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Posted work and deterritorialization in the European Union

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4. EUROPEAN INTEGRATION AND THE DISEMBEDDING OF LABOUR MARKET REGULATION: TRANSNATIONAL LABOUR RELATIONS AT THE EUROPEAN CENTRAL BANK CONSTRUCTION SITE⁹

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

⁹ 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.

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 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) decisions¹⁰ 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).

¹⁰ 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.

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 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 Bauern-Agrar-Umwelt*) and the two sectoral employer associations, the ZDB¹¹ (*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 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

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

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.¹² Most construction 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, 2007¹³). 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

¹² 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.

¹³ Interview by Nathan Lillie, used with permission.

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 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.¹⁴ 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

¹⁴ 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.

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.

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.