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Free mobility, locked rights: the posting of construction workers from Portugal

Introduction

Mobility is a central feature of the contemporary globalised world, as reflected in the growing movement of people, goods, technology and capital, particularly since the second half of the 20th century (Urry 2007). Work and employment are spheres that have been highly affected by the ‘mobility turn’, both at a practical level – higher mobility of workers and companies or the mobilization of labour (Nies, Roller & Vogl 2017, 48) – and in terms of policies and discourses (Gsir 2013) – an assumption embedded in political speech as a positive value (Author A), as the European Union (EU) project provides a clear example.

Labour mobility is one of the cornerstones of the common space envisaged by the EU, which actively promotes it within specific regulatory frameworks: the free movement of workers, within which the regular mobility of workers inside the EU takes place; and the free provision of services, within which posting takes place – when an employer from a Member State temporarily sends an employee to another Member State to deliver a service, as established by the European Commission (EC) Directive 96/71/EC: the Posting of Workers Directive (PWD).

This article aims to contribute to the understanding of posting, by answering the research question: to what extent posting, as a type of temporary labour mobility, is driven by corporate and state interests and how abusive and exploitative practices concerning the posting of Portuguese construction workers – with reflects on the working and living conditions of posted workers – contribute to the (de)regulation of labour in the construction sector?

This article, drawn on research developed in the framework of an EU financed project, examines the political context of posting, at the macro level, and the working and living conditions of Portuguese posted workers in the construction sector, at the micro level, based on the analysis of policy documents and the perceptions of labour inspectors and social partners.

Posted work has become a central feature of employment practices (Wagner 2018) in various countries, but the free movement of people is still a mirage.

European Union project is based on building a common space through a mobility regime grounded on the *free* movement of people, capital, goods and services. However, our research indicates that social and labour rights are, to a great extent, *locked* to posted workers, as rights are not as mobile and flexible as these workers are. This phenomenon emphasizes the complexities and inequalities among mobility policies in EU. In particular, the analysis of the construction sector highlights that posting is strongly driven by corporate interests – as companies aim to conquer new markets and lower labour costs, and by EU and national policy regimes – interested in making labour markets more flexible. Whereas the mainstream social, economic and political construction of mobility (van Ostaïjen 2017) tends to value mobility as a *capital*, for many posted workers it is experienced as a *constraint*, due to the lack of opportunities in their home countries and the limited access to rights in the host countries, while also subject to certain abusive and exploitative practices, as this article shows.

The argument develops as follows. First, the key theoretical debates are reviewed, by adopting a theoretical matrix intersecting labour studies and mobility studies and discussing the legal and political framework of the free provision of services and posted work in the EU. Next the project that frames the research and the adopted methodology are presented. This is followed by the case study of the posting of

Portuguese construction workers. The article concludes with an overview of the main findings and directions for future research, as well as policy implications.

Labour and mobility

It is increasingly accepted that one of the 20th century's long-standing trends was the intensification of the flow of people and goods on a global scale (Urry 2002; Cresswell and Ginn 2002). Traditionally approached by transport-related disciplines, the mobility paradigm emerges in social sciences as a result of bringing together social and transport research (Sheller and Urry 2006; Endres, Manderscheid, and Mincke 2016). The approach to mobility has enriched knowledge of contemporary society and of how the social construction of mobility has fuelled a culture of mobility and is tied to the dominant logic and rationality. Labour mobility occupies a prominent place within these overall mobility flows since ever more 'to be mobile (..) and to be flexible is becoming an inherent part of working experience' (Nies, Roller and Vogl, 2017, 48). Still in many situations, labour mobility, rather than a capital, is a constraint that highlights the inequalities between regions and people (Queirós and Monteiro 2016). As Meardi, Martín, and Riera state, 'foreign labour, thanks to its mobility, may play the function of "buffer" in relation to employment uncertainty, carrying a burden of insecurity that local European populations are unwilling to bear?' (2012, 6).

At the same time, mobility also involves awareness of the ability to move and, ultimately, the willingness to do so, as people decide to move for professional reasons based on the current expectation of being mobile and/or in the expected benefits of that decision in terms of social mobility (Schiller and Salazar, 2012). Mobility encompasses also a narrative that ideologically sustains political and economic actions in this domain. As Boltanski and Chiapello (2005) put it, the current capitalist justificatory regime values adaptability, flexibility and mobility – i.e. the ability to switch from one situation

or activity to a very different one – as qualities that make workers active, autonomous and employable. Hence, mobility has also become an established ideology, putting pressure on individuals to be mobile and able to adapt (Flamm and Kaufmann 2006) both to spatial and social changes. The levels and practices of (labour) mobility are products and producers of social differences and inequalities that are regulated by national and international policy.

The posting of workers is a specific form of labour mobility where these issues are interwoven into each other, thereby revealing the business practices and EU/national policy regimes that frame it. ‘Posting shapes and is shaped by the interaction of EU, home and host country regulatory environments, the industry-specific environment, and an industry’s production arrangements’ (Lillie and Wagner 2015, 158). Construction sector has long been a key industry in labour mobility, mainly labour migration, due to its characteristics: labour intensive, low or unskilled jobs, immobile products and fragmented production process (Fellini, Ferro, and Fulli 2007). Since the beginning of the 21st century and especially during the last economic crisis, the labour-shedding in certain places has increased the need of, both construction firms and employees, to move. Haan, Walsh and Neis (2014) propose the concept of employment-related geographical mobility (E-RGM) as a way to gather ideas and data on labour mobility in a broad sense. In fact, studies on posting are relatively scarce in mobilities studies, as well as in labour studies literature (Verschueren 2008; Cremers 2011; Greer, Ciupijus, and Lillie 2012; Wagner 2018). However, research on labour mobility is becoming more common, due, not only to the growth of posting in recent years, but also to the Eastern enlargement of the EU, as well as the global economic crisis. The changing structures of the economy have had a severe impact on the conditions that workers experience in everyday life, notably in view of mobility flows.

Mobility is not only a consequence but also a driver of social change (Creswell 2010; Urry 2007) – including, for example, the rise of social inequalities, as Sheller (2018) discusses when conceptualising mobility justice, as a way of highlighting the real injustices and inequalities that marginalised communities experience with regard to space, resources and infrastructure. Caro et al. (2015) also stress the fact that the segregation and the lack of social integration of posted workers is higher when compared with more permanent migrants. This is connected to the fact that posting, differently from migration, does not involve relocation. Posting allows workers the possibility of having a temporary paid employment abroad while maintaining residence in their home country where their family usually stays (Walsh et al. 2013). This contributes to understanding why the posted worker in the construction sector is typically a working-age man (Çinar 2020). But these specific conditions contribute to a ‘state of subjection’ (Vickers et al. 2019, 704), since workers have scarce control over their working conditions.

The management of labour mobility has been one of the major challenges of European politics over the past decades (Potot 2013). In fact, ‘while labour mobility is formally unrestrained, subsidiary non-harmonised policies still limit access to social infrastructure’ (Bertola and Mola 2009, 6). For instance, in the United Kingdom free movement was the most visible and controversial aspect of the United Kingdom (UK)’s membership of the EU (Rolfe and Hudson-Sharp 2016) and a key factor in the referendum that decided for the UK's withdrawal from the EU. The free movement of persons ‘is stuck in a fragmented and variegated regulatory mode in which the social rights of mobile persons are precarious and dependent on market contingencies’ (Lillie and Simola 2016, 7). Hence, to discuss posted work it is crucial to consider both

contributions from labour and mobility studies, dully crossed on the analysis of labour mobility.

The political framing of the European Union: from mobility regime to mobility as an ideology

The European Union free mobility project

The EU project is based on the idea of building a common space where a set of fundamental freedoms are promoted, as defined in the Treaty of Rome: the free movement of people, capital, goods and services. However, in contrast to goods and capital (which are essentially free to move within the EU), labour and services markets have proved to be more difficult to integrate and liberalise. As Wagner states, ‘borders still exist. They just exist elsewhere: in unequal payment, in lack of access to collective channels of representation, or in the inability to claim rights’ (2018, 2).

The EC proposes a mobilities typology that allows to have a general portrait of the main forms of labour mobility in the EU (table 1): *Long-term labour mobility*, ‘where someone moves his/her residence to a country of which he/she is not a citizen, for at least one year, to take up work or seek work’; *Cross-border mobility*, ‘where someone resides in one country but is employed or self-employed in another and who, for this purpose, moves across borders regularly’; and *Posting*, ‘where employees [or self-employed persons] who are regularly employed in one Member State are sent to another Member State by the same employer to work there for a limited period’ (European Commission 2020, 17).

[Table 1 here]

The posting of workers is a specific form of temporary labour mobility that occurs in the framework of the free provision of services. According to the PWD (European

Commission 1996), posting presupposes: i) an employment relationship in the sending country (through a regular employer or temporary work agency) to which the workers remain formally attached; ii) a contract between an undertaking in an EU Member State (sending country) and an undertaking in another Member State (receiving country) based on the temporary provision of a service within the territory of the receiving country; and iii) a limited period of time. The question is whether the rights of workers are respected or not (Wagner 2018).

The framework of the free movement of workers provides every EU citizen with the right to move freely to another Member State with the purpose of working and living there, and to enjoy full equal treatment with nationals in terms of access to employment, working and social conditions. In the framework of the free provision of services, posted workers are given a distinct status as employed in the sending country. Their employment conditions are partially determined by the sending country where their employment contract is set and social security contributions are paid. In the receiving country, they are only partly covered by the right of equal treatment or equal pay in comparison with nationals (Voss et al. 2016), as the PWD (European Commission 1996) only requires the service provider to comply with a set of ‘terms and conditions of employment’ in the Member State where the posting takes place. These terms and conditions should cover a specific number of issues: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay (including overtime rates); conditions of the hiring-out of workers; health, safety and hygiene at work; protective measures regarding the terms and conditions of employment of pregnant women or women who have recently given birth, children and young people; equality of treatment between men and women and other provisions on non-discrimination (Article 3 of the PWD, European Commission 1996). This set of labour

rights should ensure a minimum protection of posted workers in the receiving country, where they might be entitled to limited social protection. In fact, although the general rule on the coordination of national social security systems within the EU is based on the principle that mobile workers are subject to the social security scheme of the country in which the work takes place, this rule does not apply to posted workers. Posted workers and their employers are exempt from paying social security contributions in the receiving Member State during a posting period of a maximum of 24 months. Instead, these contributions are paid in the sending Member State, as a way of facilitating the free movement of services. This also means that the existing differences between the social security schemes of the sending and receiving Member States may lead to comparative advantages from the employers' point of view (Wispelaere and Pacolet 2015) and to different levels of social protection from the workers' point of view (Lillie and Simola 2016).

The definition of EU citizenship rights frames a conflict between employment and mobility situations: 'For EU citizens, their right to move and work is not geographically congruent with their social security, raising the possibility that: 1) EU citizens will find themselves ineligible for social security after having some unfortunate life event when moving abroad to work and 2) mobile EU citizens will be more exploitable by employers because their lack of social security makes them cheaper and lowers their reservation wage' (Lillie and Simola 2016, 8). This 'mobility regime' is governed by norms and institutions, but also by engaging the daily lives and imaginaries of 'mobile subjects' (Jensen 2013).

It is, thus, clear that posting is distinct from other forms of labour mobility, as these workers are defined as service providers. Hence, their working conditions and rights are at risk of being *lost in transaction*. But this kind of conflict is not strange to

the inner contradictions of the concept of mobility regime itself (Schiller and Salazar 2012) and to the fact that, as Koslowvsky points out, ‘a majority of the world’s states (...) do not add up to a regime facilitating the international movement of labour’, despite being much interested in the movement of trade, tourism and business travel (2011, 4). So behind the narrative of free movement, it is important to unveil the ‘different intersecting regimes of mobility’ and ‘regimes-of-mobility approach must move beyond the ready equation of mobility with freedom by examining not only movement as connection but also as an aspect of new confinements and modes of exploitation’ (Schiller and Salazar 2012, 7-8). Posting can provide an important contribution to this ongoing debate, as it illustrates the inner contradictions of EU definition of mobility regime both at conceptual and practice levels.

Fair competition or fair social treatment: tensions between economic freedom and social rights in the European Union

Posting as a political and labour rights issue has mostly been framed in terms of labour cost advantage and work opportunities. In fact, ‘intra-EU labour mobility brings job opportunities to millions’ (Kalls and Lillie 2017, 7) and has played an important role in rescuing companies from closing down and, consequently, employees from unemployment during the late economic crisis. However, there are very different practices of posting contrasting real good job opportunities with fake job situations, as Cremer (2011) and Kalls and Lillie (2017) highlight. The specificities of this form of temporary labour mobility gives floor to ‘institutionalized illegalities’ (Lima and Junior 2018).

The decision of posting workers abroad with the purpose of reducing labour costs reflects the existing tension within an EU framework that encourages economic competition but inadequately ensures the social protection of workers, resulting in the

subordination of social rights to the economic freedoms (Cremers 2019). The protection of workers' rights is insufficiently addressed in the PWD (Voss et al. 2016, 22). This concern is only expressed in one paragraph of the preamble, which states that the 'promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers. Different stakeholders in the field of posting – such as trade unions, employer organisations, and even the European Parliament – have strongly advocated the need for significant improvements in the posting framework, which led the EC to publish a proposal revising the Posting of Workers Directive in 2016 (approved in 2018¹). The European Trade Union Institute (ETUI) and the Portuguese Labour Inspectorate (Authority for Working Conditions – ACT) have highlighted how the Internal Market legislation and CJEU jurisprudence prioritise economic freedoms over the protection of posted workers' rights, while existing loopholes open space for fraudulent practices.

According to Caldarini (2016), under the argument of preventing 'fraud and abuse', the EC's intention to review provisions threatens the pillars of free movement of people and coordination of social security systems, therefore challenging the entire European project and penalising mobile and migrant workers, as well as their countries of origin. A set of measures aimed at promoting the free mobility of workers was announced by the EC in 2015 through the so-called 'Labour Mobility Pack', oriented towards the development of 'a more comprehensive and fairer internal market for mobile and migrant workers'. In practice, this pack 'intends to prevent fraud and abuse by monitoring companies' behaviour, for instance in relation to posted workers, and by introducing new and more stringent criteria to access social security benefits' (Caldarini 2016, 2). Higher-wage countries, which traditionally attract more workers, have argued that a significant number of new immigrants burdens the receiving countries' social

welfare systems (such as the provision of schooling, health care and adequate accommodation). The alleged ‘abuse’ is that workers move from countries with lower standards of living to countries with higher standards of living to take advantage of these welfare benefits; hence, the ‘package’ intends to limit the access to social benefits to those who exercise their right to freedom of movement.

Posting, labour mobility regulation and social dumping

One of the arguments employed by the receiving countries for raising barriers to free labour mobility is tied to accusations of social dumping and unfair competition. These, in turn, are linked to the lower labour costs of posted workers (mainly due to different social security contribution levels) and result in the replacement of domestic workers, particularly in labour-intensive and lower-skilled sectors.

In Europe, debates connected to social dumping have been taking place ever since the EU enlargement to Greece, Spain and Portugal (Bernaciak 2012). Some so-called ‘Old’ EU Member States feared the uncontrolled inflow of Southern European workers, accusing them of unfair competition through lower labour costs that could result in a growth of unemployment and a pressure to lower wages and employment standards in the domestic population. The increase in migration flows following the EU Eastern enlargement in 2004 and 2007, and the economic crisis that exploded in 2008, increased resistance to intra-EU migration in countries receiving major flows of migrants. This led to the emergence of national policies with the aim of restricting free movement and access to social insurance, and to the position adopted by some countries against EU regulations on labour mobility. This was the case of Germany and France’s joint position on reforms over the future of posted workers, which they believed should go further and deeper:

Last week I had the opportunity for a close exchange with my French colleague and we shall take the same position, namely that there needs to be further improvement. – Andrea Nahles, German Employment Minister (*Euronews*, June 15, 2017).

The single European market and the free movement of workers is not meant to create a race to the bottom in terms of social regulations. (...) The posted workers' directive as it currently functions is a betrayal of the European spirit in its essence. – Emmanuel Macron, French President (*Reuters*, August 23, 2017).

Based on arguments against social dumping and unfair competition, the receiving countries, have demanded and put into practice the restriction of posted workers' social rights, often subjecting the more vulnerable and less-skilled workers to worse working and living conditions, contributing to their precarisation, which benefits these same countries through access to cheaper labour that does not entail the long-term social consequences.

On their turn, countries that are mainly senders of posted workers, such as Spain or Poland, have joined forces in opposing the introduction of any changes to the PWD that raise obstacles to posting:

Spanish Prime Minister Mariano Rajoy and his Polish counterpart, Beata Szydło, last week reaffirmed their commitment to the European project but reiterated their concerns about the EU's posted workers directive. (...) both countries oppose any barriers or obstacles that could hinder the free movement of people, goods, products and services. (*Euractive*, July 6, 2017)

This second group of mainly sending countries tends to encourage the mobility of their companies and workers as a way of reinvigorating the national economy, particularly in times of crisis. This was the case of Portugal during the four-year period of crisis

(between 2011 and 2015) when, together with the Structural Adjustment Programme, the government openly encouraged labour mobility. Portugal has been working towards cooperation agreements and their effective consequences for the regulation of posted work. But to be effective, we must take into consideration the specific conditions of the agreement's signing. The agreement between Portugal and France – the Administrative Cooperation Agreement between the Ministry of Labour from the French Republic and the Ministry of Labour, Solidarity and Social Security from the Portuguese Republic on the posting of workers and prevention of undeclared work – signed in 2017 has the specificity of having been discussed and signed at the ministry level and not at the Labour Authorities level, what provides the Labour Inspectorate an additional legitimacy to act on the workers' behalf.

National realities are different, as well as the tools each country has to negotiate and regulate posting in order to overcome social dumping, and the institutional arrangements play an important role in the process.

Bernaciak (2012) draws attention to how the term 'social dumping' is widespread in European public discourse but remains poorly defined and subject to misconceptions or conscious abuse (including in academia). Social dumping is understood as 'the strategy geared towards the lowering of social standards for the sake of enhanced competitiveness. It is prompted by companies but indirectly involves their employees and/or home and host country governments, and has negative implications in the social sphere' (Bernaciak 2012, 25). However, the understanding of social dumping as 'unfair' competition from countries with low wages is problematic. An inflow of posted workers from low-wage countries does not automatically imply social dumping. Specific social dumping strategies in the area of labour mobility may involve the non-observance of host countries' employment standards by foreign posting firms, e.g. by

forcing employees to work inhumanly long hours, introducing wage deductions for tools or charging exceptionally high fees for housing or transport to the workplace. In addition, relocation or liquidation threats might also be regarded as a form of social dumping, since they enable the employer to depress employment standards and/or limit union influence at the existing locations. Hence, the author argues that anti-social dumping measures tend to have a defensive character aimed at protecting high standards in the wealthier countries. As it was mentioned above, it is important to take into consideration the institutional arrangements between the countries, namely their position as mostly sending or hosting countries.

Literature also provides evidence that loopholes in the PWD (European Commission 1996) have encouraged multiple practices that evade or circumvent employment or social security legislation in labour-intensive sectors such as construction. This is the case of: *letter-box companies* (undertakings that have never been engaged in any genuine or meaningful business in the country of origin, whose primary purpose is to post workers abroad as a way of avoiding taxes and lowering social security costs); *bogus self-employment* (used particularly by fraudulent work agencies that place workers who assume the status of self-employed when in fact there is a link of subordination, usually to avoid payment of tax and high social security contributions); and *regime shopping* (whereby agency workers are sourced from locations that are convenient in terms of social security to countries with more restrictive regulations) (Voss et al. 2016).

EU legislation and the tensions between the different countries, their economic, social and institutional situations and conditions highlight the difficulties of assuring free labour mobility and the control of working conditions, a reality that will be discussed for the Portuguese reality.

Materials and Methods

This article analyses the posting of workers in the construction sector – particularly the abusive and exploitative practices concerning the posting of Portuguese construction workers – based on research developed within a European consortium, which comprised 10 EU countries plus Turkey, envisaging activities of cooperation, information exchange and awareness raising in the field of posting².

The methodological procedures included: document analysis of policy documentation (legislation produced in the scope of the PWD, proposals and reports from the EU and Portuguese authorities, as well as social partners; news from the press); open-ended in-depth interviews (audio recorded) with Portuguese labour inspectors (namely, the Deputy Chief Labour Inspector, the Construction Coordinator and four labour inspectors working directly with posting) and social partners (one representative of the construction employers' organisation); documentation and publications of the unions³. The fieldwork was conducted between April and December 2017. All the interviews were audio recorded and integrally transcribed. Their duration varied between 43 minutes the shortest and 1 hour and 24 minutes the longest. Interviews were subjected to content analysis using Computer Assisted Qualitative Data Analysis Software (MAXQDA), coded using mainly theoretically driven categories – from the literature review and from the project analytical framework, but also categories that emerged from the data.

The analysis categories of the interviews, detailing those concerning living and working conditions, were the following:

Politic and economic context (e.g. mobility, national public policies, economic national situation)
Juridical framework (national and European)
Portuguese Labour Inspection activities

National and European working groups on posting
Construction industry (e.g. economic development, employment, regulation, trade and employers' associations)
Working conditions (minimum wage application, wage discrimination, paritarian funds, social security, subsidies, working times, health and safety)
Living conditions (subsistence, accommodation, social integration, violence, adaptation)
Characterisation of posting to Portugal
Data Base uses (e.g. type of existing databases, articulation with labour inspection activities)
Sharing of information at EU level (e.g. procedures, main obstacles)
Fraud and infraction situations (e.g. 'letter box companies', social dumping, illegal activities)
Workers organisations (e.g. role played by the unions and by the Non-Governmental Organisations)
Main posting problems (e.g. social integration, legal frameworks)
Main posting challenges (e.g. knowledge production, difficulties in dealing with posting)

The information gathered in the interviews with the social actors, was crucial to the identification and discussion of the most critical situations posted workers face abroad and the discrepancies and contradictions that exist between the EU legislation and discourse and the reality of the workers' working and living conditions.

Results

The posting of Portuguese workers in the construction sector: exploring the European single market, exploiting workers

Labour mobility is not a recent trend in Portugal, as the country has gone through various migration trends, starting in the 1950s. More recently, the number of people in mobility has risen, including the number of posted workers, which show a growing trend: in 2015, 64,970 workers were posted from Portugal to other European countries, an increase of 10.2% compared to 2010 (Wispelaere and Pacolet 2017).

Portugal is mainly a provider of posted workers, as a consequence of the labour cost differentials and its comparative advantage as a lower-wage country, particularly in

labour-intensive sectors that cannot be delocalised, as is the case of construction (Baganha, Marques, and Góis 2002). Nevertheless, the recent growth in the number of workers posted to Portugal – 15,374 in 2015 (a 26.1% increase when compared with 2010) – has also started to capture the government’s attention.

The construction industry is the economic sector posting the most workers. In 2016, it accounted for 45% of total posted workers in Europe and 34.2% of the workers posted from Portugal, as indicated by the number of *PD A1* social security forms issued (table 2).

[Table 2 here]

As explained above, construction is a key sector in the configuration of labour mobility in Europe, due to a set of factors that characterize it as particularly attractive ‘for labour migration [and posting], because single tasks can easily be farmed out to foreign companies or to very small companies usually employing foreign workers, either regular or irregular, either authorized or unauthorized’ (Fellini, Ferro, and Fulli 2007, 279). An important study on the construction sector in Portugal, carried out in the 1990s, defined it as a certain kind of ‘nomadism’, yet associated to a fixed place of residence and to complementary occupations, particularly connected to small family farming (Pinto and Queiroz 1996).

Portugal's entry in the EU in 1986 facilitated new flows of Portuguese workers to other European countries, often hired by Portuguese companies for the provision of services abroad. As Baganha, Marques, and Góis (2002) explain, the conjuncture of a European free market resulted in two types of developments for Portuguese construction companies in terms of employment. On the one hand, it brought more competition, leading many Portuguese companies to adopt a strategy based on *downsizing* workers and *outsourcing* various work stages, which meant resizing medium and large

companies by reducing their staff and increasing the number of small companies working as subcontractors. In an expanded market, the demand for labour also grew – which, in the Portuguese case, was addressed through direct recruitment, temporary work agencies and outsourcing. ‘This strategy allowed large Portuguese companies to send members of their own staff to construction works in EU countries and/or to place in their subcontracts abroad workers specifically hired for that purpose’ (Baganha, Marques, and Góis 2002, 5).

Construction and public works had an important weight in the country’s employment structure, representing over 10% of total employment up to 2010 (figure 1). The importance of this economic activity in Portugal is reflected in the creation of a labour force potentially ready to migrate or be posted abroad, whereby mobility is a way of economically regulating the sector.

[Figure 1 here]

Following the global financial crisis and the economic recession in Portugal, which resulted in the implementation of a Structural Adjustment Programme for the period between 2011 and 2014, with heavy austerity measures imposed to Portugal by the International Monetary Fund, the European Central Bank and the European Commission, the construction industry was one of the most affected sectors, having faced a considerable economic crisis and a decrease in employment. At the same time, the outsourcing of labour through subcontractors and temporary work agencies, and the use of non-standard forms of employment (such as temporary work and self-employment), became common practices in Portugal, just as in most countries, against the decline of a permanent, directly employed workforce.

This context had an important impact on workers’ mobility. The flow of Portuguese construction workers to other European countries resulted from economic

circumstances and opportunities created by the European market, usually being prompted by Portuguese employers posting workers abroad (whether directly, through temporary work agencies, or through subcontractors). This reality was felt on the ground by the Portuguese Labour Inspectorate and required the development of new frameworks to approach it:

In 2011, with the economic crisis, we started noticing the increase in posting and felt the need to create a working group to study this new phenomenon. (Labour Inspector A interviewed on November 7, 2017)

At the same time, the growing fragmentation and flexibilisation of work in the construction sector has led to work insecurity and the erosion of workers' protection, particularly in the case of posted workers. The temporary and fragmented nature of work relations also weakens the prospects for collective organisation and action (Lillie and Sippola 2011), when these workers' vulnerable situation and subjection to abusive practices would demand increased action from workers' organisations.

The interviews with Portuguese Labour Inspectors and social partners highlighted a set of abusive and exploitative practices concerning the posting of Portuguese construction workers. These practices are central in the (de)regulation of labour in the construction sector, expressing a set of contradictions within EU regulations. This article highlights the importance of identifying those practices and discusses their consequences on labour mobility and on workers' labour and living conditions.

Letterbox companies

Portuguese labour inspectors reported that they often receive requests from their counterparts in other European countries hosting Portuguese posted workers for

information on the posting companies:

Often the company doesn't physically exist in the national territory, that is, they have an office or a letterbox and nothing else... although these companies often provide every document we ask for. We send a notice to that letterbox and they send us all the documents. Some companies work like that; others don't even answer. Sometimes it's a private house: we send a notice and don't get an answer and when we go there it's a private house. I've had two or three cases like that recently... (Labour Inspector B, interviewed on December 26, 2017)

However, labour inspectors also stressed that such cases are not necessarily letterbox companies, since the company may not be located in the national territory and still be legal, as a result of economic circumstances and the opportunities opened by the European free market:

Sometimes we even go to people's houses but when we get there the doors are closed because they are not here, all partners are abroad... This doesn't necessarily mean it's a letterbox company, the answer is never linear. That's a problem that concerns the substantial activity, since many companies working abroad (especially small companies) are not active here. This is a reality, which doesn't mean the company doesn't exist legally. It exists here but is not active due to obvious economic circumstances: "if there's no work here, I go abroad"... (Labour Inspector C, interviewed on November 9, 2017)

Wages and the organisation of working time

Wages are the dominant issue raised in terms of abusive and fraudulent practices, especially by foreign labour authorities that send requests to their Portuguese counterpart through the EU Internal Market Information System (IMI)⁴. These concerns are shared by some of the Portuguese Labour Inspectors, while others minimise them in

the face of other issues perceived as being more urgent, namely the living conditions and social integration of posted workers in the host countries:

In terms of net values, there is no wage discrimination [against Portuguese posted workers], but the way wages are paid may vary. For instance, while French workers are obliged to comply with French rules and are charged on that value, Portuguese workers make up their salary with other types of benefits that sometimes are not subject to deductions, but the net sum they receive is usually the same... Because if they are paid subsistence allowances up to a certain amount, those are exempt from taxes. If they are paid as allowances for something that is not taxed, it's possible, it's not forbidden by law. (Labour Inspector D, interviewed on October 26, 2017)

This labour inspector also expressed concern with the way minimum wages are calculated, based on the organisation of working time and overtime:

We have a big issue with the working periods, but that's something the Portuguese Inspectorate cannot monitor, because the provision is done abroad, so it will always require the foreign inspectorate to check the records of hours there. Some say they work 50-60 hours per week, but that's something we can't easily prove. And this is also tied to the compensation for extra hours, because we have a formula to calculate additional work that is different from other countries. (...) So, there is some room for manoeuvre as the legal systems are different. (Labour Inspector D, interviewed on October 26, 2017)

Other inspectors reported that sometimes the host country's minimum wage is not complied with:

Wages are the main situation of fraud related to posting, because it's obviously an economic issue: people go abroad because they want to earn more; I haven't heard about anyone who went to earn less... I tend to simplify grossly, but if I earn 500 in Portugal and in country B the minimum

wage is 1500 but I am offered 1000, I still go, even if the Directive says I should earn 1500, because it's still more than 500. If the company that was meant to pay 1500 manages to only pay 1000, it will do so. That way, everyone wins! Related to wages, is the issue of the organisation of working time and work duration... (Labour Inspector C, interviewed on November 9, 2017)

Linked to wages, are the social security contributions due in the sending country, included in the cost of the service provided. Hence, these may lead to comparative advantages for providers from countries where such contributions are lower, as mentioned by the representative of a civil construction employers' organisation:

There are social security contributions on the part of the worker and the employer. Therefore, if the social security rate is lower than in Belgium, once again we are talking about a price formulation here that is lower than the price formulation there, so it makes this company more competitive against the other, unequivocally... All these values – it is not the social security rate on its own, it is not the salary in itself – contribute towards the price formulation. (Employers' organisation representative, interviewed on October 25, 2017)

Non-existent absences

In the Portuguese case, a strategy employed by construction employers for circumventing the payment of wages during specific periods of inclement weather, when workers are not able to work, is that of 'non-existent absences'. As Portugal has a predominantly mild climate, the country's legislation does not provide for allowances in situations of inclement weather and, until very recently, workers were not allowed to apply for these allowances in the EU Member States where they provide services. However, when abroad, they often face such situations and labour inspectors have found that employers usually declare unexcused absences by workers during these periods,

cutting their wages:

In the construction sector, we notice a lot of the so-called non-existent absences. (...) in some regions in Europe, especially during the winter, sometimes workers don't work for a whole month because they can't. For instance, they work for 15 days and in the other 15 they can't work due to the so-called inclement weather. (...) So, a Portuguese company that wasn't allowed to apply to the fund wouldn't work during the periods of inclement weather, but wouldn't pay its workers either. They can't do that because, according to Portuguese law, regardless of whether the workers are abroad or inside the country, the employer can't deduct the worker because s/he did not work for external reasons; the employer always has to pay the wage, regardless of whether the worker has worked or not due to the weather or anything else. But they do cut wages and social security contributions. In these cases, if the Inspectorate finds out, it will tell the employer to rectify the situation, otherwise s/he will be fined... (Labour Inspector D, interviewed on October 26, 2017)

Illicit recruitment

The illicit recruitment of workers has also been highlighted as a matter of concern, particularly difficult to address. It occurs through gangmasters and informal networks that play an important role in attracting and 'supplying' posted workers, feeding undeclared economy (Meardi, Martín, and Riera 2012):

Another issue that is very difficult to monitor is gangmasters... We have huge difficulties in this field because it is not dealt with; it is an issue that we always bring to international meetings, but no one listens. They are like ghosts, with no track on the Internet, they just disappear... We had two companies registered with the Employment Institute that did not exist! So, we are also working on convincing companies to recruit workers through formal channels, but if you look at the job ads in newspapers you'll be shocked! (Labour Inspector E, interviewed on April 13, 2017)

In France, the Portuguese trade union CGTP-IN [General Confederation of Portuguese Workers] (2013), working with the French trade union CGT [General Confederation of Labour], reported ‘the flagrant breach of promises made at the time of hiring, either directly by the French employers or by national and French gangmasters’, not only in construction but also in the farming sector. One of the complaints was that workers were paid the Portuguese minimum wage when they had been promised the triple. As it was mentioned above, the agreement between Portugal and France signed at the ministry level as been important to overcome these situations, by legitimising and reinforcing joint inspection actions of the labour authorities of both countries.

The activity of these gangmasters remains surrounded in mist, but labour inspectors state it is not an issue directly linked to posting but to the recruitment process, ending up in the national territory:

Illicit recruitment may be an issue... we have some reports. However, they are not directly linked to posting but to the recruitment agencies, informal placement agencies – completely informal! We are only aware of this through some accounts of promises made by middlemen that are not what workers find when they get there (such as a higher wage or better housing conditions)... (Labour Inspector A, interviewed on November 7, 2017)

Circumvention of rules

Portuguese employers adopt other strategies in order to benefit from the European free market and circumvent existing regulations. For example, they create companies in the countries where they are providing construction services, and they even create temporary work agencies, given their less strict regulations when compared to the construction industry:

A phenomenon we observe is that Portuguese companies posting to France are almost forced to create a French company... Some are even setting up temporary work agencies because, since these are not in construction, they are not bound by the rules of construction, which are even more strict than in other sectors. So they do two things: they create a French [construction] company and a temporary work agency. In the French company they place emigrants who have been in France for 20 or 30 years. The problem is solved: they have a French company with Portuguese workers, i.e. the older ones; the young ones are posted through the temporary work agency. (Labour Inspector C, interviewed on November 9, 2017)

An increase in the posting of workers via temporary agencies is noticeable and exacerbates the flexible, temporary and precarious nature of these employment relations.

Working and living conditions and social integration

The precarious situation of posted workers is further aggravated by their vulnerable situation of being abroad in face of the lack of opportunities at home, making them exploitable and subject to precarious working and living conditions:

[The problem with posted workers] is they are left unattended; there is no integration or monitoring activity. (...) They have no roots there, so they are subjected to everything! (...) Those who are in trouble and want to work accept anything. So, posting is the legal side; the extreme cases are left outside. (Labour Inspector E, interviewed on April 13, 2017)

As foreigners, posted workers face linguistic, cultural and social barriers and are often not familiar with their rights, becoming subjected to the abusive practices of employers. As Dhéret and Ghimis describe, ‘some employers tend to subtract disproportionate sums from the workers’ salaries for food, transport and accommodation’ (Dhéret and Ghimis 2016, 7). This kind of practice has been recurrently reported in the case of

Portuguese posted workers.

Portuguese construction workers abroad spend their days predominantly between the construction sites where they work and their accommodation sites. The latter are typically shared with other countrymen, so there is limited social interaction with locals or workers from other countries. Hence, to some extent, the posting of Portuguese workers today reinforces the 20th-century pattern of Portuguese emigration waves but with the important feature that family reunification never happens. Being posted in different locations through time but always with no local familial connections makes 'being away' a permanent status where the personal and family *time* is everyday *missed* (Nies, Roller and Vogl, 2017) and therefore the right to settlement is denied (Salazar 2019) and the sense of rootless is prevalent (Vickers et al. 2019):

The social integration of people doesn't occur (with minor exceptions, because there are always exceptions), but for the large majority it doesn't occur. They live closed in their own world, always turned towards Portugal, and they do not get along with the others... Even in big construction sites, the Portuguese get along with the Portuguese, the Polish get along with the Polish... there is a clear division. (...) Besides, workers now go home much more often. Many workers go home once a month, which before was totally unthinkable. (...) We went to a camping site where workers live in the outskirts of Bordeaux and many of them had never been to the city centre, which makes integration difficult. In this respect, we are just like the Portuguese emigrants of decades ago; there was little change, apart from the fact that now it's easier to come back to Portugal. (Labour Inspector C, interviewed on November 9, 2017)

This situation also has to do with the expectations of Portuguese posted workers, which – in line with the analysis of Lillie and Greer (2006) and Lillie and Wagner (2015)– are mostly oriented towards conditions in their home country, rather than the host country where they are temporarily employed. Hence, they suffer also processes of segregation

(Caro et al. 2015). The mobile lives of Portuguese construction workers entail a desire of immobility, of returning and settling back home, not only because of their effective permanent rootlessness but also because the mainstream representation of the world as morally static tend dispose a view on mobility as disruptive to families (Haan, Walsh, and Neis 2014; Walsh et al. 2013).

Conclusion

Subjected to poor working and living conditions, limited social protection, as well as fraudulent, abusive and illegal practices, posted workers are quite a vulnerable part of the workforce, on which employers rely as a means of reducing costs and increasing the competitiveness of the services they provide in the European free market. This phenomenon deeply shows the contours of mobility injustices (Sheller 2014) and the ways in which mobilities are an important factor framing the dynamics of precarity (Vickers *et al.* 2019). Therefore, we could not agree more with Tazzioli when she argues that more than describing (labour) mobility importance in nowadays society ‘what requires further investigation are the asymmetries through which different practices of mobility are governed’ (2020, 4). In a world of *corporate mobilities regimes* (Kesselring and Vogl 2010), where the mobility of workers became not just a regular practice but an expectation (Author A), it is increasingly important to promote a *just and fair mobility* (Sheller 2014; Barlund and Busse 2016), both at individual and structural level.

Our study has shown that posting, as a form of temporary labour mobility, is driven by corporate and state interests and that abusive and exploitative practices concerning the posting of Portuguese construction workers contribute to the (de)regulation of labour in the construction sector. The analysis of the main abusive and exploitative practices yields important findings at three levels of analysis, with

important contributions to existing literature: the micro level of workers' working and living conditions; the meso level of employers' practices and workers' organisations; and the macro level of European and national policy.

At the *individual actor level*, we have shown how posted work develops into precarious working and living conditions. As the interviews clearly showed, posted workers in construction are often subject to precarious employment relationships when compared to the nationals of the host country (e.g. in terms of salary or contract), and are target of abusive and illegal practices, hence contributing to the deregulation of labour. Furthermore, these workers are frequently unaware of their rights, which makes them an easy target for abusive practices by employers (work periods, minimum wage compliance, non-existent absences). The lack of mobility power (Vickers *et al.* 2019) plays an important role in this situation as enforces the isolation and weakness of social ties. In this respect low-skilled labour mobility in general and posting in particular is often characterised by lack of social integration and segregation in the destination country, due to linguistic, social and cultural barriers. In what concerns posting, the lack of rootness presents to this type of mobile labour specific challenges to work-life balance. Posted workers need to address through their career path the redrawing of boundaries (Nies, Roller and Vogl 2017) between these two realms, since posting demands the dwelling of workers in a rootless space and time of work.

Despite a European common space based on a narrative of *free* mobility and a desired European imaginary (Jensen 2013), these workers experience a set of mobility injustices and inequalities with regard to rights and resources and are permanently in transit, which entails another form of un-freedom (Gil, Caletrio and Mason in Salazar 2019).

Posting is, hence, both a functional illustration of European free market of services and circulation of people and how these mobile subjects do not fit the glamour of cosmopolitanism (Schiller and Salazar 2012) of the mobile elites. Hence, posted workers' rights and conditions are often disregarded. Ongoing research plans along this front include further exploring workers perspectives and undertaking ethnographic work in construction sites, which was not possible within this research. It will be important to deepen the analysis by including an inquiry to workers and stakeholders in the host countries.

At the *meso level of organisations*, the article offers a contribution to the engagement between mobility studies and sociology of organisations, providing a better understanding of the institutional level. The Portuguese reality draws attention to the intensification of labour mobility and how it is used as part of the companies' business strategy, who weight the costs and benefits of posting against those of employing the local labour force. To post workers abroad has been a common practice in the construction sector and is tied to the international nature of the business. However, the globalization of the economy, increased competition and the flexibilisation of labour relations have intensified the posting of workers abroad, playing a major role in the configuration of labour mobility. At the same time, temporary labour mobility also poses new challenges to social partners, collective agreements and the general organisation of labour markets, including difficulties in organising mobile workers, which is a relatively uncommon approach, with scattered examples in the literature (Barslund and Busse 2016; Meardi, Martín, and Riera 2012). Trade unions face the challenge of overcoming possible conflicts between local workers and posted workers by defending a global working class, in the sense of embracing these mobile, temporary workers, together with all others in precarious situations, and fighting for adequate

social security for all. The project [reference omitted], has, precisely, as core partners, unions' representatives from various EU countries, aiming that they contribute to the discussion of tools that might help to promote shared knowledge and, hence, improve the situation of posted workers.

In addition, the administrative transnational cooperation goal of this project is an important step to the overcome of the 'methodological nationalism' denounced by several authors (Schiller and Salazar, 2012; Jensen, 2013) as a framework of analysis unable to address the fragilities of posting mode of mobility.

Finally, at the *macro level*, while examining a specific case focused in one sending country and one economic sector, the article provides a case study of the importance of engaging mobility studies with policy analysis. The research has shown that posted work in the EU as a form of temporary labour mobility is driven by the interests from EU member states and their corporations, which aim at reinforcing the mobility regime, flexibility and European integration and taking advantage of wage and income divergences between Member States and exploiting existing loopholes in the framework. In spite of the legal framework allowing the free provision of services, many barriers to posting are still raised in the name of the fight against fraud and social dumping, restricting the rights of posted workers and contributing to their precarisation, besides the health and safety risks that are common in the construction sector (Meardi, Martín, and Riera 2012).

From the perspective of public policy – both at national and European level (and how both are interwoven), it is essential to discuss labour mobility and the rules that regulate it. As our analysis has shown, although the procedures governing labour mobility have been fully defined, their dissemination and full compliance is far from being a reality and the work of the Portuguese Labour Inspectorate shows it quite

clearly. The European project, which frames the present study, sets out, precisely, to create a single database to be shared and managed by employers, labour inspectorates and stakeholders. The need to produce and share data is also emphasized by Chan, Clarke and Dainty (2010).

The case of posting construction workers highlights major trends that express the political economy of contemporary labour mobility in the framework of the political economy of borders (Wagner 2018). The existing power imbalances between European countries contribute to the potential exploitation of the most vulnerable groups, which include the less qualified workers making up the construction sector.

The EU regulatory framework of labour mobility plays a central role in the (de)regulation of labour markets, whereby this ‘mobility capital’ can represent not an advantage but a constraint according to the different types of mobility and the profiles of ‘mobile subjects’.

These findings allow to argue the centrality of posting studies within ongoing debates that critically conceptualise labour mobility. Labour mobility is a challenge for workers, companies, social partners and European and public policy. Therefore, also ends up being a challenge for researchers. Migration trends have existed and been studied for decades. The challenge now is to figure out the different trends in labour mobility and to integrate them within the economic and political dynamics, while continuously questioning EU directives, to what extent they are an answer for workers’ precariousness and social fragility, and whether they are being implemented.

Endnotes

¹ The Directive (EU) 2018/957 amending Directive 96/71/EC was approved after the conclusion of the current research. It adds some additional provisions for the protection of workers’ rights and replaces the reference posting period from 24 months to 12 months.

² Reference of the research project omitted.

³ The project aimed to interview also other institutions involved in the process such as in the Portuguese case, trade unions and the Social Security but it was not possible to get their cooperation. Still, and considering the almost inexistent information and reflection available until now, the methodology applied was central to understand in detail the framing and formal procedures involved in posted work and to gather the most relevant data from the social actors who know best the main challenges Portuguese workers face when posted abroad.

⁴ The Internal Market Information System (IMI), created under EU single market laws, enables the exchange of information between the involved authorities from different EU countries.

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