European Institute for Construction Labour Research - GB Office

CLR-GB

Newsletter 2/2006

The CLR-GB Office is a platform linking CLR activities at EU and GB levels as well as trade union and academic work in GB in the field of Construction Labour Research. It will support related initiatives specific to GB.

Introductory Note:

You may have noticed that we have published less Newsletters and introduced an additional way of information and communication: 'Mail extra'. We would greatly welcome a response relating to this change.

A new publication in CLR-Studies is about to be published in English, French and German, Jan Cremers, Jörn Janssen (ed.) **Shifting Employment: Undeclared Labour in construction**. This book is an account of the present precarious situation of the contract of employment across Europe. The 'Services Directive' would further undermine remaining regulations for the protection of labour. Labour rights in the European labour market are indeed being targeted from all sides and everywhere, in the Scandinavian and Benelux countries as well as in Germany, France and other states who pride themselves to defend the European Model. Britain and Poland may be the exception. And the construction industry is one of the most vulnerable sectors. It was no coincidence that the Institute of Employment Rights asked Charles Woolfson and Jan Cremers from CLR to speak at their conference 12 July 2006 on 'The draft Services Directive versus Social Europe' (report in CLR-News 3/2006). The EFBWW has issued an evaluation of the last draft and a letter to the President of the European Commission (our last Mail extra).

In the previous CLR-GB Newsletter we announced that we would continue discussing the Services Directive. We are well aware that information and sensitivity is not as much developed in Britain as it is in most continental countries. This is why we decided to use the whole space for an article by John Grahl, explaining the background and contents of the Directive in relation to neo-liberal policy which tends to regard any regulation as detrimental to competition and hence economic prosperity.

We hope that this Newsletter will inspire you to join our AGM on 5 December 2006 at the University of Westminster, to discuss our 2007 programme.

Jörn Janssen/CLR-GB, 7 November 2006

Bolkestein and the Service Economy

The European Commission's proposed Directive on Services in the Internal Market (Bolkestein Directive) was an astonishing attack on the social models of the member states in general and on the rights of workers in particular. Although some of its teeth have now been drawn by the European Parliament (after a massive and almost universal campaign against it) the Directive is still a threat to the effective regulation of market economies.

The growing importance of services in economic life results directly from their growing weight in output and employment. Services raise particular difficulties for the project of international trade liberalisation because often they cannot be delivered from a

distance but require the presence of the service supplier in the country which makes use of them. Thus it is not usually possible to separate trade issues from issues of international investment and the international movement of labour.

The services report

It is important to note that the Bolkestein Directive was produced by the Directorate-General for the internal market (of which Frits Bolkestein was Commissioner between 1999 and 2004). The issues concerned the functioning of markets which have already been fully liberalised in principle; they are therefore EU issues to be determined by qualified majority vote in the Council and with full co-decision powers for the European Parliament. However, the actual draft Directive made such vast incursions into member state autonomy that it might well have been challenged on these grounds, had the Parliament not drastically reduced its scope and impact.

The specific character of Frits Bolkestein, a convinced neoliberal, may also have influenced the course of events. He is an economic liberal of very long standing, having represented the VVD in the Dutch Parliament for some twenty years. He takes a robust view of the need for market-oriented reforms in the European economy.

In any case, the Commission (2002), in pursuit of the Lisbon objective of service sector liberalisation, produced a report on the 'State of the Internal Market for Services'. Although the Commission shares the neoliberal Zeitgeist of most ruling groups in Europe, it is often more royalist than the king. Most proponents of the market economy recognise that many conceivable markets do not exist because there is little or no need for them. To the Commission on the other hand, the absence of any Europe-wide market is usually taken as a highly damaging consequence of non-tariff barriers. So it was with the Report's identification of barriers to the cross-border movement of services. These relate to the fact that it is often necessary to have a presence in the importing country in order to deliver a service there. Thus service suppliers might need to establish themselves in that country, obtain inputs there, carry out marketing, distribute and sell the service concerned, and perhaps provide further services after sale. Each step could involve difficulties.

The Bonfire of Controls

On the basis of the report on barriers to trade in services, Bolkestein's Directorate-General for the Internal Market prepared a draft Directive on Services in the Internal Market (European Commission, 2004). This had two outstanding features.

Firstly, it sought to apply the principle of home country control to all transactions in services. That is, service providers operating in another member state would not be subject to regulation, of any kind, by that state, but would remain under the exclusive supervision only of their home country.

The actual service provision activity would take usually place, in whole or in part, in the host country but would somehow be regulated, at a distance, by the home country. It was never made clear, in any of the discussions, how this could work – except by miracles of administrative 'cooperation' by the governments of the member states concerned. Nor was there to be any attempt at approximation of regulatory standards – rather, mutual recognition of regulatory regimes was to be, as far as possible, 'automatic.'

The legal chaos threatened by this approach to integration deprived the proposal of support from jurists. In essence the rules applicable to a service activity would become not only arbitrary – any one of twenty-five regimes might apply depending on the origin of the provider – but also potentially compound – if a dentist and an anaesthetist came from two different member states - the service activity they provided together might be governed by two different regulatory systems, both of them external to the country where the service was being provided, that is, that of the patient.

Secondly, and in order to consolidate the regulatory disarmament of service-importing countries, the draft directive specifically outlawed a whole range of regulatory procedures. According to Article 16 host governments would not be allowed to:

- oblige a service provider to be established on their territory;
- require a service provider "to make a declaration or notification to, or to obtain an authorisation from, their competent authorities, including entry in a register or registration with a professional body or association in their territory";
- require the service provider to have either an address or a representative in the host country;
- oblige the provider to comply with national requirements for service providers;
- restrict the use of self-employed workers by a service provider;
- require the service provider to possess an identity document issued by host authorities.

Further, Section 2 of the draft imposed drastic limits on the supervision of service activities in general, *whether the provider was domestic or external.* It did permit authorisation procedures for services where there was an "overriding" reason of public interest, but even these, exceptional, procedures prevented host authorities from using many measures. For example, they were not permitted to:

- require a service provider to be resident on their territory;
- make service provision subject to a demonstration of economic need;
- require a financial guarantee;
- require registration for a period of time prior to service provision;
- restrict the freedom of a service provider to choose between presence as branch, subsidiary or agency.

In addition, a large number of administrative requirements would be made subject to strict limitations – that is, they would be permitted only if they could be shown to be non-discriminatory, justified by an "overriding" public interest and "proportional" (that is, not more stringent than was required to meet their objective). The requirements so limited included:

- the imposition of territorial or quantitative limits on service providers (such as a minimum distance between them);
- restrictions on the legal form of a service provider (for example, require the provider to be non-profit making, or a limited company);
- requiring minimum capital to be held by the provider, or require the management of a service provider to have specific qualifications;
- requiring minimum or maximum prices for the service;
- requiring a service provider to offer specific other services with the service concerned;
- require a certain number of workers to be employed;
- restrict specific providers for any other reason than lack of professional qualifications.

Further, no new restrictions of such a nature were to be introduced without the Commission being informed and reasons given for their introduction. The Commission would then have the power to strike down such rules or regulations.

The cumulative effect of these proposed restrictions would be to render it extremely difficult and often impossible for governments or other authorities to control service activities. They would, in fact, find it difficult even to inform themselves about what service activities were taking place on their territory without breaking these rules. In order to bring about market integration of very dubious value it would subvert the entire regulatory structure of every member state and replace these relatively coherent structures, rooted in specific social histories, with the most complete anarchy.

The immediate and massive opposition to Bolkestein certainly contributed to the climate in which the EU suffered a drastic loss of legitimacy, demonstrated by the rejection, in France and the Netherlands, of the Constitutional Treaty.

H*ealth Care, Posted Workers, Services of General Interest*
It is clear that the draft directive did have very serious implications for employment rights and that these were intentional. The situation for a worker who takes up indefinite employment in another member state is clear; the employment relationship is governed by the employment rules of the host country and the worker receives the full social security rights of the host country. This approach was firmly established at a time when the European social models were perceived as the political basis for the market economy; failure to give full national treatment to migrant workers was seen at that time as a barrier to integration.

At an advanced stage of integration, however, increasing difficulties resulted from temporary movements of workers, often linked to the provision of services. These 'posted' workers might have employment contracts in their countries of origin (or in third countries) but they spent short periods of time in another member state. A notorious example of these problems arose from the presence of British construction workers in Germany in the first half of the 1990s, during the reconstruction boom in the Eastern Länder. Supplied by Dutch intermediaries, these workers broke every rule of the German employment regime, from limitations on hours of work, through health and safety regulations to basic compliance with the tax laws.

The Posting of Workers Directive of 1996 attempted to bring some order to this chaotic situation. It specified that workers temporarily active in another member state (usually in order to provide some service) would be covered by a core of basic employment rights laid down by the host country, even though this might fall well short of full 'national treatment'. Thus the host country's maximum working periods, minimum rest periods, minimum rates of pay, health and safety rules, and equal opportunities rules would all apply, even though, for example, such workers would not be integrated into the host country pension system.

However, even this very limited constraint on the employment of workers in other countries was seen as a barrier in the Bolkestein proposal. The draft recognised, in Article 24, that the host country authorities would have to be responsible for ensuring that the posted worker was actually accorded national treatment. In the same article, however, it proceeded to tie the hands of these authorities by forbidding them:

- to require posted workers to be authorised or registered;

- to require their employer to have a representative in the country;
- to require either employer or employee to hold or keep employment documents in the country.

Amendments Proposed by the European Parliament
The European Parliament (EP) considered the draft directive in detail in the autumn of 2005 and voted on it in February of 2006. By this time, the Constitutional Treaty had fallen victim to the massive loss of legitimacy of the European project even in countries, such as France and the Netherlands, where the traditional view had been very much in favour. By this time, also, the negative verdict on Bolkestein of all organisations except those of big business had become extremely clear. Even with its current conservative majority there could be no question of the Parliament simply endorsing Bolkestein.

There is no doubt that the amendments passed by the European Parliament (2006) would significantly dilute the directive and reduce its impact on the regulation of service provision. The impact of Bolkestein's proposals is reduced firstly by the exclusion of a wide range of services from the directive: health care is removed, as are some social services and several others. Secondly, the European Parliament states that the established legal position in several fields must not be changed by the directive. This is, in particular, the case for both labour law and social security so that the original provisions of the Posted Worker directive, as establishing minimum conditions, remain in force. Similarly, it is made clear that regulations designed to ensure cultural pluralism are unaffected by the services directive. Throughout the amended document, it is insisted that there are many reasons which will justify regulation of service activities, including regulation by the obligatory registration and authorisation of providers.

However, not all the teeth of the Bolkestein directive have been drawn. Although the general requirement for regulation of service providers by their "country of origin" is removed, there is no clear assertion that regulation will be by the host country; rather a general "freedom to provide services" is asserted. And the relevant article 16 is little changed. It still contains a list of requirements and procedures which the service-receiving country must not impose.

It would be complacent, therefore, to think that the European Parliament has blocked the Bolkestein initiative. The attempt to drive through a widespread deregulation of economic and social life on the basis of free competition in service sectors is still a central component of the current strategy of EU leaderships.

John Grahl/ University of Middlesex

Future Events:

CLR-GB, Annual General Meeting
5th December 2005, 5 p.m.
University of Westminster
35 Marylebone Road, London NW1 5LS

Provisional Agenda:
1. Welcome
2. Report of CLR-GB activities, critical debate
3. CLR research in 2006
4. Construction Labour Research at Universities
4. CLR-GB programme for 2007
5. Drinks and chats

Please let us know, if there are issues you want to be discussed at the meeting.

Whoever feels like it may join us for supper in a nearby restaurant.

To Our Readers:

The CLR-GB Newsletter is the organ of exchange for CLR in Great Britain. This function depends on the co-operation of its readers. The editors ask everybody who is interested in construction labour to contribute with information and commentaries. Please send your suggestions, articles, information, letters, etc. to

CLR-GB Office:
Prof Dr Linda Clarke
Westminster Business School
University of Westminster
35 Marylebone Road
London NW1 5LS
phone: 020 9115000 ext. 3158
email: clarkel@wmin.ac.uk

Or to the editors of the Newsletter:
George Fuller
119B Earlham Grove
Forest Gate
London E7 9AP
phone: 020 85345352
email: george@fullerg.fsnet.co.uk

Jörn Janssen
58 Freegrove Road
London N7 9RQ
phone: 020 77007821
email: joern.janssen@btinternet.co.uk