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Latvian Presidency
of the Council of the
European Union

EU2015.LV



European Economic and Social Committee

BASIC EUROPEAN RIGHTS TO FREE MOVEMENT UNDER THREAT

Conference – Tuesday, 27 January 2015 at 2.30 p.m.

EESC, 2 Rue Van Maerlant, 1040 Brussels, Room VMA 3

BACKGROUND DISCUSSION DOCUMENT

FREE MOVEMENT OF PEOPLE WITHIN THE EUROPEAN UNION UNDER THREAT

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INTRODUCTION

European rights to free movement are the most popular of the European Union's achievements with 57% of people sharing this view according to a Euro barometer poll, and a majority also believing that it is good for their own country.¹ An internal market of four interlinked freedoms of people, goods, services and capital is the basis on which the European Treaties, legislation and policies are built. Moreover, the right to move freely around Europe is the first right of European citizenship. For the young generation, Europe as a space of freedom stretching from Edinburgh to Zagreb, Lisbon to Riga is taken for granted, but it is also a legacy which has to be defended. Economic studies all point towards similar conclusions: with an ageing population, Europe requires more, not less, free movement of workers. This is also needed to absorb asymmetric shocks between the periphery and core Euro zone countries. Free movement in aggregate is seen as a win-win situation for European migrants themselves, countries of origin and host countries where newcomers fill vacancies which are complementary rather than competing with the domestic workforce and contribute more in taxes than they receive in benefits.

Why then has free movement of people within the Union become a contentious issue as shown for example during the campaign for elections to the European Parliament in May 2014? A number of reasons can be put forward:

- The economic and monetary crisis has brought to the surface tensions between national and European citizenship, expressed in the rise of euro sceptical parties now represented by over 20% of members in the European Parliament. Centrifugal forces and nationalism are on the rise.
- Before the 2004 and 2007 enlargements, free movement of people within the European Union was not an issue. Arguments over "transitional arrangements" and restrictions on access to the labour market raised fears of competition for jobs and undercutting of wages in host countries and a sense of being treated as second class citizens for people moving from the new member states.
- Whilst the overall picture remains, despite enlargement from 15 to 28 member states, of a low-level of free movement within the EU by comparison with other parts of the world, local perceptions and facts

¹ See for example standard Euro barometer no. 365 of February 2013.

can contradict the aggregate figures. Free movement remains unevenly spread and heavily concentrated on certain trajectories and destinations. Local problems with vulnerable European citizens and strain on local services were insufficiently anticipated by EU and national policy-makers.

- There has been a failure of political discourse with even main stream parties allowing free movement of people within the EU to become associated with an increasingly toxic debate about immigration and the perceived failure of migration policies.
- In this debate, free movement of people tends to be presented as if it were an absolute freedom, even though complaints show it is fraught with obstacles. European citizens are under an obligation to have comprehensive health insurance and sufficient resources not to be a burden on the host member state. Benefit tourism is more myth than reality.

The purpose of this paper is to explore the arguments and how to defend European free movement as fundamental both to European citizenship and the very existence of the European Union. The role of the Commission as guardian of the Treaties in enforcing European citizens' rights to free movement is essential. Can European citizens' rights be entrusted to the European Institutions and ultimately national governments which are the masters of the Treaties? Are not trade-offs always possible?

This paper proposes options for policy but also ends with an "action kit" to encourage citizens themselves to become protagonists in defending European free movement rights as a third party alongside the EU Institutions and national governments.² Free movement rights can no longer be taken for granted.

I. THE ORIGINS OF EUROPEAN RIGHTS TO FREE MOVEMENT OF PERSONS AND EUROPEAN CITIZENSHIP

Free movement of persons has become only recently an issue of public debate in the run-up to the enlargements of the EU a decade ago. The historical perspective and explanation of how the European rights came into being is important for those who wish to defend them. It can show that the rights do not just correspond to a set of rules promulgated by "Brussels," and which could therefore be changed, but are in reality the product both of an older European dream and the earliest period of European integration. In 2013, the European Year of citizens marked the anniversary of inclusion of

² See also Right to move: seven strategies to improve the EU's free movement rules by ECAS and the EU rights clinic. ETTW has joined this campaign.

Union citizenship in the Maastricht Treaty (now articles 20-25 TFEU), 20 years go previously, but as one author has observed it could have been a 60 year anniversary.³

(i) From workers to a more holistic approach

A brief reminder of the history shows that the substance of these European rights should not be treated lightly but represents the results of parallel trends in patterns of mobility and institutional developments. The origins of European citizenship rights to free movement lie in the limited degree to which free movement of workers in the coal and steel industries was achieved in the immediate period of post-war reconstruction. The main lesson drawn from this initial sectoral approach was to make free movement a right for all workers. In terms of the Treaty of Rome in 1956 the legislative process governing freedom of movement became also more European and less intergovernmental. Nevertheless a further ten years passed before a general regulation on free movement of workers (regulation 68/1360 EEC) was agreed, described at the time as “an incipient form – still embryonic and imperfect – of European citizenship.”⁴

It is often maintained that a European citizenship cannot be created from the economic basis of an internal market.⁵ The regulation however treats workers more than factors of production, establishing their right to move with their families, join trade unions and access social security and other benefits on equal terms to workers in the host country. An incremental process to the development of European rights is discernible. As the economy diversified beyond the heavy industries to the services sectors, so patterns of intra-EU mobility became more diverse, with the legislation catching up to cover the self-employed, regulated professions particularly in the health sector and finally after much delay and opposition (reflecting current debates) students, pensioners and non-active persons. To achieve free movement the coordination of social security arrangements was essential and at an early stage covered by a general regulation (regulation 1408/71) which was updated recently (regulation 883/2004) with its implementing rules (regulation 987/2009). The regulation extends the coverage to new categories of the population, including legally resident third country nationals and should in theory improve cooperation among member states as people move more frequently in and out of different national systems. The rest of the regulatory framework has become more focussed on citizens in general replacing earlier legislation on particular categories of the population or particular professions.⁶ There are legislative gaps and areas which need further

³ Willem Maes (2013).

⁴ Lionello Levi Saudri, Commission Vice President.

⁵ See for example Richard Bellamy “The Liberty of the Moderns: Market Freedom and Democracy within the EU”. Global Constitutionalism 2012.

⁶ 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, consolidated nine pieces of previous legislation and reflected the case-law of the European Court. A

clarification such as the distinction between social assistance and social security or the rights and obligations of job seekers. The strategy for defending European rights to free movement should not though aim at legislative change primarily. That would open the door in the current climate, for governments to restrict further free movement rights. The aim should be to defend the legal framework whilst campaigning to ensure it is better enforced.

(ii) From access to European Justice to forging European citizenship

At a time of increasing public preoccupation with the non-transparent lobbying processes and their undue influence on legislation, rules governing free movement offer some guarantees of being more citizen driven and in the public interest. Thus, the Treaty of Rome in 1957 addressed not only the member states but also their citizens as the European Court of Justice established in an early landmark judgement (case 26/62 Van Gend & Loos). From this original finding – rare for any international treaty the legal framework has been a result of the interplay between cases brought by citizens to national courts and referred to the Court of Justice and then reflected in the European legislation. The independence of the Court has been an important guarantee in defining the status of worker or reciprocal access by citizens to services in each other's member states, for example.

When Union citizenship was added to the Maastricht Treaty, opinions varied as to its significance – “a cynical exercise in public relations” (Weiler 1998) for some, heralding a new post-national citizenship for others. The European Court of Justice is establishing the territory of Union citizenship uneasily between these extremes. Reflecting Van Gend & Loos, the Court repeated on a number of occasions: “Union citizenship is destined to be the fundamental status of nationals of member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality subject to such exemptions as are expressly provided for.” (C-184/99 Grzekezj)

As this statement implies, early judgements relied on a link between Union citizenship and non-discrimination on the basis of nationality (Martinez Sala C-85/96; Dany Bidar C-209/03). More recently the status of European citizens has appeared more enforceable in its own right irrespective of economic situations and even actual free movement across a border (Ruiz Zambrano C-34/09). In theory European citizens have more rights than they imagine and which they do not have to prove; it is for member states to show that any restrictions are reasonable and proportionate. There is a gap however between the Court's perception of European citizens and that of member states, which still tend to regard them as aliens and have implemented Directive 2004/138 through their legislation on immigration.

similar process was apparent in the area of recognition of professional qualifications with Directive 2005/36/EC consolidating piecemeal laws profession by profession and a more general system of mutual recognition.

It was inevitable that once Union citizenship was included in the Treaties, it would become through appeals to the courts more than just a public relations exercise. European rights are being assessed when they come in conflict with the main areas of national expenditure such as social assistance, benefits for job seekers, the organisation of health systems or university education. They may also conflict with policies which are sensitive in other ways such as immigration policy, one's choice of name or even the acquisition of citizenship itself (Rottman C-135/08). Members of the Court have been unusually outspoken in drawing attention to the significance of this line of case-law.⁷ For an apparently distant EU Institution, the Court looks sympathetically at all the circumstances surrounding the appeal, including European citizens of very young age ("Baby Chen" C-200/02).

At the same time, the "exemptions expressly provided for," are taken into account, namely the requirement not to be a burden on the health and social assistance systems of the host member state. The Court is sensitive to the arguments of member states about the danger of "benefit tourism", requiring for example a reasonable period of residence before non-contributory social assistance can be claimed. In a recent case (Dano v. Jobcenter Leipzig C-333/13) the Court found that "A member state must therefore have the possibility...of refusing to grant benefits to economically inactive Union citizens who exercise their right to free movement solely in order to obtain another member state's social assistance although they do not have sufficient resources to claim a right of residence." The judgements do not always offer clear solutions so much as indicate ways to reconcile European rights with member states' prerogatives but on a case by case basis – creating a challenge for citizens, their advisers and front-line officials (i.e. "the financial situation of each person concerned should be examined specifically" Case C-333/13). The Court has created a space for Union citizenship but has not sought to impose a post-national citizenship.⁸

(iii) From rhetoric about a peoples' Europe to a Europe without internal borders

In parallel to legislative processes, clarification by the Court of Justice and a more top-down process towards European citizenship was steered by heads of government in the European Council. Their concern was that the creation of an economic common market was leaving citizens behind or in periods of "Eurosclerosis", losing their support. Special committees were set up to explore such ideas as a European passport, equivalence of qualifications, student

⁷ For example Dr. Juliane Kokott, Advocate General in her Durham Law Lecture 2005: "Union citizenship...can no longer be brushed aside, nor circumvented...".

⁸ European citizenship and the constitutionalisation of the European Union, Thesis by Hanneke Van Eijken, Utrecht University. The analysis of the scope and limits of the case-law is helpful.

exchanges and symbols of citizenship.⁹ Much of the early history is one of fits and starts. Once directly elected in 1979, the European Parliament gave more support and impetus to such reforms and in its proposed Treaty on European Union declared that "citizens of the member states shall ipso-facto be citizens of the Union."¹⁰ A more decisive push came from the European Commission's white paper in 1985 which included "a new initiative in favour of community citizens" with a view to completing the internal market of goods, services capital and persons by January 1993. This was not to be for free movement of persons but at least 5 member states went ahead with the Schengen agreement which now covers 26 states in the Union and neighbouring countries.

In theory this Europe without borders is underpinned by a space for freedom, justice and security. If citizenship is the "right to have rights", the EU is setting up a comprehensive structure. This is particularly so since the entry into force of the Lisbon Treaty which gives the Charter of Fundamental Rights the same value as the Treaties (article 6 TEU) and requires the Union to become a party to the European Convention on Human Rights (ECHR). This will give individuals an ultimate right of appeal against its claims to the European Court of Human Rights in Strasbourg.¹¹ It places European citizens' rights in the broader framework of universal basic human rights and their more modern expression – for example condemning trafficking in persons as a form of slavery. The Charter makes "citizenship" one of six chapters, the others being dignity, freedom, equality, solidarity and justice. It places more emphasis on economic and social rights than the ECHR. According to one observer: "Citizenship of the European Union has finally acquired its Bill of Rights in the form of a legally binding EU Charter of Fundamental Rights; the skeleton that citizenship of the Union once was is now acquiring the flesh and blood it needs to merit the title."¹² This should involve however closing gaps in the structure: between the fine principles of European law and what happens in practice when people move round Europe, in their political rights and between European citizens and third country nationals.

In a similar way to Union citizenship itself, the impact of the Charter may be both less than hoped for by some, but more than just a codification of existing rights as claimed by others. Many citizens have been misled into believing that this is a general charter for human rights, whereas it is only applicable in areas where the EU has legal competence (article 51). The charter is an

⁹ Report on European Union, Leo Tindemans, December 1975. Reports by the working party for a Peoples' Europe chaired by Pietro Adonnino, March and June 1985.

¹⁰ The proposal for a Treaty on European Union 1984 presented by Altiero Spinelli, member of the European Parliament.

¹¹ After years of hesitation in the context of Treaty revisions with member states equally divided as to whether the Union should have its own separate charter or join the ECHR, the issues have been settled in favour of both steps.

¹² Guild, Elspeth (2010). The European Union after the Treaty of Lisbon, Fundamental rights and the EU citizenship. CEPS Liberty and Security in Europe, July 2010, page 1. http://aei.pitt.edu/15107/1/Guild_Jean_Monnet_speech_e-version.pdf.

additional source of law citizens and their representatives can claim, particularly with the new rights to good administration (article 41) and access to justice (article 47).

II. PATTERNS OF FREE MOVEMENT WITHIN THE EU

Europe is on the move, certainly to a greater extent than the official statistics suggest with intra-EU migration taking on increasingly diverse forms. According to the official statistics (Eurostat) 14.1 million European citizens or 2.8% of the population were residing in another member state at the end of 2012, less than the 21 million third country nationals in the EU. The immediate onslaught of the economic crisis brought about a slow-down in the intra-EU migration, but it has picked up and increased, taking a larger share of migration as a whole. For young people in the hardest hit countries in the Euro zone, the possibility to find jobs in Germany and other better performing economies is a tangible benefit of European citizenship, although South to North movements remain well below those from “new” to “old” member states. The official statistics do not capture all forms of mobility such as seasonal or posted workers on temporary assignments in another member state or cross-border commuting between place of residence and place of work or the more recent trend to long-distance commuting. Such impermanent forms of mobility could add a further 1.6 million to the total of 14.1 million. There are more significant but unknown numbers of European citizens whose movements go unrecorded because they stay for a short period, but who are effectively resident in two member states. “Migration as a phenomenon presents formidable problems in terms of statistical measurements”.¹³

Whilst the political importance attached to free movement of people is leading to increasing numbers of studies,¹⁴ improving knowledge of what is really happening, particularly at the local level, for reasons we explain later, is a priority. According to a special Euro barometer poll on geographical mobility, 10% of Europeans have experience of living for a time in another member state. Different forms of regular transnational mobility and networking including “virtual” may be practiced by 30% of 508 inhabitants of the EU, so that sociological Europe is much bigger than the Europe to create a single European labour market and very different from political Europe.¹⁵ Is this not positive?

¹³ Labour mobility in the EU, recent trends and policies by Eurofound.

¹⁴ ETTW is working on the issue of statistics, convinced that the numbers are underestimated. This paper draws on work by the European Policy Centre (EPC) issue paper no. 75 and a more recent study by the Centre for European Policy Studies (CEPS) on the European Labour Market.

¹⁵ See final report of the EUCROSS project and Special Euro barometer (2010) on the “new Europeans”.

The main focus of policy makers in the aftermath of an economic and financial crisis is inevitably on the European labour market, because it is here that the potential both for growth and the main sources of controversy on free movement lie. Civil society organisations, professional bodies and associations of communities living abroad have a role in drawing attention to mobility as not just employment related but involving a much broader range of phenomena and therefore policies across the board.

If mobility is more widespread than officially recognised, it covers also a wide economic and social spectrum, which at the risk of caricature requires policy makers to take into account a heterogeneous population:

- Euro-workers are the original foot soldiers of Europe, surplus labour from the South needed in the heavy industry sectors of the North. To some extent their successors are the construction and other low or semi-skilled workers from the countries of Central and Eastern Europe, often working below their level of qualifications. Whilst governments tend to stress the value of high-skilled Euro-migrants, in reality low-skilled work can contribute just as much to economic growth.
- Euro-entrepreneurs are those who are targeted by the rules on right of establishment for the professions, internal market rules such as the services directive, or measures to reduce the time and administrative burden it may take to set up a business in another member state. Maybe they have succeeded in filling a niche market at home, so why not expand and try the formula elsewhere in Europe? Euro-entrepreneurs often have complex questions as short or long-distance commuters about tax and social security, family members – a mix of personal and professional preoccupations.
- Euro-lovers have attracted the attention of some European research.¹⁶ Practice of free movement and the choice of where to live and work in another country may not be influenced by economic factors or even professional development alone, but also the difficulty of managing a relationship at a distance with long periods of absence. If the Euro-lovers stay together and found a family, their choice of which languages to use at home, how the children are brought up, whether they access the media of the host country, or the countries of origin, all such factors make this citizenship group an interesting laboratory for the study of European identity.
- Euro-learners are an increasingly important category with growing awareness that a period studying in another EU member state or outside the EU “looks good” on a Curriculum Vitae. Students are aware

¹⁶ Professor Robert Miller, Queen University, Belfast is coordinator of a research project on the evolution of European identity in private life (www.euroidentities.org).

of the difference in performance of universities across Europe. A period studying abroad may be time out, and a relatively easy option for some, or more essential for others, to make up for deficiencies in education at home and learn another language (in particular – English). The Erasmus scheme is seen as one of the EU's success stories. The main problem is that the chance to study abroad tends to be given to high achieving students likely to have such opportunities in any case, whereas research suggests that for less well off or educated students, having such an opportunity is particularly appreciated and productive.

- Euro-sun seekers tend to be pensioners from the North seeking a better climate for their retirement on the shores of the Mediterranean or Adriatic. Often they bring with them their own services, native language media and expat associations, whilst complaining about their own lack of integration in their adopted country of residence. Within the Euro zone, the risks of currency fluctuations to one's pension or the value of one's property are reduced, but the crisis has signalled new risks. It has also created new opportunities for pensioners to buy property at reduced prices in Greece, Spain or Portugal. Euro-sun seekers are also taking advantage of the crisis.
- Euro-stars are among the young people whose parents and grandparents may have been Euro-lovers or Euro something else. They may regard themselves as European citizens, finding the practice of attachment to more than one country and a readiness to move, work in different languages comes naturally. Many came out of the period when Erasmus was a novelty and had a more formative influence. Euro-stars are well qualified, linguistically competent, involved with each other through social networks and likely to be politically active and become involved in transnational networks. They are likely to be strongly attracted to civic activism beyond the national state.¹⁷

III. COSTS AND BENEFITS OF LABOUR MOBILITY

The benefits of more rather than less freedom of movement in the European Union are argued by a significant volume of European but also national studies.

"EU migrant workers can help the host country's economy to function better by addressing skills shortages and labour market bottlenecks. They contribute to macroeconomic demand and to government revenues, so they can help to create more jobs in the host country. They can also help to reduce the tax

¹⁷ See for example Ilte Flevert, How to become a good European citizen in the making of citizens in Europe, Viola B. Giorgi (Ed).

burden on the domestic population.”¹⁸ This is not therefore a zero sum game. The same lecture goes on “All available studies point in the same direction. There is a consensus among experts on these fundamental, overall advantages of EU labour mobility.” An additional argument and one which leads many studies to conclude that the level of labour mobility in Europe is low, for example by comparison with the US, is that “it is also a necessity to make the European monetary union (EMU) more resilient.”¹⁹ “Free movement of workers within the EU does not appear to be acting as a significant shock absorber against the widening economic symmetries between core and periphery within the EU”.²⁰ In theory free movement is a win-win situation: well prepared migrant workers can improve their living standards and gain additional skills and competencies; host countries gain because they are more likely to be of working age on average than the local population, whilst countries of origin can benefit from remittances and the return of more skilled workers, if their period abroad in the in is temporary rather than permanent. Whilst the bigger picture is one where the benefits of labour mobility outweigh the costs – it is always possible to find specific examples where this aggregate positive scenario is contradicted by facts on the ground. The challenge for policy makers is to address these very real concerns and not fall in the trap of giving way to demands for general restrictions. “Member states governments should address these genuine concerns by tackling the specific problems – and not by restrictions on their free movement.”²¹

(i) Concerns of would be European migrants themselves

The main pull factors are the availability of jobs and people move to work or look for work, (not to access social benefits) and therefore compare wages and the cost of living in their own country and a possible new country of residence. This decision-making process does not though necessarily follow just the economic logic necessary to create a well-functioning European labour market. Other factors come in play, such as language, with “some empirical evidence, migration flows between countries with closely related languages tend to be larger than between countries with unrelated languages” (Eurofound: Labour mobility in the EU page 36).

Given the uneven performance in Europe in language skills, proposals to improve the functioning of the European labour market place emphasis on removing language barriers, by more support to intra-EU migrants to learn the language of the country of destination. There is also increasing recognition that family and social ties are a deterrent, explaining the gap between theoretical intentions to move and actually doing so. Migration flows may be encouraged by transnational networks or they may be discouraged by the

¹⁸ Labour mobility in the European Union – The inconvenient truth – Laszlo Andor, former European Commissioner for employment. University of Bristol 10 February 2014.

¹⁹ European Policy Centre (EPC) issue paper no. 75 on labour mobility in the EU.

²⁰ Eurofound page 18 quoting Holland and Paluchowski (2013).

²¹ Speech by Laszlo Andor at Bristol University.

loss of social capital in one's country of origin which is going to be difficult to replace in one's country of destination. Studies of how to improve the functioning of the European labour market, place emphasis on the need for mentoring "more personalised guidance," and upgrading EURES (European employment services). Given the wide variety and heterogeneous categories of people on the move, policy makers need to address also issues outside the labour market, and work more closely with associations representing European citizens or providing them with information and advice about working and living conditions.

(ii) Concerns about the barriers to the exercise of free movement rights on the one hand, and their abuse on the other

In the "action kit" to defend European free movement rights, a number of proposals are put forward to reduce the gaps between the fine principles of European law and the practice on the ground by member state administrations, which tend to stress the exceptions rather than the spirit of European law. Most advice services will confirm that more people are coming to their doors with complaints. It is difficult to conclude whether this is due to a hardening of attitude towards EU migrants by front-line officials, or increased awareness by European citizens of their rights. The barriers are well known: obstacles to free movement and residence particularly for EU families including third country nationals, risks of expulsion against low income groups and job-seekers, delays in accessing social entitlements or recognition of professional qualifications, "red tape" due to the failure of member states to recognise each other's documents. Increased public awareness of the barriers within Europe could lead many young people to seek work outside Europe.

As the Eurofound study puts (page 9): "It is clear that the national debate in many countries has increasingly focussed on the negative rather than the positive prospects of intra-EU mobility." In this debate, the barriers to intra-EU mobility are ignored. Free movement is seen as an absolute unconditional freedom, which is being abused. The European Commission has in repeated occasions demanded evidence of abuse but "no member state has given the Commission any factual evidence that so-called benefit tourism is systematic or widespread."²² In a communication "Free movement of EU citizens and their families: Five actions to make a difference" (COM (2013)837 final of 25.11.2013), the Commission spells out the rights and obligations attached to free movement and aims to address the concerns raised by some member states²³ by helping them to fight marriages of convenience,

²² Speech by Laszlo Andor "Labour Mobility – The inconvenient truth" Lecture at Bristol University, 10 February 2011.

²³ The UK, Germany, Austria and the Netherlands raised such concerns in a joint letter to the Irish Presidency. This communication provides valuable guidance with its reference to the Treaties, European legislation, and a number of opinion polls and studies, including one by ICF GHK milieu: A fact-finding analysis on the impact on the

apply EU social security coordination rules or meet the challenges of social inclusion. Whilst there is little evidence of “benefit tourism” as a push factor for intra-EU migration, there are circumstances in which reliance on benefits may be a reason to stay in the country, rather than return home. This can occur for example when free movement is abused by unscrupulous employers paying EU migrants less than the minimal wage, and exploiting them in other ways by imposing illegal contract conditions, housing and other costs, so that the migration experience ends in failure.

(iii) Concerns about strain on local services in countries of destination and brain drain in countries of origin

In the Communication, “five actions to make a difference,” the Commission mentions for the first time “efforts to help build the capacity of local authorities to use European structural and investment funds efficiently”. The message is therefore that the overall benefits of free movement of people and the rights attached to them should be preserved, but that more than just the EU regulatory framework is required to deal with problems on the ground. In a report to the Commission with recommendations for the future of cohesive policy 2014-2020, (the so-called Barca report) it was argued that “Cohesion policy, by combining EU principles and the freedom of member states and regions as well as local institutions to apply them to specific needs, could serve as the appropriate framework to take one step further.” Migration is recommended as one priority for the funds. The report argues that “citizenship is de facto defined in part by the accessibility of people to services” – from which it follows that European citizenship is about access to each others’ services, to mutual advantage. Therefore, “an EU place-based approach can respond to the highly differentiated way in which migration inflows and outflows affect different places.”

Because patterns of free movement are so strikingly uneven across the member states, there are regions and cities in countries of destination where strains on local services – housing, health, schooling, transport, can be affected by the sudden and unexpected arrival of a large number of newcomers. Migration can become also a convenient scapegoat for cuts in public services and failure to invest in local infrastructure, but it is a factor to be addressed on the basis of sound local population statistics and economic evidence.

Similarly problems of brain drain, loss of skilled workers to maintain the infrastructure in specific regions of countries of origin – are equally real. Matching supply and demand across borders in health services may be to mutual advantage but it does not always work that way, if it has negative repercussions on access to such services in left behind regions.

member states’ social security systems of the entitlements on non-active intra-EU migrants to special non-contributory cash benefits and health care.

For many of the recommendations to improve European policy on free movement of people, cohesion policy is the right context. The social fund can address issues of training for mobility and social inclusion: the regional fund could be used to help meet infrastructure development needs of localities in countries of origin and countries of destination. The proposal in the conclusions is that the two should be linked in a European free movement solidarity fund, which can be set up within EU Cohesion policy using existing resources. This is also the framework within which exchange of best practice can be encouraged and successful local experiments to tackle the unwarranted side effects from the advantages of free movement can be scaled up. Although the economy gains from the new arrivals, it is important to demonstrate to the domestic sedentary population that they should not bear the full cost in increased demand for public services, but that this should be shared between countries of origin, countries of destination and the EU Cohesion budget. Moreover within the new structural funds, the principle of partnership for local community development and local action groups has been strengthened.

IV. COMBATting SCAREMONGERING ABOUT FREE MOVEMENT OF PERSONS

At a recent conference to celebrate the 25th anniversary of the European Foundation Centre (EFC), considerable attention was given to the issue of migration.²⁴ Should the discourse of migration be changed? The consensus appeared to be that actions speak louder than words, to answer peoples' concerns. As the examples below show, it is from a narrative about a specific issue to do with borders, a group in the population or locality that below the surface of the apparent popularity of EU free movement, hostility can be stirred up. This is being done, as the campaign for the 2014 European elections showed, not only by euro sceptical or fringe parties, but by mainstream politicians as well. In all the examples below, the populist conclusion would be restrictions on free movement, and even the reinstatement of border controls. The response should be to resist such restrictions and make free movement work better. Without such a response, scaremongering about free movement has considerable resonance.

(i) The Polish plumber

In France, in the run-up to the 2005 referendum which saw the rejection of the constitutional Treaty, "the Polish plumber" made a considerable impact. This was used as a mythical example derived from the first version of the services directive, which proved highly controversial. Based on the costs of labour being on average 3.47€ per hour in the new member states and 22.19€ per hour in EU 15, the Polish plumber is able to offer his services in Paris from Poland, driving his French competitors out of business.²⁵ Business leaders and

²⁴ Euro Philantopics 4-5 November 2014.

²⁵ A more real case is the Laval judgment of the European Court of Justice involving the use of Latvian posted workers to build a school across the border in Sweden below

the “yes” campaign pointed to the shortage of plumbers in Paris, whilst a Polish travel agency produced a poster of a plumber as a male sex symbol with the slogan: “I am staying in Poland.”

(ii) The “Roma affair”

Again in France, but also in Italy and to a more limited extent in other EU member states, the rights of Roma as European citizens was a further test of legislation and policy on free movement of people. The dismantling of Roma camps over summer 2009 by the Sarkozy government, combined with the repatriation of the inhabitants eventually led to mass expulsion which is forbidden by the citizenship directive and the Charter of Fundamental Rights. The Roma Rights Centre in Budapest, civil society organisations in Paris, Bucharest and Brussels took up the cause, but whilst their legal arguments were sound, the basis in terms of evidence and the willingness of those directly affected to step forward was weak. In the discussion between the delegation for the Commission and the French government, the European citizen concerned needed to be – if not physically present – at least there as a third party. The problems found by the Commission in enforcing European legislation and the Charter directly in an emergency situation were evident. This explains why Viviane Reding, the Commissioner responsible, used political rather than legal pressure, stating that Europe had not seen such deportations since the Second World War.

(iii) Political exploitation of tensions over open borders

Tensions over Schengen appeared at intervals to be signalling a spill over from the Euro crisis affecting Europe’s achievements in guaranteeing in open borders. There was a Dutch proposal to monitor border crossings and a Danish proposal to strengthen border control towards Sweden and Germany. This was despite the long tradition of absence of border controls in the countries of the Nordic Council and the investment in the bridge to increase the flow of traffic. A more serious dispute between France and Italy over refugees from Libya was referred by Silvio Berlusconi and Nicolas Sarkozy to the European Council, which working in June 2011 asked for legislative proposals. The aim was to extend the Schengen safeguard clause so that as a measure “of very last resort” it would “allow the exceptional reintroduction of internal border controls in a truly crucial situation”, meaning where a member state was no longer in control of immigration on its external Schengen frontiers. The legislation has been adopted since.

The Commission defended this proposal as a lesser of two evils, and a way to contain strain to the Schengen system, whilst at the same time, demanding more European supervision of the safeguard clause. The attacks on Schengen have withstood the economic and financial crisis as well as anti-immigration rhetoric. The newly-won freedom to travel across the European continent

the rates agreed in collective bargaining between Unions and employers in that region.

since the fall of the Berlin wall and the extension of the Schengen zone to the new member states (except Bulgaria and Romania) can no longer be taken for granted however.

(iv) Popular initiative in Switzerland in favour of immigration quotas

By a wafer thin majority, 50.3% of the Swiss population voted on 9 February 2014 in favour of an initiative by the right wing People's Party. The new constitutional provision approval in the referendum provides that "the number of permits entitling foreigners to reside in Switzerland shall be subject to annual ceilings and quotas." The promoters of the initiative distanced themselves from more extreme supporters such as the Egerkingen Committee which co-ordinated the successful campaign for the proposed ban on minarets in 2009. Voter participation was low at 56% but the result is here. In contrast to the European Citizens' Initiative, Switzerland has a system of binding, direct rather than deliberative democracy. It is not as if the borders will suddenly become closed since the government has three years to implement the provision with legislation and then negotiations with the EU. It is difficult to imagine however how a quota system, which has now become a democratically established right, can be reconciled with the European rights to free movement. This vote therefore probably signals an end to EU-Swiss agreement on the free movements of persons signed in Luxembourg on 21 June 1999, which was also approved in a referendum held less than three years.

This affects 1.15 million foreign workers in Switzerland or 23% of the Swiss workforce, but also a further 453,000 Swiss citizens living throughout the EU. Commentators have also pointed out that this referendum could be a counterproductive blow to the high performing Swiss economy and standard of living it was designed to protect. Moreover, the free movement agreement contains a "guillotine clause" which if broken automatically triggers termination of six other bilateral agreements with the EU on transport, agriculture, technical standards, government procurement, scientific and technical co-operation. Politicians have reacted by pointing out that the agreement with the EU is not like a Swiss cheese, with holes in it, and that a pick and mix policy is not possible. The firm line taken by EU leaders may be influenced by the need to signal to the UK that an opt-out or renegotiation of free movement of people to and from the UK should not be possible whilst maintaining full participation in the other three "commercial" freedoms of the internal market.

(v) Scaremongering about "benefit tourists"

A typical theme, often fuelled by Euro-sceptical or right wing political forces is that free movement paves the ways for so-called "benefit tourists." In early 2013 four ministries of the interior for the UK, Germany, Austria and the Netherlands wrote to the EU Council pointing out that some municipalities were being "put under considerable strain by certain immigrants from other member states (...) burdening the host countries' social welfare system." They also drew attention to their need, whilst supporting free movement as a

fundamental right, to defend the rights of their own citizens. There is very little evidence of “benefit tourism”, despite differences in levels of member states’ welfare benefits which in theory could be exploited by European citizens practising their rights to free movement within the EU.²⁶

Despite this, restrictions on free movement appear to have become a major plank in the bid by the UK government to renegotiate their terms of membership of the EU, the results of which would be put to the in-out referendum after the 2015 general elections. In a speech on 26 November 2014, the Prime Minister, David Cameron, did not go so far as to demand “emergency brakes” or quantitative restrictions on intra-EU migration. The five proposed measures would however have an equivalent effect, creating a new class of European citizens in waiting:

To deport EU job-seekers who have not found work within six months; and to stop such job-seekers accessing ‘universal credit’ (which will incorporate the current job-seeker’s allowance) when it is rolled out from 2015 onwards, for their first four years in Britain.

- To impose a four-year period before EU migrants have access to in-work benefits like tax credits and housing benefit.
- To stop workers in one EU member state collecting child benefit there for children who live in another member state.
- To prevent workers from countries that join the EU from seeking work in the rest of the EU and these countries’ economies have partially converged with those of the existing members.
- To make it easier to deport criminals, fraudsters and beggars from other member states and to ban their re-entry.²⁷

The threat to European rights to free movement is evident. It is also worrying that such speeches by leading politicians, which fail to make a clear distinction between free movement of people within the EU and immigration, will feed prejudice. The message and assumptions on which the speech is based are as negative as the proposals. For example: “And of course freedom of movement has evolved significantly over the years from applying to job-holders to job-seekers too; from job-seekers to their non-European family members; and from a right to work, to a right to claim a range of benefits.”

CONCLUSIONS

Free movement of people, although apparently the EU’s most popular achievement is being contested to an increasing extent. In this document, it is argued that whilst overall free movement is a win-win situation for countries of origin, host countries and European migrants themselves, there are inevitable

²⁶ In free movement of EU citizens, five actions to make a difference, the Commission states, “recent studies conclude that there is no statistical relationship between the generosity of the welfare systems and the inflows of mobile EU citizens.”

²⁷ Summary by the Centre for European reform.

failures and local problems because of its uneven spread. It is not though because of this, that calls for restrictions on European rights should be allowed to succeed. On the contrary, the emphasis should be on defending European rights by stepping up enforcement to make sure that they work better, whilst dealing locally with local problems. The European Union is now emerging from an enlargement process where “transitional arrangements” and overall restrictions on free movement rights for European citizens from new member states created more problems than they solved. There should now be emphasis on giving cities and local authorities more power and resources to manage effectively the impact of free movement of people, where there is an impact in selective regions. Evidence suggests that although messages about the overall benefits of intra-EU migration and progress towards a European labour market should be part of the response to scaremongering about free movement, they are not enough. The message has to address local communities and the facts on the ground.

The following action kit is proposed as a basis of discussion to defend European rights to free movement and ensure that they work better.

- More statistical evidence, particularly at a local level where free movement has an impact. There is no doubt that knowledge of patterns of free movement of people within the EU has improved. As a result of enlargement and the need to measure the impact of transitional arrangements, for example, there have been far more regular publications in the press by the European Commission, national authorities or research institutions and European think tanks. Where statistical evidence is still lacking however is at a local level, in order to explain and involve people in the local community, but also make it possible to design policies in response. More use of EU Cohesion funds and creating within that context a European free movement solidarity fund would have to be based on sound statistical evidence of outflows or inflows of people and their impact on services.
- An even-handed approach to combating the abuse of free movement rights. The European Court of Justice has confirmed that a right to free movements after the first three months is dependent on having sufficient resources, health cover, and that European citizens having no intention to seek work can be denied access to social benefits. In the current climate however, most of the emphasis is placed on abuse by European citizens themselves and not enough on unscrupulous local employers. People move to other countries to work not to claim benefits, but precarious contracts, undercutting the minimum wage and other illegal practices can make European citizens vulnerable. If there is more evidence of European citizens coming to the door of emergency services or visiting shelters for the homeless, it is not generally because they are failed benefit tourists, so much as failed job-seekers or workers. The burden of ensuring that free movement is

not abused should be shared more equitably and involves not so much new legislation as applying both European and national legislation.

- More emphasis on prevention is better than cure. Legislation covering free movement of people takes the form generally of directives which establish common principles and objectives but leave it to each member state to implement them according to their own legal and administrative practice. Although the so-called “citizenship directive” on free movement of European citizens does no more than reflect the case-law of the European Court, the Commission found that no single article had been correctly reflected in national law by all member states.²⁸ In retrospect a binding requirement on member states to notify in advance to the Commission any draft implementing measures, but also any other legislative measures which could have affected implementation might have prevented the subsequent infringement procedures. Alternatively such legislation could be recast as a regulation, which has the advantage of being directly applicable, without relying on correct enforcement through national implementing measures.
- A one-stop shop in each member state to solve problems quickly. At European level, there is “Europe-Direct” with a free phone system which sends more difficult questions to Your Europe Advice or if more than just guidance is needed SOLVIT which aims to solve problems within 10 weeks. This deadline to instil a more problem-solving approach in the European administration should apply to all EU citizen assistance services, and in turn these should operate according to the same standards in each member state. A recently adopted directive requires member states to set up contact points, and give equality bodies and NGOs a bigger role in defending European rights.²⁹
- Collective action by citizens. The Commission has considerable discretion as to whether or not it acts on individual complaints. Therefore citizens have an interest in grouping their concerns and evidence together to give them greater weight, and perhaps backing them up with a petition to the European Parliament or an appeal to a national court. When the Commission tries to persuade member states to lift barriers to free movement rights, citizens need to make their presence felt as an unofficial third party.

²⁸ Report from the Commission on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (COM (2008)840 final, 10.12.2008). This conclusion was supported also in a study by ECAS for the Legal Affairs Committee of the European Parliament (Pc 410/650).

²⁹ Directive 2014/54/EU of 16 April 2014 (OSL128/8 of 30.4.2014) on “measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers” should be implemented by 21 May 2016.

- A fast-track enforcement procedure. It is relatively easy to send a complaint, but unless there is an immediate solution, it can take at least two years before the Commission appeals to the European Court of Justice and a further 18 months at least for judicial procedures. In the meantime the member state(s) concerned can maintain the barrier to the exercise of European rights. The Commission should apply to the European Court to demand a member state lift immediately any barrier to the exercise of European rights which prima facie violates European law and affects a large number of people, pending full examination.
- A free movement solidarity fund. In addition to making more effective use of European law to improve enforcement, action at the local level could also reduce tensions between European citizens on the move and the host country society. These tensions fuel demands for general restrictions on European rights and scaremongering about benefit tourists. However because free movement is so unevenly spread the real issues are exceptional instances of brain drain in countries of origin or strains on local services in host countries. EU cohesion policy provides the right context, combining a European framework with strong emphasis on local community development and partnership with all actors. This would be the right context to set up such a European free movement solidarity fund. The fund should serve a dual purpose of supporting emergency help to vulnerable EU citizens, mentoring language teaching and guidance for job seekers, whilst providing additional resources for local health, educational and housing services.³⁰ There should be equal contributions to such a fund from the country of origin, the host country and the EU budget.

³⁰ The European Commission is beginning to draw attention to the use that can be made of the EU social and regional funds notably in “free movement of EU citizens and their families: five actions to make a difference”. In a report for the European Commission on the future of EU cohesion policy for the period 2014-2020 - the Barca report – a convincing case is made for migration to become a priority.