



**Prof Michael Doherty,
Head of the Department of Law,
Maynooth University,
Co. Kildare,
Ireland**

Address to Institute of European Democrats Conference on Free Movement and Labour Mobility, Maynooth University, Friday, November 13th 2015.

Introduction

Many thanks to Marian Harkins MEP and the IED for the invitation to speak here today. This is a topic on which I have done a fair bit of work recently, and what follows are some of my impressions on the direction in which EU law and policy seems to be going.

I recently contributed to a report for the EP on 'EU Social and Labour Rights and EU Internal Market Law'

([http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2015\)563457](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)563457)). The lead author was Prof Dagmar Schiek, who is in the audience today. The report was looking at tensions between internal market law and social and labour rights in the EU. I am going to draw heavily, in my comments, on this report, relating the content to the theme of today more generally.

I am going to briefly discuss four points, which are closely interlinked.

The history and development of the EU are crucial, here, but I expect are familiar to this audience.

As a result, I will confine myself to remarking that, from the outset, economic and social integration have been linked; economic success and progress in the EU was intended to promote improvements in the standard of living. This is now made quite explicit following the Treaty of Lisbon, which commits the Union to achieving a 'social market economy' (Article 3 TEU).

It is never great to start off by reading out numbers...but a little context to preface my remarks:

1. The percentage of EU citizens exercising free movement rights was approx. 2% in 2004; it's now approx. 3%
2. Eurostat 2013 figures give us the percentage of 'free movers' in the total population of various Member States, for example:
 - a. Ireland 8%
 - b. Belgium 7%
 - c. UK/Germany- under 4%
3. The percentage of non-EU migrants in most of the high-wage Member States is higher than EU migrants- except in Ireland

Given the nature of popular debate around EU migrants in the UK, in particular, these figures are interesting.

1. Free Movement of Workers & Citizens

Free movement of persons is predicated on the idea that those who move to another Member State to work are entitled to equal treatment in employment and in relation to 'social and tax advantages' with nationals of the host state. It is important to remember that what is at issue here is not 'better', but 'equal' treatment- Member States are free to treat all persons equally badly!

Current discourse often posits the view that the equal treatment principle favours those who migrate; however, equal treatment should be understood as protection for both those who move and those in the host state. Without it, workers will often have to compete on price, driving down wages and working conditions in the host state generally.

Equal treatment, not only in wages and working conditions, but in terms of social security and assistance is also necessary, for similar reasons. Without it, migrants will undoubtedly be willing to accept lower wages and standards of employment than nationals. The resulting fall in standards/wages and/or the increase in dependence on social security/assistance by nationals of the host Member States will likely have a dampening effect on the economy as a whole.

It is necessary to appreciate, therefore, that equal treatment of workers who move to another Member State with home workers in that State is necessary from an economic point of view.

However, it also necessary from a social point of view (particularly as a means to lower the risk of xenophobia).

2. The Internal Market and Free Movement of Labour

It must be understood that the successful operation of the internal market for goods and, especially, services is dependent upon on maintaining labour standards. The internal market and free movement of labour should not be portrayed as separate, or worse in opposition; law and policy in these areas must be intertwined and complementary.

This is because granting the right to free movement creates an inextricable link between the internal market and European societies.

It is also important that the division does not open up between internal market law as a matter for the EU (as business cannot cope with 28 different sets of rules) while social and labour rights are seen as an issue for the Member States (to respect national diversity in terms of industrial relations, etc).

It is not clear to me how one can wish for a better functioning market in the cross-border provision of services (which encompassed everything from IT to plumbing), without also needing to protect the rights of those actually providing the service.

3. Posted Workers & Public Procurement

This can be seen in relation to posted workers. Without protecting the labour standards of workers sent temporarily to other Member States by their employer to provide services, neither the posted workers nor workers or employers in the home states can be guaranteed a level playing pitch.

Recent case law of the CJEU has severely restricted the rights of trade unions, and State authorities via public procurement processes, to enforce labour standards (going beyond the statutory minimum) against service providers established in other EU Member States.

Collective bargaining processes and industrial action are seen as infringing the rights of service providers to operate across borders. However, little attention, to date, has been given by the CJEU to the question of whether the limitations on the fundamental rights to undertake collective bargaining and to take industrial action are excessive and go beyond what is required to allow the free functioning of the market in cross-border services.

Posted workers are also denied equal treatment rights; effectively 'normal' free movement rights are suspended in favour of employers' freedom to provide services.

The interaction of the Posting of Workers Directive (which guarantees some application of the host state's labour standards) and the social security regulations (the default position for which is that the employer's home social security system remains applicable) is complicated.

There are some recent attempts to deal with these issues:

- The Posting of Workers Enforcement Directive: note Article 4 clarifying what is a genuine posting; and Article 6 requiring Member States to keep and share better statistical information on posting.
- The new Public Procurement Directives-there must be a robust transposition of these (and a robust interpretation by the CJEU) in order to allow for social rights/labour standards to be protected.

4. Free Movement and Social Security/ Assistance

Since the 1970s, the EU has tried to 'coordinate' social security for free moving workers with the aims that, first a worker is only subject to one social security system, and, secondly, that workers do not lose social security benefits by virtue of exercising free movement rights (see Reg 883/2004; 987/2009).

Workers are also entitled to equal treatment in relation to 'tax and social advantages' (see Reg 492/2011 and Directive 2004/38 (Art 24)).

Non-economically active citizens, of course, are treated less generously (they cannot be a burden on the host state and must show sufficient resources, especially related to sickness insurance).

Under Article 24(2) 2004/38, the host Member State is not obliged to provide 'social assistance' in the first 3 months. However benefits designed to facilitate access to the labour market are not 'social assistance'. This is a source of controversy- but, in principle, should not Member States be trying to ensure all those on the national territory who are available to work should be facilitated in trying to access employment?

Current discourse and some CJEU case law makes much of 'welfare tourism'. But there is a need to disentangle arguments about abuse of the system from discussions of migration rights (for example, - 'sham marriages' are not permitted; but it is for national authorities to ensure that these are policed).

There are some concerning signs, however, that the position of both non-economic movers and workers are being eroded:

The Dano case (C-333/13), for example, suggests that equal treatment is only available to those residing lawfully in a Member State in line with Directive 2004/38 (and not simply resident on any lawful basis, as was previously the position established in Martinez Sala C-85/9). Therefore, a poor person with no access to the labour market, albeit with a residence permit, will not be able to participate in the social system of the host Member State. Such a person must be able to demonstrate a level of 'integration' in the host Member State.

There is a danger is that this idea will also spill over to job-seekers and former workers, unless they can demonstrate a 'stable socio-economic link' to the host Member State.

The position of workers is even more worrying: my research has indicated:

1. Member State authorities may misclassify someone as a 'non-worker'; especially if the person has engaged in 'informal' work.
2. Migrants are often unaware of the correct procedures, which can prejudice genuine claims to worker status.
3. Work records in the home state are not always considered by the host state authorities (and migrants may provide insufficient information, due to a lack of knowledge of the system)
4. Member State authorities may have a desire to 'defend' the national coffers and not be seen as a 'soft touch'.

5. Conclusion

The level of movement is still small; but public opinion in some Member States sees it as a large problem (is there, here, some conflation of EU and non-EU migration?).

Fears of a decline in wages and living standards are common, but the political reaction is often to deny benefits to migrant workers (making such a decline more likely).

EU migrants might, initially, accept lower standards BUT equal treatment will most likely result in them adapting to the standards of the host Member States.

Unequal treatment will likely mean a decline in living standards overall, resentment on the part of migrants, and hostility on the part of the receiving Member State nationals.

This, I believe, is an outcome that ultimately benefits no one.