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Title: Posted work as an extreme case of hierarchised mobility

Year: 2023

Version: Accepted version (Final draft)

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Please cite the original version:

Arnholtz, J., & Lillie, N. (2023). Posted work as an extreme case of hierarchised mobility. *Journal of Ethnic and Migration Studies*, 49(16), 4206-4223.

<https://doi.org/10.1080/1369183x.2023.2207341>

Posted work as an Extreme case of Hierarchized mobility

Abstract

This article draws on a range of case studies to explain how worker posting can cause hierarchized labour mobility, involving nationality-based hierarchies in pay and conditions between workers in the same labour markets or work sites. This hierarchisation is most apparent on large construction sites, where companies systematically use posting for labour cost advantage, but is also found on smaller sites, and in other sectors besides construction. The article outlines three features of this low-wage posting system – worker hypermobility and dependency, transnational enforcement challenges, and multifaceted employer arbitrage strategies – that conspire to maintain posting as a form of hierarchized mobility. We argue that posting undermines many of the countervailing forces that typically mediate hierarchization.

1. Introduction

The dream of a common European labour market is that workers and firms can move and work freely across Europe, allowing labour supply and demand to find equilibrium on a European scale, responding to local labour shortages and unemployment. In principle, European wage-levels should converge based on skills, rather than [reflecting](#) national [wage structure](#) (Spaak, 1956). One way to facilitate the flow of labour is through posting, in which employers send their workers across borders to perform specific tasks, presumably returning home and continuing in their position when the job abroad is done. When companies post employees, this overcomes many barriers to international mobility, such as language differences, workers' risk adversity, and the practical difficulties of matching jobs and skills. The continued employment relationship in the sending country implied in posting also allows the worker's continued participation in the sending country's social insurance programs, and their employer can continue to offer the familiar workplace norms of their country of origin (Wispelaere and Pacolet, 2020). Ideally, posting could be the perfect means for making the dream of a common European labour market come true.

However, the practice of posting has acquired a reputation as an employer tool for segmenting labour markets and exploiting national pay hierarchies. While posting is a multifaceted phenomenon (Lens et al., 2021), many posting companies have developed business models relying on channelling cheap labour into labour intensive sectors of high wage countries. We refer to this form of posted as "competition posting" to differentiate it from postings that are not driven by labour costs. In competition posting, companies structure their operations in ways that allow them to arbitrage between different national employment relations and social security systems, driving the development of extremely exploitive labour conditions (Berntsen and Lillie, 2015). These company practices are resource intensive for unions and labour inspectors to monitor (Wagner and Berntsen, 2016), and difficult to counteract since EU rules on posting place firms partially between and outside of national labour regulation (Arnholtz and Lillie, 2020). The above-mentioned mechanisms that make posting an attractive option for workers also perpetuate dependency on the employer and counteract workers' mobilisation to gain improved conditions (Caro et al., 2015). In this way, various aspects of posting conspire to offset the labour market integration mechanisms that normally limit the degree of hierarchisation resulting from labour mobility. Rather than contributing to fulfilling the dream of an equalising, pan-European labour market, posting often reinforces labour market hierarchies across Europe (Moses, 2021).

This article draws on previously published case studies of industrial construction worksites to present a coherent model of how posting underpins and sustains hierarchized labour mobility. Outlining an analytical framework that highlights the difference between posting and ordinary labour migration, the article highlights three features of posting – worker hypermobility and dependency, transnational enforcement challenges, and multifaceted employer arbitrage strategies – that help to maintain posting as hierarchized mobility. Focusing on competition posting, we show how the interplay between these features counteracts labour market integration and undermines the regulation of wages and working conditions. By focusing on large industrial construction sites in Western European countries, our research is intentionally biased toward locations with relatively strong unions and regulatory regimes. This means that among labour intensive localized forms of production, we would expect unions to be more successful in controlling conditions, despite the influx of posted labour, than they would be elsewhere in Europe. If we see posting related hierarchisation in industrial construction, despite union efforts to regulate it, this suggests that other, less organized contexts will be even more susceptible. The article goes on to show that, although more difficult to observe, ~~the~~ competition posting also exists in smaller construction sites and other sectors. The article illustrates how posting can function as an extreme case of the hierarchising tendencies of ordinary labour migration because it subverts many of the countervailing forces that typically limit hierarchisation.

2. Background – posted work in the European single market

As with free movement of workers generally, posting of workers originated with the 1957 Treaty of Rome. Unlike labour migration from outside the EU, both forms of intra-EU labour mobility ~~work~~ by constraining member states from regulating the flow of labour by excluding EU-based firms and workers from their national labour markets. As a result, both forms of mobility are shaped directly by labour market opportunities (Engbersen et al., 2013). Since the accession of Eastern European countries to the EU, EU labour mobility has largely been dominated by East-West and, to a lesser extent, South-North flows ([introduction to special issue](#)).

Posting differs from mobility under free movement of workers because it relies on the employer's right to provide a service across borders rather than the workers' right to move. When workers move individually under the free movement of workers, EU law in principle protects them from discrimination based on nationality and demands that they are covered by the host-country's labour regulation. In contrast, when an employer posts employees abroad to perform a job under free movement of services, it is the firm's right to free movement that is protected by EU law. Part of that is the right to be protected against inhibiting regulations – for instance regulation of wages and working conditions. As a result, certain aspects of host-country social security systems and labour regulation do not apply to posted workers, as they would for migrants who move under the free movement of labour. The regulatory space for posted workers is between two or more nation states. Because there are multiple sets of rights that could apply, the actual outcomes is indeterminate. In practice, this means posted worker's labour rights and actual working conditions are largely dependent on explicit and implicit bargains between the worker and employer (Lillie 2016; Matyska 2020).

Over time, developments in the European regulatory framework, national and European case law, and industrial relations practices by firms, member states, and unions have narrowed and refined this space of indeterminacy. The Posted Workers Directive (PWD), passed in 1996, established that posted workers should be covered by the minimum wage conditions of the host country, and a 2018

revision of the PWD expanded this coverage from ‘minimum wages’ to ‘remuneration’ more generally (Costamagna, 2019). The PWD therefore gives government regulators and unions room to impose certain national regulations on transnational subcontractors’ employment standards, but does not set a uniform European standard. The system assumes that national actors, such as trade unions or government agencies, will define, impose and enforce national regulations relevant to posted workers’ conditions, but this is not always the case. Not all EU countries have national wage standards relevant to posted workers, and not all have actors to enforce them (Bosch and Weinkopf, 2013). Even when they do, enforcement is often very difficult, making non-compliance a viable firm strategy (Wagner, 2018; Wagner and Berntsen, 2016). Furthermore, the European Court of Justice (ECJ) and the European Commission’s interpretation of the free movement of services often makes both imposition and enforcement difficult, because actors remain uncertain that their interpretation of their space of action will be shared by the ECJ and Commission (Danaj and Kahlert, 2021).

While statistical data on posting are fraught with uncertainties, they indicate that EU posting has grown from one million postings in 2010 to 4.5 million postings in 2019 (Wispelaere et al., 2021). The latter amounts to around 2.4 % of total EU employment. However, the numbers should be interpreted cautiously since many workers are posted informally, and therefore not registered in the official statistics. Lens et al. (2021) argue that posting is a ‘multifaceted phenomenon’, with ~~different~~ various types of posting occurring for different reasons. They talk about ‘Competition Posting’, in which posting is used to provide low cost manpower and increased flexibility. Similarly, Arnholtz and Lillie (2020) distinguish between posting in general and posting as a ‘business model’, where company’s business strategy is based on posting under special, labour-cost saving conditions. While not all posting fits this picture (de Wispelaere and Pacolet 2020), the focus of our article is on this business model, competition posting.

3. Posting as labour market segmentation, supply of cheap labour and institutional changes

‘Hierarchisation’ is better suited than ‘segmentation’ for explaining labour market inequality in posting, because it involves employers exploiting multiple and mutually reinforcing social barriers to slot different groups into different job market categories. Employers do not just sort workers based on their skills and the jobs’ technical requirements. Rather, employers also construct, exaggerate and exploit differences that divide groups of workers by allocating them into hierarchies of relative privilege and exploitation.

It is widely recognized from the labour migration literature that migrant workers tend to be channelled toward lower pay, more precarious jobs. While culturally specific human capital explains some of this (Lulle et al., 2021), a substantial body of research shows that nationality and ethnicity based labour market segmentation significantly contributes toward channelling migrants into bad jobs (Felbo-Kolding et al., 2019). Some national labour markets are characterized by ethnic hierarchies, which do not reflect posted or other migration status directly but rather simply (perceived) membership in a certain ethnic group (Ahmad, 2020). How to explain this? Our model highlights three mechanisms.

First, there are employer strategies to create and exploit segmentation. These reflect the prejudices and preconceptions of managers (MacKenzie and Forde, 2009). While classical segmentation theory (Doeringer and Piore, 1971) argued that segmentation was caused by companies’ functional needs, later studies highlighted employers’ active role in structuring production processes and constructing jobs, including creating inter-firm relations that reinforce national and ethnic hierarchies among groups of workers (Rubery, 2006). As ‘architects of inequality’ (Grimshaw et al., 2017), employers

thus play a key role in segmenting migrant workers into bad jobs. They do this by providing well-paid and stable jobs for their native employees, while using migrants as a peripheral labour force to adjust to market fluctuations. Similarly, seemingly function-based hierarchies among posting subcontractors often hide nationality-based divisions of labour.

Second, migrant worker demands and expectations are often lower. Starting with Piore (1979), scholars have argued that migrant workers' willingness to accept the low wage and poor working conditions is part of the reason they are sorted into the secondary labour market. More specifically, Piore contended that migrant workers have a 'dual frame of reference', which makes them evaluate their employment conditions by the standards of their home country (see also Waldinger and Lichter, 2003). Thus, differences in working standards between countries translate into differences in working standards between native and migrant workers. The greater the orientation of migrant workers towards their home country, the more pronounced [is](#) this dual frame of reference ~~is~~. Migrant workers also sometimes negotiate a very personalized "moral economy" relationship with their employer, of which the employer can take advantage (Näre, 2011). Posted workers often display this dual frame of reference, and make implicit and explicit bargains with employers, reflecting sending rather than host country employment standards (Berntsen 2016; Lillie 2016; Matyska 2020).

Third, regulatory institutions do not necessarily include migrants adequately. The degree of inclusivity of bargaining institutions and labour market regulation also affect the precarity of migrant workers, and the likelihood of segmentation. As Krings (2020) argues, the segmentation of migrant workers into bad jobs is not a universal law. Analysing the development in Germany, he shows that in the 1980s, native and migrant workers had similar likelihood of being low paid when controlling for other factors. However, after decades of deregulatory reforms, migrants have become much more likely to be sorted into bad jobs. In that way, he highlights that the institutional setting regulates employers' ability to use migrant workers as a source of cheap labour and nationality as a source of hierarchisation. Conversely, when a labour market is egalitarian, there are fewer opportunities for employers to keep migrants segregated into precarious jobs (Danaj et al. 2018). Thus, the hierarchisation of the labour force occurring around migrant workers stems from the interaction between employer strategies, workers willingness and regulatory possibilities.

In cases of ordinary labour migration, integration and institutionalised regulation partially counteract this hierarchisation. Initially, migrants are vulnerable to exploitation because they are unaware of local labour market norms and retain wage expectations from the sending country (Piore 1980). However, as they settle and become more oriented towards the host country, they start assessing working condition based on their consumption possibilities in that country (Sayad, 2004). If they progress to a more secure visa and residential status, their bargaining power in the workplace improves (Könönen, 2019). They may also become more knowledgeable about labour rights and labour market institutions and may even join trade unions (Danaj et al. 2018). Over time, migrant workers become less willing to accept inferior working conditions, and are better equipped to resist them. If business strategies do not rely on low labour costs, if migrant workers are unwilling to accept bad jobs, or if there is an effective enforcement of regulation limiting poor working conditions, hierarchization is difficult to maintain for ordinary labour migrants.

However, competition posting relies on the three segmentation mechanisms contributing to hierarchization, while itself undermining some of the countervailing mechanisms. First, competition posting is a business model based on channelling cheap labour into labour intensive sectors in high wage countries. Employers following this model rely on their ability to undercut host country workers as a part of their competitive advantage, meaning they must hierarchize labour to maintain

market share. The employer's strategy relies on hierarchization. Second, posted workers do not move on their own, but are sent by their employer, and they usually have little legal or practical attachment to the host country. Thus, their frame of reference remains their home country. Third, governed by EU rules on the free movement of services, posted work implies both a partial exemption from host countries labour regulation and a regulatory regime that makes the enforcement of the remaining elements of that regulation ineffective. The right of posting firms to be exempted from ordinary labour market regulation was for instance explicitly justified in the Laval judgement of the ECJ (C-341/05). In other words, posting as a form of mobility removes many of the mechanisms that would otherwise counteract segmentation, hierarchisation and exploitation in situations of ordinary labour migration.

Posting distinguishes itself in that it institutionalizes the hierarchization of the European labour market. Even though ordinary EU migrant labour is often exploited in segmented labour markets, and discrimination by ethnicity and nationality are common, host country actors such as unions can and do organize and bargain on behalf of such workers, reducing the tendency to hierarchization. Individual migrants can and do integrate, changing their wage expectations over time, and increasing their social capital to resist exploitation. Immigrants often have limited social and labour rights when first migrating, but over time acquire more secure legal status. By contrast, the regulation of posted work is deliberately set apart and insulated from national labour market regulation. The way posting enables a continuous inflow of workers from countries with poor working conditions makes it easier for employers to maintain migrant workers as a source of cheap labour. This is not to say that posting always prevents integration, because it does not (Sippola and Kall 2016), but rather that the system discourages integration, and exploits workers' weak contacts with their host societies.

4. Posting as hierarchizing mobility

There are no official data on the wages and working conditions of posted workers. However, survey data shows that posted workers are not only underpaid when compared to native workers, but also compared to ordinary migrant workers (Friberg and Eldring, 2011; Hansen and Hansen, 2009). Competition posting is most prone to develop in sectors where subcontracting is common, which is one reason why it is so prevalent in construction. 40 % of all postings occur in construction (Wispelaere et al., 2021) despite the sector only accounting for 6-7 % of EU employment according to Eurostat. In many Western European countries, the construction sector has relatively strong union organization, while labour costs are a major factor in overall production costs (Arnholtz et al., 2018). Consequently, posting is a perfect tool for companies seeking to undercut wage standards. In these situations, large or small subcontractors send their work crews to fulfil a contract ordered by a customer or main contractor in another country. Subcontracting arrangements, even when there is no international dimension and no migration involved, often involve hierarchization, either deliberately engendered by management (Wills, 2009), or sometimes enforced by the workers themselves (Byoung-Hoon and Frenkel, 2004). Posting in construction adds nationality difference to these existing fissures.

Undoubtedly the best-known posting case is Laval un Partneri (C-341/05), which set a damaging precedent for trade unions in EU countries seeking to protect posted workers. In this case, Swedish construction trade unions, Byggnads, initiated industrial action to force a Latvian construction company to sign a collective agreement to ensure that the posted Latvian worker working in Sweden would be paid the same as Swedish workers working in the same area and industry (Woolfson and Sommers, 2006). In Sweden, as in many European countries, imposing and enforcing collective

agreements is the main mechanism used to prevent exploitation and nationality-based hierarchisation in the labour market. However, the Latvian company, Laval, did not want to sign the collective agreement because this would have undermined the profitability of the school renovation they were undertaking. Instead, Laval convinced the Swedish labour court to send the case to the ECJ, and the ECJ found the trade union's industrial action violated EU law because their effort to secure equal pay (rather than only the minimum wage) for the posted workers constituted an obstruction to the free movement of services (Bruun and Malmberg, 2011). The ECJ placed the right of posting companies to compete in foreign markets based on labour costs above posted workers' rights to equal treatment and non-discrimination (Deakin, 2008). In other words, EU law protects the employers' right to gain competitive advantage by treating workers differently, according to their national origin, above the trade unions' right to defend their collective agreements or the workers' rights to equal treatment. The case justified employer practices that, admittedly, were already widespread, but had fallen into a grey zone of legal and industrial relations norms (Lillie and Greer, 2007) and legitimised the actions of employers seeking to use posting to insulate themselves from long-established national systems aimed at preventing worker exploitation and hierarchization (Joerges and Rödl, 2009).

4.1 Posting and the hierarchisation of big construction sites

While few cases reach the ECJ, enforcement problems related to posting have been observed on many larger construction sites around Europe. Channelling cheap labour into large construction projects has become a systematic business strategy for a certain segment of the construction labour market (Cremers, 2011). Employers seek in this way to segment their labour force into hierarchized groups of workers, who are paid and treated differently based on country of origin. To accomplish this, they must thwart the mechanisms in national law and industrial relations practice, which counteract such nationality-based hierarchies. A good illustration of this is a Danish labour court case concerning an Italian manpower company, which supplied workers for the construction of the Copenhagen Metro (Arnholtz and Refslund, 2019). The company had signed a Danish collective agreement, but violated the terms of the agreement. First, the posted workers received no overtime pay for working approximately 70 hours a week despite the normal workweek being 37 hours. Second, workers received somewhere between 5½ and 9 euros per hour despite the collectively agreed sectoral minimum wage being 16 Euros. The workers were paid different wages depending on their home country, and reflecting a clear nationality-based hierarchy: Italian workers received 9 Euros, Poles 7 Euros and Rumanians only 5½ Euros (Danish Labour Court, 2015). This case neatly exemplifies the way wage structures follow nationality, so that workers in the same job working side-by-side find themselves paid and treated very differently.

We observe similar dynamics at various sites around Europe. At the Olkiluoto 3 powerplant construction in Finland, site management sought to reduce labour costs by extensive transnational subcontracting, so that construction involved contractors from 28 different countries employing workers of more than 50 different nationalities. Site management aggressively sought to minimize trade union influence and avoid application of the legally extended collective bargaining agreement, which would have seriously limited possibilities for pay hierarchies to develop (Lillie and Sippola, 2011). At the Eemshaven powerplant construction site in the northern Netherlands, the FNV union seeking to represent posted workers at the site conducted a survey of the workers about their wages. To inform the workers of the results, they displayed a sign outside the gates informing the workers that on this site a Dutch pipefitter receives on average 13,12 per hour, a Portuguese 10,10, and a Pole 9,54 (Berntsen and Lillie, 2016). The European Central Bank tower construction in Frankfurt evidenced a similar degree of fragmentation of labour relations, with transnational subcontractor workers excluded from key elements of the German industrial relations system such

as works councils (Wagner and Lillie, 2014). An action research project which consulted dozens of unionists and labour inspectors with wide experience in the industry from around the EU found that these experts consider the aforementioned cases and the hierarchization they showcase as -typical in industrial construction (Kall and Lillie, 2017).

Unions oppose hierarchization by trying to ensure the application of labour laws and collective agreements, but even the strongest and most well-resourced unions are unable to regulate wages [for posted workers](#), and [even](#) find their occasional victories slipping. For example, Finnish construction sector unions are well resourced, and are capable of mobilization, so that the Olkiluoto 3 site became a source of numerous industrial and legal disputes with the employers (Lillie and Sippola, 2011). Construction on the site began in 2005, and continued until 2021. For a long time, despite a wildcat strike by Polish posted workers against the notorious Ireland-based manpower firm Atlanco Rimec, and numerous other worker grievances, the unions were never able to gain more than minor and temporary organizing victories. This changed in 2011, when the Electricians' Union organized 186 Polish posted electricians, and pursued a case in labour court on their behalf. The labour court referred the case to the ECJ, ultimately resulting in the *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna (C-396/13)* decision, which codified the existing [Finnish union](#) practice in terms of posted worker representation.

Whereas [Laval](#) prevents unions from taking industrial action against posting firms to win collective agreements, *Sähköliitto* allows unions to enforce existing agreements [if/where](#) these are universally applicable (i.e. legally extended). Unions in many countries, including Germany, the Netherlands and Finland, depend on legal extension in their attempts to regulate posted work. The Polish employer at OL3, Elektrobudowa, argued [in court](#) to undermine this, but the ECJ found that Finnish trade unions could in fact rely on legally extended agreement to represent Polish posted workers to claim local skill-based pay rates, holiday and overtime payments, as per the electricians' collective agreements (*Sähköliitto* 2018).

This ruling was viewed as a major victory for unions and posted workers' rights, and it provided a basis for the 2018 revision of the Posted Workers Directive (Rocca, 2020). Outside the abstract world of legal precedent, however, it illustrates the disconnect between legal structures and regulatory effect. The workers involved had to wait many years to receive their payout (Matyska, 2020), and in the end the Polish company declared bankruptcy, and negotiated a small partial settlement of 680.000€ (Elektrobudowa press release, 2018) instead of the 8 million in the initial judgement (*Sähköliitto* 2018). Unions are rarely positioned to pursue cases this aggressively, and even regulatory tools such as chain liability are seldom used due to the difficulty of investigating breaches and pursuing claims (Bogoeski, 2017; Arnholtz and Refslund, 2019), so that monitoring employers' compliance with regulation remains a constant challenge.

On the construction of the European Central Bank tower, in Frankfurt, Germany, the unions lacked or chose not to expend the resources needed to monitor conditions. Management subcontracted intensively to foreign contractors, who brought their own workforce. The objective of the subcontracting was to reduce costs, by paying posted workers the minimum wage, rather than hiring German workers demanding [the](#) significantly higher wages. Of the approximately 1,000 construction workers on the ECB site as of May 2012, only 25 were employees of the main contractor and all these were managers or foremen. The German construction workers union had only minimal access to the site. German labour relations relies on legally established works councils for unions to gain site level influence. However, works councils existed only in the German contractors, and their works councillors were prevented from representing workers posted by transnational subcontractors. Workers lived and worked in single nationality groups, with different nationalities performing different jobs; for example, workers originating from Macedonia usually did the steel fixing and once that job was completed, Polish workers set up the moulds. [Different](#)~~The physical location of the~~ nationalities [were also located](#) on [different parts of](#) the site ~~also differed accordingly~~. Turkish and

Serbian workers worked on the ground level, while the Polish workers worked in the high rises. There was no communication between the work teams. The language of communication on the site was German, although only a small portion of workers spoke German. By keeping different nationality-groups separate, and using subcontractors without established works councils, employers were able to maintain hierarchization and avoid workers being organised to improve conditions (Wagner and Lillie, 2014).

At the powerplant construction sites near Eemshaven, Netherlands, the Dutch FNV trade union ran a pilot project to develop organizing strategies for posted workers. Eemshaven was actually two sites, one with the main contractor Nuon building a natural gas plant, and the other where the RWE was simultaneously building a coal-fired plant. As with the other sites, employers developed complex international subcontracting arrangements. Each had about 2500-3000 workers at its peak, with the majority recruited from abroad by work agencies or via transnational subcontracting. There were also locally hired migrant agency workers, self-employed migrant workers, many of whom were actually 'bogus' self-employed, third country nationals, some of whom were posted, and others who were employed on the basis of work permits. The union noted that the variety of contractual arrangements, as well as the fact that employers could refer to the national law of the posting country (which was not always the home country of the worker concerned), created a great deal of confusion about workers' legal rights, and this confusion served to make union representation complicated and difficult (Wagner and Berntsen, 2016). As at Olkiluoto, at Eemshaven the unions could rely on the legally extended collective agreements for construction and metalworking. However, enforcing these standards proved problematic, as the unions needed to collect proof of violations, and the workers were afraid to come forward. Although the union's strategy was proactive, including visits to worker housing and an on-site office offering information and representation services, the unions at Eemshaven only managed partial enforcement of Dutch collective agreement standards, after great effort and expense (for more details see Berntsen and Lillie 2016).

The picture painted by these case studies is remarkably similar despite national differences between industrial relations systems. While our focus on competition posting does not give the whole picture about posting as a form of mobility, it is nonetheless clear that posting allows employers to compete on cost using segregation and hierarchization. The findings are consistent with those from similar studies (Alberti and Danaj, 2017; Cillo, 2021; Marques et al., 2021; Matyska, 2020; Thoemmes, 2020; Arnholtz and Refslund, 2019).

4.2 Beyond big construction – the diffusion of a business model

The hierarchisation created under the posting business model is easiest to observe on large construction sites because workers from different countries work side by side, but are paid differently. However, the hierarchizing effect of posting is much more widespread, affecting smaller construction firms, and other industrial sectors. Using a combination of survey and registry data, Arnholtz (2021) showed that a large share of posted workers in Danish construction are working on small construction sites, for private clients, and that those workers are the ones with the poorest working conditions by far. Not only is workers' dependency on their employer greater, but the hierarchisation is harder to detect. At large sites, posted workers may receive information about prevailing wages and working conditions through encounters with other workers. As in Eemshaven, a single labour market may be formed around these large projects. However, on the smaller sites the posted workers will typically be completely isolated - especially from native colleagues. Additionally, enforcement actors, such as trade unions and labour inspectors, will typically prioritize big projects, while many minor sites fly under the radar. The risk of being caught is so low that posting companies

on such construction sites will often ignore the rules of the host country and only base their practices on informal agreements made with their clients.

Furthermore, while posting may be most prevalent and profitable in the construction sector, this is also a sector with relatively strong trade unions willing to defend their institutions and counteract exploitation and segmentation – sometimes with the support of employers’ associations (Lillie and Greer, 2007; Afonso, 2012; Arnholtz et al., 2018). Over the years, however, business model posting has spread to other sectors, although this has gone more unnoticed because the trade unions are weaker and therefore less able to call attention to these developments. One sector in which posting is becoming increasingly used is international road haulage, where posted workers continuously cross borders. Since the EU enlargement eastward, the sector has seen an increase in the number of companies established in the new member states, but competing on the entire EU market on the basis of the lower wages of these new member states. This can occur under complicated legal arrangements, which make them difficult to monitor. For instance, Haidinger (2017) describes how one IKEA’s hauler recruits drivers from Romania, via a Slovakia-based company, and dispatches them to drive mainly in Scandinavia. These workers are paid the Romanian minimum wage, plus per diems. Their formal employers are illegal letterbox companies, making it laborious to disentangle the relation between the drivers’ home country, country of employment and countries of work. In confronting these letterbox firms, unions and labour inspectors face language barriers, national limits to jurisdiction, and legal threats based on employers’ claiming violations of EU law on free movement of services. The truck will typically be long gone before anyone can pin down whether the company’s business practices are fraudulent.

While labour mobility via posting may be regarded as suited to the natural patterns of mobility and subcontracting relations in construction and road transport, in certain sectors it appears more as an artificial construct. For instance, Wagner and Hassel (2016) highlight how meat processing firms employ posted workers via subcontractors inside their own factories, using the tools and equipment of the main contracting firm. Posted workers come to Germany from Poland, Rumanian and Bulgaria and are paid as little as 5 euro per hour while working 15-hour shifts (Bosch et al., 2020). It is quite clear that posting is used specifically to circumvent regulation and enforcement, and thereby undercut labour standards. Despite criticism from neighbouring countries that feel a strong competitive pressure on their meat processing sectors (Wagner and Hassel, 2016), German authorities have been slow to improve labour regulation, and it is not clear that recent reforms are effective (Wagner and Refslund, 2016). During the Covid-19 pandemic, authorities have focused on posting in the German meat-processing sector, because of extensive media coverage on how the posted workers’ tight quarters led to large COVID outbreaks (Bosch et al., 2020). The business model of competition posting was not contested.

As in construction, other labour-intensive sectors also use posting to avoid paying higher wages. Hierarchization of pay and conditions according to nationality is a characteristic of labour markets in many EU contexts. The constant circulation of posted workers, which helps ensure that their frame of reference remains their home country, makes posted workers attractive to employers seeking to use hierarchization to drive down wages and working conditions. Over time, posting causes an erosion of the institutions that should counteract hierarchisation because EU law is used to restrict the institutional enforcement.

5. Mechanisms that underpin hierarchisation in posting

We have shown that posting as a business model is associated with hierarchization. In the following sections, we will highlight the three features of posting that underpin hierarchies in the face of countervailing forces, such as worker demands for better pay or enforcement by national regulatory institutions. These features are 1) workers' hypermobility and dependency, 2) transnational enforcement challenges, and 3) multifaceted employer arbitrage strategies.

5.1 Dependent and hypermobile workers

While the employer driven nature of posting illustrates how employers can be the architects of inequality and hierarchy (Grimshaw et al., 2017), it is important to note that competition posting relies on the posted workers not contesting their unequal treatment. In this sense, the posting business model is 'fragile', as the workers involved often have a legal right to higher wages, and in some cases, a plausible ability to claim them (Lillie 2016). Thus, we should avoid viewing posted workers as helpless and exploited victims, but recognise that they are fully capable of acting in various ways to improve their life situation (Andrijasevic and Sacchetto, 2016; Berntsen, 2016). In addition, we should aim to understand the mechanisms that counteract the fragility of the posting business model by securing the posted workers compliance with conditions that are often inferior to both natives and to other forms of labour migrant.

First, work plans often involve a system of rotation in which posted workers work a very high number of hours while abroad and then have periods at home (Thoemmes, 2020). This typically suits their immediate interest in family life, but also maintains their 'dual frame of reference' (Waldinger and Lichter, 2003), keeping them isolated while in the host country because they have little free time. Second, posted workers are typically dependent on their employer for transportation, housing and sometimes even meals. The employer providing these things has many benefits for the worker, but also affects the power relations between workers and employer, limiting the worker's ability to demand better working conditions and higher wages. Furthermore, their isolation means that they have few social resources to draw on if they end up in a conflict with their employer (Caro et al., 2015). Third, many posted workers are aware that their job is dependent on a business model based on low labour costs. Therefore, posted workers will often tolerate or even help their employer circumvent the rules that would improve their conditions (Lillie, 2016).

Fourth, beyond a variety of 'scare tactics' that posting companies use to keep their workers from contacting authorities, trade unions and even native workers (Arnholtz and Refslund, 2019), unions have difficulty organizing posted workers due to the temporary nature of their stay (Lillie and Sippola 2011; Berntsen and Lillie 2016; Berntsen 2016; Matyska 2020). Instead, unions try gaining the posted workers' cooperation in enforcing collective agreements or minimum wages, in countries where those are applicable to posted workers (Lillie et al., 2020). Posted workers sometimes cooperate, either because they have some (unrelated) grievances that they wish to pursue, or because they are enticed by the possibility of higher wages. However, as Matyska (2020) notes, posted workers' "moral economy" typically is focused more on the relationship with their employer and the terms of the agreement with that person – which is often implicit and generally does not include payment of host country wage levels. Thus, posted worker will usually only primarily ask host country unions for help if the employer violates the terms of this implicit agreement (Matyska 2020).

5.2 Transnational enforcement challenges

Because posted workers are reluctant to support unions, it is fundamentally easier to represent posted workers in countries that have institutionalized collective agreement extension mechanisms, or legal minimum wages. This is because such mechanisms grant an automatic right to a certain wage to the posted worker, regardless of whether the posted worker claims it. This is why Germany started using extension mechanisms in the construction sector after the first major wave of posting in the early 1990s, and Norway did the same after the 2004 EU enlargement. Extension mechanisms apply collective agreements across whole industries regardless of whether a particular employer agrees to it, or a particular worker asks for it. Such institutions potentially counteract hierarchization by securing uniform regulatory standards.

However even with such institutions in place, national actors do not have the resources, authority, or infrastructure to enforce these collective agreements, under conditions of widespread posting. The second mechanism underpinning posting as a hierarchized form of mobility is [posting's transnational nature](#), [which of posting](#) represents an enforcement challenge. Of course, unions and governments can try to re-regulate labour markets, by 'relocalizing' labour conflicts: i.e. by mobilizing local power resources, at a point when the target employer cannot easily escape to another national jurisdiction (Lillie and Greer 2007). However, they are constrained nationally, and therefore they cannot govern this transnational market comprehensively. Instead, they can only intervene haphazardly in parts of this market and at certain moments. The very incompleteness, ineffectiveness and unevenness of their interventions make them vulnerable to charges of exerting 'protectionism' and serving as obstacles to free mobility. The above-mentioned *Laval* case is a good example of how union efforts to secure equal wages for posted workers can be outlawed by the ECJ.

Furthermore, differences between national regulatory regimes mean that firms move over a variegated landscape of rules and select between regulatory systems. Their right to do this is protected as an expression of market forces and mobility, although it is nothing more than regulatory arbitrage. The workers' dependency on their employer is supplemented by the transnational nature of posting and EU rules limiting actions of national authorities and trade unions, and jointly they contribute to creating an 'enforcement gap' (Wagner and Berntsen, 2016) that causes host country institutions to be less effective.

This transnational enforcement challenge often has a banal nature. Because posted workers are in a transnational employment relationship, enforcement often requires transnational cooperation between national actors. Apart from practical issues such as language barriers and the lack of information about who to contact there are also barriers due to the differences in the competence between actors in different member states. In one member state, a given aspect of wages and working conditions might be monitored by trade unions, by labour inspectors in another and in a third perhaps by tax authorities (Cremers, 2020). Due to data protection and confidentiality requirements, among other things, it is sometimes even illegal for authorities in one country to hand over information about a company to authorities in another country. Therefore, even if companies are not deliberately trying to exploit the rules to avoid enforcement, the transnational nature of posting makes it both legally and practically challenging to enforce the regulation that applies to the posted workers (Čaněk et al., 2018). Cooperation between national authorities and the recently established European Labour Authority might improve the situation, but their resources pale [completely in comparison to](#) [against](#) the number of yearly postings.

5.3 Multifaceted employer arbitrage strategies

Posting, when done for labour cost reduction purposes, is a form of regulatory arbitrage, between national social regimes and labour regulations (Berntsen and Lillie 2016). In the case of posting, regulatory arbitrage occurs when a firm strategizes about the regulatory treatment of a transaction in the selection between two (or more) alternative regulatory regimes from different sovereign territories (Fleischer, 2010: 4). Firms who move their workers around the EU as a cost completion strategy also strategically move between these different forms of regulatory regimes, ~~depending on which provides the tighter, and/or most expensive regulatory framework~~. This, however, does not always mean they use “posting” in the sense defined under EU law. Sometimes the most attractive option is to post using a firm based in the sending country. Sometimes it can mean formally posting via a letterbox firm registered in a third EU country, unrelated to the actual recruitment and work activities. This can allow firms to minimize social fees, avoid paying wages and confound enforcement authorities. Cremers (2020), for example, cites instances of labour inspectors being unable to continue investigations in the Netherlands, because employers use transnational shell firms, shifting the regulatory jurisdiction of a posting employment relationship to another EU country. Opening an office in the host country and hiring formerly posted workers as ordinary labour migrants can be the most attractive option in cases where collective agreements are actively enforced, and these agreements mandate payment of per diems and travel expenses for workers who are away from home (Sippola and Kall, 2016; Alsos and Ødegård, 2020).

6. Conclusion

European mobility and posting of workers hold the promise of an equal and open common European labour market, but the hierarchization of this mobility means that the wages and treatment one can expect ~~in this market~~ depend on ~~one’s~~ nationality. Posting serves as a legal and organizational tool for circumventing national regulatory actors’ efforts to reduce this tendency toward hierarchization. This circumvention works through the following three mechanisms: First, workers’ hypermobility and their dependency on their employer maintains their dual frame of reference and undermines their integration into the host labour market. Second, transnational enforcement challenges undermine the functioning of institutions aimed at securing equal treatment of workers. Third, multifaceted employer arbitrage strategies ensure the viability of the cost competitive posting business model. All three mechanisms thus counteract ~~tendencies toward migrant~~ ~~how ordinary societal~~ integration, ~~which~~ would lead mobile workers to demand wages in line with ~~norms in the host countries they work in.~~ ~~society they work in, and- undermine the normal functioning of how~~ labour market institutions, ~~normally~~ regulating working conditions, ~~and how a single regulatory system limits employers’ ability to circumvent those institutions~~. Thus, posting allow posting firms to maintain hierarchisation in otherwise well-organized labour markets.

This hierarchization is fragile, however, as it depends on the agency of posted workers continuing to drive them towards individual rather than collective solutions (Berntsen, 2016), as well as a European regulatory environment which encourages regulatory escape. Recent years have seen ~~something of~~ a change in the direction of regulation, with the passage of the 2016 Enforcement Directive, the 2018 revision of the Posting of Workers directive, and the establishment of a new European Labour Authority in 2019. These regulatory reforms solidify host states’ ability to apply collective agreements, and improve the capacity and cooperation of labour inspection agencies. ~~However, they, but~~ do not ~~necessarily~~ change the ~~underlying~~ dynamics of the system. ~~They do# will~~ not reduce workers’ dependence on employers nor resolve ~~completely~~ the transnational enforcement challenges. In ~~all~~ the case studies presented in this article, ~~the posted workers were~~

covered by valid collective agreements already applied, but companies circumvented them, and national actors were unable to enforce them. While the new European level regulatory reforms gives national actors more scope to enforce national collective agreements and labour laws, employers react with new avoidance strategies, so that fundamentally, the enforcement problem remains. ▲

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