimes up to midnight. Also, workers perform duties during their weekly days off, depriving them from enjoying one day off out of every seven days. Provision of alternative days off rarely occurs.*
- *Legal consent is not sought from female workers for doing overtime. Female workers work in factories after 10pm without their written consent taken by the management.*

⁴⁸⁷ Section 100, 102, 103, 108, 109, Bangladesh Labour Act, 2006

⁴⁸⁸ Labour Force Survey (2016-2017). Available at <https://www.ilo.org/surveydata/index.php/catalog/2047/overview>

⁴⁸⁹ Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

c) Gender gaps and gender based violence in the RMG sector in Bangladesh

The gender wage gap in Bangladesh was estimated at 21.1 per cent in 2007⁴⁹⁰. The Labour Force Survey⁴⁹¹ states that Gender gap persists in the characteristics of the employment, status in employment, under-utilization, with women generally worse than men. Thus, the labour force participation rate of women remains far below that of men (36.4 per cent for women compared to 80.5 per cent for men). The unemployment rate is 6.7 per cent for women compared to 3.3 per cent for men.

Informal employment is estimated at 91.8 per cent of women in 2017 (compared to 85.6 per cent in 2005–06) and 82.1 per cent of men⁴⁹².

The United Nations Committee on Economic, Social and Cultural Rights expressed in its 2018 concluding observations its concern at the large and persistent gender pay gap which reached 40 per cent⁴⁹³.

Sexual harassment has been a crucial question within the sector, as its composition is highly feminized.

Section 332 of the BLA states that 332 “Where any woman is employed in any work of any establishment, whatever her rank or status may be, no person of that establishment shall behave with her which may seem to be indecent or unmannerly or which is repugnant to the modesty or honour of that woman”. According to the Government⁴⁹⁴ “sexual harassment in employment and occupation is very rare and that workers, employers and their organizations are very much aware of their rights, obligations and procedures”.

However, there are a number of reports in quite the opposite vein:

- *The Decent Work Country Programme (2017–20)*⁴⁹⁵ underlined that “studies and BBS data shows that violence against women (VAW) in the form of verbal and physical abuse is taking place among industrial workers. Meanwhile, 37% of women surveyed perceive that VAW can occur at the workplace”.
- *The UN Special Rapporteur on violence against women reported that sexual harassment was also commonplace in various working environments and was sometimes justified as being “part of the culture” by state and non-state actors*⁴⁹⁶
- *The CEDAW also expresses concern at “the failure to implement the High Court guidelines concerning the protection of women from sexual harassment in the workplace”*⁴⁹⁷.

It is particularly relevant to refer to the report “Gender Based Violence in the H&M Garment Supply Chain Workers Voices from the Global Supply Chain”⁴⁹⁸.

The report provides detailed accounts of gender based violence, including personal experiences reported by women garment workers in H&M supply chains in Bangladesh, Cambodia, India, Indonesia, and Sri Lanka. The testimonies include “experiences of violence that inflict sexual harm and suffering; forms of violence characteristic of industrial discipline practices, including physical violence, verbal abuse, coercion, threats and retaliation, and routine deprivations of liberty, including forced overtime”

The report states that “the experiences of gender based violence in H&M garment supplier factories documented in this report are not isolated incidents. Rather, they reflect a convergence of risk factors for gender based violence in H&M supplier factories that leave women garment workers systematically exposed to violence” (...) “Operatory labour practices correspond with particular workplace conditions and relationships that expose women garment workers to risk factors for violence.”

⁴⁹⁰ Observation (CEACR) - adopted 2019, published 109th ILC session (2020). Equal Remuneration Convention, 1951 (No. 100)

⁴⁹¹ Bangladesh Bureau of Statics (2018) Labour Force Survey (2016-2017). Available at <https://www.ilo.org/surveydata/index.php/catalog/2047/overview>

⁴⁹² Ibidem

⁴⁹³ E/C.12/BGD/CO/1, 18 April 2018, paragraph 33(b). In the framework of the Universal Periodic Review (UPR), the Human Rights Council specifically recommended reducing the gender wage gap and ensuring women’s access to the labour market (A/HRC/39/12, 11 July 2018, paragraph 147).

⁴⁹⁴ Vid. Direct Request (CEACR) - adopted 2019, published 109th ILC session (2020) Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

⁴⁹⁵ ILO, Decent Work Country Programme: Bangladesh (2017-2020). Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_655559.pdf

⁴⁹⁶ A/HRC/WG.6/30/BGD/2, 19 March 2018, paragraph 54.

⁴⁹⁷ CEDAW/C/BGD/CO/8, 25 November 2016, paragraphs 18, 28(b) and 30(b)

⁴⁹⁸ The report was conducted by a global coalition of trade unions, worker rights and human rights organizations. In contains a number of factory level research reports, documenting gender based violence in H&M’ Asian garment supply chains. It is available at: <https://www.globallaborjustice.org/wp-content/uploads/2018/05/GBV-HM-May-2018.pdf>

The report also identifies risk factors for violence placed in the H&M garment supply chain, “including use of short term contracts and unrealistic production targets that drive wage related rights abuses, excessive working hours, and unsafe workplaces. The combination of calorie deficiency and relentless working hours is violent in the wages it withholds and the labour it extracts. Barriers to accountability—including unauthorized subcontracting, denial of freedom of association, failure to require independent monitoring, and gendered cultures of impunity among perpetrators of violence prevent women from seeking accountability and relief”.

The report of Fair Wear also includes some findings about this question⁴⁹⁹:

- *Most factories have a policy against discrimination and sexual harassment.*
- *The number of women in supervisory roles and other high-paid positions is low. In about half of the factories there were no women supervisors.*
- *There is no effective performance assessment system as a basis for determining eligibility for promotion or wage increases. The informal nature of performance assessment makes it prone to favouritism and discrimination.*
- *Dyeing, washing, and knitting/weaving operators are male-dominated jobs and tend to be better paid, while the majority of helpers and sewing operators are women. Other than that, the audits do not show big differences between salaries of male and female workers.*
- *An anti-harassment committee is in place in more than half of the audited factories. However, very few workers are aware of its existence and activities, or even know the committee members. In some case, even the committee members are unaware of the activities of the committee.*

d) Health and safety in the RMG sector in Bangladesh

As it is well known, on 24 April 2013, the eight-storey Rana Plaza building in Dhaka collapsed, killing 1,129 workers producing garments for international fashion brands. These brands, the parent companies, had publicly proclaimed a commitment to ensure that their suppliers respect workers’ health and safety standards. But that did nothing to prevent the building from collapsing, nor did it guarantee any sanctions or punishments for the individuals or companies that benefited from the profits derived from lowering labour and safety standards.

The case of the Rana Plaza is one of many that reveals the reality of TNCs and human rights: first, TNCs operations may lead to human rights violations through the business activities that take place all along their global production chains; and second the vast majority of these violations have ended either in impunity or, in the best-case scenario, with compensation negotiated out of court, which lets the guilty parties off the hook⁵⁰⁰.

Following the collapse⁵⁰¹, worldwide attention was paid to the labour conditions in the readymade garment (RMG) sector in Bangladesh and two multi-stakeholder initiatives were implemented: the Accord for Fire and Building Safety and the Alliance for Bangladesh Worker Safety⁵⁰². H&M was the first major brand to sign the Accord on 13 May 2013.

In addition to the international initiatives, the government promoted changes in terms of workers safety as the 2013 amendment of the Labour Act 2006 or the adoption of the National Occupational Health and Safety Policy.

Some authors have voiced their criticisms to the Accord and the Alliance saying that the worker involvement is limited and its capacity to address exploitative working conditions is reduced. To Banerjee and Algami⁵⁰³ the Accord may be a victory for global brands to which it could be a sheen of legitimacy but it does little to

⁴⁹⁹ Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

⁵⁰⁰ This reality has been affirmed by the Office of the United Nations High Commissioner for Human Rights (UNHCHR) in a 2016 report: “Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of ‘adequate, effective and prompt reparation for harm suffered’” The report summarises the difficulties facing the victims of human rights violations: ‘fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement’.

⁵⁰¹ The collapse was not an “accident” but the actualization of a well-known risk aroused from the labour conditions and subcontracting policies.

⁵⁰² Donaghey, J., Reinecke, J. (2017) “When Industrial Democracy Meets Corporate Social Responsibility. A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster” *British Journal of Industrial Relations*.

⁵⁰³ Banerjee, S. B. & Alamgir, F. (2018), op. cit.

empower workers at each factory or to improve mechanisms for worker participation, to achieve better wages or to reduce working hours. The authors denounce that, we quote, “Building and fire safety codes following the Accord and Alliance may well reduce factory accidents but the structural exploitative labour conditions that jeopardize worker safety remain unaddressed.” Moreover, the actors state that multi-stakeholder initiatives like the Accord and Alliance provide legitimacy to powerful actors but do little to address the sourcing, pricing and procurement practices in the garment industry, which are the key reasons for the deplorable condition of workers and which remain outside the mandate of these compliance mechanisms. Other studies have added that factory inspections under the Accord and Alliance do not address the root causes of unsafe working conditions and have done little to change the culture in garment factories⁵⁰⁴.

The H&M sustainability report confirms that of 98% of its suppliers have remediated issues as defined by the Bangladesh Accord. From January 2019 H&M only place orders with factories that 100% comply with the Accord requirements.⁵⁰⁵

As it was said in the previous sections, despite these initiatives, labour rights as wages or working time have not been properly improved. In fact, following the IMF report for the 2019 article IV consultation, it seems clear that low-cost labour in the growing ready-made garment sector is still considered a factor to “help the economy to diversify away from the agricultural sector to a more manufacturing-based economy”⁵⁰⁶.

3.2. Industrial relations in the RMG sector in Bangladesh

As pointed out in the introduction, H&M has chosen as primary source of its production one of the countries with the worst record in international labour and human rights bodies. The comments adopted by the CEACR regarding Bangladesh show that some of the main and typical critical considerations are link with situations affecting directly the garment sector, especially regarding freedom of association and collective bargaining.

Bangladesh has been member of the ILO since 1972. It has ratified 35 conventions, but just seven of the eight fundamental ones, since it has not ratified the Minimum Age Convention, 1973 (No. 138) yet, nor the Protocol of 2014 to ILO Forced Labour Convention No. 29⁵⁰⁷.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has published many observations and direct requests regarding the workers rights' situation in Bangladesh. In addition, the Conference Committee on Application of Standards (CAS) has reviewed its labour legal framework in many occasions, last time in 2017 regarding Convention 87. Violations of right to freedom of association and to bargain collectively have been confirmed by an ILO high-level tripartite mission in 2016.

The largest trade union federation in the sector is the National Garment Workers Federation (NGWF). It has been operating since 1984, with a total membership of 78,000 workers in 12 garments industrial zones, including 61 registered factory unions and 1,255 factory committees. NGWF is affiliated with IndustriALL and the Accord on Fire and Building Safety⁵⁰⁸.

The main employer association is the Bangladesh Garment Manufacturers and Exporters Association (BGMEA). It has around 4,300-member factories, representing around 40 per cent of knitwear and sweater manufacturers. It is interesting to note that, according to Banerjee and Alamgir, that owners of garment factories constitute a powerful political ruling class in Bangladesh, the authors remark that “at the time of the Rana Plaza accident 10% of the country's members of parliament were also owners of garment factories”. These links, obviously, enabled the garment sector to influence legislative processes of the country⁵⁰⁹.

⁵⁰⁴ Saxena and Labowitz (2015), op. cit.

⁵⁰⁵ H&M Sustainability Report (2008)

⁵⁰⁶ <https://www.imf.org/en/Publications/CR/Issues/2019/09/17/Bangladesh-2019-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-48682>

⁵⁰⁷ Bangladesh ranked 19th on the 2016 Global Slavery Index. In 2018 there were 592,000 people living as modern day slaves in Bangladesh. Vid: Walk Free Foundation (2018) Modern Slavery Index. Available at https://downloads.globalsslaveryindex.org/ephemeral/GSI-2018_FNL_190828_CO_DIGITAL_P-1586103146.pdf

⁵⁰⁸ There are other Trade Unions, inter alia: Bangladesh Apparels Workers Federation (BAWF), Akota Garments Workers Federation (AGWF), United Federation of Garment Workers (UFGW), Federation of Garments Workers (FGW), Bangladesh Textile and Garments Workers League (BTGWL), Bangladesh Revolutionary Garment Workers Federation (BRGWF), Bangladesh Independent Garment Workers Union Federation (BIGUF), Bangladesh Garments, Textile & Leather Workers' Federation (BGTLWF), Garments Tailors Workers League (GTWL), Shadhin Bangla Garments Sramik Karmachari Federation (SBGSKF), and Bangladesh Garment and Industrial Workers Federation (BGIWF)

⁵⁰⁹ Banerjee, S. B. & Alamgir, F. (2018). Op. cit.

a) Social agents and industrial relations in Bangladesh

The post-Rana Plaza era saw a mushrooming of trade unions in the garment sector as the government simplified its policy on union registration. The amendment of Labour Act 2006 in 2013 made it somewhat easier for unions to get registered.

The number of trade unions in the garment sector climbed up after the law amendment. At the end of 2012, there were 132 trade unions in the RMG sector. According to the MOLE, since the amendment of the Labour Act in 2013 and the simplification of trade union registration procedures, an additional 527 trade unions have been registered in the RMG industry, increasing the total number to 6591 in 2018⁵¹⁰. Despite the rise of trade union registration, only 3.5-4% of RMG factories have union presence⁵¹¹ and there are still a number of practical as well as political and legal challenges that stop workers from exercising their full freedom of association.

However, according to the International Trade Union Confederation (ITUC) nearly half of applications to form a new union in the RMG sector were not registered in 2017 while according to publicly available government data the rejection rate stood at approx. one third⁵¹².

The difficulties for registration have been denounced by trade unions for years. On the one hand, legal requirements are excessive, particularly those related to the minimum number of workers needed to form a trade union. On the other hand, the registration process is complicated and non-transparent. Moreover, EPZs' workers and the rest of work force do not enjoy equal rights of freedom of association. These issues have been criticized by the ILO CEACR⁵¹³ and the Bangladesh Labour Act was modified in 2018.

The minimum membership requirement to form a trade union and maintain its registration was reduced from 30 to 20 per cent of the total number of workers employed in the establishment in which a union is formed. However, the threshold is still too high in light of the reality in the factories. In large factories employing thousands of workers signing up a third of them can prove difficult, and consequently most of the new union registration is occurring in small factories,

According to Siddiqui and Uddin “The formation of new unions does little to alleviate the historical animosity between factory owners and workers given the state’s long history of violence against union leaders. Although it is considered illegal to block trade union formation, the trade association body BGMEA continues to oppose them according to several union leaders”⁵¹⁴

Moreover, the CEACR (2018)⁵¹⁵ also observed that “a trade union formed in a group of establishments (defined as more than one establishment in a particular area carrying out the same or identical industry) can only be registered if it has as members not less than 30 percent of the total number of workers employed in all establishments, an excessive requirement that unduly restricts the right of workers to establish sectoral or industry unions”.

The CEACR also indicated that despite the efforts the registrations remained complicated “obliging the applicants to comply with stringent conditions and submit numerous documents, leading to the online registration not being fully functional”. Rejection of registrations remains high (26% of complete applications) with arbitrary denials and discretionary use of powers by the administration.

Furthermore, the Committee also criticized other parts of the legal framework as the interference in trade union activity, including cancellation of registration for reasons that do not justify the severity of the act; the interference in trade union elections; excessive restrictions on the right to strike; excessive preferential rights for collective bargaining agents.

⁵¹⁰ https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157426.pdf

⁵¹¹ ACTRAV-ILO “Trade Unions in Bangladesh: Promoting Safe and Healthy Workplaces in the Ready Made Garment (RMG) Sector. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_615874.pdf

⁵¹² https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157426.pdf

⁵¹³ Observation (CEACR) - adopted 2019, published 109th ILC session (2020), regarding Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

⁵¹⁴ Siddiqui, J., Uddin, S. N. (2016) “Human Rights Disasters, Corporate Accountability and the State: Lessons Learned from Rana Plaza?”, Accounting Auditing & Accountability Journal.

⁵¹⁵ Observation (CEACR) - adopted 2019, published 109th ILC session (2020), regarding Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Observation (CEACR) - adopted 2019, published 109th ILC session (2020), regarding the right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Freedom of association is especially difficult in the EPZ, where there are around 400,000 workers. Regarding this situation, it was adopted in 2019 the Export Processing Zones Labour Act (ELA). The new Act is not in line with ILO standards and includes a large number of provisions that, according to the Committee, need to be repealed or substantially amended to ensure its conformity with the Convention 91.

Anti-union discrimination is another problem that has been underlined by the CEACR. The Committee recalls that the existence of legal provisions forbidding acts of anti-union discrimination is not enough. The procedures and fines are not sufficiently dissuasive. The ITUC referred the dismissal of 36 workers in two EPZ factories in April 2019 following unsuccessful attempts at collective bargaining.

As for collective bargaining, the Labour Act 2006 provides for a Collective Bargaining Agent (CBA) to represent workers in any disputes within a given establishment. An establishment can have only one CBA, which is essentially a trade union elected to be the CBA for that establishment. The tenure for each CBA is two years. The main functions of the CBA are to represent workers on all matters of employment and working conditions and on all proceedings, conduct investigations on behalf of workers when needed, and give notice of, and declare strikes.

There is no legal basis for collective bargaining the industry, sector and national levels and there are some barriers to bargain related to the threshold of representativeness. Bargaining at EPZs zones is also more difficult.

The report of Fair Wear also includes some findings about this question⁵¹⁶:

- *Almost all of the audited factories had a written policy on freedom of association and the right to collective bargaining.*
- *There was no independent union or workers committee run by workers without management involvement at the factories audited*
- *There were no Collective Bargaining Agreements (CBA) observed during audits.*
- *Moreover, workers were not aware of their rights in terms of freedom of association.*

The improvement of freedom of association and collective bargaining is one of the goals of the Bangladesh Sustainability Compact. The three main achievements, according to the 2018 report are the followings:

- *A Workers Resource Centre (WRC) was launched on 11 March 2018. The WRC brings together federations from the National Coordination Committee for Workers Education (NCCWE) and IndustriALL Bangladesh Council (IBC) and will provide capacity building and services for workers and unions.*
- *In March 2017, a 20 member Tripartite Consultative Council (TCC) for the RMG Sector was established. The RMG TCC will monitor worker rights and safety while seeking to enhance industrial relations. It also plays a role in consolidating recommendations from constituents relating to BLA amendments. The TCC has met several times as of May 2018.*
- *Standard Operating Procedures for trade union registration and unfair labour practices were adopted by the Government of Bangladesh in May and August 2017 respectively.*

b) The Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall

The GFA between H&M, IndustriALL and IF Metall on compliance and implementation of international labour standards at the suppliers of H&M was concluded on 3 November 2015, valid for a period of one year. On the 29 September 2019 it was signed again and converted into a permanent collaboration.

With the agreement, H&M confirms its commitment to respect human and trade union rights in the workplace as well as its engagement to use all its possible leverage to ensure that its direct suppliers and their subcontractors respect human and trade union rights in the workplace. On the other side, IndustriALL and IF Metall's confirm their commitment to increase trade union capacities, encourage collective bargaining agreements, and to ultimately foster well-functioning industrial relations.

⁵¹⁶ Fair Wear (2018), *Bangladesh country study 2018*. Available at <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf>

The scope of application of the agreement covers all production units where “H&M’s direct suppliers and their subcontractors produce merchandise/ready made goods sold throughout H&M group’s retail operations, and trade unions/worker representatives present at these production units. Non-affiliated unions may participate in the implementation of this GFA by mutual agreement with IndustriALL”.

According to the agreement, H&M’s suppliers and subcontractors are expected to respect a list of international labour standards. The agreement includes 31 ILO Conventions and Recommendations covering fundamental principles and rights at work, working conditions (wages and benefits; working hours and part-time work; occupational safety and health) and employment policy.

Other international principles are also included, such as the Universal Declaration of Human Rights, the UN Conventions on the Right of Child, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration and the OECD MNE Guidelines.

The guiding principle of the Agreement is “the shared belief that cooperation and oversight of the Parties is the best way to fulfil the Agreement and to ensure good working conditions in the industry at H&M’s direct suppliers and their subcontractors”. In this sense, the parties agree to solve every conflict on the interpretation and implementation of the Agreement within the provisions and spirit of the Agreement.

The Agreement states that H&M shall inform all its direct suppliers of the existence and the implementation of this Agreement and request all direct suppliers inform their subcontractors (producing goods for H&M). Moreover, the brand shall request that their direct suppliers inform their employees and request subcontractors to inform their employees of the existence and the implementation of this Agreement.

H&M shall evaluate the capacity of management representatives at H&M’s direct suppliers and subcontractors and when needed request them to undergo necessary capacity building, including but not limited to fields of employers’ responsibility, workers’ rights and obligations, industrial relations, collective bargaining agreements and peaceful conflict resolution.

According to the Agreement, H&M should provide IndustriALL and or IF Metall with the latest available updated list of H&M’s direct suppliers and their subcontractors whenever they request it.

For implementation of the agreement and dispute resolution the parties have agreed on a specific structure in three levels: factory level; national level with the National Monitoring Committees (NMC); and global level, with the Joint Industrial Relations Development Committee (JIDRC).

Even if the Agreement says that management and workers’ representatives should cooperate and negotiate at the workplace, it does not provide further detail or information about how this implementation at factory level should be done.

Considering that only 3.5-4% of RMG factories in Bangladesh have union presence⁵¹⁷. It is thus questionable whether, according to the company 100% of H&M tier 1 supplier factories in Bangladesh had democratically-elected worker representation. The lack of workers’ representatives at the workplace is the weakest part of the International Framework Agreement.

The NMC have been created in some countries as in Bangladesh, Cambodia, Indonesia, Myanmar and Turkey. They are composed of local IndustriALL-affiliated trade union representatives and local H&M group production office representatives.

Although the Agreement was considered as an improvement, even by CCC, there were some criticisms about the contents and there are many questions about its development and outcomes.

From the very beginning, CCC stated that “The H&M GFA has no binding dispute resolution and only non-binding mediation in case the parties disagree on various issues. It is ambitious in its content but its success to achieve effective implementation will depend on the capacity and political will of the parties”⁵¹⁸.

⁵¹⁷ ACTRAV-ILO “Trade Unions in Bangladesh: Promoting Safe and Healthy Workplaces in the Ready Made Garment (RMG) Sector. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_615874.pdf

⁵¹⁸ Vid: Clean Clothes Campaign response to the agreement between H&M and IndustriALL. Available at: <https://cleanclothes.org/news/2015/11/11/clean-clothes-campaign-response-to-agreement-between-h-m-and-industrial>

Criticism was focused in two main questions, wages and freedom of association and collective bargaining. As we have explained in the precedent sections, the improvements published by H&M do not meet the field research done by several organisations⁵¹⁹.

Among the reasons that weaken the implementation process of the agreement, we should also mention the lack of respect and adherence to implementation of fundamental trade union rights and international labour standards by suppliers and government. This creates a situation where workers fear from organising in order to enforce their rights.

On the other hand, it should be also highlighted that the commitments of the agreement were tested during the labour unrest of 2016 and the following repression. Then H&M together with other brands, due to trade union and social organisation pressure, announced that they would not be attending the Dhaka Apparel Summit 2017. This decision, and a letter sent by the brands to the Prime Minister informing that the climate of trade union repression in Bangladesh was incompatible with their industrial promotion activities, was important to release the repression against workers⁵²⁰.

3.3. Remedies and sanctions

Labour inspection is a key actor for enable to promote decent work throughout the RMG chains. However, the capacity of labour inspection in Bangladesh is reduced. In this line, the ILO CEACR has adopted several observations regarding the application of Labour Inspection Convention (N. 81)⁵²¹ in Bangladesh.

Among the comments, it mentioned the necessity of putting the EPZs and SEZs under the purview of the labour inspectorate and criticizes the EPZ Labour Act was adopted in February 2019. This text allows to undertake inspections but requires an approval of the Executive Chairman of the BEPZA⁵²². Moreover, the Committee asked the Government to take the necessary measures to ensure that labour inspectors are empowered to enter freely and without previous notice establishments in EPZs and SEZs, without any restrictions.

Other issues such as the limited amount of labour inspectors⁵²³, the previous announcement of the 80% of inspections (in 2016-17), the reduce amount of the fines prescribed (not dissuasive)⁵²⁴, were also raised by the Committee to the Government.

The CEACR also adopted a Direct Request⁵²⁵ regarding the ready-made garment (RMG) sector and the end of the period of validity of private initiatives. The Committee noted the observations made by the International Trade Union Confederation (ITUC), that among the factories not covered by Accord or Alliance, only 107 of 809, had taken all the suggested remedial action in accordance with the corrective action plan established. It showed also its concern that the public inspection authorities may not yet have the necessary capacity to assume monitoring of the factories that were covered by Alliance and are currently covered by Accord. The committee was also worried by the under-reporting of industrial accidents and the lack of reporting of any cases of occupational disease⁵²⁶.

⁵¹⁹ Vid. <https://cleanclothes.org/news/2019/not-a-single-worker-is-making-a-living-wage-yet-hm-claims-to-have-done-an-amazing-job>

⁵²⁰ Zito, M., Cirioni, M., Stanzani, C. (2017) *Implementation of International Framework Agreements in multinational companies*. SindNova, Fondazione Di Vittorio, IRES France, Fundación 1º de Mayo.

⁵²¹ Observation (CEACR) - adopted 2019, published 109th ILC session (2020). Labour Inspection Convention, 1947 (No. 81)

⁵²² The Committee recalls that Article 12 of the Convention provides that labour inspectors provided with proper credentials shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection.

⁵²³ The Committee noted that 575 labour inspection positions had been approved in 2014 but not filled, and that the number of labour inspectors decreased from 345 to 320 between 2017 and 2018. The number decreased to 308 labour inspectors by August 2019.

⁵²⁴ In 2018, 42,866 labour inspections were undertaken and 116,618 violations detected (compared with 40,386 inspections and 100,336 violations in 2017), 1,531 cases submitted to the labour courts (1,583 in 2017) and 798 resolved cases (574 in 2017). The Committee notes that the outcome of cases referred to the courts were limited to the imposition of fines, and that the amount of penalties imposed in 2018 was BDT3.55 million (approximately US\$41,268, an average of approximately US\$52 per resolution).

⁵²⁵ Direct Request (CEACR) - adopted 2019, published 109th ILC session (2020). Labour Inspection Convention, 1947 (No. 81 https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4019768:NO)

⁵²⁶ The Committee notes from the statistical information provided by the Government that the number of occupational accidents reported decreased from 568 in 2017-18 to 88 in 2018-19 (although the number of fatalities increased from 36 to 121), and it observes that the Government again did not provide information on statistics of cases of occupational disease

SECTION 4:**CONCLUSIONS**

Since the 1970s, transnational corporations have used different mechanisms fundamentally linked to Corporate Social Responsibility strategies in order to offer a friendly image to citizens while trade unions and NGOs reported multiple violations of human rights and environmental norms in many TNCs subsidiaries and supply chain. From that time until today, the efforts of unions and organizations and social movements have been enormous and have made vast progress, both in terms of transparency and due diligence mechanisms, and in terms of progress towards improving the working conditions of the workers involved in the global value chains.

There is no doubt that the response by H&M to social pressure has been one of the most visible, launching a series of measures in several areas and especially with regards to the adoption of the International Framework Agreement. However, much work remains to be done.

This report has been prepared without any access to direct sources, such as the testimonies of the workers and trade unionists involved, and has therefore been written making use of secondary sources. Under these circumstances, the conclusions of the investigation, which are necessarily provisional, can be summed up as the three following ones:

The first issue that is important to highlight are the difficulties in obtaining direct information and in evaluating the claims from different sources. Thus, It is evident that H&M uses partial information that can be interpreted favourably to promote its image without comparing or contrasting information”.

Secondly, it is necessary to compare the data provided by the company itself or the studies that simply collect these, with a large set of reports that point in the opposite direction, both in relation to H&M and, especially, with regards to Bangladesh. The reliability of the data used by international bodies as the ILO CEACR is undeniable and shows an irrefutable truth: the choice of Bangladesh as the country on which to base most of its production responds, fundamentally, to the objective to lower production costs as much as possible and thus to indirectly take advantage of the precariousness in terms of both rights and institutions. Thus, the efforts that H&M can make to pressure its suppliers to comply with minimum labour standards may likely only be effective over some of them. As remarkable as they are, they may in no case be enough. In the same way, the data reveal another irrefutable truth, the employment created by H&M in Bangladesh is currently fundamental to the country's development model.

Thirdly, and in order to combine this permanent dilemma (economic development v. Labour rights), the activity of unions in the international arena is essential. In this sense, the Framework Agreement is a valuable instrument, although repeated criticism of the NMC's lack of contact with reality in the workshops should be taken into consideration.

And last but not least, it should be highlighted that beyond the agreement, the joint work of unions with social organizations and strategies that combine labour protests with other pressure mechanisms, especially in the area with regards to consumer strategies, remain key.

In addition, the existence of different national-level proposals, an outstanding example of legal strategies against the impunity of TNC is the *Loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre*, adopted by the French National Assembly on 21 February 2017.

At the international level, the most important fight at legal level is the so called ‘Binding Treaty’ process. The process brings together different old social struggles, it was officially launched on 26 June 2014 with the adoption in the United Nations Human Rights Council of Resolution 26/9, which established ‘an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’. This treaty, could be, together with the reinforcement of mechanism as the International Framework Agreement, a crucial point towards the guarantee of decent work throughout the global value chain, around the world.



CONCLUSION



The six cases selected for the first phase of the ETUC project on “Securing Workers Rights in subcontracting chains” concern different sectors: food and agriculture, garment industry, road transport and construction. All of these sectors have been identified by the literature as sectors where subcontracting practices are widespread and abuse of workers’ rights is frequent.

The main outcome of our studies is that subcontracting is, in the analysed sectors, THE business model. This means that, for the companies in these sectors, subcontracting has become a strategy to increase profits participating in highly competitive markets. Companies that contract out achieve significant competitive advantages; consequently, many competitors end up emulating the outsourcing model. Moreover, subcontracting is not a temporary solution to deal with peculiar market situations or to perform tasks that do not belong to the company’s core business. Subcontracting can concern almost the entire production process and it is a never-ending story: as illustrated in many reports (as Italpizza, the Spanish meat sector, Rive Gauche, Racing Arena), even when labour inspectors or trade unions intervene to denounce worker rights’ violations or other severe infringements, subcontracting does not end but it is just adapted in order to be control-resilient. In many circumstances, the best solution is to find a new subcontractor: in fact, the main companies claim not to be responsible of any infringement happening in the subcontracting chain, allocating the full liability to their subcontractor(s); in order to demonstrate their innocence, the client and the contractor(s) immediately terminate the contract(s) and look for other subcontractors. Sometimes, the latter are just apparently new subcontractors; in fact, the physical persons that have managed the company whose contract has been terminated, can easily register a new company and sign a new subcontract with the same client or the contractor.

We should also underline that certain national legislations foster these washout solutions. The Belgian legislation on joint liability is emblematic: once informed of the worker rights’ violations, the client and the contractor(s) have 14 days to end the contract and avoid any joint liability. A similar washout solution has occurred in the Racing Arena case, in which the main companies have taken advantage of the French legislation that allows the client and the contractor(s) to terminate the subcontract(s), avoiding any joint liability, in case the subcontractor refuses to stop an infringement.

From the studies carried out, it appears clearly that subcontracting is a risk management strategy: it allows (usually) large companies to separate power and profits, on one side, from risks and responsibilities, on the other side. In fact, the client and the main contractor(s) keep a certain control on their subcontracting chain, deciding the conditions that must be respected in the service provision or in the good production (e.g. the price, the timing, the technical requirements, the volume of production; see the Spanish meat industry and Rive Gauche reports). The degree of control on subcontractors is even higher when the latter belong to the same group of companies in which several companies seem to behave like one single business structure. Sometimes, subcontractors are letterbox companies, i.e. companies that do not perform any economic activity, but are created in order to lower labour cost or set up fiscal optimisation strategies. A similar situation has been detected in the Spanish meat industry and in the Italpizza cases in which we have denounced the presence of bogus cooperatives (i.e. cooperatives that are far from being participative and democratic) that do not operate as independent corporate organisations and whose only purpose is to manage and outsource labour to the client companies. In the Rive Gauche and Italpizza reports, we have also underlined the volatility of the subcontracting companies: they can easily be created, can cease their activities with a short notice and can be quickly replaced.

The risks and the responsibilities linked to the good production or the service provision are instead displaced on subcontractors (usually small companies) that, in order to comply with the conditions imposed by the client or the main contractor, are often forced to infringe labour regulation on working time, health and safety, wages, etc. (see the Racing Arena and the Italpizza cases). In the Rive Gauche case, many people have indicated that the unfeasibility of the price established in the subcontract can be the main evidence that the client and the contractor are aware of the worker rights’ violations.

Sometimes, the first tier of subcontractors decides to further contract out all/part of the activity, so as to benefit from the same risk management strategy set up by the client and the contractor. Consequently, the workers employed by the last tier of subcontractors are usually the ones that enjoy the worst working conditions.

As explained in the Spanish meat industry report, subcontracting can also support the idea of companies without workers that can fully exercise the functions of employers without assuming any of the obligations and

responsibilities that said statute implies. A similar situation has been found in the Italpizza case in which the entire production cycle has been outsourced to companies that work exclusively for one client.

Consequently, the remedies adopted to face worker rights' abuse in subcontracting chains are totally ineffective if they strengthen the position of the main companies involved. On the contrary, remedies should aim at reconstructing the link between power and profits, on one side, and risks and responsibilities, on the other side. Among the rules that can produce this effect, the most effective are certainly the ones that limit the possibility to contract out or shorten the length of the subcontracting chain⁵²⁷. However, both measures could not comply with the EU Law that recognises economic freedoms as fundamental freedoms and allows obstacles to them only if they pass a strict proportionality test. White lists or black lists of reliable/unreliable subcontractors would also be helpful. Nevertheless, these measures require detailed information on companies operating in the EU (e.g. on disciplinary or administrative actions, criminal sanctions, decisions on fraudulent practices, insolvency, bankruptcy) and a well-functioning data exchange system, both requirements that are currently missing.

Other rules aimed at re-linking power and profits with risks and responsibilities can be found in national labour regulation. Some States (as Belgium, Italy and Spain: see the Rive Gauche, the Italpizza and the Spanish meat industry reports) prohibit workers' supply and provide a substantial definition of employer, defining the latter as the person that exerts the power to direct and control the workers and to organise the production process; consequently, whoever exploits worker's activities must bear the duties linked to the contract of employment. As detected in several reports (as the Spanish meat industry, Rive Gauche), illegal workers' supply seems to occur in several subcontracting chains.

Moreover, the companies should be made responsible for what happens in their subcontracting chain through rules on joint and several liability⁵²⁸. These rules fulfil three important objectives: first, they force the client and the contractor(s) to better select their subcontractors and to verify that they comply with their obligations (preventive effect); second, these rules punish the person(s) that profits from activities performed by workers involved in the subcontracting chain, without respecting labour regulation (deterrent effect); third, they enable workers to address the client and the contractor(s), in case their employer does not fulfil its obligation (guaranteeing effect). The latter objective is particularly important in cases of bankruptcy or company closure that happen very often in subcontracting chains (see Italpizza and Rive Gauche reports). Only a full chain liability is able to effectively pursue the above-mentioned objectives. Besides, in order to be effective, the rules on joint and several liability should avoid any escape clause, i.e. any clause that easily allows a company to rule them out (see the Racing Arena and Rive Gauche reports). In particular, it should be avoided that the fulfilment of the duty of vigilance on the subcontracting chain allows the client and the contractor(s) not to be liable for the risks generated by their economic activities (see the Racing Arena report)⁵²⁹.

Other strategies to re-link power and profits with risks and responsibilities exploit the theories on co-employer. In particular, the remedial theory on co-employer, i.e. the theories that impute the unlawful conduct of the employer to another subject who controls or directs the former, seems to be useful⁵³⁰.

The study conducted has also proven that subcontracting allows *à la carte* work thanks to which companies have at their disposal, at their will and with total flexibility, a large number of workers. In fact, in a subcontracting chain, the stability of the work contract is affected by the duration of the main contract and the subcontract(s): if the latter end, the workers employed by the subcontractor(s) could be lawfully dismissed. In the Spanish meat industry case, this effect has been emphasised by the fact that the members of the cooperatives operate under a self-employment regime. Similarly, in Italpizza, the greater flexibility in the management of the workforce has been possible thanks to the special labour regulation applied to cooperatives' members. Therefore, subcontracting can be used to manage the workforce in a very flexible way: facing production peaks

⁵²⁷ Council Conclusions on Improving the working and living conditions of seasonal and other mobile Workers (9 October 2020) suggest to introduce «limits to subcontracting chains as well as joint and several liabilities». See also the ban to use subcontractors in the meat industry introduced by the German legislator (Erol S., Schulten T., RENEWING LABOUR RELATIONS IN THE GERMAN MEAT INDUSTRY. An end to 'organised irresponsibility?', WSI Report No. 61e, January 2021).

⁵²⁸ See European Parliament, *Report on a strong social Europe for Just Transitions* (2020/2084(INI)), 24 November 2020, § 56.

⁵²⁹ On the use of due diligence obligation to rule out joint liability see Article 12 of the Directive 2014/67 and Article 17 of the Directive 2014/36.

⁵³⁰ On the contrary, the *ex-ante* theory on co-employer can boost the promiscuous use of the workforce without ascribing the employer's obligations to all of the companies involved (see the Italpizza report).

or times of crisis, the client and the main contractor(s) can simply adapt their subcontracting chain to demand more services or to reduce the services demanded. During the pandemic crisis, this outcome was clearly visible. Many brands and retailers responded to the steep and sudden drop in consumer demand, caused by the closure of retail stores, by suspending or cancelling orders with their suppliers worldwide, leaving many workers without a salary and a job⁵³¹.

In order to remedy the *à la carte* work, measures to guarantee the continuity of the work contract should be applied (as social clauses in public procurement, workers' protection in case of transfer of undertaking). Moreover, washout solutions in favour of the main companies should be forbidden (see above).

Subcontracting permits as well the client and the contractor(s) to cut labour costs and thus to reduce the price of the goods produced or the services provided. This outcome is much more evident in global supply chains (see the H&M in Bangladesh report) and when subcontracting concerns transnational cases (as in Rive Gauche and Racing Arena). In the latter, subcontracting boosts the regime competition among States which struggle to offer to foreign investors the best conditions to establish in their territory from where they can then provide their services abroad. In global supply chains, the transnational corporations' capacity to move production seeking the cheapest location (i.e. the location with the laxest labour laws) forces States in a permanent race to the bottom, that can end in the creation of free trade zones (FTZs) or special economic zones (SEZs) which offer business-friendly regulations (see the H&M in Bangladesh report)⁵³².

Subcontracting affects labour conditions (in general) and labour costs (in particular) also in national cases, as the Itaipizza and the Spanish meat industry cases demonstrate. Both reports clarify the techniques set up to reduce the cost of the services provided, by progressively deteriorating the working conditions.

Therefore, we can conclude that workers' exploitation features subcontracting and it is fostered by the fragmentation of the production process among several different companies. Workers' exploitation can occur in a range of forms, some of which are illegal whether others can be gathered in a wide definition of social dumping⁵³³.

The illegal forms of workers' exploitation can vary from severe crimes, as trafficking of human beings (see the Rive Gauche report), to bogus self-employment and bogus cooperatives (see the Itaipizza and Spanish meat industry cases), bogus posting of workers (see the Rive Gauche), illegal workers' supply (see the Itaipizza and Spanish meat industry cases), or other forms of worker rights' violations. Sometimes, these violations are so common that we face a normalisation of labour abuse: in these circumstances, the workers do not perceive anymore the existence of worker rights' violations; these violations are embedded in the sector and are considered as part of the normal working conditions⁵³⁴.

Consequently, workers do not fight for their rights. In fact, the absence of workers' complaints has been detected in almost all of the reports. Besides the cases in which we face a normalisation of labour abuses, there are cases in which workers give up their rights because they are third-country nationals and their stay in the European Union depends on the work permit (see the Rive Gauche, the Racing Arena, the Itaipizza and the Spanish meat industry cases). Therefore, they are afraid of denouncing violations they are victims of: in fact, if they denounce these violations, they risk losing their work contract and, consequently, their work permit. Even worse is the situation of the third country nationals without a work permit who risk to be convicted of illegal migration and deported back to their country in case they denounce worker rights' abuse. For this reason, illegal migrants are often involved in the most severe forms of workers' exploitation (see the Rive Gauche case).

⁵³¹ ECCHR, ILAW, WRC, *Farce majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers*; ILO Research Brief, *The supply chain ripple effect: How COVID-19 is affecting garment workers and factories in Asia and the Pacific*, October 2020; Penelope Kyritsis, Genevieve LeBaron, and Scott Nova (2020) *Hunger in the Apparel Supply Chain: Survey findings on workers' access to nutrition during Covid-19*, Worker Rights Consortium. In order to avoid the devastating effects caused by retailers' behaviour, the Clean Clothes Campaign, for example, has called on brands to sign up to a wage assurance, a public commitment to ensure that the workers in their supply chains are paid what they are owed and to enter into negotiations to establish a fund so that, if retrenched, workers will receive legally-owed severance pay (<https://news.trust.org/item/20201016100358-n8xy0/?fbclid=IwAR26nJRLzdmXBH7gyjDcEauHLt6ni2CdQJHDzXyfstjvU4j0B9mgvZr1VVM>). On the 15 March 2021 H&M and Industriall Global Union adopted a joint statement to support to the recovery of the Global Garment Industry through the Covid-19 crisis with which H&M commits to fulfil all its payment terms and to continue to strengthen the predictability of orders, and work for reducing monthly fluctuations in order placement.

⁵³² In the same report it is also underlined that, in order to attract foreign investors, some countries have specialised in certain tasks and business functions.

⁵³³ Social dumping refers to any practice that exploits low labour conditions with the aim of gaining competitive advantage. It includes both legal and illegal behaviour: only in the second case, there is a breach of national and/or EU law (Kiss M., *Understanding social dumping in the European Union*, EP Briefing, 2017; Bernaciak M. (ed.), *Market Expansion and Social Dumping in Europe*, Routledge, 2015).

⁵³⁴ Some scholars have talked about "everyday abuse": «Workers experiencing everyday abuses rarely regard themselves as victims in need of rescue, but their capacity to defend their interests tends to be heavily constrained» (J Quirk, C Robinson, and C Thibos, 'Editorial: From Exceptional Cases to Everyday Abuses: Labour exploitation in the global economy', *Anti-Trafficking Review*, issue 15, 2020, p. 7).

Moreover, many workers decide not to sue their employer (and the client or the contractor) due to the cost and the length of the proceeding. They prefer to accept a certain degree of worker rights' violations in order to keep their job and not to lose their salary. The lack of workers' complaints is even more evident in the transnational cases, when workers face additional problems, as the difficulties in suing an employer established abroad and executing a decision against him (see the Rive Gauche and Racing Arena cases). Besides, posted workers, even if illegally exploited, usually earn more than in their country of origin, and thus prefer to keep their job (see the Racing Arena report).

In global supply chains, the impunity in cases of human rights' violations committed by transnational corporations is the rule. As explained by the H&M in Bangladesh report, in the best scenario, some of these cases have ended with compensation negotiated out of court.

Of course, it can happen that the degree of workers' exploitation is so high that it becomes unbearable for the workers involved. In this situation, a Pandora's box opening moment can take place (see the Rive Gauche and Itaipizza reports) during which the exploited workers organise 'spectacular' protests to denounce the worker rights' violations; the labour inspectors, the trade unions and sometimes other public authorities intervene to control what has occurred; in some occasions, in order to avoid bad publicity, the client or the main contractor are available to satisfy workers' requests but, in the end, subcontracting goes on as a never-ending story.

As already mentioned, the client and the main contractor(s) do not wish to be involved in any worker rights' violation because it affects the image of the company. For this purpose, they sometimes request ex-ante certifications. The consequences of these certifications have been clearly illustrated in the Itaipizza report: they hamper effective labour inspections and prevent workers' access to justice. This should be taken into consideration when dealing with proposals such as the service e-card.

It should also be highlighted that subcontracting makes controls by labour inspectors much more difficult. In fact, the complexity of the subcontracting chain hinders the detection of the companies involved, whose relationships are often unclear; moreover, the labour inspectors struggle to determine who are the employers of the workers in the chain, which working conditions are applied, whether labour regulations are respected (see the Spanish meat industry report). Sometimes (as in the transport sector), inspections require the cooperation of different national authorities. Labour inspections are even more complex in transnational cases, when the subcontracting chain involves companies established in several Member States. As testified by the report on H&M in Bangladesh, in global supply chains effective inspections are almost impossible, due to the weak presence of labour inspectors in the foreign country, the previous announcement of the inspections and the low amount of the fines.

In order to face the illegal forms of workers' exploitation, it is therefore necessary to strengthen the efficiency of the inspections, promoting the cooperation among different public authorities at national level, as well as among different authorities at European level. In the transnational cases, the role of the European Labour Authority will be fundamental. Considering their dissemination on the territory, trade unionists should also be empowered to promote monitoring and controls.

As regards the legal forms of workers' exploitation, they can take place in different ways. On one side, we have the national cases (Itaipizza and the Spanish meat industry) in which companies exploit the benefits linked to a particular type of company (as the cooperative) and to the fragmentation of national collective agreements, as a way of flexibilising the use of workforce and significantly reducing labour costs. On the other side, we have the transnational cases (Rive Gauche, Racing Arena) in which companies fully enjoy the possibilities offered by the freedom to provide services as far as it concerns, for example, the payment of social contributions in the home country, the impossibility to apply company collective agreements, the obstacles for organising collective actions. Finally, in global supply chains (as H&M in Bangladesh), companies benefit from the much more advantageous conditions offered by some countries that, participating to the global regime competition, do whatever they can to attract foreign investors, despite of the consequences that this can entail on working conditions and environment.

In order to fight against the legal forms of workers' exploitation, several measures could be adopted, at national, European and international level. First of all, in national and European subcontracting chains, the principle of equal treatment should be fully enforced. European Labour Law should also promote the harmonisation of national labour regulations, establishing minimum standards that can always be increased by Member States.

At international level, the respect of the International labour standards should be strengthened throughout the entire supply chain, intervening also on the commercial agreements between the main company and the suppliers. Of course, a due diligence obligation is also useful to monitor the supply chain and to prevent human rights violations. However, the effectiveness of these measures is currently affected by the lack of labour inspections and the weakness of local trade unions and worker representatives (see the H&M in Bangladesh report).

All of the reports relate the workers' division and the difficulties to organise workers in the subcontracting chains. In fact, the fragmentation of the production process among several companies hampers, in itself, the creation of worker representatives, as workers involved in the subcontracting chain often pursue different interests, since they have various employers, different collective agreements and sometimes diverse national legislations. In case of transnational subcontracting chains, these differences are even more significant and the interaction among workers can be prevented by the linguistic barriers (see the Racing Arena and Rive Gauche reports). Moreover, the collective rights that the workers benefit from are often divergent (e.g. concerning the scope of the worker representative, the number of its members, the information and consultation rights), and this is even more true in transnational cases. The fragmentation of the production process among several companies can also hinder the achievement of the thresholds to create a worker representative in the company or in the establishment; in fact, subcontractors are usually small companies without any worker representative. Consequently, in none of the studies we have found a worker representative for the subcontracting chain or in the site.

It would be extremely important to support the creation of worker representatives in complex organisations, such as the subcontracting chain, the site or the group.

The lack of worker representatives in the subcontracting chain threatens the effectiveness of the monitoring obligations sometimes imposed to the client and the contractor(s). In absence of workers' control, these obligations can be easily fulfilled through formal declarations demanded to subcontractors and assessments done mainly (or only) by the leading company (see the H&M in Bangladesh report).

In some cases, national trade unions have intervened on the subcontracting chain, on the site (Italpizza and Rive Gauche) or on the sector (the Spanish meat industry cases), in order to limit social dumping and fight workers' abuse. Moreover, some national legislations and collective agreements aim at strengthening the position of worker representatives present inside the client or the contractor(s)' organisations. In Belgium, for example, the national collective agreement for the construction sector guarantees to these worker representatives the right to be informed on the subcontractors and on the conditions applied to their workers. Similar rules are established by the French labour code (see the Racing Arena report) and in the Global Framework Agreement between H&M, IndustriALL Global Union and Industriefacket Metall. The rules designed to strengthen the position of worker representatives at client or contractor level are extremely important since they contribute to developing solidarity among workers and to fighting the prejudices entailed by the Insider-Outsider Theory.

Moreover, these rules increase the transparency of the subcontracting chain⁵³⁵. The latter is also promoted by national and European legislation (see, notably, the rules on preliminary declaration in case of posting: Racing Arena and Rive Gauche reports). The rules on transparency should be strengthened in order to have a clear picture of the full subcontracting and supply chain.

We have also noticed that companies do not only benefit from the workers' division caused ex se by subcontracting, but promote it through several strategies. In the Rive Gauche case, the workers have been systematically clustered according to their nationalities: not only they have been accommodated in different apartments according to their country of origin, but the tasks have been assigned on the basis of the nationalities; consequently, the Belgians on the construction site performed mainly managerial tasks, while the Italians monitored the work carried out by the third-country nationals whose activities were the most arduous. As explained in the report, this management strategy boosts the spread of stereotypes that can end in some forms of racism.

Moreover, in the construction sector (Rive Gauche and Racing Arena), workers' organisation is also prevented by the temporary duration of the construction site, the use of temporary contracts of employment and the widespread presence of posted workers and bogus self-employment. Therefore, it is very difficult to form a worker representative in the construction site.

⁵³⁵ On the importance to strengthen transparency and disclosure also in company law see Cremers J., EU Company Law, Artificial Corporate Entities and Social Policy, Report for ETUC, 2019, p. 59.

Similarly, in Italtpizza and the Spanish meat industry cases, workers' organisation has been hampered by the high turnover of workers. This has been caused not only by the wide use of precarious contracts, but also by the bad working conditions: as soon as they find a better position, workers engaged in this sector (food industry) quit their job. Moreover, also in the food industry, the trade unionisation of the workforce is hindered by the wide presence of foreign workers.

In the road transport sector, we can talk of invisible workers: when performing their activities, workers are extremely mobile; consequently, they are difficult to detect and organise. Moreover, they have few occasions to get in contact with each other.

In the supply chain case (H&M in Bangladesh), we have detected an almost complete absence of trade unions and worker representatives in the factory. In global supply chains, the absence of worker representatives at company level can hardly be compensated by the intervention of national trade unions and worker representatives at the client or contractor level. In fact, trade unions are often very weak or controlled by the company management, while the worker representatives at the client or contractor level are too distant from the country where the supplier is based and do not have the means to perform trade union activities along the entire supply chain. It is therefore extremely important to support the role of European and Global trade unions in monitoring and promoting the respect of collective labour rights in the supply chain. Besides, the creation of worker representatives at company and group level should strongly be supported.

Another relevant outcome of our study is the lack of collective actions. As already mentioned, many workers prefer not to protest in order not to lose their job; this is particularly true in case of third-country nationals whose presence in the European Union depends often on a work permit linked to the contract of employment. The lack of strikes is also caused by the instability of the work contracts, as well as by the difficulties in organising workers in the subcontracting chain (see above).

We should also mention that, when strikes have been organised, sometimes they have been severely repressed. In some cases (as in H&M in Bangladesh), this has happened because strike is not duly protected in the country concerned, and workers that participate in protests can lose their jobs. In other cases (as in Italtpizza), the intervention of the police has been caused by the decision to block the trucks' access to the site, so as to strengthen the effect of the protest. These collective actions have been triggered by severe forms of workers' exploitation in the subcontracting chain. Consequently, workers not only have been victims of this exploitation, but have also been convicted or dismissed when they have dared protesting.

In the Italtpizza case, we have also detected two other important elements: on one side, the intervention of a public authority to mediate the conflict can help in responsabilising the client for the working conditions in its subcontracting chain; on the other side, trade unions can struggle in finding a unitary strategy to contrast workers' exploitation, so that subcontracting boosts not only workers' division but also conflict among trade unions.

In the Spanish meat industry case, trade unions have pursued diversified strategies, combining strikes with negotiation processes, media pressure, continuous claims before the labour inspectorate, pressure on political parties. A similar strategy has been set up by Belgian trade unions in the Rive Gauche case. We can thus conclude that the simultaneous intervention of labour inspectors and journalists next to the trade unions increases the effectiveness of the collective action.

Finally, we should underline that, in many countries (also in the EU), strikes in support of workers employed in the subcontracting chain is considered illegal. Moreover, there is no international treaty or European legislation that recognises the right to strike against a transnational enterprise to all workers involved in its production process, including workers in the subcontracting and in the supply chain. Both elements strongly weaken collective actions inside these complex organisations.

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