

# Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need for Strong State Capacities

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## **ABSTRACT**

*National welfare states within the European Union have become semi-sovereign and can no longer limit benefits and services to national citizens. Significantly limiting the social rights of EU migrant citizens would very likely require treaty changes. Some countries, such as Germany, Spain and the United Kingdom, absorb a large proportion of intra-EU, East-West migration. Nevertheless, the overall proportion of EU migrant citizens resident in Germany and the UK is slightly less than 4 percent, and in Spain about 4.5 percent, of the total population. Semi-sovereign EU welfare states require strong state capacities to deal with the complexities of EU citizenship and associated social rights.*

## INTRODUCTION

Following the public debate over the past year, it has become clear that the alleged “costs” of EU citizens for the public purse, public services and the labour market have become a dominating political issue on the agenda in the United Kingdom. Very seldom are these debates placed in the context of EU citizenship, even though it has become a reality for British citizens as well as other EU citizens to spend some time studying in another EU Member State, using the European Health Insurance Card when in need of health treatment, working in another Member State or retiring to warmer climes of the EU. Core to all these benefits is the concept of EU Citizenship, which guarantees citizens the right to freedom of movement and to reside in any Member State.

This paper presents a brief overview of the legal foundations of EU Citizenship and associated social rights, provides some data on the actual number of EU migrant citizens and their take up of benefits and social services. We argue that in many instances we have insufficient data to make any strong claims about benefit reliance or social service usage and that the weakness of the UK state and its incapacity to effectively implement EU regulations are core factors relevant to – yet largely missing from – the current debate.

## EUROPEAN INTEGRATION AND SEMI-SOVEREIGN WELFARE STATES

In many countries in Europe the development of the welfare state was closely linked to the establishment of the nation state. Moreover, the nation state was sovereign to limit the provision of social services and benefits to its citizens. European integration has eroded the sovereignty of the nation state to limit service provision and consumption of benefits to its citizens and territory. Nevertheless, nation states remain the primary institutions responsible for determining the over-

all design of social policies in a multi-tiered polity guided by the principle of subsidiarity.

The Treaty of Rome, signed by the initial six Member States in 1957, defined European integration as a *political project* with the aim of “an ever-closer union among the peoples of Europe”. It was the hope of its founders to overcome Europe’s fragmentation and build an institutional framework that would promote peace on a continent that had been devastated twice by war during the first half of the 20th Century.

Since its inception, European integration has aimed to achieve the *freedom of movement* between member states of goods, services, capital and workers and was always intended to be more than purely a trade bloc. From the very beginning of European integration the freedom of movement of workers (and job seekers) was embedded as an individual (social) right within the European Economic Community, the predecessor of the EU (Hantrais, 2007), with Article 51 clearly stating: “The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers ...”. Leibfried and Pierson (1995: 54) write in reference to the 1958 coordination requirements to promote labour mobility and their subsequent interpretations by the European Court of Justice (ECJ): “any de facto discrimination against nationals of other EU members is illegal, a traditional means of excluding noncitizens is no longer at the disposal of the national legislator.” In other words, key elements of EU governance and competencies, which are currently questioned by some political actors as something Britain had not signed up to when she joined in the 1970s, were in place since the very beginning of the EU integration process. Over the years, significant progress in specifying the principles of freedom of movement and non-discrimination for migrant workers was made through rulings of the ECJ, highlighting the limits of national sovereignty in the realm of social policy. Many of the rulings of the ECJ related to the

## KEY ELEMENTS OF EU GOVERNANCE AND COMPETENCIES, WHICH ARE CURRENTLY QUESTIONED BY SOME POLITICAL ACTORS AS SOMETHING BRITAIN HAD NOT SIGNED UP TO WHEN SHE JOINED IN THE 1970S, WERE IN PLACE SINCE THE VERY BEGINNING OF THE EU INTEGRATION PROCESS

coordination or, in effect, exportability of social security benefits for workers and the application of the principle of non-discrimination (Leibfried/Pierson 1995; Pennings 2012). But as the ECJ has made clear in its *Paletta I* ruling in 1987, national public administrations have also lost their role as *sole* administrative gatekeepers of the welfare state. In this case an Italian working in Germany fell sick and became unable to work whilst on vacation in Italy. The ECJ ruled that the German sickness fund had to accept an Italian doctor's sick note, even though there were implications of fraud (cf. Leibfried/Pierson 1995: 62).

These rulings have made explicit that Member States are no longer sovereign in determining the eligibility criteria of national social policies – they have lost sovereignty and could best be characterized as “semi-sovereign welfare states”. Nation states can no longer limit benefits to their “own” citizens and insist that benefits are consumed within their territory. The idea of “semi”-sovereignty appears to be in conflict with traditional understandings of parliamentary sovereignty in Britain.

The end of the Cold War triggered a rapid deepening and widening of European integration. Austria, Finland, Sweden and most Central and Eastern European countries became Member States, eventually turning a club of 12 Western European Member States into a club of 28 Europe-wide Member States. Britain was one of the key protagonists pushing for the membership of the poorer CEE countries. The Maastricht Treaty of 1992 established the concept of *EU Citizenship* as a constituent element of the EU. EU citizenship was further embedded into the EU architecture with the entry into force of the Lisbon Treaty and the EU Charter of Fundamental Rights in 2009.<sup>2</sup> Article 15 of the Charter explicitly states: “Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”; and article 34 stipulates, “Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.”

These clauses provide the context for various EU Regulations and Directives that regulate not only the exportability of social rights, but also EU citizens' access to social security benefits in the “host” country (Pennings, 2012). The key piece of EU legislation in relation to the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States is the Free Movement Directive (2004/38/EC). Replacing earlier regulations, two new EU social security regulations came into force in 2010 (Regulation (EC) No 883/2004 and No 987/2009). Based on the principles of freedom of movement and non-discrimination, these directives and regulations specify that the

coordination of social security is no longer limited to economically active persons, but that EU Citizens also have access to special non-contributory social security benefits based on the same conditions as nationals (in the UK: State Pension Credit; Income-based Allowance for Jobseekers; Income-based Employment and Support Allowance; and Disability Living Allowance), if they are habitually resident in a Member State.

Member States have the right to withhold social assistance payments during the first three months after the arrival of an economically inactive EU migrant citizen and to request that they have health insurance coverage during that time. However, EU migrant citizens are entitled to family benefits from the very beginning of their residence in a Member State. Economically *non-active* EU citizens are in practice unlikely to be eligible for social assistance benefits during the first five years, since to acquire the right to reside they would have initially needed to show to the national authorities that they had sufficient resources. After a residency period of five years, governments can no longer discriminate between national citizens and resident EU citizens from another Member State. For workers, the principle of non-discrimination is effective from the point of taking up residence (for an overview see European Commission 2013a).

These legal arrangements, and the increased mobility of EU citizens, have significantly expanded the reach of Social Europe. Unsurprisingly, the construction of social rights is regularly legally contested within the European Union. Eigmüller (2013) argues that increasingly European citizens assert their social rights through the legal system, expanding EU social policy from below. However, in a recent case the ECJ “sided” with the restrictive view of the German authorities. In this case the ECJ had to adjudicate whether Ms Dano, a Romanian national, and her child (also a Romanian national) were eligible for the so-called Hartz IV benefit in Germany, which had been denied by the German authorities. Ms Dano has only very limited

primary education, no occupational qualification and has never worked in Germany or Romania. The ECJ in its recent ruling upheld the decision of the German government and ruled that the various regulations “do not preclude the national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of a general criterion, such as the reason for entering the territory of the host Member State, which is capable of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system”.<sup>3</sup> Further cases are to be adjudicated in the near future.

The EU Commission, as the guardian of the Treaties, is monitoring whether Member States are in compliance with EU law. It has challenged the UK at the ECJ for imposing a “right to reside” clause in determining the eligibility for a number of social benefits in addition to determining the habitual residence of non – British EU citizens and thereby, according to the legal position of the Commission, discriminating against EU citizens (European Commission, 2013b). The Commission’s argument would suggest that many EU migrant citizens, who are under the general suspicion of being “welfare tourists”, are in effect disintitiled by the UK government of their legitimate social rights as EU Citizens!

Despite various regulations and court rulings, uncertainties in the application of the fundamental right to freedom of movement and associated social rights remain, especially around defining work and legal residence. Defining the minimum conditions for the status of a “worker” under the freedom of movement directive is especially important for workers on low wages or with only a limited number of hours of work, as they might be eligible for in-work benefits. European case law generally assumes that a minimum of 10 hours of work per week fulfils the minimum requirement. The UK government has recently established a minimum weekly income of £153 to define the status of worker, which is equivalent

to 23 hours at the UK minimum national wage of £6.50 per hour. Whether this restriction is in compliance with EU law remains to be seen. Furthermore, how should authorities *practically* assess the social rights of EU citizens after they have worked for some period of time, but in the meantime have become unemployed and have to rely on social assistance payments? What is the process of establishing legal residence?

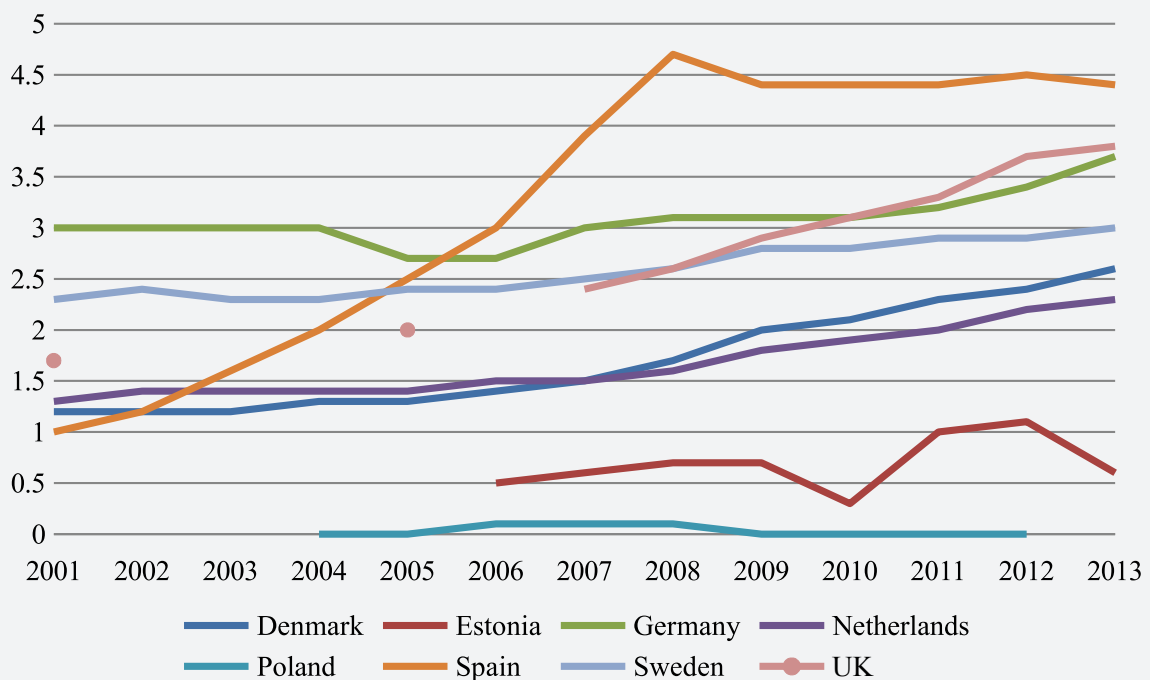
**FREEDOM OF MOVEMENT AND THE WELFARE STATE**

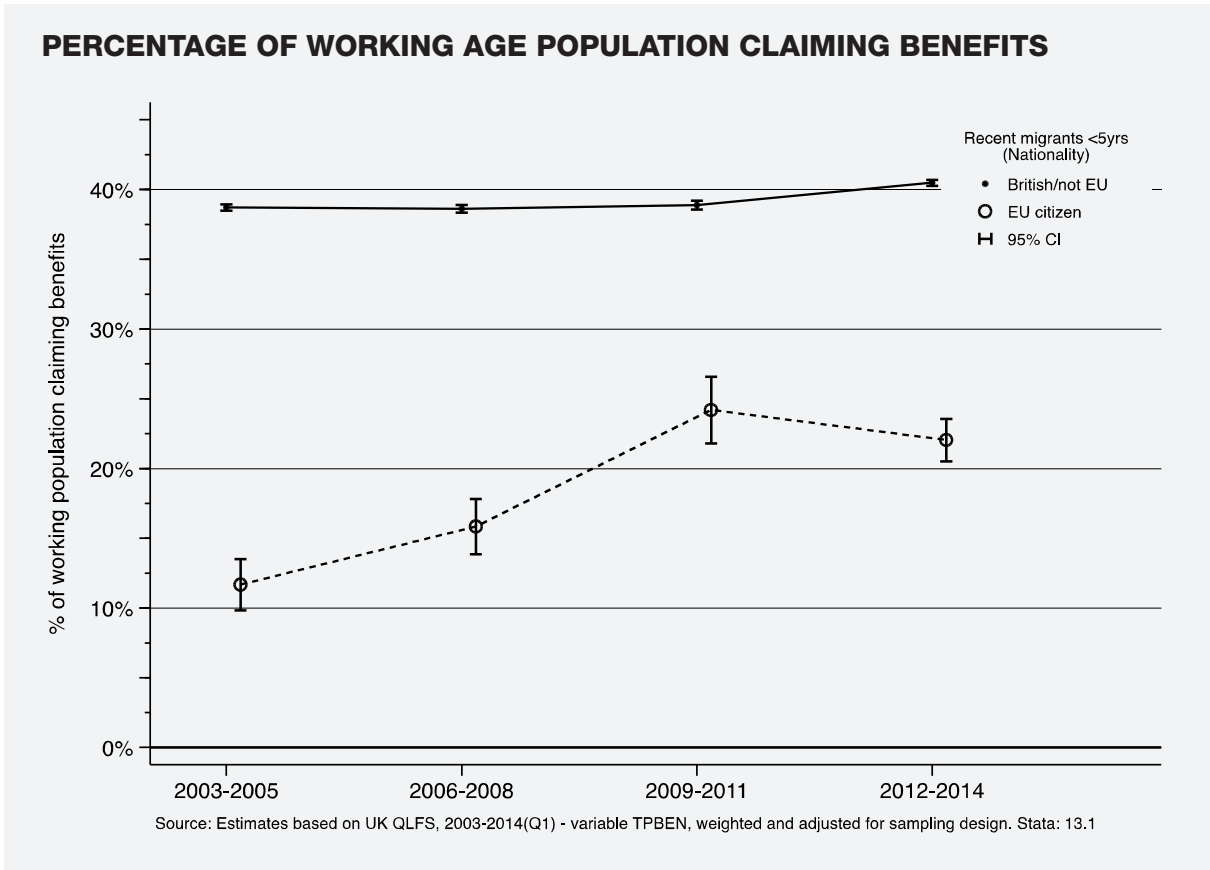
Overall migration within the EU continues to be quite limited, if compared for instance with the United States (European Commission 2013a: 11), and can be characterized as geographically uneven. The decision to expand the EU to countries of the former Eastern Bloc entailed

a commitment to accord EU citizenship to all nationals from those countries, even though transitional arrangements regarding the freedom to move and reside were applied in a number of Member States to workers from the new Member States joining in 2004 (EU8) and in 2007 (EU2). Although the UK has witnessed a steep increase in absolute numbers of EU migrant citizens, it is by far not the steepest increase in the EU and proportionally not the highest level. Spain experienced a bigger increase both in terms of shares of population and in absolute numbers (405% compared to 140% in the UK) since 2001. Moreover, EU citizens coming to Britain are more likely to be younger and economically active than the British working age population.

Nevertheless, this does not mean that migration from EU member states has been negligible, especially as new arrivals tend to cluster in certain geographical areas. Data on National

**PERCENT OF EU MIGRANT CITIZENS AS A SHARE OF TOTAL POPULATION (2001 – 2013) IN SELECTED MEMBER STATES SOURCE: EUROSTAT**





Insurance Number registrations in the UK, for example, indicate that in 2011/12 42 percent of all migrants to the UK including those from the EU initially settled in London (DWP 2012).

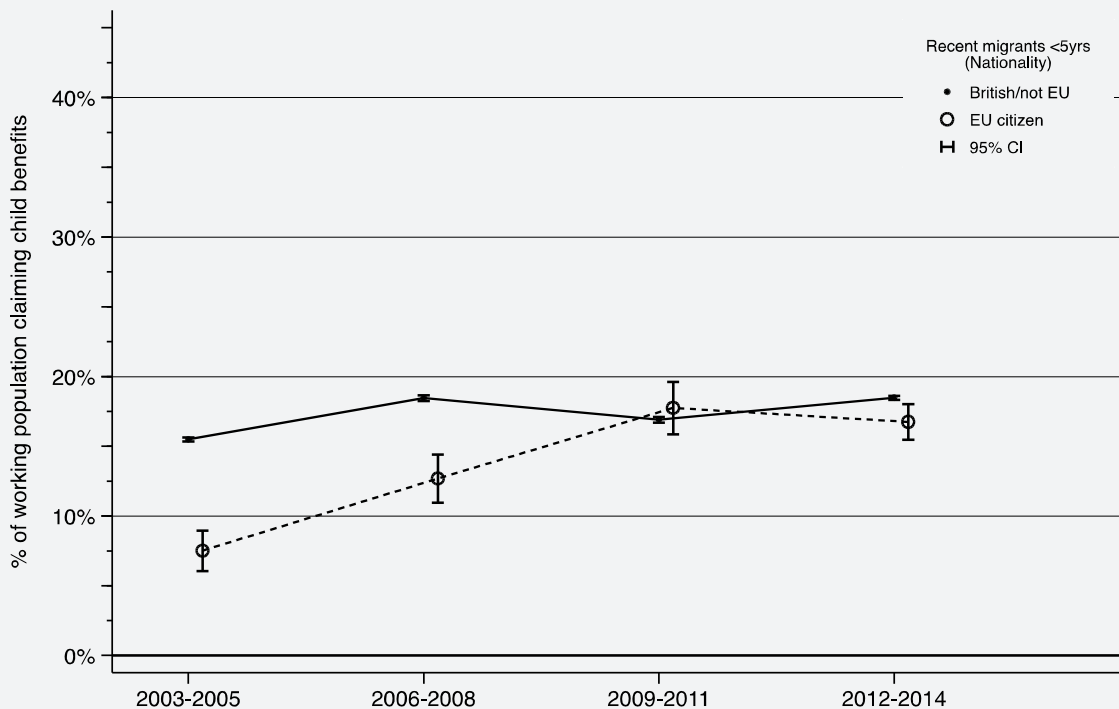
These migration patterns can lead to or amplify pressures on regional and local public services and labour markets; however, it does not mean that at the nation-state level migration has negative effects. Moreover, according to research by Dustmann and Frattini (2014), EU migrant citizens contribute a significant net fiscal benefit to the public purse in the UK. In the absence of any robust longitudinal administrative data on benefit receipt or service use, their research relating to benefit receipt is based on estimates from the Labour Force Survey. In their *Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons* the government concludes:

We do not record the nationality of benefit recipients at present but are working to improve the data available and have published estimates of the number of migrants accessing benefits using national insurance numbers linked to benefit administration data. With the introduction of the Universal Credit, the Government is looking to routinely collect more robust data on the nationality and immigration status of claimants on benefit payment systems (HM Government 2014: 39).

Labour Force Survey data seems to suggest that EU migrant citizens are much less likely to be claiming benefits than British citizens.

If we take a look at Child Benefit receipt, we see that EU citizens are also not more likely to receive these benefits than British citizens.

### PERCENTAGE OF WORKING AGE POPULATION CLAIMING CHILD BENEFITS



Source: Estimates based on UK QLFS, 2003-2014(Q1) - variable TPBEN, weighted and adjusted for sampling design. Stata: 13.1

Contrary to the claim of “benefit tourism”, the overwhelming majority of EU nationals enter the UK to work. In 2013, 67% of EU migrant citizens stated that their main reason for coming to the UK was for work related reasons (compared with 22% for formal study and 8% to join/accompany a family member). Of those who come to work, around 60% had a definite job and 40% were looking for work (HM Government (2014: 33)). There is no available evidence that access to benefits was a significant factor in migration patterns (*ibid.*: 40).

Despite contrary research evidence and the lack of any robust administrative data it is surprising that EU migrant citizens are increasingly portrayed to be a “burden” on the state purse. Furthermore, it is argued that it is much easier for EU migrant citizens to access benefits in the UK, for instance compared to France and Germany, as the British welfare state is largely non-contributory and also provides in-work benefits.

Although Germany’s welfare system is widely based on the principle of social insurance, it does indeed provide access to a number of benefits, very similar to those in Britain, unrelated to social insurance contributions. These include means-tested social assistance benefits, in-work benefits, child benefits/child tax allowances, parental leave benefit etc. In addition, the German government records benefit receipt by nationality, which might provide us with some information relevant for the public debate in Britain.

With the increase of EU migrant citizens in Germany the number of recipients of means-tested benefits paid to EU nationals increased. In 2013, 6.13 million residents in Germany received means-tested social assistance benefits for the unemployed (Hartz IV), of which a total 293,000 were EU migrant citizens – less than 5 percent of the total. Among EU migrant citizens the highest number of benefit recipients were of Polish



## IT WOULD SEEM PLAUSIBLE THAT THE CONTRIBUTIONS BY EU MIGRANT CITIZENS OUTWEIGH THE COST, AS THEY TEND TO BE YOUNGER THAN THE AVERAGE BRITISH CITIZEN

(70,000), Italian (63,000) and Greek (39,000) nationality. Benefit receipt among EU migrant citizens from EU2 (12.9 %) and EU8 (11.3%) is lower than among the overall population without German citizenship (16.3%), but higher than the recipiency rate among the total resident population (7.5%) (BMI/BMAS 2014: 31). The distribution of benefit receipt across Germany, like in Britain, is very uneven, with a regional concentration in Berlin and urban centres such as Bremen in the West of Germany. Nevertheless the overall numbers remain relatively small. Many EU migrant citizens receiving social assistance for the unemployed are actually working. For instance in Berlin about 12,000 *working* EU migrant citizens, including 7,153 from CEE countries, received means-tested in-work benefits, as their incomes from dependent employment (8,656 workers) or self-employment (3,798) were below the relevant subsistence level for the household. The total number of social assistance recipients from EU27 countries (without Germany) in Berlin was 37,632 or 6.6 percent out of a total of 568,789 recipients. These numbers show that in Germany, in contrast to what the data for the UK seems to suggest, the probability of receiving social assistance is higher among EU migrant citizens than among the overall population. However, taking all social transfers, including social insurance benefits,

into account, EU migrant citizens are much less likely to receive benefits compared with the resident population without a migration background in Germany. Overall, it is very likely that net migration from Romania and Bulgaria will have a positive impact on the social insurance funds in the long term, as migrants from EU2 countries on average are much younger than the domestic population (Brücker et al. 2013).

In the British debate, the receipt of child benefits for children of EU migrant citizens living outside Britain has also become a very contentious issue. Again no robust data seem to be available for the UK. German data reveal that only 0.64 percent of children for whom child benefits are received actually live outside Germany. In other words, 99.36 percent of child benefits are not exported! In absolute numbers Polish (41.361) and German (23.511) parents constitute the largest groups to export child benefits; only 112 British families “export” child benefits from Germany (BMI/BMAS 2014: 128).

The alleged cost and drain to the English National Health Service is a further area of contention within current debates on migration and social rights. However, the cost-benefit ratio is far from clear and it would seem plausible that the contributions by EU migrant citizens outweigh the cost, as they tend to be younger than the average British citizen. Moreover, the NHS has directly benefited from intra-EU migration, as the significant domestic skill shortage was partially compensated for by EU immigration. For instance, seven percent of consultants within the NHS have received their qualification in an EEA country other than Britain (Blitz 2014: 62 f). Furthermore, emigration to other EU countries by British citizens, especially pensioners, is said to have contributed to savings for the NHS. British pensioners in receipt of a state pension abroad, posted workers, and temporary visitors to other Member States who hold an European Health Insurance Card receive healthcare on the same terms as nationals from the “host” Member State, which can then seek reimbursement



for treatment from the respective authorities in the UK. As large numbers of British citizens retire in countries where the average cost of healthcare is lower, such as Spain, this is very likely to have resulted in a net gain for the exchequer (HM Government 2014: 50). Furthermore, it is not clear to what extent EU migrant citizens continue to make use of healthcare services in their country of origin while residing in the UK, instead of using the NHS, as some anecdotal evidence would seem to suggest, thereby further lowering the costs to the NHS.

Despite the ongoing debate about “benefit tourism”, anecdotal evidence suggests that in reality, many EU migrant citizens are unlikely to claim their social rights due to barriers such as a lack of information about entitlement to rights or language skills.

### **STATE CAPACITY AND SOCIAL RIGHTS OF EU MIGRANT CITIZENS**

Welfare states within the EU are dependent on strong state capacities to deal with the complexities of intra-EU migration. A precondition for being able to plan effectively is the availability of accurate data, knowledge about the rules governing freedom of movement and associated social rights, and state capacity to implement, and comply with, the relevant regulatory framework. A lack of knowledge and state capacity to enforce EU regulations can lead to strains on welfare state budgets and misrepresentation of the causes of such strains.

There is no question that certain municipalities in Britain (and Germany) are challenged by high numbers of EU migrant citizens claiming benefits and using social services. But as has been argued above, economic analysis indicates that EU migrant citizens are a net “gain” for the national economy and the public purse of the destination country. Therefore it would seem reasonable if the national government provided additional support to those municipal-

ities with comparatively high levels of resident EU migrant citizens.

Having robust up-to-date data about benefit receipt and the use of social services by EU migrant citizens can help local authorities plan more effectively and provide guidance for resource allocation from central government. After a comprehensive review by state secretaries relating to legal questions resulting from the use of the social security system by citizens of EU member states, the German Federal Government has recently pledged to provide more than €200 million in additional funding, financial resources from the European Social Fund (ESF) and the Fund for European Aid to the Most Deprived (FEAD) for affected local communities. Amongst other initiatives this funding is intended to avoid homelessness, provide support for migrants from Bulgaria and Romania, especially Sinti and Roma, and fund employment and skill initiatives as well as language courses among EU migrant citizens (BMI/BMAS 2014). By contrast, the UK government has not allocated any funds from the ESF specifically targeting local authorities in England that are struggling with pressures on public services as a result of intra-EU migration.

In addition to allocating extra funding to local authorities under pressure from intra-EU migration it seems urgent to provide extensive training as well as the necessary infrastructure to enable service providers to effectively apply EU regulations. A recent study commissioned by the Department of Health in England (Creative Research 2013) highlights the lack of knowledge among healthcare professionals within the NHS regarding the eligibility for free medical treatment. This has significant implications for the public purse, as considerable amounts of money are seemingly not claimed back from EU citizens’ countries of origin, as should be the case under reciprocal arrangements for care across borders. Furthermore, the UK government is not obliged to provide free health services to EU students or economically inactive EU migrant citizens during the first three months of their stay in Britain,

but can request health insurance coverage, as other EU countries do. Improving cross-border charging and implementing obligatory health insurance coverage for instance for EU students and economically inactive EU migrant citizens would reduce the “burden” for the NHS, but require stronger state capacities and investment in the administrative capacities of the NHS.

At times it is argued that EU workers undermine the existing terms and conditions in Britain, by working longer hours or for less than the minimum wage. Instead of scapegoating EU migrant workers, dealing with unlawful practices by UK employers would seem more reasonable, but require improved capacity of the state to enforce minimum labour conditions and the minimum wage. British workers would also directly benefit from such a policy. According to the Annual Survey of Hours and Earnings compiled by the Office of National Statistics, more than a quarter of a million workers were paid at less than the minimum wage in 2012, but no company has been prosecuted since 2013 (Boffey 2014).

## CONCLUSION

National welfare states within the European Union have become semi-sovereign and can no longer limit benefits and services to their citizens. Moreover, workers as well as economically non-active EU citizens have social rights that cannot be unilaterally restricted by Member States. Strengthening state capacities can be an effective avenue in dealing with some of the challenges of semi-sovereign welfare states in a multi-tiered, supra-national system of governance. EU citizenship entitles people to the freedom of movement and residence within the EU. The right to freedom of movement and associated social rights are important elements of a Europe for the people which reaches beyond the market.

## ENDNOTES

- 1 We thank Thees Spreckelsen for his support in analyzing data. The research for this report was funded as part of the FP7 project bEUcitizen by the EU Commission (grant no 320294).
- 2 Despite some confusion about the application of the Charter in the UK the House of Commons European Scrutiny Committee (2014: 5) has come to the conclusion that “the Charter is directly effective in the UK with supremacy over inconsistent national law (as it is for all other EU Member States).”
- 3 ECJ Case C-333/13 available at <http://curia.europa.eu/juris/document/document.jsf?docid=152523&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=613111>

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