



HM Government

# Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons

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Single Market:  
Free Movement of Persons

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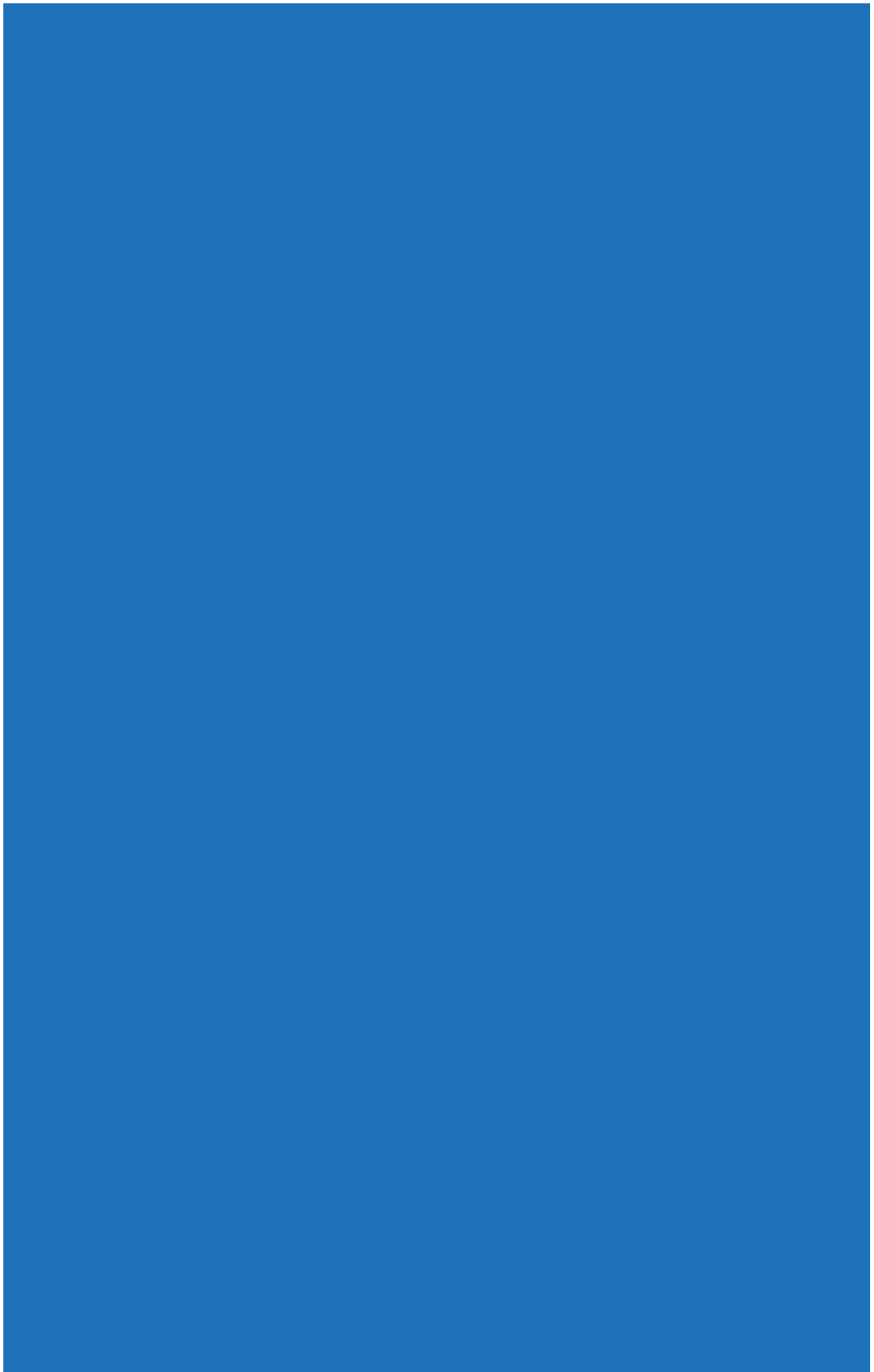
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# Executive Summary

This report examines the balance of competences between the European Union (EU) and the United Kingdom (UK) in the area of the free movement of persons, and is led by the Home Office and the Department for Work and Pensions. It is a reflection of the analysis and evidence submitted by experts, non-governmental organisations, business people, Members of Parliament and other interested parties, either in writing or orally, as well as a literature review of relevant material. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

Chapter One sets out the historical development and current state of EU competence in the area of the free movement of persons and the associated provisions on social security coordination. The principle of free movement of persons has expanded from its origins in the Treaty of Rome (1957) to become one of the four ‘fundamental freedoms’ of the EU’s Single Market, and is now regarded as a central principle of EU integration and, through the Maastricht Treaty (Treaty on European Union) a core part of the concept of EU ‘citizenship’. Over time, the right to free movement has been progressively extended from its original focus on workers to apply also to job-seekers, the self-employed, students and the self-sufficient, including, for example, retired persons.

Similarly, provisions were included in the Treaty of Rome to ensure that workers and their families could move between Member States to work without losing their social security entitlements. These provisions grew over time into a detailed system of social security coordination with the original provisions stretched to cover other groups of mobile EU citizens. However, Member States retain exclusive competence for the organisation and funding of their social security systems. The report notes the significance of the UK’s Habitual Residence Test (HRT) which is the gateway test which any migrant who makes a claim to benefits, including British nationals returning from a period living or working abroad, must satisfy. Since 2004 this test includes a ‘right to reside’ requirement which is met automatically by British citizens and is the subject of current infraction proceedings brought by the European Commission. The Government introduced a set of new measures from December 2013 onwards in order to ensure that EEA migrants come to the UK to contribute to the economy, not to access benefits.

Free movement rights and entitlements, including protection against discrimination on grounds of nationality, are set out partly in the Treaties and partly in secondary legislation. Key measures are the Free Movement Directive, the Regulation on the Free Movement of Workers, the Directive on Enforcement of Free Movement Rights and the Social Security Coordination

Regulation.<sup>1 2 3 4</sup> The European Commission takes an active role in promoting and enforcing free movement rights, notably by pursuing infraction proceedings against Member States concerning their implementation of free movement rights. Free movement rights are not unqualified but are subject to the restrictions and limitations made in the relevant EU legislation.

The European Court of Justice (ECJ) has also played a key role in the evolution and extension of EU competence in this area. Important examples are the *Baumbast* judgment (1999) which confirmed the de-coupling of free movement rights from economic activity, the *Metock* judgment (2008) which enabled third country nationals to gain free movement rights by marriage to EEA nationals, without having been lawfully resident in a Member State, and the *Zambrano* judgment (2011) which for the first time created rights based on an EU citizen's residence in his or her own country of nationality.<sup>5</sup> More detail is provided in the legal annex at Annex D.

Chapter Two explores in detail the impact of the current balance of competence on the UK national interest.

There are considerable differences in opinion on this topic, as shown by the evidence submitted and gathered at stakeholder events. Some saw free movement of persons as both a necessary part of the Single Market and as broadly positive for the UK economy. Others however highlighted negative effects, such as competition for jobs and pressure on public services and housing. Some of the negative consequences were also highlighted in the literature review, such as the potential for immigration (from the EU and from elsewhere) to create both winners and losers.

This chapter highlights the sharp increase in EU migration to the UK in the last 10 years, resulting from a variety of factors. Apart from the expansion of competence noted in Chapter One, major contributing factors were the expansion of the EU in 2004, the decision to open the UK's labour market to workers from the accession countries earlier than most other Member States, and the relative openness and flexibility of the UK's labour market and economy. Other Member States also experienced increases in migration from within the EU, flowing both from East to West and from South to North.

The impact on the labour market is considered across a range of different sectors, including manufacturing, engineering, legal services, agriculture, hospitality, financial services and healthcare; and with regards to highly skilled, low-skilled and regulated professions. The effects are viewed as largely positive, providing a wide range of skilled labour and opportunities for UK workers, and their employers, in other Member States. Whilst there is broad consensus that highly skilled migrants from the EU have been beneficial to the UK, there is less agreement regarding low skilled migration, with some arguing that gains for employers are offset by negative impacts on the lowest paid workers. The critical importance of ensuring clinical standards, including language competence, was highlighted with regards to the healthcare sector. Recent findings from public opinion surveys indicate the impact on public confidence, in particular declining levels of public support for free movement of persons.

<sup>1</sup> Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004.

<sup>2</sup> Regulation 492/2011/EU of the European Parliament and of the Council on the Freedom of Movement for Workers within the Union, 2011.

<sup>3</sup> Directive 2014/54/EU of the European Parliament and of the Council on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Freedom of Movement for Workers, 2014.

<sup>4</sup> Regulation 883/2004/EC of the European Parliament and of the Council on the Coordination of Social Security Systems, 2004.

<sup>5</sup> *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [1999]; *Metock and Others v Minister for Justice, Equality and Law Reform* Case C-127/08 [2008]; and *Zambrano v ONEm* Case C-34/09 [2011].

Evidence was also received on the impact of the EU rules on coordination of social security. Some submissions argued that these rules, especially on maintenance of accrued pension rights, are necessary to support labour mobility, including for British citizens seeking work elsewhere in the EU, and that the net fiscal impact was positive for the UK. Others were concerned that these rules in combination with the UK's relatively generous welfare system, including the availability of in-work benefits, could act as an undue pull factor for EU migrants. Only limited data is currently available concerning the numbers of EU migrants claiming benefits in the UK and the numbers of UK citizens claiming benefits in other EU countries, but the introduction of Universal Credit will allow collection of robust data on the nationality of benefit claimants in future.

This chapter also examines the impact of free movement of persons on local communities, schools, healthcare and housing. Overall the evidence suggests that EU migration has had similar effects to migration from elsewhere, for example by adding to demand for primary school places and both private and social housing. There was little hard evidence regarding problems in community cohesion as a result of EU migration. However, this chapter notes the evidence of increased homelessness in some locations and the need for the Government to respond effectively to concerns about criminality and abuse of free movement rights by a small minority of EEA nationals. Other Member States, including Germany, have also called for a more effective EU response to the abuse of free movement rights.

Lastly, this chapter examines evidence concerning British citizens exercising free movement rights in other Member States. Estimates for the numbers doing so ranged from 1.4m to 2.2m. Some of the evidence highlighted the advantages for individual citizens of being able to work or live in other Member States and noted that more consistent implementation and/or enforcement of free movement rules, including those on mutual recognition of professional qualifications, would benefit this group.

Chapter Three considers future options and challenges in the area of the free movement of persons. Some of those who submitted evidence argued for stricter enforcement of the existing rules, but others called for radical change, including amendments to EU legislation or Treaties. Specific proposals that were submitted to the review include the introduction of 'caps' or quotas to prevent future large-scale migration from the EU and much stronger restrictions on access to benefits. Some of these proposals would be a significant departure from the current concept of free movement. Others would involve more limited revision of the existing rules, dependent on negotiation with other Member States.

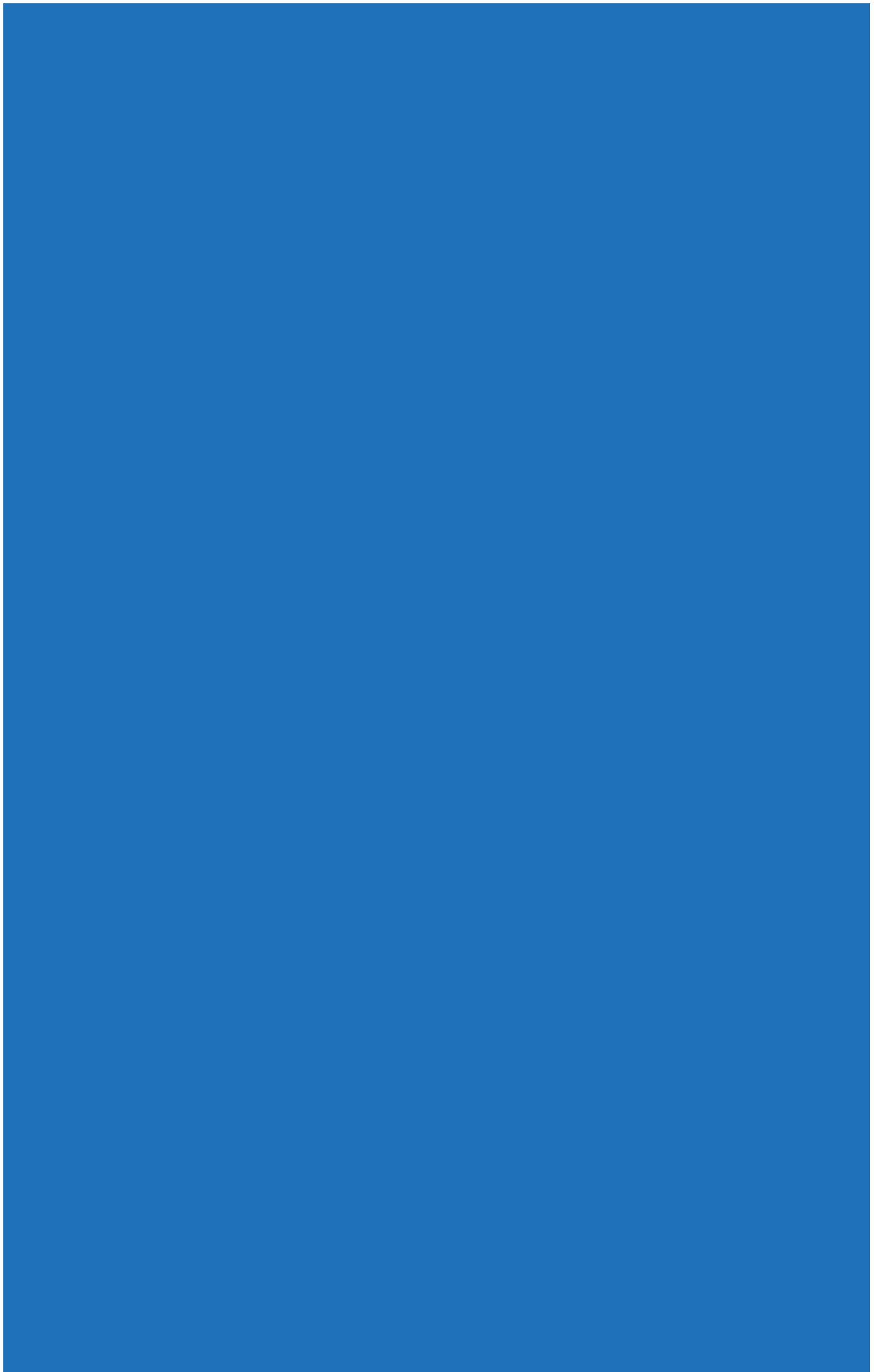
This chapter also notes the implications of future enlargement of the EU (which will be the subject of a separate Balance of Competences report) and summarises proposals for reform of the system of transitional controls on free movement rights.<sup>6</sup> In November 2013 the Prime Minister called for a new approach to transitional controls, moving away from a set time limit and making a closer link between free movement rights and economic conditions.

Finally this chapter refers to the recent adoption of new EU legislation, including a new Directive to promote and enforce the free movement rights of workers, and a revised Directive on the mutual recognition of professional qualifications. The Government is preparing to implement these Directives.

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<sup>6</sup> HMG, *The Balance of Competences between the UK and the EU: Enlargement*, to be published in Semester Four.





# Introduction

This report is part of a Coalition commitment to review the balance of competences between the UK and the EU. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest, and deepen public and Parliamentary understanding of our relationship with the EU. It seeks to provide a constructive and serious contribution to the national and wider debate about the EU. We have not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

This account is one of 32 subject-based reports analysing specific areas of EU competence. The reports are divided into four semesters and will be published on a rolling basis until the end of 2014. All reports will be based on evidence gathered during a twelve week period. More information on the Review can be found at [www.gov.uk/review-of-the-balance-of-competences](http://www.gov.uk/review-of-the-balance-of-competences).

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

## Free Movement of Persons Report

The analysis in this report is based on evidence submitted during the Call for Evidence period. This evidence includes written evidence submitted to the report, records of discussions at stakeholder events and existing material which has been brought to our attention by interested parties, such as past select committee reports or reports of the European Commission. A list of the evidence submitted in response to the Free Movement of Persons Call for Evidence can be found at Annex A of this document. A list of academic literature and other material examined as part of the research for this report is at Annex B.

The Home Office and the Department for Work and Pensions planned and carried out extensive stakeholder engagement in order to ensure that key stakeholders were fully briefed on the report and were strongly encouraged to submit evidence.

The Home Office also conducted a separate Balance of Competence Review report on Asylum and Non-EU Migration. That report considers EU competence and policies regarding immigration from outside of the European Union, focusing on borders and visas (including Schengen); asylum; and legal migration. Any overlaps between the two reports have been covered, and, where appropriate, evidence of relevance to both reports was shared.

As in all such reviews, the evidence examined in this report is of varying quality, ranging from hard fact to opinion and conjecture. At one end of this spectrum, opinion survey findings have been included in order to illustrate trends in public perceptions and in the level of public confidence in the system of free movement. At the other end of the spectrum, the review includes ONS-published data on migration stocks and flows, although it should be noted that the statistics quoted are estimates based on passenger surveys and have a margin of error. Chapter Two also notes the limited data currently available concerning benefit claims by EU nationals in the UK.

Further information on a number of the issues covered in this report can also be found in the Migration Advisory Committee's report on low-skilled migration, published after the completion of this report.<sup>1</sup>

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<sup>1</sup> Migration Advisory Committee, *Migrants in Low-Skilled Work – The Growth of EU and non-EU Labour in Low-Skilled Jobs and its Impact on the UK* (2014).



# Chapter 1: Historical Development and Current State of Competence

## The Historical Development of EU Competence

- 1.1 Since the formation of the EU there have been specific rules in place designed to facilitate the movement of certain groups of EU nationals within its territory. These rules are distinguished from the rules applicable to nationals from outside the EU – so-called ‘third country nationals’ – be they ‘visa’ or ‘non-visa’ nationals.<sup>1</sup>
- 1.2 The rules applicable to EU nationals, and in some cases also their family members, under the provisions of the free movement of persons therefore differ from the treatment of third country nationals. The free movement of persons is understood as one of the four ‘fundamental freedoms’ which comprise what is known as the EU’s ‘single’ or ‘internal’ market – an area without internal frontiers designed to ensure the free movement of persons, goods, services and capital. The Single Market was a concept at the heart of the original Treaty of Rome which envisaged the creation of a common market for the original six members of the then European Economic Community (EEC).
- 1.3 Free movement was originally focused on those who were ‘economically active’ – such as workers and self-employed persons, and those giving or receiving services. Free movement was therefore intended to support the development of an EU labour market where workers could move across the EU to fill skills and employment gaps and improve their own economic opportunities. From the outset EU law included supporting provisions to ensure rules within national social security systems would not act as a barrier or disincentive for workers and their families to move between Member States.
- 1.4 Article 2 of the Treaty of Rome in 1957 set out the objectives of the then EEC: to establish a common market in order to promote development of economic activities, high levels of employment and social protection and to raise the standard of living in the Member States. Article 3(1)(c) EEC provided that the Community aspired to ‘the abolition, as between Member States, of obstacles to freedom of movement for[...]persons’.

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<sup>1</sup> The EU’s competence with regards to these groups is examined in: HMG, *The Balance of Competences between the UK and the EU: Asylum and Non-EU Migration* (2014).

- 1.5 The free movement rights set out in the Treaty of Rome were confined to persons who exercised economic activity.<sup>2</sup> In order to qualify the individual had to be both a national of a Member State and be engaged in economic activity. Those falling within this scope enjoyed and continue to enjoy the right to free movement.
- 1.6 Closely associated with the relevant provisions within the Treaty was the general principle of non-discrimination on the grounds of nationality: a mobile worker from another Member State must enjoy the same treatment as nationals in a comparable situation.<sup>3</sup> This continues to be a cornerstone of the four freedoms (persons, services, goods and capital), as does the general principle that the Treaty provisions are engaged only when there is movement between States, and that free movement provisions cannot be applied to wholly internal situations in a Member State.
- 1.7 EU competence in relation to the free movement of persons has changed and evolved in subsequent Treaties (the Maastricht Treaty, in particular), secondary legislation, and as a result of domestic and Court of Justice of the European Union (ECJ) case law. The relevant legislative and voting procedure to adopt measures in this area has also evolved, moving from unanimity to qualified majority voting and co-decision.
- 1.8 In the late 1960s, two key measures implemented the rights of free movement for workers. These were Directive 68/360 on free movement for workers within the then European Community (EC); and Regulation 1612/68 on the abolition of restrictions on movement and residence within the EC for workers of Member States and their families.<sup>4</sup>
- 1.9 In 1990 the EC adopted three Directives which conferred a general right of movement and residence on the retired, students and those with independent means, provided that they had sufficient resources and medical insurance.<sup>5</sup> This reflected the gradual change which had been taking place in relation to the link between economic activity and free movement – moving towards the idea of migrants as individuals with rights in their host Member State.
- 1.10 The Maastricht Treaty (The Treaty on European Union) explicitly introduced the concept of Union citizenship into the EC Treaty in 1992, together with a number of associated rights. This included the right to move and reside freely in Member States subject to limitations and conditions laid down in the Treaties and in EU secondary legislation. It created the European Union and formalised the recognition of the status of ‘citizen of the Union’, with the associated rights and duties, for every national of a Member State. The case of *Baumbast* effectively confirmed the severance of the absolute link between migration and the need to be economically active.<sup>6</sup>

<sup>2</sup> Articles 48 to 50 EEC provided for the free movement of workers, Articles 52 to 58 concerned the right to establishment and Articles 59 to 66 provided for the freedom to provide services.

<sup>3</sup> Article 7 EEC (see also Article 48(2) EEC).

<sup>4</sup> Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the community for workers of member states and their families, 1968.

<sup>5</sup> Council Directives 90/364/EEC on the rights of residence for persons of sufficient means, 1990; 90/365/EEC on the rights of residence for employees and self-employed who have ceased their economic activity, 1990; and 90/336/EEC on the rights of residence for students, 1990.

<sup>6</sup> *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [1999].

- 1.11 The earlier legislation was replaced in 2006 by Directive 2004/38/EC (known as the 'Free Movement Directive'); and Regulation 1612/68 by Regulation 492/2011 (the 'Free Movement of Workers Regulation').<sup>7</sup> Since the adoption of the 2004 Directive the ECJ has continued to clarify and, in some cases, expand free movement rights through various rulings such as the *Metock* judgement (2008) on free movement rights for family members.<sup>8</sup> The effects of ECJ rulings are further discussed below.
- 1.12 The provisions for social security coordination in the Treaty of Rome had their origins in previous bi-lateral agreements between the founding States, and were designed to meet the needs of workers, predominantly male blue-collar workers crossing borders to take up full-time work for a period before returning home. The rules were built around the social insurance systems operating in those States at that time, and the implementing regulations covered both migrant access to benefits and healthcare.<sup>9</sup>
- 1.13 The provisions allowed and continue to allow for the 'export' of particular benefits, meaning that, if a person remains eligible for a benefit in one Member State, it can be received in another. For example if a person acquires entitlement to a pension in one Member State, that pension can be received in another Member State, allowing people to return to their home state upon retirement. Most means-tested benefits, such as support for housing costs cannot be exported.
- 1.14 These rules evolved over time to take account of new patterns of migration, changes in labour force participation and European labour markets. The rules were expanded in scope to cover the family members of workers exercising their free movement rights.<sup>10</sup>
- 1.15 The emergence of the concept of an EU citizen in the Maastricht Treaty created a new treaty basis for EU competence on social security. The articles currently covering social security, Article 48 and related articles on the Free Movement of Citizens, remain the subject of some debate. While Article 48 clearly states that workers and the self-employed are in scope, the secondary legislation broadened the scope of the rules, bringing in those 'who are subject to the legislation of one or more Member States' as well as their dependents and survivors.<sup>11</sup> The scope of Article 48 has also been more recently extended further to be a sufficient legal base for certain agreements covering social security coordination for third country (non EEA) citizens.<sup>12</sup>

<sup>7</sup> Council Regulations 1612/68/EEC on Freedom of Movement for Workers within the Community, 1968 and 492/2011/EU on Freedom of Movement for Workers within the Union, 2011.

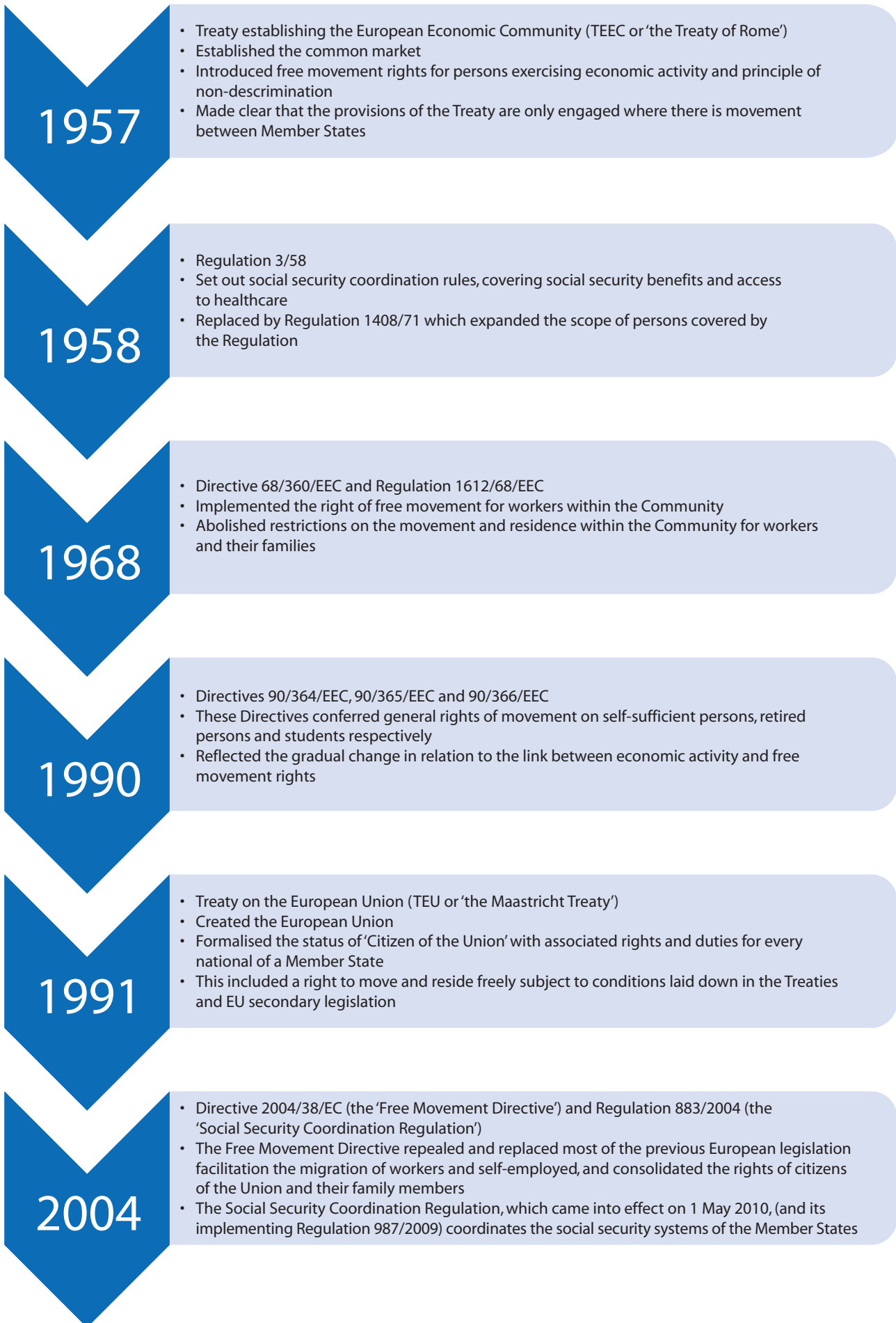
<sup>8</sup> *Metock and Others v Minister for Justice, Equality and Law Reform* Case C-127/08 [2008].

<sup>9</sup> Council Regulation 3/58/EC on social security for migrant workers, 1958.

<sup>10</sup> Council Regulation 1408/71/EEC on the Application of Social Security Schemes to Employed Persons and their Families Moving within the Community, 1971.

<sup>11</sup> Article 3 of Regulation EU 883/2004/EC.

<sup>12</sup> *UK v Council of the European Union* Case C-656/11, [2011]; *UK v Council of the European Union*, Case C-431/11 and *UK v Council of the European Union* Case C-81/13 with a hearing in May 2014, the judgement is expected in autumn/winter 2014.





## The Current Balance of Competence

- 1.16 The free movement of persons is underpinned by a broad set of rights including the principle of protection against discrimination on the grounds of nationality with regards to employment, remuneration and other conditions of work and employment; and associated measures to facilitate free movement such as provisions on social security coordination so that people do not lose entitlement to social security benefits when they move between Member States to work, study, or retire.
- 1.17 Free movement rights can be exercised by citizens of the 28 EU Member States, their dependants and (in certain circumstances) other family members. They have also, in large part, been extended to nationals of the EEA who are not members of the EU (Iceland, Norway and Liechtenstein) and to Switzerland by virtue of two separate agreements. Union citizens also have the right to exercise free movement rights in these States.
- 1.18 The free movement of persons is an area of 'shared competence'. However, this means that where the EU has enacted legislation, the UK does not have competence to act other than in accordance with that legislation. Where EU citizens and family members are clearly exercising Treaty free movement rights, the obligations imposed on the Member States in which they reside are largely set out in the EU's primary law (the Treaties) and in secondary legislation.
- 1.19 Whilst, competence for the *coordination* of social security schemes is 'shared' between the EU and Member States, Member States have exclusive competence for the *design, organisation and funding* of their social security systems. Within the overarching EU framework, they are free to decide who is entitled to be insured under their legislation; which benefits are granted and under what conditions; and how benefits are calculated.

## Treaty Provisions on Free Movement

- 1.20 Today the two main Treaties which set out the competences of the European Union are:
- The Treaty on European Union (TEU); and
  - The Treaty on the Functioning of the European Union (TFEU).
- 1.21 The main Treaty provisions relevant to the competence of the EU in relation to the free movement of persons and associated provisions on social security and welfare provision in cross-border situations are:
- Article 18 TFEU on non-discrimination;
  - Articles 20 and 21 TFEU which deal with Union citizenship and free movement rights;
  - Articles 45-48 TFEU on the free movement of workers and social security co-ordination; and
  - Articles 49-53 TFEU as they relate to the freedom of establishment of self-employed persons.

## Union Citizenship and Free Movement Rights

- 1.22 The provisions of the Treaties are given further detail by secondary legislation. As described above, there are key pieces of secondary EU legislation that are most relevant. One creates rights of citizens of the Union and their family members to move and reside

freely within the territory of the Member States – the Free Movement Directive.<sup>13</sup> This Directive repealed and replaced most of the previous European legislation facilitating the migration of the economically active, and it consolidated the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It also conferred rights on migrant EU citizens and family members who accompany or join them, irrespective of the latter's nationality. The Directive is implemented in the UK via the Immigration (European Economic Area) Regulations 2006 and also applies to Swiss nationals and nationals of those EEA States which are not EU Member States by virtue of separate agreements.<sup>14</sup>

## Free Movement of Workers

- 1.23 A number of other related measures support the exercise of free movement rights. Regulation 492/2011 sets out a range of rights applicable to workers and their family members with regards to employment, equal treatment, and cooperation between national employment services.<sup>15</sup> It prevents discrimination on the basis of nationality between workers in employment, pay and working conditions. It means that, for example, a French worker cannot be denied employment, or paid less than a British worker, on the basis of their nationality.
- 1.24 There is also a Directive on the Mutual Recognition of Professional Qualifications.<sup>16</sup> This is a more specific measure which aims to support the free movement of certain regulated professionals, and harmonise minimum training for some professionals – including architects, chartered engineers, healthcare professionals, lawyers, qualified accountants, teachers and veterinary surgeons.

## Social Security Coordination

- 1.25 As the EU enlarged and Member States' welfare systems evolved and rights were extended to non-working migrants, it became increasingly difficult to apply rules designed for social insurance principles to residence based benefits and social assistance. A modernised set of rules for social security coordination was established in two later Regulations.<sup>17</sup> Together these provide the current basis for the coordination of Member States' social security benefits.<sup>18</sup> However, while Member States retain sole competency over the design and funding of their social security systems, in practice rules designed to support the free movement of workers who are contributing to host Member States' social insurance systems now operate in a way beyond that which was envisaged, and cover how Member States might want to manage access to their systems.
- 1.26 The rules have evolved over time, and a large body of case law has been created on how they are interpreted, but there is a view that the rules fail to sufficiently recognise the diversity in social welfare systems across today's 28 Member States. A number of contributors to the Call for Evidence reflected on this, stating that the UK system fits poorly with the EU distinction between Social Security (generally paid on the basis of a contribution record,

<sup>13</sup> Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004.

<sup>14</sup> The Immigration (European Economic Area) Regulations, 2006.

<sup>15</sup> Council Regulation 492/2011/EU on Freedom of Movement for Workers within the Union, 2011.

<sup>16</sup> Directive 2005/36/EC on the Recognition of Professional Qualifications. Revised by Directive 2013/55/EU.

<sup>17</sup> Council Regulations 883/2004/EC on the Coordination of Social Security Systems, 2004; and 987/2009/EC on Laying Down the Procedure for Implementing Regulation 883/2004/EC on the Coordination of Social Security Systems, 2008.

<sup>18</sup> Council Regulation 1408/71/EEC (which Regulation 883/2004 repealed) is still in force for certain transitional issues.

and addressing specific risks such as unemployment, sickness and old age) and Social Assistance (usually subject to some form of means test, funded from general taxation and used to address poverty or housing costs) with the latter sitting outside the scope of 883/2004.<sup>19 20</sup> The UK system is not unique, and other EEA countries with predominantly residence and means based rather than insurance based systems are Sweden, Finland, Denmark and Norway. Open Europe in their submission illustrated this point by comparing the composition of benefit expenditure (as a proportion of GDP) comprising Individual Contribution, State Contribution, Employers Contribution and Other Receipts.

- 1.27 In the UK, with the exception of time limited, contributory Jobseekers Allowance and Employment Support Allowance, our current suite of key working age benefits are all based on residence rather than a contribution record, and both means tested and tax funded. These benefits (primarily Jobseekers Allowance and Employment and Support Allowance) have elements of both social assistance and social security and address risks covered by the scope of 883/2004. They fall into a specific EU category in Regulation 883/2004, as hybrid benefits known as Special Non-Contributory Benefits (SNCBs). These perform the functions of Social Assistance benefits and address specific Social Security risks namely unemployment and sickness/disability and, are, therefore listed in the Regulation but do not fall within the full scope of coordination rules. The rules in the Regulation that apply to SNCBs are limited and Member States may provide those benefits exclusively in the Member State in which the persons concerned reside. Within the UK system, EEA migrants' access to benefits varies depending on how each particular benefit is categorised under the EU Regulations.

**Contributory Benefits** that is contribution based Jobseekers allowance (JSA) and Employment and Support Allowance (ESA) are payment to those who satisfy the contribution record and other conditions, regardless of nationality. Where contributions have been made in other Member States they can in some cases be aggregated with a UK contribution record to establish eligibility. Contributory benefits can be exported to other EEA countries.

**Universal Benefits** Disability Living Allowance (care component)/Personal Independence Payment, Attendance Allowance, Maternity and Carer's Allowance can be paid to EEA migrants who have been assessed as having a Genuine and Sufficient link to the UK. These benefits can be exported to other EEA countries.

**Family Benefits** Child Benefit and Child Tax Credit are administered by HMRC are paid to parents who are 'ordinarily resident' in the UK and have the 'right to reside' under EU Free Movement rules which generally means they are in-work, jobseekers, self-employed a student or financially self-sufficient. Family benefits can be exported to other Member States.

**Special Non-Contributory Benefits** Income-based JSA and ESA, Income Support and State Pension Credit can be claimed at present by EEA migrants who satisfy the UK's Habitual Residence Test (HRT) and meet new residence requirements introduced from January 1 2014.

- 1.28 The HRT is an important feature of the UK system. The test was first introduced in 1994. In 2004 a right to reside requirement to check legal right of residence in the UK was introduced to the test. The HRT is applied to all migrants, including those from other Member States and UK nationals returning from a period abroad, unless someone has only had a short absence abroad. Other Member States have equivalent measures and the rules allow each Member State to assess the rights of residence and whether someone's centre of interest is in the host Member State.

<sup>19</sup> David Goodhart, Director of Demos, *submission of evidence*.

<sup>20</sup> Open Europe, *submission of evidence*.

- 1.29 The right to reside part of the test checks applicants' immigration status under EU, international and UK law. UK citizens with a right to abode and those from the Common Travel Area (CTA) (UK, Republic of Ireland, Isle of Man and the Channel Islands) will satisfy the right to reside part of the test. Whether an EEA migrant will pass the right to reside part of the HRT when claiming a particular benefit will depend on their status under EU Free Movement rules transposed into UK law in the Immigration Regulations 2006.<sup>21</sup> Qualified persons in these regulations are defined as workers; the self-employed; job seekers; students and those who are self-sufficient and have comprehensive sickness insurance.
- 1.30 Assessing whether someone is 'factually habitually resident' is to determine where the individual's centre of interest is and their degree of attachment and intention to remain in the UK. Length and continuity of residence can be considered, but case law has determined that length of residence alone cannot be used as a determining factor. Assessments are on a case by case assessment of each individual's circumstances. The regulations also allow for specific exemptions. Certain limited categories of migrants who demonstrate a right to reside in the UK are treated as factually habitually resident, this includes people granted refugee status or humanitarian protection and EEA national workers.
- 1.31 The HRT is a vital means of protecting the UK welfare system from claims by economically inactive migrants who do not have a qualifying right to reside and are unable to support themselves. The HRT test has been challenged by the European Commission on the basis that the application of the right to reside part of the test is discriminatory.
- 1.32 The Commission issued their reasoned opinion, i.e. their ground for complaint, on 29 September 2011, claiming that the right to reside part of the HRT for claims to certain residence-based non-contributory benefits constitutes unjustified discrimination prohibited by the EU regulations on social security coordination.
- 1.33 The UK Government responded on 29 November 2011 strongly contesting the Commission's claim. Furthermore the UK Supreme Court found that the Test did not directly discriminate on the grounds of nationality, and that whilst it was indirectly discriminatory, it was justified as a proportionate response to the legitimate aim of protecting the public purse, and that this justification was independent of the claimant's nationality. On 30 May 2013 the Infraction Chefs and College of Commissioners agreed to refer the case to the ECJ. The Government is waiting for the grounds of the application to the Court.
- 1.34 Since the decision to refer the UK to the Court, there has been a judgement by the Court in the case of *Brey*.<sup>22</sup> The ruling in *Brey* appears to support our position in the HRT infraction. In particular this ruling makes it clear that Member States can make access to benefits by EEA nationals who are not economically active conditional upon them meeting the necessary requirements for obtaining a legal right of residence in the host Member State; Member States were entitled to place restrictions on all assistance granted to EU nationals by public authorities based on need – to prevent EU citizens becoming an unreasonable burden on the social assistance system of the Member State; and such restrictions can apply whether or not the benefit falls within the EU Social Security Regulation 883.

<sup>21</sup> The Immigration (European Economic Area) Regulations, 2006.

<sup>22</sup> *Peter Brey v Pensionsversicherungsanstalt* Case C-140/12 [2013].

## Newly Introduced Measures to Protect the UK Social Security System

- 1.35 Since the closure of the Call for Evidence on this review the Government has introduced a set of new measures to further protect the UK social security system from potential exploitation, to ensure that EEA migrants come to the UK to contribute to the economy, not to access benefits.
- 1.36 From mid-December 2013 a strengthened HRT was introduced. The new Test increases the range of questions asked and is hosted on an IT programme that ensures questions are tailored to claimants' circumstances. It ensures that more comprehensive evidence is gathered at the point of claim for decision making.
- 1.37 From 1 January 2014, all EEA migrants, non-EEA migrants, and UK nationals returning from living abroad after more than a short absence from the UK or CTA need to have been living in the UK for three months, as well as meeting the requirements of the HRT before they can claim Income Related Jobseekers Allowance (IR – JSA).
- 1.38 Also from 1 January 2014, EEA nationals who are job seekers and those EEA national workers who have become involuntarily unemployed lost their right to reside after six months if they are unable to provide compelling evidence that they are actively seeking and have a genuine prospect of finding work. This means that if they cannot provide such evidence they will no longer be entitled to JSA. This measure has been introduced for all new EEA claimants to JSA, each of whom will be assessed at the six month point in their JSA claim. The burden of proof is on the claimant.
- 1.39 For EEA jobseekers, JSA has also acted as a gateway to Housing Benefit. Housing Benefit, a minimum income subsistence benefit to meet the cost of rent, is defined as social assistance. This means it sits outside the social security coordination rules, and therefore access can be restricted for EEA jobseekers. Since 1 April 2014, new EEA jobseekers have been unable to access Housing Benefit.
- 1.40 EEA migrants claiming a treaty right to residence as 'workers or as 'self-employed' have access to a wider range of out-of work and in-work benefits because of the equal treatment provisions. The definition of 'worker' is complex and is defined broadly in EU law. Under case law the work that a migrant has carried out to achieve worker status must be 'genuine and effective' and not on such a small a scale as to be 'marginal and ancillary'. From 1 March 2014, new guidance has been in place to allow for a more effective assessment of whether a migrant's employment or previous employment allows them to qualify for worker status. The new two tier assessment consists of Tier 1 – a new Minimum Earnings Threshold – if an EEA national claims worker status and has been or will earn £153 per week or more for three consecutive months they will automatically be treated as having worker status; and Tier 2 – this is applied if someone does not meet the threshold; they have a more detailed individual assessment to check whether work is or has been genuine and effective.

## Interpretation of Secondary Legislation by the ECJ

- 1.41 This is an area of constantly evolving case law in the ECJ, where continuing, or acquiring, entitlement to benefits arises from rights under Article 21 TFEU. Secondary legislation, however, continues to be based on Article 48 TFEU.
- 1.42 Article 21 TFEU nonetheless states that rights are 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. Those limitations and conditions are set out in Directive 2004/38 'on the right of citizens of the Union and their family members to move and reside freely within the territory of the

Member States'.<sup>23</sup> In assessing the rights of inactive EU citizens to have access to income-related benefits, the UK takes the view that the provisions of the Directive place limitations on that access.<sup>24</sup> The European Commission has challenged that view, on the basis that the right to equal treatment under Article 4 of Regulation 883/2004 has primacy over the limitations of Directive 2004/38.<sup>25</sup> The recent ECJ ruling in *Brey* supports the UK position.<sup>26</sup> Member States are entitled to place certain restrictions on the eligibility to assistance granted to EU nationals by public authorities irrespective of whether or not the benefit falls within the EU Social Security Regulation 883.<sup>27</sup> The UK has also intervened in the case of *Dano* which raises similar issues.<sup>28</sup> The Advocate General's Opinion was delivered on 20 May 2014. There is a more recent preliminary reference in the *Alimanovic* case which also raises related issues.<sup>29</sup>

- 1.43 In other areas, there are also debates about the extension of competence on the basis of Article 48 beyond the territories of the European Union. In 2011 the European Commission introduced proposals to amend the agreements with the EEA and Switzerland (which apply the social security principles to Switzerland) and in 2012 with Turkey on the basis of Article 48. The UK took the view that the rights arising for nationals of those countries should not be based on Article 48, but rather on Article 79(2), in accordance with their application to third country nationals. The UK challenged the legal base in all three cases. However, the ECJ ruled in September 2013 that Article 48 is the correct legal basis for the Decision in the EEA case, followed by a similar ruling in the Switzerland free movement agreement case in February 2014.<sup>30 31</sup> The ECJ noted the similarities in the aim and content of those agreements and EU Single Market measures in relation to free movement of persons. In the case of Switzerland the court considered that numerous agreements binding Switzerland and the EU effectively equated Switzerland with the EU Member States. In contrast, the ruling found the use of an Article 79 legal basis, which entails an opt-in decision for the UK and Ireland, could result in undermining the objectives of the EEA Agreement. The Government will continue to argue that such interpretations cannot apply to the EU-Turkey case. A hearing in the Turkish case will go ahead in May and we may receive a judgment in that case in autumn/winter 2014.
- 1.44 The ECJ has ruled that, where Member States have reciprocal bilateral agreements with non-EU third countries, those agreements do not constitute 'legislation' within the definition of Article 3 of Regulation 1408/71 (the predecessor Regulation to 883/04).<sup>32</sup> The Court has also ruled however, that the provisions of such bilateral agreements cannot limit benefits to nationals of the Member State concerned, but must treat all EU citizens equally. Debate continues between Member States and the Commission over the breadth of coverage of these rulings.<sup>33</sup>

<sup>23</sup> Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004.

<sup>24</sup> Article 7 of Directive 2004/38.

<sup>25</sup> Council Regulation 883/2004/EC on the Coordination of Social Security Systems, 2004; and Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004.

<sup>26</sup> *Peter Brey v Pensionsversicherunganstalt* Case C-140/12 [2013].

<sup>27</sup> Council Regulation 883/2004/EC on the Coordination of Social Security Systems, 2004.

<sup>28</sup> *Elisabeta Dano, Florin Dano v Jobcenter Leipzig* Case C-333/13 [2013].

<sup>29</sup> *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* Case C-67/14 [2014].

<sup>30</sup> *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* Case C-431/11 [2013].

<sup>31</sup> *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* Case C-656/11 [2014].

<sup>32</sup> *Grana Novoa v Landesversicherungsanstalt Hessen* Case C-23/92 [1993].

<sup>33</sup> *Gottardo v Istituto nazionale della previdenza sociale* Case C-55/00 [2002].

- 1.45 With regard to wider free movement principles, successive judgments by the ECJ have interpreted the right to free movement set out in the Treaties and the Free Movement Directive broadly, with the consequence of expanding the rights of entry and residence which may be asserted in reliance upon them, and consequently restricting Member States' competence in this area.
- 1.46 The case of *Metock* in 2008 was significant in this regard.<sup>34</sup> The judgment by the ECJ extended the rights applicable to third country national family members of EEA nationals coming to join their EEA family member from outside the EU. The ECJ ruled that the provisions of the Directive were not limited to those who had previously lawfully resided in another Member State.
- 1.47 The ECJ has, in a number of recent rulings, created rights of residence in circumstances in which it considers this is necessary in order to allow someone with an EU free movement right to exercise that right. The first such case was the case of *Chen* in which the court concluded that the primary carer of a self-sufficient Union citizen child should be allowed to reside in a Member State with that child, on the basis that refusing this would have prevented the child from exercising their free movement rights in that country.<sup>35</sup> Similarly in the case of *Ibrahim & Teixeira*, the ECJ ruled that primary carers of the children of Union citizens, who were in education in a Member State where the Union citizen was working, should be entitled to a right to reside as refusing them such a right would force their child to leave their education in that Member State.<sup>36</sup>
- 1.48 The ECJ took this one step further in its ruling in *Zambrano* in 2011 when it concluded that the primary carers of Union citizens living in their Member State of nationality were entitled to a right to reside where a refusal to confer such a right would have forced the Union citizen to leave the Union.<sup>37</sup>
- 1.49 The ruling by the ECJ in *Surinder Singh* extended the scope of the Directive to allow it to be relied upon by the third country national spouse of a Union citizen, when seeking to enter and remain in the home Member State of their Union citizen spouse, where the Union citizen has been exercising a free movement right in another Member State.<sup>38</sup>

## Transitional Provisions

- 1.50 Under the Accession Treaties, Member States can apply transitional provisions which limit access to their labour markets for workers from a new Member State for a limited period – up to a maximum of seven years after that State joins the EU. Specific provisions applied to nationals from two accession States (Bulgaria and Romania) who wished to work in the UK as employees until the end of 2013, and similar transitional controls apply to Croatian nationals.
- 1.51 Until the end of 2013, Romanian and Bulgarian nationals who wanted to work in the UK needed the permission of the Home Office in order to do so, unless they qualified under an exemption. They were able to apply to work in skilled work permit employment; in low-skilled employment under the Seasonal Agricultural Worker Scheme or in food processing under the Sector Based Scheme. Similar restrictions applied to Romanian and Bulgarian workers in Austria, Belgium, France, Germany, Luxembourg, Malta, the Netherlands and Spain.

<sup>34</sup> *Metock and Others v Minister for Justice, Equality and Law Reform* Case C-127/08 [2008].

<sup>35</sup> *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* Case C-200/02 [2004].

<sup>36</sup> *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* Case C-310/08 [2010].

<sup>37</sup> *Zambrano v ONEm* Case C-34/09 [2011].

<sup>38</sup> *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, reference for a preliminary ruling Case C-370/90 [1992].





# Chapter 2: The Impact of the Free Movement of Persons on the National Interest

## The Single Market

- 2.1 The EU's Single Market was at the heart of the original Treaty of Rome, which aimed to create a 'common market' and later an 'internal market' covering the entire territory of the then six members of the EEC. As set out in detail in the Balance of Competences Report on the Single Market, the intention was to create an area without internal frontiers designed to ensure the free movement of goods, services, capital and workers – the so-called 'four freedoms'.<sup>1</sup>
- 2.2 The original objective was therefore the movement of 'economically active' (workers and the self-employed) to support the development of an EU labour market. The idea was that workers would move across the Union to fill skills and employment gaps and improve their own economic opportunities. In line with this purpose, the expectation was that the numbers who actually moved would be fairly small.
- 2.3 Some respondents commented that the Single Market was 'highly inter-related and interdependent'.<sup>2</sup> Therefore that the free movement of persons was very closely linked to the other three freedoms: goods, services and capital. Business and industry groups, including the CBI, British Chambers of Commerce, and City of London Corporation, as well as a number of think-tanks and academics, highlighted the central importance of the principle of free movement of workers to the concept of the Single Market:

[The] free movement of persons within the EU is necessary alongside the free movement of goods, services and capital to facilitate the operative functioning of the internal market, helping to raise the productivity and global competitiveness of UK-based companies.

(CBI)

It is widely accepted throughout the EU, including within the UK [...] that participation in the European Single Market is beneficial to all parties. [...] it would be mistaken to suppose that the impact of free movement rights upon the UK can be considered meaningfully in isolation from an overall assessment of the issue of UK membership of the Single Market.

(The Federal Trust)

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<sup>1</sup> HMG, *The Balance of Competences Between the UK and the EU: Single Market* (2013).

<sup>2</sup> British Influence, *submission of evidence*.

The principle of free movement is essential to the successful operation of a coherent single market. To remove free movement of persons from the four freedoms [...] would undermine the other freedoms

(British Influence)

- 2.4 According to this view the free movement of persons is very closely linked to the other three freedoms. The link with provision of services (both provided and received by mobile EU citizens), with employees who can move across borders so that companies do not need local staff in 28 separate jurisdictions was noted in particular by the Law Society and is also discussed in more detail in the separate Balance of Competences report on Free Movement of Services.<sup>3</sup> As highlighted by the Senior European Experts Group, businesses trading goods across the EU similarly rely on mobile EU nationals to transport those goods freely across national borders. Equally, the free movement of capital, Migrants' Rights Network argued, requires a concomitant free movement of persons, without which regions deprived of capital by its movement to elsewhere in the Union 'would become congested with surplus, unproductive populations with no means to relieve their disadvantage'.<sup>4</sup>
- 2.5 Many of those who submitted evidence considered that the impact of free movement of persons on the UK economy has been broadly positive.<sup>5</sup> But, others, including David Goodhart (Director of Demos) and Open Europe highlighted the need to take wider effects into account. David Goodhart noted that:

Labour markets remain overwhelmingly national and exporting unemployment has to be managed so it is not at the cost of national citizens. And the slender gains from such new developments must be set against the much greater danger that it will alienate too many people from the whole EU project.

(David Goodhart)

Open Europe commented that:

The free movement of workers within the EU has the potential to boost growth and competitiveness in both the UK and Europe.[...] However, free movement throws up a huge number of political challenges, such as a substantial loss of national control over who can enter the country, increased competition in low-skilled sectors of the labour market, downward pressure on wages, and increased demand for public services and infrastructure. If public confidence is not to be lost, free movement needs to be managed with extreme care and tempered with other policies including the right of the UK to protect its welfare system from abuse.

(Open Europe)

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<sup>3</sup> HMG, *The Balance of Competences between the UK and EU: Free Movement of Services*, published in parallel.

<sup>4</sup> Migrants' Rights Network, *submission of evidence*.

<sup>5</sup> For example, please see: Senior European Experts; British Chambers of Commerce; EEF and the City of London Corporation, *submissions of evidence*.

## Expansion of the Scope of Free Movement Rights

- 2.6 The scope of free movement rights has now expanded beyond their original intention, and is no longer limited to economic factors. They were extended in 1990 to students and others, foreshadowing the provisions in the Maastricht Treaty in 1992, which introduced the idea of EU citizenship for all citizens of EU Member States. The principle of citizenship extends a general right to move and reside for up to three months (and beyond three months if 'Treaty rights' are being exercised), as well as a set of broader rights including, for example, the right to vote and stand as a candidate in European Parliament and local elections. The free movement of persons has become a more complex area of the Single Market as it continues to develop through European Union secondary legislation and ECJ judgements, as described in Chapter One.
- 2.7 Some of the academic literature noted three distinct phases of free movement.<sup>6</sup> Prior to the 2004 and 2007 enlargements most movements were small scale and regional, for example, between Member States with close historical links. Following the 2004 enlargement the second phase of EU migration saw very large numbers of, in many cases unanticipated, movements from east to west; and the third phase has seen an initial decline in east-west migration following the economic crisis, with some evidence of a new south-north trend in movement of workers from the crisis hit Member States of the south to the more prosperous north.

## Expansion of the European Union and its Effect on Net Migration

- 2.8 The nature of the Single Market changed significantly with the 2004 enlargement of the EU. This led to ten new Member States joining the European Union – eight from central and Eastern European countries that are known as the EU8 – and, whereas flows had previously been relatively modest, enlargement resulted in a significant increase in the numbers of EU citizens in the UK: from around 1.1m in 2004 to approximately 2.3m by 2012. By comparison, the estimates of the number of UK nationals living elsewhere in the EU range from 1.4m to 2.2m.<sup>7</sup>
- 2.9 Numbers of citizens from the older EU14 States have stayed largely stable, from 951,000 resident in 2004 to just under 1.1m in 2012.<sup>8</sup> However, numbers of EU8 nationals have increased significantly – from just 125,000 in 2004 to over 1m by 2012, as the table on the next page demonstrates. The fact that the UK was one of only three countries (UK, Sweden and Ireland) that gave EU8 nationals full access to their labour market in 2004 clearly played a major part in attracting this influx. The biggest single group of foreign nationals in the UK are now Polish nationals. Around 700,000 residents in the UK have Polish nationality; 14%% of the total number of non-British nationals resident in the UK. This is compared to 69,000, or 2%% of the total, in 2004.<sup>9</sup> During the same ten year period the estimated number of non-EU nationals living in the UK increased from approximately 1.9m to just over 2.5m. There was also an increase in the number of EU2 (Romanian and Bulgarian) nationals from 20,000 to 155,000.

<sup>6</sup> M. Benton and M. Petrovic, 'How Free is Free Movement: Dynamics and Drivers of Mobility Within the European Union', *Migration Policy Institute Europe* (2013).

<sup>7</sup> The term 'EU8' refers to eight of the ten Member States that acceded to the EU in 2004 and whose workers were subject to transitional controls in a number of Member States: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia.

<sup>8</sup> The term EU14 refers to the existing 15 EU Member States prior to 2004, excluding the UK.

<sup>9</sup> ONS, *Annual Population Survey* (2004-2012).

**Table One: Estimate of the Resident Population of the UK (by Non-British Nationality) 2004 to 2012 (Figures in Thousands)**

Year	EU14	EU8	EU2	Non-EU
2004	951	125	20	1,852
2005	945	233	27	2,000
2006	981	404	28	2,191
2007	971	567	33	2,354
2008	975	677	64	2,433
2009	1,006	745	87	2,486
2010	1,038	829	118	2,457
2011	1,091	1,038	135	2,489
2012	1,092	1,074	155	2,509

Source: ONS, *Annual Population Survey (2004-2012)*.

- 2.10 The scale of EU migration since 2004 was a central theme in the evidence we received. David Goodhart argued that prior to the 2004 enlargement, free movement was ‘a largely symbolic right used mainly by multinational companies, spouses, senior professionals and a small but growing group of retirees– with only 0.1%% of EU nationals living in another EU Member State’.<sup>10</sup> He believed that this was the result of the large similarity in living standards across Member States, which changed dramatically with the 2004 enlargement. He described this as ‘the biggest peacetime movement in European history’.<sup>11</sup>
- 2.11 A number of different studies on the drivers of migration note the importance of disparity in income or opportunities as a main motivator.<sup>12</sup> In 2004, average per capita income in the EU8 countries was around a quarter of that in the richest existing Member States. In addition, the UK paid ‘in work’ benefits, in particular tax credits and housing benefit, which made it an attractive destination for migrants working in low paid jobs, including those who were self-employed but working relatively low hours. Income disparity and strong pull factors have meant that free movement has had a significant impact on the UK.<sup>13</sup>
- 2.12 The European Policy Centre agreed that the 2004 enlargement (and subsequent economic crisis in Europe) ‘radically changed the landscape of labour mobility in the EU’.<sup>14</sup> The Freedom Association pointed out the parallels with the EU transforming from a Union of 257m people in 1973 to one of over 500m in 2012, and increases to the UK population over roughly the same period, from around 56m to around 63m – and argued that this was in part a result of EU enlargement.

<sup>10</sup> David Goodhart, Director of Demos, *submission of evidence*.

<sup>11</sup> Idem.

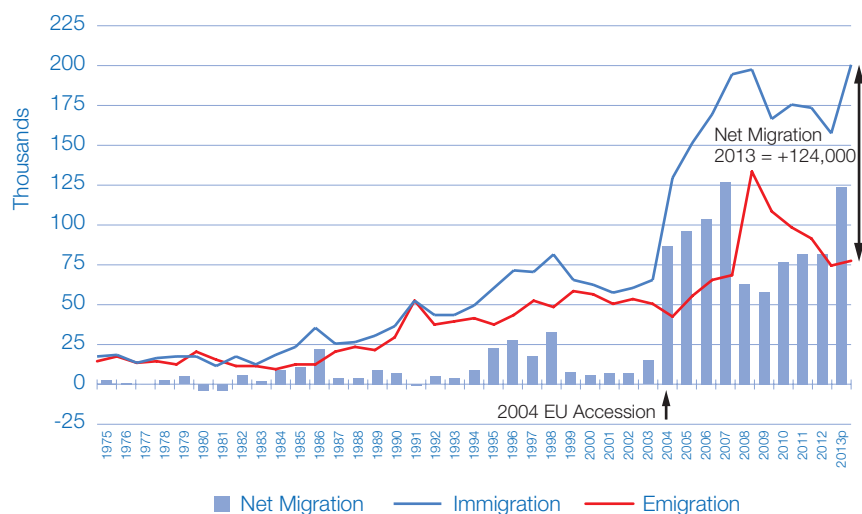
<sup>12</sup> For example, please see: ‘How Free is Free Movement; Dynamics and Drivers of Mobility within the European Union’, *Migration Policy Institute Europe* (2013) and: Migration Watch and David Goodhart, Director of Demos, *submissions of evidence*.

<sup>13</sup> Migration Watch and David Goodhart, Director of Demos, *submissions of evidence*.

<sup>14</sup> European Policy Centre (EPC), *submission of evidence*.

2.13 The first chart below shows how both migration flows from the rest of the EU, and net EU migration, increased sharply from 2004. The second chart compares levels of EU and non-EU migration during the same period.

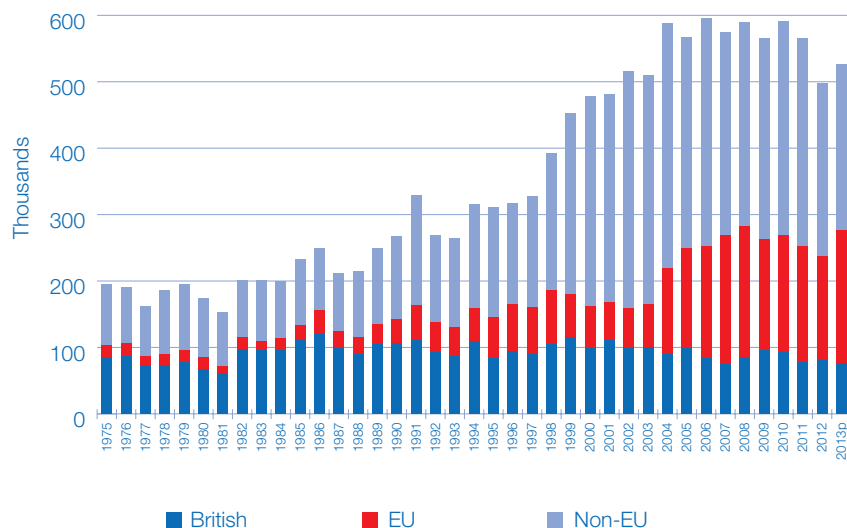
**Chart One: Migration Flows into and out of the UK by EU Citizens**



Source: ONS, *International Passenger Survey (1975 – 1990)*; and *Long Term International Migration (1991 –2013p)* Notes: p Year includes provisional estimates for 2013.

Immigration (and net migration) of EU nationals have historically been low. However, the 2004 accession led to a sharp increase in flows to the UK. Numbers fell back during the recessionary period, but have risen recently mainly due to flows by EU15 nationals.

**Chart Two: Immigration Flows to the UK by Nationality**



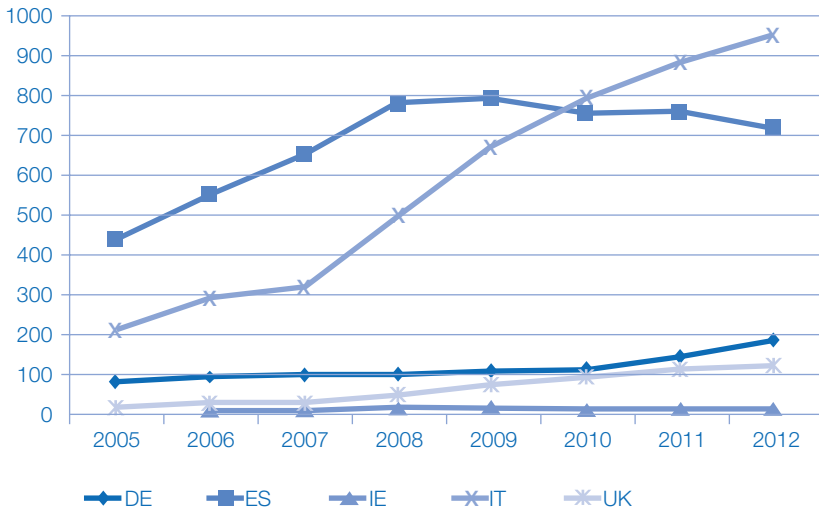
Source: ONS, *International Passenger Survey (1975 – 1990)*; and *Long Term International Migration (1991 –2013p)* Notes: p Year includes provisional estimates for 2013.

Between 1975 and 1990, EU nationals accounted for around 10% of all immigration. This increased after 1990 and then more sharply after the new EU accessions: by 2005, it stood at 27% and in 2013 it reached 38%.

## Intra-EU Mobility

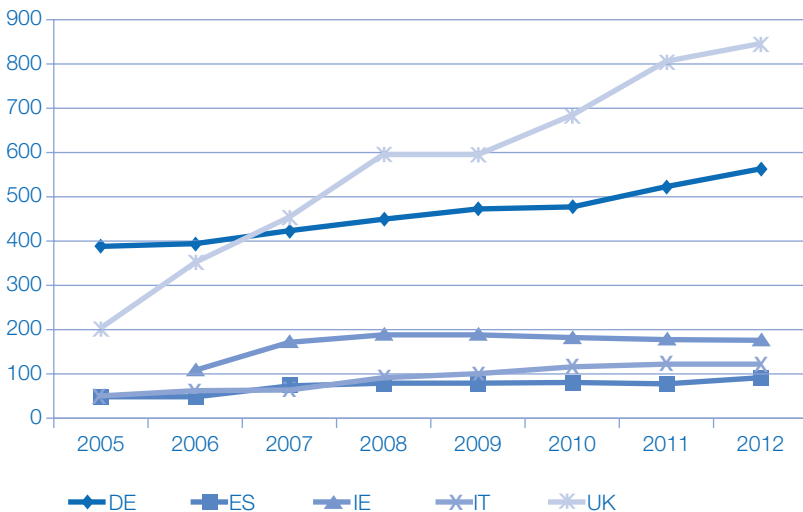
2.14 The UK was not the only EU Member State that received larger inflows following the accession of the EU8 and EU2 countries, but the increase in EU8 nationals was much sharper for the UK than for other Member States, partly due to the UK’s decision not to restrict access to its labour market. The two charts below, taken from the European Policy Centre’s paper: *Making Progress Towards the Completion of the Single European Labour Market*, show these impacts and how the UK’s decision to restrict access to its labour market by EU2 nationals resulted in a much lower inflow from these countries.

**Chart Three: EU2 Population in the Main Receiving Countries, Net Stocks, ‘000**



Source: Eurostat, *Making Progress Towards the Completion of the Single European Labour Market* (2013).

**Chart Four: EU8 Population in Major Receiving Countries, Net Stocks, ‘000**



Source: Eurostat, *Making Progress Towards the Completion of the Single European Labour Market* (2013).

## Extension of Free Movement Rights

2.15 Chapter One describes the evolution of judge-made immigration law in this area. Successive judgments of the ECJ have interpreted the right to free movement broadly, with the consequence that the rights of entry and residence which may be asserted in reliance upon them have expanded. This has had the effect of limiting the ability of Member States to control immigration from within the EU.

2.16 The case of *Metock* in 2008 was significant in this regard.<sup>15</sup> The judgment by the ECJ extended the rights applicable to third country national family members of EEA nationals coming to join their EEA family member from outside the EU. The ECJ ruled that the provisions of the Directive were not limited to those who had previously lawfully resided in another Member State. During the four years since 2008 the number of reports of suspected sham marriages between EEA nationals and non-EEA nationals received by the Home Office increased by more than 500%.<sup>16</sup> The issue of sham marriage is discussed further below.

## Effects on the Labour Market

2.17 Few studies look specifically at the effect of migration from the EEA, and so the results are difficult to isolate from the effects of immigration more generally. There are also a wide range of different factors to be taken into account, and a difference between short-term and longer-term impacts. Noting this, the Government asked the Migration Advisory Committee (MAC) to advise on the economic and social impacts of low skilled migration (including from the EEA) on British workers, and the UK. The MAC report was published in July 2014.<sup>17</sup>

2.18 The evidence that we received in response to the Call for Evidence reflects much of the debate in the literature on the economic impacts of immigration. It also reflects the ongoing public debate in which ‘many Britons feel that the reciprocal arrangement has broken down: free movement is no longer perceived to be an arrangement that works for the mutual benefit of both Britons and other Europeans’.<sup>18</sup>

2.19 We received evidence from both large and small companies, and from think-tanks suggesting that, in some respects, the impact had been positive. For example, the National Farmers’ Union (NFU) noted the benefits for the agricultural and horticultural sectors.

UK agriculture and horticulture has benefitted greatly from the free movement rights of workers from other Member States to participate in the UK labour market [...] The impact of this area of competence on employment [...] has been large and positive. It has alleviated skills shortages and provided a welcome source of energetic and motivated workers eager to undertake work that is not being filled by the resident labour force.

(NFU)

2.20 The British Chambers of Commerce, NFU, COSLA and EEF all argued that workers from other Member States were often recruited for their ‘work ethic’ in addition to particular skills.<sup>19</sup> 32.1% of employers in the British Chambers of Commerce *Skills Survey* quoted this as a reason for employing EU national workers.<sup>20</sup> However, the House of Lords report – *The Economic Impact of Immigration* – is cautious in comparing work ethic to

<sup>15</sup> *Metock and Others v Minister for Justice, Equality and Law Reform* Case C-127/08 [2008].

<sup>16</sup> Evidence submitted by the Home Office to the European Commission, *Free Movement Rights – Initial Information for the European Commission (UK)* (2014) and *Evidence of Fraud and Abuse of Free Movement in the UK* (2014).

<sup>17</sup> Migration Advisory Committee, *Migrants in Low-Skilled Work – The Growth of EU and non-EU Labour in Low-Skilled Jobs and its Impact on the UK* (2014).

<sup>18</sup> John Springford, Centre for European Reform, ‘The Impact of EU Migration on Britain’s Economy’, *The CER Commission on the UK and the Single Market: The Impact of EU Migration on Britain’s Economy* (2013).

<sup>19</sup> British Chambers of Commerce; National Farmers’ Union (NFU); Convention of Scottish Local Authorities (COSLA); and EEF *submissions of evidence*.

<sup>20</sup> British Chambers of Commerce, *submission of evidence*.

the domestic population, noting that this may reflect a range of qualities and attributes including a willingness to accept low wages and poor working conditions.<sup>21</sup>

2.21 It was also recognised that the overall impact was difficult to assess. Some contributors, such as Open Europe, as quoted below, felt that there had been a downward pressure on wages as a result of the volume of low-skilled migration.

2.22 The evidence shows that the effects of free movement are felt differently by different individuals, and particularly at different ends of the income scale. The House of Lords report, *Economic Impacts of Migration in 2008*, suggests that the biggest ‘winners’ from immigration (both EU and non-EU) are the migrants themselves, and the companies that employ them. The biggest ‘losers’ are workers employed in low-paid jobs.

In the short term, immigration creates winners and losers in economic terms. The biggest winners include immigrants and their employers in the UK. Consumers may also benefit from immigration through lower prices. The losers are likely to include those employed in low-paid jobs and directly competing with new immigrant workers. This group includes some ethnic minorities and a significant share of immigrants already working in the UK.

(House of Lords Select Committee on Economic Affairs)<sup>22</sup>

In their evidence, Open Europe agreed with this point of view, arguing that:

The evidence on the overall economic impact of new EU migration is inconclusive. However, the likelihood is that it has had an impact on specific groups, the low-skilled and young, by increasing competition and downward pressure on wages. This is certainly the public perception.

(Open Europe)

2.23 Available research on the impact of migration on wages models the impact of different groups of migrants on the economy. The conclusions as to the impact on wages vary across the different studies: whilst some studies show that immigration has a negative impact on the low skilled sector others have also found a positive impact for median earners.

2.24 Some reports have found evidence of immigration having a negative impact on wages and employment of UK natives in low skilled sectors and at the bottom of the income distribution. For example, Nickell and Saleheen found that a 10% rise in the proportion of immigrants working in semi/unskilled services – that is in care homes, bars, shops, restaurants, cleaning, for example – leads to a 5.2% reduction in pay.<sup>23</sup> Nathan found that a 1 percentage point rise in migration decreased average native employment by approximately 0.7% for low skilled workers.<sup>24</sup> In contrast, other studies, such as Dustmann et al found that working-age migrants increased average wages for the median earner and the top 10% of earners.<sup>25</sup>

2.25 The joint Home Office/Department for Business, Innovation and Skills report, *Impacts of Migration on UK Native Employment Looks at the Displacement Effects of Migration on*

<sup>21</sup> House of Lords Select Committee on Economic Affairs, *1st Report of Session 2007–08* (2008).

<sup>22</sup> *Idem*.

<sup>23</sup> S. Nickell and J. Saleheen, *The Impact of Immigration on Occupational Wages: British Evidence* (2008).

<sup>24</sup> M. Nathan, *The Long Term Impacts of Migration in British Cities: Diversity, Wages, Employment and Prices* (2011).

<sup>25</sup> C. Dustman, T. Frattini and I. Preston, *The Effect of Immigration along the Distribution of Wages* (2008).



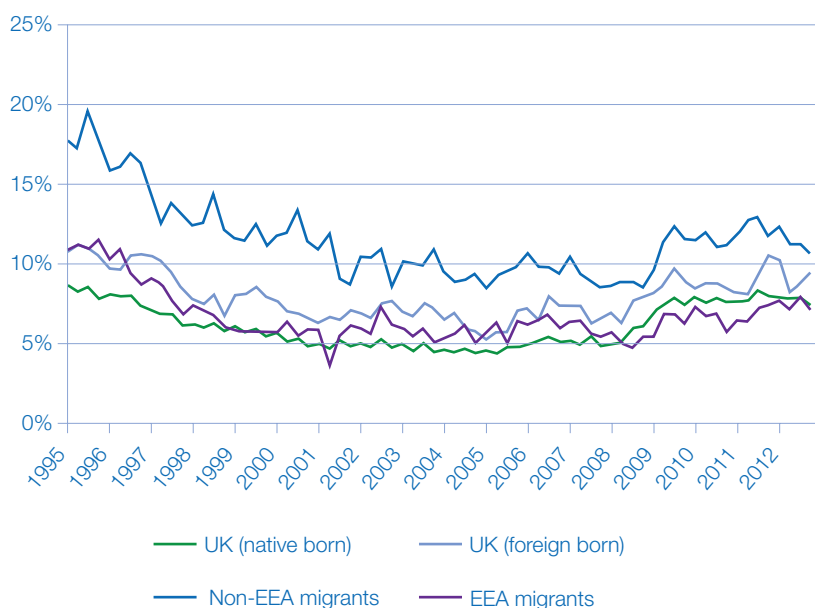
*UK Native Employment.*<sup>26</sup> It does not consider factors such as impact on wages, other economic costs, such as the use of public services, or the impact on the wider economy, such as on housing prices, or the social impact.

2.26 The report finds that there is relatively little evidence that migration has caused statistically significant displacement of UK natives from the labour market in periods when the economy has been strong. However there is evidence for some labour market displacement in years when the economy was in recession. Displacement effects are also more likely to be identified in periods when net migration volumes are high, rather than when volumes are low. In addition, where displacement effects are observed, these tend to be concentrated on lower-skilled workers.

2.27 The report found that there has been little evidence so far in the literature of a statistically significant impact from EU migration on native employment. However, significant EU migration is still a relatively recent phenomenon and this does not imply that displacement impacts do not occur in some circumstances.

2.28 The chart below shows that whilst there was a reduction in the unemployment rates of the UK (native born) population from 1995 to 2005, there were larger decreases amongst the migrant groups. After the enlargement of the EU in 2004, the unemployment rates of the UK (native born) population remained low by historical standards for the first few years. Across all groups a sustained rise in unemployment occurred in response to the 2008/09 recession, although unemployment rates for EEA migrants have since that time remained below that of the UK (native born) population.

**Chart Five: Unemployment rates, People Aged 16 or Over, by Population Group, 1995–2012**



Source: Devlin et al, *Impacts of Migration on UK Native Employment: An Analytical Review of the Evidence* (2014).

2.29 The majority of EU nationals enter the UK in order to work. In 2013, 67% of EU migrants stated that their main reason for migrating to the UK was for work related reasons (compared with 22% for formal study and 8% to join/accompany a family member). Of those who come here to work, around 60% had a definite job and 40% were looking for work.<sup>27</sup>

<sup>26</sup> C. Devlin, O. Bolt, D. Patel, D. Harding and J. Hussain *Impacts of Migration on UK Native Employment* (2014).

<sup>27</sup> Office of National Statistics NS Long-Term International Migration (LTIM) estimates, 2013. These are available at: [www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/may-2014/provisional-13q4.xls](http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/may-2014/provisional-13q4.xls), accessed on 17 May 2014.

**Table Two: Employment of Working-Age UK, EEA (ex UK) and Non-EEA Nationals by Occupation**

Occupational category	UK	EEA (ex. UK)	Non-EEA
Managers, Directors And Senior Officials	10%	6%	8%
Professional Occupations	20%	16%	25%
Associate Professional And Technical Occupations	15%	11%	12%
Administrative And Secretarial Occupations	11%	7%	7%
Skilled Trades Occupations	11%	12%	8%
Caring, Leisure And Other Service Occupations	9%	7%	11%
Sales And Customer Service Occupations	8%	5%	8%
Process, Plant And Machine Operatives	6%	11%	6%
Elementary Occupations	10%	25%	16%
<b>TOTAL</b>	<b>25.6m</b>	<b>1.4m</b>	<b>1.2m</b>

Source: Calculated using data from ONS, *Annual Population Survey* (January 2012 – December 2012).

## Skilled Workers

- 2.30 For employers, a number of contributions cited the ability of businesses located in the UK to recruit from a much wider pool of potential workers, enabling them to address skills gaps and to provide flexibility during periods of growth, as a benefit of free movement. This point was made by contributors across a broad range of sectors including agriculture, engineering and manufacturing, healthcare, legal services and others. For example, participants at the stakeholder roundtable event for businesses, industry and education representatives held on 24 June 2013.
- 2.31 Free movement of workers was also seen as a major benefit of free movement for the higher education and research sectors. The Russell Group highlight the cutting edge research carried out by EU nationals at Russell Group universities. This is demonstrated in the proportion of academic staff at UK universities from other EU Member States – 13.4% overall in 2011-2012, rising to 18.7% in the 24 major research-intensive universities which comprise the Russell Group. Similarly, 11% of the workforce of the UK's seven research councils is from other Member States.<sup>28</sup>
- 2.32 Free movement makes it easier for UK-based companies to operate more effectively within the Single Market. By being easily able to post existing staff to another Member State on a short or longer-term basis, businesses are able to expand into EU markets, without necessarily having to employ staff in different EU Member States. This point was made by EEF and the Law Society.
- 2.33 Highly-skilled migrant workers are seen as a net benefit to the UK economy as they both generate wealth and provide a 'quantitative contribution to wider society'.<sup>29</sup> In addition to employment taxes (at an average of £22,971 a year in 2011 for a highly skilled migrant worker in the City), employees also spent on goods and services, to the benefit of the wider UK economy. This point was also made at the stakeholder roundtable event for businesses, industry and education representatives where the 'economic footprint' left by temporary EU migrant workers which had the effect of creating employment opportunities in the UK, including for example using taxis, hotels and catering services, was highlighted. Furthermore, highly skilled EU migrants are 'less likely to make claims on publicly-funded services, such as the NHS and state education'.<sup>30</sup>

<sup>28</sup> Russell Group, *submission of evidence*.

<sup>29</sup> City of London Corporation, *submission of evidence*.

<sup>30</sup> City of London Corporation, *submission of evidence*.

## Regulated Professions

2.34 Specific rules apply to the movement of certain professionals across the EU and their ability to practice in other Member States. Under the provisions of Directives on the Mutual Recognition of Professional Qualifications (MRPQ), the most recent of which was adopted in November 2013, doctors, dentists, general care nurses, midwives, pharmacists, veterinary surgeons and architects can have qualifications that they have gained in one Member State automatically recognised in another, without the need for further training.<sup>31</sup> Most other professionals can apply to have their qualifications recognised via the ‘general system’, which is based on a comparison of their qualifications with those required in the host Member States. More detail on how mutual recognition works in practice is included in the separate Balance of Competences report on Free Movement of Services.<sup>32</sup>

2.35 The movement of healthcare professionals has attracted the most attention during the review. Both the Royal College of Nursing and the British Medical Association (BMA) argued that while the UK health system has benefitted from overseas trained health professionals, free movement must not risk patient safety. Language ability was also highlighted as a specific concern.

The BMA supports, in principle, the free movement of doctors in the EU, so long as there are appropriate safeguards to ensure patient safety. The UK health system has benefitted from EEA and international doctors practicing in the UK [...] EEA doctors who exercise their right to free movement must be able to demonstrate regularly to the host competent authority that they are fully qualified and fit to practice.

(BMA)

2.36 The Government was aware of this issue during negotiations on the latest Directive. The final text provides for Competent Authorities – the General Medical Council in the case of doctors – to conduct language checks where there is a significant cause for concern before the doctor is placed on the register. The revised Directive also contains an alert mechanism allowing Competent Authorities to warn others when a professional has been restricted from practising.

2.37 The Department of Health, in conjunction with the Department for Business, Innovation and Skills, is now in the process of transposing the healthcare specific amendments to the Directive into UK legislation and, as part of that process, will be working with the healthcare professional regulators to ensure that patient safety is not put at risk in the future.

2.38 The BMA also noted concerns about the potential effect of free movement on access to training for British nationals. The 2012 UK Foundation Programme – completed on graduation from medical school and required to secure registration with the General Medical Council and therefore practice as a doctor – was over-subscribed. If UK medical graduates were unable to secure a place on this mandatory programme this would have ‘a devastating effect on any affected graduates and would waste substantial financial investment in educating and training doctors to work in the NHS’.<sup>33</sup> The causes of oversubscription are complex, but one contributing factor is the unpredictable number of applications from eligible EEA graduates.

<sup>31</sup> Council Directive 2005/36/EC of the European Parliament and the Council on the recognition of professional qualifications, 2005. Revised by Directive 2013/55/EU.

<sup>32</sup> HMG, *The Balance of Competences Between the UK and the EU: Free Movement of Services*.

<sup>33</sup> British Medical Association BMA, *submission of evidence*.

2.39 The Architects' Registration Board (ARB) noted the faster route to the recognition of qualifications provided for by the Directive on the Mutual Recognition of Professional Qualifications. For UK architects EU competence in this area made it easier to work in other Member States. However, both the ARB and the Engineering Council highlight that although the EU competence with regards to the free movement of professionals is broadly beneficial to UK workers, the uneven application of free movement rules in some cases creates a barrier to the exercise of this right. The ARB, for example, note that in some cases, although British architects held the listed qualifications under the Directive and were registered in the UK they were nevertheless required by the competent authority in another Member State to undertake additional examinations in order to practice – in contravention of the provisions of the Directive.

## Low Skilled Migration

2.40 Much of the debate around the impact of free movement on the UK economy focuses on the effects of low skilled migration associated with enlargement since 2004. Public support is consistently lower for migrants who come to seek work rather than to fill existing labour shortages; and who are unskilled compared to those who are professionals. Data from the British Social Attitudes Survey suggests 'particular public sensitivity about the inflow of labourers from the [EU8] countries, the principal source of unskilled labour migration in recent years'.<sup>34</sup> Net support for professionals from the EU8 coming to the UK to either fill existing jobs or look for work in the UK stands at 39% and 33% respectively, but falls to –27% for unskilled workers filling job vacancies and –51% for unskilled workers searching for work. These views are thought to reflect concerns about the economic and cultural impacts of migration.

2.41 As discussed above, the UK has seen an influx of very large numbers of EU8 migrants. A quarter of EU8 migrants have had language difficulties, which made it difficult for them to find or retain a job, compared to 12% from the EU14.<sup>35</sup> Migrants from both the EU8 and EU2 are also concentrated in lower skilled jobs when compared to other groups. Data shows that around 783,000 (68% of EU8 and EU2 nationals working in the UK) worked in low-skilled occupations in 2012, compared to around 744,000 EU15 nationals (35% of working EU15 nationals).<sup>36</sup>

2.42 According to the evidence we received, many were working in jobs at skill levels below their education and experience.<sup>37</sup> Some contributions saw this as a positive result, demonstrating that for many EU8 workers the motivation for moving to the UK was 'clearly economic' [...] 'essentially the possibility of earning a comparatively higher salary, albeit in a lower-skilled position than they would ordinarily have been expected to occupy, led them to take a temporary trade-off in professional investment for economic gain'.<sup>38</sup> Migration Watch argues that East European migration has been 'of great benefit to individual employers by providing very low paid workers who are also very industrious and flexible' but notes the NIESR finding that their contribution to GDP per head in the medium term is likely to be 'negligible'.<sup>39</sup>

<sup>34</sup> A.Park, E.Clery, J.Curtice, M.Philips, and D.Utting, *British Social Attitudes: the 29th Report*, London: NatCen Social Research (2012).

<sup>35</sup> John Springford, Centre for European Reform, *The Impact of EU Migration on Britain's Economy*, The CER Commission on the UK and the Single Market: *The Impact of EU Migration on Britain's Economy* (2013).

<sup>36</sup> ONS, *UK Labour Force Survey* (2012), data taken from Migration Advisory Committee, *Call for Evidence on the Review of Migrant Employment in Low-Skilled Work* (2013).

<sup>37</sup> For example, please see TUC *submission of evidence* and M. Dougan, N. Ferreira, S. Reynolds and S. Currie, University of Liverpool, *submission of evidence*.

<sup>38</sup> M. Dougan, N. Ferreira, S. Reynolds and S. Currie, University of Liverpool, *submission of evidence*.

<sup>39</sup> Migration Watch, *submission of evidence*.

- 2.43 Some of the evidence highlighted the potential deflationary impact of migration on wages, particularly at the low-skilled end of the labour market. Evidence submitted by Open Europe and the report by the House of Lords Select Committee on European Affairs remarked on this issue, whilst acknowledging that this also came with economic upsides.
- 2.44 The House of Lords Select Committee on Economic Affairs concluded that ‘immigration has had a small negative impact on the lowest-paid workers in the UK, and a small positive impact on the earnings of higher paid workers’ whilst Open Europe noted that wage deflation ‘could come with overall benefits to the UK economy by improving competitiveness’.<sup>40</sup>
- 2.45 Others, including Fresh Start and David Goodhart, went further suggesting that the disadvantages at the low end of the market may be underestimated. The Migration Advisory Committee published a report on the impact of low skilled migration in July 2014 which looks specifically at a number of these issues.<sup>41</sup>
- 2.46 David Goodhart, in his evidence, argued that the view that there are some benefits for employers and better-off citizens and some ‘disbenefits’ for workers at the bottom, ‘may underestimate the negative effects at the bottom, and among the self-employed builders and tradesmen’.<sup>42</sup>
- 2.47 Fresh Start call for more research into the effect of EU free movement on the employment prospects of both low-skilled and young British nationals, noting that a large proportion of immigrants from newer Member States are employed in low-skilled sectors. They predict that competition for jobs between domestic and EU workers may intensify as the Government’s welfare reforms, which aim to get the long-term unemployed back into work, take effect.

## Effect on Public Confidence in the Immigration System

- 2.48 The free movement provisions in the EU Treaties create a set of rules concerning the rights of entry and residence of EU nationals, and in many cases their family members (regardless of nationality). These provisions are outside of the UK’s domestic immigration rules, and the Government’s ability to control EU migration is constrained compared to domestic controls.
- 2.49 The Prime Minister and the Home Secretary have stated the aim of reducing migration from the hundreds of thousands to the tens of thousands.<sup>43</sup> Non-EU migration is already down by around a third in the year ending December 2013 compared with September 2010 and is at its lowest level since 1998. EU migration has however increased by over 50% during the same period. The Immigration Act 2014 is the latest step in reforms to stop migrants using public services to which they are not entitled, reduce factors which encourage people to come to the UK and make it easier to remove those who should not be here.
- 2.50 Although the legal framework on free movement sets EU migrants apart from non-EU migrants, EU migration has many similar effects to non-EU migration, and this is reflected in the evidence we received, and in the wider public debate – on the level of immigration to the UK and the consequent impact on public services and local communities.

<sup>40</sup> House of Lords Select Committee on Economic Affairs, *1st Report of Session 2007–08 (2008): The Economic Impact of Immigration* and Open Europe, *submission of evidence*.

<sup>41</sup> Migration Advisory Committee, *Migrants in Low-Skilled Work – The Growth of EU and non-EU Labour in Low-Skilled Jobs and its Impact on the UK* (2014).

<sup>42</sup> David Goodhart, *submission of evidence*.

<sup>43</sup> HC Deb 23 Nov 2010 C169.

- 2.51 These concerns affect public confidence in the Government’s ability to control immigration: ‘few EU citizens consider themselves Europeans first, and they regard the inability of their national governments to retain ultimate control over who lives and works in the country and the inability to privilege national citizens over those from other EU states as rather a bewildering development’.<sup>44</sup>
- 2.52 These effects on public confidence in the immigration system are reflected in the most recent Eurobarometer polling (from July 2013) which highlights the importance of immigration as an issue for the UK population. When asked for the two most important issues facing the country, 32% of UK citizens cited immigration – second only to unemployment (cited by 36%). The UK population are significantly more concerned about immigration than the EU population as a whole; only 10% of EU-wide respondents mentioned immigration as one of the most important issues facing their country.<sup>45</sup> The British Social Attitudes survey found increasing calls for a reduction in overall migration and increasingly negative views about the impacts of migration: 52% of those polled thought immigration had a negative economic impact in 2011 (compared to 43% in 2002) and 48% considered that immigration had a negative cultural impact in 2011 (compared to 33% in 2002).<sup>46</sup>
- 2.53 When it comes to free movement specifically, the YouGov polling from September 2013 highlights a ‘seismic change’ regarding attitudes to the EU migration: in 2005 ‘the right of people in EU countries to live and work wherever they want’ was supported by two-to-one of those polled; in 2013 free movement was opposed by a margin of 49% to 38%.

## The Role of Social Security Coordination Rules in Supporting the Free Movement of Persons

- 2.54 The Call for Evidence asked for views on the extent to which the current EU provisions on social security coordination are necessary to facilitate an effective EU labour market. We received limited evidence addressing this question specifically. The Centre for European Reform stated that ‘the current rules are generous to the migrant but have to be in order to provide the necessary freedom from doubt to voluntarily migrate’.<sup>47</sup> The British Chambers of Commerce focusing also on labour mobility stated that ‘social security coordination at the European level makes it easier for employers to recruit workers from other countries’ and ‘supports British workers considering work opportunities in other Member States’.<sup>48</sup>
- 2.55 This view was supported by the Centre for Cross Border Studies, with a particular focus on supporting migration for employment across the UK-Republic of Ireland border, and the University of Warsaw who specifically reference the importance of pension rights. None of the evidence we received was able to point to specific research or analysis on the importance of access to social security benefits in the decision to migrate, but of those who offered views, maintaining accrued pension rights was seen as the most important element. In their evidence NIESR stated that ‘It seems highly probable that some degree of coordination of social security provisions, particularly in relation to the transferability of pension entitlements, is required to facilitate labour mobility in the EU’.<sup>49</sup>

<sup>44</sup> David Goodhart, Director of Demos, *submission of evidence*.

<sup>45</sup> Only Malta had a similar level of concern. At 29% immigration was seen as the number one issue thought to be facing Malta.

<sup>46</sup> A.Park, E.Clery, J.Curtice, M.Philips, and D.Utting, *British Social Attitudes: the 29th Report*, London: NatCen Social Research (2012).

<sup>47</sup> The Centre for European Reform, *submission of evidence*.

<sup>48</sup> British Chambers of Commerce, *submission of evidence*.

<sup>49</sup> NIESR, *submission of evidence*.

- 2.56 While debate in the UK has focused on migrant access to our welfare system, as a number of contributions highlighted, UK citizens benefit from the coordination rules when moving to live and work in other Member States. While the UK Government administers the payment of benefits under exportability provisions, we do not have data on UK citizens receiving benefits from other Member States. While some figures have been quoted in the media benefit data by nationality of recipient is not collected at EU level.<sup>50</sup> This makes it difficult to satisfactorily assess the role that the rules play in facilitating migration from the UK to other Member States for employment. The same applies with respect to migration to the UK. We do not record the nationality of benefit recipients at present but are working to improve the data available and have published estimates of the number of migrants accessing benefits using national insurance numbers linked to benefit administration data.<sup>51</sup> With the introduction of the Universal Credit, the Government is looking to routinely collect more robust data on the nationality and immigration status of claimants on benefit payment systems.
- 2.57 Of the evidence we received on social security coordination the key issues raised were with respect to the impact of migrants' access to benefits on the UK social security system, and the concern that the relative generosity of a Member State's social welfare system may act as a pull factor for EU migrants. Migration Watch argued that in-work benefits for the low paid in the UK are more generous than in other EU Member States, stating that the UK is the fourth most generous country in the EU15 with regards to benefits to low income workers (after Denmark, Luxembourg and Ireland), and that this may act as a pull factor for migrants to the UK.
- 2.58 A number of submissions to the review stated that there was not sufficient evidence on the number of migrants currently claiming benefits and migrants were less intense users of the social security system than UK nationals.<sup>52</sup> Evidence from some organisations referenced analysis on the net fiscal impact of EU migration on UK economy, weighing up the costs of social security benefits received against contribution to the UK economy through the tax system and concluding that the net impact was positive.<sup>53</sup> The specific impact on the welfare system is however difficult to assess because of limitations in the data on the nationality of benefit recipients.
- 2.59 The European Commission published a research report in October 2013 which explored migrant flows, motivations and the extent to which EU migrants use social welfare systems as compared to nationals of Member State.<sup>54</sup> The report focused on intra-EU migration of non-active EU citizens, defined as those who are retired, studying full-time, disabled (and not employed or self-employed) and jobseekers. The analysis underpinning the report used a range of data sources of varying robustness, and there have been some concerns on how definitions used have led to confusing and inaccurate interpretation of the data.

<sup>50</sup> Tom Whitehead, 'Thousands of Britons Claim Dole in Germany' *Daily Telegraph* (21 October 2013) stated that 10,000 Britons were claiming unemployment benefit in Germany.

<sup>51</sup> Department for Work and Pensions Statistical Bulletin, *National Insurance Number Allocations to Adult Overseas Nationals Entering the UK – Registrations to March 2013* (2013). Available at ([www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271415/nino-statistical-bulletin-aug-13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271415/nino-statistical-bulletin-aug-13.pdf)), accessed on 17 May 2014.

<sup>52</sup> Please see, for example, NIESR; British Chambers of Commerce; TUC; and New Europeans, *submissions of evidence*.

<sup>53</sup> C. Dustmann, T. Frattini and C. Halls, Institute of Fiscal Studies, *Assessing the Fiscal Costs and Benefits of A8 Migration to the UK* (2010); and C. Dustmann and T. Frattini, Centre for Research and Analysis of Migration, *The Fiscal Effects of Immigration to the UK* (2013).

<sup>54</sup> C. Juravle, T. Weber, E. Canetta, E. Fries Tersch, M Kadunc (ICF GHK in association with Milieu Ltd), *A fact Finding Analysis on the Impact on the Member States' Social Security Systems of the Entitlements of Non-Active Intra-EU Migrants to Special Non-Contributory Cash Benefits and Healthcare Granted on the Basis of Residence* (2013).

- 2.60 The report concluded that employment was the main motivation for intra-EU migration and the flow of inactive migrants between EU States was a relatively small proportion of total migrants. It found that the proportion of migrant jobseekers who had never worked in their host country was relatively low. However, of those Member States from which data was available, at 37% the UK had the highest proportion of jobseekers who had not worked here. Using the same survey data sources, it reported that between 2008 and 2011, while the total EU migrant population in the UK increased by 28%, the number of job seeking migrants increased by 73%.
- 2.61 On the role of social welfare systems in driving migration patterns or acting as a pull factor, the study concluded there was no available evidence that access to benefits was a significant factor in migration patterns. This is not surprising, given the complexity of systems and variations in how they operate; most migrants' primary motivation will be to work, but it is unlikely that it would be possible to satisfactorily separate specific pull factors from the range of considerations that determine individual decisions to migrate, and individuals are unlikely to self-report as being motivated primarily by the ability to access benefits.
- 2.62 Other submissions to the Call for Evidence received looked at EU social security coordination from a different perspective, focusing on how the EU rules on social security coordination fit with the UK system in principle and practice, and what that means for our ability to manage access to UK benefits. The UK system is based on an implicit understanding that only those who have made some sort of contribution to our economy or society should benefit from our welfare system. Public attitudes are clear with respect to migrants from other Member States. Polling data illustrates that 64% of people recently polled feel that immigrants 'receive more than their fair share of welfare payments', and 62% that 'immigrants [are] claiming benefits and public services when they have contributed nothing in return'.<sup>55</sup>
- 2.63 David Goodhart addresses this issue in his evidence, stating that it was considered unfair by most people that EU migrants 'usually have to pay into the system for two years before acquiring rights to contributory benefits (in the same manner as UK citizens) but 'they qualify almost at once for non-contributory benefits, and for social housing, so long as they are habitually resident and working or seeking work'.<sup>56</sup> As noted by David Goodhart, this applies to Tax Credits for those in work, as well as key social security benefits.
- 2.64 Open Europe stated that 'in order to maintain any public confidence in EU free movement it is essential that the rules respect differing national welfare systems that have developed through national democratic choices'.
- 2.65 There have been a number of public statements from representatives in other Member States referring to the need to tackle potential abuse and exploitation of free movement rules and stating that free movement cannot equate to migration into social welfare systems.
- 2.66 The Government is concerned about how EU rules on social security coordination are working. The rules were developed at a time when there were a smaller number of Member States and less diversity in how they arranged their social security systems. Greater diversity in systems and new patterns of migration has given rise to concerns

<sup>55</sup> Lord Ashcroft Polls, *Small Island: Public Opinion and the Politics of Immigration* (2013). Available at: [yougov.co.uk/news/2013/09/23/how-hostility-immigration-has-grown/lordashcroftpolls.com/wp-content/uploads/2013/08/LORD-ASHCROFT-Public-opinion-and-the-politics-of-immigration2.pdf](http://yougov.co.uk/news/2013/09/23/how-hostility-immigration-has-grown/lordashcroftpolls.com/wp-content/uploads/2013/08/LORD-ASHCROFT-Public-opinion-and-the-politics-of-immigration2.pdf), accessed on 17 May 2014.

<sup>56</sup> David Goodhart, Director of Demos, *submission of evidence*.



about whether the current rules are fit for purpose. The scope of the rules has been stretched to cover further groups of mobile EU citizens beyond workers and their families, the interaction between the social security rules and the residence rules has become increasingly complex, and fresh legal challenges relating to how the rules are applied in Member States are being raised on an increasingly frequent basis. The potential reform of the rules is covered in Chapter Three.

## The HRT

- 2.67 The UK's HRT for migrants claiming benefits was discussed in Chapter One. It was noted that the European Commission consider the 'right to reside' element of the test discriminatory and have referred the issue to the ECJ as a breach of EU law. In their submission Migration Watch describes the 'right to reside' element of the Habitual Residence Test as a 'thin line giving some protection to the UK welfare state'.<sup>57</sup>
- 2.68 The legal action by the Commission was discussed in submissions we received. Open Europe stated that the dispute 'is largely the result of a clash between the UK's particular welfare model, which includes many non-contributory, means-tested benefits, and the EU regulation, which prevents any discrimination and applies the same logic to every EU Member State, despite the heterogeneity of individual welfare systems'.<sup>58</sup>

## Exportability of Benefits

- 2.69 A key element of EU social security coordination is the rules which allow those who have worked and made contributions in one State to receive, for example, their state pension when retiring to another State. These provisions are of significant benefit to UK citizens, particularly retirees, who are living in other Member States. The Department for Work and Pensions pays pensions to 475,000 people in EEA countries, the countries with the largest number of recipients are the Republic of Ireland (28%), Spain (23%) and France (13%).<sup>59</sup>
- 2.70 The export of pensions to those who have accrued the necessary entitlements is perhaps the clearest example of the necessary role of coordination rules as originally envisaged, and the EU rules superseded bi-lateral agreements already in place for example with the Republic of Ireland. The TUC submission recognised that the export of benefits was considered controversial by some, but considered it an important right, citing the example of a British citizen retiring to the UK after spending their working life in France or Germany. In their evidence NIESR stated that, 'it seems highly probable that some degree of coordination of social security provisions, particularly in relation to the transferability of pension entitlements, is required to facilitate labour mobility in the EU'.<sup>60</sup>
- 2.71 While the limited evidence we received on the exportability of benefits was supportive of the principle with respect to pensions, the export of other universal and family benefits has become increasingly controversial. Case-law from the ECJ, which requires the payment of universal benefits in other Member States, has raised important questions about the degree to which Member States can insist on current residence as an eligibility test for non-contributory benefits, particularly where these benefits are designed to meet extra costs associated with living in the UK. The UK also exports Winter Fuel Payment, but is considering how winter temperatures and thus heating needs in particular Member States can be taken into account in assessing eligibility.

<sup>57</sup> Migration Watch, *submission of evidence*.

<sup>58</sup> Open Europe, *submission of evidence*.

<sup>59</sup> Figures taken from Department for Work and Pensions Administrative Data, April 2014. The figure includes both UK born citizens and the citizens of other Member States who have worked in the UK long enough to acquire entitlement to a UK state pension.

<sup>60</sup> NIESR, *submission of evidence*.

2.72 While supportive of current rules on pension rights, Professor Maciej Duszczczyk of the University of Warsaw said that ‘one could consider restriction of EU competencies as regards the transfers of family benefits’.<sup>61</sup> Open Europe stated that ‘the rules on family benefits should be tightened so that people cannot claim for contributory benefits such as Child Benefit if their child is not living with them in the host country’.<sup>62</sup>

## The Impact on Local Communities Across the UK

### Local Councils

2.73 A small number of the contributions we received to the Call for Evidence came from members of the public, several of whom set out concerns about the effects of free movement on local communities and local public services, and more broadly on access to benefits. This reflects correspondence received by the Home Office from members of the public and MPs on the effects of EU migration. Between March and May 2013 free movement was the biggest single issue on which the Home Office received correspondence from MPs and members of the public.

2.74 NIESR noted, in their 2013 report on the potential effects of Bulgarian and Romanian migration to the UK, that some local authorities were not prepared for the scale of migration from the EU8 countries, which was more widely distributed across the UK than previous migrations and saw many go to areas previously unaccustomed to accommodating large numbers of migrants, including many rural areas.<sup>63</sup> These effects were also felt strongly in areas where existing services were already stretched.

2.75 NIESR noted that significant levels of EU8 migration affected service performance in some English councils, although those with previous experience of migration were able to maintain service standards better than others. The greatest impact has been on demand for translation and interpretation services, increasing pressure on budgets and existing services. However, there is also evidence from local studies that lack of English language skills among migrants reduces the use of some services and increases reliance on friends and family.<sup>64</sup>

### Schools

2.76 Some reports have highlighted an increasing pressure on school places as a result of migration, including by EEA nationals. A Local Government Association analysis published in September 2013 highlighted increasing pressures on primary school places.<sup>65</sup> It argued that two thirds of councils in England could see more children looking to start primary school in their area by September 2016 than they currently have places available for. The driver has been the birth rate rising more quickly than at any time since the 1950s. According to the Office of National Statistics around half of the increase is due to increasing immigration. A quarter of births (25.1%) in 2010 were to mothers born outside the UK.<sup>66</sup> The LGA analysis highlights particularly pressures in certain areas, including Peterborough, Redbridge, Ealing, Bristol, Lewisham, Slough, Manchester, Sutton and Barking and Dagenham.

<sup>61</sup> Professor Maciej Duszczczyk, Institute of Social Policy, Centre of Migration Research, University of Warsaw, *submissions of evidence*.

<sup>62</sup> Open Europe, *submission of evidence*.

<sup>63</sup> H. Rolfe, T. Fic, M. Lalani, M. Roman, M. Prohaska and L. Doudeva, National Institute of Economic and Social Research, *Potential Impacts on the UK of Future Migration from Bulgaria and Romania* (2013).

<sup>64</sup> *Idem*.

<sup>65</sup> Local Government Association, *Councils Warn of Rising Demand for Primary School Places Press Release 3 September 2013* (2013).

<sup>66</sup> ONS, *Statistical Bulletin, Births in England and Wales by Parents' Country of Birth, 2010* (2011).

2.77 NIESR's 2013 report found that overall pupil numbers had increased since 2011. Local authorities are responsible for ensuring there are sufficient school places. Central Government has allocated over £7bn since 2011 to create places to meet demand until 2017, and data shows that local authorities are making good use of the funding.

## Healthcare

2.78 EEA nationals visiting the UK who hold a European Health Insurance Card (EHIC) are entitled to medically necessary treatment where the need arises during their visit on the same terms as UK residents (the UK can then seek reimbursement for this treatment from the relevant EEA country). Open Europe considered that EEA migrants' access to the NHS presented a challenge and the Government has acknowledged the need to do much more to reclaim the cost of medical treatment given in the UK to temporary EEA visitors from their home Member State.<sup>67</sup>

2.79 Whilst the UK is likely to continue to pay out more than it receives under these agreements for demographic reasons – because many more of our citizens visit other EEA countries and many more UK state pensioners reside in other EEA countries than happens in reverse – there is more we can do to reduce our net payments. Following a consultation last year, the Government is making changes to the way we identify and charge visitors and migrants using the NHS, including plans to more effectively claim back reimbursement from the home countries of patients who are visiting from within the EEA. A detailed implementation plan will be published shortly.

## Private Housing

2.80 A number of studies look at the impact of EU migration on access to housing. NIESR's report notes that the majority of migrants live in low-cost private rental accommodation; this was mirrored in a study in the East Midlands focusing on EU8 migrants; and another in Liverpool looking at EU8 and EU2 migrants, which found that 73% of respondents were housed in the private rental sector.<sup>68</sup> There is also evidence of EU8 and EU2 migrants living in 'tied accommodation' linked to their employment, practices most common in the agricultural and hospitality sectors.<sup>69</sup>

2.81 Access to private renting housing is a theme addressed in a number of local studies. NIESR's findings are borne out by evidence we received from Suffolk County Council, which notes that the vast majority of new migrants to Suffolk live in private rented housing.<sup>70</sup>

2.82 A University of Birmingham study found similar results in Birmingham, noting that EU8 migrants generally moved frequently, often staying temporarily with friends or relatives on arrival and moving into private tenancy shortly afterwards, frequently in a House of Multiple Occupancy (HMO). Arrival and settlement patterns were reinforced for subsequent migrants because of the reliance on fellow nationals for accommodation.<sup>71</sup>

<sup>67</sup> Open Europe, *submission of evidence*, citing HC Deb 25 March 2013 C1295.

<sup>68</sup> H. Rolfe, T. Fic, M. Lalani, M. Roman, M. Prohaska and L. Doudeva, *Potential Impacts on the UK of Future Migration from Bulgaria and Romania*, National Institute of Economic and Social Research (2013).

<sup>69</sup> *Idem*.

<sup>70</sup> Suffolk County Council, *submission of evidence*.

<sup>71</sup> J. Phillimore, L. Goodson, D. Hennessy and J. Thornhill, *'The Neighbourhood Needs of New Migrants'*, Centre for Urban and Regional Studies for Birmingham City Council (2008).

2.83 The housing picture was similar in Slough, like the West Midlands one of the most popular destinations for migrants (in 2011 7% of Slough residents were born in one of the EU countries) – resulting in an increase in demand for private rented housing, and rents:

A further reflection of the very high demand for private rented housing across the borough is the ‘Slough Shed’ phenomenon (i.e. landlords accommodating tenants in outhouses and garages in the gardens of properties that they own). These structures are erected generally without planning or building control regulations. So far the council has inspected in excess of 2,500 of such structures and the most appropriate enforcement action has been taken for those which are found to be occupied.

(Slough Borough Council)<sup>72</sup>

2.84 In *The Pinch*,<sup>73</sup> David Willetts suggested that willingness to accept a significantly lower standard of accommodation (‘under-housing’) can give migrants a competitive advantage in locations where housing costs are high:

The larger the proportion of earnings consumed by housing costs, the greater the benefit of under-housing and the greater the price advantage of immigrant labour. It was not despite the high cost of housing that immigrants came to the house price hotspots in Britain to make a living – it was because of them.

(David Willetts)<sup>74</sup>

## Social Housing

2.85 The large majority of social housing lettings continue to be made to UK nationals. In 2012/13, 91% of general needs social lettings and 94% of supported housing lettings were to UK nationals. However lettings to EU nationals new to social housing have risen over time, from 3% in 2007 to 5% in 2012/13. The number of new housing association and local authority lettings to tenants from the EU8 and EU2 countries in 2012/13 was 6,164.

2.86 The Localism Act has given local authorities the power to set their own criteria determining who qualifies for social housing in their district. In December 2013, the Government issued new statutory guidance to ensure that local authorities use their new qualification flexibilities to set a residency test for social housing. This would mean that someone would have to have lived in the district for a minimum of two years before they could go on the local authority’s waiting list.

## Homelessness

2.87 Little evidence was received concerning the impact of EU migration on community cohesion. A national survey by Homeless Link in 2009 found that rough sleeping by EU8 and EU2 nationals was increasing, with these groups comprising 25% of rough sleepers in London in 2009 compared to 18% in 2008. In 2010-2011 fewer than half of rough sleepers in London were thought to be UK citizens, with EU8 and EU2 nationals comprising 28%.<sup>75</sup>

<sup>72</sup> Slough Borough Council, *The Slough Story* (2013).

<sup>73</sup> David Willetts, *The Pinch: How the Baby Boomers Took Their Children’s Future – and Why They Should Give it Back* (2010).

<sup>74</sup> Idem.

<sup>75</sup> Department for Communities and Local Government, *Evidence Review of the Costs of Homelessness, London* (2012).

2.88 Between November 2011 and October 2012, police working in the City of Westminster recorded 698 offences of begging and 922 instances of rough sleeping, the majority of which concerned EU nationals.<sup>76</sup> Of 292 arrests in Westminster in 2012 for begging, 207 (70%) were Romanian nationals.<sup>77</sup>

### Criminality

2.89 The foreign national prisoner population of England and Wales accounts for 13% of the overall prison population and has remained steady over recent years at around 11,000.<sup>78</sup> As of 31 December 2013 there were 4,106 EU nationals in prison, which accounted for 5% of the total prison population. This is equal to the number of EU nationals as a proportion of the total population of England and Wales.

2.90 Free movement within the EU is extensively exploited by organised criminals to bring illicit commodities including drugs, human trafficking victims, illegal immigrants and counterfeit goods to the UK. Spain, Italy, Belgium and the Netherlands are key entry and distribution hubs for drugs and other illicit goods before they reach the UK's shores.<sup>79</sup> Europol highlights that 'the free movement of people and goods across the EU's internal borders reduces the chance of detection'.<sup>80</sup>

2.91 The Government is clear that EU citizens who benefit from the right to free movement must adhere to the responsibilities this brings with it and abide by our laws. Those who engage in serious or persistent criminality are liable to deportation.

2.92 Under Article 27 of the Free Movement Directive, EU nationals or their family members who have committed crimes may be deported or excluded on grounds of public policy. However the Directive and associated case law limit such action to persons who 'represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.<sup>81</sup> Previous criminal convictions alone do not constitute grounds for taking such measures. The bar to removing or excluding EEA national criminals is therefore higher than is the case for foreign national offenders from outside the EU.

2.93 The Home Secretary has a statutory duty to take deportation action against all non-EEA nationals sentenced to 12 months imprisonment or more. All EEA nationals sentenced to a period of imprisonment are considered for deportation or other immigration enforcement action by the Home Office. The deportation consideration process takes account of the Immigration (EEA) Regulations 2006 and any human rights considerations on a case-by-case basis. Deportation will normally be pursued where the person is sentenced to two years' imprisonment or more, or 12 months' imprisonment for a sexual, drugs or violence offence. Where an EEA offender receives a shorter sentence, deportation will be pursued where it can be justified in accordance with the Immigration (EEA) Regulations 2006, taking into account the particular circumstances of the case. These regulations state that deportation action must be proportionate and that an individual must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests

<sup>76</sup> City of Westminster, *Consultation Response: Westminster City Council to the Mayor's Office for Policing and Crime (MOPAC) consultation on the Draft Police and Crime Plan* (2013).

<sup>77</sup> Metropolitan Police *Freedom of Information Release on 1 February 2013*. Available at: [www.met.police.uk/foi/pdfs/disclosure\\_2013/feb\\_2013/2013010001669.pdf](http://www.met.police.uk/foi/pdfs/disclosure_2013/feb_2013/2013010001669.pdf), accessed on 8 July 2014.

<sup>78</sup> Ministry of Justice, *Offender Management Statistics Quarterly Bulletin, October to December 2013, England and Wales* (2013).

<sup>79</sup> HMG, *Serious and Organised Crime Strategy* (2013).

<sup>80</sup> European Police Office, *Serious and Organised Crime Threat Assessment* (2013).

<sup>81</sup> Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004.

of society'.<sup>82</sup> The same test applies to decisions to exclude an EEA national from the UK. So, for example, it is usually more difficult to exclude an EEA national for unacceptable behaviour than a non-EEA national.

- 2.94 Anyone convicted of more minor offences may also be removed from the UK under administrative powers and returned to their country of origin. This applies to anyone not exercising Treaty Rights or abusing Treaty rights to reside in the UK.
- 2.95 As discussed in the Balance of Competences Review report on Asylum and Non-EU Migration, EU free movement law has an impact on the collection and processing of passenger data.<sup>83</sup> Collection of such data in advance of travel is important in countering illegal immigration, crime and terrorism and is a key element of the UK's e-Borders programme. The Home Office already collects Advance Passenger Information (API) on a significant proportion of inbound and outbound journeys which is used to conduct electronic checks. The current estimated proportion of passengers who travelled to and from the UK on routes connected to the system that processes API is just under 80%. This includes a substantial number of European routes. However there have been challenges to the lawfulness of compelling carriers to provide API on passengers exercising free movement rights. Whilst the UK's goal is to maximise API collection within the legal parameters, some carriers remain unwilling or unable to collect API on those exercising free movement rights due to concerns around compatibility with EU legislation.

## Abuse and Fraud

- 2.96 The Government has made clear that the UK does not tolerate abuse and fraud of free movement. Implementation of the Free Movement Directive is as restrictive as possible and we regularly review the Immigration Regulations which transpose this Directive into UK law. The UK also makes robust use of provisions which allow Member States to refuse, terminate and withdraw rights in cases of fraud and abuse. In January 2014 amendments to the Immigration (EEA) Regulations 2006 came into force to ensure that EEA nationals who are removed from the UK under administrative powers because they have no right of residence (for example those who have been begging or sleeping rough) are not able to re-enter during the next 12 months unless they can show that they will genuinely be exercising Treaty rights. This ended the 'revolving door' which allowed those removed to re-enter whenever they wished.
- 2.97 The abuse and fraud of the right to free movement is an issue of growing concern across Member States. This includes abuse by non-EEA nationals seeking to circumvent UK immigration controls by asserting a free movement right to which they are not entitled. This is done, for example, by presenting false documentation to claim EEA nationality, or by entering into a sham marriage with an EEA national to benefit as a 'family member'. The UK and other Member States have repeatedly raised these concerns with the European Commission.
- 2.98 The need to address this issue has now been recognised at a European level: the EU's Roadmap *EU Action on Migratory Pressures: A Strategic Response*, approved by the Council of the European Union in April 2012, cites addressing free movement abuse as a strategic priority for the EU.<sup>84</sup> In April 2013, the UK (together with Germany, Austria and the Netherlands) wrote to the Irish Presidency of the Council calling for EU action to tackle this abuse. The UK will continue to apply pressure so that this is followed through with real action.

<sup>82</sup> The Immigration (European Economic Area) Regulations, 2006.

<sup>83</sup> HMG, *The Balance of Competences Between the UK and the EU: Asylum and Non- EU Migration* (2014).

<sup>84</sup> Council of the European Union, *EU Action on Migratory Pressures: A Strategic Response* (2012).

- 2.99 Every year, over 1,000 non-EU nationals arrive and try to gain entry to the UK by fraudulently using European Union documentation and pretending to be an EU citizen with a right of free movement.<sup>85</sup> In 2011, UK Border Force detected 1,494 non-EU citizens who attempted to gain entry to the UK by falsely presenting themselves as a national of an EU Member State with a right of free movement. Many thousands more fraudulent documents are detected en route to the UK by carriers and by UK staff based at airports around the world.<sup>86</sup>
- 2.100 Sham marriage, often linked to organised crime, is a growing area of concern as the examples below demonstrate. Between 2008 and 2012, following the *Metock* judgement, the number of suspected sham marriages reported to the Home Office by registrars (section 24 reports) increased over fivefold from 344 to 1,891.<sup>87</sup>

## Sham Marriage

A London vicar who carried out nearly 250 sham marriages between non-EU and EU nationals, to enable the non-EU nationals to stay in the UK, was jailed for over four years. The vicar earned over £30,000 from the fees he charged for conducting a marriage of convenience.

A vicar at the Church of St Peter and St Paul in the south of England was jailed for conducting 383 marriages of convenience between EU nationals and African (mainly Nigerian) men to enable the non-EU nationals to stay in the UK. The EU nationals were paid up to £3000 to participate. An immigration solicitor and 'recruiter' were also jailed.

A vicar in the North of England was jailed for carrying out 28 marriages of convenience, some of which involved the same 'bride' taking part in multiple ceremonies to different men.

## Views of Other EU Member States

- 2.101 The principle of free movement of persons is widely supported across the EU and viewed as a core achievement of European integration. In a number of Member States, of the EU, however, there has been public debate on difficulties experienced by some local communities as a result of EU migration since the 2004 enlargement. In Germany especially the debate has been focused on so-called 'poverty migration'. The German Government decided in January 2014 to set up an Inter-Ministerial Committee to examine this issue. It issued an interim report in March 2014 and is due to complete its work by June.
- 2.102 The German Chancellor Angela Merkel referred to this issue in January 2014, when addressing the Bundestag. She said that while Germany should take advantage of the opportunities offered by the free movement of labour: 'we must not close our eyes to its abuse'. She went on to say that 'there is a need for clarity: who is entitled to claim social security in Germany, and under what conditions [...] it ought not to become a de facto immigration into the social security system'.<sup>88</sup>

<sup>85</sup> This is based on internally generated statistics.

<sup>86</sup> Evidence submitted by the Home Office to the European Commission, *Evidence of Fraud and Abuse of Free Movement in the UK* (2014).

<sup>87</sup> *Metock and Others v Minister for Justice, Equality and Law Reform* Case C-127/08 [2008].

<sup>88</sup> German Chancellor Angela Merkel, Address to the Bundestag. Cited in: Jeevan Vasagar, 'Angela Merkel warns on EU Benefit Migration', *Financial Times* (29 January 2014).

2.103 On 8 April 2014, the German Finance Minister Wolfgang Schäuble, speaking in parliament about the national budget, said:

We must safeguard freedom of movement in Europe, but of course it must not lead to a kind of 'benefit tourism' with massive poverty immigration. Levels of prosperity in Europe today are so varied that we have to find solutions at European level which show consideration for this reality with regard to the legislative framework for entitlements under social security systems.

(German Finance Minister, Wolfgang Schäuble)

2.104 Governments of some EU Member States have also expressed concern about labour exploitation. On 13 February 2014 the Governments of Belgium, The Netherlands and Luxembourg agreed a joint declaration on this issue in the context of the expected adoption of a Directive on the enforcement of Directive 96/71/EC on posting of workers in the framework of the provision of services.<sup>89</sup> The declaration recognised that 'the European internal market, with its free movement of persons, goods and services, is of the utmost importance for the growth of our economies, and is essential for the recovery of the economy in Europe and in our countries' but added that 'it is necessary to address negative developments such as underpayment, exploitation and evasion of social security contributions, phenomena which are unacceptable, both from a perspective of protection of employees and self-employed workers, and in view of fair competition between employers,' It also underlined 'the importance of immediate and effective measures in the fight against fraud and abuse'.<sup>90</sup>

## British Nationals in other Member States

2.105 It is difficult to estimate precisely the number of UK nationals resident in other EU Member States. One source is the World Bank's Bilateral Matrix, which indicated that in 2010 there were around 1.4m UK born individuals lived elsewhere in the EU – out of around 4.7m UK nationals living outside the UK in total.<sup>91</sup> Another is a report commissioned by the Foreign and Commonwealth Office and published by the Institute for Public Policy Research (IPPR) called *Global Brit: Making the Most of the British Diaspora* which used earlier data from 2008 and estimated that there were around 2.2m UK citizens living abroad in EU Member States.<sup>92</sup> The IPPR report also included British citizens living in a Member State for part of the year, which may partly explain the higher figures.

2.106 The largest recipients of British residents are Spain and Ireland (each around 400,000). France was estimated to have around 170,000 resident UK citizens and Germany 150,000. The fifth largest EU recipient of UK citizens was the Netherlands with around 45,000. In all cases, the actual numbers present at any one time will be higher when taking into account short-term visitors and residents.

<sup>89</sup> Governments of Luxembourg, The Netherlands and Belgium, *Joint Declaration Social Summit Benelux* (2014).

<sup>90</sup> *Idem*.

<sup>91</sup> World Bank, *Global Migrant Stocks Database* (2010). The majority of UK nationals overseas were in Australia (1.2 m), the US (701,000) and Canada (675,000).

<sup>92</sup> T. Finch with H. Andrew and M. Latorre, Institute for Public Policy Research, *Global Brit: Making the Most of the British Diaspora* (2010).



**Table Three: The World Bank's Bilateral Matrix: Bilateral Estimates of Migrant Stocks in 2010**

EU country of origin or residency (estimates, '000s)	UK born citizens resident overseas	Foreign born citizens resident in UK	Net Balance
Austria	8.9	21.9	13
Belgium	25.5	22.9	-3
Bulgaria	-	35.4	35
Cyprus	32.1	67.7	36
Czech Republic	1.5	25.0	24
Denmark	14.5	18.7	4
Estonia	-	2.7	3
Finland	4.5	15.0	11
France	172.8	128.0	-45
Germany	154.8	299.8	145
Greece	14.1	28.1	14
Hungary	3.7	25.0	21
Ireland	397.5	422.6	25
Italy	34.4	108.2	74
Latvia	0.8	27.1	26
Lithuania	0.2	68.7	69
Luxembourg	3.8	1.6	-2
Malta	5.1	26.0	21
Netherlands	45.8	56.2	10
Poland	2.9	521.4	519
Portugal	14.2	84.3	70
Romania	-	53.1	53
Slovak Republic	1.1	50.0	49
Slovenia	0.3	1.6	1
Spain	411.1	70.8	-340
Sweden	19.7	21.9	2
TOTAL 2010	1,369.3	2,203.7	834

Source: World Bank, *Global Migrant Stocks Database* (2010)

2.107 We received a number of contributions from British businesses and individuals exercising free movement rights in other Member States.<sup>93</sup> A number of these British nationals highlighted the opportunity that free movement afforded to UK workers to increase their skills and gain valuable international experience that will enhance their professional experience and career prospects through periods working in other Member States. Free movement can also be seen as an opportunity for companies to expand into new European markets by using their existing workforce.<sup>94</sup>

<sup>93</sup> IET French Network, Eloquant SA, Bourton Group France and Garden Solution, *submissions of evidence*.

<sup>94</sup> Law Society; the City UK; City of London Corporation; EEF; *submissions of evidence*.

2.108 Overall these responses argued that free movement was advantageous for British migrants, including rules on access to healthcare and benefits. Several contributors suggested that the absence of these rules would result in complicated and burdensome administrative requirements for UK citizens to obtain, for example, a visa or work permit in another Member State, increasing complexity for citizens and UK employers.

Without the treaty right to live and work in another EU country it would be much more difficult (costly, time-consuming and frequently legally impossible) to work and to access benefits and services.

(Senior European Experts)

2.109 A number of contributions from British citizens in France found difficulties accessing British benefits and services, which they argued created a barrier to free movement.<sup>95 96</sup>

2.110 SSAFA note that UK citizens residing in other Member States take pressures off UK public services including healthcare. British pensioners in receipt of a State Pension abroad, posted workers, and temporary visitors to other Member States who hold an EHIC receive healthcare on the same terms as nationals from the host Member State, which can then seek reimbursement for treatment from the competent Member State. In some countries where large numbers of British citizens retire, the average cost of healthcare is lower, resulting in a net gain for the exchequer.

2.111 Access to benefits and healthcare were highlighted as the most difficult significant issues for these groups. A further dimension highlighted was that of British citizens returning to the UK who were required to re-establish residency before being able to access these services in the UK.

2.112 Several respondents suggested that improved information about entitlements to benefits and other services for British citizens in other Member States would help those exercising free movement rights. SSAFA France particularly highlighted access to information for 'economically-inactive' retirees, which they argued would enable British citizens to better ensure that their rights were properly implemented by local administrations who may be unfamiliar with some of the provisions of EU law in this complex area.<sup>97</sup>

2.113 Of the responses that welcomed action by the European Commission and the ECJ, which was seen to benefit British citizens living in other Member States, one group representing British citizens in France cited as positive examples of the effect of EU competence that the EU has intervened to stop the French Government withholding health benefits from 'early retirees' from the UK, and that EU free movement rules required the UK Government to pay Winter Fuel Payment to non-resident British pensioners.<sup>98</sup> In this view, further EU competence would be advantageous for UK nationals, making it easier for them to work and access benefits in another Member State. This was implicitly supported by NIESR, who stated that some British citizens living abroad fall between the gaps of national entitlements.<sup>99</sup>

<sup>95</sup> For example, see SSAFA France and Pensioners Debout! France, *submissions of evidence*.

<sup>96</sup> Access to banking services is covered in HMG, *The Balance of Competences Between the UK and the EU: Single Market Services*. Voting rights is covered in HMG, *The Balance of Competences Between the UK and the EU: Voting, Consular and Statistics*, published in Semester Four.

<sup>97</sup> SSAFA France, *submission of evidence*.

<sup>98</sup> Rodney Sabine, The English Library and Information Centre, La Souterraine, *submission of evidence*.

<sup>99</sup> C. Drew and D. Srisandarajah, *Brits Abroad: Mapping the Scale and Nature of British Emigration* (2006). Cited in: NIESR, *submission of evidence*.

- 2.114 A number of contributions noted the obstacles to the free movement of workers that resulted from the uneven implementation of the rules across the EU, which has been described as the ‘greatest difficulty for UK citizens living elsewhere in the EU’.<sup>100</sup>
- 2.115 Some contributors highlighted specific examples of barriers to British professionals exercising free movement rights.<sup>101</sup> For example, the BMA highlighted a particular problem in some countries, such as Germany, where general practice was considered to be a specialism, meaning that British GPs were prevented from registering as GPs in those countries. This creates an artificial barrier to free movement for doctors wishing to practice in other Member States. The Architects’ Registration Board similarly noted in their submission that some British architects had found that their qualifications were not recognised in other Member States and they were required to take further professional exams, despite this being contrary to the provisions of the Directive. A similar point was also flagged by the Engineering Council, and by SSAFA France.
- 2.116 A particularly egregious and long-running example involving British and other EU citizens is the case of the *lettori*, foreign lecturers in Italian universities who have been subject to discrimination for more than thirty years with regards to pay, continuity of employment and competition for full academic posts. The Minister for Europe, David Lidington, has described the Italian position as ‘unacceptable and illegal’ and the Government has pressed Italy to find a satisfactory and sustainable solution.<sup>102</sup>

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<sup>100</sup> British Influence, *submission of evidence*.

<sup>101</sup> Architects’ Registration Board, Engineering Council and British Medical Association, *submission of evidence*.

<sup>102</sup> HC Deb 9 April 2014 C279W.



# Chapter 3: Future Options and Challenges

## The Context

- 3.1 The scope of the free movement rules, and the numbers of EU nationals exercising free movement rights has expanded very significantly since UK membership in 1973, and in particular in the last ten years. From the original objective of facilitating the free movement of workers across the Single Market, free movement has expanded to cover all EU citizens exercising a Treaty right. These rights have also been extended over time, including by rulings of the ECJ, to specific groups of non-EU citizens.
- 3.2 The 2004 enlargement has had the single biggest impact on the UK. The significant increase in the numbers of migrants from the EU8 countries has been mirrored in growing public concern about the local impacts of large inflows to particular areas, especially those unused to receiving large numbers of migrants.
- 3.3 As discussed in Chapter Two, some of those who provided evidence thought that large disparities in the standards of living or employment opportunities across the EU had the potential to continue to generate large migratory flows and accentuate negative impacts of free movement, such as pressures on public services.<sup>1</sup> Others, however, noted the potential economic benefits from free movement of workers and argued that ‘the challenge will continue to be that Member States impose barriers to free movement of persons which are contrary to both the spirit and the letter of EU law and that procedures for securing remedies or redress are too costly and/or cumbersome’.<sup>2</sup>

## Options

- 3.4 The evidence that we received included suggestions for changes to the way that the free movement rules operate both at a domestic and EU level. While the former include a number of proposals that could and are being implemented in the UK; the latter would generally require the reform of the EU rules in cooperation with other Member States and the EU institutions.

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<sup>1</sup> David Goodhart, and Open Europe, *submission of evidence*.

<sup>2</sup> New Europeans, *submission of evidence*.

- 3.5 Domestically, the Government regularly reviews the Immigration Regulations which transpose the Free Movement Directive into UK law and we will make further amendments to these Regulations, when necessary, in order to prevent abuse. The Government has also consistently raised the problem of fraud and abuse with other EU Member States.

## Changes to the Treaties or to EU legislation

- 3.6 David Goodhart of Demos has already published suggestions for possible reforms to free movement. They suggest that the principle of non-discrimination on the grounds of nationality has gone too far for most EU citizens, with EU law and the successive rulings of the ECJ having ‘gradually dissolved almost all special rights, rules and privileges for national citizens’. David Goodhart noted this in particular with regards to the labour market and access to state welfare and public services. He suggested that special rights and privileges should be reinstated. Furthermore, he suggested that the right of free movement should be scaled back from a right applicable to citizens to instead focus on the free movement of workers, through a system of ‘national citizen preference’ which would favour ‘own citizens’ over EU migrants.<sup>3</sup>
- 3.7 Thus, David Goodhart suggests that Member State labour markets should contain national caveats and discretions to protect the domestic labour market. For example a cap on the inflow of migrants set, for example, at 75,000 in a single year, or less for smaller Member States, would be a key feature. As part of this cap higher-skilled EU migrants should have a job offer before they move to another Member State; and lower-skilled migrants should only have access to jobs on an approved national shortage occupation list. This cap could alternatively be modelled on the ‘safeguard clause’ in the EU-Switzerland Free Movement agreement.<sup>4</sup> These proposals would be a major change in the concept of free movement, making it mirror the structures of national immigration policies, rather than the EU’s system of free movement as currently designed. They would require treaty change, dependent on agreement of the other Member States.
- 3.8 Other evidence contributed to this report also set out proposals for changes to functioning of the principles of free movement which in many cases are very far ranging. Open Europe argued that it is important to ensure that free movement rights are not abused and that the access of EU nationals to welfare should be tightened, in order to ensure ongoing public confidence in the principles of free movement.
- 3.9 In their submissions, Open Europe and Fresh Start suggested that the UK work with other Member States to amend the free movement rules. Like David Goodhart, they suggested reverting to a focus on free movement for workers, arguing that the right to reside in another Member State beyond the initial three month period should be more closely linked to being in work or self-sufficient, they also suggested removing the right to reside for jobseekers unless they have already been in work in the host Member State for a period of time.

<sup>3</sup> David Goodhart, *submission of evidence*.

<sup>4</sup> Decision 2002/309/EC, Euratom of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation on the conclusion of seven Agreements with the Swiss Confederation.

- 3.10 Open Europe suggested that the Treaty principle of non-discrimination should be scaled back. For their part, Open Europe suggested that only EU citizens with a permanent right to reside in a host Member State – who have resided legally and continuously in a host Member State in accordance with the Free Movement Directive for a period of five years – should benefit from equal treatment with ‘own citizens’ concerning access to certain benefits and public services, including social housing.<sup>5</sup>
- 3.11 Migration Watch, amongst others, is clear that the UK could not seek to ‘opt-out’ of the principle of free movement as a whole while remaining subject to the free movement of goods, services and capital in the Single Market: ‘this would not be negotiable. Nor is it necessarily desirable’.<sup>6</sup> However, they do suggest a tougher approach to the implementation of the free movement rules, including restricting the right to reside for jobseekers to a maximum six months, and requiring EU nationals in the UK to register (as required in several other Member States). Finally, they suggest that there should be no access to benefits or tax credits for the first five years before an EU national acquires permanent residence.
- 3.12 However, as noted above, some contributions warn of the potential consequences of undermining the principle of the free movement, and the potential damage to the UK’s wider interest in the smooth and efficient functioning of the Single Market.<sup>7</sup> The Convention of Scottish Local Authorities (COSLA) argued that EU migration had a broadly positive effect in Scotland, although noted that the impact would differ between urban and rural areas. The Government of Wales took a similar view, and cautioned that the impact of any changes be considered very carefully.
- 3.13 Some contributors suggested measures to further promote EU labour mobility.<sup>8</sup> Those proposed by the EPC included:
- Better implementation of existing tools – including the EU employment service EURES; simplification of the recognition of professional qualifications; and further and deeper coordination of national social security systems;
  - Empowering individuals to move more – including by administrative measures to provide career guidance and facilitate registration and other administrative formalities;
  - Strengthening the role of the EU – by setting European standards for minimum wages and working conditions; creating an EU Mobility Fund to help receiving Member States deal with the costs of large inflows; better coordination of healthcare systems and improving information about the benefits of mobility; and
  - Better monitoring of free movement – to improve coherence between the goal of mobility and policies designed to achieve it; and improving knowledge of migration patterns.

<sup>5</sup> Open Europe, *submission of evidence*.

<sup>6</sup> Migration Watch, *submission of evidence*.

<sup>7</sup> British Influence and the Senior European Experts’ Group, *submissions of evidence*.

<sup>8</sup> New Europeans and the European Policy Centre (EPC), *submissions of evidence*.

## Coordination of Unemployment Benefits for Migrant Jobseekers

- 3.14 An area of debate on the future of social security coordination rules has been the extent to which migrant jobseekers should receive unemployment benefits from their home state while looking for employment in another Member State. As discussed in Chapter One, UK jobseekers claiming contributory Jobseekers Allowance (CB – JSA) can receive (export) it to another Member State for up to three months, the mandatory minimum under the EU provisions, while income-based JSA cannot be exported at all. In the European Commission's 2013 Citizenship Report there was a commitment by the Commission to 'look into extending the export of unemployment benefits for longer than the mandatory three months, to make it easier for citizens to look for a job in another EU country'. The report urged Member States to make full use of the current rules in allowing jobseekers to receive their unemployment benefits for up to six months while looking for a job in another Member State. This position was supported in a recently published IPPR report which called for the Government to 'renegotiate the principle of exportability so that origin states are legally responsible for covering any unemployment and non-contributory benefits required by their own citizens for a minimum of six months'.<sup>9</sup>
- 3.15 A recent proposal by Vox EU for a mobility assistance scheme addressed the challenge of social security provision for EU migrants in a different way.<sup>10</sup> Under their proposal the EU would fund means-tested support for migrant jobseekers for a transitional period. The scheme would apply the strict eligibility rules of the country of origin and provide the minimum guaranteed income level of the country of origin, adjusted to guarantee purchasing power parity. They note that the advantage of such a scheme would be that 'it encourages labour mobility but does not distort incentives by directing migrants to countries with generous welfare states. Moreover, it does not create a burden to the welfare state in the countries of destination'.
- 3.16 The European Policy Centre discussed another variant of reform at EU level. Noting that while individuals moving to other Member States as jobseekers can receive unemployment benefit from their home state for three months, some Member States are reluctant to extend this period because they 'do not trust other EU countries' administrative capacity to check that their nationals are effectively looking for a job'.<sup>11</sup> A proposal is to create a European unemployment scheme for mobile workers, with some agreed minimum surveillance principles. In practice, the issue goes beyond one of 'trust' however, it is one of competence, and the ability of each Member State to design and implement their own active labour market policies in line with national requirements and preferences. In the UK receipt of JSA is strongly conditional on meeting job search requirements and participating in mandatory activation activity under the supervision of Jobcentre Plus, the UK's public employment service.

<sup>9</sup> A.Glennie and J. Pennington, Institute for Public Policy Research (IPPR), *Europe, free movement and the UK: Charting a New Course* (2014).

<sup>10</sup> T. Boeri and H. Brücker, 'A European Mobility Assistance Scheme', Vox (2014).

<sup>11</sup> European Policy Centre, *submission of evidence*.



## Modernising Social Security Coordination Rules

- 3.17 As discussed in Chapter Two, there has been considerable public debate on the impact of migration on the UK welfare system, and whether current rules allow Member States sufficient flexibility to protect their system from potential exploitation. Building on the safeguards provided by our HRT, the UK has introduced a series of new measures and is engaging with other Member States on potential reform in this area at EU level. In Germany, the Cabinet interdepartmental committee on migration published an interim report on 27 March 2014 which included proposals to increase protection at domestic level and the issue has been the subject of debate in other Member States alongside concerns about the potential exploitation of migrant workers.<sup>12</sup>
- 3.18 The Call for Evidence received a number of contributions on this issue and the need for reform. Open Europe suggested that to maintain public confidence it is essential that EU rules respect different national welfare systems that have developed through national democratic choices. They suggested that, working with other Member States the UK should work to secure changes that would ensure that the condition in the Free Movement Directive that a person will not become an unreasonable burden on the social assistance system of the host state, could be extended to cover all state welfare. They suggested that when determining whether a person is a 'burden' the host Member State should be allowed to apply general thresholds for the income / resources that person is required to have.<sup>13</sup> On exportability of benefits, Open Europe said that the rules on family benefits should be tightened so that people cannot claim for non-contributory benefits such as Child Benefit if their child is not living with them in the host country.
- 3.19 David Goodhart suggested that non-UK citizens should have to wait for a period of two years, before access to social security benefits, tax credits and social housing. Migration Watch suggested a period of five years before people could access social security benefits or tax credits, aligning the rules with those for non-EU migrants.
- 3.20 Other contributors contested whether significant changes were needed to the EU rules on the basis that there was no evidence of a problem with the current rules.<sup>14</sup>
- 3.21 The Government considers that now is an appropriate time to review the EU level rules with a view to modernisation and ensuring they are fit for purpose in the EU of today. The rules have evolved beyond the original scope as the EU has evolved and the interaction between rules on residence and social security coordination becoming increasingly complex. This complexity has led to an increasing number of challenges through the ECJ, creating uncertainty and, in the majority of cases, weakening the ability of Member States to determine how their systems operate. These problems are magnified by the fact that the EU of today is very different to when the rules were created. There are many more Member States and much greater diversity in how their social security systems operate. Migration patterns have also changed significantly, with much more migration than in the past, including more migration of non-working people including jobseekers. Without reform, legitimate public concern about how EU migrants access social security in other Member States is likely to significantly undermine support for the principle of free movement.

<sup>12</sup> German Government, *Interim Report of the Committee of State Secretaries on legal issues and challenges in the field of social security claims by nationals of the EU Member States* (2014).

<sup>13</sup> Open Europe, *submission of evidence*.

<sup>14</sup> Please see, for example, Brussels and Europe Liberal Democrats and Jonathan Portes, National Institute of Economic and Social Research (NIESR), *submissions of evidence*.

## Changes to Transitional Controls

- 3.22 Following the accession of Croatia (population 4.3m) in 2013, the EU is unlikely to admit any further new members until the early 2020s, depending on progress in negotiations. The populations of the candidate countries of the western Balkans range from 620,000 in Montenegro to 7.2m in Serbia. Turkey, with a population of 75.6m, is by far the largest EU candidate country. However it is too early to predict when it may join the EU. A separate, forthcoming Balance of Competences report will examine the wider issues surrounding EU enlargement.<sup>15</sup>
- 3.23 Some respondents suggested that future EU enlargement should be underpinned by alternative models of transitional controls. These, it was suggested, should be designed to ensure not just a fixed time period before full access to the labour market for accession state workers, but instead should seek greater economic convergence, for example by reference to GDP per capita and/or other indicators, before full free movement of persons rights are granted. This would be a significant departure from the existing model of transitional restrictions.
- 3.24 For example, David Goodhart (of Demos) suggested that automatic labour market access for workers from new Member States should not apply for future accessions until those Member States reach 75% of income per head of the EU average, thus reducing the incentive for large scale migration as a consequence of income disparity, which is currently the main driver of intra-EU migration. Fresh Start have similarly called for greater flexibility in future accession treaties to introduce controls that are based on economic criteria such as GDP, rather than on a fixed time period as under the current rules. They argue that this would allow the UK Government to control mass immigration, rather than simply postpone it.
- 3.25 In an article dated 27 November, the Prime Minister David Cameron, argued that the EU ‘must put in place new arrangements that will slow full access to each other’s labour markets until we can be sure it will not cause vast migrations’.<sup>16</sup> He noted that there could be various ways to achieve this, one of which would be to ‘require a new country to reach a certain income or economic output per head before full free movement was allowed. Individual Member States could be free to impose a cap if their inflow from the EU reached a certain number in a single year’.<sup>17</sup>

## Change to Existing Directives

- 3.26 Other changes proposed related to ongoing EU negotiations, including to the Directive on the Mutual Recognition of Professional Qualifications which recently underwent revision.<sup>18</sup> Several of the contributions we received, particularly at a stakeholder event on 30 July 2013, suggested that revising the Directive was an opportunity to resolve issues around language testing, malpractice and minimum length of training amongst healthcare professionals.<sup>19</sup>

<sup>15</sup> HMG, *The Balance of Competences Between the UK and the EU: Enlargement*, published in Semester Four.

<sup>16</sup> Prime Minister David Cameron, ‘Free movement within Europe Needs to be Less Free’, *Financial Times* (26 November 2013).

<sup>17</sup> *Idem*.

<sup>18</sup> Council Directive 2005/36/EC of the European Parliament and the Council on the recognition of professional qualifications, 2005. revised by Directive 2013/55/EU.

<sup>19</sup> *Record of 30 July 2013 Stakeholder Event*.

3.27 In line with their view on promoting the free movement of workers, the Commission have proposed a new Directive on the enforcement of the rights of EU national workers in other Member States.<sup>20</sup> The Directive does not create any new rights, but seeks to ‘improve and reinforce’ the application of the rights already established in the Treaties (Article 45 TFEU) and in Regulation 492/2011 and thereby ‘facilitate[e] a better and more uniform application of rights conferred by EU law on workers and members of their families exercising their right to free movement’.<sup>21</sup> These rights are already enforceable in the UK before the national courts and the Government considers the likely impacts of the Directive to be minor in practice. Neither of these Directives would significantly affect the balance of competence.

## Changes Within the Current Rules

- 3.28 Other contributors suggested changes within the scope of the existing free movement rules.
- 3.29 David Goodhart suggested that ‘special employment support services’ are offered to own nationals – either managed geographically, for example, with special support for areas with higher unemployment; or by category of person, for example, the long-term or youth unemployed, given specific assistance.<sup>22</sup> Such assistance could comprise training and apprenticeships to improve the skills of workers, or alternatively tax incentives to encourage employers to hire local workers, such as a waiver for National Insurance contributions. Such measures may not be compatible with existing EU rules. Other measures suggested by David Goodhart would include explicitly reserving more jobs than are currently the case for national citizens only, for example in the civil service; or by increasing the numbers of jobs likely to be suitable only for own nationals, for example because native language ability or knowledge of domestic culture were considered essential.

<sup>20</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

<sup>21</sup> European Commission Communication COM (2013) 236 final.

<sup>22</sup> David Goodhart, *submission of evidence*.



# Annex A: Submissions to the Call for Evidence

The following formal responses to the Call for Evidence were received:

1. Architects Registration Board (ARB)
2. Association of Foreign Lecturers in Italy (ALLISI)
3. Bailey, David, Fenland District Council
4. Bearder, Catherine, MEP
5. Bell, Graham, Garden Solutions
6. Blitz, K. Brad, Professor of International Politics and Deputy Dean, School of Law, Middlesex University
7. British Chambers of Commerce
8. British Influence
9. British Medical Association (BMA)
10. Brussels & Europe Liberal Democrats
11. Business for New Europe
12. Cave, Brian, Pensioners Debout! France
13. Centre for European Reform
14. City of London Corporation
15. Confederation of British Industry (CBI)
16. Convention of Scottish Local Authorities (COSLA)
17. Council of British Chambers of Commerce in Europe (COBCOE)
18. Cuthbert, Jeff, Minister for Communities and Tackling Poverty, Welsh Government
19. Donnelly, Brendan and Dr. Blick, Andrew, The Federal Trust
20. Professor Duszczuk, Maciej, Institute of Social Policy, Centre of Migration Research, University of Warsaw
21. EEF, the manufacturers' organisation

22. Engineering Council
23. European Commission
24. European Policy Centre (EPC)
25. Ford, David, Justice Minister, Department of Justice for Northern Ireland
26. Fresh Start Project
27. Garben, Sacha, Academic Fellow at the London School of Economics (LSE)
28. Goodhart, David, Director of Demos
29. Hanslip, Kenneth, NSL Validation Solutions
30. HS1 Limited
31. Institution of Engineering and Technology (French Network)
32. Liberal Democrats Home Affairs, Justice and Equalities Parliamentary Party Committee
33. Migrants' Rights Network
34. Migration Watch UK
35. Ministry of Foreign Affairs of the Republic of Bulgaria
36. National Association of Software and Services Companies (NASSCOM)
37. National Farmers' Union (NFU)
38. New Europeans
39. Northern Ireland Council for Ethnic Minorities
40. Open Europe
41. O'Kane, Annmarie, Centre for Cross Border Studies
42. Petrie, David, Chair, ALLISI, Association of Foreign Lecturers in Italy
43. Portes, Jonathan, Director, National Institute of Economic and Social Research (NIESR)
44. Port of Dover
45. Professional Contractor's Group (PCG) –The Voice of Freelancing
46. Research Councils UK
47. Romanian Business Association
48. Royal College of Nursing UK
49. Russell Group
50. Sabine, Rodney, The English Library and Information Centre, La Souterraine, France
51. Scottish Government
52. Senior European Experts Group

53. Professor Shaw, Jo (School of Law, University of Edinburgh), Ms. Fletcher, Maria (School of Law, University of Glasgow) and Ms. Miller Westoby, Nina (School of Law, University of Glasgow)
54. Smith, Richard, Labour International
55. Sissons, Robin, Operations Inspector, Cambridgeshire Constabulary
56. SSAFA (Soldiers, Sailors, Airmen & Families Association) – France (two submissions of evidence)
57. Suffolk County Council
58. Taylor, Rebecca, MEP
59. Telecommunications Company (Anonymous)
60. The British Hospitality Association
61. TheCityUK
62. The Freedom Association
63. The Law Society of England and Wales
64. Trades Union Congress (TUC)
65. UK Chamber of Shipping
66. UK Higher Education International Unit and Universities UK
67. Professor Dougan, Michael, Dr Ferreira, Nuno, Ms. Reynolds, Stephanie and Dr Currie, Samantha, University of Liverpool
68. Westerberg, Robert, NATS
69. Wyld, Brian, Eloquant SA
70. David Broucher
71. Crispin Brown
72. Sarah Melton
73. Hazel Prowse
74. Alan Reid
75. Dr. Lee Rotherham
76. Martina Weitsch
77. Nigel Varian
78. Anonymous (Member of the public)
79. Anonymous (Member of the public)

Any references to MEPs reflect their status at the time of the Call for Evidence period.

## Annex B: Engagement Events

- A number of engagement events were held during the Call for Evidence period to explore the issues raised in the Call for Evidence. These events included:
  - Roundtable event with business, industry and education sector representatives on 24 June, London
  - Roundtable event with Brussels-based stakeholders on 26 June, Brussels
  - Roundtable event with academics and think-tanks on 3 July, London
  - Roundtable event with the legal sector, migrants' rights groups and voluntary organisations on 8 July, London

In addition, discussions on the Review were held with a number of organisations, including:

- Intercontinental Hotel Group
  - Migration Watch UK
  - Representatives of the Channel Islands Governments
  - Representatives of the Isle of Man Government
- Attendees at the roundtable events included:

### **Business, Industry and Education**

BAE Systems

British Chambers of Commerce

British Medical Association (BMA)

City of London

Confederation of British Industry (CBI)

Council of British Chambers of Commerce in Europe (COBCOE)

Deloitte

English UK

Ernst & Young

EU Representation to the UK



Eurostar

HS1 Limited

National Association of Software and Services Companies (NASSCOM)

Professional Contractors Group (PCG)

Royal Institute of British Architects (RIBA)

TATA

### **Academics and Think-Tanks**

Blinder, Dr. Scott (Migration Observatory, University of Oxford)

Centre for European Reform (CER)

Centre Forum

David Goodhart (Director of Demos)

Dustmann, Prof. Christian (University College London)

Keith, Prof. Michael (Centre on Migration Policy and Society (COMPAS), University of Oxford)

Manning, Dr. Alan (London School of Economics (LSE))

Migration Advisory Committee

Migration Watch UK

Preston, Prof. Ian (University College London)

Salt, Prof. John (University College London)

### **Legal Representatives, Voluntary Organisations and Migrant Rights Groups**

Bail for Immigration Detainees (BID)

British Red Cross

Helen Bamber Foundation

London First

Migrant Help

Migrants' Rights Network

National Council for Voluntary Organisations (NCVO)

### **Brussels Event**

Boyle, Robert (Parliamentary Assistant to Phil Bennion MEP)

Euclid Network

European Policy Centre (EPC)

Groeneveld, Matthijs (Permanent Representation of the Netherlands to the EU)

Isle of Man Government

Jørgensen, Morten (Permanent Representation of Denmark to the EU)

Kirkhope, Timothy, MEP

Mandzhukova, Rossi (General Secretariat of the Council of the European Union, Directorate-General for Employment, Social Affairs and Inclusion)

Migration Policy Institute

Nalewajko, Pawel (General Secretariat of the Council of the European Union, Directorate-General for Justice)

Paulig, Kasper (Permanent Representation of Sweden to the EU)

## Annex C: Other sources used for the Review

The following list is not exhaustive but sets out some of the main sources drawn upon in preparing the analysis.

Dustmann, C; Frattini, T and Halls, C. 'Assessing the Fiscal Costs and Benefits of EU-8 Migration to the UK'. *Fiscal Studies, Volume 31* (2010).

Green, A; Owen, D; Jones, P; Owen, C; Francis, C and Proud, R. *Migrant Workers in the South East Regional Economy* (2008).

House of Commons Home Affairs Committee, *Bulgarian and Romanian Accession to the EU: Twelve Months On* (2008).

House of Lords Select Committee on Economic Affairs, *The Economic Impact of Migration* (2008).

Rolfe, H; Fic, T; Lalani, M; Roman, M; Prohaska, M and Doudeva, L. *Potential Impacts on the UK of Future Migration from Bulgaria and Romania*, (2013).

Rolfe, H and Metcalf, H. *Recent Migration into Scotland: The Evidence Base*, (2009).

Scullion, L; Morris, G and Steele, A. *A study of A8 and A2 Migrants in Nottingham*, (2009).

Scullion, L and Morris, G. *A Study of Migrant Workers in Peterborough*, (2009).

Scullion, L and Morris, G. *Migrant Workers in Liverpool: A study of A8 and A2 Nationals*, (2009).

Zaronaite, D and Tirzite, A. *The Dynamics of Migrant Labour in South Lincolnshire* (2006).

# Annex D: Legal Annex

## Introduction

1. The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EC Treaty had a number of economic objectives including establishing a European common market. Since 1957 there have been a series of Treaties extending the objectives of what is now the European Union beyond the economic sphere. The amending Treaties are:
  - The Single European Act (1 July 1987), which provided for the completion of the single market by 1992;
  - The Treaty on European Union – the Maastricht Treaty (1 November 1993);
  - The Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.
2. Following these changes, there are now two main Treaties which set out the competences of the European Union:
  - The Treaty on European Union (TEU);
  - The Treaty on the Functioning of the European Union (TFEU).
3. The Union must act within the limits of the competence conferred on it by the Member States. Articles 3-6 TFEU set out the categories of exclusive, shared and supporting competencies into which EU policies and actions fall. Article 2(2) TFEU provides that in areas of shared competence the Member States must exercise their competence to the extent that the EU has not exercised its competence.
4. The free movement of persons/the Single Market is an area of shared competence. This means that to the extent that the EU has enacted legislation relating to the free movement of persons, the UK does not have competence to act other than in accordance with that legislation. Where Union citizens and family members are clearly exercising Treaty free movement rights, the obligations imposed on the Member States in which they reside are largely set out in the EU's primary law and secondary legislation.
5. Where their rights and obligations under Union law are more contentious, this remains subject to fast-evolving case law of the European Court of Justice ('ECJ'). Similarly, social security and welfare benefits provision intended to complement the provisions on free movement of workers is an area of shared competence and where the EU has enacted

legislation to that end, the UK does not have competence to act other than in accordance with that legislation.

6. The legal annex to the Call for Evidence document does not cover developments after April 2014 such as major cases referred to the ECJ or legislative proposals presented to the Council by the Commission.

## THE EU LEGISLATIVE PROCESS

7. Some Treaty Articles, including some of those promoting free movement, are of direct effect in themselves. Others provide the legal base on which secondary EU legislation made by the European Parliament and Council can be founded. Secondary legislation may delegate power to the Commission to make further legislation.<sup>1</sup> In the social security field the Treaty has traditionally only given the power for the EU to coordinate the social security systems of the Member State. This is done by means of directly applicable EU Regulations which don't generally require national implementing legislation.

## SECTION 1: DEVELOPMENT OF COMPETENCE

### A. FREE MOVEMENT OF PERSONS

8. Article 2 of the Treaty of Rome set out the objectives of the EEC: to establish a common market and economic and monetary union in order to promote development of economic activities, social cohesion, high levels of employment and social protection and to raise the standard of living in the Member States. Article 3(1)(c) EEC provided that the Community aspired to 'the abolition, as between Member States, of obstacles to freedom of movement for...persons'.
9. The free movement of workers was one of the fundamental foundations of the EC Treaty. At Article 48 EEC (now Article 45 TFEU), provision was made for the free movement of labour, allowing workers who were nationals of the Member States to move freely across borders with their families to seek and take up employment in other Member States. This included a prohibition on discrimination based on nationality between workers as regards employment, remuneration and other conditions of work and employment.
10. However, the Treaty of Rome did not provide a general right of free movement for all EC nationals. Free movement rights were confined to those who exercised economic activity.<sup>2</sup> In order to qualify the individual had to be both a national of a Member State and be engaged in economic activity as a worker, a self-employed person, a company, branch or agency, or as a provider or receiver of services. Those falling within this scope enjoyed and continue to enjoy the right to free movement subject to derogations on the grounds of public policy, public security and public health, as well as a specific exception for employment in the public service.
11. Underpinning the relevant provisions within the Treaty was the general principle of non-discrimination on the ground of nationality: the EEA migrant must enjoy the same treatment as nationals in a comparable situation.<sup>3</sup> This continues to be a cornerstone of the four freedoms (persons, services, goods and capital), as does the general principle that the Treaty provisions are engaged only when there is movement between states and free movement provisions cannot be applied to wholly internal situations in a Member State.

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<sup>1</sup> Articles 288 to 290 TFEU.

<sup>2</sup> Articles 48 to 50 EEC provided for the free movement of workers, Articles 52 to 58 concerned the right to establishment and Articles 59 to 66 provided for the freedom to provide services.

<sup>3</sup> Article 7 EEC.

12. The competence conferred by the original EEC Treaty in relation to the free movement of persons has changed and evolved in subsequent Treaties (the Maastricht Treaty in particular) and secondary legislation and as a result of case law. The relevant legislative and voting procedure has also evolved in relation to the adoption of measures concerning the free movement of persons, moving generally from a requirement for unanimity in relation to the relevant Articles to the ordinary legislative procedure and qualified majority voting in the Lisbon Treaty, facilitating the means by which legislation can be made in this area of competence.
13. In the late 1960s, two key measures implemented the rights of free movement for workers. Directive 68/360 was repealed with effect from April 30 2006 and replaced by provisions contained in Directive 2004/38/EC ('the Free Movement Directive').<sup>4</sup> This gave rights to migrant workers, the self-employed and other migrant citizens including students and those of independent means. Regulation 1612/68<sup>5</sup> has now been replaced by Regulation 492/2011.
14. In 1990 the Community adopted three Directives<sup>6</sup> which conferred a general right of movement and residence on the retired, students and those with independent means, provided that they had sufficient resources and medical insurance. This reflected the gradual change which had been taking place in relation to the link between economic activity and free movement from the idea of migrants as factors of production to the idea of migrants as individuals with rights against the host Member State.
15. The Maastricht Treaty (The Treaty on European Union) explicitly introduced the concept of Union citizenship into the EC Treaty in 1992, together with a number of associated rights. This included the right to move and reside freely in the territory of the Member States subject to limitations and conditions laid down in the Treaties and in EU secondary legislation. It created the European Union and formalised the recognition of the status of 'citizen of the Union', with the associated rights and duties, for every national of a Member State. The case of *Baumbast*<sup>7</sup> effectively confirmed the severance of the absolute link between migration and the need to be economically active.

## B. SOCIAL SECURITY AND ENTITLEMENT TO WELFARE BENEFITS IN CROSS BORDER SITUATIONS

16. From the outset the Treaty of Rome contained a provision on social security: Article 51 EEC, intended to complement the provisions on free movement of workers. The aim of the provision was not to harmonise social security systems, but rather to negate the effect of rules within national social security systems which might act as a barrier or disincentive for workers and their families moving between Member States. Article 51 (now Article 48 TFEU) required the Council to provide for the coordination of social security for migrant workers and their dependants. This coordination consists of two key principles: first the need to put in place measures to provide for aggregation of insurance periods; second the principle that benefits should be paid to people resident in the territories of other Member States (export).

<sup>4</sup> Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the community for workers of member states and their families, 1968 and Directive 2004/38/EC of the European Council and the Parliament on the right of citizens of the Union and their family members to reside freely within the territory of the member states, 2004.

<sup>5</sup> Abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

<sup>6</sup> Council Directives 90/364/EEC on the rights of residence for persons of sufficient means; 90/365/EEC on the rights of residence for employees and self-employed who have ceased their economic activity and 90/336/EEC on the rights of residence for students.

<sup>7</sup> *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [2002].

17. In the Treaty of Rome, provisions adopted with this legal basis required the Council to act unanimously on a proposal from the Commission. The Amsterdam Treaty introduced the co-decision procedure but the requirement for unanimous voting continued. Under the Lisbon Treaty, actions under Article 48 TFEU are subject to the Ordinary Legislative Procedure and qualified majority voting. The competence in this area largely remained unchanged until its amendment by the Lisbon Treaty when it was explicitly extended to provide for co-ordination of social security for employed and self-employed workers and their dependants.
18. An 'emergency brake' procedure was also introduced at Lisbon in Article 48 TFEU, applicable in circumstances where a Member State declares that a draft legislative act affects 'important aspects of its social security system', or 'would affect the financial balance of that system'. In these circumstances, it can request the matter be referred to the European Council. This suspends the legislative procedure. The European Council must then decide within four months whether to refer the proposal back to the Council, to take no action or to request the Commission to submit a new proposal. Where no action is taken, the act is deemed not to have been adopted. In a further potential extension of EU competence, the Lisbon Treaty also made provision for Article 21(3) TFEU to be used to adopt measures concerning social security and social protection for the purpose of enabling citizens of the Union to move and reside freely within the European Union, albeit that any such measure will be subject to a special legislative procedure involving consultation of the European Parliament and unanimous voting in Council. Unlike Article 48 TFEU there is no indication in Article 21(3) that it is limited to coordination of national social security schemes and it could therefore in principle form a basis for harmonisation of social security. To date no legislation has been proposed or adopted using this legal basis in relation to social security.

## SECTION 2: CURRENT STATE OF COMPETENCE

19. For the purposes of this Call for Evidence, the main Treaty Articles relevant to the EU's and the UK's competence in relation to the free movement of persons and associated provision in relation to social security and welfare benefits provision in cross border situations are:
  20. Article 18 (non-discrimination on the grounds of nationality)
    - Articles 20 & 21 TFEU (as they relate to nationality, citizenship and free movement of persons);
    - Articles 45-48 TFEU (free movement of workers); and,
    - Articles 49-53 TFEU (as they relate to the freedom of establishment of self-employed persons).
  21. The ECJ has determined that Article 20 & 21(1) on the right of citizens to move and reside freely within the Union, Article 45 on the free movement of workers and Article 49 TFEU on the freedom of establishment are all directly effective. This means that the relevant Treaty provisions not only provide the framework for the free movement of workers but also provide specific rights that can be relied on by individuals before their national courts and authorities to assert specific rights in the absence of secondary legislation. Further, Article 45 can have both vertical and horizontal effect, meaning that the Article 45 prohibition of

discrimination based on nationality between workers of the Member States in areas such as employment, remuneration and other conditions of work applies not only to acts of a public authority but also to private employers.<sup>8</sup>

22. Provisions on the free movement of persons, social security, the free movement of workers, and self-establishment in respect of self-employed persons apply fully in respect of Gibraltar. They do not apply to the Crown dependencies.
23. A further point to note is that the competence in relation to cross-border ‘social security’ must be understood as including both social security and healthcare. The term ‘social security’ for the purposes of EU law includes both sickness benefits in cash and sickness benefits in kind and applies also to state healthcare provision.
24. Member States remain free to determine the details of their own social security (and healthcare) systems: they decide what the contribution levels should be: what benefits are available; and what the level of benefits provided shall be. In principle, Member States are also free to determine the conditions of entitlement to benefits. However, care has to be exercised to ensure that entitlement conditions do not discriminate, directly or indirectly, against persons exercising their rights of free movement and do not create obstacles to free movement, breaching the principle of free movement of workers<sup>9</sup> (see further below on the free movement of workers, jobseekers and self-employed persons).

#### A. THE RIGHT TO MOVE AND RESIDE FREELY WITHIN THE UNION (ARTICLES 20 & 21 TFEU)

25. The current competence of the EU in this area has been extended by significant developments in the case law.
  - i. Cases involving UK nationals
    26. In certain circumstances, the family members of UK nationals may benefit from free movement rights in the same way they would if the UK national were an EEA national. This principle was established in the case of *Surinder Singh*<sup>10</sup> where it was held that a national of a Member State must not be deterred from exercising free movement rights by facing conditions on return to the national’s own Member State which are more restrictive than EU law. The UK accepts this position in certain limited circumstances, specified in the Immigration (European Economic Area) Regulations 2006.<sup>11</sup>
  - ii. Cases falling outside the Free Movement Directive: derivative rights
27. Article 21 TFEU can also be relied on by certain individuals not already covered by primary and secondary legislation as a directly effective source of free movement rights.

<sup>8</sup> As confirmed in the case of *Angonese v Cassa di Risparmio di Bolzano* Case C-281/98 [2000].

<sup>9</sup> *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* Case C-415/93 [1995].

<sup>10</sup> *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* Case C-370/90 [1992], as interpreted and expanded upon by the ECJ in the case of *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* Case C-291/05 [2007].

<sup>11</sup> S.I. 2006/1003 (as amended), regulation 9(2).



28. This was confirmed in the case of *Chen*,<sup>12</sup> which held that Article 18 (now Article 21) and Directive 90/364 (subsequently repealed and replaced by Directive 2004/38/EC) confer on a 'self-sufficient'<sup>13</sup> child who is a national of a Member State, a right to reside for an indefinite period in that State. Further, a parent who is that child's primary carer has a right of residence under Union law derived from the EEA national child's right to reside and is not required to apply for leave to enter and remain in the UK.
29. Recent judgments have further developed the principle that Member States lack the power to deprive EU citizenship of its essential substance. In the recent case of *Ruiz Zambrano v Office National de L'Emploi*<sup>14</sup> the ECJ confirmed that national measures which deprive a Union citizen of the genuine enjoyment of the substance of his/her rights as a Union citizen are precluded by Article 20 TFEU.<sup>15</sup>
30. The cases of *Ibrahim*<sup>16</sup> and *Teixeira*,<sup>17</sup> which established a further category of derivative rights of residence outside the Free Movement Directive in reliance on Regulation 492/2011 are mentioned later in this annex. The law is developing rapidly in this area and the question of the division of competence between the UK and the EU is likely to be further refined as the case law evolves.
- iii. Non-discrimination on the grounds of nationality
31. Article 18 TFEU prohibits discrimination on grounds of nationality provided that the person subject to the discrimination and the subject matter fall within the scope of the Treaties. This is a fundamental principle of EU law.
32. Union citizenship provides the EU law nexus through which Union citizens can gain the protection of Article 18 TFEU. However, the prohibition on discrimination on the grounds of nationality remains subject to any special provisions contained in the Treaties and secondary EU legislation.
33. The UK's position is that a person can only fall within the scope of Article 21 TFEU and thus gain the protection of Article 18 TFEU if they comply with the limitations and conditions in the Free Movement Directive. The ECJ has been prepared to require Member States to provide all Union citizens with non-discriminatory access to minimum forms of social assistance in reliance on that principle.<sup>18</sup> It has also held that measures which would enhance the exercise of the right to move and reside freely in another Member State fell within the scope of Article 18.<sup>19</sup> Protections against discrimination include protections against indirect discrimination, where a provision is likely to affect Union citizens disproportionately in the exercise of their Treaty rights (e.g. the ability of those

<sup>12</sup> *Zhu and Chen v Secretary of State for the Home Department* Case C-200/02 [2004].

<sup>13</sup> In this case this means a child who is covered by comprehensive sickness insurance and is in the care of a non-EEA national having sufficient resources for that child not to become a burden on the public finances of the host Member State.

<sup>14</sup> *Ruiz Zambrano v Office National de L'Emploi* Case C-34/09 [2011].

<sup>15</sup> This case established the principle if the removal of the primary carer from the host Member State would necessitate the EU citizen child for whom they care leaving the territory of the Union, the third country national primary carer could derive a lawful right to reside in the host Member State under Union law from their relationship to the child.

<sup>16</sup> *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* Case C-310/08 [2010].

<sup>17</sup> *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* Case C-480/08 [2010].

<sup>18</sup> *Michel Trojani v Centre public d'aide sociale de Bruxelles* Case C-456/02 [2004].

<sup>19</sup> *Bickel and Franz* Case C-274/96 [1998]: these Union citizens fall within scope as the recipients of services.

exercising Treaty rights to satisfy a particular condition is intrinsically more difficult). The ECJ has made it clear that it is not necessary to prove that a provision does in fact affect a substantially higher proportion of migrant workers: it is sufficient that a provision is liable to have such an effect.<sup>20</sup>

34. The ECJ has repeatedly emphasised, however, that a finding of discrimination on the grounds of nationality will not necessarily mean that Article 18 has been contravened. To justify such an action, the Member State will have to demonstrate that any condition is ‘based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions’.<sup>21</sup>
- iv. Prohibition on obstacles to free movement
35. Workers are able to rely on Article 45(2) TFEU and Regulation 492/2011 as the basis for comprehensive protections against discrimination which go beyond the protections offered by Article 18. They are explicitly protected from discrimination between workers of the Member States as regards employment, remuneration and other conditions of work and employment by Article 45(2). Where someone has ceased to be employed but retains worker status, that person remains within the scope of the Treaty in terms of the relevant protections against discrimination.
  36. In addition, the ECJ has confirmed that the principle of equal treatment applies to work seekers in matters relating to access to employment (Article 1, Regulation 492/2011). Work seekers also have a right to benefits intended to facilitate access to employment in the labour market of a Member State. This was based on the principle that following the establishment of citizenship of the Union, it was not longer possible to exclude benefits of a financial nature from the scope of Article 45(2).<sup>22</sup>
  37. The scope for action in deciding qualification conditions for benefits is also constrained to the extent that the UK cannot unjustifiably create obstacles to citizens moving from or to, or residing in Member States. The UK is therefore obliged to ensure that our rules concerning entitlement to social security comply with the right to move and reside freely within the territory of the Member States given by Article 21 TFEU. The Court has found, for example, that Article 21 was infringed in the following circumstances: a failure to give child-raising credits for the purposes of an old-age pension where a person was residing in another Member State at the time of child-raising;<sup>23</sup> a residence requirement for entitlement to unemployment allowance;<sup>24</sup> a presence condition for the (now-phased out) UK short-term incapacity benefit in youth.<sup>25</sup> It is clear from this developing area of ECJ case-law that the UK’s competence to determine entitlement conditions for social security benefits can be limited by Article 21 TFEU.

<sup>20</sup> *O’Flynn v Chief Adjudication Officer* Case C-237/94 [1996].

<sup>21</sup> *Bickel and Franz* Case C-274/96 [1998].

<sup>22</sup> *Collins v Secretary of State for Work and Pensions* Case C-138/02 [2004].

<sup>23</sup> *Doris Reichel-Albert v Deutsche Rentenversicherung Nordbayern* Case C-522/10 [2012].

<sup>24</sup> Albeit that the requirement was justified, see *De Cuyper v. Office national de l’emploi* Case C-406/04 [2006].

<sup>25</sup> *Stewart v Secretary of State for Work and Pensions* Case C-503/09 [2011].

## B. FREE MOVEMENT OF WORKERS (ARTICLES 45 – 48 TFEU)

### i. Workers

38. The ECJ has made it clear that the definition of worker is a matter for EU law and not for national law.<sup>26</sup> The UK cannot therefore define who is a worker for the purposes of Article 45 TFEU: it has to apply the concepts that have been set down by the jurisprudence of the Court. To be considered a worker, a person must pursue effective and genuine economic activity under the direction of someone else, although activities on such a small scale as to be regarded as purely marginal and ancillary are excluded.<sup>27</sup> A person working part-time, or earning a very low income, can still be considered as a ‘worker’ for the purposes of EU law.<sup>28</sup> The application of the equal treatment rule in Article 45(2) TFEU means that such persons will be entitled to in-work benefits in the same way as UK nationals.
39. Workers have the right, derived directly from the Treaties, to enter another Member State and to reside and pursue an economic activity there. A migrant worker exercising rights under the Treaties is able to start working before completing any formalities to obtain residence documentation because their right of residence is a fundamental right derived from the Treaties.<sup>29</sup> Further detail is provided in Regulation 492/2011.
40. A worker who loses his job will, for a certain period of time, retain worker status for the purposes of EU law.<sup>30</sup> EU nationals who retain worker status must be treated equally on the basis of Article 45(2) TFEU and the UK rules on access to benefits must also take this category of person into account. Although the EU concept of ‘worker’ is well established there are still uncertainties about who can be included in the category. The recent judgement in the case of Ms Saint Prix determined that Ms Saint Prix who gave up work in the late stages of her pregnancy retained the status of worker. The court found that she did retain status by virtue of Article 45 TFEU which has a wider concept of the meaning of ‘worker’, such that a person in her position does not cease to belong to the employment market, despite being unavailable for work for a few months, provided that she returns to work or finds another job within a reasonable period of time.<sup>31</sup>

### ii. Jobseekers

41. In Case C-292/89 *ex parte Antonissen*, the ECJ held that the scope of Article 45 TFEU included persons who were seeking employment. It held that such jobseekers had a right to remain in the Member State for as long as they could provide evidence they were looking for employment and had a genuine chance of being engaged. This principle is now integrated into the Free Movement Directive.<sup>32</sup>

### iii. Impact of the definitions of worker and jobseeker on access to welfare benefits in the UK for EEA nationals and their family members

42. The UK has made access to certain benefits conditional on migrants having a legal right of residence. Therefore concepts such as who is a worker or the rights of jobseekers under Article 45 TFEU, have direct consequences for those social security rules. The ECJ has

<sup>26</sup> *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* Case C- 75/63 [1964]; *Levin v Staatssecretaris van Justitie* Case C-53/81 [1982].

<sup>27</sup> *Lawrie-Blum v Land Baden-Württemberg* Case C-66/85 [1986].

<sup>28</sup> *Levin Case & Kempf v Staatssecretaris van Justitie* Case C-139/85 [1986].

<sup>29</sup> *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* Case C-208/05 [2007].

<sup>30</sup> Article 7(3), Directive 2004/38.

<sup>31</sup> *Saint Prix v Secretary of State for Work and Pensions* [2012].

<sup>32</sup> Article 14(4)(b).

also held that, where a jobseeker can demonstrate a genuine link with the employment market of the state where he was looking for work, Article 45(2) TFEU requires that he be given equal treatment as regards benefits of a financial nature intended to facilitate access to the host state's labour market.

#### C. ESTABLISHMENT OF SELF-EMPLOYED PERSONS (ARTICLES 49 – 53 TFEU)

43. Article 49 TFEU ensures that Member States afford nationals of other Member States the same treatment in relation to establishment as they do to their own nationals. It applies to all national persons and to companies. This report is only concerned with its impact on the UK's competence in relation to self-employed persons. Article 49 prohibits any discrimination based on nationality which hinders the taking up or pursuit of such activities.

##### i. Self-employed persons

44. A self-employed person must be engaged in economic activity and their activities must be genuine and effective rather than marginal and ancillary, including the provision of services in return for some sort of remuneration.<sup>33</sup> This has been held to include a wide variety of different activities including, for example, residence in a religious community where the services provided to its members may be regarded as indirect remuneration for their work.<sup>34</sup> The activity cannot be purely internal, it must have a cross-border character. Union law will not apply in purely national situations. The concept of establishment requires the pursuit of an economic activity through a fixed establishment in another Member State without foreseeable limit to its duration.<sup>35</sup> Whether or not activities amount to establishment must be determined taking into account duration of the provision of the service, regularity and continuity.

45. The provisions permit all types of self-employed activity to be pursued on the territory of any other Member State. Whilst the rights afforded to the self-employed are largely the same as those for workers the ECJ recently confirmed that certain rights are confined only to workers and do not extend to the self-employed.<sup>36</sup>

##### ii. Measures to facilitate self-employment

46. Article 53 aims to make it easier for persons to take up and pursue self-employed activities. It provides that the European Parliament and the Council will issue directives concerning the mutual recognition of diplomas and other formal qualifications. The aim is to reconcile freedom of establishment with the application of national professional rules justified by the general interest of Member States. Where a directive has not been adopted for a particular profession under this provision, a person subject to European Law still cannot be denied the practical benefit of the freedom of establishment.

#### D. MAJOR PIECES OF EU LEGISLATION

##### i. DIRECTIVE 2004/38: THE FREE MOVEMENT DIRECTIVE

47. The key piece of EU legislation in relation to the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States is Directive 2004/38/EC (the Free Movement Directive). This marked the consolidation of citizens' rights in EU legislation. The Directive is designed to regulate the conditions in which Union citizens and their families exercise their right to move and reside freely within

<sup>33</sup> *Jany v Staatssecretaris van Justitie* Case C-268/99 [2001].

<sup>34</sup> *Steymann v Staatssecretaris van Justitie* Case C-196/87 [1988].

<sup>35</sup> *The Queen v Secretary of State for Transport Ex p Factortame Ltd* Case C-221/89 [1991].

<sup>36</sup> *Secretary of State for Work and Pensions v Lucia Czop* Case C-147/11 [2012].

- the Member States and restrictions on these rights on grounds of public policy, public security or public health.
48. In the case of *Metock*,<sup>37</sup> the ECJ made it clear that the Directive should not be interpreted restrictively and that its objectives must not be interpreted so as to deprive them of their effectiveness. The particular impact of the case in terms of the UK's competence was its clear assertion that a Member State should not be imposing additional requirements on those seeking to rely on free movement rights in addition to those set out in the existing legislation (the Free Movement Directive).
  49. The underpinning principle of the Directive is that the longer an individual resides in the host Member State, the more rights s/he enjoys. The Directive distinguishes between three groups of migrants: those entering the host state for up to three months, those entering for up to five years and those resident beyond five years. It sets out the circumstances in which those rights can be restricted including the relevant thresholds to be satisfied in order to refuse admission, issue an exclusion order, deport someone or refuse to issue them with residence documentation.
  50. EEA nationals, their family members,<sup>38</sup> their dependents (defined as those who need the support of the principal in order to meet their living needs)<sup>39</sup> and extended family members (if they have been issued with an appropriate residence document under the Directive) can all benefit from the Free Movement Directive. As set out above, in certain circumstances the family members of UK nationals may also rely on such rights.<sup>40</sup> There are also circumstances in which family members of EEA nationals may retain a right of residence notwithstanding that the family relationship with the EEA national comes to an end<sup>41</sup> and they may remain in the UK for as long as they retain such a right.
  51. The Directive's significance in terms of access to welfare benefits is due largely to the general guarantee of equal treatment with nationals of the relevant Member State at Article 24. This guarantees equal treatment to EU nationals who are resident in accordance with the Directive and to their family members (who can be non-EU nationals) with a right of residence in the Member State concerned. However, there is an explicit derogation from the principle of equal treatment at Article 24(2). This means that Member States are not obliged to grant social assistance to EU citizens and their family members except for workers, the self-employed or work seekers. While in a Member State before achieving a permanent right of residence, other Member State nationals are not entitled to social assistance of the host State. In addition, Article 14(1) of the Directive states that EU citizens, who become an unreasonable burden on the social assistance system of the host Member State in the first three months of residence, lose their right of residence. The ECJ has also held<sup>42</sup> that benefits of a financial nature intended to facilitate access to the labour market cannot be regarded as 'social assistance' within the meaning at Article 24(2). Thus, where EU work seekers can show a link to the UK labour market, they will be entitled to jobseeker's allowance.

<sup>37</sup> *Metock and Ors v Ireland* Case C-127/08 [2008].

<sup>38</sup> See Article 2 of the Directive.

<sup>39</sup> *Yunying Jia v Migrationsverket* Case C-1/05 [2007].

<sup>40</sup> *The Queen v Immigration Appeal Tribunal et Surinder Singh ex parte. Secretary of State for the Home Department* Case C-370/90 [1992] & *Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind*, Case C-29105 [2007].

<sup>41</sup> See Articles 12, 13 & 14 of the Directive.

<sup>42</sup> *Athanasios Vatsouras, Josif Koupatantze v. Arbeitsgemeinschaft Nürnberg 900* Joined Cases C-22/08 and C-23/08 [2009],

## ii. REGULATION 492/2011

52. Regulation 1612/68 was recently replaced with a new codified Regulation 492/2011 which contains a range of rights for migrant workers and their family members. There is a strong focus on the importance of non-discrimination. Article 5 provides, for example, that the same assistance should be given to nationals of other Member States as is given to host country nationals. The Regulation is strictly confined to workers and work seekers and does not give rights to the self-employed or to EU citizens generally.
53. Article 7(2) guarantees workers ‘the same social and tax advantages as national workers’ from the first day of the worker’s employment in the host state. The ECJ has held that the term ‘social advantage’ covers all advantages, whether or not linked to a contract of employment, that are generally granted to national workers primarily because of their objective status as workers or by virtue of the fact of their residence on the national territory, where their extension to workers who are nationals of other Member States seems likely to facilitate their mobility within the EU.<sup>43</sup> It covers both financial benefits and non-financial ones and the Court has found that the term covers welfare benefits in their broadest sense.<sup>44</sup>
54. Article 7(2) therefore guarantees access to the full range of welfare benefits available to UK nationals to EU migrants working in the UK and in that sense it covers a wider class of benefits than the EU social security regulation. It covers frontier workers, meaning that benefits have to be paid to workers, who work in the UK but live in other Member States<sup>45</sup>. Article 7(2) does not confer rights directly on family members of workers, but it does confer a right to benefits that the worker can obtain for his family.<sup>46</sup> It applies to both direct discrimination and indirect discrimination. This means that the UK has to design the entitlement conditions for its benefits carefully, making sure that unjustifiable residence conditions are not attached.
55. Article 10 states that the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the national of that State if such children are residing in its territory. In terms of significant case law impacting on the UK’s competence in this area, in the cases of *Ibrahim*<sup>47</sup> and *Teixeira*<sup>48</sup> the applicants argued that they had a right to reside under Article 12 of Regulation 1612/68 (Article 10 of the current Regulation). The ECJ said that the children of a national of a Member State who works or has worked in the host State and the parent who is their primary carer could claim a right of residence on the sole basis of Article 12 without that right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State. It confirmed that the derivative right of residence of the parent, acquired as a result of the Union citizen’s right, ends when the child reaches the age of majority unless the child continues to need the presence and care of that parent in order to complete his/her education.

<sup>43</sup> *Martinez Sala v Freistaat Bayern* Case C-85/96 [1998].

<sup>44</sup> Such as a child-raising allowance (*Martinez Sala v Freistaat Bayern* Case C-85/96 [1998]), a funeral payment (*John O’Flynn v Adjudication Officer* Case C-237/94 [1994]), a redundancy payment (*H Meints v Minister van Landbouw* Case C-57/96 [1997]) and a disability subsistence payment.

<sup>45</sup> *H. Meints v Minister van Landbouw* Case C-57/96 [1997].

<sup>46</sup> *Centre public d’aide sociale de Courcelles v Marie-Christine Lebon* Case C-316/85 [1987].

<sup>47</sup> *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* Case C-310/08 [2010].

<sup>48</sup> *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department* Case C-480/08 [2010].

iii. DIRECTIVE 2005/36: MUTUAL RECOGNITION OF QUALIFICATIONS

56. Directive 2005/36<sup>49</sup> on the recognition of qualifications was adopted in part on an Article 53 legal basis. It provides for a system for mutual recognition of qualifications which applies to both the employed and the self-employed so as to allow the holder of those qualifications access to that profession. It provides for a scheme for temporary mobility and also applies to professionals wishing to establish themselves in another Member State on a more permanent basis. It also includes provisions on knowledge of languages and academic titles. An automatic recognition system for professional qualifications applies for seven specified professions.

iv. LEGISLATION ADOPTED ON THE BASIS OF ARTICLE 48 TFEU: REGULATIONS 883/2004 & 987/2009

57. In 2010 two new ‘modernised’ EU social security regulations came into force: Regulation (EC) No 883/2004 on the coordination of social security systems; and the ‘implementing regulation’, Regulation (EC) No 987/2009. These Regulations, were based on Articles 42 and 308 EC (Articles 48 and 352 TFEU). They replace previous Regulations<sup>50</sup> and contain basic rights and principles. Perhaps the most important of the principles is that the payment of benefits should not generally be subject to a condition that the recipient resides in the state responsible for payment (the export principle). Due to the need to keep the Regulations in line with changes to Member State social security systems, there are regular miscellaneous amendments to them. The scope of the EU coordination Regulations has widened over the years due to legislative change and ECJ judgments. There are no specific domestic law provisions implementing Regulations 883/2004 or 987/2009. These are directly applicable EU Regulations.

*Material Scope*

58. The list of branches of social security now covered by the EU social security coordination rules can be found at Article 3(1) of Regulation (EC) No 883/2004.

59. Article 3(5) states that the Regulation does not apply to social and medical assistance; these terms are not defined but the ECJ has interpreted social assistance as a type of benefit relating to something that is not a social security risk.<sup>51</sup>

60. The Regulation also applies ‘special non-contributory cash benefits’. This is a category of benefits which have features of both social security and social assistance.<sup>52</sup> These benefits are usually means tested or provide specific protection for the disabled. Unlike most categories of benefit these benefits, which are closely linked to the social and economic conditions in the paying state, are not subject to the normal export rule meaning that they are not required to be paid outside the territory of the paying state. The UK currently lists four benefits as special non-contributory benefits in Annex X of Regulation (EC) No 883/2004: State Pension Credit; Income-based Allowance for Jobseekers; Income-based Employment and Support Allowance; and Disability Living Allowance (mobility component).

<sup>49</sup> Directive 2005/36 was revised by Directive 2013/55/EU.

<sup>50</sup> Regulations 3/58 and 4/58 concerning the coordination of social security systems between Member States were adopted and came into force on 1st January 1959. These two Regulations were replaced in 1971 with two new Regulations, Regulation (EEC) 408/71 and Regulation (EEC) 574/72.

<sup>51</sup> For example, benefits related to housing needs (e.g. UK Housing Benefit) and to the risk of poverty (eg. UK Income Support) are considered to be social assistance and therefore excluded from the scope of the coordination regulations.

<sup>52</sup> Sometimes referred to a ‘hybrid’ benefits.

61. The exception to the export principle for this class of benefits has led to a number of references to the ECJ, seeking clarification about whether national benefits were correctly classified as special non-contributory cash benefits. For example in 2007 the ECJ found that UK attendance allowance, care allowance and the care component of Disability Living Allowance were wrongly listed as special non-contributory cash benefits and should therefore be paid outside of the territory of the paying state<sup>53</sup> under the rules applicable to sickness benefits.

#### *Personal scope*

62. Regulation No 1408/71 originally applied to employed persons, their family members and survivors and to refugees and stateless persons (and their family members and survivors). The personal scope of the Regulation was gradually extended by Regulation (EC) No 1390/81 to bring other categories within its scope.
63. A new definition of personal scope was inserted into Article 2 of the new ‘modernised’ *Regulation (EC) No. 883/2004*: to come within its scope it is necessary to show only that the person is a national of a Member State (or a stateless person or refugee residing in a Member State), who is or has been ‘subject to the legislation of a Member State’.

#### *Equal Treatment*

64. Article 4 of Regulation (EC) No 883/2004 contains a rule of equal treatment, which sets out that persons within the scope of the Regulation shall enjoy the same rights and obligations under the legislation of a Member State as nationals do. The ECJ has found that this prohibits both direct and indirect discrimination<sup>54</sup> in relation to social security benefits. However, EU law<sup>55</sup> appears to allow for the possibility of justifying treating migrants differently from home state nationals in respect of access to ‘social assistance’. Thus the scope of the term ‘social assistance’ is significant in this context and is currently the subject of a reference to the ECJ in the case of *Brey* in which the UK is intervening.<sup>56</sup>

#### *Decisions of the Administrative Commission for the Coordination of Social Security Systems*

65. The remit of the current committee, now known as the Administrative Commission for the Coordination of Social Security (‘Administrative Commission’), can be found in Articles 71-72 of Regulation (EC) No 883/2004. The Administrative Commission is empowered to adopt Decisions and Recommendations on how provisions of the Regulation should be interpreted by the Member States. The ECJ, has held that the Decisions of the Administrative Commission do not have the force of law and are thus neither binding nor an authoritative guide to the interpretation of the social security coordination rules.<sup>57</sup>

### E. MAJOR PROPOSED PIECES OF EU LEGISLATION

- i. Proposal for legislation based on Article 45

#### *Equal treatment for workers exercising free movement rights*

The Commission, in its 2012 Work Programme, indicated it would propose a Directive to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement.

<sup>53</sup> *Commission v Parliament and Council Case C-299/05* [2007].

<sup>54</sup> *Carl Borowitz v. Landesversicherungsanstalt Westfalen Case C-124/99* [2000].

<sup>55</sup> For example, Directive 2004/38.

<sup>56</sup> *Pensionsversicherungsanstalt v Peter Brey Case C-140/12* [2013].

<sup>57</sup> *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht Case 19/67* [1967].



A new proposal was adopted by the Commission in April 2013 concerning the enforcement of rights given by Article 45 TFEU and by Regulation (EU) 492/2011, with a particular focus on the prevention of discrimination.

ii. Proposals for legislation based on Article 48

*Revising the EU social security coordination regulations*

66. The Commission announced as part of its 2012 Work Programme that it intended to bring forward proposals to revise certain aspects of Regulations (EC) No 883/2004 and No 987/2009. Recent indications suggest it will consider a simplification of the rules on coordination of unemployment benefit and examine the need for a legislative system of coordination for long-term care benefits.

*Occupational Pensions and worker mobility*

67. Regulation (EC) No 883/2004 applies to old-age pensions provided for in legislation. It does not generally apply to occupational pensions provided by employers in the context of a contractual relationship. Nonetheless, barriers to portability of occupational pensions between Member States form obstacles to the free movement of workers. Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community provides for basic equal treatment as regards preservation of occupational pension rights in the case of persons who have moved to other Member States and requires payment of supplementary pensions to be made on the territory of other Member States. In 2007 the Commission put forward a more far-reaching proposal regarding the portability of occupational pensions based on Article 42 EC (now Article 48 TFEU) and Article 308 (now Article 352 TFEU) which met resistance from a number of Member States. An amended proposal was re-launched for further discussion in the Council in late 2012.

F. UK IMPLEMENTATION

Immigration (European Economic Area) Regulations 2006

68. The UK has implemented the Free Movement Directive by way of the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations') made under section 2(2) of the European Communities Act 1972.<sup>58</sup> The regulations take the following format:

- Definitions of the various concepts which appear in the regulations including definitions of the categories of person who may derive rights under the regulations appear in Part 1;
- Rights of admission and residence are dealt with in Part 2;
- Residence documentation is dealt with in Part 3;
- Refusal of admission and removal is dealt with in Part 4; and
- Procedure and appeals are dealt with in Parts 5 & 6 respectively.

<sup>58</sup> The Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003) have been successively amended by the following instruments: The Immigration (European Economic Area) (Amendment) Regulations 2009 (S.I. 2009/1117); The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 (S.I. 2011/544) The Immigration (European Economic Area) (Amendment) Regulations 2012 (S.I. 2012/1547) The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (S.I. 2012/2560) and The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013 (SI 2013/3032).

69. In order to give effect to the ECJ decisions in *Chen, Ibrahim & Teixeira* and *Zambrano*, the regulations have been amended to confer derivative rights of entry and residence on those meeting the relevant conditions.<sup>59</sup> The other relevant provision of domestic law to note is section 7 of the Immigration Act 1988 which states that: ‘A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.’ The Regulations have been amended at other times, and most recently on 1 January 2014 (SI 2013/3032). Changes which came into force then include provisions tackling abuse of rights and clarifying, as the ECJ did in *Antonissen*,<sup>60</sup> that jobseekers only have a right of residence if they have a genuine chance of being engaged.

#### G. RECENT SIGNIFICANT CASES IN THE ECJ

##### i. Interpretation of the Free Movement Directive: role of time in prison

70. There are two recent cases which were referred to the ECJ known as *Onuekwere* and *MG* in relation to the role of time in prison as it relates to the acquisition of rights and/or protections under the Directive.<sup>61</sup> Both are significant in terms of their potential impact on the ability of the UK to deport EEA nationals (and family members) who pose a threat to public policy/public security and, in one case,<sup>62</sup> the circumstances in which someone who has spent time in prison in the UK can acquire a right of permanent residence and the associated benefits which come with that status. Rulings in these cases were handed down by the ECJ in January 2014, stating that in relation to calculating the period required in order to acquire a right of permanent residence under the Free Movement Directive, a period of imprisonment cannot be taken into consideration and is, in principle, capable both of interrupting the continuity of the period of residence and of affecting the decision regarding the grant of the enhanced protection provided in relation to expulsion decisions, even where the person concerned resided in the host Member State for ten years prior to imprisonment.

##### ii. Interpretation of the Free Movement Directive: the right of residence of third-country nationals who are family members of an EU citizen

71. Three recent cases have examined the right of residence of third country nationals who are family members of an EU citizen, in relation to the provisions of the Free Movement Directive.

In *Reyes*<sup>63</sup> the ECJ ruled in January 2014 that, in relation to the status of dependants of EU citizens under Article 2(2)(c) of the Free Movement Directive – specifically concerning dependants of EU citizens who are over the age of 21 and are third country nationals – that a Member State cannot require a direct descendant of an EU citizen who is 21 years old or older (and regarded as a dependant) to have tried unsuccessfully to obtain employment, or obtain subsistence support or otherwise to support him/herself; and that whether the relative is deemed to be well placed to obtain employment does not affect the interpretation of the requirement that he/she is a ‘dependant’.

<sup>59</sup> Regulations 11 & 15A.

<sup>60</sup> *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* Case C – 292/89 [1991].

<sup>61</sup> *MG* Case C-400/12 & *Onuekwere* Case C-378/12 [2014].

<sup>62</sup> *Secretary of State for the Home Department v Nnamdi Onuekwere* Case C-378/21 [2014].

<sup>63</sup> *Flora May Reyes v Migrationsverket* C-423/12 [2014].

In *O*<sup>64</sup> the ECJ ruled in March 2014 that where an EU citizen has created or strengthened a family life with a third-country national during genuine residence in a Member State other than that of which he is a national, the provisions of the Free Movement Directive apply by analogy where that EU citizen returns, with the family member in question, to his Member State of origin.

In *S*,<sup>65</sup> the ECJ ruled (on the same day as its ruling in *O*) that the Free Movement Directive must be interpreted as not precluding a refusal by a Member State to grant a right of residence to a third-country national who is a family member of an EU citizen where that citizen is a national of/resides in that Member State but regularly travels to another Member State for work. Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of an EU citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of Article 245 TFEU, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

iii. Definition of a ‘worker’

72. There is currently a preliminary reference to the ECJ concerning whether a person who gives up work or looking for work because of some physical constraint can remain a worker under Article 45.<sup>66</sup>

iv. Whether special non-contributory benefits falling within the scope of Regulation 883/04 can be ‘social assistance’ for the purposes of Directive 2004/24

73. There is currently a reference from an Austrian Court which concerns the application of a ‘right to reside’ condition for access to a means tested benefit. The underlying issue is whether a person having access to such a benefit constitutes a burden on the ‘social assistance system’ of the host state for the purposes of Directive 2004/38. The Court is considering whether the benefit in question constitutes ‘social assistance’. This case could have implications for the UK’s right to reside condition for means tested benefits. The ECJ ruling has now been received in this case.

H. ACCESSION STATES’ FREE MOVEMENT RIGHTS

74. Under the Accession Treaty signed in Luxembourg on 25th April 2005 Bulgaria and Romania (generally referred to as the EU2) acceded to the EU on 1st January 2007. Croatia will accede on 1 July 2013.

75. The Luxembourg Accession Treaty includes a labour market derogation that provides that during a transitional period following accession, the existing Member States can derogate from the free movement of worker provisions in Article 39 EC Treaty and Articles 1 to 6 of Regulation 1612/68.<sup>67</sup> The labour market derogation can extend to a total of up to seven years.

<sup>64</sup> *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel* Case C – 456/12 [2014].

<sup>65</sup> *S v Minister voor Immigratie, Integratie en Asiel v G. v Minister voor Immigratie, Integratie en Asiel* Case C – 457/12 [2014].

<sup>66</sup> *Saint Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.

<sup>67</sup> The labour market derogations for Bulgaria and Romania are contained in paragraph 2 of Annex VI and Annex VII respectively of the 2005 Treaty between the EU and Bulgaria and Romania.

76. There are two limits on the restrictions that may be imposed by national measures. First, there is a standstill clause – the restrictions must not result in conditions for access to a Member State’s labour market that are more restrictive than those in place on the date of signature of the accession treaty. Secondly, there is a preference clause – accession State workers are to be given preference over third country national workers as regards access to a Member State’s labour market. The Treaty Croatia signs will contain similar provisions.
77. The EU2 countries (Bulgaria and Romania) are currently subject to full work permit requirements consistent with those that applied pre-accession and their access to lower skilled employment is confined to quota based schemes which prevent them from working before they have authorisation and restrict their rights to claim income related benefits by restricting the circumstances in which they can be considered to be jobseekers in this 12 month period, and the associated right to reside in the UK. These restrictions are currently in force until the end of 2013, the maximum period permitted under the Accession Treaty. The scheme includes highly skilled workers and students with registration certificates. EU2 family members of other EEA nationals may not fall within the EU2 regime.
78. When Croatia acceded to the EU on 1st July 2013, transitional controls were put in place to ensure that Croatian workers would be subject to a Worker Authorisation Scheme.
79. These accession schemes link an accession worker’s right to reside in the UK as a worker to their compliance with the restrictions. Work seekers do not have a right to reside. The accession schemes have UK-wide application.