

Transnational labour markets and national wage setting systems in the EU

Gerhard Bosch

Professor

University Duisburg-Essen / Institute for Work, Skills and Training
Duisburg, North Rhine-Westphalia
Germany

Email: gerhard.bosch@uni-due.de

July 2012

Transnational labour markets and national wage setting systems in the EU

By Gerhard Bosch

1. Transnational grey areas in labour markets

The repeated expansion of the EU and the ensuing migration flows have been the trigger for extensive empirical research on various social and economic aspects of migration. This research has concentrated almost exclusively on individual migrant workers. This focus on individuals has shaped most of the studies on immigration and emigration and their various effects on the employment systems of the countries of origin and countries of destination. Thus, for example, a major research project has concluded that migration flows from Central and Eastern Europe following the introduction of full labour mobility since 1 May 2011 will be very limited in scale. Nor is it expected that such migration will give rise to serious imbalances in labour markets or other disruptions in the countries of destination (European Integration Consortium 2009).

Such reassurances contrast sharply with studies that have revealed considerable dislocations as a result of increasing competition in Europe based on wage dumping. Industry-level studies have thus produced evidence of displacement effects and wage reductions in sub-labour markets, such as in the construction industry, for example (Bosch/Zühlke-Robinet 2000), or in the meat processing industry (Czommer 2007). Another strand of research has focused on the pressure for change in national employment models generated by the legalisation of wage competition in Europe. In addition to country studies (e.g. Woolfson/Thörnquist/Sommers 2010), there are comparative studies that draw on the varieties of capitalism approach (e.g. Bosch/Mayhew/Gautié 2010). Finally, several judgements by the European Court of Justice on posted workers have triggered a lively, even heated debate among legal scholars in Europe (Blainpain/Swiatkowski 2009; Krebber 2009; Kempen 2010) that is increasingly extending to the social sciences (Alber 2010; Höpner 2009).

Such ‘parallel communities’ in research, which make completely opposing assessments of the same object, are all the more likely to arise the more tightly the research framework is drawn. From the bird’s-eye perspective of macro-economic models, small wage reductions or increases in average levels of unemployment in the population as a whole may well seem innocuous. From the micro-level perspective of affected sectors and employees, however, they could appear very threatening indeed. This gap between the micro and macro levels can be bridged only by using a mix of methods. Moreover, research on posted workers shows how important it is to look beyond traditional research on migration and to include in the analysis new forms of transnational labour mobility resulting not from the free mobility of labour but from the deregulation of product markets and competition law. Finally, it is not sufficient to see the institutions of the employment system solely as fixed elements in migration processes. The Europeanisation of labour and product markets is putting these institutions themselves under considerable pressure to change. Since institutional change frequently follows European legislation, disciplinary boundaries have to be transcended if the developments are to be fully understood.

This article begins with an analysis of the deterritorialisation of labour law as a result of the new constellation of labour market and product market regulations within the EU (section 2).

The effects of the new legal grey areas on national wage setting systems are then investigated (section 3). Because the construction industry has become the main destination for postings in the EU, the impact of the freedom to provide services on the wage systems of this industry is examined on the basis of four country studies (DE, FR, NL, UK). Finally, I examine the extent to which the gaps in the regulations opened up by transnational mobility can be closed by transnational agreements (section 5).

2. The deterritorialisation of labour law in the European Union

One of the fundamental characteristics of modern nation states is the territorial basis of their legislation, which defines the geographical limits of national sovereignty. At the same time, the territorial principle is a constituent element of democratic societies, in which all of a country's citizens are equal before the law regardless of status, race or nationality (Supiot 2009). Industrial relations and working and employment conditions are also extensively regulated by national legislation. This territorial principle is not called into question by most supranational regulations pertaining to employment conditions, such as the EU directives on employment or the ILO conventions to which nation states are signatories. If, when adopted, these regulations gave rise to a need for adjustments, then it was the responsibility of nation states to adapt their legislation accordingly. Even though the motives for amending legislation originated outside the country, the 'camel' of supranational regulation had first to pass through the 'eye of the needle' of national legislation. Consequently, there was a certain amount of leeway for national labour law to continue to evolve along a path-dependent trajectory. Moreover, national actors seldom missed the opportunity to incorporate other objectives into the legislation and sell them to the outside world, so that in the end often only legal experts understood the supranational background.

Even the large-scale migratory flows resulting from the right of workers to full mobility within the EU left the territorial principle unaffected. When they cross national borders, migrants enter a new legal system and become subject to the legislation of the country of destination. Initially, discrimination could be prevented under the terms of Article 119 of the EU Treaty, which enshrined the principle of equal pay for equal work for men and women, for both foreigners and nationals alike. In the 1960s and 70s, the Member States were unanimous in arguing the case for the harmonisation of working and employment conditions while maintaining the better conditions for workers that prevailed in individual countries.¹ The project for European unification was not to be jeopardised by tempering the potential for labour market policy disputes stirred up by migration.

While the territorial principle was applied in labour law, competition law was governed by the country of origin principle, which the EU had been extending step by step since the early 1970s. According to this principle, products that had been approved in one country could be exported to other countries without any further inspection. Since services were also included among such products, this fundamental principle of the EU's internal market impacted directly on employment conditions. Companies had the right to provide time-limited services in other countries with their own workers and in accordance with their employment conditions. Thus the principle of equal pay for equal work within the geographical sphere of application of national legislation does not apply in the case of contractors.

¹ The Council Resolution of 1974 formulated the objective as follows: 'Improvement of living and working conditions so as to make possible their harmonisation while the improvement is maintained' (cited in Krebber 2009:879)

The freedom to provide services was not of any practical significance until the early 1990s, when contracts began to be awarded in some industries, particularly construction, to foreign companies. The extent to which the territorial principle in labour law could be undermined by 'islands of foreign labour law' (Hanau 1997: 145) soon became evident. In contrast to the early years, the principle of equal treatment was not supported strongly enough by EU Member States, because the EU was becoming increasingly more heterogeneous as a result of the accession of new Member States at different stages of development. The conflicts of interest became evident during the consultation on the 1996 Posted Workers Directive. Whereas the countries of destination for posted workers generally voted to protect their labour standards, the less developed countries saw services with low wages and hence low prices as an export opportunity that they did not wish to have restricted. Furthermore, neo-liberal thinking was becoming increasingly dominant, with the result that even the governments of some countries of destination, such as the UK, opposed all labour market regulation. In the end, it was left up to individual member states to regulate equal treatment at the national level.

This compromise of leaving the question of equal treatment for contract workers up to national actors seemed logical, since Article 137, Paragraph 5 of the EC Treaty excludes any Community activity in respect of 'pay, the right of association, the right to strike or the right to impose lock-outs' (quoted in Kempen 2010: 20). In recent years, however, the European Court of Justice has extended the scope of its jurisdiction in several landmark decisions. The starting point for these decisions was always a conflict between basic EU freedoms and national legislation in connection with transnational mobility. In 1997, the Court decided against the French state because it had permitted a blockade of the country's roads by striking lorry drivers and had thereby failed to ensure the free circulation of goods within the EU. In 2007, the blockade by the Swedish construction union of a building site operated by the Latvian company Laval was declared illegal because the action, which was intended to force collective negotiations with the aim of obtaining equal rates of pay, unduly restricted the freedom to provide services. In particular it had been inadmissible to attempt to apply the entire collectively agreed pay grid to contract workers, since the EU Posted Workers Directive stipulates that only minimum conditions can be demanded. The strike by a Finnish trade union against the reflagging of a ferry (Viking) to operate under the flag of another Member State was judged to be an infringement of the right to freedom of establishment also in 2007 (Krebbler 2009: 890-1). Finally, the 2008 Rueffert decision overruled the Act on the Observance of Collectively Agreed Standards (*Tariftreuegesetz*) passed by the parliament of the German state of Lower Saxony. The ECJ took the view that the Act constituted an infringement of the Posted Workers Directive, since the observance of collectively agreed standards was ensured only for public procurement, not for all companies through generally binding collective agreements (Alber 2010: 23).

These decisions join other judgements by the ECJ, which has staked its claim to be able to examine and judge the appropriateness of national legislation when the EU's basic economic freedoms come into conflict with national law. In the Laval and Viking cases, it is true that the fundamental right to collective action was emphasised, but the actions themselves were judged to be disproportionate. Furthermore, the judges considered that only individuals were worthy of protection. The right to the collective representation of interests, was not considered to be a good worthy of protection and was thereby deemed to be of less value than the basic economic freedoms. Were it regarded as a basic right, the decisions may well have been different, a situation which legal experts have seen fit to criticise (Schlachter 2009: 65). Kempen (2010) sees the failure to enshrine basic rights in the European treaties and the

deliberate restriction of their scope to the establishment of a common economic space as a structural fault in the EU that has facilitated the development of a case law that restricts key basic rights. Many legal experts are of the opinion that so many inconsistencies have arisen that this case law will develop further in the years to come. Thus in its concern to establish a level playing field for foreign companies, the ECJ has paradoxically accepted that national firms may be disadvantaged. Thus in Sweden, foreign companies with contract workers are protected against strike action but national companies are not (Schlachter 2009: 68).

The interventions by the ECJ in national industrial relations systems are far-reaching and a decisive step towards the deterritorialisation of labour law in the EU. Strikes can now be scrutinised by the courts and autonomous collective bargaining is being weakened, since it requires the cooperation of the legislature with regard to declarations of general applicability. Ultimately, even the content of collective agreements is subject to state control or the scrutiny of the courts, since only minimum conditions can be laid down for contract workers. Kempen rightly notes that collective bargaining at national level can also be affected, since the restriction to minimum conditions for contract workers is not without implications for the 'main negotiations' (p. 32).

The possibilities for the transnational enforcement of sanctions in the event of infringements of national legislation on postings have gone virtually ignored in research literature to date. However, institutions cannot survive unless they are protected by controls and sanctions. 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. Thus national legislation on posted workers provides for controls on foreign companies and sanctions in the event of infringements. In order to enforce the sanctions in the country of origin, it has until now been necessary to conclude bilateral agreements, which Germany has so far managed to achieve only with Austria. Most countries of origin have no interest in such agreements. As a result, spaces that are unregulated by law have emerged and actively encourage abuse. The EU has closed its eyes to this problem and has even criticised the few regulations governing registration and attempts at control that have been introduced in some Member States (Cremers/Dølvik/Bosch 2007; Cremers 2011). It is not beyond the bounds of possibility that the next round of ECJ judgements will make all controls subject to the country of origin principle, thereby rendering national actors completely impotent.

3. Effects on national wage setting systems

Wage systems are a central pillar of national employment systems. They determine the income that can be achieved in various occupations and forms of employment. Wage differentials relating to gender, age, nationality, size of firm and form of contract determine the demand from firms for the various categories of workers. Income distribution, finally, is a measure of the degree of social inclusion or polarisation. Consequently, when attempts are made to summarise the complex differences between various types of coordinated and liberal market economies, income distribution is often selected as a basic distinguishing characteristic (Hall/Soskice 2001).

One feature common to wage systems in the coordinated European market economies was their high level of inclusiveness, by which three things are meant. Firstly, it is not only the working and employment conditions of those workers with considerable bargaining power that are collectively negotiated. Rather, the outcomes of the negotiations are extended to all employees in a firm, industry and the economy as a whole. Secondly, a minimum level of

income that enables independent living above mere subsistence is guaranteed (Figure 1). Thirdly, integration into the labour market is not hampered by excessively high wages. This third aspect is disregarded in what follows, since recent international research does not show any negative effects produced by minimum wages (Bosch 2010).

Unless employees' interests are unified by strong trade unions that do not simply represent the sectional interests of powerful groups but also negotiate on behalf of weaker ones, inclusive wage systems are as unfeasible as they are without sufficiently centralised employers' associations. Depending on the strength of the social partners, the state may have a role to play. It can even out the social partners' weaknesses and extend, as well as restrict, the inclusiveness of wage negotiations. In inclusive wage systems, productivity gains are not skimmed off by individual groups but are distributed among all groups of workers. Compared with exclusive systems, with weak trade unions and employers' associations and a state that does little to intervene in market processes, the income distribution in inclusive wage systems is compressed.

The temporary relocation of workers, combined with the deterritorialisation of labour law outlined above, can be described as an external shock that can call into question the inclusivity of wage systems. Such external shocks, resulting from the deregulation of product markets initiated by the EU, have occurred before. EU directives have opened up broad sections of the public services, such as postal services, telecommunications, energy, water and transport, to private providers. Fiori et al. (2007) showed in an econometric analysis that product market deregulation weakens the bargaining power of employees in the affected industries, as measured by union density and the extent to which pay bargaining is centralised and coordinated.²

Figure 1: Inclusive versus exclusive wage systems

	Within a company	Within an industry	In the economy as a whole
Exclusive	No equal pay for all employees	Equal pay only in firms with strong employee bargaining power (bound by collective agreement)	Equal pay only in industries with strong bargaining power (bound by collective agreement)
Low wage			
Inclusive	Equal pay for all employees	All firms in an industry bound by collective agreement	All industries bound by collective agreement

Source: own representation

² As a result, the authors argue, product market deregulation has complementary effects on labour markets. Thus countries that have had difficulties in deregulating their labour markets can achieve this goal in a roundabout way by deregulating product markets, which the authors also recommend, albeit with reservations.

However, detailed country studies show that the effects of product market deregulations on the labour market are ‘filtered’ by national wage systems. Depending on the architecture of the system in question, therefore, product market deregulation affects the bargaining power of employees in the Member States in very different ways. The crucial difference between the countries lies in whether new providers are able to pay lower wages than the old providers once product markets have been opened up.

In one group of countries, wages in the deregulated industries are taken out of competition, so providers have to compete on quality and productivity. In most of these countries, the state has declared regional collective agreements, with their entire pay grid, generally binding for various categories of employees. This applies to France, Belgium, the Netherlands and most of the Southern European countries. These countries have two de facto minimum wages, a national minimum wage as a lower limit and, above that, a collectively agreed minimum wage, the level of which varies by industry and pay grade. In the Scandinavian countries, the state does not intervene, but the unions are able, by virtue of their high membership levels, to ensure that the collectively agreed rates are maintained, even for new providers. In the second group of countries meanwhile, the collective bargaining systems are susceptible to the new competition from outsiders facilitated by product market deregulation. This susceptibility is the result of the inability of the weak trade unions to organise workers employed by the new providers and inadequate support from the state in extending the applicability of collective agreements. This enables new providers to expand in this market, using business models based primarily on wage undercutting. In the UK, which embarked on privatisation well before the EU directives, business models of this kind swept away the once dominant industry-wide collective agreements as early as the 1980s. In contrast to Germany, however, the UK and most of the Eastern European countries, where industry-wide collective agreements play only a minor role, still have a minimum wage, which prevents extreme forms of exclusion. In Germany, where most product market deregulation did not take place until the 1990s, the industry-wide collective agreements that once dominated have been eroded in virtually all the deregulated product markets, with the exception of the energy sector, where public monopolies have been replaced by private monopolies. The less favourable working and employment conditions in the outsider companies have triggered a downward wage spiral and have now become the norm. It may seem surprising today that the German trade unions once cherished the belief that they could control wage competition through their collective bargaining arrangements and did not link their acceptance of privatisation to a demand for generally binding collective agreements. This misjudgement can be explained only by the very slow pace at which the erosion of industry-wide collective agreements proceeded initially before it eventually started to gather pace. Recent research on institutional change makes reference to cumulative effects (Streeck/Thelen 2005; Bosch/Lehndorff/Rubery 2009).

Various types of wage-setting systems are summarised in Figure 2. The first three countries (DK, NL, FR) are characterised by a high and stable level of inclusiveness. In these three countries, the already high level of coverage by collective agreements has actually increased further in the last two decades in spite of extensive product market deregulation, and the shares of low-wage workers are low and stable. In the Netherlands and France, collective agreement coverage has risen even though trade union density has fallen considerably, since the state compensated for the weakness of the trade unions by declaring collective agreements generally binding. The other three countries (DE, UK, USA) have exclusive wage systems. Collective agreement coverage has declined and the share of low-paid workers is

high and has increased in recent decades (Bosch 2009; Bosch/Gautié/Mayhew 2010). As a result of its growing share of low-wage workers and firms not bound by collective agreements, Germany has come closer to the Anglo-Saxon model.

One important difference between the wage systems can be discerned. In three of them (DK, FR, NL), the consequences of privatisation have been absorbed without any need for active adjustment. The two other European models (DE, UK), meanwhile, have proved to be less shock-resistant. Collective agreement coverage in these two countries could have been stabilised only by increasing the use of (DE) or introducing (UK) declarations of general applicability. The political will to do so, however, was wholly absent.

However, no system is resistant to the shocks produced by transnational postings and the country of origin principle. All countries are forced to take steps to adapt their wage systems, insofar as they wish to maintain or re-establish their inclusiveness. The task was easiest for those EU Member States with generally binding collective agreement systems, whose legal structures the ECJ judges had in mind. France and the Netherlands used the European Posted Workers Directive to make the entire pay grid applicable to posted workers. The UK similarly extended the applicability of the national minimum wage. The situation was more difficult for countries with voluntarist wage systems. In order to satisfy the requirements of the ECJ, the Scandinavian countries have to declare collective agreements to be generally binding, which weakens collective bargaining autonomy. In Germany, minimum wage agreements concluded by the social partners in certain industries have been declared generally binding in accordance with the Posted Workers Act (*Arbeitnehmerentsendegesetz*).

In view of the ECJ's judgements, those countries with voluntarist wage systems cannot maintain the inclusiveness of those systems without state assistance. As a result, their wage systems are turning into hybrid models, located somewhere between the voluntarist and state supported systems. In the case of Germany, inclusiveness has already increased to such an extent in recent years that the effects of the minimum wages stipulated by the Posted Workers Act, which were actually supposed to restrict transnational wage competition, have primarily been felt internally – a classic example of an unintended change in the function of institutions.

Figure 2: Collective agreement coverage, membership of employers' associations and trade unions and share of low-wage workers (2/3rds of the median wage*) among all employees in 6 countries, 2007

	1-10	11-20	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	Share of low-wage workers in % (2005)
Denmark						E		T	C		8.5
France	T							E		C (G)	11.1
Netherlands			T					E	C (G)		17.6
UK			T	E, C							21.7
Germany			T				E, C				22.7
USA	E	T, C									25.0

C = Collective agreement coverage

E = Membership of employers' associations, measured by the percentage of companies that are members of an employers' association

T = Trade union density, measured as the percentage of employees who are members of a trade union

G = Most industry-wide collective agreements are declared generally binding

Source: Bosch 2009; Visser 2008, European Commission 2006

4. Impact of postings on the wage system in the construction industry in four destination countries

There is no reliable information on the amount and duration of this cross-border subcontracting. The only source is administrative data on the number of so-called E101 certificates collected by the European Commission. E101 certificates confirm to the authorities in host member states that social contributions continue to be paid in the home state and prevent the host state from requesting contributions to their social security scheme. Form E101 is obtained by the employer on behalf of the employee from the home social security authorities prior to posting and is valid for up to 12 months. The weaknesses of the data are that not all posted workers request a E101 form, that not all announced postings really take place and that it contains no information on the duration of the posting (EC 2011b: 14).

The construction industry has become the main destination for posted workers in Europe. Of around 1.01 million postings registered in the EU and EFTA in 2009, about a quarter took place in the construction industry (European Commission 2011a: 26). While national subcontracting has a long tradition, cross-border subcontracting is a relatively new phenomenon in this industry. It has been facilitated by the freedom to provide services in all EU member states and has increasingly been used since the beginning of 1990s.

Table 1 show that Germany, France and the Netherlands are destination countries for large numbers of posted workers. The main difference between these three countries is that most posted workers in France and the Netherlands come from the old (EU15) member states, while Germany has a strong inflow of posted workers from the new (E12) member states, mainly Poland but also Hungary. Hungary and Poland are the main countries of origin and the destinations of their posted workers are mainly EU15 countries. UK receives very few posted workers. In the case of the UK, individual migration prevails. The number of immigrants from the new member states increased between 2003 and 2009 by around 600,000, while in Germany, which decided to utilize all three transition phases and restrict access of workers from the new member states until 2011, the number of migrants from the new member states increased by only around 130,000 (European Commission 2011b: 32). Depending on the national regulations, posted workers were partly substituted by migrants or by the self-employed.

Obviously we have two contrasting types of cross-border subcontracting. Posting from low-wage countries like Hungary or Poland to high-wage countries mainly aims to reduce costs by employing lower paid foreign workers. Posting between countries with similar wage levels is mainly based on quality and short-term availability. These contrasting types are found at the national as well as the cross-national level. Harvey characterized them as cooperative and competitive subcontracting (Harvey 2003:195-6). The cooperative model is based on specialisation and professional knowledge. Each agent carries out one stage of the production process and must cooperate with the other agents to achieve a satisfactory result. It is a model compatible with an organisation based on professional qualification, good working conditions (pay, etc.) and the application of specialised skills to assemble the elements that form part of the construction. It is also based on horizontal relations between companies. The mechanisms for protecting working conditions reinforce the model because they make it possible to retain specialised manpower and facilitate mobility between companies to meet the changing needs of the production process. Competitive subcontracting, in contrast, is based on lowering costs through the differences in market power of the agents participating in the process. The main companies tend to outsource most activities to smaller companies that are contracted through a price-based approach. A common practice in this model is the successive subcontracting of the same task, which is typical of the “hollowed-out firm” (Harvey 2003: 197). The middle units in this process often are mere intermediaries that coordinate the activity of smaller units. The higher the wage differences between construction companies are, the more competitive subcontracting contributes to the further fragmentation of an already highly fragmented industry, with many small companies and self-employed workers.

Table 1: E101 certificates for posting by country of origin and destination 2009 in 1000s and labour costs per hour in € 2007

	Country of origin (only E12) 2009	Destination country (only E12) 2009	Labour costs per hour in € 2007	Price for construction 2000-2010 2000=100
DE	170.3 (13.7)	221.2 (165.4)	20.9	116
FR	160.8 (19.6)	155.6 (32.9)	27.0	143
HU	36.4 (3.2)	25.0 (1.4)	5.2	180
NL	9.9 (0.0)	81.9 (21.8)	29.8 (2008)	137
PL	204.4 (5.8)	14.7 (1.7)	6.3	
UK	32.3 (0.1)	34.8 (7.4)	25.46	134
EU15	651.2 (46,1)	852.1 (346.9)		
EU12	346.9 (20.7)	66.9 (20.7)		

Source: European Commission 2011a and Eurostat

Which of the two subcontracting models is dominant in a country depends very much on the national and cross-national regulations governing the construction labour market, which will be characterized in four short country sketches, which are based on interviews with representatives of employers and unions in the four countries (Bosch/Weinkopf/Worthmann 2011).

Germany

One fundamental characteristic of labour relations in the German construction industry is the centrally negotiated collective agreements. The two employers' associations, one from the industrial and the other from the craft sector, and the only representative union in this industry, IG BAU, whose membership accounts for about 35% of all construction workers, consider national negotiations as a necessary means of ensuring that common standards apply to workers from different firms in different regions of the country brought together to form work teams on a construction site.

Collective bargaining in the construction industry covers more issues than in most other industries. Beside wage agreements, the social partners set up social funds. These are jointly administered organizations which are financed by a levy of about 20% of gross wages of blue-collar workers paid by all construction firms. The funds use the levy to finance vocational training and an industry-wide occupational pension scheme and to pay wages during holidays and bad weather. The collective agreement on social funds and the federal outline collective agreement for the construction industry, which contains provisions on job classifications, are declared as generally binding. Until 1996, none of the agreements on

wages and salaries had been declared generally binding. To avoid unfair wage competition from outsiders, the use of temporary workers employed by firms not paying contributions to the social funds is prohibited. Until the 1980s, the regulations had a formative effect on the labour market in the construction industry. Wages and social benefits had been widely removed from the list of competition parameters.

Since German reunification, however, there have been substantial regional differences in the German construction labour market, so that wages have once again become a competition parameter. At the same time, the German construction industry has become the main destination for posted workers in Europe, first from Southern Europe and then from Central and Eastern Europe. Against the fierce resistance of the federal employers' association, the BDA, this industry was the first to agree on the introduction of minimum wages (MWs) for blue-collar workers in the main construction industry based on the new Posted Workers Act.

The industry-specific MWs, with different rates for Western and Eastern Germany, have been declared generally binding since 1998 and cover all posted workers. In 2003, a second MW for skilled workers was agreed in order to keep the industry attractive for skilled workers. However, it was abolished in Eastern Germany in 2009. The MWs in the construction industry are above the low pay threshold of two thirds of the median hourly wage in the economy, at 10.80 € or 12.90 € (for skilled workers) in Western and 9.25 € in Eastern Germany.

Because of high overcapacities after the end of the post-unification building boom, pressures on prices and wages were very high and the collectively agreed standards eroded, especially in Eastern Germany. The unions did not have the power to stop this erosion. In an industry dominated by small companies, only 4% of employees work in a company with a works council, which in the German system of industrial relations is the main actor in enforcing labour standards in the work place.

A representative employee survey on actual wages in the main construction industry from 2008 revealed this erosion of labour standards (Bosch/Weinkopf/Worthmann 2011). In Eastern Germany, about three quarters of workers were paid only the minimum wage or slightly above. The MW was the going rate and only 21% received a higher wage according to the differentiated wage grid in the collective agreement. In Western Germany, two thirds of workers were paid above the minimum wage stipulated in the collective agreement. However, more deviations from collectively agreed standards were identified in Western Germany in respect of other wage components, such as travel and accommodation allowances and annual bonuses (for Christmas or holidays). Compliance with MW rates, however, tends to be quite high. Only 6 % of Eastern German and 3% of the Western German construction workers were paid less than the MW. However, regular checks by the Department for Financial Control of Undeclared Work (Finanzkontrolle Schwarzarbeit) reveal high levels of non-compliance to MW by posting companies which are not covered in the wage survey.

One can conclude that the MWs set an effective lower floor for wages in Eastern Germany, where the collective agreements have been seriously eroded, while they stabilized the differentiated pay structure set by the collective agreements in Western Germany. The high volume of postings from low-wage countries (E12) to Germany, the extension only of MW to posted workers and the enormous cost pressures on companies indicate that traditional cooperative subcontracting has been partly displaced by competitive subcontracting.

France

In the French construction industry, collective bargaining on the framework agreements, which also include provisions on job classifications, and on social funds takes place at national level but separately for public and private construction work. The two employers' organizations in each sector negotiate with the five representative unions. The framework agreements for blue and white-collar employees in both sectors are declared as generally binding. The levy paid to the social funds for paid holidays and bad weather amounts to about 20%. Unlike in Germany, wage negotiations take place at regional level. In general, the wages are a little higher for public construction work. The regional differences in the lower wages groups are marginal in both sectors (between 8.77 € and 9.34 € in 2010 for private construction work). They are larger in the higher wage groups for master craftsmen (from 11.85 € to 14.09 € in 2010). Most wage agreements in the regions are declared as generally binding. Since the whole wage grid is declared as generally binding, skilled posted workers and site managers (foremen and master craftsmen) also have to be paid the collectively agreed rates.

In the past, the collectively agreed wages were often below the level of the national minimum wage, for two reasons. Firstly, the employers had a strong interest in low agreed wages, since supplements such as overtime pay were calculated on the basis of the collectively agreed standards. Secondly, unions are weak in French private industry and therefore unable to oblige employers to conduct regular negotiations. In 2008, the French state introduced new legislation containing strong incentives to raise the lowest agreed wages above the level of the national minimum wage (NMW) (SMIC). Low wages in France are heavily subsidized by grants for the employers' contributions to social security. The new legislation gave companies three years to raise the lowest agreed wages to the level of the SMIC. If the agreed wages were not raised to the SMIC levels within that time, the grants would expire. This law accelerated the often stagnating wage negotiations in the French construction industry and eliminated overlaps between the SMIC and collective agreements.

The weakness of the unions is still reflected in the marginal differences between the SMIC and the lowest agreed wages. Thus the regular increases in the SMIC are the main driver pushing up the whole wage grid in the construction industry. There is no information on enforcement of the collectively agreed wages. The French construction boom, the much higher price increases than in Germany, the regional pay differences, the self-reinforcing effect of a well-known NMW and regular controls of the SMIC by the factory inspectorate indicate less price competition and higher enforcement rates for the SMIC and the collective agreements than in Germany. The high levels of protection for agreed wages, the low numbers of postings from low-wage countries (E12), the construction boom and the high price increases are strong indicators of cooperative subcontracting.

Netherlands

Two unions and four employers' organizations negotiate framework agreements at national level on pay scales, working hours, holidays, etc., as well as on wage levels. As in Germany and France, the social partners signed an agreement on social funds, which finance occupational pensions and vocational training. The national agreements are all declared as generally binding and also cover posted workers. The extensions are approved by the state without detailed examination because of the high coverage by collective agreements (65%). In case of a lower coverage the social partners have to prove the extension is necessary. To

protect the extended collective agreements, temporary agency workers also have to be paid according to the collective agreements if they are doing construction work.

Because of the strong tradition of autonomous, industry-wide collective bargaining without state intervention, wages in the Dutch construction industry are far above the level of the NMW. In 2010, the NMW was 8.65 € compared to 11.83€ for the lowest wage group in the construction agreement. The NMW does not play a role in the construction industry. In their compliance checks, the labour inspectorate found no violations of the NMW in the construction industry. It was also found that only 0.3% of construction workers were paid the NMW, while 95% of construction workers were paid at least 30% more than the NMW (Arbeitsinspectie 2006). The social partners set up an arbitration committee for complaints from workers. If collectively agreed wages are not being paid, the arbitration committee requests the employers to do so. If the recommendation of the voluntary arbitration committee is not followed, complainants have recourse to the courts. The general contractor is liable for the taxes and social contributions of subcontractors. An evaluation showed that this liability improved compliance with laws along the chain of subcontractors (van der Meer 2003: 36). Union and employer representatives report that posted workers are usually paid the collectively agreed rates. The only problems identified were failures to allocate posted workers to the correct wage categories (Bosch/Weinkopf/Worthmann 2010: 132). The high compliance with the collective agreements, the high average labour costs in the Dutch construction industry and the low share of postings from low-wage countries show that in the Netherlands cooperative subcontracting predominates.

United Kingdom

Industrial relations in the British construction industry are rather fragmented. However, contrary to most other private industries, there is still some joint industry-wide bargaining between groups of employers' organization and unions. Employers and unions still have enough common interests to negotiate at industry level in order to keep the industry attractive to a skilled workforce and to take wages out of competition. The main collective agreement covering about 600,000 employees is the Construction Industry Joint Council Working Rule Agreement (CICJ), which is signed by four unions and three employers' associations. It follows the Building and Allied Trades Joint Industrial Council Agreement, which covers about 200,000 employees, mostly in small companies in residential construction. These agreements are not extended since the UK does not have any legal mechanisms for extending collective agreements. To avoid transaction costs stemming from competing labour standards, some general contractors on big construction sites (such Heathrow Terminal 5 or the Olympic Games sites) determine which collective agreement has to be applied. Thus construction companies often belong to different employers' organisations or change membership when they start working on a new site. The legal obligations to pay the collectively agreed rates are low. Even members of the employers' organisations are not legally obliged to pay the agreed rates. The enforcement of standards seems to be high on unionized sites, where union site representatives monitor wages. In interviews, union and employer representatives reported a high level of compliance with the collective agreements at the larger sites. As in the Netherlands, however, they did report problems with the correct classification of foreign and posted workers, often because foreign workers' qualifications were not recognized or not properly understood. The main driver for non-compliance is the high level of pseudo self-employment in the UK. The share of self-employed increased to 50% of total employment in the industry in early 2000 (Harvey 2003: 198) and has decreased slightly since then. The lack of licensing for construction work encourages this bypassing of collective agreements.

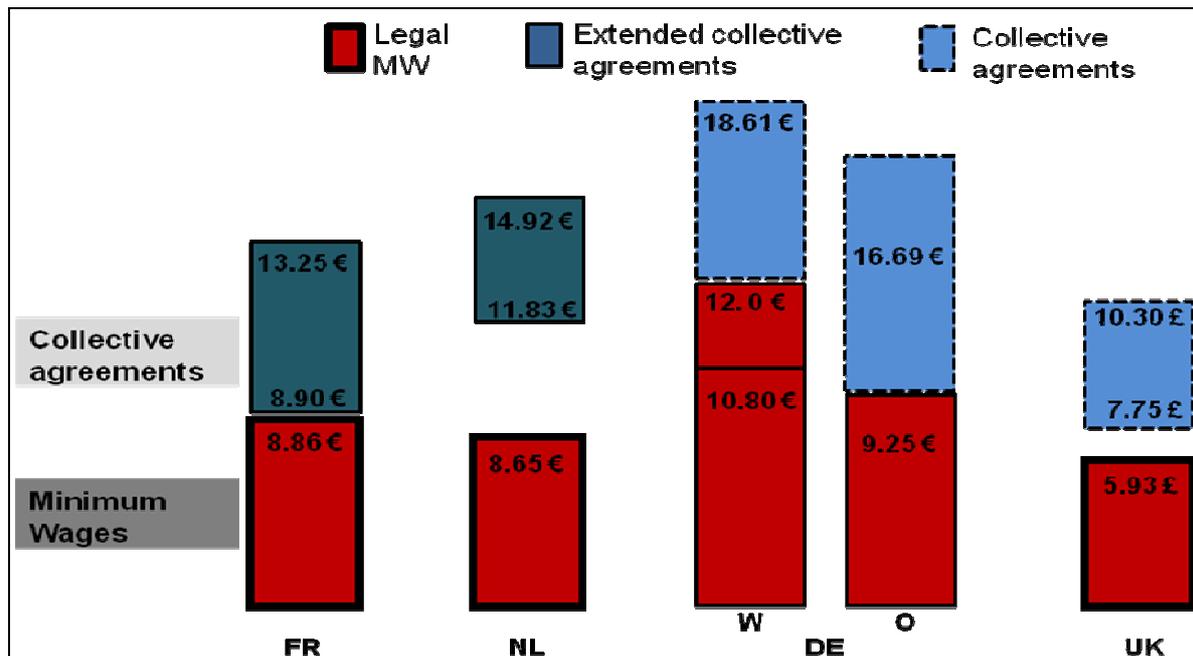
Hourly rates for unskilled workers are far above the NMW in the UK (£5.93 NMW compared with £7.75 in the CIJC). The rates for skilled workers are going up to £10.41. Because of the higher wage levels, the NMW does not seem to play a role in the construction industry. This industry is not mentioned as a typical low-wage industry in the annual reports of the Low Pay Commission (2011). Problems with compliance were, however, reported for migrant workers who are not conversant with their rights and do not speak English (Low Pay Commission 2011: 93).

The high hourly labour costs, the still strong industry-wide bargaining in an environment of decentralized bargaining, the obligation of subcontractors to pay according to a collective agreement at large construction sites and the small share of low-paid workers in the industry indicate cooperative subcontracting in some parts of the industry. The fragmented bargaining structure, the high share of pseudo self-employment, the low coverage by collective agreements in small companies and problems in enforcing the NMW for foreign workers show high levels of competitive subcontracting. In general, wages seem to be above the NMW, which does not play a role in this industry.

Two of the four countries (FR and NL) provide broad protections for posted construction workers. The whole wage grid of collective agreements is declared as generally binding and also covers posted workers. In these two countries the wage setting systems in the construction industry resemble more or less the dominant national system as described in section 3 and have remained stable by successfully controlling outsider competition. Some enforcement problems are reported but not non-compliance on a large scale. Because the Dutch unions are stronger than French unions, they have been able to negotiate minimum standards clearly above the NMW, while in France the SMIC sets the lower floor for collectively agreed wages (Figure 3). It seems that in both countries cooperative subcontracting dominates.

The UK and Germany have only implemented minimum protection for posted workers. However, since the minimum rates in Germany are negotiated by the social partners in the construction industry and a second rate for skilled workers has been introduced, the level of protection is higher than in the UK (Figure 3). In both countries, the wage setting system in the construction industry is different from the dominant national model. In the UK, there is still an influential industry-wide agreement, while in the rest of the private sector industry-wide bargaining has largely disappeared. In Germany, the construction industry was the first industry to introduce industry-specific minimum wages in a traditionally voluntarist wage setting system. The introduction of industry-specific minimum wages in other industries and the national debate on the introduction of an NMW indicate that Germany may slowly move towards a mixed wage setting system (MW in combination with collective agreements), as in the Netherlands. In the UK, on the other hand, the industry-wide bargaining in the construction industry remains the isolated legacy of a tradition of industry-wide bargaining that has been irrevocably lost. In both countries, the minimum standards are as important for regulating wage competition within the country as with foreign companies. In both countries, compliance with the minimum wages is high but much lower for the collectively agreed rates. Bypassing labour standards by using self-employment is common in both countries. The porous wage setting system encourages competitive subcontracting, which exists alongside the traditional cooperative subcontracting. The coexistence of different forms of subcontracting is the reason for high institutional instability.

Figure 3: Wages of construction workers in DE, FR, NL and UK (2010/11)



Source: Bosch, Weinkopf, Worthmann, 2011

5. Transnationalisation of wage systems?

The question arises as to whether, above and beyond supranational or national regulation, actors below the national government level can take the initiative and assume the task of regulation on a transnational basis. European integration has always been bound up with the hope that the restricted room for manoeuvre that nation states possess might be overcome by integrating the sub-national levels of action, thereby creating a new, transnational level of action. Following Pries, I take 'transnationalisation' to denote 'economic, cultural, political and social relations and interconnections that cross the borders of nation states but are not maintained primarily between the states themselves and their governments...' (2008: 13). Collective bargaining arrangements, which enable standards to be set autonomously within national frameworks but below the level of central government, seem to be the optimal locus for transnational standard setting.

However, there are few convincing examples of functioning transnational relations in the industrial relations sphere. The most obvious are probably the bilateral agreements between social security funds in the construction industry. In several European countries, the social partners in the construction industry have set up social security funds that jointly administer certain social benefits for the industry on a transnational basis. These benefits include holiday and bad weather pay and supplementary benefits for the elderly. Contributions to the funds are compulsory even for posted workers. In order to prevent construction companies having to contribute twice to the fund for workers posted abroad, the German social security funds have agreed mutual recognition of contribution payments with the funds in Belgium, Denmark, France, Italy, Austria and Switzerland.³

³ A detailed description of the arrangements can be found at: http://www.soka-bau.de/soka_bau/europaverfahren/europaverfahren_eustaaten/ accessed 27 July 2011

These examples demonstrate that transnational agreements are indeed possible, provided four conditions are met. First, there must be institutional similarities. Second, employers' and employees' interests must be represented at the aggregate (i.e. national) level. Third, the national partners must be able to negotiate with each other on an equal footing. Fourth, the negotiating parties must have a strong interest in reaching agreement. In the case of the bilateral agreements between social security funds, these conditions were fulfilled. The similarities lay in the funds' structures, the compulsory contributions and the comparable regulatory content. The shared interests resulted from a mutual desire to facilitate postings between countries with comparable wage levels. Finally, the funds are organised at national level and with similar degrees of professionalism.

Such ideal conditions for transnational agreements on contract workers' conditions of employment are the exception and are to be found only in the old core EU member states. Because of the considerable wage differentials, the differences in interests between the core member states and the Southern and, now especially, the Central and Eastern European member states are too great. A further obstacle is the fragmentation of industrial relations in Central and Eastern Europe, the most important countries of origin for posted workers, which scarcely have the capacity for national, let alone transnational agreements (Kohl/Lehndorff/Schief 2006).

6. Conclusions

Whereas individual migration from Central and Eastern Europe has had a manageable impact on economic aggregates only, postings have the potential to transform institutions. The right to provide services within the EU and the primacy accorded to product markets in the decisions of the ECJ have placed national wage systems in particular under pressure to adjust.

The key question is how these changes affected labour standards. In short, the impact varied across the countries and has been filtered by the national institutions regulating the labour market. In the voluntarist wage setting systems of UK, and Germany they have been a major factor bringing wages back into competition and in increasing the incidence of low pay. In both countries such forces were aided by widespread privatization in the 1980s and 1990s. The Netherlands and France were able to absorb external shocks like the cross-border posting of workers since their inclusive wage setting systems did not allow downward pressure on employment practices in affected firms and industries. The four country studies on wage systems in the construction industry confirm the overall picture of the different national wage system. They also show the strong will of many actors in this industry with a long tradition of social partnership to mobilize this traditional social capital and reregulate the labour market in this industry. This seems to be easier in Germany with a tradition of extending collective agreements than in the UK where such legal procedures do not exist.

The European treaties expressly stipulate that pay and collective bargaining are the province of national actors. In some countries, the freedom to provide services appears to have removed important pillars supporting labor standards. So far these pillars have only partially been replaced. As we have learnt from the experiences of some other European countries, such replacements could be generally applicable collective agreements or high trade union density. These replacements are, however, not easy to introduce or re-introduce in employment systems in which trade union density is low or industry wide bargaining has rarely existed, been weakened, or even disappeared.

In addition the ability of national actors to act has been considerably curtailed by the ECJ, which has placed free competition above the basic rights of autonomous collective bargaining. Because of the divergent interests of Member States, this weakening of national actors cannot be compensated for by transnational agreements. This ‘negative integration’ (Scharpf 2008) brings with it a serious risk that the inclusive wage systems of Europe will be eroded by a series of cumulative effects. Experiences with the privatisation of public services provide evidence of the destructive potential that a downward wage spiral can have for the basic institutions of employment systems. Whether the European social model, with its inclusive wage systems, will be able to survive in open markets for services is obviously one of the great questions for the future of the European Union.

Bibliography

- Arbeidsinspectie (2008): *Werknemers met een bruto-loon op en onder het wettelijk minimumloon in 2006*. Den Haag
- Alber, Jens (2010): *What – if anything – is undermining the European Social Model?* WZB Discussion Paper. Berlin: WZB
- Blanpain, Roger/Swiatkowski, Andrzej, Marian (eds.) (2009): *The Laval and Viking cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. New York u. a., Wolters Kluwer
- Bosch, Gerhard (2009): *Low-wage work in five European countries and the United States*, in: *International Labour Review* 148, 4/2009, pp. 337-356
- Bosch, Gerhard (2010): *Beschäftigung und Mindestlöhne: neue Ergebnisse der empirischen Mindestlohnforschung*, in: *WSI-Mitteilungen* 63, 8/2010, pp. 404-411
- Bosch, Gerhard/Zühlke-Robinet, Klaus (2000): *Der Bauarbeitsmarkt: Soziologie und Ökonomie einer Branche*. Frankfurt
- Bosch, Gerhard/Lehndorff, Steffen/Rubery, Jill (2009): *European employment models in flux: pressures for change and prospects for survival and revitalization*. In: *European employment models in flux: a comparison of institutional change in nine European countries*. Basingstoke: Palgrave Macmillan, pp. 1-56
- Bosch, Gerhard/Mayhew Ken/Gautié, Jérôme (2010): *Industrial relations, legal regulations, and wage setting*, in: *Gautié, Jérôme / Schmitt, John (eds.): Low-wage work in the wealthy world*. New York, NY 2010, Russell Sage Foundation, pp.147-182
- Bosch, Gerhard/Weinkopf, Claudia/Worthmann, Georg (2011): *Die Fragilität des Tarifsystems: Einhaltung von Entgeltstandards und Mindestlöhnen am Beispiel des Bauhauptgewerbes*. Berlin, edition sigma
- Cremers, Jan/Dølvik, Jon Erik/Bosch, Gerhard (2007): *Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*, in: *Industrial Relations Journal* 38, *Annual European Review* 2007, pp. 524-541
- Cremers, Jan (2011): *In search of cheap labour in Europe. Working and living conditions of posted workers*, CLR Studies 6, CRL/EEBWW/International Books. Bruxelles
- Czommer, Lars (2007): *Wildwestzustände in Deutschland? - Einfacharbeitsplätze in der Ernährungsindustrie*, in: *Bosch, Gerhard/Weinkopf, Claudia (eds.): Arbeiten für wenig Geld: Niedriglohnbeschäftigung in Deutschland*. Frankfurt/Main 2007: Campus Verlag
- European Commission (2006): *Industrial Relations 2006*. Luxemburg.
- European Commission (2011a): *Posting of workers in the European Union and EFTA countries: Report on E101 certificates issued in 2008 and 2009*, DG Employment, Social

- Affairs & Inclusion Analysis, Evaluation, External Relations Employment Analysis. Bruxelles
- European Commission (2011b): Study on the effects of the economic and social effects associated with the phenomenon of posting of workers in the EU, Final report VT/2009/062. Bruxelles
- European Integration Consortium (IAB, CMR, fRDB, GEP, WIFO, wiiw) (2009): Arbeitsmobilität in der EU vor dem Hintergrund der Erweiterung und dem Funktionieren der Übergangsregelungen, Studie im Auftrag der Generaldirektion Beschäftigung, soziale Angelegenheiten und Chancengleichheit der Europäischen Kommission. Nürnberg (http://www.frdp.org/upload/file/Final_Report.pdf) accessed 26 July 2011
- Fiori, Giuseppe/Nicoletti, Giuseppe/Scarpetta, Stefano/Schiantarelli, Fabio (2007): Employment Outcomes and the Interaction Between Product and Labor Market Deregulation: Are They Substitutes or Complements? IZA DP 2770/2007, Forschungsinstitut zur Zukunft der Arbeit. Bonn
- Hall, Peter A./Soskice, David (eds.) (2001): Varieties of Capitalism: the Institutional Foundations of Comparative Advantage. New York, Oxford University Press
- Hanau, Peter (1997): Sozialdumping im Binnenmarkt, in: Baur, Jürgen F., Watrin, Christian (eds.) (1997), Recht und Wirtschaft der Europäischen Union, R.I.Z.Schriften, Bd. 6. Berlin/New York
- Harvey, Mark (2003): 'Privatisation, fragmentation, and inflexible flexibilization in the UK construction industry', in: Bosch, Gerhard/Philips, Peter (eds.) (2003): Building Chaos: An international comparison of deregulation in the construction industry. London, Routledge, pp. 188-209
- Höppner, Martin (2009): Integration durch Usurpation – Thesen zur Radikalisierung der Binnenmarktintegration, in: WSI-Mitteilungen 8, pp. 407-413
- Kempfen, Otto Ernst (2010): Das Grundrecht der Koalitionsfreiheit vor dem Europäischen Gerichtshof, in: Dieterich, Thomas (Hrsg.): Individuelle und kollektive Freiheit im Arbeitsrecht. Gedächtnisschrift für Ulrich Zachert. Baden-Baden, Nomos, pp. 15-36
- Kohl, Heribert/Lehndorff, Steffen/Schief, Sebastian (2006): Industrielle Beziehungen in Europa nach der Erweiterung, in: WSI-Mitteilungen 59, pp. 403-409
- Kreber, Sebastian (2009): Status and Potential of the Regulation of Labor and Employment Law at the European Level, in: Comparative Labor Law Policy Journal Vol. 30, 4/2009, pp. 875-903
- Low Pay Commission (2011): National Minimum Wage. Low Pay Commission Report 2011. London
- van der Meer, Marc (2003): The Netherlands. Rules in revision: high-quality production in the Dutch construction industry, in: Bosch, Gerhard/Philips, Peter (eds.): Building chaos: an international comparison of deregulation in the construction industry. London, Routledge, pp. 24-47
- Pries, Ludger (2008): Die Transnationalisierung der sozialen Welt. Sozialräume jenseits von Nationalgesellschaften. Frankfurt am Main
- Scharpf, Fritz (2008): Negative und positive Integration, in: Höppner Martin/Schäfer Armin (eds.): Die politische Ökonomie der Europäischen Integration. Frankfurt New York, pp. 40-87
- Schlachter, Monika (2009): Germany, in: Blanpain, Roger/Swiatkowski, Andrzej Marian (eds.): The Laval and Viking cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia. New York u.a., Wolters Kluwer, pp. 63-72
- Streeck, Wolfgang/Thelen, Kathleen (2005): 'Introduction: Institutional Change in Advanced Political Economies', in: Streeck, Wolfgang/Thelen, Kathleen (eds.): Beyond continuity.

- Institutional change in advanced political economies. Oxford, Oxford University Press, pp. 1-39
- Supiot, Alain (2009): The Territorial Inscription of Laws, in: Calliess, Graf-Peter/Fischer-Lescano, Andreas/Wielsch, Dan/Zumbansen, Peer (eds.): *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*. Berlin, De Gruyter Recht, pp. 375-393
- Visser, Jelle (2008): *Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts (ICTWSS)*, an international database. Amsterdam Institute for Advanced Labour Studies (AIAS). Amsterdam
- Woolfson, Charles/Thörnquist, Christer/Sommers, Jeffrey (2010): The Swedish model and the future of labour standards after Laval, in: *Industrial Relations* 41, pp. 333-350