

Chapter 7

Subcontracting, insecurity and posted work: evidence from construction, meat processing and ship building¹

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1. Subcontracting and posted work

An explicit goal of European integration is to remove barriers to the free movement of labour. European Union citizens have broad rights to live and work in other EU member states, and, in a legal sense, to be treated as equals when abroad. Many Europeans, particularly those in the less prosperous new member states have taken advantage of labour mobility. Alongside this migration of individuals from East to West, however, another migration is taking place: that of workers ‘posted’ as dependent employees of transnational subcontractors or subsidiaries. These workers, unlike those who migrate as individuals, are treated in part under the standards of the country they are sent from, rather than those of the country they are posted to. Instead of coming under the EU regulatory regime governing the free movement of labour, these workers are legally treated under the free movement of services. Providing agency labour or subcontracting on a construction or shipbuilding project, or in a meat packing plant, for example, constitutes a ‘service’ under EU law. Because of the centrality of the free movement of services under EU constitutional law, EU rules limit what governments and trade unions can do to regulate transnational service providers (Lillie 2010). It is now common to subcontract to transnational service providers in this way specifically because firms can contest many aspects of host country employment regulations, thus ‘arbitraging’ between regulatory environments.

Regulatory arbitrage is defined as strategizing over the regulatory treatment of a transaction in selecting a regulatory regime from among two (or more) alternatives (Fleischer 2010: 4). In practice, this can mean physically moving the transactions to a different territory by opening up

1. The insights in this chapter are based on the findings of the *Transnational Work and the Evolution of Sovereignty* (TWES 263782) project.

an office or factory there, or incorporating a new company in another territory with a view to transacting business (such as managing employment contracts) under the law of that territory, even if the actual activity takes place elsewhere. It can also mean moving between different forms of regulation in the same geographic space, such as between labour laws governing temporary agency work or between metalworking and construction collective agreements. The issue of posted work is therefore closely linked to mechanisms of subcontracting and agency work, and to the strategies of employers for ‘regime shopping’. The precise legal and organizational formulations used and the reasons for them differ from one context to another, but behind these superficial differences and complexities are a set of very similar employer strategies and motivations all based on regulatory arbitrage.

Regulatory gaps emerge in the transnational regulation of employment for posted workers within the EU. These gaps are both in the regulations themselves – i.e. there are regulatory loopholes created by European institutions keen to foster competition in wages and social standards² – as well as in the fact that the enforcement of any labour standards at all is inherently difficult in the context of complex EU regulatory interactions with national systems. Company practices interact with this complex and variegated regulatory environment, systematically seeking cheaper options for employing workers. This means that practices like ‘worker posting’ exist both to fill a real need for companies sending workers abroad to perform a particular service, and as a form of regulatory avoidance. Posting is most prevalent in industries such as construction and shipbuilding where subcontracting practices are highly developed because there are already organizational processes in place to facilitate multi-employer worksites, but it also emerges in other types of workplace offering opportunities for regulatory arbitrage. Subcontracting combined with posting allows employers to access alternative regulatory regimes in a legal sense, as well as in an employment relations sense, in that company boundaries and practices, as well as the expectations of the subcontractors’ workers relate back to their home country. Thus, posting shapes and is shaped by the interaction of EU, home and host country regulatory environments, the industry-specific environment, and an industry’s production arrangements.

² This intentionality is made clear in the infamous *Laval* decision (Case C-341/05), discussed later herein.

The aim of this chapter is to explore the diverse ways in which employers use transnational contractual arrangements to construct precarious employment in the EU. We explore the way in which certain kinds of contracting result from firms taking advantage of their ability to arbitrage between European regulatory frameworks, exploiting regulatory gaps and avoiding regulatory enforcement. Following a discussion on the European labour mobility policy we examine the contractual arrangements and labour market regulations in three respective industries and countries: 1) the construction sector in Germany, the Netherlands, Finland and the UK; 2) the German meat industry, and 3) shipbuilding in Finland. We look at construction in the EU from a broad perspective, as it is well-researched in many EU countries and we can draw some general lessons and comparisons from this research. As the meat industry and shipbuilding have been less researched, we look closely at how cases have played out in the specific contexts of Germany and Finland. Within these case studies we discuss the use of contingent labour as part of a new strategic approach to flexibility and examine the peculiarities associated with the use of respective contractual relations in each case.

2. European labour mobility policy

The EU politics of labour mobility establishes a rights regime for workers migrating as individuals and a separate regulatory strand for workers posted by their employers. This fact is an important driver for transnational subcontracting, since it creates differences between workers who are sent by firms to work abroad, and workers who move as individuals. Posted work falls under the free provision of services rather than the free mobility of labour, which is important because posting is subject to a different set of social and labour regulations than individual labour mobility (Dølvik and Visser 2010). Posted worker contracts must comply with the Posting of Workers Directive (PWD), which allows host states to apply their own standards in specific areas when these are higher than the sending state's.

The Directive specifies the categories of employment conditions it regulates:

1. Maximum work periods and minimum rest periods;
2. Minimum paid annual holidays;
3. The minimum rates of pay, including overtime rates; this point

- does not apply to supplementary occupational retirement pension schemes;
4. The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
 5. Health, safety and hygiene at work;
 6. Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and
 7. Equality of treatment between men and women and other provisions on non-discrimination (Directive 96/71/EC, Article 3.1).

While unions originally regarded the Posted Workers Directive as a minimal set of protections, designed to enable action by regulators to improve conditions, this collided with the ECJ's interpretation of the Directive's intentions, which follows more of a market-opening line of thought (Arnholz 2014). In its *Laval* decision (ECJ C-341/05), the ECJ decided that host country regulators – including private players such as trade unions – cannot oblige foreign service providers to respect labour rights that go beyond the minimum standards of the PWD because these might constrain a firm's competitive advantage, insofar as that advantage is based on national wage norms from a cheaper sending country. This formulation makes labour rights a competition parameter, undermining the ability of trade unions to bargain for pay and conditions above the minimum set by legislation. 'Proportionate' action is still allowed, as the ECJ's *Viking* decision, issued together with *Laval*, establishes that unions have the right to take action limiting firms' freedom of movement as long as that action is 'proportionate' to the objectives to be achieved (ECJ C-438/05). The combination of *Laval* and *Viking* produced a situation where unions are restricted from conducting free collective bargaining on behalf of posted workers, because strikes could be ruled as disproportionate, exposing unions to fines. On the other hand, these decisions did establish that unions have the right to conduct 'proportionate' action to enforce legal minimum wages, which, as the ECJ's recent *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* decision confirms, includes enforcement of legally extended collective agreements, which may include inter alia wage rates which are higher than minimum depending on skill levels, as well as vacation and overtime payments (C-396/13). Although it had seemed clear from *Laval* that unions would be able to defend the pay rates in extended collective agreements, the ECJ's Advocate General expressed in an Opinion in 2014 that this should just apply in respect to the lowest wage brackets in

those agreements, so the result of the *Elektrobudowa* was a favourable surprise for the unions.

While posted workers are only entitled to equal treatment with regard to the PWD, workers who move as individuals have the same labour rights as workers from the host country state. The legal constraints arising from the transnational provision of services only apply to posted workers from transnational subcontractors, or transferred within multinational companies. Employers use transnational subcontractors and work agencies to be able to choose between the labour rights and social protection regimes of the host and sending countries, thereby enabling them to recruit migrant workers from locations where wage expectations are low and who are employed under the (partly) home-country (low) wage terms. However, although the Posted Workers Directive does not cover all conditions, it does cover the most important ones. The terms which can be applied to posted workers on the basis of extended collective agreements and/or minimum wages are often so close to what it would cost to employ native workers that there is not always any great labour-cost difference, although this varies according to local conditions. Nevertheless, differences in social insurance costs, which have to be paid in the home instead of the host country, can reduce overall labour costs. Moreover, a big problem is the way in which enforcement of local rules is hindered by the complicated mix of home and host country legal standards, by the ability of transnational subcontractors to shift between jurisdictions to avoid compliance, and by the unwillingness of most posted workers to confront their employers with their legal rights (Berntsen and Lillie 2015; Cremers 2013; Wagner and Lillie 2014).

The ECJ's approach has generated a great deal of concern from a labour rights perspective because it enables companies to opt out of host country labour conditions and collective agreements, if they are willing and able to use transnational subcontractors, and because it imposes limits on unions' right to strike and on the enforcement options of labour inspectorates in cases where intra-EU mobility is involved. In an attempt to create a firmer legal basis for enforcing existing labour laws, the European Commission initiated policy negotiations around an Enforcement Directive for the Posting of Workers Directive. The Enforcement Directive was a reaction to complaints from trade unions and from a Commission-financed report showing that the labour rights of posted workers were routinely violated (Houwertzijl and van Hoek 2011). It was not the first attempt to find a solution to the post-Laval regulatory

environment: an earlier regulation foundered when its content became so badly compromised that the unions decided to abandon the attempt (Arnholz 2014). The Enforcement Directive encountered similar difficulties, with unions struggling to have wording included to protect national labour inspection practices and chain liability provisions from possible future ECJ decisions. For example, 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. Chain liability provisions vary from country to country, but in the German construction industry, it is possible to extend liability to all subcontractors in the construction chain. This ensures that workers can collect back-pay and/or social security contributions when firms go bankrupt and disappear. It also obliges main contractors to consider the reputations of their subcontractors and institute policies for checking up on them. While trade unions were pushing for a similar regulation in the Enforcement Directive, the text only specified, in Article 12 of the Enforcement Directive in which chain liability is discussed, direct (first tier) subcontractor liability.

The content of the Enforcement Directive as finally adopted hardly goes beyond the codification of existing national regulatory measures, in some cases allowing scope for the ECJ to limit them in future. For example, the Directive contains frequent references to the need to limit enforcement actions to those which are ‘justified’ and ‘proportionate’. This reveals a deep concern for preventing national labour rights enforcement from interfering with the free movement rights of firms, leaving open the possibility that member states could be held liable should they undertake ‘disproportionate’ enforcement action, whatever that may mean. The actual outcome is likely only to become apparent when the ECJ interprets the wording of the directive as to whether specific union and government efforts to enforce labour standards violate the free movement rights of firms.

3. Contractual arrangements and the way the labour market works

European Union rules on labour mobility and transnational service provision interact with national labour market rules, while industry practices of subcontracting and agency work shape the posted worker labour

market. Thus, posted worker employment systems and the European Union regulations governing them must be understood in the context of labour markets shaped by boundaries and hierarchies created by contracting chain power relations. The use of agency workers and subcontractors is not a given and constant phenomenon, but rather is driven by the opportunities and strategies of firms. Firms use contracting to access expertise which they do not have internally, to externalize risk to less powerful firms (Deakin and Walsh 1996), to fragment employment relations, complicating and weakening worker representation (Wills 2009), and to place workers in peripheral operations under less protected regulatory systems (Doellgast and Greer 2007).

Harvey (2003: 195-196) divides subcontracting into 'cooperative' and 'competitive'. The cooperative model is compatible with an organization based on professional qualifications, good working conditions (pay, etc.) and the application of specialized skills. Competitive subcontracting, by contrast, is based on lowering costs through leveraging the differences in the market power of the agents participating in the process. A common practice in this model is the successive subcontracting of the same task, typical of the 'hollowed-out firm' (Harvey 2003: 197).

Posting as we encountered it in our interviews almost always goes hand in hand with the second form. In this application, subcontracting becomes a cost-saving way of exploiting differentials between countries, sectors and workplaces and of increasing/decreasing production in line with demand (Flecker *et al.* 2008). Workers at subcontractors often experience poorer working conditions, such as lower wages, higher work intensity, increased job insecurity and a higher reliance on non-standard employment contracts (Grimshaw and Rubery 2005; Wills 2009; Flecker and Meil 2010; Gautié and Schmitt 2010). They are often not represented by works councils and are often pressured by management not to talk to unions or other forms of worker representation. This undermines union representation and drives the creation of two-tier labour markets (Wills 2009). Thus, this form of inter-capitalist relations has distributive consequences, affecting the wage-effort bargain within a productive process, and the ability of workers to take individual or collective action to redefine this bargain (Grimshaw and Rubery 2005; Wills 2009).

The PWD legal framework encourages transnational subcontracting by 'immunizing' transnational subcontractors from local enforcement efforts. The fact that posting invokes foreign conditions and regulatory

frameworks is not always as important as the way the way employers use it as a cloak to prevent monitoring and enforcement. Through posting, employers make it plausible that they are complying with the rules, even if they are not, thus making it complex and labour intensive to check. In the legal definition an employer must be ‘established’ (i.e. actually carrying out business) in the sending country in order to send workers from there, and the workers must be ‘habitually’ employed in the countries they are sent from (Houwerzijl and van Hoek 2011). We found that these conditions are often not observed. Employers sometimes hire migrants locally and label them as posted workers, and they may employ them under contracts from countries where neither employer nor worker has any real connection. Nevertheless, we are more concerned with the character of the employment relationship this implies, rather than whether a particular worker fits the strict legal definition. The actual contractual relationship of posted workers is often vaguely defined, and only becomes specific when host country regulators subject it to close examination – for example in cases where a lawsuit is pursued.

Posted workers exist in a diverse pan-European labour market of mobile workers employed under various kinds of similar arrangements. The common thread is that employers look for contractual constructions which allow them to access desirable regulatory frameworks – while posting is a common framework there are other arrangements as well. In some countries (for example in the Netherlands, Germany or the United Kingdom) the legal regulation of self-employment is such that employers are able to avoid collective employment regulation by classifying workers as self-employed. In these cases, it is common to encounter nominally self-employed migrant workers who are *de facto* dependent posted workers. Occasionally, we found workers posted in an organizational sense but not a legal one. As with posted workers, these workers were brought by an employer to work on specific projects and had their accommodation and travel arranged as if they were posted workers, but had local work contracts and social security. This practice has become increasingly common, for example in Finland, because unions have been fairly successful in using legal and industrial action in recent years to ensure that employers adhere to their legal obligations under the Posted Workers Directive (Lillie 2012). When legal standards are complied with, the cost difference between posted workers and native workers is not that large, so *de jure* posting is only used when there is a legitimate reason for it. Although the details of contractual arrangements are often important in terms of particular enforcement efforts, posting and organizationally

similar forms of migration define a single labour market, with the line between the various categories blurred through ignorance, legal indeterminacy and management strategy (Berntsen and Lillie 2015).

The posted work phenomenon has emerged from the specific regulatory environment of the European Union, and from contracting practices in certain industries, most notably construction. Moreover, in an increasing number of industries, now including among others construction, meat processing, distribution and shipbuilding, hypermobile workers working and living in substantially deregulated social spaces now dominate the labour market. In this context, it has become a systematic and large-scale way for employers to (more or less legally) access cheap labour and circumvent national labour laws and collective agreements.

4. Shop floor employment relations/sectors of posted work

4.1 Case study: the construction sector in Germany, Finland, the Netherlands and the UK

Construction is the industry most affected by posted work, and has been the primary focus of regulatory efforts such as the Posted Workers' Directive. The PWD is implemented differently in the respective EU member states: in some it covers the whole economy, while in others it only covers certain sectors. The high prevalence of posted work in construction means that construction subcontracting processes shape and are shaped by the posted work phenomenon. This, however, is not as much of a change as it may seem: high levels of subcontracting and site mobility have long been a normal situation in the industry, making for a volatile labour market even within national boundaries.

As main contractors, large construction companies do not usually post workers themselves but act as site managers on large construction projects. However, they play a vital role in the development of subcontracting chains, engaging companies from lower wage countries which post workers to construction sites in order to fulfil a particular construction service. In the four countries examined – Finland, Germany, the Netherlands and the UK – large companies (in terms of turnover) function as main contractors or as building service providers while small and medium-size companies assume the role of the subcontractors and provide

the majority of workers (Berntsen and Lillie 2015; Lillie 2012; Bosch and Zühlke-Robinet 2003).

We found workers posted both as employees with long-term work relationships with particular subcontractors, remaining there after a particular posting (an indicator of a posting being a 'real' posting under the meaning of the PWD), and workers hired just for a particular posting. Workers in the first group are to be found working for actual contracting companies specialized in particular types of construction work. Workers in the second group work for work agencies, or 'labour only' subcontractors which essentially act as work agencies. We found many posted workers in skilled jobs, sometimes with long-term stable jobs with the contractors they work for. Even so, these skilled workers often work for lower wages than local workers would expect for similar jobs. Often these wages are illegally low, although we also encountered workers appearing to be paid in accordance with local collective agreements.

Illegal underpayment is sometimes accomplished through vague employment arrangements, only clarified in the case of an enforcement action. For example, we found a case like this at the Rauturuukki metal construction materials factory in Raahe, near Oulu in northern Finland. Skilled Polish masons hired to repair a blast furnace were being paid 3-4 euros per hour under Polish contracts. The employer claimed the contractual payment only constituted partial payment and was supplemented by payment in Finland. Neither the Finnish construction union nor the shop stewards at the factory found this plausible, and conducted a two day walk-out. This resulted in an agreement by the employing company, Beroa, to pay the full Finnish wages set forth in the collective agreement. In most cases, unions either never find out about the underpayment, or are unable to take action to fix it. For example, one Dutch unionist estimated that at the Eemshaven construction site in the northern Netherlands, some 80% of the workers were receiving below-standard pay (Berntsen and Lillie 2015).

Employers will label highly qualified workers 'unskilled', assigning them to the lowest pay category while still appearing to comply with the collective agreements. This means that to prove that a contractor is in violation, the union or worker must prove not only that they worked a certain number of hours, but also that the work done matched that of a higher skill grade set forth in the legally extended collective bargaining agreement. The classification of posted workers into skill brackets higher than

the lowest one stipulated in the collective agreement was challenged by the ECJ in a recent court case. Despite an opinion given by the Advocate General that unions should only be allowed to apply the lowest pay rate in the applicable extended collective agreement to posted workers,³ the ECJ supported the application of skill brackets for the determination of posted worker minimum pay rates. From the union perspective, this is quite fortunate, as the application of extended collective agreement rates to posted workers has been a cornerstone of union strategy for example in the Netherlands (Berntsen and Lillie 2015) and Finland (Lillie 2012).

The most problematic groups are those working for transnational work agencies and labour-only subcontractors active within the lower levels of the contracting chains. There is a grey area in terms of the difference between a temporary agency and a subcontractor. In Germany, where temporary work agencies are, with a few exceptions, not allowed in the construction industry, employers turn instead to labour-only subcontractors supplying only labour, recruitment services and payroll management, but not providing supervision or equipment. 'Real' subcontractors engage labour from labour-only subcontractors and work agencies on flexibility and cost grounds; these firms supply extra labour when needed, and the labour-only subcontractor or agency workers work under the supervision of the 'real' subcontractor's management much as if they were temp workers. Thus, the *de facto* and *de jure* employers are different. Usually, these workers are hired for the duration of the posting, managed in small groups, and have tenuous relations with both their *de jure* and their *de facto* employers. With these kinds of employment arrangements, being paid below legal rates is the norm, there is very little job security, and social security contributions and insurance might not be paid. Furthermore, these workers will often have an explicit or implicit agreement with their employer to work at illegally low rates and to not cooperate with enforcement efforts. Sometimes, even this agreement is violated by employers. In the infrequent cases where posted workers go on strike or seek assistance from the unions, it is often because the employer has violated this informal agreement with the workers, cheating them of their agreed wages.

3. Opinion of Advocate General Wahl, Case C-396/13, Sähköalojen ammattiliitto ry v Elekrodubowa Spolka Akcyjna 18 Sept 2014.

4.2 Case study: the meat sector in Germany

Germany is the number one pork producer in Europe (Fleischatlas 2014). Most slaughterhouses in Germany are small or medium-sized, though the smaller companies play only a minor role with regard to the overall total of slaughtered animals. In 2012, 55% of the commercial value of the latter was in the hands of the four biggest slaughtering companies – Danish Crown, Tönnies, Vion and Westfleisch. Since the Eastern enlargement of the EU in May 2004 the large German slaughterhouses have scaled down their core workforces to a minimum (NGG 2013), with posted and temporary workers from Eastern Europe now doing the majority of the meat slaughtering and processing in Germany. A recent works council survey indicates that in some meat processing companies posted workers make up 50-90 % of the factory workers (NGG 2012). Of the 30,000 workers in the slaughtering industry every third one is employed under a subcontracting contract (NGG 2013).

The EU Posting of Workers Directive has been transposed into the German Posting Law. However, the particularity of the regulatory framework for posting workers to Germany is that this law does not apply to the whole economy but only to the sectors listed in it. Until mid-2014 the meat sector was not included. This created a regulatory gap because posted workers in unlisted sectors can work according to the conditions and pay of their home country.

As a consequence meat producers in Germany increasingly subcontracted slaughtering and meat packaging operations to Eastern European subcontractors. Low labour costs have been a major driver allowing the German slaughter industry to grow quickly over the last 10 years. The cost advantage in Germany allows slaughterhouses to lower their processing costs, enabling them to compete for retail and food service customers by offering lower prices. Companies such as Danish Crown have relocated their production facilities to Germany specifically to employ lower-wage subcontractor labour.

In Germany, posted workers predominantly from Bulgaria and Romania received piece-rates between 1.30-1.60 EUR per slaughtered pig. Apart from the low pay, subcontracted employment relations also divided the workforce, with subcontractors subdividing tasks according to nationality. The separate teams were not allowed to talk to each other or exchange information on wages and working conditions. In dire cases of

work-related accidents posted workers were sent home since their employer had not arranged for accident insurance. Workers were faced with pay deductions for accommodation, travel costs and work gear that were previously not agreed, reducing their pay considerably.

Posted workers accept these working conditions because of their isolation from collective channels of representation and because of their temporary status which increases the likelihood of them 'enduring' these conditions temporarily. Nevertheless, there are efforts to improve the conditions of posted meat industry workers. After a change in government, the German national minimum wage of 8.50 € was agreed in December 2013. It took effect in January 2015 and includes a transitional period before becoming mandatory for all employees. In January 2014 the social partners in the meat industry agreed on a sectorial minimum wage starting at 7.75 € with a regular rise up to 8.75 € until December 2016. The sectoral minimum wage was declared as generally binding through the German Posting Law. However, the establishment of the minimum wage is unlikely to reverse the trend to hire subcontractors – as trade unions, government representatives and employers' organizations agree – because it has become an institutionalized part of the meat industry. Moreover, employers still save on labour costs because social security contributions for posted workers are paid in the home country at a rate usually substantially lower than in the country where they are posted to. However, the new legal situation will improve the terms and conditions for posted workers. While this is certainly a positive development, experiences from the construction sector show that posted workers hardly use legal channels to enforce their rights. Workers are afraid of being unable to find work if they do so. As collective redress does not exist in Germany, trade unions cannot represent workers in court and therefore workers always have to reveal their identity in judicial proceedings. Experiences from the implementation of minimum wages show that there is often a gap between policy and implementation. In this sense, it remains to be seen to what extent the minimum wage will effectively alter the established subcontracting structures, as well as to what extent it will improve the working conditions of posted workers.

4.3 Case study: shipbuilding in Finland

Shipbuilding is a highly subcontracted business, with large multinational companies owning the yards, but most of the actual employment

taking place at subcontractors. Finnish shipyards are no exception. As in the construction industry, this has made it easy to switch to a less expensive foreign workforce by engaging foreign contractors. Shipbuilding in Finland was until recently dominated by STX Finland, a subsidiary of the Korean STX, which owned a large shipyard in Turku (yards in Rauma and Helsinki having been recently closed). In late 2014, after difficulty in acquiring large orders since the delivery of three large cruise ships in 2008-2010, STX sold the Turku shipyard to German shipbuilder Meyer Werft.

STX followed a highly subcontracted production model in which its blue-collar workforce was brought in primarily from the Baltic States via subcontractors. Of the workers at STX Finland sites at the end of 2009, about half were Finnish and half non-Finnish, either posted by subcontractors or as agency workers. Only a small number of non-Finnish workers worked for STX directly, with the majority employed by subcontractors or agency firms. During the post-2011 downturn, only a small number of foreign posted workers remained on the site, though numbers increased briefly when Viking Lines put in an order for a large ferry. The sale to Meyer Werft brought with it a substantial order book which is expected to revive the Turku yard. Employment at the yard is forecast to increase substantially in the coming period, perhaps returning to the levels and dynamics of the pre-2010 period.

In 2009 when STX had a full order book, there were around 3,800 workers on site, with a similar number working for on-site subcontractors. Off-site numbers working for STX subcontractors were estimated at around 40,000 workers. Since the end of this boom period, employment levels have been much lower, with numbers between 1,350 and 2,850 mentioned in the press, including both STX and its on-site subcontractors. Most of the variation in employment levels is due to increases and decreases in subcontractor and temporary workers. During the boom period, the Metalworkers Union, the labour inspectorate and the main contractor, which was concerned about main contractor liability and its reputation, all attempted to monitor labour standards in the supply chain, but the frequency at which groups of workers working for different subcontractors came and went made it difficult for the unions to monitor conditions. There was some unease among the native workforce, who could expect unemployment when the contracts were finished, about the posted workers, who were seen as competing on an unfair cost basis. Unlike the Finnish construction workers union which

had an effective blacklist to sanction subcontractors with a history of non-compliance with collective agreements, the metalworkers had no overarching strategy to ensure employer compliance with its collective agreement. Instead, it left it to the initiative of shop stewards to devise their own strategies and to government labour inspectors to uncover illegal conditions.

As a result, during the shipyard boom of the pre-2010 period, no one really knew whether posted shipyard workers were being paid according to Finnish minimum standards. Government inspectors routinely uncovered irregularities, and shop stewards claimed that underpayment was rampant, but there was an evident lack of capacity to enforce standards. Shop stewards and inspectors complained of the prevalence of shell firms, which disappeared if regulatory authorities took too close an interest in them; they often just changed their names and moved elsewhere. Ironically, it appears that the slowdown of business has made it easier to control conditions, because there simply have not been the same numbers of posted workers going in and out, with more workers working for 'legitimate' employers rather than fly-by-night labour-only contractors.

5. Outcomes/conditions and problems for workers

In insular contexts of national industrial relations systems, employers would be unable to escape from national laws, regulations and informal norms, as these comprehensively regulate the entire space in which they operate. However, in the current environment, the ability to 'cherry-pick' between different regulatory frameworks allows management to shape the micro-politics of individual worksites, to isolate groups of workers from each other, and to weaken the ability of regulators to influence working standards. The result is a variety of contractual arrangements tailored to circumstances and the employer's strategy. We can differentiate between posted workers on legitimate contracts, which in some IR systems might legitimately offer lower conditions than what native workers might expect, but are legal nonetheless. Then there are posted workers on contracts that are made to appear legal, but where posting is used only as a way to conceal illegal employment arrangements, and to make it difficult and expensive to pursue corrective legal action. Furthermore, there are many workers who are posted in an organizational sense, but who do not work under foreign contracts; these workers have

other, often dubious, employment arrangements, such as bogus self-employment. They are part of the same labour market as posted workers. These regulatory possibilities interact with the subcontracting possibilities of industry-specific work processes to shape the employment relations of posted workers.

Posted workers are mostly excluded from collective channels of worker representation, and are mostly in contingent, insecure employment situations (Wagner and Lillie 2014; Berntsen and Lillie 2015; Lillie and Sippola 2011). They can potentially be somewhat ‘cheaper’ under the slightly lower conditions of employment sometimes possible under the PWD legal regime, but more frequently posted work is a form of ‘grey’ employment, under which it is very hard to detect violations of labour standards. Posted work has enabled and encouraged employers to create a segmented labour market in which the rights of posted workers are *de jure* as well as *de facto* different to, and more often than not lower than, those of native workers in the workplace. It is clear from many conversations with posted workers that many feel deceived and betrayed by recruiters, who often profit from travel and accommodation fees for the workers, do not pay some or all of the wages due, or fail to pay social security contributions, leaving workers without benefits. Many compare their situations to those of other, better treated, native workers. While often resentful, they also accept that this situation is part of the reality they face, representing the best option they have in an unfair world.

In construction, smaller domestic firms – subcontractors who compete directly with Eastern European subcontractors – have sometimes been supportive of stronger labour market regulation (Alfonso 2012). Many firms build their strategies around circumventing regulations, social security payments and collective labour agreements by creative corporate structures. Trade unions and regulatory authorities have noticed that temporary employment agencies sometimes use countries such as Cyprus or Portugal as places to incorporate their businesses; this use of an EU country as a ‘flag of convenience’ allows the firm to pay lower social security contributions. While it is commonly recognized that the main contractor is the main beneficiary and power holder, and that any strategy to control the labour market must ultimately hold them responsible, unions cannot help but be caught up in the shell game of tracking subcontractors, as the specific features of the cases they deal with inevitably revolve around which contractor did what for whom. In addition to the fluidity, contract documents in foreign languages and unclear and

unfamiliar legal constraints interfere with the ability of unions to monitor the construction labour market.

These country and industry case studies show the diverse ways in which employers use transnational contractual arrangements to construct precarious employment in blue-collar employment in the EU. The precarious employment situation results from the fact that employers are able to use the transnational deregulation of labour markets to their advantage while labour market regulation agencies are constrained from enforcing the rights of mobile workers (Wagner 2015). While a pan-European labour market exists, this market is not matched by equal enforcement mechanisms able to effectively protect workers' rights. Firms use subcontracting and temporary agency work in all three industry cases and across countries as a way to exploit regulatory gaps and avoid regulatory enforcement.

These regulatory gaps differ across countries and industries, requiring new efforts by unions and labour inspectors to find out where these workers are and how to represent them, but underlying it all is a Brussels policy which seems to be more intent on undermining national enforcement systems than on seeking legitimate solutions to the enforcement problems which free labour mobility has brought. Unions can and should seek autonomous solutions for organizing and representing posted workers (see Danaj and Sippola, this volume). Nevertheless, this will remain very difficult unless a new line of policy is adopted in Brussels, giving due attention to the functioning of industrial relations systems and national traditions of wage determination.

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