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The road to cross border justice

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Contents

Note from the editor

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Labour migration, the temporary and mobile character of (cross-border) construction work and the posting of workers have been a red thread in the work of CLR for years. We have researched, reported and written about the clash between economic freedoms and workers' rights and about the socio-economic impact of migration and transnational subcontracting. Since the implementation of the internal market and the development of the Community *acquis,* trade unions and the workers they represent in Europe are confronted with the question how to defend workers' rights that can be derived from European Union (EU) law, especially in a cross-border context. Although in theory it is often claimed that foreign workers have access to justice and redress to local courts like any other worker, the practice is rather patchy. On top of that, the primacy of the internal market rules has been a cornerstone of European Court of Justice (ECJ)-rulings. Based on the internal market rules, economic freedoms have been applied as the starting point in several cases. These economic freedoms have had a horizontal effect and fundamental rights are seen as derogations that have to be justified.

In this issue of CLR-News the legal dimension of transnational recruitment is treated. As a starter, we come up with a poem written by good old George Fuller who was inspired by *A Tale of Two Power Plants*, a contribution in CLR-News 4-2011 on trade union efforts to improve the working conditions of foreign labour on large multi-national worksites. Then two subject articles go into the problem of the enforcement of workers' rights and on legal redress. In the CLR-research on the functioning of the posting rules we found that the enforcement and recognition of workers' rights in cross-border situations is not self-evident. Preconditions necessary for individual workers to be able to seek justice in a foreign constituency and to defend their rights that can be derived from EU law before the court are often missing in cross-border disputes. In practice, workers are often unable to exercise these rights due to the inadequacy of existing means of redress in mass claim situations and to a lack of cross-border cooperation. On top of that, the costs of legal proceedings are sometimes higher than the compensation they can receive. Redress is the result of an uncertain path by the route of individual lawsuits that can take years in an unknown constituency and jurisdiction. Evidence obtained in one Member State is not automatically recognised by courts in another and administrative sanctions and sentences are not recognised by

or binding in other countries. In general, sanctions do not stand up in an extra-territorial context and are, as a consequence, not observed. The result is that procedures are interrupted or terminated and that the EU's legal system is unable to guarantee effective sanction, remedy or redress.

In the proposals for a Monti II clause that are circulating, it looks as if the EC has realised these problems. In the explanatory part of the draft proposal, the EC signals that the Court rulings have 'sparked controversy on the adequacy of existing EU rules to protect the rights of workers in the context of the freedom to provide services and the freedom of establishment'[1]. The proposal also talks about the necessity of remedy. At the same time the EC calls the economic freedoms 'fundamental principles' of EU law. The key word in the whole proposal is 'proportionality', and the question is of course who decides on what kind of proportionality (is it a check or a principle?). The proportionality of workers rights has to be tested, justified and reviewed in three stages: appropriateness, necessity, and reasonableness. ECJ judgements do not stem optimistic. A restriction of economic freedoms is, according to ECJ rulings, warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest (cited in recital 9 of the draft). As a consequence, fundamental social rights are immediately on the defensive, as these have to be justified and assessed in individual cases from the perspective of belonging to the 'overriding reasons of public interest'.

In this issue we advocate a broader and more worker friendly concept. The single market has to be countered with fundamental workers' rights and the instrument of collective redress should be installed (or strengthened in countries that have already such instruments) for trade unions as a recognised legal track to defend and enforce workers' rights, irrespective where the worker comes from. In the first exploratory contribution, I have described the latest developments in the EU related to the cross-border enforcement of workers' rights. The notion of collective redress is introduced with a short explanation of the position of the trade unions. The article ends with an overview of challenges and open questions that ask for further research. Martin Bulla has investigated whether collective redress can provide a possible way of improvement of judicial enforcement of posted workers' rights vested in the Posting of Workers Directive (Directive 96/71/EC). His contribution starts with the most

significant problems posted workers are facing, followed by an overview of basic types of redress procedures as well as differences in approaches to legal regulation in countries. EU initiatives dealing with the issue of collective redress mainly related to consumer law are examined and existing legal instruments are addressed with a view to a possible use for enhancement of posted workers' rights. Finally an overview of ways of applying redress procedures under the existing legislation is followed by proposals concerning a better functioning of collective redress in respect to posted workers.

The contribution of Jean-Luc Deshayes is dedicated to another aspect of transnational mobility. Based on examples from the trans-boundary basin of Longwy, long dominated by the steel industry and the scene of a sharp increase in asymmetric cross-border work in the direction of Belgium and Luxembourg, his contribution is dedicated to the status of the frontier worker. Employment at the frontiers reveals the new frontiers of employment: those of legitimisation of the labour market and the elusive goal of an individualised injunction to employability accompanied here by a cross-border territorial employer.

In the discussion section, two contributions are presented that can be seen as an important follow-up of two earlier issues of CLR-News. First, a critical contribution by Huige and Keune who shed light on their manifesto that pleads for a strategy towards a sustainable and solidary society. They see a trade union movement in decline, but it is not too late: a labour movement in its after days can move to the front of the struggle for an ecological and solidary society. Secondly, we have an extensive review of a 'classical' book of Günter Moewes that fits extremely well in our crisis and climate change debates.

Finally, we have our constant values, reports and reviews of books that are worth reading. As ever, we wait for your critical rebound.

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1. EC, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the economic freedoms of the single market, in particular the freedom of establishment and to provide services, Brussels, 2011/EMPL/093

Subject articles

Transnational Unionism and Democracy in Global Governance.

George Fuller

At the Olkiluoto 3 nuclear power plant site
in Eurajoki, on the west coast of Finland
and at the coal-fired power plant
in Eemshaven, Netherlands
in remote, economically depressed, lightly populated areas
migrant builders from fifteen countries work and live
in self-contained, international social space.

On multi-national and multi-lingual worksites
with widespread labour standards violations
and deliberate policies to confound and undermine,
in the pan-European labour market, segmented by nationality
principles once deemed fundamental
such as equal pay for equal work
have become archaic.

So, at Eemshaven, on World Day for Decent Work
the FNV produced a leaflet and raised a banner
that flew above the accommodation container park
home to 1,200 migrants - and the site
where employers decreed
that Dutch pipe fitter Jan earn 13.12 euros per hour,
Portuguese pipe fitter Jose earn 10
Polish pipe fitter Janek only 9.54.
And that anyone who complained,
whose complaint was found justified
would be fired.

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The notion of collective redress in a cross border context - an introduction

Introduction

In recent years remarkable shifts in the (power) balance between fundamental workers' rights and the single market rules, notably in the field of the provision of services, European company law and competition rules, can be signalled. There are clearly competing forces with different prospects for workers' rights. The founders of the European Union (EU) advocated the single market with the promise that it would organise a richer, more creative, and more intelligent, fairer and stronger society. However, since the implementation of the internal market project and the development of the Community *acquis,* as a cornerstone for the integration of the EU, trade unions in Europe are confronted with the question of how to strengthen workers' rights that can be derived from EU law, especially in a cross-border context. Although it is often claimed that foreign workers have access to justice and can seek redress through local courts in seeking respect for working conditions and legal provisions, the practice is less rosy. The overall picture in the Member States is rather patchy.

In this exploratory article the notion of collective redress is introduced with a short explanation of the challenges this notions brings for the trade union side. After an exploration of trade unions' possibilities, the article ends with a list of practical problems and open questions that require further investigation.

Remedy in the legal EU frame

As a result of the introduction of the single market European citizens and employees are more and more confronted with aspects of life and work that are based on European rules and regulations. The topical question is how citizens and workers can ask for justice in deriving their rights from this legal and

regulatory frame. The Treaties provide for legal and administrative cooperation and, according to the Lisbon Treaty (article 82 TFEU), the European legislator (Council and Parliament) will adopt measures to lay down rules and procedures for ensuring mutual recognition on all forms of judgments and judicial decisions throughout the EU. In addition, throughout the last decade, the European legislator has enshrined the collective defence of workers' interests in the EU Treaties. The strongest overall case in this area (next to the Convention on Human Rights recognised at EU level[1]) is a section in the Charter of Fundamental Rights of the European Union that deals with the right to effective remedy (title VI, article 47):

> *Right to an effective remedy and to a fair trial*
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Another topical question is the role of the European social partners in cases where there is direct reference to parts of the EU legal system that originate from the results of the social dialogue. In the recent past there has been a call for a transnational labour dispute system since the introduction of the social dialogue procedures[2].

All in all, the right to compensation, the right to access to justice and the right to effective remedy should no longer be a matter of theory. Legal provisions guaranteeing the practical enforcement of rights have to be a crucial element in policy making. The right to act collectively should be strengthened

at EU level and the EU should play an important role in promoting effective enforcement of these rights. But recognition of workers' rights in cross-border situations is not self-evident and the problems that EU citizens encounter when they try to seek redress are manifold. In practice, workers are often unable to exercise these rights due to the inadequacy of existing means of redress in mass claim situations and to a lack of cross-border cooperation. On top of that, the costs of legal proceedings are sometimes higher than the compensation they can receive.

The theme that we want to explore here, therefore, is whether a collective redress mechanism that allows citizens and workers to bring a case via their representative organisations before the court could be more effective.

The notion of collective redress back on the agenda

In 2011 the European Commission (EC) (DG Justice) opened a public consultation: *Towards a Coherent European Approach to Collective Redress.* The purpose was to identify common legal principles on collective redress and to examine how such common principles could fit into the EU legal system. The consultation explored which different forms of collective redress (injunctive and/or compensatory) could have an added value for improving the enforcement of EU legislation and for better protecting the rights of citizens and business.

The EC produced a working document emphasising that rights, which cannot be enforced, are worthless (EC, 2011). Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation. The Charter of Fundamental Rights of the European Union confirms the right to an effective remedy for everyone whose rights and freedoms guaranteed by EU law are violated. The EC refers to cross-border disputes in particular and to the fact that individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices. However, in

the consultation the EU only referred to the rights of consumers and businesses not workers.

The trade union movement developed several arguments in reaction to this consultation process, mainly focused on infringements of EU law in cross-border disputes. An answer to the collective redress consultation was a logical follow up to these demands (ETUC, 2011a). In May 2009 the European Trade Union Confederation (ETUC) had already formulated a position paper called *Towards a New Social Deal*. In that paper the ETUC called for a New Social Deal as a driver for social justice and more and better jobs. Key demands in the paper were the creation of a dispute settlement system and the creation of a specific chamber at the European Court of Justice, with the participation of the social partners, devoted to social and labour problems (ETUC, 2009). In the 2011-2014 Action Plan (adopted during the Athens congress) a clear demand with reference to redress was formulated (ETUC, 2011b):

> 338. The ETUC will step up the work inside the ETUC litigation network, taking the next step by deciding upon a litigation strategy for the European trade unions and by starting to actively bring suitable cases to court, via all possible channels, national, European, and international, in order to create a body of case law that is favourable to the interests of workers in the EU.

In a joint letter to the Commissioner for Justice, Fundamental Rights and Citizenship the ETUC, alongside a list of NGO's, stressed the urgent importance of providing European citizens with the missing tool for efficient redress in mass claim situations (ETUC, 2011c).

The arduous path for workers

Institutional enforcement and related sanctioning exist in some member states but legal facilities and court access vary significantly across the member states. The legal position of some of the institutional authorities involved in the world of work in member states (for instance tax authorities) is rela-

tively strong. For other institutions i.e. the labour inspectorate, the outlook is more diverse as their judicial competence in cross border situations is weaker. A completely different situation applies for the individual worker who is confronted with cross border cases. The preconditions necessary for workers to be able to seek justice and to defend their rights that can be derived from EU law before court are often missing in cross-border disputes. This of course can have an important effect on the proper search for justice.

For individual workers the route through national tribunals and courts is an arduous one:

- courts are often unfamiliar with transnational issues,
- courts are not always committed to the results of collective bargaining,
- evidence obtained in one member state is not automatically recognised by courts in another,
- there is a lack of guidance on how to deal with cross-border issues and the ECJ cases have not contributed to more clarity or certainty,
- therefore, it is also difficult for individual workers to prove abuses,
- fines are rather symbolic and have no deterrent effect,
- employers can close down their operations and re-emerge under different names relatively quickly,
- it is difficult to master and monitor regulations that originate in another EU country

In the CLR-research dedicated to the theory and practice of the Posted Workers Directive we found that, in situations with individual cases of breaches of EU law, the offences often turned out to be of a larger scale. However, redress is the result of an uncertain path by the route of individual lawsuits that can take years in an unknown constituency and jurisdiction. Evidence obtained in one Member State is not automatically recognised by courts in another and administrative sanctions and sentences (for instance imposed by the labour in-

spectorate and the courts) are not recognised by or legally binding in other countries (as they would be if they were treated as criminal offences). Therefore, administrative sanctions in general do not stand up in an extra-territorial context and are, as a consequence, not observed. As a consequence, procedures are interrupted or terminated. The result is impunity and the inability of the EU's legal system to guarantee effective sanction, remedy or redress. On top of that, redress initiated by the competent national enforcement institutions is often dependent on the number of workers involved and/or the extreme nature of the exploitation or abuse (Cremers, 2011).

It is evidential that in recent years the role of trade unions and their representatives at the workplace has been crucial for the detection of irregularities in a cross-border context, especially in situations where unions have established regular contacts with the workforce. The most significant groups involved in compliance and enforcement at the workplace are local trade union shop stewards and representatives. Their activities range from the translation of trade union information into several languages to cooperation with the labour inspectorate or networking with solicitors. The legislative instruments, which support and maintain the function for trade unions to monitor and check wages and employment conditions for domestic and foreign employers alike, have not kept pace with this important new role and have been partially weakened by EU law.

New challenges for the trade unions

In recent years several national disputes related to the clash of economic freedoms and workers' rights have been handed over to the ECJ. The trade union movement in Europe has been confronted with the situation that violations and breaches of workers' rights, even with severe consequences such as fatalities, are taken less seriously than cases where economic freedoms are at stake. The workers' voice is often neither heard nor recognised. If we face the situation of an

individual worker in a foreign constituency, the situation is very complicated. Recognition of workers' rights in cross-border situations is not self-evident and the problems that EU citizens encounter when they try to seek redress are manifold. In practice, workers are often unable to exercise these rights due to the inadequacy of existing means of redress in mass claim situations and to a lack of cross-border cooperation. On top of that, the costs of legal proceedings are sometimes higher than the compensation they can receive. This has to lead to the formulation of new union demands. The enforcement of workers' rights and effective sanctioning, in a transnational context, has to be guaranteed. The legal force of administrative fines has to be upgraded in order to be mutually respected and recognised in a transnational context. The cooperation between competent authorities in the checks on contract compliance and in the enforcement of EU rules has to be strengthened and mutual assistance between member states has to be made mandatory. In this respect, the long-standing union plea for a system of joint liability in the sub-contracting chains with extra-territorial competencies will certainly stay on the agenda.

The ETUC claims in its submission paper to the EC to protect all workers and to strive for a regulation ensuring respect of fundamental rights and for stricter sanctions in case of infringements of existing regulations (ETUC, 2011a). Trade unions should have access to justice at national level and be entitled to challenge administrative decisions. Cross-border mobility based on EU regulations has to be complemented by Europe-wide recognised legal national provisions to guarantee effective transnational sanction, remedy and redress in cases of violations of workers' rights. Therefore, several questions raised in the aforementioned consultation will stay relevant in the work towards an improvement of collective redress of workers' rights in the area of labour law. Trade unions must be entitled at national and at EU level to put an end to practices that infringe national and EU workers' rights. In the social field, collective redress could contribute to a

stronger enforcement of the rights enshrined in the Charter and in other parts of the *acquis*. Strengthening the position of trade unions in case of EU law-related cross-border disputes is complementary to the role of collective negotiations, collective action and national juridical procedures. Recognition of the representative role of trade unions in this field could contribute to a more effective enforcement of rights that derive from EU law.

This might also clarify and solve the question of whether an individual worker is eligible in a foreign constituency, a situation that is not settled in a uniform way all over Europe. The bundling of individual claims by trade unions can increase the efficiency of both judicial and out-of-court redress. Therefore, trade unions must be able to represent (if they wish to) in their countries victims of other member states, even when they are domiciled in different member states. Apart from the judicial mechanism, the right to negotiate as an alternative dispute resolution (ADR) has to be recognised. In the legal provisions the imbalance of power has to be taken into account. Therefore, the 'loser pays' principle cannot be applied in the case of a violation of workers' rights. Procedures that serve as a barrier for workers to claim their rights must be prohibited.

Unsolved questions

In the area of cross-border activities and the posting of workers, evidence is found that the access to redress is uncertain and arduous for individual workers. Breaches of fundamental social rights are often not covered by transnational judicial mechanisms and the recognition of collective actors is in no way guaranteed.

This leads to some important questions:

- Where is the legal standing vested for workers' rights in cross-border or transnational disputes and what about the recognition of the workers' voice?
- In a situation of multiple claims, bundling of individual claims in a single collective redress procedure, or allowing

such a claim to be brought by a representative entity might increase the efficiency of both judicial and out-of-court redress. How to create effective remedy related to workers' rights?
- What role can trade unions representing workers' rights play in the context of litigation or multiple claims in a cross-border context?
- How to safeguard the representative role of trade unions and the capacity to represent victims of other member states (in court and out-of-court)?
- Is the effect of collective redress binding for all or can individuals' opt-in/opt-out?
- In the social field, the classical sanction is of an administrative nature. This type of sanction is not EU-proof. Cooperation between member states and/or their competent authorities is poor. Do we need a Regulation on Workers Protection Cooperation (comparable to the general framework for the cooperation of national enforcement authorities initiated for consumer protection)?

The crucial issue raised in this initial exploration is how to elaborate tailor-made provisions in the field of workers' rights in cross-border disputes, notably in those cases where rights can be derived from EU law. If, for instance, competent authorities in countries where cross-border work is pursued want to enforce workers' rights, these countries are often dependent on the cooperation of the home country. A reply to requests for information can take some time and the employer and the workers have often disappeared. Thus, systematic and effective supervision in the host country becomes an illusion. The EC has produced a procedure to streamline the request for information. However, this procedure has a non-binding character; the competent authority (in the host country) '*would be grateful*' if the competent authority in the home country could provide the information concerning the worker. A refusal or simply negligence is not sanctioned. Therefore, a general framework for the cooperation of national enforcement in the field of workers' rights (equivalent

to the existing framework for consumer rights) with a mandatory character combined with a strengthening of the collective instruments for the defence of workers' rights should improve this situation.

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1. Article 6 of the European Convention on Human Rights: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf
2. According to articles 154 and 155 of the Treaty on the Functioning of the European Union the EU can hand over to the European social partners the possibility to conclude contractual relations, including agreements, related to proposals in the social policy field. At the joint request of the partners these agreements can be transposed in EU legislation. This procedure can put the partners in a co-regulatory role.

Collective redress of posted workers' claims[1]

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Introduction

Enforcement has been a serious issue ever since the Posting of Workers Directive[2] (hereinafter referred to as PWD) has been adopted. Posting of workers is a triangular relationship between the posted worker, the sending employer and the user undertaking. The PWD, however, fails to define sufficiently internal relations within this complex legal construction. Especially unclear and vague relations between the user undertaking and the posted worker give rise to many practical legal issues, which will be discussed in this article. Posted workers are in a precarious position also from a practical perspective. They are on the territory of a foreign state, where they do

not orientate themselves sufficiently. Besides, in many cases, especially as regards manual labourers, they do not speak the language of the host member state. This very fact makes their position very insecure in terms of seeking justice. Posted workers are usually completely dependent on their user undertaking. The user undertaking often provides (or ensures) accommodation, pays (ideally) wage and not exceptionally even retains workers' travel documents. For this reason workers are apparently not willing to anger their user undertaking by raising their voice or even seeking legal action for the protection of their rights. This is even worse in cases of third countries nationals, whose very presence in the host country depends on the duration of the employment provided by the user undertaking (work permits, visas). Given the specific character of posting, an appropriate means of remedy needs to be available for posted workers. This enforcement mechanism must take into account all the aforementioned particularities of the posting. Collective redress, if designed and applied in appropriate form, may cause significant improvement in posted workers' legal position, since it addresses several of the most significant problems, which arise in this respect, such as hesitance of posted workers when it comes to stand up for their rights, lack of knowledge about the host country's legislation and environment, or high litigation costs.

What is collective redress?

Collective redress may be defined as a means of seeking remedy for a breach of law in cases where a higher amount of claimants is affected by a single unlawful act of the defendant. In this case the amount of damage caused to a single individual may be relatively small, which would act as a deterrent from seeking remedy individually[3]. The point of collective redress is to provide for such a procedural tools, that would, on the one hand, encourage injured individuals to stand up for their rights by diminishing the deterrents from seeking remedy and, on the other, ensure that courts will be able to manage mass actions effectively and in reasonable time.

There is a long and well-developed tradition of collective redress in the United States. In European countries, however, this issue is still in a developing stage. To date only 14 European Union Member States have adopted any form of collective redress mechanism and even in these countries these legal instruments are not very widely used[4]. The most significant issue, which has been widely discussed in the course of debates concerning collective redress, is the dichotomy between the opt-in and opt-out approach. The opt-in system means that each individual, who might be affected by the infringement in question, has to give his or her explicit consent to take part in the process and be included in the class of claimants. On the contrary, under an opt-out system all the subjects putatively aggrieved by the particular misconduct of the defendant are automatically deemed to be parties in the case, unless they expressly make known their will not to take part in the case and to be excluded from the class of claimants. Considering the basic principles of continental civil legal systems, it is not a surprise that most countries tend to favour the opt-in approach[5].

Collective redress under current legal regulation

Jurisdiction in cases involving a cross-border element is governed by Regulation No. 44/2001 (European Council, 2001; hereinafter referred to as 'Brussels I Regulation'). This regulation contains special provisions for various types of disputes. Besides the general rule, vested in article 2, special jurisdiction rules are provided for matters related to a contract (article 5.1), matters related to maintenance (article 5.2), tort, delict or quasi delict (article 5.3). Moreover, there are special sections regulating jurisdiction in specific contractual matters like insurance (section 3), consumer contracts (section 4) or contracts of employment (section 5).

Who to sue - the problem of classification

Usually a posted worker is in no direct contractual relationship with the user undertaking. The posting is governed principally by two contracts: *(i)* a contract between the sending

employer and the user undertaking and *(ii)* amendment to the contract of employment between the sending employer and the posted worker. Also the PWD itself, while laying down the obligation to guarantee certain terms and conditions of employment to posted workers in article 3.1 mentions the 'undertakings referred to in Article 1 (1)', which means the posting employer[6]. Thus the relationship between a posted worker and the user undertaking is very specific and usually regarded as a labour relationship *sui generis*. For this reason there is very little space for posted workers to sue their user undertaking. The employment relationship between the posted worker and the sending employer, on the other side, is maintained during the whole period of posting. To conclude, an action for non-compliance of terms and conditions of employment guaranteed by the PWD should be primarily directed against the posting employer, not the user undertaking.

Should the defendant be the posting employer, no problem basically arises with respect to classification of the claim, as it is with no doubt that it would be a matter relating to the individual contract of employment and thus subject to special protective jurisdiction rules vested in section 5 of the Brussels I regulation. In case the claim was directed against the user undertaking, which is not a viable idea according to the author of this paper, protective jurisdiction would hardly be applicable and the claim shall be regarded as a matter relating to a contract, as defined in article 5.1. Clear classification of a claim directed against the posting employer however, applies unambiguously only in respect to individual claims. As regards collective redress, the classification issue is more complex. First of all we have to distinguish between different types of collective actions. In respect of group actions or test cases, the contractual base of the collective action would persist, since in this kind of procedures all the particular claimants are individually in the position of a litigating party and the collective aspect only lies in the fact that individual actions are procedurally brought and heard together[7].

A different situation, however, occurs in relation to representative actions. In this case the action is brought to the court by a representative, who acts as a litigating party on behalf of individual claimants. The representative either may or may not be a party to the contract of employment. Under certain conditions, if the representative is a public authority, a question will arise whether this action would even fit in the scope of the Brussels I Regulation. Zheng Tang suggests two possible approaches to this problem: *(i) the subject matter approach*, which emphasizes the character of the subject matter of the case itself. This would mean that only the relation between the defendant (employer) and individual posted workers would be considered. Secondly, the *(ii) procedural qualification approach* takes into consideration the relation between the litigating parties. In this case a contractual relationship between the defendant and the representative itself would be required. Should the representative be a public authority, which apparently did not enter into a contract of employment with the employer, a contractual or even quasi-contractual character of this case would be hard to recognise (Zheng Tang, 2011). But, if the representative would be one of the individual claimants (posted workers), it is beyond controversy that there is a contractual relationship between the actual litigation parties.

Trade unions as representatives of posted workers

From our perspective, it is important to assess a situation in which the class of posted workers would be represented by a trade union. Let's now put aside the question of whether trade unions are allowed to represent posted workers in judicial proceedings, since this would depend on the national legislation of the member state competent to hear that case (*lex fori*). Trade unions are not a public authority and they obviously cannot be considered as a party to the contract of employment. In this respect, we are speaking about representative action. Therefore an issue of qualification of such a dispute would arise. May an action brought by a trade union on behalf of posted workers against the posting employer be

regarded as a matter relating to an individual contract of employment within the scope of section 5 of the Brussels I Regulation? Since section 5 does not provide any definition of 'matters relating to individual contracts of employment', we have to refer to the preamble to the Brussels I Regulation, which explains why the European legislator has introduced special jurisdiction rules for certain types of claims. According to recital 13 of the preamble *In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.* It is clear from this recital that the aim of the special jurisdiction rules for insurance, consumer contracts and individual contracts of employment is to protect the weaker party. Speaking about the 'weakness' or 'strength' of contractual parties, we can make a distinction between the procedural aspect, litigation power, and the substantive aspect – the bargaining power. Although collective redress procedures may significantly improve the litigation power of posted workers, since joining individual claims, often of negligible value, may result in a considerably high claim, it does not affect in any way the bargaining power of the respective parties. The collective redress itself though has purely a procedural character and is aimed at improving workers' position within the course of the enforcement of their right. On that account, collective redress would not change the nature of the employment relation, which is typically imbalanced in favour of the employer. Not to mention the fact, that the posted workers' position is even weaker compared to 'standard' employees working in their home country, for many reasons already outlined in section 1 above. Therefore, in accordance with recital 13 of the preamble to the Brussels I regulation, workers' claims should always be subject to special protective jurisdiction rules, regardless of the procedural form they want to make use of in order to enforce their rights. To sum up, even if classes of posted workers pursuing their claim via collective redress were represented by a trade union, protective jurisdiction rules aimed at protecting employees as the weaker party should still apply.

Where to sue

Under current legislation posted workers facing non-compliance of terms and conditions of employment guaranteed by both EU and national legislation within the course of their posting may only sue the original employer who posted them abroad. Article 19 of the Brussels I regulation provides for three different ways as regards to how to determine the competent court. In case of posted workers, however, all these rules will most probably lead to the same result. The first rule (article 19.1) refers to the member state where the employer is domiciled. Under this provision, it is quite simple to identify the competent court. The second rule (article 19.2a) point to the place where the employee habitually carries out his work (or where s/he last did so). Although the Brussels I regulation does not define the concept of 'habitual place of work', the Court of Justice of the European Union explains, that it is a place where or from which the employee principally discharges his obligations towards the employer[8]. So a habitual place of work will be a place embedded in the employment agreement or a place where (or from where) the employee as a matter of fact (regardless of the wording of the employment agreement) physically and truly performs his/her obligations to the employer, resulting from the employment agreement. As regards the posting of workers, the very nature of this legal relation clearly proves that it may not affect the determination of the 'habitual place of work' within the meaning of the Brussels I Regulation, since the posting has an exclusively temporary character. Even though there is no uniform limit regarding the length of duration of the posting, the very logic of this legal institute gives voice to the fact, that it is only a temporary modification of a permanent regime of the employment relation. While the Brussels I Regulation does not provide for a definition of the 'habitual place of work' concept, the same concept of 'habitual place of work' is used also by the Rome I Regulation (European parliament, 2008). In this instrument we can find more detailed explanation, clearly saying in article 8 (2) that the country where the work is habitually carried out shall not be deemed to have

changed if the employee is temporarily employed in another country. Finally, the last jurisdiction rule contained in (article 19.2b of) the Brussels I regulation refers to the courts for the place where the business which engaged the employee is (or was) situated. This rule however may only be used provided that the employee does not or did not habitually carry out his/her work in any single country. As regards the posting of workers, again, this jurisdiction rule will lead us to the country where the worker signed his employment agreement and the amendment regulating the posting and from where he was posted to perform temporarily working tasks at the workplace of the user undertaking abroad.

To conclude, current legal regulation does not provide space for lodging a sue against the user undertaking or even against the posting employer in the host country, where the employee temporarily works. In most cases the only viable solution for posted workers is to sue the posting employer in the country of origin. This is obviously a very inadequate solution, which hampers posted workers' access to justice during the period of posting, when they are mostly vulnerable and their position is ever weaker than normal. In the last section we would like thus to point out on possible ways of improving the enforcement of posted worker's rights.

Proposals for new legislative initiatives at EU level

As already mentioned , there are several serious problems in the current legislation, endangering and impeding the enforcement of posted workers' rights. From the systematic point of view we can divide these issues into two categories: *(a)* questions concerning substantive legal matters and *(b)* problems connected with the legal procedure of enforcement.

Substantive legal issues

One of the most significant issues with regard to the posting of workers is the very complex triangular internal structure of the legal concept of posting of workers and especially the

unclear and complicated relationship between the posted worker and the user undertaking. This has a vast impact also on procedural aspects, since identification of the subject holding the passive legitimation in the case (who shall be sued) is dependent on the substantive legal regulation. As already pointed out above, under current legal regulation, posted workers essentially cannot sue their user undertaking, since there is a lack of comprehensible legal link between these subjects, with clearly defined mutual obligations. Thus, it is desirable to redefine the whole relational triangle of posting of workers and to define mutual rights and obligations of all subjects composing this triangle in a comprehensive and coherent way. Special attention shall be paid to the issue of liability. It must be clearly established which subject (user undertaking/posting employer) is responsible for observance and violation of any particular right of the posted worker. In this respect, introduction of joint and several responsibility of both user undertaking and posting employer is strongly recommended by most scholars and practitioners. The exact scope of this responsibility, however, is up to discussion. Some authors would like to limit the joint and several responsibility only to financial obligations, or only to some of them. We, however, would prefer establishment of this type of common responsibility in respect to the whole extent of the hard nucleus of terms and conditions of employment, as defined in the PWD. This solution would provide much stronger protection for posted workers, which is all in all the principal aim of the whole directive.

Procedural issues

Should the new and clear definition of mutual rights and obligations within the triangular relationship of posting of workers be established, together with joint and several liability of both the user undertaking and the posting employer, it would unambiguously represent a major improvement from both the substantial and the procedural points of view. As regards the procedural angle, this solution would make it possible for posted workers also to sue their user undertaking or

ideally both employers at once, based on their joint and several liability. However, an issue concerning a classification of such a case would arise. Should the defendant be only the user undertaking, most probably this kind of cases would not be eligible to be classified as a matter relating to the individual contract of employment within the meaning of section 5 of the Brussels I Regulation. This would, however, to a large extent be dependent on the exact wording and construction of the new definition of the posting triangle. A different situation occurs if the posted worker chooses to sue both the user undertaking and the posting employer, which is obviously a strongly recommended solution. In such a case, protective jurisdiction of section 5 would be established.

On the other hand, it is not necessary in this case to make this kind of procedure subject to special protective jurisdiction. Even if classified as a matter relating to a contract within the meaning of article 5.1 of the Brussels I Regulation, it would provide sufficient solutions for posted workers. The jurisdiction rule under this provision says that the court competent to hear the case is that of the place of performance of the obligation. Since within the period of posting a posted worker carries out his obligations towards the user employee in the host member state, this would lead to the establishment of competence of the host member state's court. As a matter of fact, if the action were directed only against the user undertaking, only the relation between the user undertaking and the posted worker should be taken into consideration when solving the classification issue.
Ideally a new provision could be introduced into the Brussels I Regulation, providing for a special jurisdiction rule for matters relating to posting of workers. This special rule should lead to the courts of the place where the posted worker habitually carries out his/her obligations *during the period of posting*, i.e. courts of the host member state. This, however, is not necessary and as outlined above, this issue may be solved also under current legislation.

Need for an effective enforcement
Making the user undertaking responsible for observing the terms and conditions of employment in relation to posted workers and making the courts of the host member state competent to hear this kind of case would without doubt bring substantial improvement to the enforcement of posted workers' rights. This would, however, not solve all the problems observed. The need for an instant and rapidly enforceable solution will persist, as well as a need for special instruments, addressing the problems of costs of the proceedings and reluctance of posted workers to stand up for their rights. The problem of the length of standard judicial proceedings could be solved by the introduction of a special accelerated judicial procedure, aimed particularly at protection of posted workers' rights. This could be based on a mechanism established by the injunctions directive described above.

The second problem mentioned - high litigation costs and reserved behaviour of posted workers as regards using judicial redress - may be worked out by enabling collective redress of posted workers' claims and simultaneously providing trade unions with the right to represent posted workers in such cases. The most suitable way to achieve this would probably be through a new provision, incorporated into the PWD, which would unequivocally provide for an option to merge posted workers` claims and to bring such a class action to the court by the respective trade union, which would act as legal representative of aggrieved posted workers in the host member state.

Conclusion
Pivotal problems occurring in relation to bringing posted workers' rights to bear may be divided into two crucial categories. The first category concerns the very structure and nature of the concept of the posting of workers, which is too complicated, with unclear and insufficiently defined internal relations and responsibilities within the triangle of posting. In particular, the vague division of duties between the sending

employer and the user undertaking makes it very difficult to call for the accountability of any of these subjects. Solving this first cluster of problems seems to be rather easy. It requires opening the PWD and redefining the internal structure of the triangle of posting. In order to improve enforceability, it would be very desirable to introduce joint and several liability of both the sending employer and the user undertaking for observing terms and conditions of employment guaranteed to posted workers.

The second category of problems is related to the legal procedure of enforcement. These procedures are usually very longstanding, costly and complex. This acts as a substantial barrier to effective enforcement of justice for posted workers. The generally weaker position of employees in an employment relation as compared to employers is even more precarious when the employee is posted abroad within the scope of the PWD. Given the fact that the legal relation of posting has a temporary character, a need for a fast procedure, with an instant and directly enforceable decision in cases involving failure to meet guaranteed terms and conditions of employment for posted workers is even stronger. It is not viable for posted worker to wait long months for the outcome of a remedial procedure, since at the time of achieving the final decision the posting may already be long over. The way of tackling this second group of problems is tougher. The simplest solution would be the introduction of strict periods for courts to issue a decision in cases involving the posting of workers. A reasonable period would be of up to 30 calendar days. More complex, but also a far more effective solution, would require the development of proper procedures, specifically designed for cases dealing with posting of workers. This new accelerated model of legal enforcement might be based on a template instituted by the Injunctions Directive (European Parliament, 2009).

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1. An extended version of this paper was published as AIAS working paper under the title: *Enforcement of posted workers' rights via collective redress*. Forthcoming at: http://www.uva-aias.net/101
2. 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.
3. According to the EC Green paper on consumer collective redress half of the European consumers will not go to court for less than 200 €. One out of five European consumers will not go to court for less than 1000 €. Cited in COM (2008) 794, Brussels, November 2008, p. 4.
4. Other resources report only 13 EU member states having adopted any kind of collective redress mechanism, however, on July 19 2010 a Polish Act on Class Action came into force.
5. One of the constitutional cornerstones of most civil law countries is the freedom to take legal proceedings. It is understood as the right of each individual person who may be involved in the case to be heard by the court and to take part on the litigation. This principle is expressed also in multiple international human rights documents, such as the European Convention on human rights. Therefore it is hardy viable in civil law to impose a judgement on a person who did not give consent to take part in the particular process.
6. Article 3 (1) of the PWD: 'Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment.' Article 1 (1) of the PWD: 'This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.'
7. Compare with the analysis dealing with consumer collective redress: Zheng Tang, S. *Consumer collective redress in European private international law.* Journal of Private International Law, Vol. 7 No. 1, 2011, p. 108.
8. Judgement of the ECJ of 13 July 1993 Mulox IBC Ltd v. Hendrick Geels (C-125/92).

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Employment at the frontiers, revealing of the new frontiers of employment[1]

Cross-border labour reveals profound changes taking place in employment, as the base for workers' rights passes from the workplace to worker's employability. In this contribution this shift is illuminated with the inclusion of unemployment in the status of the frontier worker, the rival use of the status of the posted worker, and the construction of a territorial trans-border employer.

Employment at the frontiers is an excellent indicator of the 'new frontiers' of employment, namely the reforms put into place since the 1980s in European countries in the name of employment. It is no longer the socialisation of wages, but rather employability that is privileged. Employees within an inter-professional wage space based on the workplace are replaced by permanently employable workers who are invited to reduce their presumed distance to the job. The role of jobs and employers remains critical, but the weight has shifted from businesses to the labour market, hence the proposed notion 'territorial employer.'

Three border dynamics contribute to this situation. First, the status of the frontier worker, which results from the coordination of national social security schemes, is adapting to the changes in the role of employers. It must, moreover, face the weakening of its influence due to the growing importance of supplementary insurance schemes as well as competition from the practice of posting. Finally, the legitimisation of the labour market in the construction of the employability of cross-border workers involves the construction of a cross-border labour market. These trends are illustrated with examples from the transboundary basin of Longwy, long dominated by the steel industry and the scene of a sharp increase in asymmetric cross-border work in the direction of Belgium and Luxembourg since the early 1990s [see also IES note No. 9].

The evolution of the status of frontier workers

European Union (EU) Regulation 1408, which specifies the status of frontier workers, was adopted in 1971. The first amendment was proposed in 1992. A first new draft was then submitted to the European Parliament in 1998. Negotiations continued until the adoption of new regulations in 2004 (EC Regulation No. 883/2004). Its implementing regulation (987/2009) came into force on 1 May 2010. This slow evolution of texts and jurisprudence reflects both the adaptability and deeply contentious nature of this domain. A frontier worker is defined as 'any employed or self-employed person who pursues his/her occupation in the territory of a Member State and resides in the territory of another Member State to which s/he returns as a rule daily or at least once a week'. His/her primary social security system - that of the place where the work is pursued prevails over that of his/her place of residence or the employer's headquarters - adapts to the shift in the field of responsibility of employers: from the job to the labour market.

The cross-border basin of Longwy. The transboundary basin of Longwy is a "privileged" field of observation due to past domination of the steel industry and the brutality of the changes occurring over the past thirty years. The numerous decisions to close plants from the late 1970s to the late 1980s have reduced the number of steelworkers from 24,000 in 1955 to zero in 2006. In 2007, a total of 34,586 employees, 18,623 work in the employment area of Longwy and 16,323 abroad. Almost one out of two employed workers is involved in cross-border work. 80% of the frontier workers commute to Luxembourg. More broadly, 43.7% of wage labour in Luxembourg consists of frontier workers. These numbered 150,000 in 2010, a tenfold increase since the early 1980s.

Initially, the status of frontier worker fitted in the continuous acquisition of rights established during the 1950s to 1970s. The labour market is nowadays partly marginalized in favour of an internal market, as in the case of the steel industry in Longwy. Employed or unemployed, the worker is entitled to health insurance, unemployment benefits, family services or retirement

pensions. Priority is given to the salary as a function of qualification, compliance with the pay scale, industry-based collective bargaining, and public social policy of respect for a hierarchy of standards by the employment contract. The qualification of a position does not mean qualification of its holder, who remains vulnerable to unemployment, but the action of powerful industrial unions helps to integrate the frontier worker into collective labour rights schemes, both conflictual and negotiated, through employment. From the perspective of social security laws, European regulations guarantee equal social treatment of frontier workers and residents of the country of employment. Employers cannot differentiate employees based on their country of origin's level of social security contributions, which they would have been able to do if affiliation of employees with their place of residence had been chosen.

This logic is also demonstrated by the solution to the legal dispute over the general welfare contribution (*contribution sociale généralisé*e, CSG) and the contribution to the reimbursement of social debt (contribution au remboursement de la dette sociale, CRDS) in France. Each nation-state, country of residence and country of employment, is entitled to collect taxes on the income of frontier workers. Where bilateral conventions have been signed to avoid double taxation, the tax status of frontier workers is based on the worker's country of residence in some, while in others, as in the case of those signed by Luxembourg, a worker's status is linked to his/her country of employment. The Commission has opposed the French government by relying on the provisions governing the coordination of national systems on the principle of equal treatment in the workplace. The French government wanted frontier workers residing in France and working in Belgium and Luxembourg to be subject to the CSG and the CRDS. In two judgments delivered on February 15th 2000, the European Court of Justice (ECJ) ruled in favour of the Brussels Commission and established that frontier workers did not have to pay these contributions, concluding that these were in fact social security contributions under community rule. Here we have a

case of reinforcing the principle of belonging to the country of employment.

The existence of the frontier reveals the limitations of this logic of employment, which is less obvious within a national frame of reference. Wage rights are strictly related to the workplace, but the country of employment and hiring companies have no responsibility vis-à-vis the unemployed. Therefore, in case of unemployment, after contributing social charges in the country of employment, the unemployed worker is taken under the social security of his home country, where s/he collects unemployment benefits under that country's legislation and is recorded in the unemployment statistics of his/her home country, even if s/he continues to actively seek transborder employment. The unemployed worker is not an employee of his/her country of work, although s/he meets the conditions on most recent employment required by the Member State's legislation for eligibility for the right to benefits.

This situation no longer corresponds to the shift of rights from employment to employability, with the new role of the labour market, along with the status of the unemployed worker that it implies. Thus, in recent decisions, the ECJ (becoming the Court of Justice of the EU in 2009) has partially opened the way to a review of the separation of social security contributions and benefits. Since May 1st 2010, Luxembourg is required to reimburse the administration of the frontier worker's residence for all unemployment benefits for the first three months of compensation. Luxembourg negotiated hard on the duration limit for budgetary reasons: the flow of frontier workers between France and Luxembourg is indeed very asymmetric. The limitation of reimbursement to the first three months of unemployment also shows that the employability of the unemployed worker is in fact at the centre of the system, and not his compensation.

The status of the frontier worker and its rivals

Notwithstanding the above observations, other developments

are undermining the principle of the worker's affiliation to the workplace. We will focus here on two of them, both related to changes in employment and its relationship to the socialization of salary.

On the one hand, both the employers and the social protection policies 'to promote employment' are pushing for a reduction in mandatory social security contributions, drawing on a national-level pooling of wages for the benefit of a 'second pillar' of supplementary schemes based on capitalisation. And if the Court of Justice has ruled that the administrative institutions that manage the compulsory provisions which are based on a contributory system should not be considered as businesses, and that European competition law does not apply to them, the same cannot be said of most voluntary schemes based on a capitalisation system. Supplementary provisions therefore belong to a competitive market that gives no priority to the country of employment.

On the other hand, border zones witness the amplification of consequences of the coexistence of very different statutes. This is especially evident in posting situations, which have become more and more numerous. Directive 1996/71 established a principle of the host country's liberty to determine employment conditions for posted workers. Since then, the Court has prioritised free-market competition in national social and labour legislation, and thus implicitly authorises social dumping. In Commission v. Luxembourg, decided June 19th , 2000, the ECJ ruled in favour of the European Commission, which alleged that Luxembourg's registration of the Directive overemphasised the equal treatment of resident employees and those posted from another country. It considers that Directive 1996/71 only establishes minimum conditions that the laws of the Member States cannot override, lest free competition be impeded. The Court's jurisprudence on posting has thus paved the way for the use of a rival status to that of frontier work which conflicts with employment rights in the host country, while the status of frontier work upholds them. The effects

are clear, although they are difficult to quantify due to the lack of means of control for posting. Posting has now become one of the channels through which the supply of (cheap) cross -border labour passes in the European internal market[2].

We will see that these changes favour the development of a 'regulation' that separates the worker from the labour collective, and submits him/her individually to the judgment of a territorial employer operating on an increasingly trans-border basis.

The establishment of a trans-border labour market

The slow rise of what is called regulation in border zones is based on the idea found in the European Employment Strategy and developed in many countries according to which the focus should be on securing, not jobs, but the ability of workers find a job if the 'vagaries' of economic life cause occupational transitions. The worker with a social wage linked to his/her job becomes an individual holding employability rights such as being reassigned, receiving guidance, and being informed about available jobs, both in his/her professional mobility and in case of unemployment. Three recent developments in the transboundary basin of Longwy confirm: a) progress in the legitimisation of a trans-border labour market, b) the possibility of employment aid payment by the State of the workplace, c) debates and conflicts move towards recognition of individual rights to promote trans-border mobility.

Starting in 1991, all public, private and non-profit educational organisations of the three countries working in the border area of European Development Pole (EDP, the area covered by the Mission Interministérielle, the regional task force for economic reconversion) jointly initiated a process of resource management and coordination of jobs. It is based on coordinated action and collaboration of analysis on the immediate and forecasted availability of jobs and the results of skills assessments routinely given to jobseekers. The same 'matching' approach now inspires the *Optimatch* project (optimisation of

supply and demand accounting processes on the job market) in an area expanded to the Greater Region (the cross-border area uniting one state, the Grand Duchy of Luxembourg; two regions, Wallonia and Lorraine; and two Länder, Rhineland-Palatinate and Saarland). Thus, since 2009, the network of research institutes, Interregional Observatory of Employment (Observatoire Interrégional de l'Emploi), financed by the Interreg IV A programme in the Greater Region, seeks to identify actions that will improve the adjustment of needs and supply on a trans-border labour market. These initiatives legitimise the role of a 'cross-border' labour market, defined by multiple individual comparisons of job seekers and employers.

Thus, Member States hosting trans-border workers are encouraged to incorporate them into their national employment aid schemes, as allocation of these resources to national workers alone is presumed to restrict mobility. In the transboundary basin of Longwy, this development is taking place in two stages. Along with unemployment registration in his/her country of residence, the French frontier worker may also now enrol in ADEM, the Luxembourg Employment Administration, as job seeker. Cross-border workers are not yet entitled to the same services as resident employees, but that will change under the new European regulation. Starting on May 1, 2012, an unemployed foreign resident whose last job was in Luxembourg will benefit from the same services and measures, including activation, as unemployed residents of Luxembourg. S/he will then need to comply with the conditions laid down by Luxembourg law, and will be subject to the controls carried out there.

Public authority and its local intermediaries will thus, on a trans-border scale, support the worker who is recognised only by what s/he lacks: lack of employability, lack of mobility, lack of information, as they had already done in each state for their own residents. A trans-border 'territorial employer', more or less homogeneous, complementary or coordinated, and composed of businesses, employment intermediaries and local training structures, thus becomes an increasingly neces-

sary phase in the allocation of rights to the cross-border worker [see IES note No. 9].

Associations and unions are divided between militant standards and participation in this dynamic, which shifts the conflict of collective wage rights within employment toward individual rights linked to an improvement of the 'intermediation of the labour market.' By 1995, they had already experienced the limits. The European Commission, in the framework of a Leonardo project, had authorised the launch of company-level negotiations on professional training, a project led by the trade unions of the border area of the EDP. This involved moving from analysis to the negotiated construction of qualifying inter-company and cross-border training plans targeting the most vulnerable employees. Its implementation faced the closure of several companies before the project was completed, in both France and Luxembourg. In addition, this action was challenged in two of the companies in which HR changed. Businesses have therefore remained decisive.

The trade unions are also divided on the missions proposed to them in the framework of the EURES (European Employment Services), established in 1993, which connects them to public employment services and employers' associations in the border areas. The system created by the Commission is intended to contribute significantly to identifying and eliminating the barriers to free movement by workers. Some trade unions distinguish this objective – which presupposes the abolition of all discrimination based on nationality with regard to employment, remuneration and other working conditions – from simple assistance with job mobility, which is not always freely chosen, but preferred by the EU in the framework of the European Employment Strategy. Thus, they refuse any limitation of their action to a simple public employment service in favour of claims meant to improve the rights of workers who suffer breaks in employment. Similarly for the recognition of individual rights, such as the ability to grant the adult in cross-border training the status of 'cross-border continuing education train-

ee' or to certify a cross-border validation of work experience (Accreditation of Prior and Experiential Learning). These proposals do not conflict with EU policy. They fall under the safeguarding of career paths rather than professional social security [see IES note No. 20] and thus contribute to affirming the notion of the territorial employer.

Conclusion

The analysis of the evolution of employment law and practices at the borders – the changing role of employers, competition from new statuses, and legitimisation of a cross-border labour market – is a valuable but complex indicator of transformations in employment. Social security affiliation in the place of work rather than the place of residence has allowed frontier workers to enter into a pattern that has emerged from the 1950s to the 1970s, of rights negotiated and related to the workplace against a backdrop of employment-based mutualisation. If the establishment of a European social wage has never been privileged, the subsequent development of texts, practices and the jurisprudence of the ECJ have nonetheless contributed to moving away from this perspective, as it has done as successive reforms are applied in each state. These tensions are exacerbated by the coordination of social security schemes, which do not rely on the same principles of wage solidarity and the guidelines of EU policies. In the name of employment, the debates and struggles have shifted toward securing career paths, without reaching this goal, rather than focusing on professional social security.

Thus, employment at the frontiers reveals the new frontiers of employment: those of legitimisation of the labour market and the elusive goal of an individualised injunction to employability accompanied here by a cross-border territorial employer.

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1. Originally published in French in Les Notes de l'Institut Européen du Salariat. All other IES-Notes referred to can be found on www.ies-salariat.org
2. Cremers J., *À la recherche de main d'oeuvre bon marché en Europe, Conditions de travail et de vie des travailleurs détachés*, European Institute for Construction Labour Research, CLR Studies 6, 2011, www.clr-news.org

EFBWW Open letter to the College of Commissioners

EFBWW letter, sent on 7 March 2012

Dear President of the European Commission,
Dear Vice-Presidents of the European Commission,
Dear Commissioners of the European Commission,

For a long time all European trade unions have been addressing the problem of discrimination between foreign posted workers and domestic workers, the inefficient bureaucratic cross-border cooperation amongst labour inspectorates, as well as the various legal, administrative and fraudulent practices to create social dumping. Unfortunately, many of these practices occur in the construction industry and are performed under the business heading of posting of workers.

It has been commonly acknowledged that the Posting of Workers Directive 96/71EC contains various fundamental shortcomings, which should be resolved at European and national levels. A fundamental problem for all workers is the European promotion of discrimination between foreign posted workers and domestic workers regarding their terms and conditions of employment. For all workers this is completely unacceptable and it makes us wonder what kind of Internal Market the EU is promoting?

Although we remain strongly convinced of the necessity to review the existing Posting of Workers Directive completely, we also acknowledge that the announced "legislative initiative to resolve the problems of implementation and interpretation of the Posting of Workers Directive" (wordings of President Barroso at the EP on 15.09.2009), *could* contribute to solving some existing problems.

We strongly emphasize the wording "could", because there is a real danger that the announced legislative act will merely serve as window-dressing and have no real impact on achiev-

ing equal rights and a better prevention, detection and enforcement of social fraud created through the instrument of posting, or – in some cases – make the situation even worse.

Based on various experiences of our national trade unions, who for a long time have been combatting fraudulent practices through posting of workers, we consider that the upcoming legislative proposal should *at least* take into account the following 6 points:

- The existing PWD contains various vague and dubious definitions, which need to be clarified in such a manner that discrimination, evasion of social responsibilities and social fraud is prevented. The most important is a horizontal purposive interpretation, which clearly states that posting of workers "aims at promoting a fair and non-discriminatory cross-border mobility of workers", as initially aimed at by the legislators, but radically changed by the ECJ judgments from 2007 onwards. Additional, clear definitions are needed to define what a posted "worker" is. At this stage, the application of the PWD is massively circumvented by cross-border false self-employed workers. The open definition of a "worker" in the current Directive allows some countries to promote false self-employment as a legal social dumping instrument. A clear definition of a "worker" should also determine that long term and/or permanent posted workers are considered as habitually employed in the host Member State. A third clarification is the need for a clear distinction between genuine companies that post workers and "letter box companies", which are set up as a criminal instrument to use workers as commodities. In order to eradicate these letter box companies efficiently, we need to establish clear criteria which should allow an efficient control of the economic reality and activity of the company. It is also absolutely vital that these criteria ensure that country-of-employment conditions are applied during the whole period of posting, preventing country-of-origin rules to be applied through e.g. the Rome I Regulation. As

such, once there are defined rules on what posting is within the meaning of the PWD, any violation of or deviation from said rules on posting must result in a full application of the country of destination labour law including collective agreements. These rules should not preclude that workers can additionally claim more favourable working conditions of the country-of-origin when he/she is temporarily posted to a country with less favourable terms and conditions of employment. As such, the "most favourable treatment" principle should work in two directions.

- The conflict between the Temporary Agency Workers Directive (TAWD) and the Posting of Workers Directive allows companies to apply a legislation of convenience when they post temporary workers to another country. Although article 5.1 of the TAWD confirms equal treatment of these workers, it also foresees a derogation through national collective agreements (article 5.3). At the same time these workers also fall under the scope of the PWD (article 1.3.c). In order to avoid legal shopping of convenience it should be stated clearly that cross-border temporary agency workers are always entitled to the most favourable treatment regarding their terms and conditions of employment. The upcoming Directive should clearly foresee that the worker sent by a company to work abroad shall never receive less than a properly posted worker in case that his company does not fulfil the criteria for a true posting and above all shall also enjoy full equal treatment with the domestic workers of the destination company or comparable domestic workers if the work abroad is de facto temporary agency work.
- For several years cross-border posting has mainly taken places through deliberately – by the main contractors – created networks of subcontractors and insourced companies. Often, these networks are extremely non-transparent and make it extremely hard to identify who is responsible for social fraud in a company, which often takes place at the bottom of the subcontractors' chain. The main contrac-

tors always have – or should have - knowledge of illegal practices within the companies with whom they have a direct or indirect contractual relation. Experience teaches us that long chains of subcontracting normally generate a tremendous price pressure at the bottom of the chain, for which – in many cases – no genuine service provider could execute the job under reasonable circumstances. The non-responsibility of the main contractor is an open door for social fraudulent practices. For this reason, we are demanding that the main contractor becomes fully and unconditionally responsible for the social fraud in the companies with which it has a direct or indirect contractual relation in the chain of subcontracting or insourcing. Such an instrument will oblige each main contractor to select his/her companies more carefully and to set up preventive controlling mechanisms. In addition to this, we would strongly recommend that a cap is put on the levels of subcontractors or insourced companies in the chain of subcontractors. This will facilitate the work of the inspectorates substantially.

- Without any doubt the existing inefficient and bureaucratic bilateral cross-border administrative and juridical cooperation between national authorities facilitated the use of posting as a business tool to evade social obligations. We are surprised that the European Commission continues to promote the bilateral approach between national authorities as an instrument for cross-border cooperation, instead of an efficient European cooperation model. Through a bilateral cooperation model the EU would require at least 350 bilateral agreements, which all will be different. By doing so the Commission chooses to create a huge bureaucratic monster. Each bilateral agreement will have unique procedures, control mechanisms and so on. This will inevitably create a cooperation model which will be very costly, non-transparent, bureaucratic, inefficient and, in the end, non-sustainable. Labour inspectorates in the field are all asking for a fast, transparent and simple European cooper-

ation model between national authorities. This could only be offered via a European model with clear mandatory rules for all.

- Although the Posting of Workers Directive aims to lay down a country-of-employment principle, we have learned from the leaked Enforcement Directive that the European Commission wishes to re-introduce a country-of-origin principle (which was heavily contested during the legislative discussion of the Services Directive) in the PWD. The proposed IMI-instrument, with an emphasis on the country -of-origin and which is set up to execute the Services Directive, is now proposed as the instrument to establish bilateral cooperation. Since the terms and conditions of employment of the destination are applicable to posted workers, the centre of control should take place in the country of employment and not in the country of origin. However, regarding the social security rules, the situation is different. A complaint often voiced by labour inspectorates is that they have very serious doubts whether social security rules in the country of origin are genuinely being respected. Controlling this is virtually an impossible task.

- One of the typical features of posted workers is that they are all employed on a foreign labour market, of which they have no knowledge or information regarding their rights and options to file complaints. Most of them live isolated and do not speak the language of the country in which they are employed. As such, many posted workers are in a very vulnerable position and can be easily exploited. This problem should be acknowledged and resolved through appropriate instruments. Based on our information we have learned that at least 3 instruments are absolutely required to remedy this problem: firstly, all information regarding terms and conditions of employment and ways of legal support should be available in an accessible and transparent way in the mother tongue of the workers; Secondly, all posted workers should have simple

access to free-of-charge legal, administrative and practical support and aid in the country of employment; thirdly, workers representatives should receive the adequate financial and logistical support to help, assist and defend workers who are faced with social fraud.

Without a satisfying solution to these considerations, we fear that the proposed legislative act will have no real positive impact in the field and will offer no or little progress to solving the existing problems.

Together with our national trade union colleagues we have, on several occasions, reiterated our commitment to the European project. But a *sine qua non* for the European project to gain confidence amongst workers in Europe is that workers' rights and concerns are taken seriously at EU level.

With this in mind, we kindly ask you to take our remarks into consideration.

Sincerely yours,

Domenico Pesenti
EFBWW President

Sam Hägglund
EFBWW General Secretary

Discussion

Which crisis? Which economy? Which strategy? A discussion

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The financial economic crisis

Most politicians and economists coincide in characterising the actual state of the economy as in crisis. The many insecurities in the financial markets, the lack of positive expectations of consumers, fast growing unemployment, declining profits, fast-growing public deficits, and in general the lack of trust in the future are broadly recognised manifestations of that crisis. Notwithstanding the impressive figures of economic growth in South and South-East Asia, Latin America, and some African countries, generally the conclusions are that we are confronted with a crisis affecting the whole world economy.

The last two issues of CLR news contribute to this debate. The title of issue 3 refers primarily to the crisis in labour relations, but has many references to the actual crisis in a broader sense. And issue 4 gives much emphasis to the need and consequences of a policy of sustainable development for the construction sector. We welcome both issues as very valuable contributions to the debate about the actual economy in crisis. Among the many issues raised is that of the burden of this crisis: who are the victims; who experiences the most severe consequences? Generally, politicians and economists advocate austerity in social services that are of essential importance for the great majority of the people. One can also observe deterioration in social benefits, subsidies, wages and working conditions. A growing number of concrete working relations are submitted to a process of precarisation. And it is also clear that these kind of measures do not give real solutions to the actual crisis: the quality of labour will deteriorate and worries about shrinking consumer markets, the results of all these austerity measures and of unemployment, are growing. Paul

Krugman: 'Millions of workers are paying the price for their willful amnesia[2].' And it is also clear that the climate crisis presents many opportunities including for the construction sector. One cannot continue saying as Margaret Thatcher did: *There Is No Alternative*. Instead, and as shown in CLR-News 4-2011, there are many alternatives.

The concept of economy

It is remarkable that there is no discussion about the concept of 'economy'. In various instances attention is given to the relationship between the financial sector and the so-called real economy. Rightly this attention implies that the financial sector does not belong to the real sector. The financial sector barely produces real use values for society. It produces for itself the use value of absorbing an immense part of societal wealth. And that can be qualified as a negative use value for the rest of the society. But that is the only place where the concept of economy is seen as problematic, and then only to a certain level.

In this respect, the discussion falls in line with the general way of neo-liberal thinking. 'Economy' is limited to that total of added value that is accompanied by officially registered monetary transactions. This way of calculating excludes all those monetary transactions that take place in 'grey' and 'black' circuits. As is well known, the total value of non-registered monetary transactions adds up to some tens of percents of GDP.

Yet more important is the failure to value all those transactions that do not take the form of monetary transactions. And these transactions are as important for the economy and society as monetary transactions. A very big category consists of all unpaid labour. Several investigations show that, at least in European countries, the total amount of unpaid labour, expressed in working hours, is more or less as great as the paid labour[3]. Another important category refers to all unpaid ecological costs. Thirdly many unpaid social costs are not taken into account, including amongst others child labour, and the growing risks of health damage caused by traffic. 'Economy' is

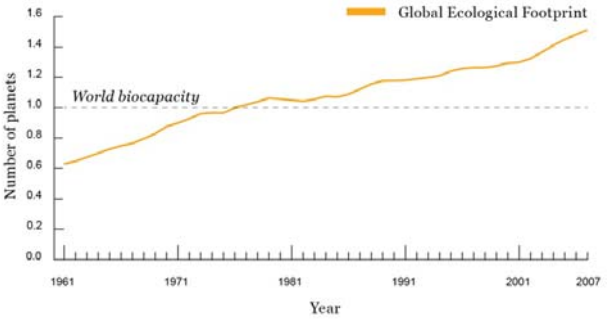
much more than officially registered monetary transactions. So, for developing a political and trade union strategy for the future, including combating the actual crisis, a broad definition of economy should be the starting point.

Ecological economic crisis

This has far reaching consequences for the description and analysis of the actual economic crisis. Humanity is threatened not only by the financial crisis but also by more fundamental threats, such as for instance the dramatic worldwide overuse of the available bio capacities. A broadly accepted indicator of that use is the global ecological footprint. The (latest) Living Planet Report (LPR 2010) of the World Wilde Fund for Nature shows that this 'overshoot' has reached the level of almost 50 % (see graphic 1[4]).

Graphic 1.

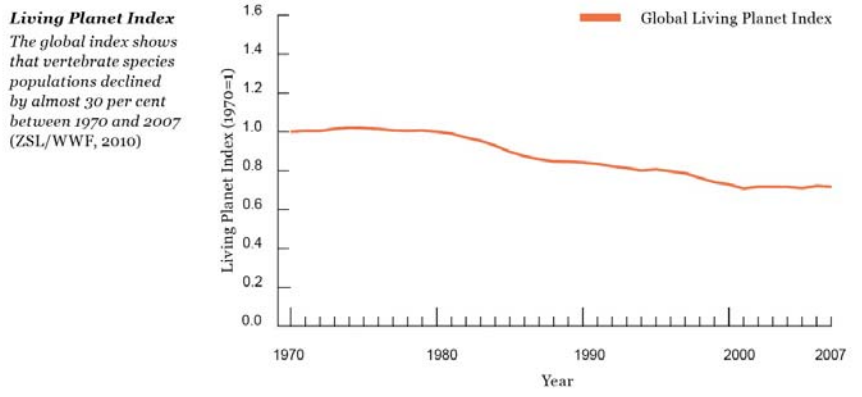
Global Ecological Footprint
Human demand on the biosphere more than doubled between 1961 and 2007 (Global Footprint Network, 2010)



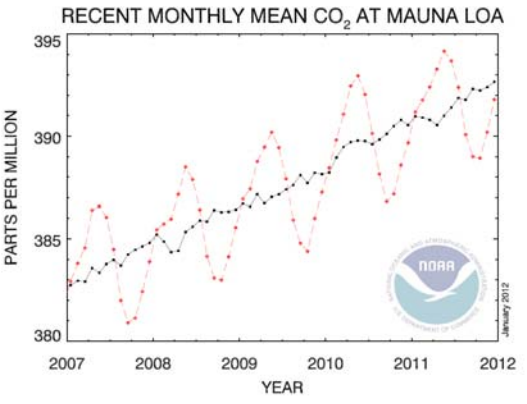
The implication is that we are living in an era that decreases the available physical preconditions of human life, while the world population is still growing. These phenomena can clearly not be solved by technological improvements alone. We are faced with the urgent need to directly limit the use of material resources, including shrinkage in of the material consumption of labour in the western countries. A comparable dramatic development has been reported by the LPR 2010 concerning the evolution of biodiversity. At a global level we can

observe a decrease in wildlife population of about 30 % since the 1970s (see graphic 2[5]).

Graphic 2.



This underdevelopment also has far reaching consequences for human life. It not only threatens life directly (because of the growing lack of certain resources) but also indirectly, as the regeneration of ecosystems is hampered.



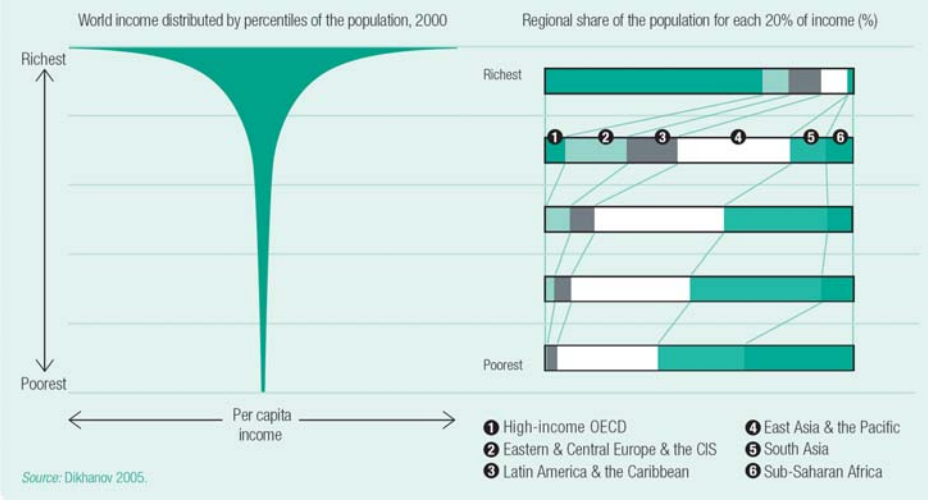
Graphic 3.

A third ecological crisis can be observed with regard to emissions of CO_2. Looking at one of the clearest forecasters of the climate crisis (graphic 3[6]), one has to admit that severe ecological processes will affect humanity worldwide in the medium and short time.

Social economic crisis

At the same time, our world has inherited a massive problem of inequality and poverty from colonial and neo-colonial times. Based on UNDP figures, a graphic has been developed showing the distribution of world income as a champagne glass (graphic 4[7]).

Graphic 4.



What needs to be taken into account is that nearly all the inhabitants of countries like the Netherlands belong to the 20 % richest of the world. Since the 1960s income inequality has more than doubled. With regard to poverty, UNDP reports: '*Our aggregate estimate of 1.75 billion multidimensionally poor people exceeds the 1.44 billion people estimated to be living on less than $1.25 a day in the same countries, but it is below the 2.6 billion people estimated to be living on less than $2 a day*[8].' And although there are some indications of a decline in relative poverty, the absolute numbers remain alarming. These problems need a vast programme of redistribution of wealth and income at a world level.

And of course all these alarming conditions form a context that easily leads to more social and even violent conflicts. A well-documented case is that of the Somalian hijackers: big fishing factories from European countries exhausted the seawaters of Somalia. That has lead to a loss of the basic conditions of life. Somalians were urged to look for other sources of subsistence, one of them being hijacking. And the actually intensifying conflict of western countries with Iran increased the chance of large-scale war.

Political crisis, global crisis

Over and above the many-faceted economic crisis, we are undergoing a crisis in government and representative institutions. Since the seventies, most western states have developed a deep belief in neo-liberal thinking. This has lead to many neo-liberal practices and the beginning of the destruction of the welfare state. All measures taken during last centuries have been oriented towards minimising social security. Many public utilities have been privatised and brought under the law of the market. The labour market is in a process of flexibilisation and equally put under the law of the world market: workers all over the world have been pushed into competition with other workers. This whole process of neo-liberal globalisation has resulted in ineffective strategies. Many social movements have adapted themselves to the exigencies of the neo-liberal market and try to make the best of it, in competition with movements and organisations in other countries. The lack of global coordination makes the situation even worse.

At the same time it is important to recognise that the actual economic crisis is global. That does not mean that there is no room for national or regional or local strategies, as manifestations of crises have specific characteristics at different levels of society. The value of strategies at a more local level is limited just because of the global nature of the actual economy. All our economic activities have global consequences and are at the same time (co-) determined by global forces. A modern

political and trade union strategy must give a face to that global context and develop perspectives of a global nature. A very specific aspect is that of the global position of the working class in countries like the Netherlands. As stated, if only for ecological reasons 'we' have to diminish our material consumption, our ecological footprint, by a factor of two-thirds. In principle, we people of the earth are all victims of the actual economic crisis. But we do not have to lose equally; in this respect 'some are more equal than others'. This specific aspect can be of great importance for the (im-) possibilities of mobilising people for a common strategy.

Crises and economic belief

The various crises we described above are expressions of dominant economic theories. They are an indication of system failure. System failure is an expression often used in relation to the banking crisis but it applies to many aspects of economic theory. Many structures and theories are built for the justification of the market economy.

- The belief in free markets: The belief is – and there is no other word for it because it is not a science; an invisible hand indicates a suprahuman being - that the market is an automatic corrective mechanism. The market system often fails. Market prices do not include environmental and social costs. Markets do not include so called 'externalities'. The other end of this thinking is a centrally planned economy. Historical examples for this case are not very attractive either. In the political struggle against the planned economy of the former Soviet Union and following the arguments of Milton Friedman the majority of government services have been brought to the market. Many of these services should be brought back under public control. So we need a careful balance between elements of the free market (for the exchange of goods, for stimulating technical change and so on) and elements of restriction (in laws and rules and international and national quota for scarce goods). As the British *think tank* NEF[9] formulates: '*the market sphere needs to be more tightly drawn and rebalanced*

alongside the public sphere and the 'core economy' – our ability to care, teach, learn, empathise, protest and the social networks these capacities create'.

- Economic growth is the second belief. Growth is seen as a solution for all economic evils. Grow and all your problems will be gone. We can read it in our newspaper every day. Not mentioned in these scenarios are the negative aspects of GDP growth, such as growing inequality, diminishing stock of natural sources, diminishing bio diversity etc. In GDP –terms: if we take the EU 2020 strategy for 3% economic growth per annum, GDP will have doubled in 23 years. Growth is no longer a solution; growth is an obstacle. A quote often used is from Ghandi: '*Earth provides enough to satisfy every man's need, but not every man's greed*'.
- International free trade: there is no such thing as free trade. In the words of Herman Daly, author of many publications on the steady state: 'Free trade' really means 'deregulated international commerce'[10]. Trade is usually an expression of different – unequal- power relations. I. Wallerstein, a famous historian and social scientist, argued this case in his books on the modern world system[11]. On Wikipedia[12] he is mentioned as the *éminence grise* of the anti-globalisation movement. Such well known international institutions as the World Bank, the IMF and in this list also belongs the WTO are known as neo-liberal institutions. They are therefore not fit for a fair and green transformation of the economic world system. We need new international institutions that are part of a truly global governance.
- Economies of scale: bigger is not always bigger or better. E.F. Schumacher's book of almost 40 years ago[13] showed a different way of thinking about the economy. It had a great impact, but apparently still not enough. We do not have to go back to mediaeval production, but a better understanding of an optimum scale is necessary. Universities, hospitals, cities, many factories have grown to a size that is no longer productive. Working on regional scale where

possible, and on a larger scale when necessary, can lead to much more working pleasure and to large savings in transport and other environmental effects.
- Insatiable demand: as we can see the consumer addiction around us we are led to believe that it is the natural state of humanity. Unequal income, advertising, cultural codes and other aspects are not part of this theory. On the other hand, there are a great number of statistics that show that happiness in relation to annual income does not rise any more after a level of 20000 $ is reached. Statistics, on the other hand, show a distinct correlation between for instance inequality and crime and between inequality and mental Illness[14].

The heating of the frog

The sense of urgency is great. The heating of the planet is often compared with the conduct of a frog. Put it in a pot of boiling water and it will jump out. But, if you put in cold water and heat it slowly, chances are that it will be cooked to death. We have argued that critical limits have been surpassed. It is therefore not by accident that Lester Brown gives three possible models of social change and starts with: the catastrophic event model[15]. Brown calls it the Pearl Harbor model. Brown states: '*The weakness of the Pearl Harbor model is that, if we have to wait for a catastrophic event to change our behaviour, it might be too late*'. Good-bye frogs. The second model is the Berlin Wall model. Nobody expected it to fall. Brown explains: '*many social changes occur when societies reach tipping points or cross thresholds. Once that happens, change comes rapidly and often unpredictably*'. A recent example is Fukushima. After this disaster nuclear energy is no longer an option in many industrialised countries. '*In the sandwich model rapid progress is possible when mounting grassroots pressure for change merges with a national leadership committed to the same change*'.

It is in this sandwich situation that the urgent change towards a sustainable and solidary economy is possible.

Need of structural reforms

The actual economic crisis has many faces and manifestations: financial, ecological, social and violent. Developing a strategy to combat the crisis has to take into account all these aspects. And for the trade union movement of the western European countries there is a very new element involved. Their working class has also to face a future of shrinking material consumption. Certain economic sectors such as the financial sector and air transport will have to restrain severely their workforces, as activities have to shrink. The construction sector will also undergo some drastic changes. On the one hand, many new physical investments are needed in for instance the field of renewable energy and the mitigation of the consequences of climate change. On the other hand, new and far-reaching restraints have to be applied in the housing industry and in the construction of roads. We are in urgent need of new visions and proposals to reform structurally our economies. The challenges are big. Fortunately, the number of workable proposals to realise such structural adjustments is growing.[16]

New visions and proposals

Each strategy for a sustainable and solidary society does –in our view- need both components: sustainability: we need a world in the sense Brundtland formulated of preserving the environment for present and future generations; solidarity, in the sense that all human beings have the same rights and deserve the same possibilities. This means that the whole world system and its components are part of the strategy. Various authors and institutions have made plans and formulated agendas. Combining proposals of various authors and institutions, we come to the following list of 10 bundles[17] of necessary measures[18]:

1. Establish ecological limits. Most urgent is it to reach climate goals. On the other hand, accelerate the promotion of renewable energies. (International) Government action, fiscal measures and rationings are urgent.
2. Bio diversity needs an infusion. We cannot create new species, but preserving remaining nature is in the interest of

the earth. '*Demonstrating the full range of ecosystem service values can help to increase awareness and commitment to sustainable management of biodiversity*'.[19]

3. Develop ecological macroeconomics. GDP does not represent the 'real economy' as has been argued before. A new model should not contain a pursuit of labour productivity increases as this leads to a growth economy for full employment. Taxation systems need to shift from taxation on income to taxation of the use of environmental space.
4. Diminishing labour time to 21 hours, as proposed by NEF, is a good possibility. This also means a reappraisal of the *'core economy' our ability to care, teach, learn, empathise, protest and the social networks these capacities create*. A massive reskilling follows from the two aforementioned aspects.
5. The role of the market needs to be reviewed. A new balance between government and market has to be formulated. Common goods must be brought under common governance, directly or indirectly. The role of financial institutions has to be reconsidered. Speculation and trade in derivates will be forbidden. The total amount of money in circulation (including the digital ones) will be adapted to the monetary needs of the real economy. Community banks, credit unions and a green investment bank will form the basis of the new system. And prices will be corrected so as to represent all costs (paid and non paid, ecological and social)
6. The new sustainable economy has its base in the local community. For more complicated production processes and services, an adequate scale must be established.
7. Sustainable urbanisation. Cities have a key function in the transformation process. Retrofit buildings, redesign public transport, utilities, public spaces. Low carbon cities are the future.
8. Create a new global social contract. This contract should involve a minimal international standard of living for all. The means can come in large part from an international financial transaction tax (FTT). Information on population

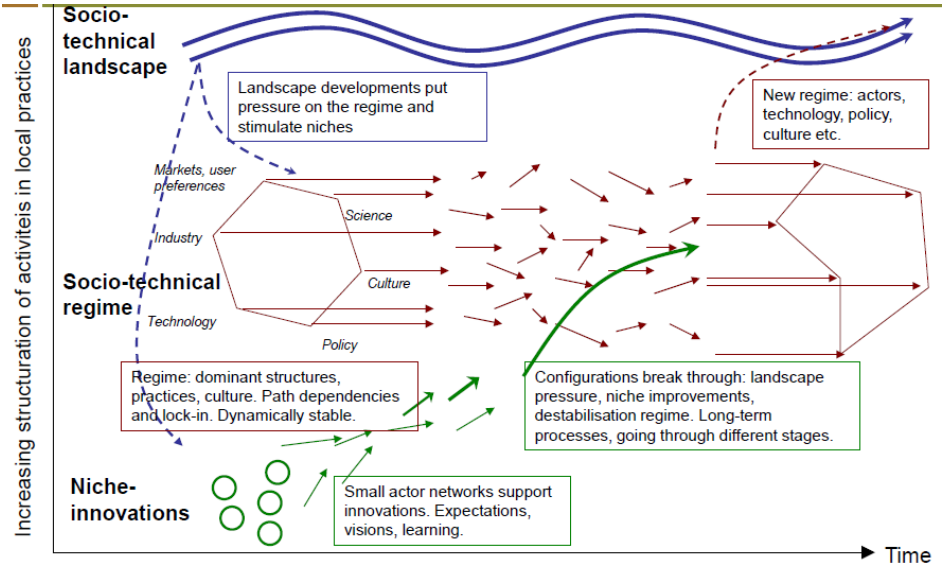
policies (school programmes for girls, sexual information etc.) is of utmost importance to diminish global population pressure.

9. To realise these urgent measures it is necessary that popular support is created. National and international solidarity is –in our view- only to be reached if growing inequality in income is strongly diminished. New governance models are also needed. Start on the local level with further experiments for a deliberate and living democracy.
10. A revolution in international cooperation. Rio + 20 cannot be another failure. Create a United Nations 2.0 and the establishment of a UN Council for Sustainable Development, on a par with the Security Council. This last project will take some conferences. In the meantime, there is a need for large-scale intervention in the market mechanism at lower spatial levels. Zoning to curb fisheries, and agreed schemes for ecosystems protection (rainforests, coral reefs, etcetera).[20]

The transition process

In the Netherlands transition theory has become quite popular. Since 2001 over a thousand scientific publications have been written[21]. Basically: transitions are a passage from one system to another. They are not seen a single step but as a continuous cyclical process. Of further importance is the notion that not all the parts of the system of subsystems move in the same direction. So the theory distinguishes multi-level processes, multi-actor participants and multi-governance. Multi-level for instance distinguishes the macro level or 'landscape' (culture, political systems, market mechanism etc.) and the 'regime' level (on-going practices, rules, institutions, power relations). The 'niche' level is the place where experiments are possible (new technologies, new cultures, new societal patterns etc). At the niche-level more and more processes influence the regime, creating windows of opportunities to influence the landscape. The following figure shows the complex structures[22]

Figure Paredis, quoted by Peter Tom Jones.



A new role for the national and international labour movement

The ten bundles of measures and proposals together form a totally different (global) society. On many of these measures unions have expressed their opinions and have to some extent taken action. The Dutch labour movement for instance has made proposals for a green deal. But –to our knowledge- the call for a new sustainable and solidary society has not yet been heard. Unions mainly stay in their traditional role of pursuing the material interests for their members. This is in line with the basic idea of the '*good life*': a welfare state for all. In view of the crises at hand, the need for a new consistent story of the '*good life*', of the '*good society*' has become urgent. The labour movement has the experience and the means to operate at all three levels in the transition to a new society.

It certainly demands courage and leadership, but then a sustainable society is in the interest of each and every member, and of nature and environment, bringing:

- More working satisfaction;
- Work and the core economy closer together;
- Shorter working hours;
- Less income inequality;
- More income security;
- Better resilience;
- Regional cohesion;
- A balance between man and nature

We should start discussions in workplaces, in our communities, with our delegates (political) etc. From a labour movement in its after day of existence, it can move to the front of the struggle for an ecological and solidary society.

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Reviewed by
Lutz Luithlen

[NEITHER HUTS NOR PALACES, Architecture and Ecology in the Employment Society - A Polemic],

Introduction

This polemic is more like a treatise which is not only addressed at architects, as the title may suggest, but at all those who deal in matters environment, town planners, engineers, bankers, energy companies, researchers, politicians, and all consumers of the environment. Although it is largely written from a German standpoint, using German data and case material, the book speaks to all of us without exception wherever we live, whether in Europe, in South East Asia, Latin America or Alaska, in the city, in the countryside, in an igloo or a modern bungalow. However, as the issue is the voracious, frivolous and nonsensical depletion of the planet's non-renewable resources, the finger points squarely at those who live in high energy and resource devouring societies and, among those, at the affluent citizens and the footmen who lift them into their gold-plated stagecoaches. You see why it is called a polemic. However, this is a political economy polemic with a difference. Although the author is deeply concerned about poverty, the gap between rich and poor, the plight of 'developing countries', climate change and the dwindling biodiversity, the argument does not, as you might think, follow the well-trodden path of a Marxian polemic or a welfare economics argument. Instead, he uses a concept borrowed from physics: entropy. Entropy is the corner stone of the second law of thermodynamics and posits that, as time passes, all matter tends toward increasing disorder, randomness, chaos. Entropy is a one-way process exemplified, for instance, by the fact that heat transferred from a warm body to a cool one cannot be made to flow back to the first one to

return it to the temperature it had at the outset. It is thus that scientists, among them Arthur Eddington, came to conclude that the entire Universe shall eventually die. More to the point, the law of entropy implies that the use of energy is always an increase in entropy.

Setting up his store Moewes starts with his fundamentals as follows: the Earth is largely a closed system with the exception that it absorbs solar heat. The Sun is the only directly available source of energy on the planet without which there would be no evolution and no life, and evolution is the only force on Earth working against entropy. Nature always remains within the limits set by the Sun. These limits have been broken with the access to Earth's larders of fossil fuels at the early stages of capitalism. The Earth is a very efficient converter and 'hoarder' of solar energy in the form of fossil fuels, provided it is given time – billions of years in he case of coal, gas and oil. Our voracious appetite for energy does not give Nature a chance to catch up with refuelling. So whatever we do amounts to depleting the reserves of stored solar energy and adding at the same time to the entropy of the natural system. Mineral resources are finite and therefore the only escape we have is to use as little as possible and to recycle. In the case of energy we have two options: saving and tapping the Sun's energy directly. Whatever we do we cannot stop entropy but we can slow down its current pace dictated by an unscrupulous economic system which devours the accumulated store of energy, ravages the seams of minerals, diminishes the diversity of the species, produces commodities we do not need, and leaves its detritus wherever it sets up business. Entropy is increased twice: first by using energy and second by taking things to pieces which, like Humpty Dumpty, can never be put together again. Try to put the bits of tarmac back together again into a coherent structure and you get an idea about the finality of entropy.

On building and urbanisation

You may ask why building and construction is being picked out from so many human activities. The answer is that building and construction in the wider sense of including urban planning, transportation, and agriculture is a voracious gobbler of energy and thus responsible for much that is happening in our environment. Building accounts for about 50 % of all energy flows and most of it is directed at new build. Any attempt at reducing energy consumption and environmental damage may as well start here. Moreover, the majority of material inputs into new construction cannot be reused and therefore ends up on the rubbish heap as a random admixture of bits and pieces – a fair contribution to entropy.

Given the influence of architects on the built environment as designers, space planners, project managers, advisers, competition judges, and style gurus, it should not come as a surprise that they are getting quite lot of stick on almost everything they currently stand for. And it is not just the odd instance or current fad but the general trend in shaping our environment, even by those who profess to an environmentally benign approach, which is fundamentally at odds with the precept of minimising the march of entropy. In particular Moewes singles out the trend toward the free-standing single dwelling or one-family house, for it sins not only as a building with a high surface-to-volume ratio but also as a vehicle pushing the suburban boundary further into the surrounding countryside.

A single dwelling unit has five exposed surfaces whereas a terrace house has only three: front, back, and the roof. Thus a first remedy would be reverting to the well-tried but currently unfashionable terrace house. There are good reasons why Mediaeval villages and 19th century working class housing adopted this heat and material-efficient style of building. Savings in materials and the conservation of energy were right at the top of builders' priorities. The affluent society does not need to bother. However, the author also shows that size

matters: larger buildings are more heat efficient than small ones. That is to say that the terrace house can be bettered by building upward as flats rather than houses. If these rows of flats are built around a courtyard, and if a glass dome covers these courtyards, Moewes suggests, we get close to an optimal solution. Big buildings have another advantage: they can be conceived as modular structures, a technology briefly fashionable in the sixties and seventies but now out of favour among architects. These fulfil their purpose only if individual elements are so designed that they can be disentangled and reassembled to new structures. Here's a real challenge for the architect/engineer team. Buckmister Fuller, Jean Prouvé, Hannes Meyer, and Konrad Wachsmann get a favourable mention. The current building technology in housing is rather retarded and unfit to comply with such requirements, for it uses bricks glued together with mortar, or parades large monolithic structures of cast concrete. In both cases buildings, when tainted with obsolescence, tend to suffer death through the sledgehammer or the swing bomb. The result is a heap of randomly mixed bits which, as they cannot be meaningfully reassembled, end up on the refuse tip, for ever a contribution to entropy. The best thing, Moewes concludes, would be to learn to live with the inherited stock of buildings, to adapt, reuse and conserve it. If new build is necessary it should be built for long life (therefore needs to be flexible) in the form of dry assembly to allow reuse as opposed to recycling.

In traditional and classical architecture, buildings had the function of defining and accentuating spaces. The ordering principle was the street and the square. Current fashion among architects, in particular our star architects, is to build prestigious monuments to themselves, gloriously oblivious to their neighbours but to be admired for their singularity and fitness for glossy magazines. The result is the disruption of the urban fabric and the demise of a meaningful system of public spaces – a form of spatial entropy. The majority of recent housing estates in Britain are so amorphous and uniform so as to suggest that randomness is the guiding principle.

Our modern urban fringe developments don't fare any better on the scale of progressing entropy. Infused with garden green, trees, bushes, flowerbeds, and lawns, all nicely clipped, these areas give the impression of nature regained. Moewes declares this a fallacy. Green is not a substitute for nature for there is no substitute for nature. Mini-enclaves of prettily clipped plantations, however green and lush, do not create viable ecological systems, neither are they a recipe for minimising water usage. Nature needs large areas left in peace with as little contamination from restless civilisation as possible. Moewes also debunks the popular myth that greenery produces oxygen and therefore reduces urban pollution. He explains how the decomposition (rotting or burning) of biomass reclaims all the oxygen, which is released during the process of photosynthesis when carbon (C) is separated from oxygen (O_2) to form the biomass. Entropy again - nothing gets lost in a closed system!

Modern agriculture, although not a form of building, is nevertheless an aggressive interference in the natural ecosystems and takes the blame as one of the worst miscreants in the environment. The destruction of existing habitats, huge stretches of monocultures, with the attendant problems of soil erosion, as well as the depletion of soil ingredients, artificial fertilisers, and the use of pesticides are all unfriendly gestures against Nature. The apologetic notion of 'Everything is Nature' leads to the destruction of Nature.

With the urbanisation of the countryside and the greening of the city, architects and planners are guilty of abetting yet another form of entropy, as the difference between both spheres becomes blurred and the specific character of both spheres disappears – a form of 'green goo' seeping into the countryside. The lesson for architects and planners here is to build large units in medium-sized urban settlements of high density, clearly set off from what is not urban. The current mania of merging city and country, of building single-family houses, whether spherical in shape, covered in grass or dug

into the ground, is revealed as a fallacy. Anything leading to the loss of diversity is a step toward greater entropy. What parades as 'green' living turns out to be bad ecology.

On economic growth and work

Moewes is not content to set up a long list of ecological sins and their associated culprits, he is interested in explaining the problem and squarely points the finger at capitalism. The replacement of human labour by the efforts of machines is accepted as perfectly legitimate and desirable, but the relentless push for growth, inbuilt in the DNA of capitalism, is not. Capitalism in its current guise is destroying vast stretches of finely tuned ecosystems, leaves huge scars on an exploited landscape, depletes the stores of carbon fossils, produces goods and gadgets which are not needed for decent living – the planet gets poorer by the minute! To make matters worse, it leaves behind wherever it sets foot the detritus of its obnoxious digestion, be it spewing CO_2 into the atmosphere, piling up huge mountains of refuse, releasing poisonous chemicals into the rivers, and dumping its atomic waste at the bottom of the seas or in the cracks of the Earth's crust. As if that was not enough, this crust incurs never healing scars in the form of huge holes and disappearing mountains due to the exploitation of raw materials and fossil fuels (see the current debate about 'cracking'). The fact that some of the holes are refilled with 'entropic' waste material makes matters worse. The planet is getting messier by the minute! All this amounts to galloping entropy.

Entropy can be avoided neither in the universe nor on Earth, but it can be managed for the sake of nature and future generations. It is not an economic but a political problem. But politicians are not getting anywhere near a solution of the problem because they are unable (or not allowed) to even question the mantra of growth. Without growth, exponential growth of course, we are doomed. Just follow the debate about the future of the Euro and you realise it is all about getting back on the growth path. There must be growth in

production, in export, in services, in income, in investment. As soon as the capitalist growth machine shows signs of slowing, there is panic, helplessness – 'Untergangsstimmung'. Moewes has an interesting explanation for what he calls growth mania: it is the fetishisation of work or the mantra of full employment. In advanced economies, where most goods can be produced with little labour input and infrastructures have been built up over centuries, there is less demand for work, he argues. But managed unemployment is a political taboo. So we have to create employment even if we don't need it. The consequence is production of needless gadgets, luxury goods, armaments and, of course, production for export.

How can we get out of this employment trap? First, by avoiding the abuse of language and the misuse of figures. For instance, 'zero growth' suggests stagnation, no growth at all – a horrific idea, totally unacceptable! But this is not its meaning. Zero growth implies that growth is constant (e.g. 100,000 dwelling units per year every year), steady growth as opposed to exponential growth (e.g. 10% more than last year, every year). It is to be noted that the growth rhetoric prefers relative (percentage) figures. These are useful as a propaganda tool but otherwise quite meaningless in telling us about the 'real' economy or the health of society – a tool of obfuscation.

Second, by avoiding pernicious work such as producing armaments for export, fast cars, poisonous fertilisers, and futile work to remedy avoidable damage caused by previous work. Third, by establishing the right *not* to work. A general subsistence insurance would see to it that people who are out of work for whatever reason do not become destitute and are still able to live a comfortable life. Society would then enjoy the promise which early industrialisation had made: the liberation from toil and hard labour. The benefits of mechanisation are to be used to support those made redundant. Moewes also indicates what in this context would mean 'useful trade'. It would be trade, which assists in levelling diverse resource potentials and products, based on balanced

exchange relations. Such trade would lead away from large concentrations of people and production and instead favour decentralisation and regionalism. Think of the savings in transport costs and infrastructure! It would easily pay for the necessary subsistence insurance. We may then witness a dematerialisation of trade where the emphasis would be on knowledge, technology transfer, licences, patents rather than on goods. Such a system of exchange would foment regional diversity around the globe - a kaleidoscope of regional activity, which would put a brake to the extinction of regional cultures under threat from the rapacious tentacles of capitalist consumption and the concentration of production. In the context of production, Moewes would like to see the application of 'small technology', which chimes in with the idea of regionalism, decentralisation, and diversity.

A conclusion

What Moewes offers is more than a polemic. It is a plea for radical action but not in a Marxist mode urging revolution to finish off capitalism while it is choking under its own contradictions. In fact, the author has stood Marx right on his head (who claimed to have done so with Hegel). Instead of assuming that labour is the only source of value, Moewes moves that we can do without labour at least in the sense of full employment; instead of liberating the working class, we need to liberate nature from the capitalist yoke; instead of waiting for the propitious moment to give capitalism the *coup de grace*, we need to act now to stop the run of entropy by using as little as possible of our precious resources. Capitalism would not survive under these conditions. On many scores, I guess, both writers would be in full agreement: on the exploitation through hard and tedious work, the gigantic waste of resources for the benefit of the rich, the growing disparity between the rich and the poor, the primacy of financial capital over all other forms of capital. If Marx were to live now he might well be an environmentalist, for he says in Capital 1 (Chapter 13): "Capitalist production thus only advances its techniques and the combination of social production process-

es by undermining at the same time the sources of all wealth: the Earth and the labourer." (translation LL)

Moewes's is a coherent argument for change, which is nothing short of radical, although never couched in terms of overthrow or violent action. All the usual shibboleths of the need to work, of green is good for you, of technology is getting us out of the mess, of the consoling fallacy that politicians will find a solution, etc., are a fata morgana of a rosy future based on ignorance and deception. He is adamant that without giving up the notion of exponential growth there can be no redistribution of wealth, that without redistribution of wealth there can be no meaningful ecology, and that without meaningful ecology there cannot be brakes on the run toward entropy. There is no way out: we have to change our economic system, our understanding of industrialisation, of growth and of work.

There are a few gripes on my part about nothing more than overstatements. For instance, the idea that humankind has for millennia dreamed of the liberation from work through the stewardship of machines. Our ancestors can't have imagined power-driven machines because there weren't any; but I am sure they dreamed of a decent living and peace with their neighbours. *Dolce far niente* as a congenital human endeavour, I am sure, can also be challenged with reference to the evolution of the human species. Neither can I see functionalism in the pink morning light depicted here. Reference to Le Corbusier and the *ville radieuse*, the wide-spread use of cast concrete, the brutal incisions in subtle urban webs of buildings and communities are all sinful acts of pushing entropy, perpetrated in the name of modernism. Also early capitalism did not have the benign face portrayed here. Suppression, exploitation, extortion, violence and greed were part of the Faustian deal right from the start. However, these are minor points in a powerful and prescient argument for reason and responsibility. Finally, it appears to me that there is a serious problem using entropy as the central plank of a plea for ur-

gent action. You can't smell nor hear it, you can see it but only if you know about it. Worse than that, you cannot measure it. Scientists have a simple, abstract formula that may well be of use in the laboratory, but the complexity of the environment defeats such an endeavour. If we had regular statistics to monitor entropy (as a measure of natural regression), comparable to GDP data (as a measure of capitalist progress), then we would be able to chart what Moewes calls 'evolution in reverse' (see CLR News, No. 4/2011). And even then, the urgency of the matter would probably escape our attention.

Reports

Confronting uncertainty in European labour markets in the crisis

Jörn Janssen/
CLR, London
18/02/2012

ETUI-GUSTO Conference, Brussels, 15 February 2012

It is certainly important to know what the European Trade Union Institute does for the trade union movement, in particular in the field of 'the labour markets in the crisis'. This conference presented and discussed the conclusions of an international research project funded by the European Commission under its Seventh Framework Programme (FP7). The acronym of the project GUSTO translates into 'Governance of Uncertainty and Sustainability: Tensions and Opportunities'. The full title reads: 'Meeting the challenges of economic uncertainty and sustainability through employment, industrial relations, social and environmental policies in European countries (www.gusto-project.eu)**.** A less sophisticated observer would probably address the same issue as an 'account of the deterioration of employment conditions culminating in the sustained present crisis' (ADECCSPC).

The researchers and their institutions involved in this substantial project, costing 2.26 million Euro, represent 12 countries: Czech Republic, Denmark, France, Germany, Hungary, Italy, the Netherlands, Slovakia, Spain, the UK, Belgium, and Canada. Those 'Uncertainties' have been classified under six categories:

- Individuals' labour market transitions;
- Immigration;
- Pensions;
- The role of the EU;
- Collective bargaining;
- Local employment strategies.

A most depressing picture of how the staggering growth of the global financial sector has ruined employment conditions can be read in the 'draft discussion paper' handed out to the conference participants of the conference. A large audience

was given ample opportunity to discuss the findings with two panels, the first focussing on 'young people, old people and immigrants', the second on 'the role of the Commission, governments and social partners'. (agenda: www.etui.org/events/confronting-uncertainty...)

The research team includes the most distinguished scholars in the field of industrial relations across Europe. To set the scene of the conference, the first intervention of Jan Hendeliowitz advocated labour market flexibility according to the Danish model. Colin Crouch/University of Warwick made this palatable with well-meaning reflections on 'trust and uncertainty'. Generally it was symptomatic that almost all the contributions from the rostrum remained confined to a framework of labour relations reminiscent of a past when employers were still present as partners of employees to negotiate the distribution of the social product based on the development of productivity. With this background the discourse now is based on 'wage moderation', 'concession bargaining', 'trade-offs', euphemisms which unmistakably reveal the loss of employee bargaining power. Conference participants who may have expected glimpses of a strategic outlook must have been frustrated.

Reviews

N. Fraser, R. Gutiérrez & R. Peña-Casas (Eds.)(2011). *Working Poverty in Europe. A comparative approach.* Basingstoke: Palgrave Macmillan.
ISBN 978-0-230-29010-5, £60, 342 pages.

Review by Janna Besamusca
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Working Poverty in Europe is the latest book of the Reconciling Work and Welfare in Europe series, in which researchers analyse the friction between welfare and labour market participation. The book contains three introductory chapters mapping the phenomenon of in-work poverty, followed by five country case studies and five chapters highlighting several crosscutting themes. Relying on data from the EU Statistics on Income and Living Conditions (EU SILC) database, the authors offer an in-depth insight into the complex and multifaceted phenomenon of in-work poverty, busting a number of myths along the way. The authors warn European policy makers that pushing the unemployed into low quality jobs is by no means certain to reduce poverty.

While the working poor are often still seen as an American phenomenon, the authors of Working Poverty in Europe show that roughly twenty million Europeans work in jobs that fail to lift them above the relative poverty threshold (60% of the median household net equivalised income for a country). In-work poverty is certainly not limited to the new, Central Eastern European member states, on which the book unfortunately does not give a very detailed or convincing account; and, while low wages significantly increase people's at poverty risk in all countries, many of the working poor do not actually earn low wages.

In three slightly repetitive and fairly technical chapters, the authors dive into the complexity of the phenomenon, introducing the country sample of Sweden (Nordic), Spain (Mediterranean), the UK (Anglo-Saxon), France (Continental) and Poland (Central Eastern European), as representatives of five archetypical welfare state formations. The authors show that in-work poverty is the result of an interaction of wages,

labour intensity and household expenditure and that its manifestations differ quite radically between countries. Whereas Swedish working poor are most often young singles working for low wages, French and British are regularly single-earner households where one salary does not suffice to foresee in the needs of two adults and children. In Spain and Poland, in-work poverty stems from a combination of low wage work, large families and intermittent employment status at the lower end of the labour market.

While primarily written for the academic public and therefore fairly elaborate with regard to methodology, the chapters give a clear picture of the group of people in Europe that is labelled working poor, as well as their working conditions and family circumstances. The chapters introduce the definitions, causal mechanisms and country sample that will be relied on for the rest of the book (with the exception of chapter 3). The use of the more legible odds ratios, where coefficient stands for the number of times a particular effect increases the probability of a certain outcome (0,5 being half and 2, twice as likely), means most of the statistics are relatively easily interpretable.

The country case studies are probably the most accessible chapters of the book, wherein authors guide the reader through the respective countries' in-work poverty landscape, national policies and specificities. In a particularly interesting chapter on the UK, Fraser relates in-work poverty to part-time work and observes the large number of low-wage workers that would fall into poverty except for the complex system of tax credits. Special attention is paid to the situation of women in the chapter on France,; and to youth in Sweden. In the case of Spain, García-Espejo and Gutiérrez focus on recurrent entries and exists from the labour market and the risks run by large families. The last study highlights the failure of Polish redistributive policies.

In the chapters on addressing crosscutting themes, the authors address the recurrent nature of in-work poverty, the position of women and migrants, the link between low (individual) wage and low (household) income and the various making work pay initiatives. Gutiérrez, Ibañez and Tejero show how different welfare policies primarily affect the duration and recurrence of in-work poverty for a group of families closest to the poverty threshold and establish different paths into and out of working poverty in the five countries. In what is probably the best of the cross-cutting themes chapters, Peña-Casas and Ghailani show how the application of a different level of measurement, unveils the very fragile position of women in working-poor households, showing that as many as one third of all women would be poor if left to rely on their own incomes.

While not an easy read, Working Poverty in Europe offers a detailed account of in-work poverty for readers with at least a basic knowledge of statistics. Partly on account of available data, the analysis of the Nordics, Anglo-Saxon and Continental Europe is by far the strongest, with the authors themselves indicating that the very solid study of Spain might not be representative of the entire Southern Europe. The crosscutting themes offer valuable insights, particularly with regard to mobility into and out of working poverty and the position of women. The chapters being written in the form of articles and therefore readable separately as well as together, readers may choose to select only the parts most interesting to them.

Review by Jan Cremers, CLR/ AIAS Amsterdam, 27/11/2011

Behrens, Martin: ***Das Paradox der Arbeitgeberverbände - Von der Schwierigkeit, durchsetzungsstarke Unternehmensinteressen kollektiv zu vertreten.***
(The Paradox of Employer' Organisations – How to represent enforceable company interests), Research series of the German Hans-Böckler-Foundation, Bd. 130. Berlin: Edition Sigma 2011, ISBN: 978-3-8360-8730-8. 238 pp

In his book *The Paradox of the Employer' Organisations,* Martin Behrens, working at the Hans Böckler Foundation, has made an in-depth analysis of the German employer' organisations. He sketches out a picture of diversity, not - as is sometimes supposed - of a monolith block.

In two chapters (2 and 3) he first provides an overview of the main theories related to collective action by employers and the way employers' interests are taken care of in a situation of competition and collegial cooperation. Different theories, whilst mainly of German origin, posit to a certain extent universal dichotomies of what could be the added value of being organised in a union or employer' organisation (membership versus influence – Streeck; solidarity versus effectiveness – Traxler: economic versus political output – Weber).

In the next chapters the author brings in empirical findings based on several German sources, with the bulk coming from the WSI Databank with information on around 350 employer' organisations. This part is for non-German readers perhaps too detailed. Nevertheless, in a following chapter the author continues with a classification that is partly based on this empirical input and that is interesting to look at. Employer' organisations can be seen as associations of competitors that differ according to their structure (regional or sectoral), the type of company that is represented (small and medium, or large firms), the market orientation of their members (export/ domestic), their labour intensity and their interest definition.

The core of the book is chapter 7, where the binding effect of collective agreements and the phenomenon of opting out are treated. Most employer organisations have opened up their membership to companies that do not want to be bound by the collective bargaining outcome. The figures used demonstrate that there are enormous differences between sectors. Construction, for instance, is not seriously threatened by a large group of companies that has chosen to opt out, whilst other industries, like for instance the timber and woodworking industries, have become the forerunners in this development (after the 37 hour week was negotiated in the late 1990s).

The reaction of the employer' organisations to a growing opt-out in their ranks can be characterised by a range of attitudes:

- first comes a defensive reaction of how to keep the membership upright; the result is an opt-out of bargaining processes, not a split in the employer organisation;
- secondly, organisations 'instrumentalise' this membership to legalise the opt-out;
- thirdly, the possibility to opt-out is used as a pressure tool during negotiations;
- fourthly, the acceptance of opt-out can be part of an explicit policy to quit the existing system of bargaining.

Spokespersons in some sectors claim that the disadvantages of decentralised bargaining (less expertise on bargaining, polarisation and industrial disputes at plant level during the negotiations, the long and arduous path to compromises) will outweigh the advantages. Important know-how in the sector disappears and business consultants are in no way capable of compensating for that loss. In this respect, Behrens again has to conclude that there is not one uniform strategy.

In the German context, employer organisations have always been an integral and important building block of the regulatory frame that stabilised the Rhineland model of industrial relations. That this role is not vanishing, but has to be nu-

anced is the conclusion after reading this book. It would certainly be interesting to apply parts of Behrens' analysis to other European constituencies. And I am quite sure that an international comparison would bring even more diversity than Behrens demonstrates in his book. Several of the aspects raised are related to the question of how broad or small the role of an employer organisation can be defined, and how this is reflected in the process of collective bargaining.

In the early 1990s, the EFBWW produced a first comparison of collective agreements in the European construction industry, based on a 'blueprint', an ideal list of items. The interesting outcome of the assessment of different existing national agreements was, of course, that not all items of the blueprint were covered everywhere. In some countries the content was not much more than a voluntary wage agreement, in other countries the deal between the social partners covered a broad range of binding wages, health and safety issues, qualification funding and other paritarian provisions. As it takes 'two to tango', it was up to the partners to define their role and the scope and content of their agreements. This experience came to my mind while reading Martin Behrens. If partners in collective bargaining define their role as a contribution to industry-wide continuity and long-term perspectives, they will probably be more open to a broader concept of collective bargaining. And the outcome of bargaining will be more than just a wage regulation. But if it is the short-term market that dictates and the primacy is on competition, then the outcome will probably be a beggar-thy-neighbour policy that leads to further decentralisation and an erosion of the regulatory model that was once described as the Rhineland-model of industrial relations.

Richard Croucher and Elizabeth Cotton (2009) *Global Unions, Global Business, Middlesex University Press*, London, 146 pages, ISBN 978-1-904750-62-8, £ 19.95.

Review by Jörn Janssen, CLR, London, 27/01/2012

Given the worldwide level of capital concentration and economic interdependence, the power and role of national labour organisation is alarmingly weakening. Therefore this book is a particularly important publication. We have to apologise that we have not reviewed it earlier. It is a most helpful companion for the labour movement and for the protection of labour rights in that it presents the development and institutional structure of international and global unionism, its achievements and shortcomings by way of examples; assesses the present political and organisational development; and concludes with recommendations on how to raise the power of global unionism.

This book serves a number of purposes. First, it is an encyclopaedic overview not only of global unionism but also of transnational, international and regional links, cooperation and organisation since the 1920s. This overview is underpinned by a list of about 250 bibliographical references - including 14 German publications, 1 French, and 1 Italian - allowing for a more intensive study of certain aspects and approaches. Secondly, it tries to summarise and assess what has been the focus of global union activities across the world, e.g. International Framework Agreements and HIV/AIDS programmes. Thirdly, it highlights, sometimes in a most detailed and realistic way, how traditional national structures and internal frictions often obstruct more effective transnational coordination, let alone unity of action. Finally, and most importantly it tries to identify the areas in which global labour union organisations ought to concentrate their efforts.

At the present stage, the 12 sectoral Global Union Federations and their International Trade Union Confederation form the skeleton of global unionism. Regional organisations such as the European sectoral federations under the European Trade

Union Confederation ambiguously contribute to internationalism and may, at the same time, distract from the overriding focus on worldwide unity. It is in relation to that global framework of 'genuinely global bodies' that Croucher and Cotton put forward their recommendations in the final chapter.

This chapter first summarises the main problems, above all the shortage 'of 'legitimacy and resources': 'The logic of resources is that integrating these [unaffiliated unions and groups of currently unorganised workers] into internationals will simply deepen the financial crisis." (p. 115) The commitment of the affiliated unions can be measured by their contribution to the global federations, namely just 1 percent of their dues (p. 51). Hence the first conclusion is, 'if the internationals are to survive, more will be required to develop in the directions we suggest." (p. 115) The authors pinpoint three directions to be prioritised, "defend the existing space, … work to create further space' and 'build the capacities to exploit that space, by helping unions to carry out core and new tasks more effectively … mainly carried through the international's educational work." (p. 116) The purpose of education and how it is to be organised is elaborated in a special chapter (Seven, pp. 80-94). Education is to combine a number of objectives, e.g. spread knowledge and experience, discuss politics and activities, coordinate action, intensify international networking, recruit and mobilise workers. And it should be carried out at all levels as a way of consolidating global unity.

An affirmative statement concludes the book: 'The global unions are the only institutions that can develop the collective experience, articulation and collaboration between unions in the ways demanded by globalisation." (p. 119)

The - unfortunately - symptomatic shortcoming of this book is that it is published only in English. It is ideally suited for education in the trade union movement across the world.

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