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Contribution

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The German construction industry in European competition

International Conference
"Free mobility and EU's enlargement – the migration of the construction workers after May 2004"

CLRdenmark
Copenhagen, 20th of April 2004

1 Introduction

There is a lengthy tradition of using foreign workers in the German construction industry. In 1970, almost 20% of employees subject to social security contributions in the building trades were foreign workers, this percentage being more than twice that found in the economy as a whole. Today, 9% of employees in the building trades in Germany still have a foreign passport. These foreign workers are integrated into the German social security system, as they are employed by companies here and work in accordance with the collective bargaining terms in force. This equality of status has helped to ensure that this labour migration exerted no direct pressure on our wage standards.

Figure 1: **Form and regulation of activities of foreign workers**

Form of migration	Regulation of working conditions
Individual migration	Principle of territoriality; inclusion in the full German system of collective agreements and the systems of social welfare legislation; equality of status for all workers employed by German companies.
Posting by companies based outside Germany	In principle, no integration into German labour and social law. Integration occurs only via special laws or generally binding collective agreements.

Source: Bosch/Zühlke-Robinet 2000: 215.

Today, this individual migration has become less significant and is increasingly replaced by posting of workers by companies based outside Germany within or out of the EU. In Section 2 we begin by describing the various legal bases of posting. In Section 3 data on quantitative trends in recorded postings will be presented. Section 4 will deal with the legislative responses in Germany to postings. Subject of Section 5 is the increasing illegal employment. Finally the impact of legal and illegal postings on the German construction labour market is analyzed.

2 Legal bases of posting

Even before the collapse of the socialist economic system, the German government had concluded the first bilateral agreements with Hungary and Yugoslavia, under international law, on the posting of contract workers. Further agreements followed once the borders of the Central and Eastern European countries had been opened up. These “agreements on the posting of workers on the basis of contracts for services” were aimed at, among other things, promoting a closer relationship between the Central and Eastern European countries and Western Europe, stimulating commercial relationships, transmitting know-how, and preventing uncontrolled immigration into Germany (Heyden 1997: 29 ff.; Faist et al. 1999: 30 f.).

The agreements on contracts for services lay down terms and conditions for the posting of workers. For example, contract workers must have a residence permit and a work permit in order to be able to work in Germany for a limited period (usually two years, and three years at most). Under the agreements, they are to be paid a net wage (including travel allowances, holiday pay and other emoluments), as provided for under German collective agreements for comparable activities. Furthermore, the number of contract workers is subject to a quota. A standard quota, i.e. a maximum number of posted workers (as an annual mean number), was agreed for each country. Some agreements also include additional quotas, by which the number of contract workers may be increased for certain reasons (cf. Table 1).

Table 1: **Extent of overall, standard and additional quotas 1991 to 2001 by agreements on contracts for services with Central and Eastern European countries (CEEC)**

	1991	1992	1993	1994	1995	1996	1997*	1998	1999	2000	2001
Overall quota	89 340	83 264	79 690	61 920	56 850	54 100	34 638	52 340	53 700	57 630	58 310
of which											
Standard quota incl. ministerial agreements	79 590	74 144	71 030	53 620	48 400	46 320	29 056	44 770	45 950	49 480	50 070
SMEs quota, German firm	7 000	6 500	6 140	5 860	5 970	5 380	3 897	5 210	5 350	5 660	5 730
SMEs quota, foreign firm	1 000	930	880	840	860	820	780	800	820	870	880
Additional quota for Romanian Germans	1 000	930	880	840	860	820	390	800	820	870	880
Restaurateurs	750	760	760	760	760	760	515	760	760	750	750
Sub-quotas											
Construction	16 340	15 180	14 390	13 930	14 000	12 210	9 355	9 730	10 360	10 020	8 870
Insulation construction	1 770	1 660	1 600	1 550	1 530	1 330	877	1 110	1 210	1 000	910
Usable in construction sector as a whole	64 840	60 310	58 140	41 630	35 560	32 440	19 612	29 320	30 460	31 280	30 390

* Quotas not used in full owing to EU infringement proceedings on the grounds of infringement of Art. 59 EC Treaty.
Source: German Federal Ministry of Labour and Social Affairs, Federal Employment Service, miscellaneous documents.

Owing to rising unemployment among German construction workers in particular, the quotas were steadily reduced (cf. Table 1) by amending the agreements on contracts for services (Bosch/Worthmann/Zühlke-Robinet 2000: 47).

Posting of workers from one European Union Member State to another is based on freedom to provide services within the EU, which allows companies based within the EU to provide a service in another Member State temporarily and for a short time without having a branch there. Under the EC Treaty, freedom to provide services has enabled companies to execute orders in another country since as long ago as 1970 (Eichhorst 2000: 123 f.). Judgments of the Court of Justice of the European Communities (CJEC) in 1982 and 1990 gave concrete form

to the possibilities of posting within the EU.[1] However, these possibilities have been exploited on a larger scale only since the Maastricht Treaty was concluded in 1992, giving shape to the single European market, although this Treaty made no changes to the freedom to provide services.

Since 1993 posting companies in EU Member States have also been used. While the standard number of posted workers from the CEEC could be controlled via bilateral agreements on contracts for services, under the Maastricht Treaty and earlier European agreements it is not possible to limit the number of postings within the framework of freedom to provide services in the EU. Until the German regulations on posting came into force, many posting companies in the EU were able to offer their services even more cheaply than companies in the CEEC, since the latter were obliged to pay their workers a wage equivalent to the collectively agreed German wage. At first this obligation did not apply to posting companies within the EU. They were able to pay their posted workers in accordance with the country-of-origin principle and in case they came from a low wage country they had a competitive advantage over German and even Central and Eastern European companies (Worthmann/Zühlke-Robinet 2002).

Enlargement of the EU to the east involves introducing the four basic freedoms (free movement of goods, persons, services and capital) in the new Member States. The pay differential between the new and existing Member States is markedly larger than that within the EU as it is now. Consequently, as the destinations of choice hitherto for workers migrating from Central and Eastern Europe, Germany and Austria in particular feared a sharp increase in postings and individual labour migration. According to estimates by the German Institute of Economic Research (DIW), the number of immigrants in the first year after accession is likely to total between 340,000 (DIW 1997) and 1.1 million (DIW 2000). To this must be added postings in the construction industry in particular under freedom to provide services which are bot included in all estiations on migration.

For this reason, on the insistence of several Member States, including Germany, transitional periods have been agreed for freedom of movement for workers and freedom to provide services. The transitional periods for freedom of movement for workers are divided into three phases and are based on a 2+3+2 model. In phase 1, which will last two years, freedom of movement for workers in all current Member States will be suspended, although they will still be able to open up their labour markets. Germany will permit this within the framework of the existing rules for cross-border commuters, “guest workers” and seasonal workers. Before phase 2 begins, EU Member States will announce whether they will be retaining the phase 1 rules for another three years or amending them and, if so, in what way. Phase 3 would extend the transitional period for freedom of movement for workers to a total of seven years. The Member State must formally notify the Commission if it is utilising phase 3. At the end of the

[1] Judgment of 3 February 1982 in Case “Seco v. EVI” (Joined Cases 62/81 and 63/81, ECR 1982, p. 223) and Judgment of 27 March 1990 in Case “Rush Portuguesa” (Case C-113/89, ECR 1990, p. I-1417). For European case law on posting, see Eichhorst 2000: 123-131.

seventh year after accession, full freedom of movement for workers will be applicable in all Member States.

Freedom to provide services will also be suspended for two years, and the transitional period can be extended to up to seven years. In Germany, this transitional period will apply to the construction industry, interior works and commercial cleaning. Accordingly postings from the accession countries will be prohibited for a transition period, except within the framework of agreements on contracts for services.

3 Quantitative trend in recorded postings – figures

As Table 2 shows, postings by companies in the CEEC predominated only for a short period, up to and including 1993. The increasing unemployment in the building trades, particularly in the new *Länder*, led the German government markedly to reduce the national quotas for the CEEC as from 1992, so that the standard demand for postings from these countries was cut back. Postings from EU Member States more than compensated for this decline. The number of recorded postings rapidly increased, peaking in 1996 with a total of 188,000 postings – almost 90% of them from EU Member States. This meant that in the mid-1990s, one in five construction workers in Germany was employed by a company based outside Germany.

Table 2: **Posted workers and German workers, 1992-2002 (annual averages, in 1000s)**

Year	Posted workers*			Employees in building trades subject to social security contributions (total)***	Employees in building trades subject to social security contributions (blue-collar workers)***	Posted workers as a percentage of workers employed in building trades
	from Central and Eastern Europe**	from the European Union	Total			
1992	103	13	116	1 301	989	10.5
1993	70	20	90	1 343	1 016	8.1
1994	31	106	137	1 405	1 057	11.5
1995	29	132	161	1 411	1 046	13.3
1996	23	165	188	1 311	950	16.5
1997	16	165	181	1 221	869	17.2
1998	19	150	169	1 156	815	17.2
1999	19	139	158	1 110	783	16.8
2000	17	121	138	1 050	736	15.8
2001	16	111	127	954	662	16.1
2002	15	103	118	870	603	16.4

* Estimates by the German Construction Industry Association, annual averages.

** Including commuters.

*** Data from the Federal Statistical Office, annual averages; 2002 estimates by the German Construction Industry Association.

Source: German Construction Industry Association 2002: 24.

The number of postings has been falling since 1997, particularly as regards postings from EU Member States. The causes range from the continuing downturn in the construction industry, via the effects of the Law on the posting of workers and the shift to illegal employment, to the favourable economic trends in some of the posting countries.

4 Legislative responses to postings

The 1996 EC Directive on the posting of workers left it to Member States to lay down the definitive minimum terms and conditions for posted workers and also allowed them until the end of 1999 to transpose the Directive into national law (Eichhorst 2000). In Germany, regulation of posting was a controversial issue – more so than in other EU Member States with high labour and social welfare standards. While critics spoke of a "protective duty on work" (Straubhaar 1996), others supported regulation on the grounds that the same wage should be paid for the same work in the same place (Gross 1999). The Law on the posting of workers (AEntG) has been in force in Germany since 1997. Under the AEntG, all employers who supply construction services in Germany are obliged to apply, as from the first day on which a service is supplied, the rules in the collective agreements on minimum wages and holidays applicable in the German construction industry and declared to be generally binding. This applies to all construction enterprises irrespective of whether they are bound by a collective agreement or whether their registered office is within or outside Germany.

The regulatory content of the AEntG is currently as follows:

- Registration obligations of posting companies: employers without a registered office in Germany must register all posted workers with the relevant *Land* employment office prior to execution of every order. They must also indicate the place where the documents required for monitoring of standard posting (in particular, level of [minimum] wage, working hours, etc.) are kept available, together with the name and address of the person responsible and the authorised recipient.
- *Sanctions:* Infringement of the AEntG (i.e. of the provisions on minimum wages, holidays and holiday pay, and registration and cooperation obligations) is treated as an administrative offence, punishable with fines and exclusion from the award of public building contracts. Priority is given to punishing the company committing the offence, but the client of a company committing an administrative offence can also be punished if it knows, or is negligent in not knowing, that a subcontractor employed by it is not complying with the minimum working conditions. Fines of up to 500,000 euro may be imposed.
- *Monitoring:* The principal customs offices are responsible for monitoring compliance with the AEntG. These authorities are entitled to see employment contracts, records and other business documentation. Employers must keep these documents available within Germany and submit them when required.
- *General-contractor liability:* The aim of the general-contractor liability in the AEntG is to increase the involvement of (German) clients (general contractors) in responsibility for the actions of their subcontractors. Under this liability, clients are directly liable if their subcontractors (and also the latter's own subcontractors) do not pay their employees the minimum wage or do not pay the construction industry's holiday fund the contribution to which it is entitled. The general contractor should fulfil its duty of care

in selecting subcontractors, oblige them to comply with statutory provisions, and monitor them in its own interests.

- *Statutory-instrument authorisation:* The embargo mentality of the employers' associations represented in the collective bargaining committee led to amendment of the procedure for declaration of general validity.[2] In order to make it possible for the parties to collective agreements in the construction industry to decide on them autonomously in future procedures for declaration of general validity, since 1999 the Federal Minister of Labour has been able to declare a collective agreement to be generally valid via a statutory instrument, without the consent of the collective bargaining committee.

In order to avoid infringing the prohibition on discrimination, only collective agreements that are also binding on German companies can be extended to posting companies. These include the collective agreements declared to be generally valid. Only posting companies, that transfer contributions to a "social security fund" in their country of origin comparable to the holiday fund, are exempted from participation in these agreements.

Very soon after the change of government in 1998, further statutory instruments were adopted in connection with the national regulations on posting, relating specifically to combating of illegal employment. A very common form of illegal employment is tax evasion by the employer. In September 2001, the Law on controlling illegal employment in the construction industry entered into force. It provides for a tax deduction procedure that covers both German and posting companies. Under this Law, every company providing construction services in Germany must transfer 15% of the order total direct to the tax office. Under certain circumstances, exemption from the tax deduction procedure is possible, for example when the order total is very small (less than 15,000 euro) or for posting companies that produce evidence of tax domicile with a foreign tax authority.

Other legislation comprises laws on the award of contracts, aimed at harmonising the competition conditions of German construction companies and posting companies. They have already been adopted in some *Länder* (e.g. North Rhine-Westphalia, Bavaria and Saxony-Anhalt). They provide for all companies participating in a tender procedure for public construction projects to undertake to carry out the work, if awarded the contract, with due regard for the local collective agreements in force. The aim is to ensure that non-German companies do not undercut and potentially supersede local construction companies.

The first collective agreement on minimum wages was declared to be generally valid at the beginning of 1997, and since then the wage level involved has been raised several times (Ta-

2 Owing to its ability to impose a veto in the collective bargaining committee, the German Federation of Employers' Associations, the employers' umbrella organisation, was able to prevent a declaration of general validity for the collective agreement on a minimum wage for months. Only the threat by the then Minister of Labour, Herr Blüm, to issue a declaration of general validity without the consent of the collective bargaining committee if necessary made the Federation of Employers' Associations give way (Worthmann 2001: 224 ff.).

ble 3). For the first time, the collective agreement concluded in 2002 contained a second minimum wage level for skilled construction workers. The holiday regulations provide for posting companies to transfer holiday fund contributions to the construction industry's holiday and wage equalisation fund for employees working in Germany. This means that the collectively agreed holiday regulations valid in Germany (duration of annual holidays and level of holiday pay) are also applied to posted workers.

Table 3: **Minimum wage levels in Western and Eastern Germany, 1997-2004**

Date concluded	Declared generally valid by	Term	Minimum wage level (TCAHW)*			
			for unskilled workers (occ. group VII 2)		for skilled workers (occ. group III)	
			West	East	West	East
2.9.1996	CBC**	1.1.1997-31.8.1997	17.00	15.64	-	-
17.7.1997	CBC	1.9.1997-31.8.1999	16.00	15.14	-	-
26.5.1999	Statutory instr.	1.9.1999-31.8.2000	18.50	16.28	-	-
2.6.2000	Statutory instrument	1.9.2000-31.8.2001	18.87	16.60	-	-
		1.9.2001-31.8.2002	19.17	16.87	-	-
4.7.2002	Statutory instrument	1.9.2002-31.8.2003	10.12	8.75	-	-
		1.9.2003-31.8.2004	10.36	8.95	12.47	10.01

TCAHW: Total collectively agreed hourly wage
* Minimum wage level in DM up to August 2002, in euros as from September 2002.
** Collective bargaining committee.

Source: 1996: German Construction Industry Association 1997: 464-466; 1997, 1999: German Construction Industry Association 1999: 48-54; 2000-2004: IG Bauen-Agrar-Umwelt 2000: 5, Federal Law Gazette Part I, various references, compiled by author.

Only when a company obtains a contract for a public construction project can it be compelled to comply with all the locally applicable collective agreements on wage rates when fulfilling the contract. The entire wage scale is applied via laws on compliance with wage rates, and not simply the minimum wage. In addition, in some cases laws on compliance with wage rates may not be applied in certain areas of construction in which the public sector has a monopoly (e.g. road construction or civil engineering), where they discriminate against employers who are not bound by collective agreements. At least, this has been shown to be the case in Berlin, where the Federal Cartel Office prohibited application of a declaration of compliance with wage rates for road construction contracts with the *Land* of Berlin. The Federal Court of Justice had to rule on an appeal on points of law, and shared the Federal Cartel Office's opinion that Berlin's Law on the award of contracts discriminated against employers not bound by collective agreements and contravened "negative" freedom of association. This means that in all probability, even a law on compliance with wage rates with national validity could be applied only to structural engineering contracts. However, public structural engineering works account for only a very small percentage of the overall construction volume, with a total of just over 6% (Table 4).

Table 4: **Percentage of construction volume by areas of construction in Germany, 2001, 2010 and 2020**

Year	Housing construction, total	Service construction, total	Public construction	
			Road construction, other civil eng.	Structural eng.
2001	54.76	29.15	9.65	6.45
2010	55.18	29.86	8.97	5.99
2020	54.61	31.53	8.13	5.73

Shaded section = probable field of application of laws on compliance with wage rates.
Source: Institute of urban research and structural policy, Berlin/DIW Berlin 2003: study on future prospects for the construction industry in North Rhine-Westphalia, work unit 1: 67, unpublished manuscript, author's calculations.

5 Illegal employment

Many employers fail to comply with the provisions of the Law on the posting of workers and the regulations on compliance with wage rates. For many years the construction industry has been one of the sectors in which illegal employment is very widespread, and this includes a wide range of "traditional" infringements. For example, the various forms of clandestine work (such as benefit fraud, non-compliance with the craft trades ordinance or illicit "neighbourhood assistance") are found in the construction sector in particular. In contrast, offences against the instruments newly created to structure the internationalised construction labour market constitute relatively new forms of illegal employment. In addition, offences committed in the context of postings include illegal supplying of workers by temporary employment agencies, illegal employment of foreigners, or evasion of social security contributions and tax evasion by German clients and German and foreign subcontractors. Offences of this kind are not new, but for some years now they have been occurring on a much larger scale than hitherto.

It is in the nature of things for illegal practices to evade official records, and so it is impossible systematically to research illegal employment relationships. Consequently any comments on the scale of illegal employment can only be speculative. Various methods are used in an attempt to assess its extent (and in some cases also the associated effects on the national economy) (cf. inter alia Schneider and Enste 2000, Trockel 1987, Cassel and Caspers 1984, Graß 1984, Paasch 1989). However, the figures arrived at for the clandestine economy as a whole vary widely depending on the approach adopted, namely between 3.4% and 27% (Gretschmann and Mettelsiepen 1984: 29) or between 11.3% and 31.4% (Schneider and Enste 2000: 38) of the official GNP. Moreover, even surveys using the same method are barely comparable, since they are based on different reference points (restriction to regions or sectors, inclusion of the legal informal economy, e.g. DIY, different timescales, etc.).

Only one thing seems certain, namely that according to the surveys available, illegal employment is relatively common in the construction industry, which accounts for over 40% of the clandestine economy as a whole, a relatively high proportion (see, for example, Schneider 2001). A 1993 survey of illegal supplying of workers by temporary employment agencies

(two years after the ban on temporary workers in the construction industry) showed that in the Lower Saxony/Bremen Employment Service Region, 60-65% of all recorded offences against the Law on the supply of workers by temporary employment agencies (AÜG) related to the construction industry (Mayer and Paasch 1986: 17). Another offence common in the construction industry is corruption.

Information from the supervisory authorities shows the extent to which labour market regulations are infringed in the construction industry. Since the Law on the posting of workers came into force, between some 14,000 and 21,000 cases a year have been brought in relation to offences against this Law alone, leading to fines totalling almost 43 million euro in 2001 (Table 5). In the same year, in some 281,000 cases in the context of combating illegal employment and benefit fraud, fines totalling over 100 million euro were imposed. Bearing in mind how difficult it is for the authorities even to establish that an offence has been committed, this gives some idea of the extent to which forms of illegal employment must actually occur.

Table 5: **Number of summary and criminal proceedings in the context of combating illegal employment and benefit fraud, 1997-2001***

Year	Benefit fraud	Illegal supply of temporary workers		Law on the posting of workers
		by employees and employers	by companies supplying and accepting temp. workers	
1996	321 835	86 792	8 520	**
1997	344 012	78 551	9 754	18 979
1998	290 818	75 390	11 009	21 044
1999	253 298	76 475	6 713	19 358
2000	230 189	64 051	5 971	18 236
2001	189 837	50 743	3 482	14 165

* Cases initiated and taken up.
** Offences not recorded, as minimum-wage regulation not yet in force.
Source: Data from the Federal Employment Service.

6 Consequences for the German construction labour market

Owing to the particular working and production conditions in the construction industry, this sector is intensively regulated in many European countries (Bosch/Philips 2003). This regulation has been accompanied by the development of markets for skilled workers. These skilled workers are tied to the sector by inter-company social security benefits, so that investment in (continuing) training is worthwhile for both companies and employees. In order for these regulatory systems to function effectively, all construction companies and construction workers need to be integrated into them, to prevent "free ride" strategies. Furthermore, the national-level social partners and the legislator must be able to structure working and employment conditions autonomously (Worthmann 2001).

These preconditions for effective functioning had already become vulnerable with the conclusion of bilateral agreements on the posting of contract workers, and they were then further undermined by the increased utilisation of freedom to provide services within the single mar-

ket. Construction services are now provided transnationally, which means that it is increasingly possible to talk of a European construction labour market. At the same time, to a great extent the mobility flows in this European labour market go in one direction only, namely from low-wage countries to high-wage countries. The high-wage countries are attempting to create fair competition conditions by adopting national legislation on posting and statutory or collectively agreed minimum wages. This is designed not only to protect the country's own workers against competitors whose lives are not based in Germany and who can therefore offer their workers at lower wages, but also to preserve a construction industry that is geared to skilled workers and focuses on quality products, and which also invests in training and innovation. Experience in the USA and the UK has shown that vocational training in this highly flexible sector collapses if tenders can be won by ceasing to make provision for future needs (Bosch/Philips 2003). Thus binding minimum levels must be laid down via working and social security conditions for national and foreign construction companies, in order to concentrate competition on the search for the best products and production processes. The construction sector's specific regulatory system is a key element of this, in that only the combination of labour-market regulation with product-market regulation ensures that skills chains and quality chains ensue. An unregulated juxtaposition of various pay systems, combined with a high level of illegal unemployment, destroys all institutionalised order in the labour market. Companies that pay the statutory wages are "penalised" in the market, as they have little chance when competing against rivals who are not bound by the local rules.

Owing to its proximity to the accession countries and its relatively high wage levels, the German construction industry is particularly affected by enlargement of the EU to the east. Against this background, the transitional periods decided on for freedom of movement for workers and freedom to provide services are essential.

It is apparent that the many small and medium-sized enterprises that form the backbone of the German construction sector have not so far responded adequately to the changing market constellations. This has been the outcome of recent studies on the future f the Geran construction industry (Bosch/Rehfeld 2003, RKW-Bau 2001; UBS 2000). They are still finding it difficult to survive in a climate of intensified competition without going down the road of putting pressure on wages and reducing collectively agreed standards. It is important for construction companies to implement a variety of in-house process innovations, in order to be able to offer cheaper construction services. One way of doing this is to be proactive in exploiting the new room for manoeuvre in inter-works cooperation agreements in order to offer "one-stop" services and, increasingly, extra construction-based services. There is also a need for innovation on the part of the product market, facilitating, for example, more efficient, cheaper construction that is less dependent on the weather. Even after all the transitional periods expire, however, it will still be necessary to lay down generally binding minimum standards. In deregulated construction labour markets, the incentives for "free ride" strategies at the expense of long-term investment are simply too great. This chronic failure on the part of the market means that we need a regulatory framework for social and economic policy that sets out to preserve an innovative construction industry.

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