Shifting Employer Strategies in Light of Institutional Change

Kristin Alsos and Anne Mette Ødegård

The Norwegian shipbuilding industry has faced fierce competition from shipyards in other European and Asian countries for many years. Traditionally, these yards have met the competition through high productivity and quality, as well as partly offshoring production, thereby compensating for high wages and labour costs (Dølvik et al., 2018). Since the EU-enlargements in 2004 and 2007, this strategy has changed. Norwegian shipyards have turned to low-cost-labour from Central-Eastern European (CEE) countries as an alternative to relocation and outsourcing production across borders. When important shipbuilding countries like Poland and Romania became EU Member States, this led to new opportunities for hiring workers and subcontractors to a booming industry, especially in Western Norway. The shift in labour strategies made possible by the EU-enlargements can be illustrated by quoting one of the most significant industrialists in Norway, Kjell Inge Røkke:

> Hiring of Eastern European workers is decisive in order to avoid offshoring of Norwegian shipyards to countries with lower costs [1]

This chapter aims at investigating business strategies used by Norwegian shipyards after the EU-enlargements and how trade unions and the government have responded. The shipyard industry, being part of the metalworking industry, is a core industry of the Norwegian industrial relations system. Changes in this industry can, therefore, affect the whole model for cooperation and mutual understanding between the social partners. We aim to analyse how companies (shipyards) and national employers' organisations have acted and reacted to existing regulations and new initiatives aimed at combating low-wage competition, and whether this has led to institutional

change, that is, changed the industrial relations system within the core industry of the Norwegian labour market

'The Norwegian shipbuilding case' can serve as a good example of the tensions and inconsistencies between different national labour regulations and EU regulations. This case shows how the strategic choices of employers have consequences for changing legal statuses, wages, and working conditions for employees engaged in cross-border work. The shipyards' and their employer organisation's adjustments, contestation, and argumentation illustrate both a legal and political struggle over the future development of the Norwegian labour market model in an open and competitive market.

The Norwegian Labour Market Model Meets a New Reality

Within the typology of industrial relation systems, Norway is, together with the other Nordic countries, labelled as a coordinated corporatism model (Visser, 2009). The model is characterised by a high level of organisation on both sides of industry and high coverage of the labour market by bilateral industry-level collective agreements. Wages are the domain of collective bargaining between the two sides of the industry, or if such bargaining does not take place, the employee and the employer by individual employment contracts. There is no national minimum wage, but in several industries, collective agreements have been extended, among them the agreement covering the shipbuilding industry (from 2008).

A key-element in the model is the cooperation between employers and workers' representatives at the company and industry level. The system has, since the 1990s, undergone a decentralisation process (Traxler, 1995). Sector-level collective bargaining is still important but is supplemented by company-level bargaining under peace clauses (Dølvik et al., 2018). Representation is based on so-called single-channel representation, meaning that the workplace-level representation is

based on trade unions. Shop stewards have a central role in this system, and an effective implementation of the employees' rights will often rely on the presence of a trade union at the workplace and cooperation between the local union and management (Hagen and Trygstad, 2009; Dølvik et al., 2015).

The shipbuilding industry forms part of the path-setting metalworking industry, defining a mark for other industries to follow in the annual central bargaining rounds. With strong partners on both sides of the industry, high union density, and bargaining coverage, the industry, in many cases, mirrors the most salient example of the Nordic industrial relation model. This is where collective bargaining is taking place within structures of centralised coordination underpinned by state support preventing firms from resorting to downward wage competition (Pontusson, 2011; Svalund et al., 2013).

Competition from other Northern European countries has led to manufacturing companies restructuring and relocated production, or threats of such, to low-cost countries in Eastern Europe (Müller et al., 2018). This has also been the case for the Norwegian shipbuilding industry. The shipyards are highly specialised in equipping and finishing offshore vessels for the oil-industry. Manufacturing in high-cost countries depends on high quality and productivity, supplemented by offshoring parts of the production to low-cost countries. The shipyards have traditionally worked hard to improve their productivity to meet competition in the international product market. We will argue that after 2004 their strategies altered. They have partly abandoned the effort to increase productivity and/or offshoring.

Through the agreement on European Economic Area (EEA), Norway is part of the EU single market with free movement of workers, services, goods, and capital and was, therefore, directly affected by the EU enlargements in 2004 and onwards. As shipbuilding-nations such as Poland

and Romania became EU members, labour and service markets expanded to countries with wages between one-fifth and one-tenth of the Norwegian level (Dølvik et al., 2015). Workers, mainly from these two countries, quickly became an important part of the production at Norwegian shipyards. There are two major explanations for this development: First, an economic boom in the period from 2005 to 2008, with swelling order books but scarcity of local labour and, second, the prosperity of higher profits by importing labour with a lower cost. Considering the boom and scarcity of local labour, the enlargement in 2004 seems to have come like manna from heaven for the Norwegian shipbuilding industry.

In the period from 2005 to 2012, the turnover at the Norwegian shipyards doubled (despite a downturn in 2010 and 2011). At the same time, the number of permanent employees increased only by 23 per cent, while the use of short-term personnel and subcontractors increased by 36 per cent (Hervik and Oterhals, 2012). What was distinctively different between this boom compared to earlier upturns in the industry was the massive growth in subcontracted work, and that the vast majority of the contracted labour and hired personnel came from CEE countries. Findings of a 2009 survey of general managers revealed that close to 55 per cent of the shipyards had hired workers from CEE states, mainly temporarily recruited through subcontractors and temporary work agencies. In some yards, these workers outnumbered the permanently employed Norwegian workforce (Andersen et al., 2009).

The EU enlargements have led to the highest immigration wave to Norway in modern history. The influx of CEE labour has, for the most part, been welcomed. It has stimulated economic growth and employment by expanding the workforce, curbing cost pressures, resolving labour bottlenecks, improving services, increasing flexibility for employers, and providing grounds for more expansionary economic policies (Dølvik et al., 2015).

Simultaneously, use of low-cost labour from CEE countries has put pressure on labour market regulations and collective bargaining structures, as in many other Western European countries. Hence, national labour market consequences in the aftermath of the EU eastward enlargements have been widely discussed among researchers, politicians, and stakeholders (see, for instance, Evju, 2013; 2014). In these discussions, the division between individual migration and posting of workers has been highlighted.

Labour from CEE countries is not well integrated into the Norwegian industrial relations model, and whether they have been individual migrants or posted workers seems to have been of less importance as regards unionisation. The huge influx of labour from the new Member States has, therefore, exposed a 'weakness' in the Norwegian model (Alsos and Eldring, 2010). Developments at the shipyards altered the power-balance between the employer and the employees. The role of local shop stewards became more demanding, and not the least in balancing a possible conflict between decent wages and working conditions on the one hand and the yards' need to reduce expenditures on the other hand. The dilemma was, as seen in other countries, balancing wage increases with the threat of offshoring production and loss of local jobs (Ødegård and Andersen, 2011).

The increased supply of international labour has, therefore, strengthened the drift towards more atypical, flexible work-arrangements and widened the gap between the labour market's core, covered by institutions of coordination, and the periphery outside the national industrial relations system (Hassel, 2014).

Analytical Framework

Through intra-EU mobility, differences between wage floors and regulations, companies competing in an international product marked have created a latitude for reducing production cost without offshoring (Lillie, 2010) or increasing their productivity.

We aim to study the shipbuilding case both trough an analytical framework for employer strategies at the local level and through theory of institutional change at the industry or national level.

Berntsen and Lillie (2015) have identified three categories of firms' cost-saving regulatory engagement strategies, that is, company-level strategies within the EU single market regulations. This framework categorises different forms of action that aims at bending or circumventing rules or the spirit of these institutions (Mahoney and Thelen, 2010). This implies that employees working in the same national context are treated differently depending on whether they are hired locally or posted, their nationality, and the regulatory strategy of their company and its contracts. EU law has, since the *Rush Portuguese* judgment (C-113/89) and the adoption of the Posting of Workers Directive (PWD, 96/71/EC), put up different sets of rules depending on the status of the worker as a migrant or a posted worker (Eurofound, 2010). This distinction has made it possible for employers to lower wage costs by adapting their business strategies to different regulatory regimes (Dølvik and Visser, 2009; Afonso, 2011; Lillie, 2012). Based on the PWD and the case law (i.e., the *Laval* quartet), posted workers have not been able to profit from the complete set of regulations in the host country, but are entitled to a 'nucleus' of employment conditions. The yards' *strategic* interactions with national regulations can be labelled as *regulatory evasion*, *regulatory arbitrage*, or *regulatory conformance* (Berntsen and Lillie, 2015, 50–56).

Regulatory evasion is understood as the violation of formal national industrial relations rules and implies the concealment of these violations from regulatory authorities. Regulatory arbitrage describes situations involving the exploitation of differences between national systems within the

constraints set out by the PWD (96/71/EC). The firms are operating partially outside the national industrial relations framework of the host country. Regulatory conformance means staying within the national rule system but manipulating the system or making use of loopholes to obtain cost advantages. According to Berntsen and Lillie (2015), there is generally considerable room for achieving labour-cost savings in ways that bend, but do not break the rules of the national industrial relations systems. One example could be to set up offices in another country in order to post workers from this country to the company site in the home country. In this chapter, we examine the Norwegian case in light of this analytic framework.

Employer strategies at the company level are not disentangled from the national industry-level institutions. Through membership in employer organisations, members influence their organisation both formally and informally. Moreover, the organisations will act in accordance with the best interests of their affiliates. Institutions, like those embedded in the Norwegian labour market model, are normally stable due to paths chosen in the past (Pierson, 2004). However, as Mahoney and Thelen (2010) point out, there is nothing automatically self-perpetuating or self-reinforcing about institutional arrangements. Institutions represent compromises based on coalition dynamics and are always vulnerable to shifts. Change can occur through exogenous shocks but also through more endogenous incremental developments (Streeck and Thelen, 2005; Mahoney and Thelen, 2010). Stability might disguise changes, where the institutional frameworks offer opportunity for strategic action, and where institutions are modified or redefined (Streeck and Thelen, 2005; Deeg and Jackson, 2007). As a result, four types of gradual transformation may occur: displacement, layering, drift, or conversion (Mahoney and Thelen, 2010); the latter two are discussed in this chapter. In this typology, drift represents neglect of institutional maintenance despite external change, which turns into slippage in institutional practice on the ground. This may

occur if the willingness to support existing institutional actions disappears, for instance, due to shifting coalitions. Conversion, on the other hand, describes a process of redirection or reinterpretation where old institutions are redeployed to new purposes.

Applying this analytical framework on the system of concept of Berntsen and Lillie (2015), we can link the companies' regulatory strategies with agents for institutional change. Strategies for regulatory engagement that firms employ when they have the option of choosing between different regulatory regimes, can lead to drift or conversion of institutions.

Such regulatory strategies can be met by different responses from trade unions, and the response may vary at different levels. Trade unions at the central level can be eager to protect existing systems by guarding the power balance between the bargaining parties. At the company level, trade unions having tools in the form of regulations and high union density might, however, choose not to use these as their employers rely on exploiting workers in order to meet the competition in the international production marked (Mahoney and Thelen, 2010; Lillie, 2012). Thus, trade unions can act opportunistically and thus contribute to institutional drift.

3.3 Methods

The chapter is based on interviews among employer organisations and trade unions at the central level as well as 39 interviews with local TU reps and managers in shipyards and in temporary work agencies. In all cases, we used semi-structured interview guides. The interviews were conducted in 2015 to investigate employer strategies in light of the transposition of the Temporary Agency Work Directive and adjustments in the regulation on posted work (Alsos et al., 2016). This material is supplemented by literature, media reports, and documents made available by the organisations. Additionally, we draw on the judgement from the Supreme Court and the written statements from experts and shipyard-representatives (employers) presented in the case in 2012 (case 2012/1447).

We have also used documents from the EFTA Surveillance Authority (ESA, monitoring compliance with the EEA agreement) from their proceedings in this case.

First Phase – 2004–2008: Use of Posted Workers and Extension of Collective Agreement

The first phase is defined as the period from the eastward enlargement in 2004 and up to 2008 when the decision to extend the collective agreement for the shipyards and their subcontractors was made.[2]

In this period, shipyards relied mainly on posted workers, as labour migrants were covered by the transitional scheme. Like most other countries, Norway imposed transnational arrangements for CEE workers, requiring full-time contracts with pay at the 'Norwegian level' in order to take up work in Norway. This arrangement lasted from 2004 to 2009 for the first accession-countries and from 2007 to 2012 for Romania and Bulgaria. However, as in most EU countries, there were no transition arrangements for the free movement of services, including posted workers. Consequently, only a share of the employees from the new Member States who came to Norway did so as individual labour migrants. Instead, the posted subcontracted and hired personnel from the new Member States eventually outnumbered the national permanent workforce at shipyards (Ødegård and Andersen, 2011). At the same time, Norwegian shipyards also became owners of yards in Poland and Romania and posted workers from those yards to their sites in Norway. This is an example of regulatory conformance (Berntsen and Lillie, 2015).

The lack of a national minimum wage and extended collective agreements made it easy for shipyards to lower their costs by using labour from the CEE-countries during these years. Trade unions discovered several cases where CEE employees had bad working conditions and wages far below the collective agreed minimum wage. This was not a breach of the formal system of

industrial relation, as the foreign companies posting CEE workers were not bound by a collective agreement. This challenged the norm of the collective agreements setting an informal wage floor in many industries (Alsos and Nergaard, forthcoming). We find that this bears a resemblance to regulatory arbitrage, but in a different form than the one described by Berntsen and Lillie (2015). Differences between national regulations make employers hire subcontracting firms with posted workers instead of employing workers in the national labour marked.

Trade unions responded by trying to attract the attention of the media and public opinion to the wage- and working-conditions for the CEE-workers. Through media exposure, they aimed at making shipyards take responsibility for wages and working conditions in subcontracting companies. At the same time, trade unions also tried to make shipyards formally responsible for wages and working conditions in subcontracting companies through regulations in the industry-level collective agreement. In 2006, regulations giving the employer a duty to inform subcontractors about Norwegian wage-conditions, and an obligation to ensure that this was followed up were agreed on. At the same time, shop stewards gained a right to information on wages and working conditions in subcontracting companies. However, no minimum wage regulations for subcontracting firms were introduced. If low pay was discovered, the trade unions still would have to make use of media exposure and so forth to force the shipyards to take responsibility for the subcontracting chain. Even if this proved successful in some cases, this strategy was not sufficient to ensure a wage floor within the industry.

As the trade unions did not manage to secure low-wage competition through collective agreements and media strategies, they asked for a legal extension of collectively agreed minimum wages. Extending collective agreements had been one of the main responses to the use of low-cost labour from CEE-countries in the aftermath of the 2004 enlargement. The long dormant 1993 act on

General Application of collective agreements had been activated. The main purpose of the act is to ensure that foreign workers have wages and working conditions similar to those of Norwegian employees and to prevent distortion of competition in the Norwegian labour market. The decision to extend an agreement is taken by the Tariff Board. The board comprises two representatives from both sides of the industry together with three neutral members. Extension can be decided by a majority decision.

Because the Tariff Board decided to extend the collective agreement for the shipyard industry in 2008, a wage floor was established for all workers, independent of their status as migrant or posted employees. The extension covered several core elements of the collective agreement, but most important in this case are the minimum wage regulations, additional pay for staying away from home while working ('barrack pay') as well as coverage of travel, board, and lodging ('TBL'). Besides, the government introduced several enforcement measures for extended collective agreements. However, the extension did not bring the wage level for posted and migrant workers to that of the Norwegian employees. As the collective agreements lay down an obligation to conduct wage negotiations at the company level, the wage level at the shipyards and in the Norwegian companies, delivering services to the yards were far above the minimum wage.

Nonetheless, before the decision by the Tariff Board, it became clear that extension of collective agreements was a highly contested area between the two parties of industry. In 2005, the Confederation of Norwegian Enterprises (NHO) presented a legal opinion from two professors of EU law (Hjelmeng and Kolstad, 2005). This report concluded that the Norwegian system of extending collectively agreed minimum wages was in breach of the EEA agreement. This report was used by NHO to challenge the General Application Act, both in the case brought before the Tariff Board to extend the collective agreement for the shipbuilding industry in 2007 (decided in

2008) and in a complaint by an affiliated branch organisation, to ESA, over the General Application Act.

While the legal opinion was directed at single market regulations, arguments that were more political were brought forward by NHO regarding the handling of the Tariff Board case. Their main argument against the extension was related to the cost by using of foreign labour, and that it was more expensive for employers to use foreign than national labour. In other words, the employers argued that it was the need for labour and not the access to low-wage labour that was the main reason for hiring CEE workers. This was also the conclusion drawn from a survey among shipyards at the time (Dølvik et al., 2006). Furthermore, NHO argued that wage costs within the industry were increasing, making the introduction of a minimum wage unnecessary. Even though the majority of the board, formed by the neutral members together with the members from the trade union side, accepted that the main motivation for using foreign workers was not based on cost saving but lack of labour, they still argued that foreign workers could be at risk of being paid below Norwegian standards. Further, they argued that employers already paying minimum wages would not be affected by a decision to establish a wage floor. Therefore, extending the agreement would be of no harm for these employers (Tariff Board decision of 6.10.2008). The employers, on the other hand, argued that introducing unnecessary regulations made the situation for companies more complicated, thereby unsuccessfully trying to neutralise the argument of the majority.

While shipyards exploited loopholes in the system made possible by the two-path regulation of cross-border labour, their employer organisation sought to resist change by contesting the legal bases for the decision. Gradual institutional change occurred as shipyards engaged in regulatory arbitrage, by exploiting the differences between national systems within the constraints set out by

the PWD (96/71/EC). This was met with the initiative from the trade unions to extend the collective agreement.

At the same time, the parties failed to negotiate a solution to the problems following from the use of low-wage labour. The trade union's decision to make use of the General Application Act and the employer's response of challenging the Act legally lifted the issue from the negotiating table to the court system.

However, neither of the response strategies by NHO were successful. ESA ruled that the act was in conformity with the EEA agreement,[3] and the Tariff Board decided to extend collectively agreed minimum wage regulations for the shipyard industry. Employers both at company and industry level, therefore, had to rethink their strategies.

Second Phase 2009–2013: Individual Labour Migrants and New Court Battles

The extension of the collective agreement in 2008 increased the costs of using posted workers. The cost difference between labour migrants and posted workers was further reduced in 2009, as the transitional period had terminated for labour migrants from all new Member States, except Romania and Bulgaria. This removed the condition requiring full-time contracts, and thus no additional costs were placed on the use of labour migrants compared to posted workers, as long as neither was covered by collective agreements. As both 'barrack' pay and TBL were included in the extended agreement, the situation was rather the opposite. Turning to labour migrations instead of posting, employers could, therefore, reduce their costs. Consequently, subcontractors started to establish Norwegian branches and employ people in Norway in order to avoid these regulations. This shows that the legal status of these workers was not fixed but dependent on strategic choices made by the employers. As the workers, for all practical reasons, were posted, that is, commuting

to their home country, this became a problem for the workers themselves, here illustrated by two quotes from the managers in shipyards:

> In my opinion, not only we as a company, but also employees have lost due to the extension of the barrack pay, because they have if any, made little money out of this but have in many cases been forced to migrate in order to get a job.
>
> (manager shipyard, statement to the Supreme Court)

> We witness that more and more companies establish themselves locally to avoid the extra cost the general application of collective agreement has caused. The personnel are the same as we previously hired, they come from the same company or through new companies that establish themselves with Norwegian subsidiaries. The consequence of this is that the workers are left with less net than they did before, they become locally employed with responsibility for travel, boarding, and lodging, taxes to Norway, double households etc.
>
> (manager, shipyard, statement to the Supreme Court)

Qualitative data indicate that this shift after 2009 has been pushed by the shipyards as, in their negotiations with subcontractors, they make clear demands under what conditions the labour should be delivered. Again, this can be viewed as arbitrage within the same national system, where employers are juggling between different regulations in order to gain cost advantages.

Regulatory initiatives to secure wage floors have, as in other countries, been met by threats of offshoring production and thereby losing jobs (Lillie, 2010; Wagner and Refslund, 2016). This was also the case in Norway. Following the extension, yards started again to outsource parts of the production that a few years earlier they had insourced (employer statement to the Supreme Court, 2013).

Parallel to the shifting strategies at the company level, nine of the leading shipyards took to court the decision to extend the collective agreement for the industry. The legal process was supported by NHO, and the affiliated Norsk Industri (The Federation of Norwegian Industries). The Confederation of Trade Unions, LO, and the affiliated union Fellesforbundet joined the state on its side. The previous failure to solve the issue of low-wage competition through negotiation was further reconfirmed as the two sides of the path-setting industry in the Norwegian wage-setting model were heading to the courts. At this point, the link between company- and national-level strategies became clear.

The main argument from the employers was that the extension was restricting cross-border competition and thereby infringing internal market regulations that Norway is bound by through the EEA- Agreement, that is, the PWD and the treaty regulations on the freedom to provide services. The employers argued that the 'barrack' pay and TBL were unlawful restrictions on the freedom to provide services and that the PWD did not allow such regulations to apply to posted workers. The shipyards lost the case in the first round but made an appeal. The appeal court decided to ask the EFTA Court[4] for a preliminary ruling. The EFTA court ruled mainly in favour of the arguments put forward by the employers. However, both the Appeal Court and the Supreme Court decided not to follow the ruling of the EFTA Court. In March 2013, the Supreme Court decided that the extension was valid and in line with the obligations in the EEA agreement (HR-2013–00496-A, STX-ruling).

Looking at the arguments laid in front of the courts, we can identify shifting strategies from the shipyards. Employers repeated the argument of a labour shortage. However, while the lack of labour was related to the booming Norwegian economy in 2004 and 2005, the situation had changed in 2009. The financial crisis had hit the international economy, and even though Norway

was not seriously affected, the internationally exposed shipyard industry experienced a more unstable market than in the previous years. The employers, therefore, put forward an additional explanation. Due to market fluctuations, there was a need for numeric flexibility, thus they had to use subcontractors instead of employing people on permanent contracts. The main concern was not any longer a lack of workforce, but uncertainty about future market prospects.

At this point, the low labour costs related to CEE employees was not put forward as an argument. However, as the legal dispute made its way through the court system, the arguments changed. In the Supreme Court case, the employers argued that the extension of the collective agreement had made the market for posted workers shrink due to higher cost, and that the extension, therefore, did not favour the posted workers. The argument was that the extension did not protect them and could, therefore, not be seen as a lawful restriction on the freedom to provide services.

> The consequence for workers from abroad has been that they for a major part have been forced to migrate to Norway, i.e. take up a position locally at the companies we use. That has been necessary as the companies are not competitive if they were to pay barrack pay (and TBL) when their competitors do not.
>
> (manager shipyard)

The Supreme Court rejected this argument. The Court pointed to the fact that a high number of workers de facto still had barrack pay and coverage of TBL. Further, they argued that though some of the companies had established themselves in Norway, and thereby avoided barrack pay and TBL, this did not indicate that the market for foreign labour had shrunk but only that the labour strategies had changed (STX ruling, paragraph 112).

The argument related to a shrinking labour market somehow contradicts earlier arguments that the use of foreign workers is based on a shortage of Norwegian workers and fluctuations in the market.

The Supreme Court argues that the fact that many of the companies establish themselves locally proves that the market is still there. In other words, the employers act strategically in order to lower the costs.

As the employers lost the Supreme Court case, they turned to the EFTA Surveillance Authority for help. In the autumn of 2013, NHO sent a complaint to ESA arguing that the STX ruling was not in line with the EEA agreement. This led to ESA opening an infringement case against Norway. The complaint was mainly directed at the extensions of provisions related to TBL (Letter of formal notice, ESA). The 'barrack' pay seems not to be challenged further, as it has been considered to be in line with the regulation in the Posting of Workers Directive.[5]

In the second phase, we witness further regulatory arbitrage by the shipyards, as a response to the institutional change introduced by the trade unions through the initiative of extending the collective agreement. Parallel to this, shipyards and their employer organisation continue their strategy of neutralising the extension through the court system.

Third Phase 2013–2018: The Puzzle on Equal Treatment and Closure?

By the transposition of the EU directive on temporary agency work, another industrial change was introduced affecting the shipyard industry.[6] The principle of equal treatment for agency workers was, until then, unknown in the Norwegian system. Through the transposition of the directive, this principle should apply to all agency workers in the Norwegian labour market, and their legal position was improved. The government decided to make use of the opening in the PWD to grant posted agency workers the right of equal treatment. This meant that agency workers who used to be covered by minimum standards should be treated as if they were employed directly by the hiring company, independent of them being posted or not (Alsos and Evans, 2018).

Before the transposition, the head of Norsk Industri (The Federation of Norwegian Industries) stated that the regulations on equal treatment would lead to a cost increase of 50–60 per cent for the end users, making it less profitable to hire employees from other countries.[7] However, the use of agency workers did not stop following this legal amendment. In a survey from 2014 conducted among companies in the shipbuilding and oil industries, managers still strongly emphasised that the main motive for using hired work from temporary work agencies was to cover a temporary need for labour. At the same time, the study showed that 71 per cent of the companies agreed that hiring through temporary agencies rather than employing the workers reduced the economic risk of the company (Bråten et al., 2014). To explain this, we need to look into strategies used by companies after the introduction of the equal treatment principle. In interviews with employers and local TU reps at the shipyards, adjustments aimed at lowering the comparable wage were outlined. This included lowering of the lowest wage level and not granting seniority pay to agency workers. Additionally, companies could save costs as short assignment periods made it easier to adjust labour levels. Foreign workers were not given extra payment for their vocational training from their home country.

> At the X yard they have a local wage agreement that increases the wage level with 30 NOK [€3] after six months. Agency workers are always compared with the starting wages.
>
> (local TU rep, temporary work agency)

This practice could resemble regulatory evasion, as it is a breach of the intention of equal treatment principle but could be judged differently based on the point of view. Employers might see it as regulatory conformance where they are only adjusting their practice to the new regulation. This case has never been tried in the courts.

Furthermore, another strategy came to the surface in 2013 as part of a court case between a temporary agency delivering labour to the shipyard industry and LO (The Norwegian Trade Union Confederation). The company had changed their business strategy in 2010. By establishing branches and employing CEE-workers at the shipyard sites, they avoided all costs related to barrack pay and TBL. As assignments at the site were finished, employees were offered contracts at a new site. The company was covered by the collective agreement with LO-affiliated Fellesforbundet, and LO took the company to court claiming breach of the regulation on barrack pay and TBL in the collective agreement. As the case developed, the agency became a member of NHO. In court, NHO-lawyers argued that the CEE workers commuted voluntarily to take up work at the different sites. In other words, they had to cover the travel expenses themselves. The court concluded that the practice of the temporary work agency was in line with the collective agreement. NHOs decision to represent the agency in court is an example of regulatory arbitrage at the company level leading to institutional change.

This change paved the way for other companies to take up the same practice. According to our interviews, the shipyards increasingly demanded their subcontractors adopt this new practice. In many cases, the branches set up at the sites are letterbox companies that do not resemble actual branches. Both trade unions and companies claim that this practice has developed even further, leading to a situation where these additional payments are never paid.

> At [name of shipyard], my members do not get barrack pay and TBL. The [hirer] argues that Norsk Industri tells them that the companies do not have to pay these additions even if the employees at the yard receives this payment. Equal treatment starts at the gate.
>
> (TU rep, temporary agency)

> We do not hire employees without barrack pay and TBL, but if we lose the contract we are tendering for now, we will have to adjust our strategy in accordance with the other yards.
>
> (HR manager, shipyard)

By these adjustments, shipyards gain access to a very flexible workforce at the lowest possible cost. Trade union representatives claim that this development has consequences for subcontractors with Norwegian employees. These companies are not able to compete with the cheap CEE labour and have to close down. The fierce competition creates a race to the bottom for both CEE and Norwegian workers.

After losing the court case, Fellesforbundet responded by bringing the case back to the negotiating table. Both in the bargaining round in 2016 and 2018, regulation of wages and working conditions for foreign workers were one of the main issues. In 2018, the parties agreed on new regulations that aim to restrict the practice of hiring CEE-workers at the sites in Norway to avoid barrack pay and TBL.

The new collective agreement securing more migrant workers compensation for TBL inside Norway made it easier for the trade union to accept that the travel to and from Norway should be covered in accordance with the workers' home country regulation. Consequently, the trade union accepted a decision by the Tariff Board in October 2018[8] that the coverage of travel expenses to and from Norway should be in line with the regulations in the sending countries. On the other hand, costs for travel, board, and lodging inside Norway is still part of the extended collective agreement. Soon after, in November 2018, ESA closed their case against the Norwegian government. In the closure letter, ESA argues that the amendments entail that the provisions on travel, board, and lodging appear to be in line with the revised directive on the posting of workers, which includes compensation for travel, board, and lodging in the list of mandatory requirements

for minimum protection of posted workers, but only with regard to travel within the host EEA state.[9]

Discussion and Conclusion

In an international product market, employers can rely on different strategies to lower their labour costs. In the shipyard case, offshoring, posting, and labour migration have been used. Due to the massive influx of cheap labour, tasks that earlier had been outsourced to other countries were again brought back to Norwegian yards (Ødegård and Andersen, 2011). This situation changed again after the extension of the collective agreements and the obligation to pay costs for TBL.

As shown in the years between 2004 and 2008, subcontractors employing CEE-workers could deliver services at costs far below the Norwegian companies. To circumvent the transitional arrangements claiming work-permits for individual labour migrants, the yards used posted workers from foreign companies. After the extension of the collective agreement, in December 2008, the situation changed. There was no longer much to gain by using posted workers instead of individual labour migrants. As challenging the extension did not succeed, companies started to lower their costs by adjusting to and bending the regulations.

Arguments used by employers and their organisations have shifted. In the first phase (2004–2008), companies argued that their main motivation was labour shortage and not primarily cost-reduction. At the same time, they also argued that posted workers did not need to be paid at the Norwegian level, as they lived in low-cost countries. Employers have also argued that the extension of collective agreements creates competitive barriers for foreign enterprises and workers and makes it more difficult for them to establish themselves in the Norwegian market for labour and services (Alsos and Eldring, 2008). Still, the shipyards have not shifted away from using labour from CEE-countries but, rather, have made use of different strategies to lower the wage costs for their

subcontractors and thereby their own production costs. As employees commute to Norway to get a job, arguments concerning living in low-wage countries have lost their value. Employers are now arguing that these workers are voluntarily commuting.

In this chapter, company choices of different regulatory regimes are categorised partly as regulatory evasion, regulatory arbitrage, and regulatory conformance (Berntsen and Lillie, 2015). The transposition of the EU directive on temporary agency work into Norwegian law led to a situation in which some yards tried to escape the intent of the regulation. The labelling of this strategy can be in the eyes of the beholder. While the employer might see this as regulatory conformance, it could be labelled as evasion by trade unions or the workers. Regulatory conformance is also identified, where yards establish companies in CEE-countries to provide their Norwegian yards with low-cost labour. Finally, strategies aimed at exploiting differences between national systems were labelled by Berntsen and Lillie (2015) as regulatory arbitrage. We will argue that exploitation could also take place within one national system as companies may juggle between hiring subcontractors with posted workers and subcontractors with labour migrants, depending on the costs related to the different categories. The establishment of branches and employing CEE-workers at the sites was a way to avoid all costs related to barrack pay and TBL. This indicates that it is not only the international competition but also the national competition that push in the direction of lowering wages and working conditions for employees within the shipyard industry.

It is, however, important to keep in mind that making use of labour from CEE-countries does not have to be based on a strategy of exploiting labour cost differences but could also be based on finding workers for jobs for which no local workers are available, while at the same time gaining a cost advantage. Independent of the motivations, these strategies can lead to institutional change.

Furthermore, company strategies must be seen in light of the strategies from the employer's organisations. By contesting new regulation through the Tariff Board and the court system, they might have legitimised and encouraged the strategic positioning on 'the ground', and in this way, there is a link between the local (yards) and national (employer organisations) levels.

Shipyards have exploited the flexibility within the institutional arrangements where different regulations for posted workers and migrant workers gave them an opportunity to reduce their costs. Institutional change has occurred as a result of pressure from below to change existing practices but channelled to the national level through the employer organisation. It could also indicate how employers have tried to look for new zones of exceptions when other zones have been closed. Also, doing so made it necessary for other companies to take up the same practice to stay competitive.

With Mahony and Thelen's words, we witnessed a drift away from institutional maintenance of the industrial relation system in this branch, a drift that might challenge the whole labour market model. To underpin this, we want to highlight the following three arguments.

First, the regulatory arbitrage related to extended collectively agreed regulations has put pressure on arrangements in the collective agreement and moved the discussion from the bargaining table and towards the courts—but with a possible reorientation following the 2018-bargaining round. A similar development has been seen in the Danish construction industry, where pragmatism and a search for consensus between the bargaining parties have shifted towards the political and juridical arena, leading to an extra-institutional shift (Arnholtz and Andersen, 2018).

Second, a court case in 2013 ruled the practice of the temporary work agencies to set up branches and employ CEE-workers at the site, thus avoiding additional costs ('barrack-pay', travel, board,

and lodging), as lawful. This institutional change paved the way for other companies to take up the same practice, breaching the purpose of the regulations.

Third, this was possible because of the power resources that shipyards, as influential members, have had in the employer organisations. According to Mahoney and Thelen (2010), such changes in the institutional arrangements depend on actors with the necessary power and willingness to go through with it.

Paradoxically, in this case, the actors are at the same time one of the most central actors in preserving the Norwegian model for wage-setting in the central bargaining rounds. They are interested in preserving and maintaining the institutions but act in a way that undermines these institutions, including jeopardising the trust between the parties. In addition, the same actors have led the legal process towards the state – against the decision to extend the collective agreement – all the way to the Supreme Court.

Through these strategies, shipyards and the national employers' organisations have loosened their commitment towards the regulation in the collective agreement, and this has led to a slippage in the institutional practice at the company level (Mahoney and Thelen, 2010).

For the trade unions, especially at the national level, the extension of the collective agreement was seen as the only possible way to secure a wage floor in the industry. One explanation for this is that labour from CEE countries has not been integrated into the industrial relations model, and this development has, therefore, led to changed power relations between the parties. As one of the preconditions for the Norwegian model is a high union density, this caused concern about wages and working conditions. However, some local trade union-representatives have accepted the shipyards' strategies and silently approved many of the employer's strategic adjustments in order to prevent relocation. These trade union representatives can be seen as applying an opportunistic

strategy, leading to decoupling, where the ambitions of the industry-level parties have been disconnected by practical action at the company level (Meyer and Rowan, 1977). This has contributed to putting pressure on collectively agreed rights, also for the native workers. In such an atmosphere, it seems impossible to design regulations that are waterproof and fully able to stop the leakage; the water will burst out somewhere else. Further convergence has been the result of the ongoing ESA infringement case and the Tariff Board's decision to extend TBL in line with EU-level regulations.

The shipyard case illustrates how EU eastward enlargement has made it possible for employers to test the boundaries of what is acceptable and what they can get away with (Streeck, 2009). Their different strategies clearly show how regulations related to the free movement of workers and services have created a sphere of contestation where employers can act strategically to reduce costs, and where the legal position of foreign workers can change from one day to another due to this practice.

The EU eastward enlargement, followed by the strategic actions of employers and trade unions responses, have led to institutional change in an industry that is one of the core industries of the Norwegian industrial relation system. However, the results of the 2018 bargaining round might be a sign of the bargaining parties being able to return to bargaining instead of relying on political and judicial processes.

References

Afonso A. (2011) Employer strategies, cross-class coalitions and the free movement of labour in the enlarged European Union. *Socio-Economic Review* 10: 705–730

Alsos K. and Nergaard K. (forthcoming) Collective bargaining as a tool to ensure a living wage – experiences from the Nordic countries. Transfer

Alsos K. and Evans C. (2018) Temporary work agencies: triangular disorganization or multilevel regulation? *European Journal of Industrial Relations* 24 (4): 391–407. https://doi.org/10.1177/0959680118790819

Alsos K. and Jensen R.S. (2013) Bemanningsbransjens gråsoner. Oslo: Fafo-report 2013: 20.

Alsos K. and Eldring L. (2008) Labour mobility and wage dumping: the case of Norway. *European Journal of Industrial Relations* 14 (4): 441–459.

Andersen R.K., Bråten M.M., Eldring L., Friberg J.H. and Ødegård A.M. (2009) Norske bedrifters bruk av østeuropeisk arbeidskraft. Oslo: Fafo-rapport 2009: 46.

Arnholtz J. and Andersen S.K. (2018) Extra-institutional changes under pressure from posting. *British Journal of Industrial Relations* 56 (2): 395–417.

Bråten M., Albrechtsen E., Andersen R.K., Tovslid T. and Værnes R. (2014) Innleide arbeidstakere i verfts- og petroleumsindustrien. Styring av arbeidsmiljø og personskaderisiko. Oslo: Fafo-rapport 2014: 54

Berntsen L.E. and Lillie N. (2015) Breaking the law? Varieties of social dumping in a pan-European labour market. In: Bernaciak M. (ed.) *Market Expansion and Social Dumping in Europe*. London: Routledge, 43–60.

Deeg R. and Jackson G. (2007) Towards a more dynamic theory of capitalist variety. *Socio-Economic Review* 5: 149–79.

Dølvik J.E. and Marginsion P. et al. (2018) Cross-sectoral coordination and regulation of wage determination in northern Europe: Divergent responses to multiple external pressures. *European Journal of Industrial Relations* 24 (4): 409-425.

Dølvik J. E., Marginson P., Alsos K., Arnholtz J., Meardi G., Müller T. and Trygstad S. (2018). Collective wage regulation in northern Europe under strain: multiple drivers of change and differing responses. *European Journal of Industrial Relations* 24 (4): 321–339.

Dølvik J.E.; Fløtten T., Hippe J.M. and Jordfald B. (2015) Final report NordMod 2030: the Nordic model towards 2030. A new chapter? Oslo: Fafo-report 2015: 07.

Dølvik J.E. and Visser J. (2009) Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles? *Industrial Relations Journal* 40 (6): 491–509.Dølvik J.E., Eldring L., Friberg J.H., Kvinge T., Aslesen S. and Ødegård A.M. (2006). Grenseløst arbeidsliv? Endringer i norske bedrifters arbeidskraftsstrategier etter EU-utvidelsen. Oslo: Fafo-report no. 548.

Evju S. (ed.) (2014) *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance*. Oslo: University of Oslo, Department of Private Law. Publication Series No. 196.

Evju S. (ed.) (2013) *Cross-Border Services, Posting of Workers, and Multilevel Governance*. Oslo: University of Oslo, Department of Private Law. Publication Series No. 193.

Eurofound (2010) Posted workers in the European Union. *European Foundation for the Improvement of Living and Working Conditions*. 25.10.2010.

Hagen I.M. and Trygstad S.C. (2009) Local flexicurity: resolving the conflict between direct and representative participation. *Transfer* 15 (3–4): 557–577. Brussels: ETUI.

Hassell A. (2014) The paradox of liberalization—Understanding dualism and the recovery of the German political economy. *British Journal of Industrial Relations* 52 (1): 57–81.

Hervik A. and Oterhals O. (2012) Klyngeanalysen 2012. Ålesund: NCE Maritime, 25.09.2012.

Hjelmeng E. and Kolstad O. (2005) Allmenngjøringsloven og innsynsrett – EØS-rettslige problemstillinger. Betenkning utarbeidet på oppdrag fra NHO 17. November 2005.

Lillie N. (2012) Subcontracting, posted migrants and labour market segmentation in Finland. *British Journal of Industrial Relations* 40 (1): 148–167.

Lillie N. (2010) Bringing the offshore ashore: transnational production, industrial relations and the reconfiguration of sovereignty. *International Studies Quarterly* 54 (3): 683–704.

Mahoney J. and Thelen K. (2010) *Explaining Institutional Change: Ambiguity, Agency, and Power*. Cambridge: Cambridge University Press.

Müller T., Dølvik J.E., Ibsen C. and Schulten T. (2018) The manufacturing sector: still an anchor for pattern bargaining within and across countries? *European Journal of Industrial Relations* 24 (4): 357–372.

Ødegård A.M. (2014) Arbeidsinnvandring og fleksible bemanningsstrategier i fire bransjer. *Søkelys på arbeidslivet* 1–2: 100–117.

Ødegård A.M. and Andersen R.K (2011) Østeuropeisk arbeidskraft i hotell, verft, fiskeindustri og kjøttindustri. Oslo: Fafo-notat 2011: 21.

Pierson P. (2004) *Politics in Time: History, Institutions, and Social Analysis*. Princeton: Princeton University Press.

Pontusson J. (2011) Whose interests do unions represent? Unionization by income in Western Europe. In: Brady D. (ed.) *Comparing European Workers Part B: Policies and Institutions*

(Research in the Sociology of Work, Volume 22 Part 2). Bingley: Emerald Group Publishing Limited, 181–211

Streeck W. (2009) *Re-forming Capitalism: Institutional Change in the German Political Economy*. Oxford: Oxford University Press.

Streeck W. and Thelen K. (2005) Introduction: institutional change in advanced political economies. In: Streeck W. and Thelen K. (eds.) *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford: Oxford University Press, 1–39.

Svalund J., Casinowsky G., Dölvik J.E., Håkansson J.E., Kervinen H., Møberg R.J. and Piirainen T. (2013) Stress testing the Nordic models: manufacturing labour adjustments during crisis. *European Journal of Industrial Relations* 19 (3): 183–200.

Traxler F. (1995) Farewell to labour market associations? Organized versus disorganized decentralisation as a map for industrial relations. In: Crouch C. and Traxler F. (eds.) *Organized Industrial Relations in Europe: What Future?* Farnham: Ashgate Publishing.

Wagner I. and Refslund B. (2016) Understanding the diverging trajectories of slaughterhouse work in Denmark and Germany: a power resource approach. *European Journal of Industrial Relations* 22 (4): 335–351.

---

[1] Interview with Kjell Inge Røkke in the newspaper Aftenposten, October 6 2006.
[2] Decision of 6 October 2008, in force 1 December 2008
[3] http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/247 (accessed 02/06/19)
[4] Equal to the European Court of Justice for EU Member States.
[5] The new regulations in the posting directive (from 2018) is not taken into consideration here as it is not yet implemented in national legislation
[6] Implemented in Norway from 1 January 2013.
[7] From the newspaper Dagens Næringsliv, 10 and 11 November 2012.
[8] Protocol from the Tariff Board, 19 October 2018
[9] Letter from EFTA Surveillance Authority, 21. November 2018.