

Ines Wagner

Posted Work and  
Deterritorialization in the  
European Union

A study of the German  
Construction and Meat Industry



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Esitetään Jyväskylän yliopiston yhteiskuntatieteellisen tiedekunnan suostumuksella  
julkisesti tarkastettavaksi yliopiston vanhassa juhlasalissa S212  
maaliskuun 27. päivänä 2015 kello 12.

Academic dissertation to be publicly discussed, by permission of  
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UNIVERSITY OF JYVÄSKYLÄ

JYVÄSKYLÄ 2015

# Posted Work and Deterritorialization in the European Union

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JYVÄSKYLÄ STUDIES IN EDUCATION, PSYCHOLOGY AND SOCIAL RESEARCH 521

Ines Wagner

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UNIVERSITY OF JYVÄSKYLÄ

JYVÄSKYLÄ 2015

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Publishing Unit, University Library of Jyväskylä

URN:ISBN:978-951-39-6124-4

ISBN 978-951-39-6124-4 (PDF)

ISBN 978-951-39-6123-7 (nid.)

ISSN 0075-4625

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Jyväskylä University Printing House, Jyväskylä 2015

## ABSTRACT

Wagner, Ines

Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry.

Jyväskylä: University of Jyväskylä, 2015, 2015, 155 p.

(Jyväskylä Studies in Education, Psychology and Social Research

ISSN 0075-4625)

ISBN 978-951-39-6123-7 (nid.)

ISBN 978-951-39-6124-4 (PDF)

Diss.

'Posted workers' are a type of labour migrant sent by their employer to work temporarily in another EU member state. Their labour, employment and social security rights are embedded in both the sending and the host countries. This inhibits effective regulation of labour markets and labour relations within insular political economies. The regulatory capacity of states is deterritorialized. At the same time, the transnational flexibilisation of employment relations increases. This study explores the interrelationship between transformations of labour markets and nation states in the EU, two trends that are embodied in the posting relationship. The workplace-level focus reveals how posting actors redefine the posting regulatory framework, and conversely how the effects of EU integration impact industrial relations practices and labour market regulation. The aim is to decipher the current labour market structure and dynamics of change in transnational workspaces in a pan-European labour market. I focus on the German construction and meat industries, because of the prevalence of posted work in them.

Bottom-up case study data supports four main findings. First, transnational subcontracting allows the emergence of different regulatory spaces at the national and workplace levels. Second, it opens exit options for capital but constrains voice options of unions, works councils and mobile workers. Third, transnational workspaces also create opportunities for transnational action; however, these opportunities take other forms than those usually expected within the German political economy. Fourth, borders in the EU are not abolished, but shift and are activated by mobility practices. In order to decipher the current structure of the pan-European labour market it is necessary to relate the shift in state borders to the shift in firm borders, since these transformations create a differentiated membership for mobile workers. Although posted work is a particularly complex policy field, labour migration as such is regarded as a decisive field where the profile of mid-21<sup>st</sup>-century Europe will be forged (Pries 2001).

Keywords: European integration, labour mobility, institutional change, Germany

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## ACKNOWLEDGEMENTS

It has been a privilege and pleasure to do my PhD research as part of the ERC project #263782 *Transnational Work and the Evolution of Sovereignty*. This project created the infrastructure for me to do this particular field work, created the opportunity for me to present my work at international conferences, to collaborate and exchange with academics with similar research interests, and has greatly contributed to my professional and personal development. I am humbled to have met, and worked with so many inspiring, knowledgeable workers, practitioners and academics.

I wish to express my gratitude to Nathan Lillie, one of my supervisors and the principal investigator of *Transnational Work and the Evolution of Sovereignty*. Nathan, thank you for your continuous support, trust and encouragement. You have given me the freedom to creatively develop my own thoughts, view and voice in academic debates. My deep appreciation also goes out to Sjoerd Beugelsdijk, my supervisor at the University of Groningen and to Marja Keränen, my co-supervisor at the University of Jyväskylä. Sjoerd, your thorough reading and comments on the structure and contextualisation of the research have greatly contributed to the development of this dissertation. Marja, thank you for carefully reading all the drafts of my chapters and for constructive discussions about my work, which has aided in sharpening my arguments.

For this dissertation I would like to thank the reading committee members: Brian Burgoon and Gregory Jackson for their time, interest, and helpful comments.

A very special thanks goes out to all the interviewees. In spite of the barriers of conducting research on a politically sensitive topic, I was able to interview various people involved in the posting relationship: posted workers, native workers working with posted workers, volunteers, activists, trade unionists, works councillors, community members, managers and government and EU officials. Due to the politically sensitive nature of the research I am grateful to the interviewees who shared their insights on posted work. Out of consideration for their anonymity, I am sorry I cannot give recognition to some of those who helped me most. Without them, this work would obviously not have been possible. Furthermore, I would like to extend my thanks to the interpreters, translators and transcribers who aided me in the development of the interviews: Aleksandra Koch, Anna Grygiel, Mateusz Dymarek, Anna Siwec-Glab, Adam Gaik, Tijana Milunovic, Kamila Meyer, Anca Gabriela Lelutiu, Judith Schneider and Julia Schlüter.

I want to extend my thanks to the research team of the project *Transnational Work and the Evolution of Sovereignty* and of the project *Industrial Citizenship and Labour mobility in the EU*. Thanks are due to Lisa Berntsen, Erka Caro, Sonila Danaj, Laura Mankki and Markku Sippola for creating such a pleasant working



environment. Lisa deserves a special thanks. We started our PhD projects at the same time, and got to know PhD student life together including the ups and downs that are part of it. Lisa, I very much appreciate the ways in which we have exchanged views on a wide variety of interesting topics; it was a pleasure. I am looking forward to our continuous collaboration and friendship in the future.

I would like to thank my colleagues at the University of Groningen at the Department of Global Economics and Management and at the University of Jyväskylä at the Department of Political Science for providing me with a pleasant working environment. Thanks are due to Miriam Wilhelm, Marjolein Onrust, Dimitris Soudis, Katja Mäkinen, Anu Kettunen and Marko Nousiainen for interesting discussions and feedback. I sincerely thank the members of the SOM Research Institute for their kind assistance and support. These include Ellen Nienhuis, Rina Koning and Arthur deBoer. At the University of Jyväskylä I would like to thank Tarja Etelälähti, Tiina Hokkanen and Sari Korkia-aho for continuous support.

I would also like to thank all the people and institutions that facilitated and supported my guest research stays in Germany. I want to thank the Max-Planck Institute for the Study of Societies in Cologne. Thanks go out to the research group Political Economy of European Integration, and in particular to Martin Höpner, Benjamin Werner and Martin Seeliger. I have greatly benefitted from productive discussions and comments on my work. Many thanks also to Chiara Benassi and Inga Rademacher who have made my stay at the MPI much more pleasant.

I would also like to offer my thanks to the WSI within the Hans-Boeckler Stiftung for their kind *Gastfreundschaft* during the time I spent at the institute. I enjoyed and benefitted not only from my research stay at the institute but also from the WSI summer school in Berlin in 2012. I want to thank my fellow 'WSI summer schoolers' Lisa Dorigatti, Chiara Benassi, Nadja Doerflinger and Jenny Auffenberg for making academic conferences not only intellectually stimulating but also fun.

A lot of people provided insightful comments on the chapters during different draft stages. In no particular order I would like to thank Virginia Doellgast, Ian Bruff, Matthias Ebenau, Andreas Nölke, Christian May, Miriam Kullmann, Martin Behrens, Katja Mäkinen, Marko Nousiainen, Gregory Jackson, Maite Tapia, Andreas Bieler, Roland Erne, Knut Kjeldstadli, Sabina Stan as well as various anonymous reviewers. Support for travel and conference organization was provided by the Economic and Social Research Institute within the Hans Böckler Foundation, the Society for Advancement of Socio Economics, The Centre for Advanced Study at the Norwegian Academy of Science and Letters, the Society for Advancement of Management Studies, Assoziation für Kritische Gesellschaftsforschung, the BISA International Political Economy Group, the University of Jyväskylä, University of Groningen and the University of Duisburg-Essen.

Finally, I want to thank my family and friends for their never-ending encouragement and belief in me. Tim, my deepest gratitude goes to you, for always being there, patiently listening to my endless ramblings about posted work, for waiting up late at night with a warm cup of tea after exhausting field work trips, for critically reading my drafts and supporting me in every possible way. Most of all, thank you for the wondrous life outside of academia full of love and laughter. I am looking forward to our next adventures whatever they may be!

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- ARTICLE I Wagner, I. (2014) Posted Work and Rule Enactment in the German Construction Sector. *British Journal of Industrial Relations*. doi: 10.1111/bjir.12053
- ARTICLE II Wagner, I. and Lillie, N. 2014. Deterritorialization of Sovereignty and the Disembedding of Labour Market Regulation: Transnational Labour Relations at the European Central Bank Construction Site. *Journal of Common Market Studies* 52 (2): 403-419.
- ARTICLE III Wagner, I. EU posted work and transnational action in the German meat industry. *Transfer: European Review of Labour and Research* as part of the special issue 'European Collective Action in Times of Crisis'. Accepted and forthcoming 2015-2.
- ARTICLE IV Wagner, I. The political economy of borders in a borderless European labour market. Submitted to *Journal of Common Market Studies* (Revise and Resubmit).

# 1. INTRODUCTION & BACKGROUND

## 1.1 Introduction

Just over a century ago, Max Weber addressed the relationship between the nation state, economic regulation and seasonal labour at his inaugural lecture in Freiburg. In his words, the 'swarms of nomads' (1994: 9) of Polish seasonal labourers brought in by middlemen in Russia appeared desirable to employers because they saved on 'workers' dwellings, on taxes to support the poor, on social obligations, and further because their precarious situation as foreigners puts them in the hands of the landowners' (1994: 9). Yet, he argued, this seasonal labour was preventing unemployed German peasants from re-entering employment. In a nationalist tenor Weber demanded the 'state's economic policies ought to rise to the challenge of defending' the German race and shut the borders to migration.

More than a century later the fundamental issues he raised remain: employers prefer temporary migrant workers as a cheap, exploitable source of labour; agents channel migrants across borders; and labour migrants are blamed for rising unemployment and for degrading the nation through 'benefit tourism'. However, the structure in which these developments take place has changed considerably. The Weberian nation state able to close the borders of the territory over which it had full authority and employ economic policy as it saw fit was reconfigured by European integration. The European Union has created a single market with reduced regulatory barriers for firms and workers. Part of the new labour mobility takes the form of posted work, in which firms based in one EU member state 'post' their employees temporarily to another EU member state to fulfil a service. In doing so, EU citizens are legally employed on terms partly determined and regulated by the sending country. The employment relationship and labour market regulation are thus not embedded in a more or less insular

political economy but in a transnational context. While the Weberian nation state was fundamentally territorial, the EU, by contrast, disassociates national territorial borders from the borders of authority. This impacts significantly on how labour markets are regulated and how collective goods are distributed.

This thesis addresses the recent, and to a large extent still unexplored, regulatory dynamics of change within transnational workspaces in the EU where posted work is prevalent. It examines the complexities and dynamics of worker posting through three key topics: 1) the usage of the regulatory framework and its implications for labour market regulations, 2) collective voice for workers and exit opportunities for firms and 3) the possibilities for resistance within transnational workspaces. With these insights as a backdrop, the overall aim is to analyse the shifting relationship between the changes in the territorial nation state and its institutional apparatus and changes in employment relations in the EU.

Posted work incorporates two trends that have been explored separately in the political science, political economy and industrial relations literature. On the one hand, the impact of European integration on the territorial order of modern nation states is at the heart of a key debate in international relations and comparative politics. On the other hand, the increasing employment of workers via subcontractors or temporary work agencies as a way to weaken labour power and segment the labour force through institutional change dynamics has been explored in the industrial relations and political economy literature. However, the interrelationship of those dynamics is largely missing from the debate; it is this examination that is specifically carried out in chapter 6.

Using a bottom-up approach I examine the dynamics between different actors (posted workers, firms, trade unions, works councillors, NGOs, labour inspectors, policymakers) and institutions within these transnational workspaces. Such a perspective concentrates on how local actors implement European rules and opportunities (Pasquier and Weisbein, 2004) in order to analyse the evolving balance of power induced by the EU around policy issues (Woll and Jacquot, 2010). The approach binding the chapters of this thesis has been informed by an understanding of the need to link the institutional setting to the actual practices of actors involved in order to comprehend the full meaning of an institution and its changing nature (Kauppi, 2010; Woll and Jacquot, 2010; Steeck and Thelen, 2005). Concentrating on formal rules when considering political conflict in the EU 'would leave some of the most striking features of this transformation in the dark' (Woll and Jacquot, 2010, p.120). National policies are not simply downloaded from the European level (Kauppi, 2013) but neither are they just imported to the workplace level. Regulatory dynamics may take different forms throughout multiple levels in the EU. Special attention has to be paid to the embedded and embodied nature of the regulatory framework and the forms of industrial relations structures at the supranational, national and workplace levels. These levels and actors at these



levels do not exist in isolation to each other but are mutually constitutive of the regulatory space in the EU.

In relation to posted work the academic discussion has revolved mainly around the interactive effects between top-down Europeanization and national labour market institutions, as well as power dynamics between management and labour in Europe on a supranational and national level. Scholarly discussions dealt with: the political processes highlighting the conflicts and power dynamics around the Posting of Workers Directive (see Dølvik and Visser, 2009; Barnard, 2008; Cremers *et al.*, 2007; Eichhorst, 2000); analyses of EU member states' room for manoeuvre to effectively re-regulate their labour markets in light of the EU politics of labour mobility (see Alsos and Eldring, 2008; Höpner and Schäfer, 2007; Dølvik and Eldring, 2006; Lefevbre, 2006; Menz, 2005; Eichhorst, 2000) and examinations of capital's and labour's tactics and scope of action in national re-regulatory processes (see Greer *et al.*, 2013; Afonso, 2012; Lillie, 2010; Krings, 2009; Lillie and Greer, 2007; Kahmann, 2006). Moreover, a vast legal literature discussed the impact of contentious European Court of Justice rulings on the regulatory scope of political economies to regulate their labour markets (see Joerges and Rödl, 2010; Kilpatrick, 2009; Barnard, 2008).

While these examinations are important and necessary, they fail to include the perspectives of those who are the subject of the matter: transnational posted workers themselves. This research contributes to this discourse by examining how posted workers and actors involved in the posting relationship actually utilize and experience the posting framework. It investigates which institutional conditions enable and shape the actions of the particular actors involved in the posting process. This approach raised a number of practical questions, such as: How do different regulatory systems clash at the workplace level? What are the implications for employment conditions? And how do posted workers react to contentious regulations?

The examination takes place in the German context in two sectors where posting is most prevalent: the construction industry and the meat industry. I focus on Germany due to the empirical and theoretical relevance of this case. Germany has always been an important case in the development of the comparative political economy and industrial relations literature (Bamber *et al.*, 2011; Hall and Soskice, 2001). In 2011 a significantly higher number of workers were posted to Germany than to other EU countries. The main sending countries were Poland, Slovakia, Slovenia and Bulgaria (European Commission, 2012).

## 1.2 Posted work in the EU and how it is regulated

The posting of workers framework allows firms based in one EU member state to send their employees temporarily to another EU member state to fulfil a service. The original contentious issue around the posting regulation was, and still is, the question of which regulatory framework applies to posted workers at their place of work. Irish or Portuguese companies posted to Germany workers whose wages and contracts were signed under Irish or Portuguese law, creating ‘islands of foreign law’ (Hanau 1997) or ‘spaces of exception’ (Lillie 2010) in the territory of the receiving country. The question of which regulation applies to posted workers resulted out of the distinction between posted and migrant workers. The European Court of Justice (ECJ) regarded posted workers as a ‘manpower service’ and not as labour migrants. Therefore posted workers are regulated under the free movement of services instead of the free movement of people. The European Court of Justice justified this decision by reasoning that ‘such a worker returned after the completion of the service and *did not at any time gain access to the labour market of the host state*’ (C-113/89 *Rush Portuguesa* §15), manifesting the isolated nature of posted workers in the host country context. Liberal voices welcomed the greater competitive pressure posted work produced. Others such as trade unions feared ‘wage dumping’ and the erosion of member states’ capacity to regulate their labour market and social policies (Menz, 2005).

These camps engaged in a heated debate culminating in the adoption of the Posting of Workers Directive (PWD) in 1996 – five years after its first proposal in 1991.<sup>1</sup> At the centre of the policy struggle has been the question in how far the protection of posted workers was on par with the free provision of services (Cremers *et al.*, 2007; Höpner and Schäfer, 2012). The outcome is mainly codified in Article 3 (1), which lists a number of mandatory rules for posted workers’ minimum protection on matters such as pay, rest periods and holidays (see Annex I for Art. 3). These minimum requirements in force in the host country ‘shall not prevent application of terms and conditions of employment which are more favourable to workers’ (Art. 3(1)). However, about a decade later, as further discussed below, the European Court of Justice (ECJ) reinterpreted the formulation of Article 3. Social security contributions are still due to be paid in the country of

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<sup>1</sup> The start of the discussion on the posting of workers can be traced to the late 1980s. At that time the European building unions pleaded for a social clause to guarantee compliance with working conditions and collective agreements in the host country in procurement rules for public works, in line with ILO Convention 94 and the Davis-Beacon Act in the USA (Cremers, 2009). Despite broad support in the European Parliament, the Council of Ministers reduced the proposal to a voluntary Act instead of an obligatory clause. In response, the European Commission introduced a proposal for a directive on posting of workers in 1991 (Cremers *et al.*, 2007).

residence. Moreover, the Directive also specified to whom the minimum rights apply.

### 1.2.1 Operationalizing 'Posted Work'

The Directive covers three transnational posting situations.<sup>2</sup> The underlying condition is an employment relationship between the undertaking making the posting and the posted worker during the period of posting, namely:

1. Posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended;
2. Posting to an establishment or an undertaking owned by the group;
3. Posting by a temporary employment undertaking to a user undertaking operating in a member state other than that of the undertaking making the posting.

The second option usually involves employees generally regarded as 'expatriates' rather than 'posted workers', and is a more common situation for technical and managerial staff (Pedersini 2010). This category of employees often receives a number of benefits for their work abroad. Their situation appears to lie outside the objectives of the Directive. The thesis is rather interested in the situation of posted workers that fall under the first and third options.

The PWD defines 'posted worker' as a worker who, for a limited period, carries out his work in the territory of a member state other than the state in which he normally works (Article 2(1)). However, I hardly encountered posted workers who would fall under the aforementioned legal definition because they were not in an employment relationship before their posting. Instead, most of the workers I talked to were employed for the purposes of the posting. Therefore they would actually fall outside the scope of the Posting Directive. Since this was not recognized by either the employer or the worker, however, they did in practice fall under it.

Moreover, the 'posted worker' classification, instead of, say, seasonal workers or even long-term labour migrants, is often ambiguous. A European market for low-skilled labour has emerged in which the boundaries between mobile labour, posted work and self-employment are fluid. The employment channel reflects my best assessment based on the interview data. In each interview I tried to discern in which country the workers were paying social security contributions as an indication of the posting relationship. I refer to workers as *posted workers* when they are sent by their employer to work in another country under a service contract. I use *posted work* as a conceptual tool to demarcate the transnational employment

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<sup>2</sup> Article 1.3 (a) (b) (c)

relationship and a *de facto* dependent employment relationship for workers from those moving under the free movement of people. Thus, when I refer to posted workers in this thesis I do not necessarily refer to the strict legal definition but to the particular *de facto* employment situation.

### 1.3 Posted work and the impact of Eastern European accession

The establishment of minimum conditions for workers has for many years been considered a landmark in the European trade union movement's attempt to influence EU legislation. While initially the PWD had little impact because of a decline in posting in the late 1990s, the issue regained importance with the accession of 10 Eastern European and Mediterranean island countries to the EU by 2007.<sup>3</sup> However, as of now it is difficult to accurately estimate the quantitative importance of posted work. The portable documents A1 are currently the only register of information on posting data. Employers posting workers to an EU member state are required to apply to the relevant national authorities for an A1 document. The document exempts workers from paying social security contributions in the country where they are temporarily working and proves they do so in their country of residence (Council Regulations 1408/71 and 574/72).

The European Commission estimates that in 2011, a total of 1.51 million A1 documents were recorded across the EU-27 and Iceland, Liechtenstein and Norway (European Commission, 2012). In comparison to data from 2010 (1.33 million) and 2009 (1.27 million) there is a strong increase in posting. In 2011, around 60% of all postings (compared to 63% in 2010) originated in the EU Member States that joined the EU before 2004 and almost 40% (compared to 37% in 2010) in the EU-12 Member States who joined in 2004 and 2007. Postings originating in EEA-EFTA countries accounted for only 0.2% of all postings (European Commission, 2012).

The main sending countries of posted workers in 2011 were Poland, Germany and France followed by Romania, Hungary, Belgium and Portugal. Germany and France were the main receiving countries followed by the Netherlands, Belgium, Spain, Italy and Austria. According to the European Commission's data workers posted from Czech Republic, Hungary, Poland, Slovakia, Slovenia, Romania and Bulgaria, were mainly sent to Germany. The secondary destinations of posted workers from these countries are France, Belgium, the Netherlands, Austria and Italy. A main destination for posted workers from Estonia is Finland, while for those from Latvia it was Germany and Sweden. Posted workers coming from Lithuania mainly went to Norway, Germany and France (European Commission, 2012). Between 2010 and 2011 the A1 data indicates that the number of posted

<sup>3</sup> In 2004 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia joined the European Union, followed by Bulgaria and Romania in 2007.

workers sent abroad has increased the most in relative terms (more than 70% increase) from Slovenia, Romania, Latvia, Estonia, Lithuania and Bulgaria. In absolute terms, the number of posted workers sent abroad has also increased strongly from Germany, Poland, Hungary and Slovakia. On the contrary the number of workers posted to Spain and Greece has decreased, most probably in relation with the decline of labour demand subsequent to the crisis in those two countries (European Commission, 2012).

Some EU member states do not produce figures by economic activity, including Germany and France, two countries with a large number of postings. The European Commission data on A1 documents states that fourteen countries, which did provide a sectoral breakdown for 2011 suggest that on average around 43% of A1 documents issued were for the construction sector. Around 27% of the A1 documents were issued for activities in the service sector (European Commission, 2012).

Over time comparison by destination country shows from 2009 to 2011, the following trends can however be noted. There has been a strong increase in the number of posted workers received for Austria (+32,000 or +71%), Norway (+9,000, or +42%) and Germany (+90,000 or +41%). In absolute terms, strong increases also occurred towards Belgium (+30,000), the Netherlands (+24,000), Italy (+14,000) and Switzerland (+11,000). On the contrary the number of posted workers has decreased towards Spain (-16,000 or -25%) and Greece (-3,000 or -26%), most probably in relation with the decline of labour demand subsequent to the crisis in those two countries (European Commission, 2012).

The DG Employment aims to continue to collect similar data in 2014 to cover years 2012 and 2013. Nevertheless, on a more methodological note, the available data only provide the number of PD A1 certificates issued in each country. It does not contain any information on the duration of postings or the hours worked. Therefore, the present data are not an indicator for labour input. Moreover, a structural analysis of the labour market impact of postings is prevented by the lack of sectoral breakdown for the data of the main sending countries and a general lack of detail by economic activity. While postings tend to concentrate on a few specific activities (e.g. construction), the available data are not detailed enough to allow any deeper analysis (European Commission, 2012).

In addition, there is still some uncertainty to what extent the numbers of A1 documents recorded by countries is a precise proxy of the actual number of postings taking place. First, the number of certificates can include duplications. An employer can request more than one A1 form for one employee, if this person is posted to different countries within a year. In that case the number of postings is not equal to the number of posted persons. Second, the certificates do not distinguish between different types of posting. For example, any monitoring of posted workers will likely include expatriates in the overall numbers. To get an accurate picture, it would be necessary to discriminate between posting via a

subcontractor, via a temporary work agency or within companies. Third, many employers do not comply with the requirement to apply for the certificate for their employees. The A1 forms are thus likely to underestimate the overall number of posted workers. Fourth, national data is only available in a limited number of countries. The available data are non-comparable across countries because they are collected according to different criteria and purposes. For example, while the Belgium LIMOSA system is based on the national mandatory register system, France collects data via the French labour inspectorate. The German system is limited to the construction sector and the Danish RUT-register is equally not comprehensive regarding content and coverage (Ismeri Europa, 2012). In general, the numbers found on the basis of these social security forms are considered to represent the absolute minimum amount of posting (IDEA Consult/Ecorys NL, 2011).

The relevance of posting goes beyond a mere quantitative problem. The issue resurged as a contentious matter because of, amongst other factors, the heterogeneity between member states' wage levels, social models and varieties of capitalism. In various EU member states completely different systems of wage determination and collective agreement levels exist alongside one another. There are collective agreements at national level, for regions, industries, for amalgamations of branches of the economy, in companies and even on work sites. Since, Poland, Germany, France, the Netherlands and Belgium were the main sending and receiving countries, the following will shortly address the specific industrial relations developments in the construction sector. The different industrial relations developments in Germany and Denmark are alluded to in the conclusion when discussing in how far the findings travel to other countries and sectors. Denmark has been selected because it plays a vital role in the meat production and export in the EU.

In Belgium all wages are decreed to be generally binding. The trade union organisation rate in the construction sector is constant around 95%. The social funds system is managed by both sides of industry, comparable to the situation in the German construction industry. Construction wages in Belgium are comparatively high. There is a positive wage drift of about 10% in many conurbations. Wage levels are set in free collective bargaining, the inflation rate is incorporated in wages at given intervals. Non-wage costs for construction employers are very high, at approx. 110% (EFBWW, 2010).

In Germany owing to the economic crisis in the construction industry, the substantial decrease in regular employment relationships and the use of eastern European workers and construction firms, partly under wage-dumping conditions, only small pay increases have been achieved in recent years (Bosch *et.al.*, 2013). This not only concerns the construction sector, as the overall pay trend in real terms in Germany is in the bottom range of the European trend. Added to this, there is a negative wage drift of up to 20% in the construction industry as there are

only two generally binding minimum wage rates in East and West Germany, respectively. Negotiated non-wage benefits, which are not arranged via the industry social fund, often do not reach the construction workers, and the supervisory network of works councils and the trade union is not as dense as in other EU countries, partly due to the sharp decline in membership (Bosch *et.al.*, 2013). Furthermore, illegal employment and bogus self-employment is very prevalent, the employers' organisations are constantly splitting off from one another and coverage by collective agreements is going down. Non-wage costs stand at 80 to 90% (EFBWW, 2010).

In the Dutch construction industry the national collective agreement, signed by all responsible trade unions and employers' associations, is authoritative for the building industry. The building industry has experienced a positive development since 2004 with growth of between 4%-8% in housing construction. There are currently approx. 370,000 dependent employees and approx. 115,000 self-employed, of which 30,000 are estimated to be bogus self-employed. The central building and construction trade currently employs around 170,000 workers. Wage levels are high and pay increases in recent years have been very good, negotiated rates are minimum wages and very often supplements, that may also be performance-related, of 30 to 50% are paid. In conurbations there is a 10% positive wage drift. Undeclared work is not very common, although in recent years a move away from employment relationships to self-employment (bogus self-employment) has been observed. Negotiated working time in the Netherlands is 36 hours per week, but normally 40 hours are worked, meaning that 24 paid free days per year must be added to total leave. Non-wage costs are very high, at around 120% (EFBWW, 2010).

The Polish construction industry is facing fundamental changes following accession to the EU. The level of wages actually paid has risen significantly, resulting in many skilled construction workers returning from other EU countries to work in their home country. There are no national collective agreements in the construction industry as there are no employers' organisations with the capacity to negotiate such agreements. Company collective agreements are in force in a number of larger plants. What is more, the trade unions in the individual sectors have little capacity for exerting influence. As in the past, working conditions continue to be regulated by labour law which is why the trade unions primarily take action on the political front in the legislative process. Undeclared work and illegal employment are at extremely high levels (EFBWW, 2010).

In general, this heterogeneity has spurred unprecedented politicized controversies over European integration arising out of opposing economic interests anchored in different levels of economic welfare (Höpner and Schäfer, 2012; Hooghe and Marks, 2009). For example, in relation to worker posting the Commission's Services Directive caused fierce protests between 2004 and 2006, especially in Austria, France and Germany. The Services Directive tried to establish

a 'country of origin' principle for posted workers. Trade unions and parts of the business community were concerned this would legalize 'wage dumping' in the EU and undermine both national regulations and EU legislation such as the PWD (Lillie, 2012). In response, the European Parliament and the Council of Ministers significantly amended the Directive (Crespy and Gajewska, 2010). The final text did not include the country of origin principle, marking an important success for the parties against its adoption (Crespy 2011). However, this success was short-lived. While the 'hard core of rules' in the Posting of Workers Directive and the defeat of the 'country of origin' principle in the Services Directive were favourable for posted workers, the Posting of Workers Directive has since been reinterpreted in light of the EU's 'four freedoms' in a series of European Court of Justice<sup>4</sup> decisions.

#### 1.4 The role of the ECJ and the 'clash of capitalisms'

The 28 EU member states demonstrate broad heterogeneity with regards to their varieties of capitalism, economic development and economic interests. This heterogeneity is perceived to result in slow policy negotiations resulting in minor policy change. By contrast, integration via the European Court of Justice takes less time and can advance more radical decisions because of the absence of political negotiation (Höpner and Schäfer, 2012). For example, in the cases *Viking*, *Laval*, *Rüffert* and *Commission vs. Luxembourg* the ECJ fundamentally reconfigured the posting policy previously agreed during multilateral negotiations (Scharpf, 2008). These decisions have received much attention because they were interpreted as landmark decisions on the struggle between economic freedoms and social regulation in the European common market. In the context of this thesis, two aspects are of importance. The first particularity is the reinterpretation of the PWD.

In *Laval* the Court referred to the list in Article 3 (1) as defining the *ceiling* on the *maximum* standards that member states are allowed to impose on posted employees<sup>5</sup> (see Kilpatrick, 2009: 845–849). With this judicial reinterpretation, the Court effectively limited the host countries' room for manoeuvre to regulate the

<sup>4</sup> EU law has semi-constitutional status because of the broad powers of the ECJ to judge whether national law is compatible with EU law (Stone Sweet, 2004). Its decisions have both 'supremacy' over national law and 'direct effect,' in that national laws and courts must protect the rights conferred by the EU (Fligstein and Stone Sweet, 2002).

<sup>5</sup> In a similar vein, in the *Rüffert* case (C-346/06) the ECJ ruled that the Public Procurement Act of the German *Land* Lower-Saxony, according to which public authorities are obliged to only contract firms if they pay the wages laid down in the relevant sectoral collective agreement (*Tariftreueerklärung*), restricted the provision of services in the host member state and thus, by extending the *minimum* conditions as established in the PWD, posed a threat to competitiveness in the single market.



labour market. This constraint accelerates races to the bottom in the field of labour standards, a problem set to become increasingly prevalent as heterogeneity among member states increases (Scharpf, 2006). The second aspect concerns the restriction on private bodies (such as trade unions) in defending the rights of posted workers. In *Viking* (C-438/05) and *Laval* (C-341/05) the ECJ ruled that industrial action aimed at representing posted workers from a foreign undertaking could violate the company's freedom to provide services across borders. Thereby the ECJ effectively curtailed trade unions' right to strike (see Kilpatrick, 2009: 845–849). The Posting of Workers Directive and the Services Directive are the outcome of democratic processes. The European Court of Justice has, however, refined the details of posting regulations through judicial integration. This is problematic due to the inherent difficulty in reversing these decisions through the EU democratic process (Höpner and Schäfer, 2007).

These decisions impacted member states' abilities to respond to EU legislation according to national institutional systems. First, the rulings regarded the particular regulatory nature of national industrial relations systems as a constraint on freedom of services (Barnard 2009). This undermines the ability of national industrial relations systems to set collective standards according to their respective traditions, resulting in a 'clash of capitalisms' (Höpner and Schäfer, 2012; Kilpatrick, 2009; Joerges and Rödl, 2009). Second, the ECJ intervened in particular national industrial relations institutions, such as the right to strike in Sweden. Third, the cases established that the *minimum* set of rights as set out in the PWD is a *maximum* set of rights, meaning that member states are constrained from enforcing conditions for posted workers beyond the minimum conditions set down in law or in extended collective agreements. This is important for the context of this research. The decisions constrain the member states' room for manoeuvre to effectively regulate their labour markets. As a result, posted workers occupy isolated spaces outside the host country's institutional framework. The regulatory context is to a large extent delinked from insular national territorial regulations.

## **1.5 The influence of globalization and European regionalization on posted work**

The story of posted work is embedded within a manifold of developments that are simultaneously at play within the European and global economy. The fragmentation of, for example, manufacturing and service delivery processes has resulted in a disintegration of employment on a global level that has taken a variety of forms (Gereffi et al. 2005). For instance, foreign direct investment or cross-border offshoring usually imply that labour processes are stretched across country borders leading to a divided and geographically separated workforce

often in competition for jobs. Moreover, the increasing externalization and relocation of service functions initiates a trend toward the outsourcing and relocation of front-office activities in customer service, back-office tasks, high-end software development, and other divisible domains in business processes (Huws et al. 2004, Batt et al. 2009, Taylor 2010, Flecker and Meil 2010, Coe et.al. 2008).

As a result labour in the workplace is increasingly fragmented also because of the presence of workers employed by subcontracting or outsourcing service provider companies and temporary work agencies (Marchington et al. 2005). This thesis discusses the role of hypermobile labour in this process. The main focus of analyses within approaches that are being called 'Global Value Chains' or 'Global Production Networks' is on the relocating or offshoring of work of Transnational Companies with the aim of tapping national, regional or local labour markets with lower wages, higher flexibility or laxer health and safety regulations (Dicken 2005). This thesis looks in particular in how far mobile labour and capital mobility coincide in the fragmented employment relations processes. To put it differently, both capital and labour are mobile in the transnational workspaces where posted workers are present. Capital mobility here is not motivated by the access to local labour markets because it involves mobile labour in the first place.

Mobile labour is attractive to transnational capital due to several reasons. A very particular 'spatial fix' (Harvey, 1982) is based on the use of migrant mobile labour usually without local family ties. Mobile workers are per definition not rooted in the local community and have not been socialised into the traditions of the regional working class. They therefore lack the source of power local communities and workers' organisations may provide (Rainnie et al. 2010: 302). While today's geographic places should be conceptualised as intersections of partly global circuits (Massey 1994), it is still the case that localities or geographical proximity may support the transfer and thus convergence of workers' demands and the emergence of mutual support or collective action. Recruiting mobile labour can be regarded as a way to cut off such power resources. The effect of using mobile labour is strengthened by strategies to keep individuals or groups of workers divided. Language barriers and cultural differences do separate mobile workers. Moreover, in more extreme cases, so do the forms of accommodation and surveillance they are placed in.

The accommodation sites can be arranged in a way that allows for high levels of temporal flexibility and extended working hours. Posted workers are usually accommodated in what has been called a 'dormitory labour regime' (Pun and Smith, 2007) where 'workers live next door to a factory so that they might always be on call for work' (Rainnie et al. 2010: 300). The term was established in the context of today's Chinese production regime. The function of these dormitory labour regimes is to 'capture single migrant workers for short periods of tenure in order to maximise the utilisation of labour services during the working day' (Smith 2003: 334). This aspect of extended control is similar in the case of posted work

when, for example, meat factory workers report to be picked up without notice for an additional shift. The intersection of mobile labour and capital can then be characterized by an asymmetric power relation and by far-reaching disembeddedness from the societal and institutional environment.

In relation to posted work while many rights have been established at the European level, in theory establishing at least a partial European social space, the effect of these rights is ambiguous, since they are established in the absence of mechanisms for social solidarity (Wagner and Lillie, 2014). This relates to the way EU integration preceded and how internal borders have been removed. Höpner and Schäfer argue that the European Union 'disembeds' markets, and detaches social relations previously regulated via national social bargains (Höpner and Schäfer 2012). Van Apeldoorn (2009) has characterized this constellation as an "embedded neoliberalism," in which market-embedding institutions remain at the national level, but are increasingly targeted by supranational liberalization attempts. These policy developments have been guided by the idea that markets are the most efficient and equitable means of governing economic exchange and distribution. Neoliberal ideological wisdom incorporated within the institutions of the European Union, as has been argued by various authors, is thus part of the process that weakens institutions that supported strong collective and government regulation of the terms and conditions of employment (Van Apeldoorn, 2009; Macartney, 2010).

This thesis thus investigates how actors at the micro level engage with a particular policy regime that is embedded in and conditioned by certain processes of globalization, European regionalization or neoliberal ideological wisdom. While these processes certainly condition the interaction of actors and institutions within transnational workspaces the focus here is in particular on the interaction between mobile labour and capital. The concept of territorial embeddedness is used as a tool to further the understanding of industrial relations and labour processes in cases of transnational mobility of both capital and labour. It allows addressing questions of location-bound and non-location-bound actions and the impact of the place. At the same time it points to processes of disembedding or de-territorialization that are of particular importance in this context. Moreover, it includes a broad notion of actors (individual actors and aggregated actors like organizations), it enables to reveal figurations of networks between actors, which are characterized (or not) by power asymmetries, dependency and solidarity. The notion of re-embedding or re-territorialization allows to investigate the emergence of institutionalized norms and regulatory frameworks within these transnational workspaces.

## 1.6 Deterritorialization and institutional change in transnational workspaces

Posted work is an example of how European integration restructures relationships between states and actors in ways that challenge the traditional understanding of 'nationally organised' economic systems in mainstream institutional theory. The authority to regulate within clearly defined borders has never been a completely accurate picture of reality. Relevant to this thesis is the way these assumptions have been discussed in Western thought in several streams of literature. Historically the formation of borders had a clear purpose. The territorial demarcation was a necessary prerequisite for the formation of the modern nation state system. Borders delineated a given territory over which authority was consolidated and order enforced (Weber, 1964). Next to a central bureaucracy, citizenship, and the abilities to collect taxes and enforce order, borders were the prerequisite for any state-like formation (Zielonka, 2000). The nation state had a monopoly of control over the movement across the borders of its territory and decisions on who could participate in its labour market (Torpey, 2000). Within these borders each nation state created a distinct set of institutions that have in turn structured actor behaviour. Institutional scholar have connected these to national socioeconomic outcomes.

The comparative political economy and industrial relations literature are inclined to embed actors in nationally bounded sets of relations (Bamber *et al.*, 2011; Hall and Soskice, 2001). In these models institutional complementarities have a tendency to reinforce each other, making a particular set of institutions within different national models resistant to change (Hall and Soskice, 2001). As with comparative political economy, industrial relations, as a discipline, focuses on national systems as sets of relationships between workplace-based actors within enclosed territorial spaces corresponding to national borders.

Globalization and Europeanization have started to dissociate, or deterritorialize, the bonds that tied economics, politics and culture to fixed spatial configurations. For the purpose of this thesis, deterritorialization relates to the disconnect and reconnect of national territory from and to workers in relation to labour market integration. For Deleuze and Guattari deterritorialization designates the freeing of labour power from specific means of production (1972). For example, deterritorialization is directly related to the labour process in the example of the Enclosures Acts in England. The act disconnected peasants from grazing land, and reterritorialized them onto textiles in the burgeoning garment industry (Elden, 2005). In the posting-of-workers discussion the term was mainly used by legal scholars to denote the decontextualization of labour law and industrial relations systems from particular territorial ties (Mundlak, 2009).

Firms are able to base themselves in countries with a favourable regulatory regime while providing services in any member state they like. Following an employer-managed migration pattern, the company determines and certifies who is to move and who is not. The rights of posted workers are increasingly related to their employer instead of the sending or receiving country (Guild, 2001). Posted workers, even though working in the host country's territory, are disconnected to a large extent from the host-country institutional system and labour relations. Lillie, drawing on Ong (2006) and Palan (2006), compares this regulatory situation to a 'space of exception' (Palan 2006) – a condition in which the regular law is exempted. However, these spaces still inhibit a particular structure. An actor-centred research strategy helps identify the ways actors order these regulatory processes at the workplace level. This approach can help generate an understanding of the dynamics of change in transnational workspaces in relation to: the usage of rules, voice and exit, the possibilities of resistance and more generally how such a pan-European labour market is structured.

### **1.6.1 The usage of rules in transnational workspaces**

Menz (2005) contends that national varieties of capitalism filter the impact of European regulations. This mediation results in different regulatory outcomes to EU-wide policies for regulating the provision of services. The institutional setup of nationally organised political economies thus influences how EU-level regulation is implemented. While this research does not take issue with the view on the potential of national systems to explain the diversity of response to changes in EU regulation, the evidence here underlines the fragility of capital's support for national varieties of capitalism, and how it depends on a degree of national insularity that no longer exists (Lillie, Wagner and Berntsen, 2014). In light of the deterritorializing capacity of posting, specific national re-regulation often remains ineffective at the workplace level. The way in which firms create and exploit transnational workspaces reduces the capabilities of state-centred institutional systems to regulate within their own territories.

Chapter 3 explores how actors in the posting workspace enact the posting framework creatively. The examination of how actors engage with an institution draws attention to the 'gaps' between the design of an institution and its actual on-the-ground implementation (Pierson, 2004: 103). Actors do not necessarily internalize rules which should regulate their behaviour (Deeg and Jackson, 2007). Institutions not only constrain but also enable action and are dynamic. For example, actors may not conform to the institutional setting if their interests come out of alignment with the expectation and reward structures of the subsystem in which they take part (Greif and Laitin, 2004). This becomes problematic when alternative legitimate frameworks present themselves, which actors can access to protect themselves from enforcement.

The posting regulation presents such options to actors. The delinking of labour market regulation from insular national territories creates a space where the regulatory system can be avoided. Firms adhere to the norms on paper but not in practice. This is relevant because the appearance of conformity is often sufficient to attain legitimacy (Oliver, 1991: 155). The rule system can be upheld because of the inability of unions and labour inspection authorities to control these gaps. These discrepancies can lead to institutional transformation, even when no sudden shocks or breaking points are prominent (Greif and Laitin 2004). Indeed, Djelic and Quack (2002) have suggested that central foreign actors may become missionaries of institutional change. Beyond simply playing according to their own rules of the game, foreign firms may help institutionalise their rules in new contexts.

Here, national mediation of the European liberalisation of services can only partially take place. State-centred border regimes remain foundational elements of the system (Sassen, 2005), but their ability to regulate within those is limited. Held usefully distinguishes between *de jure* and *de facto* sovereignty (Held, 1992). *De facto* sovereignty is used in the negative to refer to a loss of authority or control, while *de jure* sovereignty refers to having supreme power over a given territory. Deterritorialization of labour regulation allows for a loss in control over the host-country territory to emerge. That is why it is necessary to examine how actors utilize transnational institutions in these specific situations. The real meaning and function of an institution ultimately emerges only in the course of how it has been interpreted and practically applied by actors (Streeck and Thelen, 2005). Delinking territorial contingency with access to political and social protections removes posted workers from the protection they would normally enjoy as regular labour migrants. This provides firms with leeway to exploit regulatory gaps creatively in their cross-border activity. Undermining the nation state system also undermines the collective goods and stability states provide. The impact of this institutional space on posted-worker voice and exit options for firms is the topic of chapter 4.

### 1.6.2 Exit, voice and labour market dualisation in transnational workspaces

A territorially demarcated space, such as the state, offers a framework within which common norms are formulated and established. Solidarity, it has been argued, is mainly possible to articulate and effective within a homogenous, demarcated space (Hoffmann, 2006). Rokkan (1999), drawing on Hirschman's (1979) concept of 'exit' and 'voice', explained how the scope of economic actors to pursue their interests was defined by territorialisation. The establishment of borders was instrumental in establishing institutional 'voice' for those within them, discouraging exit. For example, collective bargaining, just like labour market regulation, was territorialized by embedding a legal pattern within and through the state, because its coverage was usually limited to employers and workers

within the territory's borders (Mundlak, 2009). Territorial boundedness and coherence was thus a requirement for the efficient functioning of industrial relations institutions.

The traditional industrial relations institutions of collective bargaining and works council worker representation still exist at the German national level. However, they seem to be, in the words of Busemeyer and Trampusch, 'exhausted' (2013): they still exist but are not effective with regards to certain groups of workers such as posted workers. Trade unions struggle to include posted workers into collective channels of representation and works councils are legally constrained from interacting with this workforce. Europeanization can be regarded as an opening-up of exit options. It is a threat to territorial bounded collective solutions insofar as it challenges the territorial control of nation states. Firms can exit from the industrial relations system without having to actually exit the geographic territory. In the short term this may result in hybrid solutions. In the longer term we may witness a decline in the provision of collective goods.

These re-regulatory dynamics co-evolve alongside similar, or complementary, labour market segmentation approaches within states as unified entities. The 'German model' still covers a significant proportion of workers. However, a complex labour market of low-wage workers outside that system has grown (Bosch and Weinkopf, 2008; Palier and Thelen, 2010; Thelen, 2009: 484). The so-called Hartz reform package, together with the controversial Agenda 2010, paved the way for a paradigm shift in the German labour market and social policies. Among other re-regulatory measures, Minijobs was expanded, atypical employment was liberalized, the age threshold for the application of repeated fixed-term contracts was lowered, start-up ('Me Inc.') subsidies were expanded and the master craftsman's diploma as required in many crafts was abolished (Menz, 2010; Eichhorst and Kaiser, 2006).

As a consequence unions and collective bargaining institutions have become less encompassing (Bosch *et al.*, 2007: 330-34). Instead of decommodifying labour, collective agreements are now used to bring competition within the company's workforce, creating a 'core' and a 'peripheral' workforce (Holst, 2014). Dual labour markets can be seen as an attempt to continue to access the collective goods provided by the organised economy, while creating less organised workspaces walled off from the organised economy in various ways. Posted work is thus likely to produce labour market segmentation similar to vertical disintegration. The result is a decrease in collective goods and an increase in exit. Rather than being fundamentally different, these processes are both part of and signal the variegated nature of regulatory configurations in European political economies (Brenner *et al.*, 2010). A dual labour market exists that is embedded within the German political economy. Posted work cross-cuts regulatory regimes. Chapter 4 relates the changing industrial relations within the German national systems with alterations in the traditional nature of nation states. Deterritorialization of regulation is likely

to lead to a decline in the cohesion of national systems in general, particularly in systems which are institutionally dense and rely on collective voice.

### 1.6.3 The possibilities of resistance

Trade unions, as argued by various authors, play an ambiguous role in the development of labour market segmentation (Emmenegger *et al.*, 2012: 310; Palier and Thelen, 2010). While trade unions preferred to resist employer pressure towards dualisation, they have increasingly concentrated on core members due to their weak position (Palier and Thelen, 2010). Therefore they helped allow for organisational measures and reforms protecting insiders, while negatively affecting outsiders (Emmenegger *et al.*, 2012: 310). Others have related increasing market inequalities to the weakening of trade union power. This loss in power impedes effective resistance, resulting in dualisation (Benassi and Dorigatti, 2014; Korpi, 2006). In these accounts, employees' representatives have been much less involved in the labour market liberalisation processes (Streeck, 2009). Posting is part of the segmentation process (Menz, 2001). In some cases trade unions have tried to resist employers' segmentation strategies by means of organising campaigns and collective bargaining targeted to the outsiders, but with mixed results.

Generally trade unions struggle to incorporate posted workers into collective channels of representation. Some authors relate union strategies to their institutional position within the national framework. Unions in the UK, for example, are more prone to form coalitions with other societal actors in order to resist segmentation tendencies. In a similar vein, variations in trade unions' institutional position also explain different strategic choices in their organising efforts with migrant workers (Baccaro *et al.*, 2003; Frege and Kelly, 2003; Penninx and Roosblad, 2000). Previous studies discussed the ability of unions in various host countries to organise migrant workers after the enlargement of the European Union in 2004 (Bengtsson, 2013; Krings, 2009; Fitzgerald and Hardy, 2010). Depending on institutional strength, sectoral characteristics, and the ability to innovate, unions in, for example, the UK, Denmark and Sweden managed to include migrant workers by employing staff with relevant language skills or by cooperating with other organisations.

Trade unions in Germany, it is argued, do not feel the necessity to form such coalitions because of their strong position within an institutionally dense labour market (Frege *et al.*, 2004). However, the German meat industry does not much resemble the German metal industry, on which much of the theory is based. Moreover, in the context of organising hypermobile workers, the perspective of transnational EU posted workers, their own experience of temporary work and their everyday practices to cope with the exploitative and uncertain nature of the employment have rarely been the subject of attention. This unduly narrows the



scope of analysis when trying to comprehend the contemporary contours of power and government in transnational workspaces. While the isolation from host trade union representation results in the loss of collective voice, workers may use other means to challenge malpractices within transnational workspaces. The various ways they appropriate their rights as EU citizens may differ from traditional channels of voice such as joining unions or voting in union and works council elections.

Chapter 5 discusses a case study in the meat industry to illuminate the conditions under which an alliance between the trade union, a community organisation and posted workers can evolve. This goes against traditional arguments that German trade unions usually refrain from building coalitions in areas that are vital to union interests. Chapter 5 asks the following questions: How do trade unions in Germany resist the deterritorializing capacities of posted work? Under which conditions are posted workers able to exercise voice when traditional channels of worker representation are absent or blocked? How do coalitions come about in transnational workspaces and under which conditions are they successful? Contrary to the varieties of trade unionism literature, the case highlights experimental strategies of German trade unions trying to reterritorialize posted workers into the institutional host-country system.

#### **1.6.4 Mapping the pan-European labour market: Borders and institutional systems**

Borders as lines of demarcation have become so integrated in the way we think that we rarely notice or question them. In light of the various mobility practices in the EU we have to take a new look at how borders relate to territory, order and security (Bigo, 2013). Similar to Branch (2011), who focuses on state borders as a key constitutive driver of the origin of modern territorial statehood and international relations, the final chapter of this thesis investigates the reconfiguration of borders in a pan-European labour market. Some have argued that the organisational setup of the EU has destroyed the link between borders, citizenship, territory and sovereignty (Kelstrup and Williams, 2000). In a pan-European labour market, state borders shift. Posting via subcontractors and temporary agency firms also shifts the borders of the firm. In fact, scholars found a positive correlation between EU immigration influences and the incidence of employment flexibility (Raess and Burgoon, 2013). However, we know very little about how these bordering practices interact at the workplace level.

The notion of 'border' has been the topic of many discussions. In this thesis I refer to borders as institutions. They are constructed demarcating lines referring to a territorial or functional definition delimiting membership (Bigo, 2013: 112). Borders can give insights into the social ordering because of their constitutive nature (Heatherington, 2003: 64). While political geographers used to think of

borders as physical lines on the ground separating one nation state from another (Minghi, 1963), European integration showed borders are flexible and constructed by actors (Paasi, 1996). Borders can serve and be constructed by the state (Berman, 2003) but also by transnational companies, diasporas or other actors (Adamson and Demetriou, 2007; Paasi, 2005). Herod emphasises how workers, employers, capital and others – each with their own concerns – construct borders (Herod 1998; McGrath-Champ *et al.*, 2010). As labour markets transnationalise, the authority bounded in monolithic concepts of nation states is disaggregated and allows various state and non-state actors to claim these competencies, forming new territorial borders.

In the field of migration and mobility the issue of borders is discussed in relation as to how new technologies facilitate controlling the movement of people at the national and at the external EU border (Huysmans, 2006, p. 97). For example, Verstraete provides a vivid account of the involvement of private companies in marketing human detection technologies to the Belgian port of Zeebrugge. This has given rise to an 'emerging market in the removal of illegal refugees' (Verstraete, 2001, p. 27). Others have focused on airports as sites where the intersection of technologies, subjectivities, migrations and markets occurs, giving rise to particular practices of mobility and immobility (Fuller, 2003). The discussion on internal EU borders is then particularly geared toward non-EU or illegal labour migrants. Nevertheless, these practices point to the constitutive role of border regimes in giving rise to semi-permanent, vulnerable sectors of workers. Borders do not actually prevent the movement of workers but shape the terms under which their movements and subsequent existence takes place (Favell and Hansen, 2002). In that sense, the EU's border regime can be regarded as a major element in the flexibilization of work (Samers, 2003).

Posted work embodies the abolishment of nation state borders induced by the EU single market. Paradoxically, the nature of the posted workers' regulatory context creates borders within transnational workspaces for workers. These are not as clear-cut as territorial borders, but rather disintegrate into a multiplicity of fragmented borders. Borders are not physical but the result of the movement of workers and their interactions with other actors (see Guild, 2009; Favell, 2008). In relation to posting these borders are very much related to the posting firm. Posted workers do not experience controls on their way to the posting country but at their worksite. The firm border here takes a central place because it determines, to some extent, the rights of posted workers. Borders are no longer related to security and political order but mobility has become a new challenge and even threat to security (Bigo *et al.*, 2010). This is important because even though the movement across sovereign state borders no longer activates a border for EU citizens, borders still exist in the daily lives of citizens and create a system of 'differentiated' memberships for workers.

The reconfiguration of political space lies at the heart of the European project. The new shape of the European Union is the subject of manifold studies, but relatively little attention has been paid to the way borders are de- and reconstructed in a pan-European labour market. The assumption seems to be that few borders remain in the single market; however, other researchers have noted that many borders endure (Steen Knudsen, 2005). Even though the EU's four freedoms have created a common market without internal borders for labour and services, I argue that borders have not become obsolete in the context of EU labour market integration. The de- and reterritorialization of state borders intersects with significant changes in labour markets and shifts in the borders of the firm. In developing a framework for understanding the relationship between changes in sovereign borders and changes in employment relations in the EU, chapter 6 integrates significant works in international relations, comparative institutional analysis and labour geography. Especially significant for posted workers, as my analysis shows, are the borders for labour market regulation and firm borders. This has negative implications for labour rights and transnational solidarity in the European Union.

## 1.7 The German regulatory framework for worker posting

German construction firms and meat factories have employed foreign subcontractors since the 1990s through bilateral treaties (Interview NGG, 2012; Menz, 2001). With the advent of Eastern European accession, Germany, alongside Austria, applied a transitional period to the free movement of services, insofar as they worked in the construction sector – building maintenance and interior design (Donders and Sengers, 2009: 56). This exception did not apply to the meat sector. In 2007 Germany again made use of the transitional arrangements on the freedom of services in relation to Bulgaria and Romania joining the EU in the construction but not the meat industry (until December 31, 2013) (Kahanec *et al.*, 2010).

While in 2012 53,500 posted workers were registered in the construction sector<sup>6</sup>, no similar data exists for the meat industry, where registration requirements for posted workers do not exist. A recent NGG works council survey indicates that in some meat processing firms posted workers make up 50%–90% of

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<sup>6</sup> In Germany there is a mandatory registration requirement according to §18 of the German Posting Act. Firms have to register their posted workers at the *Bundestfinanzdirektion West* (the Federal Financial Directorate West). While this data is used for tax and labour enforcement purposes, the data is not processed further. However, in the construction sector the social fund for the construction economy, the so-called SOKA-BAU (*Sozialkassen der Bauwirtschaft*), which administers the collection and distribution of vacation pay in the sector, processes the registration data and identifies the annual number of workers posted to the German construction sector.

the factory workers (NGG, 2012). Of the 30,000 workers in the slaughtering industry, every third is employed under a subcontracting contract (NGG, 2013). The use of subcontracting arrangements is itself highly contentious in the meat industry. Such arrangements require a service to be fulfilled. In the meat industry this service is oftentimes formulated as 'the smooth sequence at the conveyor belt' (Interview Community Initiative, 2012), offering an indication of the precarious use of these contracts in order to cut labour costs. Service contracts were attractive because a sectoral minimum wage was long absent.

At the time of finishing this thesis, Germany is about to introduce a statutory minimum wage. Moreover, the German meat industry has negotiated a sectoral minimum wage. The absence of the statutory and sectoral minimum wage in the meat industry has long been the weak link in the German institutional system. This lack increased the attractiveness of insourcing lower-wage labour via subcontracting companies. As a consequence, the employment conditions and pay levels of meat-slaughtering and meat-packaging workers corresponded to those of their home countries. The construction sector, for its part, introduced a sectoral and universally binding minimum wage with the implementation of the Posting of Workers Directive in German law via the German Posting of Workers Law (*Arbeitnehmerentendegesetz*) in 1996.

The most important regulatory content of the law is the provision on minimum wages. The German Posting of Workers law could not refer to a statutory minimum wage or to *de facto* universally binding collective wage agreements (Eichhorst, 2005). In order to conform to European law, a minimum wage had to be negotiated between the social partners in the construction industry. It then had to be declared universally binding by the corresponding federal minister. According to §5 of the collective agreement act (*Tarifvertragsgesetz* or TVG) at the time, collective agreements can be declared generally binding by the Federal Minister of Labour if one of the parties to the agreement so requests, if at least half of the workforce is already covered by the collective agreement, and if there is a public interest in the general applicability of the collective agreement and an equal number of representatives of the umbrella organisations of employers and trade unions that form the tariff committee agree to the general applicability.

In line with the *Tarifautonomie*, the social partners – the construction trade union IG BAU (*Industriegesellschaft Bauen- Agrar-Umwelt*) and the two sectoral employer associations, the ZDB (*Zentralverband der Deutschen Bauindustrie*) and the HDB (*Hauptverband der Deutschen Bauindustrie*) – had to agree on the universal applicability (*Allgemeinverbindlichkeit*) of this wage regulation to all companies in Germany before the law could take effect. Both sides have three votes in the relevant Ministry of Labour's Commission on wages. In this case the German employers' umbrella association BDA (*Bundesvereinigung der Deutschen Arbeitgeberverbände*) refused to accept the universal applicability (Eichhorst, 2000) until the wage bracket was significantly lowered. The union thus accepted a lowest

wage level significantly lower than the already-existing lowest wage bracket within the collective bargaining agreement. The outcome leaves ample room for employers to use transnational subcontracting to 'exit' from higher wage brackets in the collective bargaining agreement (Menz, 2005).

A particularity of the German Posting Law is its limitation to certain sectors.<sup>7</sup> It does not encompass the whole national economy. Sectors have to be included individually in the law, with the meat industry being the latest addition. It was not until 2014 that the social partners in the meat industry were able to negotiate a minimum-wage agreement. While the trade union NGG requested sectoral minimum wage negotiations, it did not have a negotiating partner because the big slaughterhouses were not members of the employers' association ANG (*Arbeitgebervereinigung Nahrung Genuss*).

A couple of key events impacted on this situation. First, national public pressure was rising due to daily media reports on exploitative practices and precarious working situations within the big slaughterhouses. Second, international political pressure was also increasing as the Belgian government filed an official complaint to the European Commission against social dumping in German slaughterhouses. According to the ANG's chief executive, the industry has had a great interest in restoring its image. The four large slaughterhouses, Vion, Westfleisch, Tönnies and Danish Crown, became members of the ANG, which now represents all slaughterhouses for pork, beef, poultry and meat processing plants such as sausage factories. Ironically, even the BDA, which staunchly opposed the introduction of a collectively binding lowest wage bracket in the construction sector in 1996, now supported the introduction of a minimum wage in slaughtering (although their support had tactical motivations). In the midst of a public discussion about the introduction of a minimum wage, the employers' side wanted to send a signal to the newly formed government that the state does not have to interfere in wage-setting.

After a change in government, the German national minimum wage of €8.50 was agreed in December 2013. It is set to take effect in January 2015 and includes a transitional period before becoming mandatory for all employees. This is the only way to prevent loopholes from occurring in the sectoral minimum wage agreements. For example, one service provided by subcontractors in the meat industry is the removal of bristles from the pig. It may be possible that, under the new sectoral minimum wage regime, the service provider could label its services 'hairstyling services' to thus fall outside the sectoral minimum wage's scope. In

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<sup>7</sup>The law initially included the construction, building cleaning and mail services industries. With the amendment of the law in 2009 six other industries were included: care sector (elderly care and ambulant treatment), security services, waste management (including street cleaning and winter services), training and educational services after the Second or Third Book of the Social Code, laundry services in customer business objects, and special mining work in coal mines. (See <http://www.bmas.de/DE/Service/Gesetze/aentg.html>).

this case only a national minimum wage can ensure compliance for all employees regardless of their contract.

In January 2014 the social partners in the meat industry agreed on a sectoral minimum wage starting at €7.75 with regular raises up to €8.75 until December 2016. Since January 1, 1999, only the advice instead of the consent of the tariff committee is required before the Federal Labour Minister can declare the minimum wage binding by decree of law (Menz, 2005). The aim is to avoid allowing the employers' umbrella organisation to veto the trade union request to declare the collective agreement universally binding. Trade unions, government representatives and employers' organisations agree that the establishment of the minimum wage is unlikely to reverse the trend to hire subcontractors, because it has become an institutionalised part of the meat industry (Hassel *et al.*, forthcoming). Nevertheless, it will improve the legal terms and conditions for posted workers.

## 1.8 The structure of this thesis

The central theme of this thesis is to examine the co-evolution of changes in territorial political economies and employment relations in transnational workspaces from the bottom up. The structure is an article-based thesis, inevitably resulting in some repetition (which I have, notwithstanding, tried to minimize). The thesis addresses the complexities of transnational posted work through three key topics. Chapter 3 discusses how power imbalances between capital and labour as created at the policy level are translated to the workplace level. The aim of the chapter is twofold: to study how firms enact the posting framework creatively and to examine how these mechanisms initiate a process of institutional change through power dynamics at the micro-level, a process relevant for theories on institutional change generally. My findings show that the possibility for firms to diverge from rules is accelerated in a transnational setting due not just to the unequal power dynamics between firms and workers but also due to the inability to publicly or collectively enforce rules. The examination of how actors engage with this transnational institution contributes to institutional change theory by bridging the gap between institutional context and its appropriation by firms, posted workers and unions.

Chapter 4 discusses how the particular institutional context explored in chapter 3 impacts collective voice functions in Germany for posted workers. It shows how European integration opens exit options for capital but isolates posted workers from collective channels of worker representation. The chapter relates the changes in labour market regulation to changes in the nature and organisation of the nation state. These findings contribute to comparative institutional analysis by

highlighting how the deterritorialization of previously 'bounded' institutional political economic or industrial relations systems decreases collective voice and increases institutional exit. This chapter has been co-authored by Nathan Lillie. We jointly developed the theoretical framework. It is difficult to disentangle the exact contribution after several rounds of revision. Initially Nathan Lillie contributed more theoretical insights on territorial cohesion and collective goods and on the mechanisms opening the European space while I developed the sections on transnationalism, deterritorialization and the German political economy. I contributed all the empirical work on worker posting and wrote the case study.

Given posted workers' predominant exclusion from institutionalised voice channels in the German industrial relations system, chapter 5 explores the conditions for posted worker resistance. As a counterpoint to the literature on institutional stability and change, the chapter investigates a case of how trade unions in Germany seek experimental ways to reform institutions, also by building coalitions with civil society actors. It contributes in a number of ways to findings from other studies of union strategies towards labour migrants (among them Krings, 2013; Bengtsson, 2013; Tapia and Turner, 2013; Lillie and Greer, 2007) and highlights the shift in trade unions' strategy in the meat sector from social partnership to forming coalitions.

Chapter 6 explores the position and creation of borders in a pan-European labour market. It studies the reshaping of the nation state from the bottom up from the point of view of actors involved in the posting relationship. The insights of three key areas of study - the changing nature of state borders, institutional analysis and labour geography - are combined to develop our theoretical and practical understanding of transnational workspaces in the EU. It contributes to the literature on European integration and the territorial structuring of politics. The conclusion summarizes the findings and discusses policy implications and paths for future research.

## 2 METHODOLOGY

This chapter will explain the methodological choices undertaken for the research, the reasons a qualitative approach was used, the underlying research design, the strategy for data collection and the clarification of how the data was analysed in connection with relevant literature.

### 2.1 The approach

The approach underpinning this research has focused on how actors interact with institutions (Scharpf, 1999) at the workplace level. It complements the dominant research on EU integration that regards individuals as separated from the institutional spheres in which they act as rational beings (Kauppi, 2010). As stated in the previous chapter, the literature on worker posting mainly dealt with supranational political processes. This study aims to understand the relationships of actors involved in the posting relationship at the workplace level. It posits that the actors involved in the posting relationship do more than produce automatic responses to the regulatory framework. Rather, they utilize it creatively, with their ability to do so determined by how powerful they are. By focusing on actor strategies in response to the creation of a pan-European labour market, this study highlights how 'actors engage with, interpret, appropriate or ignore the dynamics of European integration' (Woll and Jacquot, 2010).

A qualitative inquiry is the most appropriate method for this endeavour. Qualitative research aims to produce knowledge of little-explored individuals and social groups in order to obtain insight into situations and problems within their social setting. It allows for in-depth description of procedures, beliefs, and knowledge from the point of view of the interviewees (Corti and Thompson, 2004: 326). Therefore, this research aims not only to contribute to academic knowledge



by providing first-hand, empirically based insights on how posted workers and other actors re-appropriate the posting situation, but also to understand the ruptures and tensions between what one expects to see in a policy field and what one encounters, and its consequences for the larger social or institutional setting.

Case studies allow for discovering hidden, previously unknown forms of behaviour in complex social settings and can be effective in addressing issues as broad as globalization (Bélanger *et al.*, 1994). This thesis follows what Yin calls an 'Embedded Case Design' where several 'units of analysis' are investigated within the same context, namely Germany, and the same case, namely transnational posted work, with the purpose of extracting lessons (Yin, 2006: 13). Multiple units of analysis are useful in order to understand the dynamics present within particular settings and from the point of view of different actors (Eisenhardt, 1989). The levels of analysis in this study are firm-, industry-, country- and EU-level. Firm-level cases are suitable to interrogate the microcosm of interaction between posted workers and actors involved in the posting relationship. Marginson and Sisson showed the usefulness of company case studies in exploring the link between European integration and industrial relations (2004). Industry-level cases are also constructed in order to explore how the specific nature of the industry interrelates with the firm-level cases. Moreover, Germany is taken as a country case to investigate how the national regulatory framework interacts with the micro-level findings, and in addition the regulatory developments with regards to posting are traced at the EU level. The case studies as such seek to examine processes and dynamics that can generate insights (Eisenhardt, 1989).

Some authors argue that the objectivity of researchers in a real-time study is endangered by the potential for becoming too involved with the object of study and the process itself. It is argued that instead of being an observer the researcher is in danger of becoming an advocate (Leonard-Barton, 1990). However, according to King (1994), qualitative research, in seeking to describe and make sense of the world, does not require researchers to strive for objectivity and distance themselves from research participants. Indeed, to do so would make good qualitative research impossible, as the interviewer's sensitivity to subjective aspects of his or her relationship with the interviewee is an essential part of the research process (King, 1994: 31). Nevertheless, some ways to guard against bias is to consider whether other researchers can trace the interpretations made in the study (a feature known as *intersubjectivity*). Miles and Huberman (1994) suggest that: (1) the study's general methods and procedures should be described in detail, (2) one should be able to follow the process of analysis, (3) conclusions should be explicitly linked with exhibits of displayed data, and (4) the data from the study should be made available for reanalysis by others.

In the following, and in response to these requirements, I will describe the study's data collection procedures and processing in detail. Next, the primary data are displayed in each chapter in the form of quotations and extracts from

documents to support and illustrate the interpretations of the data. Finally, all the primary but anonymised data from the study were accessible to a small group of researchers from the research project *Transnational Work and the Evolution of Sovereignty*. We discussed the coding in coding meetings and debated the findings in comparative papers. In addition, I reflected on the data and my analysis by presenting my findings at numerous international research conferences at different stages of the study and through various peer-review processes for scientific journals or scientific edited books. Moreover, close to the end of analysis phase of the research I co-organised, together with Lisa Berntsen, a fellow colleague from the research project, a workshop to which we invited trade unionists, government representatives, NGOs, representatives from paritarian institutions, policymakers and researchers. The research findings and their interpretation were presented and discussed and no concerns over the validity of the data were raised at the time.

## 2.2 Data collection

This research examined how posted workers and actors involved in the posting relationship engage with the posting framework at the workplace level. Four themes have been investigated:

- 1) How do posted workers and actors involved in posting interact with the regulatory framework at the workplace level? (Chapter 3)
- 2) How does the relationship between national systems of social solidarity and territorial boundedness impact on voice and exit incentives for firms? (Chapter 4)
- 3) How do posted workers and trade unions protest in poorly regulated workspaces under conditions where traditional avenues to protest are blocked or marginalized? (Chapter 5)
- 4) How are borders constructed or reconstructed in a seemingly borderless EU? (Chapter 6)

Each theme calls for relevant data collection from a broad range of actors. The types of data gathering were:

- 1) Interviews and group conversations with transnational posted workers from various countries complemented with native workers, when possible.
- 2) Interviews of union officials, managers and works councillors to establish the background facts of particular cases, describe firm strategies, and gather narratives about worker posting and the employment of migrants.
- 3) Interviews with policymakers, employer association representatives, labour

inspectors, political (migrant) activists and trade union officials involved in policy work, for describing legislative and legal struggles taking place around the posting-of-workers regulations.

- 4) Participant observation of trade union actions and participant observations of communal posted workers' housing spaces to examine the strategies and methods of union engagement with posted workers and how posted workers interact amongst themselves.
- 5) Field notes to document certain participant observation activities.
- 6) Selected media, union, employer association and parliamentary questions and parliamentary responses on selected political developments, firms, job sites and issues.

The aim was to collect material from actors with opposing viewpoints in order to increase representativeness and prevent interviewee perspectives and personal viewpoints from having undue influence over the final result to achieve a less biased narrative (Stake, 1995). Moreover, multiple informants were interviewed from each category. According to Glick *et al.* (1990), an important advantage of using multiple informants is that the validity of information provided by one informant can be checked against that provided by the others. The triangulation of the different sources and types of data gathering were used to test the validity of the data (Eisenhardt, 1989).

### 2.2.1 Industry and workplace case study selection

The construction and meat industries have been selected because of the prevalence of posted workers in them (see chapter 1 for numbers and their limitations). Apart from the quantitative prevalence of posting, the structure of the industries is also similar. Both are structured hierarchically, with a main contractor employing mainly subcontractors for work processes through which vertical disintegration is widely developed. The workplace case site location was determined according to a media overview and interviews with trade unionists about the whereabouts of large construction sites and meat factories. The determining factors in selecting the workplace case studies were the number of posted workers working at the site, its size and the location or accessibility. The size was important because long subcontracting chains are more prevalent at construction megaprojects and in large meat factories.

The interviews with the actors involved in the posting relationship were organised around these particular work sites. The fieldwork locations ended up being based in the *Länder* Hesse, North-Rhine Westphalia and Lower Saxony. In addition, interviews with relevant actors from other industries and worksites were conducted in order to test validity. The overall interview numbers according to the industry are the following:

Germany	Construction industry	Meat industry
Management	2	1
Works councillors	4	2
Trade union	11	2
Employers' association	2	0 (non-existent at the time of research)
Posted workers	28	21
Native workers	1	3
NGOs	2	4
Participant observation trade union/NGO mobilizing activities	4	4
Labour inspection	2	0
TOTAL industry	57	37
<b>TOTAL</b>	<b>94</b>	

These interviews were supplemented with interviews from other relevant actors. For example, two interviews with representatives of IG Metall, the German metal workers' union, as well as two interviews with the German united services union ver.di (*Vereinte Dienstleistungsgewerkschaft*) and one with the German trade union confederation (*Deutscher Gewerkschaftsbund* or DGB) were conducted in order to contextualize the developments in the construction and meat industries in relation to other sectors. Moreover, one interview with a European Commission official from the Directorate General for Employment, Social Affairs and Equal Opportunities, and two interviews with the EU policy representative of ver.di were conducted in order to trace relevant policy developments in relation to posting. In total I thus conducted 108 interviews at various intervals during April 2011 and September 2013.

### 2.2.2 Interview guides and interviews

The actual interviews were semi-structured, with open-ended questions. Semi-structured interviews can be described in terms of a conversation framed by some main questions (Leech, 2002). Open-ended questions permit the informant to engage in the interview at greater depth, in a more nuanced fashion (Aberbach and Rockmann, 2002: 674). Participants were assured of anonymity and confidentiality and data were handled in a way that enabled these requirements to be strictly observed (Goldstein, 2002: 671). Other project employees did not have access to the names, addresses or other contact details of workers interviewed. All employees involved in the project had to sign confidentiality statements. Interviews are only

cited insofar as doing so does not violate promises of confidentiality, and is not likely to result in negative repercussions for the interviewees.

The interviews were recorded and transcribed if possible and ranged from one to two-and-a-half hours in length. If the interviewee did not consent to the interview being recorded, detailed handwritten notes were taken and were written up at the end of the research day. The data collection strategy used for this project was to conduct as many interviews under each sub-type (see 2.2.2) as possible until the data began to show a pattern or until the data collected began to reproduce similar insights. While saturation is a 'matter of degree' (Strauss and Corbin, 1998: 136), the study followed the suggestions of Strauss and Corbin (1998) that saturation should be more concerned with reaching the point where it becomes 'counter-productive' and when discovering 'the new' does not necessarily add anything to the overall story (p. 136). Different questionnaires were developed for the interviews with workers, trade unionists, works councillors, employers, NGOs and policymakers. The types of questions asked in the industrial relations and policy interviews are alluded to in the types of data gathering. How I gained access to posted workers and the content of the worker questionnaires as well as relevant interviewee characteristics will be explored in greater depth in the following.

### **2.2.3 Gaining access to posted workers**

There are several ways of making the initial contacts with posted workers. The 'gatekeepers' for researching German industrial relations are usually considered to be the trade union and works councillors at the firm level. However, the predominant number of informants from the local trade union offices had no established contact with the posted workforce. If they did, they did not have the contact details anymore due to the workers' site mobility. The same holds true for the works councillors. However, both were very helpful informants in selecting the workplace case studies. Moreover, through these initial interviews I established a relation with local union offices in order to accompany union secretaries on organising activities or join meetings on how to organise posted workers.

Moreover, community organisations proved fruitful facilitators in establishing contact with posted workers, especially in the meat industry. To secure this cooperation it was first necessary to meet several times and provide official information about my status as a researcher and detailed information about the study. Conducting interviews at the worksites was not possible for various reasons. Construction sites and meat factories are highly sealed-off workspaces that I needed special permission to access. This would have required management oversight of the interview process, which was likely to skew the answers of the interviewees due to the dependent relationship between posted workers and management. It could have been a strategic choice to conduct workplace-based studies by securing the cooperation of employers. However, I wanted to avoid

accessing workers through their employers for ethical reasons such as protecting anonymity and avoiding employer retaliation.

Another means of generating initial contacts is through participant-observation in natural social settings where posted workers congregate (Cornelius, 1982). In my fieldwork I found visiting the workers' housing sites very useful for making initial contacts. The trade union or the works councillor from the main contractor gave me the information on the location of the housing sites of different nationalities working at a particular workplace site. For my research purposes it was important to know which nationalities were working on the site and where the respective nationalities lived, as I needed to hire translators for those site visits. However, difficulties arose related to the fact that employees are often housed together with a supervisor who controls the private lives of the workers. This complicated the initial interaction with the workers as they worried about management oversight and possible employer retaliation. If anything, this provided an early glimpse at the microcosm of the dependent relationship that exists between employee and employer.

When gathering data at the housing sites of the workers, I discovered informants are often placed within a delineated area. This could, for example, be at a housing site where 200 workers were housed and one informant introduced me to new informants. After making initial contact, I could sometimes use participants' social networks to recruit other participants. In this phase, it was crucial to have a flexible data collection programme so that opportunities could be grabbed when they arose, especially in situations when an informant pointed to another informant of relevance during an interview (Goldstein, 2002: 671). However, distrust between the workers was also visible at the housing sites. Some were afraid to talk about their situation when other workers were present. The high labour turnover and management intimidation are possible explanations for the lack of trust between the workers.

#### **2.2.4 Interviews with transnational posted workers**

When interviewers approached interviewees they were instructed to guarantee anonymity. Respondents were informed that the European Research Council funded the study, that they did not have to answer questions if they did not want to and could end the interview at any given point during the interview. The interviewers assured that, even though a public institution funded the study, they would not have personal access to any of their personal data. This information was important in enabling access to this workforce and establish rapport.

The people participating in their research were often marginalized and vulnerable. The involvement in the research provided an opportunity for some people to be listened to by a person who really did want to hear their story. Some interviewees were saying that they actually look forward to participating in the

interview because they hoped that it would bring about change in their situation and that the public will get to hear their part of the story.

The prime interview focus was to gain insight into how different regulatory systems clash, the outcomes for workers, and how this affects their lives. The exact questions asked and their order depended heavily, amongst others things, on the interview setting, the legal knowledge about posting and experience of being posted of the interviewee and the trust or social relations between the interviewee, the interpreter and the researcher. However, the questionnaires were usually structured into five major sections.

- The first section was intended to collect the personal data of the respondents, including their age group, years of professional and posting experience, nationality, profession, qualifications and language ability.
- The second section identified the recruitment channels, the reason he or she wanted to enter posting employment, the nature of his or her job tasks, contractual relations and skills development.
- The third section evaluated the workplace setting, number of workers, nationalities, impressions of interactions amongst workers at work and between firms, number of subcontractors and the supervisory chain.
- The fourth section supported the third section, but with more emphasis on details of working hours, pay, social security contributions, payment method, bonus payments and deductions, and their impressions about their rights.
- The fifth section is an opinion pool of the respondents' perceptions of voice options or the barriers thereto, possibilities for resistance or experiences thereof, and knowledge of and opinions on trade unions and works councillors.

I usually finalized the interview with questions on their future prospects, and more general questions on social issues or family relations. The workers were aged between 17 and 53, and originated from Poland, Portugal, Spain, Bulgaria and Romania. The common characteristic of these states at the time of research is that they were all EU member states, and had a lower income level and lower social security contributions than in Germany (Höpner and Schäfer, 2008, Fellini *et al.*, 2007). At the time of research Bulgaria and Romania did face a transition period in Germany in relation to the freedom of movement of workers. In addition, Bulgarian and Romanian companies faced a transition period for the freedom of services as well, but only in certain industrial sectors. Romanian and Bulgarian companies were free to offer their services, meaning they could send workers to Germany to fulfil contract work in the meat but not in the construction industry. The transition period for the freedom of services in the construction sector expired at the end of December 2013.

In that sense, I encountered more Romanian and Bulgarian workers in the meat sector, while the other nationalities were more strongly represented in the construction sector. Both sectors are male-dominated. Meat packaging and certain parts of the meat-slaughtering processes, such as the slicing of the throat of the pigs, are partially performed by female workers. As a result I conducted five interviews with female posted workers out of the total of 48 posted worker interviews. The majority, two-thirds of the interviewees, had previous experiences with being posted either to Germany or to a different EU country, while it was the first time being posted for the other one-third.

Posted workers are in general accommodated together with co-workers and therefore I often encountered them in group settings. In addition to individual interviews, I consequently conducted group conversations. Interviews were held at the location where interviewees felt most comfortable and the location was chosen by interviewees. This differed accordingly and interviews were held at their housing sites or in public spaces such as cafes or restaurants. Since the site mobility of the worker posed a considerable challenge to access as well as to conduct follow-up interviews, I conducted telephone interviews in cases where interviewees were placed to a distant locale or sent back to their home country. In some cases follow-up interviews or follow-up telephone interviews were also conducted.

### **2.2.5 Use of interpreters**

The interviews with EU posted workers were conducted in various languages with the help of interpreters who were interviewed before being recruited. Key to the selection process was the respect for confidentiality and anonymity and the nondisclosure of information about employment relations of any named individual, interpreting experience, and knowledge of and interest in the subject matter. Before the interviews I trained all interpreters about research objectives, logistics and access. Information on legal background and posted worker regulations was provided. As well as participating in training sessions, interpreters were given written guidelines on how to pose and probe questions, how to approach workers, and how to take and write up notes at the end of the research day, resulting in a rather time-consuming recruitment and training process.

Working with interpreters had advantages and disadvantages. Workers were often curious to interact with persons from their country outside their work environment, which helped to establish interest in the interview and trust in a workplace setting hostile towards outsiders, thus enabling access to posted workers. However, there were also some limitations. Sometimes issues that to other researchers might seem particularly interesting were not explored in depth by interviewers because they were not particularly novel to the interpreter. In that sense, the potential difficulties of using an interpreter, such as the three-way



production of data, selective translation and reliability of interpretation (Murray and Wynne, 2001: 16), are readily acknowledged. Nevertheless, the use of an interpreter is not solely a practical issue but is an important approach to ensuring that minority voices, in this case those of posted workers from different countries, are heard (Murray and Wynne, 2001: 24). Ideally, the interpreter who conducted the interview was responsible for translating the interview from the native language into English or German, depending on the translation ability of the interpreter. The translation was discussed at some length with the translators. Throughout this research the author translated the quotes from German into English, if necessary.

### **2.2.6 Native workers**

The main focus and the principal time investment of this research was to gain access and conduct interviews with posted workers. However, I have also paid attention to interviewing native workers that work alongside posted workers, if the opportunity arose. While this instance occurred in two cases in the meat industry, I did not encounter a native construction worker that worked intensely alongside posted workers. This is possibly due to the size of the construction projects I researched. I assume this will be different at smaller or medium-sized construction projects. However, the interviews with works councillors, who had all previously worked on construction sites, gave me an in-depth view not only of the historical development of posted work in the industry but also insight into a native worker's perspective. In order to test the validity of the data I triangulated the interview data with primary sources, participant observation and field notes (Eisenhardt, 1989; Yin, 2006).

### **2.2.7 Primary sources**

I examined primary sources such as trade union reports, employers' association reports and parliamentary questions and government responses to these questions in order to triangulate my data. I also compiled press statements from the trade union, the employers' association and government in order to track legislative processes in relation to posted work. I also collected newspaper articles reporting on the workplace sites. These sources were useful for tracing the history of events and statements made by people in the particular organisation that could be used as inputs to the interview guide. Moreover, the sources were useful to in counteracting the biases of the interviews.

### **2.2.8 Participant observation and field notes**

I used interviews as the key data collection source but complemented those with observations, using the 'the observer-as-participant' data collection method

(Waddington, 1994). In this situation the researcher maintains only superficial contact with the people being studied but makes no secret of the observation. Participant observation is useful for gaining an understanding of the physical, social, cultural and economic contexts in which study participants live and the relationships among and between people and context (Mack *et al.*, 2005). The visits to the workers' housing sites were very helpful in this regard, allowing me to observe the relationships between the workers and between workers and management. For example, on one occasion workers only started talking to us after checking if all the windows were closed. At other times, after we interviewed workers in their apartments, they told us to come back another time but to pretend that we did not know each other in order not to raise suspicion among other workers and management.

Moreover, I observed a meeting between the trade union and NGOs on how to mobilize posted workers, accompanied the trade union on visits to posted workers' housing sites or work sites, partook in a trade union information event for native and posted workers, joined informal meetings between a community initiative and posted workers, and observed a consultation meeting within a service centre for mobile workers. All these observations gave me an opportunity to validate the data from the interviews and gave me an insight into the microcosm as to how, for example, the trade union approached posted workers, how they interacted and how they spoke about the interaction.

Handwritten notes, later converted into computer files, are often the only way to document certain participant observation activities. Moreover, writing and analysing field notes are an important means of accomplishing an overlap between data collection and analysis (Eisenhardt, 1989). Field notes can incorporate both observations and analysis separated from one another (Van Maanen, 1988). For example, I kept field notes to record my ongoing thoughts and informal observations throughout the study.

### **2.3 Analysis**

Data analysis consists of 'examining, categorizing, testing, or otherwise recombining evidence, to draw empirically based conclusions' (Yin, 2006: 126). The analysis was carried out with the help of the computer-assisted qualitative software MAXQDA. It enables researchers to code and retrieve data and as such facilitates the analysis of large chunks of qualitative interview material (Bryman, 2001). Coding the interviews helped identifying recurrent themes, patterns and connections (Miles and Huberman, 1994). Coding involves marking passages of text that have the same message or are connected in some way to eventually study whether meaningful patterns or differences in the data emerge. In this process the

material from the posted worker interviews was 'triangulated' with expert interviews, union reports and newspaper articles to prevent interviewee perspectives and personal viewpoints from having undue influence over the final result and achieve a less biased narrative (Stake, 1995).

Posted work touches upon many issues such as labour migration, labour market regulation, industrial relations institutions, territoriality and the changing nature of the nation state, to name but a few. Each chapter required a specific analytical lens and level of analysis through which different themes were explored using the data. The analytical generalisation in the study included exploring and developing the concepts and examining the relationships between the constructs. In carrying out this analytical generalisation, I acted on Eisenhardt's (1989) recommendation to use a broad range of theory.

One of the main debates in political science today is how institutions within a particular political economy change. In chapter 5 I analysed the data according to how the posted workers regulatory framework contributes to an institutional change process within Germany. Many approaches in the literature look for processes of change induced by external market forces. I approached the data by looking at how actors, usually external to the German political economy, induce a process of change endogenously. Throughout my fieldwork it became apparent that actors were operating in two normative systems – one that formally applied to the host-country rules system but also another that was concealed by conforming to the norms on paper. For this chapter I took the construction industry as the level of analysis. More generally, but for this chapter in particular, I categorized the data according to different management practices coded such as 'deduction for accommodation', 'legal on paper', 'manipulation of hours and non-payment of min. wages' and 'two contracts'. The aim was to extract how firms enact the posting regulation. After several rounds of coding the codes were grouped under the sub-code 'semi-compliance', indicating a form of superficial compliance. These findings were similar to observations about institutional change at the policy level, where institutions change due to endogenous rather than exogenous practices (Thelen, 2004; Hacker, 2005). In these instances change is induced over a long period of time instead of through a path-breaking shock. The coded text segments point to instances in which the institution remains formally intact while policies may change without formal revision, causing ground-level change (Hacker, 2005: 47). Firms conceal their rule avoidance behind a façade of conformity. By relating my results to similar findings in the institutional change literature I strengthened the confidence that my findings are valid and generalisable, because others obtained similar findings in a very different context (Eisenhardt, 1989).

Chapter 4 and chapter 5 are workplace case studies. Workplace case analysis typically involves detailed case study write-ups for each site. While the write-ups involve pure descriptions, they are central to the generation of insight because they help researchers to cope early in the analysis process with the often enormous

volume of data (Eisenhardt, 1989). The overall idea is to become intimately familiar with each case in order to generalize patterns across cases.

The fourth chapter's workplace case has been chosen because it was a revelatory case. It reflects a real-life situation of general public interest and the underlying issues are important in theoretical as well as practical terms (Yin, 2006: 185). The case study analysed how the appropriation of this regulatory regime impacts collective channels of worker representation. It connects the data to the comparative capitalisms literature, which mainly examines institutional systems within a nationally bounded territory. The analysis connected the impact of the deterritorializing effects of European integration on institutional characteristics described as 'typically' belonging to the German political economy such as collective voice (trade unions and works council) and skill formation. The key issues in the case study, reflecting the larger trend as identified through interviews at other sites and with different actors, were the posted workers' isolation from 'traditional' collective voice and skill formation in the German context.

The isolation from collective voice and skill formation was coded in several rounds. First, interviews were coded to extract how mobile workers are insulated from skill formation. I created the codes 'effect of migration on skill' and 'career advancement prospects'. Second, the isolation between the union and posted workers was captured by the codes (for trade unions) 'access to work sites' and 'difficulty of establishing networks on-site'. Third, the isolation between main contractors' works councillors and posted workers was coded under 'migrants saying they have no voice', 'lack of power', 'works council only representing core workers' and 'individual voice via supervisors'. In comparing the data with the dominant discussions in the comparative capitalisms literature, this literature asks what this is similar to, what it contradicts, and why (Eisenhardt, 1998). While the case study revealed that the institutions labelled as 'typical' for the German model are still in place, it also showed that they do not apply for posted workers. This is similar to dualisation tendencies in the German labour market. In the case of posting, different institutional systems are accessed to isolate workers. This is different from, but related to, labour market dualisation developments within the German labour market which divert from the standard regulatory system within the German territory instead of accessing a regulatory system from another territory. Codes representing this relationship are assembled under the sub-codes 'extraterritorial' and 'territorial practices'.

In chapter 5 the workplace case study is useful because the case reveals a process uncommon to the German system of industrial relations: trade union coalition-building with community organisations. The codes used to disentangle how the cooperation between the union, the community initiative and the posted workers was established and sustained were, for example, 'community initiatives/mobilisation', 'workers taking actions on their own behalf without union' and 'non-union related mobilisations'. From the coded data I was able to

build abstractions and connect these to theoretical discussions on social movements and trade union strategies in different EU countries (Merriam, 1988: 19-20).

Chapter 6 identifies key problems between labour mobility and EU labour market integration. The literature on European integration and the territorial structuring of politics researches the current shape of the EU and its borders (Del Sarto, 2013; Kostadinova, 2013). However, deeper debates on the conceptual understandings of how the de-bordering of a political territorial space affects the European labour market and its mobile workers are only beginning (Meardi, 2009). Chapter 6 takes this research further by searching for the position and the creation of borders in a seemingly borderless European labour market. I analysed the data according to patterns of functional and symbolic borders – the lines trade unions draw when they talk about posted workers, the lines firms draw in their hiring or subcontracting process and the state lines that emerge for public administration officials in relation to worker posting.

Codes that reflected the administrative borders for labour inspectorates based in two member states were 'difficulty inspecting foreign contracts and firms', 'difficulties between labour inspectorates' or 'limited mandate of control labour inspectorates'. The information on borders drawn between firms in the posting relationship was reflected in the codes 'labour market segmentation by firm, due to position in contracting chain' and 'difference between subcontractor and main contractor'. Two types of borders emerged from the data: firm borders that separate workers from the host country's institutional industrial relations systems and borders for labour market regulation that inhibit the enforcement of labour rights. These borders impact significantly on the way trade unions can effectively interact with posted workers, inhibiting the creation of social solidarity across borders. These findings were used to create a bottom-up analysis to investigate of the reshaping of the nation state (Radaelli and Pasquier, 2006).

### **3 RULE ENACTMENT IN A PAN-EUROPEAN LABOUR MARKET: TRANSNATIONAL POSTED WORK IN THE GERMAN CONSTRUCTION SECTOR<sup>8</sup>**

#### **3.1 Introduction**

The European cross-border movement of services has facilitated a labour market in which firms can 'post' workers temporarily to another member state. The issue has attracted political and academic attention because subcontractors employing posted workers pose a competitive threat to firms and workers in high-wage countries (Menz, 2005). The academic discussion has revolved around how posted work in the enlarged EU should be regulated, and how it may affect national labour market institutions and power dynamics between management and labour in Europe (Dølvik and Visser, 2009; Lillie and Greer, 2007). There has been less research, however, on how transnationally operating firms engage with the regulatory framework in place.

Transnational posting in a pan-European labour market is governed by a strong market logic that created a power imbalance between management and labour through policy negotiations at the EU and national levels (Lillie, 2010). I take this investigation further and discuss how these power imbalances are translated to the workplace level. The aim of this chapter is twofold: to study how employers enact the posting framework creatively by circumventing rules in the German construction sector and to examine how these mechanisms initiate a process of institutional change through power dynamics at the micro-level relevant

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<sup>8</sup> This article is forthcoming in the *British Journal of Industrial Relations*: Wagner, I. (2014) Rule Enactment in a Pan-European Labour Market: Transnational Posted Work in the German Construction Sector. *British Journal of Industrial Relations*. doi: 10.1111/bjir.12053

for theories about institutional change generally. I focus on Germany because it emerged as the most significant case of recourse to foreign subcontractors and posted workers in a recent comparative country study on EU labour mobility in construction (Fellini *et al.*, 2007: 289). The construction industry is not the only industry with a pan-European labour market, but in construction, the transnational labour supply system is at its most developed (Lillie and Greer, 2007) due to the hierarchical nature of the industry (Fellini *et al.*, 2007: 280).

The focus on cases involving EU posted workers is meaningful in two respects. First, it contributes to the growing literature on posted work. While much of this literature studies processes of change and power dynamics between management and labour at the supranational or national levels (Afonso, 2012; Eichhorst, 2000; Greer *et al.*, 2013; Krings, 2009; Menz, 2005), I study the power dynamics between actors involved in the posting relationship and the rule enactment at the micro level. The examination of how actors engage with an institution draws attention to the 'gaps' between the design of an institution and its actual on-the-ground implementation and effects (Pierson 2004: 103). Taking my cue from Lipsky's classic study *Street-level Bureaucracy* (1980) and Dubois's (2010) recent work on street-level bureaucrats, I look at how policy is renegotiated in the daily encounters of actors in the posting relationship. Lipsky and Dubois have both examined the vertical relation between organisations strongly tied to national institutions and alerted to the high degrees of discretion and the relative autonomy that exists at the micro level within nation states. By contrast, this research focuses on transnational institutional spaces.

My findings show that the possibility for firms to diverge from rules is accelerated in a transnational setting. Transnational worker posting offers employers an additional power resource due to the increasing inability of states to regulate (Lillie, 2010) and enforce regulation in a cross-border work relationship and the difficulties unions face in mobilising posted workers. Second, it provides a microcosm for wider issues of institutional change. My findings are similar to what Thelen (2004) elsewhere has called *conversion* and Hacker (2005), in a very different context, has labelled *drift*. In both instances the institution remains formally intact while policies may change without formal revision, causing ground-level change (Hacker, 2005: 47). While firms officially adhere to the rules and thus leave them formally intact, they conceal their rule avoidance behind a façade of conformity. Firms divert the attention from the actual power dynamics and processes of change within transnational posting workspaces. This is relevant because the appearance of conformity is often sufficient to attain legitimacy (Oliver, 1991: 155). My in-depth study of context contributes to institutional theory by bridging the gap between institutional context and intentional action (Jackson, 2010: 77).

Posted work has expanded across the EU member states and is representative of new employment situations in industrial countries characterised by low pay, insecurity and high levels of exploitation. A growing body of evidence suggests

that the ambiguous rule system surrounding posted workers and their work environments results in similar avoidance mechanisms across countries (Lillie *et al.*, 2013). Construction firms will oftentimes claim they are complying with the host country's rules and the Posting of Workers Directive, but these claims are difficult to check, and they may be violating their home country's regulations as well.

This chapter is divided into five parts. It begins with an overview of posted work in the German construction sector. Section 3 outlines the research methods: I base my research findings on qualitative interviews but triangulate the data with government, union and employer association reports. In Section 4, I consider the research findings in three subsections: respectively, management practices, posted workers' perceptions, and union strategy and rule enforcement. Section 5 links the micro level findings to the larger discourse on institutional change and rule enactment. Section 6 concludes by summarizing the findings and emphasizes the contribution of micro level analysis when discussing poorly regulated workspaces and institutional change.

### **3.2 Posted work in the German construction sector**

The EU's 'freedoms of movement' has facilitated the growth of a pan-European labour supply system in which transnational subcontractors 'post' workers from low-wage to higher-wage areas. Posted workers are employed via transnational subcontracting arrangements, which is a strategy generally used to reduce labour costs (Lillie and Greer, 2007). In Germany posted workers are paid according to the local lowest wage level and their social security contributions are paid according to home country standards that are significantly lower than the German equivalent (Fellini *et al.*, 2007: 289).

The German government imposes notification requirements on foreign service providers when they post a worker to the German territory. While the information provided through the notification requirements is used for monitoring and enforcement purposes, the data that is collected via the notification requirements is not further processed in order to generate statistical data on posted workers. As posted workers are employed via subcontracting arrangements, a good measure of its pervasiveness is to look at the prevalence of subcontracting. In Germany between 1995 and 2010, 50% of native construction workers have been replaced with workers employed at foreign service firms (Bosch *et al.*, 2011: 185). In fact, construction became the main target sector for posting due to increasing demand of German firms for low-wage labour from abroad (Bosch *et al.*, 2011: 185). This is in line with a general trend of increasing employment flexibility in European economies when workplaces are exposed to immigration (Raess and Burgoon, 2013).



Firms do have to adhere to a minimum rights framework when employing posted workers. The regulatory framework for posted workers falls under the free movement of services as they are considered dependents of service providers. By contrast, individual migrants are regulated via the freedom of movement because they move on an individual basis (Dølvik and Visser, 2009: 494–6). The difference is that the labour rights of posted workers are more limited than those of migrants taking up work individually in another EU member state. In 1996, the EU passed the Posting of Workers Directive, establishing that posted construction workers are entitled to a set of statutory minimum working conditions of either their host state or sending state, whichever set of rights is more favourable to the workers. Article 3 of the Directive lists a number of minimum conditions that have to be met when posting workers, such as maximum work periods and minimum rest periods, maximum paid annual leave and minimum rates of pay (including overtime).

Following the *Laval*, *Viking*, *Rüffert* and *Luxembourg* judgments, the European Court of Justice has created a new jurisprudence as to how the Posting of Workers Directive should be interpreted (Barnard, 2008). The list of minimum conditions enumerated in the Directive is to be considered ‘exhaustive’, meaning that member states could not enforce conditions for posted workers beyond the minimum conditions (Dølvik and Visser, 2009: 498). The rulings, on the one hand, undermine the ability of national industrial relations systems to set collective standards according to their national traditions (Joerges and Rödl, 2009; Kilpatrick, 2009). On the other hand, they place posted workers in a disadvantaged position by limiting their rights, while monitoring and enforcing these rights is very difficult due to the transnational nature of the employment relationship.

The German Posting of Workers Act (*Arbeitnehmerentsendegesetz*) regulates posted work. However, the particularity of the German system of industrial relations caused problems during the implementation of the PWD into national law. In Germany, there are two ways in which collective agreements can become generally binding, either via the *Tarifvertragsgesetz* (the tariff law) or the Posting Law. The Posting Law route is the stronger one, as via this route every employer who falls under the scope of the collective agreement must abide by the provisions. Since there was no general statutory minimum wage in Germany the social partners in the construction industry negotiated a minimum wage. The parties consist of the construction trade union *Industriegesellschaft Bauen-Agrar-Umwelt* (IG BAU) and the two sectoral employer associations, the *Zentralverband der deutschen Bauindustrie* (ZDB), representing small companies and skilled artisans, and the HDB (*Hauptverband der deutschen Bauindustrie*), representing medium and large companies.

However, the employer’s side agreed on a minimum wage floor only after contentious negotiations. The amount applicable to posted workers was significantly lower than the scale set out in the German collective agreement (Eichhorst, 2000). A special wage commission in the Ministry of Labour composed

of representatives of the employers, the union and the state declared the outcome universally binding. The wage-level difference leaves room for employers to use transnational subcontracting to 'exit' from the collective agreement. It effectively creates a dual labour market for posted workers (Menz, 2005). In addition to the minimum wage, the German Posting of Workers Act mandates certain other minimum rights, such as maximum work hours, a designated number of breaks and paid time off.

While the discussion on the rulemaking procedure of the institutional framework for posting has highlighted the political conflicts and power dynamics that led to institutional change in the German labour market, it has done so by focusing on the formal rule-making apparatus (Cremers *et al.*, 2007; Eichhorst, 2000; Menz, 2005) or the strategies of the union towards labour market regulations (Kahmann, 2006; Krings, 2009; Lillie and Greer, 2007). I take this investigation further, exploring the ways in which the strategies of micro-level societal actors such as firms, unions, works councils and individual workers interact with the changing regulatory configuration. In pursuit of a more nuanced understanding of the regulatory dynamics of posted work, the chapter identifies the ways in which actors draw on different power resources in order to influence the outcome of negotiations, or implement policies without negotiation, at the workplace level.

My micro-level findings show that the posting-of-workers regulation creates not only a dual labour market in Germany but a complex array of regulatory spaces where actors are able to enact policies according to their own needs and interests. The goal is to show that the enactment of institutions depends not just on the overall social context but also on the power dynamics between the actors shaping this context (Dubois, 2010). Management creatively engages with the rule framework, whereas posted workers are structurally constrained from effectively resisting management practices in isolation from union representation. While a certain wage floor has been created for posted workers, we should be cautious in inferring from the seemingly compliant behaviour of firms that they have internalized the normative order put forth by the rulemakers (Dubois, 2010). Rather, transnational workspaces adhere to regulatory dynamics of their own. The European provision of services has removed many possibilities for states to regulate their labour market or to properly enforce the regulations, thereby creating micro worlds that produce autonomous rules. My argument is that in order to adequately grasp the institutional mechanisms at work in transnational posting, it is necessary to look at changes in legal and policy settings but complement them with the power dynamics at the micro level.

### 3.3 Research methods

For this chapter I draw on qualitative data gathered from March 2011 until March 2013 from construction-site case studies in Germany. The construction sites were large construction projects (starting at 1,000 workers) where German firms were the main contractors and foreign firms were the subcontractors. The major share of the empirical data was gathered through qualitative open-ended interviews with Polish, Spanish and Portuguese posted construction workers. The informants were interviewed in their temporary homes or in a public space. Face-to-face follow-up conversations were possible in some cases. However, because most workers were only temporarily working at the sites I researched, I tried to stay in touch with them via phone if possible. I refer to workers as *posted workers* as they are sent by their employer to work in another country. However, a European market for low-skilled labour has emerged in which the borders between mobile labour, posted workers, agency workers and self-employment are fluid. The employment channel is a reflection of my best assessment based on the interview data rather than the result of a comprehensive evaluation of respondents' position.

The prime interview focus of this research was to gain insight into the workers' lived experience of their social, economic and workplace settings. In total, I conducted 28 interviews with posted workers. Posted workers are frequently forbidden by their employers or by site management from discussing their working conditions. I tried to build trust by repeatedly visiting the workers' housing site. Workers I talked to introduced me to fellow workers or pointed me to apartments where others lived who might want to be interviewed. The interviews were conducted in various languages, and interpreters were used when necessary. The interviews were recorded and transcribed if possible. If the interviewee did not consent to the interview being recorded, detailed handwritten notes were taken and were written up at the end of the research day. The author translated the quotes from German. All interviews are anonymised in order to protect the informants. Interviews are only cited insofar as doing so does not violate promises of confidentiality and is not likely to result in negative repercussions for the interviewees.

I triangulated this material with expert interviews and government, union and employer association reports to prevent interviewee perspectives and personal viewpoints from having undue influence over the final result and achieve a less biased narrative (Stake, 1995). In this process, actors with opposing viewpoints were interviewed to increase representativeness. I conducted interviews and follow-up interviews with nine representatives from the construction sector union IG BAU, four with works councillors from main contractors, two with management and one with the labour inspection. The interviews lasted between one and two hours. In addition to these interviews, I accompanied union

representatives and works councillors on housing-site and construction-site visits. The research data were stored and coded using MAXQDA qualitative data analysis software (VERBI GmbH, Berlin, Germany).

The data for the construction sector are embedded within the context of a four-year study on posted work in the meat and construction sectors in Germany. The study's value lies in how it illuminates posted workers' employment and social relations and lived experiences. In this respect, it contributes to a growing body of qualitative studies that discuss workers' position in poorly regulated workspaces in Germany (Bosch and Weinkopf, 2008; Doellgast and Greer, 2007; Dörre, 2005; Wagner and Lillie, 2014) and other European countries (Lillie *et al.*, 2011), which will be useful for generalising to theory (Gerring, 2004).

### 3.4 Micro-level rule enactment

#### 3.4.1 Management Practices

Three management practices exemplify how the posting-of-workers rules are circumvented at the micro level in particular: the disregard for adherence to the maximum work period, the manipulation of working hours and thereby undermining the hourly minimum wage, and the withholding of annual leave pay. The legislation in Germany requires written documentation of posted workers' contracts with detailed information on wages and working hours to be kept on-site in case of controls by the labour inspection *Finanzkontrolle Schwarzarbeit* (FKS). On large construction sites, firm's accounting books will mostly adhere to the maximum working hours and pay. On the surface it would seem as if transnational subcontractors adhere to the existing institutional framework, but when special attention is paid to the enactment of institutions, a different picture emerges. Several unionists I spoke to expressed that nowadays 'on paper all the employment standards are correct' but there is 'a difference between the rights on the one hand and the reality on the other. Workers operate in what can be described as a lawless space' (IG BAU, interview, 2012). One unionist describes the current practice on German construction sites:

We do not encounter what we consider classically as 'illegal', that is, undocumented workers. Companies deceive us on a whole new level. They manipulate the working hours of workers, deduct accommodation pay from the worker's wages and thereby circumvent the minimum wage standards.

(IG BAU, interview, 2012)

While actors adhere to the rules artificially on paper, thus not officially breaking the rule, they also do not enact the rules as envisioned by the rulemakers. One of

the many cost-saving strategies of service providers is the deliberate manipulation of hours. Posted workers work 240 hours a month, while the employer accounts for only 160 hours in the payslips and thereby reduces the actual hourly wage (IG BAU, interview, 2012). Posted workers from various countries working for diverse service providers on different construction sites confirm this practice. One worker states explicitly that 'all the workers get five or six euros per hour while the main contractor knows and supports this' (Polish posted worker, interview, 2012). This practice disregards the adherence to the maximum work period and at the same time undermines the hourly minimum wage. Even though workers earn an hourly wage on their pay slips, they do not receive overtime, night-time or weekend bonuses on top of their wage. However, working 100 hours overtime, without extra payment, reduces the hourly minimum wage to five or six euros. These practices are very difficult to detect because the payslips and accounting books list the legally allowed maximum number of hours worked. In addition, management requires workers to attest in writing that they receive the minimum wage payment (management interview and posted worker interview). Controls do take place by the FKS; however, official controls are not able to detect malpractices because the paperwork of foreign firms is in accordance with the rule system.

Moreover, all workers on German construction sites are entitled to annual leave pay. The collective social fund *Sozialkassen der Bauwirtschaft* (SOKA-BAU) was set up to ensure that workers receive their holiday entitlements by raising contributions from the employers and granting benefits to employers and workers. However, employers deduct the holiday payment from the collective social fund from the worker's wage. A Spanish posted worker describes:

The SOKA-BAU system is well conceived from the German legislator and no one can circumvent it. And now there is the big but. SOKA BAU transfers the accumulated holiday payment for the workers to their service provider. However, my employer does not pass the vacation pay received from the SOKA BAU on to the workers. And that is unfortunately the practice.

(Spanish posted worker, interview, 2012)

The vacation pay system as envisioned by the rulemakers imposes useful rules on the payment of vacation pay to posted workers. However, the way it is appropriated turns its purpose upside down. Instead of guaranteeing the due vacation pay for the workers, firms make a profit. There is clearly a discrepancy between the rule system as envisioned by the rulemakers and its appropriation by the rule takers. This system is created and preserved through the interplay of unequal power relations between workers and transnational firms as well as through posted workers' isolation from trade union structures and the inability of the labour inspection to detect rule-breaking and enforce compliance.

### 3.4.2 Posted workers' perceptions

Norms are related to the types of workers firms employ. A firm's policies on, for example, hours of work will be important in developing a set of norms around what firms expect from workers (Smyth *et al.*, 2011). Rules or norms between posted workers and employers can establish that certain practices, even if technically illegal, are perceived as bending and not breaking the rule. This agreement oftentimes deviates from the regulatory norms of the host country. There is a discrepancy between the norms of the host and the home country in terms of what is expected from the employer's side as well as what is acceptable from the employee's side. One worker explains:

Our firm told us what to say when controls takes place. We agreed to that before we came to Germany. That's normal. If someone offers you to work in Germany for €8.50 and you earn €3 in Poland than you agree, even if €8.50 is less than the German minimum wage. Management also told us that we would not receive vacation pay even though the contract states that we do.

(Polish posted worker, interview, 2012)

As Höpner and Schäfer (2008) point out, the creation of a single European market, which includes the free mobility of services and labour, is not one among equals. Significant wage differentials and social security contributions exist between the member states (Höpner and Schäfer, 2008: 16–19). The reasons posted workers take up work and accept certain employment conditions vary, ranging from the experience of unemployment in the home country, to payment of debts or medical procedures for family members, to simply being able to afford a better life (posted worker, several interviews, 2012).

Workers are afraid of losing their employment if they voice grievances. At times they feel that exiting the employment relationship is the only viable option to alter the situation. Structural limitations, economic deprivation and isolation from union structures constrain worker resistance, leading to 'a sense of powerlessness at the collective level' (Mrozowicki and van Hootegem, 2008: 201). Interaction between posted workers and the union does take place but is mainly limited to certain dire cases. Even though workers on occasion express anger about their situation, they fear employer retaliation and feel powerless to claim their rights. These are decisive factors that deter workers from interacting with the union or reporting management malpractices to the authorities.

### 3.4.3 Union strategy and rule enforcement

IG BAU has responded to posted work by establishing the European Migrant Workers Union, which attempted to create a transnational structure from which

workers could also receive representation in their home countries (IG BAU representative, interview, 2011). After several years of practice, this structure failed to establish an independent role and was eventually reintegrated into the IG BAU (Greer *et al.*, 2013). Nevertheless, the union continues to advocate equal rights for the same work in the same place and a better enforcement of the existing rights framework at the policy level (Krings, 2009). While the IG BAU has sought to establish closer relationships with transnational posted workers, they face considerable obstacles to interacting with workers at the workplace level, including language barriers, frequent site mobility of workers, and fear and lack of trust in unions from workers. These factors reinforce the persistence of the employment practices as unions often try to enforce the regulations in place without the support of the transnational posted workforce. If workers try to cooperate with the union, they are often exchanged quickly with other workers and sent to another construction site (IG BAU representative, interview, 2011). This intimidates the new workforce even more and the union will find it very difficult to get in touch with the new workers (IG BAU, interview, 2011). One unionist explains:

If you ask workers what they earn they always say, out of fear, the respective minimum wage. And then you stand there and think: 'Well, if the people are paid minimum wage, we cannot do anything'. Everyone knows that this is not the case. I cannot report this to the media or the labour inspection because workers are afraid to talk.

(IG BAU, interview, 2011)

This union perception reinforces the isolation of posted workers from union structures. Likewise, worker fear hinders meaningful interaction with the union and sustains certain management practices. This leaves considerable leeway for subcontracting firms to disrespect certain posted workers' rights (IG BAU representative, interview, 2011). The complex relationship between management practices, worker fear and union isolation constrains the ability of the labour inspection to detect malpractices. The task of the labour inspection is to check the hours worked and wages paid to posted workers in the firms' accounting books, which must be kept on the construction sites at all times. According to an official from the labour inspection, there is rarely a discrepancy. However, they suspect that the actual accounting book is kept in the host state (labour inspector, interview, 2012). One labour inspector explains:

Companies in principle commit to paying the minimum wage, but we know that there are, I would almost say, hundreds of ways to circumvent it. The detection of these malpractices is almost impossible for us because of the difficulties to investigate in their home country or to prove the manipulation of hours or wage deductions.

(Labour inspector, interview, 2012)

Both the union and the labour inspection are aware of the practices that *appear* to be legal but actually circumvent the rights of posted workers. According to a recent government report, many subcontractors in the construction as well as care and cleaning sectors, avoid paying salaries according to the minimum wage regulations (Deutscher Bundestag, 2013). The report identified that controls do take place, but only to a minimal extent because they are extremely time-intensive and complicated. Two recent reports by the German Confederation of Trade Unions identified mechanisms to avoid minimum wages in construction similar to the findings of this study. For example, the manipulation of working hours oftentimes results in the payment of wages close to what workers would earn in their home country instead of the host country's minimum wage (Siebenhüter, 2013: 17-20; Dälken, 2012).

Moreover, the enforcement of rights is difficult due to the limited control mandate and staff shortage of the FKS and the lack of transparency created through long subcontracting chains (Dälken, 2012: 30). These practices are widespread in construction, but similar avoidance mechanisms occur in other sectors, for instance in cleaning or care (Dälken, 2012: 30). The central association of the German building industry (*Zentralverband deutsches Baugewerbe* or ZdB) confirms the existence of gaps in the regulation (*Zentralverband deutsches Baugewerbe*, 2006: 8). Mechanisms such as double-bookkeeping across borders make it very difficult for the FKS to detect firms' avoidance mechanisms (*Zentralverband deutsches Baugewerbe*, 2006: 8). The reports from the union as well as from the employers' side state that while a relatively dense institutional framework exists, the possibilities for the labour inspection to detect malpractices in these transnational workspaces are severely limited.

### **3.5 The possibilities for institutional change through rule enactment at the micro level**

The interaction between host- and home-state institutional frameworks and norms creates a space in which actors can draw on different power resources in order to enact policies without official negotiation at the political level. This is especially relevant for institutional change because the meaning of an institution is constantly reinvented, in this case, by posting actors (Streeck, 2011: 141). To understand the creation and evolution of an institution, it is important to examine the context as well as the intentional action of actors as they are mutually constitutive (Jackson, 2010). I refer to the notion of institutions as formal rules that actors can use dynamically to realise their aims (Streeck and Thelen, 2005).



The literature on institutional change identifies different modes of change under the categories of *displacement*, *layering*, *drift* and *conversion* (Streeck and Thelen, 2005). In the variant of *displacement*, newly introduced behavioural patterns gradually or completely replace the originally existing institution. *Layering* refers to practices that do not replace old ones but are added to already-existing institutions. Changes occur because the new additions cumulatively transform the initial operation of the institution in a relevant way. *Drift* describes institutional settings in which the institution as such remains intact but changes in the environment are not adequately addressed. The absence of adjustments leads to significant changes in the operation of an institution. Similar to drift, in the fourth type, *conversion*, the institution remains formally intact but is used, by way of interpretation or different application of its properties, for a purpose for which it was originally not intended. The forms of change most relevant for the empirical material discussed in this chapter are similar to *conversion* and *drift*. In both instances the institution remains formally intact and policies may change without formal revision, causing ground-level change (Hacker, 2005: 47; Thelen, 2004). To understand the incremental process of change dynamics at play in the posting relationship, it is useful to combine these mechanisms (Barnes, 2008).

*Conversion*, like *drift*, can be considered a process of adaptation in which the institution itself does not change but is exploited to serve new ends (Thelen, 2000: 105). Even actors that are not involved in the institutional design may circumvent or subvert rules when these are in opposition to their own interests (Streeck and Thelen, 2005). In this mode of transformation, actors are recognized to have a greater space in the institutional reproduction to reassess their interests and contemplate institutional change (Streeck and Thelen, 2005: 27). The real meaning and function of an institution ultimately emerges only in the course of how it has been interpreted and practically applied by actors. Rules and their enactment converse 'through deviant local enactment or the slow accumulation of anticipated or unanticipated consequences of an institution's routine operation' (Streeck, 2009: 125). This is possible because institutional rules are left ambiguous as a result of political compromises, and the balance of power between actors has shifted (Jackson, 2005).

In the case of transnational posting, firms use the lack of strong union presence or the ability of labour inspectorates to enforce regulation to redeploy familiar institutions in ways that undermine their logic of action. Practices such as double-bookkeeping across borders hinder the proper monitoring of the labour rights of posted workers. This creates an ambiguous space in which it is difficult to disentangle which rights are adhered to, as circumstances change and practices are fluid. The firm strategies discussed here are similar to what Oliver (1991) labelled *avoidance* in her research on strategic responses of organisations to institutions. Avoidance is defined as 'the organizational attempt to preclude the necessity of conformity, organizations achieve this by concealing their nonconformity from

institutional rules or expectations' (154). Nonconformity is hidden behind a façade of compliance: firms officially adhere to the rules, and thus leave them formally intact. However, they re-appropriate them in a different manner by manipulating working hours and thereby undermining the minimum wage.

This is important from an institutional perspective because, as Oliver remarks, the appearance of conformity is often sufficient to attain legitimacy (Oliver, 1991: 155). These practices result in a situation of conversion: while the regulation was originally implemented to hinder the underbidding of wages in the construction sector, it now becomes an instrument to place workers in direct wage competition next to each other ostensibly legitimately. The inability of unions and the labour inspection to control these practices shields firms from the enforcement mechanisms in place. While the rules are officially adhered to and not formally altered, the original intention of the institution is reversed by not paying the due amount or by not passing on the due vacation pay to the workers.

*Drift* is closely related to *conversion* but differs from it because under conversion the implementation and use of institutions change, while under drift the changing environment alters the effect of institutions (Hacker, 2005: 45). Institutional drift occurs due to long-term shifts in the institution's environment. The effects of institutions change because they do not adapt to the newly emerged structure (Hacker, 2005; Streeck and Thelen, 2005: 24–26). In relation to transnational posted work, the empirics show the insufficient adaptation of union and rule-enforcement mechanisms. Borders exist between IG BAU and posted workers due to language barriers, high labour turnover and worker fear. In similar contexts, unions have been criticized for their ineptitude at finding ways to organise and represent vulnerable workers (Jenkins, 2013: 4). The union's inability to adapt to the changing environment, on a national or transnational level, isolates posted workers from interest representation and hinders the detection of the avoidance of collectively agreed institutional practices. Union dissatisfaction with limited worker interaction runs the risk of reinforcing the borders between workers and the union, contributing to a further drift between the design of the institution and its coverage. Drift also occurs due to the inability of the labour inspection to effectively control employment standards or enforce fines across borders. The union and labour inspection both agree that the regulation cannot be fully enforced within the current framework. While a pan-European labour market was created, the institutions that enforce rules have not been adapted effectively, creating multiple institutional segments that float like driftwood next to each other without being able to interact.

In the end, the process of institutional change is initiated by these practices. New interpretations of existing rules emerge and gradually displace the old. Caused in this way, however, deviations from traditional interpretation and application of practices are often merely matters of degree. If these small changes are over the course of time used by more and more actors and reinforced by

further deviations, then this can add up to larger discontinuities. It is a 'sort of incremental institutional change that proceeds independently from the intentions of those supposedly in control' (Streeck, 2009: 125). The empirical material described here offers a snapshot of an ongoing larger process. Combining different modes of change can help disentangle the current process of transformation.

Nevertheless, the ultimate consequence of eroding institutions through, for example, drift might result in a situation in which an institution gradually breaks down over time and 'withers away' (Streeck and Thelen, 2005: 29–30). Recent policy developments at the supranational level signal a change in policy that would further decrease the rights for posted workers. The proposed enforcement directive for the Posting of Workers Directive by the European Commission and its discussion and vote in the employment and social affairs committee of the European Parliament point to the decrease in the ability of labour inspectorates to control the policy implementation at the micro level (European Parliament, 2012). However, further policy negotiations are currently taking place between the European Parliament and the European Commission, and it is still too early to determine the exact policy outcome.

### 3.6 Conclusion

The literature on institutional change has highlighted the dualisation of the posting-of-workers labour market induced by policy adjustments (Menz, 2005). I add to this literature by showing how transnational firms are able to circumvent this re-regulation in isolation from union and labour inspection control. I combined processes of institutional drift and conversion to interrogate local practice and dynamics of change, which form an important foundation to examine further processes of change at the aggregate level (Fiss and Zajak, 2004). Extensive interaction with posted workers and actors involved in the posting relationship allows me to analyse how the actual posting framework is renegotiated at the workplace level. It also gives voice to posted workers' position within these spaces and illuminates the constraints workers face in resisting malpractices. Unequal power dynamics are played out at the workplace level, resulting in complex relations between employers, workers, unions and enforcement institutions. The findings presented here suggest that national institutions have persisted, but actors re-appropriate them differently than initially intended, launching a process of change. The institutional framework is adhered to formally, concealing nonconforming practices.

Incremental changes in the European labour market have opened loopholes that management can exploit. Transnational firms have identified creative ways to avoid regulation, and posted workers are oftentimes not able to resist these

malpractices due to fear of employer retaliation, structural limitations and isolation from union structures. This leads to a process of *conversion* in which institutions remain formally in place but are adapted by firms in order to serve their interests. This process of change strongly depends on the interests and power of actors that make decisions in organisations. Transnational workplaces can be considered political arenas in which different actors engage with and contest rules drawing on unequal power resources (Fiss and Zajak, 2004).

The union's aim to extend the regulation to posted workers has been achieved at the policy level but has been adapted ineffectively at the micro level. On a day-to-day level, posted workers and the union do interact but meaningful engagement is not taking place. Even though the union and labour inspection are aware of these malpractices, they lack the resources to detect and prosecute rule circumvention. Employer strategies to exploit gaps in regulation tend to weaken these traditional sources of power. The concept of *drift* can illustrate the multiple spheres of regulation that exist between unions and workers and their inability to sufficiently interact to close the gaps in the regulation in order to counter management practices.

While the regulatory framework claims to establish a rights framework for workers, it allows its circumvention through its many loopholes. The practices in transnational posting are the result of the tension between the claimed needs of a flexible labour market and the desire to closely monitor employment of mobile workers. Castles argues that migration 'policies that claim to exclude undocumented workers may often really be about allowing them in through side doors and back doors, so that they can be more readily exploited' (Castles, 2004: 223). Transnational posting provides a low-cost pool of labour that facilitates the 'flexibility' of the labour market while appearing to adhere to the institutional setting. The negotiated policy framework is being neglected by transnational firms due to the inability of states to enforce policies across borders and the inability of workers and unions to interact in a labour market characterised by high mobility, labour turnover and exploitation.

From the perspective of employer strategies and labour market outcomes, transnational labour posting is often complementary to other institutional change dynamics in the German labour market. While the traditional German model still covers a significant proportion of workers, a complex labour market of low-wage workers outside of that system has grown (Bosch and Weinkopf, 2008; Palier and Thelen, 2010; Thelen, 2009: 484). Firms now regularly use outsourcing to smaller firms as a way to avoid works council and trade union power (Doellgast, 2009). Recent micro-level studies in other sectors in the German labour market also allude to avoidance mechanisms similar to those in posting. For instance, so-called mini-jobbers, temporary workers employed on a €400-a-month basis, often do not benefit from the tax and social security exemptions they are legally entitled to in the retail sector, while employers make a profit (Voss-Dahm, 2008: 256). Other

studies have revealed that mini-jobbers are regularly being denied lawfully guaranteed sickness and holiday pay (Benkhoff and Hermet, 2008). In a similar vein, Jaehrling and Méhaut (2012) analysed the gaps in regulation for atypical workers in the retailing, hotel and service sector that lead to precarious employment practices and rule avoidance. This suggests that the findings presented here may be representative of broader trends in the German labour market, whereby loopholes in the regulation and the growth of weakly organised sectors allow for discrepancies between context and enactment.

While posted work and its national and micro-level regulation is embedded in deep structural changes in the German political economy, it does add another dimension to the debate. New exit opportunities created through the EU freedom of services undermine current regulatory practices and union power. This provides firms with leeway to exploit regulatory gaps creatively in their cross-border activity. While this study focuses on the German setting, other studies have shown that various EU countries struggled to adapt their labour market policies to implement the Posting of Workers Directive. For example, Lillie and Greer (2007) look at transnational posted work in the construction industry in Germany, Finland and the UK and examine how transnational politics and labour markets are undermining national industrial relations systems in Europe. Moreover, Lillie, Wagner and Berntsen have discussed the similarities of construction firms in Germany, the Netherlands and Finland to evade or modify the application of the regulation in their employment relations (Lillie *et al.*, 2014). This cross-country comparison finds that construction firms will oftentimes claim they are complying with the host country's rules and the Posted Workers Directive, but these claims are difficult to check, and they may be violating their home country's regulations as well. Employer behaviour in all countries examined is fairly similar, made possible by the ambiguous rule system surrounding posted workers and their work environments.

The process of change is still in flux and up for contestation. Conclusions about the ultimate extent of the modes of change have to remain preliminary. Nevertheless, the findings point to a process in which surface compliance is substituted for deep compliance. The picture that emerges is one of a variegated labour market in which concealed nonconformity drifts alongside institutional host-country systems of worker representation and rule enforcement. Future research may further investigate whether over the longer term, these institutional practices will replace the old or whether new alliances can be formed to counter the current process of change. The impact of this institutional space on posted worker voice and exit options for firms is the topic of the next chapter.

## **4 EUROPEAN INTEGRATION AND THE DISEMBEDDING OF LABOUR MARKET REGULATION: TRANSNATIONAL LABOUR RELATIONS AT THE EUROPEAN CENTRAL BANK CONSTRUCTION SITE<sup>9</sup>**

### **4.1 Introduction**

European integration restructures relationships between states in ways that challenge traditional notions of sovereignty. These changes are driven by firm strategies to segment labour markets and exit constraining national industrial relations frameworks. All over Europe, migrant workers posted temporarily by their employers from their home countries work on construction sites for lower wages and in poorer conditions than their domestically hired colleagues. Unlike long-term immigrants, mobile posted workers are not embedded into the territorial regulatory context they move to, but are kept apart from it. Wage expectations, firm management practices, industrial relations and even labour rights are, to a large extent, calibrated to the workers' countries of origin. These practices create and reproduce deregulated workspaces, or 'spaces of exception' (Palan, 2003), physically inside, but juridically and socially set apart from, national systems. Deregulation via spaces of exception involves referencing alternative extraterritorial regulatory regimes via transnational subcontracting in order to

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<sup>9</sup> This chapter is co-authored by Nathan Lillie and has been published in the *Journal of Common Market Studies*: Wagner, I. and Lillie, N. 2014. European Integration and the Disembedding of Labour Market Regulation: Transnational Labour Relations at the European Central Bank Construction Site. *Journal of Common Market Studies* 52 (2): 403–419.

allow firms to opt out of national industrial relations systems. This situation is enabled by the market-making regulatory framework of the European Union (EU), creating a feedback loop in which the deterritorialization of regulation creates labour market competition, and vice versa. The process not only deregulates labour markets, opens exit options for firms and reduces employee voice for contingent segments of the workforce, but also contributes to the blurring of territorial borders and fragmentation of state sovereignty.

We argue that the blurring of territorial borders undermines collective voice through industrial relations institutions. Following Stein Rokkan's reasoning, which associates collective voice with territorial boundedness (Rokkan, 1999), challenges to borders should be particularly evident in institutional systems that rely on collective voice. Germany, our research setting, is considered the archetypical case of a 'Rhein model', or coordinated market economy, in which social solidarity, buttressed by the collective power of unions and works councils, serves as a 'collective good' for firms (Albert, 1993; Hall and Soskice, 2001). By tracing the impact of the extensive use of foreign subcontractors on collective bargaining, works council influence and skill formation on a German construction site we show that declining territorial boundedness allows firms to circumvent key German industrial relations institutions.

Höpner and Schäfer (2012) argue in a recent article that the EU 'disembeds' markets, recommodifying social relations previously decommodified via national social bargains. While many rights have been established at the European level, in theory forming at least a partial European social space, these exist in the absence of mechanisms for social solidarity. Höpner and Schäfer relate this to the way the EU regime for mobility has been implemented through judicial activism rather than political consensus. They trace processes by which this disembedding occurs, focusing on the removal of national-institutional barriers to markets by the European Court of Justice. We take this investigation further, exploring the ways in which the strategies of micro-level societal actors such as firms, unions, works councils and individual workers interact with the changing regulatory configuration. We trace one of the mechanisms by which market disembedding occurs, as actors adjust their notions of territory and borders.

This chapter begins by discussing the relationship between national systems of social solidarity and national territorial boundedness, which relate to voice and exit incentives for firms. The territorial nation state is a social construction, although one so basic to modern conceptions of society that it is rarely questioned. National borders embedded in this construct serve to limit actors in their exit options, favouring investment in 'voice' or democratic institutions and civil society, binding together actors within the territory into a society (Rokkan, 1999); this boundedness is an implicit underpinning of comparative institutional analysis. We examine how European liberalisation opens exit options for capital but constrains the rights of unions, works councils and mobile workers. It has allowed the

importation of informal work practices, placing these into 'regime competition' (Streeck, 1992) side by side with the German employment relations system. We examine the deterritorialization of national borders and the resulting impact on worker representation by discussing employment relations at the European Central Bank's (ECB's) new premises construction project in Germany in order to gain in-depth insights into the effect of the unbundling of sovereignty on labour relations. We conclude that transnational work, and the reconfiguration of regulation along non-territorial lines, facilitates exit over voice options in the German institutional system.

## **4.2 Methods and case selection**

We draw on in-depth interviews with posted workers and trade union officials, works councillors, management and labour inspectors gathered from March 2011 until April 2012 in Germany. The interviews were conducted in various languages, and interpreters were used when necessary. Many interviews were recorded with the permission of the interviewees; others were conducted with the interviewer taking notes. The authors translated the quotes from German. Posted workers are frequently forbidden by their employers or by site management from discussing their working conditions. Interviews are only cited insofar as doing so does not violate promises of confidentiality, and is not likely to result in negative repercussions for the interviewees.

The ECB construction site is interesting because it is a megaproject where only foreign posted workers do the labour-intensive structural works. The case is attentive to situations and interactions in concrete settings to show how Europeanization interacts not only with the nation state setting, but with actors at the local scale. The empirical data from the ECB site show how workplace relations are changed by deterritorialization connected to a pan-European labour market.

## **4.3 Organised capitalism, territorial cohesion and collective goods**

It is a key assumption of institutionalist frameworks that actors act primarily and are embedded within territorially bounded relationships, which can be analysed without reference to actors outside the national territory. This is also an assumption often inherent in the practice of institutional design; collective bargaining institutions, for example, have traditionally been presented in industrial relations as at their fullest development when they attain national scope (Commons, 1909). Comparative institutionalism relies on a notion of states as



containers in which regulatory practices span evenly across a given territory (Macartney, 2010; Brenner *et al.*, 2010), and only across that territory. This has long been a close enough approximation to reality, although challenged by globalisation. However, increasingly the EU politics of labour mobility cross-cuts and interconnects national regulatory systems, resulting in the deterritorialization of regulation. Deterritorialization and unbundling describe specific practices of sovereignty that we connect with transnational work relations. These practices produce tensions with socioeconomic systems organised along national lines. The permeability of borders permits exit, borrowing from other systems and hybrid solutions, which lead to a decline in the provision of collective goods.

Industrial relations institutions are first and foremost about providing voice (Freeman and Medoff, 1984). Territorial boundedness and coherence is a requirement for the efficient functioning of industrial relations institutions. Geographic borders define which social actors are parts of a given system, which encourages the exercise of 'voice' via national institutions and discourages exit to those within. National institutions establish cooperative norms through incentive structures - designed to punish non-participants within the territory and/or to reward participants. Historically, territorialization and boundary-making were part of the process of modern state-building, with stronger territorialization favouring voice over exit being connected to a smoother development of democracy (Rokkan, 1999). In territorially bounded nation states it was possible to lock in economic and social actors who then expressed their grievances through voice in national institutions.

The common presupposition of institutional analysis, whether in political economy or in industrial relations, is that economic systems and institutions are contained within and organised along territorially bounded national states. The regulatory framework within each nation state is regarded as coherent and to varying degrees containing or excluding the neoliberal market order (Brenner *et al.*, 2010; Peck and Theodore, 2007). Industrial relations institutions rely on fundamental assumptions about a connection between territory and borders; their functioning is likely to change as territories become less insular, and borders more porous. The bounded territory helps them arrive at within-system solutions: although goods may enter and leave the territory, the presumption is that there *is* a defined territory connected to a social collectivity which can be entered and exited. In this respect, states can be seen as units whose institutions make them more or less competitive on world markets, and whose internal institutional arrangements may evolve to address competitive challenges (Katzenstein, 1985). This line of thinking assumes that actors and the institutional world they inhabit are defined, so that there can be a meaningful differentiation between endogenous and exogenous.

Transnationalism and supranationalism, in different though interrelated ways, challenge this territorial locus of institutional systems. State-centred border

regimes remain foundational elements of the system, but the way in which transnational firms create and exploit deterritorialized sovereignty reduces the capabilities of states to regulate within their own territories (Sassen, 2005). There is a contradiction because capital as an aggregate needs territorial nation states to provide collective goods, but individual firms seek to escape from those systems in order to avoid contributing to collective goods. In a sense, Europeanization opens exit options, allowing actors to weigh the costs and benefits of participation, making them more likely to elect not to contribute to collective goods. As a result, we see increasing efforts by capital to strategically (mis)use institutions, instead of participating in them in good faith (Streeck, 2009).

The effect of deterritorialization on national systems enables exit from the industrial relations system without having to actually exit the geographic territory. From the perspective of employer strategies and labour market outcomes, transnational labour posting is not very different from, and is indeed often complementary to, other labour market segmentation approaches which do not seek 'exit' from the entire system, but rather exit from firm-specific norms and practices (Grimshaw and Rubery, 2005; Doellgast and Greer, 2007). Dual labour markets can be seen as an attempt to continue to access the collective goods provided by the organised economy, while creating less organised workspaces walled off from the organised economy in various ways. This is likely to produce labour market segmentation similar to that described in the labour market dualisation literature, and we agree that these sorts of firm strategies are more likely to prevail in institutionally dense national systems such as Germany (Doellgast, 2009).

Unlike the dualisation literature, which examines changing industrial relations within national systems, we are also interested in relating changes in labour market regulation to a set of related changes in the nature and organisation of the Westphalian state system – that is, in the ways in which the deployment of sovereign state regulatory authority is increasingly less connected to national territorial borders. This is what Ong (2006) means when she speaks of 'variegated sovereignty'. Because political access to rights is (mostly) only available via national systems, delinking territorial contingency with access to political and social protections allows zones of alternative regulation (social or spatial) to be created within sovereign territorial spaces. By exploiting these strategically, capital is able to remove specific workspaces, contexts and categories of people from the protection they would normally enjoy within sovereign states.

#### 4.4 Mechanisms for opening the European space

European integration abolishes fixed economic and legal territorial borders, which increases the possibility of exit (Bartolini, 2005). In the EU context, supranational actors have encouraged transnationalism as an integrative policy, seeking to bring about spillover effects and realise economic efficiency gains (Tömmel, 2011). The EU 'freedoms of movement', supporting legislation and case law move in the direction of opening national systems to outsiders – that is, they deterritorialize sovereignty and remove borders by removing regulatory requirements, resulting in declining commitment to territorially inclusive national institutions (Hurrelman, 2011).

Support for mobility in EU law arises out of an economic logic, with workers supported in their mobility as factors of production. The rights regime for migration in the EU assumes that migrants move as individuals. Increasingly, they do not. A great deal of the mobility occurs under the freedom of movement of services, rather than of labour, with the implication being that contracts refer to sending-country rather than host-country law (Schlachter, 2010: 6–7). Many workers now move as posted workers – that is, within transnational firms as dependent employees – precisely because it is possible to pay these workers less.

The EU Posting of Workers Directive (PWD) (96/71/EC) aims to regulate the movement of workers posted from one EU country to another. The directive was intended and originally received as laying down a 'host country principle' (Lillie and Greer, 2007), concerning which (national) employment regulations are applicable for workers posted by an undertaking in one member state to work in another member state. The PWD enumerates in Article 3 a number of areas in which the minimum standards of either the host country or sending country, whichever is better from the perspective of the worker, must apply. While this seems favourable for posted workers, it has since been reinterpreted in the light of the EU's 'Four Freedoms' of movement, in a series of European Court of Justice (ECJ) decisions<sup>10</sup> in precisely the opposite direction to that originally intended by its proponents (Moses, 2011). For the purpose of this study, it is decisive that the Court supported, in these four cases, the practical implementation of a 'country of origin' principle, asserting that union or government regulation of labour conditions for foreign service providers constitutes a violation of the free-movement rights as set out in the 1957 Treaty of Rome (Hyde and Ressaissi, 2009). This undermines the ability of national industrial relations systems to set collective standards according to their national traditions (Kilpatrick, 2009; Joerges and Rödl, 2009). The list of minimum conditions enumerated in the PWD is now considered 'exhaustive', meaning that member states are constrained from enforcing

<sup>10</sup> These so-called Laval Quartet decisions are *Viking*, *Laval* and *Rüffert* and *Commission v Luxembourg*, all of which were issued between December 2007 and June 2008.

conditions for posted workers beyond the minimum conditions set down in law or in extended collective agreements.

The tendency of EU jurisprudence to restrict posted workers' access to rights is an extension of the EU's promotion of 'regime competition', which has long been the outcome of the promotion of free movement of goods (Streeck, 1992). This older use of regime competition, however, occurred between geographical (national) territories and was mediated through national institutions. Movement of dependent workers as a 'service' removes this dependence on geography, marginalising host-country regulatory influence through the introduction of alternative national regulatory frameworks and practices. Limiting mobile workers' access to labour rights goes together with employers using flexible forms of production organisation to create categories of precarious employees for whom they take no responsibility (Meardi *et al.*, 2012). Exit occurs not because opportunities for exit exist, although this is a necessary precondition, but because firms take advantage of these opportunities, and because workers perceive their alternatives to exist within the job market created by these firms. Because posted migrants' contact with host societies is mediated via the home-country employment relationships, work can serve as a form of alienation from national host societies.

#### **4.5 German industrial relations**

In the classic German social market economy archetype, organised industrial relations is said to undergird competitive advantage in high-quality export-oriented production. Germany's dual system of unions for collective bargaining and works councils for in-firm representation produced 'democracy at work', closing out the 'low-road' of cheap, low-quality production using flexible labour markets, and encouraged German employers to participate in apprenticeship programmes that produced workers with high-level job skills (Turner, 1991). 'Institutional complementarities' between industrial relations and other sub-systems, such as skill formation and corporate governance, supported a 'high-wage, high-skill' equilibrium (Hall and Soskice, 2001). External challenges such as import competition reinforced the integrity of national systems because national competitive advantage was path-dependent (Thelen and Wijnbergen, 2003). German capitalists, under this social market economy model, were, only half reluctantly, pushed down the 'high road' of social partnership (Turner, 1998). While most research on the 'German model' focused on export industries, such as automobile manufacturing, the system also functioned in other non-export industries, such as construction.

These traditional institutional arrangements are under enormous pressure. Scholars in the above-described literature acknowledge that some changes have occurred in the institutional set-up, but not everyone regards them as undermining the existing arrangements (Thelen, 2009). Some have argued that the political impossibility of discarding traditional institutions has motivated employers instead to bring about change by adding new transformative elements alongside the old (Streeck and Thelen, 2005). While the traditional German model still covers a significant proportion of workers, a secondary labour market of low-wage workers outside of that system has grown (Bosch and Weinkopf, 2008; Palier and Thelen, 2010). Firms now regularly use outsourcing to smaller firms as a way to avoid works council and trade union power (Doellgast, 2009). From the perspective of employer strategies and labour market outcomes, transnational labour posting is often complementary to other dualisation dynamics of the German labour market. However, posted workers add another dimension to the debate, involving not just diverting from the standard employment relationship rules of the German institutional system, but rejecting German sovereignty and social regulation wholesale by employing precarious workers embedded in institutional systems other than the German one.

In the case we look at, we are mostly talking about importing labour relations that are less reliant on voice, and provide firms with lower cost structures, than does the German system. Indicators about the use of posted work in Germany exist in terms of subcontracting practices. Between 1995 and 2010, 50% of native construction workers were replaced by workers employed by foreign service firms (Bosch *et al.*, 2011). Moreover, in a comparative country study on EU labour mobility in construction, Germany emerged as the most significant case of recourse to foreign subcontractors (Fellini *et al.*, 2007).

German regulators and unions have made use of the options available to them to regulate posted work. The PWD was implemented in Germany via the German Posting of Workers Act (*Arbeitnehmerentsendegesetz*) of 1996, which was renewed in 2009. There was no general statutory minimum wage in Germany. The social partners, the construction trade union IG BAU (*Industriegesellschaft Bauen-Agrar-Umwelt*) and the two sectoral employer associations, the ZDB<sup>11</sup> (*Zentralverband der Deutschen Bauindustrie*) and the HDB (*Hauptverband der Deutschen Bauindustrie*), negotiated a minimum wage specific to the construction sector. After contentious negotiations they agreed on a minimum wage floor, significantly lower than the scale set out in the German collective agreement (see Eichhorst, 2000). The negotiated framework leaves room for employers to use transnational subcontracting to 'exit' from the collective agreement. This was then declared universally binding by a special wage commission in the Ministry of

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<sup>11</sup> The ZDB represents small companies and skilled artisans, while medium and large companies are organized by the HDB.

Labour composed of representatives of the employers, the union and the state. In addition to the minimum wage, the German Posting of Workers Act mandates certain other minimum rights, such as maximum work hours, a designated amount of breaks and paid time off.

The two-tier nature of the current wages structure is reflective of IG BAU's shop floor weakness in the context of an industry dominated by non-union migrant workers. IG BAU has responded by attempting to organise and represent migrants, but with very little success. One well-known aspect of this effort was the establishment of the European Migrant Workers Union (EMWU), which attempted to create a transnational structure from which workers could also receive representation in their home countries (Interview 1 with IG BAU union representative, Frankfurt, 2011). The EMWU failed to establish an independent role due to insufficient union support from unions in other European countries, as well as organisational flaws in EMWU itself, and was eventually reintegrated into the IG BAU (Greer *et al.*, 2013). Although the idea of an independent transnational migrant workers union has been abandoned, the IG BAU strategy of representing posted migrants remains the same: represent the rights of posted workers at the political level and provide information to workers on construction sites or at housing sites and legal services in certain dire cases. Although the union is quite active in pursuing legal cases (Van Hoek and Houwerzijl, 2011), it seems overwhelmed by the scale of the posted worker problem and is only able to intervene in specific cases. As the ECB case will show, problems in accessing and engaging with posted migrant workers make it difficult to see a path for IG BAU to regain a shop floor presence through organising.

#### **4.6 The European Central Bank Construction Project**

The ECB new premises construction project exemplifies how mobile workers are insulated from Germany's conventional institutional structure in three main respects. First, transnational subcontracting chains consisting of firms with no tradition of participation in the German skill formation regime lead to exit from that regime. Second, the restriction of trade union site access, combined with the presence of vigorously non-union foreign firms and workers unfamiliar with German labour rights and trade unions, leads to exit from collective bargaining. Third, hierarchical transnational subcontracting chains, and presence of firms not covered by the German works council legislation, inhibit the functioning of the works council system. The labour market is segmented in a way similar to that described in dualisation theory, but which also reveals a restructuring of the relationship between sovereignty and state territory. Posted workers find

themselves working on Germany territory, but isolated from its worker representation and skill formation frameworks.

At the ECB, we find widespread outsourcing of labour-intensive work to mainly central eastern European subcontractors, undercutting wages and undermining skill formation. One of the ECB's main contractors (the ECB site has several) outsourced its labour-intensive structural work to approximately 20 transnational subcontractors – all of whom posted workers from abroad to work on the site. Of the approximately 1,000 construction workers on the ECB site as of May 2012, 25 were employees of the main contractor for structural works, and all these were managers or foremen (Works councillor of a contractor company, interview, 2012). Posted workers lived and worked in single nationality groups. Different nationalities performed 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 (IG BAU, interview, 2012). The physical location of the nationalities on the site also differed accordingly. The Turkish and Serbian workers work on the ground level, while the Polish workers work in the high rises. There was no communication between the different work teams. The language of communication on the site was German, although most of the workers did not speak German. One member of each work team has to be able to speak German in order to pass on the orders from management (Works councillor of a contractor company, interview, 2011). Management of one of the main contractors, one of the largest buildings firms in Germany, explained that the reason why they subcontract all of the building work was to ensure cost competitiveness. In order to be able to offer the most competitive price in the bidding process, they have to work with partners who pay only the minimum wage to their workers. In choosing the subcontractors the management made a distinction between German and foreign subcontractors:

We pay the collective agreement wage [to our own staff]. Eastern European companies and German subcontractors pay their staff minimum wages and can offer a more competitive price. Eastern European firms can offer a more competitive price because they have fewer surcharges. They do not see themselves as a construction company but as a service provider. This is the key difference.

(Management, interview, 2012).

Cross-border subcontracting opens up another, more price-competitive exit option for German companies compared to national forms of disembedding. A works councillor from the same firm reiterated that 'the firm can earn more money by hiring a subcontractor even though we would have our own staff to do the job. The margin [ratio of native: posted workers] is already at 1:3 and that's the purpose of subcontracting' (Works councillor of a contractor company, interview, 2011). Even as the company adheres to German industrial relations for its own staff, it circumvents the country's institutional arrangement by employing foreign

subcontractors who do not and are more price competitive than German subcontractors. This form of subcontracting is used especially for labour-intensive, low-skill parts of the construction process (Management, interview, 2012).

In construction, works councillors have traditionally worked to ensure continuous vocational training systems on all levels, supporting a high-skill, high-wage employment paradigm in the construction industry (Bosch and Zühlke-Robinet, 2003). Nothing like this is available for posted workers at the ECB site. While the works councillors of the main contractor ensure that their core staff receive further training, none of the posted workers I spoke to were offered advancement opportunities while working in Germany. In the opinion of the works councillors it would not be very beneficial to their own firm if they were to invest in the training of posted workers. One works councillor said:

[I]f we give a lot of input, nothing sticks. And that's the difference to our own staff. If you train them you get something back. You can even track it. But when you invest in training staff from subcontractors, you get nothing out of it because they take our investment with them somewhere else. I cannot judge if they use it at other construction sites.

(Works councillor of a contractor company, interview, 2011).

This promotes a system in which workers are often asked to perform tasks not related to their qualifications. The main contractor differentiates when contracting out to a German subcontractor or foreign subcontractor. In case of a task that requires highly skilled personnel, he would contract to a German company while the firm would subcontract to a foreign company for the labour-intensive works (Interview with management, Darmstadt, 2012). This is not to say that the posted workers I spoke to had low skill levels. On the contrary, many were highly skilled working for a low-skill wage. One worker told me that there is no upward mobility in the firm. He could get additional training in Poland, but the firm expects flexibility. Workers can neither choose the country where they will perform the work nor the tasks they are doing. The firm decided where (in Europe) and for what task the worker is needed (Polish crane operator, interview, 2012).

#### **4.6.1 Voice Mechanisms for Posted Workers**

Our empirical research highlights how the increasing use of the above-described subcontracting arrangements enables German companies to exit from relations with the union and works councils. In the German context, voice is provided through the 'dual system' of firm-centred works councils in the workplace and trade unions in industry-level collective bargaining (Müller-Jentsch, 1995). A difference in terms of organising native as opposed to transnational posted workers in construction is the familiarity with the firms. In practice the union is in touch with the works council of German firms and even if there is none, the union



will still be familiar with the firm and its management (Interview with IG BAU union representative, Frankfurt, 2012). However, with the liberalisation of the provision of services new unfamiliar actors have entered the construction market. In the absence of established relationships, one of the main ways of engaging with workers is site visits to distribute information about labour rights, and ask about working conditions.

IG BAU has the right to access all construction sites on German territory, codified in a clause in the national collective agreement (IG BAU, interview, Frankfurt, 2011). As commonly happens in construction, at the ECB site, project management also obstructed union access to the workers. ECB management justified its response on a 1998 agreement between the EU and the German government granting the ECB extraterritorial status, and the discretion to decide who enters its premises (Articles 2 and 5). Even though this law was only intended to cover the current ECB headquarters, and has uncertain application in the labour relations context, ECB management argued it also applied to the construction site. According to the union, if it can only enter the site after officially asking for access, employers will 'clean everything up [. . .] and tell the employees how to answer our questions'. The monitoring of employment standards at the ECB new premises site, as one unionist expressed, 'has been massively hindered' by this restriction (IG BAU, interview, 2011). Government labour inspectors were allowed to enter the site to check the legal status of workers, but also seemed doubtful of their own effectiveness: '[I]nspections can be performed but whether these occur to a proper and necessary extent that I cannot judge. That I cannot say' (Labour Inspector, interview, 2012).

In claiming extraterritorial status, the ECB site management is not doing anything unusual. At other sites in the region the union has had similar experiences, with management trying to restrict the access to the site through various means (IG BAU, interview, 2012). In similar cases in other countries, unions encountered similar arguments – in Finland unions were shut out for reasons of 'nuclear safety' at the Olkiluoto 3 nuclear power plant construction site, and Dutch unions had long negotiations to access construction sites in the Eemshaven (Lillie *et al.*, 2011). Site managements around Europe increasingly seek to prevent unions and labour inspectors from interacting with posted workers, and seize on the nearest available justification. The borders imposed to interacting with posted workers combined with short job tenures, fear of employer retaliation, language barriers and the opacity of employment rights challenge the effective interaction between the union and posted workers.

Another possible channel for worker voice and way for the IG BAU to access the site would be via the main contractors' works council.<sup>12</sup> Most construction

<sup>12</sup> Interest representation at the company level in Germany is decreasing (Bosch and Zühlke-Robinet, 2003). However, the main contractors in our case study had a works council at the time of the interview.

work at the ECB site is performed by foreign subcontractors, which have neither works councils nor trade union structures. In the German metal industry, works councils of core firms have sometimes used their power to influence industrial relations conditions in contractor firms (IG Metall, interview, 2007<sup>13</sup>). However, employee representatives from the ECB main contractor told us that it is 'illegal' to represent employees further down the subcontracting chain in construction because they do not belong to 'their company' (Works councillor of a contractor company, interview, 2011). Workers from the main and subcontractors may not 'mix' as this would be suggestive of the situation with temporary agency work, which is (mostly) prohibited in construction. The only possibility for the main contractor works councillors to communicate with the posted workers is via the posted workers' supervisor. The standard way to inform a posted worker about a health and safety breach on the site is to 'notice the defects, communicate it to the supervisor who informs the workers about it' (Works councillor of a contractor company, interview, 2011). This invokes neither direct contact with the workers nor interest representation. While German subcontractors also operate under the same limitations, their workers have other channels as well as the right to establish their own works council – at least in principle.

#### 4.6.2 Working in Spaces of Exception

The posted workers notice the lack of representation. Among the workers we interviewed, most did not know to whom to address their problems and none had ever been informed about worker rights. One posted worker told us that 'union representation does not exist. There is no right to strike for us. Even if you are sick you can get in trouble' (Polish steel worker, interview, 2012). Most of the workers we talked to were unaware that a works councillor checks the health and safety standards on the site, remarking that workers have to take care of the health and safety standards themselves and no one else cares. Their only option to communicate grievances is directly to their supervisor. In the interviewees' opinions, if a worker has grievances, realistically all he can do is quit.

The workers we talked to expressed a disconnection with the German work environment. They worked together with home country colleagues, for home country firms, were usually paid in their home country, and had families in their home country. One worker related: 'A German decides what work is to be done, but he gives it to my Polish boss. We work as Poles, as a Polish firm, but under a German firm, under German management, oversight' (Polish steel worker, interview, 2012). It is not just one factor, but a combination of legal barriers, organisational borders between firms, lack of union capacity and familiarity with subcontracting firms, and weak wage agreements that all add up to home country

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<sup>13</sup> Interview by Nathan Lillie, used with permission.

conditions on the ECB site for foreign workers, but side by side with German conditions for German workers, all underneath German management.

#### 4.7 Discussion

Although comparative institutionalist analysis relies heavily on implicit assumptions of internal territorial cohesion, if we make these assumptions explicit, à la Rokkan (1999), it becomes apparent that the decline of territorial cohesion implies changes in the operations of these systems, and to the extent to which they can be called independent systems. The industrial relations at the ECB site suggest that workers experience this as a profound disconnection; they do not have local ties and representation channels, but work in isolation from the German system. The firm practices, which shape their relationship with their employer, derive not from the German industrial relations traditions but from the countries from whence the posted workers originate. As we have seen, unions are excluded from the ECB site, works councils have no rights to engage with posted workers and skill formation is informalized. As a result, collective agreements are not applied and workers have no independent channels for grievances.

Transnationalism and deterritorialization as discussed in the ECB case show that trade unions and works councils are inhibited from serving as channels for participatory workplace democracy. In the absence of effective collective organisation, channels for worker voice do not operate for the posted workers at the ECB site; rather they are separated from the institutional structure in Germany through which worker voice is secured. Works councils are very much focused around the firm, so in a highly subcontracted industry, with the intra-firm hierarchies this implies, works councils are ill-suited to organising solidarity at the site level unless they would be granted rights to engage with posted workers. In other industries, employers have subcontracted to take advantage of this dynamic (Doellgast and Greer, 2007). Unions are unable to get a foothold on the ECB site because their usual way in, through the works councils, would only allow them to organise the German contractors and not the more numerous foreigners. This is important as new actors are present in the construction sector unfamiliar to the German union which makes it important to engage with the workers on site. IG BAU does not have a strong network of lay activists and lacks the capacity to send representatives to the sites to meet with the workers. Language barriers, site mobility, fear and mistrust of unions strengthens the barriers between the vehicles of participatory workplace democracy and the posted workers.

On the ECB site, treatment of workers differs by nationality, but these differences in treatment coincide with firm borders as well. Organisational studies have long recognized that within firms, internal norms of reciprocity and fairness

develop between workers and management. These follow an internal organisational logic only partly dependent on outside context (Doeringer and Piore, 1971; Grimshaw and Rubery, 2005). Indeed, if workers of different nationalities were employed by the same firm, and not via a subcontractor incorporated in a different country, according to different wage norms, national and EU rules about equal treatment would suddenly become applicable.<sup>14</sup> Subcontracting sets groups of workers outside these norms. For this reason, it is common to see posted workers employed via subcontracting arrangements because this does not trigger a claim to equal treatment internal to the firm. Subcontracting arrangements therefore exist in interaction with recruitment in certain national markets, and are used to keep different groups of workers organisationally and legally apart. Regime competition, in the sense meant by Streeck (1992), is not merely between national economies, but between work groups of workers who may be side by side on a European construction site, employed by different firms to reference the different national regimes. In this way, nationally bounded firm strategies of labour market dualisation interact with and reinforce segmentation via transnational subcontracting.

Posted workers are hired and sent by contractors or work agencies from their home countries. If they came as individuals, they would be legally entitled to equal treatment with native workers. There is an element of acquiescence to posted worker behaviour on which the system depends; this is in part due to ignorance and uncertainty, but conversations with posted workers also clearly reveal discontentment at unequal treatment. It is common for short-term migrant workers to continue to frame their work expectations with reference to their home, rather than host, country. Their goal is to earn as much money as possible in a short time, with the idea of improving their economic situation at home (Piore, 1979). While migration normally involves a process of integration and adoption of local norms, after which the workers no longer serve as a source of cheap labour, the continued home country environment in the workplace and absence of regulation reinforces the spaces of exception, meaning the workers' conditions continue to be determined by home country norms. Legal exception, through the country of origin principle, is an important factor in keeping posted migrants separate, but equally relevant are industrial relations practices and internal organisational practices which firms carry with them. These exist in a mutually constituting and reinforcing relationship with the legal aspects of shifting sovereignty.

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<sup>14</sup> This has been an issue in the seafaring industry - Maersk Shipping has issued contracts which explicitly forbid seafarers from moving their formal residence from the country from which they are hired, for exactly this reason. Interview with 3F, Danish Trade Union, Transport Group Official, Genoa, Italy, 2010. Interview by Nathan Lillie, used with permission.

## 4.8 Conclusions

Our analysis of the ECB site reveals that changes occurring in the relationship between sovereign states and territory are reflected in the practices of workers and employers. Firms use subcontracting not just as an 'exit' option from relationships with unions and works councils, but also for accessing another territorial frame of regulation. The Polish workers at the ECB site were working for a Polish employer on a Polish contract. Their work environment, frame of reference, taxation, social security – everything to do with their employment – refers back to the Polish context. Their employer has left Poland geographically, but in a regulatory sense extends Poland's institutional system onto German territory and into direct, unmediated, competition with the German institutional context. Rokkan's (1999) concern with national territories was that they provided borders, beyond which 'exit' was expensive, thus favouring investment by actors in 'voice' or democratic institutions and civil society, binding those within the territory together into a society. As the border becomes porous, it no longer discourages exit, undermining voice and investment in national civil society. In this case, the civil society institutions supporting the German institutional system – in terms of worker representation, but also training – no longer function.

This development is embedded in deep structural changes in the German political economy. Transnational worker posting has a similar labour market effect as dualisation policies or subcontracting arrangements (Palier and Thelen, 2010; Doellgast, 2009). I draw attention not only to the labour market changes, but also to the deterritorializing effects of supranational regulations that create intensified labour market competition, and vice versa. We have shown that there is interplay between the blurring of territorial boundedness and the increasing availability of exit options. This is especially harmful for posted workers as their employment relations take place in legal grey zones isolated from the German institutional structure. The borders existing exist due to language barriers, worker mobility, new actor presence, and fear and mistrust on behalf of the workers reinforce this isolation.

Workers and employers on the ECB site, and on other, similar sites around Europe, are no longer confronted with an insular, territorially defined, regulatory framework, but rather with an array of regulatory contexts, defined only partially and imperfectly by geographical contingency, between which they can choose and strategize. We are interested in the changing geography of states, but, similar to offshore, this is not so much about state power or its decline, but rather the exercise of state power through a decision not to regulate (Palan, 2003). Furthermore, this is not neutral, but rather favours capital over labour, and is a deliberate circumvention of democratic institutions. This is not surprising: Rokkan's work also suggests that historically states with well-defined borders had an easier path

to democracy. However, while posted workers are largely isolated from the German industrial relations institutions, institutionalizing workplace democracy, during their posting they may also be embedded in other social relations, such as civil society. For both workers and unions this can be an important alternative power resource. The following chapter explores under which conditions worker resistance comes about in these transnational marginal spaces.

## 5 EU POSTED WORK AND TRANSNATIONAL ACTION IN THE GERMAN MEAT INDUSTRY<sup>15</sup>

### 5.1 Introduction

Territorial boundedness and coherence long served as the backdrop for the efficient functioning of industrial relations institutions. Europeanization, however, has arguably started to disassociate, or deterritorialize, the bonds that tied trade union structures to fixed spatial configurations. In Germany unions are struggling to adapt to these new challenges while also aiming to ‘reterritorialize’ the relations with labour migrants. Reterritorialization implies the reinsertion of an element previously extracted from one context (this is called deterritorialization) into another. While a certain destruction takes place during deterritorialization, it also opens up the opportunity for reterritorialization. Deterritorialization in its most useful sense therefore forces us to think anew about how territorial configurations are challenged and re-challenged (Ó Tuathail, 1998: 82; Cox, 1997; Brenner, 1999).

This chapter examines recent efforts to re-embed or reterritorialize posted workers in collective representation in the German meat industry. This industry is currently the leading meat producer in the EU. Its economic success can be attributed to a combination of high technological standards and a low-wage and increasingly transnational workforce. German meat companies profited from

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<sup>15</sup> A slightly altered version of this chapter has been accepted and is forthcoming at *Transfer: European Review of Labour and Research* as part of the special issue ‘European Collective Action in Times of Crisis’ 2015-2: Wagner, I. “EU Posted Work and Transnational Action in the German Meat Industry” *Special Issue: European Collective Action in Times of Crisis. Transfer: European Review of Labour and Research 2015-2*. Accepted and forthcoming.

lower labour costs, labour flexibility and posted workers' isolation from collective representation. By contrast, transnational posting weakened the position of the NGG (*Gewerkschaft Nahrung Genuß-Gaststätten*), the trade union representing the meat industry. However, the union is now seeking alternative ways to counteract the often-precarious employment situation of the posted workforce. While the comparative industrial relations literature argues that German trade unions are unlikely to form coalitions with other civil society organisations (Baccaro *et al.*, 2003), surprisingly it is exactly these kinds of coalitions that seem able to build relations with posted workers and reintegrate them into the host country's institutional framework. From an analytical perspective, I consider these coalitions as examples of reterritorialization, that is, a form of resistance in increasingly deterritorialized labour markets (Pile and Keith 1997).

Through an exemplary case study I will trace the process and explore the conditions under which reterritorialization can evolve in these transnational workspaces, in this case through an alliance in the meat industry between transnational posted workers, a local civil society organisation and the trade union NGG. The case study concerns a group of Polish posted workers employed in the German meat industry resisting precarious management practices. A local community initiative, the NGG and the media played a major role in facilitating resistance. The case demonstrates that the transnational nature of posted workers' employment relationship and living situation requires a different approach to organising resistance beyond the traditional institutional perspectives on German trade unionism. The case goes against traditional arguments that German trade unions usually refrain from forming coalitions because of their institutional position and Germany's strong employment law. I ask the following questions: Under which conditions are posted workers able to exercise voice when traditional channels of representation are absent? How can we explain a shift by a trade union in a national context in which it is more uncommon than not to mobilise labour migrants from the grassroots in coalition with civil society actors? And under which conditions are these coalitions successful?

The present case contributes in a number of ways to findings from other studies of union strategies towards labour migrants (among them Krings, 2013; Bengtsson, 2013; Tapia and Turner, 2013; Lillie and Greer, 2007). In doing so, it aims to enhance understanding of the challenges and limitations for traditional and non-traditional actors in a pan-European labour market. First, it highlights the shift in German unions' strategy from social partnership to coalition-building (Greer, 2008), revealing blind spots in cross-national comparative perspectives based on institutional equilibrium (Tapia and Turner, 2013). Second, it demonstrates the conditions under which such coalitions emerge and are successful. Third, it illuminates how posted workers can be embedded in the host-country institutional system and voice concerns in situations where traditional channels of representation are inefficient (Tapia and Turner, 2013). Fourth, the case



highlights how unpromising prospects for goal attainment, instead of opportunity structures, can also enhance chances of forming coalitions (McCammon and Campbell, 2002). Finally, it emphasises the importance of engaging with migration and its different configurations in relation to industrial relations, an area too often neglected by industrial relations scholars (McGovern, 2007; for exceptions, see Berntsen, forthcoming; Wagner, 2014; Alho, 2013; Fine, 2006; Holgate, 2005; Milkman, 2006; Wills, 2004).

This chapter proceeds as follows. First, the EU-induced deterritorializing tendencies in the posting labour market as well as the reterritorialization possibilities for trade unions are explored. The following section describes the research methods, followed by the case study on transnational action in transnational workspaces. In the discussion I explore what this case can tell us about contemporary debates in comparative political economy and industrial relations. These insights contribute to our understanding of how unions can and should interact with labour migrants in an era when labour mobility is both intensified and politically contested (McGovern, 2007) and how far these relations contribute to renewed union solidarity and vitality (Le Queux and Sainsaulieu, 2010).

## 5.2 De- and reterritorialization in the context of EU worker posting

A fundamental characteristic of the modern nation state and of democratic societies is the territorial basis of its legislation (Supiot, 2009). The territorial principle also extensively regulates industrial relations and working and employment conditions. Most supranational regulations concerning employment conditions leave this basis in place. For example, when labour migrants cross borders via the free movement of persons they enter a new legal system and become subject to the legislation of the destination country. By contrast, posted workers move as dependents of service providers. Worker posting became increasingly relevant after the Eastern European enlargement due to socioeconomic differences between the EU member states. Posted workers are regulated under the free movement of services instead of migration. As a result, their employment relationship is embedded in (at least) two national contexts and social security contributions are paid in the home country. Even though they work in the territory of the host country, they are regulated under a different regulatory framework and largely excluded from the host-country institutional system. While migrant workers are regulated under an *international* framework, posting follows a *transnational* pattern because their employment relationship is mediated by their employer instead of by the host country (Lillie, 2011).

Posting firms determine the duration of stay in the host country as well as some of the applicable workers' rights by basing themselves in countries with a favourable regulatory regime. Following an employer-managed migration pattern, the company determines and certifies who is to move and who is not. The rights of posted workers are increasingly related to their employer instead of the sending or receiving country (Guild, 2001). The growth of posting thus follows a path laid by the gradual unfolding of tensions between the international system and national industrial relations institutions, representing a particular form of what Bruff (2010) calls an 'articulation between the national and the international' (2010: 616). Posted workers, even though working in the host-country territory, are disconnected to a large extent from that country's institutional system and labour relations. Posting disentangles the borders, tying economics, politics and culture to fixed spatial configurations. In the posting-of-workers discussion, *deterritorialization* connotes the decontextualization of labour law and industrial relations systems from particular territorial ties (Mundlak, 2009). The European Union deterritorializes capital and labour from the restrictions of national regulatory systems (Bailey, 2010).

This context poses a challenge for industrial relations, working and employment conditions, and modern unions because these institutions evolved in symbiosis with the nation state and are also extensively regulated by national legislation (Streeck and Hassel, 2003). In Germany, employment relations grounded in the concept of social partnership (Behrens *et al.*, 2004), feature institutional representation through collective bargaining as well as the workplace-independent but union-dominated works council system. The latter not only diminished competition between unions but also secured interest representation in the workplace. Collective bargaining, just like labour market regulation, was territorialized by embedding a legal pattern within and through the state, with its coverage usually limited to employers and workers within the territory's borders (Mundlak, 2009). European integration gave employers the option to exit territorial regulation. The posting regulation enables them to insource labour from other regulatory regimes into the country where the work is carried out.

In the German meat industry the absence of a minimum wage made the outsourcing of certain parts of the production process particularly interesting. The social partners in the meat industry introduced a sectoral minimum wage only in January 2014. Before that, the NGG faced severe employer resistance to industry-level bargaining. In fact, the employers' association in the sector even dissolved at one point, depriving the union of a centralised counterpart at the bargaining table (Behrens and Pekarek, 2012). Moreover, works councillors have no rights to engage with posted workers or co-decide whether subcontractors are employed. Organised labour has little influence over subcontracting at all. This created workspaces in which home-country conditions in fact applied to the posted

workforce. The wages are calculated according to the state where the firm is based, creating 'regime competition' (Streeck, 1992) between workers.

This creates workspaces in which, in order to cut labour costs, employers in Germany hire foreign workers under different employment conditions that depend on the seat of the service provider, even though the employees themselves work in the same workspace performing similar jobs. These practices create and reproduce workspaces physically inside, but juridically and socially apart from, national systems (Wagner and Lillie, 2014). For example, a Poland-based company can legally offer to send its employees to Germany to process a certain amount of meat in a certain amount of time at a German slaughterhouse. Its employees perform their work at the German company, but their wages and employment rights refer partly back to the sending country's standards. This deterritorialization of the labour market has resulted in the employment of a largely Eastern European workforce working for three to five euros per hour.

However, deterritorialization is regarded as a process consisting of both destabilising and stabilising tendencies, or reterritorialization (Deleuze and Guattari, 1988/2004: 98). Transnational workspaces need not be spaces of exclusion. Resistance may reterritorialize spaces in various ways in order to transform their meanings and 'enable [them] to become [spaces] of citizenship, democracy and freedom' even within limits (Pile and Keith, 1997: 30). The margins especially have recently been discussed as sites of resistance. Other forms of regulation may also produce 'other' voices (Hetherington, 2003). The reterritorialization process arises from the re-embedding of elements into a different context. In this case reterritorialization could mean disembedding posted workers from the meat industry's (absent) regulatory framework that lacks collective action (deterritorialization) into an inclusionary framework with collective interest representation. In the traditional industrial relations literature, collective bargaining is viewed as a process aimed at re-embedding an otherwise oppressive environment (Colling and Terry, 2010; Katz *et al.*, 2008). Where no such channels exist, employers resist power-sharing, and workers may require a more active mobilisation to promote their interests and win acceptance of collective representation (Tapia and Turner, 2013).

The union revitalisation literature argues that variations in trade unions' institutional position explain different strategic choices in their organising efforts with previously unorganised groups of workers, such as migrant workers (Baccaro *et al.*, 2003; Frege and Kelly, 2003; Krings, 2009). Previous studies discussed the ability of unions in various host countries to organise migrant workers after the enlargement of the European Union in 2004 (Bengtsson, 2013; Eldring *et al.*, 2012; Fitzgerald and Hardy, 2010). Depending on institutional strength, sectoral characteristics, and their ability to innovate, unions in, for example, the UK, Denmark and Sweden managed to include migrant workers by employing staff with relevant language skills or by cooperating with other organisations.

German unions are under similar strain to include previously unorganised groups of workers. Nevertheless, it is argued that the institutional embeddedness of German unions and a 'framework of employment law [that] has remained broadly supportive,' restrains them from seeking coalitions with community organisations, mobilising workers outside the usual tool of the strike, and framing issues in terms of social justice (Frege, Heery and Turner 2004: 146). If they did so in the past, the issues were not vital to union interests. However, most of what we know about German industrial relations is based primarily on studies of large manufacturing firms (Greer, 2008). Also important are differences within countries (Artus, 2007) and within transnational contexts. In the case considered here, the meat trade union NGG has sought to establish closer ties with community initiatives. To mobilise resistance in the absence of collective representation, and in the absence of collective bargaining, unions do in fact seek to build coalitions with other actors.

### 5.3 Research methods

This article focuses on the German meat industry because posted work is increasingly used in this sector to cut labour costs and undermine worker voice (Krings, 2009). The study is based on qualitative open-ended interviews with posted workers from Poland, Romania and Bulgaria. The interview focus was to gain insight into the workers' lived experience of their employment relations, and to learn how they had resisted management practices in an environment overtly hostile to trade unionism. I triangulated this material with expert interviews, union reports and newspaper articles (Stake, 1995). I conducted interviews and follow-up interviews with activists from a local community initiative, NGG staff, works councillors and management from the main contractor. In addition to these interviews, I spent several afternoons at the workers' and activists' housing sites, where group interviews were undertaken. The research data was stored and coded using MAXQDA qualitative data analysis software. All interviews are anonymised in order to protect the informants.

This case study is embedded within the context of a four-year study on posted work in the meat and construction sector in Germany and is part of a larger project comparing posted work in Germany, the Netherlands, Finland and the UK (ERC Starting Grant #2637820). In this respect, it not only contributes to a growing body of qualitative studies that illuminate workers' position and their possibilities for resistance in poorly regulated workspaces various EU countries, but also connects the findings to a developing literature on how immigrants and contingent workers are organised under circumstances in which traditional mechanisms of industrial relations systems are marginalised (Berntsen and Lillie, 2014; Tapia and

Turner, 2013; Vandaele and Leschke, 2010). It also contributes to the literature on migration and industrial relations, a topic still largely neglected by industrial relations scholars (McGovern, 2007; for exceptions, see Fine, 2006; Holgate, 2005; Milkman, 2006) which is an input in theory development (Gerring, 2004).

#### **5.4 Transnational action in the German meat industry**

The production process in the meat-slaughtering and meat-packaging sector is fragmented through a specific division of labour between large contractor firms and small and medium-sized subcontractors. Since the Eastern enlargement of the European Union in May 2004, the large German slaughterhouses have scaled down the core workforce to a minimum (NGG, 2013). Labour is the first expense of a company operating in the meat sector, representing up to 82% of the net added value (Mériaux, 2011). Therefore, labour costs have a direct impact on competitiveness and are reduced by increasingly employing posted workers via subcontracting arrangements. As a result, the majority of the meat slaughtering and processing in Germany today is done by posted and temporary workers from Eastern Europe working for an hourly wage of about three to five euros (NGG, 2013).

A combination of 'an unholy alliance of technical efficiency and wage dumping' has led to an increase in exports and related profits for meat companies based in Germany (NGG, interview, 2013). In this process the meat industry has seen a numerical reduction of companies accompanied by the expansion of a few large companies, with little or no communication taking place between them (Sebastian, 2014: 20–21). The low production costs in Germany have become widely known abroad. On the one hand, international meat companies are moving their production to Germany in order to escape from the tighter regulatory frameworks of their countries, such as Denmark (Hassel *et al.*, forthcoming). On the other hand, European countries like Belgium, France and Austria have started to accuse Germany of unfair competition practices due to employing posted workers under 'dumping' wages and of undermining traditional forms of worker representation.

The main response at the policy level from the NGG to increased labour migration has been to demand the introduction of a legally binding minimum wage. At the workplace level, organising hypermobile workers proves to be an inherently challenging task. Workers oftentimes accept substandard employment due to experiences of unemployment in the home country or because of cross-country wage differentials. The workforce is often unfamiliar with or rarely seeks the help of collective channels of representation (NGG, interview, 2013). Moreover, worker mobility and language barriers inhibit initial or continuous communication with union staff. To a certain extent the challenges of including posted migrants into

collective channels of representation revealed the weakness of the trade union itself (NGG, interview, 2013). In order to counteract these processes, the union started to form coalitions with local groups (NGG, interview, 2013). An example of such a coalition as well as the conditions under which it was able to develop and be successful are explored in the following.

#### **5.4.1 Power relations in transnational workspaces**

This case involves a group of 82 Polish posted workers. A first-level German agency firm subcontracted their employer, a Polish firm, at a meat factory in Germany. Their employer was a second-level firm. The factory had 1,100 employees in 2012, of which 50% were core personnel and the other half externally employed. Of the external employees, 90% were subcontracted and 10% agency workers (Interview management, 2012). The largest nationality groups of the posted workers are Polish, Romanian and Hungarian (Works councillor, interview, 2012). Due to long subcontracting chains neither the management nor the works councillors of the main contractor were aware of the existence of the second-level subcontractor and the working conditions of its workers.

The workers' contract stated that they would receive an hourly wage of €7.50, with additional overtime, night and weekend work bonuses. Upon arrival they were paid four euros per hour with no bonus pay on top. Moreover, they were treated as a highly flexible source of labour. The supervisors decided late every evening which worker was assigned to work the following day. At times the workers were transported to the factory only to learn that no work was available on that day and consequently did not earn any wages. Some of the workers worked in the meat-slaughtering halls and others in the meat-packaging section. The employer organised the transportation to and from work; on various days workers had to wait hours for the transportation after a ten- to twelve-hour shift. The company did not pay social insurance and sick pay as promised to the workers (Community initiative, interview, 2012). In a severe case, a woman who suffered a work accident was sent back to Poland and the lack of treatment resulted in permanent disability (Community initiative, interview, 2012).

Moreover, the living conditions were substandard. Upon arrival the workers were confronted with empty flats and they had to collect furniture from the bulk waste on the street. Eight to twelve workers had to share a two-room flat. There was no gender separation in the flats and a person close to management lived in each flat in order to watch the workers in their leisure time. In the factory the workers were not provided proper work clothes: even though the clothes adhered to the hygiene standards of the factory, they did not protect the workers against the cold in the cooling chambers where the meat was cut and processed.

Solidarity was difficult to establish within the work team because of high labour turnover and management oversight in their apartments (Interview Polish

posted workers, 2012). Moreover, the workers were engaged in industrialized work for the first time and had no prior experience in collectivism. Such attitudes worked in concert with workers' unfamiliarity with the union structure in Germany, fear of employer retaliation and lack of appropriate contacts (Interview Polish posted workers, 2012). Employees had few options for expressing discontent other than unilateral exit. The material motivation for taking up the work in Germany – related to paying off debts, experiences of unemployment in the home country, or being able to finance medical procedures for family members – increased the workers' dependency on the job, and the low-skilled nature of their work placed them in a poor bargaining position (Interview Polish posted worker, 2012).

#### 5.4.2 A 'moment' of transnational action

The labour practices in the meat factory received local and later national attention when the posted workers shared their grievances with a local community initiative. The initiative was created in 2006 and consists of ten volunteer activists, who also finance the incurred costs. Most of the volunteers are employed in the care sector. From its outset the initiative raised a scandal over the arbitrariness of companies and entrepreneurs against their employees in the region of North Rhine Westphalia. Using media pressure, it has organised public solidarity around and supported local work disputes on, for example, the unlawful termination of works councillors or the improper use of 'one-Euro jobbers'<sup>16</sup>. While the community initiative had experience in mobilising workers and creating public solidarity, by 2012 they had not yet interacted with hypermobile EU workers.

The posted workers' housing sites were based in the same town where two activists from the community initiative lived. The story began when two activists became aware of the posted workers' situation by chance. One activist, a Polish native speaker, overheard a conversation of the Polish posted workers in the local store and started to make conversation. In the opinion of the activist, trust was established because of their shared nationality and language and, having herself immigrated to Germany many years before, she came to be regarded by the workers as a confidant (Interview community initiative, 2012). Meeting a fellow Polish native speaker served as a catalyst for the workers, who shared their grief about their work and living conditions. However, after the initial chat the workers did not want to act on their situation further. Nevertheless, the two activists decided to try and mobilise the workers.

The initiative informed the union from the beginning about the workers' situation. Ideological positions influenced the likelihood of the emergence of the coalition. The activists are trade union members themselves. They believed it to be

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<sup>16</sup> One-euro jobs are intended for unemployed persons in order to reintegrate into the employment relation. It has been observed that firms use it to employ low-wage labour (Dörre, 2005).

important to include the NGG in the process. Together they decided that the community initiative would try to establish further contact with the workers and keep the union informed. The initiative sought contact with workers over a period of several months by repeatedly visiting their housing site and distributing flyers with information about the workers' rights. Finally, contact with a group of six workers was established by entering the housing site without management noticing. The workers trusted the two activists and repeatedly visited the activists' home on Sunday afternoons. Together they looked at their contractual situation in order to decipher which rights the workers had and how they could claim them (Interview community initiative, 2012).

In response to the precarious working situation and the workers' dependency on the employment, the initiative decided on a strategy of media attention. The aim was to present the case in a social justice frame to win public support. The initiative used informational materials from the trade union and later depended on the union to negotiate with the employer. They also started to organise a strike action in front of the meat factory; however, the management response resulting from the media pressure made the planned strike action obsolete. The media strategy created public solidarity because it exposed the employers' treatment and publicised the substandard living conditions of the workers' housing. Because a municipal building company owned the workers' apartments, the activists were able to put pressure on local politicians and win their support in the debate. Moreover, the initiative created an online database with detailed information on the main contractor, the subcontracting firm and the municipal housing company as well as employee testimonies about their deficient working conditions. The aim was not just to document the situation but also to create easily accessible information that media and political actors could draw on. Addressing local politics was thus an essential strategy in the procedure. With the workers' consent the activists released a press statement about the workers' precarious working and living conditions. The local and national media responded immediately.

While the workers' initial step to alter their working conditions was to secretly meet with the community initiative, the transformative act was to speak out in a TV documentary by a national public broadcaster. While one worker agreed to give an anonymised interview in front of the camera, others distracted management and guarded the door in order to allow the journalist to film their apartment. Both the documentary and the media coverage by local and national media included the 'shaming' of the main contractor as well as bad publicity for the municipality that hired out the flats to the Polish subcontractors. In the meantime the community initiative and the NGG prepared for a long battle that would bring company abuses to the public eye, embolden employees, and force major concessions on their behalf.

However, after the airing of the documentary on nationwide television the main contractor terminated contractual relations with the Polish subcontractor. At



this point the NGG became more formally involved in the process, organising a meeting with the main contractor and the posted workers in order to clarify their grievances and negotiate the further employment of the workers (NGG, interview, 2012). The outcome was the takeover of the whole workforce by the German agency firm that had previously contracted the Polish subcontractor. The workers were now employed under a German agency contract. Here the agency collective agreement (between the IGZ and the DGB) applies, which entitles workers to the hourly wage of €7.89. The main contractor was forced to make an arrangement with the German agency firm to take over the workers because the localized work stoppage would have caused wider disruptions to the production process. In that sense, the workers, in tandem with the community initiative and the media, were able to exert ‘workplace bargaining power’ (Silver, 2003: 13).

From the workers’ point of view the material gains – in this case higher wages and improved employment and living conditions – were significant. Moreover, workers did not need to feel threatened or intimidated by management anymore, and had a fixed monthly income and proper work clothes. Despite the fact that they were still used as a highly flexible source of labour, the workers appreciated that their work schedules were not as unpredictable as before and that their employment contract was prolonged for one month. Their employment context changed from being excluded from the host-country institutional framework to being included through their employment at a German agency firm. Taking further legal action against the employer would have jeopardized the workers’ future employment and therefore outweighed their gains.

#### **5.4.3 From the local to the national**

In Lower-Saxony a coalition between priests, ministers, politicians, the trade union and NGOs is involved in a campaign to stir public concern over the exploitative practices of meat companies employing posted workers under precarious work and living conditions. Here, too, media attention in a social justice frame is essential.

This strategy has led to the creation of two service centres within the region funded by the *Land* Lower-Saxony. The service centres are established within civil society organisations where project workers with relevant language skills inform posted workers about labour law and social legislation in their native languages across sectors. The project workers cooperate with the NGG on a daily basis. This development is in fact part of a larger trend in Germany to establish coalitions between trade unions and civil society organisation in order to build solidarity with the posting workforce. The German Federation of Trade Unions (*Deutscher Gewerkschaftsbund* or DGB) has responded to increasing numbers of posted workers by establishing ‘fair mobility’ centres with the aim of providing information and help to posted workers (Fair mobility, interview, 2013). The

centres do not focus on a particular sector and are not part of a trade union but rather simply employ staff with relevant language skills. However, they closely cooperate with trade unions and other NGOs in order to cater to the needs of labour migrants or facilitate the respective contact with other organisations. The fair mobility centres are financed by the DGB, national and European funds and operate on a project basis.

The media pressure not only led to the establishment of service centres for workers but acted as a catalyst to get employers to the bargaining table. According to the ANG's chief executive, the industry has a great interest in restoring its image. The four large slaughterhouses – Vion, Westfleisch, Tönnies and Danish Crown – became members of the ANG, which now represents all slaughterhouses for pork, beef, poultry and meat-processing plants such as sausage factories. In response to the public debate, ANG started negotiations with the NGG to agree on a minimum wage in order to restore the meat industry's reputation. In January 2014, an agreement was reached introducing a minimum wage as of July 2014, starting at €7.75. One necessary precondition for its applicability for posted workers is its inclusion into the German Posted Workers Law. The sectoral minimum wage starts slightly below the national minimum wage of €8.50, which will come into effect in January 2015. In fact, the awareness-raising on precarious working conditions in the meat industry proved a major factor in mobilizing the discussion on the German minimum wage (Interview DGB, 2014; Behrens and Pekarek, 2012).

In 1996, the EU passed the Posting of Workers Directive, as implemented by the German Posting Law (*Arbeitnehmerentsendegesetz*). It entitled posted workers to a set of statutory minimum working conditions. The particularity of the Germany Posting Law is its limitation to certain sectors<sup>17</sup>, instead of covering the whole national economy. However, the most important regulatory content of the law is the provision on minimum wages. Due to the long absence of a sectoral minimum wage, the inclusion into the posting law was mainly ineffective (Czommer and Worthmann, 2005). Even though the meat sector has decided on a sectoral minimum wage, it is binding for posted workers through its inclusion in the German Posting Law.

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<sup>17</sup> The law initially included the construction, building cleaning and mail services industries. With the amendment of the law in 2009, six other industries were included: the care sector (elderly care and ambulant treatment), security services, waste management (including street cleaning and winter services), training and educational services, laundry services in customer business objects, and special mining work in coal mines. (See: <http://www.bmas.de/DE/Service/Gesetze/aentg.html>).

## 5.5 Discussion

The dominant institutional argument in comparative industrial relations is that German unions are unlikely to build coalitions with other civil society organisations (Baccaro *et al.*, 2003). Even as membership declines there is little incentive to change union strategy because of the institutional embeddedness of unions supported by a strong employment law framework. Nevertheless, the case discussed here and the general trend in mobilising posted workers on a national level supports a different view. First, posted work in the German meat industry not only illustrates the alteration of the German institutional system, but rejects the German institutional framework and social regulation wholesale by embedding posted workers in an institutional system other than the German one (Wagner and Lillie 2014). Second, the industrial relations system in the German meat-slaughtering and meat-processing sector corresponds less and less to the image of an institutionally embedded German trade union secured by a stable framework of employment law. In the meat industry, as employers have broken with patterns of cooperation and transnational workspaces have increased, the NGG has sought alternative forms of leverage. The case illustrates an alternative approach to transnational action in the German setting based on forming coalitions with other social actors in an experimental way.

Workers draw strengths not only from industrial relations institutions but also from social interactions with community leaders, religious associations or other local social ties (Lier, 2007). Therefore, and in response to the isolated and precarious position of posted workers, a local community initiative and the local NGG office developed a strategy around changing the employment situation of the workers. In contrast to established German labour practices based on relations of social partnership punctuated by occasional episodes of collective bargaining conflict, this campaign privileged extensive media publicity, social coalition-building and local political pressure. In that sense certain features resemble the logic of so-called social movement unionism. This type of unionism refers to a strategic orientation propounding that unions should form coalitions with other progressive social forces (Johnston, 2002). The union started to look for alternative sources of power by building coalitions with societal actors and by finding issues that appeal to the broader public. Extensive publicity included the 'shaming' of the German main contractor by drawing attention to new forms of 'slavery' within a highly industrialized country such as Germany, pleading to a larger understanding of social inequality. Furthermore, publicizing the municipal role in providing housing to the workers' employer contributed to putting pressure on local politics. These efforts were led by a small group of volunteer and union activists.

As Staggenborg (1986: 374) points out, 'understanding . . . the conditions under which coalitions emerge and succeed in advancing movement goals is crucial.' The conditions influencing the coalition were, amongst others, related to a shared ideology (McCammon and Campbell, 2002). The community initiative was sympathetic towards trade unions and thought it crucial to establish the connection. Moreover, the trade union appreciated the work done by the initiative because the union itself faced several constraints. Some scholars reported that in case of resource shortage, groups may seek out coalition partners because an alliance with another group can sometimes provide them with the means to accomplish their goals (Almeida and Stearns, 1998: 40). For the trade union it is generally problematic to interact with posted workers because of the absence of a common language or general lack of staff and hiring additional personnel is oftentimes not possible due to budgetary constraints (Interview NGG, 2013). Cooperating with other organisations helps to solve this dilemma. For the initiative, drawing on union informational materials and knowledge during the negotiations with the employer was helpful due to their lack of resources in this regard.

Moreover, the weak political position of the NGG has been a catalyst for it to seek partners in order to push their agenda. Otherwise, the lack of impetus may have left their strategy unchanged. In certain cases, the lack of political opportunities, rather than their presence as argued by some authors (Diani, 1990; Staggenborg, 1986), may actually spur coalition-building (McCammon and Campbell, 2002; Tilly, 2001). Overall, the success of the efforts by all sides was strongly influenced by a social-justice frame that won media attention and broad public support, including among local politicians. This development may prove problematic when we conceive of the mass media as agenda-building instead of as a mere instrument or resource for activists, which can privilege certain groups over others and structure the chances for discursive success (Blanco, 1997). Similar coalitions are increasingly forming in other regions where meat factories are present and also nationwide in the context of organising posted and labour migrants more broadly.

The mobilisation of posted workers depended on the flexibility of the community initiative, the language skills and trust related to a certain extent to a shared identity. According to the community initiative it was its ability to act and react more flexible than the local union office (Interview Community Initiative, 2012). The proximity to the workers' housing site facilitated frequent visits. Moreover, due to the migratory background and shared language between one of the activists, the workers' trust was more easily established than would have been possible for the local union officers. Another important catalyst was that the community initiative served as a shield for the workers' anonymity. While the trade union can generally protect anonymity, it has to reveal the workers' identity in, for example, more formal legal proceedings due to the absence of collective redress in Germany. Nevertheless, it was important that the NGG stepped in to

formally negotiate the takeover of the workers with the employer because it was able to draw on experiences with employers' negotiations and established contacts with the main contractor. New experimental strategies may aim not only to revitalize previously existing institutions but to build them as well (Turner, 2009: 308). Due to the nationwide effort to increase media pressure on politics to act by exposing precarious employment and living conditions of workers, local governments funded service points for posted workers and the formation of an employers' association that negotiated a sectoral minimum wage and also helped to place the issue of statutory minimum wages firmly on the political agenda (Behrens and Pekarek, 2012). In that sense, union ability and willingness to form coalitions with societal actors depends not only on the country but on the nature of the employment structure (national or transnational) and industry-specific factors.

In the case of transnational posted work the short-lived nature of the transnational action was effective because it was able to address the immediate needs of the posted workers. Due to their temporary employment status in the host country, they were not looking for an institutional channel representing their long-term interests but rather needed a voice mechanism that would help them alter certain modes of management conduct (Interview Polish posted worker, 2012). Transnational collective action did take place through local ad hoc organisations when certain problems needed to be addressed. Even though workers did not act out established scripts of collective worker resistance such as joining the union or initiating a legal case against the subcontractors, their act of resistance was constituted by challenging existent forms of management conduct (Isin, 2009). Contrary to conventional claims, labour migration is not necessarily a purely voluntary process (Cohen, 1987). The interviewed posted workers came to Germany not because of the enthusiastic embrace of freedom of movement but because of socioeconomic problems, particularly low wages and unemployment but also debt payment, medical procedures for family members, or simply being able to afford a better life. For the workers the balance has to be struck between retaining the employment but countering certain management conducts covertly.

The case of transnational action did not cause an overall liberation from the unequal power relations within the pan-European labour market. Even though the workers' position in the labour market improved momentarily, they still navigate in a highly flexible labour market, moving from one short-term contract and low-paid job to the next. Their 'lived experience' can still be classed as a low-paid, easily replaceable source of labour. Their employment contract was extended for one month but their employment status afterwards remained uncertain. The contact between the union, the community initiative and the workers disintegrated. However, even short-lived transnational labour alliances could still be useful for the purposes of a transnational action (Brookes, 2013). Some of these workers may have gained valuable experience in collective organisation and may be more predisposed to collective orientation in their next employment post (MacKenzie,

2010). After all, transnational solidarity does not develop automatically, but is the result of concrete struggles (Bieler 2014). While economic competition is certainly an obstacle to union action, it may also initiate it since unions were in any case founded as a counterforce to the commodification of labour (Erne, 2010).

The findings of this chapter contribute to a recent but growing literature revealing blind spots in comparative cross-national perspectives based on institutional equilibrium. Recent findings in different institutional contexts such as the UK, France, Germany and the Netherlands point to fundamental similarities underlying the mobilisation efforts for previously unorganised groups of workers (Bertossi, 2010; Gumbrell-McCormick, 2011). In Germany trade unions have adopted similar organising tactics as found in the UK context to incorporate contingent workers into collective channels of representation (Vandaele and Leschke, 2012). Moreover, a similar observation has been made in the French context with regards to immigrant workers more generally (Tapia and Turner, 2013). Other studies on trade-union and posted-worker solidarity in the Netherlands showed that modes of mobilisation such as media exposure and access to new resources and instruments of power also required coalition-building (Berntsen and Lillie, 2014). In France increased alliance-building between trade unions and other civil society actors has been observed to counter exploitative practices affecting posted workers (Lefebvre, 2006).

The cases point to common dynamics in today's form of capitalism and the opportunity structures to counteract the current tendencies. The chapter suggests that this and also other case studies in similar contexts can be viewed as advances to reterritorialize deregulated labour markets. Reterritorialization as resistance may take place as a reaction against injustice but it may also involve a sense of 'dreaming of something better' (Pile and Keith, 1997: 30). By trying to resist it is also possible to imagine or dream that resistance is possible, advancing the search for alternative worlds. The commonality between the different findings is pointers as to how unions mobilize 'invisible workers' in the face of increasing employer opposition (Baccaro *et al.*, 2010). These case studies can enhance our understanding of the opportunities and challenges for unions and workers in an era of increased labour mobility instead of oscillating between the 'converge' and 'varieties of capitalism' debate.

## 5.6 Conclusion

The possibility for posted worker resistance is embedded in the deep structural changes in the European labour market. Novel transnational workspaces are being created in the European Union and we need to investigate not only how labour power resists at the policy level but also how workers are able to claim their labour

rights in the absence of collective labour power in these marginal spaces. Traditional avenues of resistance have become difficult to access for transnational posted workers in the German meat industry. The paper has challenged the understanding of German unions being constrained by the institutional framework to seek coalitions with societal actors (Kitschelt and Streeck, 2003).

The case study has shown that posted workers are able to exercise voice through channels largely uncommon to the German institutional framework. In the German meat industry the weak institutional position of the trade union and the porous posting regulation led the trade union to seek out new strategies in an experimental way. While trade unions have largely been unable to mobilize this workforce, in this case, a community initiative stepped in to fill the gap. The case demonstrates that the transnational nature of the posted worker's employment relationship and living situation requires a different approach to organise resistance beyond the traditional institutional perspectives on German industrial relations.

Several conditions underlie the emergence of the coalition. First, the need to share resources (flyers) and the possibility of dividing the work according to ability/expertise (the mobilisation by the community initiative and the formal negotiation with the employer by the NGG) were preconditions for the cooperation. Second, achieving the NGG's goals required seeking out new partners. For posted workers it was possible to exercise voice in the absence of traditional channels of representation because of the time-intensive and flexible approach by the community initiative as well as shared language skills and to a certain extent a shared identity. Overall, the success of the effort on all sides was strongly influenced by a social-justice frame that won media attention and broad public support, including among local politicians. Also, it was important that the parties had a particular workplace bargaining power as the employer may have reacted differently otherwise.

Similar coalitions are increasingly forming in other regions where meat factories are present, and also nationwide in the context of organising posted workers and in relation to labour migrants and contingent workers more broadly. This suggests that the findings presented here may be representative of broader trends in the EU labour market, whereby loopholes in the regulation and the growth of weakly organised sectors call for a more nuanced understanding of labour differentiation. The cases are able to provide a microcosm of the conditions under which resistance may unfold in poorly regulated workspaces where traditional avenues to protest are blocked or marginalized.

More reflection is needed because different forms of power and labour markets, such as posting in a pan-European labour market, may call for different forms of resistance. This has some critical implications at the level of employment relations and labour market reform. Changes are needed in the current forms of labour opposition, especially in non- or less-unionised and highly flexible sectors

where traditional forms of protest are undermined or marginalized, in order to improve the conditions of permanent and temporary, settled and mobile workers alike. Acknowledging different forms of labour differentiation is a key step in this process for industrial relations actors in order to be able to support alternative modalities of resistance in poorly regulated workspaces. Future research may further investigate whether these practices will undermine or coexist next to more traditional forms of resistance and whether new alliances can be formed in this process.



## 6 THE POLITICAL ECONOMY OF BORDERS IN A BORDERLESS EUROPEAN LABOUR MARKET<sup>18</sup>

### 6.1 Introduction

In this chapter I will be looking at borders as a line of differentiation for workers posted by their employer from one EU member state to another in a pan-European labour market. In both theory and practice the border for the movement of persons and services within the European Union is no longer consistent with the edges of the physical territory of the member states (Christiansen *et al.*, 2000; Zielonka, 2000; Geddes, 2005; Guild, 2001). Borders still exist but they are increasingly recognized as 'fuzzy' (Christiansen, 2000), permeable (Zielonka, 2001) and possibly not that important (Christiansen *et al.*, 2000).

While the discussion on EU integration and re-bordering has highlighted how EU integration impacts the territorial structuring of politics, it has done so mainly from the point of view of the state or the supranational level (see Zielonka, 2000; Del Sarto, 2013; Kostadinova, 2013). However, the borders of and within the EU are not just produced by the Council of Europe or the European Commission; they are reproduced, constructed and given meaning by different institutions and people. For example, the re-bordering process of states intersects with the trend to outsource production in certain industrial sectors. The reconfiguration of the traditional form of the organisation of the state and of the employment relationship embedded in and organised around bounded nation states (Emmenegger *et al.*, 2012) requires the examination of the complex relationships actors find themselves in across national contexts (Jackson *et al.*, 2013).

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<sup>18</sup> A revised version of this chapter is currently under review at *Journal of Common Market Studies* (revise and resubmit).

This paper explores the position and creation of borders in a pan-European labour market from the bottom up. I study the reshaping of the nation state from the micro-level point of view of societal actors such as mobile workers, public administration officials, firms and trade unions (Radaelli and Pasquier, 2006: 44). My findings show that two types of borders are significant in relation to posting in a pan-European labour market: borders for labour market regulation that inhibit the enforcement of labour rights, and the border of the firm, that is, the border between the main and the subcontracting firms that isolates workers from the host-country industrial relations systems. These borders impact on the institutional separation between posted workers and host-country trade unions. The European single market created permeable borders for firms and workers, but these borders are contingent. The article identifies how firms strategically use and exploit the significance of national borders in the posting relationship and how this affects the workers' employment situation. While capital can take advantage of permeable borders, national administrations and organised labour cannot, impeding the effective enforcement of workers' employment and social rights.

Three key areas of study – the changing nature of state borders, institutional analysis and the industrial relations literature on transnational solidarity and labour geography – provide important theoretical insights into the overall complexities of employment relations in the European Union today. Separately, these literatures have yet to provide a coherent theoretical framework through which to comprehend the current labour market structure in a pan-European labour market. Combining their insights is a useful way of thinking about the shape of the current EU labour market as labour migration is one decisive field where the 'New Europe' will be forged (Pries, 2003).

The chapter is structured as follows. It starts with a discussion of the spatial reconfiguration of the EU labour market in relation to the regulatory framework of posted work in the EU and Germany. In this section I also discuss the theoretical understanding of borders in relation to this study. After discussing the research methods I will examine, drawing on qualitative interviews, how borders to regulatory enforcement are created and how they intersect with the reconfiguration of firm borders. In this section I will also discuss the implications of these re-bordering processes on transnational solidarity. In the final section I will link the empirical findings to the discussion on the territorial structuring of politics and institutional literature and conclude.

## **6.2 The spatial reconstruction of EU labour market regulation**

Posted work as a form of labour migration is peculiar because posted workers move as dependents of service providers and are therefore regulated under the

free movement of services instead of migration. The rights and employment relations of labour migrants who move individually refer to the host-country framework. By contrast, the employment relationship of posted workers is embedded in (at least) two national contexts as regulated by the Posting of Workers Directive falling under the EU framework of freedom of services. While worker posting across borders has been possible since the creation of the European single market, it became more relevant with the advent of Eastern European accession due to the socioeconomic differences between EU member states. As discussed in the previous chapters, in Germany this has led to a rise in the employment of posted workers in certain labour-intensive sectors such as construction and meat slaughtering.

Posted workers are employed via subcontracting arrangements and therefore a good measure of the pervasiveness of posting is to look at the prevalence of subcontracting. In Germany between 1995 and 2010, 50% of native construction workers have been replaced with workers employed at foreign service firms (Bosch *et al.*, 2011: 185). Large construction companies cut their core staff to the point of employing only management-level workers and hire subcontractors for all other works (Employer Association Interview, 2012). According to the meat sector union NGG (*Gewerkschaft Nahrung-Genuss-Gaststätten*), of the 30,000 workers in the slaughtering industry every third person is employed under a subcontracting contract (NGG, 2012). The majority of the home base of the subcontracting firms is in Eastern European countries.

The EU Posting of Workers Directive established that firms have to adhere to a minimum set of rights when posting workers abroad, such as minimum wages and working time. However, social payments are paid according to home-country standards and are significantly lower than the German equivalent (Fellini *et al.*, 2007: 289). Moreover, in case no statutory minimum wage agreement exists in the country or has been negotiated and declared generally binding in the sector to which the worker is posted, the wage framework refers back to the home country as well. The regulatory context of the employment relationship is thus embedded in two national contexts as regulated by the EU Posting of Workers Directive. The implementation of the Directive into the German regulatory framework is peculiar. First, a statutory minimum wage is only being introduced from January 2015 onwards. Second, the German Posting Act does not cover the whole economy but lists sectors to which the minimum set of rights of the posting regulation applies. The construction sector was included in the German Posting Act since its onset in 1996, making the wage levels of the sectoral bargaining agreement binding for all workers on German territory. While a significant wage gap exists between the lowest wage bracket posted workers are paid according to and higher wage levels, the Act at the very least guarantees a minimum wage standard. At the moment discussions are taking place as to how to include the meat industry in the German Posting Act. The reason this discussion is only taking place now is related to the

absence of a statutory minimum wage in the sector until December 2013. Therefore, the long absence of a statutory minimum wage in combination with a nonexistent sectoral minimum wage in the meat industry created spaces where the home-country wage applied. But even when universally binding sectoral and statutory minimum wages exist, the particularity of the posting regulation and its embeddedness in two EU member states blurs the previously fixed delineations of regulatory power confined to nation states.

Transnational posted work opens up the opportunity to literally post a particular part of labour regulation from one 'bounded' nation state into another, allowing companies to 'import' labour that is regulated, at least in part, according to the labour regulation of another 'bounded' nation state. The authority of an EU member state lies to a certain degree outside existing state borders. For example, a Poland-based company can legally offer to send its employees to Germany to process a certain amount of meat in a certain amount of time at a German slaughterhouse. Its employees perform their work as subcontractors as part of the production process in the larger meat factory in Germany, but their employment rights and potentially their wage level, if no generally binding minimum wage exists, refer back partly to the sending country's standards. In that sense, labour markets are not confined to a national space as to how they are regulated and how labour rights are enforced. The ability of states to seal their borders, the *sine qua non* of sovereign states, is therefore restricted, and as a result borders become porous.

However, bordering is not always the business of the state. Different actors such as citizens, NGOs or employers are active in constructing, shifting or erasing borders (Rumford, 2008). These borders are not created at the edges of the nation state but are configured throughout society. The European order is multilayered instead of state-centric and requires a new way of thinking about borders (Zielonka, 2001) and their construction through various actors. This reconfiguration of borders is more about different regimes of rights than about managing population flows (Zielonka, 2001). In relation to posting, an important actor in creating borders, strategizing around state borders and creating different regimes of rights is the firm. The changing nature of national borders intersects with the trend to outsource production in certain industrial sectors. Not only has re-bordering occurred - and is still occurring - at the nation state level through EU-induced re-regulation; it also takes place at the firm level due to the firms' perceived need to adapt to market pressures. Posting occurs in sectors characterized by a fragmented production process through a specific division of labour between large contractor firms and small and medium-sized subcontractors. In Germany, this is the case in the meat-slaughtering and construction sectors. This enables employers in Germany to hire foreign workers under different employment conditions depending on the seat of the service provider in order to

cut labour costs, even though these employees work in the same workspace performing similar jobs (Lillie, 2010).

Outsourcing and atypical employment forms have eroded the inclusiveness of the standard employment relationship, a core element of the post-World War II institutional context in European economies (Bosch and Weinkopf, 2010; Gautié and Schmitt, 2010). Cross-border employment relationships add an extra dimension to labour market segmentation because posting does not take place within a 'bounded' nation state context but cross-cuts territories, as well as the employment institutions and labour market regulations that have been established around these nation state territories. The move away from the traditional form of the employment relationship embedded and organised around bounded nation states (Emmenegger *et al.*, 2012) requires the examination of organisational and social relations that underpin the complex relationships actors find themselves in across national contexts (Jackson *et al.*, 2013). Previously fixed borders have shifted, creating complex interactions between different types of actors across a variety of national contexts embedded in particular normative orders. Novel border sites are created when these different spheres meet in the daily working lives of posted workers. These borders take a variety of forms, materializing in state and firm borders, and impact the relationship between posted workers and host-country trade unions.

First, national enforcement institutions face borders to monitor and/or enforce the rights of posted workers in their sending state. Here borders take the form of state borders structured around enforcing labour law within their territory. The inability to monitor and enforce posted workers' rights across borders hinders the effective enforcement of the posting rights, rendering posted migrants disproportionately vulnerable to criminal victimisation and workplace exploitation. Second, subcontracting chains differentiate the rights of workers between firms. Here borders take the form of borders between the main and the subcontracting firms<sup>19</sup> that separate workers from the host-country institutional industrial relations systems. Third, the embeddedness in different normative frames of reference between the trade union and the posted workers and between the host-country orientation of the unions and the home-country orientation of the workers inhibits meaningful interaction between the two parties. The border thus takes the form of borders to the building of an effective solidaristic labour force. Interlinking these borders is a useful way of thinking about the shape of the current EU labour market, as labour migration is one decisive field where the 'New Europe' will be forged (Pries, 2003).

The fundamental function of the border is delineation. Borders can delineate territories, cultures, ideas and activities but also labour markets, work sites or work teams. In that sense, borders can be regarded as *institutions* governing the

<sup>19</sup> 'Firm borders' will be used to describe these borders in the remainder of this paper. This shall not be confused with 'firm' borders as in the adjective 'firm'.

extent of inclusion and exclusion between a territorial or membership group or groups of workers (Anderson, 1992; Cassarino, 2006). Scholars conceptualize actors and institutions 'as being mutually constitutive of one another' (Jackson, 2010). Borders are not static but are socially constructed (Paasi, 1996) through state practices (Berman, 2003) and through the European Commission (Kostadinova, 2013) but also by transnational companies, workers, employers and capital (McGrath-Champ *et al.*, 2010; Herod, 1998) – each with their own concerns.

My argument is that in order to grasp the differentiation between different forms of mobile labour in a pan-European labour market and their rights it is necessary to look at the creation of borders at the state level but complement this with insights into how borders are constructed in the daily working lives of mobile workers in a pan-European labour market. In what follows I will trace the process of how borders are created in a pan-European labour market and the interrelationship between sovereign borders and firm borders.

### 6.3 Research methods

Taking my cue from Lamont's (2000) study on class borders, I adopted an interview-based approach to study the 'permeability and relative importance' of different sorts of borders for actors involved in the posting relationship (Lamont *et al.*, 2002: 173). In that sense I adopted a bottom-up research approach to study re-bordering in a pan-European labour market. This approach can extend policy analysis by 'addressing the crucial issue of the reshaping of the nation state in Europe' from the micro-level point of view (Radaelli and Pasquier, 2006: 44). The research for this paper was undertaken from March 2011 to March 2013. The major share of the empirical data was gathered through qualitative open-ended interviews with posted workers in the construction and meat industries, the sectors where most of the posted workers are present in the German labour market. The majority of the workers were sent from Poland, Romania and Portugal.

This material was triangulated with expert interviews of union representatives, works councillors, labour inspectors at the national and EU levels and management, and with government, union and employer association reports (Stake, 1995). In this process actors with opposing viewpoints were interviewed to increase representativeness. Each interview lasted between one-and-a-half and two hours. All interviews were recorded and transcribed if possible. The research data was stored and coded using MAXQDA qualitative data analysis software. All interviews are anonymised in order to protect the informants.

On the basis of these findings the chapter will proceed to look at bordering practices in relation to 1) state borders that national administrations encounter when monitoring and enforcing the rights of posted workers, and 2) firm borders

that define the inclusion and exclusion of a particular membership group, weaken the rights of posted workers and enable firms to strategize around national borders when hiring subcontractors. Then, the implications of these borders for unions and posted workers will be explored.

## 6.4 Bordering practices in transnational workspaces

### 6.4.1 Borders to regulatory enforcement

Territorial borders confine a territory and usually an area in which a specific law applies (Del Sarto, 2013). They are typically understood as the sites at which the sovereign authority of states to exclude is exercised (Torpey, 1998). However, in relation to transnational worker posting the key claims of states to control exit and entry of labour migrants and enforce labour law within fixed borders are curtailed. In that sense, these borders may exceed the territory of a given polity. The limited sovereignty of EU member states over their labour markets is visible in relation to the detection and enforcement capabilities of national labour inspectors. From a Weberian perspective – whereby the state ‘upholds monopoly of the legitimate use of physical force’ (Weber, 1947: 154) – enforcement officers in the German context can be regarded as agents of state-crafting and are therefore a good indication of where the sovereign border lies in the posting relationship.

In Germany the central agency inspecting labour market standards is the Black Economy Unit (*Finanzkontrolle Schwarzarbeit* or FKS) within the customs authorities. This has been the case since the unification of Germany and can be seen in the context of a more general trend within German law of conceptualising immigration almost entirely as a labour-control issue (Stobbe, 2004). Most of the work of the officials involves the application of administrative law, but they also enforce criminalised immigration law in many cases. FKS enforcers have police-like powers, with many wearing uniforms, driving marked cars or carrying weapons. They have the power to force entry, search persons and premises, confiscate and retain evidence and, arrest without warrant. Enforcing labour standards for posted workers also falls under the task of the FKS.

The legislation in Germany requires written documentation of posted workers’ contracts with detailed information on wages and working hours to be kept on site in case of controls by the FKS. The task of the FKS is to check the hours worked. Records of working hours have to be kept on every site. Then the FKS checks the accounts of the company and inspects if the pay matches the hours worked. However, nationally organised control systems have struggled to adjust to the cross-borders movement of firms with regard to three issues in particular: the detection of malpractices in the host country, the payment of social security

contributions in the home country and the enforcement of fines for transnationally operating companies.

First, in spite of the requirements to provide documents for inspection, according to an FKS representative the inspectors rarely notice a discrepancy. The difficulty in detecting and enforcing malpractices is due to the employment relationship's embeddedness in two national contexts. The FKS suspects that many documents are manipulated while the actual accounting book is kept in the home country (Labour inspector, interview, 2013). To detect malpractices the FKS would need to investigate if wage deductions have taken place or if the correct amount has been paid to the workers. However, in practice this is almost impossible because 'the investigative power of the labour inspection stops at the German border on the grounds that they have to respect state sovereignty' (Community initiative, interview, 2012).

Second, another task of the FKS is to check if the social security contributions are received in host country. However, it cannot check if they have been received in the home country. Before sending a posted worker from one member state to the other the posting firm has to fill out and submit the so-called A1 forms. The A1 form proves the worker's registration in the social security system of the home country. It also affirms the payment of the employer's social security contributions according to the worker's wages - which includes the home-country wages. However, the circumvention practice observed is that firms may deduct an untaxed allowance of a maximum of 60 euros per day. In the receiving country such deductions cannot legally be made from the minimum wage; an employer pays these on top of the minimum wage. However, firms deduct this amount from the 'minimum pay', thereby reducing the sum on which social contributions need to be paid in the sending country. Therefore, the social security benefits are only calculated and paid according to the minimum wage level of the sending state (Dälken, 2012). This deprives workers of their legitimate social security contributions. This is a typical example of the problems with cross-border enforcement and there is no control or enforcement for this practice.

Third, should a malpractice be uncovered and the employer fined, the enforcement of rights conveyed by the PWD still stops at the national frontier. Fines and the exclusion from public procurement provisions have no prohibitive effect, especially because the fines cannot be enforced in the home country (*Zentralverband deutsches Baugewerbe*, 2006). The cooperation with courts and lawyers in home countries necessary to enforce fines is basically nonexistent (SOKA BAU (*Sozialkassen der Bauwirtschaft*), interview, 2013). As a result only 15%-20% of the fines are enforced, while 80%-85% of breaches of the posting-of-workers regulation remain without consequences (*Zentralverband deutsches Baugewerbe*, 2006). This is not only the case in Germany. A comparative country study reached similar conclusions on the implementation and application of the Posted Workers Directive, demonstrating that fines are rarely imposed in practice



and furthermore that the fines that have been imposed are rarely enforced either locally or abroad (Van Hoek and Houwerzijl, 2011).

While the possibilities for the labour inspection to detect malpractices and enforce standards in these transnational workspaces are severely limited, the likelihood of exploitative practices increases. According to a recent government report many subcontractors avoid adhering to the minimum standards for posted workers such as respecting the minimum wage or maximum working times (*Deutscher Bundestag*, 2013). Two recent reports by the German Confederation of Trade Unions identified mechanisms to avoid minimum wages in construction similar to the findings of this study. For example, the manipulation of working hours oftentimes results in the payment of wages close to what workers would earn in their home country instead of the host country's minimum wage (Siebenhüter, 2013: 17–20; Dälken, 2012). The reports state that while a relatively dense institutional framework exists the possibilities for the labour inspection to detect malpractices are severely limited due to the transnational nature of the workspaces. A public administration official explains the relation:

We've seen in every [EU] country that the borders have disappeared for the companies and they have been reinforced for national administrations. And in essence, with privacy legislation, etc., everybody keeps to himself and it is so easy to commit fraud. And you really must be very unlucky to get caught.

(Public Administration Official, interview, 2013)

National borders have not disappeared but made the insider/outsider divide of membership groups even more visible. In conjunction with the other types of social and economic exclusion, unequal access to justice also renders irregular migrants disproportionately vulnerable to criminal victimisation and workplace exploitation. There clearly is a discrepancy between the rights that have been created for posted workers and the actual ability to use and enforce the rights. This de- and reterritorialization of state borders intersects with the significant transformations of labour markets in OECD countries since the 1970s (Emmeneger *et al.*, 2012). A key change has been the flexibilisation and increasing use of atypical employment contracts (King and Rueda, 2008), substantially altering the organisational activity of the main contracting firm but also differentiating the rights between employees working at the main and subcontracting firms. The increasing use of subcontracting forms another element in excluding posted workers from the collective voice function that could help them clarify and claim their rights.

### 6.4.2 Firm borders

Subcontracting arrangements are prevalent in the production process in the construction and the meat-slaughtering industries in Germany. Subcontracting is a cost-saving means to exploit differentials between countries, sectors and workplaces and to increase or decrease production according to need (Flecker *et al.*, 2008). Outsourced occupations often see a deterioration of working conditions, such as reduction of wages, work intensification, increased job insecurity and higher reliance on non-standard employment (Grimshaw and Rubery, 2005; Wills, 2009; Flecker and Meil, 2010; Gautié and Schmitt, 2010). Moreover, these processes produce an increased variation of working conditions along value chains, often resulting in people working side by side having different employment conditions. The essential dividing line is thus the border of the firm. To put it differently, the shift in the firm border has stark consequences for the employment relations of a worker. The border between the main contractor and the subcontractor implies the differentiation of rights, entitlements and services provided to different categories of employees depending on their employment at the main or the subcontracting firm.

While the use of subcontracting arrangements has increased over the last decades in Germany more generally (Bosch and Weinkopf, 2010), employing posted workers via subcontracting arrangements adds another dimension to the debate, involving the employment of workers embedded in institutional systems other than the German one (Wagner and Lillie, 2014). This is manifested not just in the separation between the main firm and subcontractor but also between the work teams. One union official contextualizes this isolation:

In the sixties and seventies the so-called guest workers were integrated into the pre-existing structures of the firm, which also had works councillors. Today, especially in the construction sector but also increasingly in the metal sector, migrant workers are not integrated into pre-existing structures of the firm. They work in teams separate from the core workers. The separation is institutionalized.

(IG BAU, interview 1, 2011)

The main contractor on construction sites or in meat factories usually remains a German company. Posted workers are increasingly hired via subcontractors with their base in lower-wage EU countries to fulfil services. The firm border defines which employment and industrial relations context the worker belongs to. The rights and employment relations differ starkly between subcontracted and main-contractor workers. For example, posted workers are excluded from labour market institutions such as co-determination, collective bargaining and firm laws of the main contractor in the host country, all of which provide institutionalised voice functions in the host country (Lillie, 2010). In practice this means that the work

environment, social security and taxation of posted workers refers to a country other than where they work.

The borders of the firm have economic as well as social implications. First, the reason to employ workers via subcontractors is the cost advantage for main contractors (Management, interview, 2012). Subcontractors can offer a competitive price because they pay minimum wages instead of collective-agreement wages in the construction sector and home-country wages in the meat sector because of the absence of a statutory minimum wage. The social security contributions are paid according to the home-base country, which are usually lower compared to German social security contributions. The wages are calculated according to the country where the firm is based, creating 'regime competition' (Streeck, 1989) between workers based on their EU nationality. This has been observed particularly in the meat industry, where native workers were given the choice between being employed via a Romanian contract or being let go (European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT), interview, 2013). In that sense, both firm and national borders become strategically important for main contractors in employing posted workers.

Second, workers employed by the main contractor are ensured certain benefits specified in the collective agreements such as continuous skills-based training, social benefits and worker interest representation (Management, interview, 2012). The employees at the main company are paid according to collective agreement wages and are represented by works councils. (In Germany works councils form part of a two-pillar system of interest representation and represent the interests of employees at the firm level.) By contrast, posted workers are excluded from the German system of interest representation and voice functions. This isolation substantially increases the control of the firm over its employees and increases employee fear of voicing grievances (Posted Worker, several interviews, 2012). It is exactly this exclusion materialized at the borders of the firms that makes the claiming of posted workers' rights difficult by isolating posted workers from voice functions. Here borders take the form of borders between the main and the subcontracting firms that separate workers from the host-country institutional industrial relations systems. There are no outlets for voicing grievances in order to achieve socially efficient levels of minimum protection for the workers. Firms are able to profit from the freedom of movement and services by saving labour costs but workers are excluded from collective-agreement pay, benefits and voice functions.

## 6.5 The implication of the spatial reconfiguration of employment relations for trade unions and posted workers

Despite its internationalist ideology, the history of organised labour is profoundly linked to the nation state (Erne, 2008: 3). Diverse national arrangements in the field of industrial relations have integrated the working classes into their nation states (Visser, 1996). In general, unions have taken the position that posted workers have a right to work in their host countries, but their pay must be in line with local standards. Trade unions have an interest in maintaining the norms within the home country because they helped to create them in negotiations with the employer's side in order to regulate the labour market. The German Federation of trade unions (*Deutscher Gewerkschaftsbund* or DGB) has responded to increasing numbers of posted workers by establishing 'fair mobility' service centres across Germany, where project workers with relevant language skills inform posted workers about labour law and social legislations in their native languages and across sectors to preserve the created norms within the German labour market. The creation of the fair mobility service centres interacts with the recognition that organising hypermobile workers proves to be an inherently challenging task for home-country unions. While the lack of resources hinders meaningful interaction between posted workers and the trade unions, the motivations, hopes and strategies of posted workers may also differ from those of unions, as one unionist expressed:

The problem is that the people know they should receive €13 here but in their home country they agree to receive a different amount with a handshake. The employer is more or less open about adhering to the German wage norm on paper. Basically, workers contact us when they do not receive the amount they agreed to in the home country. For us this is, I would say, a motivation problem, because the workers support their own exploitation with these agreements and support social security and tax fraud and related issues. Humanly I can understand it but politically it is difficult for us because we created the minimum standards for them.

(IG BAU, interview, 2011)

Though this may sound like a blatant admission of undercutting the host country's labour standards, it omits the hopes and strategies of posted workers that may have nothing to do with 'social dumping'. While there may be an implicit bargain involved in paying posted migrants less, this is not because posted workers accept this as a just and fair state of affairs. Contrary to conventional claims, labour migration is not necessarily a purely voluntary process (Cohen, 1987). Most of the interviewed persons signed up for posted work because of socioeconomic problems, particularly unemployment. This leads to accepting practices that may not uphold the normative standards in Germany.

Workers are afraid of losing their employment if they voice grievances. At times they feel that exiting the employment relationship is the only viable option to alter the situation. Structural limitations, economic deprivation and isolation from union structures constrain worker resistance, leading to 'sense of powerlessness at the collective level' (Mrozowicki and van Hootehem, 2008: 201). Interaction between posted workers and the union does take place but is mainly limited to certain dire cases. Even though workers on occasion express anger about their situation, they fear employer retaliation and feel powerless to claim their rights. These are decisive factors that restrain workers from interacting with the union or reporting management malpractices to the authorities. These two normative frameworks materialise the borders between two work or industrial relations contexts. The predicament is that while unions are understaffed and lack the resources to effectively mobilise posted workers, the workers themselves also mostly refrain from seeking help from the union due to fear of employer intimidation and retaliation. This results in a catch-22 and creates a border between the union and workers, inhibiting efforts from both sides to transgress it.

## 6.6 Mapping the shape of the pan-European labour market

The impact of European integration on the territorial structuring of politics and territoriality as a fundamental ordering principle of political life embodied in the modern nation state is at the heart of the debate in international relations and comparative politics. In this line of inquiry, the borders of and within the EU are recognised as being 'permeable' (Kohler-Koch, 2005: 13) and increasingly 'fuzzy' (Christiansen *et al.*, 2000: 73). Scholars described the current state of the EU in relation to territoriality as bearing resemblance to a 'neomedieval Empire' (Zielonka, 2001) or a 'maze' Europe (Christiansen *et al.* 2000: 74). The neo-medieval concept, particularly in relation to borders, is similar to what Caporaso (1996), Ruggie (1993) and others have identified as a postmodern alternative to the Westphalian form of the state. While the Westphalian system defines the world in territorially bounded spaces, the postmodern model is about 'unbundling territoriality'. Instead of seeing the EU as a new type of Westphalian (federal) state with a central government in charge of a certain territory with clear-cut borders, the neo-medieval model describes the EU as a space in which authorities overlap, sovereignty is divided, institutional arrangements are mixed and citizenship is diversified (Zielonka, 2001: 510). In this EU space the inside/outside line between membership groups is said to be blurred and borders are recognized as 'soft', and over time will become 'less territorial, less physical and less visible' (Zielonka, 2001: 510; Hassner, 2001). In a similar vein Christiansen and Jorgensen describe the multiplication of new borders resulting from the dissolution of borders as dividing

lines between jurisdictions, which are 'perhaps not that significant' (Christiansen and Jorgensen, 2000: 68).

The empirical findings show that, in relation to the freedom of services and labour mobility, borders are neither soft border zones nor are these new borders less significant. In fact, this chapter argues that in relation to labour and industrial rights the borders are significant for EU citizens encountering them. Instead of blurring the inside/outside divide between membership groups, these borders strengthen the divide between mobile posted workers with less pay and rights and native workers with higher pay and better employment rights. The types of borders especially significant for posted workers are the borders for labour market regulation that inhibit the enforcement of labour rights, and firm borders that separate workers from the host-country institutional industrial relations systems.

In line with the postmodern conception of borders, a salient feature of the borders in relation to transnational posting that this article discussed is their markedly porous character. However, while borders in the EU become porous it seems that the permeability only goes one way. The structures in the EU labour market are better understood as sieves: the objective of borders is not so much to hamper the free flow of services across jurisdictions in question but rather to open them to capital while impeding the effective enforcement of workers' employment and social rights. Even though a regulatory system has been created for hypermobile posted workers, it leaves gaps constraining the ability to enforce or claim workers' rights.

State-centred regimes remain foundational elements of the EU state system. However, the complex regulatory embeddedness of posted workers and the related opaqueness of their employment relationship reduce states' capabilities to regulate within their own territories. Member states can no longer fully enforce order over their defined territory as regards the movement of persons and services. Practices such as double-bookkeeping, with one book in the host and the other book in the home country, as well as social dumping practices and fines that cannot be traced across borders, create borders to the proper monitoring of the labour rights of posted workers. The border that exists for national administrations opens the door for exploitative practices and the possibility for private actors to strategise around national borders. The importance of the reconfiguration of state borders is therefore interrelated with the institutional reconfiguration of firms.

The current debate over the future of the state and the EU in relation to its borders departs from the point of view of the state or supranational level (see Del Sarto, 2013; Nadalutti, 2013; Kostadinova, 2013). However, the shift in state borders intersects with other bordering processes that need to be taken into account in the current discussion. For example, the institutional political economy literature acknowledges that next to states, non-state entities – including employers – possess the ability to influence the market economy, significantly analysing both public and private actors in relation to capitalist regulation (Streeck,

2009: 254). A case in point is Katzenstein's analysis of the German industrial relations system constituted by a weak and decentralised state as well as private actors that, in the 1970s and mid-1980s, became partners in cooperative governance. What Katzenstein described as a 'semi-sovereign' (1987) state exemplified the influence of private actors in the market economy. For the purpose of this study it is important that the changing strategies of private actors may eventually also affect the effective functioning of the public institutions. In the 1980s and 1990s 'the public use of private organised interests, as described by Katzenstein and others, turned into a private use of the public interest' (Streeck, 2003: 4).

In a similar vein, in today's pan-European labour market, because of the significance of nation state borders in relation to posting, firms strategically 'use' and exploit these. One consequence of this is that borders are constructed wherever they are needed. Here, the permeability of firm borders also goes one way: while firms can benefit from low-wage labour through the freedom of movement and services, they are able to exclude workers from in-firm voice functions, added benefits and skill development by employing them via subcontracting arrangements. Posted workers remain isolated from the institutional and native in-firm employment framework without being included in collective channels of interest representation. Firms now regularly use outsourcing to smaller firms as a way to weaken labour power and avoid works council involvement (Holst, 2013; Doellgast and Greer, 2007).

The added dimension in the sphere of posted work is that the European dimension offers employers additional power resources due to the increasing inability of states to regulate and properly monitor the labour rights of posted workers (Wagner, 2014). Firms use the lack of a strong union presence and inability of labour inspectorates to enforce the law across borders to create an institutional life of their own in defiance of regulations. This is especially harmful for posted workers because they are oftentimes unaware of their rights and unfamiliar with host-country trade union structures, have no previous experience of collectivism and are structurally dependent on the employment relationship. Moreover, union power is further diminished by the cross-border nature of the employment relationship. The borders of firms are therefore, just as fluid and just as in need of academic attention as the borders of the state (Martinez *et al.*, 2004). By exploiting these strategically, capital is able to remove specific workspaces, contexts and categories of people from the protection they would normally enjoy within sovereign states (Wagner and Lillie, 2014).

The interrelationship of the shifting nature of state and firm borders has significant implications for organised labour in the host country and worker voice of posted workers. While trade unions usually start from an ideological basis of working class solidarity, their actual functioning as organisations is often closely tied to local communities and national identities and developed according to nation state institutional systems (Erne, 2008: 3). Unions are caught in

contradictions. Union migration policy was largely directed towards long-term migration. These strategies are largely ineffective with regards to increasingly circular migration patterns. In the face of these problems German unions have largely retreated to defending the national-territorial system of labour migration with demands for more effective controls. By representing posted work predominantly as a labour supply phenomenon, underlying structural tensions are not adequately addressed. Therefore, the host-country orientation of the unions and the home-country orientation of the workers inhibit meaningful interaction between the two parties, hindering the building of an effective solidaristic labour force. While capital can move effortlessly across state borders, trade unions experience borders in their efforts to represent posted workers and enforce their rights. The isolated situation places posted workers in a precarious position, creating a grey zone in which employer practices fluidly change between legal and illegal practices with a high potential for worker extortion.

While the state border in the posting relationship still has a crucial border function, the case of posted work also sheds light on the fact that borders are not constructed solely by European or national policies but by multiple actors who occupy different positions and have unequal power: firms, labour inspectors, trade unions, works councillors and posted workers who follow a grid of different strategies and practices. The shifts of borders are based on uneven and unstable resources, and the actors located at the key points of those border shifts, such as trade unions, have not necessarily been constituted in a manner suitable to adapt to these changes. The interrelationship between firm and sovereign territorial spaces allows for new kinds of institutional spaces to emerge, which become less and less attached to the border of the territory but create and reproduce new institutional borders within the territory. These borders are not to be found at the nation state level but disintegrate into a multiplicity of fragmented borders.

In the case of posting, closed and open borders exist in the same space, curtailing the rights of posted workers and weakening labour power. Borders are not physical anymore but the result of the movement of workers and their interactions with other actors. This is important because even though the movement across sovereign state borders no longer triggers a border for EU citizens, the border still exist in the daily lives of citizens and creates a system of differentiated memberships for workers. Moreover, this study has revealed the performative aspect of borders (Paasi, 1996). Different actors enact and perform the border. The examination of the way in which various types of borders make inclusion/exclusion visible and also who is involved in making them visible in a transnational labour market can have important effects on understandings of and responses to posted work. In that sense, borders not only separate but also bring together. They have the potential to be resisted and to create a portal for change (Rumford, 2008). It is for this reason that the discussion of the shape of the current European labour market requires an analysis of the form of regulation and the



interface between its different sites and actors that create borders, because these hint at the solutions of how one can resolve these issues.

## 7 CONCLUSION

### 7.1 Introduction

This thesis addressed the (to a large extent) still-unexplored regulatory dynamics within transnational workspaces in the EU where posted work is prevalent. At the end of this thesis the reader will, I hope, have learned 1) how and under which conditions the regulatory posting framework is implemented differently at the workplace than at the policy level, 2) the extent to which posted workers are constrained from exercising voice through collective channels of representation in the host country, 3) the conditions under which transnational action can occur and 4) how firm and state border interact in a pan-European labour market to create differentiated membership for workers.

One of the intentions was to analyse the enacting of institutional frameworks. Throughout the chapters, the reader was advised that the institutions of a political economy can best be understood in relation to how they have been enacted at different levels. The chapters then each investigated which institutional contexts enable and condition the room for manoeuvre of the particular actors involved in the posting process. The thesis stressed the possible transformative capacity of enactment. It focused on the workplace level, looking at actors involved in the posting relationship, including posted workers themselves, as opposed to policymakers. The aim was to portray how local affairs both sustain and prompt shifts in the posting regulatory framework. By illuminating the micro level, which is not part of the standard repertoire of EU integration research, the study aimed to highlight the overall importance of this approach for a dynamic research agenda of European integration and the changing nature of employment relations it induces. I believe it can shed additional information on the uneven and multilevel dynamics of EU integration and the discrepancy between market-making and social integration.

This qualitative case study and the in-depth interview data with posted workers, trade unionists, NGOs, works councillors, management, labour inspectors and policymakers support four main findings. First, transnational subcontracting allows the emergence of different regulatory spaces at the national and workplace level. Second, it opens exit options for capital but constrains voice options for unions, works councils and mobile workers. Third, transnational workspaces also create opportunities for transnational action; however, these opportunities take on other forms than is usually expected within the German political economy. Fourth, it is necessary to analyse how different kinds of borders, in this case state and firm borders, intersect in order to fully grasp the structure of a pan-European labour market.

These broad findings reflect the discussions within the respective chapters. Chapter 3 studied how firms enact the posting framework creatively. It examined how these mechanisms initiate a process of institutional change through power dynamics at the micro level relevant for theories on institutional change generally. The findings show that the possibility for firms to diverge from rules is accelerated in a transnational setting. The reason is related to the unequal power dynamics between firms and workers but also due to the inability to publicly or collectively enforce rules. The examination of how actors engage with this transnational institution contributes to institutional theory by bridging the gap between institutional context and its appropriation by firms, posted workers and unions. The next chapter showed how the pan-European labour market opens exit options for capital but isolates posted workers from collective channels of worker representation. Chapter 4 related the changes in labour market regulation to changes in the nature and organisation of the nation state. These findings contribute to comparative institutional analysis by highlighting how the deterritorialization of previously 'bounded' institutional political economic or industrial relations systems decreases collective voice and increases institutional exit.

The following chapter explored the conditions for posted-worker resistance. It highlighted the shift in strategy of the German meat sector union to coalitions with community organisations in order to mobilise posted workers. It demonstrated the conditions under which such coalitions emerge and are successful such as lack of union power and resources, a useful division of work and a media strategy focusing on social justice. It contributed to blind spots in cross-national comparative perspectives based on institutional equilibrium and sectors with union strongholds. It emphasised the importance of engaging with migration and its different configurations in relation to industrial relations, an area of study too often neglected by industrial relations scholars.

Finally, chapter 6 considered how the changing nature of state and firm borders affects posted workers in transnational workspaces. The insights of three key areas of study – the changing nature of state borders, institutional analysis and

labour geography, and the industrial relations literature on transnational solidarity – are combined to develop an original framework that enhances both our theoretical and practical understanding of transnational workspaces in the EU. The chapter contributes to the literature on European integration and the territorial structuring of politics. A bottom-up approach aimed to enhance the understandings on how the de-bordering of a political territorial space affects the European labour market and its mobile workers, which is largely missing from the debate (Meardi, 2009).

All chapters point to the weakening of labour power and labour market regulation due to the disembedding of labour relations from the territorial nation state. In establishing the freedom to provide services, the EU has created a European economic space but has not at the same time extended the spaces for controls.

## **7.2 Posted work and labour market segmentation in various sectors and countries**

Posting is most prominent in the construction and meat industry in Germany but has increased to other industries since 2004. However, the rights for other mobile workers, such as temporary agency workers or self-employed labour migrants are also being circumvented in other industries where such employment channels are more common. In sectors such as cleaning, logistics, care and industrial services employees with flexible employment relations originating mainly from eastern European countries are increasingly replacing ‘core’ employees (Dälken, 2012). Labour migrants are also increasingly being employed in sectors such as the shipping trade and in winter services. The reasons their rights are being circumvented are similar to the findings in this study: labour migrants in flexible employment relationships have little bargaining power, are largely isolated to the German institutional system of interest representation but also lack a judicial coverage (Dälken, 2012). The different sectoral minimum wages in Germany create confusion for employees but also complicate effective controls for the labour inspection authorities.

One sector that illustrates the underlying reasons to employ or to not employ labour migrants or posted workers more specifically are the distribution centres of Amazon. Amazon.com is one of the biggest online retailers operating worldwide. To be able to meet the demands of a growing online market, the company is constantly opening new sites but also relocating distribution warehouses and logistic centres across the world. Decisions on location are guided by available infrastructure accessibility of markets (Interview, ver.di, 2013). Distribution centres can be found in France, Germany, Italy, Spain or the UK. Recently Amazon has

opened new locations in the Czech Republic and Poland. The sites are often located close the Amazon's main markets in Germany or the UK. Amazon warehouses have a high need for personnel but in many cases, like in the Bad Hersfeld distribution center in Germany, only a small part of the workforce is recruited from the local labour market. Temporary mobile workers from all over Europe (in particular from Spain, Hungary, Rumania and Poland) are recruited during peak seasons to cover high staff requirements. During these periods Amazon relies on temporary agency firms to provide enough suitable workers on time. Among those temporary foreign workers and national temporary workers are recruited (Interview, ver.di, 2013).

In sectors where hardly any posted workers are present, such as the German metal or telecommunications industry, we nevertheless see a trend towards outsourcing. The employment relations, at least to a certain extent, have commonalities with those of posted workers. Evidence from metalworking and telecommunications suggest that a fragmented landscape of labour relations exist in Germany. In fact, German labour relations have undergone a significant reconstruction in the last decades. The bargaining coverage is decreasing, workplaces without co-determination are expanding and non-standard employment is proliferating (Hassel, 1999). As a consequence, the core institutions of labour relations are losing their previous inclusiveness (Jacobi et al., 1998). Until the late 1980s, sector agreements covered the vast majority of workplaces; firm-level co-determination was widespread; and statutory provisions such as dismissal protection and sick pay leave shielded virtually the entire workforce. Due to the legal-political institutions' inclusiveness, labour relations contributed to the decommodification of labour, a characteristic of the German model of post-war organized capitalism (Streeck, 2009). The ongoing decline of institutional inclusiveness results in a tangible recommodification and increasing poverty risks among the lower ranks of the labour force (Dörre, 2005). As a result, even in the allegedly stable core areas, the institutions of labour relations are gradually transformed from market constituting institutions to market-dependent variables. Vertical disintegration plays an important role in this process of institutional commodification. It not only moves the core-periphery boundary; it is also deployed to subjugate collective bargaining, workplace co-determination and the utilization of labour law to firm-level economic calculations (Holst, 2014). Rather than being fundamentally different, these processes are both part of and signal the variegated nature of regulatory configurations in European political economies (Brenner *et al.*, 2010).

### 7.2.1 Posted work in other EU countries

In order to arrive at sharper inferences of the effects of posted worker presence this section will look at how the posting phenomenon is reconfigured in other

European settings. In particular I will look at the Norwegian construction sector and the Danish meat industry. However, I will base these insights on empirical investigations that mainly examine the institutional characteristics within the national and sectoral context. These studies did not, as this dissertation did, base their findings on interviews with posted workers but mainly on data derived from interviews with trade unionists and other industrial relations actors. In that sense, these findings do not focus on the circumventory practices in relation to posted work but rather on the institutional characteristics surrounding the posting framework.

The inflow of labour migrants from Eastern European countries into the Norwegian construction sector has brought serious challenges for the trade union *Fellesforbundet*. The trade union density is at 37% (Hardy et.al., 2012). The minimum-wage provisions in the sectoral collective agreement have traditionally had a normative effect for wage-setting, even in companies without a collective agreement. The increase of the recruitment of Eastern European workers into construction who were willing to work for substandard conditions, especially through posting and subcontracting, changed this situation. There were numerous examples of labour migrant workers earning far less than what could be considered a living wage in Norway (Hardy et.al., 2012).

After much debate, *Fellesforbundet* decided to apply for an extension of the collective agreement in construction through the Act relating to general application of wage agreements. From 2007, parts of the collective agreement were made generally applicable nationwide, which means that a statutory minimum wage level has been introduced in the sector (Alsos and Eldring, 2008). Moreover, the union's local branches engaged very actively in organizing Eastern European workers, initiating special meetings for Polish workers, employing organizers with relevant language skills and distributing printed material in various languages (Hardy et.al., 2012).

The union deviated from its longstanding principle of assisting only workers who were already members. This gave the union a migrant-friendly reputation, and it was also careful not to initiate any action against foreign companies that might result in migrant workers being expelled from the country (Eldring et al., 2012). These efforts produced good results; in 2008 the local union in the capital area, *Oslo Bygningsarbeiderforening*, reported that a total of 40 percent of its members came from newly accessed Eastern European countries, a majority of these from Poland. When asked to explain this success, local trade unionists emphasized that the general application of the collective agreement has become a key instrument in their organizing efforts. Earlier they had to press employers to sign collective agreements (which often proved impossible in the case of foreign companies) to help members or potential members to get a decent wage, while they now could focus more on providing assistance to individual workers (Hardy et.al., 2012).

With regards to the specific findings of this thesis it is difficult to discern whether similar circumventory practices can be observed in the Norwegian construction sector since no comparative studies exist. What is striking is the successful attempt of the Norwegian trade union to organize labour migrants. In general, German unions have relied on lobbying rather than mobilizing their members. The IG BAU initiative with the European Migrant Workers Union constituted an innovative strategy, despite its lack of success. On the one hand the concept of the EMWU failed as it was not able to attract a significant number of migrant workers. On the other hand, IG BAU also failed to get support from other construction workers unions in Europe, which preferred to organize migrants within their own structures.

Increasing international competition and pressure for liberalisation of labour markets and industrial relations affects basically all sectors across European welfare states. The slaughterhouse sector in Denmark and Germany is a prime example of this trend. While the wages and working conditions in the pig meat industry in the two countries were almost similar two decades ago (Refslund 2012) they are now completely different. Since the 1990s the slaughterhouse industry in both countries has faced the same pressure from international competition, liberalisation and Europeanisation. However, the Danish industry has maintained comparatively high wages and good working conditions, while working conditions and wages have deteriorated radically in Germany with wide-spread workforce dualisation and increasing labour migration inflows, facilitated by European integration.

German companies resort to external flexibilisation measures paired with the opening of the Eastern and Central European labour markets through European economic integration. Hyper mobile EU labour migrants were often employed in the European construction sector and often work under precarious employment conditions (Wagner 2014). However, temporary agency workers and posted workers are increasingly employed in the German meat industry working for substandard wages. In Denmark, the main meat producer Danish Crown has rather resorted to relocating especially the most labour intense production from Denmark to Germany, Poland and UK in order to reduce costs (Refslund 2012).

In Danish slaughter-houses there is as of yet no dualisation tendency because of the all-encompassing industrial relations system. By contrast, Germany shows widespread dualisation with mainly EU labour migrants constituting the lower tier of the labour market with very low wages and precarious working conditions. Several institutional characteristics explain this divergent development: 1) union strength is an integral variable to explain diverging paths; 2) which in combination with declining bargaining coverage gave employers "exit options" in the German context; 3) labour power is also preconditioned on the structural conditions of the employers' side (Wagner and Refslund, forthcoming).

Firstly, in line with the Korpi argument (Korpi 1983, 1978) the main explanation of the sectorial differences between the two countries is the unions' power resources, reflected in union membership but also in institutional strength in industrial relations and labour market regulation, which is embedded in the national model (Esping-Andersen 1990; Esping-Andersen & Korpi 1984). Nevertheless, unions' membership rates also reflect power resources. Historically all Danish slaughterhouse workers are union members and the unionisation rate remains 100 % today (Refslund 2012). By contrast, the comparative rate for NGG in Germany has been much lower around 30 % (Czommer 2008: 172).

Moreover, the institutional embeddedness of Danish unions as an integral part of the Danish industrial relations system adds to explaining cross-country differences. The German sector faces much precarious employment mainly through subcontracting of labour migrants. Menz (2005) found in an intra-European labour mobility study that organized labour strength was an important determinant in reducing downward wage pressure stemming from labour migration. The dual labour market outcome in Germany is conditioned on the weakness of the German slaughterhouse unions rather than explicit choices to not include or to exclude migrant workers. In Denmark the share of migrant workers mainly Poles and other Eastern Europeans is growing, but in the slaughterhouse industry they have been fully integrated into the industrial relation system including the union. This is fostered by the strong workers collective culture in Danish slaughterhouses that can exercise large social pressures on unorganised workers as well as the industry structure with large sites, which makes union recruitment easier.

Secondly, while the European trend is towards declining importance of sectorial or national coordinated bargaining on behalf of more company bargaining (Marginson 2014), the Danish slaughterhouse workers have managed to maintain sectorial wage bargaining and thus avoided any concession bargaining. Much wage bargaining in the Nordic countries is still multi-employer bargaining and rather coordinated (Vartiainen 2011). Any multi-employer wage bargaining has completely been eroded in the German slaughterhouse industry over the last two decades, and there is today still no multi-employer bargaining beyond the political negotiations of a minimum wage and the sector negotiation between the big four companies.

Thirdly, the realistic probability of wage coordination is not only contingent on workers organisation, but also employers' organisation (Martin & Swank 2012). Historically employer organisations has been lacking in the German meat industry (Czommer 2008: 158), while it has been an integrated part of the Danish industrial relations system since the end of the 19th century when labour market regulation was settled in *September-forliget* (the September agreement), which has almost constitutional status in the Danish labour market system. Moreover, while the findings in the case studies shows institutional and socio-economic settings are the



main explanatory variable, structural conditions also influences the outcome. The more modernized and centralized industry in Denmark has an impact on how firms try to adjust their costs. The larger Danish slaughterhouses can easier automatize part of the production, while often the small and medium size companies in Germany cannot afford to do so, so they choose the low-road with low wages and subcontracted labour migrants (Czommer 2008; Grunert *et al.* 2010: 386–87). The German meat industry is also much more segmented than the Danish industries with around 1.300 companies in 2008, which makes the coordination of the labour market even more difficult (Czommer 2008).

The slaughterhouse industry in Denmark still has good working conditions and wages in combination, while the German case have deteriorating wages and working conditions especially for subcontracted migrant workers. This difference is mainly explained by the unions' power position in the industry (Esping-Andersen & Korpi 1984; Korpi 1983; Stephens 1979).

### 7.3 The Enforcement Directive of the Posting of Workers Directive

What are the implications of these findings for institutional reforms to the worker-posting framework? Unfortunately, the recently negotiated Enforcement Directive (ED) missed an opportunity to correct the gaps in the regulatory framework. In response to the loophole between the established rights and their appropriation, or what in practice has become 'the rule' (Streeck, 2001: 142), policymakers felt the need to negotiate a framework in order to clarify how the Posting of Workers Directive can be more effectively enforced.

In April 2014 the European Parliament adopted the Enforcement Directive of the Posting of Workers Directive. Its main purpose, as the name indicates, is to strengthen the enforcement of the Posting of Workers Directive. The final document passed just before the European Parliamentary election in 2014. The timing was no coincidence. The Directive was a political solution to show they did all within their might to improve the position of posted workers. Its content does hardly go beyond the codification of already-existing regulatory measures at the national level. More importantly, the ED may have opened the door for deteriorating practices. The aim here is not to present the detailed and complex negotiation process, reflecting the various interests and positions of the actors leading to the outcome. Rather, the section discusses some of the main Articles in relation to the findings of this thesis in order to attend to the implications for the changing regulatory configurations.

One of the most contentious issues of the ED is the specification of which rights apply when the worker is deemed to fall outside the posting framework. As set out in the operationalization of posted work for this thesis (see chapter 1), a

fluid labour market has emerged in which it is difficult to disentangle under which rights framework a worker is actually employed. For example, it is often unclear if the worker *de facto* falls under the free movement of persons or services (here the added complication is if the person is employed via a subcontractor or agency contract) or is unconsciously bogusly self-employed. Most of the workers interviewed for this research were recruited for the purposes of the posting relationship. They would therefore fall outside the scope of the posting framework. Trade unions demanded a clear definition of which law would apply to a worker who is under a *de facto* but not a *de jure* posted employment relationship (such as bogusly self-employed workers). The demand was for the ED to clearly state that in the aforementioned case the worker would be covered by the entire legislation of the host country. However, the ED does not state which framework would apply and therefore leaves the possibility open that it will be the country-of-origin framework.<sup>20</sup> The danger is the introduction of the country-of-origin principle through the back door. The way the posting framework is enacted, as described in this thesis, will thus not be curtailed but may turn out to be justifiable with this legal loophole in place.

This thesis has argued that the particular precarious situation evolves for posted workers due to the discrepancy between nationally embedded regulatory institutions and labour power and the transnational labour market. The ED hardly introduced remedies in this regard. Interestingly, the heated debate in relation to the ED revolved around strengthening the national control measures instead of transnational cooperation. For example, the main debate focused on subcontracting-chain liability and other particular control measures. Social partners of several EU countries pushed for a main-contractor liability for all the elements in the subcontracting chain. According to Article 12 of the Enforcement Directive, only the direct subcontractor can be held liable. It is left to the member state to determine the exact tool to enforce such abuse in the subcontracting chain. Paradoxically, the ED leaves room for the member states to decide relevant enforcement measures but at the same time repeatedly cautions that additional measures need to be 'justified' and 'proportionate'.

For example, national inspectorates are not restricted in imposing particular measures. However, any additional measures have to be *justified* and *proportionate* in order to avoid creating a barrier, or an obstacle to the free provision of services.

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<sup>20</sup> Recital 11 states: 'Where there is no genuine posting situation and a conflict of law arises, due regard should be given to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council ('Rome I') or the Rome Convention that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit. Member States should ensure that provisions are in place to adequately protect workers who are not genuinely posted.' (Directive 2014/67 EU).

In fact throughout the ED the attention to 'proportionate' measures alerts member states to maximize their own tools to avoid infringement procedures. Moreover, the European Commission emphasizes in Article 9 that it will monitor whether the Directive is effectively translated into national law. Even though the European Commission has an institutional duty to monitor compliance, this responsibility is usually not written in Directives. By doing so, it again draws attention to the importance of employing proportionate instruments at national level. This may render national regulatory frameworks impotent to counter transnational exploitative practices as observed in the case of transnational workspaces.

In certain aspects the Directive did advance transnational administrative cooperation. It sets time limits by which authorities of other member states have to respond to requests for assistance (for example a 2-working-day limit to respond to urgent requests and a 25-working-day limit for non-urgent requests). However, how the actual collection of fines is to be achieved is unresolved. Fines imposed on a posting firm cannot be executed effectively because they are based in a different jurisdiction. Moreover, Art. 18 (1) introduces a right for the service providers to contest the fine, penalty and/or underlying claim. If such a dispute arises, the cross-border enforcement procedure of the fine or penalty imposed will be suspended pending the decision of the appropriate national authority in the matter. Companies making a business model out of worker posting may be able to use this provision as a tool to postpone real execution. In that sense companies are still able to profit, and can strategise around the fact that they are registered in another jurisdiction.

Essentially, the ED hardly tackled the underlying structural issues. This study has observed a functional change in the institutional framework. Even though policymakers wanted to remove loopholes, the actual policy framework did not change much on the EU level. Campbell argues that most researchers would agree that changes in rules would qualify as instances of institutional change; by contrast, functional changes would not (2009). However, the complexity of the posting regulation and the outcome of the ED show that highly politicised controversies impede on changing the actual rules of the game through the political process. The heterogeneity of economic interests for both member states and trade unions largely inhibits effective change. These policy struggles more often than not result in vague and ambiguous formulations of legal text that leave wide room for reinterpretation. Therefore, the study points to the importance of paying equal attention to functional change. In light of these rather grim conclusions and policy developments, what then are the implications of this research for more effective strategies to strengthen workers' rights in transnational workspaces?

#### **7.4 Practical and utopian considerations on how to proceed**

Interested parties in the posting policy field have developed several practical policy recommendations. I will shortly point to policy measures that may enhance the position of posted workers at the national and transnational levels before moving on to more utopian, but in my view equally important, ideas.

First, at the national level, trade unions demand the curtailing of the development of long subcontracting chains. This would be a preventative measure against possible abusive practices down long subcontracting chains. Second, there is public demand to significantly upgrade sanctions for non-complying firms in order to disincentivise rule circumvention. Third, in Germany, there are proposals to establish a (currently nonexistent) system of legal collective redress. Collective redress enables trade unions to file court proceedings on behalf of workers. Posted workers could file legal proceedings without having to reveal their identities and thus protect their employment relationship. Collective redress would give a voice to posted workers' concerns but also uncover malpractices. Fourth, trade unions demand a formal role in the labour-inspection process, including both its design and the labour inspections themselves. This may strengthen worker voice as well as enforcement, and could include the involvement of the social partners.

A recent European Parliament report suggests a transnational measure to strengthen effective enforcement of mobile labour rights (European Parliament, 2013). First, the report suggests the introduction of a European agency dealing with all kinds of cross-border matters within the field of labour inspections aimed at more effective administrative cooperation. This could, for example, cover the control of transnational service providers as well as letterbox companies, and the organisation of cross-border controls (European Parliament, 2013). Second, MEPs proposed the implementation of a European social security card, where all necessary data such as working time or social security are stored. This would permit labour inspectors to review all the necessary data on the spot. Such a card has already been implemented in the Swedish construction sector and has proved to be an effective way to control workplaces and facilities. Inspectors would be able to read the information on the cards via detectors. Third, the establishment of an EU-wide register of A1 forms is needed in order to make controls effective in nation states and also quantify the numbers for policy pressure purposes and effective quantitative research.

Apart from these isolated measures, and in order to move away from defeats to improving the PWD, it may be feasible to introduce a whole new directive altogether. This directive would focus and refer to all kinds of cross-border labour mobility in the EU, removing the competition created by different forms of mobility. Such a directive, geared towards a mobile low-wage sector in a pan-

European labour market, would articulate and fuse the rights between atypical, posted and agency work.

Besides thinking about preventive or current policy possibilities, it is equally important to think about European utopias. While utopist solutions are rather remote from the current institutional context, they are important in providing paths for alternative thought. Jennifer Gordon (2007), describing similar problems regarding migrant workers in the United States, proposes a more far-reaching change to improve the situation of labour migrants. In her conceptualization of 'transnational labour citizenship' she suggests linking the employment permit to non-territorial (industrial) citizenship, that is, to membership in a trade union. EU citizens do not need an employment permit to take up work in another member state. However, by slightly adapting Gordon's suggestions the idea of establishing a transnational labour citizenship for posted workers is transferable to the EU context.

A possible adaptation of Gordon's idea may be to create an institutional setting in which the employment at foreign subcontracting chains is not solely determined by the sending firm. For example, similar to the idea of 'transnational labour citizenship' EU posted workers (but also labour migrants more generally) could engage in cross-border work after joining an organisation of transnational workers, rather than through a previous employment relationship with a service provider. To foster solidarity, accommodate voice and provide the necessary conditions for collective action, this policy would encompass all workers in a pan-European labour market to whom collective action is meaningful, regardless of the territory on which they reside. According to Gordon's idea, the migrant has to commit him or herself to the trade union. The person becomes a member throughout the employment relationship and commits to reporting misconduct. Thus, while the supranational policy discussions adhere to territoriality, it is practices that span territories that have the potential to disconnect migration from state-based citizenship as suggested by Gordon.

## 7.5 Implications, future research and industrial and global patterns

This thesis has discussed alternative, uneven and very much dynamic forms of regulation beyond a self-contained view of the national level that do not *per se* undermine the nation state. In these spaces differentiated forms of regulation are pertinent in which the regular institutional system largely does not apply. This is similar to what Aihwa Ong labels 'neoliberalism as exception,' John Agnew depicts as 'portable sovereignty' and Lillie, drawing on Palan, labels 'spaces of exception' (Ong, 2006; Agnew, 2009; Lillie, 2010). The authors depict spaces in which sovereignty is fragmented, and in which firms can strategize around this

disjointed regulation. Palan explains this as a process in which social and political controls are selectively not enforced, in order to allow capital a freer hand in designing the social relations of production (Palan, 2003). My main concern in this thesis was not to accept the 'lack of regulation' *per se* but to investigate how these spaces are structured and how actors in these spaces engage with the institutional framework in place. If one seeks to understand how these spaces come into being and are sustained, one must therefore look not only at the structures laid down by laws and authorities, but also at the various agents reconstituting those structures.

This approach may produce important insights for other industries or policy fields in the European Union or other parts of the world where processes of deterritorialization interact with the changing nature of employment relations. In the European Union similar processes are occurring in industries such as shipbuilding (Lillie and Wagner, 2014), warehouse distribution (Berntsen, forthcoming) and trucking. Workers who may well be permanently mobile inhabit these spaces (Van Hoek and Houwerzijl, 2011). The labour markets of these industries are in the process of being transformed. While this study focuses on the German setting other studies have shown that various EU countries struggled to adapt their labour market policies to implement the Posting of Workers Directive. For example, Lillie and Greer (2007) look at transnational posted work in the construction industry in Germany, Finland and the UK and examine how transnational politics and labour markets are undermining national industrial relations systems in Europe. Moreover, Lillie, Wagner and Berntsen have discussed the similarities of construction firms in Germany, the Netherlands and Finland in evading or altering the application of the regulation in their employment relations (2014). This cross-country comparison finds that construction firms will oftentimes claim they are complying with the host country's rules and the Posted Workers Directive, but these claims are difficult to check, and they may be violating their home country's regulations as well. Employer behaviour in all countries examined is fairly similar, which is made possible by the ambiguous rule system surrounding posted workers and their work environments.

New EU directives confirm the trend in changing borders between political economic territories and employment relations. The intra-corporate transfer directive (COM (2014/66 EU) on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (ICT) is such an example. 'Intra-corporate transfer' means the temporary secondment of a third-country national from an undertaking established outside the territory of a member state and to which the third-country national will return. The directive enables third-country nationals to be posted within the European single market. The condition is that they have to have worked for 6 months within a EU member state in a daughter undertaking of the company for which they normally work. For example, a Russian undertaking can send his employee for a secondment to Poland. The

worker could be posted under the Posting of Workers Directive to Germany if he or she has worked for the daughter undertaking in Poland for six months. In light of the findings of this study, difficulties in enforcing the regulatory framework in such a situation can easily be imagined.

These findings confirm that similar processes are occurring in other EU member states and in similar policy fields. For future research it may be useful to examine the influence of posting on other institutions such as social policy. Social policy is a crucial component of establishing the comparative advantage of posting. It deserves more attention to see the extent to which posting impacts the host as well as the home countries' institutional social policy system. Also, it is important to examine how the two affect one another. Moreover, future research may also look more closely at similar processes within other world regions. Preliminary research in Taiwan and Japan suggests that posted work is increasingly used as an employment flexibilisation measure in East Asia (Mottweiler *et al.*, 2014). Despite the absence of similar supranational regional regulations, the regional integration of transformation market economies (China, India, Vietnam) as well as the well-developed cross-national capacities of the Japanese temporary-staffing industry in East Asia (Coe *et al.*, 2012) indicate developments which parallel some of the driving forces for the expansion of migrant agency work in Europe.

Finally, it is crucial to further investigate the impact of mobility practices on society at large. The politics of differentiation between mobile workers themselves and between mobile workers and native workers has a strong influence on stability in the process of EU integration. Perceived or existing levels of inequality can spur an anti-EU backlash (Burgoon, 2013). The recent European Parliament elections point to rising levels of xenophobia. EU citizens in several member states expressed concerns about the widening integration. Populist discussions accuse labour migrants of either being 'welfare tourists' or of contributing to rising unemployment. The Dutch Freedom Party established a website on which it was possible to name and shame eastern European workers who allegedly stole the jobs of native workers. In the UK, workers took to the streets to demand 'British jobs for British workers'. Such sentiments are particularly noticeable towards EU citizens from recent EU additions Bulgaria and Romania. Right-wing parties with strong positions on immigration gained major support in the UK, France, the Netherlands and Finland. So far, no similar tendencies are noticeable in Germany. However, fears of 'poverty migrants' settling in Germany to profit from the benefits of the welfare state feature in the popular media and in political discussions.

The main task ahead will be to re-embed mobile workers into structures of social inclusion and collective resistance. This study was firstly interested in how actors order and utilise regulation within transnational workspaces. The findings should not be seen as an end point; rather, they are part of a dynamic process. Chapters 5 and 6 suggested paths that steer this process in the direction of social

inclusion. Labour migration is an opportunity to weave the texture and create the ferment for a New Europe. A focus on actors and on the hopes, needs and strategies of marginalised groups in society may be an enzyme to develop much-needed transnational labour structures in a pan-European labour market.



## ANNEX I

Art. 3 of the EU Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

*Terms and conditions of employment*

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the
  - undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
    - by law, regulation or administrative provision, and/or
    - by collective agreements or arbitration awards which have been declared universally applicable
 within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
    - (a) maximum work periods and minimum rest periods;
    - (b) minimum paid annual holidays;
    - (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;<sup>21</sup>
    - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary
      - Employment undertakings;
    - (e) health, safety and hygiene at work;
    - (f) protective measures with regard to the terms and conditions of employment of pregnant women
      - or women who have recently given birth, of children and of young people;
    - (g) equality of treatment between men and women and other provisions on non-discrimination.

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<sup>21</sup> For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

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