Construction labour, mobility and non-standard employment

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Construction industry workers were long regarded as enjoying not unfavourable working conditions. While their work was hard, the rewards included a high level of job security, decent pay, and various bonuses. This state of affairs was knocked off balance by the free movement of labour in an eastwards enlarged Europe where job competition among European building workers triggered a downward wage spiral as well as deteriorating working and safety conditions.

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European legislation put an end to the idea that accidents are inevitable in the construction sector. However, job competition between European workers has undone much of the progress made with regard to prevention measures.

Image © Belga
The Treaty of Rome which, in 1957, stipulated the building blocks for the foundation of the European Economic Community stresses, in its Article 117, the member states’ aim of working towards an upward harmonisation of the living and working conditions of citizens and workers throughout the Community. The goals are clearly stated; the free movement of its citizens, and the labour mobility to which this is expected to lead, calls for Europe-wide, streamlined, and common social standards.

Although, from the outset, the EEC experienced collisions between its financial rationale and economic targets and the requisite social policies, progress was able to be achieved in, for instance, the field of Europe-wide occupational safety and health legislation (hereafter OSH). This progress was possible on the basis of strong consensus among the experts involved within, and outside, the European institutions. Moreover, for a long period, during successive Treaty revisions and the related European Council ceremonials, lip-service was paid to the need for continuing regulation to ensure the ongoing improvement of working conditions and OSH policy.

By the end of the 1990s, however, the political tide had turned as EU policy was increasingly dominated by the primacy of the economic freedoms, with absolute priority now being accorded to competitiveness and free trade. The UK, with its policy of blocking common initiatives, bore part of the blame for the watering down of law-making insofar as the search for consensus remained a diplomatic goal of the other member states. The eastern enlargement led to the entry of countries whose social policy tradition existed on paper only (in former times, the Eastern Bloc countries were always among the first to ratify ILO conventions), while the globalisation and free trade lobby groups had started to push for a deregulation of social standards. From that moment on, barely a single piece of social legislation was tabled and finalised in either the social policy area at large or the OSH field in particular. This change of paradigm has led, in recent years, to the dogma of deregulation being imported also into existing legislation.

Nowadays, the Internal Market legislation that underpins the economic freedoms in the EU represents a direct interference with national regulatory frames in the fields of social security, working conditions and labour legislation. Freedom to provide services, and transnational operations of the world of finance, have become of paramount importance, and EU social policy has failed to keep pace with these developments. In labour-intensive industries like construction this has led to side-effects that currently threaten national labour and employment standards.

Drawing on evidence from the construction sector, it is possible to document the occurrence of rule circumvention through the establishment of letter-box companies, and to point to the risks of social dumping that arise as soon as a cross-border dimension enters the market strategy of businesses. Practices that are typical and accepted in one country (because there is no rule and hence nothing to comply with) may be atypical in another country where labour markets are, to some extent or in some respects, more regulated. Market liberalisation has paved the way for new types of ‘social engineering’ and, in the search for cheap labour, decent labour regulation is nowadays regarded as an ‘administrative burden’. This label has, in recent years, come to be applied even to elementary prescriptions and provisions in the occupational safety and health field.

### The rise of non-standard employment relations

The post-World War II period, with its unprecedented growth, development and close to full employment, created for quite some time, especially in the OECD countries, a climate favourable to the establishment of a ‘standard’ or ‘typical’ employment relationship. During this period – to which historians refer as ‘the golden decades’ – labour legislation and collective bargaining developed around and on the basis of this employment relationship, remaining stable and taken-for-granted. Collective agreements and direct employment relationships thus contributed to a general feeling of justice and fair treatment, simultaneously providing effective mechanisms for social peace. For the construction sector the golden decades brought a range of collectively funded joint arrangements, negotiated and governed by the social partners and designed to guarantee continuity and stability for the construction workforce. In a sector characterised by temporary and mobile worksites the need was felt for industry-wide provisions (on vocational training, health and safety, pensions, and bad weather).

Later, after the Berlin Wall had come down, neo-liberal thinking gained momentum and the digital revolution, world-wide delocalisation of production, and intensified global competition between high-wage and low-wage countries, altered the perspective and induced significant changes in the world of work. The resulting corporate restructuring has had adverse effects on workers, with corporate managers treating labour increasingly as a commodity, thereby shifting risks away from firms and on to the workers themselves. The ‘reform’ policy, in recent years advocated by international organisations such as the IMF, World Bank...
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and OECD and which has, in the meantime, also entered the ‘mainstream’ of EU policy, has been pursued in ways that are selective, resulting in increasingly precarious labour practices. The new agenda – placing sole emphasis on ‘flexible’ work patterns – was initially inspired by the strong growth of the low-paid services sectors on the US market. The consequence in some new forms of services (health care, domestic care and the like) is a serious downgrading of occupational profiles combined with a deterioration of workers’ status.

In labour-intensive traditional industries like construction the standard model is no longer the undertaking with its skilled and unskilled workers contributing their labour under the supervision and disciplinary control of an employer. The possibility to outsource parts of the process, and the intensification of sub-contracting, driven by a strategy to reduce costs and/or by the aim to avoid direct employment of workers, have created a new playground for numerous forms of (commercial) service-supply contract that do not fit into the classical model.

Early in 2006 a group of researchers published a study on undeclared labour commissioned by the European social partners in the construction sector. The outcome of that research represents exemplary documentation of the developments of different forms of labour in labour-intensive industries that depend or rely on cheap unskilled labour. The conclusion was that, right across Europe, similar patterns had emerged. After introduction of the internal market and when freedom to provide services became the guiding principle in the business environment, two fundamental developments significantly altered the landscape:

— the introduction of management contracting and externalisation of labour, leading to intensified cross-border subcontracting, for the sole purpose of recruiting cheap labour;
— freedom of establishment and, in the slipstream, the introduction of easier access to the status of self-employment.

As from the beginning of the 1990s the volume of direct labour began to shrink. On larger sites (in civil engineering, infrastructure, utilities, and new housing developments) the trend has been for less direct employment on the part of the main contractor. Relatively small numbers of specialised staff became responsible for procurement and management on site and, for the execution of work, a chain of specialised contractors was engaged. In this way, the supply of cheap, unskilled labour has become an integral part of lower-level subcontracting, such that exploitative and fraudulent labour-only subcontracting is nowadays seen as a permanent feature of the industry.

**Free movement and OSH – construction as a pilot**

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**Free movement and OSH – construction as a pilot**

Several studies offer evidence that special measures are needed for newcomers and for
of migrant workers and, on the other, the appearance of temporary and mobile work-sites with flexible, short-term contracts. In the sector as a whole, a broad range of labour contracts can be found including a unstable and flexible layer of (bogus) self-employed, temporary workers and day labourers recruited via gang masters, agencies and other middlemen.

Mandatory OSH coordination between all relevant actors on a construction site, as prescribed by the European Directive on temporary and mobile worksites (92/57/EEC), is of great significance precisely because of the high incidence of subcontracting and employment through intermediaries. This Directive was intended to regulate enhanced cooperation in the OSH field, starting from the concept phase. A crucial condition is the mandatory duty of mutual exchange of information, from which it can be deduced that full registration of all necessary information related to OSH aspects during the entire construction process should be considered part of normal procedure (‘business-as-usual’, in REFIT-terms).

However, we must conclude that the view taken by the business consultants engaged by the European Commission to assess the implementation of the directive is

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According to the European agency for safety and health at work (EU-OSHA), three major problems give cause for concern:

— work that has to be pursued in high-risk sectors and functions;
— communication problems attributable to language and culture;
— too much overtime, often combined with poor physical living conditions.

Given that access to local health care is not straightforward and in some cases not even allowed, the consequences are predictable.

A British case study concluded that ‘calling in sick’ is not an option for the lower echelon of agency workers and migrants. It would mean an end to their current job; it would diminish the chance of being recruited again; and it would signify a loss of income, often without any guarantee of sick pay. The result is ‘gritting the teeth and going to work’ accompanied by an attitude whereby less attention is paid to safety or health. The authors of the study observed a lack of the necessary induction and instruction, with all the resulting risks for workers.

Construction remains the sector characterised by, on the one hand, a large segment

6. Article 5.c Directive 92/57/EEC states that the coordinator has to prepare a file appropriate to the characteristics of the project containing relevant safety and health information to be taken into account during any subsequent works.
somewhat different since the conclusion reached on the basis of their interviews is that this mandatory coordination is, from the employer standpoint, one of the most irritating OSH topics. Moreover, the outcome of the consultants’ calculations (based, N.B., on attitude measurement) is that 73.38% (an unexpectedly precise figure, considering the methodological doubts to which their so-called research gives rise) of existing administrative work falls into the category of ‘administrative burden’. Finally, in their treatment of this item, the consultants come up with remarkable differences between countries, ranging from those where employers are not required to ‘waste time’ with the burden in question and others where at least 40 hours of work are invested in dealing with it.7

As indicated by several statistics, it highly doubtful whether the flexible layer of the workforce (newcomers, temporary workers and labour migrants) has sufficient knowledge of occupational risks and the necessary prevention procedures. It is therefore of the utmost importance that all links in the chain should comply with the basics of OSH policy and that liability should be able to be established along the whole chain. This notion is completely absent from the reasoning of the EU proponents of deregulation and burden reduction. In the former strategic plan (2007-2012) the European Commission listed four priorities (demographic development and ageing of the workforce; new forms of labour relations including self-employment and outsourcing; the development of SMEs; and migrant work). In the current plan, demographic change is regarded as crucial, as if labour mobility were a thing of the past.8 The change is all the more remarkable in that the promotion of cross-border labour mobility is still accorded primacy in the general Europe 2020 Strategy.9

Convergence or taken for granted

Specific OSH risks in different sectors display great similarity irrespective of borders; it was for this reason that the 1989 OSH framework directive and its associated directives referred to the need to assist the member states in further developing and improving their OSH policy. The term harmonisation was initially used cautiously; most experts at the time saw it as their task to create uniform or similar conditions as far as possible across the EU. This approach has indeed led to a substantial degree of convergence – a positive result, undoubtedly, against the background of growing mobility and externalisation of the workforce. For instance, it emerged during a project of the joint labour inspectorates that the existence of an OSH coordinator, as prescribed by the temporary and mobile worksites directive, was relatively well known (though not always ascribed to EU law). British research, meanwhile, has revealed that migrants (from EU countries) had basic OSH knowledge as a result of the provisions of EU legislation, because the legislation had been implemented in their home countries.

However, an analysis of the content of the existing national websites for posted workers made it clear that the provision and distribution of OSH information among migrants is at best in its infancy and at worst completely absent. Labour inspectors noted that, during inspections, compliance with the OSH rules is poor and migrants are excluded from their application. Especially lacking is the necessary cooperation between the many (sub)contractors on site. The inspectors therefore argue for training from a European perspective and for strengthening the chain of liability, with the customer or the main contractor being responsible for the necessary and timely disclosure of OSH information in the required languages.

The EU posting of workers Directive states that the OSH legislation of the country where the work is being performed has to be respected. A first evaluation of compliance in this respect showed that little or no information was provided to posted workers. National enforcement services, generally operating with too few people, had their hands full with the control of construction sites with foreign posted labour. There was frustration that the appropriate legal means were missing. Besides, for the sanctioning of different breaches inspectors could not
act immediately and had to rely on the judiciary in the country of origin. It is not easy for the negative consequences of economic freedoms to be taken to court by workers, as the eligibility of posted workers to take such steps in the host country is highly restricted. Even more complicated is the situation of third-country workers who are recruited via letterbox companies or other bogus middlemen. Excessive overtime and non-respect of rest periods cause additional risks; fatigue, ignorance of the dangers, failure to understand regulations, inadequate or no protection, and an unhealthy work environment do the rest.

Finally – fundamental right or production factor

The EU encourages flexible work patterns and labour mobility and the European Commission expects net immigration in the coming years. In the presence of an ageing population, labour migration could become a key factor for the functioning of large parts of our labour markets. So far, a majority of migrant workers are employed in labour-intensive, poorly paid and dangerous 3-D (‘dirty-dangerous-difficult’) jobs. Recruitment takes place in the shady segment of the market, with no commitment to OSH issues. The EU internal market, based on economic freedoms (notably the freedom to provide services and the freedom to establish firms), endangers the health of the people who actually embody the ideals behind this internal market. This is in itself a strong argument for the further improvement of the OSH framework. Safety and health should not be sacrificed to the holy cow of competition (between member states), let alone to plain commercial or business interests. Since WWII the International Labour Organization (ILO) has advocated a progressive OSH policy, with special attention paid to migrant workers and vulnerable groups. The labour prospects for workers in vulnerable jobs have to be more than a future of functioning as a commodity, as a willing, readily available, international, mobile, second labour reserve. In the ILO’s Philadelphia Declaration of 1944, the international community recognised that ‘labour is not a commodity’, labour is not like an apple or a television set, an inanimate product that can be negotiated for the highest profit or the lowest price.

The EU must prevent labour from becoming a simple factor of production to be deployed at will wherever profit is greatest. Permanent action in the OSH field is accordingly both necessary and wise. Restraint in this area is a poor counsellor. The improvement of occupational safety and health must not become a paper tiger; it has to remain a fundamental right, as the 1989 Community Charter of the Fundamental Social Rights of Workers states: 'Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made. (...) The provisions regarding implementation of the internal market shall help to ensure such protection.'