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Transgovernmental Labour Standards Enforcement in a Pan-European Labour Market: An Arms Race Between Institutional Alignment and Regulatory Arbitrage

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Abstract

Transgovernmental co-operation is an important European Union (EU) regulatory method, but it imposes transaction costs on the organizations involved. Regulatory requirements under conditions of European free movement drive transgovernmentalism, but transaction costs also shape transgovernmental regulation and regulatory outcomes. We investigate co-operation around labour standards regulation for posted construction workers, focusing on bilateral co-operation of labour inspectorates between Estonia and Finland and comparing it with co-operation efforts between Poland and Finland, and Ukraine via Poland to Finland. The shifting patterns of labour mobility and employer efforts to recruit from less regulated sources mean that investment in bilateral relations can be undermined by the dynamic character of the pan-European labour market. This article contributes to debates on EU regulatory governance by showing how transaction costs from co-operation can decrease the effectiveness of transgovernmental network-based governance; in the case of labour regulation, employers exploit this to undermine the effectiveness of labour inspection co-operation.

Keywords: institutional alignment; labour inspection; labour mobility; posted workers; TCE; transgovernmentalism

Introduction

European free movement means that actors regulating national labour conditions, that is, unions and labour inspectorates (LIs) (hereinafter, regulators),¹ feel pressure to constantly renew their enforcement strategies and cross-national alliances. For this reason, ‘worker posting’, or intra-European Union (EU)² labour mobility through employers sending dependent workers from one EU country to work in another EU country, is one of the EU’s most controversial and active regulatory arenas (Jorens, 2022). Posting is particularly important in the construction sector, allowing firms to employ workers on foreign contracts, mixing and matching regulatory frameworks to find more favourable ones, raising the costs of protective regulation for posted workers and forcing transnational co-operation between unions and LIs. This is in part driven by the subcontracted character

¹Unions are seldom regarded as regulatory bodies, in the same sense as government enforcement agencies. Through ‘co-enforcement’ with labour inspectors, however, they have an important role in the labour standards regulatory process (Amengual and Fine, 2017). Where we are concerned with this aspect, we use the term ‘regulators’ to mean unions as well as labour inspectors.

²The free movement principle applies to 27 EU + 3 European Economic Area (EEA) countries.

of production organization, which facilitates transnational subcontracting to small transnational firms, which often try to evade regulatory enforcement.³

Worker posting divides the regulation of the employment relationship between two or more countries, encouraging regulators to co-operate across borders. The pressure to co-operate arises from practical enforcement work in the field, following the needs of investigating violations or enforcing judgements and fines against violators across country borders [European Labour Authority (ELA), 2023]. From the perspective of a specific national enforcement agency, the impetus to co-operate can, in principle, emerge with any EU/EEA country but most often tends to follow patterns related to migration flows. To facilitate co-operation, many LIs have invested in co-operation ‘regimes’,⁴ with partners in the countries that most often send workers. These regimes reduce the high transaction costs inherent in ad hoc regulatory co-operation and include both bilateral and multilateral transgovernmental linkages and supranational EU-level co-operation. Bilateral regimes favour higher levels of institutional alignment, allowing for successful enforcement co-operation, but suffer from the instability of migration flows.

There is a ‘Red Queen’ effect in that migration flows shift more quickly than regulators can adapt their strategies and transgovernmental relationships by forming new organizational networks and alliances. The Red Queen effect in evolutionary biology refers to situations where an organism must adapt as fast as possible to survive but not get ahead, referring to Lewis Carroll’s *Through the Looking Glass and What Alice Found There*. In the book, Alice is frustrated by her inability to walk from one place to another. She meets the Red Queen, who informs her that ‘It takes all the running you can do to keep in the same place. If you want to get somewhere else, you have to run twice as fast.’ This metaphor is often used to describe a situation so unstable that there is no way actors can adapt quickly enough.

Our goal is to show how network-based governance can lead to a situation in which the required investment in transactional institutional alignment cannot be made quickly enough to gain a pay-off before the situation changes again and the institutions need to be revised yet again. The EU makes extensive use of transgovernmental network-based governance because it holds important regulatory competences but lacks the administrative resources and authority to implement and enforce this regulation in practice (Eberlein and Newman, 2008). We show how this method of regulation is susceptible to the Red Queen effect because of the possibility for employers to evade enforcement by escalating transaction costs. In bilateral relationships, the degree to which transaction cost escalation allows employers to evade enforcement depends on the stability of the labour flows, the degree to which LI preferences can be quickly aligned and LI’s ability to engage in identity work: if preferences are similar, if it is possible to meet and make personal contacts and if flows remain stable, re-establishing effective labour market control through co-operation is easier than if these conditions do not hold. Multilateral relationships cover more jurisdictions and are less vulnerable to the ‘Red Queen’ effect, but they do not favour the deep institutional alignment possible in bilateral co-operation because it is more difficult and time-consuming to align preferences when there are many actors. In this way,

³For an extended discussion of industrial relations and migration in the European construction industry and how this relates to worker posting, see Wagner (2018).

⁴Young (1996) defines regimes as common sets of implicit or explicit principles, norms, rules and decision-making procedures.

we draw attention to the importance of transaction costs in transgovernmental co-operation, in particular in the EU context.

We first describe the EU posted work regime and show how the dilemma labour inspectors face with EU free movement both incentivizes and supports transgovernmental co-operation. We discuss how transaction costs emerge from and shape transnational regulatory co-operation. Next, we outline our research method of sustained observation and interviews with LI over time to chart the development of co-operative relationships. We then compare regulatory co-operation concerning posting flows from Estonia, from Poland and from Ukraine via Poland to Finland in the construction sector. Three types of co-operative relations emerge: bilateral, multilateral and ad hoc – these do not always map onto regulatory co-operation around each flow but describe specific interactions and pathways. The regulatory dynamic in Estonia is mostly bilateral, relying on intensive personal relationships and an alignment of methods and preferences within the inspectorates concerned, even in the face of deregulatory obstacles. Estonian and Finnish LIs share common goals and are able to mutually adjust their activities to fit the changing landscape of posting. They have better co-operation and enforcement outcomes. In contrast, regulatory co-operation between Finland and Poland occurs in the multilateral framework by default, with ad hoc union co-operation, but appears only occasionally to be effective. LI relies on impersonal contacts via information technology [notably the Internal Market Information (IMI) system]. For Ukrainian posted workers, the situation is even worse with no detectable institutional alignment with Ukrainian institutions, inhibiting enforcement of labour norms and collective agreements on behalf of Ukrainian workers. We conclude from comparing the three flows that transaction costs of co-operation shape the regulatory behaviour of the actors, and investing in bilateral institutional alignment – i.e., co-operation infrastructure – reduces costs and improves outcomes. However, employers can and do base their recruitment strategies on escalating regulatory costs, undermining this investment and fuelling the Red Queen effect. The EU's active investment in co-operation infrastructure may eventually reduce transaction costs in multilateral co-operation sufficiently to subsume existing bilateral co-operation, but for the near term, at least we expect these frameworks to exist side by side.

I. EU's Posting Institutions and Infrastructure

EU regulations share regulatory responsibility for posted work between the host and the sending country because the employment relationship and associated social insurance are governed by a combination of both regulatory regimes (ELA, 2023). Work contracts, wages and social security payments occur in the home country or in the employer's country of incorporation (which can be different). LI organizations lack authority beyond the national border, and even when the work is in their jurisdiction, their capacity and authority to interpret foreign laws and enforce foreign decisions are limited. As posted workers' contracts, salary deposits and social security contributions occur in the sending country, sending country LI is better positioned to monitor them (ELA, 2023). They are also familiar with the laws, contracts and practices of firms from their country, and posted work contracts are concluded under sending country terms [subject to certain host country standards, as per the Posted Workers' Directive (PWD)]. However, sending country LIs lack capacity and authority abroad, so they must rely on host country LIs to inspect the work

sites, talk with the workers and see the context of relationships with other firms. They are not familiar with the laws and collective agreements in force on the work sites and thus have difficulty interpreting how these standards should be applied. The overall effect of the system is that enforcement is patchy, facilitating employer fraud, and in this sense, it is not a fully functional LI system (Wagner, 2018).

In typical integrative EU fashion, the policy response has spilled over into transgovernmental regulation, subsidizing and encouraging multilateral transgovernmentalism. Whilst there is a deregulatory trend to restrict the ability of national regulators to regulate foreign service providers, exemplified by the so-called ‘Laval Quartet’, the EU has also favoured certain types of regulatory interventions and sought to build a transgovernmental infrastructure. Directive 2014/67/EU (hereinafter the Enforcement Directive) specifies tools and sanctions for enforcing the PWD. Directive (EU) 2018/957 updates the original 1996 PWD, including language to protect the right to strike, and allows unions to apply certain extended collective agreement provisions. EU legislation has complex interactions with national systems, so comprehensive analysis is not possible here, but the trend is to encourage regulatory actors to use tools compatible with free movement and to develop a transnational enforcement infrastructure, creating conditions for an EU-level enforcement regime (Arnholtz and Lillie, 2019).

Hartlapp and Heidbreder (2018) characterize EU administrative co-operation as information co-operation (exchanging data between competent authorities), procedural co-operation (joint administrative practices) and organizational co-operation (establishment of stable co-operation networks and infrastructures). All three types result from front-line inspection requirements, following demands such as the results of investigations, as well as EU initiatives (Hartlapp and Heidbreder, 2018). Since the 1990s, the European Commission has supported the Senior Labour Inspectors Committee (SLIC), and since 2016, a European platform tackling undeclared work (EU UDW) has synchronized inspection processes and worked on common problems. The ELA is a permanent bureaucratic EU institution founded in 2019 that develops sector-specific inspection tools and facilitates transgovernmental co-operation on inspections to improve enforcement outcomes.⁵ Day-to-day co-operation is facilitated by the IMI system software platform. Inspectors can submit requests for information or action via the system in their own language to inspectorates in other countries. Requests go to an IMI contact person, who determines how to respond and who to ask for help from in their own organization. This allows labour inspectors who may not know each other and may not share a language to transmit labour inspection requests to any other EU country. The system is generally considered useful, though limited, by the inspectors we interacted with.

As co-operation between national regulatory bodies improves, employers seek out new labour sources where regulation is still weak. One option for employers is to recruit workers from outside the EU, called ‘Third Country Nationals’ (TCNs) in EU parlance, as intra-EU posted workers (Danaj et al., 2023; Lens et al., 2022). The employer recruits TCNs in an EU member state where they can gain entry but sends the TCN to any desired EU member state to work, offering a cheaper and more vulnerable workforce. The introduction of TCNs makes established co-operation irrelevant or insufficient. TCNs within the EU do not have free movement rights under the free movement of labour, and each

⁵<https://www.ela.europa.eu/en/road-transport>.

member state is entitled to decide which TCNs it will admit (Cillo, 2021). However, if one member state allows a TCN to reside and work, that TCN can be posted as a dependent employee, as Court of Justice of the European Union (CJEU) Case C-43/93 Vander Elst v Office des Migrations Internationales (1994) clarified. Using the metaphor of ‘a hole in the wall of fortress Europe’, Lens et al. (2022) document that TCN re-posting is becoming a new way for employers to circumvent national restrictions on the employment of labour migrants.

II. Regulatory Arbitrage, Transaction Costs and Institutional Alignment

Some employers use posting as a way to arbitrage between labour regulatory regimes. This ‘regulatory arbitrage’ (Fleischer, 2010) is a social technology to reduce labour costs. Both firms and LI are active in developing new strategies around it (Cremers, 2019), so that it takes on the character of an arms race. Although other forms of migration and employment construction are also used, posting is often favoured by employers because it provides an easy opportunity to confound regulation by arbitraging across multiple regulatory jurisdictions, raising the cost of regulation (Arnholtz and Lillie, 2019). This is possible because the terrain of regulation is determined in part geographically, in part by the nationality of people and companies and in part by legal choices, of which some are fictitious circumlocutions. As both regulators and firms strategize around each other’s actions, the regulatory terrain is dynamic. Firms actively seek opportunities to increase transaction costs for regulators, for example, by exploiting rules from foreign jurisdictions to escape inspectors’ authority (Cremers, 2019).

The implication for LI is that, whilst ideally, under free movement, they would have deep bilateral co-operation with every other LI in the EU, this is too costly, time-consuming and organizationally challenging. In diverse regulatory environments, co-operation strategies cannot be easily mimicked and transplanted between regulatory regimes; that is, they are ‘bespoke’ (Spiller, 2013). Instead, transaction cost economics (TCE) leads us to believe that LIs will deepen bilateral co-operation with those easiest to work with and/or more important to their work and rely on more superficial EU-organized multilateral co-operation with the rest.

Both multilateral and bilateral transgovernmental co-operation are motivated by practical concerns. The main driver is that host countries’ LIs want information from sending countries about firms under investigation, assistance in collecting fines and follow-up on cases after the worker returns to the sending country to ensure host country rules are fully and effectively applied (Čaněk et al., 2018). Furthermore, sometimes sending country LI organizations want to protect ‘their’ workers working for firms under their jurisdiction. Others feel that when these workers leave, they are no longer the sending country LI’s responsibility, and their limited resources are best focused domestically rather than on helping foreign organizations. How they define their organizational mission and professional role as labour inspectors is important in determining the reaction of sending country LI to co-operation initiatives. There is, therefore, a potential, though not a guarantee, for a mutual interest in regulatory co-operation. However, even when both sides are willing, TCE suggests that it probably occurs less often in practice than one might otherwise expect in the absence of transaction costs.

Transaction costs can be reduced through investment in regulatory co-operation infrastructure. In TCE literature, regulation is described as an incomplete form of long-term contracting (Williamson, 1985), and most research has analysed it in terms of the relations between regulators and regulated organizations (Marjosola, 2021). Interorganizational costs arise from planning, adapting and monitoring task completion; these costs can be reduced through investment in the relationship (Williamson, 1985). This reduction is possible because most costs arise from information asymmetry, bounded rationality and the hazards of opportunism, which tend to be larger factors when the relationship is recent and superficial but decline with deepening co-operation (Spiller, 2013). LIs can reduce costs and risks by investing in co-operation, but they are constrained by the need to devote time and resources to each relationship.

Co-operation is costly, requiring time and resources to realize. This is the fundamental insight of TCE: to successfully co-operate, co-ordination problems must be resolved, information learned, organizational changes made and identities and interests aligned (Williamson, 1985). The LI co-ordination we observe follows functional requirements, but our cases are also consistent with prioritizing the 'low-cost' options. We show that just because co-operation is necessary does not mean it will happen or be effective. Eggertsson (1990) classifies transaction costs as (1) searching for information, (2) bargaining, (3) making contracts, (4) monitoring partners, (5) enforcing the contract and collecting damages and (6) protecting property rights. The first three are *ex ante*, meaning devoted to establishing the relationship, that is, institutional alignment, and serve to reduce the later three types of *ex post* costs. For LI, there are legal and information protection risks related to sharing information about firms' finances and activities and individual financial and social security data from workers. Assuming partner agencies will treat the workers and firms involved in their cases justly requires trust. In other words, for LIs to co-operate, they must not only know whom to contact but also know what is likely to happen when they do. Opportunistic behaviour by regulators can undermine co-operation, such as providing information only when it is to their advantage or underinvesting in the relationship.

Furthermore, differences between the role of LI in a sending versus receiving state and the political and economic interests of the states themselves are possible barriers to co-operation. As far as the former is concerned, LI may regard its jurisdiction as ending at the border and might be less interested in enforcing foreign legal decisions than in enforcing its own. Either sending or receiving country LI organizations may regard the protection of posted workers as important, but if either or both do not, this becomes a barrier to regulatory co-operation. Martinsen et al. (2021) note that co-operation in networked welfare governance in the EU tends to be 'homophilous': similar states and actors co-operate more easily. Homophilous co-operation amongst LIs could manifest both in terms of similar types of LI' bureaucracies interacting more smoothly (as Walters et al., 2011, show, LIs are not homogenous in design or areas of responsibility) but also could reflect labour-sending versus labour-receiving state interests. Although all EU countries are both sending and host countries to every other EU member state, there are major discernable flows, reflecting underlying economic differences (De Wispelaere et al., 2022). Furthermore, political cleavages between sending and receiving member states are mirrored in welfare agency network interactions. Some EU countries see cheap posting as an export opportunity, and labour-exporting firms form an influential lobby.

Formally, the process of building transgovernmental LI co-operation is one of contracting, that is, producing documents, procedures and possibly legislation, but informally, the functionality of these arrangements is embedded in interorganizational identity work. Institutionalization of the relationship, in this context, means the creation of predictable processes and procedures between the contracting parties. It is the most visible part of the process, but in some ways, it is also the easiest part. Underlying it is also a less visible process of institutional alignment, which involves forming common norms, multi-level organizational links and personal relationships.

Institutional alignment is both a formal process of agreements and an informal one. It can be initiated both from the top of the hierarchy and from the ground level, making it a multi-level process. Personal contacts bring life to formal institutional agreements by creating mutual norms and feelings of shared obligations (Kall et al., 2019). This minimizes opportunistic behaviour and facilitates activities extending beyond those immediately foreseen in the institutional arrangements. Identity work is slow and expensive (Snow and McAdam, 2000), making it easier to invest bilaterally rather than multilaterally because, as the bespoke nature of regulatory alignment implies, each relationship entails its own identity work and institutional alignment process. Deep transnational regulatory co-operation requires bespoke assets tailored for relationship-specific needs, which cannot easily be redeployed to other relationships. This is a difference between a multilateral regime and a bilateral one: bilateral regimes can be built on specific assets to make the relationship function, whilst multilateral ones are built on generalized infrastructure. As our cases demonstrate, regulatory co-operation outside of established personal relationships is relatively expensive and generally superficial. Substantive bilateral relationships, aligning institutions to move co-operation to *ex post*, are expensive to establish. Once established, however, activities become routine, so the cost of co-operation declines.

III. Case Selection, Methods and Data

This article studies three posting flows: intra-EU posting from Estonia to Finland; that from Poland to Finland; and TCN re-posting from Ukraine via Poland to Finland. Whilst most posted workers from Estonia are posted to Finland, Poland is a leading posting country in Europe due to its relatively low wages and large workforce (De Wispelaere et al., 2022). Poland is also a centre for TCN re-posting, especially from Ukraine to other member states. Between 2018 and 2021, the number of Ukrainian workers posted from Poland increased more than four times, from 18,000 to 80,000 (Danaj et al., 2023), reflecting an ongoing process of liberalizing migration from neighbouring countries, which began in 2006. This is also fostered by the rapidly developing infrastructure for the posting of workers (Matuszczyk et al., 2022).

We focus on transnational LI co-operation, and in Finland and Poland, where trade unions are occasionally involved, we discuss their role as well. There is close and deep 'co-enforcement' co-operation (to borrow the term of Amengual and Fine, 2017) between the Finnish construction union [Rakennusliitto (RL)] and the Finnish LI, whose capacities are complementary. The union and LI work together to enforce labour law and collective agreements. As a government body, the Finnish LI is better situated to manage formal co-operation with other state actors and with the Estonian LI, whilst the RL has more capacity to negotiate and force compliance by employers in Finland. LI is concerned with,

and limited to, enforcing the law, whilst the union is concerned with enforcing the (legally extended) collective agreement. Although the Finnish LI is well resourced compared with other countries, their resources are limited compared with the union, which not only has paid officials but also relies on shop stewards and active members. The Polish construction union is not active amongst posted workers, and in Estonia, the construction sector is practically without union presence.

The analysis relies on data from a series of research and social engagement projects funded by Directorate-General (DG) Employment and Social Affairs. As a whole, the trajectory of our social engagement projects could be regarded as an extended participatory action research project, in which we involved unions, LI and other actors in managing the research as a way for them to reflect on and improve their worker protection strategies. This extended proximity to our research participants allows us to reflect on long-term developments, triangulate facts, actions and motives from multiple directions and observe interactions rather than only hear about them. We are aware that it brings us close to the participants in a way that could make us more sympathetic to them; this bias, however, is not relevant to the analysis at hand, as our conclusions do not reflect normatively on our participants.

We held seminars, focus groups and interviews with unions, employers' associations, employment agencies, border patrol, police, government ministries, LIs, law firms, the third sector and academics from 2017 to 2022. We observed the development of relationships and strategies around posting. The main project here was Con3post (Posting of Third Country Nationals: Mapping of Trends in the Construction Sector), about re-posting TCNs in the EU, involving three focus group interviews (FGIs) with 8–12 participants and three seminars in Finland (with Finnish and Estonian stakeholders) and Poland (with Polish stakeholders and Ukrainian community representatives in Poland) in 2019 (for methodological details of Con3Post, see Kall et al., 2020). From the PROMO project (Protection of Posted Workers in the European Union, 2017–2018), we use a 2017 focus group with LI from various countries, including Estonia and Finland. We draw on selected interviews from the POW-Bridge project⁶ ('Bridging the Gap between legislation and practice in the posting of workers') of stakeholders and representatives of posting companies (for methodological details, see Matuszczyk et al., 2021). Finally, we rely on an FGI with Finnish LI and unionists and interviews with two Ukrainian posted workers from the SMUG project ('Secure Mobility') in 2022. These projects used purposive sampling, selecting participants to address particular research questions. All participants were informed of the project's aims and consented to take part. Interviews were conducted in-person or online. All interviews (see Appendix A) were audio recorded, transcribed and thematically analysed. Interviews varied in length between 20 min and 2 h, whilst the FGIs lasted between 2 and 4 h. Documents and agreements also informed our co-operation taxonomy, but actions on specific cases, statements of inspectors about the character of the relationship and the costs and advantages involved are at the centre of our analysis.

A limitation of our data as it relates to TCNs is that we collected it prior to the increased Russian aggression in Ukraine in February 2022, and since then, Ukrainian

⁶POW-Bridge was co-financed in 2021 by funds from the Ministry of Science and Higher Education (Poland) programme 'PMW' (ID 5204/EASI/2021/2).

inflows to Poland have changed, and refugees have been granted temporary protection in the EU, including free movement rights. It nonetheless exemplifies a widespread ongoing trend in TCN posting (see also ELA, 2023), and so it is still relevant. Our central finding, however, is about the effect of transaction costs on transgovernmental co-operation, and this remains of general applicability. We were not able to interview the stakeholders inside Ukraine; however, we covered the issue of co-operation with Ukrainian counterparts when interviewing stakeholders in Finland and Poland.

IV. Transaction Costs of Monitoring ‘Simple Posting’

There is a regular flow of construction workers from Estonia to Finland, many of whom are posted by Estonian companies. To regulate this, the Finnish and Estonian LIs have developed deep bilateral co-operation. When Estonia joined the EU in 2004, the posting of workers to Finland became a major migration channel, especially in the construction sector. The reason posting emerged as important was that Finland implemented a ‘transition period’ until 2006, when individual mobility remained restricted. Estonians could, however, be posted by their employers. This made it easier for employers to avoid paying Finnish-level wages, so the transition period restrictions caused more labour market disruption than they prevented. As a result, the restrictions were dropped. However, by then posting practices were already established, so firms from Estonia and other Central and Eastern Europe (CEE) countries continued to use social dumping practices and disrupt the generally well-regulated Finnish labour market (Lillie and Sippola, 2011).

Finnish unions, notably the construction union (RL, representing around 70%–80% of Finnish construction workers), developed sophisticated techniques to enforce their extended industry-level collective bargaining agreements (CBAs). In the context of legal extension, the RL’s CBAs are legally binding on non-member companies, functioning effectively as a minimum wage. Finnish labour inspectors are an integral and co-operative part of monitoring labour standards, although the RL takes the lead and other unions, such as the Electricians’ Union, also play a role. After the initial accession period, regulations and union strategies around posted work have improved, including the introduction of mandatory tax numbers and main contractors’ liability, which allows LI to issue fines to main contractors if they do not use due diligence in monitoring subcontractors (Sippola and Kall, 2016). Although the fines are not dissuasive, their issuance means that both the subcontractor and main contractor are in violation of the collective agreement, annulling the unions’ peace obligation. This allows the union to take industrial action, including secondary action, against that employer. Occasional ‘boycotts’ of violator firms serve to dissuade other firms from working with boycotted contractors.

The union/LI monitoring system gives a presence on construction sites, but as the firm, employment contract and workers’ residence are all in Estonia, the system requires capacity to act there as well. As there is no Estonian construction workers’ union, this job falls on the Estonian LI. Estonian LI supplies the necessary local knowledge and authority to check employer claims and provide follow-up on cases. Whilst in Finland, Finnish unions have a level of quasi-governmental authority, this does not extend to foreign LI organizations, for whom Finnish LI is the appropriate collaboration partner.

The institutional alignment of the Estonian–Finnish posting system started via a process of interorganizational contracting and grew through personal contacts and working

together. In 2014, the Labour Inspectorate of Estonia and the office of the Finnish LI signed a bilateral co-operation agreement for the protection of posted workers. The parties agreed to (1) share information, (2) meet biannually, (3) exchange inspectors and (4) raise awareness of Estonian workers posted to Finland (Čaněk et al., 2018). From this, Estonian and Finnish LI representatives built regular practical co-operation. The Finnish and Estonian regulatory actors emphasized activities such as joint inspections of construction sites and sharing information on a detailed level via emails, phone calls and visits. IMI is a sideshow compared with the bilateral contacts, as one Estonian inspector explained:

... [we] have good contacts with [LI in] Southern Finland, I wrote to them and I asked: do you have any other phone number or email of the employer? And the Finnish counterpart really answered me very fast. We got the other number which was a Finnish number which the employer didn't give us, and we managed to get in contact with the employer this way and got all the documents we needed I could have asked this also via IMI, but maybe it could have taken more time ... what I find useful is that we exchange information about these Estonian companies and we can also make a background check on them in Estonia (22_HEL)

A Finnish LI inspector explained the importance of the information that Estonian LI can get for them:

/.../ to evaluate if they fall into the category of the posted workers, we would need to know better what is going on in the country of origin. With Estonia we have good cooperation, we are quite easily exchanging information. (17_HEL)

Estonian LI depends on Finnish LI to investigate the Finnish sites, while Estonian LI has access to posting firms' offices, is present where the worker is resident and can check that workers receive the rights and benefits they have earned, even after returning home. Considering the agile reactions of employers, quick and precise information sharing becomes crucial. As one Estonian LI representative related:

they [deceive us about] where they were actually hired or where they were sent and I don't want to even get into *per diems* and everything related to that But it is necessary [to cooperate well together] because there are four different authorities,⁷ in two different countries, and they are lying to at least one of us for sure. And manipulating our systems. (17_HEL)

Maintaining this bilateral system of monitoring and sanctioning violators requires a significant resource commitment. However, by regularizing co-operation, regulators in Finland and Estonia created a regime that made it more difficult for companies to use posting to gain an unfair competitive advantage by avoiding taxes and violating collective agreements. This has resulted in Estonian construction workers demanding and receiving higher pay, becoming less willing to take jobs with shady operators and joining the RL (Sippola and Kall, 2016). In turn, this motivates some companies to look for alternatives to employing Estonians, such as employing posted TCNs, including Ukrainians, as discussed in the latter section.

⁷In addition to LIs, monitoring posting work can involve tax administrations, social security administrations and, in the case of TCNs, also police and border guards, but in this article, we focus on labour rights, mainly the responsibility of LIs (and unions).

Ad Hoc and Multilateral Co-operation Running Up Against Resource Limits

Unlike with Estonia, Finnish LI networks with Poland rely primarily on multilateral institutions; particularly on the Polish side, there is neither the time nor inclination to invest in institutional alignment. The Polish regulators highlight their regular use of the IMI system, emphasizing that it is a ‘low-cost’ way to send and request information, useful when the sender does not know the person they are asking to help. It also reduces language problems. There has been no bilateral contracting process between Finnish and Polish LIs, nor have bespoke, detailed processes been designed to handle cases or develop personal relations between inspectors.

Finnish inspectors and unions emphasize that they regularly encounter Polish workers on the Finnish building sites, and compared with Estonian workers, Polish posted workers’ employment is considered problematic in terms of labour violations and exploitation. However, Finnish regulators only sporadically contact Polish ones (14_HEL). Neither Polish nor Finnish LI highlighted the friendly enthusiasm for that relationship evident in the Finnish–Estonian co-operation. Indeed, a Polish inspector we invited to attend our Helsinki workshop was unable to get permission to come, whilst several Estonian representatives attended.

There is a construction sector union in Poland, which the RL contacts on occasion for information, but it has neither the resources nor the quasi-governmental authority of the Finnish unions. The lack of an authoritative partner makes it more difficult to follow up on enforcement actions in Poland. For example, the famous *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* (C-396/13) decision of the European Court of Justice, which resulted from a 2011 dispute at the Olkiluoto 3 nuclear powerplant construction site, was viewed as a major union victory in terms of setting legal precedent (Rocca, 2019). However, the workers had to wait many years to receive their payout (Matyska, 2019), and ultimately, the Polish company declared bankruptcy. The payout in the end was far smaller than mandated by the court. The RL had difficulty enforcing the court judgement against the company in Poland, and the union did not have an established route through Finnish LI to Polish LI to ensure follow-up. There are other, less high-profile cases usually concerning underpayment and non-payment of wages, but transnational co-operation between trade unions in Finland and Poland is sporadic also due to posted workers’ limited interest in union involvement, stemming from a lack of trust and a perception of ineffectiveness in their actions (02_WAR). In turn, workers’ low confidence in institutional frameworks undermines the effectiveness of labour inspections, facilitating an agreement between employers and workers to allow employers to take advantage of loopholes in the regulations, undermining the regulatory regime (Dimitriadis, 2022; Matyska, 2019).

Polish LI is plagued by a lack of capacity due to underfunding (similarly to the Estonian situation), a bureaucratic frame ill-suited to protecting posted workers via international co-operation and state policies that inhibit enforcement activities at uncooperative and evasive companies. Polish LI is set in a reactive rather than proactive role by the way their authority is framed in the statutory rules of the National Labor Inspectorate, as well as the law on the posting of employees within the framework of providing services (Posted Workers Act or PWA). The PWA stipulates detailed rules concerning the principles of administrative co-operation between Polish authorities and other EU states, as well

as the imposition and execution of administrative pecuniary sanctions and fines (Otto, 2020). Although fully compliant with the letter of the PWD, the Act remains inadequate to meet the regulatory needs of a country with such an active labour export industry. For example, the Polish LI has no authority to impose its own sanctions on Polish employers posting abroad who violate the law in the receiving country – they can only help foreign entities impose fines. This is a constraint if a posted worker brings a complaint to a Polish LI instead of it coming via a host country's LI. Since September 2020, the LI has received more control powers, including the right to request information from employers posting outward from Poland, but the impact of these regulations remains unclear. Each year, there are a few dozen inspections carried out based on complaints submitted by workers posted out of Poland. These relate to occupational accidents, non-payment of wages or other work-related payments in the host country. This, however, is a tiny number given the scale of postings, suggesting that Polish posted workers do not regard this as a viable channel to have complaints resolved.

Polish inspectors report that certain state policies restrict their ability to inspect and enforce rules in practice, suggesting that political priorities do not always align with enforcement goals. For example, posting companies confound LI inspection efforts through legal circumlocutions, such as 'virtual offices', which involve listing the company's physical address in a location where no company representatives work (similar to 'letterbox companies', described by Cremers, 2019). Labour inspectors have firms' correspondence addresses, but as there is no requirement to have a company representative at that address, the summons sent there will not reach an authorized representative, and the company may ignore it without penalty.

Polish labour inspectors identified differences in LI organizations and authority, and the role of unions, as a reason to co-operate more with some foreign organizations than others. Because areas of LI and trade union responsibility are different in different countries, the responsible actor for addressing an issue in one country might not be regarded as a legitimate and appropriate co-operation partner in another. For example, in Finland, the construction union has the main responsibility to monitor wages and occupational safety and health (OSH), and LI is secondary. The Polish system relies more and Estonian entirely on LI. For the Estonian LI, this does not hinder co-operation with Finnish actors, but this is precisely due to their institutional alignment. For the Polish LI, it is different, as a Polish LI representative explains:

If we were to ask them (foreign LI) about whether issues such as working time or payment of wages are being observed, they wouldn't bother because this is not part of their job description or their remit. In some countries, so-called legal labour protection is dealt with by the courts or arbitration bodies, sometimes it's the trade unions as in Scandinavia. So it's hard to make them give us answers to these questions. Whereas France or Belgium, for example, they [LI] deal with both. So they operate a little bit on our level. So it is exactly there that we can send such questions. (05_WAR)

Finnish–Polish co-operation was deemed difficult because of a mismatch of competencies; matching them up would require a significant investment in institutional alignment. However, as the comparison with the Finland–Estonia relationship shows, the mismatch of competencies is not a fundamental difference per se but rather a lack of investment in co-operative practices that prevents these differences from being overcome. However,

from the Polish perspective, their statement reveals a wider perspective, with multiple partners, many of whom are more important than Finland; for Estonia and Finland, proximity, mutual importance and a stable migration flow encourage each of them to focus on this relationship.

V. The Escalation of Transaction Costs Triggered by TCN Re-posting

Posting of TCN workers adds another layer of complexity and cost to regulatory enforcement, as there is not the same level of LI co-operation as between EU member states (Čaněk et al., 2018). The Ukrainian LI, State Service of Ukraine on Labour Issues, was not a participant in the multilateral EU co-operation infrastructure that EU member LIs rely on when deep bilateral relations are missing. In Poland, the Trade Union of Ukrainian Workers is an important promoter of Ukrainian workers' rights (EU UDW, 2021); it is, however, a migrants' union in the Polish context rather than a body with transnational capacities. In the empirical material that we collected, there was no indication of co-operation with regulators in Ukraine around posting, despite the growing importance of flows of posted Ukrainians through Poland into the EU.

Ukrainian workers began being reposted through Poland and turning up on job sites in significant numbers in Finland (and Estonia as well), around 2018. The arrival of TCN workers added legal uncertainty, both in terms of the competency of host and transit country regulators and TCN labour standards outcomes. These workers are often highly exploited but reluctant to co-operate with regulators. Compared with 'regular' posted workers, TCNs often speak neither the transit nor host country language and are not familiar with their rights in either country (Lens et al., 2022; Novitz and Andrijasevic, 2020).

TCN workers are particularly challenging for LI, as they are often unsure of their right to remain, an issue that does not arise for intra-EU postings. TCN workers depend on permission to work from the transit country as well as on continued access to the receiving country. Whilst, in principle, established case law allows re-posting of TCNs, employers operating in this space rarely have their papers in order, and their workers' right to remain in their re-posting job depends on this. TCN workers might be working legally in the host country, but LI and the unions will not know this until they investigate; this investigation may result in the worker being deported, as the LI in Finland explained (17_HEL). For regulators and workers in Finland, finding out TCN workers' status is costly. Part of this relates to weak relations with Polish LI (and unions) and Polish actors' challenges enforcing EU rules in the Polish context, but on top of this is the precarious status of these workers in Poland.

As is often the case for temporary migrant workers (Dimitriadis, 2022; Matyska, 2019), there is an implicit bargain with their employers, which is more important to them than co-operating with LI. Gaining their trust would require capacity to protect the workers' rights, in the host, transit and home country. For this, deeper transgovernmental co-operation would be needed. The high transaction costs involved ensure the prospect of it happening is remote.

Conclusion

The EU creates unpredictable and dynamic labour flows by design. This is a valuable achievement but presents labour market regulators with a formidable challenge. The fact that firms may freely select from different regulatory frameworks as well as source labour from outside via an EU member state sets up a dilemma for LI, which must now invest in, and then constantly renew with different partners, transgovernmental co-operation. Bilateral co-operation functions well once established but is inherently limited and can be evaded by employers sourcing from other countries or, ultimately, by re-posting from third countries via an EU member state. However, multilateral EU-based co-operation is inadequate to the task of institutional alignment and, in any case, can also be evaded.

The analysis showed that in the Finnish–Estonian case, the investment in institutional alignment through agreements, joint processes and identity work has created common norms and practices, resulting in successful co-operation. There is no evidence of positive outcomes from the Finnish–Polish LI co-operation, whilst the Finnish construction union had minor success co-operating with the Polish unions. With Poland, Finland initiates contacts via the EU's multilateral infrastructure or through union contacts, and this is always because the Finnish regulators want something: information or follow-up on a case. We found no evidence of successful co-operation with the Ukrainian LI.

Both Estonian and Polish government policies place seemingly unintentional obstacles in the way of labour enforcement (such as the possibility to use shell companies and the underfunding of LI). This suggests that political priorities, on the one hand, seek to officially protect workers, whilst on the other, they seek to frustrate the activities of those tasked with this protection. Estonian co-operation with the Finnish LI provides resources to compensate for the deregulatory bias inherent in their environment. The obvious lesson is that, given Poland's importance as a posting state, Finnish and Polish regulators should set up bilateral ties and push forward institutional alignment. However, institutional alignment is most successful as a multi-level, bilateral process, and the lack of top-level approval works counter to this. Finland also seems to be a lower priority partner for Polish LI, and the difference in regulatory structures appears to be problematic for Polish LI.

Furthermore, the Ukrainian example suggests that should even deeper ties between Poland and Finland be established, bilateral institutional alignment remains vulnerable to destabilization, as it prompts employers to shift their recruitment to ever more exploitable labour sources. The Red Queen effect is inherent to the situation because the dynamism of the situation quickly erodes the value of investing in institutional alignment: by the time the investment pays off, the situation has changed. The regulators feel caught in a situation where, to stay in place, they must develop co-operation as quickly as they can, but to get ahead, they must adapt more quickly than is possible. Investing in institutional alignment just results in an escalation in TCN posting as employers find new ways to raise the transaction costs of co-operation. Ultimately, for regulators to regulate effectively, they need a fundamentally different regulatory governance concept or much more commitment to multilateral networks. The problem is inherent in transgovernmental EU governance. Our contribution shows that the effect of transaction costs should be considered when analysing transgovernmental co-operation.

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Appendix A: List of Interviews

<i>Code</i>	<i>Type of interview</i>	<i>Participant</i>	<i>Date</i>	<i>In-person/ telephone/ remote = video conference</i>	<i>Language</i>
POW-Bridge_01_WAR	Expert	Social partner/employers' association	08-09-2020	Telephone	Polish
POW-Bridge_02_WAR	Expert	Union	21-09-2020	In-person	Polish
POW-Bridge_03_WAR	Expert	Public administration	09-09-2020	In-person	Polish
POW-Bridge_04_WAR	Expert	Employer	01-10-2020	Remote	Polish
POW-Bridge_05_WAR	Expert	Public administration	02-10-2020	In-person	Polish
POW-Bridge_13_WAR	Expert	Employer	25-11-2020	Remote	Polish
SMUG_14_HEL	FGI	Unions, LI	14-03-2022	In-person	Finnish
SMUG_15_JYV	Interview	Ukrainian posted worker	27-10-2021	Telephone	Russian
SMUG_16_JYV	Interview	Ukrainian posted worker	27-10-2021	Telephone	Russian
Con3Post_17_HEL	FGI	LI, unionists, researchers, police and border guards	19-09-2019	In-person	English
Con3Post_18_WAR	FGI	Employment agency, third sector	10-10-2019	In-person	Polish
Con3Post_19_WAR	FGI	LI, employment agencies, law firms, third sector organization, unions, academics	21-10-2019	In-person	Polish
Con3Post_20_WAR	FGI	Employment agency, third sector	10-10-2019	In-person	Polish
Con3Post_21_WAR	FGI	LI, employment agencies, law firms, third sector organization, unions and academia	21-10-2019	In-person	Polish
PROMO_22_HEL	FGI	LI	24-05-2017	In-person	English

Abbreviations: FGI, focus group interview; LI, labour inspectorate.