INSIGHT

A New Settlement for the United Kingdom in the European Union: A New Challenge to EU Citizens' Social Benefits and Freedom of Movement?

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ABSTRACT: On 18 and 19 February 2016, the Heads of State or Government of the 28 Member States of the European Union met within the European Council in Brussels and agreed on a New Settlement of the United Kingdom within the EU. This *Insight* only focuses on social benefits and freedom of movement. It provides an account of the modifications that the New Settlement aims to introduce and assesses whether such changes would be compatible with the European Treaties. Following such analysis, this *Insight* concludes that the proposed changes would restrict the right of workers and job seekers to access, respectively, the labour market and social benefits in a host State. Furthermore, the New Settlement would change the scope of the Citizens' Directive granting Member States greater powers to deport EU criminals. This is in violation of the principle of proportionality, legal certainty and the principle *nullum crime sine lege*. Moreover, the introduction of the 'prior lawful residence' for the EU citizens' family members undermines their parallel right to free movement within the EU and the EU citizens' right to family. Finally, workers' freedom of movement and the principle of non-discrimination would be infringed by the safeguard mechanism, which would allow the UK to restrict in-work benefits for EU citizens for four years from the commencement of their employment.

KEYWORDS: Freedom of movement – social benefits – workers – job seekers – EU citizens' family members.

I. Introduction

On 18 and 19 February 2016, the Heads of State or Government of the 28 Member States of the European Union (EU) met within the European Council in Brussels and agreed on a New Settlement of the United Kingdom (UK) within the EU. The operational information of the New Settlement is contained in several annexes: Annex I contains

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the Decision of the Heads of State or Government (the Decision), Annex II is a Statement on banking union, followed by five Annexes containing five Declarations on competitiveness, subsidiarity, child benefits, safeguard mechanism, and the right of free movement of persons.[1]

This *Insight* focuses on the issues of social benefits and EU citizens' free movements, which have been at the centre of recent political debate in the UK. In a speech held on 28 November 2014, David Cameron said that, if re-elected as Prime Minister in the following May's election, he would negotiate to reform Britain's relationship with the EU, especially in the fields of freedom of movement and social benefits.[2] During the speech, the British Prime Minister expressed concerns about the scale of EU migration to the UK, in what can be seen as a response to the growth of UKIP. At the general election in May 2015, Cameron was re-elected and with UKIP receiving 13 per cent of all votes cast (but only 1 MP), and the UK's membership of the EU was cemented as a defining political issue for his second term as PM. His re-negotiation would be a pivotal moment in this.[3]

According to Cameron, the New Settlement re-negotiation meets his expectations in terms of control of the flow of EU citizens entering the UK. Shortly after, he declared that he was going to campaign with his 'heart and soul' to stay in the EU at the referendum of 23 June 2016.[4] Additionally, Cameron was pleased with the New Settlement because it will grant the UK a 'special status' within the EU.[5] In this regard, the New Settlement is in line with the traditional reluctance of the UK to commit to further European integration. For example, the UK is not part of the Schengen Area or the Eurozone agreements. However, the name 'New Settlement of the UK within the EU' is misleading because the amendments of the New Settlement will be applicable not only to the UK but to all Member States. The only exception is provided by the 'safeguard mechanism' contained in Declaration VI, which will only apply to the UK. Thus, the UK will only retain a special status with regard to the 'safeguard mechanism' (see Section VIII of this *Insight*).

Against this background, the aim of this *Insight* is to provide an account of the modifications that the New Settlement aims to introduce and to assess whether such changes would be compatible with the European Treaties. Specifically, Sections III and IV focus on free movement and social benefits of workers (III) and job seekers (IV). Sections V and VI cover the deportation of EU criminals and the abuse of rights by EU family members, Section VI deals with child benefits. Finally, the analysis considers in-work

[1] Conclusions of the European Council of 18-19 February 2016, EUCO 1/2016.

[2] See *David Cameron's EU Speech: Full Text*, in *BBC News*, 28 November 2014, www.bbc.co.uk.

[3] B. Wheeler, A. Hunt, *The UK's EU referendum: All you need to know*, in *BBC News*, 18 April 2016, , www.bbc.co.uk. See also M. Abberton, *You think This Referendum is about EU? Think again*, in *Huffington Post*, 29 February 2016, www.huffingtonpost.co.uk.

[4] *David Cameron's EU Speech: Full Text*, cit.

[5] *Ibid*.

benefits and the safeguard mechanism in Section VII. However, before moving to the analysis of this legal instrument, it is necessary to determine its legal status.

II. The legal status of the decision and declarations

Section E of the Decision establishes that the Decision is legally binding for all the EU Member States under international law. The Decision is not an act of the European Union, but it is as an international treaty concluded by the 28 Heads of State and Government. For this reason, the New Settlement is not under the direct scrutiny of the Court. However, the Decision requires the creation of new EU legislation, if the UK decides to remain a member of the EU following a referendum on 23 June 2016.[6] If this happens, the legality of the new legislation can be challenged before the Court. If the UK decides to leave the EU, the changes decided in the Decision will not be implemented. Additionally, Annexes V, VI and VII contain three Declarations which aim to amend the current EU legislation on child benefits, on the safeguard mechanism and on the abuse of the right of free movement of persons. These instruments are not legally binding. They only show the interest of the Commission to discuss the proposed modifications after (and if) the Decision takes effect.

With this in mind, it is possible to analyse whether the Decision and the Declarations, once implemented within EU law, would be compatible with the EU Treaties.

III. Workers' free movement and social benefits

Section D of the Decision proposes to introduce some changes to EU citizens' social benefits and free movement. The introductory paragraph of Section D notes that the different levels of remuneration among Member States make some job markets more attractive than others. This factor pushes workers to migrate towards more prosperous job markets with the consequence of undermining certain States' social security systems. The Decision notes that the UK is particularly worried about the number of EU workers applying for benefits in the UK impairing the correct functioning of the British social security system. For this reason, the Decision establishes that all Member States (not only the UK) can take measures to limit the access of EU workers when their numbers are "of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination".

The freedom of movement of workers within Europe is enshrined in Art. 45 of the Treaty on the Functioning of the European Union (TFEU). Art. 45, para. 2, reads that "any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment" is prohibited. According to this principle, European workers can accept offers of employment,

[6] Section I, para. 3, lett. iv), of the European Council, Conclusion, 2014, cit.

freely move within Europe for this purpose, stay in a Member State for the purpose of employment and remain in the territory of a Member State after having been employed in that State (Art. 45, para. 3, TFEU).

Two types of restriction can limit the freedom of movement of workers. The first relates to measures taken on grounds of public policy, public security or public health. The second refers to 'overriding reasons of public interest' (ORPIs). ORPIs are developed by the Court in its case law and can be invoked by Member States to restrict the free movements of workers (*De Cuyper*).[7]

The Decision establishes that "[b]ased on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim pursued, conditions may be imposed in relation to certain benefits to ensure that there is a *real and effective degree* of connection between the person concerned and the labour market of the host Member State".[8]

In requiring a 'real and effective degree of connection' between the EU citizen and the job market in the host State, the Decision sets a limitation to the right of free movement of European citizens.

However, the Decision does not create the 'real link' from scratch; rather, it relies on the case law of the Court. The 'real link' requirement was established by the Court in *Collins*.[9] Mr Collins had dual Irish and American nationality. After a period of work in the United States and Africa, he returned to the UK, where he studied, in order to find a job. In the UK, he applied for job seekers' allowance but this was refused by the British authorities because "he could not be regarded as habitually resident in the United Kingdom".[10] On this occasion, the Court ruled that a real link between the claimant and the job market may be required. Otherwise, in the absence of such criteria, any EU citizen (even those who have little or no link with the UK employment market) could claim job seekers allowance.

Given the ruling in *Collins*, at first glance, the Decision does not introduce anything new to the Court's case law. However, a closer inspection suggests otherwise. First of all, the Decision introduces a new limitation to workers' freedom of movement which is neither an ORPI nor a Treaty-based exception. Secondly, in *Collins* the applicant was not exercising his freedom of movement qua worker since he was looking for a job. With this in mind, the Decision seems to extend the 'real link' requirement, developed by the ECJ for job seekers, to workers under Art. 45 TFEU. However, the application of 'real link' test to workers seems to contradict the very premises on which *Collins* is based be-

[7] Court of Justice, judgment of 18 July 2006, case C-406/04, *De Cuyper*.

[8] Section D, para. 1, lett. a), of the Decision of the Heads of State or Government, Meeting within the European Council, Concerning a New Settlement for the United Kingdom within the European Union, alleged to European Council, Conclusion, 2014, cit. Italics added.

[9] Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*.

[10] *Ivi*, para. 19.

cause the Court in that case held that "[t]he existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question".[11] It follows that, if an EU citizen has found a job in the Member State to which he has migrated, he fulfils the real link test according to *Collins*.

The Decision's starting point is that some workers might not have a 'real and effective degree' of connection with the labour market of the host Member State. However, it is uncertain which criteria (whether, for example, the time spent working in the UK, the level of remuneration or the nature of the job) would help to define the 'real and effective degree' of connection. According to his 2014 speech, Cameron wants to reduce the incentives (tax credits, welfare payments, children's benefits) for lower paid, low-skilled EU workers.[12] Cameron believes that about 400,000 EU migrants take advantage of in-work benefits.

Against this background, the Court could assess the compatibility of the restriction on the freedom of movement with the objectives of an internal market such as the abolition of obstacles to the free movement of persons between Member States (Art. 3 TEU) and the principle of non-discrimination (Art. 45, para. 2, TFEU). Indeed, the Decision would allow each European State (not only the UK) to limit EU workers' access to the benefit system by reason of their nationality. This means that the more attractive job markets will only attract workers with higher-paid jobs, who do not need to rely on the social security system. Thus, even though the Decision only imposes a restriction on workers' benefits, this would have an indirect deterrent effect on the freedom of movement of workers because this would discourage certain workers to move towards those States that require the 'real link'. This is in breach of workers' right to free movement within the EU and the principle of non-discrimination.

IV. Job seekers' free movement and social benefits

Art. 21 TFEU establishes that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States". The freedom of movement of EU citizens has also been regulated by Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the EU (hereinafter, Citizens' Directive). In the case of periods of residence of up to three months, EU citizens are only required to hold a valid identity card or passport (Art. 6 of the Citizens' Directive). According to Art. 24, para. 2, of the Citizens' Directive, during this period the host Member State is not obliged to give access to social benefits to a national of another Member State or his family members (*García-Nieto et al.*).[13] However,

[11] *Ivi*, para. 70.

[12] *David Cameron's EU Speech: Full Text*, cit.

[13] Court of Justice, judgment of 25 February 2016, case C-299/14, *García-Nieto et al.*

the host State cannot expel them for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged (Art. 14, para. 4, lett. b), of the Citizens' Directive). For periods of residence longer than three months, the right of residence is subject to the conditions set out in Art. 7, para. 1, of the Citizens' Directive. According to Art. 7, para. 1, lett. b), job seekers need to meet two requirements: they must have sufficient resources for themselves and their family members so that they do not become a burden on the social assistance system of the host Member State during their period of residence, and they must have comprehensive sickness insurance coverage in the host Member State.

The Decision reads that "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. This includes claims by EU citizens from other Member States for benefits whose predominant function is to cover the minimum subsistence costs, even if such benefits are also intended to facilitate access to the labour market of the host Member States".

The modifications that the Decision would introduce raise some concerns. First of all, the Decision establishes that the State can refuse benefits whose predominant function is to cover the minimum subsistence costs, even if such benefits are also intended to facilitate access to the labour market of the host Member State. Thus, according to the Decision, it would be possible to deny an application for job seekers' allowance, which facilitates access to the labour market of the host Member State. However, the Decision does not seem to take into consideration the latest developments in the case law relating to job seekers' allowance. In this regard, the most important case is *Vatsouras and Koupatantze*, which established that job seekers' allowance is not a form of social assistance.[14] The case concerned two Greek nationals residing in Germany, who applied for job seekers allowance. They were denied job seekers allowance and brought their case before the ECJ. The ECJ ruled that "[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38".[15]

Therefore, insofar as the Council's Decision establishes that Member States may reject claims for social assistance, including job seekers' allowance, it overrides the interpretation of the Court in *Vatsouras and Koupatantze*, according to which job seekers' allowance cannot be considered as social assistance.

Secondly, if the Decision gives any Member State the power to restrict EU citizens' access to benefits, this raises some concerns over the principle of non-discrimination be-

[14] Court of Justice, judgment of 4 June 2009, cases C-22/08 and C-38/08, *Athanasios Vatsouras, Josif Koupatantze v Arbeitsgemeinschaft Nürnberg 900*.

[15] *Ivi*, para. 45.

cause job seekers who retain the citizenship of the relevant Member State will not subjected to any restriction. It is true that, in order to apply the principle of non-discrimination, it is necessary for the EU citizen to fall "within the scope of the application of the Treaties" under Art. 18 TFEU. Job seekers fall within the scope of the Treaties if they have a comprehensive sickness insurance and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence (Art. 7, para. 1, lett. b), of the Citizens' Directive). However, in *Trojani*, the Court held that recourse to the social assistance system by a citizen of the Union may not automatically imply that the citizen does not have sufficient resources and, therefore, does not lawfully reside in the host country.[16] Thus, the Member State cannot simply refuse benefits to EU job seekers presuming that he/she does not have enough resources; further investigation of the specific situation of the individual concerned will be required. For this reason, restraining the access of EU citizens to job seekers' allowance might be interpreted as infringing the principle of non-discrimination under Art. 18 TFEU.

V. Deportation of EU criminals

The Decision would allow Member States to take the "necessary restrictive measures" against individuals whose personal conduct is likely to represent a genuine and serious threat to public policy or security. In this case, the Decision is in line with Art. 27, para. 1, of the Citizens' Directive, which establishes that Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health.

In order to determine whether the conduct of an individual poses a present threat to public policy or security, Art. 27, para. 2, of the Citizens' Directive provides that "[m]easures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".

The Decision proposes to give Member States greater power to deport EU criminals by changing the scope of Art. 27, para. 2, of the Citizens' Directive in four key ways. Firstly, it does not mention the principle of proportionality anymore. Secondly, Member States may take into account past conduct of the individual. Thirdly, the requirement of an imminent threat is not necessary, and finally, even in the absence of a previous crim-

[16] Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani*, para. 45.

inal conviction Member States may act on preventive grounds, so long as they are specific to the individual concerned.

Against this background, it is necessary to explore whether the Court would find these changes compatible with the Treaties. First of all, the meaning of proportionality in this context has been explored by the Court in *Orfanopoulos and Oliveri*.[17] In this case, a Greek citizen, Orpanopoulos, and an Italian citizen, Oliveri, were residing in Germany. They had committed several drug offences and were serving a sentence in a German prison. The German authorities wanted to deport them on grounds of public policy, i.e. the frequency and seriousness of the offences was a real risk of reoffending in the future. In its decision, the Court ruled that "[t]o assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country".[18]

In fact, if the individual resides within the country with family members, an additional factor has to be taken into consideration. The deportation of individuals on the grounds of public policy might infringe the right to family life of their family members, under Art. 8 of the European Court on Human Rights (ECHR).[19] Against this background, the Court might potentially strike down a decision of expulsion by national authorities either because it violates the principle of proportionality, protected by Art. 5 TEU, or because it infringes the right to family life under Art. 8 ECHR.

The fact that it is unnecessary to demonstrate that the individual is a genuine and imminent threat to the State, and that his/her past conduct is a sufficient ground to justify expulsion, seems to undermine the principle of proportionality. Indeed, a State might decide that an offence committed several years before by the individual is a sufficient ground to request his/her expulsion. This arbitrary use of state power would seem to violate the principle of proportionality under Art. 5 TEU, and on that assumption the Court would find the decision of national authorities to be unlawful. Furthermore, the fact that previous conduct might not only lead to a conviction for that conduct but might also impact a future decision on expulsion undermines the principle of legal certainty (law must be certain and its legal implications foreseeable), *nullum crimen sine lege* (no crime exists without a pre-existing law) and Art. 7 ECHR, according to which "[n]o one shall be held guilty of any criminal offence on account of any act or omission

[17] Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*.

[18] *Ivi*, para. 98.

[19] *Ivi*, para. 91.

which did not constitute a criminal offence under national or international law at the time what it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".[20]

Therefore, the Court might invalidate national authorities' decisions to the extent they are based on individuals past conduct.

Finally, the Decision requires Member States to act on preventive grounds. In *Orfanopoulos and Oliveri* the Court established that deporting a European citizen based on general preventive grounds is prohibited. The Court clarified that deportation on such grounds has the effect of deterring future offenders from committing a crime because of the foreseeable risk of deportation. However, the Court concluded that a criminal conviction already has, *per se*, a deterrent effect. Therefore, the deportation of European citizens on grounds of public security is not justifiable, especially if such deportation automatically follows a criminal conviction, or if the European citizen has not committed any crime.

The Decision states that "Member States may act on preventative grounds, so long as they are specific to the individual concerned". In this case, the Decision seems to make an indirect reference to the proportionality principle because the preventive grounds should be linked to the personal situation of the individual. However, this reference to the proportionality principle might only be an empty shell. Indeed, it is uncertain how, according to the proportionality principle, the domestic authorities would link the personal conduct of a European citizen who has not committed an offence to a non-imminent threat to public security. For this reason, the Declaration of the European Commission, contained in Annex VII, would serve a key role. According to the Declaration, the Commission will clarify notions of 'serious grounds of public policy or public security' and 'imperative grounds of public security'. This will provide further guarantees against the arbitrary use of state power even though the Court might overrule decisions of national authorities where it finds a breach of the principle of proportionality or of legal certainty.

VI. Abuse of EU family members' rights

The Decision seeks to prevent the abuse of rights by European citizens and their family members. A family member is the spouse, the partner with whom the Union citizen has contracted a registered partnership, the direct descendants who are under the age of 21 (or are dependants and those of the spouse or partner) and the dependent direct

[20] Art. 7 of the European Convention on Human Rights.

relatives in the ascending line (and those of the spouse or partner).[21] According to Art. 21 TFEU, European citizens have the right to move and reside freely within the territories of the Member States. Family members have the parallel rights to European citizens to move and reside in any Member State other than that of which the Union citizen is a national. This right derives from the family relationship alone, and it has been broadly interpreted by the Court. Indeed, according to the Court, a citizen who returns to her own home state after a period abroad (in another Member State) will fall within the scope of the EU rights.[22]

Art. 5, para. 2, of the Citizens' Directive establishes that nationals of non-member countries who are family members of a Union citizen need (only) to have either an entry visa or a valid residence card. The residence card certifies the right of residence for such family members for more than three months in the Member State concerned (Arts 9, para. 1, and 10, para. 1, of the Citizens' Directive).

Against this background, the Decision establishes that Member States can take action to address marriages of convenience with third country nationals. In this regard, the Decision does not modify the current European rules, and it is consistent with them. Specifically, Art. 35 of the Citizens' Directive ('Abuse of rights') provides that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience".

Additionally, the Declaration states that "[t]he Commission intends to adopt a proposal to complement Directive 2004/38/EC on free movement of Union citizens in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host Member State's immigration law will apply to the third country national".

The Decision would change the applicable law by attaching a new residence condition, i.e. a requirement of prior lawful residence in another Member State, to the freedom of movement of EU citizens' family members. Currently, under Art. 5, para. 2, of the Citizens' Directive it is unnecessary for an EU citizen's family members to possess a residence card certifying that they were already lawfully resident in another Member State, for entry into the host Member State. The non-necessity of any lawful prior requirement was confirmed by the Court in *Metock et al.*[23] *Metock et al.* grouped together

[21] Art. 2, para. 2, of the 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 (Citizens' Directive).

[22] Court of Justice, judgment of 7 July 1992, case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*.

[23] Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock et al.*

the claims of four non-EU citizens who applied for a residence card as spouses of Union citizens residing in Ireland. The Irish Minister for Justice rejected their applications on the grounds that they did not satisfy the condition of prior lawful residence in another Member State. In *Metock et al.* the Court ruled that the enjoyment of freedom of movement cannot depend on the prior lawful residence of those spouses in another Member State. Thus, according to *Metock et al.*, it does not matter if the third-country national has entered the country illegally or, if prior to the marriage, this person was illegally present. Becoming a family member 'wipes the slate almost clean'.[24]

In its turn, the Council's Decision would wipe out the *Metock et al.* case law and restore *Akrich*, according to which the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State before moving to another Member State to which the citizen of the Union is migrating or has migrated.[25]

Against this background, it must be considered whether the Court would object to the changes introduced by the Decision. Firstly, it is uncertain whether these changes are compatible with the objectives of an internal market characterised by the abolition of obstacles to the free movement of persons between Member States (Art. 3 TEU). In this regard, as explained above, the Decision imposes a prior lawful residence in another Member State as an additional requirement to the enjoyment of free movement. The Court might consider this additional requirement to be an obstacle to the attainment of the free movement of people within the EU. In that respect, an instrument of secondary legislation, such as the Citizens' Directive, is restricting EU citizens' rights more than the Treaties, instruments of primary legislation, do.[26] Secondly, the changes contained in the Decision might infringe European citizens' right to family life under Art. 8 ECHR.

In this context, Annex VII, containing the above-referenced Declaration of the European Commission, is of fundamental importance. The Declaration states that the Commission will clarify the concept of 'marriage of convenience' and will clarify when residence in the host Member State has not been sufficiently genuine to create or strengthen family life and when the real purpose of such arrangements is to evade the application of national immigration rules.

VII. Child benefits

The Decision would amend Regulation (EU) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems with regard to new claims on the exportation of child benefits. In reassuring that this provision only relates

[24] D. Chalmers, G. Davies, G. Monti, *European Union Law Cases and Materials*, Cambridge: Cambridge University Press, 2014, p. 471.

[25] Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich*.

[26] C. Costello, *Metock: Free Movement and "Normal Family Life" in the Union*, in *Common Market Law Review*, 2009, p. 587 *et seq.*

to child benefits and not to other types of exportable benefits (such as old-age pensions), the Decision seeks to change the indexation of such benefits. In particular, child benefits would not longer be calculated on the basis of the living conditions in the State of which the child is a citizen but on the basis of the conditions of the Member State where the child resides. This change would only apply to new claims. However, from 1 January 2020, all Member States would be able to decide to extend the new indexation to existing claims of child benefits. Since there is no case law on child benefits, it is difficult to assess whether the change of indexation could amount to a violation of the European Treaties.

VIII. The safeguard mechanism

Finally, the Decision would amend Regulation No 492/2011 on freedom of movement for workers within the Union. It introduces a safeguard mechanism against an "inflow of workers from other Member States of an exceptional magnitude over an extended period of time, including as a result of past policies following previous EU enlargements".[27] A Member State wishing to avail itself of this mechanism would have to notify the Commission and the Council that "such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services".[28]

If authorised by the Council, the derogation is valid for a period of 7 years. During this period the Member State in question may restrict access to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. The Decision clarifies that such a limitation should be graduated, from an initial complete exclusion to an increasing access to such benefits.

Even though the Decision states that "[t]he 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", it breaches the principle of non-discrimination. Indeed, the safeguard mechanism introduces an indirect and temporary restriction on workers' freedom of movement based solely on their citizenship. Therefore, it would undermine one of the objectives of the internal market, i.e. the abolition of obstacles to the free movement of persons between Member States.

[27] Section D, para. 2, lett. b), of the Decision of the Heads of State or Government, Meeting within the European Council, Concerning a New Settlement for the United Kingdom within the European Union, alleged to European Council, Conclusion, 2014, cit.

[28] *Ibid.*

On this point, Annex VI contains a Declaration of the European Commission which will introduce for the United Kingdom a 'safeguard mechanism' against an exceptional inflow of workers from other EU Member States.

The Declaration provides that "[t]he European Commission considers that the kind of information provided to it by the United Kingdom, in particular as it has not made full use of the transitional periods on free movement of workers which were provided for in recent Accession Acts, shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today. Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval".

As explained in Section III of this *Insight*, workers' freedom of movement can only be restricted on grounds of public policy, public security or public health, or where there is an ORPI. The Declaration does not invoke any of these justifications but limits the access of EU citizens to the UK on ground of their nationality. More specifically, the Decision clarifies that the UK is justified in triggering this mechanism because it has not made full use of the transitional periods on free movement of workers which were provided for in recent Accession Acts to the EU. The States which recently became members of the EU are, in 2004, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia; in 2007, Bulgaria and Romania; and, in 2013, Croatia. Therefore, EU citizens of these countries might be affected by the implementation of the safeguard mechanism. If so, the content of the safeguard mechanism for the UK raises the same concerns in terms of respect of the principle of non-discrimination because the UK would be allowed to treat the citizens of these countries less favourably than the citizens of the countries which joined the EU less recently.

IX. Conclusions

This *Insight* has assessed the amendments introduced by the New Settlement of the UK within the EU on social benefits and freedom of movement against the fundamental principles of the European Union. Although the Decision is itself an international treaty and not part of the EU legal system, it calls for new EU law. For this analysis, it is clear that many of the proposed changes are in breach of one of the cornerstone principles of the European Union: the freedom of movement of EU citizens and their family members. First, workers' access to the benefit system would be restricted by the need to show a 'real and effective degree of connection' between the person concerned and the labour market of the host Member State. Secondly, the modifications proposed by the Decision would restrict the right of job seekers to access social benefits in a host State. Thirdly, the Decision would change the scope of Art. 27, para. 2, of the Citizens' Directive so that EU citizens could be expelled taking into account past conduct of the individual, without the requirement of imminent threat and on preventative grounds. The Decision would also grant Member States greater power to deport EU criminals. However, none

of these changes would be compatible with three EU cornerstones: the principle of proportionality (because the expulsion decision would not be based only on the present circumstances), legal certainty (because a crime committed several years before could be a valid ground for expulsion) and the principle *nullum crime sine lege*. Fourthly, the introduction of the 'prior lawful residence' requirement for the EU citizens' family members has the potential to undermine their parallel right to free movement under EU law because the matter would be regulated by national immigration laws. Additionally, such an additional requirement might also undermine EU citizens' right to family life because their family members might be denied entry in the host Member State, with a consequent disruption of their family life. Finally, workers' freedom of movement and the principle of non-discrimination would be infringed by the safeguard mechanism, which would allow the UK to restrict in-work benefits for EU citizens for four years from the commencement of their employment.