

# Worker Mobility in Europe – A perspective inspired by “Lexit”

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## Introduction: why focus on the “Lexit” perspective on workers’ mobility in the EU

The term “Lexit” is meant to capture the rejection of the EU and continuing membership in it from a progressive rather than conservative perspective. We characterise a progressive perspective as a political orientation which focuses on improving the socio-economic position of those parts of the population which constitute the lower half in terms of income, employment participation and education. Since we focus on free movement of workers, environmental policy orientations are not relevant, though progressive policies will often combine ecological and social policies.

There are a number of reasons from a progressive perspective to reject the EU, ranging from critiquing its state aid regime as a hindrance to nationalising key industries, rejection of the economic orthodoxies underlying the convergence criteria for national economies (“Maastricht criteria”), which focus on price stability and government budget discipline, and thus aggravate counter-cyclical macroeconomic policies, to rebuffing the factor mobility induced by the EU’s internal market as an instrument of labour arbitrage.<sup>1</sup> The critique of worker mobility, as one element of factor mobility, constitutes a specific aspect, which in our view warrants prominence for three reasons. First, inciting fears of EU induced migration was one of the main reasons why the LEAVE campaign won the referendum for the UK to leave the EU.<sup>2</sup> Second, the EU has ceded to the conservative demands on reducing free movement of workers alongside full equal treatment of those workers in the “compromise” offered to David Cameron in 2015: the UK would have been allowed to limit incoming EU free movement and at the same time to treat unequally workers who have moved to the UK, for example by granting lower child benefits if the children did not accompany the workers.<sup>3</sup> Third, there is a potential counter-narrative of progressive anti-EU politics around worker mobility, which focuses on preventing the “importation of underpaid workers”<sup>4</sup> and points beyond free movement of workers: containing negative impacts of posting and ensuring equal treatment at work for non-EU citizens in the EU may be strategies better suited to alleviate this concern than limiting free movement of workers.

This paper proceeds on the assumption that the “LEXIT” perspective on worker mobility, while partly incoherent, but rather has a legitimate core. It concludes, however, that any outright rejection of free movement of workers under the condition of equal treatment will not address the concerns informing the legitimate core of the “LEXIT” perspective. It first develops this legitimate core, highlighting negative consequences of workers’ mobility in the EU, and the limited response of EU law and policy. The next part analyses the “Brexit” related demands on changing the EU regime of free movement of workers, exploring their success in the so-called “Cameron deal” and the recent

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<sup>1</sup> (Guinan & Hanna, 2017)

<sup>2</sup> See with recent references (Lindstrom, 2019, p. 286)

<sup>3</sup> (Nic Shuibhne, 2018, p. # add page #)

<sup>4</sup> Jeremy Corbyn in the Andrew Marr Show of 23 July 2017, cited from (Lindstrom, 2019)

reform of social security coordination rules, and considering in how far they address the legitimate core. The final part develops how this legitimate core can be addressed, and analyses recent legislation as well as proposing further developments. Much of the discourse on free movement in the EU does not focus on workers, but rather on citizens generally, highlighting the position of those not aiming to work. This portion of free movement is not the theme of this paper.

## The progressive case against EU workers' mobility – a legitimate core?

This section considers recent literature and advocacy on free movement of workers from the progressive spectrum, excluding merely citizenship-related positions.

### Free movement of workers as element of the Internal Market

The UK's "Lexit" campaigns offered ample examples for such advocacy. For example, a 2017 publication by "Labour Leave" engaged in "myth-busting" the Remain campaign specified the progressive critique of free movement as follows:

*"EU migrants, in general, have excellent economic performance in the UK - in pure economic terms a clear benefit to the economy as a whole, not to mention their significant cultural contribution (beyond simply teaching us how to cook). However, this broad-brush approach overlooks much that matters to ordinary people: wages, access to housing and public services, working conditions and the social fabric: no society has a boundless ability to absorb new people. These problems are exacerbated by the often highly uneven labour flows causing severe localised pressures. Hot labour can be just as challenging as hot money. (...) It is often argued that mass migration has no impact on housing shortages or prices, for instance, yet Osborne argued [quite openly](#) that leaving the EU would see house prices drop by 10-18%. Regardless of what is intellectually fashionable both housing and labour generally operate according to supply and demand, and the imbalances between the two. (...) [citing George Borjas] "An immigrant influx that increases the supply of workers in a particular schooling-experience group by 10 percent lowers the wage of natives in that group by 3-4 percent, and reduces weeks worked by 2 to 3 percent.", and [citing Michael Rose] "If Brexit leads to restrictions on EU migrants, then "the price of labour will, frankly, go up". (...) In Barnett's *Lure of Greatness* (an essential read for Leavers and Remainers alike) there is a memorable quote from Jonathan Portes in 2013, who said that migrants are "making the job market more competitive [and increasing] the incentives for natives to learn new skills". This quote immediately strikes a chord (...) Had the EU taken a much slower approach, ensuring higher levels of economic convergence before pooling labour, the picture would be very different. British anxieties over migration are entirely in line with other EU nations, many of which record even higher rates of concern. Corbyn understands that there are tricky economic realities beyond the abstract appeal of 'free movement', saying last year that while EU immigration would continue, "What there wouldn't be is the wholesale importation of underpaid workers from central Europe in order to destroy conditions, particularly in the construction industry." <sup>5</sup>*

This goes beyond the mere statement that free movement of workers, as one of the fundamental freedoms, is part of the "four axioms of market liberalism" and as such cannot be part of a left

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<sup>5</sup> (Labour Leave, undated)

agenda.<sup>6</sup> The argument is focused on the assumption that labour markets are governed by the laws of supply and demand, and that an increase of labour supply via free movement will lower the price of labour. A shortcut from this market-based argument to equating refugees, economic migrants and EU free movers into a general threat to Britain is conjured by Lapavitsas:

*“Against this background of economic and political malfunctioning, the trigger for political turbulence was the refugee and migrant crisis of the 2010s. Relatively free movement of workers within the EU after the Treaty of Maastricht significantly increased immigrant population in several countries. Britain particularly acquired a sizeable layer of Eastern European workers. During the same period immigration across the Mediterranean, mostly by young men from Africa, exerted a steady pressure. The scales were tipped in 2015 by waves of desperate families displaced by civil war in Syria and seeking refuge in Europe 2015.”<sup>7</sup>*

However, that shortcut is not necessarily preordained by making the point that labour is a commodity in capitalist economies, and that the potential increase of labour through free movement may have consequences on working conditions, which determine the price of labour. As Whyman, Lapavitsas does not rely on free movement of workers as the main critique of the EU, which would justify the left supporting “Brexit”. Both authors focus on basing Economic and Monetary Union on supply side economies, as well as on the critique of the EU’s handling of the global economic crisis, the interference with paths chosen by democratically elected governments, such as that of Greece, and more generally the “neoliberal and hegemonic transformation of the EU”.<sup>8</sup> Both authors identify Germany as the EU’s hegemon, and alongside EMU, this is the thrust of their critique. Lapavitsas also posits that “once the single market was in place, the only feasible direction of movement would be towards liberalism”.<sup>9</sup> Accordingly, Lapavitsas rejects free movement of workers alongside the other economic freedoms, because it is an element of the Internal Market.

There is a different thrust of the left critique of the EU, lining up with a “LEXIT” perspective, though. The Socialist Worker, the media outlet for a faction of the UK labour party supportive of Jeremy Corbyn’s leadership and rumoured to be the recruiting ground for his personal advisors, argues that “A left wing vision of Brexit should be based on an internationalist defence of workers and migrants. It should say, “Yes to freedom of movement,” and, “No to the single market.”<sup>10</sup> This position may seem puzzling from a more systematic standpoint typical for continental Europe, from which free movement of workers constitutes a core element of the internal market (the term used by the Treaties). However, such a split between free movement of workers on the one hand, and the internal market on the other appears entirely logical from a UK perspective. This is the country where most academics insist on teaching the four fundamental freedoms of the EU Internal Market in two sections: they start with free movement of goods, services and capital and freedom of establishment, only to add free movement of workers and EU citizenship as a separate section after that.<sup>11</sup> This split portrays free movement of workers as separate from market freedoms, belonging to some EU citizenship

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<sup>6</sup> (Greene, 2018). The main text of Peter Whyman’s “pamphlet” (quoted from Greene’s foreword) only mentions free movement of labour in passing, arguing that a left Brexit will have to avoid its continuation. Similarly, Lapavitsas objects to the rights-based character of all four economic freedoms, which in his view only emerged with the Treaty of Maastricht (Lapavitsas, 2019, p. Loc 391)

<sup>7</sup> (Lapavitsas, 2019, pp. 9-10)

<sup>8</sup> (Lapavitsas, 2019, p. 11)

<sup>9</sup> (Lapavitsas, 2019, p. 457)

<sup>10</sup> <https://socialistworker.co.uk/art/48125/Dont+back+bigots+in+the+battle+for+Brexit>

<sup>11</sup> See, for example, ### add textbooks ##

sphere, which is not shared by the European Economic Area, for example, and thus seems dispensable in principle for the EU integration project.

Accordingly, a German-British cooperation paper promoted a functional concept of the Internal Market as the basis for the future EU UK relationship, demanding that this concept should - in contrast to the constitutional model - exclude free movement of workers. This demonstrates that the effects of discourses demanding a split in the Internal Market between free movement of workers on the one hand and the rest of the economic freedoms on the other hand may diverge: some may promote free movement of persons but rejecting the Internal Market, others may promote a reduced internal market without free movement of workers. That latter perspective cannot be a perspective from a progressive perspective, though: that perspective rejects free movement of workers as part of the internal market generally.

### Free movement as one aspect of enhanced labour mobility – wage/work relation

The market focused critique of free movement of workers is, as stated, focused on the enhancement of labour mobility, and its potential negative consequences on the work/wage relation in a broad sense. If there is a risk of reducing wages by expanding labour, this does not only emanate from EU citizens moving into EU countries using their free movement rights. Non-EU citizens moving into those countries are equally relevant, as are those workers being posted by their employers in order to provide a service – either as a genuine service activity, or after an activity originally classed as productive has been rephrased and redefined as a service.

Empirical studies on the effects of migration on national labour markets do not typically distinguish between “free movers” and other migrants also. Moderately progressive economists converge on the conclusion that “in aggregate, migration has little or no impact on employment or wages, but that it may have some, relatively small, impact on the distribution of wages (depressing wages for some, generally low-paid, sectors, while increasing it for others).”<sup>12</sup> The overall positive assessment of migration generally is sometimes based on an overall positive assessment of market mechanisms,<sup>13</sup> but also on the overall positive fiscal effect of migrants on the receiving economy,<sup>14</sup> which again mirrors the generation of demand by those migrants fuelling rather than depressing the economy. Nevertheless, the negative effect on some partitions of the labour market does warrant attention. From a progressive perspective, the fact that a depression of wages is noted in low-skilled and low wage sectors is particularly worrying.<sup>15</sup> In the UK, a tendency to depress wages in public sector employment such as nursing has been noted, which is closely related to the strategic decision to profit from investment by other EU Member States in education and training while reducing that investment in the UK.<sup>16</sup> In relation to the EU, labour mobility is specifically furthered through other routes than free movement of workers: the EU is perceived as unique in providing a legal obligation of Member States to accept without limits the influx of posted workers on a stable legal basis.<sup>17</sup> Utilising the opportunities of posting workers has led to significant depressing of wages in specific sectors also in countries whose labour market institutions are usually perceived as providing some resilience against that depressing effect of migration.<sup>18</sup>

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<sup>12</sup> (Campo & Portes, 2018), with further references

<sup>13</sup> Hence the characterisation of Campo et al as moderately progressive

<sup>14</sup> See (Nyman & Ahlskog, 2018)

<sup>15</sup> (Parker, 2017, p. 487) with further references pointing beyond the UK

<sup>16</sup> (Teague & Donaghey, 2018, p. ## add page ##)

<sup>17</sup> See (Däubler, 2017, p. paragraph 62)

<sup>18</sup> See, comparing Denmark and Germany (Hassel, et al., 2016)

Beyond specific sectors and strategies to generate labour mobility beyond the constraints of equal treatment, it is also worthy of note that the impact of inward labour mobility differs in accordance with the specific growth models applied in particular Member States. Liberal Market Economies, such as the UK, which are characterised by underregulated labour markets and highly flexible wage regimes, attract larger inflows of low-skilled labour, which due to the less protective character of the labour market also has a larger effect on wages of non-movers.<sup>19</sup>

As some authors readily acknowledge,<sup>20</sup> the contribution of free movement of workers to the negative impact of labour mobility is less pronounced than stated in the public discourse. Especially for the UK, it is noteworthy that the proportion of EU migrants overall is about half as high as in Ireland and Sweden, the other EU Member States which accepted free movement of workers from post 2004 accession countries immediately.<sup>21</sup> After opening their labour markets in 2009, the proportion of EU workers in Austria and Germany soon dwarfed the same proportion in the UK. Nevertheless, the ideological discourse apportioning blame for dwindling public services and depression of wages was much stronger in the UK than in these countries.<sup>22</sup> There is thus an ideological element to the UK discourse. Nevertheless, the flexibility of the labour market and the absence of cushioning welfare state institutions also constitutes a higher level of vulnerability towards labour mobility. As the case of Denmark and Germany illustrates, that vulnerability also exists in coordinated market economies if labour mobility is accompanied by the specific precarity of posting and self-employed work.<sup>23</sup>

In sum, even moderately progressive and explicitly pro-market authors accept that enhanced labour mobility in the EU has negative effects on the most vulnerable workers, in particular in unregulated labour markets and in connection to posting and other marginal forms of employment.<sup>24</sup> Widening the perspective to discourses from academics beyond the UK, we recognise that the progressive critique of the EU (potentially leading to more “Lexit” movements<sup>25</sup>) engages with all these bases of mobility, and not “just” free movement.

### Free movement of workers, individual equal treatment rights and national welfare states

While the market-based critique of worker mobility arguably finds more issue with mobility under the condition of unequal treatment, as in the case of posted workers, the obligation of Member States to award equal treatment to free moving workers triggers another set of critique also from progressive perspectives. As indicated initially, the left case against the EU cites the absence of a political space to effectively negotiate the class conflict beyond the nation state as a specific risk.<sup>26</sup> This idea can be perceived as underlying already Milward’s<sup>27</sup> rescue of the nation state, which always focused on the rescue of the national welfare state. In relation to the impact of free movement on national welfare or social states, the progressive critique articulates that the inclusion of the non-possessing classes into the national democracies necessitated the creation of social rights and welfare

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<sup>19</sup> (Ruhs & Palme, 2018); see also (Teague & Donaghey, 2018), who find that the liberal labour market of the UK resulted in the largest fall of wages in the wake of the global economic crisis.

<sup>20</sup> (Parker, 2017; Schiek, et al., 2015)

<sup>21</sup> (Leschke & Galgoczi, 2015; Parker, 2017; Schiek, et al., 2015)

<sup>22</sup> (Parker, 2017) ## Ruhs?? #

<sup>23</sup> (Hassel, et al., 2016; Leschke & Galgoczi, 2015) ## add specific pages

<sup>24</sup> On the relevance of influx of self-employed workers into Germany see (Wagner & Hassel, 2015)

<sup>25</sup> On social movements and “Brexit” see (Ishkanian, 2019)

<sup>26</sup> See above footnote 6 to 9.

<sup>27</sup> (Milward, 1992)

provisions.<sup>28</sup> These are viewed as being based on national solidarity, which again is presumed to be based on closure,<sup>29</sup> or exclusion of newcomers.<sup>30</sup> Despite the international orientation of the progressive discourse in principle, this results in some authors' uneasiness with opening of national welfare states to EU free movers. This uneasiness is specific for free movers, because posted workers do not have equal treatment rights in relation to social security and social assistance. One may wonder why the demand to maintain the national closure of welfare states<sup>31</sup> could be embraced by progressive authors at all. After all, the function of social security and social assistance within market societies consists in limiting the commodification of workers by removing the need to compete at wages below the level of unemployment and other benefits, as well as the necessity to continue working in spite of illness, pregnancy and early maternity or old age.<sup>32</sup> Not including mobile labour into those protections enables employers to draw on a pool of workers who are not so protected, and thus under more pressure to accept work, ultimately impacting negatively on whatever has been achieved in the work/wage relation. Equal treatment of free movers not only in relation to employment rights and the contract of employment, but also in relation to social inclusion generally is thus indispensable should free movement not exert a depressing influence on the work wage relation. Nevertheless, the anxieties around welfare migration and the depletion of resources [such as housing or education] are represented in the progressive discourse on labour mobility. This remains the case in spite of the factual evidence that EU free movers contribute more in taxes than they receive in benefits, even in countries such as the UK where many benefits such as tax credits are not contribution based.<sup>33</sup>

One background for such arguments is the concern that solidarity cannot emerge organically beyond the community defined by national borders.<sup>34</sup> This then results in classifying free movers as unwelcome strangers, and arguing for denying their children full benefits if they do not live in the country where they work, for example.<sup>35</sup> There is a certain parallel with discussions of EU citizenship and rights of those not moving for work, which also highlight the need to limit the solidarity beyond national borders with reference to the need to maintain a link between political representation (in the nation state) and receipt of benefits.<sup>36</sup> This debate is beyond this article, though.<sup>37</sup>

### Legitimate core?

Overall, some of the concerns relating to the market effects of labour mobility are legitimate. This is even more so if and when labour mobility is not connected to equal treatment rights, or those equal treatment rights are not enforced efficiently. In these case, mobile workers may undercut wages or other working conditions, initiating a downward spiral on the host labour market. While the empirical evidence indicates that overall the impact of labour mobility still is positive, negative impacts on the most vulnerable are sufficiently concerning to require addressing the underlying problem. However, the question is whether the call to limit the absolute numbers of EU migrants<sup>38</sup> is opportune to

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<sup>28</sup> (Eigmüller, 2015; Schiek, 2017)

<sup>29</sup> (Ferrera, 2003; Ferrera & Pellegata, 2017). A recent contribution by Ferrera tries to strike a more positive cord, assuming that the reach of closure can eventually be expanded to the EU (Ferrera, 2019)

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<sup>31</sup> See for a recent example (Joerges, 2017)

<sup>32</sup> ### (Schiek, 2017) with further references

<sup>33</sup> (Nyman & Ahlskog, 2018)

<sup>34</sup> (Ferrera, 2003)

<sup>35</sup> (Ferrera, 2017, p. 66)

<sup>36</sup> This is the pessimistic conclusion by (Bellamy & Lacey, 2018)

<sup>37</sup> See on this the contributions in (Bauböck, 2019).

<sup>38</sup> (Barnard & Fraser Butlin, 2018)

address this problem. It may well be that truly enforcing equal treatment, and abandon forms of labour mobility which presuppose precarious wages is more appropriate.<sup>39</sup>

The legitimacy of the concerns on opening up welfare states and benefits to free movers is less apparent. There are two dimensions to this discourse, one, the dimension relying on the limits for extending solidarity, and two, the discourse concerned about draining of funds or depleting of resources due to equal treatment of EU free movers within the more generous welfare states. The solidarity discourse is multifaceted and possibly beyond the realm of this paper. The progressive critique of equal treatment of EU workers in the first dimension contains a legitimate core in the apprehension on draining social security systems which are not contribution funded. In so far as this fear is justified it could potentially be addressed either by introducing a system of financial compensation in cases where certain national or regional systems are consistently overchallenged, or by extending the EU's regulatory competences or at least its policy coordination in order to achieve that Member States steer the tax contributions made by EU free movers towards those communities where they receive services. The UK system, for once, does not know any systematic tax redistribution to localities where tax is generated, and is characterised by a systematic drain of local resources which may indeed be stretched to accommodate all the workers generating taxes locally.<sup>40</sup>

The question is whether and how these legitimate concerns have been addressed in the EU's policy towards the UK in threatening to leave the EU, and how foreseeable extensions of such proposal into future EU politics will address those concerns.

## Policies on workers' mobility in the wake of "Brexit" and beyond

In order to answer this question, this section analyses the EU's response to UK demands in the field, and assesses from EU proposals of the post-Brexit EU UK relations potential future directions. We focus on "Brexit", because the UK is so far the only Member State which has made perceived problems of free movement of workers into one of the central reasons to first threaten withdrawal from the EU and finally realise that threat, using a provision that Member State had devised. The EU's response to demands made first by the Cameron government accompanied by statement that they wished to avoid "Brexit" reflect also the rising scepticism of free movement of workers and equal treatment of those in other Member States. While the populations remain overwhelmingly supportive of free movement of workers,<sup>41</sup> governments increasingly reject the institution in particular with relation to perceived threats on social security systems, which again feeds into individual attitudes,<sup>42</sup> promising political gains for those fanning the flames of anti-EU-free-moverism. Thus, the reactions to Brexit in the field of worker mobility are indicative of what to expect in the future EU, especially if we consider the dependency of the new EU Commission from support by right wing populist parties in the European and national parliaments.

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<sup>39</sup> (Schiek, et al., 2015; Schiek, 2017)

<sup>40</sup> If maintaining this add references ###

<sup>41</sup> The Standard Eurobarometer does not differentiate between free movement of workers and free movement of other citizens. The most recent one finds the lowest support for free movement in the UK and Italy (both 68%), closely followed by Romania (72 %), Austria (75 %) and Denmark (79%), with the EU average at a comfortable 81 %. [retrieved from <https://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/standard/surveyky/2253> ] This is interpreted as a slightly stronger support for free movement of workers, based on data up to 2017 ( (Vasilopoulou & Talving, 2019)

<sup>42</sup> (Ferrera & Pellegata, 2018)

## The Cameron compromise and its continuing relevance

As is well known by now, the Cameron government demanded for the EU to respond positively to the demand for a new settlement between the EU and the UK, and the EU Council on 18 and 19 February 2016 responded positively.<sup>43</sup> Curbing free movement of workers was a central aspect of these demands and was embraced by the response.<sup>44</sup> In short, the European Council endorsed the idea that different levels of remuneration as well as “social security advantages” acted as pull factors for EU citizens to use their free movement,<sup>45</sup> and reiterated EU law principles which allow Member States to require sufficient resources for those moving for non-economic reasons and to limit free movement of those posing a threat to public security.<sup>46</sup> Further, promises were made to propose future more restrictive legislation, in particular curbing child benefits for children living abroad, but not pensions for pensioners living abroad.<sup>47</sup> Further, the promise entailed the introduction of an “alert and safeguard mechanism”, allowing a Member State to limit equal treatment of EU citizens moving freely as workers if the pull-factors of its in work benefit system resulted in “inflow” of an “exceptional magnitude”.<sup>48</sup> The Conclusions of the European Council specified, that those “offers” would be withdrawn should the UK referendum on European Union result in a preference for “leave”.<sup>49</sup> So far, the EU has remained true to this announcement as regards the “alert and safety mechanism”. However, the indexation of child benefits (and potentially other family benefits) remained on the agenda during the reform of Regulation 883/2004/EC in 2019.<sup>50</sup> While indexation was not introduced, it clearly was discussed seriously<sup>51</sup> and is likely to return to the agenda. The discussion on the “alert and safety mechanism” is continued by influential academics, who repeatedly proposed for the EU to allow Member States to introduce a cap on free moving workers if a situation of national crisis arises due to the numbers.<sup>52</sup> This proposal rejects the “solution” found by the Council, which in a more indirect way only allowed capping some in work benefits with the hope, that reducing this “pull factor” would also reduce the “inflow”. The reasons for this rejection are noble: allowing unequal treatment of migrants is likely to enhance any depressing effect on the lower quintile of wages, while limiting migration would curb some of those effects. Nevertheless, the continuing attractiveness demonstrates, how the ideas hatched for the “Cameron Deal” may continue to haunt the EU.

The “Cameron demands” were not necessarily informed by the Left case for leaving the EU: instead of focusing on limiting access to local or national labour markets, he was focused on limiting access

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<sup>43</sup> (European Council, 2016) OJ (2016) C 69/1-15

<sup>44</sup> See, with a focus on a legality assessment, (Nic Shuibhne, 2018), with a focus on extending this “offer” into the future under the slogan of fair movement (Barnard & Fraser Butlin, 2018)

<sup>45</sup> (European Council, 2016, p. 7); economic research confirms that migration is more frequently triggered by push factors, either the absence of opportunities at home, or the demands by employers (in the framework of posting) to move abroad #####

<sup>46</sup> (European Council, 2016, p. 8)

<sup>47</sup> (European Council, 2016, pp. 8, 14). The UK was meant to benefit from this, as it profits from influx of relatively young and qualified workers from post 2004 Member States, whose children sometimes remain behind, while also profiting from the emigration of its older population with ill health, exporting their full pensions and utilising health care systems abroad (Schiek, et al., 2015, p. add page ##)

<sup>48</sup> (European Council, 2016, pp. 9, 15)

<sup>49</sup> (European Council, 2016, p. 2)

<sup>50</sup> Interinstitutional File 2016/0397 (COD), provisional agreement COREPER of 25 March 2019 – 7698/19 ## update ##

<sup>51</sup> (Guibboni, et al., 2017, pp. 53-56)

<sup>52</sup> (Barnard & Fraser Butlin, 2018), see also (Barnard, 2017, pp. 496-497), suggesting that the referendum would have gone the other way had the EU promised Cameron an option to limit the absolute numbers of EU free movers entering the UK.

to social security payments. While some of the “left case” would support just that, the logical priority would be for controlling migration as such.

### Legacies of the Juncker Commission and their likely fate

There were other, more comprehensive responses to the challenges of EU membership based on a progressive position. In hindsight, the Juncker Commission’s commitment to reviving “social Europe”, accompanied by the “Europe that protects” promoted by Macron, has resulted in some successes which, however limited, were not to be expected by a Commission and a European Parliament dominated by conservative politicians, which collaborated with right wing parties.

Following the adoption of the Pillar of Social Rights in November 2017, the EU Commission launched proposals for three new instruments: the Directive on work-life balance,<sup>53</sup> a reform on the “Written Statement Directive”, which grew into the new Directive on Predictable and Transparent Working Conditions (Directive 2019/1152)<sup>54</sup> and a Council Recommendation ensuring coverage of dependent self-employed workers by social security.<sup>55</sup> While the regulatory content of these directives constitutes small steps on the long way to safeguarding gender equality and fair employment conditions for non-standard workers on employment contracts with flexible hours, they clearly signalled that there was some social commitment by the EU.

More closely related to workers’ mobility, the long -pending reform of the Posted Workers Directive (Directive 96/71, amended)<sup>56</sup> was concluded in summer 2018, and a European Labour Authority established by Regulation in June 2019.<sup>57</sup> Both proposals were part of the “Labour Mobility Package”, which again was promoted as an important step towards implementing the European Pillar of Social Rights by then Commissioner for Employment and Social Affairs, Marianne Thyssen.<sup>58</sup> The initial emergence of the labour mobility package adds some interesting detail on its link to Member States’ reservations on maintaining free movement of labour and to the (limited) role of the “Brexit” process. The launch of the Labour Mobility Package in 2014 was preceded by a common letter of representatives of four Member States (Austria, Germany, the Netherlands and the UK), stressing the “additional costs (of free movement) in particular caused by the provision of schooling, health care and adequate accommodation” as well as the fact that “a significant number of new immigrants draw social assistance (...) burdening the host countries’ social welfare system.”<sup>59</sup> Further, the indexing of child benefit was not invented by the UK government, but actually trialled by Luxembourg, until the European Court of Justice declared this policy as incompatible with EU Law.<sup>60</sup> The Labour Mobility Package evolved over time, and finally comprised the reform of the Posting of Workers Directive, the related legislation on work in the transport sector, the reform of the Social Security Coordination (which, as mentioned, did not take up the indexation of family benefits – yet) and the creation of the European Labour Authority. However, the inception indicates that controlling free movers may also attain a dimension of preventing their access to social security benefits.

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<sup>53</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0253>

<sup>54</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152>

<sup>55</sup> <https://ec.europa.eu/social/main.jsp?catId=1312&langId=en>

<sup>56</sup> Amended by Directive 2018/957 OJ L 273/16 of 9 July 2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0957&from=EN>

<sup>57</sup> ###

<sup>58</sup> [https://europa.eu/rapid/press-release\\_STATEMENT-19-844\\_en.htm](https://europa.eu/rapid/press-release_STATEMENT-19-844_en.htm)

<sup>59</sup> (Caldarini, 2016, p. 3), with electronic reference to the letter (the article can be accessed from [http://ejcls.adapt.it/index.php/ejcls\\_adapt/article/view/368/516](http://ejcls.adapt.it/index.php/ejcls_adapt/article/view/368/516) )

<sup>60</sup> ECJ Case C-177/12, Lacheb, ECLI:EU:C:2013:689 ## check ##

The passing of the substantive reform of the posting of workers directive.<sup>61</sup> As mentioned, posting of workers constitutes an alternative way of workers' mobility, which is not governed by equal treatment, but instead allows employers to maintain a labour regime and social security affiliation other (and often cheaper) than that at the place of work.<sup>62</sup> This the phenomenon emerged in the wake of the EEC's "Southern Enlargement" in the 1980s, which led to fears in the existing Member States that their labour markets would suffer from the movement of Greek, Portuguese and Spanish workers. Accordingly, free movement of those workers was subjected to long phase-in, which again prompted the development of posting as an alternative route of migration for employees in the construction sector. In the 1990s the Court established the principle that those workers could not rely on free movement of workers.<sup>63</sup> Instead their posting was framed as an expression of the employers' freedom to provide services. Any limitations on moving these workers from the employer's country of establishment to the place where their work is needed have been qualified as restrictions of the freedom to provide services.<sup>64</sup> While the Court first addressed requirements of immigration control,<sup>65</sup> it soon clarified that demanding the equal treatment of workers on the same building site would also constitute a restriction of freedom to provide services. The by now infamous Laval case<sup>66</sup> established that this also applied to demands of trade unions to the same effect. The crux of the matter is not only that workers moving as posted workers cannot rely on their Treaty rights under what is now Article 45 TFEU. If the Court would acknowledge that posting is by now the only way to move from a low wage to a high wage country in a number of sectors, and grant those posted workers the protection of Article 45 TFEU,<sup>67</sup> this still would leave unprotected non-EU workers. Employers keen to exploit differentials in social security costs and wage levels, but also employment law rules, could take to preferring non-EU workers and post them. However, extending the protection of free movement of workers to posted workers would arguably make a difference. The reform of the PWD does not achieve the same level of equal treatment as free movement of workers for these employees. While posted workers, who are also agency workers, no longer lose the protection of the agency work directive, and the fields in which workers must be treated equally with workers in the host state have been expanded,<sup>68</sup> important differences remain. Even after being posted for 12 months, posted workers still are subject to the employment law regime of the country where their employer is established. In the case of Polish labour law, for example, this means that the employer is largely free to issue a non-employment contract and deprive the worker from the protection of employment law. Further, the reform does allow employers to benefit from differentials in social security systems, which, for example, generate immense cost advantage between countries such as the Netherlands and Belgium.<sup>69</sup> Another desideratum of the reform directive lies in its treatment of collective agreements: the employer who posts her workers can only be required to comply with collective agreements which are either extended for general application, or apply in the whole territory

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<sup>61</sup> An earlier reform package established a directive supporting the enforcement of the 1996 directive [add directive number here ##]

<sup>62</sup> The bulging literature on posting of workers is increasingly beyond coverage in individual papers. See for references of the most recent literature (Krebbler, 2019; Costamagna, 2019) ##

<sup>63</sup> Case C-43/93 *Vander Elst* [1994] E.C.R I-3803, paragraph 21-22.

<sup>64</sup> Case 113/89 *Rush Portuguesa* [1990] E.C.R I-1417 paragraph 15.

<sup>65</sup> *Ibid.*

<sup>66</sup> ###

<sup>67</sup> (Krebbler, 2019; Schiek, et al., 2015, p. #add page#)

<sup>68</sup> Partly this implements the Court's "post Laval" case law, in particular the *Elektrobudowa* case, according to which "minimum wages" pre reform also comprised the wage brackets of collective agreements, if these were generally applicable (ECJ C-396/13, 12 February 2015 ## add full reference ###)

<sup>69</sup> (Voss, et al., 2016) for an excellent overview of the cost advantages of posting

of a state, or at least a larger region. Despite all these critical remarks, the situation of posted workers has been improved by the directive.

### Tentative conclusion: suitable answers to the progressive's dilemma?

The question remains whether any of these practical policy proposals and solutions addresses the progressive challenge to free movement of workers. Just answering with “no” would clearly deprive me from developing a more encompassing conclusion. In the first place, one could not expect the Cameron government to plead the case for the left-wing critique of the EU. Its demands to perpetuate unequal treatment of migrants certainly deteriorate acceptance of free movement, if anything.

The legitimate core of the progressive critique of free movement lies in the lack of the EU integration process of offering a realistic opportunity to re-negotiate the social situation of workers at a transnational level. As stated above, this presupposes equal treatment of labour migrants in the host state, both in the employment relationship and in relation to social security and social assistance.

Barriers to equal treatment in the employment relationship consist of the continuing deficits of the legal regime for posting of workers, as well as the lack of equal treatment rights for non-EU migrants.<sup>70</sup>

In order to alleviate concerns of depleting the resources for social solidarity at national levels, the idea of a European re-distribution of social security funds<sup>71</sup> might be a first step, which could be complemented by transnational and ultimately European structures. In the absence of EU legislative competences, transnational schemes might be based on collective agreements – if problems related to EU competition law could be overcome.

This points to the largest barrier to realising the full potential of free movement of workers, which remains a medium term project: the re-establishment of functioning processes for industrial relations suitable to achieve a transnational and ultimately EU level balance between management and labour. There are so many processes impeding this project that one might be reluctant to start investigating them.<sup>72</sup> They include not only the weakening of industrial relations through successive economic crises, but also the problem that ostensibly diverging interests of workers from different Member States and from beyond the EU would have to be amalgamated into some common approach.

The argument made here is that rejecting free movement of workers under the condition of equal treatment at the place of work by employers and social institutions will not contribute to any substantive progress here. Instead, such rejection would lock workers into the national space, while employers remain free to use the free movement rights for goods, services and their own establishment. Such nationalism, even if promoted by prominent authors such as Milward, will not be suitable to engender social integration in the EU Internal Market. The hope of the LEXIT argument that the EU will collapse will not end the mobility of capital and economic globalisation, but would surely end a regional integration project committed to labour mobility under the condition of equal treatment in principle.

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<sup>70</sup> (Zoetewij, 2016) ## replace by reference to journal article, add more literature ###

<sup>71</sup> Developed for the European unemployment insurance by (Vandenbroucke, 2017)

<sup>72</sup> This is the theme of an ERC funded project led by Roland Erne in Dublin, see (Erne, 2019) # check whether out and exact pages#

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