Reconnecting free movement of workers and equal treatment in an unequal Europe

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Abstract

This article argues that free movement rights for workers should be more consciously reconnected to the prohibition on nationality discrimination in EU law. It questions whether the principal aim of achieving the greatest possible freedom of movement detracts from the fundamental objective of equal treatment, using proposals agreed in February 2016 as part of the renegotiation of the UK's membership of the EU to demonstrate the risks of privileging movement in a more abstract sense over how workers who do move are actually treated. One implication of emphasising equal treatment is that disconnecting national criteria from the definition of work/worker is more difficult to defend. However, in the absence of harmonised definitions of these concepts in EU legislation, engaging the shared responsibility of the Member States can be rationalised within the wider system of free movement law and would also enable deeper reflection on whether the current framework is adequately attuned to the rapidly changing reality of work.

Introduction

The extent to which equal treatment protects EU citizens who are neither working nor self-employed, within the meaning of EU law, was intensely discussed after recent judgments of the Court of Justice.[1] Stronger legal protection for EU workers derives in part from differences between arts 21 and 45 TFEU on the limitation of rights,[2] as well as from distinct legislative provision both within Directive 2004/38 on the free movement of EU citizens generally and from the retention in force of worker-specific legislation notwithstanding the Directive's aim of 'remedying th[e] sector-by-sector, piecemeal approach to the right of free movement and residence'.[3] One critical difference concerns the right to reside in another State for more than three months. EU citizens who work or are self-employed enjoy

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[1] *Brey* (C-140/12) EU:C:2013:565, *Dano* (C-333/13) EU:C:2014:2358, *Alimanovic* (C-67/14) EU:C:2015: 597, *García-Nieto (*C-299/14) EU:C:2016:114*,* and *Commission v UK (*C-308/14) EU:C:2016:43.

[2] Article 21(1) TFEU provides that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' but art. 45(3) TFEU makes freedom of movement for workers subject only to 'limitations justified on grounds of public policy, public security or public health'.

[3] Directive 2004/38/EC 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 L158/77, recital 4. On workers specifically, see Regulation 492/2011 on freedom of movement for workers within the Union, OJ 2011 L141/1. See also, Regulation 883/2004/EC on the coordination of social security systems, OJ 2004 L166/1.

this right without any further conditions (art. 7(1)(a) of Directive 2004/38) but others must demonstrate that they 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover' (art. 7(1)(b)).

However, the apparently secure legal position of EU workers should not be taken for granted.[4] A particularly sharp jolt came from the conclusions of the European Council meeting in February 2016, as part of which a Decision of the Heads of State or Government outlined an agreed mandate for legislative reform that would have introduced discrimination against EU workers.[5] The spectre of Brexit could be argued to call for and to justify a response of pragmatic flexibility, to warrant a loosening of the legal and perhaps also ideological rigidity often attributed to the conservation of free movement rights. The problem with that argument is that it concentrates too narrowly on one dimension of the proposed reforms: the restriction of free movement per se. But the 2016 Decision mounted a double attack on EU legal fundamentals. It challenged not just freedom of movement but also the principle that workers who are nationals of other Member States must be treated equally with host State workers. Respect for equality is one of the values on which the Union is 'founded' (art. 2 TEU). Legislating for differential treatment is therefore a different order of attack.

This article argues that free movement rights have become damagingly detached from discrimination on the grounds of nationality. What should the principal aim of art. 45 TFEU be: promoting free movement to the greatest extent possible, or focusing more on how people who do move are actually treated? The objective is not to 'return the principle of free movement to its economic foundation – workers, factors of production in a common market – and away from its new citizenship grounding'.[6] Rather, the analysis concentrates on workers to expose the vulnerability of even free movement law's presumed safe core and the neglect of equal treatment in consequence of EU law's constant compulsion to propel itself beyond discrimination. The procedural argument is that how we reform free movement law requires careful negotiation of political objectives and legal constraints. Reform of free movement law is not impossible, but reform processes must be legally defensible and robust. Reform options that more strongly engage the shared obligations of the Member States are also discussed.[7]

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[4] E.g. AG Wathelet in *Bragança Linares Verruga and Others* (C-238/15) EU:C:2016:389 at [3]-[5] of the Opinion: 'In a world in which the dominant economic model is proving to have its limits, budgetary constraint has become a daily reality. Since the beginning of the "European project", freedom of movement has been one of the fundamental freedoms.…That freedom…is today being called in question and put under pressure'.

[5] Section D, Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, 2016 OJ C691/1.

[6] JHH Weiler 'The case for a kinder, gentler Brexit' (2017) 15 I•CON 1, 2.

[7] On the responsibilities of the EU more particularly, see C O'Brien, 'Civis capitalist sum: class as the new guiding principle of EU free movement rights' (2016) 53 CML Rev 937.

Two proposals for reform in the 2016 Decision – restricting 'in-work' benefits for 'newly arriving EU workers' and indexation of exported family benefits – are first assessed as prototypes for legislative change. This legally binding (Article 3(iii)) Decision established a commitment to amend EU legislation but did not take effect in light of the outcome of the UK referendum in June 2016 (art. 3(iv)). Nevertheless, notwithstanding the characteristic dismissal of its content in the referendum debate, it is argued here that the proposals agreed would have overturned decades of EU free movement law fundamentals had they been enacted and that this point needs to be made. The Decision communicated with some confidence that its content was 'fully compatible with the Treaties' (art. 3(ii)). But neither proposal easily survives against established legal principles, even acknowledging the extent to which the applicable framework has blurred the significance of the type of discrimination at issue and expanded the latitude of justification on public interest grounds. This section also examines the legitimacy of imposing on workers a requirement to demonstrate, beyond the fact of work, other forms of connection with the host State labour market and/or with host State society. It is not denied that recent case law exhibits mixed messages. But it is argued that the reasoning offered in the 2016 Decision failed to disaggregate material legal distinctions or to take account of the complex inter-connectedness of different legislative measures relevant to the free movement of workers. Ironically, the influence of EU citizenship law poses a risk to the legal security of workers in these respects.[8]

Free movement is a shared competence, yet the Member States are too often portrayed as passive or even destructive actors (without much complaint on their part) – as valiant defenders of national priorities against ever more excessive obligations inflicted by the demands of free movement. It is time that Member States instead demonstrated leadership as active and constructive architects of the legal framework. Before offering insights into how that might be realised, formative case law on the free movement of workers is first outlined to show that a critical choice was made about the interpretation of arts 45-48 TFEU at the very beginning. By assigning achievement of the greatest possible freedom of movement as the principal aim of these provisions, the Court instituted a legal framework never conceived around equal treatment with host State workers. The resultant understanding of restrictions as obstacles impacting upon that freedom reflects how free movement rights are deployed to induce the internal market more generally. But we tend not to frame the consequences of this for what they are: instances of special treatment vis-à-vis host State nationals. The Court's resolve to fortify the definition of worker as an autonomous concept of EU law is then introduced as another important feature of the founding legal framework. A framework more

[8] See further, S Reynolds '(De)constructing the road to Brexit: paving the way to further limitations on free movement and equal treatment?' in D Thym (ed.) *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing, 2017) 57.

consciously grounded in equal treatment with host State workers requires us to question whether the Court's definition should continue to remain formally disconnected from national criteria.

Free movement is an idea, and achievement, of extraordinary vision and ambition. The arguments developed here do not seek to undermine its value and they do not seek to question existing rules in response to 'problems' with free movement law that are simply not demonstrated by evidence, as will also be explained in the analysis below. Rather, it is suggested that aiming for the 'greatest possible freedom' has different material consequences as a legal benchmark than as a political objective. Alongside this, EU legal premises on the free movement of workers have barely changed notwithstanding transformative change in the practice of work itself. Is the legal framework properly reflective of the problems that cross-border workers actually face now? In that light, how free movement rules might be reformed has much wider significance than the specifics of Brexit. The central question is this: what do we want free movement, ultimately, to be about: as much of it as possible, however flawed its exercise in practice; or how we treat the people who move?

Reforming free movement of workers: the February 2016 Decision

This section examines the proposals for phased-in entitlement to in-work benefits and indexation of exported family benefits and calls into question the legal analysis offered in the Decision. As noted in the Introduction, the Decision never took legal effect. However, its radical overturning of equal treatment fundamentals serves as a cautionary tale for ongoing calls for and processes of reform, returned to in more detail below.

The text framing the 2016 proposals concentrates on challenges caused by asymmetric free movement. Having first affirmed that the free movement of workers is 'an integral part of the internal market' – expressed (upgraded?) meanwhile as an 'indivisible' part[9] – Section D of the Decision suggested:

> Different levels of remuneration among the Member States make some offers of employment more attractive than others, with consequential movements that are a direct result of the freedom of the market. However, the social security systems of the Member States, which Union law coordinates but does not harmonise, are diversely structured and this may in itself attract workers to certain Member States. It is legitimate to take this situation into account and to provide, both at Union and at national level, and without creating unjustified direct or indirect discrimination, for measures limiting flows of workers of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination.

[9] European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU, 29 April 2017, para. 1 ('core principles').

Identifying social security advantages as a free movement pull factor is symptomatic of the atmosphere in which the reforms were devised even though empirical evidence does not support the claim, a point returned to below. As emphasised at the outset, the argument here is not that reform is impossible, but that reform processes must be legally defensible and robust. The discussion first outlines, at a general level, the capacity of the EU legislator to condition the free movement of workers. The proposals on in-work benefits (raising questions about degrees of connection to the host State labour market) and exported family benefits (raising, additionally, degrees of connection to host State society) are then assessed, highlighting problematic implications for equal treatment in particular. The final part of this section interrogates the Decision's statements on justification and proportionality.

Reforming free movement of workers by legislation: general principles

Article 46 TFEU authorises the adoption of directives and regulations 'to bring about freedom of movement for workers, as defined in Article 45' and offers a non-exhaustive ('in particular') list of issues to address. Article 48 TFEU provides specifically for competence to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers'. The boundaries of legislative autonomy have emerged to date[10] through case law. The Treaty 'does not prohibit the [Union] legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers *or from determining the limits thereto*'.[11] However, while it has 'wide discretion',[12] the legislature must exercise its powers 'in conformity with the provisions of the Treaty' – a limitation that has produced successful legality challenges to attempted amendments of social security legislation.[13] For present purposes, it is significant that infringement of equal treatment – whether by direct or indirect nationality discrimination – has been a consistent red line for the Court. In *Coonan*, it determined that the principal aim of Regulation 1612/68 was 'to ensure that in each Member State workers from the other Member States receive *treatment which is not discriminatory by comparison with that of national workers* by providing for the systematic application of the rule of national treatment as far as all conditions of employment and work are concerned'.[14]

[10] Though note the mechanism for potential Council/European Council override of draft legislation in art. 48 TFEU, added by the Lisbon Treaty.
[11] *Gray* (C-62/91) EU:C: 1992:177 at [11] (emphasis added).
[12] *Von Chamier-Glisczinski* (C-208/07) EU:C:2009:455 at [40].
[13] E.g. for Reg 1408/71, *Petroni* (24/75) EU:C:1971:129 at [20].
[14] *Coonan* (110/79) EU:C:1980:112 at [6] (emphasis added). Broader questions about the principal aim of arts 45-48 TFEU are returned to in the next section below.

For directly discriminatory restrictions, only derogations specified in Article 45(3) TFEU should apply.[15] It is true that the Court has not always adhered rigidly to this position but, for free movement of workers, the main incursion to date concerns arguments raised not by the EU legislature (or by Member States) but by private actors.[16] The narrowness of the public policy derogation is another established premise of the case law.[17] For indirectly discriminatory restrictions and non-discriminatory obstacles, the objective justification defence applies. But public interest arguments accepted in principle must also be proportionate, which normally means demonstration of the appropriateness and necessity of the measure under review. However, elements of the legal framework on justification and proportionality have mutated in recent years and will be returned to below.

Requiring a link to the host State labour market: restricting in-work benefits

Section D of the 2016 Decision stated that 'Member States have the right to define the fundamental principles of their social security systems and enjoy a broad margin of discretion to define and implement their social and employment policy, including setting the conditions for access to welfare benefits' (para. 1(a)). Case law has always recognised this,[18] and the conflict rules of Regulation 883/2004 are built around it. Neither can Regulation 492/2011 'be regarded as a harmonising measure. [It] does not seek to approximate the legislation of the Member States but gives effect to Article [45 TFEU] in particular by way of certain provisions intended to abolish any discrimination on the ground of nationality as between workers of the Member States'.[19] However:

> The [Union] legislature has acted on the assumption that an economic migrant will not claim any subsistence allowance in the host Member State. Article 7 of Regulation [492/2011] grants the migrant worker rights primarily in respect of conditions of employment and, moreover, social advantages that facilitate his stay...Meanwhile, however, this assumption by the

[15] *Ugliola* (15/69) at [3] and [6]; confirmed in e.g. *Masgio* (C-10/90) EU:C:1991:107 at [24].
[16] See esp. *Bosman* (C-415/93) EU:C:1995:463 at [121]ff.
[17] E.g. *Clean Car Autoservice* (C-350/96) EU:C:1998:205 at [40]: 'recourse to the concept of public policy as used in [art. 45 TFEU] presupposes…the existence…of a genuine and sufficiently serious threat affecting one of the fundamental interests of society' (citing *Bouchereau* (30/77) EU:C:1977:172). Linking the narrowness of public policy to the creation of objective justification in the first place, see D Thym 'The constitutional dimension of public policy justifications' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds.) *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Oxford: Hart Publishing, 2016) 166, 168-169. Advocating a broader approach in the context of in-work benefits, see G Davies 'Brexit and the free movement of workers: a plea for national legal assertiveness' (2016) 41 ELRev 925, 928-930.
[18] E.g. *Pinna I* (41/84) EU:C:1986:1 at [20]: 'Article [48 TFEU] provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article [48] leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article [48].
[19] AG Geelhoed in *Akrich* (C-109/01) EU:C:2003:112 at [166] of the Opinion.

> [Union] legislature that the economic migrant will be able to provide entirely for himself has been called somewhat into question.[20]

That evolution was precisely the object of the 2016 Decision. In para. 2(b) of Section D, the text refers to the 'pull factor arising from a Member State's *in-work benefits* regime' – a phrase that appears nowhere else in EU legislation to date – and proposes:

> an *alert and safeguard mechanism* that responds to situations of inflow of workers from other Member States of an *exceptional magnitude over an extended period of time*, including as a result of past policies following previous EU enlargements. A Member State wishing to avail itself of the mechanism would notify the Commission and the Council that such an exceptional situation exists on a scale that *affects essential aspects of its social security system*, including the primary purpose of its in-work benefits system, or which leads to *difficulties which are serious and liable to persist in its employment market* or are putting an *excessive pressure on the proper functioning of its public services*.

Following a Commission proposal, the Council could authorise a State 'to restrict access to non-contributory in-work benefits to the extent necessary'. That State could then 'limit the access of *newly arriving EU workers* to *non-contributory in-work benefits* for a total period of up to four years from the commencement of employment'. The resulting 'limitation should be graduated, from an *initial complete exclusion* but gradually increasing access to such benefits to take account of the *growing connection of the worker with the labour market of the host Member State*'. The authorisation would have 'limited duration and apply to EU workers newly arriving during a period of 7 years'.

A first observation concerns the extremity of circumstances conveyed by the language used: not just an inflow of workers, but one of 'exceptional magnitude'; not just difficulties in a State's employment market but 'difficulties which are serious and liable to persist'; not just pressure on the proper functioning of public services but 'excessive pressure'. Second, neither an alert and safeguard mechanism nor the proviso of limited duration is new to EU law. Article 226 EEC – a transitional provision in the Treaty of Rome – provided:

> If, *during the transitional period*, *difficulties arise which are serious and liable to persist* in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, *a Member State may apply for authorisation to take protective measures* in order to rectify the situation and adjust the sector concerned to the economy of the common market.
> On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.
> The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, *to such an extent and for such periods as are strictly necessary* in order to attain the

[20] Ibid paras 18-19 of the Opinion.

> objectives referred to in paragraph 1. *Priority shall be given* to such measures as will *least disturb the functioning of the common market*.[21]

Reference to art. 226 EEC was entirely absent from the 2016 Decision. Considering the provision in 1963, AG Lagrange emphasised its explicitly transitional nature.[22] In that sense, art. 226 was intended to progress acceptance of common market obligations towards a more integrated and more stable phase. Does the replication of its essence in 2016 suggest a new phase of transition, but towards acceptance instead of a more diverse and more variable market? If it does, what role then for equal treatment? Even in 1963, however, the Court interrogated the evidence base of the claims presented.[23] That dimension of the 2016 Decision is deeply problematic and is returned to below. First, the equal treatment and labour market link aspects of restricting in-work benefits are examined.

Work, social advantages, and equal treatment

The Court has ruled that 'the concept of worker has a specific [Union] meaning and may not be defined on the basis of criteria laid down in national legislation. Member States cannot therefore *unilaterally* make the grant of the social advantages contemplated in Article 7(2) of [Regulation 492/2011] conditional upon the completion of a given period of occupational activity'.[24] But even if States cannot condition social advantages 'unilaterally', does that mean that it cannot be done *collectively* i.e. through EU legislation? More specifically, what *is* a non-contributory in-work benefit – social assistance, a social advantage, or an amalgam of these categories? And does it matter?

In *Brey,* concerning EU citizens who were not working or self-employed, the Court defined 'social assistance' under Directive 2004/38 as 'all assistance introduced by the public authorities…that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence'.[25] It drew from *Skalka* – a case on Regulation 1408/71 – where it had similarly emphasised that a social assistance benefit is 'intended to guarantee a minimum subsistence income'.[26]

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[21] Note also the safeguard mechanism linked to serious imbalances in the workforce provided for in Regulation 38/64/CEE relatif à la libre circulation des travailleurs à l'intérieur de la Communauté [1964] OJ 62/965 (repealed by Regulation 1612/68), similarly concerning e.g. *grave danger* (art. 2).
[22] In contrast to the more permanent procedure in art. 37 ECSC; AG Lagrange in *Italian Government v Commission* (13/63) EU:C:1963:9, p182.
[23] *Italian Government v Commission* (13/63) EU:C:1963:20, p178.
[24] *Lair* (39/86) EU:C:1988:322 at [41]-[42] (emphasis added).
[25] *Brey* (C-140/12) EU:C:2013:565 at [61].
[26] *Skalka* (C-160/02) EU:C:2004:269 at [24].

Frilli provided early consideration of a guaranteed income benefit in the context of work. The Italian Government submission merged a bold understanding of social advantages with straightforward application of equal treatment: '[s]ince the guaranteed income applies in the field of employment— *even if it has wider objectives and purposes*— and since the employment sector is amongst those which have been governed by rules of [Union] law, any restriction on the grant of the guaranteed income by reason of the nationality of the claimants is contrary to [art. 18 TFEU]'.[27] Interestingly, the Commission was more cautious. It noted that the Treaty 'has laid down a different legal basis for the general rules for the progressive attainment of freedom of movement for workers on the one hand (Article [46 TFEU]) and, on the other, the field of social security (Article [48 TFEU]). Therefore it appears at first sight difficult to acknowledge that social security might be included among the social advantages mentioned in Article 7(2) of [the] Regulation…adopted in application of Article [46]'.[28] However, it acknowledged that equal treatment must apply if the guaranteed income benefit was found to constitute a 'social advantage'.

The Court resolved the case on the basis of Regulation No 3, noting the 'double function' of the national legislation: 'it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits'.[29] Its classically broad definition of 'social advantages' came soon afterwards in *Cristini*, detaching social and tax advantages from contracts of employment, and justifying this 'in view of the equality of treatment which [art. 7(2) of the Regulation] seeks to achieve'.[30] Bringing the two lines of case law together, it ruled in *Hoeckx* that 'a benefit guaranteeing a minimum means of subsistence constitutes a social advantage, within the meaning of Regulation [492/2011], which may not be denied to a migrant worker who is a national of another Member State and is resident within the territory of the State paying the benefit, nor to his family'.[31] In *Matteucci*, it characterised art. 7(2) as 'a general rule *which imposes responsibility in the social sphere on each Member State with regard to every worker who is a national of another Member State*…as far as equality of treatment with national workers is concerned'.[32] Finally, reversing the position taken in earlier case law, the Court ruled that art. 7(2) of Regulation 492/2011 can apply even

[27] *Frilli* (1/72) EU:C:1972:56, p462.
[28] Ibid.
[29] *Frilli* (1/72) EU:C:1972:56 at [15]; it also referred to 'the rule of equality of treatment which is one of the fundamental principles of [Union] law' (at [19]).
[30] *Cristini* (32/75) EU:C:1975:120 at [13]; see further e.g. *Reina* (65/81) EU:C:1982:6 at [12].
[31] *Hoeckx* (249/83) EU:C:1985:139 at [22]; confirmed in e.g. *Scrivner* (122/84) EU:C:1985:145. In *Kempf* (139/85) EU:C:1986:223, the Court ruled that receiving income from public funds did not negate worker status, discussed further below.
[32] *Matteucci* (235/87) EU:C:1988:460 at [16] (emphasis added).

if the benefit in question falls also within the scope of Regulation 883/2004[33] – a finding with particular implications for indexation of benefits and returned to again below.

Case law therefore exhibits a deep-rooted bond between work, equal treatment and access to social advantages. Amending Regulation 492/2011 to institute phased-in access, even in extreme circumstances, would have been a direct strike at this framework. There is a brief reference to equal treatment in Section D of the 2016 Decision, but only to require that '[t]he future measures referred to…should not result in EU workers enjoying less favourable treatment *than third country nationals* in a comparable situation' (para. 2) – an astonishing statement in light of the case law outlined above. To date, only the claims of jobseekers have been severed from the scope of art. 7(2).[34] In *Dano,* a restrictive judgment on citizenship rights in general terms, the Court affirmed that '[u]nder Article 7(1)(a) of Directive 2004/38…Union citizens [who are working] in the host Member State have the right of residence *without having to fulfil any other condition*'.[35] Because workers in consequence reside lawfully in a host State, they may then (continue to) claim equal treatment rights under art. 24(1) – considered by the Court to be a 'specific expression' of art. 18 TFEU.[36]

The distinction confirmed in *Dano* also raises another problem: failure to have regard to the intersection of legislative measures. The 2016 Decision proposes only an amendment of Regulation 492/2011, but its effects would surely have to be reflected in arts 7(1) and 24 of the Directive too. Relatedly, the Decision made no reference to the fact that the concept of social advantages applies also in the context of self-employment,[37] providing another reminder that amendments to EU legislation should comply with rights that flow directly from the Treaty.

However, arguably the biggest problem is the Decision's presentation of the proposal as direct discrimination – restrictions that apply only to 'newly arriving EU workers' – because then only art. 45(3) TFEU derogation grounds could be used to defend it. In other words, the proposed amendment 'confronts only workers who have exercised their right to freedom of movement'.[38] Perhaps if the UK had decided to remain in the EU, the Commission might have recast the amendment as indirect discrimination through the setting of a residence rather than 'newly arriving' condition. In that situation, the justification threshold would alter from virtually impenetrable to still significantly

[33] *Commission v Luxembourg* (C-111/91) EU:C:1993:92 at [21].
[34] *Lebon* (316/85) EU:C:1987:302 at [26]; confirmed in *Collins* (C-138/02) EU:C:2004:172 at [31].
[35] *Dano* (C-333/13) EU:C:2014:2358 at [75] (emphasis added). The requirement that persons not working must have sufficient resources demonstrates, according to the Court, that 'Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence' (para. 76) – suggesting that the Directive does not preclude workers from doing so.
[36] *Dano* (C-333/13) EU:C:2014:2358 at [61].
[37] Regulation 492/2011 does not apply to self-employment, but the Court draws equal treatment rights directly from art. 49 TFEU; on equal treatment, guaranteed minimum income benefits and freedom of establishment, see *Commission v Luxembourg* (C-299/01) EU:C:2002:394, esp. [12].
[38] *Vougioukas* (C-443/93) EU:C:1995:394 at [41].

difficult, as explained further in the discussion on justification and proportionality below. However, the language of the Decision itself was unambiguously directly discriminatory. The alert and safeguard mechanism may not therefore have been a radical limitation of free movement. But it did represent a radical reconfiguration of how EU workers are treated: differential eligibility for social advantages as they undertake the same work as and alongside national workers yet remain under the same taxation obligations. It is about time that this particular spade was so called.

Work and links to the host State labour market

Paragraph 1(a) of Section D states that 'conditions may be imposed in relation to certain benefits to ensure that there is *a real and effective degree of connection between the person concerned and the labour market of the host Member State*'. In case law involving economic activity, this requirement has only ever been imposed on jobseekers.[39] There is more developed case law on conditionality in other sectors of the free movement of persons: for example, on student maintenance before the adoption of Directive 2004/38.[40] But those judgments concern integration into host State *society* and not, more specifically, the host State labour market. The translation of that broader objective to workers in the form of residence conditions has already been ruled out.[41]

More specifically, the fact of participating in the host State labour market 'establishes, in principle, a sufficient link of integration with the society of that Member State, allowing [workers] to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages'.[42] The Court has reasoned that '[t]he link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers'.[43] It referred in support to the third recital of Regulation 1612/68,[44] further enhanced as the fourth recital of Regulation 492/2011.[45] The 2016 Decision therefore faced directly opposing case law: to which it made no reference. Its pick and mix approach to legal justification fails to unpick different strands of reasoning based on different Treaty

[39] *Collins* (C-138/02) EU:C:2004:172 at [69]-[70]; *Vatsouras and Koupatantze* (C‑22/08 and C‑23/08) EU:C:2009:344 at [37]-[38]; *Prete* (C-367/11) EU:C:2012:668 at [44]-[47].
[40] See esp. *Bidar* (C-209/03) EU:C:2005:169.
[41] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [63].
[42] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [65].
[43] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [66].
[44] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [67].
[45] 'Freedom of movement constitutes a fundamental right of workers and their families. Mobility of labour within the Union must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States. ...'

provisions. This criticism is not about the extent to which judgments of the Court lock down an interpretation that becomes resilient to legislative revision, though that is in itself a significant question upon which to reflect.[46] It is, for present purposes, more about how things fit together as part of a wider system. Opposing legal premises should not be ignored and proposals for reform should be rigorously rationalised in that light.

More generally, requiring links to the host State labour market is just a peculiar way to condition the free movement of workers, which is defined by exactly that link. Requiring connections of particular duration with no corresponding alteration in, for example, tax obligations illustrates further the degree of the inequality of treatment contemplated. It is true, though, that for links to host State *society*, the language in *Commission v Netherlands* is qualified – integration requirements are satisfied *in principle* through work. Could that proviso therefore rationalise the other proposal examined here i.e. indexation of exported family benefits?

Requiring a link to host State society: indexation of exported family benefits

The 2016 Decision proposed an amendment to Regulation 883/2004 'to give Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits to the conditions of the Member State where the child resides' (Section D, para. 2(a)). This option was to apply 'only to new claims made by EU workers' but with the possibility that 'from 1 January 2020, all Member States may extend indexation to existing claims to child benefits already exported by EU workers'.[47] In a Declaration attached to the Decision, the Commission noted that the 'conditions of the Member State where the child resides' would include 'the standard of living and the level of child benefits applicable in that Member State' (Annex 5). To evaluate the legality of the amendment, this sub-section outlines the legal principles applicable to Regulation 883/2004 and child benefits and discusses that measure's relationship to other legislation. It then questions the transposition to exportability of child benefits of case law permitting conditionality through links to host State society.

Regulation 883/2004, child benefits and equal treatment

[46] PAJ Syrpis 'The relationship between primary and secondary law in the EU' (2015) 52 CML Rev 461; G Davies 'The European Union legislature as an agent of the European Court of Justice' (2016) 54 JCMS 846.

[47] Indexation of other types of exportable benefits (e.g. pensions) was ruled out, at least on the part of the Commission. For comprehensive discussion of the underlying legal framework, see G Strban 'Family benefits in the EU: is it still possible to coordinate them?' (2016) 23 MJ 775.

By setting up a system of conflict rules rather than 'a common system of social security',[48] Regulation 883/2004 aims to navigate legitimately different national systems, in order to identify the State of responsibility for payment and to facilitate aggregation of entitlement across two or more systems while avoiding undue overlap of benefits. An important consequence of choosing a system of coordination is that 'the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security'; that 'may be to the worker's advantage in terms of social security or not, according to circumstance'.[49] Article 7 of Regulation 883/2004 states: *'[u]nless otherwise provided for by this Regulation*, cash benefits payable under the legislation of one or more Member States or under this Regulation *shall not be subject to any reduction*, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary *or the members of his family reside in a Member State other than that* in which the institution responsible for providing benefits is situated'. Would amending this provision suffice to enable indexation of exported child benefits?

The Court has repeatedly stated that 'regulations in the field of social security have as their basis, their framework *and their bounds* Articles [45-48 TFEU] which are aimed at securing freedom of movement for workers'.[50] Thus while art. 4 provides that 'persons to whom [the] Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof' only '*unless otherwise provided for by this Regulation*', amending that measure to introduce indexation is not straightforward when the wider system of EU law is taken into account. As we saw also for in-work benefits, the strongest objection to indexation is an equal treatment argument. In particular, the indexation proposal was again framed as direct discrimination ('new claims made by EU workers') and that choice has implications for how the measure might be justified. If the restrictions were rephrased around residence conditions applying also to workers of host State nationality, they would still constitute indirect discrimination since EU workers are more likely than host State workers to have family members in other States.[51] The 2016 Decision therefore sought to amend legislative rules that reflect established case law.

Regulation 883/2004 defines 'family benefits' in art. 1(z) as 'all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances'. Article 67 provides that '[a] person shall be entitled to family benefits in accordance with the legislation of the competent Member State, *including for his family members residing in another Member State, as if they were residing in the former Member State*' while

[48] *De Moor* (2/67) EU:C:1967:28, p207.
[49] *Hervein and Hervillie* (C-393/99 and C-394/99) EU:C:2002:182 at [51].
[50] *Van der Veen* (100/63) EU:C:1964:65, p573 (emphasis added).
[51] E.g. *Pinna I* (41/84) EU:C:1986:1 at [24].

art. 68 establishes conflict rules to manage overlapping benefits, again prioritising the responsibility of the State where economic activity takes place. Moreover, excluding a benefit from the scope of Regulation 883/2004 does not make it immune from challenge under art. 7(2) of Regulation 492/2011[52] – as discussed further below.

Attaching conditions to the export of benefits is therefore a derogating measure and related concepts must be interpreted strictly.[53] As stated in recital 37 of the Regulation, '[t]his means that [such provisions] can apply only to benefits which satisfy the specified conditions'. According to Chapter 9, exportability may be restricted when a cash benefit is both special and non-contributory, and it must also be listed in Annex X. However, the Court investigates the DNA of benefits in substance against its own criteria for these characteristics.[54] On that basis, child benefits are neither special nor non-contributory; restricting their exportability should therefore be acknowledged for what it is: a major departure from current rules.

Benefits 'closely linked with the social environment' of the host State can be made subject to residence conditions; but 'benefits paid exclusively by reference to the number and, where appropriate, the age of the members of the family' must be granted 'wherever the recipient and his family reside'.[55] In *Commission v France,* AG Van Gerven did not accept the French Government's argument that 'the supplementary allowance at issue…cannot be exported outside the national territory…because the amount thereof is closely connected with a specified economic and social environment'.[56] In his view, 'the argument that economic and social circumstances vary from one place to another, for instance differences in the cost of living, is no more applicable as between Member States than it is as between different regions in a single Member State. Furthermore, it takes no account of the costs resulting from mobility itself. Policy arguments based on general economic considerations of that kind are a matter of domestic politics and have no place before the Court'.[57]

Ironically, integration of family members *into* the host State was a strong driver of foundational case law on access to social advantages and still finds reflection in recital 6 of Regulation

[52] E.g. *Leclere and Deaconescu* (C-43/99) EU:C:2001:303.
[53] E.g. *Jauch (*C-215/99) EU:C:2001:139 at [21].
[54] E.g. *Kersbergen-Lap and Dams-Schipper* (C-154/05) EU:C:2006:449 at [30] (a special benefit 'must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria') and [36] (non-contributory concerns 'how the benefit concerned is actually financed… whether that financing comes directly or indirectly from social contributions or from public resources'). See further, *Commission v Parliament and Council* (C-299/05) EU:C:2007:608.
[55] *Lenoir* (313/86) EU:C:1988:452 at [16].
[56] AG Van Gerven in *Commisison v France* (C-236/88) EU:C:1990:243 at [7] of the Opinion.
[57] Ibid. Note also the seemingly discordant positions taken by AG Kokott in *Hosse* (C-286/03) EU:C:2005:621 at [109] and [112] respectively of the Opinion.

492/2011.[58] But what the case law respects and aims to facilitate overall are the *choices* that workers (have to) make. The Court has stated consistently that the purpose of what is now art. 67 of Regulation 883/2004 is 'to prevent Member States from making entitlement to *and the amount of* family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that [Union] workers are not deterred from exercising their right to freedom of movement'.[59] The legal principles that resist restricting exportability were in many respects designed to meet the needs of frontier workers. The experience of split work/residence still includes that group but far exceeds it too. People increasingly spread their lives across different places for all kinds of reasons. The 2016 Decision punishes precisely this expression of contemporary free movement – moreover, as shown below, it did so for no demonstrably good reason.

Meanwhile, the most pragmatic counter-argument comes from AG Lenz*,* who highlighted the self-defeating consequences of curbing exported family benefits: in response to the suggestion that there could be 'serious financial consequences' for a paying State 'if spouses living abroad had to be taken into consideration', he pointed out that the worker's spouse 'would undoubtedly have the right to move to the [host State] to live with her husband. If she exercised that right, the full amount of the benefit claimed by [the EU worker] in the main proceedings would unquestionably have to be paid'[60] – not to mention all other costs to the host State that result from family members living there.

Regulation 883/2004 and equal treatment: relationship to other measures

It was noted above that no parallel restrictions on in-work benefits were included for the self-employed. The same ambiguity exists for indexation, but it is more striking here since both Article 48 TFEU and Regulation 883/2004 explicitly refer to self-employed workers. The potential for intersection with Directive 2004/38 – and its guarantee of equal treatment in art. 24(1) in particular – was also discussed above and has relevance again here.[61] But for the indexation proposal, there is a much bigger intersection of measures problem: 'since Regulation [492/2011] is of general application regarding the free movement of workers, Article 7(2) thereof may apply to social advantages which, at the same time, fall specifically within the scope of Regulation [883/2004]'.[62] Amending only Regulation 883/2004 could not therefore suffice.

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[58] E.g. AG Trabuchi in *Mr and Mrs F* (7/75) EU:C:1975:75, p696; *Cabanis-Issarte* (C-308/93) EU:C:1996:169 at [38]-[39]; *Depesme and Kerrou* (C-401/15 to C-403/15) EU:C:2016:955 at [44].
[59] *Hoever and Zachow* (C-245/94 and C-312/94) EU:C:1996:379 at [34] (emphasis added); confirmed in e.g. *Slanina* (C-363/08) EU:C:2009:732 at [20]-[21].
[60] AG Lenz in *Acciardi* (C-66/92) EU:C:1993:341 at [26] of the Opinion.
[61] On Directive 2004/38 and work/self-employment crossover, see *Gusa* (C-442/16) EU:C:2017:1004.
[62] *Commission v Luxembourg* (C-111/91) EU:C:1993:92 at [21]; confirmed in e.g. *Martínez Sala* (C-85/96) EU:C:1998:217 at [27] and *Commission v Germany* (C-206/10) EU:C:2011:283 at [39].

The Court classifies child benefit as a social advantage under art. 7(2) of Regulation 492/2011.[63] Moreover, even restrictions on 'special' family benefits legitimately excluded from the scope of Regulation 883/2004 will be tested under the former provision.[64] This second level of equal treatment compliance stems from the premise noted above: that social security measures 'have as their basis, their framework *and their bounds*' arts 45-48 TFEU. Other primary law guarantees also have relevance. In *Dano*, the Court (controversially) ruled out consideration of the Charter of Fundamental Rights in connection with national rules laying down conditions for special non-contributory cash benefits under art. 70 of Regulation 883/2004.[65] However, neither the EU legislature's designation of benefits under that Regulation nor intended exclusions from its scope would enjoy immunity from judicial review. A proposal that varies the level of benefit paid on the basis of where family members live raises obvious questions about respect for privacy and family life.[66]

Conditionality through links to host State society

Testing residence requirements that condition access to social advantages is commonplace in case law on frontier workers. Article 36(2) of Regulation 492/2011 states that the Regulation 'shall not affect measures taken in accordance with Article 48 [TFEU]'. In *Hendrix,* the Court acknowledged that statement and also pointed out that 'the provisions of Regulation [883/2004] enacted to give effect to Article [48 TFEU] must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers'.[67] Nevertheless, the Court found the contested residence condition to be justifiable in principle – by invoking the benefit's status as special and non-contributory per Regulation 883/2004.[68] In practice, then, the second level of evaluation was no stricter than resolving the case on the basis of the Social Security Regulation in the first place. The elevation of integration requirements over equal treatment that results will now be considered in more detail.

The indexation proposal challenges the *sufficiency* of the connection that a worker can establish with a host State if family members reside elsewhere. Recital 8 of Regulation 883/2004 affirms that '[t]he general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers'. At a general level,

[63] *Martínez Sala* (C-85/96) EU:C:1998:217 at [28].
[64] E.g. *Leclere and Deaconescu* (C-43/99) EU:C:2001:303 at [31].
[65] The reasoning was that Member States were not 'implementing' Union law per art. 51 of the Charter; see *Dano* (C-333/13) EU:C:2014:2358 at [87]-[91].
[66] For Regulation 492/2011, e.g. *Baumbast* (C-413/99) EU:C:2002:493 at [72].
[67] *Hendrix* (C-287/05) EU:C:2007:494 at [50]. The 'greatest possible freedom' objective is returned to below.
[68] *Hendrix* (C-287/05) EU:C:2007:494 at [55]-[57]; the determination of proportionality was left to the national court.

the Court recognises that commitment through an adapted version of the reasoning seen in the previous section for connections to the host State labour market: 'compulsory membership of the [host State] social security system, which ensures that workers pay social contributions to that system, constitutes a *sufficiently close* connection *with [host State] society* to enable cross-border workers to benefit from the social advantage in question'.[69] In *Hartmann*, a residence condition was attached to a child-raising allowance on the basis that it was 'an instrument of national family policy intended to encourage the birth-rate' in Germany and was granted 'to benefit persons who, by their choice of residence, have established a real link with German society'.[70] The applicant did not come within the personal scope of Regulation 883/2004, but the Court looked at the benefit as a social advantage under Regulation 492/2011 and observed that 'under the German legislation in force at the material time, residence *was not regarded as the only connecting link* with the Member State concerned, and a *substantial* contribution to the national labour market also constituted *a valid factor of integration into the society* of that Member State. In those circumstances, the allowance at issue…could not be refused to a couple…who do not live in Germany, but one of whom works full-time in that State'.[71]

The challenging consequences of this turn from equal treatment to integration unfolded further in *Giersch*, where the Court stated that 'the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State'.[72] In a statement with implications for both indexation and phased-in benefits, it suggested that 'to ensure that the frontier worker who is a taxpayer and who makes social security contributions in [the host State] has a *sufficient* link with [that] society, the financial aid could be made conditional on the frontier worker…having worked in that Member State *for a certain minimum period of time*' and noted the five year requirement (for permanent residence) in art. 16 of Directive 2004/38 in 'another context'.[73] Yet national legislation taking that guidance literally – i.e. codifying a five year residence condition before financial aid was granted to frontier workers – was later disapplied by the Court because of the 'significant period of time' that the applicants had worked in the host State.[74] So what exactly is the Court trying to rule out – or to rule in – for residence conditions and frontier workers?

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[69] *Commission v Germany* (C-269/07) EU:C:2009:527 at [60] (emphasis added).
[70] *Hartmann* (C-212/05) EU:C:2007:437 at [32]-[33].
[71] *Hartmann* (C-212/05) EU:C:2007:437 at [36]-[37] (emphasis added); cf. the narrower approach taken by AG Geelhoed (EU:C:2006:615). See further, *Geven* (C-213/05) EU:C:2007:438, returned to below.
[72] *Giersch* (C-20/12) EU:C:2013:411 at [65].
[73] *Giersch* (C-20/12) EU:C:2013:411 at [80].
[74] *Bragança Linares Verruga and Others* (C-238/15) EU:C:2016:949 at [63]-[69]. This case law also concerns links between the *children* of migrant workers and the host State; see further, C Jacqueson 'Any news from Luxembourg? On student aid, frontier workers and stepchildren: *Bragança Linares Verruga* and *Depesme*' (2018) 54 CML Rev 901.

AG Wathelet has been critical of the discord generated by the *Hartmann/Giersch* case law, contrasting it with clearer equal treatment reasoning in previous judgments: clarity now 'blurred' by 'introducing the concept of sufficient integration or genuine link with the host Member State into…case-law relating to workers'.[75] He acknowledged that 'the Court has accepted certain reasons as justifying legislation establishing a distinction between residents and non-residents pursuing a professional activity in the Member State concerned, according to their level of integration into the society of that State or their connection to it' but remains 'reticent about that development'.[76] He frames *Hartmann/Giersch* as an 'exception' to the general rule that 'as regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment…as regards social advantages' and argues that, as an exception, it must be 'applied restrictively'.[77]

Criticism notwithstanding, *Hartmann/Giersch* does introduce the contention that all workers are *not* equal under EU law.[78] However, a crucial point of difference between these judgments and the 2016 indexation proposal is that workers potentially affected by the latter worked *and* lived in the host State. Thus to defend indexation of exported family benefits through *Hartmann/Giersch* would require a further significant limitation in an already uncertain sphere of already controversial limitation. Furthermore, the Court has spent decades emphasising that family members of an EU worker derive their rights from that worker – that they are 'indirect recipients of the equal treatment granted to the worker'.[79] To condition family benefit not with reference to the place of work or residence of the worker but to the place of residence of the derived rights-holder(s) would undercut that legal construction too.

Demonstrating justification and proportionality

It was argued above that if the 2016 amendments had proceeded as proposed – i.e. as directly discriminatory restrictions – they could not have survived legal challenge since the public interest arguments specified in the Decision (encouraging recruitment, reducing unemployment, protecting

[75] AG Wathelet in *Bragança Linares Verruga and Others* (C-238/15) EU:C:2016:389 at [36] of the Opinion.
[76] AG Wathelet in *Bragança Linares Verruga and Others* (C-238/15) EU:C:2016:389 at [67]-[68] of the Opinion; note the same conflicted tone in [75]-[76] of the Opinion.
[77] AG Wathelet in *Bragança Linares Verruga and Others* (C-238/15) EU:C:2016:389 at [68] of the Opinion. The specific context of Luxembourg was also relevant in *Giersch* (C-20/12) EU:C:2013:411; see [70]-[80] of that judgment.
[78] Cf. AG Mengozzi in *Giersch* (C-20/12) EU:C:2013:70 at [30] of the Opinion: 'When interpreting Article 7(2) of Regulation [492/2011], the Court has made no distinction between the concepts of migrant worker and frontier worker precisely because [the] Regulation…does not treat those two categories of worker differently'.
[79] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [48].

vulnerable workers, and averting the risk of seriously undermining the sustainability of social security systems) are not derogation grounds in art. 45(3) TFEU. If the Commission had later drafted the amendments in the language of indirect discrimination, through residence rather than nationality conditions, public interest justification could be engaged. Two further questions would then arise. First, are the public interest grounds listed in the Decision applicable to the free movement of workers? Second, were either of the proposed mechanisms grounded in objective assessments that established their appropriateness and necessity i.e. did they satisfy a proportionality test?

Justification, public interest and the free movement of workers

Free movement law has adapted on the question of economically-driven public interest arguments. For workers, case law reflects a gradual shift from rejection of 'purely economic' arguments as unwarranted protectionism[80] to recognition that public interest defences often have mixed ambitions – reflecting 'the inescapable fact that every public service provided by our welfare states is dependent on there being sufficient budgetary means to finance it'.[81] This compromise was expressed as follows in *Commission v Cyprus*:

> [W]hile reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty…national legislation may, however, constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest…Therefore, it is conceivable that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the public interest capable of justifying the undermining of the provisions of the Treaty concerning the right of freedom of movement for workers.[82]

However, in another line of case law, that position is displaced when consideration of equal treatment is added. In *Commission v Netherlands,* the Court seemed both to accept but also to limit its tolerance of integrated economic/social objectives, ruling that 'although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers'.[83] Otherwise, 'the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might

[80] As captured by the Court's (continuing) rejection of 'considerations of a purely economic nature' e.g. *Roeckler* (C-137/04) EU:C:2006:106 at [24].
[81] AG Sharpston in *Bressol* (C-73/08) EU:C:2009:396 at [91] of the Opinion.
[82] *Commission v Cyprus* (C-515/14) EU:C:2016:30 at [53]; confirmed in Case C-651/16 *DW*, EU:C:2018:162, paras 33-34.
[83] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [57].

vary in time and place according to the state of the public finances of Member States'.[84] Here, the judgments cited in support were drawn not from free movement but from social policy case law.[85]

In contrast, the Court accepts 'protection of public finances' more straightforwardly to accommodate legislation curtailing social assistance when EU citizens are not working or self-employed.[86] In this context, as noted earlier, Directive 2004/38 expressly requires financial self-sufficiency for lawful residence in a host State beyond three months, which in turn conditions EU equal treatment protection.[87] Member States may impose general restrictions on EU citizens as a preventive defence against 'the accumulation of all the individual claims which would be submitted to it', which would be 'bound' to constitute an unreasonable burden on their social assistance systems.[88] However, for workers, the Court (still) holds a harder line on general measures. For example, in *ITC*, it characterised the 'systematic refusal' of a benefit as 'tantamount to an outright negation of the freedom of movement for [Union] workers laid down by Article [45 TFEU]'.[89] The intersection of work and social assistance targeted by the proposal for phased-in benefits called for overt merging of these two different sectors of case law. Broader questions about work and welfare are picked up below. But arguments made above about the distinctive Treaty bases for citizenship rights and free movement of workers respectively, the particular legislative powers conferred by art. 21 TFEU in particular, and the retention of legal distinctiveness for workers in art. 7 of the Directive may be recalled in response for now; for they apply again here.

Were the proposals proportionate?

If the amendments were drafted as indirect discrimination, and if case law analogies requiring links either to the host State labour market (to date, applied only to jobseekers) and/or to host State society more generally (to date, applied in principle to frontier workers but not yet successfully) were significantly extended, and if the position in *Commission v Netherlands* on equal treatment and budgetary considerations with respect to workers was set aside, even that would not mean that the

[84] *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [58]. See similarly, AG Sharpston in *Bressol* (C-73/08) EU:C:2009:396 at [95] of the Opinion, where the 'familiar "free rider" argument' is countered by free movement being exercised on the basis of non-discrimination.

[85] *Kutz-Bauer* (C-187/00) EU:C:2003:168 at [59]; *Nikoloudi* (C-196/02) EU:C:2005:141 at [53]; *Roks and Others* (C-343/92) EU:C:1994:71 at [36]; and *Steinicke* (C-77/02) EU:C:2003:458 at [67]. On the intersection of social policy and free movement law, see T Van Peijpe, 'EU limits for the personal scope of employment law' (2012) 3 *European Labour Law Journal* 35.

[86] *Brey* (C-140/12) EU:C:2013:565 at [55]; *Commission v UK (*C-308/14) EU:C:2016:43 at [80].

[87] The Commission has proposed that this distinction is added to art. 4 of Regulation 883/2004 (see n99 below).

[88] *Alimanovic* (C-67/14) EU:C:2015: 597 at [62].

[89] *ITC* (C-208/05) EU:C:2007:16 at [44]; see also AG Lenz (EU:C:2006:649) at [102]-[104] of the Opinion.

proposals would overcome legal vulnerability. For perhaps the deepest weakness turns on proportionality. In short, the Decision exemplifies a detrimental and dangerous rejection of the critical importance of evidence: a rejection of decisions based on 'solid and consistent data'[90] and an acceptance instead of perceived or projected effects; dynamics that in many respects delivered Brexit itself despite the Decision's efforts.

The Court has consistently rejected arguments that defend restrictions of free movement by 'merely allud[ing], without providing any precise elements to substantiate [the] arguments, to a hypothetical financial burden which would be put on the national social security scheme'.[91] This contrasts with the projected burden approach for social assistance claims by EU citizens who are not working or self-employed. For workers, standards of proof continue to require that the proportionality of a restriction must be *demonstrated* i.e. must be accompanied by 'specific evidence substantiating [the] arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system'.[92] These principles are also reflected in the direction recently set by the legislator in Directive 2014/54, which commits the Member States to establishing national bodies 'for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement' on the premise of evidence-based data.[93]

For phased-in benefits, a Commission Declaration attached to the Decision (Annex VI) asserted 'that the kind of *information provided to it by the United Kingdom*, in particular as it has not made full use of the transitional periods on free movement of workers which were provided for in recent Accession Acts, *shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today*. Accordingly, the United Kingdom *would be justified* in triggering the mechanism *in the full expectation of obtaining approval*'. This was a breath-taking – and unsubstantiated – statement: none of the evidence published by the Commission[94] or by the UK itself[95] in the months preceding the 2016 negotiations reached or even implied anything like

[90] *Commission v Cyprus* (C-515/14) EU:C:2016:30 at [54].
[91] *Rockler* (C-137/04) EU:C:2006:106 at [26].
[92] *Commission v Cyprus* (C-515/14) EU:C:2016:30 at [54]; see also, *Commission v Netherlands* (C-542/09) EU:C:2012:346 at [82].
[93] Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, 2014 OJ L128/8, art. 4.
[94] E.g. 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', prepared for DG Employment, Social Affairs and Inclusion (2013), https://publications.europa.eu/en/publication-detail/-/publication/c6de1d0a-2a5b-4e03-9efb-ed522e6a27f5.
[95] E.g. 'Free movement of persons: a review of the balance of competences', July 2014, https://www.gov.uk/government/consultations/free-movement-of-persons-review-of-the-balance-of-competences. A 2015 House of Lords Review of the Balance of Competences explicitly criticised the 'lack of

the Decision's high threshold. More generally, research examining negative perceptions about the impact of EU citizens on national welfare systems within the UK[96] and elsewhere[97] continues to dispel them. Not even the (typically less demanding) appropriateness limb of proportionality was met: analysis of in-work benefit claimants in the UK suggests that the safeguard mechanism would have had little impact on inward migration from the EU since the proposed 'restrictions are concentrated on a small share of newly arriving families'.[98]

Finding evidence to justify the indexation amendment is even more problematic. The Commission was already working on a proposal to amend Regulation 883/2004 (since 2014) but an impact assessment was published only after the February 2016 Decision, in December of the same year.[99] The Commission's Proposal indicates that 'a significant minority of Member States delegations favoured different coordination of benefits intended to replace income during child-raising periods' (p6). But evidence to support reform of the rules on family benefits simply did not materialise. With the exception of the special situation of Luxembourg as an 'outlier', Annex XI of the Impact Assessment concluded that [t]he impact of the export of child benefits on total expenditure is quite limited for most of the Member States under the current rules…A change to another option has on average no significant impact on the public spending on family benefits' (p66). On the balance of evidence gathered, the Commission Press Release issued on the publication of its proposal to amend Regulation 883/2004 concluded that '[n]o indexation of child benefits is foreseen' since '[l]ess than 1% of child benefits in the EU are exported from one Member State to another'.[100] For the UK, statistics published

balance' and 'undue weight given to evidence reflecting the Government's own position' of the free movement of persons report (para. 28 of the Review, https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/140/140.pdf).

[96] E.g. A Sangiovanni 'Non-discrimination, free movement, and in-work benefits in the European Union' (2017) 16 *European Journal of Political Theory* 143, 154-155.

[97] E.g. D Sindbjerg Martinsen and G Pons Rotger 'The fiscal impact of EU immigration on the tax-financed welfare state: testing the "welfare burden" thesis' (2017) *European Union Politics*, http://journals.sagepub.com/doi/pdf/10.1177/1465116517717340, which establishes that EU nationals have made a 'significant positive net contribution to the Danish welfare state'.

[98] M Sumption and S Altorjai 'EU migration, welfare benefits and EU membership', Migration Observatory report, COMPAS, University of Oxford, UK, May 2016, http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/05/Report-EU_Migration_Welfare_Benefits.pdf.

[99] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016) 815 final; see further the Impact Assessment (SWD(2016) 460 final) and the part containing Annex XI, https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-460-F1-EN-MAIN-PART-4.PDF.

[100] 'Fairness at the heart of Commission's proposal to update EU rules on social security coordination', 13 December 2016, http://europa.eu/rapid/press-release_IP-16-4301_en.htm. Changes are proposed only for family benefits intended to replace income during child-raising periods; see draft Recitals 11 and 35a, and draft art. 68b.

by the House of Commons *before* the European Council meeting on 18-19 February 2016 showed that only approx. 0.3% of child benefit was claimed for children living in another EEA State.[101]

Annex XI of the Impact Assessment proceeded on the basis that only the option of 'no export' was 'disregarded due to legal reasons'.[102] The Commission offered no comment on the legality of indexation. However, it has been argued here that neither the phased-in benefits nor indexation amendments could be defended against established principles constituting the integrated system of free movement and equal treatment law. It is not only the proportionality test and its demands for evidence-based decisions that present problems. Other legal barriers discussed include: the narrow scope of the public policy derogation; the intersection of different legislative measures and of legislative measures and rights conferred by the Treaty, which constricts the discretion of the legislator; and the array of legal distinctions – in the Treaty, in legislation, and in case law – between EU citizens who work or are self-employed and those who do not. Transplanting ideas (or judgments) from one sector of EU law to another is not inherently problematic. But the problem here is not just that one or two or a few legal difficulties escaped the attention of the 2016 Decision. It is that an entire multiplicity of them did. In consequence, the proposals sought a more fundamental reform of the very conception of treating workers equally than has tended to be appreciated through its presentation of selective, under-reasoned connections. This is not about legal flexibility, but about legal instability.

However, it can be acknowledged that the changing nature of work, disparities between work and subsistence, and the reality of asymmetric movement have not been properly worked through at EU level. Also, while the particular areas highlighted for reform in the 2016 Decision addressed perceived more than actual problems, the legacy of political pressure created by sustained efforts to call free movement rights into question is very real. Whether 'complete' equality of treatment can be sustained for all workers should be confronted, but this should happen only in stronger recognition that EU law sets parameters around appropriate reform, in both procedural and substantive terms. With these points in mind, the discussion that follows first examines foundational case law on the free movement of workers and identifies a corresponding foundational problem: attribution of the greatest possible freedom of movement as the principal objective of arts 45-48 TFEU. Reform that prioritises equal treatment and also emphasises a contribution from the Member States in sustaining free movement law is then discussed.

[101] Sumption and Altorjai 'EU migration, welfare benefits and EU membership' (2016), 6, citing House of Commons Briefing Paper No CBP 7445.
[102] See pp 30 and 42 of the report on export of family benefits included in the Impact Assessment.

The shaping of a legal framework: the 'greatest possible freedom' as principal aim

Choices made in the first substantive judgment on workers still shape the functioning and reach of free movement today. For present purposes, the foundational case law fixed two critical points: first, free movement rights are about much more than equal treatment with host State workers; second, certain concepts should be defined and controlled at EU level.

Origins: the 'greatest possible freedom' as principal aim

The Court first considered the 'principal objective' of arts 45-48 TFEU in *Unger*, a judgment delivered in March 1964.[103] The case concerned the definition of 'wage-earner or assimilated worker' for the purposes of the Social Security Regulation. Unlike art. 45 TFEU, art. 48 does not confer directly effective rights. But the Commission linked the shared purpose of the provisions and shaped its submission around equal treatment:

> Regulations…have as their object the creation of a unified law in the Member States; it follows from this that the concepts which they contain are in principle vested with a Community character. This does not however prevent Community law from employing in exceptional circumstances concepts borrowed from national law, especially when it is concerned with adapting the application of national legislation to the rules of Community law…The *principal object* of [Articles 45-48 TFEU] is to ensure that each Member State guarantees the nationals of other Member States the same treatment as that guaranteed to its own nationals, including the application of the provisions in force relating to social security. On the other hand, it is not the intention of the Treaty to replace national legislation by other rules. Consequently it is not the object either of the Treaty or of the provisions in implementation thereof to determine by a legislative Community measure who is a 'wage-earner'.[104]

However, the Court went much further:

> Article [48 TFEU] is [in] Part Two of the Treaty ('Foundations of the Community'). *The establishment of as complete a freedom of movement for workers as possible,* which thus forms part of the 'foundations' of the Community, therefore *constitutes the principal objective of Article [48] and thereby conditions the interpretation of the regulations adopted in implementation of that Article*. Articles [45-48] of the Treaty, by the very fact of establishing freedom of movement for 'workers', have given Community scope to this term. If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' *and to eliminate at will the protection afforded by the Treaty to certain categories of person*…Articles [45-48] would therefore be deprived of all effect and the above-mentioned objectives of the Treaty would be frustrated….[105]

[103] *Unger* (75/63) EU:C:1964:19.
[104] *Unger* (75/63) EU:C:1964:19, p182 (emphasis added).
[105] *Unger* (75/63) EU:C:1964:19 at [1] (emphasis added).

Three months later, in *Nonnenmacher*, the 'principal objective' assigned to art. 48 TFEU in *Unger* became a generalised statement about arts 45-48 TFEU collectively. Moreover, '[i]n case of doubt [these] Articles and the measures taken in implementation of them must therefore be construed so as to avoid placing migrant workers in an unfavourable legal position'.[106]

The 1964 judgments determined how free movement law would apply to workers,[107] but also a philosophy for achieving the common market and an understanding of the relationship between the Union and the Member States that presages the workings of primacy, unveiled by the Court shortly afterwards.[108] On the common market, the Court in *Nonnenmacher* already expressed the 'elimination of legislative obstacles' and 'unfavourable legal position' conception of restrictions normally associated with later judgments.[109] It acknowledged that free movement could be secured 'particularly by' the abolition of nationality discrimination[110] – that it 'entails' such a prohibition.[111] But equal treatment with host State workers, though fundamental on its own terms,[112] was never the *principal* objective. This might explain how little discussion of equal treatment actually occurs in the case law, except for judgments on taxation in which identification of an appropriate comparator is more pressing.[113] But we should not forget that '[w]ithout equal treatment of goods, people, services and capital…no internal market could exist or be sustained'.[114]

On the relationship between the Union and the Member States, *Unger* used quite dramatic language to suggest that accepting national competence for the definition of worker would 'eliminate at will the protection afforded by the Treaty' with the result that arts 45-48 TFEU would be 'deprived of all effect'.[115] But the timing of the judgment – just before *Costa* – should be remembered: EU law

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[106] *Nonnenmacher* (92/63) EU:C:1964:40 at [1]. Confirmed in e.g. *Spruyt* (284/84) EU:C:1986:79 at [18]; *Jauch (*C-215/99) EU:C:2001:139 at [20]; *da Silva Martins* (C-388/09) EU:C:2011:439 at [70]; and *Commission v Cyprus* (C-515/14) EU:C:2016:30 at [34].

[107] Though it is striking that, in several early cases, protecting the person because of circumstances connected to the fact of movement – to a cross-border dimension – was more pertinent than any connection to work or other economic activity: e.g. *Bertholet* (31/64) EU:C:1965:18; *van Dijk* (33/64) EU:C:1965:19; *Singer* (44/65) EU:C:1965:109; *SNCFL* (27/69) EU:C:1969:56.

[108] *Costa v ENEL* (6/64) EU:C:1964:66.

[109] *Van Binsbergen* (33/74) EU:C:1974:131; *Dassonville* (8/74) EU:C:1974:82.

[110] *Ciechelski* (1/67) EU:C:1967:27, p188.

[111] *Commission v France* (167/73) EU:C:1974:35 at [44].

[112] E.g. *Frilli* (1/72) EU:C:1972:56 at [18]-[19]; *Sotgiu* (152/73) EU:C:1974:13 at [4].

[113] E.g. *Schumacker* (C-279/93) EU:C:1995:31; *Gschwind* (C-391/97) EU:C:1999:409; *Wallentin* (C-169/03) EU:C:2004:403.

[114] J Paju, *The European Union and Social Security Law* (Oxford: Hart Publishing, 2017) 185.

[115] Reflecting the premise of coordination (not harmonisation), Regulations 1408/71 and 883/2004 refer for the implementation of their provisions to employed or self-employed activity as defined in national social security legislation (see art. 1(a) and 1(b) of Regulation 883/2004 and e.g. *De Jaeck* (C-340/94) EU:C:1997:43 at [34]; *Hervein and Hervillier* (C-221/95) EU:C:1997:47 at [22]; and *Partena* (C-137/11) EU:C:2012:593 at [50]. This contrasts with the EU-level definition of 'migrant worker' and is returned to below.

was literally under construction and the statement in *Costa* that '[t]he obligations undertaken under the Treaty…would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories' indicates the broader concern.[116] Also, at the time, contested national restrictions were often directly discriminatory as they pre-dated the creation of the EEC. Later case law tended to emphasise instead the effectiveness of rights.[117]

But national rules setting thresholds for work would 'call into question' the greatest possible freedom objective; not the equal treatment of workers who move. Nevertheless, the link between effectiveness and Union ownership of concepts that stems from *Unger* is now deeply entrenched:[118] the Court goes as far as saying that the 'unity' of EU law, which is 'fundamental to the existence of the Union', depends upon it.[119] However, securing uniform application of EU law can also be mistakenly conflated with securing equal treatment,[120] a point returned to below.

Implications: 'special' treatment?

Reflecting *Nonnenmacher,* the elimination of 'obstacles to the mobility of workers' was added to the preamble to Regulation 1612/68 – now recital 6 of Regulation 492/2011 – and drawn from directly by the Court.[121] As noted above, early case law tended to involve discrimination (direct or indirect) but the obstacles approach had more independent effect in later assessments of non-discriminatory restrictions, which sought to temper disadvantage or deterrence experienced by the worker.[122] That case law in turn generated the idea that an EU national should not be 'penalised' for having exercised free movement rights in the past.[123]

As Brexit has all too unfortunately demonstrated, reciting only rights-centred statements of free movement law would suggest unlimited freedom. In reality, limits and qualifications were *always* built into the system. Derogation, justification and proportionality were discussed already above. Additionally, for non-discriminatory measures, a requirement to establish a connecting factor between the contested rule and the right claimed means that not every limitation is a restriction of free movement for the purposes of the Treaty.[124] Nevertheless, it is undeniable that the aim of eliminating obstacles, premised on a 'greatest possible freedom' objective, creates a sphere of relative

[116] *Costa v ENEL* (6/64) EU:C:1964:66, p594.
[117] E.g. *Antonissen* (C-292/89) EU:C:1991:80 at [16].
[118] E.g. *Levin* (53/81) EU:C:1982:105 at [15]; see further below.
[119] *Commission v Belgium* (149/79) EU:C:1980:297 at [19].
[120] E.g. *Lebon* (316/85) EU:C:1987:302 at [21]; *Cabanis-Issarte* (C-308/93) EU:C:1996:169 at [31].
[121] E.g. *Scutari* (76/72) EU:C:1973:46 at [13]; *Casagrande* (9/74) EU:C:1974:74 at [6].
[122] E.g. *Bosman* (C-415/93) EU:C:1995:463; *Eind* (C-291/05) EU:C:2007:771.
[123] E.g. *Singh* (C-370/90) EU:C:1992:296; *Terhoeve* (C-18/95) EU:C:1999:22.
[124] E.g. *S and G*, EU:C:2014:136 (C-457/12) [39]-[43].

privilege for EU workers. In that sense, 'the Court has shown no reluctance to give a wide interpretation to those [Union] rules which benefit migrant workers, even when the consequence is to place them at an advantage compared with workers who spend the whole of their working life in one State'.[125] This is normally presented as reverse discrimination 'against' host State workers. But it can also be expressed conversely: EU workers can benefit from special, not equal, treatment compared to host State workers.

The Commission has invoked the comparator dimension of equal treatment to refute that perception. For example, in *Giuliani*, it argued that '[t]he position of a migrant worker who has had the courage and the resourcefulness to move to another State in order to take up employment cannot be compared with that of a worker who has spent his whole working life in one Member State. There can be no question therefore of migrant advantage'.[126] In *Mura*, the Court reasoned similarly that '[t]he charge that migrant workers obtain an advantage over workers who have never left their own country cannot be accepted, since no discrimination can arise in legal situations which are not comparable'.[127] But the fact that preferable treatment can continue after a worker returns to their home State exposes the wider range of 'migrant advantage'.

The tension between equal treatment and 'special' treatment is well illustrated by *Reed*. The Netherlands characterised the granting of rights to family members of workers – conferred at the time by art. 10 of Regulation 1612/68 – as being 'not a result of the principle of non-discrimination but rather *an independent right* granted under Community law'.[128] AG Lenz distinguished similarly between the guarantee of equal treatment in art. 45(2) TFEU, and the independent or positive rights in art. 45(3). In his view, the latter 'are granted to [Union] nationals *in order to give practical effect to the principle of freedom of movement*, and not to place them in the same position as the nationals of the host State'.[129] Conversely, EU law enables the placing of restrictions on EU nationals that cannot be replicated for a State's own nationals, deportation being the obvious example. Here, EU law still plays a supervisory role through the fixing of boundaries (e.g. compliance with proportionality and with EU fundamental rights) around the discretion of the Member States,[130] a critical function returned to below.

For present purposes, it is significant that AG Lenz focused on the role of legislation regarding independent or positive rights that go beyond equal treatment with host State workers since art. 10 of Regulation 1612/68 did not extend residence rights to partners other than spouses. However, the

[125] AG Capotorti in *Maris* (55/77) EU:C:1977:186, p2338.
[126] *Giuliani* (32/7) EU:C:1977:165, p1862.
[127] *Mura* (22/77) EU:C:1977:154 at [9].
[128] *Reed* (59/85) EU:C:1986:157 at [19] (emphasis added).
[129] AG Lenz in *Reed* (59/85) EU:C:1986:62, p1289.
[130] E.g. *Oteiza Olazabal* (C-100/01) EU:C:2002:712 at [41]-[43].

Commission and ultimately the Court used art. 7(2) of the Regulation instead, engaging equal treatment and the social advantages concept to extend the application to EU workers of national rules conferring residence rights on the partners of Dutch nationals.[131] AG Lenz had argued against that on the basis that '[t]he legal position of [an EU] national as a result of the prohibition of discrimination may…vary according to the Member State…in question'.[132] But the Court's approach invokes equal treatment so that regulatory differences across Member States can persist, which fits with another line of case law exemplified by *Kenny*:

> By prohibiting every Member State from applying its law differently on the ground of nationality…Articles [18 and 45 TFEU] are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality.[133]

Essentially, when rules are not harmonised at EU level, States (legitimately) make diverse regulatory choices; and so long as the resulting rules and practices are also applied to EU workers, EU law is 'not concerned'. In these circumstances, EU law concentrates on equal treatment *within* each State's employment market and not *across* the internal market as a whole – a natural offshoot of social security coordination (*Kenny*), but a more selective approach to rights drawn from art. 45 TFEU and developed further in legislation (*Reed*). But how then is the pragmatism of *Reed* reconciled with the concern for uniform application of EU rights in *Unger*? [134]

Examining the case law foundations thus reveals some paradoxes: workers from other States must be treated equally with host State workers, yet the former are not comparable with the latter in certain situations. Effectiveness of rights is ensured by requiring concepts to be defined uniformly at EU level, yet EU law is not consistently concerned with disparities in treatment that result from divergences in national laws. Equal treatment has exhibited both fundamental and incidental significance. Most crucially, the 'greatest possible freedom' objective has generated a propulsion beyond equal treatment that has ended up rendering the latter both less visible and more fragile: vulnerability laid bare in the discriminatory timbre of the 2016 Decision. If we brand free movement

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[131] AG Lenz reached the opposite conclusion i.e. since family member residence rights were addressed by Article 10 of the Regulation, 'it cannot be assumed that the Member States have restricted their freedom of action further than is to be inferred from' that measure, noting that 'in determining the category of persons entitled to accompany a worker the Member States went beyond the minimum duty laid down in the Treaty' (AG Lenz in *Reed* (59/85) EU:C:1986:62, pp1291-1292).

[132] AG Lenz in *Reed* (59/85) EU:C:1986:62, p1289.

[133] *Kenny* (1/78) EU:C:1978:140 at [18]; confirmed in e.g. *Commission v France* (236/88) EU:C:1990:303 at [15]. In *Kenny*, AG Mayras (EU:C:1978:111, p1505) drew this analysis from competition law, citing *Wilhelm* (14/68) EU:C:1969:4 at [13].

[134] Consider also the broader aim of 'merg[ing] the national markets into a single market' (*Gaston Schul* (15/81) EU:C:1982:135 at [33]). However, that aim is already softened by the internal market's reliance in reality on mutual recognition; see generally, S Weatherill 'The several internal markets' (2017) 36 YEL 125.

as the 'problem' then limiting movement naturally becomes the solution. But we then obscure the damage done to equal treatment. In what follows, the presumed affiliation between uniform application and equal treatment is therefore re-opened.

Sustaining free movement of workers as work itself evolves

It was argued above that the 2016 Decision did not address problems that were *demonstrated*, or at least not at the scale required by either the language of the Decision itself or the standards of proof applied in proportionality review generally. It was also seen that, separately from Brexit, a 'significant minority' of States[135] had raised questions about exported family benefits. At the same time, recent fissures in the reasoning of the Court underline a sense that sustaining an entirely unchanged legal framework for the free movement for workers is unrealistic. Three broad themes underline the exploration of reform that follows: renewing equal treatment of EU workers as a value to be upheld; the changing nature of work; and shared Union/Member State guardianship of free movement.

It is first important to clarify what is *not* being claimed – that free movement law consists of untouchable truths impervious to any reform – as well as the 'problems' with free movement (law) with which the reform argument seeks to connect. As Brexit negotiations continue, the impact of different contributory factors is still being unpicked.[136] Did free movement become a problem because many more people now move, and/or because they do not move evenly around the Member States? Or was free movement turned into a problem as deliberate political displacement activity – to distract from national regulatory failures and externalise policy challenges? How much of what happened is UK-specific, or at least UK-containable? We need to be very careful about properly connecting cause and effect in any discussion related to Brexit specifically. But it was also acknowledged above that even if the branding of free movement as a problem responds to situations that are more constructed than concrete, the pressure that such strategies generate is real. The idea of free movement as confounding national burden more than founding Union value will not easily be repaired. It is interesting that the unified position of EU27 that the four freedoms 'are indivisible and there can be no "cherry picking"' continues to hold, suggesting a refreshment of political commitment to free movement of persons as a result.[137] But it is also true that the same 27 were prepared to sanction openly discriminatory treatment of EU workers just two years earlier.

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[135] Exportation of benefits has also been questioned by EEA States; see *EFTA Surveillance Authority v Kingdom of Norway* (E-06/12) [2013] EFTA Ct. Rep. 618.

[136] E.g. J Shaw 'Between law and political truth? Member State preferences, EU free movement rules and national immigration law' (2015) 17 CYELS 247.

[137] At the time of writing, reconfirmed by the European Council in its (Art. 50) (23 March 2018) – Guidelines, EUCO XT 20001/18 at [7].

However, the more challenging task is to acknowledge that minimalist equal treatment law is not securing EU rights; and to confront the problematic mismatch between free movement law and free movement practice in the interests of *sustaining* rather than undermining free movement itself. In other words, this discussion aims to connect free movement 'problems' to practical more than ideological questions.

In that light, a first concern is that aspects of free movement law – much of which was conceived in the 1960s – no longer properly reflect how movement is exercised in reality. For example, the unevenness of intra-EU mobility was noted above, but asymmetries do not find easy resolution in a uniformity-driven approach to free movement.[138] Similarly, we saw that EU legislation does not deal well with lives split across different States, not just as a temporary transition to 'full' free movement but as the long-term life experience of many (more) EU nationals.[139]

Second, what constitutes 'work' in the first place is undergoing significant mutation. For example, binary distinctions between work and self-employment have blurred, making the applicable regulatory framework harder to identify – as burgeoning case law, at both national and EU levels, on the status and rights of participants in the gig economy shows just now. Additionally, attaching sharply decisive legal significance to economic activity is disputable when it cannot be taken for granted that work or self-employment produces financial self-subsistence.[140] Third, and relatedly, protection of vulnerable workers is then both more precarious and more urgent.

EU legislation on workers was designed to manage mobility in altogether different economic, geographical, social and technological contexts. AG Geelhoed recognised this in *Baumbast* nearly 20 years ago, observing that 'Regulation No 1612/68 was adopted at the high-water mark of industrial mass production *when employment conditions were relatively stable*. The Community legislature was able to assume that the working cycle *had a certain permanence*'.[141] He then highlighted 'the consequences of a divorce, the presence of children from a previous relationship or of families with different nationalities, including nationals of non-Member States, professional mobility and the separation of the place of residence and the place of work', pointing out that 'none of these phenomena are really new; it is merely that the *intensity with which and the scale on which* they now occur have become so considerable that the [Union] legislature must take account of them'.[142]

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[138] For an exception, see AG Sharpston in *Bressol* (C-73/08) EU:C:2009:396 at [106]-[112] and [151]-[154] of the Opinion.

[139] See further, Y Orens, P Minderhoud and J De Coninck, *Comparative Report: Frontier workers in the EU*, FreSsco, European Commission, January 2015, http://ec.europa.eu/social/main.jsp?catId=1098&langId=en).

[140] See further, G Davies 'Migrant Union citizens and social assistance: trying to be reasonable about self-sufficiency', College of Europe Research Papers in Law 2/2016, https://www.coleurope.eu/study/european-legal-studies/research-activities/research-papers-law, 5.

[141] AG Geelhoed in *Baumbast* (C-413/99) EU:C:2001:385 at [24] of the Opinion (emphasis added).

[142] AG Geelhoed in *Baumbast* (C-413/99) EU:C:2001:385 at [26] of the Opinion (emphasis added).

But reflection on appropriate reform also raises questions about what can/should be done at Union level and what can/should be done at national level. The Commission recognises that '[i]n spite of recent improvements in economic and social conditions across Europe, the legacy of the crisis of the last decade is still far-reaching, from long-term unemployment and youth unemployment to risks of poverty in many parts of Europe. At the same time, every Member State is facing the rapid changes taking place in our societies and the world of work'.[143] The November 2017 European Pillar of Social Rights includes the promise that '[a]dequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented'.[144] However, policy preferences for achieving these goals – openness to universal basic income, for example – differ greatly across the Member States; as does the extent of the inequality gap itself.

The Commission acknowledges EU competence limits, noting that '[m]ost of the tools required to deliver on the Pillar are in the hands of local, regional and national authorities, as well as the social partners, and civil society at large. The European Union – and the European Commission in particular – can help by setting the framework, giving the direction and establishing a level-playing field, in full respect of the specifici[ti]es of national circumstances and institutional set-ups'.[145] Thus while the EU legislator has a clear mandate to regulate the movement of workers, it has less straightforward capacity to settle questions at the intersection of work and welfare. Moreover, EU competence on working conditions, social security and the social protection of workers is limited by art. 153(1) TFEU to supporting competence. The Commission could certainly undertake comprehensive review of existing legislation to address instances of misfit between the legal framework and how rights are exercised in practice. But questions at the intersection of work and welfare are arguably too 'big' for the EU to resolve unilaterally[146] or at least without more meaningful State input in parallel. That is not to say that the EU has no part to play,[147] but we may need to shift expectations to coordination and outer boundaries guardianship as an interim step; to recognise that transformative discussions about the nature of work and *in*equality must happen urgently but that they may need to happen more intensively at national level *first*. Moreover, focusing only on the EU

[143] Communication from the European Commission, Establishing a European Pillar of Social Rights, COM(2017) 250 final at [2].
[144] https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf at [6].
[145] COM(2017) 250 final, para. 1.
[146] Discussing some options for EU legislative change, see Davies 'Migrant Union citizens and social assistance: trying to be reasonable about self-sufficiency' (2016), 24.
[147] E.g. discussing the option of a 'joint fund...to defray the additional costs arising from the cross-border movement of persons', see Paju, *The European Union and Social Security Law* (2017), 194-195.

dimension enables the continuation of a leadership vacuum with respect to expectations of the Member States.

The implication of putting equal treatment at the centre of potential reform means that the discussion that follows therefore reopens part of the *Unger* legacy i.e. that 'nothing in Articles [45-48] of the Treaty leads to the conclusion that these provisions have left the definition of the term "worker" to national legislation'. Specifically, beyond the narrower context of social security coordination, could 'who' a worker is could be linked explicitly to national rules?[148] I am not pretending that the personal scope of art. 45 TFEU would be unaffected: EU nationals not meeting a State's criteria for work (or self-employment) would need to meet Directive 2004/38's alternative conditions for lawful residence under EU law. But nor can we keep pretending that this is not happening already.[149] Challenging the fitness for purpose of the Directive's lawful residence criteria is a related but distinct, much broader question. Relying on an EU definition of worker to displace national thresholds that would otherwise apply cannot be a long-term proxy for dealing with far more widespread and deeply-rooted inequalities.[150] Choosing the 2016 Decision's reform route to sanction discrimination against EU workers does little to unscramble the challenges actually affecting the lives of those who move. And if we do nothing, equal treatment will continue to be eroded stealthily through case law, as seen in the increasingly confusing judgments for frontier workers. Sharing responsibility for free movement more consciously across EU and national levels would reconfigure premises of the legal framework but it will also be shown that those premises are not *inherent* in that framework.

The worker as a concept of (only) Union law

As seen in the previous section, *Unger* established not only the greatest possible freedom objective but also that arts 45-48 TFEU, 'by the very fact of establishing freedom of movement for "workers", have given [Union] scope to this term'.[151] The Court then forged an explicit link between effectiveness of rights and *uniform* application of the concept of worker.[152] At first, this reasoning was mainly applied in cases on attempted derogation. For example, on the public service exception in art. 45(4) TFEU, the Court ruled that 'recourse to provisions of the domestic legal systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that

[148] E.g. for the UK, see https://www.gov.uk/employment-status/worker.
[149] E.g. for the UK, see C O'Brien 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37 *Journal of Social Welfare and Family Law* 111.
[150] For exposition and analysis underpinned by extensive national data, see C O'Brien, E Spaventa and J De Coninck, *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, FreSsco, European Commission, Comparative Report 2015, http://ec.europa.eu/social/main.jsp?catId=1098&langId=en.
[151] *Unger* (75/63) EU:C:1964:19 at [1].
[152] E.g. *Manpower* (35/70) EU:C:1970:120 [17]-[18]; *Angenieux* (13/73) EU:C:1973:92 at [21].

law and consequently cannot be accepted'.[153] In *Levin,* the implications of *Unger* materialised in a different sense through articulation of the Court's definition of worker.

Levin concerned whether national minimum wage thresholds could delineate who should be a worker under EU law. The applicant was a part-time worker, earning less than the minimum legal wage in the Netherlands. No general right to reside existed in EU law at the time. The Netherlands and Denmark raised questions about the *extent* of work performed: the former advocated 'activity which is full and complete in both the social and economic spheres and which enables the worker at least to provide himself with means of support' while the latter suggested that free movement rights are 'conferred only on those persons who play a role in the economic life of the Member States, whereas persons who do not or have not pursued an occupation have under the [Union] rules applicable at present no right of residence in another Member State'.[154] On that basis, the Danish Government submission considered that the term migrant worker 'implies that the persons concerned work a normal number of hours', which it linked to applicable national rules. It also pointed out that EU legislation had not 'laid down specific criteria enabling the respective categories of employed or self-employed persons entitled to obtain a residence permit…to be defined' and in consequence 'the Member States may themselves lay down certain minimum rules concerning the period of work and income…which a foreign national must satisfy in order to be granted a residence permit'.[155] Critically, the argument did recognise the principle of equal treatment, emphasising that rules or administrative practices more restrictive than those applied to a State's own nationals could not be accepted.[156]

The Commission acknowledged political concerns around work levels below national minimum wage thresholds as well as the consequences for public funds through supplementary social assistance. But following the logic of *Unger* (and in contrast to its submission in that case), it rejected the idea of national 'modification' of Union rights.[157] The Court took the same route, reinforcing that the term worker must have a Union meaning and cautioning that 'enjoyment of the rights conferred by the principle of freedom of movement for workers could not be made subject to the criterion of what the legislation of the host State declares to be a minimum wage, so that the field of application ratione personae of the [Union] rules…might vary from one Member State to another'.[158] It then provided a Union-wide definition of work i.e. 'pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'.[159]

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[153] *Commission v Belgium* (149/79) EU:C:1980:297 at [19].
[154] *Levin* (53/81) EU:C:1982:105, pp 1040 and 1041 respectively.
[155] *Levin* (53/81) EU:C:1982:105, p1041.
[156] *Levin* (53/81) EU:C:1982:105, pp1041-1042.
[157] *Levin* (53/81) EU:C:1982:105, pp1043-1044.
[158] *Levin* (53/81) EU:C:1982:105 at [12].
[159] *Levin* (53/81) EU:C:1982:105 at [17]; see further *Lawrie-Blum* (66/85) EU:C:1986:284.

The Court recognised that part-time work was likely to result in earnings below national subsistence levels but stressed that it 'constitutes for a large number of persons an effective means of improving their living conditions' and therefore 'the effectiveness of [Union] law would be impaired and the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage'.[160] This reasoning resonates perfectly with the greatest possible freedom objective. But through an equal treatment lens, it is less clear why the fact that rules might 'vary from one Member State to another' transgresses a Treaty enabling *movement* around different States.

The decision in *Kempf* clarified that supplementary assistance from public funds does not negate worker status under EU law provided that the 'effective and genuine' *Levin* criteria are met.[161] The Court does leave space for invocation of national rules on minimum wage or minimum hours but in an indicative sense only.[162] The Union definition therefore provides another example of *special* treatment of EU workers: it requires national authorities to apply different considerations than those applied to its own nationals, which are developed in line with the relevant national context. It would be an exaggeration to say that this approach caused the us/them dichotomy magnified in current debates about the extent to which EU nationals should be supported by host States, but it might be naïve to see no connection at all. There is also a note of discord between the reasoning of the Court on subsistence and work when compared with how subsistence outside the context of work or self-employment is now addressed by Directive 2004/38 and related case law (as emphasised above: the fitness for purpose of that framework on its own terms being a related but wider question).

It is particularly important to probe past the fiction that equal treatment is secured by uniform application of Union-wide definitions. Legislation at national and EU levels raises distinct questions in this respect. First, on national legislation, a significant degree of local discretion is already built into the Union definition, the less positive side of which was highlighted in *Genc* where the referring court complained that 'the Court's case-law does not contain a threshold, determined on the basis of working time and level of remuneration, below which an activity would have to be regarded as being marginal and ancillary, and that this contributes to a lack of precision in the concept of marginal and ancillary activity'.[163] Yet we know that threshold rules *are* applied more definitively than indicatively

[160] *Levin* (53/81) EU:C:1982:105 at [15].
[161] *Kempf* (139/85) EU:C:1986:223 at [14]-[15].
[162] E.g. *Raulin* (C-357/89) EU:C:1992:87 at [14].
[163] *Genc* (C-14/09) EU:C:2010:57 at [29]. The Court merely underlined the 'relationship of close cooperation' upon which Article 267 TFEU is premised. On ambiguities in the Court's definitions, see Reynolds '(De)constructing the road to Brexit: paving the way to further limitations on free movement and equal treatment?' (2017), 81.

to exclude EU nationals from the protection of EU law in practice – including in situations where they are not applied to home State nationals.[164] The influence of apparently non-binding administrative guidelines is another problematically grey area in national shaping of EU rights.[165]

Second, on EU legislation, and even more basically, had the 2016 proposals been implemented the fact that the resulting legislative amendments would be applied 'uniformly' would have done little to overcome the patently unequal treatment for which they would have provided.

Legal barriers – or routes? – to change

Case law permitting disparities in national rules was discussed above. While *Kenny* concerned Regulation 1408/71 – defined by coordination and therefore accommodation of national rules – *Reed* showed the same thinking applied to Regulation 1612/68. In *Martínez Sala,* the Court confirmed that 'there is no single definition of worker in [Union] law: it varies according to the area in which the definition is to be applied…[T]he definition of worker used in the context of Article [45 TFEU] and Regulation [492/2011] does not necessarily coincide with the definition applied in relation to Article [48 TFEU] and Regulation [883/2004]'.[166] In *De Jaeck*, AG Ruiz-Jarabo Colomer reasoned that 'Article [45 TFEU] and Regulation [492/2011] confer rights of [Union] origin on migrant workers, so that it is necessary to arrive at a [Union] definition which makes it possible to identify who has those rights, whereas Article [48 TFEU] only provides for the coordination of national social security schemes'.[167] However, we have also seen that 'regulations in the field of social security have as their basis, their framework and their bounds Articles [45-48 TFEU]'.[168] In that light, the idea that Regulation 883/2004 does not give effect to 'rights of Union origin' is odd since the measure is needed precisely – only – because EU free movement rights are exercised.[169] Absence of judicial concern about different definitions of worker also stands at odds with the Court's insistence that *benefits* covered by Regulation 883/2004 must accord with EU criteria rather than be determined through national

[164] Editorial comments 'The free movement of persons in the European Union: salvaging the dream while explaining the nightmare' (2014) 51 CML Rev 729; O'Brien, 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015); O'Brien et al, *The concept of worker under Article 45 TFEU and certain non-standard forms of employment* (2015).
[165] E.g. N Nic Shuibhne and J Shaw, General Report in *Union Citizenship: Development, Impact and Challenges*, XXVI FIDE Congress 2014, Vol. 2, para. 2.3; http://fide2014.eu/pdf/FINAL-Topic-2-on-Union-Citizenship.pdf.
[166] *Martínez Sala* (C-85/96) EU:C:1998:217 at [31]; confirmed in e.g. *von Chamier-Glisczinski* (C-208/07) EU:C:2009:455 at [68]. However, greater alignment with the free movement definition can be seen in recent case law e.g. for social policy, *Fenoll* (C-316/13) EU:C:2015:200.
[167] AG Ruiz-Jarabo Colomer in *De Jaeck* (C-340/94) EU:C:1996:322 at [22] of the Opinion; see also the judgment of the Court at [25]-[33].
[168] *Van der Veen* (100/63) EU:C:1964:65, p573. For analysis of Regulation 883/2004 and internal market law, see Paju, *The European Union and Social Security Law* (2017), ch2.
[169] See also, H Verschueren 'Scenarios for Brexit and social security' (2017) 24 MJ 367, 371.

classification[170] (or solely via the Regulation[171]), which results in definitional convergence for some aspects of the social security rules but not others.[172]

More remarkably still, the definition of worker applied for art. 45 TFEU has never been harmonised by EU legislation. Regulation 492/2011 neither adopts nor references it. The Court's approach to uniform application in *Levin* is therefore different from case law in which the applicable rules are explicitly harmonised.[173] Regulation 492/2011 seeks to assist workers who move to navigate through different national systems and must guarantee a baseline of equal treatment with host State workers. But as noted in the earlier discussion on *Reed*, it is not then explained how the 'disparities happen' reasoning should be reconciled with the autonomous concept case law, which aims more to invigorate the fiction of a unitary workplace within which the EU worker moves as a special being beyond the reach of national criteria applied to identify host State workers.

The decision in *Geven*, linked to the *Hartmann/Giersch* case law examined above, illustrates very well the contradictions highlighted in this discussion. The Court ruled that a 'sufficiently substantial occupation' requirement applicable only to workers not residing in Germany could be imposed on the granting of a child-raising allowance. The applicant lived in the Netherlands but worked in Germany between three and 14 hours per week. Noting the 'wide discretion' that Member States have in the field of social policy, the Court held that Regulation 492/2011 did not preclude Germany from excluding 'a national of another Member State who resides in that State and is in minor employment [in Germany] from receiving a social advantage with the characteristics of German child-raising allowance on the ground that he does not have his permanent or ordinary residence [there]'.[174] The Court did mention *Levin* in noting the referring court's conclusion that the applicant was a worker for the purposes of Regulation 492/2011.[175] But it did not refer to *Levin* again in its substantive analysis or seek in any way to explain its openness to the application of a national employment hours threshold here. Not surprisingly, AG Geelhoed had reached the opposite conclusion precisely by applying the *Levin* test i.e. examining whether the applicant's level of activity was marginal and ancillary.[176] He also argued that 'the requirement of minor employment…distinguishes between two categories of frontier workers working in Germany (those below and those above the threshold of minor employment),

[170] E.g. *Jordens-Vosters* (69/79) EU:C:1980:7 at [6].
[171] See again, the discussion above on special and non-contributory benefits.
[172] The Court has only occasionally not required a uniform Union approach for the operation of Regulation 883/2004 at national level; e.g. contrast AG Geelhoed (EU:C:2001:584 at [25]-[31] of the Opinion) with the judgment in *Rydergård* (C-215/00) EU:C:2002:111 at [24]-[25].
[173] E.g. *Commission v Portugal* (C--55/02) EU:C:2004:605 at [44]-[48] and the case law cited.
[174] *Geven* (C-213/05) EU:C:2007:438 at [29] and see generally [25]-[30], citing e.g. *Megner and Scheffel* (. C-444/93) EU:C:1995:442.
[175] *Geven* (C-213/05) EU:C:2007:438 at [16]-[17].
[176] AG Geelhoed in *Geven* (C-213/05) EU:C:2006:616 at [36] of the Opinion.

even though having regard to the purpose of child-raising benefit to stimulate child-birth in Germany those frontier workers are all in the same position, i.e. they do not contribute to that objective'.[177]

Different definitions of worker apply in national employment laws for different circumstances – eligibility for in-work benefits being just one example – and these could be applied to EU nationals in the same circumstances.[178] EU legislative reform could 'make express reference' to the laws of the Member States to determine the concept of worker for the purposes of arts 45-48 TFEU,[179] essentially extending what applies for social security coordination at present.[180] In a sense, the argument sits between the judgment and Opinion in *Geven*: there should be a place for national criteria, since the definition of worker has not been harmonised by EU legislation; but these criteria should be subject to EU legal parameters – in particular, they must be applied without any distinction on nationality grounds.[181] Other legal parameters developed or adapted specifically for the free movement of workers would still apply: for example, that the motivation of the worker in taking up employment is irrelevant.[182] Moreover, if the socio-economic dimension of the Charter develops more progressively in the future than we have seen to date, another critical layer of EU rights protection could yet manifest.[183] But without harmonisation of definitions by the EU legislator, it seems unrealistic to expect EU law to do more, for now, on the basis that conceiving of a unitary workplace traversing all of the Member States as well as their regulatory needs is also, for now, unrealistic. This consequence of equal treatment analysis comes with risk. However, not returning equal treatment to the centre of free movement reform thinking could yet take us to far more dangerous places.

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[177] AG Geelhoed in *Geven* (C-213/05) EU:C:2006:616 at [38] of the Opinion; see further [41] of the Opinion.
[178] See similarly, on the definition of companies at national level for the purposes of freedom of establishment, *VALE Építési* (C-378/10) EU:C:2012:40 at [27]-[28].
[179] In *Coman* (C-673/16) EU:C:2018:2 at [34] of the Opinion, AG Wathelet cites case law confirming that it is provisions of EU law that make '*no express reference to the law of the Member States* for the purpose of determining its meaning and scope [that] must normally be given an autonomous and uniform interpretation throughout the European Union' (emphasis added), citing in fn13 'among many examples' *Nikforidis* (C-133/15) EU:C:2017:354 at [28].
[180] E.g. *Salgado Alonso* (C-306/03) EU:C:2005:44 at [27]: 'the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between Community workers'. On EU oversight of areas within national competence more generally, e.g. *Schumacker* (C-279/93) EU:C:1995:31 at [21] (direct taxation); *Rottmann* (C-135/08) EU:C:2010:104 at [39] and [45] (determination of nationality).
[181] For this principle in other areas of non-harmonised rules, e.g. on judicial protection *Hayes* (C-323/95) EU:C:1997:169 at [13].
[182] *Ninni-Orasche* (C-413/01) EU:C:2003:600 at [28]; *N* (C-46/12) EU:C:2013/97 at [46]-[47].
[183] On the Charter's potential, see Paju, *The European Union and Social Security Law* (2017), ch7; on developments already for third country nationals, see H Verschueren 'Free movement of EU citizens including for the poor?' (2015) 22 MJ 10, 31-32.

Conclusion

This article has argued, first, that aiming for the greatest possible freedom of movement is a legitimate aspiration but that it serves less well as a legally binding benchmark against which to sustain the rights of EU workers into the future. We often speak of 'promoting' free movement but the Treaty, in Article 3(2) TEU, asks that it be 'ensured'. Second, how we change EU law must be taken seriously. Not all legal sources have equal legal weight; not all premises of the legal framework can be collapsed together or transplanted unaltered across different contexts, especially when this would effect fundamental and systemic change. The proposals in the 2016 Decision fashioned a patchwork of legal principles to present an apparently reasoned account of amendments agreed to politically. Free movement law is not immutable. But it forms a system – a system of parts that are deeply interconnected in some respects yet materially different in others. The 2016 Decision challenged not one or a few but virtually all parts of that system, and it would have upended equal treatment most profoundly had it come into effect.

A Union-wide definition of worker played a particular part when no general rights to move and reside existed. Yet despite the force with which uniform application is endorsed in the case law, the discretion that national authorities retain and exercise in reality delivers far from uniform practice – practice which has not, moreover, been systematically monitored and challenged by the competent EU authorities. Moreover, EU legislation never codified the case law definitions. Sharing guardianship of free movement by engaging national definitions of work and worker could relieve some of the pressure induced by the 'problematising' of free movement without compromising the equal treatment of EU workers. It would entail personal scope compromise. In particular, EU worker status can provide a critical safety net for those who are vulnerable without host State social assistance that supplements economic activity.

But there are deeper questions here about work and welfare. Ritually invoking freedom of movement at the level of an ideal beneath which nationality discrimination is not just tolerated but positively entreated in EU legislation does nothing to render workers more secure. If national criteria are applied, there can still be a vital role for the EU as the gatekeeper of outer parameter principles and as coordinator of policy advancement and innovation until such time as the EU legislature decides that approximation is necessary and/or desirable and/or possible. This approach calls for the assumption of greater *positive* ownership of the direction of integration by the Member States. We may have to think less about EU institutions as the source of the right answers and more as a means to ensuring that the right questions are asked across the States. Sharing leadership also means that Member States would rightly share more of the criticism for their choices.

Overall, we have to confront more openly the fitness for purpose, the sustainability, and the *quality* of free movement rights. At the same time, attention must be paid to the integrity of EU law in the process of law reform. The challenge is to induce re-conception of free movement rights where that is demonstrably needed, but not to ignore the principles and structures of the wider EU legal system in doing so. Reform must be both legally robust and problem-appropriate. It should not be overlooked either that some reforms may well require Treaty change. That is just the way it is.

Political decisions rightly set the reform agenda, but law constrains politics: at least until such time as politics changes the legal constraints. Reform that takes the law further away from how workers are treated takes free movement further away from the integrity of the person and thereby undermines the credibility of many of the Union's stated objectives. The 2016 proposals responded to a particular driver for legislative reform of free movement rights. But '[t]he EU should not need the prospect of its own imminent demise in order to concentrate its mind on the inequalities that will kill it more slowly'.[184] Brexit does not cancel out an underlying discontent that can be seen beyond internal UK dramas. But neither should the situation of the UK overly distort our understanding of the wider EU environment. Complex questions about the allocation of resources and about how connections with another State should manifest in a highly fluid free movement context do need to be addressed. But they will not be successfully addressed on the pretence of a singular Union workplace where movement takes place on a neatly symmetrical basis. They should not be addressed by hyper-ramping of circumstantial evidence and perceptions. And they should not be addressed in order to deflect attention from national decisions that have far more to do with public spending choices than with EU workers in the first place.[185]

[184] F O'Toole 'EU is still at risk of slow self-destruction' *Irish Times,* 8 July 2017, https://www.irishtimes.com/news/world/europe/fintan-o-toole-eu-is-still-at-risk-of-slow-self-destruction-1.3144284.

[185] Cf. C Barnard and S Fraser Butlin 'Free movement vs. fair movement: Brexit and managed migration' (2018) 54 CML Rev 203.