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

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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 level1) 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 procedures2.

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-
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-

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spectatorate 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 subcontracting 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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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.