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Governance of the Free Movement of EU Citizens: Weathering the Storm of Politicisation

Alex Lazarowicz

Despite the limited mobility of EU citizens across the European Economic Area, let alone that of migrants, this cherished right has found itself at the centre of political debates in Europe. As illustrated by the key cases debated, and against the backdrop of a rise of populist solutions, one cannot expect a complete overhaul of the free movement framework. All in all, intra-EU mobility for EU citizens and migrants has not been changed as such, only certain provisions have been specified. To this end, bilateral cooperation between sending and receiving countries gains in importance. Cooperation between Norway and Poland, especially on integration, could help depoliticise the debate, and ensure the continued success of Polish workers in Norway.

The freedom of movement of workers is one of the EU's four fundamental freedoms (free movement of goods, capital and services being the others) and as such is considered a core pillar of the European project, so much so that third countries with privileged relations to the EU, non-members such as Norway and Switzerland, must sign up to these rules as part of their respective agreements with the Union. In Norway's case the European Economic Agreement, which comprises these four freedoms, is the cornerstone of bilateral relations.

There is a reason why free movement is so central to a project that has otherwise struggled to gain traction with voters. European citizens have continually rated free movement as one of the most highly-appreciated achievements of the European Union, as recorded in countless Eurobarometer polls referenced by the European Commission.¹ Yet although these rules apply in principle to all EU citizens, historical levels of mobility have been low (3% in 2013),² in spite of the increased ease of travel and the economic pressure forcing mobility from European countries most affected by the crisis.

The biggest boost to mobility rates was the so-called "big bang" enlargement of the European Union in 2004. At the time of their accession, certain "old" Member States, were quicker than others to open their labour markets to newcomers, and they reaped the benefits but also stored up serious long-term problems,

¹ *Free Movement of People: Five Actions to Benefit Citizens, Growth and Employment in the EU*, European Commission press release, November 2013, www.europa.eu.

² "Making Progress towards the Completion of the Single European Labour Market," *EPC Issue Paper*, no. 75, May 2013, www.epc.eu.

attracting more people than they bargained for, as was the case in the UK. Many Member States, and signatories to the EEA Agreement, such as Norway, opted to impose transitional arrangements for the newer Member States, known formerly as the EU8. Those restrictions were lifted in 2011, in the midst of the financial crisis.

Since the financial crisis hit Europe in 2008, popular opposition to free movement has grown amongst those citizens not availing themselves of the right. Access to work, and welfare shopping, have been singled out as the most contentious issues. This has placed the EC on the defensive, leading it to claim simultaneously that there is no substantial information to back these fears up, and also to provide a variety of ways of improving the functioning of the rules. It has also set “receiving” countries such as the UK against “sending” countries such as Poland.

As this language of “sending” and “receiving” shows, the growing popular opposition has also led to a subtle yet crucial semantic change, one that has blurred the lines between a specific right of EU citizens to “free movement” and the general status of “migrant.” The term “EU migrants” has crept into the lexicon of even official political debate, effectively lowering the status of EU citizens, and lumping them in with third-country nationals. This is crucial, and not just because the sets of rights that are accrued to each of those groups are different. It has placed a highly contentious construct at the heart of countries’ EU membership (or, in Norway’s case, close association).

Freedom of Movement: a Pillar of the EU

Freedom of movement, meaning the free entry into another EU country by an EU citizen, is a right each citizen of the EU has, as granted in the Treaty of Rome. Family members who do not have EU citizenship share the same rights, although they may be required to have short stay visas.

Conditions for EU citizens only kick in at the three month stage of their residence in another EU Member State. This is embedded in the “right to reside” rule where workers and the self-employed (and their direct family members) have the right to reside with no conditions attached. Job seekers also have the right to reside without conditions, but only for a period of six months (or longer if they are still seeking and have a “genuine chance” of employment). Other categories of EU citizen, such as students and economically inactive persons (unemployed, stay-at-home spouses, retired) may reside beyond the three month period if they have sufficient financial means to support themselves and their family, so as not become a burden on the host EU country’s social security and health systems. For all EU citizens, the right to reside permanently is given when a person has had five years continuous legal residence in their adopted EU country.

These rules are simple, but are also subjective as the terms “sufficient” and “burden” are left undefined. This then leaves the issue very much up to an individual Member State and how it implements rules in individual cases.

Regarding the contentious issue of social assistance and benefits, the principle of equal treatment of all EU nationals forms a basis of the EU framework in this regard. Nevertheless, EU law provides safeguards regarding the aforementioned economically inactive mobile EU citizens, in order to ensure that financial burdens on social systems do not occur. Regarding such social assistance, it is worth highlighting that, in an EU citizen’s first three months of residence, the host EU country is not obliged to grant social assistance to economically inactive EU citizens. Judging from some of the debates, especially in the UK, one would think that EU law obliges Member States to grant such support. Furthermore, the issue of needing to have “sufficient” financial resources for the EU citizen and his or her family should ensure that unemployed EU citizens are ineligible when it comes to the period after the first three months.

However, the situation of a mobile citizen can also vary, and they are not stuck in one category or another. If a mobile EU citizen loses job in the host country and applies for social assistance, a re-evaluation is necessary, and the person may be deemed to have become an unreasonable burden on the social system. This re-evaluation is crucial, as it is up to Member State authorities to assess whether the EU citizen has an automatic right to social assistance or whether he or she should be treated as an unreasonable burden.

Regarding social security benefits (old age pension, survivor's pension, disability benefits, sickness benefits, birth grants, unemployment benefits, family benefits, and health care), this is very much the domain of each Member State, with the EU only coordinating rules (Regulations (EC) No 883/2004 and 987/2009) so that mobile citizens do not lose these rights when moving to another EU Member State. Member States define the conditions of receiving benefits, and the amount and length of time, and the former EU regulation ensures that mobile citizens are protected by either the host or home Member State. Working mobile EU citizens are covered by the host Member State and inactive citizens are not covered by virtue of not working. Social security coverage in a host Member State only kicks in such a case when citizens can pass a "habitual residence test." This is a test that has proved contentious, as it is badly implemented by Member States and has been the target of infraction procedures against the UK. This is because the UK also imposes a "right to reside" test on top of the "habitual residence" test. By imposing the "right to reside" test the UK discriminates against other EU citizens, and this is the crux of UK (not exclusively) disapproval. In its recent move, the European Court of Justice (ECJ) ruled that Elisabeta Dano, a 25 year old Romanian living in Germany, did in fact have her application for benefits rightly rejected as she had been in Germany but not actively looking for a job.³

It is unsurprising that these terms are considered vague, given that Regulation (EC) 883/2004 only gives a definition of "residence" being the "place where a person habitually resides"⁴ and stay "means temporary residence."⁵ With this in mind, in January 2014 the EC, in cooperation with Member States, drafted a guide on the application of this "habitual residence test." This will most probably make it easier for those implementing the rules on the ground, to ensure that only the Member State in which the EU citizen is habitually resident pays residence based social security benefits. This guide re-emphasises the following criteria that should be used when making decisions on habitual residence:

- family status and family ties;
- duration and continuity of presence in the Member State concerned;
- employment situation (in particular the place in which such activity is habitually pursued, the stability of the activity, and duration of the work contract);
- exercise of a non-remunerated activity;
- in the case of students, the source of their income;
- how permanent a person's housing situation is;
- the Member State in which the person pays taxes;
- reasons for the move;
- the person's intentions based on all the circumstances and supported by factual evidence.

The document adds that "other facts may also be taken into account if relevant."⁶

As the EC's memo on the guide admits, there are difficult situations, where guidance is needed. These apply to "frontier workers, seasonal workers, posted workers, students, pensioners, and highly mobile inactive people."⁷

"Frontier workers" are those EU citizens who work near a border between two countries, residing in one of them, and travelling regularly to work in the other, for example a German living in Kehl, Germany, who

³ Judgment in Case C-333/13, Elisabeta Dano, Florin Dano v Jobcentre Leipzig, www.curia.europa.eu.

⁴ Article I(j), Regulation (EC) No 883/2004.

⁵ Article I(k), Regulation (EC) No 883/2004.

⁶ "Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and Switzerland," European Commission, DG Employment, Social Affairs and Equal Opportunities, December 2013.

⁷ "Free movement: Commission Publishes Guide on Application of 'Habitual Residence Test' for Social Security," European Commission Press Release, January 2014, www.europa.eu.

works in Strasbourg. “Seasonal workers” are people who will relocate from one EU country to another for a limited period, sometimes returning to do the same job, such as fruit pickers. “Posted workers,” the most controversial category, are people who are sent from one EU country to another on fixed term contracts by their employers. In reality, often used as a cost cutting measure, companies will recruit workers from lower wage countries and bring them in to the country where they are completing the given project. In Britain, this most famously led to Gordon Brown’s speech at the Labour Party Conference, where he called for the creation of “British jobs for British workers.”⁸ The latter category is especially hazy from a national policy making perspective, as people who work in many different countries but then become inactive, can sometimes find it difficult to find a “home” country, let alone one that will ensure benefits, although here the aforementioned social security coordination rules will apply. Although these types of people are in a minority, it is exactly these situations that have been politicised in recent years, often under the banner of “benefit tourism” or “welfare shopping.”

The Politicisation of Freedom of Movement

Although the economic crisis has been the catalyst for the undermining of freedom of movement, much of the challenge, both in a real sense and through the politicisation of it, has to do with the enlargement of the EU and access to the EU labour market for new EU citizens. Neither was the enlargement of the 1980s, bringing in Greece, Portugal and Spain, without concerns, with the term “welfare tourism” already being used back then in reference to potential Greek migration, and France fretting over the potential of waves of Iberians crossing the border.⁹ With smaller wage differentials than that between the “old” and “new” in 2004, similar transitional arrangements of seven years were applied in the wake of the Southern European enlargement.

Regarding the 2004 “big bang” enlargement, concerns were raised about the UK being one of the few Member States to open its labour market to the EU10, and even more so when the numbers of new arrivals far exceeded predictions. However, the benefits of new labour to a booming economy were apparent, and concerns turned out to be mostly unjustified. Nevertheless, with the 2008 economic crisis in full swing, grumblings started to be heard first in the UK,¹⁰ where the looming deadline for transitional arrangements for access of Bulgarian and Romanian citizens to the labour market was approaching. The predicted “floods” never materialised, but the large increase in EU citizens working in the UK since 2004, the economic crisis, traditional British antipathy to the EU, and a Conservative Party looking to hold an in/out referendum to meet the UKIP challenge created perfect conditions for politicisation of the issue. Another political storm was kicked up regarding child benefits being paid for children living in Poland, whose parents were working in the UK, which riled the Polish foreign minister, who defended Polish residents in the UK as tax payers to the UK coffers.

Despite these political issues, there was no evidence to suggest that EU migrants were a burden on social systems, as seen in a study commissioned by the EC,¹¹ the 2013 International Migration Outlook of the OECD,¹² countless studies,¹³ and even the UK’s own Balance of Competences report. The latter report points more to pressures on public services and housing as something that EU mobile citizens have also contributed to. This is something that some cities are struggling with, as seen at the Conference for Local Mayors on EU Mobility at Local Level in February 2014.¹⁴ It also highlights a range of responses to its

⁸ Gordon Brown, Labour Party Conference speech 2007, www.bbc.co.uk.

⁹ J. Pelkmans, “Economic Implications of Enlargement,” *BEEP Briefing*, no. 1, 2002, p. 12.

¹⁰ A. Lazarowicz, “A Dangerous UK Consensus on Free Movement of Workers in the EU,” *EPC Commentary*, March 2013, www.epc.eu.

¹¹ “Evaluation of the Impact of the Free Movement of EU Citizens at Local Level: Final Report,” Ernst & Young, January 2014, www.ec.europa.eu/justice/citizen.

¹² “Migration Picking Up but Rising Unemployment Hurting Immigrants,” OECD Press Release on the *International Migration Outlook* issue of June 2013, www.oecd.org.

¹³ “W latach 2014–2020 polscy emigranci zbudują gospodarki Wielkiej Brytanii i Niemiec,” Instytut Sobieskiego, Analiza IS #60, www.sobieski.org.pl.

¹⁴ “Conference for Mayors on EU Mobility at Local Level,” 11 February 2014, European Commission, DG Justice, www.ec.europa.eu/justice.

consultation on ways forward, ranging from better implementation of existing rules to a fundamental move away from the freedom of movement concept as it is constituted now by introducing quotas and caps. This is exactly the policy that has emerged most recently from the UK government. With freedom of movement emerging as a central element to Cameron's renegotiating strategy, and with the spectre of the UK leaving the EU, some experts are even considering that it may be a principle worth amending to the UK's wishes in order to keep the UK in the EU.¹⁵

Although the UK has a very specific situation with respect to the EU, it has not been alone in raising concerns about the freedom of movement.¹⁶ The most concrete coalition, formed through a letter co-signed¹⁷ by the Austrian, Dutch, German and UK interior ministers to the Irish presidency, called on the EC to tackle abuses of free movement that were straining social systems. No data was forthcoming either on the numbers of EU citizens moving to their Member States, or regarding the level of abuse. Politicisation particularly occurred in the lead up to European Parliament elections, and, in the German case, through the CSU party.

In response, the EC has taken the approach of robustly defending freedom of movement, clarifying rules (such as the aforementioned habitual residence test), and helping national authorities tackle¹⁸ the concrete abuses that have been brought up, mainly under the theme of "marriages of convenience."

The heat of the debate was ratcheted up through the Swiss referendum,¹⁹ and the proposed immigration quotas proposed (for which 50.3% were in favour) have probably been a source of inspiration for the British government. The Swiss government has two and a half years left to implement the immigration quotas from the referendum, but is now trying to dilute them into more general immigration (not just EU) quotas, which is unlikely to be accepted by the EC as it will discriminate between EU citizens. Although unrelated, a much stricter proposal of quotas, known as "ecopop" after the organisation that proposed the term, was rejected in November 2014.

The Case of Norway and Poland

With Norway and the EU being bound by the EEA, Norway has assumed the pillars of the single market as any other EU Member State. It too applied transitional arrangements for the 2004 enlargement, as there was no minimum wage in Norway and general tariffs were not yet in place. During and since the transitional arrangements, Norway was generally seen as quite open in its approach when compared to other Nordic countries, and in the early years, two thirds of Norwegian work permits were granted to citizens of Poland.²⁰ These arrangements only lasted until 2009, and a prerequisite for granting permits was the attainment of full time employment at Norwegian pay level. An OECD study of 2012 noted that Norway had benefitted substantially from labour migration from the EU8, in a similar way that the UK had whilst being less affected by the economic crisis.²¹

Currently, with the main coalition partner favouring a business friendly approach, no fundamental issues have been brought up with freedom of movement of persons, although similarly to Germany there is a

¹⁵ S. Peers, "Cameron's 'Emergency Brake': Killing the Free Movement of Persons or Saving It?," *EU Law Analysis*, October 2014, www.eulawanalysis.blogspot.co.uk.

¹⁶ P. Delivet, "The Free Movement of People in the European Union: Principle, Stakes and Challenges," *Robert Schumann Foundation Policy Brief*, 312, www.robert-schuman.eu.

¹⁷ Letter to the Irish presidency of the Council of the EU, signed by interior affairs ministers of Austria, Germany, the Netherlands and the UK.

¹⁸ "Helping National Authorities Fight Abuses of the Right to Free Movement: Handbook on Addressing the Issue of Alleged Marriages of Convenience between EU Citizens and Non-EU Nationals in the Context of EU Law on Free Movement of EU Citizens," European Commission, COM(2014) 604 final, September 2014, www.ec.europa.eu/justice.

¹⁹ A. Lazarowicz, "The Swiss Referendum: Stoking Fires Home and Away," Heinrich Böll Stiftung Foundation, March 2014, www.eu.boell.org.

²⁰ J.E. Dolvik, L. Eldring, "EU Enlargement Two Years On: What Challenges to the Nordic Labour Market?," *Nordic Labour Journal*, October 2006.

²¹ J.H. Friberg, "The Stages of Migration. From Going Abroad to Settling Down: Post-Accession Polish Migrant Workers in Norway," *Journal of Ethnic and Migration Studies*, 38 (10), 2010, pp. 1589–1605.

minor more populist coalition party, which had some pre-election gripes about child benefits going to Poland.

Although not near the scale of Polish mobility to the UK, 82,000 Poles moved to Norway between 2010 and 2013.²² This is larger than the stock population of the largest non-EU migrant group in Norway, Pakistanis.²³ Norwegian businesses have invested in Polish labour with Norway being in rude economic health and in need of it.

The Real Migrants and the EU's Salami Approach

The rights that EU citizens have when exercising freedom of movement go far beyond what is available for non-EU migrants. For them, entry is difficult, rights are not the same, and mobility is limited. While freedom of movement has been attacked, migration policy has been a very conservative sphere at EU level and progress has been made in a very piecemeal way.

With a failed attempt by the EC at getting a true common policy on admission during the time of Justice and Home Affairs Commissioner António Vitorino, the EC went back to the drawing board and split up admission policy for third country nationals by sectors through the 2005 Policy Plan on Legal Migration. This sectoral approach to labour migration policy saw the adoption of the Blue Card (Highly Skilled Workers Directive) in June 2009, the EU Single Permit in December 2011, and the Seasonal Workers Directive and Intra-Corporate Transferees Directive in the spring of 2014. The remaining legislative proposal in this field, the recast of the Students and Researchers Directive, was adopted by the European Parliament at the end of February 2014 at first reading.

In all these directives relating to the admission of third country nationals, there have been attempts to coordinate/harmonise conditions for admission and rights accrued, but admission is always decided by Member States. None of these directives have provided “new” routes into Member States for migrants, and despite some minor successes on approximation, procedures will vary from country to country even in these very narrow categories of workers. The so-called “common migration policy” is still some way off.

Two directives that are geared towards the integration of migrants are the Family Reunification Directive and the Long Term Residents Directive. Despite the expressed aim of integrating migrants, the former has become an oft-used route into the EU for migrants, and the latter provides for mobility for migrant residents, among other rights.

Family Reunification

In order to protect the family unit, and to promote the integration of third country nationals, family reunification policy has been introduced in all Member States. If a third country national has a residence permit of at least one year validity, and a genuine chance of long term residence, his or her family (spouse and/or dependent minors) is eligible to apply.

Since its introduction in 2004 as an integration tool, some Member States have started using it as a way of restricting admission due to its frequent use, sometimes becoming the main source of admission of third country nationals. However, a push by the Netherlands towards reforming the rules fell flat.

²² J.M. Godzimirski, “Polsk diaspora og norsk utenrikspolitikk,” *Internasjonal Politikk*, 69 (4), 2011, pp. 617–643.

²³ “Innvandringen fra Polen vil ikke avta med det første,” *Bergens Tidende*, September 2014, www.bt.no.

The Restricted Mobility of Migrants

Another tool of integration is to enhance the rights of third country nationals who have stayed in the EU for a period of five years. This takes place through the Long Term Residents directive and this status is awarded when the migrant:

- has resided for five years immediately prior to the application in a Member State;
- has stable, regular and sufficient resources;
- has health insurance;
- complies, where requested by Member States, with integration conditions, and
- does not constitute a threat to public policy or public security.

Long-term resident status is accompanied with a set of rights, mainly equal treatment with respect to employment, education, vocational training, social protection and assistance, as well as enhanced protection against expulsion. Among these improved rights, the directive opens up the possibility for long-term residents to exercise their right of free movement.

According to article 14 of the directive, “a long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him or her long-term residence status, for a period exceeding three months” The provision adds that such a possibility is open for the performance of an economic activity in an employed or self-employed capacity, for the pursuit of studies or vocational training, or for any other purposes.

Labour market tests may still be applied by individual Member States before allowing such mobility, with EU preference, as well as preference for existing long-term residents in the would-be host Member States. The directive also provides for the possibility for Member States to limit the total number of persons entitled to be granted right to reside on the basis of an already existing quota system. European Commission reports say that only Austria already had such quotas in place.

Nevertheless, the mobility provided through this directive is limited. The 2011 European Commission report on the implementation of the directive states that the transposition of rules related to intra-EU mobility has fallen short of meeting the objectives. “May clauses” in the directive and poor implementation by Member States have led to this directive failing in one of its key objectives: mobility.

Naturalisation is of course the ultimate way of EU citizens or migrants being able to have full rights in their new home country. Although there is no doubt this would be an attractive proposition for some applicants, the Immigrant Citizens Survey showed that long-term residence was an attractive enough proposition for the majority of migrants. This survey, covering Belgium, France, Germany, Hungary, Italy, Spain and Portugal, shows that even “the foreigners who do want to naturalise, especially long-term residents, do not see the difference between their current status and citizenship.”²⁴ This, in addition to the need to renounce your origin country citizenship in some Member States forbidding dual citizenship, makes long-term residence a more suitable option, in spite of its failings in terms of mobility.

Lessons for Polish and Norwegian Migration Governance

There is a growing coalition of EU governments questioning the basic principles of the free movement of workers. Yet the real problems often derive more from the politicisation of the insecurity felt by EU citizens in the face of staggering unemployment rates, not to mention the poor implementation of EU rules by Member States. This dynamic is best highlighted by the recent *Dano vs. Jobcentre Leipzig* case. In its

²⁴ Immigrant Citizens Survey, Migration Policy Group, 2013, www.immigrantssurvey.org.

judgment, the European Court of Justice simply confirmed the existing conditions in EU rules. Yet the UK government latched on to the ruling, saying it proved the necessity of reforming EU rules in this area.


This issue of EU “migration” (as it is increasingly framed in national debates), is unlikely to go away given the slow rates of job creation in many parts of the EU, and the growing public support in certain EU Member States for the types of curbs on benefits for EU migrants proposed by the UK government.²⁵ The negative spiral of fears and politicisation is thus set to continue. Nevertheless, the full-scale rethink the UK is pushing for is unlikely to garner support. This means that issues of migration that are to be solved bilaterally between Poland and Norway will continue to be determined by the EU framework on the freedom of movement of workers.

For the time being, neither the question of labour migration, including from Poland, nor the question of Norway’s withdrawal from the EEA agreement regulating its relations with the EU, is very high on the political agenda in Oslo. However, recent economic developments, with oil prices falling and the Norwegian economy showing some signs of slowing down, may change the mood in the country.

These developments could have a negative impact on the situation of Poles living and working in Norway, finding themselves stigmatised as a group and facing serious economic and social problems. The two countries might even find the old EU framework shifting around them, triggering a search for new bilateral or multilateral means of addressing the question of labour migration and free movement. This only underlines the importance of improving cooperation on the practical, micro-level, with a focus on the obstacles to workers’ labour market integration.

Norway and Poland would be wise to discuss any points of tension in Polish migration to Norway bilaterally, in order to avoid UK-style politicisation and confrontation in a less favourable future economic situation. As things stand now, it is heartening for those who cherish free movement to see a more positive approach from Norway, as opposed to fellow non-EU country Switzerland. However, as many Polish labour migrants will most probably choose to settle permanently in Norway, it would be wise to implement measures facilitating their smooth integration into Norwegian society. Providing incentives and possibilities to learn Norwegian should be considered one of the most efficient facilitating measures to be considered by Norwegian authorities. There is indeed an additional cost to be borne, but the long-term benefit seems to far outweigh this.

²⁵ Judgment in Case C-333/13, *Elisabeta Dano, Florin Dano v Jobcentre Leipzig*, www.curia.europa.eu.



The GoodGov project explores how Poland and Norway can learn from each other in the crucial policy areas of security, energy and migration. This paper is one of three analyses devoted to the problem of migration and mobility in the European Union and the European Economic Area. It is one of the core issues in relations between sending countries, like Poland, and receiving countries, like Norway. The project is conducted by PISM in cooperation with the Norwegian Institute of International Affairs and the Institute of Political Studies of the Polish Academy of Sciences. The project is managed by Lidia Puka (PISM). The content editor is Roderick Parkes (PISM).

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