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Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons

Abstract

On 23 June 2016, voters in the United Kingdom (UK) rejected remaining in the European Union (EU) and the result initiated processes that can lead to the eventual resolution of the present UK-EU contractual relations.[1] The 'New Settlement', approved in February 2016, and the period since the June referendum may serve us with many ideas regarding the conceptual elements of future contractual relations. In addition to the statements of Heads of State and Governments, several approaches can be found at both EU and national level which foreshadow future directions. Our considerations need to be seen through that prism. Firm political support for the four freedoms of the Internal Market and emphasis on the guiding principle of 'everything can be put on the table once the Article 50 process is triggered', are regarded as such, as along with the activity of the European Commission (its proposals in the field of free movement), the case-law of the European Court of Justice (ECJ) on social rights and some newly enacted legislation in the target countries of intra-EU migration. The article is centred around two questions, namely why the British attempt to restrict free movement of persons is not an isolated phenomenon and what are the chances of shielding the fundamental principle and inherent rights of free movement in the post-Brexit process. The article argues that the 2016 February 'New Settlement' is taken not only as a basis for negotiations with the UK but also as a basis for the internal law-making process of the EU. It is important because a deal with the UK will be much smoother if the internal debate around the most crucial issues will be closed prior to the decisive part of the Brexit negotiations. The article also argues that the EU-UK deal will probably not be more restrictive than the 'New Settlement': as such, the debate is no longer only about another opt-out for the UK but also about the unity of the remaining Member States.

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1 NKE, Stratégiai Védelmi Kutatóközpont – *Elemzések 2016/2. Brexit olvasatok.*

I Introduction

1 Focused Context-Setting

Internal British procedures are in themselves challenging the Brexit process (namely whether the British government should seek Parliamentary approval before triggering Article 50, the 'divorce clause' or if voting could only come after a deal with the EU has already been agreed, in the form of ratification),[2] but the real question is the future relationship between the UK and the EU and its Member States. In the negotiation process that presumably ends in 2019,[3] one of the focal points is the free movement of persons. At the centre of the debate is clearly the vision of the extent of the rights related to free movement. Through Brexit, the debate has gained a new dimension and so citizens of the world's fifth biggest economy voted for intervention from their government, aiming to protect their jobs and their generous welfare system. The positive effect of migrants on the British economy has been reiterated by several economic analysts, which can be summarised as 'At the national level, falls in EU immigration are likely to lead to lower living standards for the UK-born.'[4] In spite of the definite economic conclusion, voters instead questioned the idea of an 'ever closer union' and they favoured the traditional British 'splendid isolation' idea of the 19th century. What prompted the fears exactly – whether it was the powerhouse and its far-reaching competences in Brussels, or the mass arrival of immigrating nationals from other EU countries, can't be answered conclusively. The reasons were manifold; political, economic, but mostly sociological and psychological, and they have been analysed extensively.[5]

In fact, the UK's ties to the EU have always been economically motivated and were loosened in the last decades, ever since the EU started to expand its competences and more recently also due to the biggest economic crash for more than 80 years. The UK is one of the countries to which EU legislation applies selectively; it is the Member State with the most opt-outs.[6] The UK

[2] A legal challenge – to force the government to give Parliament a vote before Article 50 is triggered – was approved by the High Court.

[3] The date might be not only be influenced by the EU-UK talks. Britain need to reach an agreement with the 163 WTO members. See for more http://uk.reuters.com/article/uk-britain-eu-trade-idUKKBN13U1GT.

[4] 'This is partly because immigrants help to reduce the deficit: they are more likely to work and pay taxes and less likely to use public services as they are younger and better educated than the UK-born. It is also partly due to the positive effects of EU immigrants on productivity' see Jonathan Wadsworth, Swati Dhingra, Gianmarco Ottaviano and John Van Reenen, 'Brexit and the Impact of Immigration on the UK' Centre for Economic Performance, LSE, PaperBrexit05, May 2016, page 16.

[5] Eiko Thielemann (LSE), Daniel Schade (LSE), 'Free Movement of Persons and Migration – Report of the hearing' held on 21st January, 2016, LSE European Institute, Commission on the Future of Britain in Europe, London: 'Overall, a disparity remains, on the one hand, between the negative public perceptions of the effects of migration, and, on the other, the more nuanced impression given by much of the available academic data, which suggests that effects are either negligible or positive.' (Page 4).

[6] http://www.euractiv.com/section/uk-europe/linksdossier/europe-a-la-carte-the-whats-and-whys-behind-uk-opt-outs/#ea-accordion-background, download: 20 November 2016

is not a member of the Eurozone, it has not signed up to the Economic and Monetary Union, it is not part of the border-free Schengen area, Britain has secured opt-outs from justice and home affairs legislation and the UK is not a signatory to the Fundamental Charter of Human Rights.[7] These are four key areas in which new laws do not automatically apply to the UK and its citizens (the UK can opt-in to legislations according to its discretion).

The so-called 'New Settlement' preceding the Brexit vote[8] was (ex post facto could have been) in fact a further example of 'opt-outs'. However, this opt-out was (could have been) very different from the former ones, in that this was intentionally and with consent based on reciprocity. The Brexit vote contributed to the principle of reciprocity (and the lack of it) becoming a key feature of the whole after-Brexit regime.

2 Main Issues Around the 'New Settlement' in February 2016

It is worth reiterating some of the ideas floated before and during the negotiations on the 'New Settlement' in the field of free movement of persons because these ideas play a crucial role in understanding current changes in national laws and in fine-tuning future expectations.

As a starting point, on 10 November 2015 UK Prime Minister David Cameron launched a discussion on the EU membership of the United Kingdom, highlighting four key areas where the UK was seeking reforms.[9] In the field of free movement, Cameron proposed that people coming to Britain from the EU must live there and contribute for four years before they qualify for in-work benefits or social housing, and additionally, exporting child benefit overseas should come to an end. On 17 December 2015 the General Affairs Council discussed the British reform proposals.[10] On 2 February 2016, Donald Tusk disclosed a multi-point package of proposals, which contained a series of measures reflecting the British requests.[11] The Heads of State and Government agreed and adopted the European Council Conclusions on Brexit (this is called the 'New Settlement') at their meeting on 18-19 February 2016.[12]

The content and uncertainties of the 'New Settlement' are well-known and well-documented.[13] It is important to summarise what the European Council and European Commission have finally undertaken:

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[7] According to of Protocol 21 of the Treaties the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union (Area of Freedom, Security and Justice), including Article 79 of TFEU aiming at developing a common immigration policy.

[8] http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, retrieved: 10-03-2016

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf, retrieved: 02-02-2016. The four areas were: economic governance, competitiveness, sovereignty and immigration.

[10] http://www.consilium.europa.eu/hu/press/press-releases/2015/12/18-euco-conclusions/, retrieved: 31-01-2016.

[11] http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/, retrieved: 10-03-2016.

[12] http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, retrieved: 10-03-2016.

[13] See for more detail 'House of Commons, Library, Brexit: impact across policy areas' Briefing paper, Number 07213, 26 August 2016. Gellérné-Lukács, Éva – Töttős, Ágnes – Illés, Sándor, 'Free movement of people and the Brexit' (2016) 4 (65) Hungarian Geographical Bulletin, p. 421–432. DOI: 10.15201/hungeobull.65.4.9.

– to amend Regulation 883/2004 on the coordination of social security systems in order to give Member States, with regard to the indexation of exported child benefits (Section D., point 2. a.) – complemented by a Commission declaration in Annex V.;
– to amend Regulation 492/2011/EU on freedom of movement for workers within the Union to include an alert and safeguard mechanism in case of mass inflow of workers which allows restrictions to non-contributory in-work benefits to the extent necessary for newly arriving workers, within a period of 7 years, and for four years for each worker (Section D., point 2. b.) – complemented by a Commission declaration in Annex VI.;
– to adopt a proposal to complement Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely in order to fight marriages of convenience (Declaration of the European Commission on issues related to the abuse of the right of free movement of persons in Annex VII).[14]

The 'New Settlement' envisaged the amendment of secondary law and also laid down Union preference.[15] It can be said that not only the UK, but potentially every receiving country was given the opportunity to apply the alert mechanism and to control public finances through restrictions on social benefits while maintaining the inflow of human capital. Angela Merkel announced immediately after the February 2016 decision that Germany would also consider the application of the restrictions on exporting family benefits.[16]

Union preference and mutual applicability of the safeguard are no longer self-evident and will be subject to further negotiation, although it is emphasised by politicians that while the 'New Settlement' was a single, unique agreement especially to keep the UK in the EU, at that point in time a clear consensus was reached which shall not be forgotten.

II Circumstances and Conditions Influencing the Future Relationship with the UK

This section will examine the following topics: (i) political statements on the free movement of persons after Brexit, (ii) development of the case-law of the Court of Justice of the European Union (ECJ) on economically inactive persons, (iii) new legislative proposals of the European Commission in the field of free movement and (iv) some highlights of changes in certain Member States' national laws. It is intended to present that while there is a strong support for free movement on the political level, behind the scenes some divergent processes can be witnessed.

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14 This topic is discussed in detail by Ágnes Töttős, 'The Fight against Marriages of Convenience in the EU and in Hungary' (2015) II, Pécs Journal of International and European Law, p. 55–65.

15 Point 2. b.: 'The future measures referred to in this paragraph should not result in EU workers enjoying less favourable treatment than third country nationals in a comparable situation.'

16 http://www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg, downloaded 15 April 2016.

1 Political Statements on Free Movement of Persons

The unity and inextricability of the Single (Internal) Market has always been a compass. Hungary experienced it during the transitional period starting 1 May 2004 and lasting until 1 May 2011.[17] During this period, there were restrictions on individual employment in the old Member States but, serving the balance, there were restrictions on free movement of capital in the new Member States.[18] The unity has also recently been demonstrated towards Switzerland. The Swiss referendum in 2014 called for quotas on EU immigration but the European Commission declared that 'This core principle of the free movement of persons is a cornerstone of our relationship. It is a fundamental right. It is not simply 'negotiable', as some tend to believe'.[19] Negotiations stalled and Switzerland now faces the dilemma of dropping its planned immigration control or losing its full access to the EU's Internal Market because of the guillotine clause. The Swiss Parliament has approved rules to implement the new constitutional provision concerning immigration aimed at remaining consistent with the Swiss-EU bilateral agreement.[20]

With regard to Brexit, EU political leaders – including union's chief Brexit negotiator *Michel Barnier* – repeatedly stick to the mantra that there can be no pre-negotiations before the UK tenders its formal notice of intent to leave the EU. There is a firm stance on 'no negotiations without notification'. It is rooted in the joint statement adopted at the informal meeting of the 27 Heads of State on 29 June 2016.[21] The joint statement stresses that the four freedoms that underpin the European Union's internal market work together, meaning that 'Access to the Single Market requires acceptance of all four freedoms'.[22] Peter Altmaier, Chief of the German Chancellery has confirmed that 'These four fundamental freedoms are at the heart of the single market' and 'That means that any country that would like to participate in the single market, basically has to accept the single market as it exists'.[23] The V4 countries have a genuine, firm standpoint which has been articulated several times that 'the V4 countries will be uncompromising' and 'Unless we feel a guarantee that these people [living and working in Britain] are equal, we will veto any agreement between the EU and Britain'.[24]

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17 Dr. Gellérné dr. Lukács Éva – dr. Szigeti Borbála, *Munkavállalási szabályok az EU tagállamaiban az átmeneti időszak alatt* ('Rules of employment in EU Member States during the transition period'), (KJK Kerszöv 2005, Budapest).

18 Sándor Illés – Gábor Michalkó, 'Relationships between international tourism and migration in Hungary: Tourism flows and foreign property ownership' (2008) 1 (10) Tourism Geographies, pp. 98–118.

19 Developments following the Swiss referendum on 9th February – statement by European Commissioner László Andor on behalf of European Commission to European Parliament plenary session, Strasbourg, 26 February 2014.

20 On 16 December 2016 the Swiss parliament adopted the change in laws on foreigners.

21 http://data.consilium.europa.eu/doc/document/ST-26-2016-INIT/en/pdf Downloaded 28 November 2016. https://epthinktank.eu/2016/07/04/outcome-of-the-european-council-of-28-june-2016-and-the-informal-meeting-of-27-heads-of-state-or-government-on-29-june-2016/ Downloaded: 29 November 2016.

22 Ibid, point 4.

23 http://www.express.co.uk/news/world/684801/Peter-Altmaier-freedom-movement-single-market?_ga=1.232016026.428302222.1480426969 Downloaded: 29 November 2016

24 https://www.theguardian.com/politics/2016/sep/17/eastern-bloc-countries-will-uphold-citizens-rights-to-live-in-uk, downloaded: 30 September 2016

Last but not least, the Heads of States of Government have confirmed recently that 'We stand firmly behind our statement of 29 June 2016 in its entirety and will continue to adhere to the principles laid down therein. We reiterate that any agreement will have to be based on a balance of rights and obligations, and that access to the Single Market requires acceptance of all four freedoms'[25].

According to British press releases, on 18 November 2016, at a conference where Theresa May and Angela Merkel met, the latter politely rejected that giving any assurances for Britons living in the European Union and EU citizens living in the UK to keep their rights to residence, work and healthcare after Brexit.[26] At the same time, however, when on 28 November 2016 May met Polish Prime Minister Beata Szydlo, who stressed the need to obtain guarantees for the one million Poles in the UK, May ,refused to confirm their rights 'insisting that the Government must not "reveal its hand" ahead of the Brexit negotiations.'[27]

2 Economically Inactive Persons in the Case-Law of the Court of Justice of the European Union

During 2013-2015 the ECJ was again faced with the question whether economically inactive EU citizens and their families are entitled to claim social assistance and special non-contributory benefits in the same way as migrant workers, and again the ECJ has been criticized. 'Again' can be said because since 1993, when the Maastricht Treaty introduced the concept of union citizenship, this theme has been periodically re-ignited. And 'again' because the ECJ in the 2000s was criticized for being too liberal when using union citizenship to overcome the distinction between economically active and inactive persons, and now it has been criticised for accepting the strict limitations set out in the Residence Directive[28] and for rejecting the claims in question on this basis.[29]

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25 Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. SN 96/16

26 http://www.politico.eu/article/uk-theresa-may-pre-brexit-expats-plan-nixed-by-german-chancellor-angela-merkel-negotiations-european-union-residence/, download: 28 November 2016

27 http://www.telegraph.co.uk/news/2016/11/28/eu-must-compromise-win-good-brexit-deal-britain-rest-union-warns/, download: 29 November 2016.

28 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

29 Laura Gyeney, 'The limits of Member State solidarity: The legal analysis of the Dano and the Alimanovic cases' (manuscript, Hungarian Yearbook of International Law and European Law, 2016) (accepted for publication). Gyeney Laura, 'A szociális turizmuskérdése az Európai Unió bíróságának joggyakorlatában' ("The issue of social tourism in the case-law of the European Court of Justice') (2016) 2 Létünk, 167–182.

The legal literature on union citizenship, including these cases, is copious, and tends to focus on the boundaries of Member States' solidarity with respect to migrant persons.[30] Prior to the Maastricht Treaty, a clear distinction prevailed between economically active and non-active Union citizens. In the post-Maastricht era, the ECJ has unambiguously decided for the benefit of migrant persons and contributed to extending free movement rights to economically non-active persons.[31] The ECJ followed the same line of logic in its cases: a lawfully resident Union citizen can rely upon the equal treatment clause of the Treaty with respect to all situations and all social benefits falling within its scope of application,[32] and residence has been regarded as lawful until an expulsion order has been initiated. The majority of legal scholars welcomed the ECJ's activism. It is necessary to note, however, that there were authors who have criticised this line of interpretation: 'the most worrying feature of the Court's recent jurisprudence on Union citizenship from Sala to Bidar is the absence of a convincing methodology and the tendency to interpret secondary Community law against its wording and purpose'.[33]

After two decades, a clear shift can be traced.[34] The *Brey* judgement,[35] the *Dano* judgment[36] and the *Alimanovic* judgment[37] are the landmark cases of the new wave. The *Brey* case focused on whether an economically inactive union citizen can take recourse to social assistance without jeopardizing their right of residence. In *Dano* and *Alimanovic* there was no intention to work and no close link with the host state and the question was whether benefits should be paid under these circumstances. The ECJ has departed from its former line of general argumentation and the decisive factor was the textual interpretation of Directive 2004/38/EC and the unwarranted use of social benefits contained therein. It was logical that, under these terms and conditions, the cases could only signal a change in the jurisprudence of the ECJ. Without sufficient resources, the residence of a citizen of another Member State was no longer lawful,[38]

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30 Herwig Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' 16 (2014) European Journal of Migration and Law, p. 147–179. Herwig Verschueren, 'Preventing 'benefit tourism' in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52 Common Market Law Review, p. 363–390. Varjú Márton, Nyircsák Adrienn, 'A tagállamokat minimális szolidaritási kötelezettség sem terheli az uniós polgárságból eredő elvárások alapján' http://hpops.tk.mta.hu/blog/2014/11/europai-birosag-dano-itelet.

31 Á. Castro Oliveira, 'Workers and other persons: Step-by-step from movement to citizenship – case law 1995-2011' 39 (2002) Common Market Law Review, p. 77–127. Bjorn Kunoy, 'Union of national citizens: the origins of the court's lack of avant-gardisme in the Chen case' 43 (2006) Common Market Law Review, p. 179–190.

32 See for more detail in Gellérné Lukács Éva, *Személyek szabad mozgása az Európai Unióban* ('Free movement of persons in the EU') (szociológiai e-könyvek, Tullius Kft 2008, Budapest). Uniós polgársággal foglalkozó fejezet (chapter dealing with union citizenship): p. 154–174. http://www.shp.hu/hpc/userfiles/eumunkavallalas/gellerne_lukacs_eva_szemelyek_szabad_mozgasa_az_europai_unioban_honlap.pdf

33 Kay Hailbronner, 'Union citizenship and access to social benefits' 42 (2005) Common Market Law Review, 1245–1267, p. 1251.

34 Giulia Barbone, LLB King's College London, Dano and Alimanovic – the end of a social European Union, Posted on January 22, 2016 https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.WGuNqpUzXX4.

35 Judgement of 19 September 2013 in Case C-140/12, *Pensionversicherungsanstalt v Peter Brey.*

36 Judgment of 11 November 2014 in Case 333/13 *Elisabeta Dano, Florin Dano v Jobcenter Leipzig.*

37 Judgment of 15 September 2015 in Case 67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others.*

38 Para 51. of the *Alimanovic* case.

or even if it was lawful under Article 14 (4) b) of Directive 2004/38/EC, benefits were legitimately rejected on the basis of Article 24 (2). The key issue was that the benefit which had been claimed qualified as social assistance and this qualification made it impossible to count on it as part of sufficient resources. It was irrelevant that, on the basis of Regulation 883/2004/EC, it should have been granted. The ECJ disregarded the necessity of individual assessment in *Alimanovic* and the concrete effect of the claimed benefits on the sustainability of the social assistance system.[39]

It seems that the ECJ has recently faced rather clear-cut cases; the claimants were real non-actives, and, for these clear-cut cases, the Residence Directive gave a clear-cut answer. It is not that a gate has forever been closed to job-seekers, students or ex-workers; it seems rather a confirmation that Member States have no unlimited responsibility for migrant persons. What is more interesting for the future how the ECJ or the Union legislator will think it over and how it will clarify the following loose ends:

– the definition of economically inactive persons versus job-seekers,
– the relationship between Directive 2004/38/EC and Regulation 883/2004/EC, hence if a benefit will qualify as social assistance in terms of the Directive and special non-contributory benefit under Regulation 883/2004/EC at the same time, the relationship (hierarchy) between these two instruments needs to be solved, and finally,
– how the necessity for individual assessment will be regulated in detail, when it is precisely this condition that can be set aside.

Why this issue is so extensively discussed here? Because the outcome of the Brexit vote was most heavily burdened by the issue of social benefits to migrants, especially for those who are not working. The UK was one of the leading lobbyists in this field. In 2013 'Britain and Germany have joined forces to demand an end to the abuse by so-called 'benefits tourists' of the European Union's free movement directive'.[40] The European Commission launched research on the impact of non-actives on the social security systems of the Member States which rejected the welfare magnet hypothesis.[41] However, this has not changed the immense political weight of the question – the best proof of this is Brexit itself.

[39] Para 59. of the *Alimanovic* case. '(…) no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.'

[40] http://www.telegraph.co.uk/news/politics/10014508/Britain-and-Germany-demand-EU-cracks-down-on-benefits-tourism.html. Britain and Germany demand EU cracks down on 'benefits tourism' 24 April 2013. Theresa May as home state secretary has initiated the process. Downloaded: 20 November 2016.

[41] 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, DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, Final report submitted by ICF GHK in association with Milieu Ltd, 14 October 2013 (revised on 16 December 2013).

3 The EU 'Internal Processes'

The European Commission have launched two proposals in 2016 that forecast considerable changes in the field of free movement. The first was the amendment of the Posting of Workers Directive 96/71/EC in March and the second the amendment of the social security coordination regime (Regulation 883/2004/EC) in December.[42] Both have been articulated by the European Commission as means of enhancing the protection of workers and fairness within the Internal Market.[43] It is problematic however, that both proposals could be the subject of an East-West disagreement, more precisely a disagreement between sending and receiving countries.

a) Social benefits – proposal for the amendment of Regulation 883/2004/EC

In the field of social benefits, first the 'New Settlement' is to be recalled. It contained the following: 'Member States may reject claims for social assistance by EU citizens from other Member States who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search.'[44] This clear statement bears similarities with the conclusions of the recent case-law of the ECJ and even goes beyond it: it excludes, from the beneficiaries of social assistance, job-seekers by definition.

The proposal of the European Commission for the amendment of the current framework mirrors the above tendencies. Preamble (5a) states that 'In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary.' In order to provide for clarity, the insertion of Article 4 (2) is suggested: '2. A Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.'

Article 4 (2) refers to economically inactive people and provides for restrictive measure in their respect. Preamble (5a) sets forth that 'The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC'. Clearly, the European Commission proposes to set up a hierarchy between Directive 2004/38/EC and

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[42] Proposal for a Directive amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final. Proposal for a Regulation 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). Amendment of the regulations was discussed in the past, too, but from different angles, see Jos Bergham-Paul Schoukens (eds.), *The social security of moving researchers* (Acco Nederland 2011, Den Haag).

[43] http://ec.europa.eu/social/main.jsp?langId=hu&catId=569&newsId=2699&furtherNews=yes, downloaded: 15 December 2016. With regard the posting directive the Commission believes that these changes are necessary to ensure better protection for posted workers and to eliminate wage differences between posted and local workers, which can lead to unfair competition between companies.

[44] Section D., point 1. a.

Regulation 883/2004/EC in favour of the Directive. It entails the following chain of events: if a migrant claims social benefit, first the conditions of their legal residence will be examined, including the existence of sufficient resources. If the person would not meet the sufficient resources requirements of the Directive, their residence would be deemed unlawful and access to social security benefits would be denied.

There is the proposal for hierarchy, but no definition of an economically inactive person is given. Preamble (5a) states that 'For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker, whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union'. But this text is not at all reflected in Article 4 (2), and so the situation of those who want work but do not have work shall be decided case-by-case, whether they are job-seekers in terms of the TFEU or not. If job-seeking is treated as part of work statuses, the situation becomes even more complicated.[45] For example, a member state would not be precluded from considering somebody economically inactive if they had been working for years but became a jobseeker for more than 6 months, or even a family member who is the primary carer of the children. Is a person who, based on previous insurance, employment or residence receives benefits under Regulation 883/2004/EC but is out of work, economically inactive? The personal scope seems obscure, which can give rise to different (even unnecessarily restrictive) decisions in individual cases and could influence all sub-schemes of social security.

There is no mention of individual assessment either. Obviously the individual assessment test is part of the Residence Directive; it should be inherent in the verification process, but after *Alimanovic,* the question is clear: in which cases can the personal test be disregarded? This issue is not dealt with in the proposal, which could probably lead to the complete elimination of the test in practice.

Probably, if these proposals will be accepted by the EU Member States (including at present the UK) and the restriction of rights of economically inactive persons will become a reality, it is may facilitate Brexit negotiations.

b) Posted workers' rights – proposal for the amendment of Directive 96/71/EC

In the field of posting, the Commission proposed that each posted worker needs to receive the same remuneration as a worker of the host state in the same position (equal pay for equal work). The wage requirement exists at present as well, but it is confined to the minimum wage; it does not prescribe 'same remuneration'. Also, the Commission proposed that if the anticipated length of posting exceeds 24 months, the labour law of the host Member State can be applied. At present, there is no time limitation for the duration and choice of labour law. Ten national Parliaments, mainly from Central and Eastern European (CEE), signalled their concerns

[45] http://www.poverty.org.uk/summary/work%20statuses.shtml. This is e.g. a UK interpretation on definitions which shows that the present state of affairs is not very clear.

regarding subsidiarity, which triggered the yellow-card procedure.[46] The parliaments argued that the proposal impinges on their national jurisdiction in setting wage levels. It was also emphasised that wage difference is an economic factor – in the same way as price difference in the field of free movement of goods or the level of capital adequacy in the field of free movement of capital. As none of the latter is considered to result in unfair competition then why should wage difference? Economic analyst Bruegel confirmed that 'If a version of the 'same pay at the same place' principle is introduced, European firms would become less competitive globally, due to the less competition and the associated efficiency losses'.[47] This opinion is also shared by Business Europe, the association of national business federations of 34 European countries. The approach of the European Commission is shared by workers' representations and civil organisations, also from CEE countries: 'The rule of equal pay for equal work in the same workplace should apply in the field of work migration too – and that without exception.'[48]

The European Commission disregarded the concerns of national parliaments when it declared that the proposal did not breach the subsidiarity principle.[49] Consequently, the negotiations of the proposal in the Council working groups have started again under the Slovak Presidency. In the event of approval – which is likely sooner or later, because the CEE countries alone do not have enough votes to block it – the conditions of posting will change to the detriment of CEE-established companies. It is important to note that CEE-established is not equivalent to CEE-owned companies; there are several companies that are subsidiaries of their Western parent or have simply been established by Western groups of owners who employ a CEE workforce using this construction. Posted workers are therefore usually low- or semi-skilled workers who live in CEE countries and only work temporarily in other countries through posting and it is likely that they will lose their job before they could enjoy the strengthened protection that is envisioned by the equal pay for equal work principle. Their work will be taken over by the low- or semi-skilled workers of the present host states or they will continue as undeclared workers. Undeclared work is already a huge problem in the EU,[50] and if artificial compensatory regulations are introduced it could grow ever larger.

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46 Member States' national parliaments can disagree with a proposal up to eight weeks after its publication. Under this 'yellow card' procedure, a total of one-third of the votes assigned to national parliaments requires the Commission to re-examine its proposal, as a result of which it can amend or withdraw it. Poland would be mostly hit because out of the estimated 1.9 million posted workers approximately 300,000 are Polish citizens.

47 http://bruegel.org/2016/03/social-dumping-and-posted-workers-a-new-clash-within-the-eu/. Elena Vaccarino and Zsolt Darvas, '"Social dumping" and posted workers: a new clash within the EU' 7 March, 2016. Downloaded 29 September 2016.

48 http://migrationonline.cz/en/free-movement-of-workers-in-the-european-union-in-the-context-of-the-amended-directive-on-the-posting-of-workers. Martin Rozumek, 'Free Movement of Workers in the European Union in the Context of the Amended Directive on the Posting of Workers' 5 September 2016.

49 http://europa.eu/rapid/press-release_IP-16-2546_en.htm. Downloaded 15 December 2016.

50 http://bruegel.org/2016/03/social-dumping-and-posted-workers-a-new-clash-within-the-eu/. Vaccarino, Darvas (n 47). Also adds: 'The elephant in the room is undeclared work, which is a much bigger problem than possible problems caused by posted workers on all three accounts: fairness of competition, protection of the rights of mobile workers and possible negative impacts on declared home country workers.'

Here, it should be noted that the UK could be a supporter of the position of CEE countries and join in to block the proposal. The UK also supported the blocking minority against the Posting Enforcement Directive.[51] Competitiveness is a key issue for the UK, and setting wage levels in EU legislation could be an issue that would not fit its economic principles. Additionally, if wage levels are artificially set and CEE workers would lose their jobs, it could be feared that these low and semi-skilled workers will head towards the UK, which could also generate tensions.

4 Highlights of Recent Changes in National Laws Related to free Movement and Benefits

Hungarian migrant workers are employed in the largest numbers in Germany, the UK, and Austria,[52] and our focus is on the trends in these countries. It is argued that Germany and Austria have introduced restrictive internal laws on access to social benefits for migrant persons which, regarding its objectives, goes parallel to what the UK tried to achieve.

Germany operates a wide social net which covers all social security risks, including temporary inability of persons to finance their living. However, a new bill has been drafted in October 2016.[53] EU citizens should in principle be exempt from Hartz IV benefits and social assistance if they did not work here or had acquired social insurance claims through previous work, according to the draft bill. Only after a period of five years, if their stay had been consolidated without state support, should citizens of the EU be entitled to benefits. For EU citizens, who are excluded from social assistance in the future, the draft law foresees a new entitlement to one-time bridging: for the last four weeks, the affected persons should receive aid to meet their immediate needs for food, shelter, body and health care. At the same time they would be given a loan for the return trip to their home country, where they could then apply for social assistance. It is worth noting that not only EU migrants are entitled to these social benefits but also asylum seekers. In central Germany, every fourth currently eligible person is a foreigner[54] and out of the 1.5 million foreigner beneficiaries 500,000 are third-country nationals.

The situation in *Austria* is also very complex. It is worth recalling that on 1 May 2011 the transitional period, during which access to Austria's labour market had been restricted for

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51 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

52 Illés Sándor, 'Külföldiek az Európai Unióból' (2001) 2 (79) Statisztikai Szemle, pp. 162–177. Illés, Sándor – Kincses, Áron, 'Hungary as a receiving country for circulars' (2012) 2 (61) Hungarian Geographical Bulletin, pp. 197-218.

53 http://www.zeit.de/politik/2016-04/andrea-nahles-eu-buerger-sozialleistungen. 'Bundesarbeitsministerin Andrea Nahles (SPD) will den Sozialhilfeanspruch von Ausländern aus anderen EU-Staaten drastisch beschränken.' Downloaded: 10 October 2016.

54 http://www.mdr.de/nachrichten/wirtschaft/inland/mehr-hartz-iv-auslaender-fluechtlinge-100.html. Downloaded: 10 October 2016.

workers from the EU-8 newcomer Member States, expired. Social and wage dumping was feared in two scenarios: (i) when Austrian companies employ workers from the EU-8, disregard relevant laws and pay lower wages than provided for in collective agreements, and (ii) foreign companies post workers to Austria but pay remuneration (minimum wages) applicable in their country of origin and not in accordance with the Austrian wage level. The initiative stressed the protection of workers' rights (the enforcement of the 'equal pay for equal work' principle) but also that the competitive advantage of these undertakings through paying lower wages was a relevant push factor. In 2014, one of the flagship initiatives of the government was therefore the launch of the so-called Act on Fight against Social Dumping.[55] The law contains penalties if minimum wages and salaries (as provided for in the collective agreements) are not paid and if documents (e.g. relating to employment contracts and insured status) are not available in German. The new changes to Austrian law enter into force on 1st January 2017. In essence, the authorities will gain power from more control mechanisms and further measures to fight against wage and social dumping, and the lessons are transferable, therefore, in June 2011, Austria and Germany signed an agreement designed to enhance cooperation between Austrian and German authorities in the field of posted workers. 'The improved cooperation includes speeding up the investigation of relevant facts and penalties for employers engaged in wage and social dumping, especially when major forms of organised social fraud are taking place'. [56] Moreover, conditions of lawful residence have also been tightened recently.[57]

The UK enjoys special status in Europe. Its population is rapidly growing and demographic ageing hits it less than any other country. The UK population is projected to increase by 9.7 million over the next 25 years, from an estimated 64.6 million in mid-2014 to 74.3 million in mid-2039. This is a growth of more than 10%.[58] Over the 10-year period to mid-2024, the UK population is projected to increase by 4.4 million to 69.0 million and it is projected to reach 70 million by mid-2027.[59] It puts tremendous pressure on public services such as housing, education, healthcare and social assistance. The UK first passed new laws regarding residence-related benefits in 2004. Prior to 1st May 2004, Union citizens who were present in the UK possessed the right of residence in terms of European Community law, and they needed to evidence their intentions to live permanently in the UK to successfully stand the Habitual Residence Test (HRT). From 1st May 2004, in response to concerns about the impact of the enlargement of the European Union, HRT legislation was amended. The change on 1st of

[55] https://www.wko.at/Content.Node/Service/Arbeitsrecht-und-Sozialrecht/Arbeitsrecht/Entgelt/Lohn-_und_Sozialdumping_Begriff_und_Ueberpruefung.html. Download: 10 September 2016.

[56] http://www.eurofound.europa.eu/hu/observatories/emcc/case-studies/tackling-undeclared-work-in-europe/law-against-wage-and-social-dumping-austria. Downloaded: 10 September 2016.

[57] See for more TRANSWELL project http://www.bath.ac.uk/casp/projects/transwel/index.html. Downloaded 10 September 2016.

[58] http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections/bulletins/nationalpopulationprojections/2015-10-29#tab-Main-points. Download 10 March 2016.

[59] http://www.theguardian.com/world/2015/oct/29/uk-population-expected-to-rise-by-almost-10-million-in-25-years. Download 10 March 2016.

January 2004 meant that a prerequisite was introduced before the original test: an initial test to determine whether the person has a 'right to reside', and then the original HRT is carried out. Any person who does not have a right to reside automatically fails the HRT and consequently cannot qualify for residence-based benefits.[60] Additionally, on 1 May 2014 restrictions were introduced for claiming social benefits. British commentators were quite clear regarding the intentions of the legislative amendment: 'On January 1 new rules were introduced to stop new arrivals claiming benefits for up to three months, to deter people from coming from Romania and Bulgaria when work restrictions were lifted.'[61]

III Projections and Scenarios

The question is which EU or UK citizens and how they can be admitted to the UK or the EU, or whether there will be a continued application of the EU free movement rules. The form and content of the cooperation agreement between the EU and the UK will surely be decisive for the free movement of persons. Some experts believe that the current forms of cooperation – either the European Economic Area model or the Switzerland model – could set the example for the new relations between Britain and the EU. This solution would inherently include free movement of persons and the competence of the European Court of Justice. Some commentators suggest, instead, a 'continental partnership' that does not include the four basic freedoms of the EU (free movement of goods, services, persons – including workers – and capital).[62] A mixed model can also be envisaged, in which security and defence matters and paying into the EU budget could be seen as a concession and used as leverage for access to the Internal Market.[63] In the last months, commentators have even suggested that the UK should secure a CETA-like agreement (deal) with the EU, by which Canada gained access to the single market without accepting freedom of movement. It has been put forward as a possible post-Brexit model for UK trade with the EU. In this case, the issues of living and working conditions and access to public services or welfare would be ignored.[64]

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60 Éva Lukács Gellérné, 'Free Movement of Persons – a Synthesis' 51-84, in Réka Somssich, Tamás Szabados (eds.), *Central and Eastern European Countries After and Before the Accession,* Volume I, (Department of Private International Law and European Economic Law, Faculty of Law, ELTE University 2011, Budapest).

61 http://www.dailymail.co.uk/news/article-2632914/Child-benefit-worth-30million-paid-Britain-families-EU-Cameron-admits-impossible-stop-it.html. Downloaded: 10 July 2016.

62 http://euranetplus-inside.eu/eu-uk-battle-over-free-movement-of-workers-after-brexit/. Downloaded: 30 November 2016.

63 http://euranetplus-inside.eu/eu-uk-battle-over-free-movement-of-workers-after-brexit/. Downloaded: 30 November 2016.

64 The CETA is a free trade agreement and not a customs union: important areas are out of its scope; it is evidently not full access to the Internal Market.

1 Free Movement – Residence and Employment Rights

In the field of free movement, EU law contains a dual regime. For intra-EU migration, Directive 2004/38/EC and Regulation 492/2011/EC are in force. These legal sources are applicable on the basis of reciprocity. For incoming migrants from third countries, there is a complete different set of common rules. Several directives have been adopted that grant rights unilaterally.[65] The EU follows a selective and sectoral approach; it grants admission for researchers, highly-skilled workers, seasonal workers, intra-corporate transferees and unremunerated categories if they meet the requirements laid down in these directives. Procedure rules have also been harmonised through the Single Permit Directive (SPD)[66] and, in addition to access to the labour market, equal treatment is also granted in several other fields.[67] Long-term resident third-country nationals, for example, enjoy equal treatment with respect to employment, education, vocational training, social protection and assistance, as well as enhanced protection against expulsion. These directives do not give workers access to the EU labour market in general: low and semi-skilled third-country nationals are admitted by each Member State at its discretion. However, the SPD covers all workers that have been admitted, meaning that the comprehensive set of rights is granted to almost all third-country workers employed on the basis of national or EU law.[68]

This sectoral, unilateral system means that, even in the absence of any contractual relationship with the EU, UK nationals who would meet the requirements laid down in the directives would have access to the EU labour market and would also enjoy equal treatment in the designated areas. Long-term residence status could also be required by UK nationals. Reciprocity as such would not bind the UK in this case.

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65 Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, Directive 2004/114/EC on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Directive 2005/71/EC on a specific procedure for admitting third country nationals for the purposes of scientific research, Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment, Directive 2014/66/EU on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, Directive 2014/36/EU on conditions of entry and residence of third country nationals for the purpose of employment as seasonal workers, Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. Directives 2004/114/EC and 2005/71/EC are repealed by this Directive with effect from 24 May 2018 when the transposition deadline expires. Yves Pascouau, 'Intra-EU mobility of third-country nationals State of play and prospects' (April 2013) http://www.epc.eu/documents/uploads/pub_3496_intra-eu_mobility_of_third-country_nationals.pdf, download 23 November 2016.

66 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

67 Kees Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive' (2015) 16 ERA Forum, 547–561, DOI 10.1007/s12027-015-0403-2.

68 Ibid, p. 547. The UK has opt-out in this field; it adopted a regime for all third-country nationals.

Because of the unilateral grant of rights, EU nationals would not enjoy the same rights in the UK. Moreover, theoretically the UK could introduce different rules for each EU country. Honestly, it would be unprecedented: the UK's Immigration Rules also have horizontal application. What is more awaited is to have a common system for EU citizens. The content could be positioned between two models or 'extremes'. The first is the continued application of the present EU free movement rules and the second is the extension of present third-country immigration rules to EU citizens. The latter would definitely be the more restrictive solution. The ultimate path for a renewed relationship is subject to negotiations, but the prevailing opinion is that 'some migration controls [are] reconcilable with the concept of free movement of workers and the right to reside'.[69]

The UK's Immigration Rules for non-EU nationals are quite strict: these require a minimum level of sufficient resources for economically non-active persons (including family members), namely: a minimum annual income of GBP 18,600. The requested sum is well-understandable if we recall the UK's tax credit system.[70] In the UK, anyone who works for low wage can obtain 'in-work benefits' amounting to a maximum of GBP 6-7,000 annually.[71] 'In-work benefits' can be claimed by low wage earners whose annual income does not exceed GBP 15,000. The underlying principle of the tax credit system is to provide for a minimum level of protection (income) for citizens, in other words, to guarantee a safety net – a minimum subsistence level of GBP 15,000 annually – for everyone.[72] If the person's income exceeds 15 thousand pounds, no credits are granted. Based on these rules, non-EU nationals cannot avail of tax credits if they have a temporary stay visa. It was presumed in the Brexit process that a major limitation of these benefits would affect the financial motivation of potential migrants with regard to migration to the UK.[73] However, this has not been regarded as primary motivation: according to the Oxford Migration Observatory, the first pull factor is employment, (78%), followed by studying and family reunification.[74]

Additionally, most non-EU visa categories set the requirement of some English language skills, which could also exclude many EU workers. Additionally, the points-based system is designed to channel in mostly skilled workers who have already obtained a job offer. It can't be overlooked that non-EU citizen workers cannot be employed in the United Kingdom as unskilled labour (for 'low- skilled jobs')[75], meaning that these jobs are available – in the absence

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69 http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/08/Brexit-Free-Movement-of-Persons-FIAFR-080516.pdf. Downloaded: 30 November 2016.

70 https://www.gov.uk/topic/benefits-credits/tax-credits. (The official UK governmental page for tax credits.)

71 Child Tax Credit, Working Tax Credit and Universal Credit

72 Gellérné Lukács Éva, Töttős Ágnes, *A Brexit elkerülése érdekében létrejött uniós megállapodás szabad mozgást érintő kérdései magyar szemmel* (kézirat, 2016 április).

73 http://archive.openeurope.org.uk/Article/Page/en/LIVE?id=22825&page=PressReleases#. 'Restricting these in-work benefits would make a huge difference to potential migrants' financial incentives while allowing free movement to stand.

74 Downloaded: April 13 2016. http://www.migrationobservatory.ox.ac.uk/commentary/pulling-power-why-are-eu-citizens-migrating-uk

75 https://www.gov.uk/tier-2-general/overview Retrieved: 11-03-2016.

of British workers to take them up – mostly for EU citizen workers. The present assumption is that low-skilled jobs are met by UK and EU nationals, therefore non-EU nationals are accepted instead for jobs requiring special knowledge. The assumptions are based on statistics which show, for example, that 70% of workers from the EU-8 Member States are in low-skilled jobs and even those with qualifications can only get jobs with lower educational requirements. This reflects the complexity of being overqualified and the relatively poor English language skills of new EU migrants (whether real or perceived). According to the House of Commons, the demand of the British economy for low an semi-skilled workers needs to be satisfied and if the present (more restrictive) immigration rules were introduced for EU nationals it is questionable whether the demand for low-skilled workers of the economy will be met.[76]

There are countless legal options between the two extremes, from allowing workers only through the EEA-model to a special British model. British politicians emphasise that there must be a genuine British model and several possible scenarios have come to light.[77] However, it needs to be kept in mind that the scenario has to be acceptable for all the EU Member States, both sending and receiving states. The EU is burdened with very divergent interests concerning free movement of persons, and pressure is present regardless of Brexit. The remaining EU Member States, when declaring their positions in the Brexit process, evidently give signals to their partners of their priorities in this field in general. The different interests of sending and receiving states within the EU have to be reconciled before the two-year long negotiation process comes to an end. Free movement of workers and the self-employed while they exercise economic activity will not be questioned by any of the remaining Member States; it is common ground that the 1958 Rome principles are acknowledged by all states. Equal treatment ('as regards employment, remuneration and other conditions of work and employment'[78]) and searching for work is also a prerogative which derives directly from the Treaty. Benefits for workers, job-seekers or economically inactive persons are, however, not explicitly included in the Treaty and are a completely different matter. National actions also confirm that here a separate approach is followed. It is expected that the EU as a whole is on the edge of making a definite shift towards a more restrictive approach in the field of benefits.[79]

2 Social Security Coordination and Cross-Border Healthcare

Polish Prime Minister Beata Szydlo brought in social security coordination as a new element of negotiations by 'adding that there must also be "proper coordination of social security systems on both sides of the English Channel" as part of the agreement.'[80]

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76 House of Commons, Library, *Brexit: impact across policy areas,* Briefing paper, Number 07213, 26 August 2016.

77 Sherman and Sterling LLP, 'Brexit: Free Movement of Persons' Client Publication, 5 August 2016. This paper foresees five scenarios: brake on free movement, brake on benefits, limitations on free movement of non-EU nationals, quantitative limitations on free movement and points-based system.

78 Article 45 (2) TFEU.

79 See the following point (3.2. social security coordination).

80 http://www.telegraph.co.uk/news/2016/11/28/eu-must-compromise-win-good-brexit-deal-britain-rest-union-warns/. Downloaded: 29 November 20

Social security coordination is a complicated set of rules which faces now the first substantive amendment since its entry into force (1 May 2010).[81] It covers all relevant risks and benefits and is hallmarked by famous instruments like the European Health Insurance Card. The UK attempted to limit the export of family benefits, and this appeared in the 'New Settlement'. However, it not only had problems with exporting family benefits but also with the reimbursement of unemployment benefits.[82] In a nutshell, the Regulation lays down that if a migrant worker has worked in a country and became unemployed but subsequently returns to their country of origin then they can claim unemployment benefits there. However, the benefit paid by the country of origin has to be reimbursed by the former country of employment.[83] The UK's view is that reimbursement could be claimed only if the unemployed person would be eligible for benefits under UK law, which requires a period of two years' work for eligibility. Consequently, Department for Work and Pensions said: 'This Government does not pay benefits to someone in another country when they would not have been eligible for them in the UK'.[84] Millions of pounds were claimed from the UK by Poland, the Czech Republic and Slovakia, but a solution has not really been found for this issue. It is noteworthy that the European Commission proposed, in its December 2016 amendment package, the complete termination of the reimbursement system. It would definitely go along with the UK's desire.

Moreover, reciprocity comes up here again. Regulation 883/2004/EC is complemented by Regulation 1231/2010/EC, which extends its scope to those third-country nationals who are legally residing in one EU Member State but 'are in a situation which is not confined in all respects within a single Member State'.[85] These rights are granted unilaterally. Consequently, similarly to residence rights, if a UK national is treated as a third-country national, they could avail themselves of Regulation 1231/2010/EC to claim rights if the requirements are met, and no reciprocity needs to be provided for EU nationals in the UK.

The reciprocal application of Regulation 883/2004/EC could in principle work with certain exceptions in the post-Brexit era, especially if the presently ongoing modification process will end in favour of the concerns of the UK. In the event of rejection of its reciprocal application (which seems unlikely), the precise examination of all rights will become necessary, along with deciding on competence and procedural rules in EU-UK relations or in UK – individual member state relations (possibly through bilateral social security agreements). In my opinion, the latter would not be beneficial for CEE countries; they need to argue for an EU-UK horizontal social security agreement in the absence of reciprocal application of the Regulation.

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81 Gellérné Lukács Éva, 'Az 1408/71/EGK tanácsi rendelet modernizációja' in Király Miklós (szerk.), *Európajogi Tanulmányok* 7., (ELTE Állam- és Jogtudományi Kar Nemzetközi Magánjog és Európai Gazdasági Jogi Tanszék 2006, Budapest) p. 63–83.

82 http://www.dailymail.co.uk/news/article-2771512/Poles-demand-millions-Britain-pay-benefits-Eastern-European-governments-want-cash-returning-migrants.html. Download 2 December 2016.

83 Regulation 883/2004/EC Articles 61-64.

84 Ibid.

85 Article 1 of Regulation 1231/2010/EC extending Regulation 883/2004 and Regulation 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

Finally, there is Directive 2011/24 on cross-border healthcare[86] that became an integral part of the Internal Market and is also intertwined with a thousand threads with the Regulation. It enhances the free movement of patients in order to obtain healthcare in other Member States, combined with reimbursement by the insurance fund of the country of affiliation.[87] The fate of this piece of legislation can hardly be forecasted because its usage is quite limited; however, its potential is growing and it contains business opportunities, from which the UK might not wish to be excluded.

IV Conclusion

The article has aimed at arguing that restricting the free movement of persons is part of a global trend and is not a Brexit-specific issue. Restrictions in this field date historically back to new accessions – including those of Portugal and Greece, the EU-8 states, and finally to Romania, Bulgaria and Croatia. Moreover, there is the relatively fresh situation evolved after the 2014 referendum with Switzerland, where the restriction of immigration was also voted for. The EU declared that the acceptance of all four freedoms is a prerequisite for gaining access to the internal market and hasn't shown any signs of softening its firm stance on the matter. If Switzerland unilaterally pulls out of the free movement of persons agreement, the guillotine clause will result in the annulment of every other agreement. Switzerland seems to be left with a choice of all or nothing.

Brexit has been an engine for generating rapid reactions from politicians in other Member States, who emphasised individually and as the European Council that 'access to the Single Market requires acceptance of all four freedoms'.[88] It must be kept in mind, however, that the concept of free movement as a freedom contains at least two layers: that of persons and that of benefits. The European Council has made it clear in February 2016 in the 'New Settlement' that the 'Free movement of workers within the Union is an integral part of the internal market which entails, among others, the right for workers of the Member States to accept offers of employment anywhere within the Union'. However, it has also been laid down that 'free movement of workers may be restricted by measures proportionate to the legitimate aim pursued' and 'Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement solely in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence'.[89] The Heads of State and Governments accepted unanimously that the free movement of workers is protected while economically inactive persons' free movement rights are subjected to the fulfilment of

86 Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

87 Gellérné Lukács Éva, Gyeney Laura, 'Határon átnyúló egészségügyi ellátás az Európai Unióban' (2014) 2–3 (52) Egészségügyi Gazdasági Szemle, p. 24–35.

88 Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. SN 96/16.

89 New Settlement, Section D, introduction and points 1. a-b.

residence conditions (especially that of sufficient resources). Finally, it has been set forth that certain factors, such as reducing unemployment, protecting vulnerable workers and the risk of undermining the sustainability of social security systems, might provide a legitimate basis for limiting the free movement of persons, workers or their benefits. The 'New Settlement' itself has confirmed a structured approach to free movement.

The article argues that the 2016 February 'New Settlement' is taken not only as a basis for negotiations with the UK but also as a basis for the internal law-making process of the EU. Both the EU's internal processes and the ECJ took stock towards a restrictive approach for social rights of economically inactive persons. The ECJ 's case-law from 2013–2015 confirmed that economically inactive persons and those job-seekers whose job search has exceeded 6 months could not have claimed to be lawfully resident without having sufficient resources. The ECJ has referred to the Residence Directive as the main source of its decisions. The most important issue was the determination of 'social assistance' within the meaning of the Residence Directive. The ECJ declared that a special non-contributory benefit that falls within Regulation 883/2004/EC and to which migrant persons are entitled, can, at the same time, be 'social assistance' within the meaning of the Residence Directive. This express categorisation has indicated a shift in the relationship between the two instruments, namely, that Member States can prioritise the application of the Directive. The new proposal of the Commission on the amendment of Regulation 883/2004/EC made it clear that Member States can make the award of benefits dependent upon lawful residence and sufficient resources. If accepted, this will lead to the exclusion of economically inactive persons from a range of social benefits. Finally, if we recall the 'New Settlement', it is exactly what it contains: 'Member States may reject claims for social assistance by EU citizens from other Member States who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search.'[90]

The article examines what the chances are of shielding the fundamental principle and inherent rights of free movement in the post-Brexit process, especially for CEE migrant citizens. The assumption is that the 'New Settlement' could be used as a springboard for Britain to start its Brexit negotiations but it is highly probable that there will be no further restrictions. In my view, first, EU citizens currently resident in the UK or UK citizens in another Member State would be permitted to stay. Second, for newcomers, there will be a reciprocal, common set of rules which will allow full free access to each other's labour markets. The demand for low- and semi-skilled workers in the economy shall be met. Preference for EU workers in the UK and preference for UK workers in the EU will be granted. However, there is a considerable chance that non-contributory income support benefits ('in-work benefits') will not be available for a certain period of time (also on a reciprocal basis within EU-UK relations). No cash benefits will be paid for first job-seekers, but placement services will be available (job-search is a prerogative under the TFEU). These rules will be horizontally applicable within the EU, too. Restrictive rules will be introduced for economically inactive persons (including family

[90] Section D., point 1. a.

members), also in the whole EU. The latter will be admitted to obtain lawful residence or to join the worker/self-employed person only if sufficient resources to fund their living are guaranteed and recourse to means-tested public resources will only be allowed in case of short-term temporary difficulties.

Short-term social security benefits, such as sick-pay, will be provided for the period of the economic activity, and unemployment benefit for a period of a maximum six months after having become economically inactive (unemployed). Long-term benefits such as invalidity benefits resulting from work accident or occupational disease and old-age benefits will be awarded and even exported to the country of origin. This is ongoing practice in almost every EU country. Acquired rights can't disappear in thin air; this is a horizontal, EU neutral issue. Family benefits will be granted in full but only if the respective family members reside within the UK together with the worker, or within the EU together with the worker.

The 'New Settlement' introduced the commitment to regulate the indexation of family benefits which are paid for children living outside the UK. The reasons were clear: the UK wanted to stop the export of, or wanted to export a reduced child benefit in these cases.[91] The financial scale of the problem did not seem to be outstanding: out of 13 million children covered by benefits, only 35,000 live in other EU countries.[92] However, the issue received a great amount of attention and was one of the main topics of the Brexit referendum debate. Whether there will be export of child/family benefits or only in indexed amounts will be dependent upon the current negotiations within the EU on the amendment of Regulation 883/2004/EC. The original proposal of the Commission does not contain indexation, but there will surely be attempts to introduce this method for the EU as a whole. The UK was not the only country highly concerned in this field: 'Following the council's resolution, adjusting child benefits to living costs in recipients' home country will also be possible in Germany from 2020,' said Marcus Weinberg, a Christian Democrat spokesman on family affairs. 'That isn't just appropriate, it's also fair.'[93] Other social assistance, such as housing benefits and subsistence support will not be available for economically inactive persons. A considerable cloud remains over whether workers will qualify for these benefits. The amendment of Regulation 492/2011/EU is not on the agenda now, meaning that the concept of 'social advantages' is fully valid within the EU. Germany, France and the Scandinavian states would not be interested in changing the regime towards UK nationals but could attempt to change it towards all EU nationals; no prognosis can yet be given.

It might gain in importance that the UK Prime Minister, Theresa May, was the Home Secretary in 2013 when, together with her counterparts in Germany, Austria and the Netherlands, they campaigned for tighter restrictions to migrants' access to social benefits and other

[91] Read more: http://www.dailymail.co.uk/news/article-2534738/Poland-hits-Cameron-plan-stop-child-benefit-exported-EU.html#ixzz45ViZrb9A. Downloaded 1 April 2016.

[92] http://bruegel.org/2016/02/child-benefits-for-eu-migrants-in-the-uk/. Uuriintuya Batsaikhan, 'Child benefits for EU migrants in the UK' 18 February 2016. Letöltve: 2016. április 1.

[93] http://www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg. Downloaded 15 April 2016.

state-funded services.[94] The above-proposed amendment of Regulation 883/2004/EC for economically active citizens and reimbursement of unemployment benefits, as well as other possible Member State suggestions on indexation of family benefits would serve this purpose. A deal with the UK might be much smoother if the internal EU debate around these crucial issues could be closed prior to the decisive part of the Brexit negotiations, resulting in provisions in EU secondary legislation that would meet the UK's concerns. The real question now seems rather whether other benefits (income replacement, income support, social housing, subsistence allowances for workers) will be brought into the negotiations.

Finally, Ian Lindsay, the British ambassador in Hungary, declared that the UK wants its 'own British model' and also that the UK is a big trading nation.[95] Clearly the UK's moves aim to control EU immigration while maximising opportunities for trade. And there has been a Brexit campaign, and a focal point of that campaign was to limit the free movement of workers. Probably no UK government wants to come back from negotiations with European partners without some limits on migration. On the other hand, it is clear that Germany and France seem determined to put preserving the unity of the remaining EU member states ahead of their future relationship with the UK. Based on the great political weight of this topic, it is feared that free movement issues will be used as 'bargaining chips' in the EU exit talks,[96] and extensive negotiations will take place. It seems very unlikely that the UK will be able to disentangle itself from the essential elements of free movement; what seems likely is that it will accept eventually a set of reciprocal provisions that will highly mirror the EU free movement regime with the restrictions set forth in the 'New Settlement'.

[94] http://www.telegraph.co.uk/news/politics/10014508/Britain-and-Germany-demand-EU-cracks-down-on-benefits-tourism.html. Britain and Germany demand EU cracks down on 'benefits tourism' 24 April 2013.

[95] http://mno.hu/kulfold/brit-nagykovet-az-eu-t-hagyjuk-el-nem-europat-1363406. Downloaded: 3 December 2016.

[96] British Trade Secretary Liam Fox described free movement of persons as 'one of our main cards'.