Twenty years in hindsight

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TWENTY YEARS IN HINDSIGHT

At the start
With this issue CLR-News completes 20 years. In November 1992, the executive committee of the European Federation of Building and Woodworkers (EFBWW) gave the green light for the installation of what was called ‘a contact point’ of researchers and trade unionists, the Construction Labour Research-network, later to become the European Institute for Construction Labour Research – or CLR. Early in 1993, CLR launched its quarterly with a ‘dummy’, our number 0, still called ‘a circular’. With just four pages, it was mainly dedicated to introducing the initiative. The official number 1 already contained several sections that sound familiar (Note from the editor, subject articles and reviews). However, even the dummy brought some content, namely a critical commentary on a study, commissioned by DG Industry of the European Commission (EC). This so-called Atkins-study had to contribute to a new strategy for the construction industry.

A few of the comments formulated are still worth memorising:

- The building trade unions were not involved at the beginning.
- The objectives of the project, as formulated by the EC, were ‘not very clear’ and above all the large-scale project ‘was extremely expensive’.
- The Atkins work was reviewed as ‘extremely variable in quality’, with some national reports being ‘definitely poor’.

A few issues later (CLR-News 2-1994) the verdict on Atkins was clear: ‘But to say that we now know where the European construction industry stands in the competitive battle, what will happen as regards employment or the way in which European construction policy can contribute towards improving industry’s prospects, seems to be going too far’. Among the shortcomings listed, we can find: notions about the competitiveness of construction without discussing at least the key con-
cept of productivity’; differences between countries not addressed; and the lack of a serious ‘analysis of the sector’s structure’ and of the relationship between large companies, SMEs and the operational end of the industry were not addressed. Social issues relevant to the construction industry were not ‘dealt with in-depth’ and ‘many myths and predictions about growing mobility and internal migration’ were given with poor or no evidence.

The quarterly CLR-News has tried to close these gaps. It has brought a broad spectrum of articles - on the disparity of wage relations in Europe, on labour migration and cross-border posting of workers, on women in construction, on wage costs and collective bargaining, on workers’ health, on skills and vocational training and the relationship with quality and productivity - all in a ‘open source’ manner, even before this was fashionable.

**The current picture**

Twenty years have passed and the EC in the meantime has produced several series of strategy papers. One of the last was the strategy as formulated in *EUROPE 2020* - *A strategy for smart, sustainable and inclusive growth* in 2010. But, the attention paid to construction in that document was extremely poor with a sole reference to the need ‘to invest in energy efficiency in public buildings and in more efficient recycling’ (page 16). In July 2012 the EC came up with a document that tried to make this phrase operational (*Strategy for the sustainable competitiveness of the construction sector and its enterprises* {SWD(2012) 236 final}). And, surprise, surprise, a High Level Forum was announced with the task to oversee implementation and to make recommendations on any necessary adjustments or new initiatives to be launched.

In its 2012 document, the EC signals ‘the construction sector is confronted by a number of structural problems, such as a shortfall of skilled workers in many companies, low attractiveness to young people due to the working conditions, limited capacity for innovation and the phenomenon of undeclared
work’ (page 2). And, what is more a complete paragraph, entitled *Improving the human-capital basis of the construction sector* (par. 3.2, page 10-12), looks at training provisions, at the conditions for a better working environment and career management, for a greater mobility of construction workers and for wider provision of cross-border services, and at the role of social partners. And, it has to be said, at least on paper the approach of the EC looks much more in balance than 20 years ago, although one can question the prescriptive and top-down approach of the European Commission in several files. The EC ‘will support a feasibility study by the European social partners on the establishment of a European Sector Skills Council. European Sector Skills Councils are networks of national observatories on labour-market and skills analysis at a sectoral level, which, under the steering of sectors' representatives, European social partners, and with the participation of representatives of education and training providers, exchange information and good practices in order to draw recommendations on the evolution of skills and jobs’ (page 11). Having in mind the difficult fight that the building unions had for a social clause in public procurement, it is pleasant to read that the EC is of the opinion that Member States should ensure that EU companies and non-EU companies compete for public contracts on an equal footing without jeopardising EU social and environmental achievements (page 5).

We do not want to comment in detail on the different aspects of the strategy formulated. But it is remarkable that the social partners (and notably the stakeholder ‘workers’) do not show up in the four other paragraphs of the strategy paper, with important issues like improvement of investment strategies, environmental performance, the functioning of the internal market and the global outlook. In fact these are all issues that do matter for both sides of the industry. Social partnership must not solely be ordered to human resource management.
In the meantime, the EC is likewise still struggling with another heritage of the last two decennia. In the paper there is only one reference to the problematic European Court of Justice (ECJ)-decisions with regard to the working conditions of posted workers where it is said that ‘the enforcement of the Posting of Workers Directive is to be improved’, in order to avoid any abuse and circumvention of rules, and to avoid ‘social dumping’ whereby non-host Member State service providers can undercut local service providers because their labour standards are lower.

However, if we examine the proposals that have been formulated for an Enforcement Directive in this area (Proposal for a Directive of the European Parliament (EP) and of the Council of Ministers on the enforcement of Directive 96/71/EC, COM[2012] 131 final, serious criticism can be formulated. For the EC, the norm is the ECJ. Therefore, the EC is not coming up with any improvements. Everything stays soft – improved information, cross border cooperation of the authorities, one contact point – and there is hardly any positive change from the point of view of workers. However, Europe is not living in a judicial context of only case law. The enforcement Directive was (and is) necessary to clarify the legislators’ aims and objectives. Thus, the legislator has to act and the ECJ has to work in the legal frame that is created by the legislator. Improvement to enforcement should first and foremost mean that the European legislator clarifies what can be enforced.

In other words, the rules and provisions that fall under the scope of Directive 96/71/EC have to be clarified, notably what is meant by public policy provisions in the case of freedom of cross border services with the use of posted workers. The notion of public policy provisions (related to this crucial part of the internal market) was formulated by the Council in a declaration (Declaration number 10) in the slipstream of the adoption of Directive 96/71/EC. This declaration, formulated when the Directive was concluded and recorded in the minutes of
the Council, was not discussed with the EP and was not published until 2003. It says: ‘The expression “public policy provisions” should be construed as covering those mandatory rules from where there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest’. The ECJ has further elaborated this notion in a very narrow way, thus limiting the possibility for the Member States to act according to the Directive’s objectives. Enforcement of these objectives with regard to the mandatory rules that can be formulated by Member States (according to article 3.10 of Directive 96/71/EC) has to be solved with a reconfirmation of this competence. And this must go beyond the ECJ-positions that limit this competence with the argument that these mandatory rules are a barrier for the free provision of services as soon as these rules contain more than the items of the list with minimum standards.

Secondly, and based on the same logic, inspection methods and mechanism that aim to control the rules laid down in Directive 96/71 and to detect breaches of the posting rules or the abuse for other purposes than the free provision of services, should be regarded as belonging to the core part of the public policy provisions, as formulated in declaration 10 of the Council. Mandatory rules of the Member States to fight against undeclared labour and to avoid social dumping, related to cross border labour recruitment, cannot be restricted solely because these rules could hinder the free provision of services.

Tackling the abuse of the posting status and acting effectively against breaches of the posting rules cannot be done without decent registration and prior notification; without such measures, any control will be hampered. Contract compliance is an important characteristic of genuine entrepreneurship. Therefore, notification and registration cannot be seen as an administrative burden, but simply a crucial part of a company’s administrative obligations prior to the start of the service supply.
Another important aspect of enforcement is the problematic control of the labour relationship. The competence of the host country to define whether there is a labour relationship is confirmed by the EC (in footnote 43 of the proposal) and has to be made operational in the proposed Directive. The enforcement Directive relates to another Directive that prescribes that every worker must have written proof of a labour relation. Given the fact that Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship is a European legal act, the competence to control compliance with related obligations must lie in the hands of the authorities in the home and the host country. In the case of differing interpretations, the law of the Member State to whose territory the worker is posted should prevail (in line with footnote 43).

The European Federation of Building and Woodworkers organises a demonstration on the 23rd January 2013. According to the leaflet (see next pages): ‘The future EU enforcement directive must include concrete measures that help to eliminate all forms of social fraud, gang masters, bogus self-employment and letterbox companies. The cheats and swindlers must be stopped’. And indeed, the European legislator still has a chance to improve the necessary tools by a thorough review of the proposals tabled.