Chapter 4

Free Movement of Workers: Some Reflections

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4.1 Introduction

This chapter will focus on the issue of Free Movement of Workers and give some reflections on recent developments. Developments regarding the Free Movement of Persons and European Citizenship can be found in the contributions of Elspeth Guild (chapter 10) and Sandra Mantu (chapter 11) to this book. The essay starts with a brief reflection on the Network on Free Movement of Workers, followed by a discussion on the new Directive 2014/54, which provides measures facilitating the exercise of workers' rights within the context of freedom of movement for workers. Then some challenges ahead are dealt with: the ongoing displacement of workers by posted workers, the changing concept of workers and the Brexit proposals regarding the reform of social security rights for workers.

4.2 The Network on Free Movement of Workers

Free movement of workers is one of the four fundamental freedoms in the EU Treaty, enshrined now in Article 45 TFEU and further developed in Regulation 492/2011 and Directive 2004/38. Free movement of workers has always been an important research issue for the Centre for Migration Law (CMR).

Twenty years ago, in the early beginning of the CMR, Kees Groenendijk wrote every year a report on the state of implementation of free movement of workers legislation in the Netherlands. Once a year he met with some officials from DG Employment of the European Commission in Brussels to present this report and then the report more or less disappeared into one of the desk drawers of these officials and everyone proceeded to the order of the day. But in 2003 the Commission established a network of independent experts, which was coordinated by the Centre for Migration Law to monitor in a systematic way the implementation of free movement of workers legislation in all Member States and to detect still existing or new developed legal obstacles. In 2013 this network consisted of a CMR coordination team and legal experts from all 28 Member

States. The network was engaged in a long list of activities. It did not only produce annually a European report on the state of implementation of the free movement of workers legislation, based on national reports of all Member States. It also produced several analytical reports on issues such as language requirements, retention of EU worker status, social and tax advantages, developments on free movement in the public sector, obstacles to free movement of young workers, breaches of Union law by private parties and the follow-up of relevant case law in the Member States. Experts answered legal requests from the Commission. From 2006 onwards an annual conference and seminars in various Member States were organised.

In 2014, however, the network was forced to merge with the existing TReSS network on EU Social Security Coordination into one larger network, which was called FreSsco: Free movement of workers and Social security coordination, which is now coordinated by the University of Ghent.¹ This merger was partly influenced by the fact that Free Movement of Workers and Social Security Coordination belonged to the same organisational unit of the Commission at that time. This merger also meant the end of one of the most successful products of our network: The *Online Journal of Free Movement of Workers* within the European Union, which only consists of 7 issues. The last issue was published in February 2014.

Its aim was to develop academic interest and stimulate debate on this fundamental area of European law. It is still online on the internet and it shows that it has had between 2,000 and 8,000 downloads per issue so far.² Issue 3, published in December 2011, contained a contribution by Koen Lenaerts, now the President of the Court of Justice of the EU, in which he explored how the Court had determined the existence of a cross-border element in the light of the landmark cases *Rottmann*, *Ruiz Zambrano*, and *McCarthy*. This issue has even been downloaded more than 14,000 times.³ Of course downloading does not automatically mean the same as reading it, but as a scholar I would be very satisfied if my articles were just downloaded so frequently.

A number of articles published in this Online Journal are still frequently cited or referred to, especially the articles which deal with such topical issues as the retention of the status of EU workers, who have worked in another Member State and the right of residence and access to social benefits for jobseekers seeking

1 See <ec.europa.eu/social/main.jsp?catId=1098>.

2 See <ec.europa.eu/social/main.jsp?catId=475>.

3 See <ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=6193>.

work in another Member State or economically inactive EU citizens. All online journal issues and other publications of the Network on Free Movement of Workers are also available on the website of the CMR.⁴

In my opinion the choice of one integrated network has weakened the effectiveness of a monitoring system dedicated only to the issue of free movement of workers. Only a minority of the activities of the new FreSsco network deals with free movement of workers issues, while the rest of the activities are social security coordination related. In 2015, within DG Employment the units of social security coordination and free movement of workers were separated from each other. Free movement of workers has become an independent unit, together with EURES (the European labour office) falling under EMPL D1. And social security coordination is now an independent unit falling under EMPL D2.⁵ This organizational separation could be a reconsideration to split the current FreSsco network in two as well.

Two reports of the Network on Free Movement of Workers deserve special attention here, because they provided the basis for the Commission to come up with a proposal to strengthen the enforcement of the free movement of workers, which led to the adoption of Directive 2014/54 (see below).⁶ The first report, finalised in January 2011, focused on the existing legal framework in each Member State and the guarantees and supporting measures they offer to EU workers. The second one, submitted in October 2011, presented an overview of the main problems related to the application of EU rules that had been identified in each Member State. These reports showed that protection against discrimination on the ground of nationality and support offered to workers varied from one Member State to another.

4.3 *Directive 2014/54*

In 2014 the EU adopted new legislation, Directive 2014/54/EU, aimed at facilitating the uniform application and enforcement in practice of the already existing rights conferred on workers by Article 45 TFEU and by Regulation (EU)

4 <www.ru.nl/law/cmr/research/projects/fimow-1>.

5 DG Employment, Social Affairs and Inclusion Organization Chart see: <ec.europa.eu/social/main.jsp?langId=en&catId=656>.

6 Proposal for a Directive 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, 26 April 2013, COM(2013)236.

492/2011 in the context of freedom of movement for workers.⁷ Thus, the scope of this Directive is identical to that of Regulation (EU) 492/2011 and it applies to Union workers and members of their families. The right of free movement of workers includes the right not to be discriminated against on grounds of nationality as regards access to employment, pay and other working conditions. Regulation 492/2011 details the rights derived from free movement of workers and defines specific areas where discrimination on grounds of nationality is prohibited, in particular as regards:

- access to employment
- working conditions
- access to social and tax advantages
- access to training
- membership of trade unions and eligibility for workers' representative bodies
- access to housing
- access to education apprenticeship and vocational training for the children of Union workers
- assistance given by employment offices

Although all these rights exist, there is a difference between formal equality (equal rights before the law) and material equality (equal outcomes, results). From a sociology of law perspective, this is described as the difference between *law in the books* and *law in action*. Directive 2014/54 aims to remove existing obstacles to the free movement of workers, such as the lack of awareness of EU rules among public and private employers and the difficulties faced by mobile citizens in obtaining information and assistance in the host Member States. To overcome these barriers and prevent discrimination, the Directive requires Member States to:

- create national contact points providing information, assistance and advice so that EU migrant workers, and employers, are better informed about their rights
- provide appropriate means of redress at national level
- allow labour unions, NGOs and other organisations to launch administrative or judicial procedures on behalf of individual workers in cases of discrimination
- give better information for EU migrant workers and employers in general

These measures should ensure better application of EU law on people's right to work in another Member State and make it easier for people to exercise their

⁷ OJ 2014 L 126/8.

rights in practice. The Directive does not create any new rights for workers, but according to the Commission will help to ensure real and effective application of the existing legislation. A crucial part of the Directive is the obligation for Member States to:

designate one or more structures or bodies ('bodies') for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement and shall make the necessary arrangements for the proper functioning of such bodies.

Member States shall ensure that the competences of those bodies include:

- (a) providing or ensuring the provision of independent legal and/or other assistance;
- (b) acting as a contact point *vis-à-vis* equivalent contact points in other Member States in order to cooperate and share relevant information;
- (c) conducting or commissioning independent surveys and analyses concerning unjustified restrictions and obstacles to the right to free movement, or discrimination on grounds of nationality;
- (d) ensuring the publication of independent reports and making recommendations on any issue relating to such restrictions and obstacles or discrimination;
- (e) publishing relevant information on the application at national level of Union rules on free movement of workers." (Article 4)

Those bodies may form part of existing bodies at national level which have similar objectives. In that case the Member State must ensure allocation of sufficient resources to the existing body for the performance of additional tasks (Recital 18). Where bodies provide assistance in legal proceedings, such assistance shall be free of charge to persons who lack sufficient resources in accordance with national law or practice.

4.4 *What are still the main obstacles?*

The following five issues can be distinguished as providing the main obstacles regarding free movement of workers:

- Tension between free movement of workers law and national immigration law
- Equality of treatment
- Access to employment in the public service
- Language requirements and recognition of diplomas and qualifications

- Frontier workers

4.4.1 *Tension free movement of workers law and national immigration law*

One of the obstacles in the application of the EU rules on free movement is the lack of separation between national immigration law and the implemented free movement rules. The privileged position of EU nationals is disregarded in practice because free movement rules are integrated into general immigration law and applied by immigration officers with these national immigration rules in mind. EU workers are required to prove sufficient income (which is not correct), they are required to present documents routinely requested from third-country nationals but not required under EU law, they have to wait for their cases to be dealt with because immigration authorities give preference to other (e.g. asylum) cases, and sometimes national rules on expulsion on public order grounds are applied rather than the stricter EU public order exception.

4.4.2 *Equality of treatment*

As a result of the economic crisis and austerity measures, national authorities have become increasingly interested in limiting access to social assistance and benefits, including stricter scrutiny to end residence for workers. Social benefits are subject to conditions more easily met by nationals than by EU citizens (e.g. a residence condition). The Netherlands for instance introduced in 2016 a language requirement as a condition for eligibility for social assistance. Although the new requirement in theory applies to "everyone", there is an exemption for recipients of social assistance who have had eight years of education in the Netherlands. This clause exempts practically all indigenous (=non-immigrant) Dutch nationals.⁸

4.4.3 *Access to employment in the public service*

There are still problems for EU workers in accessing employment in the public service in many EU Member States both in law and practice. Article 45(4) TFEU allows for a restriction of access to certain posts in the public service to its own nationals, but the Court of Justice of the European Union (CJEU) has consistently held that this exception is to be interpreted restrictively and covers only posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

⁸ *Stb* 2015, 136 and 194. See also: K. Groenendijk & P. Minderhoud, 'Taaleis in de bijstand: discriminerend, disproportioneel en onnodig', *NJB* 2016/91, afl. 3, p.183-189.

4.4.4 *Language requirements and recognition of diplomas and qualifications*

There are continuing restrictions in some Member States regarding access to posts in several sectors (for instance academic and maritime sector) caused by strict language requirements. Another problem is that professional qualifications and experience acquired in other Member States is not taken into account or is taken into account in a different way.

4.4.5 *Frontier workers*

Special problems can still be recognised for frontier workers, who live in one Member State and work in another.⁹ They often encounter difficulties with access to social entitlements and labour market support and tax issues, caused by provisions which use a direct or indirect residence requirement as a condition for eligibility. Other reported obstacles are linguistic differences, lack of information and knowledge pertaining to the legal status of frontier workers and the implications thereof, lack of mutual recognition of professional and academic qualifications and lack of cooperation between competent authorities and administrations in the various Member States.¹⁰

4.5 *What impact and added value can be expected from the Directive?*

A good sign is that the Directive underlines the importance of the issue of free movement of workers, even in times when this is under pressure, and faces the reality that there are still problems to be tackled, despite the fact that equality of rights has already been formally established. But it is an illusion to think that all existing problems can be removed by a legal instrument like the Directive itself. The Directive is not some kind of magical remedy.

In my view there are three main factors which can influence the effectiveness of the Directive in a negative way. The first problem is that the Directive, which is modelled on other Equality Directives, suffers from the same weaknesses as those Directives, and moreover lacks their enforcement tools. Secondly, the success of the Directive is highly dependent on the willingness of Member States to take it seriously. Thirdly, it is not applicable to posted workers, while this is an area in which some of the most structural problems regarding discrimination on nationality occur.

9 Frontier workers are defined as EU citizens who work in one Member State, yet reside in another, and who return to the Member State of residence on a daily or weekly basis (Article 1(f) Reg. 883/2004).

10 Jorens, Y., P. Minderhoud & J. De Coninck (2015), *Comparative Report: Frontier workers in the EU*, FreSsco, European Commission, January.

4.5.1 *Same weaknesses as other Equality Directives*

The structure and text of the provisions of Directive 2014/54 are highly similar to that of, for instance, the Race Directive 2000/43 which implements the principle of equal treatment between persons irrespective of racial or ethnic origin.¹¹ An important difference is that neither the Race Directive, nor any of the other equal treatment Directives covers the ground of nationality, and the Race Directive stipulates specifically in its Recital 13 and Article 3(2) that “This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality...”.

The text of Article 3 on defence of rights is highly similar to the text of Article 7 of the Race Directive on defence of rights. The same applies to Article 5 on dialogue which corresponds partly with Article 11 Race Directive on social dialogue and Article 12 Race Directive on dialogue with non-governmental organizations. Article 7 on minimum requirements corresponds with Article 6 Race Directive (minimum requirements). Article 6 on access to and dissemination of information corresponds with Article 10 Race Directive (dissemination of information), but here an extra provision can be found in Article 6(2) of Directive 2014/54, which says that:

Member States shall provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date. This information should also be easily accessible through Your Europe and EURES.

However, there are two important provisions which are incorporated into the Race Directive but which are lacking in the new Directive 2014/54. First, there is no article similar to Article 8 of the Race Directive on the burden of proof, which stipulates that Member States shall take measures necessary to ensure that it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. This provision can be seen as a key element necessary for ensuring the correct handling of discrimination.

And, second, there is no article similar to Article 15 of the Race Directive on sanctions, which stipulates that Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that

¹¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *OJ* L 180 , 19/07/2000 p.22–26.

they are applied. These sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive, according to the Race Directive.

Therefore the Directive can be characterized as a kind of symbolic legislation which will probably suffer from a serious lack of effectiveness in advance.¹² On the one hand, this legislation seeks to strengthen the rights of workers, but on the other hand, it does not provide the proper tools for enforcement of the objectives the Directive wants to achieve.

A related problem is that reports monitoring the implementation of the Race Directive, which has more tools than Directive 2014/54, underline that the main challenge identified in many Member States is still the lack of enforcement of anti-discrimination laws in practice, particularly with regard to access to justice.¹³ There is still a problem of lengthy procedures, evidence, high costs, failures in the provision of legal aid, ineffective sanctions, barriers in the form of language, issues relating to legal standing and legitimate interest.¹⁴ For effective claiming it is necessary to have adequate access to justice, which is not always available. In this context we can refer to the so-called naming, blaming and claiming problem.¹⁵ EU workers first have to become conscious of the fact that they are being discriminated against and to define the acts as such. Therefore they need knowledge not only of the equal treatment rules but also of the facts, the context and the ability to compare their situation with the situation of others. As a second step they have to hold someone responsible for the act of discrimination (blaming) and thirdly, they have to start a legal procedure, which could be difficult because of fear of retaliation or worsening of the relations.

4.5.2 *Willingness of Member States to take this Directive seriously*

The Directive has to be implemented in national legislation by 21 May 2016. Some Member States, such as the UK and the Netherlands, have indicated that they do not have to take many measures because all the rights of EU workers have already been secured. The British government stated: "These rights are already enforceable in the UK before the national courts and the Government considers

12 V. Aubert (1966), 'Some Social Functions of Legislation', *Acta Sociologica* Vol. 10, No. 1/2, Contributions to the Sociology of Law, p.98-120.

13 Report of the European Commission on the application of 2000/43 and 2000/78, 17 January 2014, COM(2014)2, p. 16.

14 Equinet, Equality law in practice; report on the implementation of the race and general framework directives, 2013, <www.equineteurope.org/Report-on-the-Implementation-of->.

15 W.F.L. Felstiner, R.L. Abel & A. Sarat, 'The emergence and transformation of disputes: naming, blaming, claiming', *Law & Society Review* 1981, p. 613-654. See also the contribution of Terlouw in this book, Chapter 12.

the likely impacts of the Directive to be minor in practice” According to the government the Directive will not significantly affect the balance of competence.¹⁶

The Dutch Minister of Social Affairs said in Parliament that the Directive would not lead to many legal changes. According to the Minister and the Parliament, the Netherlands was already doing a good job and the Directive would not add anything new.¹⁷ He emphasized that the scope of the Directive was limited to the scope of Regulation 492/2011. Some members of parliament even questioned the necessity of the Directive in light of the own responsibility of the EU migrant workers themselves.¹⁸ In order to fulfil the obligation to implement the Directive the Dutch government only issued one ministerial decree in which a part of the Ministry of Social Affairs was designated with the competence to coordinate the activities of existing bodies which deal with equal treatment of Union workers, like the Dutch legal advice centres, the ombudsman, local anti-discrimination organisations and the Netherlands Institute for Human Rights (the Dutch Equality Body).¹⁹

According to the Dutch government the extra provision of Article 6(2) on access to and dissemination of information does not need special implementation because there is already sufficient information available on the website of the national government (www.rijksoverheid.nl) and through a leaflet, entitled: Nieuw in Nederland (New in the Netherlands). This leaflet of 20 pages provides information on the rights of workers (like labour conditions and rules on working hours), and also on membership of a trade union, education, learning the Dutch language and on the possibilities for housing. This leaflet has been translated into most EU languages and is given to EU migrant workers when they receive their Citizen Service Number, which is a necessary document to enable them to work legally in the Netherlands. See www.newinthenetherlands.nl. It can be questioned whether this minimalist approach will be seen as sufficient for implementing the Directive. For instance it is not clear which body in the Netherlands is competent to deal with the issue of nationality discrimination as regards social and tax advantages.

16 <www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/13515.pdf>.

17 Tweede Kamer, vergaderjaar 2012–2013, 33 635, nr. 4, p. 8-9 (Dutch Parliament).

18 Tweede Kamer, vergaderjaar 2012–2013, 33 635, nr. 4, p. 4 (Dutch Parliament).

19 Wijziging OMV-besluit ivm implementatie richtlijn 2014/54 vergemakkelijken uitoefening vrij verkeer van werknemers *Official publication: Staatscourant (Journal Officiel néerlandais)*; Number: 23600; Publication date: 10/05/2016; p.1-6

Lithuania, on the other hand, wants to use this Directive to also strengthen the rights of their own Lithuanian workers in other Member States. Given the fact that more Lithuanian workers leave, than other EU workers enter Lithuania, this is an understandable desire. With regard to their own legislation, Lithuania has a problem in that much of its legislation contains a permanent residence requirement which is a condition for accessing most of the social benefits. This requirement discriminates against EU workers from other Member States and will need to be adapted.²⁰ The fact that Lithuania has amended 66 different Acts in the implementation process of this Directive raises the presumption that they have dealt with this adaptation of the residence requirement in a structural way.²¹

4.5.3 *Not applicable to posted workers*

The new Directive will only apply to situations which fall within the scope of Article 45 TFEU and Regulation 492/2011. At the moment for instance in the Netherlands the more structural problems occur with Polish and Portuguese workers, who work as “posted workers” and fall within the scope of Article 56 TFEU (freedom of services) and Directive 96/71, concerning the posting of workers (within the framework of the provision of services), which gives these workers a much lower set of rights than Article 45 TFEU and Directive 492/2011 do.

A worker is a “posted worker” when he is employed in one EU Member State but sent by his employer on a temporary basis to carry out his work in another Member State. There is an employment relationship between the undertaking making the posting and the worker during the period of the posting. The core of mandatory rules on posting covers issues such as payment of minimum wages, maximum work periods and minimum rest periods, minimum paid annual leave, equal treatment between men and women and issues such as health and safety at work and includes protective measures in the terms and conditions of employment of pregnant women, children and young people. These workers are much cheaper because they do not have to be paid the higher wages based on collective labour agreements and they fall within the lower social security and pensions systems of their country of origin, like Portugal or Poland. The issue of posting of workers seems to have created more structural difficulties at this time than the issue of free movement of workers. Posting has become one of the channels for cross-border recruitment of “cheap” labour without reference to the

20 See presentations FreSsco seminar Latvia-Lithuania, Riga, 16 September 2015 <ec.europa.eu/social/main.jsp?langId=nl&catId=88&eventsId=1042&furtherEvents=yes>.

21 <eur-lex.europa.eu/legal-content/en/NIM/?uri=celex:32014L0054>.

rights that can be derived from EU law on genuine labour mobility.²² Main problems are evasion of payment of minimum wages, abuse of payment of social security contributions and evasion of abiding by collective agreements.

This is an issue which is getting more attention in the Netherlands at the moment: An anecdotal example is the building of a tunnel in 2013 in Maastricht in the southern part of the Netherlands which led to scandalous exploitation of mainly Polish and Portuguese construction workers. They were working under the posting of workers regime and were paid the obligatory minimum wage and therefore at first sight this seemed to be in line with Directive 96/71. But it appeared that they had to pay back 965 Euro per month for so-called “logistic costs” to the company which hired them out. This amount of money was half of their salary. According to the company, these costs were meant to cover the costs of housing and transportation. But in fact these workers were sleeping three persons to a room in several old flats, which would be demolished because of the construction of the tunnel. The construction site itself was only 100 metres away from their accommodation. In the end the Polish and Portuguese workers got part of their money back under pressure of action from the largest trade union in the Netherlands, FNV, which supported them in a lawsuit.²³

In another situation, posted workers who were building an energy plant in the Northern part of the Netherlands (also mainly Polish and Portuguese workers) were not paid the obligatory minimum wage. The Dutch trade union, FNV, tried to mobilize these workers and challenged their structural underpayment and succeeded in the end by winning a court procedure. But the trade union had to overcome a lot of resistance not only from the employers, who did not allow FNV to visit the site of the plant itself, but also from the Portuguese and Polish workers, who were actually content with their underpayment, because they still earned more than double the amount of money they could have earned in their home country (if they had had a job at all).²⁴

4.6 *Challenges ahead*

This issue of posted workers brings us to the challenges ahead for the free movement of workers in the near future. In my view there are three important challenges. Firstly, there is a progressive displacement of workers by posted

22 J. Cremers (2016), Economic freedoms and labour standards in the European Union, *Transfer*, p.149-162.

23 <www.li.nl/algemeen/237605-dossier-misstanden-arbeiders-a2-maastricht>.

24 <ec.europa.eu/social/contentAdmin/BlobServlet?docId=9983&langId=en>.

workers, which will lead to serious risks of erosion of labour standards and downward pressure on pay. Secondly, there is the changing concept of workers, which can undermine the position of EU migrants and, thirdly, the Brexit proposals, which were accepted by the other Member States, affecting the principles of free movement of workers in an unprecedented way.

4.6.1 *Progressive displacement of workers by posted workers*

In 2014 there were 1.9 million posted workers in the EU. The number of posted workers increased by 44.4% between 2010 and 2014. The total number of EU workers who live and work or look for a job in another EU Member State is 8.3 million. The concentration of posted workers in some sectors is high. The construction sector, for example, comprises about 43.7% of the total posted workers. Such concentration is especially high in Belgium, Luxembourg and Austria.²⁵ In the Netherlands the amount of A1 declarations which register that workers are posted and fall within the social security system of another Member State (like Poland or Portugal) doubled last year to 100,000. In 2016 the Netherlands is the fifth EU country per number of received posted workers.

A concentration of posted workers in the lower echelons of the labour market carries the risk of an erosion of labour standards and an evasion of mandatory rules. In low skills sectors, such as construction, wage gaps of up to 30% have been observed between posted workers and local national workers.²⁶

To strengthen the practical application of the rules on posting of workers by addressing issues related to fraud, circumvention of rules, and exchange of information between the Member States, in 2014 Directive 2014/67 (the so-called Enforcement Directive) was adopted.²⁷ This Enforcement Directive aims to guarantee better protection of posted workers and a more transparent and predictable legal frame work for service providers.²⁸

But the Commission feared that this Enforcement Directive would not be enough to tackle the phenomenon of social dumping and therefore introduced in March 2016 a proposal to revise the 1996 Posting of Workers Directive.²⁹ The main change concerns the rates of pay to which a posted worker is entitled. The current Directive only requires that posted workers are subject to

25 <ec.europa.eu/social/BlobServlet?docId=15181&langId=en>.

26 J. Cremers (2016), Economic freedoms and labour standards in the European Union, *Transfer*, p.149-162.

27 OJ L 159, 28 May 2014, p. 11-31. Transposition date was 18 June 2016.

28 <europa.eu/rapid/press-release_MEMO-16-467_en.htm>.

29 COM(2016) 128.

the *minimum* rates of pay. The new proposal foresees that the *same* rules on remuneration in the host Member State will apply, as laid down by law or by universally applicable collective agreements. Posted and local workers will therefore be subject to the same rules when it comes to remuneration. Another important proposed change is that workers posted for longer than two years will at least be covered by all the mandatory rules of protection of the labour law of the host Member State. A comparable 24-month rule already exists in the social security coordination legislation.³⁰

Ironically, there is resistance from the Central and Eastern European Member States to this principle, because they fear that the competitive position of their own citizens working in another EU country will diminish. The national parliaments of 11 Member States (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) have therefore used the yellow card procedure to stop this proposed legislation. In July 2016 the Commission concluded that the proposal for a revision of the Directive does not constitute a breach of the subsidiarity principle and it will be maintained.³¹ But given the fierce resistance, the process of adoption is very unpredictable.

4.6.2 *Changing concept of who is a worker*

A second challenge concerns the changing concept of who is a worker. According to the settled case law of the CJEU, “worker” has a European definition: “services performed under supervision of another in return for remuneration, so long as such activities are genuine and effective and not on such a small scale as to be marginal and ancillary”. The consequences of being found to be or not to be a worker are increasingly significant for residence rights and social entitlements for the worker and his/her family. For instance, workers have an unconditional right to reside without a requirement for resources or comprehensive health insurance, the right to equal treatment in relation to most matters including welfare assistance, the right to education for children etc. As part-time work and atypical contracts are on the increase, the borderlines of the worker concept are becoming more crucial for an increasing number of people.

Working patterns are changing. As said previously, part-time and atypical employment are on the increase, and different forms of working relationships such as para-subordination (a mix between self-employment and employment)

³⁰ See Article 12(1) Regulation 883/2004.

³¹ Communication on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505.

are emerging. Also working forms like apprenticeships, volunteering, bogus self-employment, and other fringe work – such as rehabilitative/sheltered work and participation in workfare programmes – raise the important question: Are they workers?

EU migrants are often concentrated in lower paid, less stable positions and atypical work relationships and are incoherently, inconsistently treated by different States – both during their activities, and during the inevitable gaps between the activities where contracts are short-term, or “on-call”. This significantly undermines the protections that are otherwise afforded to those in “typical”, stable employment relationships whilst also threatening the effectiveness of the free movement of workers provisions.

The CJEU has never set a fixed amount of hours of work for the definition of being a worker. Verschueren reconstructs the answer of the CJEU to the question of how many hours a week a person has to work for his/her employment to be considered as “real and genuine” and not as “purely marginal and ancillary” as follows:³²

In Kempf, the CJEU accepted 12 hours a week as sufficient, in Megner and Scheffel even 10 hours.³³ In Genc, concerning the EEC-Turkey Association Agreement, the CJEU did not rule out that 5.5 hours a week might be considered as “real and genuine”, following an overall assessment of the employment relationship in question.³⁴ Part-time working students,³⁵ trainees³⁶ or au pairs³⁷ could also be “workers”. However, the low threshold the CJEU applies may also lead to situations in which persons are very close to being economically inactive, as a result of which different rules on the right to reside and the right to equal treatment apply, leading to seemingly arbitrary outcomes.³⁸ Therefore, Member States may be tempted to apply a strict test

32 H. Verschueren (2016), ‘Being Economically Active: How It Still Matters’, in: H. Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, Cambridge: Intersentia, p. 194 e.v.

33 CJEU 3 June 1986, C-139/85, *Kempf*, ECLI:EU:C:1986:223; and CJEU 14 December 1995, C-444/93 *Megner & Scheffel*, ECLI:EU:C:1995:442.

34 CJEU 4 February 2010, C-14/09, *Genc*, ECLI:EU:C:2010:57, para. 28.

35 CJEU 21 February 2013, C-46/12, *L.N.*, ECLI:EU:C:2013:97.

36 CJEU 26 February 1992, C-3/90, *Bernini*, ECLI:EU:C:1992:89; CJEU 17 March 2005, C-109/04, *Kranemann*, ECLI:EU:C:2005:187; and CJEU 9 July 2015, C-229/14, *Balkaya*, ECLI:EU:C:2015:455, para. 50.

37 Case C-294/06, *Payir*, ECLI:EU:C:2008:36.

38 D. Thym, ‘The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens’ (2015) 52 *CML Rev*, 43.

and give a narrow interpretation to what is “real and genuine” with a view to excluding certain migrants, such as part-time migrants, from the “worker” status and hence from the rights which this entails.

Verschueren also discusses the fact that some new forms of labour and non-standard work could also run the risk of not being covered by the concept of “worker”.³⁹ This was illustrated by the *Raulin* case in 1992. In that case the CJEU had to decide on the question of whether a worker employed under a so-called “on-call” contract (sometimes also called a “zero-hours” contract) could be regarded as a worker. Such a contract is a means of recruiting workers in sectors where the volume of work is subject to seasonal or other variations. Under such a contract, no guarantee is given as to the hours to be worked and, often, the person involved works only a few days a week or hours a day. The employer is held to pay wages and grant social advantages insofar as the worker has actually performed work. Such contracts normally mean that there is no obligation for employers to offer work, or for workers to accept it. The CJEU did not exclude that workers under such an “on-call” contract could be regarded as migrant workers within the meaning of the Treaty. However, it also said that the national court might, when assessing the effective and genuine nature of the activity in question, take account of the irregular nature and limited duration of the services actually performed under a contract for occasional employment. The fact that the person concerned worked only a very limited number of hours in a labour relationship might be an indication that the activities exercised were purely marginal and ancillary.⁴⁰

A recent FreSsco study found that some Member States establish formal or informal earnings or hours thresholds to assess whether someone is a worker.⁴¹ Falling below the threshold creates a presumption of marginality, which must be refuted by the claimant. This can place a heavy burden of proof on the worker. In the UK a worker must earn £156 per week (the equivalent of approximately 22 hours per week at the national minimum wage) for three months before automatically being considered a worker. Falling below the threshold creates a

39 H. Verschueren (2016), ‘Being Economically Active: How It Still Matters’, in: H. Verschueren (ed). *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, Cambridge: Intersentia, p. 196.

40 CJEU 26 February 1992, C-357/89, *Raulin*, EU:C:1992:87, paras. 11–14.

41 C. O’Brien, E. Spaventa & J. De Coninck, ‘The concept of worker under Article 45 TFEU and certain non-standard forms of employment’, FreSsco Comparative Report 2015, <www.ec.europa.eu/social/BlobServlet?docId=15476>. Also see: C. O’Brien (2016), ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’, 53 *CML Rev.*, p.955 e.v.

presumption of marginality and claimants are required to prove that their work is genuine and effective while being given little guidance on how to do this.

In Belgium there is a 12 hour per week threshold for determining whether work is genuine and effective. Denmark uses a 10-12 hour per week threshold and Finland 18 hours per week or 80 hours in four weeks as well as an earnings threshold of € 1165 a month. In the Netherlands the individual concerned must either receive an income which exceeds 50% of the social assistance standard or must work at least 40% of the normal working time to be considered a “worker” anyway.⁴² The effect of this statement is that in the Netherlands in practice often EU nationals working less than 40% of the normal working time are not considered to be workers and the free movement rights of that person or his family members are denied or disregarded on that ground or because of the lack of sufficient income. There is a significant risk that in all Member States where the threshold is not achieved, it is up to the claimant to adduce evidence to refute a presumption of marginality.

4.6.3 *Proposals to prevent a BREXIT*

The third challenge is the proposals the Member States formulated to prevent a Brexit. On 19 February 2016 the European Council made an agreement regarding the demands of the UK necessary to keep them in the EU.⁴³ On 23 June the UK held a referendum where the British people, despite this agreement, voted to leave the EU. It was only if they had voted to remain in the EU that the proposals of the deal would have been further elaborated.⁴⁴ But the proposals reflect the opinion of a lot of other Member States as well.

I will deal here with two proposals which touch upon the social security position of workers, challenging the principle of free movement of workers fundamentally: the emergency brake on in-work benefits and the limiting of the export of child benefits.

42 See chapter B10/3.2.1 of the Dutch Aliens Act Implementation Guidelines <cmr.jur.ru.nl/cmr/vc/vc2013/wbv.2013.05.pdf>.

43 European Council (2016), Conclusions of the European Council meeting, 18-19 February, EUCO 1/16

44 European Council (2016); No 4 of the Conclusion of the European Council Meeting of February 18/19 states: “It is understood that, should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements referred to in paragraph 2 above will cease to exist.”

4.6.4 ‘Emergency brake’ on in-work benefits

The first one concerns the introduction of the so-called “emergency brake”. This is a proposal to amend Regulation (EU) No 492/2011, which will provide for an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time, including as a result of past policies following previous EU enlargements, taking into account a pull factor arising from a Member State's in-work benefits regime.

This emergency brake would allow the UK to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. For the UK, this concerns the supplementary fiscal benefits for those EU workers who earn a low wage. These are Tax Benefits, Child Tax Benefits and Housing Benefits. The limitation would be graduated, from initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State. The authorisation would have limited duration and apply to newly arriving EU workers for a period of seven years.

This emergency brake does not apply exclusively to the UK. Any Member State wishing to avail itself of the mechanism could notify the Commission and the Council that such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services. On a proposal from the Commission after having examined the notification and the reasons stated therein, the Council could authorise the Member State concerned to restrict access to non-contributory in-work benefits to the extent necessary.

From a legal point of view, I think this proposal is extremely problematic for those benefits which are defined as social security benefits, like the UK Child Tax Benefits.⁴⁵ In these cases just adapting Regulation 492/2011 would not provide enough legal basis for this exclusion, because it would be in breach of the equal treatment provision of Article 4 of Regulation 883/2004.⁴⁶

⁴⁵ See Neville Harris, *Demagnetisation of Social Security and Health Care for Migrants to the UK*, *European Journal of Social Security* 2016, p. 130-163.

⁴⁶ Article 4 of Regulation 883/2004: “Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”. This

This proposal means for the first time in the history of the EU that some kind of unequal treatment between EU nationals and own nationals in the field of free movement of workers has been introduced (except for the restriction on access to the public service for a limited category of posts and the transitional arrangements restricting the free movement of workers of new accession States for a limited period of time).

A UK scholar, Ruhs, has advocated in this regard that if a choice has to be made, the unrestricted movement of workers within the EU is a more important asset than fully equal access to EU Member States' welfare states. The freedom to move and take up employment in other EU countries generates very large economic and other gains for workers and their families in lower-income Member States. Protecting this freedom and these gains is, in his view, worth the price of more (temporary) restrictions on access to national welfare states, especially to noncontributory benefits.⁴⁷ In my opinion this is a crucial fallacy because the moment equal access to benefits between own nationals and EU nationals is restricted there is no longer a full principle of free movement of workers. Moreover, abandoning the equal principle will only fuel the suspicion that EU migrant workers are taking jobs from the 'native' workers, not assuage it.

4.6.5 *Limiting the export of child benefits*

Second there was a proposal to amend Regulation 883/2004 on the coordination of social security systems in order to give Member States, with regard to the exportation of child benefits to a Member State other than that in which the worker resides, an option to index such benefits to the living conditions of the Member State in which the child resides. This measure was not only limited to the UK, but could be applied by the other Member States as well. The restriction was that initially this measure should only apply to new claims made by EU workers in the host Member State. But, as from 1 January 2020, all Member States would be given the possibility to extend indexation to existing claims to child benefits already exported by EU workers. The Commission delicately notes that it does not intend to propose that this future system of optional indexation of child benefits be extended to other types of exportable benefits, such as old-age pensions.

Regulation is based on Article 48 TFEU which is explicitly designed to prevent that restrictions in the field of social security would hinder the free movement of workers.

⁴⁷ Ruhs, M (2013) *The Price of Rights: Regulating International Labour Migration*, Princeton, NJ and Oxford: Princeton University Press

The question arises as to whether such an amendment of Regulation 883/2004 would stand the test of the case law of the CJEU on this issue. Already in 1986 the CJEU decided in the *Pinna* case that this kind of limitation on the export of child benefits had to be seen as a form of unjustified covert discrimination.⁴⁸ However, the content of the *Pinna* case was not completely similar to the now proposed changes. In that case the old coordination Regulation 1408/71 (the predecessor of Regulation 883/2004) permitted France to not export child benefits for children living in other EU countries at all. The children of an Italian worker in France who in that case lived in Italy were only entitled to the much lower Italian child benefits. The Court found this provision invalid (in so far as it precluded the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State) and contrary to (now) Article 45 TFEU on the free movement of workers.

The introduction of this indexation of the amount of the exported child benefits will above all be a matter of principle. The financial consequences will be minimal. There are no exact figures known, but the British government estimated it would save around € 38 million. This concerns only a very small percentage of the overall benefits paid for children.⁴⁹ The same goes for the Netherlands, where the savings would be around € 8 million (which represents 0.25% of the total amount of money paid in child benefits). It is only in Germany, which pays child benefits for 83,000 children living in the Central and Eastern European Member States that the adaptation would lead in absolute terms to a more substantial saving of € 100 million.⁵⁰ In this context the reasoning of the Advocate General in the above-mentioned *Pinna* case is still valid. He did not see any justification for the contested provision, because the finances of (in that case) France did not seem to be threatened to such an extent as to warrant this special rule.⁵¹

4.7 Conclusion

It is good to emphasize that free movement of workers is one of the four fundamental freedoms in the EU Treaty. Developments of the last decade show that this freedom cannot just be taken for granted but has to be cherished

48 CJEU 15 January 1986, C-41/84, *Pinna v Caisse d'allocations familiales de la Savoie*, ECLI:EU:C:1986:1.

49 Only 0.26% of the total UK child benefits was paid to EU migrants whose children live in another Member State in December 2013 and 0.09% UK child tax benefits were claimed by families with children in another Member State. See: <bruegel.org/2016/02/child-benefits-for-eu-migrants-in-the-uk>.

50 *Elsevier* 5 March 2016, p.48-49.

51 Opinion of Advocate General Mancini, point 7, ECLI: EU:C:1985:215.

actively every day. The fact that there is still a need for a special Directive to enforce the rights of EU workers, which have existed for almost 50 years, is a sign that these rights should not be watered down. But it is also useful to remember that there will always be a gap between formal equality and material equality and that legalisation is not a panacea in this respect. The success of the new Directive 2014/54 will be determined to a large extent by the efforts and activities of governments, and also of trade unions and national Equity Bodies.

An example of good practice is a report published in March 2013 by the Netherlands Institute for Human Rights (the Dutch Equity Body), entitled *Polish migrant workers from a human rights perspective*, based on a literature study and interviews with stakeholders and Polish labour migrants.⁵² This report gives an inventory of the problems and obstacles with which Polish migrant workers are confronted in the Netherlands and formulates 11 recommendations addressed to the Minister of Social Affairs.

The effectiveness of Directive 2014/54 and the ability to obtain rights as EU workers deserves a good monitoring system.

The preparedness of the Member States to find a balance between the rights of EU mobile workers and those of posted workers will influence the direction on terms and conditions of employment within the EU in the near future. What is important in this respect will be answering the question of who can be seen as a worker. Time will tell whether the Brexit deal had to be seen as an incidental solution to keep a Member State aboard or a harbinger of the development of new proposals to restrict the free movement of workers in a more structural way in an ever closer Union.

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⁵² The report is in Dutch with a summary in English and can be found on the website of the Netherlands Institute for Human Rights: <mensenrechten.nl> under the header *Publicaties*.

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