Ten Years after – Jan Cremers, CLR, March 2006.

Crisis in Socio-political Thinking in Europe was the title of my address to the EFBWW Congress on 20.11.1995. In that contribution I gave an overview of the state of the art of the political debate in Europe on social issues in the mid nineties. About the impact of and the possibilities for the social dialogue I started with a basic remark:

"We are not carrying out these activities in a political vacuum and must not and cannot be expected to achieve resounding successes when we are rowing against the stream. We have our own instruments, the social dialogue, negotiations in our sectors and companies, our autonomy in helping to shape our industries. But we are also dependent on developments in the political arena, and on initiatives by the legislators - in our case the European Commission and Council of Ministers. And we all have reason to talk of a crisis in socio-political thinking in Europe."

It was the period where the belief in the self-regulation of the market became the popular alibi for the national, and later on the European, legislator to withdraw from the playing field of our industrial relations. Mid-October 1995 the British Commissioner Sir Leon Brittan announced, at the Conservative party congress in Blackpool, that Britain's long-term campaign against European legislation and social measures had achieved substantial progress. With a note bordering on euphoria he reported on a new mood in Brussels. According to Brittan, the Commission was scarcely interested any more in legislation: harmonisation was out and deregulation in. And as far as social policy was concerned, the only question being considered was whether it did not cost industry too dear.
In the following years, there was little or no attempt to refute these views amongst the main actors of the European Institutions. On the contrary, the slogan became "we must leave things to the market, the government must step back and allow the market room to work properly".

Six years ago I left Brussels and was confronted in the Netherlands with the same cold breeze: talking about social issues had become old fashioned and those that pleaded for modern industrial relations based on a sound mixture of labour legislation and collective bargaining were labelled as the "conservatives".

In the meantime we have to face the facts; even in the Netherlands, a rich country with low unemployment and a tradition of social welfare, there is nowadays a penetrating insight into the harrowing effects of this "free market" policy. For the first time since World War II we have a serious growth of the so-called working poor. In the name of the market, the welfare state has been demolished, people are being saddled with insecure jobs, and the labour laws and social security systems we have fought so hard to achieve are being undermined.

The state plays a pivotal role for the construction sector in every country.
The state authority is at the same time the most important and biggest client, the legislator, the partner in tripartite social institutions, sometimes the owner of companies and in many cases one of the key creators of (un) favourable conditions for the industry (economic and tax policy, liability, labour inspection, training).
The role of the state as an initiator of decent interaction in the industrial relations and as a stimulator in the labour process has seriously decreased and the role as the creator of favourable conditions for the construction sector is ranking low under the general drive for liberalisation.
If the basic philosophy is deregulation, often proclaimed under the more popular, better sounding but also misleading terms self-regulation, decentralisation or "tailor made" policy, the result is divergence between those that have the possibilities and the means to shape their labour market positions or role in society and those that stay in the dependent and vulnerable position.
In such a situation the dialogue between the social partners comes under strong pressure. We have seen in the Netherlands how social partners were confronted with a strong and devastating deregulation of health and safety legislation. As a result they had to repair the loopholes. The legislator is no longer interfering in a progressive way in the autonomous dialogue between both sides of the industry. The outcome on their side is a defensive strategy and regression. I'm convinced that in the long-term construction as an industry will belong to the losers if this policy goes on.

At European level the inertia that I have criticized during several occasions has become worse.
In 1995 I had to conclude that "European euphoria has evaporated and the European Commission and Council of Minister are standing on the sidelines and watching it pass. In no respect does there appear to be anything left of a joint European concept or a political vision of a humane, social and democratic European future. Market thinking is prevailing and if the market regulates matters for us then we can sit back. The consequences are visible daily: no more initiatives for important European social legislation, the European institutions' departments complain about a lack of commitment, commissioners and political leaders take flight into particularism and constantly show national reflexes".

In November 2005 (ten years after) I had a meeting with MEP's. They were more and more withdrawing from the social committee in Parliament, not because they were no longer motivated or engaged in social issues but simply because there was nothing going on. The European Commission, the initiator for legislation and/or social policy has no agenda and no substantial plans. In a situation where citizens all over Europe are questioning the role of the EU because of the negative

impact on their family life, their income and their future perspectives the foremen of Europe have no answer.

In my speech in 1995 I also reported on the other side of society, the hard world of clandestine lives and illegality.
“The labour market for illegal immigrants is flourishing; never was clandestine labour so cheap. Traditional illegals from North Africa are being pushed aside by newcomers from Romania, Poland and other former East Bloc countries, which are disrupting the market with their dumping prices. If your skin is black you can no longer get work as an illegal because you stand out too much. Between Brussels and the former East Bloc a brisk commuter service has developed, with or without visas. Because people without papers do not officially exist, they have no social rights and remain cut off from all social benefits and are certainly not able to organise. Their survival depends on the jungle rules of the black market”.

Since the start of their social dialogue the social partners in construction advocated closer European integration on the basis that they had a great deal to share, achieve and gain in Europe. But they also realised from the very beginning that they had a great deal to lose. Particularly as being confronted daily with the consequences of the free movement of products and workers.
The social partners in European construction have always clearly stated that the application of the legal regulations and the collective agreements of the country where the work is done, or better said, the application of the equal treatment principles, has to be the leading principle to avoid any problems with migrating foreign workers. They therefore played a key role in the (decision-making) process leading to adoption of the Posting Directive. The partners came up with two important joint statements, one in 1993 about the general principles of equal treatment and fight against a distortion of competition through social dumping. A second joint statement in 1996 formulated a way out of too much administrative and practical problems by recommending bilateral agreements between the partners of countries involved in (frequent) posting.
The main principle of Directive 96/71/EC is equal treatment; posted workers are to be treated in the host state as workers who are normally working in that state and undertakings are to be treated equally when they want to provide services in another state. However, the Directive’s implementation, as has been shown by a recent CLR study, has been poor, cooperation is non-existent and there is a general lack of enforcement and control.

And what is more: in the meantime the ‘host country’ principle has come back into the spotlight, thanks to the proposed EU Services Directive. This draft Directive on services in the internal market (COM 2004/0002) – in the debates often named after the former Dutch commissioner Bolkestein – has from the outset met a lot of criticism.

The posting of workers in the context of services provision can be seen as a legal form of temporary cross border migration and the Posting Directive was meant to soundly base that free movement of workers. If we repeat the results of the evaluation of that Directive - poor implementation, the lack of control and enforcement, weak or absent cooperation of the authorities, and no reliable data - then the least one can conclude is that the Commission has no feeling for political timing by bringing a proposal to the forefront that removes the control to the country of origin. The application of the country of origin principle in the Services Directive, according to which the Member States cannot restrict the activities of service providers from other Member States who comply with the laws regulating access to and exercise of services in their country of establishment, can destroy the balance between the protection of employees on the one hand and market opening on the other hand. The claim that the Services Directive does not interfere with the application of the Posting Directive appears deceptive. Let's see what the Commission will do with the recent position of the European Parliament.

The impression is that the European Commission's services act as two ghosts in one bottle. In a recent draft document that deals with the criticism of the implementation of the Posting Directive the Commission replies to her opponents[1]. There it is said that:

> *It should, however, be pointed out that the Directive reflects the clear and unambiguous intentions of the Community legislators, and stresses that application of the law of the host State in an number of key areas, such as working hours, minimum wages, safety, health and hygiene at work, is in the general European interest, which should not be called into question.*

And furthermore the paper recommends Member States to create the appropriate context in which to resolve the question of the eruption of various forms of atypical work (including so-called 'bogus' self-employed):

> *(...) the only way to ensure that the same rules on protection apply to the same groups of people is by referring to the national law of the Member State to which the worker has been posted when seeking a definition for the term "worker". This places undertakings established in the host country on the same footing as those that provide cross-border services.*

What is this other than a clear promotion of the 'host country' principle? But at the same time the Commission sees the Posting Directive as the corollary to the freedom to provide services as defended in the Bolkestein Directive! To be honest, in my long career as European trade unionist and researcher I have never seen such a contradictory policy.

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[1] Draft of a *Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,* 15-11-2005, Brussels.