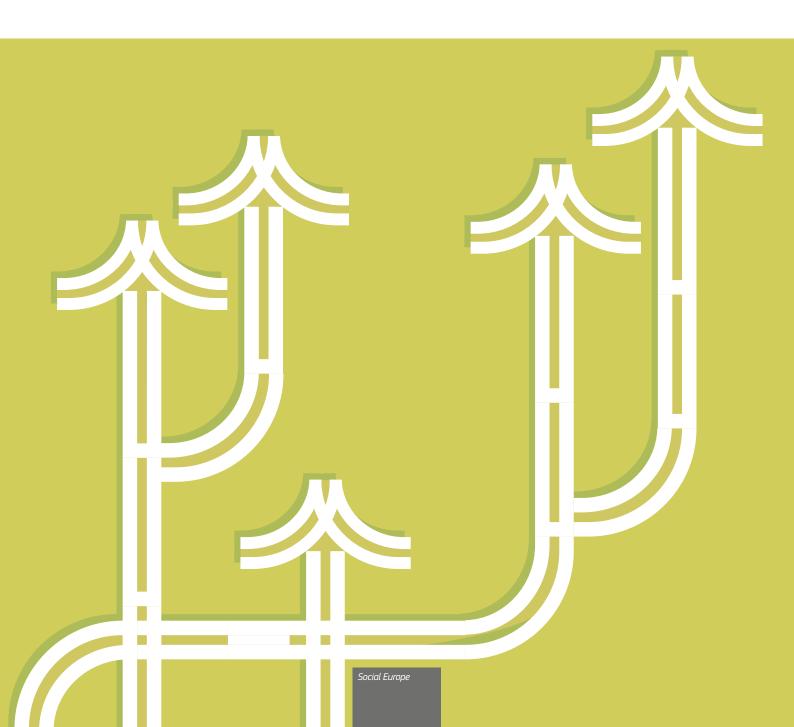


FMW

Online Journal on free movement of workers within the European Union



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Foreword

EU-8, education grants and social rights

Jean Monnet Professor ad personam Elspeth Guild, Radboud University, Nijmegen, Netherlands

The Online Journal on free movement of workers within the European Union proudly presents its fourth issue and the completion of its second year. The success of the journal has surprised even the editors who were convinced of the importance of the subject and the need for a new venue for people to read academic articles examining free movement of workers. The preceding issues have been very well received with downloads of more than 3 000 for issue 1; issue 2: almost 1 000 and issue 3: more than 550. At the time of presenting the fourth issue, many people are downloading the previous ones and the number of people interested in the subject and following the journal continues to grow. Clearly there is a substantial demand for our journal and we are making every effort to cover the areas, issues and subjects which are within its scope, creating new knowledge and making available to a wider public existing information and analysis.

In this issue we present three articles all on issues of substantial public interest and attention. Hoogenboom examines the current state of affairs across the Member States in implementing the right of EU students to take their study grants with them when they move from their home Member State to study elsewhere in the EU. This has been a fairly controversial right, but it is central to realising mobility and often of particular importance for the children of frontier workers. Realising free movement of workers also means ensuring that our next generation of workers fulfil their educational potential according to the best conditions possible. Dr Dawn Holland examines the available data on patterns of labour mobility of EU-8 nationals over the seven-year period of transitional arrangements which ended on 1 May 2011. This article provides concrete statistical data and analysis on how EU-8 nationals have used their free movement rights as workers across the other Member States as transitional restrictions were lifted in Member State after Member State. This research highlights the sensitivity of movement of workers to the economic downturn. The analysis indicates a drop of approximately 65% in the exercise of the right between 2008 and 2009 responding to unfavourable economic conditions. Dr Cremers takes a careful look at the issue of which social benefits should accrue to which EU workers when they are exercising mobility rights outside their home Member State. In times of financial instability in some Member States, this issue is central to guaranteeing security for EU workers and ensuring that they are in fact being treated equally as regards social and tax advantages with workers who are nationals of the host Member State.

We trust that our readers will both find these contributions valuable and enjoy reading them. Should our readers have particular suggestions regarding subjects in respect of which you would welcome further research, the editors would be most interested to hear from you.



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Mobility of our best and brightest from a free movement of workers perspective

This article seeks to examine the eligiblity of Union workers and their family members for grants offered by a Member State in order to pursue studies. To that end it provides an analysis of the rights that can be derived from EU law, addresses the issue of export of study grants and comments on some recent trends in the national legislation of the 27 Member States regarding study grants.

Dawn Holland (Senior Research Fellow)

Dawn Holland is a senior economist at the National Institute of Economic and Social Research (NIESR) in the United Kingdom. She is the Head of Macro-modelling at NIESR and has worked with the Institute's well-known global econometric model, NiGEM, since 1996. Her primary research focus has been on issues related to production functions and supply-side economic models and in particular the role of risk premia in the demand for capital. Recent studies include an evaluation of the impact of transitional labour market restrictions on migration within the enlarged EU; model-based approaches to addressing the European sovereign debt

crisis; and a cross-country comparison of fiscal multipliers and fiscal consolidations. She manages the quarterly production of NIESR's global economic forecast and has been a member of the editorial board of the *National Institute Economic Review* since 2003. A complete list of publications is available at: http://www.niesr.ac.uk/staff/staffdetail2.php?StaffID=193

The impact of transitional arrangements on migration in the enlarged EU

This paper assesses the impact of transitional restrictions on the free mobility of labour on

the location choice of workers from the newer Member States of the European Union, following the enlargement of 2004. We measure the degree of labour market restrictions relative to other potential locations within the EU, and develop a simple model



of the location decision, to quantify the role of transitional arrangements after factoring out macroeconomic developments.

Jan Cremers (Dr)



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Free movement of workers and rights that can be derived

In this contribution a non-exhaustive overview is provided of several aspects of free movement of workers in the EU. The author has been (and is) involved in several research projects on the posting of workers, the coordination of social security and workers rights in a crossborder context; this article is part of work in progress. It starts with an overview of the different relevant aspects of workers rights and provisions in three policy fields (social security, working conditions, labour and contract law). In the following sections these policy fields are briefly sketched out. In the last section some of the pending problems are listed.

Mobility of our best and brightest from a free movement of workers perspective

Alexander Hoogenboom (LL.B, LL.M)

This article seeks to examine the eligibility of Union workers and their family members for grants offered by a Member State in order to pursue studies. To that end it provides an analysis of the rights that can be derived from EU law, addresses the issue of export of study grants and comments on some recent trends in the national legislation of the 27 Member States regarding study grants.

1. Introduction

The importance of the free movement of students in and for the European integration project can scarcely be overstated. A-G Colomer's strong and inspired Opinion in the joined cases of Morgan and Bucher reminded us of the long pedigree of student mobility as one of the most enduring forms of mobility in Europe and highlighted that many a great thinker received his education in more than one university, established in more than one country(1). Furthermore, EU students studying abroad have a greater sense of European identity which promotes the idea of EU citizenship, and are held to contribute to the international competitiveness of the EU economy through a process of mutual learning and exchange(2). The value of such mobility has also been recognised by the EU institutions(3), as well as by the Member States who are all participants in the context of the Bologna process(4). However, one should not forget that in relative terms the number of students studying abroad

is still rather small(5) albeit rising(6); hurdles ranging from administrative difficulties to issues regarding the recognition of qualifications obtained abroad to the issue of the sometimes prohibitive cost of studying abroad undoubtedly deter many that would otherwise seek to study abroad. In respect of the latter, equal treatment as regards study grants and loans offered by a Member State to its own nationals would go some way to alleviate the financial difficulties of students seeking to study across borders. This article seeks to examine that issue from the perspective of the free movement of workers, with the first section setting out the rights that migrant workers and their family members can derive from EU law as interpreted in the case-law of the Court: when and under what conditions can a student-worker, the child of a Union worker and/or the family member of a Union worker invoke a right to equal treatment as regards study grants? The second section will then look at some recent developments in this area concerning the hot topic of the day: the export of study grants and the lawfulness of durational residency requirements imposed by the Member States as a precondition for eligibility for such grants. The third section, finally, will look more generally at the national perspective: what trends can be identified among the 27 Member States as regards the organisation of their study grant systems and are the conditions that they apply compatible with EU law?

- (¹) Opinion of A-G Colomber in Joined Cases C-11/06 and C-12/06, Rhiannon Morgan v Bezirksregiering Köln and Irish Bucher v Landrat des Kreises Düren, [2007] ECR I-9161, para. 37–43.
- (2) See Report of the High Level Expert Forum on Mobility, June 2008, available at: http://ec.europa.eu/education/doc/2008/mobilityreport_en.pdf last visited 8 June 2012. See also King, R. and Ruiz-Gelices, E., 'International Student Migration and the European "Year Abroad": Effects on European Identity and Subsequent Migration Behaviour', 9(3) International Journal of Population Geography 229 (2003) who in addition highlight the beneficial effect for mobile students on their subsequent income profiles and their propensity to consider further migration in search of job opportunities, see p. 242ff.
- (3) See the Commission's green paper: COM(2009) 329 Final Green Paper; Promoting the learning mobility of young people, of 08.08.2009, the European Parliament Resolution of 23 September 2008 on the Bologna Process and student mobility (2008/2070(INI)), OJ [2010] C8 E/18 and the Resolution of the Council and of the Representatives of the governments of the Member States, meeting within the Council of 14 December 2000 concerning an action plan for mobility, OJ [2000] C 371/03.
- (4) Joint Declaration of the European Ministers of Education convened in Bologna on 19 June 1999, available at: http://ec.europa.eu/education/policies/educ/bologna/ bologna.pdf last visited 01.04.2012.

2. The legal status quo regarding equal treatment as regards study grants

The issue of equal treatment as regards study grants has a long and relatively complicated history in the

- (5) See the report by Eurydice, Higher Education in Europe 2012: Bologna Process implementation report, p. 151ff and in particular p. 156, available at: http://eacea.ec.europa.eu/ education/eurydice/documents/thematic_reports/138EN. pdf last visited 08.06.2012.
- (6) See Commission Staff Working Document SEC(2011) nyr, Progress towards the common European objectives in education and training (2010/2011): Indicators and benchmarks, pp. 33–40, available at: http://ec.europa.eu/ education/lifelong-learning-policy/doc/report10/report_ en.pdf last visited 08.06.2012.

case-law of the Court of Justice (CJEU), starting in the 70s with the case of *Casagrande*(7). This section seeks to set out an overview of the legal status quo as regards the eligibility of Union workers and their family members for grants offered by a Member State in order to pursue studies in educational establishments situated within its territory or with a view to pursuing studies abroad (export of study grants)(8). Before addressing this particular topic, however, it is necessary to say a word on the distinction made in the case-law of the Court between equal treatment as regards study grants on the one hand, and the separate but related issue of equal treatment as regards access to education on the other.

The differentiation has its origins in two cases decided in the 1980s and originally revolved around the scope ratione materiae of what is now Article 18 of the Treaty on the Functioning of the European Union (TFEU). In the case of *Gravier*(9), a French national sought to rely on the principle of non-discrimination in what was then Article 7 EEC with a view to challenging the requirement of having to pay an enrolment fee to attend a course in a vocational institute in Belgium: the fee was not levied on Belgian nationals. In its judgment, the Court held that access to education fell within the scope ratione materiae of the Treaty for the purposes of applying Article 7 EEC due to its significance in promoting the free movement of persons and its role in the establishment of the common vocational policy(10). As such, it concluded that the practice of charging differential tuition fees by Belgium was unlawful as it constituted direct discrimination on grounds of nationality(11). In contrast, in Lair(12) the claim concerned equal treatment as regards maintenance grants for study purposes. Here, the Court took a different approach: the conditions under which such grants were provided were considered to be a matter of education and social policy, areas where competences primarily belonged to the Member States rather than the

EEC(13). It followed that such grants fell outside the scope of Article 7 EEC(14).

This distinction was to be maintained for a period of 17 years, until the seminal case of Bidar in which the Court reconsidered its older case-law and held that in the light of the introduction of the provisions on EU citizenship and the newfound (admittedly limited) competences of the EU in the area of education the issue of study grants now did fall within the scope ratione materiae of the Treaty for the purposes of applying then Article 12 of the Treaty establishing the European Community (TEC)(15).

Notwithstanding this, however, the legacy of the classic distinction continues to have relevance today in that the legal regime applying to access to education is different from equal treatment as regards study grants. As matters now stand, all EU citizens exercising their free movement rights with a view to studying in another Member State have a strong right of equal treatment as regards access to education in the host Member State(16). The Court has interpreted this principle widely to include prohibitions on discriminatory diploma requirements as well as requiring equal treatment as regards financial assistance offered by the Member State towards the payment of tuition and enrolment fees(17). Only limited derogations from this principle are accepted, subject to strict proportionality requirements and a high burden of proof(18).

In contrast, whereas all EU citizens since *Bidar* can also claim equal treatment as regards maintenance grants for study purposes, this right is subject to greater restrictions and so markedly less broad. As we shall see below, those EU citizens who are either economically active themselves or a family member(¹⁹) of an EU national who is economically active, can claim full equal treatment as regards study grants and caselaw suggests that restrictions thereto are not allowed. However, where it concerns non-economically active

⁽⁷⁾ Case 9/74, Donato Casagrande v *Landeshauptstadt München*, [1974] ECR 773.

⁽⁸⁾ For the sake of completeness it should be mentioned at the outset that the rights described below as regards study grants, including those based on Regulation 492/2011, apply mutatis mutandis to those EU nationals who exercise their freedom of establishment as self-employed persons, as well to their family members. This follows from Case C-337/97, C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep (1999) ECR I-3289, para. 27–29.

^(°) Case 293/83, Françoise Gravier v City of Liège [1985] ECR 593.

⁽¹⁰⁾ Ibid., para. 18-25.

⁽¹¹⁾ Ibid., para. 15, 25-26.

⁽¹²⁾ Case 39/86, Sylvie Lair v Universität Hannover [1988] ECR 3161.

⁽¹³⁾ Ibid., para. 15.

¹⁴⁾ Ibid., para. 16. This did not prevent the Court from finding that study grants nevertheless constituted a 'social advantage' for which Union workers could claim equal treatment on the basis of Article 7 (2) of Regulation 1612/68 (now: 7(2) of Regulation 492/2011). See below.

⁽¹⁵⁾ Case C-209/03, The Queen, on application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills [2005] ECR I-2119, para. 30–42.

⁽¹⁶⁾ See for a recent restatement: Case C-73/08, Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française [2010] ECR I-2735, para. 28–33.

⁽¹⁷⁾ See Case C-147/03, Commission v Austria [2005] ECR I-5969, para. 6, 31–35 and Case C-357/89, V. J. M. Raulin v Minister van Onderwijs en Wetenschappen [1992] ECR I-1027, para. 24–28 respectively.

⁽¹⁸⁾ Case C-73/08, *Bressol* [2010] ECR I-2735, para. 62ff.

⁽¹⁹⁾ Irrespective of nationality.

EU nationals, the host Member State may legitimately limit the provision of such grants to foreign students having demonstrated a certain degree of integration with the host Member State(²⁰). This allows a Member State to require the EU citizen to have lawfully resided on its territory for a period up to a maximum of five years prior to being eligible for study grants(²¹). As such, the default position limits eligibility for study grants to certain categories of EU citizens(²²).

A final remark in this regard concerns an issue of classification: as seen above, financial assistance meant to cover tuition fees was considered to fall under 'access to education' rather than maintenance grants for study purposes. As such the scope of the 'access to education' principle would seem to include a right of equal treatment as regards any provisions, loans, grants and other facilitatory measures which concern enrolment requirements, tuition fees or access-related issues. In that context it is submitted here that the practice of some Member States(23) to provide 'travel accommodations' (24) to students can arguably be seen as measures which, in a very real sense, promote access to education. However, currently, these Member States seem to limit such accommodations to students who are eligible to receive maintenance grants(25), therefore excluding a number of EU nationals who have not yet obtained the requisite degree of integration in the host Member State and are not economically active (or a family member of someone who is). It may be legitimately questioned whether such exclusion is compatible with EU law considering the Court's antipathy towards discriminatory measures falling within the 'access to education' framework. Therefore, for the remaining part of the discussion, the term 'study grants' will be taken to refer to **maintenance** grants or loans for study purposes only.

EU workers, their family members and equal treatment as regards study grants

In order to provide an organisational framework to discuss the relatively complex case-law in this regard, the three following positions will be considered.

- (20) Case C-209/03, *Bidar* [2005] ECR I-2119, para. 30–42.
- (21) See Case C-158/07, Jacqueline F\u00f6rster v Hoofddirectie van de Informatie Beheer Groep [2008] ECR I-8507, para. 45-60 and Article 24(2) jo. Article 16 CRD.
- (22) See for a critical view on the distinction economically active/ non active EU nationals: O'Brien, C., 'Social blind spots and monocular policy-making: the CJEU's migrant worker model', 46(4) Common Market Law Review (2009) 1107, p. 1109ff.
- (23) See eg. The Netherlands (Article 3.6–3.7 Wet Studiefinanciering 2000), Ireland (Articles 7(1) and 26 Student Grant Scheme 2011), Poland (Article 3-4 Ustawa z dnia 20 czerwca 1992 r. o uprawnieniach do ulgowych przejazdów środkami publicznego transportu zbiorowego) and Slovenia (Article 30 Zakon o štipendiranju).
- (24) Such as free or discounted travel when using public transport or grants towards the payment of travel expenses.
- (25) With the seeming exception of Poland: See Article 43 Prawo o szkolnictwie wyższym, Journal of laws of 2005, no. 164, item 1365.

- The student-worker: the student with a nationality of one of the Member States of the EU who can be qualified as Union worker(26). It will be assumed here that eight hours of remunerated work per week in a subordinate relationship qualifies the student as a worker(27).
- The student, child of a worker: the student (irrespective of nationality) who is the child of Union worker
- 3. The family member of a Union worker within the meaning of Directive 2004/38(28).

Position 1: the student-worker. The EU student-worker who has exercised his free movement rights to pursue studies in a Member State, but who at the same time qualifies as a Union worker can claim a strong right to equal treatment as regards study grants(29): in the cases of *Lair* and *Brown* the Court held that maintenance grants for study purposes constitute a social advantage within the meaning of Article 7 (2) of Regulation 492/2011(30) which must be provided to Union workers under the same conditions as host Member State nationals(31). The scope of this right of equal treatment is broadly construed and covers both grants offered on the basis of national law as well as those offered on the basis of international agreements concluded between the Member States(32). The Court also confirmed that Union workers must be able to export that study finance where that possibility is granted to the nationals of the host Member State(33). In that context the fact that the student may seek to export the grants to the Member State of which he or she is a national is irrelevant(34).

- (²⁶) See classically: Case 66/85, Deborah Lawrie-Blum v Land Baden-Württemberg [1986] ECR 2121 para. 17.
- (27) Consider that training as part of the studies can also qualify the student as a worker: Case C-3/90, M. J. E. Bernini v Minister van Onderwijs en Wetenschappen, [1992] ECR I-1071, para. 14–16. See as regards the minimum amount of hours worked further: Case C-14/09, Hava Genc v Land Berlin [2010] ECR I-931, in particular para. 22–25.
- (28) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. OJ [2004] L 158/77.
- (29) And/or scholarships: see Case 235/87, Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium [1988] ECR I-5589 para. 11–12 and 14.
- (30) Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ [2011] L 141/1.
- (31) Case 39/86, Lair [1988] ECR 3161, para. 22–24 and Case 197/86, Steven Malcolm Brown v The Secretary of State for Scotland [1988] ECR 3205, para. 25.
- (32) Case 235/87, *Matteucci* [1988], ECR I-5589 para. 11–16.
- (33) Case 235/87, Matteucci [1988], ECR I-5589 para. 16 and repeated in Case C-3/90, Bernini [1992] ECR I-1071, para. 20.
- 34) As applied to Article 7 (2) of Regulation 492/2011: Case C-3/90, Bernini [1992] ECR I-1071, para. 20.

A Member State cannot make the provision of the grant conditional on the student-worker having completed a minimum period of employment prior to the application(³⁵). Case-law further suggests that a requirement of residency of the student-worker in the territory of the Member State providing the study grant is also incompatible with Regulation 492/2011(³⁶).

The ex-worker-turned-student can furthermore continue to rely on his or her worker status in order to claim study finance where there is continuity between the previous occupational activity and the studies commenced(³⁷). In case of involuntary unemployment, however, such continuity is not required where the labour market conditions are such as to oblige the ex-worker to train in a different field(³⁸). In order to retain the ex-worker status the work must not have been merely ancillary to the subsequent studies(³⁹).

Position 2: the student, child of a Union worker. The student, child of a Union worker has two sources of rights: Article 7(2) of Regulation 492/2011 and Article 10 of that same regulation.

The conditions for a child of a Union worker to be able to rely on Article 10 of Regulation 492/2011 are twofold:

1. The child resides in the host Member State where the parent is or has been employed(40).

(35) Case 39/86, Lair [1988] ECR 3161, para. 40–44.

- (36) Case C-3/90, Bemini, [1992] ECR I-1071, para. 27–28. This was reiterated in Meeusen with particular connection to frontier workers: Case C-337/97, Meeusen [1999] ECR I-3289, para. 19–24. Note, however, that both cases concerned a directly discriminatory measure (a residency requirement imposed only on non-nationals) and that the Court did not consider any grounds for justification. It should further be mentioned that the Court has taken a more ambiguous approach as regards residency requirements in recent case-law, see eg. Case C-212/05, Gertraud Hartmann v Freistaat Bayem [2007] ECR I-6303 and Case C-213/05, Wendy Geven v Land Nordrhein-Westfalen [2007] ECR I-6347. See further below.
- (37) Case 39/86, *Lair* [1988] ECR 3161, para. 36.
- (38) Case 39/86, Lair [1988] ECR 3161, para. 37. Note that the fact that a worker from the outset entered into a fixed-term work contract does not necessarily mean that the subsequent unemployment due to the expiry of a fixed-term work contract necessarily constitutes 'voluntary unemployment' for the purposes of assessing whether the student has retained his or her worker status. The Court ruled that in making the assessment the circumstances of the employment relationship and the conditions of the labour market needed to be taken into account: Case C-413/03, Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst [2003] ECR I-13187, para. 42-47.
- (39) As was the case in Case 197/86, Brown [1988] ECR 3205, para. 27 where the student had been employed by his employer exclusively on the grounds of his admission to pursue a course of study at university in the same field.
- (40) Case C-480/08, Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department [2010] ECR I-1107, para. 44–54 and Case C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department [2010] ECR I-1065, para. 33–43.

 One of the parents is or has been active as an Union worker. For the purposes of invoking Article 10 it is enough that the child became installed in the host Member State during the exercise of the right of free movement of workers by one of the parents(41).

Once these conditions are satisfied this article provides the child with a full right of equal treatment as regards study grants(⁴²), including the export thereof where this possibility has been granted to the host Member State nationals(⁴³).

It is further been confirmed by the Court that the child of a worker remains a 'child' for the purposes of Article 10 regardless of whether he or she is older than 21 or whether he/she is dependent on his/her parents(44). In addition, the CJEU has held that the child will continue to enjoy the rights under Article 10, including a right of residency, even if the worker on whose worker-status the right was initially dependent, has left the host Member State or ceases to work(45). This article therefore lays down a particularly strong and lasting equal treatment (and residency) right. It has, however, one limitation in that it seems to require residency of the child in the host Member State where the parent is or has been employed(46).

For children not having resided in the territory of the Member State in which one of the parents works or has worked (eg. in the situation of frontier-workers), Article 10 of Regulation 492/2011 cannot be relied upon. Instead, Article 7 (2) of Regulation 492/2011

- (41) Case C-480/08, Teixeira [2010] ECR I-1107, para. 50, 72–74. It is not necessary for the worker-parent to have retained worker status or even to have been employed at the point where the child started his or her education.
- (42) Case 9/74, Casagrande v. Landeshauptstadt München [1974] ECR 773, para. 5–8 and Joined Cases 389-390/87, G.B.C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen [1989] ECR 723, para. 33–35. In more general terms the Court has confirmed that the scope of equal treatment regarding educational benefits under Article 10 is at least as broad as under Article 7 (2) of Regulation 492/2011: Case C-308/89, Carmina di Leo v Land Berlin [1990] ECR I-4185, para. 15.
- (43) Case C-308/89, *Di Leo* [1990] ECR I-4185, para. 8–16.
- (44) Case 7/94, Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal [1995] ECR I-1031, para. 23–30.
- (45) Case C-413/99, Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091, para. 50–52, 54, 68–74. See also: Case C-480/08, Teixeira [2010] ECR I-1107, para. 49–50, 53 and Case C-310/08, Ibrahim [2010] ECR I-1065, para. 38–39, 42 and Joined Cases 389-390/87, Echtemach and Moritz [1989] ECR 723, para. 19–21. This case-law has been partly codified in Article 12 of Directive 2004/38/EC. However, Article 10 of Regulation 492/2011 creates stronger rights of residency and equal treatment and continues to have independent meaning even with the adoption of Directive 2004/38. This has been confirmed in two abovementioned recent cases:
 Case C-480/08, Teixeira [2010] ECR I-1107, para. 54–60 and Case C-310/08, Ibrahim [2010] ECR I-1065, para. 44–59.
- (46) Case C-480/08, Teixeira [2010] ECR I-1107, para. 44, Case C-310/08, Ibrahim [2010] ECR I-1065, para. 33.

is of use here: in the case of Bernini and confirmed in Meeusen the Court held that study grants awarded to the children of workers constitutes a social advantage for that worker under Article 7(2) of Regulation 492/2011(47). This is to be seen as an independent right of the child of the worker (therefore also applying if the study grant is granted to students directly)(48) and includes the right to apply for export of study grants, where the possibility is offered, under the same conditions as the host Member State nationals(49). The Court explicitly confirmed the application of Article 7(2) of Regulation 492/2011 to the situation of frontier-workers: this article does not require the residency of the child in the host Member State in order for him or her to claim study finance(50).

In other respects, however, this right is somewhat weaker than the previously discussed Article 10: for the right of equal treatment for the student to remain active the worker must continue to support the student(⁵¹) and, as the case of *Fahmi* suggests, the worker-parent must continue to have the status of worker in the host State(⁵²).

Position 3: the student, family member of a Union worker. The family members(⁵³) of a Union national exercising his free movement rights as a worker can also derive a right of equal treatment as regards study grants on the basis of Article 24 of Directive 2004/38. This article is useful in that confirms that spouses and/or registered partners of the Union worker are eligible for study grants under the same conditions as host Member State

3. Issues of contention: export of grants for studies abroad

the host state for these family members.

From the above it follows that EU workers and their family members enjoy a broad right of equal treatment as regards study grants and that Member State attempts at limiting this right have been consistently struck down by the Court. The current hot topic in this area concerns the lawfulness of (indirectly discriminatory) past length-of-residency requirements imposed by several(⁵⁷) Member States as a condition for the export of study grants in order to pursue studies

where it concerns spouses and registered partners of

frontier-workers Article 7(2) of Regulation 492/2011

may again be the only option to claim study grants in

- (47) Case C-3/90, *Bernini* [1992] ECR I-1071, para. 25.
- (48) Case C-3/90, *Bernini* [1992] ECR I-1071, para. 26 and Case C-337/97, *Meeusen* [1999] ECR I-3289, para. 22.
- (49) Case C-337/97, Meeusen [1999] ECR I-3289, para. 23-24.
- (50) Case C-337/97, Meeusen [1999] ECR I-3289, para. 21–25. The Dutch and German governments had argued that the rule in Bernini regarding entitlement to study finance as a social advantage could not be extended to frontier workers: Regulation 1612/68 (now Regulation 492/2011) was intended to facilitate the integration of the worker and his family into the host Member State, whereas the frontier-worker, by definition, continues to reside in a Member State other than the host Member State. The Court disagreed and held that the rights in Regulation 1612/68 (now Regulation 492/2011) should be provided without discrimination between permanent, seasonal and/or frontier workers.
- (51) Case C-3/90, Bernini [1992] ECR I-1071, para. 25: in other words, a form of dependency is required.
- (52) Ex-workers can in some circumstances retain the right of equal treatment as regards social advantages where these are intrinsically linked with the ex-worker's prior worker status. Maintenance grants for study purposes granted to the children of Union workers do not seem to be among that category of social advantages, at least not in case the worker-parent ceases to work and returns to his or her Member State of origin: see case C-33/99, Hassan Fahmi and M. Esmoris Cerdeiro-Pinedo Amado v. Bestuur van de Sociale Verzekeringsbank [2001] ECR 2415, para. 33–47.
- (53) As defined in Article 2(2) of Directive 2004/38.

- (54) See Article 24 Directive 2004/38. Note that this category may, however, fall afoul of the (maximum) age requirements that many Member States apply to eligibility. This applies a fortiori to relatives in the ascending line who are in principle also eligible.
- (55) This can be said to follow from Case 152/82, Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées [1983] ECR 2323, para. 10–18. In a more general sense one can refer to Case 32/75, Anita Cristini v Société nationale des chemins de fer français [1975] ECR 1085.
- (56) Case C-480/08, Teixeira [2010] ECR I-1107, para. 54–60 and Case C-310/08, Ibrahim [2010] ECR I-1065, para. 45–59.
- (57) Austria, Cyprus, Denmark, Finland, Germany, Ireland, the Netherlands and Sweden.

the application of Article 7(2) of Regulation 492/2011 to this category of family members in the area of study grants, although, considering the broad-ranging case-law of the Court, it is likely that these individuals could nevertheless also rely on that Article(55). For the most part, therefore, reliance on Article 24 of Directive 2004/38 will give little added value. Children of workers can claim more extensive rights under Article 10 of Regulation 492/2011 as the right attached thereto, in contrast to the status of 'descendant' under Directive 2004/38, are not limited in terms of age, the dependency of the child on the worker-parent or even the retention of worker status of the worker-parent. The cases of Teixeira and Ibrahim confirm that Article 10 of Regulation 492/2011 remains an independent source of rights, the interpretation of which was not affected by the introduction of Directive 2004/38(56). Children of frontier-workers are also better off overall in relying on Article 7 (2) of Regulation 492/2011 to claim study grants in the Member State of employment as the application of Directive 2004/38 to such situations is somewhat unclear: Article 24 speaks of Union citizens 'residing (...) in the territory of the host Member State'. Similarly, for family members who are not children, Article 7(2) of Regulation 492/2011 will also be at least as broad as Article 24 of Directive 2004/38; and,

nationals(54): The Court has never explicitly confirmed

abroad. While the Court has never interpreted EU law to require the portability of study grants, where Member States provide for such a possibility the conditions under which such grants are provided must comply with EU law(58). In casu the issue of past length-of-residency requirements was brought to the attention of the Court by the Commission, which initiated infringement proceedings against the so-called '3-out-of-6 rule' applied in the Dutch law on study finance (*Wet Studiefinanciering 2000*, hereafter WSF 2000) and contends that the residency requirement amounts to discriminatory treatment prohibited by Article 7 (2) of Regulation 492/2011 and/or Article 45 TFEU.

Article 2.14 of the WSF 2000 provides students satisfying the general criteria for eligibility for study grants(59) with the possibility to export these grants in order to attend a full of course of study offered at a foreign institute for higher professional education or university (so-called *meeneembare studiefinanciering*; portable study grants, hereafter 'MNSF'). This export, however, is conditional on the foreign course fulfilling certain criteria relating to its quality as well as the fulfilment of a residency requirement by the applicant. The latter requires the applicant to have lawfully resided in the Netherlands for at least three years in the six years preceding enrolment at the foreign institute(60). It should be taken into account, however, that studies pursued in certain 'border areas' in Flanders and certain German Länder are exempted from the 3-out-of-6 rule by ministerial decree(61).

A-G Sharpston delivered her Opinion in this case on 16 February 2012 and in principle found the 3-out-of-6 rule adopted by the Netherlands to violate EU law. Referring to classic case-law, she considered that the 3-out-of-6 rule functioned as a past residency requirement constituting indirect discrimination as it is liable to affect migrant workers to a greater extent than host Member State national workers. She then considered the two defences put forward by the Netherlands:

In its first ground for justification, the Netherlands argued that the 3-out-of-6 rule was necessary in order to avoid the MNSF becoming an unreasonable

financial burden on Dutch society: relying on *Bidar* and *Förster*, it was contended that the provision of study grants to EU citizens, irrespective of whether they were economically active or not, could legitimately be limited to those individuals having demonstrated a certain degree of integration with the host Member State in order to avoid excessive costs.

A-G Sharpston, however, disagreed and rejected the transposition of the 'genuine link criterion' from the Bidar/Förster context, in which it was applied to economically non-active EU citizens, to the context of migrant workers and their family members. Instead, she reiterated classic case-law: budgetary concerns cannot justify discriminatory treatment where it concerns economically active citizens(62). As such, the Advocate-General held that (non-contributory) social advantages have to be provided on equal terms to host Member State national workers and migrant workers(63). In case the Court was nevertheless to disagree with that assessment (and thus, in the view of the A-G, to depart from its established case-law), A-G Sharpston also looked into the proportionality of the measure put forward by the Netherlands. She accepted that the rule could be suitable in reducing the financial pressure on the education budget of the Netherlands (the latter had submitted a studies which estimated the extra costs to be around EUR 175 million)(64), but did not consider it necessary. First, she pointed out the inconsistency inherent in the application of the 3-out-of-6 rule: whereas non-residing children of migrant workers (as well as Dutch nationals who did not fulfil the 3-out-of-6 rule) were excluded from the export of study grants, those same categories were not excluded from receiving such study grants for studies followed in educational establishments in the Netherlands(65). The Netherlands made no submission in which the different treatment of these situations was justified. Secondly, and more generally, the A-G found the measure to be too general and exclusive in nature as other elements indicative of integration (such as having the status of migrant worker) were a prima facie excluded from consideration; moreover she questioned the use of a residency requirement more generally as an indication of participation in society(66). The arguments put forth by the Netherlands regarding the fact that other funds could be available for nonresiding individuals, the use of x out of x residency criteria by other Member States as well as the arguments relating to the difficulty in monitoring the

⁽⁵⁸⁾ Joined Cases C-11/06 and C-12/06, Rhiannon Morgan v Bezirksregiering Köln and Irish Bucher v Landrat des Kreises Düren [2007] ECR I-9161, para. 24, 28.

⁽⁵⁹⁾ See for an extensive overview: Hoogenboom, A., 'Mobility of students in the EU: access to education and study finance', in Schneider, H. and de Groof, J. (eds.), The European Dimensions of Education Policies, forthcoming (2012).

⁽⁶⁰⁾ Article 2.14 (2) (c) WSF 2000.

⁽⁶¹⁾ See Beleidsregel van de Minister van Onderwijs, Cultuur en Wetenschap van 17 december 2009, nr. H0&5/ B5/2009/178030, inzake de 'Uitzondering verblijfsvereiste voor studenten in de grensgebieden' op grond van artikel 11.5 Wet studiefinanciering 2000, Stcrt. 2009, 20681.

⁽⁶²⁾ Opinion of A-G Sharpston in Case C-542/09, Commission v the Netherlands, not yet decided, para. 89, 92–95. Hereafter: Opinion A-G Sharpston.

⁽⁶³⁾ Opinion A-G Sharpston, para. 91.

⁽⁶⁴⁾ Ibid., para. 98–104.

⁽⁶⁵⁾ Ibid., para. 119.

⁽⁶⁶⁾ Ibid., para. 122.

status of the student to counter 'abuse' were similarly dismissed by the $A-G(^{67})$.

The second argument put forward by the Netherlands concerned the specific purpose of the MNSF: it was enacted to promote the mobility of students who would otherwise study in the Netherlands and who are afterwards likely to return to the Netherlands where the experience gained abroad will benefit the student, as well as Dutch society and the employment market. Whereas A-G Sharpston accepted the goal of encouraging student mobility as a legitimate aim and pointed to a degree of freedom on the part of the Member State in determining the conditions for funding(68), she nevertheless found the 3-out-of-6 rule both inappropriate and unnecessary viewed in the light of its objectives. In the first place, she pointed out that fulfilment of a past residency requirement does not inherently mean that the student is likely to return to the Netherlands after completion of the studies abroad(69). Regarding the necessity point she found that the Netherlands had not submitted any convincing evidence as to why the 3-out-of-6 rule was the only option: the Netherlands had not proven why a shorter length of residency requirement was not feasible nor adequately considered alternative measures of a less restrictive nature (the A-G suggested a prohibition to export study grants to the Member State of residence)(70).

Comments

The case brought by the Commission centres around the compatibility of a durational residency requirement with Article 7(2) of Regulation 1612/68 (now Article 7(2) of Regulation 492/2011) and Article 45 TFEU concerning both migrant workers and their dependent family members as well as frontier/cross-border workers and their dependent family members. It is necessary to distinguish the different situations that are at issue in this case more clearly as this has implications for the (strength of the) rights EU nationals can claim. The following three situations can fall foul of the 3-out-of-6 rule:

- 1. The first case concerns the worker and his family members residing in the Netherlands. It concerns two sub-situations:
 - 1.1 The student-worker (similar to the Lair or Matteucci situation) applying for a study grant under the WSF 2000 in order to follow an university course abroad.

- 1.2 The child or other family member of the Union worker who seeks to study abroad (similar to *di Leo*).
- The frontier-worker and his family members; working in the Netherlands but residing in another Member State. The same two sub-situations arise here.
- A hybrid situation whereby the frontier-worker parent resides in another Member State, but works in the Netherlands, but where his or her family members reside in the Netherlands

Following the principles set out above, the studentworker as well as student, frontier-worker can rely on Article 7(2) of Regulation 492/2011 in all three situations to claim equal treatment as regards maintenance grants (including export thereof) for study purposes offered by the host Member State. The child of the worker can rely on Article 10 of Regulation 492/2011 for equal treatment rights if he or she resides in the host Member State (situation 1 and 3) and Article 7(2) of Regulation 492/2011 if not (situation 2; subject to dependency of the child). Of course he or she can also rely on Article 7(2) in situation 1 and 3, but this is less advantageous as the child will then, as in situation 2, have to prove dependency whereas this is not required under Article 10. Finally, the (dependent) family member, nonchild can rely on Article 7(2) of Regulation 492/2011 in all three situations.

The distinction made here serves to highlight two points. First, as seen above in the section on the status quo, it is important to determine the source of the rights as the requirements for their invocation differ (e.g. Requirement of dependency of the child or not) and they differ in terms of the extent of the rights provided (e.g. Article 10 comes with a free right of residency for the child). Secondly, at issue in this case is a durational residency requirement imposed on Union workers (and their family members). This has two aspects, the residency requirement in the strict sense (distinguishing between resident and non-resident EU workers) and the duration thereof (distinguishing between resident Union workers based on their length of residency). Regarding the first aspect, the A-G mostly glossed over this issue, relying on classic law which states that the frontier-worker is to be treated equally to the resident worker for the purposes of applying the principle of equal treatment found in Article 7(2) of Regulation 492/2011(71). She therefore concluded that, as a group, migrant workers were more likely to be affected by the rule than host Member State national workers and the measure was thus indirectly discriminatory. Yet, the case-law

⁽⁶⁷⁾ Ibid., para. 124-127.

⁽⁶⁸⁾ Ibid., para. 135-139.

⁽⁶⁹⁾ Ibid., para. 147.

⁽⁷⁰⁾ Ibid., para. 150-158.

⁽⁷¹⁾ See Case C-337/97, Meeusen [1999] ECR I-3289, para. 19–21.

of the Court is more ambiguous in this regard than it might seem at first glance. In the cases of Geven, Hartmann and Hendrix the Court seemed to have been sensitive to the pleas of the Member States seeking to justify the imposition of a residency requirement as a precondition to receive social advantages(72), leading some commentators to conclude that residency requirements could thus legitimately be imposed in order to exclude frontier-workers and their family members from certain benefits in the Member State of employment(73). On the other hand, in the recent Commission v Germany case concerning a savingpensions bonus the Court seemed to have reverted to its orthodox position and showed less willingness in allowing distinctions between resident migrant workers and frontier-workers(74).

Further guidance regarding the extent that the position of frontier-workers is harmonised with that of resident migrant workers for the purposes of claiming equal treatment as regards social advantages is therefore necessary, in particular regarding areas, such as study grants, that fall outside the scope of Regulation 883/2004(75) on the coordination of the social security systems of the Member States. A recent study indicates that some 780 000 EU nationals are engaged in cross-border work and the figure is on the rise, making the frontier-worker position an increasingly occurring phenomenon in the EU(76). At the same time the experts who contributed to the report identified a large number of issues with and obstacles to the eligibility of these non-residing EU workers and their family members to receive benefits in their country of employment(77). This can lead to a weakened position of the frontier-worker and to undesirable situations such as the one giving rise to proceedings in Meeusen, where the frontier-worker status of the parents (Belgian nationals, residing in Belgium but working in the Netherlands) of a child with Belgian nationality prevented the latter from claiming study grants both in Belgium (because the parents worked in the Netherlands) and in the Netherlands (because of the requirement that the recipient reside in the Netherlands).

There is therefore much to be said for insistence on the harmonised approach assumed by the Advocate-General which equalises the position of frontierworkers with that of resident workers. Considering the increasing importance of frontier-workers in and for the EU, the benefits provided to the economy of the host Member State and the EU as whole and the fact that such labour mobility is probably more attractive to individuals than 'full' mobility which often requires moving away from friends, family and social environment, it is imperative that the Court of Justice clarifies and strengthens the position of these individuals and protects their entitlement to equal treatment in their Member State of employment.

Apart from the distinction between frontier-worker and the resident Union worker, the case also more generally raises interesting questions as regards the lawfulness of **durational** residency requirements for Union workers (which in addition to frontier-workers, can also catch resident Union workers)(78). Classic case-law suggests that such durational residency requirements are incompatible where imposed on economically active EU nationals (and their family members) following Hoeckx(79) (unlawfulness of a five-year residency requirement imposed only on non-Belgian EU nationals) and its follow-up Commission v Belgium(80) (in which the Court struck down the modified five-year residency requirement which now applied to both Belgian nationals and EU nationals). For study grants specifically this position is also confirmed in Article 24(2) Directive 2004/38 which specifically excludes workers and other economically active individuals from the requirement to have to obtain a right of permanent residency prior to being able to obtain a right to equal treatment as regards maintenance grants for study purposes. In addition, the Court has already had occasion to reject other durational requirements, such as a minimum period of employment prior to eligibility for study grants(81). Finally, there is nothing in the case-law of the Court to suggest that export of study grants deserves special treatment as a social advantage(82).

- (°²) Case C-213/05, Wendy Geven v Land Nordrhein-Westfalen [2007] ECR I-6347, Case C-212/05, Gertraud Hartmann v Freitaat Bayern [2007] ECR I-6303 and finally Case C-287-05, D.P.W. Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen [2007] ECR I-6909.
- (73) See A-P van der Mei, 'Grensarbeiders en het recht op aan ingezetenschap gekoppelde sociale voordelen', 10 NTER 210 (2007), p. 212–214.
- (74) Case C-269/07, Commission v Germany [2009] ECR I-7811, para. 51–68, in particular para. 59–61.
- (75) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ [2004] L 166/1.
- (76) G. Nerb et al., Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries, p. VII, 16–27 available at: http://ec.europa.eu/social/BlobServlet?docld=3459&langId=en last visited 23.03.2012.
- (⁷⁷) Ibid., p. 51–53.

- (78) See for a US perspective in this regard: van der Mei, A.-P., 'Freedom of movement for indigents: a comparative analysis of American Constitutional Law and European Community Law, 19(3) Arizona Journal of International and Comparative law, 803, p. 814–829. See further for a comparative perspective regarding labour mobility: Jacoby, S. and Finkin, M., 'Labor Mobility in a Federal System: The United States in Comparative Perspective', 20(3) The International Journal of Comparative Labour Law and Industrial Relations (2004) 313.
- (79) Case 249/83, Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn [1985] ECR 973, para. 23–25.
- (80) Case 326/90, *Commission* v *Belgium*, [1992] ECR I-5517, para. 1–3.
- (81) Case 39/86, *Lair* [1988] ECR 3161, para. 40–43.
- See eg. the reasoning of the Court in di Leo, where it refused to accept a limitation on export of study grants where the child of the Union worker sought to export the grants for a course of study in their Member State of nationality: Case C-308/89, di Leo [1990] ECR I-4185, para. 12–16.

As such, the lawfulness of a durational residency requirement such as the 3-out-of-6 rule, insofar it applies to Union workers (whether resident or crossborder) and their family members, can be seriously doubted. On a conceptual level one can certainly share the misgivings of A-G Sharpston in allowing such residency requirements to be applied to avoid an unreasonable financial burden. Surely, the paradigm and logic of the free movement of workers (and other economically active individuals) in an internal market militates against such a defence being invoked: in essence it would allow the Member State to enjoy the benefits of the contribution made to its economy by these individuals without a corresponding duty to reciprocate. The alternative argument of using the residency requirement to promote the dual objective of **promoting student mobility** as well as the return of the student after their study period abroad is a prima facie stronger: indeed there are some recent studies that indicate that student mobility is linked to an increased probability of subsequent labour mobility, which could lead one to the conclusion that promotion of student mobility by a Member State without some form of guarantee that the student returns would constitute an unattractive policy option(83).

However, several points should be made in this regard. First of all, the 'brain drain' argument should not be overstated: notwithstanding the link between study and labour mobility the (great) majority of students still return to their Member State of origin(84). In that regard it is further worth pointing out that Oosterbeek and Webbink found that even where students took up employment abroad subsequent to their study, in the medium-term (after some years working abroad) the return rate started to increase(85), with students thereby bringing both new skills and greater experience back to the country of origin. Secondly, this study only address the outflow of students(86); as will be seen below, however, a relatively large number of Member States in fact provide grants for studies abroad which

could lead to compensating inflow of students. As such, promoting student mobility may very well lead to a mutually beneficial exchange of students and (highly skilled) labour. Thirdly, the benefits of student mobility are not limited to extra skills brought to the Member State of origin by return migration. Mobility can increase competition between universities for (internationally mobile) bright students and so lead to higher quality education for domestic and foreign students alike(87); the prospect of migration and a higher return on educational investments (e.g. due to higher wages abroad) can further induce individuals to invest in their own education creating growth in human capital accumulation across the board in the country of origin which has been argued to be sufficient to offset the (actual) partial emigration of that group(88); more generally, student mobility promotes innovation, mutual understanding, cultural exchange and may even foster a greater sense of shared EU citizenship(89) which apart from benefiting the EU as a whole, creates positive tangible and less tangible spillover effects for the host country and the country of origin(90). As such, the promotion of student mobility with no guarantee that the student (immediately) returns does not amount to mere altruism on the part of the Member State of origin but benefits the EU as a whole as well as that Member State in a multitude of ways.

Finally, apart from the various arguments put forward against the coherency and logic of the defences invoked by the Netherlands, one can agree with A-G Sharpston's assessment of the suitability/necessity of the 3-out-of-6 rule. First of all, the Court's judgment in *Stewart* (decided on the basis of the EU citizenship provisions) seems to indicate that the blanket use of durational residency requirements as the basis for assessing the degree of integration/genuine link with the host Member State is no longer good law: rather the Court seems to be moving towards requiring a more case-by-case assessment in which all connecting factors with the host Member State are to be taken into

⁽⁸³⁾ See Pares, M. and Waldinger, F., 'Studying abroad and the effect on international labour market mobility: evidence from the introduction of Erasmus', 121 The Economic Journal (2011) 194 and Oosterbeek, H. and Webbink, D., 'Does Studying Abroad Induce a Brain Drain?', 78 Economica (2011) 347. Hereafter: Pares and Waldinger (2011) and Oosterbeek and Webbink (2011). Note, however, that it has been argued that these studies do not adequately distinguish between cause and effect: it may be that programmes promoting study mobility attract in particular those individuals who already desired to live and work abroad in the first place. So rather than inducing labour mobility, such programmes facilitate the fulfilment of already existing desire of mobility, see: van Mol, C., 'The Influence of Student Mobility on future migration aspirations', 8(5) Canadian Diversity (2011) 105, p. 106–108.

⁽⁸⁴⁾ See Kahanec, M. and Králiková, R., 'Pulls of International Student Mobility', IZAP DP Discussion Paper Series 6233 (2011), p. 6 and Rivza, B. and Teichler, U., 'The Changing Role of Student Mobility', 20 Higher Education Policy (2007) 457, p. 465.

⁽⁸⁵⁾ Oosterbeek and Webbink (2011), p. 363–364.

⁽⁸⁶⁾ Pares and Waldingers (2011), p. 196 and Oosterbeek and Webbink (2011), p. 347–348.

⁽⁸⁷⁾ S. Vincent-Lancrin, Cross-Border Higher Education: Trends and Perspectives, in Higher Education to 2030 Vol 2 (OECD: Centre for Educational Research and Innovation, 2009), p. 74–75.

Mountford, A., 'Can a brain drain be good for growth in the source economy?', 53 Journal of Development Economics (1997) 287, p. 288, 302–303.

⁽⁸⁹⁾ See the Report of the High Level Expert Forum on Mobility, June 2008, available at: http://ec.europa.eu/education/ doc/2008/mobilityreport_en.pdf last visited 26.03.2012. See also the Commission's Green Paper on learning mobility: COM(2009) 329 Final, Promoting the learning mobility of young people of 08.07.2009.

⁽⁸⁰⁾ E.g. the formation of formal and informal business and trade networks, closer cooperation across borders, and foreign direct investment opportunities. See Kugler, M. and Rapoport, H., 'Skilled Emigration, Business Networks and Foreign Direct Investment', Cesifo Working Paper No 1455 (2005), p. 12–13. See also: Tremblay, K., 'Academic mobility and Immigration', 9(3) Journal of Studies in International Education (2005) 196, p. 224–225.

account(91). Secondly, there is in any case no obvious link between fulfilment of the durational residency requirement and the propensity of the student to return to the Netherlands after their studies; nor has the Netherlands provided any support for this statement. Moreover, it is in that sense somewhat paradoxical and counter-intuitive that a grant seeking to promote mobility requires as a qualifying criterion that the applicant be (relatively) 'static' and resident in the Netherlands. As a last point it is submitted here that, as A-G Sharpston points out, less restrictive measures are available: the Netherlands could for example adopt a graduate return promotion programme, with active recruitment of highly skilled individuals with foreign study experience through (temporary) favourable taxation discounts(92). Overall, therefore, it is submitted here that the 3-out-of-6 rule must be rejected as incompatible with EU law and that instead both the Netherlands and the other Member States of the EU would do well to actively promote the mobility of students in the EU in view of the many benefits that it could bring to the EU as a whole and the Member States involved

4. National trends in study grants

From the sections above it would seem quite clear that the issue of free movement of students has a degree of salience in the European integration context and has led to an extensive amount of case-law before the Court of Justice dealing with the rights and position of these individuals. This last section seeks to look at the national legislation of the 27 Member States regarding study grant provision with a view to identifying some current trends as well as provide some comments thereon.

The great majority of the EU Member States have some kind of centralised and institutionalised support for students(93), although the conditions under which such support is provided (eg. based on merit, social need or universal values) as well as the support itself (allowance amounts, specificity of the grant) vary widely between the Member States. One can contrast Sweden, which provides a single grant (*studiemedel*) consisting of a generous allowance with additional loan facilities for eligible students enrolled in a higher education establishment up the age of 54(94) with the Polish system which provides a great variety of different

(⁹⁵) See Article 173 *Prawo o szkolnictwie wyższym, Journal of laws of 2005*, no. 164, item 1365 as amended for a full list.

grants (maintenance grants, disabled persons grants, sporting achievement grants, meals grants)(95) some of which are means tested and others which are based on merit, which is combined with a loan system with loans being more universally available and provided by commercial banks(96). A common denominator for almost all(97) study grant systems, however, are nationality requirements: (non merit-based) study grants are in the first instance provided to individuals with the nationality of the Member State in question; mere residence or (successful) admission to a higher education establishment does not suffice. However, as seen above, certain categories of EU nationals can derive a right to equal treatment from EU law as regards study grants. In response to this, national systems more or less adopt one of two approaches: Either they insert a 'catch-all' clause specifying that migrant EU nationals

are to be treated as if they had the nationality of the

host Member State for the purpose of eligibility for study

grants 'where such is required by EU/international law' (a 'catch-all' clause)(38) or else the relevant legislation

will set out the specific configurations of EU nationals

eligible for study grants(⁹⁹). Catch-all clauses have the distinct advantage that new developments in the case-law of the Court are (in principle) incorporated

automatically and without the need for amendment of the relevant legislation. However, in practice, such clauses

may have a tense relationship with legal certainty, as

individuals may be uninformed of their rights under EU

law (and thus their potential entitlement) and agencies

tasked with determining the eligible categories of

individuals may not be fully up to date with the latest developments in EU law(100). Legislation specifically

setting out the configurations of EU nationals eligible

for study grants may provide a greater degree of legal

^(%) See Article 173ff *Prawo o szkolnictwie wyższym and Ustawa z dnia 17 lipca 1998 r. o pożyczkach i kredytach studenckich, Journal of laws of 1998*, no. 108, item 685 as amended.

⁽⁹⁷⁾ The Slovak Republic seems to be the only exception: Article 95–96 Zákon z 21. februára 2002 o vysokých školách a o zmene a doplnení niektorých zákonov.

⁽⁹⁸⁾ Such catch-all clauses are found in Austria, Bulgaria, Estonia, Finland, Ireland, Italy, Lithuania and the Netherlands: Less complete catch-all clauses (requiring EU nationals but not host Member State nationals to satisfy additional criteria such as a requirement of residency or possession of a residency permit) are found in Hungary, Latvia, Luxembourg and Slovenia (before the most recent amendment).

⁽⁹⁹⁾ The approach of the Flanders Community of Belgium, Denmark, France, Germany, Poland, Sweden and the United Kingdom. The Walloon Community of Belgium, Cyprus, Portugal and the Slovak Republic are a collection of states that also technically fall in this category but only codify the case-law of the Court with regard to the different positions to a very limited degree. Malta does not provide non-Maltese nationals with any study grants at all.

⁽¹⁰⁰⁾ See e.g. the website of the Studienbeihilfebehörde, which as a result of the rapid developments in the case-law of the Court of Justice only provides very general guidelines as to eligibility: http://www.stipendium.at/studienfoerderung/ studienbeihilfe/wer-hat-anspruch/ last visited 30.03.2012.

⁽⁹¹⁾ Case C-503/09, Lucy Stewart v Secretary of State for Work and Pensions [2011] nyr, para. 85–104, in particular 95–101.

⁽⁹²⁾ Similar to the current '30 %-regeling' for highly skilled migrants, see Article 31a (2) (e) Wet op de loonbelasting 1964, Stb. 1964, 519 and http://www.rijksoverheid.nl/ onderwerpen/belastingtarieven/loonbelasting/30-regeling last visited 27.03.2012.

⁽³³⁾ Only in Spain, Romania, Greece and Czech Republic is such a central system currently absent; instead a variety of parallel scholarship programmes provide the necessary support.

⁽⁹⁴⁾ See Chapter 3 of the Studiestödslagen 1999:1395.

certainty, but risks becoming outdated or is potentially based on an incorrect or restrictive interpretation of EU law (with more limited possibilities of the relevant agency to correct this). The relevant legislation of the Walloon Community of Belgium, adopted in 1983, is a case in point as it seems to have missed the last 20 years of case-law of the Court in this regard(101). Finally, actual compliance with EU law in both cases hinges on the practice of the agency or authority tasked with the administration of the study grant system. Whereas the responsibility resting on the authority in this regard is greater where a catch-all clause applies (as the agency will have to determine prima facie eligibility), the relevant authorities operating in both types of systems may nevertheless also err in assessing the facts and/or the application of the rules(102).

As to the compatibility of the different study grant systems of the 27 Member States with EU law, only some general trends and remarks will be set out here. One worrying trend is the practice of Member States to simply implement Directive 2004/38 without regard for more extensive rights that can be claimed on the basis of Regulation 492/2011 in a variety of situations (e.g. for frontier-workers, and/or for children of workers)

A first point in this regard concerns the position of the 'child-student' of the Union worker. Quite a few Member States have implemented and are following the system of the directive in determining eligibility of study grants for this position(103). The CRD, under the heading 'family members' defines the 'child/children' as: 'the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in [Article 2(2)(b)]'(104). The directive then further provides that where an individual is a 'family member' of a Union worker or self-employed person, he or she will be able to claim study grants under Article 24 CRD(105).

It follows that where an individual reaches the age of 21 and is no longer dependent on the worker-parent (and/or if the worker-parent were to cease to have the status of worker or to leave the Member State), yet has not obtained permanent residency, he or she would no longer be a 'family member' of a worker and thus no longer be eligible for study grants under the system of the CRD. Yet as seen above, such an individual will, however, remain eligible for study grants under Article 10 of Regulation 492/2011 following the cases of Teixeira and Ibrahim: once active this right is not affected by age, dependency or residence/ worker-status of the worker-parent(106). It follows that over-reliance on Directive 2004/38 in this regard leads to non-recognition of the eligibility of such individuals to study grants in seven to eight Member States.

A second point concerns the use of residency requirements imposed **only** on migrant EU nationals and their family members as a precondition for eligibility to receive study grants(¹⁰⁷). In principle, such requirements do not breach Article 24 CRD, as this article only provides a right of equal treatment to those individuals residing in the host Member State on the basis of the directive. Of course, such a requirement nevertheless disadvantages frontier-workers and their family members. As seen above, the cases of *Bernini* and *Meeusen* clearly proclaim this as incompatible with Article 7(2) of Regulation 492/2011(¹⁰⁸) (it is directly discriminatory) and as such the five Member States applying the requirements are violating EU law.

Regarding the issue of the application of **indirectly** discriminatory residency requirements to workers and their family members, two types are used: simple or durational residency requirements for eligibility for study grants in general(109) or those specifically imposed as precondition for the export of study grants only(110). The issue regarding the legality of (indirectly discriminatory) simple and durational

⁽¹⁰¹⁾ See Décret réglant, pour la Communauté française, les allocations d'études, coordonné le 7 novembre 1983.

⁽¹⁰²⁾ See eg. the report of the Danish Ombudsman regarding the practice of the Danish authority (Ankenævnet for Uddannelsesstøttens, now renamed: Uddannelsesstyrelse), alleging incorrect determination of the worker-status of a student based on formal registration with the Regional State Administrations rather than on the basis of an analysis of the factual circumstances: Undersøgelse af Ankenævnet for Uddannelsesstøttens praksis inden for udvalgte områder, J.nr. 2008-3784-980, p. 57 and further, available at http://www.ombudsmanden.dk/om/ombudsmandens_arbejde_legen_drift/projekter/Undersoegelse_af_Ankenaevnet_for_Uddannelsesstoettens_praksis_inden_for_udvalgte_omraader/Helerapporten.pdf/ last visited 30.03.2012.

⁽¹⁰³⁾ Finland, Hungary, Ireland, Luxembourg, Poland, Slovenia, Sweden and (possibly) the Netherlands. Denmark has a very extensive article dealing with these matters, the details of which, however, involve too restrictive an interpretation.

⁽¹⁰⁴⁾ Article 2(2)(c) CRD.

⁽¹⁰⁵⁾ See Article 24(1) jo. (2) CRD.

⁽¹⁰⁶⁾ Case C-480/08, *Teixeira* [2010] ECR I-1107, para. 54–60 and Case C-310/08, *Ibrahim* [2010] ECR I-1065, para. 44–59.

⁽¹⁰⁷⁾ Estonia, Hungary, Latvia, Poland, Portugal and Slovenia. Note, apart from Poland and Portugal, these countries also seem to require a valid residency permit as a precondition for eligibility for study grants. It is however settled case-law of the Court that such procedural requirements may not validly be imposed as a precondition for a right derived directly from EU law: Case C-459/99, Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Etat belge [2002] ECR I-6591, para. 74 and the classic case of Case 48/75, Jean Noël Royer, [1976] ECR 497, para. 31–33.

⁽¹⁰⁸⁾ Case C-3/90, Bernini [1992] ECR I-1071, para. 27–28 and Case C-337/97, Meeusen [1999] ECR I-3289, para. 19–24.

^{(109) &#}x27;Simple' residency requirement: Italy for certain regional grants, Spain for certain regional grants. Durational residency requirements are found in Cyprus, Ireland, Slovak Republic and the United Kingdom.

⁽¹¹⁰⁾ Flanders and Poland (although arguably contestable) adopt simple residency requirements. Austria, Cyprus, Denmark, Finland, Germany, Ireland, the Netherlands and Sweden adopt durational residency requirements.

residency requirements has already been dealt with above. As argued, the tendency of the Court has been to reject the lawfulness of such requirements where these are imposed on Union workers and their family members(111). Overall this would lead one to the conclusion that the lawfulness of residency requirements applied to study grants enjoyed on the territory of the Member State would seem suspect. Whether the **export** of study grants deserves special treatment is doubtful. A-G Sharpston gave a relatively specific Opinion, tailored to the situation of the Netherlands. Whereas she rejects the use of durational residency requirements out of hand where they are applied in order to reduce costs, she seems to be more favourably disposed towards other grounds for justification (eq. promotion of mobility of students yet avoiding brain drain) where the Member States sufficiently substantiate their arguments. Hopefully, the Court's judgment in *Commission* v *the Netherlands* will provide some clarity in this matter.

Finally, apart from the over-reliance on Directive 2004/38, we can also identify some other issues. An admittedly small but significant (as it includes e.g. Germany and France) number of Member States do not seem to recognise the position of the (current) student-worker(112) and only provide for the ex-workerturned-student position. However, according to settled case-law of the Court the status of student (national concept) cannot prejudice the Union interpretation given to worker: part-time work of a student if it amounts to a genuine and effective economic activity allows the student to rely on Article 7(2) of Regulation 492/2011 to claim equal treatment as regards study grants(113). As such, the legislation of these Member States is incomplete. In addition, The Flanders Community of Belgium makes the recognition of the student-worker position subject to the completion of a minimum period of employment which is incompatible with EU law following Lair(114). There are also some

indications that the TCN family members of migrant EU workers are not recognised as being entitled to receiving study grants on the same conditions as host Member State nationals(115).

Overall, therefore, the criteria for eligibility for study grants in the 27 Member States both as regards general eligibility and also the export of such grants still leave something to be desired as regards compatibility with EU law.

5. Conclusion

This article has sought to address the issue of equal treatment as regards study grants from a free movement of workers perspective. Whereas much of the foundational case-law in this area was decided in the 1980s and 1990s, the issue remains a topical one as the pending case of *Commission* v the Netherlands shows: the durational residency requirement at issue in that case raises questions regarding the position of frontier-workers and (short-term) resident migrant EU workers, as well as pits the benefits associated with the free movement of workers and students against the financing of and solidarity in nationally organised welfare states. The decision of the Court in this case potentially has great impact: as seen in the last section a number of Member States employ similar criteria to determine eligibility for the export of study grants. Apart from the issue of export, however, gaps continue to exist in the national legislation of the Member State which results in certain individuals who should be eligible for study grants under EU law being excluded. In that regard, and in order to avoid these issues in the future, it may perhaps be time to look more seriously into a European instrument with a view to either coordinating more closely or else providing directly maintenance grants for study purposes to the free-moving student.

⁽¹¹¹⁾ Case 249/83, Hoeckx [1985] ECR 973, para. 23–25, Case 326/90, Commission v Belgium [1992] ECR I-5517, para. 1–3, Case C-57/96, Meints, [1997] ECR I-6689 and Case C-3/90, Bernini [1992] ECR I-1071, para. 27–28 and Case C-212/06, Government of the French Community, and Walloon Government v Flemish Government [2008].

⁽¹¹²⁾ France, Germany, French Community of Belgium and possibly Slovenia.

⁽¹¹³⁾ See above. See further Case C-3/90, Bernini [1992] ECR I-1071, para. 14–16 and Case C-14/09, Genc [2010] ECR I-931, para. 22–25.

⁽¹¹⁴⁾ This is unlawful following Case 39/86, *Lair* [1988] ECR 3161, para. 40–44.

⁽¹¹⁵⁾ Belgium, both as regards the legislation of the Flanders and Walloon Community, Cyprus and Latvia.

The impact of transitional arrangements on migration in the enlarged EU

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This paper assesses the impact of transitional restrictions on the free mobility of labour on the location choice of workers from the newer Member States of the European Union, following the enlargement of 2004. We measure the degree of labour market restrictions relative to other potential locations within the EU, and develop a simple model of the location decision, to quantify the role of transitional arrangements after factoring out macroeconomic developments.

1. Introduction

On 1 May 2004, eight former communist countries from central and eastern Europe joined the European Union: Poland, the Czech Republic, Lithuania, Latvia, Estonia, Hungary, Slovenia and Slovakia, collectively known as the EU-8(¹). Subsequently, the EU experienced a significant increase in population flows from the EU-8 to the older members of the European Union: Belgium, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom, which are referred to as the EU-15.

Free movement of workers within the EU was achieved in 1968 and acts as one of the four pillars of the EU single market. While the policy was introduced with the aim of removing barriers to the functioning of a fully integrated market economy in Europe and improving the matching of labour supply and demand, concerns regarding the sudden shock of opening labour markets in existing member countries have been an issue in all subsequent enlargements where a significant wage differential existed between new and old Member States (1981, 1986, 2004 and 2007). While in the longrun, free mobility can be expected to raise potential growth in the EU as a whole, there is widespread concern that the shock to labour markets and wages may have negative impacts on host economies in the short-term. To counteract these factors, Member States have been allowed to temporarily restrict the free mobility of workers from acceding countries for a period of five years in general, and up to seven years under certain circumstances. These transitional arrangements are intended to smooth the shock to labour markets of the enlargement process.

Following an initial period of severe transitional recession, the EU-8 economies exhibited relatively rapid economic growth after moving from centrally-planned economies towards a free market system in the

early 1990s. Nonetheless, large economic disparities persist in terms of GDP per capita and average wages between the EU-8 and the EU-15 economies. Slovenia is the wealthiest of the eight new Member States, with GDP per capita of just over 50 % of the EU-15 average in 2004. In the Baltic economies, GDP per capita was closer to 20 % of the EU-15 average in 2004 (source: Eurostat, nominal euro per inhabitant).

These differentials were a cause of concern at the onset of the enlargement process in some EU-15 countries. It was feared that free mobility of labour, in conjunction with the high discrepancy in wages and spatial proximity, could trigger a mass influx of workers that would be difficult to manage. Temporary restrictions on labour market access were introduced in a number of countries in order to smooth the adjustment to the labour markets.

The three phases of the transitional arrangements were established to allow for a stepwise adjustment of economical disparities between EU-15 countries and the EU-8. Within the first two years of accession, the EU-15 Member States were allowed to restrict access to their labour market without reservation and enforce national policies. However, no restrictions on general travel were permitted, and while workers may have been required to hold a work permit during this transitional period, they would, nonetheless, be given priority over workers from non-EU countries. Before the end of these first two years, the Member States had to notify the European Commission if they decided to extend these restrictions into the three consecutive years. The third and final phase of transitional restrictions allowed a country to extend restrictions for two more years (reaching seven years in total), but only upon notification to the Commission of serious disturbances in their labour market or a threat thereof. There is no agreed definition of what constitutes a serious disturbance of the labour market, and this requirement does allow a significant degree of freedom in its interpretation.

Malta and Cyprus joined the EU at the same time, but they are excluded from this study.

Ireland, Sweden and the UK removed all substantial restrictions on labour market access from the onset of the 2004 enlargement, while other states followed successively (see Table 1). Germany and Austria were the only countries to extend substantive restrictions on labour market access for the maximum amount of seven years (Galgóczi et al. 2009).

Table 1. Year when free access to labour market granted for workers from the EU-8

Belgium	2009
Denmark	2009
Germany	2011
Ireland	2004
Greece	2006
Spain	2006
France	2008
Italy	2006
Luxembourg	2007
Netherlands	2007
Austria	2011
Portugal	2006
Finland	2006
Sweden	2004
UK	2004

Source: Study on labour mobility within the EU, the impact of enlargement and the functioning of the transitional arrangements available at:

http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1108&furtherNews=yes

The transitory arrangements appear to have had a diverting effect, as EU-8 mobile citizens predominantly located within Ireland and the UK, two of the three countries without restrictions on labour market access from the onset of the EU enlargement. Prior to the enlargement in 2004, Germany was expected to receive the highest population inflows from the EU-8, due to the large pre-existing EU-8 resident population and its geographical proximity to the acceding countries, in particular the largest country, Poland. But Germany maintained restrictions on labour market access for citizens of the EU-8 countries for the maximum period of seven years and experienced only moderate new immigration from the EU-8 from 2004-09, whereas population flows to the UK and Ireland were far higher than had been anticipated. In practice, most studies suggest that the restrictions redirected potential foreign workers to EU-15 countries with easier access to labour markets (Münz and Tamas, 2006; European Integration Consortium, 2009; Kahanec, Zaiceva and Zimmermann, 2009; Barrell, FitzGerald and Riley, 2010; and others). Delbecg and Waldorf (2010), however, found only a weak effect of transitional restrictions on migration patterns, with little shift in destination preferences following EU accession, which leaves the question

of the role of transitional restrictions on the location decision open.

It should be noted that although transitory arrangements constituted a barrier for mobility and could discourage individuals from moving to countries with higher levels of restrictions, they did not exclude labour market access. In those countries that lifted restrictions on labour market access early on, few studies have identified any major negative effects on the economies. However, in those countries that retained restrictions for a period some negative side-effects have been observed. The restrictions appear to have encouraged irregular forms of labour mobility in the respective countries. Some EU-8 citizens might have chosen alternative or illegal routes to employment. Since the free movement per se ceased to be restricted, it would have been easy to move on a tourist or student visa and to overstay the permitted duration and to enter the labour market through an irregular channel.

Self-employment also became unrestricted following accession, and the significant rise in EU-8 citizens officially declared as self-employed since 2004 may reflect an abuse of this channel of entry into the labour market. Fellmer and Kolb (2009) found this to be the case in the construction sector in Germany, where many workers were found to be registered as selfemployed, but were in practice hired by companies. The registered self-employed did not have to pay into the unemployment and pension insurance systems and could offer their work for significantly lower wages. Undercutting the minimum wages in low-skilled jobs might result in a rise in the observed unemployment rate if this costs jobs among registered members of the labour force. The other main problem with undeclared work is that workers fall outside the tax net.

Postings have also provided an alternative route into the labour market. A posted worker is one who is employed in one EU Member State but sent by his or her employer on a temporary basis to carry out work in another Member State. While statistics on postings are limited, an external report for the European Commission (VT/2009/062) on posting of workers in the EU suggests that posting represents a sizeable phenomenon (on average 18.5 % of the stock of EU-27 non-nationals in the labour force) and that more than one third of posted workers are sent by the newer Member States to the older Member States. This may indicate an excessive use of this indirect route into the labour market during the period of transitional restrictions. Thus, entering restricted labour markets was more difficult, but far from impossible.

Final transitional restrictions on the free mobility of labour from the EU-8 to the EU-15 were lifted on 1 May 2011. As the existence of support networks for new migrants is one of the most important factors affecting the location decision, any distortion in the

distribution of EU-8 citizens across the EU-15 that has resulted from the transitional restrictions is likely to have long-lasting effects. In this study we assess the impact that the transitional restrictions on labour market access had on the location decision of mobile workers from the EU-8 between 2004 and 2009. We first develop a measure that captures the degree of labour market restrictions in each EU-15 economy relative to other potential locations within the Union. We then develop a simple model of the locations decision of EU-8 mobile workers, and finally use this model to assess the impact of transitional restrictions on the current distribution of EU-8 migrants across the EU-15.

2. A relative measure of labour market restrictions

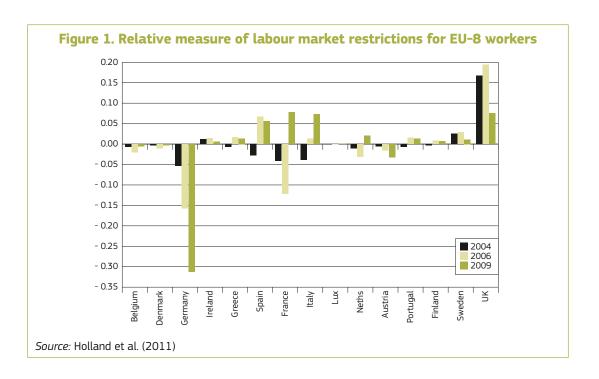
Holland et al. (2011) highlights the vast discrepancies in the share of population shifts attributable to the accession process across countries. For example, they find that only 10% in migration from the EU-8 towards Germany since 2004 can be attributed to EU enlargement, whereas closer to 90% of inward migration from the EU-8 to the UK is unlikely to have occurred in the absence of EU enlargement. Many studies have found that an existing network or diaspora is the most important factor driving the destination decision of migrants (see for example Delbecq and Waldorf, 2010; Pedersen et al., 2008). All else equal, we would expect the distribution of EU-8 citizens across the EU-15 economies to remain largely constant over time.

In order to assess the impact of the transitional labour market arrangements on the location decision of mobile workers from the EU-8, we first construct a

simple index that measures the degree of restrictions on access to the labour market in the host country compared to the EU-15 average. The index gives a value of 1 where no restrictions are present, and a value of -1 where restrictions are present (and a weighted average of the two when restrictions were lifted partway through the year). The average value across the 15 countries is calculated for the year, and a relative figure is computed as the absolute difference between the host country value and the EU-15 average value in the given year. This value is then weighted by total population size of the host country, to account for the fact that larger countries, such as the UK, can absorb a higher level of immigrants than smaller countries, such as Ireland, for a given level of restriction.

This approach ensures that a host country is more attractive if it is one of few destinations that do not impose restrictions, while it becomes less attractive if it is one of few countries that continue to impose restrictions. This simple index does not take into account the complexities of situations in individual economies, as some restrictions are more binding or more stringent than others, but provides a useful estimate of the relative openness of the labour markets in each country. The constructed measure is illustrated in Figure 1.

Germany and Austria became increasingly less attractive destinations over time, as the other EU-15 countries successively lifted restrictions on labour market access for citizens from the EU-8. The UK in particular was highly attractive in 2004 and 2006, but relatively less attractive once other countries began to lift their restrictions. As of 1 May 2011 the value of our restriction index fell to 0 in all countries, as the final restrictions on mobility from the EU-8 were lifted.



3. A model of the location decision of mobile workers from the EU-8

Figure 2 illustrates the share of EU-8 citizens resident in each of the EU-15 economies in 2003 (just prior to the 2004 enlargement), in 2006 (at the end of the first stage of the transitional arrangements), and in 2009 (at the end of the second stage of the transitional arrangements). The most striking changes are in Germany and the UK. In 2003, just over 50% of EU-8 citizens resident in the EU-15 were located in Germany, whereas by 2009 this share had fallen to less than 30 %. Over the same period the share of EU-8 citizens resident in the UK rose from about 15 % to over 35 %, overtaking Germany as the primary destination. As the UK was one of the few countries not to introduce transitional restrictions on the free mobility of labour from the EU-8, while Germany retained restrictions for the full seven years, there would appear to be a clear link between these factors.

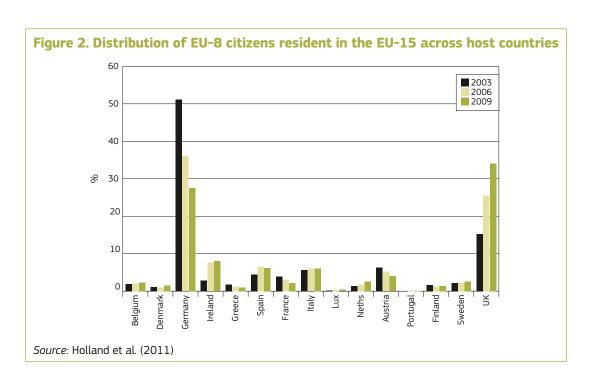
Ireland, which along with Sweden was the only other country not to impose temporary restrictions on labour mobility, also exhibits a strong rise in its share. Given the size of the country, in percentage terms the population shock in Ireland was far bigger than in any of the other EU-15 countries, raising the population by 3.7 % between 2004 and 2009. Despite the ease of access to the Swedish labour market, there was little shift in the share of EU-8 citizens resident in Sweden over this period, suggesting that the transitional arrangements cannot fully explain the changes we see. Transitional arrangements were lifted in Greece, Spain, Italy, Portugal and Finland in 2006, at the end of the first phase of the transitional arrangements. If the transitional restrictions prevented labour mobility

to these countries during the first phase of the arrangements, we would expect to see some recovery in their shares in the second phase. However, there is not a clear rise in share in any of these countries between 2006 and 2009.

It is interesting to note that the share of flows of migrants from the EU-8 to the UK had already overtaken that of Germany before 2004. The UK received the highest inflows from the EU-8 economies in both 2002 and 2003, suggesting that the distributional shift was already an ongoing process before the EU enlargement. Therefore, studies that have attributed all or most of the distributional shift to the presence of transitional labour market restrictions, without considering other factors that determine the location decision, may well have overstated the importance of these restrictions.

Other factors that have been found to affect the location decision include employment opportunities, captured by variables such as the unemployment rate relative to elsewhere, and the earnings potential, captured for example by GDP per capita relative to elsewhere. Our model of the location decision will include the unemployment rate relative to the EU-15 average and GDP per capita relative to the EU-15 average.

GDP per capita in Ireland and Denmark was higher than in Germany over this sample period, although in Ireland GDP per capita declined significantly between 2006 and 2009 relative to the EU-15 average. The unemployment rate in Ireland, Denmark and the UK was low over most of the sample period relative to Germany, and these factors may be partly related to the shift in location share from Germany towards these alternative destination countries.



We ran a simple panel regression to assess the correlation between the relative restriction index described in the previous section and the change in share of EU-8 migrants in each of the EU-15 host countries, after factoring out the impact of other key variables. The estimated equation can be described as follows:

$$\Delta migsh_{it} = \Delta popsh_{it} + \alpha_1 relycap_{it} + \alpha_2 relu_{it} + \alpha_3 relrestr_{it} + \varepsilon_{ix}$$
 (1)

where.

t is the time period, i is the EU-15 destination country, Δ is the absolute change operator and:

migsh is the share of country *i*, within EU-15, of resident EU-8 citizens,

popsh is the share of country *i*, within EU-15, of resident EU-15 citizens,

relycap is GDP per capita in country *i*, relative to the EU-15 average,

relu is the unemployment rate in country *i*, relative to the EU-15 average,

relrestr is the index describing relative restrictions on labour market access developed in the previous section, ε is a residual term that captures the remaining change in migration share that is not explained by our simple model, a_1 - a_3 are parameters to be estimated.

The sample period runs from 2004–09, for a panel of 15 countries, giving a total of 90 observations. For details on data sources see Holland et al. (2011).

The equation is designed so that if the population of the destination is growing relative to the rest of the EU, that country will attract an increasing share of new migrants — maintaining a constant share of EU-8 citizens relative to the domestic population. If GDP per capita is above the EU-15 average, the

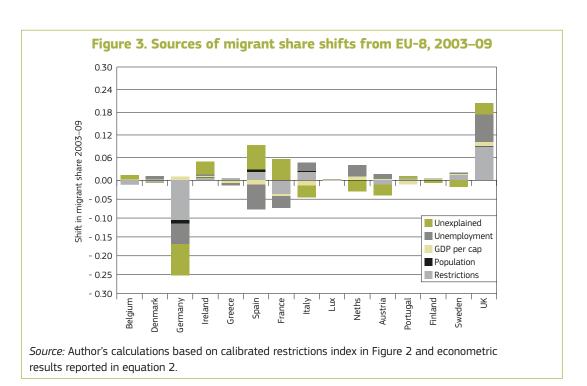
destination country can be expected to gain share each year, while if the unemployment rate is high relative to the average the destination country can be expected to lose share each year. These shifts in share would be expected to be permanent, reflecting the network effects on destination choice. Similarly, if labour market restrictions are low relative to other potential destinations, the country can be expected to gain share on a permanent basis.

The results of this simple estimation procedure are reported below (t-statistics are reported below the coefficient estimates):

$$\Delta migsh_{ii} = \Delta popsh_{ii} + 0.22 \, relycap_{ii} - 0.26 \, \alpha_3 relu_{ii} + 0.095 \, relrestr_{ii}$$
 (2)

All parameters in the estimation results are correctly signed, although relative GDP per capita is not significantly different from zero. Our equation can explain over 50 % of the shifts in location decisions over this period. The point estimates of the results suggest that if the UK lifted restrictions on labour market access while the other 14 countries retained restrictions, the share of EU-8 citizens resident in that country would have been expected to increase by about 2.5 percentage points per annum. Our econometric work suggests that the transitional arrangements can only partially explain the 20 percentage point increase in the EU-8 migrant share in the UK over the six-year period to 2009.

Figure 3 illustrates the results of the econometric estimates graphically. We disaggregate the total shift in the share of migrants from the EU-8 countries resident in each of the EU-15 economies that occurred between 2003 and 2009 into the fraction that can be explained by the transitional restrictions, the fraction that can be explained by population developments,



the fraction attributable to relative GDP per capita, the part attributable to relative unemployment rates and the remainder of the shift in share, that cannot be explained by our simple model. The transitional restrictions explain nearly 45 % of the shifts in location share between 2003 and 2009 observed between the UK and Germany. It is interesting to note that our model suggests that unemployment developments also play a relatively large role in explaining the location decision of migrant workers. A low unemployment rate in the UK over this period explains roughly an equivalent proportion of the shift in location preference away from Germany. This suggests that a weak labour market already acts as a deterrent to worker inflows, mitigating the need for an explicit policy to restrict labour market access during the transitional period.

There remains a significant residual category in each country that cannot be explained by the simple model. This may partly reflect more refined distinctions between the types of labour market restrictions across countries that our simple index cannot capture. However, our estimates suggest that some earlier studies may have overestimated the role of transitional arrangement in the location decision, as they have not adequately accounted for some of the more traditional factors driving the location decision. While we have observed a clear shift in the distribution of EU-8 citizens across the EU-15, this shift was already ongoing prior to the 2004 enlargement, and unemployment developments also appear to be an important factor in explaining the shift in location preferences between Germany and the UK.

4. Estimates of the impact of the financial crisis on migration

Net emigration from the EU-8 to the EU-15 slowed sharply in 2008 and 2009. To some extent this may reflect the winding down of the shock of EU accession on migration flows, as pent-up demand for emigration from these economies can be expected to have largely cleared after 4–5 years of EU membership, despite the persistence of certain restrictions on labour mobility in the traditional destinations of Germany and Austria. However, there is also evidence to suggest that this slowdown partly reflects the relative severity of the global financial crisis on the EU-15 labour markets and the macro-economy compared to those in some of the home economies.

We take a simple approach to estimate the impact of the recession on migration flows. We assumed that the average emigration rate of each of the EU-8 economies in 2007 would have persisted in 2008 and 2009 in the absence of the global recession to calibrate the total impact on net flows to the EU-15. Table 2 reports our estimated impact of the global recession on population flows from the EU-8 economies. This should be viewed

as an upper bound to the estimated impact, as part of the slowdown in the emigration rates in 2008–09 may reflect the exhaustion of pent-up labour migration from these economies, which have had access to at least some of the EU-15 labour markets since 2004.

Except in the case of Latvia, the emigration rate in all the countries slowed in 2008–09. The biggest impacts in percentage terms were in the Czech Republic and Slovakia. Overall, we estimate that migration flows from the EU-8 economies in 2008 and 2009 were 67% lower than they might have been in the absence of the global recession. Outflows from Latvia appear to have been higher in 2008 and 2009 than would have otherwise been expected. This may be a reflection of the exceedingly sharp downturn in Latvia, where GDP declined by 3.9% in 2008 and 17.9% in 2009, the biggest cumulative output loss in the EU. This drove the unemployment rate in Latvia up to nearly 20% by the end of 2009.

Table 2. Impact of recession on net population flows to EU-15 countries (in the period 2008-09)

	Impact on net migration to EU-15	% impact
Czech Rep	-43 601	-124.9
Estonia	-1 790	-11.5
Hungary	-23 146	-52.1
Lithuania	-20 195	-43.8
Latvia	10 421	85.0
Poland	-395 077	-70.1
Slovenia	-517	-17.7
Slovakia	-64 057	-80.7
EU-8	-537 961	-67.3

Source: Holland et al. (2011).

In addition to the impact on the total level of migration from the EU-8 to the EU-15, the financial crisis has affected the distribution of EU-8 citizens across the EU-15 countries, reflecting the relative depth of the recessions in each potential host economy. In 2007, the unemployment rates in Germany and Belgium were above the EU-15 average, whereas by 2011, unemployment in these countries was significantly below the EU-15 average, allowing them to gain attractiveness as a destination. The opposite is true for Ireland, where the unemployment rate moved from the second lowest among the EU-15 in 2007 to become the second highest in 2011.

In order to assess the impact of the financial crisis on location shares, we use the simple model estimated in the previous section, and apply this to the relative worsening/improvement in GDP per capita and unemployment in each of the potential host economies of the EU-15. This relies on the assumption that in the absence of the financial crisis, relative GDP per

capita and unemployment rates would have remained unchanged between 2007 and 2011. We attribute the actual change in relative positions over this short time span to differences in the sensitivities of each economy to the global financial crisis. We can then use our model for the change in migrant share to assess the impact that the crisis had on the location decision of EU-8 migrants residing in the EU-15:

$$\Delta migsh_{i,crisis} = 0.22 \Big(relycap_{i,2011} - relycap_{i,2007} \Big) - 0.26 \Big(relu_{i,2011} - relu_{i,2007} \Big)$$

The results of this assessment are illustrated in Figure 4, which can be interpreted as our estimate of the impact of the country-specific responses to the global downturn on the distribution of EU-8 mobile worker flows across the EU-15 economies. Spain fared worse than most during the downturn, and this can be expected to lead to a more than 3 percentage point loss in the share of EU-8 citizens choosing to locate in Spain. The UK also became less attractive as a destination, while Germany and France weathered the recession relatively well, and have become more attractive as potential destinations. The lifting of transitional restrictions for workers from the EU-8 in May 2011 in Germany compounds the macroeconomic factors that are likely to lead a higher share of new migrants choosing Germany as a destination.

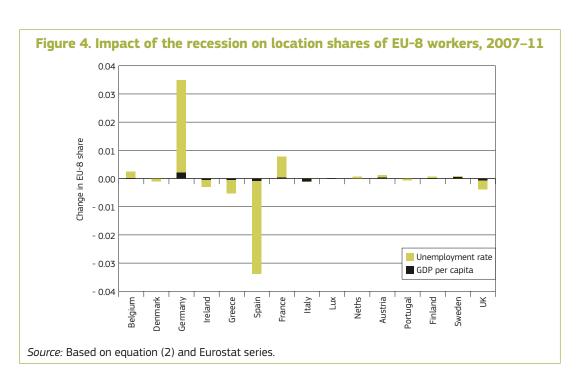
5. Conclusions

There appears to be clear evidence that the pattern of restrictions in place at the beginning of the 2004 enlargement diverted mobile workers away from their traditional destination — namely Germany

— and towards the more easily accessed labour markets in the UK and Ireland. However, we should not overemphasise the magnitude of this impact, as macroeconomic developments and demographics have also played a role in the location decision.

Final transitional restrictions on the free mobility of labour from the EU-8 to the EU-15 were lifted on 1 May 2011. As the existence of support networks for new migrants is one of the most important factors affecting the location decision, any distortion in the distribution of EU-8 citizens across the EU-15 that has resulted from the transitional restrictions is likely to prove permanent. According to the study by Holland et al. (2011) these distortions can be expected to raise the potential level of output in Ireland, the UK and Sweden over the longer term, while they will leave a permanent scar on the level of potential output in Germany, Austria, Belgium and Denmark.

The global financial crisis induced a sharp contraction in output in Europe. Labour market responses differed markedly across countries, with sharp rises in unemployment in Ireland and Spain, and limited impact to the labour market in Germany. Our estimates suggest that net population flows from the EU-8 economies were up to 65 % lower in 2008 and 2009 than they would have been in the absence of such a sharp recession. The downturn probably reduced population flows to the UK and Spain in particular, while Germany and France gained attractiveness as a location choice due to the relative strength of these economies. Differences in the economic responses to the global financial crisis are also likely to leave a long-lasting effect on the productive capacity of EU Member States.



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Free movement of workers and rights that can be derived

Jan Cremers(1), AIAS

In this contribution a non-exhaustive overview is provided of several aspects of free movement of workers in the EU. The author has been (and is) involved in several research projects on the posting of workers, the coordination of social security and workers rights in a cross-border context; this article is part of work in progress. It starts with an overview of the different relevant aspects of workers rights and provisions in three policy fields (social security, working conditions, labour and contract law). In the following sections these policy fields are briefly sketched out. In the last section some of the pending problems are listed.

1. Introduction

The ideal of European cooperation was from the very beginning connected to the notion that citizens should gain from free movement. The 1957 Rome Treaty establishing the European Economic Community contained several provisions to ensure free movement of workers (Treaty of Rome, 1957, Articles 48–51). Free movement of workers meant in particular that workers who were nationals of one Member State had the right to go to another Member State to seek employment and to work there. As a consequence European citizens obtained, after the Treaty of Rome was signed, the right to work in all Member States of the European Community. The Treaty underpinned the extension of residence, labour and equal treatment rights.

The coordination of national social security became one of the first regulated fields of cooperation in the European Community related to these free movement principles. It was a pillar of the European Community legislation from the start (Council of the EEC, 1958). The coordination was (and is), in particular, based on the principle that persons moving within the EU are subject to the social security scheme of only one Member State. The coordination rules aim to guarantee equal treatment and non-discrimination.

In the field of working conditions and labour law the basic idea was that the migration of workers from one country to another would bring the worker under the application of the so-called *lex loci laboris* principle, which means that the regulations of the new state of residence apply. An exception to this principle was the so-called posting of workers, where workers temporarily stayed in another Member State in order to provide services (under the subordination

of their posting company in the home country). As these posted workers were not supposed to seek permanent access to the labour market their position with regard to the applicable working conditions and labour rights was at least ambiguous. Some countries had a regulatory framework that made their labour legislation and collective agreements generally binding for all workers on their territory, other countries excluded temporarily posted workers from abroad from this application.

2. EU legislation related to the free movement of workers

As the plans for creating the EU internal market were drawn up, accompanied by the dismantling of internal frontiers in Europe, the mobility of workers and free movement in general came to occupy an even more central position in the socioeconomic approach of the European institutions. And although the European Commission has on a number of occasions reported that the expectations of the mideighties about mobility in Europe have not been realised, the Commission at the same time has acknowledged that the opening up of the markets in Europe brought with it some unexpected side effects (European Commission 2008a). Recruitment of a foreign workforce brought with it the risks of social dumping, while the relocation of production

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lssue →	(a) Social security	(b) Working	(c) Labour law,
Category	(Reg. 883/2004 and	conditions and pay	contract law
•	Reg. 987/2009)		
1. EU citizens	As nationals, or?	As nationals	As nationals
2. Self employed EU citizen	As nationals, or?	As nationals	As nationals
3. Posted workers	Home country	Directive 96/71	Home country

and competition waged in the sphere of taxation and social security created new tensions between regions. In the following scheme three separate fields of social policy are defined. The scheme is simplified as third-country workers, trans-frontier workers, seasonal workers and cross-border temporary agency work are not listed here. But of course the same legal mapping can be done for these groups and categories.

We summarise the core aspects of these fields and will treat the legal dimension in the sections that follow. A fourth field that is especially important for third-country workers, namely the area of work and residence permits and visas, is not treated here.

(a) Social security

As referred to in the introduction the coordination of social security goes back to the genesis of the European Community. The first regulation in this area stems from 1958. Later on Regulation 1408/71 governed for more than 25 years the coordination of agreements on social security in Europe. In recent years the European legislator has introduced a root-and-branch revision of this regulation. This was prompted by the fact that the regulation had constantly grown in size as the result of numerous amendments and additions. The coordination as such was and is based on the principle of application of one piece of legislation at a time in cases of employment occurring in one or more than one Member State. Persons moving within the EU are thus subject to the social security scheme of only one Member State. The coordination rules aim to guarantee equal treatment and non-discrimination. Workers have the right to settle with their families in their new host country and have to be treated equally with national workers in that host country. Although the form and content of the social security provisions belong to the competences of every individual Member State, the coordination of the different systems in cross-border situations has been subject to a dynamic process of legislation and modification. The aim was, and remains, to achieve mutual coordination, not harmonisation, of social security regimes across the EU Member States in order to regulate matters of cross-border concern. The intention was further, and remains, to guarantee the social security of migrating workers and their relatives. In the new Regulation 883/2004 and its implementation Regulation 987/2009 the principle of the country where the work is pursued remains the basic premise of the coordination principle. Workers who move to another country in Europe have the right to be treated as if they were citizens of that Member State.

(b) Working conditions (including pay)

For pay and conditions of employment in the case of migration for work purposes the country

of employment principle applied (and applies); discrimination on grounds of nationality is prohibited. This means that workers who come from abroad to work in a country other than their country of origin on their own initiative, in principle have the same rights as the national citizens. They also have the same instruments to derive these rights, whether through a union membership or another type of collective representation, whether through individual action or by the path to justice. However, over a longer period of time different types of temporary work abroad were introduced. In some areas EU legislation is planned and/or pending (notably with regard to seasonal work and thirdcountry workers). Pay and other working conditions of seasonal workers were often formulated in the underlying bilateral agreements between Member States. For other workers like for instance those involved in commuting cross-border work, a mixture of case-law and legislation has established a certain acquis. On the question of pay and conditions of employment for posted workers — workers sent to deliver services for temporary periods — a legal vacuum prevailed for a long time. In some countries (such as Belgium), national laws existed in this area or, to be more precise, a combination of generally binding laws and collective agreements that had to be observed by foreign employers with respect to the working conditions of their posted workers. In other countries, the legal machinery was lacking to make the country of employment principle apply in this area until the mid-nineties when the posting of workers directive (Directive 96/71) was concluded.

(c) Labour and contract law

One of the problematic aspects of the monitoring and enforcement of workers rights in the cross-border context is that of the applicable labour contract. In general terms the Rome Convention on the law applicable to contractual obligations (1980) defines the rules in this area. In Article 3 it provides that in general, 'A contract shall be governed by the law chosen by the parties'. However, we have seen in the recent past that notably in the case of temporary work abroad, as seasonal or posted workers, this notion can lead to confusion resulting in unequal treatment of workers.

Even more problematic is the position of workers who are defined in one Member State as being self-employed, when in fact their work and the associated work relationship, according to the definitions applying in another EU country, come entirely under the definition of an employment contract. In the context of cross-border working this means that the self-employed status can be abused in order to circumvent the rules in force (relating to social security, working time, pay and other conditions of employment, safety, and contributions to collective benefits).

3. Social security in a cross-border context

Although the form and content of the social security provisions belong to the competences of every individual Member State, the coordination of the different systems in cross-border situations has been subject to a dynamic process of EU legislation and modification. Regulation No 3 of the Council of the European Economic Community that ruled the social security of migrant workers since its adoption in 1958 has been modified 14 times. Its successor, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, provided for many exceptions to its main rule on the legislation applicable — lexloci laboris. It has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice as a result of permanent questioning of the scope and content of the coordination rules by national courts, but also changes in legislation at national level(2). Such factors made the Community coordination rules complex and lengthy. Replacing these rules was necessary in order to contribute to an improvement of the standard of living and conditions of employment of EU citizens that make use of their right of free movement. In 2004 the European legislator concluded modernised social security coordination rules (Regulation EC 883/2004) in order to simplify the current rules. Regulation 883/2004 would come into force after the settlement of implementing legislation and the Implementing Regulation (Regulation EC 987/2009) was concluded in April 2009. The new rules came into effect from 1 May 2010. The idea was to limit the number of specific rules for different categories of professional activities.

In a publication *EU Coordination of national social* security in multiple cross-border situations the differences between the 'old' and the 'new' regimes were explored (Cremers, 2010). The legislator aimed at further simplification and modernisation of the coordination rules, but also wanted to address unfair

competition in the context of cross-border employment and to establish a dominant role for the Member State where a significant part of the activities is performed in the case of employment activities in two or more Member States. The modifications had one additional aim: the limitation of the number of specific rules for different categories of insured persons and/or professional activities. Regulation 883/2004 removed several derogation rules for special groups that were unnecessarily complicating the coordination system. Therefore, the rules no longer include for instance a specific exemption for flying and travelling personnel in international transport.

The formulated basic principles of this coordination can be summarised as follows:

- application of the lex loci laboris, which means, as
 a general rule, that the legislation of the Member
 State in which the person pursues his/her activity as
 an employed or self-employed person is applicable;
- the determination of the legislation applicable and the responsible competent authority;
- the definition of a broad range of legislative matters concerning different branches of social security;
- the possibility to export benefits and to aggregate insurance periods;
- the coordination and systematic calculation of benefits.

EU citizens that exercise the right of free movement of persons are subject to the social security scheme of only one single Member State. As a general rule the legislation of the Member State in which the person involved pursues his/her activity as an employer or self-employed person is determined as the applicable legislation. In the coordination framework as formulated, derogation from the general rules is made possible in specific situations that justify other criteria of applicability.

In the following scheme that was originally produced for the transport sector the general application of the rules is illustrated.

⁽²) Several authors have reviewed the jurisprudence of the European Court of Justice. For instance Christensen, A. and Malmstedt, M. (2000). Lex Loci Laboris versus Lex Loci Domicilii — an Inquiry into the Normative Foundations of European Social Security Law. European Journal of Social Security, 2/1, 69–111.

Scheme: Determination of the applicable legislation (1) Character of the activity Domestic legislation of the Member State where the work is pursued 2 or more MS (2) Relation between residence and registered office (a) MS of residence and MS of registered office are identical Res = Office legislation of the Member State of residence (b) MS of residence differs from the MS of registered office Res ≠ Office (3) Dominant part of the activity (c) substantial part in MS of residence legislation of the Member State of residence (d) no substantial part in the MS of residence legislation of the Member State of registered office

Source: Jan Cremers (2010) *Coordination of national social security in the EU — Rules applicable in multiple cross-border situations*, AIAS Working Paper 10–89, University of Amsterdam.

4. Pay, working conditions and applicable labour law

The basic principle of the European model was respect for the well-balanced regulatory framework for social policy, including social security and labour standards that existed in the EU Member States. This regulatory framework was characterised by a mixture of labour legislation and collective bargaining and this mixture was different in every country. European social policy was also about how to live and deal with that diversity. The introduction of free movement principles in the European Union created an attractive open market for businesses. Along with the removal of internal borders in Europe, the Member States and the European Commission started to work out an unrivalled deregulation agenda. After the introduction of the internal market principles some Member States had clear rules regarding the working conditions that applied for everyone working on their territory, other Member States had rules with regard to the applicable labour standards and legislation that did not necessarily apply to a temporary foreign workforce.

However, mobility of a temporary nature was low and was mainly restricted to managerial staff or specialised workers with working conditions that were often above average. And even in the construction and installation sectors where a division of labour between general contractors and specialised subcontractors did not halt at national borders the working conditions of the skilled workers that were temporarily posted to large infrastructure in another country were not causing serious risks of social dumping on a large scale. As the EU legislation on working conditions for workers temporary posted to another Member State was concluded the principle of respect for the national social policy frame was applied. There was a hard core of minimum prescriptions formulated and next to that Member States could decide on general mandatory rules (or public policy provisions) applicable within their territory as long as these rules did not lead to discrimination or protection of their market. But quite soon problems arose as the relationship was construed between the working conditions of workers involved in temporary cross-border activities and the free provision of services. The posting of workers directive (96/71/EC) provided a possibility

to apply, in a non-discriminatory manner, conditions of employment that can be seen as public policy provisions. Two court cases in the 1990s seemed to underpin this idea. In the Rush Portuguesa case (CJEU C-113/89, 1990) the CJEU ruled that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means'. The Arblade case (CJEU C-369/96, Arblade and others, 1999) confirmed that provisions classified as public order legislation are those provisions that are crucial for the protection of the political, social and economic order. Both statements were seen as a confirmation of the Member States' competence to define the regulatory framework for the protection of every worker who pursues his/her activity on the country's territory.

However, CJEU judgements related to the free provision of services (Rüffert C-346/06 in 2008, Commission v. Luxembourg C-319/06 in 2008) created a situation whereby foreign service providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore do have to be respected by domestic service providers. According to the CJEU and the European Commission it is not up to the Member States to define unilaterally the notion of public policy or to impose all the mandatory provisions of their employment law on suppliers of services established in another Member State. The internal market is thus no longer functioning as a market of cross-border activities, but interferes directly in the national regulatory frame. As a consequence the basic principle of lex loci laboris can no longer be kept upright(3).

An employment contract is defined by the bond of subordination it establishes between a worker and another party (or an undertaking that belongs to someone else). The worker delivers services to the other party in the form of labour for wages. The other party is traditionally conceived as the owner of an undertaking or business unit, which engages a group of workers in the production of goods or the delivery of services. In this situation it was and is relatively easy to define the employment relationship and to distinguish between a contract of service (a labour relationship) and a commercial contract (for the provision of services). To a certain

After the free movement principles were introduced these national solutions no longer functioned adequately. What is well regulated in one Member State can be completely absent in another Member State. The consequences in cross-border situations are risks of regime shopping and social dumping. And of course the equal treatment of workers comes under serious threat. For undertakings this can create a complete distortion of competition and a race to the bottom as the level playing field is completely missing.

One of the problematic aspects of the control and enforcement of the labour standards for workers that work only temporarily abroad (like seasonal and posted workers) is the question of the applicable labour contract. In general terms the Rome Convention defines the rules in this area. The posting of workers directive stipulates in recital 9:

'Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice'. Later on this is further specified in Article 2.2:

'For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted'.

But in several court cases (*Laval* C-341/05 in 2007, *Commission* v *Luxembourg* C319/06 in 2008) the CJEU only refers to the rules applicable in the home country. The wording in the posting directive makes that reference of the applicable labour legislation at least questionable. In my view this is a serious inconsistency in the rulings(4).

In recent publications, the European Commission admits that adequate implementation and effective application and enforcement are key elements guaranteeing the effectiveness of the applicable EU rules (European Commission 2007a and b, 2008b). But the Commission has so far neglected the problems related to the control of the existence of a labour contract and of the compliance with the corresponding

extent all countries had serious problems in the past in defining at national level a regulatory scheme for the demarcation between these two forms: contracts of service and contracts for services. But most states reached a compromise through case-law and national regulation for the distinction between on the one hand employers, genuine self-employed and small entrepreneurs, and, on the other hand, employees.

⁽³⁾ In a longer article I have elaborated the different aspects of this shift and the consequences for equal treatment, Rules on Working Conditions in Europe: Subordinated to Freedom of Services?, EIRJ, September 2010.

⁴⁾ Cremers, J. (2008), Conflicting interpretations of the posting of workers directive, *CLR-News* 3-2008, Brussels.

working conditions. The CJEU has exclusively handed over and restricted this competence to the country of origin. Obtaining information on the country where the work is pursued depends on the cooperation of the home country. A reply to requests for information can take some time and the employer and the workers have often disappeared. In the latest CJEU rulings the application and control of host country labour standards are even seen as restrictions to the free provision of services. Additional administrative domestic rules and provisions should not hinder this free provision. This fight against the 'administrative burden' makes systematic and effective control in the host country an illusion.

5. Pending issues

The modification of the rules for coordination of national social security systems and the application of mandatory national rules on working conditions within the framework of free movement of persons has led to a series of debates with the legislator about the home versus the host country. The debate is on the one hand related to the social security treatment of persons moving within the EU that pursue activities in Member States other than the country of origin. On the other hand the first indications of bypassing the applicable rules through the establishment of postbox companies have been signalled and have led to question marks related to the role of agencies in an open labour market and the possibility to keep the lex loci laboris principle applicable in the field of labour law and pay.

The main change that is relevant for the application of the social security coordination rules is the introduction of the notion 'substantial'. The term 'substantial' did not figure in Regulation 1408/71. In practice, the decision on whether the Member State legislation of the registered office or place of business, or the legislation of the Member State of residence applied depended on national choices and differed accordingly. Regulation 883/2004 introduces the term 'substantial part of his/her activity' in Article 13.1 as the fundamental benchmark for the application of the legislation of the Member State of residence or the legislation of the Member State in which the registered office or place of business is situated. This distinction is decisive for the determination of the legislation.

Against the background of the provisions of Regulation 883/2004 and its implementing Regulation 987/2009 this has led to the following pending issues:

(a) In order to determine whether the legislation of the Member State of residence or the Member State of registered office has to be applied it is necessary

- to define the wording 'substantial part of his/her activity'.
- (b) In case of shifting and dynamic employment in multiple cross-border situations a procedure is needed in order to guarantee transparent determination of the legislation applicable.
- (c) This procedure includes a decision-making process on the legislation determined and on the duration of the decision made and the necessary flexibility in the system to be applied.
- (d) Finally, the question has to be answered if there are specific arguments that justify derogations from the general rule. If yes, it has to be decided which exceptions are acceptable and under which competence these exceptions can be formulated.

The modification and renewal of Regulation 1408/71 have gone a long way. With the conclusion of the implementing legislation the new rules can be made operational. Concrete experience with the application of the new rules is still missing and it will probably take several years before enough practical consequences can be found. As a consequence it is too early to draw hard conclusions related to the applicable procedure. According to the formulated rules, the institution of the Member State of residence has the lead at the beginning of the process. The provided scheme of the determination of the applicable legislation illustrates the step-by-step procedure that has to be applied. With regard to the first two steps there are no substantial controversies. In fact, the main worries can be all linked to the interpretation of Article 14.8 of the implementing legislation (in our scheme Step 3) and pinpoint the wording and definition of the 'substantial part of the activity', the duration of the attestation and the like.

The risks of distortion of competition and regimeshopping that were present under the old regime will probably decrease once the Member States of residence (of the employee concerned) work out the determination of the applicable legislation according to the new rules. This is also necessary in the fight against postbox offices established with their employers' registered office or place of business in a country with neither a link to the actual residence of the worker nor to the place where the work is pursued.

The application of the country of origin principle, according to which the Member States cannot regulate the labour conditions of the workers involved in activities of service providers from other Member States, can destroy the balance between the protection of employees on the one hand and market opening on the other hand. One of the main conclusions of a practical evaluation of posting that was executed in 2011 is that the use of the posting mechanism ranges from normal and decent

long-established partnerships between contracting partners to completely fake postbox practices of labour-only recruitment. Notably for those that are unemployed in low wage countries it is sometimes the only way out of a life without perspectives; being posted then becomes one of the channels for the cheap recruitment of labour under the cover of unverifiable invoices for the provision of services (Cremers, 2011). In March 2012 the European Commission has tabled an initiative for an enforcement directive with the aim to improve, enhance and reinforce the way in which the posting of workers directive (96/71/EC) is implemented, applied and enforced in practice across the EU. The enforcement should improve by establishing a general common framework of appropriate provisions and measures for better and more uniform implementation and application of the directive, including measures to prevent any circumvention or abuse of the rules (Andor, 2011). The content of these proposals will not be assessed here. However, if the basic philosophy is again soft law or even deregulation, often proclaimed under the more popular but also misleading terms selfregulation, decentralisation or tailor-made policy, the result will be a divergence between winners and losers. Equal treatment is reserved for those that have the possibilities and the means to shape their labour market positions or role in society. For those that stay in the dependent and vulnerable positions the outcome is exploitation and marginalisation.

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