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FREE MOVEMENT REVISITED

CLR News

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NOTE FROM THE EDITOR

As our constant readers know a group of CLR-experts contributed to the evaluation of the implementation, practical application and operation of the Posting Directive. During the last months there has been permanent reference to the results of our study (published as *The free movement of workers in the European Union*, CLR-Studies 4) in the ongoing battle pro and con the proposal for a Directive on services in the internal market (COM 2004/0002). So far we had not really dedicated an issue of CLR-News to this battle. With the number 2 issue we at least partly want to remedy that omission. I say at least because I personally think that our book is an absolute must for those involved in the debate on the Services Directive at national and European level and therefore I could restrict myself to that recommendation.

If the European Commission's aim is truly the promotion of fair and free movement of services, I'm more than willing to support that. In fact I've always been an advocate of free movement because our borders are the artificial results of wars between kings, emperors and admirals. But...this should happen in a juridical constellation and context that gives full floor to the protection of workers. The posting of workers can be seen as a legal form of temporary cross border work and the Posting Directive was meant to soundly base that free movement of workers. If we list up the results of our evaluation of that Directive: poor implementation, the lack of control and enforcement, no or only weak cooperation of the authorities and no reliable data, then the least one can conclude is that the Commission has no feeling for political timing.

The application of the country of origin principle in the Services Directive, according to which the member states cannot restrict the activities of service providers from other member states who comply with the laws of their country of establishment, destroys the balance between the protection of employees on the one hand and market opening on the other hand.

The conclusion in the explanatory parts of the Services Directive, that it does not interfere with the application of the Posting Directive, is deceptive.

It is not necessary to repeat the main arguments against the Services Directive in full detail.

Let's just sum up a few:

- the restrictions for the host country or, better expressed, the plain prohibition on imposing notification, asking for the presence of a representative of the service provider, or for the preservation of social documents make control almost impossible in the host country;

- the evaluation of the Posting Directive demonstrates that the role of the home country in the case of the posting of workers is negligible; there is no reason why this should improve based on vague promises and wishful thinking;
- what is more, the lack of a clear definition of self-employed combined with the proposed ban on the duty of registration and on other real instruments to verify, inspect and control the bona fide character of the service provider makes the liberalisation of services an instrument for wage dumping;
- the same argument can be used for the way the Services Directive weakens the possibility to control service providers with workers originally from third-countries;
- confidence in efficient collaboration between the member states and in strict enforcement has so far been an illusion; the Commission should stop these fairy tales and concentrate on proper implementation;
- member states have to make the necessary investment in their national enforcement capacity and administrative collaboration in order to build up a real framework for free movement based on a decent registration of posted workers, guarantees for social liability and a high level of protection of workers.

In this issue of CLR-News the opponents of the draft Services Directive can find some fresh ammunition. First my own overview of recent modifications of the national implementations of the posting directive. We include a contribution from Charles Woolfson and Jeff Sommers about an industrial dispute in Sweden with a direct link to the free movement debate. All this is rounded off with a summary of Mijke Houwerzijl's thesis on the implementation of the Posting Directive.

A very interesting contribution comes from Gerry Lean (British Construction Federation). He describes the development in self-employment in British construction where 'In reality the relationship between the operative and the employer was much more likely to be one "master and servant" than contractor and service provider. The construction industry became populated with operatives who were for all practical purposes employees but paid on a self-employed basis.' He has listed up the difficulties and possibilities to determine employment status.

Of course we also bring you the ordinary part of our household: reports, a review and a research announcement.

Jan Cremers, 2005-05-26.

SUBJECT ARTICLES

Free movement revisited.

Jan Cremers, CLR coordinator

Introduction

Last year we published a study about the implementation, practical application and operation of the so-called Posting Directive (Directive 96/71/EC)¹. The origins of the principles behind this Directive go back to the debate about public procurement principles in the single European market. In the late 1980s the European building unions pleaded in line with ILO Convention 94 and the Davis Beacon Act in the USA for a social clause in procurement rules for public works to guarantee compliance with working conditions and collective agreements in the country where the work is carried out. The European Parliament backed this demand with an overwhelming majority. The Council of Ministers, however, dropped the idea of an obligatory clause and watered down the proposal to a voluntary act. Thereupon the European Commission decided to put forward a proposal for a posting of workers Directive in the action programme of the Community Charter of Fundamental Social Rights of Workers. After the first proposal in 1991, it took five years of hard work to reach agreement on this Directive.² Member States were divided on the necessity for a posting Directive. The slow and difficult decision-making process forced some Member States, i.e. France, Germany and Austria (not an EU member at the time) to develop their own initiatives to guarantee national provisions and labour conditions to workers from abroad. The agreement on the Directive in 1996 made it necessary for these countries to adapt their already-existing national legislation on posting. Social partners had to re-examine their collective bargaining systems in almost every country.

In 1996 the Council and the European Parliament finally adopted the Directive concerning the posting of workers.³ With the introduction of this Directive, to be implemented by the Member States at the end of

¹ *The free movement of workers in the European Union*, Jan Cremers, Peter Donders, CLR-Studies 4, Reed Business Information, The Hague, 2004.

² OJ No. C225 of 30.8.1991.

³ Directive 96/71/EC of the European Parliament and the Council of 16th December 1996 concerning the posting of workers in the framework of the provision of services, OJL 18 of 21st January 1997.

1999, a second definition of posting was introduced into Community law. The earlier Regulation 1408/71, concerning the coordination of social security within the EU in the case of the free movement of workers, introduced posting as a possibility to stay socially insured in the regular working state when working for a short period in another member state for a maximum period of 12 months. Directive 96/71/EC introduced ‘posting’, that is the situation whereby an employer sends an employee to work in another country for a limited period of time, within the juridical sphere of labour law.

The Directive is about finding a balance between improving the possibilities for undertakings to provide services in other Member States and the social protection of workers. It therefore defines a set of terms and conditions of employment in the host state that must be guaranteed to workers posted in its territory, irrespective of the law that governs the contract of employment of the posted worker. As such the Directive touches two of the four pillars of the internal market: the free movement of workers and the free movement of services. The free movement of workers would be hampered if workers were to lose their social protection when they actually moved within the Community. Furthermore, the free movement of labour could disturb fair competition when social dumping is at issue. Social dumping can occur in cases where workers from countries with lower labour costs are posted to countries with higher labour costs. Workers would then not be covered by the protective rules in the host country. As a result, companies are confronted with unfair competition concerning labour costs and rules governing working conditions.

A lack of historic notion

In our study we have described how difficult it was to get the Directive accepted in the European Institutions and especially in the Council of Ministers.

For the trade union movement the slogan “equal treatment on site” is in fact already a very old issue. But in the political field this notion is not very popular and certainly not in the forefront of decision making. The whole process and the positions taken show a lack of historic awareness and knowledge about migration from the side of the national representatives in the Council of Ministers.

If you examine the history of the debate than it becomes very clear that most national positions only changed in favour of the Directive if there was an urgent “political” need at home. The history of the national involvement with posting and of the first national measures goes back to 1986 when the European Community was enlarged with Portugal and Spain.

Public debates about the influx of masses of workers from the Iberian peninsulas created a climate for legislation with regard to temporary foreign workers.

The main argument was not equal treatment but “they will take our jobs”.

Later on the fall of the wall in Berlin and the general feeling of an opening to the East created again an atmosphere where politicians that were first ignorant changed to a position that “something had to be done”.

In such a situation where the short term is dictating the agenda it is difficult to develop a decent frame of legislation for bona fide cross-border and temporary work abroad.

It has to be said that this wish for a legislative frame for free movement in the new Europe without borders was the real starting point for the European Commission, for the European Parliament as well as for the European and national trade union movement. Later on parts of the employer’s organisations joined this position driven by a policy against “distortion of competition”.

It was striking that the build up of know-how by the social partners in construction in a process lasting almost a decade was not welcome in the coordination working group, established at European level to supervise the national implementation. It was even more striking that this working group immediately abandoned the position that it was worthwhile to look at the “raison d’être” of the Directive and at joint or harmonised solutions and proposals for implementation. Finally we have to admit that we even lost the interest for the subject in parts of our own ranks. My feeling is that this has had a serious impact on implementation in several countries. As we have seen in our study implementation has been poor, cooperation is non-existent and there is a general lack of enforcement and control.

If political fear has been the driving force for an important part of the decision makers then it becomes also clear why the debate disappeared for a while and returned shortly before the EU enlargement.

Enlargement with Spain, Portugal and Greece proved in fact to be no problem from the point of view of migration. The history of migration shows that it takes a lot to leave your home and soil. Programmes for urban and rural development have to be set up in the country of origin to create a perspective for economic and social development. EU policy has to be based on a fair share of our wealth. Enlargement with Spain, Portugal and Greece made clear that the strongest motivation to leave a country is the belief in a perspective at home. For Spain for instance migration to other EU countries went down straight away. Most migrant workers went out to the rest of Europe for economic reasons for a few years.

This might explain why the posting debate was no longer on the agenda in the second half of the nineties.

New developments

This is neither the time nor the place to look at all the weaknesses in the final national legislation as a result of the implementation of the Directive. And this is certainly not the place to condemn the political decisions whether taken with full knowledge or not.

But a few things that were more or less predictable have to be mentioned.

- First of all the refusal of the Swedish (and Danish) legislator (based on strong pressure of their social partners) to use Article 3.8 of the Directive. This article was formulated by Danish members of the European Parliament, taken over by a majority of the MEP's and finally integrated in the Directive. The idea behind this article is that it can be used to preserve the existing industrial relations system based on the autonomy of the partners in collective bargaining to negotiate collective agreements. After consultation with the social partners, both governments decided not to use Article 3.8 and to exclude terms and conditions of employment embedded in collective agreements from the implementation of the Posting Directive into Swedish and Danish law. The main reason was that the hard core of terms and conditions (as formulated in Article 3.1 of the Directive) were covered by law except the

minimum rate of pay, which is part of the Swedish and Danish bargaining system and is the exclusive responsibility of the social partners. According to the Swedish and Danish governments, foreign undertakings normally sign collective agreements, or application agreements, with trade unions in the sector concerned or are simply covered by a collective agreement and in so doing will pay the rates attached to those agreements. Given the fact that trade unions supported by the employers' organisations have declared that they have good control over foreign undertakings in Sweden and Denmark and that application agreements are signed and followed, both governments decided that the use of Article 3.8 was unnecessary. As a consequence, only those Swedish and Danish laws apply that exclude minimum pay rates. One could say that with the refusal to implement Article 3.8 both the legislator and the social partners in Sweden and Denmark took it for granted that serious industrial disputes could take place in future. In recent months there has been a lot of political rumour in Sweden about an industrial dispute that goes back to this problem. I can restrict myself to referring to the article of Charles Woolfson and Jeff Sommers in this issue of CLR-News. What becomes clear however is that the Swedish legislator has missed the chance to create a "legal frame" for the outcome of collective bargaining by not using Article 3.8. Now it is up to the national lawyers to repair the Swedish Posting of Workers Act.

- Another striking finding was the "narrow" interpretation of the scope of the Directive. In our study we found that most Member States have extended that scope to other industries. In the Netherlands however, the application of collective agreements is restricted to the construction sector, and in Germany to the construction sector and to services assisting maritime navigation. The consequences of this narrow interpretation are analysed by Mijke Houwerzijl in her thesis (see the summary in this issue of CLR-News) and in the meantime this has led to a political dispute in both countries. The Dutch government has sent a new Bill to parliament on February 5th 2005. The proposal is to modify the Dutch Posting Act and to extend the scope of the Act to all industries with generally binding collective agreements. This means that in future not only the Dutch minimum wages settled by law

have to be respected but also wages and other terms and conditions (as formulated in Article 3.1 of the Directive) based on generally binding collective agreements. It is interesting to examine the arguments of the Dutch government. The first motivation for this change of policy is not a concern for an improvement in the legal free movement or in the position of temporary posted workers but the (real?) pressure on the labour market created by EU enlargement. It gives the impression as if the Posting Act can be used against illegal migration. Although I'm in favour of a broadening of the scope I personally think that the real solution for illegal practices, whether by domestic or by foreign undertakings, has not to be sought by changing the Posting Act. Furthermore any reliable figures on abuse of posting are missing. The Bill will probably pass parliament this summer and who knows whether the fairy tales about the Eastern influx will be over by then.

- In Germany the same development took place. Also there the interpretation was “narrow”, partially because the social partners (except for the construction sector) were not in favour of a broader implementation. In the meantime things have changed and the Schröder government has recently come up with an amendment to the German Posting Act⁴. The arguments in Germany do not completely correspond with the Dutch motivation. The German government wants to create (not only for construction as is the case so far) “possibilities for sectoral social partners to formulate social and conventional minimum prescriptions applicable for undertakings working in Germany with posted workers”. This creates an instrument against wage dumping and distortion of competition. The purpose is to put obligations on foreign undertakings and to strengthen the reach of collective agreements. The proposal of the German government is explicitly motivated by the fact that “the majority of EU Member States made use of the option to broaden the scope”. There is no reference to EU enlargement and it comes clearly out of the explanatory memorandum that the Germans do not expect to create the ultimate solution for illegal work or other abuses on the (temporary cross border) labour market.

⁴ *Entwurf eines Gesetzes zur Änderung des Arbeitnehmer-Entsendegesetzes*, Message to the press, Berlin, 11 May 2005.

These recent developments confirm what we have formulated in our reaction to the European Commission's evaluation of the Directive⁵:
“The posting of workers cannot be seen or analysed in a vacuum. There is a link with the development of the countries' labour legislation, the (juridical frame of) collective agreements, the social security systems and finally with aspects of social security and protection that are settled by both sides of the industry (...) For economic reasons companies and individual workers have an incentive to work abroad. For economic and demographic reasons countries, clients and contractors engage workers coming from elsewhere. But it must be clear that the application of the legal regulations and collective agreements of the country where the work is done, or, better said, the application of equal treatment principles, has to be the leading principle in avoiding any problems with migrating foreign workers.”

What I could add to these words is that recent developments have demonstrated that it is just as well that the national implementation of the Posting Directive cannot be made in a vacuum.

⁵ *A decent assessment needed*, Jan Cremers, CLR-News 3-2002, Brussels.

European Mobility in Construction: The Swedish Trade Unions and Latvian Construction Workers' Dispute

Charles Woolfson and Jeff Sommers⁶

Introduction

The accession to the European Union of Central and East European new member states with weak trade union organisations and poorly developed social dialogue threatens regulated labour standards in advanced social democracies such as Sweden with strong trade union movements. This article examines a labour dispute in the European construction industry arising from the presence of Latvian contract labour in Sweden. The detailed narrative of the industrial dispute is presented. Particular emphasis is laid on its rapid politicisation into a contest between the governments of Latvia and Sweden. Key issues raised by the dispute are discussed namely: the application of the Posted Workers Directive in relation to service providers from new member states and the transposition of this Directive in the context of Swedish national provisions.

'Swedish laws in Sweden'

From November 2004 until February 2005 angry Swedish construction workers, holding placards proclaiming 'Swedish law in Sweden', defiantly blockaded an old school undergoing renovation in a Stockholm suburb. The object of their anger was a Latvian company employing low-wage Latvian construction workers on the site. The dispute is an example, in microcosm, of major challenges facing labour regulation in the expanded European Union. It exposes the fragile nature of hard-won labour standards in the face of economic liberalization and European enlargement. The industrial dispute analysed here goes to the heart of the contradiction in the European political project between, on the one hand, the free movement of labour and capital, and on the other, the increasingly contested and precarious preservation of a European 'social model', with the promise of a guaranteed floor of rights for workers throughout the European Union (Vaughan-Whitehead, 2003). The European Union

⁶ **Charles Woolfson**, Marie Curie Chair and Euro Faculty Professor, University of Latvia, Professor of Labour Studies, School of Law, University of Glasgow. Email: C.Woolfson@law.gla.ac.uk (Author to whom correspondence should be sent).

Jeff Sommers, Visiting Fulbright professor to Latvia at the Stockholm School of Economics in Riga, and assistant professor at North Georgia College & State University. Email: jsommers@sseriga.edu.lv

aquis communautaire receives its standard-setting potential precisely from Community legislation such as the Posted Workers Directive, the key piece of protective legislation in contention during this dispute. Yet the aspiration of organized labour to preserve Europe's 'social dimension' would appear to be in danger of crumbling under the impact of enlargement, almost on the very morning after accession, initiating the predicted 'race to the bottom' in labour standards (Kvist, 2004). The implications of this dispute suggest it is the first gust in a cold, possibly poisonous, 'Eastern' wind blowing across the industrial relations landscape of the new Europe. Many of the issues discussed here have already been prefigured, for example, in the context of the earlier 'enlargement', which incorporated East Germany into the EU. However, the Swedish-Latvian labour conflict reveals a new potential vulnerability in existing labour standards. The impact of the Posted Workers Directive in the sensitive area of the mobility of construction workers goes to the core of the problems discussed here (Cremers and Donders, 2005).

Exploiting comparative advantage between states

Geographical proximity aside, Sweden and Latvia could not be more different in their history, tradition and current outlook. Sweden, a model of Nordic social democratic inclusiveness and developed civil society, in which organized labour has a central legitimised role (Stokke and Thörnqvist, 2001), is quite unlike neo-liberal Latvia, the most impoverished of the new member states from Eastern Europe. The latter brings with it a whole legacy of problems, including polarizing ethnic relations, growing social inequality, significant levels of corruption and, not least, poor working conditions. Industrial fatality rates in Latvia are currently the highest in the European Union of twenty-five states, and exceed the fifteen-member state average by more than one third. In Latvia in 2003, the construction industry alone accounted for one in ten of industrial fatalities. Latvia has adopted some of the most neo-liberal policies in order to attract foreign direct investment at seemingly any price. With its future path of economic development so compromised, and being unable to match the flood of Foreign Direct Investment inflows and advanced technology from abroad, the temptation for domestic entrepreneurs to seek an easier road through cut-price labour and intensive sub-contracting is

seductive. The compulsion to exercise this comparative advantage in the wider European context, as in the case to be analysed here, will doubtless continue its powerful pull in the context of the enlarged European Union.

The Dispute

The origin of the dispute between the Latvian construction company, Laval and Partners, and the Swedish trade unions stems from a contract offered by a Swedish municipal authority worth nearly 2.8m euros, which the Latvian company won in an open public competition against Swedish competitors. The contract was to refurbish a school and the building of an annex in the Stockholm suburb of Vaxholm. Laval and Partners, the mother company, was acting through a subcontractor to L&P Baltic Bygg AB, registered in Sweden. The company was not a signatory to the Swedish Construction Federation collective agreement with Byggnads, the powerful Swedish construction union with over 100,000 members and close links to the Swedish social democratic political establishment. The collective agreement for the construction sector is the most centralised industry-wide agreement in Sweden. Byggnads concludes around 1500 local collective agreements every year, and in 2004 ninety-eight local agreements were concluded with foreign companies. In the same year, Byggnads also took industrial action against twenty-one companies that refused to conclude a collective agreement, nine of which were foreign companies (Byggnads, 2004a).

Laval and Partners had undertaken various construction contracts using Latvian labour in Sweden since 2002, including renovating the Swiss Embassy in Stockholm. In 2004, the company again imported Latvian labour, reportedly paying the fourteen workers 80 kronor per hour (under 9 euros). Swedish workers could expect 130-145 kronor (15-16 euros) per hour under the Swedish construction industry collective agreement. Laval and Partners claimed to be paying its workers roughly twice what they would receive in Latvia, and in addition to their monetary pay, provided the workers with free accommodation, three meals a day and transport. The company was reportedly willing to increase the agreed rate from 80 to 105 kronor (nearly 12 euro) per hour, but the Swedish unions insisted that the rate

should be within the normal collectively bargained range for Swedish workers (European Employment Observatory, 2004).

The local section of Byggnads began negotiations with the company in early June 2004, arguing that the terms of the Swedish national agreement should apply, a position that the company at first said it would consider. Thereafter the parties met on a periodic basis but without progress. On 14 September, the day before the fourth meeting, the company announced it had concluded a collective agreement with the Latvian Building Workers' Union (LCA) and that, therefore, no agreement with the Swedish union was necessary. From the viewpoint of the Latvian Building Workers' Union, Laval and Partners now seemed to represent one of the 'better' Latvian companies, and indeed, the company claimed that two-thirds of the Latvian workers were members of the LCA. However, the timing of the signing of this collective agreement raises suspicions of an attempt at 'pre-emptive union recognition'. At a further meeting in September, the company representatives indicated they would shortly inform Byggnads of their decision regarding a Swedish collective agreement. However, at the beginning of October, Byggnads was informed that the company had still not decided its position and it was increasingly clear that the company had no intention of signing a Swedish agreement. At this point, the union's patience ran out and on 19 October, Byggnads duly intimated that it would initiate a blockade and prevent Swedish specialist services from supplying the site. Laval and Partners appeared to have been attempting to pursue a 'Latvian-style' negotiating strategy, whereby in the absence of legal compulsion to conclude an agreement within a specific timeframe, collective bargaining discussions typically extended without limit.

On 2 November, some five months after the initial contact with the company therefore, Byggnads instituted the threatened industrial action (Byggnads, 2004b).

The union picket at the school site continued throughout December 2004. On 2 December, Byggnads held a rally outside the parliament building in Stockholm to protest against vocal support for the Latvian position expressed by right-wing Swedish parliamentarians. On 3 December, the Swedish electricians union called a solidarity strike in

support of Byggnads. The Swedish Electricians and Installation Employers association duly threatened the union with reprisals for undertaking illegal secondary industrial action, arguing that the electricians had no right to boycott Swedish companies operating at the site with signed collective agreements. Deliveries of concrete to the Vaxholm site were temporarily stopped, although the company managed to source supplies from a non-union firm. In mid-December over fifty Swedish building workers gathered at the gates of the site to prevent the Latvian workers from entering. The police were called but did not become directly involved. Appeals by Laval and Partners for the police to break the picket line fell on deaf ears. As this dispute was continuing, an Estonian labour agency based in Stockholm withdrew two Estonian workers under trade union pressure. The Estonians were being employed as auxiliary workers at a Swedish ski resort, but paid less than half the minimum wage of Swedish workers. At around the same time, a Lithuanian construction company, Atkirta, abandoned a project in Denmark under similar trade union pressure. Neither of these episodes attracted more than passing attention. The Laval and Partners labour dispute, on the other hand, assumed an increasingly international political dimension.

Escalation

As early as June 2004, within a matter of days of the dispute commencing, the Latvian Deputy Foreign Minister had met the Swedish ambassador to Latvia to express his concern. He requested the Swedish government to intervene ‘to eliminate the outright discrimination on the basis of one’s citizenship’ and ‘attempts to restrict freedom of competition and the free movement of services’ in the European Union (Ministry of Foreign Affairs of Latvia, 2004). For its part, the Swedish Ministry of Industry, Employment and Communications conveyed the Swedish government’s ‘neutral’ position, while the Swedish prime minister Goeran Persson was quoted as saying the Swedish union had a ‘right take retaliatory measures’ in order to ensure ‘the survival of collective agreements’ (*Centre for a Social Europe*, 2004). The escalating dispute threatened to sour Swedish-Latvian relations. Public opinion in both Latvia and Sweden was becoming increasingly aroused, with accusations of ‘xenophobia’ and of ‘protectionist mafia’ type behaviour lodged

against the Swedish trade union. Swedish opposition parties, as well as building industry and employers' federations in Latvia and Sweden, lined up to condemn the trade union action. To defuse the charge of being 'anti-Latvian', Byggnads placed a full-page text statement in the leading Latvian daily newspaper *Diena*, (beneath two hands clasped in friendship) inviting Latvian workers coming to Sweden to join Swedish trade unions. The following day, Latvian construction employers (this time beneath a closed fist aimed at an open hand) published a full-page counter statement, warning Latvian workers that if they followed the Swedish union's advice, it could cost jobs. Meanwhile, the Swedish Conservative Party's youth organization (MUF) delivered a severed horse's head (mocked-up in cloth) to Byggnads' offices.

Matching these wild outbursts, were calls from the Latvian side for an economic blockade of Swedish companies in Latvia. The Construction Contractors Association of Latvia, in their letter to Swedish construction trade union and to Göran Håkansson, the Swedish ambassador to Latvia, observed: 'It is understandable that "old" EU member countries wish to protect their market from cheap East European workforces. They shouldn't forget, however, that Latvia and other new member countries wish for the same'. Even the Latvian trade unions, organised in the Free Trade Union Confederation of Latvia (LBAS), appeared critical of the Byggnads' action (IFBWW, 2004). In a letter to the Swedish Confederation of Trade Unions (LO), LBAS chair, Pēteris Krīgers, expressed mystification as to why the Swedish unions had not contacted their Latvian colleagues prior to taking action. Henceforth, it was agreed that bilateral communications would be strengthened. Had the Latvian trade union confederation taken other than a 'national' position, it would probably have been pilloried domestically for 'disloyalty', a charge that would have offered a handy stick to beat the trade unions with in view of their communist past.

The involvement of the Latvian authorities at the highest level continued throughout the dispute. Their interventions were justified, it was argued, on the grounds that EU rules on the free movement of services were being ignored and barriers were being placed in the way

of free competition in the EU internal market. While the proposed 'Bolkestein' Services Directive did not directly inspire this dispute, it seems evident that the general approach of the Directive, at least as first proposed, may have reinforced the determination of the Latvian authorities (European Commission, 2004). In early December, a Latvian government inter-ministerial working group was set up, headed by the Ministry of Foreign Affairs and involving representatives of the Ministries of Economy, of Justice and of Welfare. The working group came to the conclusion that the dispute constituted a breach of EU rules. The Latvian government accordingly proposed to ask the European Commission to evaluate whether Sweden has infringed the European Community Treaty (Karnite, 2005). The Latvian Minister of Foreign Affairs, Artis Pabriks, expressed his deep regret at the boycott undertaken by Byggnads, arguing that it was at variance with EU principles and values regarding the free movement of services. By mid-December, the Latvian Prime Minister, Aigars Kalvītis, had raised the matter with the Swedish Premier during a EU summit in Brussels, while the Latvian Prime Minister personally appealed to the President of the European Commission in a letter expressing 'deep concern'. The Latvian government also announced its preparedness to pursue the matter at the European Court of Justice.

Meanwhile, on 7 December, Laval and Partners applied to the Swedish Labour Court in a summons application. The company claimed that the industrial action and blockade were illegal, as was the sympathy strike of the Swedish Electricians' Union. They requested a ruling that the blockade be lifted and that an award of general damages be made in their favour. In the third week of December, the Labour Court delivered its interim finding that 'actions like this aimed at pushing through an add-on to the leading collective agreement within the industry, cannot be seen as going against good labour market practices' (*Eubusiness*, 2004). Hans Tilly, the Byggnads' chairperson, was quoted: 'For us it has been obvious the whole time that Swedish rules and laws should apply for everyone in the Swedish labour market, regardless of what country they come from...The Labour Court's decision today clarifies that the Latvian [collective] agreement will not block us from continuing our actions aimed at getting Laval

and Partners to sign a Swedish collective agreement' (*Eubusiness*, 2004). In the aftermath of the court decision, lawyers for the company intimated that they would now seek an appeal.

Following the Labour Court decision, the Latvian newspaper *Diena* quoted further promises by Byggnads' chairperson to escalate the industrial action in the New Year: 'We expected such verdict, anything else would be unacceptable. We will continue the blockade until the company signs the collective work contract. We have the right to use the blockade as a sanction against companies that refuse to cooperate with us and we will certainly expand the blockade. It is a good feeling that we can carry on our traditions and protect workers from insatiable companies. The blockade will involve industrial, metalworking, woodworking, transport and construction trade unions, as well as the union of (building maintenance) tradesmen'. At the same time, the dispute took an international trade union character. The ten million strong International Federation of Building and Wood Workers unions (IFBWW) launched a solidarity campaign by issuing a letter of protest to be sent to the Latvian government, to Laval and Partners, and to the Confederation of Swedish Enterprise, all of which had attacked Byggnads fiercely over its actions. Finally, in early January 2005, as the trade unions intensified their boycott action, Laval and Partners announced, despite considerable financial losses and amidst conflicting reports, that they were not prepared to give up their operations in Sweden. The dispute seemed set to become even more intractable. One month later, however, in early February 2005, as pressure mounted on the company from the Swedish trade unions, and the client municipality became increasingly concerned over contract completion, Laval and Partners announced their withdrawal from Sweden. The municipality offered to pay for work carried out up to the point at which the blockade had commenced while Laval and Partners reportedly suffered considerable losses.

The Posted Workers Directive

At first glance, this outcome looked like a victory for Swedish organised labour. However, the dispute has exposed underlying weaknesses in the application of European labour regulation. These may produce different outcomes in the context of less organised

resistance than that of the Swedish labour movement. Crucial to understanding the Swedish trade union position is the interpretation of the European Directive (96/71/EC) on the posting of workers abroad. The Directive stipulates a requirement that the conditions of employment in the ‘host country’, the country where the work is performed, should apply as a minimum (European Commission, 1997: Article 3.1). In countries such as Sweden, Denmark and the UK, where collective agreements are not binding in law, the Directive also equalizes generally applicable collective agreements with those concluded by ‘the most representative employers’ and labour organizations at national level, and which are applied throughout the national territory’ (Art 3.8). Such collective agreements may be used ‘in the absence of a system for declaring collective agreements universally applicable’ (Art. 3.8) The recognition of a Scandinavian labour market model, without the legal requirement for collective agreements to be universally applicable (*erga omnes*), was regarded as a major breakthrough for trade unions in Sweden and Denmark. This issue was also on the table during Sweden’s EU application negotiations in 1994-95. The result was a declaration annexed to the accession agreement, in which it was stated that Sweden could maintain its labour market model, which meant, for example, without recourse to the procedural mechanisms of Article 3.8 in order to protect such terms and conditions as minimum wages. Collective agreements in themselves were held to be an adequate method of implementing Community law in Sweden and the provisions of Article 3.8 were not transposed into Swedish law.

The Directive on the posting of workers abroad was transposed into Swedish legislation through the 1999 Posting of Workers Act, which sets out a list of the rules that must be observed by all employers, whether established within or outside the EU (Ministry of Industry, Employment and Communications Sweden, 1999). This list corresponds to the one given in the Directive, except that there are no rules corresponding to the latter's provisions regarding minimum rates of pay laid down by law or collective agreement, and terms and conditions in collective agreements for the building sector. Swedish trade unions seek to guarantee minimum wages through collective bargaining processes and, if necessary, through **industrial action**

against ‘social dumping’ in order to pressure a visiting employer (Rönngren, 2005, 2). In the context of heightened sensitivities in the immediate post-enlargement period, the Swedish trade union confederation (LO) spokesman Erland Olausson could warn: ‘This concerns the entire Swedish labour market. Every worker will be affected if dumping of Swedish salaries is permitted...We do not accept social dumping which is competition on the lowest level of salary and working conditions’ (*euobserver*, 2004).

Conclusion

For Swedish authorities the Laval dispute poses acute difficulties in addition to the revealed gaps in the national transposition of the Posted Workers Directive. Sweden was one of the few member states not to impose pre-accession restrictions on future free movement of labour. It is open to the Swedish government to ask the Commission to impose restrictions if there are serious labour problems caused. It would then be up to the Commission to decide what restrictions, and for which period, these might be imposed. The Swedish authorities may be forced to go down the Austrian and German route of seeking a specific further exclusion of the notionally ‘self-employed’ in construction, especially if new member state employers attempt to circumvent any additional restrictions. Meanwhile, in a move that seems likely to be problematic in terms of wider European legal requirements on free competition, the Swedish government has intimated that it now intends to attempt to make illegal the award of public contracts to firms without the appropriate collective agreement. Swedish Minister for Local Government and Financial Markets Sven-Erik Österberg told Swedish public radio; ‘We (in Sweden) have a different tradition than what is usual further south in Europe ... It is extremely important that we show that we can enforce the collective agreement in Sweden also in the future...In light of among other things what happened in Vaxholm, this (issue) has become very pressing’. In a final twist, the Swedish Labour Court, in an apparent step back from earlier certainties that its interim ruling against Laval and Partners did not clash with EU regulation, has decided to seek a preliminary ruling from the European Court of Justice before its own final ruling on the Laval case is issued. The Labour Court considered ‘European legislation to be unclear concerning the issue of whether the

(blockade) actions are compatible with a ban on impeding the free circulation of services and a ban on discrimination ... as well as the directive 96/71/EC on the posting of workers abroad' (*Eubusiness*, 2005). Such a ruling may take at least two years to emerge and therefore adds to the ongoing uncertainties that surround this issue.

For the European project as a whole, this seemingly small labour dispute could potentially undermine much of the legitimacy that has been created for a viable identity of 'European citizenship' in the new member post-communist states of Eastern Europe, reinforcing their perception of having 'second-class' citizenship and being subject to a differential application of the rules. It is arguable that this dispute reveals more about vulnerabilities in the 'Scandinavian model' of labour market regulation than in the European social model as such. Given that the Posted Workers Directive in Sweden (and Denmark) has been implemented via social partner agreement, this notion may be persuasive at first glance. Indeed, the Swedish LO has warned that if Sweden were forced to introduce either national minimum wages and/or legislation to extend the scope of collective agreements, it would mean 'the end of the Swedish labour market model' (Rönngren, 2005). However, the Swedish labour market framework, based on close co-operation of the social partners and non-legally binding collective bargaining arrangements, is precisely the direction in which the social model of Europe is currently evolving, strongly encouraged by the European Commission. 'Soft law' initiatives and voluntary self-regulation by social partners are being promoted, while the 'traditional' Community instruments, such as Directives, are increasingly regarded as an unnecessary 'burden' on business and competitiveness. Yet, as this episode suggests, even in the most favourable circumstances, such voluntary arrangements without a supporting architecture of national law can leave standards of labour protection vulnerable. If anything, such vulnerability is likely to increase as similar disputes arise in other less favourable industrial relations arenas.

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References

- Byggnads (2004a) The blockade in Vaxholm. [<http://www.byggnads.se/byggnads/37935.cs>]
- Byggnads (2004b) 'Byggnads' industrial conflict with Laval un Partneri Ltd affects the whole of Europe' prepared by the Nordic Federation of Building and Wood Working unions.' Official Briefing Document.
- Centre for a Social Europe (2004) 'Accused of wage dumping, Latvian construction group talked on Swedish Union', 20 December. [<http://www.social-europe.org.uk/presscuts/041220afp.htm>].
- Cremers, J. and Donders, P. (Eds) (2004) 'Free Movement of Workers in the EU', CLR Studies 4, Reed Business Information, The Hague.
- ETUC (2005) 'European Trade Unionists to demonstrate on 19 March in support of employment and social rights'. [<http://www.etuc.org/a/839>]
- Eubusiness (2004) Swedish court rules against Latvian company accused of wage dumping. 22 December. [<http://www.eubusiness.com/afp/041222164857.a03jwcp>]
- European Commission (1997) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Official Journal of the European Communities, No L18/4, 21.1.97. [http://europa.eu.int/comm/employment_social/labour_law/docs/directive96_71_en.pdf];
- European Commission (2004) Proposal for a Directive of the European Parliament and of the Council on services in the internal market (presented by the Commission) [SEC(2004) 21], Brussels, 5.3.2004, COM (2004) 2 final/3 2004/0001 (COD) [http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0002en03.pdf]
- European Employment Observatory, (2004) Monthly Newsletter, December No. 21. [www.eu-employment-observatory.net/resources/monthlyupdates0412/latvia_update_dec_04.doc]
- IFBWW (2004) 'IFBWW Solidarity campaign and Trade Union Rights Flash - Support IFBWW Swedish affiliate Byggnads in its conflict against Latvian construction company L & P Baltic Bygg AB!'
- Karnite, R. (2005) 'Dispute over pay of Latvian building workers in Sweden', EIRO online reports, Dublin: European Foundation for the Improvement of Living and Working Conditions. [<http://www.eiro.eurofound.eu.int/2005/01/feature/lv0501101f.html>]
- Kvist, J. (2004) 'Does EU enlargement start a race to the bottom? Strategic interaction among EU member states in social policy', *Journal of European Social Policy* 14, (3): 301-318.
- Ministry of Industry, Employment and Communications Sweden (1999) Foreign Posting of Employees Act, SFS 1999: 678. [<http://www.regeringen.se/content/1/c4/25/18/b0a7c3c4.pdf>]
- Ministry of Foreign Affairs of Latvia (2004) News: Under-Secretary of State of the Latvian Foreign Affairs Ministry meets the Swedish Ambassador to Latvia. 17 November. [<http://www.am.gov.lv/en/eu/news/4341/?ng=5318>]
- Rönngren, B. (2005) 'The Directive on the Posting of Workers – the case of Sweden', Information note. Stockholm: LO. February 4. [[http://www.lo.se/home/lo/home.nsf/unidView/4E20469BC7D5963DC1256FB700470CD5/\\$file/The%20posting%20of%20workers.pdf](http://www.lo.se/home/lo/home.nsf/unidView/4E20469BC7D5963DC1256FB700470CD5/$file/The%20posting%20of%20workers.pdf)]
- Stokke, T. and Thörnqvist, C. (2001) 'Strikes and Collective Bargaining in the Nordic Countries', *European Journal of Industrial Relations* 7, (3): 245-267.
- Vaughan-Whitehead, D. (2003) *EU Enlargement versus Social Europe: The Uncertain Future of the European Social Model*. Williston, VT: Edward Elgar Publishing.

Posting of Workers: Background, content and implementation of Directive 96/71/EC

*Mijke Houwerzijl*⁷

Introduction

Labour migration, whether temporary or not, is increasing all over the world. Within the EU, there has been a gradual increase in a particular type of temporary labour migration: cross-border posting (sending, seconding or subcontracting) of workers. Apart from traditional groups like managers, professionals and specialist technicians, it has become especially popular over the last twenty years to post workers in the construction sector. More recently, the cross-border posting of workers via temporary employment agencies has been increasing. Whilst the employment conditions of the traditional groups are in general well above the statutory minimum, wages and conditions in the construction sector and in temporary agency work are usually at lower levels. The gradually increasing phenomenon of posting from ‘low wage’ Member States to ‘higher wage’ Member States led, in particular in the construction sector, to concerns about ‘social dumping’. Competition concerning labour costs is possible because of the sometimes huge differences in average wage rates between Member States.

The Posting of Workers Directive (PWD) was issued in response to these concerns and extends particular ‘key’ employment protection provisions in force in the host country to workers posted from another Member State. The idea behind the PWD is to create a balance between the stimulation of the free provision of services and the protection of workers in the EU. The central question is whether the PWD has indeed achieved a balance between these two potentially conflicting goals. The dominant angle here is a combined labour law and socio-legal approach: Does the PWD, given its legal context and the form it received in national legislation in the Member States, effectively advance the interests of both the posted and the domestic workers in the host country and not at the same time disturb the free provision of services within the EU?

⁷ This is an edited version of the English summary of the PhD thesis: “De detachingsrichtlijn”, of M.S. Houwerzijl (defended at the Tilburg University, the Netherlands, 28 January 2005). The thesis is published by Kluwer Deventer (ISBN 90.130.2099.2). Mijke Houwerzijl examined Directive 96/71/EC of 16 December 1996 (OJ 1997 L 18/1) concerning the posting of workers in the framework of the provision of services.

Four important terms are elaborated upon: after a description of the terms ‘posting’ and ‘worker’, the problem of ‘social dumping’ is discussed. This term is mentioned in many texts on the Directive without an explanation of its exact meaning in this context. What does social dumping mean, and where does this term come from? In international social policy documents from the late 19th century, it is used to refer to essentially two related phenomena: (i) in connection with the movement of capital: when multinational companies relocate their businesses from highly regulated economies towards less regulated economies (*das Warenkonkurrenzargument*); (ii) in connection with the movement of labour: when this movement takes places within and across borders from less regulated economies towards more regulated economies with significantly better working conditions and job opportunities, at the expense of regulated working conditions (*das Wandererkonkurrenzargument*). The fourth term that needs explanation is contained in Article 3(7) of the Directive: the so-called ‘favour principle’. This principle implies that, in a comparison of working conditions of the ‘host state’ and the ‘home state’, the better working conditions for the posted worker will apply.

Historical background and the adoption process of the PWD

In the early 1960s, when the Common Market goal of the EEC was to be established, the content of the four freedoms (of workers, services, establishment and goods) had to be defined. As a main rule it was stipulated that all workers, whether permanently or temporarily moving to another Member State, fell under the free movement of workers. The EU law on the free provision of services may, however, interfere with the law related to the free movement of workers. Such a tension can be seen, in particular, in situations where an employer exercises the right to provide a cross-border service by posting workers to carry out the work.

Although posting and temporary employment in general was not as popular at the end of the 1950s as it is today, it did take place on a small scale. In discussions about the boundaries between the four freedoms in the EEC Treaty, it was recognised that the provision of services actually involved specialised service workers; when they are needed to install a machine or to manage a new plant of a company

established in another Member State, they are in fact part of the service and need to cross borders to provide the service. Hence, an exception to the main rule was created for this ‘very specialised, technical or managerial *key personnel*’: they could be posted to another Member State under the freedom to provide services. The strict limitation of this exception can still be traced in the scope of secondary free movement of workers legislation, as laid down in, e.g. EEC Regulations 1612/68 and 1408/71 and Directive 68/630. This legislation contains a general affirmation of the right of all workers in the Member States to pursue the activity of their choice within the Community, irrespective of whether they are permanent, seasonal or frontier workers or workers who pursue their activities for the purpose of providing services.

So, posted workers who do not belong to the *key personnel* mentioned above and who are nationals of one of the Member States used to be exclusively covered by the principle of the freedom of movement for workers. Also in secondary legislation based on the freedom to provide services, there used to be a standard sentence referring to the free movement of workers where the movement of *all* workers was concerned. The PWD, however, is based only on the freedom to provide services. What is it that happened between the early 1960s and 1996 that may explain why the issue of posted workers was, at first, dealt with under the free movement of workers and later exclusively under the freedom to provide services?

In hindsight, the reason can be deduced from case law of the ECJ. The ‘landmark’ decision was made in the case *Rush Portuguesa* of 1990. The circumstances in this case are as follows. On the TGV Atlantique construction site in France, work was subcontracted to Rush Portuguesa, a Portuguese company that brought workers in from Portugal to perform the ‘service’. According to the French immigration authority, Rush Portuguesa broke the law because no work permits had been issued for these posted workers and they were paid well below the French wage standards. At that time, Portugal was a new member of the EU and was in a period of transition, in which the legislation on the free movement of workers was not yet applicable to workers from Portugal (therefore they were seen as third-country nationals for whom work permits were required). Meanwhile, the

other freedoms, among which the freedom to provide services, could already be invoked by companies or persons from the new Member State. So, *Rush Portuguesa* defended its position on the grounds of its right to the free provision of services. The ECJ upheld this position.

Since *Rush Portuguesa*, the concept of the free provision of services was to be interpreted as covering a situation where there is a temporary movement of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer. So, ‘an undertaking established in one Member State providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from its own Member State for the duration of the work in question’. In such a case, the Court argued, the principle of freedom of movement for workers is not involved because the posted workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State. For this reason, the authorities of the host Member State may not impose on the supplier of services conditions relating to the obtainment of work permits. However, the Court also stated that ‘Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established’.

It can be argued that, with its decision in *Rush Portuguesa* and *VanderElst*, the ECJ tried to further both the interests of service providers in the context of creating the single market (Europe 1992) and the interests in a right to free movement of non-EU nationals who permanently reside in the EU. As the right to free movement of workers in the EU is only granted to EU nationals, the ECJ decision to ‘replace’ posted workers in the framework of the provision of services gives ‘third-country workers’ at least a passive right to free movement. This right only exists during the period that they are posted by their EU employers in the framework of the provision of services in another Member State. So, in these decisions the Community goal of a border-free EU single market and the conflicting national interests in border

controls to keep immigrants out are reconciled as far as the movement of posted 'service workers' is concerned. Very recently, the ECJ confirmed this case law in *Commission v Luxembourg* (Judgment of 21 October 2004, Case C-445/03) by stating that the obligation in Luxembourg for services providers from another Member State to obtain work permits for posted workers with the nationality of third countries must be seen as an unjustified infringement on the freedom to provide services within the EU.

With regard to the protection of domestic workers and national systems of labour law, the ECJ ruled that host states had the right to require all or a part of their employment regulations and extended collective agreements to apply to posted workers if such regulations and collective agreements were also applicable to domestic workers. This 'working-conditions-of-the-host-country principle' (in short host-country principle) reveals another important aspect of the legal position of the 'posted worker': the employment contract of a posted worker may be influenced by more than one legal system, as the employment contract is concluded in one Member State (state of origin or home state) and the performance of the service takes place in another Member State (host state). Here we reach the field of the conflict of laws.

In 1980, the Member States signed the Convention on the Law Applicable to Contractual Obligations (the 'Rome Convention'). The Convention came into effect in 1991. Articles 6 and 7 contain rules for international employment contracts. In principle, posted workers are temporary migrants. The main question to be answered as far as their working conditions are concerned is: What mandatory statutory labour law and extended collective agreements are applicable to posted workers? Those of the host state or those of the home state, or perhaps of both? The basic rule can be found in Article 6.2.a: predominant is the law of the country where the worker habitually carries out his work. However, Article 7 defines rules of a special mandatory character; these rules may apply even if a worker is only temporarily working in a country.

Because the Rome Convention is a classic treaty between States and

not or not yet a part of EC legislation, the ECJ has no immediate power to interpret this Treaty. Because of this vacuum, there is still no Community view of the ECJ about special mandatory law and international public order provisions. The same is true for the so-called favour principle, which is contained in Article 6 (and probably also in Article 7, but this is sometimes disputed). This principle is intended to protect the worker against the choice of the legal system with the worst employment conditions by stating that the most favourable conditions must prevail. But the Rome Convention does not give any clue about the method of comparison. How are we to decide which working conditions are the most favourable? Should we compare each provision on its own, or a group of rules about the same subject or all working conditions as a whole? Up to now, each Member State is allowed to develop its own method. Seen in a conflict of laws perspective, the PWD is in fact meant to fill in the gap that Article 6.2.a of the Rome Convention creates for the protection of temporary migrant workers. The PWD makes the optional character of Article 7 obligatory, and defines what subjects of employment law can be seen as ‘special mandatory’. It also stipulates the favour principle, although the Directive does not specify the method of comparison either. Before the Rome Convention was adopted as a ‘classic treaty’ between Member States, the European Commission had already tried to lay down conflict rules for employment contracts in Community Law. Following the adoption of Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, in 1972 the Commission proposed a Regulation about conflict rules in employment contracts. This proposal was based on the right to free movement of workers. With this proposal, the Commission wanted to make the equal treatment principle in Article 48(2) EEC (now Article 39 EC) about wages and other employment conditions more concrete. The proposed instrument contained an extensive list of employment conditions for which, minimally, the level of protection of mandatory law of the host state would apply, also in the case of temporary migration. Academics, especially those specialised in international private law, were, however, very critical about the proposal: it was supposed to go against the basic principle in contract law, the contractual freedom of the parties. From a labour law perspective, however, greater

importance was attached to the stimulation of ‘acceptable’ (among highly skilled) and the protection against ‘unacceptable’ (among the less skilled) types of mobility. The motto of the labour lawyers was: national mandatory rules are also international mandatory rules. The extensive list of ‘host country law’ items was intended to be a safeguard against influxes of cheap labour by refusing, as far as possible within the boundaries of the private law character of employment contracts, to allow pay discrimination between nationals and non-nationals. The European Commission presented an adjusted proposal in 1976, but when the Rome Convention was signed in 1980, the proposed Regulation was officially withdrawn.

After the EEC’s enlargement with the UK, Ireland and Denmark in 1973, Greece in 1981 and Portugal and Spain in 1986, the twelve Member States were much more diverse as regards labour law standards, socio-economic levels of welfare, pay levels and industrial relations structures than the EEC Member States of the early days. Thus, the original idea of the founders of the EEC that in the course of time upward social harmonisation would take place became more and more utopian. With the single internal market operation, which was launched in 1985 by Jacques Delors, then President of the Commission, and came into force in 1993, the idea of the harmonisation of social law was farther away than ever: further integration had to come from economic competition between Member States. About the desirability of competition on wages, no clear statement was made because of the different views existing in the Member States. And due to different opinions in the Member States about its necessity, the so-called ‘social dimension’ of the EC stagnated on essential points. To moderate the emerging competition on wage rates in the construction sector, the European Commission proposed to introduce a so-called ‘labour clause’ in the Directives concerning public works and public supply contracts of the EC. When this initiative stranded in 1989, the social partners in the construction sector at the European level became a strong force behind the proposal for the PWD, which was officially launched in 1991.

The European Federation of Building and Wood Workers (EFBWW) especially and, later on, also the European Construction Industry

Federation (FIEC) successfully lobbied for a ‘strong’ PWD. Their main drive was the protection of national systems of labour law by stating that the employment conditions in the host country had to be applicable to posted workers from the first day of posting. With this statement, they intended not only to support minimum employment and social conditions for posted workers but also to reinforce fair competition between domestic and foreign workers and companies. While the European Commission’s role was that of conciliator between the ‘anti-social dumping advocates’ and the ‘free competition advocates’, in the European Parliament the support for ‘fair competition’ was definitely stronger than the opposition against it. Within the Council, opinions were strongly divided, with the recipient States of posted workers favouring the proposal, and the States exporting labour having their reservations or being strongly opposed. It was only after the enlargement of the European Union in 1995 with Austria, Finland and Sweden (‘high wage countries’) that the deadlock in the discussions between supporters and opponents was broken in favour of the former group of Member States.

Before the Directive was adopted, there was much criticism against its legal basis. Directive 96/71/EC is based on Article 47 (ex Article 57), paragraph 2, and Article 55 (ex Article 66) of the EC Treaty. These Articles are in the part of the Treaty that establishes the freedom to provide services. The legal basis of the PWD was legitimised by the argument that, in order to promote a true single market, a framework of rules for posted workers would have to be created in order to avoid ‘unfair competition’. From a political point of view, the undoubted merit of this legal basis is that it facilitated a qualified majority vote. Without this, the PWD initiative would probably have stranded. This creative and ‘opportunistic’ use of legal basis can only be convincingly explained by the political circumstances of the late 1980s and early 1990s: the British Conservative Government tried to veto almost everything that had to do with social policy. From a legal point of view, the disadvantage of the choice of this legal basis is that it suggests that the PWD is only intended to facilitate the cross-border provision of services. That it also serves to protect employees is by no means evident from its legal basis. Despite other expectations, the UK, as a driving force behind the opposition to the Directive, did not

challenge the legal basis of the PWD before the ECJ. And although a question about its legal basis was raised in the preliminary reference to the Court of the *Arblade* case, the ECJ in turn chose not to dive into this matter.

The idea behind the PWD

The idea behind the PWD was to create a balance between the stimulation of the free provision of services and the protection of - posted - workers in the EU.

Three goals are mentioned in the recital of the Directive:

1. to increase the provision of cross-border services through the enhancement of legal certainty concerning the employment conditions of posted workers;
2. to guarantee that the transnational provision of services is only promoted within a climate of 'fair competition'. The term fair competition is intended to include the prevention of social dumping;
3. to ensure that the transnational provision of services is only promoted hand in hand with measures guaranteeing employment protection of the posted workers concerned.

In practice goals 2 and 3 reinforce each other.

This reinforcement can also be seen in the rationale behind Article 48 of the EEC Treaty (now Article 39 EC): when the EEC was founded, the different wage rates in the six original Member States were seen as potentially problematic because this might lead to competition centred on labour costs. A revealing detail may be that, after Italy, especially the Netherlands was seen as a threat because of its low wage rates in comparison to the other countries (Belgium, Germany, France and Luxemburg). To 'tackle' this fear of 'social dumping', one of the solutions was the inclusion in Article 48 EEC Treaty (now Article 39 EC) of the equality of treatment of workers in their access to the labour market, wages and other working and employment conditions. So, the free movement of workers was stimulated only on the condition of their equal treatment. In 1974, the ECJ confirmed that this provision was intended not only to protect the migrant workers but also to protect domestic workers from competition concerning employment conditions with migrant workers (Case 167/73 *Commission v France* [1974] ECR 360, paragraph 45).

The content of the PWD

The PWD consists of nine provisions that can be divided into four categories:

1. scope and definitions (Articles 1 and 2);
2. terms and conditions of employment for posted workers (Article 3);
3. measures to ensure information about and compliance with the Directive (Articles 4, 5, 6);
4. technical details (Articles 7, 8 and 9) that need no further explanation.

1. Scope and definitions

Article 1 defines the companies that are allowed to post workers in the framework of the provision of services; this enhances legal certainty and transparency. This can be seen as strengthening goal 1 (promotion of the free provision of services). However, one of the three situations of posting defined in Article 1(3) potentially runs counter to goal 2 (fair competition). This provision states that (a) the subcontracting of workers like in the case of *Rush Portuguesa*, (b) intra-company or intra-group secondments (the expatriation of workers) and (c) the cross-border hiring out of workers by temporary employment agencies all must be defined as the posting of workers in the framework of the provision of services. The last type, the posting of workers via temporary agencies, was explicitly mentioned by the ECJ in *Rush Portuguesa* as not falling under the freedom to provide services but under the free movement of workers. Here, the ECJ drew the line where it can no longer be denied that the posted workers indeed have access to the labour market of the host country. So, in this respect the PWD goes further than the case law of the ECJ.

If we consider the definition of ‘posted worker’ in Article 2, it becomes clear that this provision is aimed at enhancing legal certainty (goal 1). The non-defined, open character of posting in Article 2(1) also promotes the use of the freedom to provide services (goal 1), but is at the same time problematic in the light of the protection of workers (goals 2 and 3). In the PWD, the temporary character of posting is only linked to the duration of the service abroad. But what if providing the service lasts more than one or two years? When does the temporary character of posting change into a more permanent type of

migration? It would have been better if the PWD had introduced - at least for the postings mentioned under (a) and (c) - the same time limit as Regulation 1408/71 with regard to social security. Furthermore, the unlimited duration of the posting complicates the distinction between situations falling within the freedom of establishment and the free movement of workers on the one hand, and situations falling within the freedom to provide services on the other hand.

2 Terms and conditions of employment for posted workers

With regard to the terms and conditions of employment for posted workers, the key provision is Article 3(1). This Article states that Member States are to ensure that companies, falling within the scope of the Directive, guarantee workers posted to their territory the terms and conditions of employment laid down by mandatory law including collective agreements which have been declared universally applicable insofar as they concern the construction sector referred to in the Annex of the Directive. This 'host state principle' only regards terms and conditions concerning the duration of the work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, the conditions of hiring-out of workers, protective measures for pregnant women, for women who recently gave birth, for young people and children, and equality of treatment between men and women. Hence, the Directive determines the nature of the labour standards, which the Member States must apply as well as the substance of these standards. This key provision contains all three goals of the PWD. It states the standards for the minimum protection of posted workers (goal 3); it furthers 'fair competition' by guaranteeing equal treatment between posted and domestic workers in the host country as far as the mentioned subjects of employment protection are concerned (goal 2); and it enhances the legal certainty of service providers by the formulation of subjects regulated minimally by the host country and by leaving the other subjects of an employment contract to be decided on by the contracting parties. Especially the inclusion of minimum rates of pay and paid holidays in the subjects regulated by the host country shows a balanced approach to the three goals.

However, legal certainty is not served by Article 3(10). This paragraph

potentially strengthens goals 2 and 3 as regards the level of implementation legislation as it gives the Member States two important options: first of all, they may make more working conditions applicable to posted workers than stated in Article 3(1) as long as these can be seen as public policy provisions. As a second option, Member States may decide to apply the PWD also to collective agreements in sectors other than the construction sector. A balance between legal certainty for service providers and protection of posted and domestic workers would have been created if the first option of Article 3(10) would have been left out and the second option had had an obligatory character. The political compromise to limit the obligatory part of the PWD to extended collective agreements in the construction sector (see the Annex to the PWD) cannot logically or legally be defended. It leads to quite arbitrary differences in the protection of posted workers (goals 2 and 3) and does not enhance the legal certainty and transparency of the applicable rules either (goal 1).

The favour principle is stated in Article 3(7) of the PWD as a guarantee that the host-country principle only applies when working conditions in this country are better than in the home country. It is also stated that allowances specific to the posting are to be considered part of the minimum wage, unless they are paid in reimbursement of expenditure on travel, board and lodging, e.g. A solution that would have been more in line with the intentions behind the PWD would be to oblige service providers to pay these costs for the posted workers. Such an obligation would have stressed the distinction between the passive mobility of a posted worker because his employer asks him to go and the active mobility of a 'permanent' migrant worker who decides himself to exercise the right to the free movement of workers.

3 Measures to ensure cooperation on information and compliance with the Directive

Under Article 4(3), a Member State acting as a host country is obliged to give information to the general public about the working conditions applicable to posted workers. Herewith transparency and legal certainty for service providers are served (goal 1) and also the protection of posted workers (goal 3). Whether fair competition (goal 2) will be furthered is more difficult to say: bona fide companies will

be stimulated to provide more cross-border services with posted workers if clear information about the employment conditions in the host country is easily available. Another advantage of good information is that malafide companies can no longer hide behind the argument that they were not able to find information about the host country's conditions. However, supplying reliable information will not deter companies from trying to post workers on a cheaper basis than legally allowed. To combat this unfair and often illegal competition only measures to ensure compliance with the PWD will help.

In this respect, Article 4(1) of the PWD obliges the Member States to designate one or more liaison offices or one or more competent national bodies. One of the tasks of these national bodies, stated in Article 4(2), is to reply to reasoned requests from equivalent authorities in the other Member States 'for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities'. Furthermore, Article 5 states that Member States are to take 'appropriate measures in the event of failure to comply with this Directive'. However, except for the jurisdiction rule in Article 6 no concrete measures are required or recommended. This is definitely a lost opportunity: at least the responsibility - or better still liability - of the service provider and the receiver of the service for the payment of wages and other employment conditions of the posted workers should have been included. So, the main problem with the enforcement rules in the Directive is that they do not contain concrete sanction mechanisms. Therefore, they must be called weak. It seems that the PWD is mainly concerned with adding to the promises, which are to be made to posted workers, rather than with securing that the promises are actually kept. Much therefore depended on the way in which the Member States implemented the PWD: Did they repair this potential imperfect balance between the protection of workers and the obligations of the service providers when it comes to compliance measures or not?

Implementation of the PWD

1 Scope and definitions

A clear provision such as Article 1(3), which defines the three possible posting situations, is not transposed precisely in many Member States.

This increases the risk of confusion between national and European definitions of posting, which may lead either to withholding from posted workers the protection which they are entitled to on the basis of the PWD or to withholding from service providers the possibilities they have under the PWD. As far as the potentially unlimited duration of a posting mentioned in Article 2(1) is concerned, no Member State appears to have taken the initiative to repair this at the national level. Probably this is in conformity with the intention of the PWD. Still, the text seems to leave some room for Member States to introduce a fixed time limit. From the legal certainty perspective, the introduction of a fixed time limit can only be done at EU level by an adjustment of the PWD or by an adjustment of Article 6(2) of the Rome Convention. The latter option would be better because the EC is already preparing a Regulation that is to replace the Rome Convention.

2 Terms and conditions of employment for posted workers

For a balance between the goals of the PWD, the Member States' reliance or non-reliance on the options mentioned in Article 3(10) is decisive. As mentioned above, the best result to reach would be non-reliance on the first option (broader appliance of the host-country principle) and full reliance on the second option (extending the scope of the universally binding collective agreement provisions to all sectors, not only to the construction sector). Except for the Netherlands and Germany, all Member States that have and frequently make use of a system of *erga omnes* collective agreements applied the second option. The first option, however, is also applied by seven Member States, which raised concern in the European Commission. If we look closely at the working conditions added to the obligatory working conditions stated in Article 3(1), it seems, however, that most of these national public policy provisions only contain measures to enhance the compliance to the terms and conditions listed in Article 3(1). More detailed research is needed before a conclusion about proper or improper reliance on this option can be reached.

3 Measures to ensure cooperation on information and compliance with the Directive

Most Member States do not seem to be very active in making their information available to foreign service providers and their posted

workers. In its evaluation, the Commission proposes to solve the lack of easily accessible information by electronic means: an EC website is to contain links to all country information. In the meantime, this EC website has become operational,⁸ but many Member States still have no website of their own. This reluctant attitude on the part of Member States when it comes to information undermines both goal 1 (transparent information for service providers) and goal 3 (reliable and easily accessible information for the protection of posted workers). It also makes a bad, protectionist impression, which does not serve the intention behind goal 2 (fair competition). How can you ask for fair competition from cross-border service providers if you do not act fairly as a host country? Here the logic of the prisoner's dilemma applies.

As far as the compliance provisions in Articles 4 and 5 are concerned, the implementation measures taken by the Member States differ greatly. Some States implemented these by introducing special, often severe control measures, others did nothing at all. In its evaluation, the European Commission only focused on the former group, warning that the national control measures might be disproportionately limiting the free provision of services if administrative burdens were to turn out higher for cross-border service providers than for domestic companies. This would not be in line with goal 1. The other group of States leaves room not only for bona fide service providers but also for their malafide colleagues, as they do not have to be afraid of sanctions in the host state whatsoever. That this does not serve goals 2 and 3 does not seem to bother the Commission. This reveals unbalanced attention for only one of the three goals that the PWD is intended to reach.

Implementation in the Netherlands

The PWD was officially implemented in the Netherlands by the Employment Conditions for Cross-Border Work Act (WAGA). The Act entered into force on 24 December 1999.

The parliamentary history of the Act perfectly illustrates the attitude of the Dutch government. In brief: the Bill was sent to the House of Representatives in the spring of 1999. In the parliamentary debate, the central motto of the Government became clear: 'We do not want to

⁸ http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm#7

transpose more or less than necessary'. Thus, none of the optional provisions in the PWD were considered in the Bill. This attitude corresponds with the general Dutch conduct concerning the implementation of EU Directives. A majority of the Parliament objected to the limitation of the collective agreement part of the Directive to the construction sector and stated that companies in other sectors would also want equal treatment on this point. The system of universally applicable collective agreements is widely spread in the Netherlands. Thus, not broadening the scope of the Bill through Article 3(10) of the Directive would mean that Dutch companies and workers outside construction would not be able to compete with foreign colleagues on an equal footing. This discussion dominated the parliamentary debate, but did not lead to amendment of the Bill.

In the autumn of 2003, the topic was raised again. This time related to a debate about a transitional arrangement for the free movement of workers from Eastern European countries after accession to the EU on the 1st of May 2004. Until June 2004, the government kept defending its position and a majority of the Parliament still accepted this, despite continuing attempts by supporters of 'scope broadening' to put the item on the legislative agenda. In the summer of 2004, however, the Government made a U turn, because Dutch employers had complained about unfair competition related to the influx of cheap posted workers. By the end of 2004, a Bill was sent to Parliament proposing to broaden the scope of the Act to all universally applicable collective agreements. If this Bill is passed, the Netherlands will have implemented Article 3(10) in the most balanced way, by leaving aside option 1 and fully applying option 2.

Unfortunately, such a positive comment cannot be made when it comes to the cooperation on information and compliance part of the Dutch implementation. In what way is the information on the terms and conditions of employment referred to in Article 3(1) of the PWD made generally available to workers and employers from other Member States (as required in Article 4(3) of the PWD)? Although it is not easily found on the website of the Ministry of Social Affairs (<http://www.szw.nl>), the Dutch version of the site refers to a free phone number that can be dialled by individuals and companies to

obtain information. Furthermore, it provides the possibility of submitting questions by e-mail. There are no plans to improve the accessibility of the information to the general public in the near future (in spite of the strong recommendation to do so in the Evaluation of the EC Commission).

According to Article 5 of the PWD, the government is responsible for supervising compliance with the Act and the other mandatory provisions applicable. Therefore, government is to ensure in particular that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. However, because the Dutch enforcement system is mainly based on private law, the Dutch government does not have special control mechanisms to prevent fraud and to assure correct application of the Directive. It is left to the posted workers and the social partners involved to ensure the Directive's correct application and, if possible, to prevent fraud.

In this respect, Article 4 of the Dutch Act transposes Article 6 of the PWD (Jurisdiction) in the Code of Civil Procedures. Thus, it is safeguarded that the Dutch judge has jurisdiction to decide in judicial proceedings started by a posted worker. Unions are entitled to start judicial proceedings on behalf of posted workers or on the basis of their own interest in enforcement of the Directive. This is laid down in Articles 3.305a and 305b of the Dutch Civil Code. Especially for the statutory provisions of the Dutch Act and of the other legislation applicable, this may be helpful. Where collective agreement provisions are concerned, the Dutch legislation on declaring collective agreements generally binding entitles unions and employers' organisations to institute proceedings in their capacity as parties to the collective labour agreement. Government intervention with regard to the PWD may only come from the Labour Inspectorate, in its capacity of liaison office. The Inspectorate is allowed to check the pay slip of a posted worker. In practice, this probably only happens in the course of an investigation that is targeted at illegal workers. So the 'enforcement gap' in the PWD is only deepened further by the mainly private law sanctioned enforcement system in the Netherlands. All in all, the

Dutch implementation legislation and enforcement practice are not without problems.

The legal context of the PWD

Depending on the circumstances in a particular situation, Article 7 of the Rome Convention will still have some 'residuary' meaning for posted workers. Furthermore, it can be argued that especially Directive 91/533/EEC (on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship) may strengthen the position of the posted worker in relation to his employer. With regard to the construction and public works sector, especially Directive 2004/18/EC (on the coordination of procedures for the award of public work contracts, public supply contracts and public services contracts) and ILO-Convention no. 94 (on labour clauses in public contracts, 1949) contain supplementary enforcement instruments to strengthen fair competition and to enhance the social protection of the posted workers (goals 2 and 3). The need for a more comprehensive approach of posting becomes clear when we consider the differences between the EC rules for posted workers on social security (Regulation 1408/71), migration (Regulation 1612/68 and Directive 68/360) and employment conditions (PWD).

I have also analysed the case law of the ECJ concerning posted workers. Between 1996 and 2002, there have been five judgments on conflicts in which wages and working conditions of posted workers were involved: *Guiot*, *Arblade*, *Mazzoleni*, *Finalarte* and *Portugaia*. The main approach in these cases starts with a comparison of protection in the host state and that in the state of origin. If protection is the same or almost the same, the social protection of the state of origin has priority. From a provision of services perspective, this makes sense, because the service provider should not be more restricted in his movement than necessary.

In the *Mazzoleni* case, the distinction between posting and frontier labour was blurred. The ECJ uses this argument in its reasoning to make an exception to the main rule. The question was which minimum wage had to be paid to the French posted workers in Belgium, French or Belgian minimum wage? 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 if thus a better protection of the workers is served. And indeed, comparing on the level of gross wages, the Belgian minimum wage turned out to be much higher than the French minimum wage. However, according to Mazzoleni, taking into account taxes and social security contributions, it turned out that net wages, or ‘the overall positions’ were in fact quite similar. 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 this is defensible under the free movement of services, this exception from the main rule runs counter to the idea behind the PWD that the comparison should be made between gross wage levels. And from Recital 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 PWD as well. The view that gross wages should be decisive is supported by practical considerations: Net earnings are essentially dependent upon the worker’s personal situation. An overall comparison of the national regimes involved creates uncertainty about the outcome in each individual case.

Until 2001 the case law showed a tendency to overlook relatively small differences (approx. 10 %) in social protection and wage levels between Member-States that are more or less on the same socio-economic level. Except for *Rush Portuguesa*, in all the judgments about the posting of workers, the parties were established in the ‘original’ six Member States. Especially Belgian (*VanderElst*, *Guiot*, *Arblade*, *Mazzoleni*), French (*Arblade*) and Luxembourg (*Seco*, *Guiot*) labour law regulations were involved and only superficially compared. The judgments in *Finalarte* and *Portugaia* changed this picture. Here, ‘high-level’ German labour law was compared to its ‘low-level’ Portuguese and English counterparts. What guideline did the Court develop in these cases, in which the gap between the wages in the host country and the wages in the home country is much wider?

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 entitlements of their construction workers. It also demanded them to provide information for the calculation of those contributions. According to the German Posting Act (*AEntG*) foreign employers in construction works were obliged to do so. Still, the foreign firms objected to these obligations and stated that the German rules were incompatible with the freedom to provide services. 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 into 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* was only a 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 be the case not only on paper 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. 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 language problems must not be too difficult for the average posted worker. Finally, the ECJ 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. This means 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 posted workers, instead of the indirect payment through the ULAK? It is only a suggestion of the ECJ, not an order.

In the *Portugaia* case, the ECJ had to consider a new point: in Germany, and also in other countries like 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 at 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 an unjustified unequal treatment with regard 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 may prove to have revealed a serious loophole for foreign service providers to escape the collective agreement part of the PWD. The only real solution for this problem that does not run counter to EC law and serves the protection of workers, 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. However, 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.

In October 2004, the first judgment with an interpretation of the PWD was handed down: in the *Wolff & Müller v Pereira Félix* case, the main contractor's liability for the unpaid minimum wages of a posted worker by the subcontractor was questioned. According to the main contractor, this liability clause in the *AEntG* was an infringement of the freedom to provide services, as it made necessary intensive control mechanisms with more administrative burdens for foreign subcontractors. This would make it less attractive for foreign building companies to carry out construction activities in Germany. The ECJ ruled, however, that the liability clause in the *AEntG* could be seen as an appropriate measure that Member States have to take according to Article 5 of the PWD in the event of failure to comply with this

Directive. In conclusion, it is clear that the ECJ case law in the field of posting contains both positive and negative features for the effectiveness of the PWD:

1. It is positive that the ECJ recognises the substantial differences between the wage level in the UK and Portugal on the one hand and Germany on the other hand. However, the requirement that the protection of workers must be reached with effective and proportionate measures may be dangerous for too rigidly composed national Posting Acts.

2. It is also positive that the ECJ did not reject the *AEntG* on the ground that is too protective. Decisive is to what extent its rules are to the advantage of posted workers. 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 the ULAK, the posted worker will refrain from trying.

3. Positive as well is the recent judgment in *Wolff & Müller* that a liability clause is an appropriate measure to make companies comply with the obligations of the PWD.

4. 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. Fortunately, the ECJ formulated this judgment clearly as an exception to the main rule, but it is still a sign that is not to be ignored totally.

5. What may undermine the PWD is the rightfully forbidden unequal treatment in *Portugaia* between domestic employers and foreign EC employers with a collective agreement at company level. This loophole can only be removed at the national level. Otherwise let's hope that many transnational service providers will think the game is not worth the candle.

Finally it is worthwhile to analyse the bilateral agreements that social partners in the construction sector have concluded in a reaction to the *Guiot* judgment of 1996. In this case, a service provider protested against double charges in both the host state and the state of origin for contributions to so-called social funds in the construction sector. Construction workers often work under short-term contracts. In these circumstances, statutory labour law and social security law do not

necessarily provide these workers with adequate social protection. Holiday rights, for example, are hard to realise for a worker who works for many different employers in the same calendar year. To solve this problem, social partners have often concluded collective agreements to create special funds for additional workers' rights like holiday pay and bad weather payments. If these collective agreements are declared universally applicable, all employers in a particular country or region have to contribute to this fund, including foreign service providers with workers posted in the construction sector.

In *Guiot*, the ECJ ruled that the service provider only had to pay contributions in his own country. Social partners in the construction sector criticised this judgment because the ECJ had only considered the type of social funds, not the level of payment that workers could derive from the funds and thus not the equivalence of the schemes. Therefore, the Belgian and Dutch social partners took the initiative to repair this judgment: a comparison of their social funds led to the conclusion that workers in both countries were provided employment conditions at an equivalent level. This led to an agreement on the suspension of the application of the social fund of the host state. As a result, Belgian and Dutch service providers only had to contribute to the funds in their own countries and were no longer confronted with unjustified double charges. The German ULAK took a similar initiative, and has concluded bilateral agreements with, e.g., French, Dutch, Belgian and Austrian holiday funds. These bilateral agreements are a positive development, as it is a good way of avoiding double charges without creating undue pressure on funds with high levels of protection. They could also give an incentive to collective bargaining at the European level, which would be advantageous for the social dimension of the EU.

Final remarks

The aim of the PWD - to create a balance between the stimulation of the free provision of services and the protection of workers in the EU - is not fully reached. The analysis shows deficits on all three levels (content, implementation and context of the PWD), which, all in all, disturb the balance in favour of the promotion of services. To restore the balance, it would help if the text of Directive 96/71 would be modified as regards the Article 4 and 5 measures. These should be

much more concrete and should oblige Member States to take enforcement of the working conditions of posted workers in the host state serious. A liability clause for the user company would probably be most effective, and would, at the same time, limit the costs of enforcement for the state. Apart from this, a time limit to postings should be introduced and an obligation for service providers to pay for travel and accommodation expenses of their posted workers.

From a strategic point of view, however, priority should be given to the creation of a balance through national implementation measures and through a better practical application and operation of the PWD as it is today. This can be done if the political will is present in both sending and receiving Member States. Simultaneously, also the European Commission and the Council should be more genuinely concerned about reaching a balance between the goals of the Directive. This would be in contrast to its current interest, which is focused much more on removing the obstructions to the internal market and on promoting the free provision of services, regardless of whether these service activities increase through bona fide or through malafide service providers and/or temporary employment agencies. A clear example of this attitude was the proposal for a EU Services Directive. In this proposal, COM (2004/0002), specific provisions were included (Articles 24 and 25) about the posting of workers, which make the monitoring of working conditions in the host state even more difficult and only give rather weak guarantees at the EU level in return.

Of course, the European institutions are right in not wanting to tackle the protectionism in too rigid administrative procedures; and the promotion of mobility and intra-state trade in itself is a legitimate and desirable goal as well. However, the EU must show at the same time that it cares about enforcement and letting control mechanisms really work: for instance by supporting initiatives to make EU information about working conditions accessible through an EU database of collective agreement provisions. Why did it take so long, not only at the national level but also at the EU level, to build a really informative website that links to national sites and perhaps even compares the working conditions in the various Member States both in a statutory

respect and with regard to collective agreements? The conclusion must be that policy-makers do not give priority to these things. In the long term, however, it will be in the interest of all parties involved that only bona fide mobility is promoted. Only then will European citizens, workers, employers and others alike stay or become convinced that further European integration is in their interest.

On 1 May 2004, the accession of ten new Member States became a fact. Given the huge gap between the wage rates in the new Member States and the old ones, this will have a great impact on the discussion about and the practice of transnational posting and the labour standards applicable to a posted worker. In this respect, it should not be forgotten that a rather imperfect instrument such as the PWD might in practice at least prevent the most severe social dumping. In the present circumstances, the PWD might be the 'best compromise' between the threat of social dumping and the need of the decent protection of posted workers (goals 2 and 3) and the freedom to provide services for transnational providers (goal 1).

However, we should not lean back after this conclusion. From a social-policy point of view, the fundamental problem with the - albeit limited - possibility of wage competition under the PWD, is the long-term effect that this will have on the national labour standards in the host states: although domestic lower- and middle-class workers will not be confronted with a 'speedy race' to the bottom, they will experience that they are 'walking' down towards the minimum EU level. Only the best educated and better paid workers may still profit from upward social harmonisation. This runs counter to one of the aims which inspired the creation of the EEC: Article 117 of the EEC Treaty (now Article 137 EC) states that it is necessary to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation 'while the improvement is being maintained'.

When Does a Contract for Services become a Contract of Service?

Gerry Lean - Director of Industrial Relations, Construction Confederation

The UK construction industry stands apart from other industries with regard to its employment practices. The 1960's saw the growth of a system known as "the lump" which was a practice whereby employers engaged operatives on a cash-in-hand basis thereby avoiding tax and national insurance payments. This became particularly relevant in the late 1960's when the Government introduced something called "selective employment tax" (SET). This was a tax an employer had to pay specifically related to employees who were involved in the services industry sector. It was designed to encourage manufacturing activity and curtail the growth in what at that time was seen as an unproductive element of the economy! – Services. However, as is sometimes the case with initiatives designed to achieve one objective they can bring with them an unintended effect. In this case the building and construction sector was faced with additional employment costs, which acted as a driver to promote self-employment and "cash-in-hand" arrangements.

During the early 1970's the Inland Revenue reacted to the growing problem of "the lump" by introducing a new tax scheme specifically for the construction industry. This scheme introduced the CS60 and 714 systems whereby employers could engage workers on a self-employed basis and either deduct tax at source (CS60 systems) or pay gross but notify the Inland Revenue of payments (714 systems). This arrangement meant that employers were complying with their legal obligations but avoiding employment taxes associated with direct employment. Over the following 2 or 3 decades the construction industry in the UK became "conditioned" to the concept of self-employment at will. Employers were offering operatives the opportunity to work on the books or self-employed doing precisely the same work. Because of the tax and national insurance advantages to the individual many operatives chose to work on a self-employed basis and the culture of the industry became one where self-employment was seen as an entitlement.

In reality the relationship between the operative and the employer was much more likely to be one “master and servant” than contractor and service provider. The construction industry became populated with operatives who were for all practical purposes employees but paid on a self-employed basis.

During the middle and late 1990’s the contributions agency became increasingly concerned at what they perceived as a very high level of bogus or false self-employment within the construction industry resulting in non payment of national insurance contributions. At that time employers and employees national insurance contributions totalled about 22% of earnings. More recently the construction trade union, UCATT commissioned research, which indicated that approximately 360,000 workers in the construction industry are wrongly classified as self-employed but, in reality, are employees.

Self-employment gives financial advantages to both the employer and the individual and it is therefore not surprising that given choice both parties will opt for self-employment. However, to redress the loss of national insurance contributions associated with bogus or false self-employment the Inland Revenue introduced in the late 90’s what became known as the “clamp down”. This was effectively an amnesty whereby employers were invited to re-asses the status of their workforce and told that wrongly classified self-employed workers could be brought on to their books with no risk of back claims for national insurance. Where an individual has been wrongly classified as self-employed the contributions agency can claim back national insurance contributions, both employers and employees, from the employer for an unlimited period. The potential cost to an employer is therefore very significant and many employers transferred their workforce into direct employment.

Given the financial attraction of retaining the self-employed status, firms of accountants and others started to produce “contracts for services” targeted at the labour only sub-contractor and designed to satisfy the Inland Revenue/Contributions Agency should an audit occur.

We come to a paradox whereby many employers have been audited by the Inland Revenue who have examined their contractual arrangements and been satisfied that they are genuinely self-employed. In contrast when the relationship has come to an end such individuals have decided to pursue claims in the Employment Tribunal for unfair dismissal, notice pay and redundancy pay on the basis that they were employees and therefore have such entitlements. To the amazement of the employer it has not been unusual for an Employment Tribunal to find that the individuals were in fact employees with the claims being upheld.

So why should two different bodies come to different decisions about employment status based ostensibly on the same facts? Firstly the Inland Revenue tend to examine documents and contractual relationships without necessarily ever speaking with the individual concerned. In contrast an Employment Tribunal hears evidence from the individual in person and tends to want to look behind the documentation to see what the relationship of the two parties has been in practice. Frequently Employment Tribunals find that the contractual documentation is intended to avoid the relationship being held to be employer and employee and that neither party regard elements of it as a serious condition. In other words much of the contract could be regarded as a sham.

It can therefore be seen that in the determining employment status the Inland Revenue tends to take a different approach from the Employment Tribunals, which obviously leads to confusion within workplace. Over the years the courts have developed what they described as a “basket” of tests to determine employment status in which no one test is necessarily decisive and it is necessary to form a view based on the balance of all elements.

So what are the elements? Well firstly there is what is known as mutuality of obligation. The employer undertakes to provide work for the employee and the employee undertakes personally to perform the duties. The employee will normally have set hours of work, have to request permission to take holidays and not work for anyone else while contracted to work for his or her employer. In contrast the self-

employed sub-contractor is free to accept assignments or not as the case maybe, undertake the work at times that suit the sub-contractor, always providing that they comply with the overall programme of work and opening hours of the site. The sub-contractor does not have to seek permission to take holidays and is free to work for others whilst undertaking an assignment for another contractor. The leading case that I like is the House of Lords in *Carmichael v National Power Plc* [2000] IRLR 43. Mrs Carmichael worked as a tour guide for National Power at Blyth power stations. She was one of a bank of tour guides who from time to time were offered assignments and were free to accept or not as the case maybe. The House of Lords found that the lack of mutuality of obligation meant that an employment relationship did not exist.

Another element of the “basket” is the question of control. The master is held vicariously liable for the actions of his servant and therefore has power and control over someone who works for him. This extends to instructing precisely what work would be done how it will be done where it will be done and when it will done. In contrast the self-employed sub-contractor is able to determine how he goes about doing his work, when he does it or indeed if he delegates to someone else. Clearly there will be accepted normal methods working and it is therefore sometimes difficult to separate what is control from normal working practice. However the courts will tend to look at how much freedom the individual has and what sanctions if any the employer may impose. In the case of *Motorola v Davidson* [2001] IRLR 4 the employment appeal tribunal found that although Mr Davidson had been engaged by Motorola through an employment agency as “temp”. The reality was that he used Motorola tools for his work. If he wanted a holiday he would get permission from (and only from) Motorola. He arranged absence from work directly with his Motorola superior. If he had a grievance, he simply contacted his Motorola supervisor. When he was considered to have committed a disciplinary offence he was subject to a disciplinary warning by Motorola. All of this added up to sufficient control for the Employment Appeal Tribunal to decide that Mr Davidson was, in fact, an employee of Motorola.

A further element of the “basket” is the question of whether the

individual has to perform duties personally or whether they can be assigned. In an employment relationship it is the employee who provides his or her personal services whereas a sub-contract is free to delegate work to others. The case I like here is that of *Tanton v Express & Echo Publications Ltd* [1999] IRLR 367. Mr Tanton worked for Express and Echo delivering newspapers to shops. He wore an Express and Echo uniform drove their van on a route determined by Express and Echo and was to all intents and purposes viewed as an Express and Echo employee. However, Mr Tanton was allowed to engage the services of someone else to do the deliveries if he was not available and in practice he did so. There were occasions when he was on holiday or when he was ill when engaged and paid someone else to do his work on his behalf. In this case the court of appeal found that “*where a person who works for another is not required to perform his services personally, as a matter of law, the relationship between the worker and the person for whom he works is not that of employer and employee.*”

However, it should be noted that a limited power to provide substitute labour would not be seen by the courts as something that would prevent a contract of service being implied. In the case of *Byrne Brothers (Formwork) Ltd v Baird and Others* [2002] IRLR 96 the Employment Appeal Tribunal held that a limited power to appoint substitutes is not inconsistent with an obligation of personal services. The court went on to say “*As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. The fact that, in certain circumstances, a substitute could be provided does not necessarily mean that the contract cannot be regarded as a contract to supply personal services. It is a matter for assessment in relation to any given contract whether such delegation as maybe permitted means that the contract cannot be regarded as a contract to supply personal services*”. In this case the ability to substitute fell short of a blanket licence to supply the contractual services through a substitute and the court was able to decide that a limited power to substitute only with the express approval of the main contractor was not inconsistent with a contract for personal services.

Other matters that the courts will take into account are such things as who provides personal protective equipment and training. Also, and importantly, whether the individual is providing substantial tools, plant or equipment and carries some financial risk. Financial risk could be in the form a retention and certainly a requirement that the individual puts right any defects at his or her own expense.

By way of summary it seems to me that the construction industry has, over many years, developed a culture where it is accepted that individuals can choose their employment status. Choose to be self-employed for tax and national insurance purpose but in reality are employees. This has been facilitated by the Inland Revenue tax arrangements introduced to combat illegal and cash-in-hand payment arrangements, which did not exist in other industries. Put simply it is perfectly normal for someone to turn up on a building site and present themselves as self-employed bricklayer, carpenter etc and start working. The same does not apply, by way of example, with Tesco's, Sainsbury's etc. The facility is just not available to turn up as a self-employed shop assistant, checkout assistant etc. We readily accept that such people are employees but, for reasons outlined in this paper, take an entirely different view when it comes to a building worker.

When the Inland Revenue discontinued the SC60 and 714 arrangements in favour of the current Construction Industry Scheme (CIS) arrangements in 1999 we had anticipated that tighter controls would be introduced to help eliminate bogus self-employment. This has not proven to be the case but the Inland Revenue is shortly due to introduce an entirely new taxation regime, which it claims, will eliminate bogus self-employment. The new arrangements are scheduled to come into force in April 2006 although there are suggestions that this maybe delayed for a year or so. In any event the industry would seem to facing a 'C' change with regard to self-employment of individuals with the prospect of bogus self-employment being virtually eliminated. Moves in this direction have already started to occur with contractors such as Laing O'Rourke moving back to direct employment.

REPORTS

CLR Denmark Conference: One Year since EU Enlargement

held on 25th April 2005 in the 3F-House in Copenhagen

Once again the CLR Denmark annual conference was well attended and a full and interesting day. This year followed last year in looking at the impact of EU enlargement but focused especially on Denmark and the adjoining countries of Germany and Sweden. Consideration of this subject automatically meant considering the implementation (or lack of it) of the Posted Workers Directive and the threatened introduction of the Bolkestein or Services Directive.

The day began with a carefully considered presentation from Ole Bondo Christensen of the Danish Employment Ministry, which set the scene by showing a very minimal official influx of labour into Denmark, with only 172 from the new EU countries applying for work permits in the construction sector, though this does not of course cover service providers and illegal migrants. The exodus from Denmark, with over 17,000 working in another EU country and similar numbers on an expat basis, appears to be far greater than this influx. It is unclear how far this is low official influx because Denmark, like Germany, has an agreement only to gradually open up its labour market.

The official position was followed by Gunde Odgaard, who reaffirmed the trade union preferred strategy that immigrants into construction should be employed under the same conditions as Danish workers according to the collective agreement. An alternative strategy would be to implement the Posting Directive through a minimum wage, which the union opposes. However, it does mean that the union ends up policing the situation, though Gunde stressed that the union is not a political party and politicians too have to stick to the rules. This has not always worked out. 177 cases have been identified in Denmark to date, involving 710 people and found mostly on housing sites. In many of these cases east Europeans have set up their own companies in ignorance of Danish rules. However, Gunde estimated that in reality

about 3-4,000, that is less than 1% of those in the industry, are probably working below Danish conditions.

There followed a fascinating account from Hans Tilly, President of the Swedish construction union, of the Vaxholm school dispute, which began a year ago and is described in full in the paper by Charles Woolfson in this CLR News. It well illustrates the difficulty of maintaining the Scandinavian model of autonomy for the social partners in collective bargaining in posting situations. In other countries the legislative solution given in the Posting Directive to strengthen the system of collective bargaining was applied during its implementation. Sweden and Denmark however decided not to use Article 3.8 of the Directive, an article that was specially formulated in the European Parliament for countries without a system of declaring collective agreements generally binding. As a result, in the Scandinavian situation, the onus for ensuring compliance with the terms and conditions laid down in collective agreements on all sites rests rather on the unions than directly on the state. It is in the light of this that the Swedish government is now pressing to make it illegal to hand out contracts to companies that have not signed collective agreements. In this particular case of social dumping, the Latvian workers were receiving 4,000 Krone instead of an agreed 13,700 plus food and lodging. The Latvian contractor concerned has now withdrawn but the case leaves many open questions, including who has been financing it and how many more cases there will be of this nature to challenge the Scandinavian model.

The German situation was presented by Stefan Hochstadt, who described the gradual breakdown of the traditional German model through the neo-liberal policies now applied, including the spread of self-employment or 'Ich IG'. This has itself been facilitated by the fact that since 2002 it has no longer been necessary to be a master to set up your own business. Though in Germany freedom of services does not apply in the case of construction and though transitional rules have been imposed on migration from the new applicant countries, these restrictions do not apply to setting up your own business. As a result there has been a dramatic increase of 37% in the number of 'working proprietors' in the construction industry who include many German as

well as east European workers. Together with this has gone a fall in skill levels, threatening to trigger a downward spiral, a fall in trade union membership and a great increase in subcontracting. All this has posed a great threat to maintaining the terms of collective agreements. Indeed, the special minimum wage agreed by the social partners for the construction industry for the application of the Posting Directive is increasingly becoming the wage reality for those not on the normal wage scales, especially in eastern Germany.

With these three contributions the themes were set for the remainder of the day and questions raised that will no doubt persist. In a situation where trade unions are relatively weak, the *erga omnes* or extension clauses of collective agreements are vital to the implementation of the Posted Workers Directive, requiring that the employment and pay conditions of the host country apply. Can the Scandinavian trade unions continue themselves to police sites without this legal backing? As was pointed out by one of the speakers in the afternoon, Danish contractors themselves in Germany are hiring at dumping wages. As one MEP expressed it: “You can’t just build a wall around Denmark.”

Linda Clarke, May 2005

Minimum Wages in Europe

*Conference organised by Thinknet-Zurich’ and Wirtschafts und Sozialwissenschaftliches Institut der Hans Böckler Stiftung
Zurich 21st/22nd April 2005*

‘In Europe’, in European states, in the European Union or in EU Member States, this definition was not really distinguished. Legal minimum wages are already established in 18 EU member states, but not in Germany which may represent the critical mass to settle the case definitively. The Germans themselves need the European Union to overcome their internal divisions on the issue. The case is condensed in a document signed by experts from the trade union institutes IRES and WSI as well as Thinknet: ‘Theses for a European Minimum Wage Policy’. This document was at the core of this conference in order to promote a coordinated minimum wage policy in

the European Union. The document does not hide why the initiative has been launched. Across Europe the labour unions have in recent years been confronted with an offensive from their 'social partner' they have never experienced in their entire history. Wages are virtually stagnant, social security contributions disputed or scrapped and, as it seems in a concerted international effort, the employers are less and less willing to negotiate collective agreements, whilst the trade unions lack the support and militancy among their dwindling membership to fight back. This calamity hits at the heart of the labour organisations moving them to consider a hand-over to the legislator of a core area in the protection of their constituencies.

The conference on this issue was set up as a scholarly analysis and debate under different aspects. Significantly, the first intervention by Matthias Möhring-Hesse/University of Münster highlighted the subject from a social-ethical point of view, arguing that "there is no justice in wage relations". The second intervention from Thorsten Schulten/WSI on the 'Political Economy of the Minimum Wage' disproved current arguments that the legal minimum wage causes unemployment and a decline in productivity. His reasoning was seconded by Egbert Holthuis from the European Commission, as a third speaker, who was evasive, however, when challenged in the ensuing discussion about the role of the Commission to promote minimum wages in the member states. The first day was concluded by Jill Rubery, reminding that minimum wages benefit the most disadvantaged segments of wage earners, namely women, and generally help in reducing wage inequality. The second part of the conference was organised to discuss experiences and practical initiatives. Andreas Rieger/UNIA and Daniel Oesch/SGB presented their campaign for a 3000sfr minimum wage in Switzerland as a success story and demonstrated how it relied on moral rather than economic arguments, on campaigning rather than negotiating. Then Michel Husson/IRES reviewed the history of the SMIG/C (salaire minimum interprofessionnel garanti/de croissance) since 1950/70 in France, only to lead to the frontline of the present battle in Germany. Here, as Claus Schäfer and Reinhard Bispinck explained, the unions are divided into three camps: 1) IG BAU and IG BCE - extend the Posting Directive -, 2) IGM - enforce generally binding sectoral agreements -, 3) NGG and ver.di - transsectoral minimum wage at

50% of the average wage, i.e. ~ 1,500€ /month or 7,50€/hour. The case of Germany demonstrated how the legalisation of the wage is another step in the transformation of unions, whether they take it actively or suffer it passively. There is little evidence that defending the autonomy of collective bargaining will help stop the loss of membership and, hence, bargaining power, as claimed by IGM. And what about the growing numbers of employees outside coverage by collective agreements? With this background Thorsten Schulten presented the manifesto, ‘Theses for a European Minimum Wage Policy’, which admitted defeat of the labour unions in collective bargaining and advocated the handover of a core function to the legislative powers.

The final panel epitomised the discussions in two statements: Frank Bsirske/ver.di unequivocally proposed legal minimum wages and Paul Rechsteiner/SGB put this move into a secular perspective in the international fight for labour rights by comparing it with the campaign for the eight hour day. Marie-France Boutroue/CGT defended the national level as an important forum and Walter Cerfada/ETUC, disappointingly, revealed that in this campaign not much support should be expected from the European Trade Union Confederation.

I had a strong feeling, and Andreas Rieger expressed this in his concluding statement, that the movement for a coordinated minimum wage in Europe is likely to intensify. After all, maybe the legal minimum wage does not indicate defeat of the labour movement but, on the contrary, a victory after one and a half centuries of bargaining with capital.

Jörn Janssen, London 25/04/2005

Social Protection and Health and Safety in Construction in the European Union

ESRC/CLR seminar series: People in Construction, 12th May 2005, University of Westminster, London

Social protection and health and safety are not usually discussed together. In most countries they are under different administration. Accordingly the first two sessions of the seminar presented the two issues one by one and the third final session was to discuss them in common.

The wide range of significantly – and even symptomatically - different approaches to health and safety were presented at the beginning by Bernd Eisenbach for Germany, Elena Mashkova for France, and Philip White for Great Britain. The differences in reporting make comparisons unreliable, but there is no disagreement that the construction sector is at the bottom of the league in all countries. To improve the situation in Britain the Health and Safety Executive is pressing for ‘ownership’ of risk by employers, rather than relying only on control. In Germany, however, there is more emphasis on involving workers’ representatives and architects and in better education and training. And in France the complex constellation of different actors involved itself poses an impediment to effective improvement.

Social protection was presented from entirely different points of view by John Jory for Great Britain and Bernard Friot on a comparative basis for Europe. Significantly John Jory presented only supplementary benefit schemes and Bernard Friot castigated European Union policy for advocating supplementary at the expense of basic social protection in the field of pensions and thus supporting global finance speculation. The contrast could not have been more pronounced - the putting up with private social protection in Britain as against continued opposition to this in France.

In the final session Fiona Murie from the International Federation of Building and Woodworkers in Geneva made the audience aware of the dire working conditions on construction sites across the (developing) world. Tony O’Brien of the Construction Safety Campaign in Britain tried everything to disprove the rather positive picture of the new approach to health and safety presented in the first session. The

persistence and success of this campaign, focussed on such actions as picketing the courts especially in cases of death, certainly seems to have contributed to the recent decline in the number of fatalities in Britain. Wim Eshuis, finally, introduced 'burnout' as a consequence of mental stress as a new occupational disease in the Dutch construction industry. The following discussion was dominated from the floor by an acrimonious dispute about health and safety on British construction sites, reminding the audience of the adversarial nature of industrial relations in Britain in contrast again to the attempts to reach an agreed consensus on the continent. We are hoping to make this dispute productive in presenting the two sides in the CLR-GB Newsletter.

The seminar closed with the launch of the English issue of CLR-Studies 3, Jan Cremers (2004) 'Stress in the European construction sector: up-to-the-minute'.

Linda Clarke and Jörn Janssen, London May 2005

REVIEWS

Tom Brass and Marcel van der Linden (eds): **Free and Unfree Labour, the debate continues**. Peter Lang, European Academic Publishers, Berne 1997. ISBN3-906756-87-4, 603 pp., € 72,30.

We should have reviewed this book eight years ago. But as debates on the development of labour are rare, it is not yet out of date. And we are trying to retrieve the various, largely unconnected, strands of this debate. Thus we have recently reviewed Dinerstein/Neary (eds) *The Labour Debate* in CLR-News 3/2003 and Scholliers/Schwarz (eds) *Experiencing Wages* in CLR-News 1/2005. This is an exercise which should help us to assess the developments we are experiencing in the present transformation of wage labour relations such as the dispute about social protection as part of the wage package and minimum wages in a period of crisis in collective bargaining. Looking at their history is indispensable for conceiving strategies for wage labour relations.

This book publishes papers presented at a conference on ‘Free and Unfree Labour’ organised by the International Institute of Social History in Amsterdam 13th and 14th January 1995. The convenors were Tom Brass, Marcel van der Linden and Jan Lucassen. The contributions were intended to contribute to an answer to the question whether slavery as a mode of labour exploitation is compatible with capitalism and whether there is an evolutionary process at work according to which labour relations progress from (‘unfree’) slavery and serfdom to (‘free’) wage labour relations.

As Tom Brass points out in the introduction, the participants were divided about the definitions “that are ... structured by politically distinct (not to say opposed) theories. This kind of divide was evident in the different interpretations about the meaning/existence/desirability of unfreedom advanced on the one hand by those contributors who would be defined as marxists (Brass, Grossmann, Kerr, Krissman, Angelo, Roth, Martins) and on the other by adherents of a neoclassical economic framework (Steinfeld and Engerman, Shlomowitz, Pastore).”(20) However disagreements divided also both sides and there was almost unanimity in the rejection of an evolutionary

interpretation of history. The ‘marxists’ would certainly have been in disagreement about the ‘primitive accumulation of capital’ and, hence, the nature of capitalism. Unfortunately, the history of wage labour is only presented like an appendix in Part III by Marcel van der Linden (501-523). Therefore the nature of capitalism is not really explored.

The first two parts classify papers somewhat artificially according to ‘Theoretical Issues’ and ‘Case Studies’. Why are ‘Unfree Labour in the Area under German Hegemony, 1930-1945’ (Karl Heinz Roth) and ‘The Right to Strike and Worker Freedom in and beyond Apartheid’ (Jonathan Grossman) under ‘Theoretical Issues’ not case studies? Conversely, most contributions under ‘Case Studies’ present these as exemplary studies underpinning theoretical approaches and often general conclusions.

The 22 papers, not including Brass’ ‘Introduction’ and van der Linden’s ‘In Lieu of a Conclusion’ are at any rate fascinating through the geographical and historical width of coverage. Labour relations are traced back to the earliest sources of history and almost all continents of the globe are covered, e.g. United States and the Carribean, Latin America, Russia, Asia, Australasia. The level of knowledge and scientific quality displayed are equally impressive. It is impossible here to do justice to every contribution or to distil results representing the debate. Nevertheless the consensus is overwhelming that there is no evidence to depict the course of humanity on a one way road to freedom. Whether we follow the teachings of neoclassical economics or of dialectic materialism, neither slave trade nor ‘extermination through work’ can be excluded as a possibility in the future.

Those readers who are less interested in the debate about theoretical approaches may find this book rewarding as providing a (the?) central aspect of global social history of the last 400 years. 52 pages or about 1300 items of bibliography are a really helpful instrument for the study of this important subject.

Those who are looking for an answer to the question of whether slavery is compatible with capitalism will find a lot of inspiration. From my own point of view, this question is paradoxical as slave labour relations are not capitalist labour relations by definition, though I agree that different modes of labour exploitation and production do

coexist and have always coexisted in space and time. But those readers who can conceive capitalism based on slavery will find much support for this view in a number of articles. Most illuminating, finally, are those deliberations about understanding the history of human labour which put theories to the test of empirical research. In this sense Marcel van der Linden's epilogue is really exemplary in that he identifies 'dominant' social relations in the labour process as the dynamic of production from the beginning of history. Goodness only knows why, at one point he concedes that "both modes of exploitation [slave and wage labour relations] are fundamentally compatible with capitalism." (503) What does 'mode of exploitation' mean? Is capitalism perhaps the universal form of exploitation?

We should hope for the continuation of the debate and, if we are allowed to make a proposal, on the 'transformation of (free) wage labour relations'.

Jörn Janssen, London 31/05/2005

NEW PROJECTS

Research Project:

Labour Force Challenges in the Australian Building and Construction Industry: Skills Infrastructure and Migrant Workers

The project examines the sustainability of present labour supply arrangements in the Australian building and construction industry in the context of restructuring and reorientation of the major construction companies and the intensification of pyramid sub-contracting arrangements. The project will establish a deeper grasp of the labour supply pressures confronting the future of the building and construction industry in Australia by assessing the magnitude of labour supply shortages, by discerning the extent to which future development of the industry is frustrated by an inadequately skilled labour force, and evaluating the growth in immigrant, short-term and clandestine migrant workers.

This will highlight the challenges engendered by the changing pattern of training and skill accreditation, sourcing and recruitment arrangements, and industry use of immigrant, short-term and clandestine migrant workers. The analysis of labour supply arrangements will inform a better assessment of the capacity of the industry to improve construction standards and promote technological advances, and thereby contribute to charting a new strategic vision.

Now in the mid stage of its three-year term, the project is externally funded by the Australian Research Council (equivalent to the British ESRC) with contribution and research participation by eight industry partners including trade unions, employer and training organisations, small contractors and a large head contractor.

Interim outputs from the project include an occupational profile of the industry, an assessment of the skills/training infrastructure in Australia relative to Britain (paper in progress) and an analysis of skill

composition and labour process amongst Korean speaking workers and contractors in the tile-layer sector of the industry.

The chief researchers on the project are Dr Susan McGrath-Champ (s.mcgrath-champ@econ.usyd.edu.au) and Dr Stuart Rosewarne from the University of Sydney, Australia and Dr Phil Toner, University of Western Sydney, Australia.

Papers to date include:

Toner, P. (2005) 'Long Run Shifts in the Industry and Workforce Structure of the Australian Construction Industry: Implications for a Sustainable Labour Supply', in Baird, M., Cooper, R., and Westcott, M. (eds) *Reworking Work*, Proceedings of the 19th conference of the Association of Industrial Relations Academics of Australian and New Zealand, Sydney, pp 503-10.

Shin, J.S., McGrath-Champ, S. and Rosewarne, S. (2004) 'The Impact of Korean-speaking Immigrant Workers on Construction Subcontracting: A Case Study of Union Policies in the Sydney (Australia) Tiling Sector', Paper presented at International Industrial Relations Association, 5th Asian Regional Congress, Seoul, South Korea, 23-26 June, (available at

<http://www.kli.re.kr/iira2004/pro/papers/session2/7%20JoonShik%20Shin-38pages.pdf>

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Editor:

Jan Cremers
phone: +31 30 2318032
e-mail: jan@gbio.nl

Co-editor:

Linda Clarke
University of Westminster
phone: +44 20 79115000 ext. 3258
e-mail: clarkel@wmin.ac.uk

Review Editor:

Jörn Janssen
phone: +44 20 77007821
e-mail: joern.janssen@gmx.co.uk

Layout and Production:

Frank Leus
phone: +32 2 2271041
e-mail: info@efbh.be

Contact and Orders:

CLR-News
c/o Frank Leus
EFBWW
Rue Royale 45
B – 1000 Bruxelles
Phone: +32 2 2271040
Fax: +32 2 2198228
e-mail: info@efbh.be