7. CONCLUSION

7.1 Introduction

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

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

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

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

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

Finally, chapter 6 considered how the changing nature of state and firm borders affects posted workers in transnational workspaces. The insights of three key areas of study – the changing nature of state borders, institutional analysis and labour geography, and the industrial relations literature on transnational solidarity – are combined to develop an original framework that enhances both our theoretical and practical understanding of transnational workspaces in the EU. The chapter contributes to the literature on European integration and the territorial structuring of politics. A bottom-up approach aimed to enhance the understandings on how the de-bordering of a political territorial space affects the
European labour market and its mobile workers, which is largely missing from the debate (Meardi, 2009).

All chapters point to the weakening of labour power and labour market regulation due to the disembedding of labour relations from the territorial nation state. In establishing the freedom to provide services, the EU has created a European economic space but has not at the same time extended the spaces for controls. What are the implications of these findings for institutional reforms to the worker-posting framework? Unfortunately, the recently negotiated Enforcement Directive (ED) missed an opportunity to correct the gaps in the regulatory framework. In response to the loophole between the established rights and their appropriation, or what in practice has become ‘the rule’ (Streeck, 2001: 142), policymakers felt the need to negotiate a framework in order to clarify how the Posting of Workers Directive can be more effectively enforced.

7.2 The Enforcement Directive of the Posting of Workers Directive

In April 2014 the European Parliament adopted the Enforcement Directive of the Posting of Workers Directive. Its main purpose, as the name indicates, is to strengthen the enforcement of the Posting of Workers Directive. The final document passed just before the European Parliamentary election in 2014. The timing was no coincidence. The Directive was a political solution to show they did all within their might to improve the position of posted workers. Its content does hardly go beyond the codification of already-existing regulatory measures at the national level. More importantly, the ED may have opened the door for deteriorating practices. The aim here is not to present the detailed and complex negotiation process, reflecting the various interests and positions of the actors leading to the outcome. Rather, the section discusses some of the main Articles in relation to the findings of this thesis in order to attend to the implications for the changing regulatory configurations.
One of the most contentious issues of the ED is the specification of which rights apply when the worker is deemed to fall outside the posting framework. As set out in the operationalization of posted work for this thesis (see chapter 1), a fluid labour market has emerged in which it is difficult to disentangle under which rights framework a worker is actually employed. For example, it is often unclear if the worker *de facto* falls under the free movement of persons or services (here the added complication is if the person is employed via a subcontractor or agency contract) or is unconsciously bogusly self-employed. Most of the workers interviewed for this research were recruited for the purposes of the posting relationship. They would therefore fall outside the scope of the posting framework. Trade unions demanded a clear definition of which law would apply to a worker who is under a *de facto* but not a *de jure* posted employment relationship (such as bogusly self-employed workers). The demand was for the ED to clearly state that in the aforementioned case the worker would be covered by the entire legislation of the host country. However, the ED does not state which framework would apply and therefore leaves the possibility open that it will be the country-of-origin framework.\(^\text{20}\) The danger is the introduction of the country-of-origin principle through the back door. The way the posting framework is enacted, as described in this thesis, will thus not be curtailed but may turn out to be justifiable with this legal loophole in place.

This thesis has argued that the particular precarious situation evolves for posted workers due to the discrepancy between nationally embedded regulatory institutions and labour power and the transnational labour market. The ED hardly introduced remedies in this regard. Interestingly, the heated debate in relation to

\(^{20}\) Recital 11 states: ‘Where there is no genuine posting situation and a conflict of law arises, due regard should be given to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council (‘Rome I’) or the Rome Convention that are aimed at ensuring that employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by an agreement or which can only be derogated from to their benefit. Member States should ensure that provisions are in place to adequately protect workers who are not genuinely posted.’ (Directive 2014/67 EU).
the ED revolved around strengthening the national control measures instead of transnational cooperation. For example, the main debate focused on subcontracting-chain liability and other particular control measures. Social partners of several EU countries pushed for a main-contractor liability for all the elements in the subcontracting chain. According to Article 12 of the Enforcement Directive, only the direct subcontractor can be held liable. It is left to the member state to determine the exact tool to enforce such abuse in the subcontracting chain. Paradoxically, the ED leaves room for the member states to decide relevant enforcement measures but at the same time repeatedly cautions that additional measures need to be ‘justified’ and ‘proportionate’.

For example, national inspectorates are not restricted in imposing particular measures. However, any additional measures have to be justified and proportionate in order to avoid creating a barrier, or an obstacle to the free provision of services. In fact throughout the ED the attention to ‘proportionate’ measures alerts member states to maximize their own tools to avoid infringement procedures. Moreover, the European Commission emphasizes in Article 9 that it will monitor whether the Directive is effectively translated into national law. Even though the European Commission has an institutional duty to monitor compliance, this responsibility is usually not written in Directives. By doing so, it again draws attention to the importance of employing proportionate instruments at national level. This may render national regulatory frameworks impotent to counter transnational exploitative practices as observed in the case of transnational workspaces.

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

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

7.3  **Practical and utopian considerations on how to proceed**

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

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

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

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

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

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

7.4 Implications, future research and industrial and global patterns

This thesis has discussed alternative, uneven and very much dynamic forms of
regulation beyond a self-contained view of the national level that do not per se
undermine the nation state. In these spaces differentiated forms of regulation are
pertinent in which the regular institutional system largely does not apply. This is
similar to what Aihwa Ong labels ‘neoliberalism as exception,’ John Agnew
depicts as ‘portable sovereignty’ and Lillie, drawing on Palan, labels ‘spaces of
exception’ (Ong, 2006; Agnew, 2009; Lillie, 2010). The authors depict spaces in
which sovereignty is fragmented, and in which firms can strategize around this
disjointed regulation. Palan explains this as a process in which social and political
tools are selectively not enforced, in order to allow capital a freer hand in
designing the social relations of production (Palan, 2003). My main concern in this
thesis was not to accept the ‘lack of regulation’ per se but to investigate how these
spaces are structured and how actors in these spaces engage with the institutional
framework in place. If one seeks to understand how these spaces come into being
and are sustained, one must therefore look not only at the structures laid down by
laws and authorities, but also at the various agents reconstituting those structures.

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

New EU directives confirm the trend in changing borders between political economic territories and employment relations. The intra-corporate transfer directive (COM (2014/66 EU) on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (ICT) is such an example. ‘Intra-corporate transfer’ means the temporary secondment of a third-country national from an undertaking established outside the territory of a member state and to which the third-country national will return. The directive enables third-country nationals to be posted within the European single market. The condition is
that they have to have worked for 6 months within a EU member state in a
daughter undertaking of the company for which they normally work. For example,
a Russian undertaking can send his employee for a secondment to Poland. The
worker could be posted under the Posting of Workers Directive to Germany if he
or she has worked for the daughter undertaking in Poland for six months. In light
of the findings of this study, difficulties in enforcing the regulatory framework in
such a situation can easily be imagined.

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

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

The main task ahead will be to re-embed mobile workers into structures of social inclusion and collective resistance. This study was firstly interested in how actors order and utilise regulation within transnational workspaces. The findings should not be seen as an end point; rather, they are part of a dynamic process. Chapters 5 and 6 suggested paths that steer this process in the direction of social inclusion. Labour migration is an opportunity to weave the texture and create the ferment for a New Europe. A focus on actors and on the hopes, needs and strategies of marginalised groups in society may be an enzyme to develop much-needed transnational labour structures in a pan-European labour market.