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Introduction

The formal EU discourse presents free movement within the European Union as allowing EU citizens to improve their living and working conditions, promote their social advancement while participating in an efficient and flexible European labour market, and contribute to social cohesion within the EU.[1] The discourse on entitlements of EU citizens is almost the opposite of the discourse on migration from outside the EU.[2] Rights for migrants from outside the EU are granted or restricted according to the interests of the receiving Member States who control first access.[3] The receiving state may weigh the costs and benefits of immigrants based on their contribution to the economy, their impact on welfare distribution, on national identity and social cohesion.[4] Labour immigration from outside the EU is considered a potential threat to the nation-state that should be controlled, mainly by requiring specific skills or income.[5] Until recently, the European discourse on labour migration from outside the EU emphasized the need to attract high-skilled migrants to the EU.[6] The 2020 New Pact on Migration and Asylum presents a more comprehensive approach to labour migration by introducing Talent Partnerships as instruments to select and match labour

[1] Preamble recital 4 of Regulation 492/2011 on free movement of workers, OJEU L141/1 of 27.5.2011; preamble recital 17 of Directive 2004/38 on citizens' movement and residence rights, OJEC L158/77 of 30.4.2004.
[2] Boswell and Geddes 2011, 180.
[3] Ruhs 2013, 23.
[4] Ruhs 2013, 26.
[5] Boswell and Geddes 2011, 78–79 and 180.
[6] A European Agenda on Migration, COM(2015) 240 final of 13 May 2015, III.4 A new policy on legal migration.

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immigration to skills needs in the EU, as part of the global race for talent, next to attracting high-skilled immigrants.[7] In contrast, the formal labour mobility framework for EU citizens does not include selection as a means to match labour migration to skills or as a means to control migration in order to protect national identity.

The distinction between 'beneficial' mobility by EU citizens and 'threatening' migration by TCNs increasingly gets blurred in high-level income Member States. Existing populations in receiving communities make few distinctions as to the nationality of new immigrants, especially when a rapid influx of migrant workers creates tensions in towns and cities because of pressure on public services (school places, hospital beds) and housing.[8] A 2017 study on relations between employers and employees within EU labour movement from eastern Member States in Austria, Sweden, and the Netherlands showed that employers in the field of low-paid work prefer workers having less knowledge about their rights, duties, and labour market position. Employers limit resources of information to be able to pay wages lower than those paid to national workers.[9] Where different services are combined in a labour contract, such as transport and housing, EU workers may become homeless when they lose their job. It makes EU workers vulnerable, while the receiving population perceives them as just another category of 'immigrants' who can be subject to exclusion.[10]

In the context of the economic crisis that started in 2008, concerns about intra-EU mobility became more prominent, in line with the general reflection that the benefits of immigration for employers and the labour market of the receiving society become more difficult to sustain in times of rising unemployment.[11] In receiving Member States, the economic crisis led to a cost–benefit framing of intra-EU mobility similar to the framing of immigration from outside the EU. This chapter explores how these concerns and blurring of the different frames have led to adaptations in national practices falling under the scope of the legal framework on intra-EU mobility. In particular, it looks at how claims for welfare benefits from EU citizens were connected with decisions on termination of lawful residence. The paradigm underlying immigration

[7] The New Pact on Migration and Asylum, COM(2020) 609 final of 23 September 2020, point 6.6 and 7.
[8] Collett 2013, 6; van Ostaijen 2017.
[9] van Ostaijen, Reeger, and Zelano 2017, 13.
[10] Barbulescu and Favell 2020, 151.
[11] Anderson 2010, 301.

law (at both national and EU levels) towards selecting non-EU migrants based on income and employment now permeates the framework of intra-EU mobility.[12]

Several authors have used the term 'earned citizenship' to describe the recent practices of linking EU citizens' welfare claims to termination of residence.[13] The term signals that EU citizenship, instead of an automatic right to membership based on residence, is transformed into a status to be earned as a result of fulfilling certain criteria, such as money and income, imposed on newcomers.[14] Others see the concerns on intra-EU mobility as a 'nativist' turn where a growing number of voters think that nationals should have priority in terms of jobs and welfare and conclude that a rethink of solidarity between EU citizens is necessary.[15] This chapter offers a third perspective: instead of focusing on the subjects of concern (the citizens that are not 'deserving') or the systematic failures (the lack of an underlying solidarity), it takes up the point that European states' immigration policies still 'hover undecidedly between perfecting the strategies for keeping out the huddled masses while laying out red carpets for the (. . .) skilled'[16] – irrespective of whether the masses and skilled are EU citizens or not.[17]

This chapter is structured as follows. First, it will address policy practices responding to concerns on EU free movement expressed during the economic crisis in the UK, Germany, and the Netherlands – the most vocal Member States in contesting free movement of persons in the EU.[18] It selects its sources mainly from existing research and case law on those practices. Though the UK has left the EU as of this writing, its policy towards intra-EU mobility is included here because it fits a wider trend in north-western Europe.[19] Examples from other Member States as reported in literature are included where relevant. These practices send out the message that low-income workers are not welcomed to stay on a more permanent basis. Subsequently, the chapter compares the policy

[12] See also Mantu, Chapter 11.
[13] Kramer 2016; Kramer 2020; Spaventa 2017.
[14] Kramer 2020, 52.
[15] Ferrera 2016; Sankari and Frerichs 2016; Schiek 2017.
[16] Joppke 2011.
[17] O'Brien 2016.
[18] In April 2013, the Ministers of the Interior of those three Member States plus Austria sent a letter to the Irish Council presidency asking for an urgent discussion of access to social benefit rights for recently arrived EU citizens, Council Document 10313/13; Ruhs 2017, 22; Heindlmaier and Blauberger 2017; Verschueren 2014, 148.
[19] Barbulescu and Favell 2020

practices to the EU regime for legal labour immigration from outside the EU. The chapter concludes with several remarks on the appropriateness of the notion of citizenship.

Tightening EU Citizens' Right to Work and Reside – the Selective Role of Earnings

In several (high-income) Member States, the key change in discourse about intra-EU free movement started 'somewhere between the onset of the economic downturn in 2008 and the end of the transitional restrictions on the employment of Romanians and Bulgarians in January 2014'.[20] The key change in national practices included the creation of precarious residence via a restrictive interpretation of a residence condition of 'sufficient resources' for economically inactive citizens and a higher income and/or working hours condition to qualify for residence rights as a 'worker'.[21] The concept of precariousness combines factors of instability, insecurity, lack of protection, and social or economic vulnerability.[22] The discourse accompanying the creation of precarious residence contests intra-EU mobility and includes portrayal of EU workers as 'abusers', 'welfare tourists', or 'poverty migrants'.[23] The debate took on a new dimension when politicians openly started to contest free movement within the EU, as noted by Mantu and Minderhoud.[24] Similar to what happens often in political and popular debates about migration, the wealthy are not imagined to be 'migrants',[25] and they are not considered to be 'abusers' of free movement either. The discussion seems to be about a 'conflated group' of mobile poor,[26] who are looking for work, engage in poorly paid work, are from poorer Member States, or are working under increasingly 'flexible' contracts that are on-call, zero-hours, short-time, temporary, or substitute.[27] Such contracts make it difficult to provide evidence of being a worker according to the CJEU definition, performing 'genuine and effective work that is not merely marginal and ancillary'.[28] The application

[20] Ruhs 2017, 24.
[21] Eggebø and Staver 2021 Chapter 8 in this volume; O'Brien, Spaventa, and De Coninck 2016, 63–65.
[22] Anderson 2010, 303.
[23] Mantu and Minderhoud 2016, 5–6.
[24] Mantu and Minderhoud 2016, 6.
[25] Anderson 2013, 73–74.
[26] Mantu 2017, 225–226.
[27] Gutiérrez-Barbarrusa 2016.
[28] Case C-66/85 *Lawrie -Blum* ECLI:EU:C:1986:284.

of increasingly higher financial thresholds for the qualification of 'EU worker' and the increased practice of non-standard employment relations result in precarious residence status, even for young, university-educated migrants.[29] What is more, nuisance and abuse arguments are used to terminate residence of EU citizens who do not meet the financial thresholds.

In the UK, where discontent on free movement was a prominent theme in the Brexit discussion, access to welfare benefits as well as the definition of who qualifies as a 'worker' under EU law is 'actively deployed as a mechanism for controlling the mobility of EEA nationals'.[30] In 2014, new rules were introduced that EU workers would be considered 'genuine workers' only if for the last three months prior to claiming supplementary benefits they have been earning at the level at which employees start paying National Insurance, equivalent to working 24 hours a week at minimum wage. A broader range of criteria would be taken into account in case they have some income, but not the minimum threshold. Furthermore, in order to qualify for a right to reside as jobseeker and being entitled to income-based jobseekers' allowance, they must live in the UK for three months and satisfy the Habitual Residence Test. They will be ineligible for housing benefits. Those who are economically inactive are not entitled to claim benefits at all.[31] The rules are drafted in such a way that compatibility with EU law is questionable.[32]

The rules in place since February 2017 and applicable until 1 January 2021 included the provision that EEA nationals or their family members had no initial right to reside for three months in the UK if they were 'an unreasonable burden on the social assistance system of the

[29] Simola 2020.

[30] Anderson 2015, 189. She signals that harsher conditions on access to welfare and the discourse accompanying it resulted in public excoriation of those who claim benefits 'that parallels the excoriation of migrants'.

[31] O'Brien 2016, 940 ff. For 2020 the income threshold is at £183 a week (£681 per month) for a continuous period of three months immediately before the date from which the benefit has been claimed, www.citizensadvice.org.uk/benefits/claiming-benefits-if-youre-from-the-EU/before-you-apply/check-if-you-have-the-right-to-reside-for-benefits/ (last visited 28 November 2020). Below the threshold, other elements can be taken into consideration, notably regularity of work, periods of work, whether work was intended to be short term or long term, number of hours worked, and income. However, O'Brien, Spaventa, and De Coninck 2016, 64–65, note that in several Member States citizens working below the thresholds in practice are quasi-irrefutably presumed not to qualify as workers.

[32] O'Brien, Spaventa, and De Coninck 2016, 75–76.

United Kingdom', so it seems they were effectively excluded from all benefits.[33] Furthermore, they might be removed from the United Kingdom.[34] If they attempted to enter the United Kingdom within twelve months after removal without being able to provide evidence that they do meet the conditions for a right to reside longer than three months, it was considered 'misuse of rights'.[35] An application that material circumstances have changed could be made to the Secretary of State, but only from outside the United Kingdom.[36] There was an increasing reliance on deportation and even detention of EU citizens for misuse of rights, as well as systematic removal of rough-sleepers, including EU citizens working in precarious jobs in the construction or hospitality sector where they might have been paid in cash.[37] Rough-sleepers were subject to re-entry restrictions for twelve months following their removal. In December 2017, the High Court ruled that consideration of rough sleeping, 'even accompanied by low level of offending such as begging, drinking in a public place and other street nuisances', does not lead to the conclusion that a person who otherwise satisfies the conditions for residence undermines the purposes of EU law and therefore abuses free movement rights. According to the Court, the UK policy 'appeared to circumvent the protections afforded to EU citizens by Article 27 [of Directive 2004/38], and to do so (in part) to serve economic ends.'[38] With Evans one could conclude that the UK policy emptied the content of both EU citizenship and free movement rights, and confined an entire category of EU citizens in a system of immigration control that should not be applicable to them before Brexit.[39]

In Germany EU citizens do not have to show they are workers or have sufficient resources in order to stay longer than three months. They only have to report their presence at the municipal registration office (Bürgerambt),[40] following which a registration certificate will be issued. According to the administrative guidelines of February 2016,[41] if EU

[33] The Immigration (European Economic Area) Regulations 2016, Regulation 13(3).
[34] Idem, Regulation 23(6) under a.
[35] Idem, Regulation 26(2).
[36] Idem, Regulation 26(5).
[37] Evans 2020.
[38] R(Gureckis) a.o. v. Secretary of State for the Home Department, [2017] EWHC 3298, para 96.
[39] Evans 2020, 320-321.
[40] Heindlmaier and Blauberger 2017, 1210.
[41] *Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU*, GMBI 2016 nr. 5 of 18 February 2018, 86. These were still in use in 2020.

citizens claim a social benefit, the authorities may examine whether they have a right to reside, and the immigration authorities can decide, after examination of the individual circumstances of the persons concerned, that they no longer have a right to reside and must leave Germany. Accordingly, local welfare authorities assess the right of residence if social benefits are claimed, following which local immigration authorities may declare that there is no longer a right of residence – but that rarely happen in practice.[42] The amended Freedom of Movement Act/EU of 2014, however, provides that an exclusion order (entry ban) shall be issued against an EU citizen in very serious cases, in particular if the person repeatedly pretends that she fulfils the entry or residence requirements.[43] The legislator motivated this change by stating that such behaviour constitutes 'abuse of rights' under Article 35 of Directive 2004/38.[44] Furthermore, the 2014 amendments included a provision that jobseekers' right to reside is limited to six months, unless they can prove that they have a genuine chance to be employed. The 2016 administrative guidelines provide that a residence right can be lost before the period of six months has ended in case a person is not actively looking for a job, and that a 'genuine chance' of being engaged depends on qualifications of the person concerned and the situation on the German labour market. Neither the Freedom of Movement Act/EU nor the 2016 administrative guidelines provide a fixed amount that count as 'sufficient resources' or a fixed amount of weekly or monthly working hours that would qualify a person as 'worker'. In principle, EU citizens are supposed to have sufficient resources as long as they do not claim social benefits. If they do, the authorities may start examining their resources (excluding jobseeker's allowances). The amount of 'sufficiency' also depends on the regional levels of eligibility for social assistance. For the definition of worker the guidelines refer to the criteria the CJEU has given in its case law, notably in its 2010 judgment in Genc.[45]

The German Social Code (§ 7 SGB II and §23 SGB XII) simply denies jobseekers and economically inactive citizens access to social benefits. The EU Court of Justice has accepted this policy as compatible with EU

[42] Heindlmaier and Blauberger 2017, 1211

[43] §7 (2) third sentence of the Freedom of Movement Act/EU.

[44] Idem, 31; Bundestagsdrucksache 18/2581, 17.

[45] Case C-14/09, *Genc* EU:C:2010:57, mentioning the number of working hours, the level of remuneration, the right to days of paid leave, the continued payment of wages in the event of sickness, and a contract of employment which is subject to the relevant collective agreement.

law in its judgments in *Dano*, *Alimanovic*, and *García-Nieto*.[46] The combination of no access to social assistance and not withdrawing residence rights leads to EU citizens whose presence is tolerated with no access to minimum subsistence benefits. Arguably, persons working under flexible contracts in poorly paid jobs may find themselves in such precarious situations. A judgment of the German Federal Social Court in December 2015 triggered a debate on social benefits for EU citizens.[47] It ruled that the German policy to tolerate the presence in Germany of EU citizens who have no right to reside while denying them access to social benefits is not compatible with German law. The Federal Social Court found that the provision of the Social Code denying minimum subsistence benefits to foreigners who entered Germany in order to obtain social assistance or whose residence right arises solely out of the search for employment[48] could not be applied to those who, due to a lack of enforcement of the immigration authorities, stayed longer than six months in Germany. The Court ruled that the state then becomes responsible to ensure they can lead a life in human dignity.[49]

In October 2016, the German legislator adopted a bill to 'clarify' access to social benefits of EU citizens: those who are not lawfully resident in Germany can receive temporary benefits for the period until they leave the country – for a maximum of one month. They also can get a loan for a return ticket to their home country.[50] According to then Federal Labour Law Minister Nahles, the bill 'restores legal certainty' and is 'boosting confidence in the European ideal and one of its greatest achievements: the free movement of workers'. And it is 'protecting our municipalities from financial overstretch, as they have to shoulder the cost of social assistance benefits'.[51] These clarifications do not seem to help those in precarious, flexible, and poorly paid jobs. However, the underlying message is clear.

[46] Case C-333/13, *Dano* EU:C:2014:2358; Case C-67/14, *Alimanovic*, EU:C:2015:597; Case C-299/14, *García-Nieto*, EU:C:2016:114. See also Mantu 2021 Chapter 11 in this book.

[47] Bundessozialgericht, judgment of 3 December 2015, B 4 AS 44/15 R.

[48] SGB XII §23 Abs.1 S.1, S. 3.

[49] Bundessocialgericht, n. 55, para 56–57.

[50] SGB XII § 23, Abs. 1, S.1, S.3 and S.3a, amended by Article 2 – Gesetz zur Regelung von Ansprüchen ausländischer Personen in der Grundsicherung für Arbeitsuchende nach dem Zweiten Buch Sozialgesetzbuch und in der Sozialhilfe nach dem Zwölften Buch Sozialgesetzbuch of 22 December 2016, BGBl I 2016 S. 3155. The bill entered into force on 29 December 2016.

[51] See www.bmas.de/EN/Services/Press?recent-publications/2016/clarification-of-access-to-social-benefits.html

In the Netherlands,[52] the administrative guidelines indicate that the status of 'worker' in any case covers those who work at least 40 per cent of the usual full working time a month or earn more than 50 per cent of the usual social assistance level.[53] Individual circumstances need to be taken into consideration for those who do not meet the thresholds. Access to social assistance is linked to lawful residence based on EU law,[54] and is since 2004 regulated according to a 'sliding scale' – on the basis of periods of lawful residence, and periods, frequency, and amount of the claims for assistance. Over time, the sliding scale was subject to increasingly restrictive access to social assistance.[55]

The restrictions started with a 'narrative change' that turned 'migrant labourers' into 'labour migrants' taking place in the years before 2011.[56] In 2011, the new centre right government coalition presented an 'action package' that targeted migration from central and eastern Europe and focused on workers, jobseekers, the economically inactive, and students.[57] The tone in the package is that of 'increasing numbers', 'problems', 'exploitation', and 'fraud'. Subsequently it turned out that fewer EU workers from central and eastern Europe registered than previously presumed, and that there was not much 'welfare tourism'. The Minister stated that it was not a guarantee that it would not happen in the future, that 'bottlenecks caused by free movement of workers are certainly visible in society', and that although this is about 'a relatively small amount of people, it does not mean that the Cabinet will not put efforts to prevent a "honeypot effect" on the Dutch system'.[58]

Meanwhile, municipalities regularly denied social benefits to EU citizens because they saw the application of social assistance as 'proof' of their unlawful residence. On 18 March 2013, however, the Central Appeals Tribunal (the highest court in social security matters) ruled that municipalities, when deciding on allowances, may not refuse these allowances with the argument that recourse to social assistance is proof of the absence of the right to stay in the

[52] The author owes many thanks to Merel Huizer for her invaluable assistance in collecting case law and tracking the arguments used by policymakers and in administrative guidelines supporting the restrictive turn on residence rights for EU citizens at the lower end of the labour market.
[53] Aliens circular B.10/2.2.
[54] Articles 10 and 11 of the Aliens Law 2000.
[55] Kramer 2016, 285.
[56] van Ostaijen 2017, 127.
[57] Parliamentary Documents, TK 2011-2012, 29 407, Nr. 132.
[58] van Ostaijen 2017, 129–130.

Netherlands.[59] The Tribunal stressed that recourse to social assistance cannot automatically result in removal: the immigration authorities (IND) decide on the residence status and the municipalities decide on allowances. After the Tribunal's ruling the policy practice changed. Municipalities now signal to the IND those applicants for social benefits who have difficulty in providing evidence of their worker status or do not meet the sufficient resources requirement. The IND investigates the evidence and may terminate residence. Working instructions determine that non-contributory benefits of a Dutch partner are not considered for the sufficient resources requirement, which might put mixed-status families in a difficult position.[60] Residence terminations after notification from municipalities increased from 20 in 2012 to 620 in 2016.[61] In 2019 the Council of State, the highest administrative court in the Netherlands, ruled in three cases involving (family members of) EU citizens that never applied for social assistance but nevertheless were considered to lack lawful residence because they did not meet the sufficient resources or the sufficient income condition. The court in these cases concluded that the IND attached too much value to the reference criteria at the cost of considering individual circumstances.[62]

In the context of the 2011 action package a pilot on active removal policy started whereby EU citizens' recourse to homeless facilities was connected to a removal measure based on a sliding scale that links periods of residence to a maximum number of nights in a homeless shelter.[63] Next to that, the authorities focused on removal of rough sleeping EU citizens in a pilot named 'nuisance causing citizens'. Instances of rough sleeping, eating from a bin, public drunkenness, or shop thefts are compiled in a single file. An extensive file gives rise to a police hearing, with the possibility of the IND verifying whether there would be circumstances preventing a removal decision.[64] If not, a removal decision for lack of lawful residence follows where expulsion on public policy grounds under EU law conditions would not have been possible. In August 2019 the Council of State confirmed the policy practice of compiling a file followed by verification of financial means.

[59] Centrale Raad van Beroep, 18 March 2013, ECLI:NL:CRVB:2013:BZ3853, BZ3854, BZ3855, and 19 March 2013, ECLI:NL:CRVB:2013:BZ3857.
[60] Working instructions Union citizens WI2020/10, point 2.3.2; de Jong and de Hart 2021
[61] Kramer 2020, 214.
[62] ABRvS ECLI:NL:RVS:2019:2502, 2503 and 2504.
[63] Kramer 2017, 22–23; Parliamentary Documents TK 2011-2012 29 407 no. 118.
[64] Kramer 2017, 24.

However, in deciding on lawful residence, other individual circumstances should be considered next to the reference criteria.[65]

In contrast to Germany and the UK, the Netherlands does not refer to 'misuse' or 'abuse of rights' where EU citizens re-enter after removal on grounds of lack of legal residence. However, the Council of State has referred a preliminary question to the CJEU on whether Article 15 CRD allows a period of entry denial for EU citizens removed on grounds other than public policy, public security, or public health despite its explicit prohibition to impose a ban on entry.[66]

The short illustration above shows restrictive policies towards EU workers with a low or unstable income in the UK, Germany, and the Netherlands by way of raising thresholds on income and average working hours in national implementing law. As national practice does not always take into consideration individual circumstances, the raised thresholds have a disproportionate impact on atypical workers including already disadvantaged groups such as disabled workers, carers, and lone parents. A 2020 study on EU migrant atypical workers' rights in the UK shows the shortfalls in the EU definition of work and how it allows Member States to exclude atypical workers and simply ignore their economic contribution to the receiving society.[67] Raising thresholds for access to benefits and stricter enforcement of the link between residence rights and financial conditions for residence were found in all three Member States. They all signal a transformation of domestic policies and illustrate how Member States, in the absence of formal possibilities to limit EU citizens' access to their labour market, use 'strategic compliance'[68] or 'strategic non-compliance'[69] with, or 'manipulation'[70] of the free movement regime and 'containment' of Court rulings[71] on free movement to protect the national welfare system.

The European Commission is aware of non-compliant national practices, but noted as early as 2013 that it is difficult to tackle administrative practices via infringement procedures, especially where rules formally comply with EU law.[72] Not all affected persons will file individual

[65] ABRvS ECLI:NL:RVS:2019:2873.
[66] Case C-719/19, ECLI:EU:C:2021:506.
[67] Welsh 2020
[68] Kramer 2020, 277.
[69] Valcke 2020, 166.
[70] O'Brien 2016.
[71] Heindlmaier and Blauberger 2017.
[72] European Commission, *Impact assessment accompanying the document directive of the European Parliament and of the Council on measures facilitating the exercise of rights*

complaints or know that the practice is not compliant with EU law. The Commission's infringement priority criteria of systemic and serious breaches make it unlikely that individual complaints are followed up in a formal way. The rise of more informal problem-solving mechanisms at EU level, such as SOLVIT, aims at fast and pragmatic solutions for individual citizens on the basis of complaints. However, the informal and more individual nature of the mechanism is less appropriate to tackle structural practices of non-compliance. EU measures taken since 2010 to strengthen enforcement of free movement rules focus on information, contact points, and provision of legal remedies.[73] The willingness of certain Member States to go beyond a minimalist approach to implement can be questioned, as the Dutch authorities illustrate with their opinion that Directive 2014/54 did not require major adaptions in Dutch law and practice because the Netherlands already was doing a good job.[74] In the summer of 2019, the EU issued a Directive addressing flexible and atypical work by laying down minimum rights for transparent and predictable employment that apply to 'every worker in the Union who has an employment relationship in which pre-determined and actual working time is more than an average of three hours per week in a reference period of four consecutive weeks'.[75] The preamble of the Directive makes clear that atypical workers, including persons declared self-employed while fulfilling the conditions of an employment relationship, fall within the scope of the Directive as long as they fulfil the criteria of 'worker' as developed in the Court's case law. The directive does not concern access to social benefits. It remains to be seen whether the three-hour threshold will eventually influence national practices of assessment whether a person has the status of EU worker and the ensuing residence rights.

That said, the current deployment of the national legal definitions and financial conditions implementing free movement law as instruments to control and expel the poor resembles closely the system regulating labour immigration from outside the EU.

conferred on workers in the context of freedom of movement of workers SWD(2013) 149 final

[73] Directive 2014/54/EU of the European Parliament and the Council of 16 April 2014 on measures facilitating the exercise of free movement of workers in the context of freedom of movement for workers, *OJEU* 2014 L128/8.

[74] Minderhoud 2017, 63.

[75] Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, *OJEU* 2019 L 186/105, Article 1 (3).

Comparing Restrictions: Fewer Rights for 'Poor' EU and Non-EU Migrants

Where EU citizens *have the right* to work and reside in a Member State other than that of their nationality, TCNs are *granted permission* to enter the labour market of Member States. Legal labour migration from outside the EU is still a bastion of state sovereignty in the EU. Member States retain control over first admissions and are not forced in any way to issue work and entry permits. At the turn of the century, individual Member States started their attempts to attract high-skilled migrants, and the European Commission's Blue Card proposal of 2007 offering the possibility of accessing twenty-seven labour markets helped them in doing so.[76] The Blue Card Directive was supposed to be the EU's asset in the 'global race for talent'.[77] Persons granted permission to enter a Member State under this scheme can lose their residence permit if they become unemployed for more than three months, but if they continue to work for a period of five years they may acquire a long-term resident status.[78] On the other hand, Member States' need for temporary labour in seasonal activities is regulated by the seasonal workers directive. It allows Member States to admit workers from outside the EU without having to be concerned about a cost–benefit analysis. Indeed, the Directive[79] aims to 'regulate the admission of seasonal workers with a view to enhancing the EU's economic competitiveness, optimizing the link between migration and development, while guaranteeing decent working and living conditions for the workers, alongside incentives and safeguards to prevent overstaying or permanent stay'.[80] These workers cannot acquire a long-term resident status. The two Directives can be seen as a sign that the EU is heading towards a labour market where the underlying mechanism is selecting winners who can earn a permanent stay, while allowing low-paid workers only as long as there is a need for them.

The practices of the UK, Germany, and the Netherlands towards EU workers with a low or unstable income described above show a similar mechanism. The CJEU, in a very nuanced way, seemed to allow the

[76] Joppke 2008, Joppke 2011, 232.
[77] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJEU L155/17 of 18 June 2009.
[78] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJEU L16/44 of 23 January 2004.
[79] Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJEU L94/375 of 28 March 2014.
[80] Peers 2015.

restrictive turn. First, in *Dano* the Court implied that the examination of an individual situation concentrates on the question whether a person fulfils the financial *residence* conditions of the Directive and not on the question whether a person is an unreasonable burden for the public finance of the host Member State.[81] Furthermore, the Court explicitly accepted the 'welfare magnet' or Dutch 'honeypot' argument in its ruling in *Alimanovic*.[82] One could see this as what Sassen indicates as 'micro-transformation in the institution of citizenship'.[83] In the judicial construction of EU citizenship entitlements and free movement of workers, a turn is taken towards excluding those who are in low-paid temporary part-time jobs as beneficiaries of free movement – in contrast to initial case law on the concept of EU workers.[84] The economic arguments that underlie public debates on immigration and state power to send migrants back to where they came from, and distinctions made between high-level income and low-level income migrants, affect both intra-EU mobility and labour migration from outside the EU. A cost–benefit narrative erases the distinction between movement of EU citizens and migration from outside the EU.

Concluding Remarks

This chapter noted that the distinction in rights between economically stronger and high-income persons on the one hand and economically weaker and low-income workers that is present in the framework for EU labour migration from outside the EU can equally be found in national practices towards EU citizens, at least in those Member States that openly started to contest intra-EU labour mobility in 2013–14. The mechanism underlying national practices, denying low-paid or poor migrants residence and sending them back to their home state, makes the distinction between high-income and/or wealthy persons on the one hand and low-income and/or poor persons on the other significantly more relevant. That distinction might offer a better starting point to look at the complexities of movement of workers in *and* to the EU than the distinction between intra-EU mobility and labour migration from outside the EU.[85] EU citizenship has little or no relevance for EU citizens finding themselves in poverty or

[81] *Dano* para 69. For a more extensive analysis of this point Schrauwen 2016, 48.
[82] *Alimanovic* para 62.
[83] Sassen 2003.
[84] Case 139/85, *Kempf* EU:C:1986:223 para 15.
[85] Maas 2007, § 5.3.

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in precarious jobs.[86] For them, it does not add much to what Brubaker describes as the 'embryonic institution' of national citizenship, notably to divide up between states the responsibility for the migrating poor, so that one state would not dump its poor on the territory of others.[87] The notion of earned citizenship is not adequate where it presumes the entitlements of EU citizenship are attainable for all. The restrictive practices towards EU workers ignore those who find themselves stuck in low-paid part-time jobs, are simply poor, or work in the informal economy. They are pushed out – out of the host State and de facto out of EU citizenship.

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[86] van Ostaijen 2017.
[87] Brubaker 1992, 69; Maas 2009; Maas 2021.

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