

## **Free movement of services and equal treatment of workers: The case of construction – Jan Cremers**

### **Abstract**

The posting of workers as formulated and defined in Directive 96/71/EC is the legal frame in Europe for bona fide cross-border and temporary work abroad. After fierce debates at the beginning of the nineties the European Institutions concluded this Directive. The basic purpose was to guarantee equal rights to workers in case of posting combined with fair competition for transnational operations by using the ‘host country’-principle.

National implementation of the Directive after 1996 was poor as has been shown in a study by the author. With the enlargement (after the 1<sup>st</sup> of May 2004) the debate about a decent regulation of labour migration and temporary work abroad came back on the agenda. The actual deliberations on the Services Directive have brought the ‘country of origin’-principle back into the spotlight. The political struggle between supporters of decent regulation (*and legal application*) of labour migration issues and free market advocates has entered a new phase.

### **Free movement in the past**

Ever since the Treaty of Rome was signed, European citizens have had the right to go to work in other member states of the European Community. The first legal foundations for this were laid down in Europe back in 1968. As the plans for creating the internal market in the middle of the eighties were drawn up, accompanied by the dismantling of internal frontiers in Europe, the mobility of workers and free movement in general came to occupy a more central position in the socio-economic approach of the European institutions. The opening up of the markets in Europe also brought with it some unexpected side effects. The risks of social and environmental dumping emerged, while the relocation of production and competition waged in the sphere of taxation and social security have become commonplace.

Quite obviously one of the distinctions of labour-intensive sectors as construction, which I will focus on in this article, is the fact that the workers are mobile, not the product. Therefore the main consequence for the construction sector of the introduction of the free movement principles in the EU was increased labour migration and posting of workers associated with cross-border subcontracting. In recent years the building sector has experienced the side effects of introducing free movement of services without a coherent legislative social frame for the posting of workers.

Early research by the services of the European Commission made it very clear: mobility across national borders is low in the European labour market, but if it happens it takes place at management level in all industries, or on the building sites throughout Europe. The Posting Directive (96/71/EC), discussed since the late eighties, therefore touches the heart of the activities of the construction industry in Europe. The idea behind the Directive is that it is necessary to create a basic frame of equal treatment principles within the territory where the (building) work is done. The Directive doesn't say what the content of labour conditions has to be, but for a hard core of working conditions it stipulates that there should be no difference between workers wherever they come from.

The Directive defines a posted worker as a worker who, for a limited period, carries out his or her work in the territory of a member state other than the state in which he or she normally works. For the purpose of the Directive, the definition of a worker is that which applies in the law of the member state to whose territory the worker is posted. This last provision differs from Regulation 1408/71 on the application of social security schemes to cross-border

working persons and self-employed persons. For the coordination of social security the definition of a worker that is posted is determined in the statutory social security law of the member state in which the worker normally works ('sending Member State'). Within the framework of the Directive, a posted worker has to be connected with the provision of transnational services of an undertaking established in one Member State to another Member State by posting employees to that state. The Directive describes three situations where posting according to the Directive is allowed. <sup>1</sup>

### **The Posting debate**

The European trade union federation for building and woodworkers (EFBWW) and the European institute for Construction Labour research (CLR) have followed through the years the preparation, modification and coming into force of the Directive. This was often done in close cooperation with the European employers organisation in construction (FIEC). For many years the social partners of the construction industry, at national and European level, have engaged themselves for an effective and efficient implementation, application and operation of the Posting Directive. On their side the employers are very sensitive for unfair competition between construction companies. On the other side trade unions have a particular interest in defending the principle of equal labour conditions for the building workers.

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 fore field of decision-making. The whole process and the positions taken in the Posting debate show a lack of historic awareness and knowledge about migration from the side of the national representatives in the Council of Ministers. If we examine the history of the debate, 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 national involvement with posting and the first national measures go 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 meant to avoid and prevent "distortion of competition".

The Posting Directive (96/71/EC) did not have an easy birth. The first European trade union involvement with the Directive goes back to the debate about the public procurement principles in the single European market. The European building unions pleaded in the late eighties, in line with ILO Convention 94 (already formulated back in 1949 and ratified by several European countries) and the Davis Beacon Act in the USA, for a social clause in the

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<sup>1</sup> *The free movement of workers in the European Union, Directive 96/71/EC on the posting of workers within the framework of the provision of services: its implementation, practical application and operation*, Jan Cremers, Peter Donders, CLR-Studies 4, The Hague, 2005.

procurement rules for public works guaranteeing compliance with working conditions and collective agreements of the country where the work is carried out.<sup>2</sup> 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. The European Commission decided thereupon to come up with a proposal for a posting of workers Directive in the action programme of the Community Charter of Fundamental Social Rights of Workers.<sup>3</sup> After a first proposal in 1991, it took 5 years of hard work to reach agreement on this Directive.

The Member States were divided on the necessity of a posting Directive. Also the period of posting, especially very short periods less than three months, was an element in the debate. The slow and difficult decision-making process urged some Member States, i.e. France, Germany and Austria (not a EU member at that moment) 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 and we will see later on that it was also necessary to re-examine the collective bargaining systems in almost every country.

In 1996 the Council and the European Parliament finally adopted the Directive concerning the posting of workers.<sup>4</sup>

The final settlement of this Directive, to be implemented by the Member States at the end of 1999, was in fact the second notion on posting integrated in Community law.

The first instrument, the earlier Regulation 1408/71 concerning the coordination of social security within the EU in case of 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. Workers that went abroad with their employer could request a form (E101), ensuring the continuation of their social security rights in the country of origin. In practice control and enforcement of the Regulation were weak. It was amended and modified during the second half of the last century with almost no political dispute.

Directive 96/71/EC then introduced posting, the situation that an employer sends an employee to work in another country for a limited period of time, within the juridical sphere of labour law.

### **A balance between free movement and equal treatment**

The Directive is about finding a balance between increasing the possibilities of undertakings to provide services in other Member States and the social protection of workers. Therefore the Directive 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 a worker would lose his social protection

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<sup>1</sup> *The Posting Directive: origins and assessment*, Jan Cremers, in B. Köbele, J. Cremers, European Union: Posting of workers in the construction industry, Wehle Verlag, Bonn, 1994.

<sup>2</sup> Other important legal instruments announced in the action program of the Community Charter of Fundamental Social Rights of Workers (adopted by the Council of Ministers in December 1989) were an initiative to regulate liability in the chain of subcontracting (later on dropped) and initiatives on health and safety and information/consultation.

<sup>4</sup> Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJL 18 of 21 January 1997.

when he actually moves within the Community. Furthermore the free movement of labour and services could disturb fair competition when social dumping comes into sight. Social dumping can occur in case workers from countries with lower labour costs are being posted to countries with higher labour costs. Before the Directive, workers would then not be covered by the protective rules in the host country. As a result companies would be confronted with unfair competition concerning labour costs and rules governing working conditions.

The European social partners in construction played a key role in the decision making process leading to adoption of the Directive. They acted as experts for the European Commission, for the Social Economic Committee and for the Social Committee of the European Parliament. They came up with two important joint statements. The first in 1993 about the general principles of equal treatment and fight against a distortion of competition through social dumping was put on the agenda of the Social Council of Ministers and led to a change of position of the French and the German government.

A second joint statement formulated a way out of too much administrative and practical problems by in 1996 recommending bilateral agreements between the partners of countries involved in frequent posting.

The main principle of Directive 96/71/EC is equal treatment; posted workers are to be treated in the host state as workers who are normally working in that state and undertakings are to be treated equally when they want to provide services in another state. Although Member States have a possibility to implement the Directive for all industries, implementation is often restricted to construction. The Directive pays extra attention in an Annex to the construction sector. Why is it so important for this sector?

### **Particularities of construction**

Though not the largest industrial sector, construction is a key industry in Europe with some 11 million workers directly employed. Compared with other industries, construction is one of the most labour-intensive industries. About 50% of turnover is achieved through the labour of workers. The workforce of construction firms constitutes the heart of the business and their main economic pillar for future survival.

Construction workers are traditionally an exceedingly vulnerable group in the highly competitive battle between building firms. The fierce competition in the construction sector is apparent inter alia in the strong pressure to drive down prices ever lower. A major adverse effect of the competitive pressure is the relatively high number of bankruptcies in the sector. The incidence of "fraud" is also extremely high. All in all these features make the construction sector sensitive to social dumping and unfair competition, reflecting the special character of the sector:<sup>5</sup>

- *The location of production is mobile*; with workers constantly moving from one site to another, and with cooperation taking place between and with different partners, employers and their employees cannot be located at a fixed workplace. Hence construction labour agreements usually contain tailor-made sectoral provisions to compensate for travelling time and expenses, severance from families, accommodation at distant workplaces etc.
- *The production in the industry is of temporary duration*. The factory is dispersed and limited in time. Workers are often engaged for the duration and the site of a building. Once and a while they may even live there. Labour contracts, if any, are frequently of a fixed-term nature, related to finishing one project, building or constructed item. To

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<sup>5</sup> See for the international context: *EU Enlargement*, L. Clarke, J. Cremers, J. Janssen, CLR-Studies 1, The Hague, 2003.

compensate for this insecurity (and to guarantee continuity of the workforce) wages may just be higher than in more continuous jobs.

- *To meet the vicissitudes of weather conditions and of seasonal disruption, the industry has again developed sectoral provisions.* Labour relations not only have an economically related cyclical character, but also an annual or seasonal cycle. These variations in work and working time cause considerable insecurity for the earning of construction workers, with repercussions also for those not directly imposed. Since construction trades are a specialised occupation these conditions have been met by various structural and industry-wide provisions, such as funds, insurances, and benefits schemes, to even out the ups and downs in earnings and employment conditions.
- *The building process is characterised by a unique production chain,* with main contractors, supplying industries, specialised subcontractors and all sorts of subcontractors and self-employed (even into the “grey” area). Contract compliance, social liability in the chain, health and safety coordination on site, continuity and competition, quality and craftsmanship feature in this chain.

All these circumstances lead to an environment for industrial relations where discontinuity, the loss of skilled labour and craftsmanship, and the general image of the industry are central concerns to be dealt with strategically as well as in day-to-day business at national and European levels. The introduction of the free movement principles accelerated the need to look at this process from a European angle.

### **Free movement in Central and Eastern Europe.**

The collapse of the Soviet Union and the reform of society in the Central and Eastern European countries had a strong impact on the mobility of workers of these countries. In the old days state owned companies from the CEE countries went around in the whole Eastern bloc to build bridges, houses, roads, and there was a vivid East-East mobility.

After 1989 the landscape changed completely. The construction industry became privatised and important parts of the industry went into foreign (Western) hands. The sector as a whole shrunk and it took quite some time before a national segment of small and medium sized companies emerged.

The reasons why there was a sharp decrease in the volume of construction works carried out abroad by companies from CEE countries was, according to most observers, obviously due to:

- The instability after the economic and political collapse in CEE countries and even more important in the Russian Federation and in the CIS countries.
- The problem to find credible and solvent partners.
- The competition with the cheap work force of other foreign suppliers, the increase of illegal work and social dumping practices.
- The uncertain legal and political environment.
- The privatisation and the liberalisation of the sector created a sharp fall in the size of the construction companies. Only a few big companies could stay upright, whereas there was and is still no stable (national) group of small and medium sized companies. The focus is on local work.
- Finally the reduction of the work permits based on the bilateral agreements with Germany had an impact for almost all the CEE countries.

Free movement of workers is and has always been one of the fundamental characteristics of construction work. For economic reasons construction companies and individual workers got motivated to work abroad, for economic and demographic reasons countries, clients and contractors engaged workers coming from elsewhere. This was also the case in CEE countries

after 1989. A new mobility started with individual workers moving legally or illegally to Western Europe; first and for all to Germany where a system of bilateral agreements (Werkvertragskontingente) regulated to a certain extent the posting of workers from the CEE countries. The illegal part of the mobility of workers was organised by all kind of agencies and letter-box companies.

### **The national implementation**

According to European law a Directive has to be implemented by the Member States into national law. From May 1<sup>st</sup> 2004 this includes the new Member States. Implementation guarantees the legal instruments to protect workers and increases the possibilities of undertakings to provide services in another Member State.

The European Commission announced in article 8 of the Directive a report with an overview of the legal situation in the Member States<sup>6</sup>. As a follow up the Commission drafted a Communication on the implementation of Directive 96/71, without assessing the compatibility of the national transposing measures. This report on the 15 Member States' transposition was designed to ascertain the present situation as regards national legislation and collective agreements<sup>7</sup>. At the same time, the national administrations were sent a questionnaire asking them to describe the practicalities of applying the Directive and any difficulties encountered. The results of the transposition study and the replies to the questionnaire were discussed by a group of government experts.

The purpose of the Communication was to draw conclusions from all the preparatory work concerning the transposition and practical implementation of the Directive in the Member States, and to define the Commission's position as to whether the 1996 Directive needed revising.

The main conclusion of the Communication was that none of the Member States had encountered any particular legal difficulties in transposing the Directive. The difficulties encountered in implementing so far tend to be more of a practical nature – especially as regards monitoring and control - than of a legal nature. Consequently the Commission planned no proposal for amendments of the arrangements and provisions of the posting Directive.

For a number of reasons the EFBWW believed that the Commission's approach was unsatisfactory<sup>8</sup>.

- First of all the assessment was of a strict juridical nature. Seen the experiences on building sites a more in-depth study would have been more appropriate. The opening up of the markets brought with it unexpected side effects: risks of social dumping, relocation of production and competition waged in the sphere of taxation and social security. A detailed socio-economic research could have made clear whether the Directive had served to prevent bogus practices and distortion of competition.
- Secondly, the sometimes strong debates at national level during the implementation process were not addressed at all. The adoption of the Posting Directive had for a long time been resisted at EU level by several Member States (e.g. Portugal, Spain, the UK

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<sup>6</sup> Article 8 stipulated that by 16 December 2001 at the latest, "the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council when appropriate".

<sup>7</sup> Report from the European Commission on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, February 2003 (COM 2003/458).

<sup>8</sup> EFBWW's position was based on *A decent assessment needed*, J. Cremers, CLR News, 3/2002, page. 10, Brussels.

and Greece). Owing to this reluctance, the governments of some countries (such as Austria, France and Germany) decided to introduce national posting rules. Whereas France and Austria had already adopted their own posting rules back in 1993-94, in Germany there was quite some political controversy concerning the need for, scope, and form and content of such rules. Other countries had to repair their collective bargaining system in order to deal with the Directive in an effective way.

- Thirdly, it would have been valuable to come up with empirical data that could illuminate strengths and weaknesses of the Directive. The European Commission has acknowledged that the expectations of the mid-eighties about mobility in Europe have not been realised, or only to a very modest degree. Less than 2% of the European working population is working in a country other than the country of origin. Figures for annual mobility are even lower. The existence of wage and social dumping in individual EU countries is, despite a low level of migration, related to the fact that in some high-risk/vulnerable areas even a relatively low number of firms/workers offering their services in the labour market at much lower costs can upset the existing price/wage structure and (can) trigger a downward wage/price spiral.
- Furthermore, there is a need for analyses of the actual migration patterns in regions and border areas. Border regions are particularly exposed in this regard, especially in construction. There are still risks that through the free movement of persons, together with the liberalization of services, construction, staffing and services companies can use their personnel to fulfil contracts in another country without restriction. This is worth doing for construction companies if they can underbid the local and sectoral wage and labour protection rules. Even relatively small differences in the wage and working conditions, but also the vast variation in social security costs and taxation amongst countries, can play a role in this regard. Taken into account that the free movement of workers and services was one of the key issues of the enlargement debate, it would have been more than useful to have this information updated for the countries or regions already a member of the EU.

The social partners in European construction have clearly stated that the application of the legal regulations and the collective agreements of the country where the work is done, or better said, the application of the equal treatment principles, has to be the leading principle to avoid any problems with migrating foreign workers. This was in fact also the position of the European Parliament. The comments of the European Parliament on the Commission's communication contained some considerations, which deserve to be highlighted<sup>9</sup>.

- The Directive continues to be necessary in order to provide legal certainty for posted workers and the companies involved.
- A number of problems affecting implementation of the Directive can also be overcome by means of better information and administrative and operational cooperation between bodies concerned (authorities, inspectorates, social partners, etc) in the Member States.
- The Commission should submit practical proposals for strengthening such cooperation, not least with a view to combating moonlighting and other abuses.
- Better and more concrete data on the effects of national implementation have to be collected.

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<sup>9</sup> Report on the implementation of Directive 96/71/EC in the Member States, European Parliament doc. A5 0448/2003 final. The rapporteur was Ms. Anne-Karin Glase.

- The Commission is called to consider problems resulting from the different options that are allowed by the EU-Directive (unfair competition, different and diverging social protection, unclear definition of workers' status).
- Constructive legislative solutions should be examined that could lead to the prevention and elimination of unfair competition and social dumping as a consequence of the abuse of posting of workers.
- In addition, a European legislative framework or other provision *governing liability* in the case of subcontracting should be examined.
- The consequences regarding the EU-enlargement should be taken into consideration.
- The judgments of the European Court of Justice and the judgments handed down by national courts should be taken into the analysis.

### **Ten years after**

If political fear has been the driving force for an important part of the decision makers, it also becomes clear why the debate disappeared for a while after 1996 and returned shortly before the EU enlargement.

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

Even in the European construction workers' union (EFBWW), we have to admit that there was a loss of interest for the issue of migration in parts of our own ranks. The fact that the posting debate was no longer on the agenda in the second half of the nineties, had evidently a serious impact on the implementation in several countries. As shown by a recent CLR study, implementation has been poor, cooperation is non-existent and there is a general lack of enforcement and control.<sup>10</sup> Our study pinpoints important juridical and legal deficits:

- Not all Member states have implemented the notion of the *maintenance of an employment relation* directly into their posting laws.
- Accordingly we found a *grey zone* of economically *dependent self-employed workers* that are not defined as being posted. Self-employed do not fall within the transition period for the free movement of workers and we have seen in recent times that the volume of newly registered self-employed has increased enormously in countries like Austria and Germany.
- Member states have *not defined the posting period*.
- *Administrative cooperation* is poor and *registration* of posted workers coming in or going abroad is in most countries *completely missing*. Notification of provision of services, including the use of posted workers, could be a useful instrument for improving enforcement of the Directive, but is non-existent in most countries.
- The *liaison offices* and *information points* (on the labour conditions, as obliged by Article 4.3. of the Directive) suffer from a lack of staff and sometimes even from a

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<sup>10</sup> *The free movement of workers in the European Union*, Jan Cremers, Peter Donders, CLR-Studies 4, The Hague, 2005.

lack of basic knowledge. Efficient and effective control is essential, but therefore difficult to ensure.

On the basis of this research, the European social partners in the construction sector adopted the following joint statement<sup>11</sup>:

From a legal point of view two problems have to be mentioned, which should be solved by the Member States in their national legislation.

First, the grey zone of economically dependent work is a growing problem in the construction industry. A good definition of 'employees' and 'self employed' in national law can avoid problems with the application of the implementing legislation of the Directive. Secondly, it is important to be able to verify, legally and in practice, if a worker is correctly posted and falls under the scope of the Directive. In both cases the national regulation should not only contain clear and feasible definitions but should also contain clear rules about the liability in cases of fake self-employment and/or fake posting with the aim to effectively guarantee that the correct payment of the minimum conditions, fines, taxes and social contributions can be claimed by the worker and can be effectively enforced by the authorities with the aim to minimise the profit made by using fraudulent practices and enhance the economic risks of violators. It is recommendable that all the Member States implement the provision on the maintenance of the employment relationship between the sending undertaking and the posted worker in such cases where the sending undertaking is not a only a letterbox company but a real posting company. It is also recommendable to implement a provision to define who is deemed to be the real employer and thus can be held liable in such cases as fake posting by letterbox companies or fake self-employment.

### **New developments**

This is not the time and the place to review all the weaknesses in the final national legislation resulting from poor implementation of the Directive. But a few issues 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 from 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 hence not to include the terms and conditions of employment embedded in collective agreements in the legislative text implementing 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 already 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 and in so doing will pay the rates belonging to those agreements. Given the fact that trade unions supported by the employers' organisations 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. One could say that with the choice not to use article 3.8 both the legislator and the social partners in Sweden and Denmark took it for granted that serious industrial disputes in an unclear legal context could take place

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<sup>11</sup> *The free movement of workers in the European Union*, Jan Cremers, Peter Donders, page 138, 139.

in future. Since spring 2005 there has been a lot of political rumour in Sweden about an industrial dispute that goes back to this problem - the *Vaxholm*-case (see Ahlberg, Bruun and Malmberg, in this issue, and Woolfson and Sommers in CLR-News<sup>12</sup>). What has become clear is that the Swedish legislator missed the opportunity to create a stronger “legal frame” for the application of collective agreements by not using article 3.8. Now the European court will have to deal with the Swedish practice as regards industrial action aimed at ensuring collective regulation of wage conditions for posted workers (see Ahlberg et al, in this issue).

- Another striking finding of the CLR-study was the “*narrow*” interpretation of the scope of the Directive. Most Member States have applied the Directive to other industries than construction, but in the Netherlands, the application of collective agreements is restricted to the construction sector, and in Germany to the construction sector and to services assisting maritime navigation. This narrow interpretation has led to recent political disputes in both countries<sup>13</sup>. The Dutch government sent a new Bill to parliament on February 5<sup>th</sup> 2005, proposing 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 in all industries, 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, however. The first motivation for this change of policy is not concern for improvement of the legal free movement or the position of the temporary posted workers but the alleged pressure on the labour market created by the EU enlargement. The proposal leaves the impression that the Posting Act, which is essentially about the mobility of services, can be used against illegal migration. Although I’m in favour of broadening the scope to all industries, 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. In our study we had to conclude that reliable figures are missing and that the political debate is based on assumptions that need verification. The Bill passed parliament and later on the Dutch senate (December 2005). After publication in the Official Journal of the Netherlands<sup>14</sup> the extension of the Posting Bill (WAGA) to all sectors with general applicable collective agreements came into force from 14<sup>th</sup> December on. In the meantime it looks as if the fairy tales about the Eastern influx are over and replaced by a real debate about labour shortages in the future and the role of legal labour migration in coping with that. The Dutch government is planning to skip the transitional arrangements for workers from the new Member States.
- In Germany a similar development took place, because of the “*narrow*” interpretation, partially reflecting the social partners (except for the construction sector) resistance of a broader implementation. In the meantime things have changed and the Schröder government came up with an amendment of the German Posting Act<sup>15</sup>. The arguments in Germany do not completely correspond with the Dutch motivation. The former German government wanted to create (not only for construction as is the case so far)

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<sup>12</sup> In *Free movement revisited*, CLR-News 2-2005, Brussels.

<sup>13</sup> See: *Posting of workers: Background, content and implementation of Directive 96/71/EC*, M.S. Houwerzijl, CLR-News 2-2005, Brussels, based on her doctoral thesis, *De Detacheringsrichtlijn*, Tilburg.

<sup>14</sup> Published in: *Staatsblad*, 13 december 2005, Den Haag.

<sup>15</sup> *Entwurf eines Gesetzes zur Änderung des Arbeitnehmer-Entsendegesetzes*, Message to the press, Berlin, 11 May 2005.

“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 the 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.

These developments confirm the reaction of the EFBWW to the European Commission’s evaluation of the Directive<sup>16</sup>:

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.

In view of recent developments it might be added that just as well the national implementation of the Posting Directive cannot be done in a vacuum.

### **Epilogue**

In the meantime the ‘host country’ principle has come back into the spotlight, thanks to the proposed EU Services Directive. This draft Directive on services in the internal market (COM 2004/0002) – in the debates often named after the former Dutch commissioner Bolkestein – has from the outset met a lot of criticism (see Kowalski, in this issue).

The posting of workers in the context of service provision can be seen as a legal form of temporary cross border migration and the Posting Directive was meant to soundly base that free movement of services and workers. If we list up the results of the evaluation of that Directive – poor implementation, the lack of control and enforcement, weak or absent cooperation of the authorities, and no reliable data – then the least one can conclude is that the Commission has no feeling for political timing by bringing a proposal to the forefront that would remove important control mechanisms and apply to the country of origin. [ I can refer to the Kowalski article in this issue). The Commission’s proposed country of origin principle in the Services Directive, according to which the member states could not restrict the activities of service providers from other member states who comply with the laws regulating access to and exercise of services in their country of establishment, could destroy the balance between the protection of employees on the one hand and market opening on the other hand. The claim that the Services Directive does not interfere with the application of the Posting Directive appears misleading.

This is not the place to analyse the implications of the Services Directive in full detail, but a few points related to the first proposals have to be made clear:

- the restrictions for the host country or, better expressed, the plain prohibition on imposing notification, asking for an address or the presence of a representative of the service provider,

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<sup>16</sup> *A decent assessment needed*, Jan Cremers, CLR-News 3-2002, Brussels.

or for the preservation of social documents, render control almost impossible in the host country;

- the evaluation of the Posting Directive demonstrates that the role of the home country in monitoring 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 increase the likelihood that liberalisation of services will reinforce the already considerable problems with wage dumping;
- the same applies to 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.

The impression is thus that the European Commission's services act as two ghosts in one bottle. In a recent draft document that deals with the criticism of the implementation of the Posting Directive the Commission replies to her opponents<sup>17</sup>. There it is said that:

It should, however, be pointed out that the Directive reflects the clear and unambiguous intentions of the Community legislators, and stresses that application of the law of the host State in a number of key areas, such as working hours, minimum wages, safety, health and hygiene at work, is in the general European interest, which should not be called into question.

And furthermore the paper recommends Member States to create the appropriate context in which to resolve the question of the eruption of various forms of atypical work (including so-called 'bogus' self-employed):

(...) the only way to ensure that the same rules on protection apply to the same groups of people is by referring to the national law of the Member State to which the worker has been posted when seeking a definition for the term "worker". This places undertakings established in the host country on the same footing as those that provide cross-border services.

What is this other than a clear promotion of the 'host country' principle? But at the same time the Commission sees the Posting Directive as the corollary to the freedom to provide services as defended in the Bolkestein Directive! To be honest, in my long career as European trade unionist and researcher I have never seen such a contradictory policy.

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<sup>17</sup> Draft of a *Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, 15-11-2005, Brussels.