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**EVALUATION OF THE  
POSTING DIRECTIVE**

# CLR News

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## NOTE FROM THE EDITOR

First of all I would like to give my best wishes to all our readers and contributors.

Secondly I have to apologise for the break in the production of CLR-News. Although the number 2 issue of CLR-News was already available in early October 2002 it was by that time only sent via electronic mailing. It took until the end of the year before the hard copy was produced, due to some printing problems with the cover. We now come up with a third issue dedicated to the evaluation of the posting directive.

Mijke Houwerzijl from the Tilburg University started to study the posting debate shortly after the directive was finalised; she examined the implementation in several member states. In her contribution she takes a critical stance towards the judgments of the European Court of Justice.

I personally already started to work with the posting item during the debates about the public procurement directives in Europe, an important part of the internal market programme at the end of the eighties. At that time it was not possible to integrate a social clause in the procurement principles. Therefore with the European building unions we continued the fight for equal treatment and compliance with agreements and legislation in the country where the work was done. The Posting directive was a very important result in this field in a period when regulation was the exception and deregulation the norm. In my contribution in this issue of CLR-News I criticise the weak and marginal way the Commission services have sought to evaluate the implementation of the directive.

EFBWW president, Ernst-Ludwig Laux reports about the preparation for future activities of the building unions in this field. He is convinced of the fact that the fight for compliance with collective agreements, for equal treatment, and against social dumping and illegal employment will stay on the agenda.

Next to the more theoretical contributions British George Fuller comes up with a very down to earth completion of the central theme in this issue. He gives us a description of the day-to-day practices on UK sites.

We had to postpone the production of an Observatory for 2002. Notwithstanding this decision we have taken on board in this issue a report from Hans Baumann about the outlook for the Swiss construction sector. And finally you will also find a review in this number.

At the end of this introduction there are some announcements about the Industrial Relations in Central and Eastern Europe project. CLR has reached an agreement with Reed Business Information to publish an edited version of the final report and annexes. We will dedicate the CLR-Annual meeting to this theme. But given the fact that we are still working on the book, you have to be patient with us, as the date of the meeting is not yet fixed. Although the dissemination of the research is partially planned after the publishing, the first activities in this field have already taken place. CLR was asked for an ILO/IFBWW meeting in Warsaw about ‘the mobility of workers in the CEE-countries’ (in the autumn of 2001). In the meantime a new meeting with CEE-partners and representatives of the international trade unions took place in Bratislava (3, 4 October 2002). Further meetings and a workshop with representatives of European Works Councils (in February 2003) are envisaged.

CLR will produce a special edition of the CLR-News (Number 1-2003), a summary of the final results, which has been translated into 8 languages.

Jan Cremers, 18<sup>th</sup> February 2003.

# EVALUATION OF THE POSTING DIRECTIVE

## Case-law of the European Court of Justice (ECJ) about the posting of workers

*Mijke Houwerzijl*

### Introduction

The so-called “Posting Directive” or “Posted Workers Directive” (96/71/EC) had to be implemented in the Member-States by the end of 1999. Three years later there is still no case-law available that rests directly on provisions of this EC-Directive. Nevertheless, there have been three important judgments in 2001 and 2002 about conflicts in which wages and working conditions of posted workers were involved: *Mazzoleni*, *Finalarte* and *Portugaia*<sup>1</sup>.

Because the facts in these cases took place before the deadline of implementation, the Court decided to judge them solely in the light of article 49 EC Treaty about the Freedom to provide Services. The ECJ refused (in answer to a question of a Member State) to anticipate whatsoever on - in the meantime - applicable provisions of the Posting Directive. This is a missed chance to increase legal certainty about the interpretation of the Posting Directive. Moreover, some of the points of decision in the judgments seem to be inconsistent with at least the spirit of the Posting Directive. But as long as no new cases on these subjects are decided by the ECJ, the above-mentioned judgments are to be regarded as part of settled case-law. Until then, legal practitioners will have to deal with possible discrepancies between case law and statutory law on the subject of posted workers.

### *Mazzoleni and ISA* (Case C-165/98, judgment of 15 March 2001)

In ‘*Mazzoleni*’, a conflict arose between the Belgian Labour Inspectorate and the French security company ISA. The name of its director was *Mazzoleni*. Sometimes the case is referred to under the

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<sup>1</sup>EC Case-law is available at internet: [www.europa.eu.int/jurisp/cgi-bin/form.pl?lang=en](http://www.europa.eu.int/jurisp/cgi-bin/form.pl?lang=en)

heading 'Guillaume and Others'. Eric Guillaume was one of the five French posted workers who joined the side of the Belgian Labour Inspectorate as third party. The workers claimed civil damages from ISA.

Interestingly, the facts were for the first time in 'EC posting cases' not situated in the construction sector. Between January 1996 and July 1997 ISA employed 13 of its workers as security officers at a shopping mall in Belgium. Half of them were full-time at work in Belgium, while others worked there only part-time and also worked in France. In this case, the distinction between posting and "frontier labour" was blurred. The ECJ refers to this as well and uses it in its reasoning to make an exception from the main rule.

The question was which minimum wage had to be paid to the French posted workers in Belgium, the French or the Belgian one? To answer this question it was necessary to compare the wages. The main rule is that the host Member-State (Belgium) may impose its minimum-wage legislation to providers of services established in another Member State only in case of better protection of the workers. And indeed, if one compared on the level of gross wages, the Belgian minimum wage turned out much higher than the French one. But, according to Mazzoleni, if taxes and social security contributions were entered in the comparison, it would turn out that net wages, or 'the overall positions' were in fact on a quite similar level. Not surprisingly, the Court chose a method of comparison in which factual similarity of the net wage levels in both countries could be taken into account.

Although defensible under the free movement of services, this exception from the main rule would not have been possible so easily under the provisions of the Posting Directive. As the Advocate-General Alber in his Opinion rightly pointed out, the Explanatory Memorandum of the Posting Directive has explicitly states that the comparison should be made between gross wage levels. And from point 21 of the preamble it can be deduced that employment conditions on the one hand and social security on the other are, as a rule, to be handled separately. Taxation law is excluded from the Posting Directive as well. Finally the view that gross wages should be decisive is supported by practical considerations: Net earnings are

essentially dependent upon the workers personal situation. An overall comparison of the national regimes at stake creates uncertainty about the outcome in each individual case.

In the past, we have also seen in *Arblade and others*, and severely criticized so in *Guiot*, that the ECJ tends to overlook differences what it refers to as “technical”

In this view, relatively small differences (ca. 10 %) in wage-levels between Member-States that are more or less on the same socio-economic level, have to be taken for granted. Except for *Rush Portuguesa*, in all former judgments about the posting of workers and in *Mazzoleni* as well, the parties were established in the “original six” member states. Especially Belgian (*VanderElst*, *Guiot*, *Arblade*), French (*Arblade*) and Luxembourg (*Seco*, *Guiot*) labour law regulations were involved and in a very rough manner compared to each other.

Therefore, lawyers were curious to hear the judgments in *Finalarte* and *Portugaia*. Here, “high-level” German labour law was compared to Portuguese and English equivalents. What guideline did the Court develop in these cases were the gap between the wages in the host country and the wages in the home country is far more substantial?

***Finalarte*** (joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, judgment of 25 October 2001)

During 1997 eight employers established in Portugal and one in the United Kingdom each posted workers to Germany to carry out construction work. *Finalarte* was one of them. The ULAK, the social fund that regulates and maintains the German paid leave scheme in the construction sector, required them to pay contributions to the scheme to finance the holiday entitlement of their construction workers. It also demanded them to provide information for the calculation of those contributions. According to the German Posting Act (*EntsendeGesetz*, or *AEntG*) foreign employers in construction works are obliged to do so as from 1 January 1997. Still, the foreign firms objected to these obligations and stated that the German rules were incompatible with the freedom to provide services (art. 49 EC).

The ECJ considered whether the German rules in this field resulted in an unjustifiable restriction of the free movement of services: It is settled case law that a restriction can only be justifiable if it serves, in an effective and appropriate way, an objective of public interest. Furthermore, it is also settled case law that national measures with economic objectives, such as the protection of domestic undertakings, do not fit in this concept of public interest. But this was precisely the main and officially declared intention of the AEntG: The protection of the German construction industry against social dumping practices. Although this aim clearly does not belong to the justifiable public aims in EC-law, the Court stressed that the intention of the AEntG is only one part of the picture and not the conclusive one.

Conclusive is whether the applicable provisions of the AEntG actually serve the public interest objective of protecting posted workers. In this respect, the ECJ deemed it necessary to check whether the German paid leave scheme provides posted workers with **“a genuine benefit, which significantly adds to their social protection”**. This should not only on paper be the case but also in practice: Firstly, it is important to check that the worker is entitled to more holidays and a higher holiday allowance under the German rules than under the law of the home country. But secondly it is also important to check that the workers concerned are really able to assert their entitlement to holiday pay from the fund. In this light, the formalities and procedure for payment and languages problems must not be too difficult for the average posted worker.

Until so far, the judgment can be upheld under the regime of the Posting Directive. But the ECJ finally adds the condition that, given the genuine benefit for the posted worker, the application of the German rules must be proportionate to their public interest objective. That is to say that the increased social protection should be balanced against the administrative and economic burdens that the rules impose on the foreign employers. Is it possible to achieve the increased protection by less restrictive rules than the AEntG provides? For example by imposing a duty on foreign employers to pay the higher holiday allowance directly to the posted worker, instead of the indirect payment by way of the ULAK? It is only a suggestion of the ECJ and

not a prescription. But suppose the German rules would fail in this respect, I think there can be cast doubt whether this last condition can be maintained under the wordings of the Posting Directive.

Next to this main question, on which I have elaborated to show the way of reasoning of the ECJ, there were four other topics at stake in Finalarte. The most important of these was that in the AEntG “business” was given a different meaning for German employers than for foreign employers. This difference led to a different treatment between so-called mixed businesses outside Germany and inside Germany. ‘Mixed businesses’ means that only a part of the company activities are associated with the construction industry. Within Germany it depends on how much working time is spent in the construction industry, whether the firm is subject to the collective agreement in construction or not. In contrast with this, the foreign mixed firm is, according to the AEntG, always falling within the scope of the German collective agreement in construction. In this case, the posting of workers to a German construction site is decisive. This clear discrimination of foreign employers of mixed businesses could not be tolerated by the ECJ.

***Portugaia*** (Case C-164/99, judgment of 24 January 2002)

In this case, a Portuguese company had posted a number of its workers to a building site in Germany between March and July 1997. In March and May the German Employment office inspected working conditions on the building site and noticed that Portugaia was paying its workers lower wages than the minimum wage laid down in the generally binding German collective agreement. Subsequently, Portugaia was ordered to pay the difference, a total sum of DM 138 018. 52.

Portugaia objected to this punishment with the same reasoning as in Finalarte and went to Court. But the ECJ did not honor this move. It stated that, in principle, the application by the host Member-State (Germany) of its minimum-wage legislation to providers of services established in another Member-State (Portugal) pursues an objective of public interest, namely the protection of workers. It is for the national Court to ascertain whether the German rules, viewed

objectively, provide a genuine benefit for the workers concerned, which significantly augments their social protection. If so, they can be upheld against Portugaia and cannot be seen as an unjustifiable restriction of the free movement of services. On this point the ECJ did not dissent from its judgment in Finalarte.

But it also had to consider a new point in Portugaia: In Germany (and also in the Netherlands) it is possible for a domestic employer to pay lower wages than the minimum wage laid down in the generally binding sectoral collective agreement if he concludes a collective agreement on enterprise/company level. An employer from another Member-State cannot do this under the regime of the AEntG. The question was posed whether this difference creates unequal treatment contrary to the freedom to provide services. The ECJ had to confirm this, because no ground of justification was given for the unequal treatment.

In practice, this judgment might prove to have revealed a serious loophole for foreign service providers to escape the ‘collective agreement part’ of the Posting Directive. It seems to me that the Portuguese company only has to show his collective agreement on company level to get a derogation from the generally binding collective agreement on branch level! Because German labour law does not foresee in a statutory minimum wage, there is no other ‘floor’ that can limit the undercutting of the German wage level. The only solution for this problem that does not run counter to EC-law, is to change the national possibilities for derogation: It should only be possible to derogate from a sectoral collective agreement when the company collective agreement provides more favourable wages and working conditions for employees. But given the dominant national trends towards more bargaining at company level, it is an illusion to think that such a change of the law on collective bargaining will come easily.

## **Conclusion**

The last three judgments in the field of posting, consist of both positive and negative features for the effectiveness of the Posting Directive.

1) It is positive that the ECJ recognizes the substantial differences between the wage-level in the UK and Portugal on the one side and Germany on the other side. But the requirement that the protection of workers must be reached with effective and proportionate measures can be dangerous for too rigidly composed national Posting Acts.

2) It is also positive that the ECJ did not reject the German Posting Act (AEntG) on the ground of its too protective intentions. Decisive is to what extent its rules are to the advantage of posted workers. Here again, national legislators and social partners must be careful to ascertain that the benefits for posted workers on paper can be fulfilled in reality. If it takes too much trouble to obtain holiday entitlements from a social fund like ULAK, the posted worker will refrain from it.

3) Negative is the decision in *Mazzoleni* that social security and tax contributions can play a role in the comparison of minimum wage levels between host and home country. Luckily the ECJ formulated this judgment clearly as an exception to the main rule, but it is still a sign that cannot be ignored totally.

4) What can be most undermining for the Posting Directive is the rightfully forbidden unequal treatment between domestic employers and foreign EC-employers with a collective agreement on company level. This loophole can only be closed at national levels. Otherwise we can only hope that a lot of transnational service providers think the game is not worth the candle.

## **A decent assessment needed**

*Jan Cremers*

The evaluation of the posting directive.

Again an issue of CLR news dedicated to the free movement, migration and posting.<sup>2</sup>

Quite obviously one of the differences between construction and most other industries is the fact that our workers are mobile, not the product.

Therefore the main consequence for construction of the introduction of the free movement principle in the EU is the economic migration and posting of workers. This was already felt from the middle of the eighties. In those years the building unions experienced the different side effects of the free movement principle because of the lack of a coherent legislative social framework for posting.

In some countries (such as Belgium), clear national laws existed in this area or, to be more precise, a combination of laws and collective agreements declared to be generally binding which must also be observed by foreign employers with respect to their posted workers. In other countries, the legal machinery for making the country of employment principle enforceable in this area as well was lacking until the mid-nineties. Furthermore, there was still no legal framework at European level for obtaining the necessary international legal recognition for the various national provisions.

As a result of the strong lobby-work of the EFBWW, partly in cooperation with the European Employer's organisation FIEC, the European Parliament and the Council of Ministers accepted the posting directive in 1996.

Directive 96/71/EC of the European Parliament and European Council of Ministers of 16.12.1996 required EU member states to guarantee a series of working and employment conditions by law or collective agreement within three years. Each member state had the possibility to introduce different provisions to implement the directive, depending

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<sup>2</sup> In the past we have explained the origins of the posting debate. See: CLR-News 2-1999 or "European Union: Posting of workers in the construction industry", Köbele/Cremers, Bonn, Wehle Verlag, 1994.

on its legal system. Some EU member states had introduced national rules on posting even before the posting directive was adopted.

In the meantime the period for the implementation of the directive has past. As usual with European legislation an assessment and evaluation has been announced. For this purpose, the European Commission services have come up with a report on the implementation of the directive.

Mijke Houwerzijl speaks in her contribution about the case law developed.

For a number of reasons the Commission's approach is unsatisfactory.

1. First of all the assessment is of a strictly juridical nature. Looking at the experiences on building sites, a more in-depth study would have been more appropriate. The opening up of the markets in Europe brought with it some unexpected side effects. The risks of social dumping or environmental dumping emerged, while the relocation of production and competition, waged in the sphere of taxation and social security, became commonplace. Detailed socio-economic research could have made clear whether the directive has served to prevent bogus practices and distortion of competition in this field.
2. Secondly, the sometimes-strong debates at national level during the implementation process are not mentioned at all. The adoption of a posting directive had for a long time been resisted at EU level by several member states (e.g. Portugal, Spain, the UK and Greece). Owing to this reluctance, the governments of some countries (such as Austria, France and Germany) decided to introduce national posting rules. Whereas France and Austria had already adopted their own posting rules back in 1993-94, in Germany there was quite a degree of political controversy concerning the need for, scope, and form and content of such rules. Other countries had to repair their collective bargaining system in order to deal with the directive in an effective way. All this is important missing information about the impact of the directive.

3. Thirdly, it would have been worthwhile to come up with empirical data that could serve as an argument for or against this directive. The European Commission has on a number of occasions in recent years been forced to acknowledge that the expectations of the mid-eighties about mobility in Europe have not been realised, or only to a very modest degree. Less than 2% of the European working population is working in a country other than the country of origin. Figures for annual mobility are even lower. EU estimates refer to 600,000 workers who are working outside their home country. This mobility appears to be confined to middle management and other middle-ranking or senior executives, on the one hand, and to workers in the construction sector, on the other. The existence of wage and social dumping in individual EU countries despite a low level of immigration is related to the fact that in these high-risk areas even a relatively small number of workers offering their services in the labour market at much lower wages can upset the existing wage structure and can trigger a downward wage/price spiral.
4. Analyses of the actual migration at regional and border level are necessary. Border regions are particularly exposed in this regard. In addition, sectors such as construction are especially threatened. There are still risks that through the free movement of persons together with the liberalization of services, construction and services companies use their personnel to fulfil contracts in another country without restriction. This is worth doing for construction companies if they can underbid the local and sectoral wage and labour protection rules. Even relatively small differences in the wage and working conditions, but also in social security costs, which still exist amongst countries, can play a role in this regard. Taking into account that the free movement of workers was one of the key issues for the enlargement debate, it would have been more than useful to have this information updated for the countries or regions already members of the EU.

In fact a whole series of questions are not considered in the Commission's examination. This begs for a better assessment. The posting of workers cannot be seen nor analysed in a vacuum. There is a link with the development of the countries' labour legislation, with the (juridical framework of the) collective agreements, with the social security systems and finally with aspects of social security and protection that are settled by both sides of the industry (via paritarian provisions and funds). The free movement of workers is and has always been one of the fundamental characteristics of construction work. For economic reasons construction companies and individual workers have been motivated to work abroad, for economic and demographic reasons countries, clients and contractors engaged workers coming from elsewhere. But it must be clear that the application of the legal regulations and the collective agreements of the country where the work is done, or better said, the application of the equal treatment principle, has to be the leading principle to avoid any problems with migrating foreign workers.

If not, the free movement will lead to a distortion of competition and a downward trend in prices, wages, productivity and quality. And it will give the industry a bad image.

The organisations affiliated to the EFBWW and to FIEC have always argued in the past for as consistent as possible an application of the 'country of employment principle'. This plea is reiterated at the end of this note. As the European Social Partners have always been very active in this field I would like to recommend them to start the investigations needed on their own terms.

## **Quo vadis – Posting Directive?**

*Ernst-Ludwig Laux*, Industriegewerkschaft Bauen-Agrar-Umwelt, Frankfurt am Main; President of the European Federation of Building and Woodworkers

Since the employees of all sectors got organised and their trade unions exist, the prime aim has been **equal wage for equal work at the same place**. For the trade unions equal wages and fair conditions are the basis for the improvement of working and living conditions in solidarity.

This means for the construction industry that for all employees the wage of the construction site as well as the working conditions of the locality of the construction site are in force. Up until the 1980s people in construction used to be employed by the contractor who was in charge of the project. All employees of these contractors, whether nationals or foreigners, worked under the same respective collective agreements.

In West-European construction unions all sorts of collective agreements are used. They may be concluded for single sites, establishments and companies, at regional or national levels.

After the introduction of the single market in the eighties, the freedom of movement for workers and services was introduced in 1993.

Though already in the eighties and nineties employees have been posted outside their respective national boundaries, their numbers have risen considerably since the early nineties. The practice of posting has created ‘islands of foreign law’ in the EU member states. This means that employees from low-wage countries are posted to high-wage countries and employed on foreign sites at conditions of their home countries thus creating ‘social dumping’. The earnings of those employed at the locality of the site and those being posted from low-wage countries differ enormously.

This puts pressure on collective agreements at the locality of the workplace.

Since 1988 the European Federation of Building and Woodworkers (EFBWW) has been campaigning for a EU Posting Directive. In 1996 this campaign has scored success through the enactment of European legislation, which was implemented by national laws in the following years. In his article Jan Cremers gives a detailed account of how the European Commission has recently evaluated this Directive.

At a EFBWW conference with the participation of some representatives of joint Social Funds, 31<sup>st</sup> January 2003 in Brussels, experts of the individual trade unions have discussed the evaluation in the report of the European Commission against recent experiences with the practice of posting with a view to developing perspectives for the future. As almost all EU member states were represented at the conference it was evident that problems with social dumping have arisen everywhere across the European Union and that countermeasures of the respective trade unions have been discussed, decided and implemented.

All those attending were perfectly clear about the fact that further initiatives have to be started before 1<sup>st</sup> Mai 2004 in order to prevent even more political pressure on existing working conditions and collective agreements.

There was consensus among the participants that the legal basis is useful, whilst its implementation and control are insufficiently put into practice. Many violations of national collective agreements are being noticed and it is in particular the practice of controlling, in some countries carried out by government departments that is entirely inadequate. In some countries there is no control at all and it is only in those countries, in which the trade unions have rights of control and do carry them out, that wage and social dumping can be stemmed to a certain extent.

In all countries the practice of posting in construction is a great challenge to compliance with collective agreements at the locality of construction sites. Thus the autonomy of collective bargaining is drastically restricted. The scare of unemployment among the locally employed construction workers leads to a decline in honesty and respect for collective agreements.

Wage and social dumping are increasing, in particular on large construction sites, even though in the Scandinavian countries, above all Denmark, but also in Switzerland and the Benelux countries the most blatant injustice is being prevented.

On the largest EU construction market, the Federal Republic of Germany, wage dumping has undermined prices for contracting and compliance with collective agreements. Though the social funds of the construction industry are controlling jointly with the Federal Office

for Labour ('Bundesanstalt für Arbeit') and success is noticeable in comparison to former years, the great breakthrough in compliance with collective agreements has not yet been achieved. Many complaints and court cases, predominantly from East European contractors, who refuse to recognise the conditions of the EU Posting Directive, impede or obstruct the work of the control administration and the construction social funds.

The participants of the conference 31<sup>st</sup> January 2003 have decided to produce a **black paper concerning offences against the Posting Directive** in order to document all this and to enter into a new round of consultation with the European Commission, EU Members of Parliament and construction employers.

In the run up to the 1<sup>st</sup> May 2004, EU Enlargement, offences shall be documented from all countries in order to show the need for further action by EU bodies.

During the consultations also some typical shortcomings of the EU Directive have become evident. If courts of law at the locality of a construction site have obliged a posting contractor to comply with collective agreements and pay contributions to the social funds, it remains often impossible to enforce the order of the verdict in the country of origin. Whilst some countries have already started to introduce regulations, it is obvious that the practice of enforcement is greatly variable. If so-called 'Briefkastenfirmen' (post-box companies) for instance from Poland have posted workers to work on German construction sites it is impossible to make them meet claims. If a posting employer in France is awarded a contract he has to show references of contracts carried out in his home country and other documents including a certification in France. In Switzerland possibilities are in place to prevent social dumping through joint control commissions.

It is these issues that have to be tackled by committees of the EFBWW and in common with the European Construction Industry Federation (FIEC) and perhaps other trade unions in order to work out strategies for the future concerning the problems of the posting of workers.

In May the ETUC Congress will take place in Prague. There the trade unions are called upon to present their experiences concerning the Posting Directive in order to make other unions aware that they are facing similar experiences in their sectors. We observe already today that cases of posting not covered by the Posting Directive are occurring in agriculture and catering, but also in health and old peoples' care.

Moreover, it has been suggested that representatives of the social funds shall continue the series of meetings and consultations, which took place in Wiesbaden after 1999 and in Brussels after 2000.

Besides these measures the discussions in the Social Dialogue shall also be used in order to reduce 'islands of foreign law' as well as social and wage dumping in the construction sector.

Further consideration is needed and targets have to be set on this issue at the General Assembly of the EFBWW in December 2003 in Houffalize - Belgium.

## East European Workers on London Sites

George Fuller, 7th Feb 2003.

*[Thousands of East European workers work on UK sites. As Ernst-Ludwig Laux writes in his article, the control of the compliance with the stipulations of the Posting Directive is often non-existent. Significantly, British Government ministers have spoken of an amnesty for illegal workers. George Fuller provides an insight into the reality on construction sites. Boris Kostov from Ukraine, Maciej Kozłowski from Poland and Enver Kasaci from Kosovo explain why they work illegally and are not interested to join the trade union. (J.J.)]*

Boris Kostov, aged 49, married with 2 children, from Ukraine. He spent 18 years in the Soviet Army engineers and worked for 10 years on Soviet railways. He came as an asylum seeker and has been living in London 5 years – 3 illegally. Now working on a site in Central London. He said, “I was so pleased when I became legal. Before when I was coming out of a tube station and I saw the police I always feared I’d be picked up.”

Kostov said “I like it in the UK. It’s a very democratic system at first look - sometimes too democratic - crooks get away with things, but I can connect with the English.

He continued, “I started in London as a street sweeper then laboured on building sites, sometimes I work as a handyman. I try to do jobs that are interesting. On my longest job, that lasted 6 months, I was a bricklayers’ labourer getting £57 a day for 8 hours on PAYE (the bricklayers were on £110 a day). Thousands and thousands of us are working on false names and National Insurance numbers. It is very good for the government and maybe crooked bosses, but we are not getting National Insurance credits towards unemployment pay or pensions!

Thousands of people are working illegally. The government could organise a campaign against it but they like it and building bosses like it too! I find it’s easy to organise some documents and people close their eyes. Show them some paper is easier. Legal working here is

very difficult. It's impossible! There should be a system for people to come from Ukraine and other countries and work legally. If the authorities wanted to crack down on illegals they only have to stop the 25 bus: every day 500 people would be deported! But in fact is only people who make dirty life – drinking and fighting – are deported. If just go to work and go home – job/home, job/home - every day, you are ok. Some jobs pay £3.50 per hour, no English person will work for this, but illegals will, and is good profit for companies. The German government decided to stop this cheap working with a 20,000-DM penalty on employers and straight away it stopped. But cheap working is good for the British economy.

If a boss decides to sack me it is too easy. But for English people there is workers' law. When boss says to me, 'Tomorrow not come in' it is inhuman! But they can do it! But it's impossible for them to do this to English workers. I think all workers should have rights.

I agree there should be an amnesty for illegal workers. 10,000 more care workers are needed in Britain, why not employ them legally? If 50,000 more workers are needed on building sites why not employ them legally? The trade unions should work to win everyone their rights. Illegal workers - who know the situation – could help. Why do we have no rights working in the UK? The employers and economy benefit from such an well-educated workforce.

I was a member of UCATT on a Bovis contract in London. It was only for a short time and I didn't connect with them. When I was working in the Soviet Union the trade union offered the workforce a lot: we could get cheap cars and home loans and holiday accommodation.

But now it is like economic war in Eastern Europe with much poverty and unemployment. If UK had an open border millions of people would come here and destroy the UK's economic system. But if workers are required in UK they should be able to work legally. It works both ways: believe me in 20 years time British workers will be working in Siberia – British businessmen are already there – it's the first place in the world for raw materials.

Maciej Kozlowski, labourer, single, 26 from Torun in Poland, previously a student, he has a degree in Politics and Society. He came to London to earn money and learn English at the same time. Now

working on a City site he said, “I came here 20 months ago and have worked on the same site for 19 months. My landlady’s husband – a building foreman – told me about the job. I had no work permit or student visa. I work on the site for £65 a day. I hod-carry, mix muck, cut out with Kango and dry pack. The company gave me a National Insurance and tax number. My visa said, ‘Not allowed to work.’ I always worry about this. I don’t want any infringement of the law in my documents, so that when I am 40 years old and achieving something, somebody can say I was working illegally in London. I don’t want to have any dirt in my past. Most Polish people I know keep this to themselves and avoid talking about the subject.

I’ve heard of a lot of people working overtime for free or long hours for less than the minimum wage and being sacked just like that. I was worried about being sacked for a few months but now I don’t care. The firms take on foreign workers because we want the work. We need to keep the job more than the English. That makes me a ‘better’ worker. To them my lack of legal status makes me a better worker. I want to earn money quicker than in Poland though I have good prospects there. I don’t get Working Time Holiday Pay; I don’t expect the same rights as English workers.

I have not been home once in 20 months. But I will go home because I am saving to buy a flat in Poland. Those who don’t save won’t make it home.

Poland and several other East European countries are joining the European Union, when that happens there will be more Polish workers in the UK. But there will still be workers from countries not joining the EU coming in. For example the Romanians, already there are more of them on sites than from any other country. So soon employers will regard them as ‘better’ than workers from the new EU states because they’re more exploitable as illegals.

Everybody joining the trade union is a good idea. But it will only work if they are employed legally. If you’re an illegal you don’t want to mess about – don’t want to make a mess around yourself by trying to claim ‘rights’. You just work where they pay you best. I have not come across trade unions on sites in London. People I mix with don’t know their rights; they just go on gossip. Yes, to get organised, obviously people who have experience of this illegal world and can speak the languages could be very useful. First off, people could

speak to their friends. Leaflets could be distributed; in the language schools there are 3 or 4 in every class who work on building sites or in restaurants and hotels. English is the main language spoken.

I think national laws should protect the rights of British citizens. If the UK really needs labour from other countries then law should regulate the flow and the foreign workers allowed to work legally. There should be an amnesty. Then we would not be frightened of being caught by policemen. Regulations could enforce health and safety education for the migrant labour workforce. There should be EU- wide trade union organisation to enforce regulations like the EU Working Time Holiday Pay Directive. It's health and safety law, everybody needs a rest but I don't know any foreign workers who have holidays with pay. As long as I'm working here to tell the truth I'm not interested in holiday pay. It seems so far away and the risk of losing my job so great that it doesn't seem worth bothering about.

Apart from business considerations I think the company I work for would prefer to employ British people for language and nationalist reasons – as I would back home in my own country.

Enver Kasaci, aged 35, labourer, married with one child, from Kosovo. He has a degree in metallurgy. Now working on a City site. He said, "I worked a short while as an engineer in Kosovo but the firm went bankrupt, then the war started and I left Kosovo in 1999. My claim for asylum was recognised and I've now been in London three and a half years, most of that time working as a labourer for the same firm. I'm working on the CIS [self-employed tax status]. I don't know if joining a trade union would be good. I have a good relationship with my employer. I have no idea if an amnesty for illegal workers would be a good thing. I don't get Working Time Holiday Pay. I hope to go back to Kosovo but I don't know when. My wife is here in London. London is all right."

*[Conclusion: Migrant labour has always been a fact of life in the building industry. Now it's mainly from Eastern Europe, in the 60's from Ireland, the Caribbean and India. 'Illegal' working is nothing new of course. It's part and parcel of the building capitalism's scramble for profit. We, UK building workers know this, not only from everyday working life here but also from the early 90's when*

*50'000 of us worked as 'illegals' in Germany for what often turned out to be rip-off labour agencies. We're not in a position to condemn our fellow workers. Though the tabloids whip up xenophobia the only way forward for us is to hold out the hand of friendship and work together for unity and unionisation.]*

# OBSERVATORY

## SWITZERLAND

### **2002 – Breakthrough for early-retirement pensions in the construction industry**

#### **Swiss construction industry awaits economic upturn**

*Hans Baumann, David Zenth*

#### *1. The economic backdrop*

After the economic downturn at the end of 2001, hopes of an upswing in 2002 faded so that Swiss economic forecasts were also corrected downwards and now predict stagnation of gross domestic product for this year. It is anticipated that 2003 will see a timid recovery.

Consumption continues to prop up the economy, something which can no longer be claimed for the construction industry.

The Swiss franc remains relatively strong in relation to the euro and US dollar. For Swiss exporters, this means that Swiss products are still very expensive abroad. Interest rate cuts by the National Bank have, through the role of the franc as a safe third currency, had only a marginal impact in rates.

The possible risk that changes made to the general conditions by the GATS agreement may extend beyond the public services and also affect the Swiss construction industry, particularly concerning the posting of workers and temporary work, has been recognised.

#### *2. Labour market*

The situation on the Swiss labour market also looks rather gloomy. The unemployment rate rose sharply in the autumn and is likely to rise even higher over the coming months. A comparison with the previous year's figures (see Figure 1) is sufficient to quell optimism.

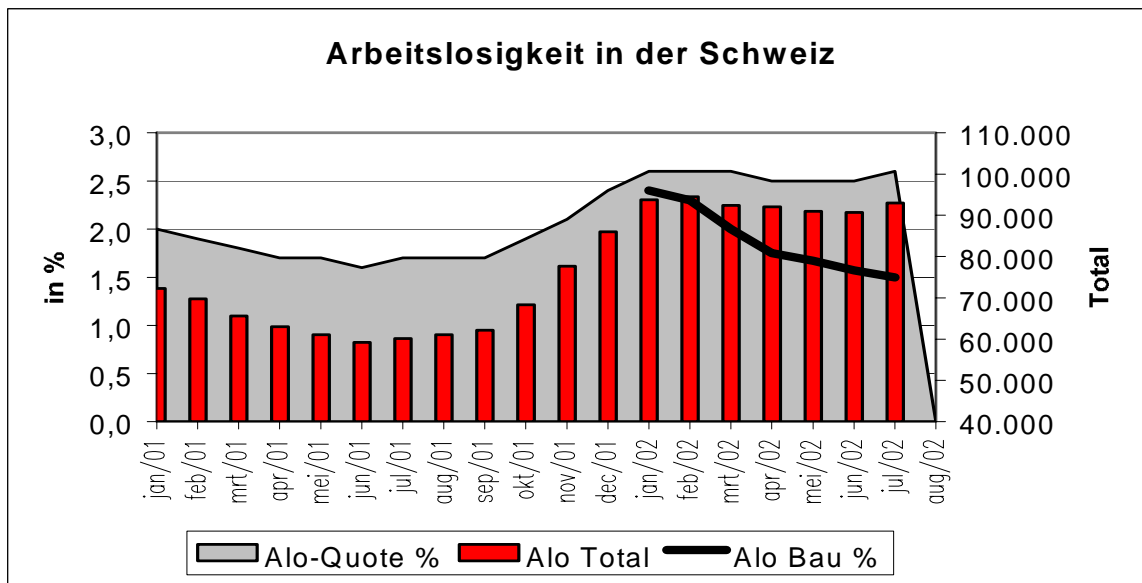


Figure 1 (Source: seco)

Legend: Unemployment in Switzerland

unemployment rate% -- total unemployment -- unemployment construction%

Somewhat brighter is the current situation in the **construction industry**, where the number of unemployed has gone down monthly and the rate also continues to be well below the general jobless level. However, the autumn is also the time when the seasonally-related increase in construction unemployment starts to kick in. Furthermore, there has been no halt in the trend towards fewer people being employed in the industry.

### 3. Swiss construction industry

Construction output levelled off during the first half-year 2002. However, the large-scale public infrastructure projects succeeded in holding at bay any far-reaching impact in the construction industry. For housebuilding, the picture is still lacklustre at present. But it would be wrong to be pessimistic on this account as the sound basic conditions in the real economy (sluggish price rises, low interest rates and unscathed domestic economy) mean that the current year is likely to see gentle growth over all. The order books situation in architects' offices also points to an improvement in the offing.

However, the State must not repeat the same mistakes of the 1990s and mothball construction investment on account of the somewhat uncertain situation.

3.1. Main building industry

Turnover in the main building industry marked time during the first six months of 2002.

By comparison with the previous year, **order books** are sharply up, although the Gotthard Trans-Alpine Tunnel project sub-lots has contributed to this situation, without which the figures would have been negative. Equipment utilisation rates in building have fallen back, but have been maintained in civil engineering.

*Order books in the main building industry at 1 July*

	1999	2000	2001	2002
Order books	+ 11 %	+ 19 %	+ 4 %	+ 11 %
New orders	+ 7.2 %	+ 12.5 %	- 2.9 %	- 8.1%

*Table 1(Change since previous year - source: Swiss Building Contractors Federation SBV)*

During the first quarter 2002, 8% fewer **homes** were built than during the same period of the previous year. Housebuilding permits actually dropped 16%. However, since May 2002 there has been a slight rise in permits for multi-family houses, but the prevailing housing shortage (Zurich, for example, had an empty housing stock of 81 out of 188,626 housing units at 1 June 2002), shows that more building will have to take place before this situation improves.

As a result of the base rate reduction by the Swiss National Bank, most banks have lowered their mortgage rates by 0.25 percentage points to 3.75%. The low inflation rate also means that an increase in the rate is not on the cards in the near future. For the housebuilding market this will hopefully serve as an encouraging factor as mortgage rate reductions have an immediate impact on housebuilding. As to whether this will be enough to create sufficient new residential space is questionable. For that reason, the GBI will be banding together with other organisations with an interest in housing issues in order to launch a housebuilding promotion programme.

### 3.2. Construction planning

Order books in the construction project planning industry has, it is true, pursued its downtrend. However, the majority of firms were still describing their situation as good on the whole during the first quarter 2002 in the KOF/ETH business survey. By contrast, there was a disproportionate decline in the public sector and technical construction. The construction project planning industry was anticipating a further fall in orders during the second quarter. As to future trends, firms were still less pessimistic than during the last quarter of 2001.

These developments provide grounds for a positive outlook as more orders entering the architects' offices will also have a positive impact on the construction project planning industry and engineering offices, after a certain time lag. In conjunction with lower mortgage rates, this could be the first sign of an improvement in the housebuilding picture.

### 3.3. Building completion industry

The trend in the finishing industry was somewhat more favourable than in the main building industry, although here too a small deterioration was recorded. But a change for the better in housebuilding and renovation work would also have positive spin-offs for the finishing industry.

### 3.4. Productivity in the Swiss construction industry

Reliable figures for productivity in the Swiss construction industry are hard to obtain. For the main building industry we have attempted to ascertain approximate figures based on employment figures and construction activity in real terms:

## Number of workers and construction activity in real terms per worker in the main building industry

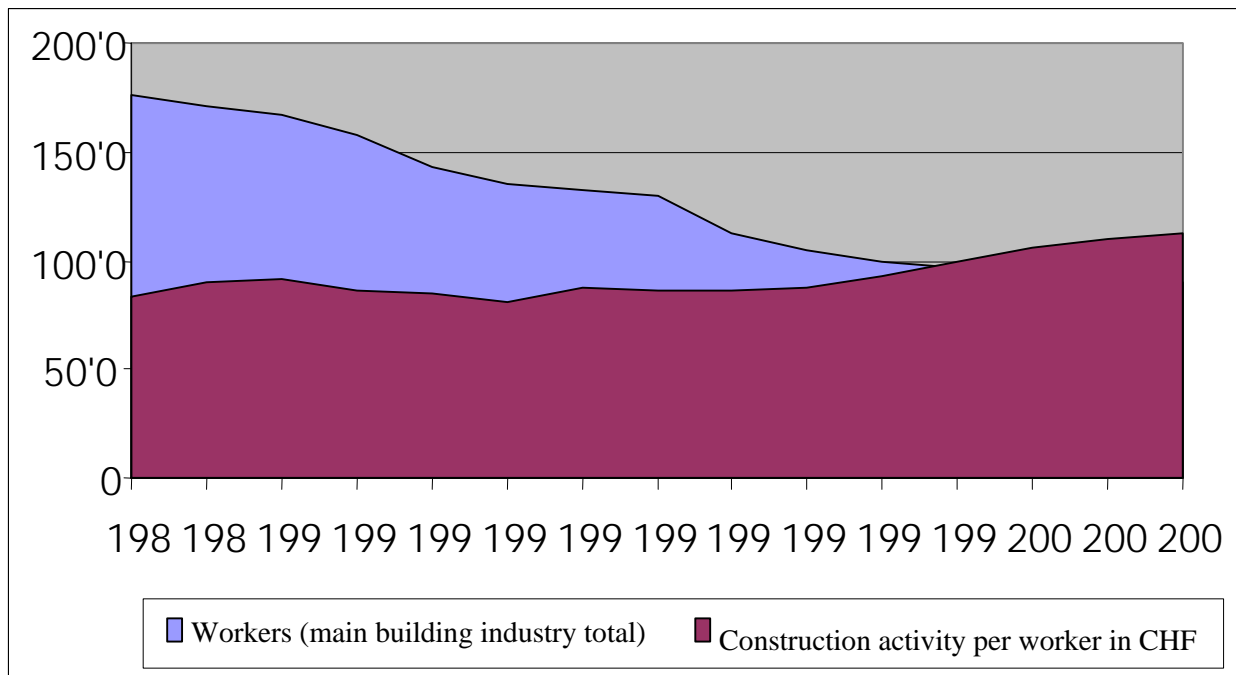


Figure II, source: *Bauwirtschaft in Zahlen*, SBV quarterly statistics

If the fall in the number of people employed in the main construction trade between 1987 and 2002 is compared with the trend in real construction activity per worker (see Figure 2), it is quite clear that output per worker (and hence productivity) has risen over the long term. This is particularly true of the more recent period between 1996 and 2002.

### 4. Conclusion of collective agreement in the construction industry in 2002

#### 4.1 Wages in real terms secured

The main focus of this year's bargaining round was on achieving early retirement pensions for construction industry workers. The wage increases for 2002 were therefore as follows: average of 100 francs, or about 2%, of which a basic sum of 80 francs per month for all. For 2003, it has already been established that compensation for price

increases will be guaranteed as from 1.1.2003 and for 2004, bargaining on further wage increases will be conducted in the event of a favourable trend in the industry. Since 1999, improvements in wages have been obtained every year in real terms in the construction industry. Below is a comparison of real wage trends with other sectors:

### Trend in wages and purchasing power 1996 – 2002

	1996	1997	1998	1999	2000	2001	2002
<b>Nominal wages</b>							
Industry/trade	1.2	0.3	0.6	0.0	1.5	2.7	2.1
Tertiary sector	1.3	0.6	0.7	0.5	1.1	2.3	2.9
Whole construction industry	1.2	0.2	0.4	-0.5	1.9	2.8	2.4
Main building industry	1.4	0.7	0.2	0.1	2.2	3.8	2.0
<b>Inflation at the time of negotiations</b>							
	2.0	0.8	0.3	0.0	1.2	1.3	0.4
<b>Real wages</b>							
Industry/Trade	-0.8	-0.5	0.3	-0.0	0.3	1.4	1.7
Tertiary sector	-0.7	-0.2	0.4	0.5	-0.1	1.0	2.5
Whole construct. ind.	-0.8	-0.6	0.1	-0.5	0.7	1.5	1.9
Main building ind.	-0.6	-0.1	-0.1	0.1	1.0	2.5	1.6

Table II, sources:

Wage statistics of the SSUV and SBV, for 2002 BfS calculations based on results of pay bargaining

Consumer Price Index for November of previous year

### 4.2. Breakthrough for early retirement pensions?

During the last week prior to expiry of the compulsory no-strike period, a breakthrough was achieved in bargaining on early-retirement pensions in the construction industry. This followed months of tough negotiations and the mobilisation of construction workers by GBI.

The Swiss main building industry was on the brink of industrial unrest. The determination of GBI and its members finally persuaded the employers to agree after all to a firm timetable for introducing

early-retirement pensions. This happened one week after an impressive demonstration in Berne, at which in excess of 10,000 construction workers made clear that they were willing, if necessary, to go on strike in support of their demand.

During the summer months, however, the employers then tore up the existing collective agreement on early-retirement -- already ratified by both sides -- and announced that they wanted to discuss matters already agreed. Both trade unions GBI and Syna declared that this intention amounted to a breach of contract and started preparing for a strike. At the time of writing this article, the trade unions are in the midst of a national industrial dispute, the biggest strike action in Switzerland since the Second World War. The aim of this dispute is to compel the employers to comply with the agreement already reached, which we have summarised in the table below:

#### Key points of the new agreement on early-retirement pensions

Bargaining parties	GBI, SYNA (trade unions) SBV (employers)		
Form	separate collective agreement		
Scope	Construction workers, foremen National level Switzerland Objective of compulsory general application		
Administration	Joint foundation		
Demands	2003 early retirement right at 63 2004 early retirement right at 62 2005 early retirement right at 61 2006 early retirement right at 60 Condition: To have worked 15 years in the construction sector, including 7 years continuously, during the past 20 working years		
Payment	Up to statutory retirement age 70% of average gross wage during final year of employment + basic amount of 6000 Swiss francs per annum. Maximum of 80% of relevant wage.		
The financing of contributions	from 1.07.2002	Worker 0.5 %	Employers 2.0 %
	from 1.01.2003	0.75 %	3.0 %
	from 1.01.2004	1.0 %	4.0 %

The trade unions will in any case do everything in their power to get this arrangement, which sets a pioneering example for other sectors, implemented before the end of this year.

## REVIEWS

Ralph Morton: **Construction UK: introduction to the industry.** Blackwell Publishing, Oxford 2002, 232 pp., £ 14.99.

The premise of this book is that knowledge of the history of the building process is key to understanding the problems, issues and relationships facing the UK construction industry. After looking at the structure of the modern industry and its markets, Morton looks at some of its characteristics in their historical context. This approach aims to give a deeper understanding of how and why the industry operates the way it does. In this he succeeds.

The book consists of 10 chapters. The first chapter traces the history of current issues facing construction and poses the questions the rest of the book seeks to explain. The second chapter is an analysis of the industry in terms of its output, which is a response to demand. In the next chapter the book describes the firms that together comprise the construction industry, organised to produce the output described in the previous chapter. It follows logically that having discussed the size and distribution of firms in the industry, Chapters 4 and 5 consider firms in more detail and deal with construction labour issues. Chapter 4 deals with the history of the union movement and industrial relations focusing on operatives in construction. The following chapter considers the role of the professions and construction process managers. The following 2 chapters discuss the history of contracting and the development of different procurement methods. The book concludes with three chapters, which discuss the growth of prefabrication, the environmental impact of construction and the relationship between government and the building industry.

Many of the features of the construction industry are seen as responses to prevailing conditions. For example Morton says, “new forms of construction developed *in response* (my italics) to new forms of demand and they transformed the face of Britain” (page 4 and again on page 36). The same could be said of the process. Indeed, he points out “new forms of organisation were necessary for new forms of

construction” (page 5). He also sees the formation of builders’ associations as a response to the growth of trade unionism.

Chapter 1 introduces the reader to the fundamental issues confronting the industry in general but with notable exceptions and asks the important question, why the industry is the way it is. Morton demonstrates the persistence of the issues of quality punctuality and price confronting the construction industry. On page 11 he asks, ‘What is it that has prevented the industry from responding to recurrent appeals for change? Or are economic factors in the construction industry too strong to allow real change to take place? This is the conundrum Morton sets the reader to answer.

Two chapters, 4 and 9, stand out but for different reasons. Chapter 4 entitled, “The Workforce on Site” is on the history of construction unions in the UK. It is not only a beautifully written narrative but contains insights which are essential reading for those studying the construction industry for the first time and who wish to understand its labour problems.

The history of the building union movement in the nineteenth century was one of failure. While the unions grew in number, membership and strength they lost disputes with employers and failed to achieve job security for their members. Even pay remained low and when it increased it was as much to do with boom periods as it was with any union pressures. At the beginning of the twentieth century there were still no provisions for insurance, pensions or compensation for injury (page 72). Only in the twentieth century were national negotiating bodies formalised with the setting up of the National Joint Council and the National Working Rule Agreement (WRA). However, even in 2002 the WRA can only be enforced where the contractor is a signatory to the agreement (page 74).

Terms of employment and working conditions remain problematic. He makes the point on page 93 that self-employment and labour only subcontracting impede efforts to improve training, health and safety. Yet the discussion of health and safety issues is only concerned with health and safety issues on the largest schemes and omits the problems

faced by those working for small and medium sized enterprises on small projects, which make up the bulk of work.

On page 77, Morton says that since the late 1980s the proportion of operatives who were self employed exceeded those in employment. Although this may indicate an industry of appeal to those with an entrepreneurial bent, it also helps explain why the industry fails to attract those who are looking for training followed by a career. While describing the decline in the number of registered trainees since the 1960s from 135 000 to 30 000 in the 1990s, (page 86) there is no mention of how many trainees actually completed their training and how many remained in the construction industry as directly employed workers or even labour only subcontractors.

Morton makes the point that [improvements] in productivity in construction are as likely to come from improvements in employment practices as from advances in technology (page 66). Nevertheless he says on page 75 that from 1995 labour productivity seems to have increased quite markedly but these improvements may have been due to “an increase in efficiency on site or maybe the result of differential changes in construction prices, values and wages”. Improvements in employment practices in this period are absent.

Moving to Chapter 9 on *Construction and the Environment*, the treatment of the subject is markedly different from the rest of the book and feels out of place here. The chapter has a preaching quality of political correctness. The emphasis on materials as an input into the construction process rather than the effect of construction and the built environment on sustainability would have been preferable.

This is not to argue that the topic is unimportant. On the contrary sustainable development is a theme in itself. One wonders just what a short chapter covering so many aspects of the impact of buildings and materials on the environment adds to the debate or develops any theoretical understanding of the issues of the environment and sustainability. Perhaps this chapter would have been more relevant in a book dealing with a variety of aspects of the built environment including buildings, architecture and interior design.

This book as a whole is a description and discussion of the construction industry. Morton discusses the development of many of the economic characteristics of construction but misses the opportunity to discuss these characteristics as responses to economic and financial forces acting on the participants in the process, factors such as low profitability and high interest rates.

Morton's book is descriptive and analytical rather than theoretical. If anything I would say that at times the book is insufficiently critical and sometimes appears to be willing to accept what he has read or been told. For example, Morton appears to place too much faith in partnering, lean production and value engineering and prime contracting without showing any evidence beyond the claims of firms themselves that savings have been made, time saved or waste reduced. He does not give any testable arguments in support of these assertions. Indeed, the "Movement for Innovation (M4I) has been established which together with the government's Best Practice programme is aiming to *preach* (my italics) the Egan gospel across the whole industry" (page 179). This seems inconsistent with Morton's own premise; namely, industrial change does not come from good intentions and people willing things to happen, but comes in response to changes in economic conditions, legislation and technology.

Another example of simplification concerns enterprise zones. Although enterprise zones may have "poured millions of pounds of government finance and levered millions more from the private sector into areas such as docklands in London and Liverpool" (page 205) there is little discussion of whether or not such government intervention (and subsidy) actually works. If banks and insurance companies need to grow and expand their offices, do they need subsidies to do it, if, as we are told on page 14, demand for buildings is a derived demand? Of course, what the developers, building owners and their tenants are doing is capturing the gains made by public sector investment.

There are a number of minor gripes. For example on page 61 he uses the term "scale economies" without an explanation or definition. Even later on in the book where economies of scale are discussed there is little real explanation of the term. Morton is more interested

in an historical approach to understanding the industry and uses economic theory and concepts only where he has to and only superficially. This is fine but it means that his book complements introductory economics texts, such as Hillebrandt's *Economic Theory and The Construction Industry*, rather than replaces them.

In another example, Morton points out (page 40) that *Construction Statistics Annual* uses the size distribution of firms as measured by numbers employed. However, he does not qualify this by mentioning that the number of people employed is not the same as the number of people who carry out the work for the firm on its projects because of the use of subcontracting. However, he does admit that there is a "certain arbitrariness" (page 41) about the size categories of firms by number of employees. He argues if the size categories were different they could give a different impression but he does not say what that impression would be or if the new size categories would be any less arbitrary.

Nevertheless none of these gripes detract from an excellent introduction to the construction industry. It is not only one of the best introductory texts for serious students and general readers it is also a very useful book for contractors and professional practitioners working in the building industry. It gives a feel for the topic and raises interesting questions, while conveying the enthusiasm, depth of knowledge and experience of the author. As such it is an authoritative text as well as being well written, enjoyable and above all informative.

Stephen Gruneberg

Dear Reader,

Reed Business Information has agreed to publish an edited version of the final report of the CLR study on the industrial relations in the construction sector.

This book will be published under the title **EU-ENLARGEMENT - Construction Labour Relations as a Pilot** - and will contain the complete study of the industrial relations in construction, including extensive country reports on Poland, Estonia, Romania, Hungary, the Slovak Republic and Bulgaria.

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