Note from the editor: [the road to cross-border justice]

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The road to cross border justice
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 start-er, 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 Günther 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.

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