



**Tread carefully:
The impact and management of EU free movement
and immigration policy**

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By

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CONTENTS

Executive summary	3
1. Introduction	5
2. EU-level asylum and external immigration policy	6
2.1. Background	
2.2. EU asylum policy	
2.3. EU immigration policy on third-country economic migrants	
2.4. The best of both worlds?	
3. Internal migration of EU nationals under freedom of movement	12
3.1. The facts and controversies of free movement	
3.2. What is the scale of EU migration to the UK?	
3.3. The impact of EU free movement	
3.3.1. Impact on economic growth and the UK's fiscal position	
3.3.2. Impact on UK labour market and employment	
3.3.3. Wider social and political impacts	
4. Conclusions and policy options	30
4.1 Asylum and non-EU migration	
4.2 EU free movement	
Graphs	
• Graph 1: Flows of EU and A8 migrants to and from the UK	18
• Graph 2: IPS estimates of long-term international migration of A8 Citizens (Rolling year)	18
• Graph 3: UK, A8, Poland GNI per capita	20
• Graph 4: Percentage of workers in each job-skill level by country-of-birth groups	23
• Graph 5: Top 10 Occupations for A8 registered workers (July 2004 – December 2007)	23
• Graph 6: Gross hourly pay of A8 migrants versus UK workers	24
• Graph 7: National Insurance Number allocations (thousands, April 2004 – September 2011)	24
• Graph 8: Unemployment in the UK (total workforce) and A8 employment	25
• Graph 9: Total number of UK jobs versus UK-born employed	26
Tables	
• Table 1: The pros and cons of EU-level external and internal immigration policies	5
• Table 2: Incentives to migrate to the UK	19
• Table 3: EU accession countries' GDP per capita as % of EU27	19
• Table 4: UK-born and A8 employment and unemployment rates	25
• Table 5: Population and GNI per capita of potential EU accession states	31
Boxes	
• Box 1: France and the repatriation of Roma	13
• Box 2: The UK's 'right to reside' test – a violation of EU free movement rules?	14
• Box 3: Who are the 'A8' and 'A2' countries?	15
• Box 4: Greece – The weak link in Schengen?	28

EXECUTIVE SUMMARY

EU policies relating to external and internal immigration have, on balance, worked in the UK's interest. However, EU free movement in particular has been subject to political mishandling by both the UK Government and the European Commission. Reform to enhance the transparency, clarity and accountability of these policies is absolutely vital if free movement is to be safeguarded as public opinion in the UK and across the EU becomes increasingly hostile to the concept.

Asylum and non-EU migration

On the whole, the UK's retention of its own border controls and its discretion to opt in to EU laws in asylum and immigration law have so far limited the EU's influence over UK immigration policy, while allowing it to take advantage of common EU measures when those are in its national interest.

The UK's 'pick-and-mix' approach to cooperation in EU asylum policy now draws a healthy degree of cross-party consensus and should remain in place. At the moment, the UK's participation in EU measures is largely limited to cooperation in the EU's so-called 'Dublin System', which, in most cases, allows the UK to return asylum seekers to the member states in which they first arrived in the EU.

However, the UK could seek to replace the current arrangement with a 'reversible' opt-in, in order to avoid the current situation whereby decisions to sign up to EU laws in this area bind future governments.

Free movement of nationals of EU member states

EU migration accounted for 27% of total UK net immigration in 2010 – a majority of which comes from the new Eastern European states which joined the EU in 2004.

While the overall impact of migration from other EU countries is inconclusive, it is clear that migration can have positive economic impacts on competitiveness and the public finances in the UK as well as Europe as a whole. The evidence also overwhelmingly suggests that migrants from EU countries have come to the UK in search of work rather than to take advantage of the UK's welfare system.

However, the impact of new EU immigration is most likely to have been felt at the low-skill end of the labour market, increasing competition for jobs amongst low-skilled and younger workers, while potentially lowering real wages. It has also put strains on public services in some areas due to a concentrated and sudden influx of migrants, while limiting the UK's ability to control its own borders and tackle cross-border crime.

Due to these side-effects, and the understandable impact they can have on public opinion, EU free movement needs to be handled with political care and attention. Unfortunately, recent errors of judgement by both the UK Government and the European Commission are only likely to undermine public confidence in free movement.

The previous government clearly underestimated the impact that EU enlargement would have on increasing net EU immigration flows, suggesting the net immigration of Eastern European migrants would range between only 5,000 and 13,000 a year. In fact, it averaged around 42,000 a year between 2004 and 2010. This is likely to have decreased public confidence in EU free movement.

The current legal dispute between the UK Government and the European Commission over the UK's 'right to reside test' concerning EU nationals' access to benefits is also likely to fuel public distrust of free movement and represents a public relations own goal for the Commission.

Open Europe recommends that the UK remain committed to free movement but, in order to keep an increasingly sceptical public on board, that the following reforms be pursued:

- The UK should work with other EU member states and the European Commission for a reformed, more transparent system that gives member states more discretion in enacting safeguards against undue strains on public finances and welfare systems. The Commission should drop its challenge against the UK's 'right to reside test' and instead pursue reform of the current EU system on access to benefits which is both confusing and illogical.
- A more effective system of statistics and planning should be put in place in order to avoid sudden strains on public services and improve public debate on immigration.
- For future EU enlargements, tighter transitional controls might be necessary, based on more objective criteria such as relative GDP per capita rather than the arbitrary time-limited controls used up to now.
- Domestic policies targeted at creating incentives for UK citizens to work and improving their skill levels is far more important than bearing down on EU free movement. Since 1998, at least three million new jobs were created in the UK but they have increasingly been filled by EU and non-EU workers. This is a UK problem, not an EU one.

1. INTRODUCTION

Immigration is an issue that can have a major social and economic impact on individual people's lives and consequently it is politically sensitive. Perceptions are often just as significant as statistical and academic evidence in the public debate on immigration and asylum. Therefore, policymakers and politicians need to be aware of both these aspects when assessing the impact of their immigration policies.

This paper is not concerned with UK immigration policy *per se* but only the aspects that are influenced by or have been outsourced to the EU.

The enlargement of the EU to several Central and Eastern European countries in 2004 has contributed to radically increasing the political salience of immigration over the last decade. The EU's growing role in asylum legislation has also increased the EU's influence over national immigration and asylum policies. EU-level immigration policy essentially concerns two aspects:

External third-country immigration to the EU, which includes asylum, visas, the EU's external borders, and non-EU economic migration:

The UK's cooperation in EU external immigration and asylum policy is limited. It has chosen to retain its own border controls and visa policy. However, the UK does have the right to opt in to new EU legislation in this area and successive governments have chosen to do so, although this applies almost exclusively to EU asylum legislation and measures to combat illegal immigration. The UK does not take part in legislation regarding third-country economic immigration into the EU.

Internal migration of EU/EEA nationals under the EU's freedom of movement rules:

Whereas the UK participates selectively in EU policy on asylum and immigration, the free movement of workers and people within the EU's borders is one of the four 'fundamental freedoms' of the Union, dating back to the 1957 Treaty of Rome.¹ It is therefore deeply entwined with the UK's membership of the EU and the UK has extremely limited control of immigration of EU and European Economic Area (EEA)² nationals.

Table 1: The pros and cons of EU-level external and internal immigration policies

Pros	Cons
EU asylum and external immigration policy	
<p>An inherently cross-border issue that requires cross-border policies</p> <p>As the EU has internal free movement it needs coordination of its external borders</p> <p>Safeguards for countries which tend to be the end destination for illegal migrants or asylum seekers</p> <p>Under the current arrangement, the UK can pick and mix which measures it wants to be part of</p>	<p>Loss of some national control over a hugely politically sensitive area, albeit limited through the UK's 'pick-and-mix' approach</p> <p>ECJ jurisdiction creates an element of unpredictability in how rules will be interpreted and enforced once agreed</p>
EU free movement of people and workers	
<p>Can boost economic growth and productivity</p> <p>Can improve demographics and therefore have a positive short-term impact on a country's fiscal position, although long-term impact is unclear</p> <p>Migrants less likely to claim benefits than UK nationals</p> <p>Circular migration boosts Europe's overall productivity and economic dynamism</p>	<p>An extremely sensitive political issue, particularly regarding its impact on low-skilled sector of the economy</p> <p>Loss of national control over immigration controls as 27% of net immigration is from the EU</p> <p>More difficult to control cross-border crime and combat illegal immigration</p> <p>Can crowd out native people from the job market, although evidence in the UK suggests that structural employment is unaffected by EU migration</p> <p>Can put strains on public services in areas where there is a sudden influx of migrants (e.g. post-EU enlargement in 2004)</p>

¹ See Article 48 of the Treaty of Rome, http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf

² EEA also includes Norway, Iceland and Lichtenstein, which are not members of the EU

2. EU-LEVEL ASYLUM AND EXTERNAL IMMIGRATION POLICY

2.1. Background

The UK is not a party to the EU's border-free Schengen area³ because it did not sign the 1985 Schengen Agreement, which means it retains the ability to enforce its own border controls. Nonetheless, the UK does participate in some of the police and judicial cooperation elements of Schengen.⁴ The UK can also apply to opt in to other areas of the Schengen system but this is subject to the unanimous agreement of the Schengen states.

Under the EU Treaties, the UK has the right to decide whether to opt in to new EU laws in the area of Justice and Home Affairs (JHA) – including asylum and immigration law – on a case-by-case basis.

The UK has to communicate its decision to opt in within three months from the publication of a proposal by the European Commission if it wants to take part in negotiations. The UK can alternatively choose to opt in to a new law after it has been agreed by other member states. However, decisions to opt in are irreversible, meaning that if the UK opts in to a proposal it cannot opt out again if it is not satisfied with the final outcome of negotiations, which in most cases are decided by Qualified Majority Voting (QMV).

The European Court of Justice (ECJ) has full jurisdiction over EU asylum and immigration law.⁵

2.2 EU asylum policy

Asylum applications made in the UK must now be processed in line with the minimum requirements set out in the EU legislation that the UK has signed up to.⁶

The Treaty of Amsterdam, which entered into force in 1999, granted the EU competence in asylum and immigration, and EU leaders agreed to develop a Common European Asylum System. To achieve this, the member states adopted the following measures between 2000 and 2005, which constituted the first phase of legislation:⁷

- The EURODAC Regulation, establishing a fingerprint database to assist in the identification of asylum seekers (December 2000);
- The Dublin II Regulation, determining which Member State has jurisdiction to examine and decide an asylum application (February 2003);
- The Temporary Protection Directive, on minimum standards for providing temporary protection in the event of a mass influx of displaced persons (July 2001);
- The Reception Conditions Directive, laying down minimum standards for the reception of asylum seekers (January 2003);
- The Qualification Directive, laying down minimum standards for qualification and status as either a refugee or a beneficiary of subsidiary protection (April 2004);
- The Asylum Procedures Directive, laying down minimum standards on procedures for the granting and withdrawing of international protection (December 2005).

³ The Schengen area now includes 25 countries, 22 EU member states plus Norway, Iceland and Switzerland.

⁴ Under Council Decision 2000/365/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:131:0043:0047:EN:PDF>. Every time an EU proposal is put forward which amends or replaces Schengen-related measures the UK has previously signed up to, the Government is given three months to state whether it wants to opt out of the proposal – otherwise, the UK is deemed to be participating

⁵ For a broader discussion on the powers of the ECJ, see *Open Europe*, 'An unavoidable choice: More or less EU control over UK policing and criminal law', January 2012, <http://www.openeurope.org.uk/Content/Documents/Pdfs/JHA2014choice.pdf>

⁶ The UK is also bound by international human rights law and the European Convention on Human Rights (ECHR)

⁷ See *House of Lords, European Union Committee*, 'Asylum directives: scrutiny of the opt-in decisions', First Report of Session 2009-2010, December 2009, <http://www.publications.parliament.uk/pa/ld200910/ldselect/lddeucom/6/6.pdf>

The UK signed up to the entire package of this first phase of legislation. In addition, the UK signed up to a 2010 Regulation establishing the European Asylum Support Office.⁸ The UK also participates in the European Refugee Fund⁹ and the European Integration Fund.¹⁰ However, these time-limited funds are renewed or extended on a rolling basis through ad hoc decisions, meaning that the UK has to notify its intention to opt in to each decision and could therefore pull out of one or both of these funds if it wished to.

a) Successive governments have taken a pick-and-mix approach

Since 2005, the European Commission has sought to amend the first phase of laws the UK signed up to between 2000 and 2005, setting down tighter and more detailed rules in many of these areas. However, although the previous Labour Government participated fully in the first wave of EU asylum legislation, it chose not to opt in to any of these amending proposals, apart from the replacement 'Dublin II' Regulation,¹¹ and the proposal to amend EURODAC, which it did opt in to.

Due to the prolonged stalemate in negotiations, the European Commission had to re-table its proposal for EURODAC, which supplements the Dublin Regulation, meaning that it was the Coalition Government which took the decision to opt in to the latest proposal.¹²

Like its predecessor, the Coalition Government decided to opt out of proposals to replace the current Directives on reception conditions for asylum seekers and the procedures for granting and withdrawing asylum.¹³ Immigration Minister Damian Green told Parliament, "This Government does not support a common asylum system in Europe. That is why we have not opted in to these directives and will not opt in to any proposal which would weaken our border."¹⁴

However, despite not opting in to the post-2005 amending proposals, apart from the Dublin System, the original un-amended first phase legislation continues to apply to the UK. The Labour Government argued that the UK's refusal to opt in to amending legislation would mean the old legislation would cease to apply to the UK.¹⁵ However, the current Government¹⁶ and the Commission¹⁷ both now agree that the old legislation continues to bind the UK.

This suggests a degree of cross-party consensus on the benefits of the EU's so-called 'Dublin System' on asylum.

b) What are the benefits of EU asylum legislation?

The Dublin System, in combination with the EURODAC database, ensures that responsibility for asylum claims falls on the EU member state where an asylum seeker first arrives in the EU.¹⁸ Consequently, the UK can send asylum seekers back to the member state which has responsibility for the asylum application, whether it is a legal or illegal application.

8 Regulation (EU) No 439/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>

9 See Decision No 573/2007/EC of the European Parliament and the Council establishing the European Refugee Fund for the period 2008 to 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:144:0001:0021:EN:PDF>

10 See Council Decision 2007/435/EC establishing the European Fund for the Integration of third-country nationals for the period 2007-2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:168:0018:0036:EN:PDF>

11 *European Commission*, 'Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast)', 3 December 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF>

12 Due to the prolonged stalemate in negotiations, the European Commission had to table three separate amending proposals for the EURODAC Regulation in 2008, 2009 and 2010. The Labour Government opted in to both the 2008 and 2009 proposals. In November 2010, the newly-elected coalition Government argued that the latest Commission draft reflected "a significant change in scope such that this can be considered a new proposal that triggers the opt-in", see Immigration Minister Damian Green's letter to the *House of Commons' European Scrutiny Committee*, 19 November 2010. For further details, see House of Commons, European Scrutiny Committee, 'Documents considered by the Committee on 19 January 2011 - EURODAC', January 2011, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xiii/42820.htm>

13 The Commission made new proposals for these Directives after original negotiations failed. Therefore, the Coalition had to decide again on behalf of the UK whether to opt in

14 Written Ministerial Statement, 13 October 2011, <http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-asylum-opt-in-decision/?view=Standard&pubID=951407>. The previous Labour Government had decided not to sign up to an earlier draft of the Directive for very similar reasons – see, for instance, Lord West of Spitehead's statement to the House of Lords, as quoted by the Guardian, 'Home Office to opt out of asylum claims EU directive', 24 February 2010, <http://www.guardian.co.uk/uk/2010/feb/24/home-office-opt-out-asylum-eu-directive>

15 The Labour Government's view was not shared by the House of Lords, see *House of Lords, European Union Committee*, 'Asylum Directives: Scrutiny of the opt-in decisions'

16 See, for instance, the exchange of letters between Immigration Minister Damian Green and the Home Affairs sub-committee of the House of Lords' European Union Select Committee, July-October 2011, <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/cwm/cwmsubfinaljune11onwards.pdf>

17 The Commission has made clear that the UK remains bound by the existing Directives in the preamble to its revised amending proposals, see *European Commission*, 'Amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (recast)', 1 June 2011, p20, [http://ec.europa.eu/home-affairs/news/intro/docs/110601/319/1_EN_ACT_part1_v12\[1\].pdf](http://ec.europa.eu/home-affairs/news/intro/docs/110601/319/1_EN_ACT_part1_v12[1].pdf); see also *European Commission*, 'Amended proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers (recast)', 1 June 2011, p16, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF>

18 Member states are allowed to voluntarily take charge of asylum applications where others are responsible under the Regulation

The previous Labour Government and the Coalition have both stressed the benefits of the UK participating in the Dublin System. In January 2010, the then Labour Immigration Minister Phil Woolas said in a statement,

“We, indeed, are the major beneficiary of the Dublin II agreement because we are, along with Sweden, a final destination on those routes.”¹⁹

In January 2011, Immigration Minister Damian Green explained the current Government’s decision to opt in to the Commission’s revised proposal to amend the EURODAC Regulation as follows,

“The Government are committed to the Dublin system, of which EURODAC is an essential part, as it helps tackle the problem of people abusing asylum systems across Europe by making multiple claims in different EU member states.”²⁰

As noted above, a proposal to replace the Dublin System was tabled by the Commission in 2008 but agreement seems a distant prospect. Crucially, the Commission and some member states (particularly those on the Mediterranean, which are directly exposed to the flow of refugees from North African countries) are keen on introducing some form of ‘burden sharing’ among all 27 EU member states when it comes to asylum seekers. The issue came under the spotlight when tens of thousands of North African refugees reached Italian and Maltese shores in the wake of the ‘Arab Spring’.²¹

In its 2008 proposal, the Commission stopped short of suggesting any mandatory burden-sharing scheme, but included the possibility of an EU member state demanding that the returns of asylum seekers to its territory under the Regulation be suspended if the country “is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure.”²²

One of the latest ideas put forward by the Commission to try and unblock negotiations has been the introduction of an “asylum evaluation mechanism”, which might be used as an early warning tool to prevent asylum crises.²³ However, there is no appetite among EU member states for a mandatory burden-sharing scheme for asylum seekers.

In theory, the UK could be outvoted on the newly amended Dublin System, because this measure will be decided by QMV.

c) EU asylum law and the courts

The establishment of an EU asylum policy has given an extensive role to the EU and national courts to interpret this legislation. The Lisbon Treaty extended the jurisdiction of the ECJ over the application of EU asylum law.²⁴ In addition, the incorporation of the Charter of Fundamental Rights means that the ECJ can rule that a member state has improperly implemented EU law in any policy area, if it breaches the rights set down in the Charter.²⁵

A recent ruling by the ECJ in December 2011 highlighted the impact that the Charter can have on Britain when applying EU law on asylum. The ECJ ruled that the UK could not deport an Afghan asylum seeker to the EU member state designated as responsible for the asylum application under the Dublin System

19 See Phil Woolas’ statement to the House of Commons’ Second Delegated Legislation Committee, 25 January 2010, <http://www.publications.parliament.uk/pa/cm/cm200910/cmgeneral/deleg2/100125/100125s01.htm>

20 Hansard, 11 January 2011: Column 11WS, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110111/wmstext/110111m0001.htm>

21 See Il Corriere della Sera, “Permesso agli immigrati? È presto. Maroni: Che senso ha stare nella UE?”, 11 April 2011, http://www.corriere.it/esteri/11_aprile_11/immigrati-direttiva-ue-permessi-bocciatura_fd3d5632-643c-11e0-a775-19c5c2b0b4ec.shtml

22 European Commission, ‘Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’, Article 31, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF>. The UK has opposed this ‘emergency suspension’, with Immigration Minister Damian Green pointing out in an explanatory memorandum, “In our view, this would undermine the fundamental principle of the [Dublin II] Regulation – that member states take responsibility for the asylum claims that fall to them to decide. It would also reward those member states that do not invest properly in their asylum systems, by expecting other member states to take responsibility for their asylum seekers” – see *House of Commons, European Scrutiny Committee*, ‘Documents considered by the Committee on 24 May 2011 – Migration’, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxviii/42811.htm#note67>

23 See the press release following the meeting of EU interior ministers on 22-23 September 2011, p8, http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/124713.pdf

24 ECJ judges had the power, prior to Lisbon, to rule on the meaning of EU laws following references from the member states’ highest courts (e.g. the Supreme Court in the UK). Now, under Lisbon, the ECJ can decide upon such references from any national court

25 The rights set down in the Charter only apply when the UK implements EU law

(Greece),²⁶ because there were “substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.”²⁷

The UK’s Supreme Court has also made important rulings, for instance, on the interpretation of the Reception Conditions Directive in July 2010.²⁸

2.3 EU immigration policy on third country economic migrants

Since the Amsterdam Treaty, the EU has also agreed a number of immigration laws regarding economic migration to the EU from third countries. These cover the entry of highly-skilled third-country migrants,²⁹ rules on family reunification³⁰ and Directives on seasonal workers and the transfer of foreign workers within multinational companies. However, given its position outside the EU’s border-free Schengen area, the UK has consequently decided to retain control of its border policy and has not opted in to any of these measures.³¹

When the then Labour Government declined to opt in to a directive setting time-limits for the pre-deportation detention of illegal migrants, the EU’s Returns Directive, then Immigration Minister Phil Woolas explained,

“We prefer to formulate our own policy, in line with our stated position on retaining control over entry and stay.”³²

However, the UK has signed up to some of the EU’s measures designed to combat ‘illegal immigration’.³³

The UK also partially participates in Frontex, the EU’s border agency, with observer status on the Frontex Management Board, and has been involved in several joint operations. Frontex’s tasks include coordinating national border agencies’ operations, helping to train national border guards and coordinating joint returns of illegal migrants to their countries of origin.³⁴

Between 2010 and 2011, the UK was involved in several Frontex missions aimed at helping EU member states (notably Ireland, the Netherlands and Sweden) to arrange the repatriation of third-country migrants issued with an expulsion order.³⁵

Furthermore, although the UK does not take part in the EU’s external economic migration policy, the EU does conclude Free Trade Agreements (FTAs) with third countries which entail provisions on the temporary movement of personnel supplying services, as in the case of the agreement with South Korea signed in October 2010.³⁶ The Coalition Government argued that these provisions were subject to an opt-in decision as any other immigration measure would be, and decided to sign up to them. However, the legal status of this opt-in remains unclear.³⁷

26 The EU’s Dublin II Regulation allocates responsibility for processing each asylum-seeker’s application to a single member state based on which member state’s border the asylum-seeker illegally crossed first, in this case Greece

27 See *ECJ*, ‘N.S. vs Secretary of State for the Home Department’, Case C-411/10, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-12/cp110140en.pdf>

28 See *UK Supreme Court*, ‘R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2010] UKSC 36’, Press Summary, 28 July 2010, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0151_PressSummary.pdf

29 The EU’s ‘Blue Card’ scheme, designed to grant highly-skilled workers from outside the EU the right to reside and work in an EU member state, see Directive 2009/50/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:155:0017:0029:EN:PDF>

30 The Family Reunification Directive, setting out the conditions under which non-EU nationals residing in an EU member state are granted family reunification, see Directive 2003/86/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>

31 For a broader discussion, see Professor Steve Peers, ‘A proposal for an EU immigration code’, *Statewatch analysis*, January 2012, <http://www.statewatch.org/analyses/no-167-immigration-code-steve-peers.pdf>

32 Written Ministerial Answer, 2 November 2009, <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091102/text/91102w0017.htm>

33 These include the Carriers Sanctions Directive, which obliges carriers (applying to all air, sea and coach carriers) to return any third-country nationals that they have carried onto national territory without the necessary travel documents, and Readmission Agreements with non-EU countries, which standardise procedures for the repatriation of illegal migrants who travel to the EU-27 from one of the contracting non-EU states

34 See the *Frontex* website, http://www.frontex.europa.eu/origin_and_tasks/tasks/

35 See *Frontex*, ‘Examples of accomplished operations’: Iraq 2011, http://www.frontex.europa.eu/examples_of_accomplished_operati/art151.html; Nigeria 2011, http://www.frontex.europa.eu/examples_of_accomplished_operati/art146.html; Nigeria and Cameroon 2010, http://www.frontex.europa.eu/examples_of_accomplished_operati/art152.html

36 These are the so-called ‘Mode 4’ provisions. The EU-South Korea agreement provisionally entered into force on 1 July 2011, after it was approved by MEPs and ratified by the Korean National Assembly, see http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm; it is also worth noting that the FTA with Korea is an agreement “between the EU and its member states, of the one part, and the Republic of Korea, of the other part”, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>

37 See Minister for Employment Relations Edward Davey’s letter to the House of Commons’ European Scrutiny Committee, www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428iv/428iv09.htm; See House of Lords, European Union Committee, ‘Ministerial correspondence from 18 May to 30 November 2010, p40, <http://www.parliament.uk/documents/lords-committees/eu-sub-com-a/CWM/CwMSubAMay-Oct10.pdf>

In particular, although the Government argues that it has the right to opt in to the immigration aspects of the agreement, it is not clear whether this is so much a choice or rather a formality once the trade deal is agreed. The EU is currently negotiating a FTA with India,³⁸ which could include similar arrangements on the movement of personnel.

2.4 The best of both worlds?

After the initial wave of EU legislation on asylum, the UK's approach can be characterised as tending to opt in to coercive measures, such as the Dublin System and those combating illegal migration to the EU, while opting out of those measures that governments have felt would involve giving up too much power or interfere with UK practice.

It has been argued that the decisions not to opt in to EU measures on procedural rights and reception conditions have diminished asylum seekers' rights.³⁹ Another argument is that declining to take part in the EU's external economic migration policies could place the UK at a disadvantage in the race for new talent from third countries.⁴⁰

There is clearly an intellectually and a politically consistent case for more coordination and cooperation in – and even harmonisation of – immigration and asylum policy across Europe. There are a number of reasons for this. Fundamentally, immigration is, per definition, a cross-border issue that ultimately requires cross-border policies in one form or another. The EU's geographical position, bordering Africa to its South and Asia and Russia to its East, makes it highly exposed to influxes of people from an unusually wide area, not least via illegal immigration. Dramatic scenes of boats crossing the Mediterranean Sea carrying North African immigrants provide a stark illustration of this. Irrespective of whether one believes in more or less liberal immigration policies, there is a strong case for addressing this combined geographical, economic and political challenge at the EU-level.

However, this must be set against the extremely sensitive nature of immigration and how closely this is linked to the 'social contract' between governments and their citizens. Ultimate control over one's borders remains an integral part of a nation's right to democratically govern itself, in addition to such powers as taxation and the monopoly of force. To 'outsource' this area to the EU is politically very difficult, potentially eroding the support for the entire European project. While an attractive deal in principle, it is therefore not surprising that the Commission has struggled to gain support for its proposal for 'burden sharing' amongst EU member states. With respect to external immigration policies, it is finding the balance between these two considerations that is essential, and why the 'opt-in' arrangement is a valuable asset to the UK.

However, on a practical level, the UK's decisions to remain outside the reforms to EU asylum measures may undermine its position when seeking to use the Dublin system. The European Commission has stated,

*"The opt-in system has never, and should never be seen as giving the Member States that are within that system the possibility of 'cherry picking'."*⁴¹

The cross-referencing of measures that do and do not apply to the UK could therefore potentially create legal and procedural confusion in the future.⁴²

38 See the European Commission's website, http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm#h2-2

39 See, for instance, Justine N. Stefanelli, 'A rule of law analysis of the potential UK opt-in to the newly tabled EU Asylum Procedures and Reception Conditions Directives', *The Bingham Centre for the Rule of Law, British Institute of International and Comparative Law (BIICL)* – Working Paper prepared for a BIICL event on, 'The EU Asylum Directives: Is opting in necessary?', London, 24 November 2011, http://www.biicl.org/files/5781_uk_opt_in_working_paper_-_bingham_centre.pdf

40 See, for instance, Dr Cathryn Costello, 'UK migration policy and EU law', *Oxford University Migration Observatory*, 11 August 2011, p8, http://migobs.vm.bytemark.co.uk/sites/files/migobs/UK%20Migration%20Policy%20and%20EU%20Law_0.pdf

41 *House of Lords, European Union Committee*, 'Asylum Directives: Scrutiny of the opt-in decisions', p16

42 However, in a letter sent to the Home Affairs sub-committee of the House of Lords' European Union Committee on 28 July 2011, Immigration Minister Damian Green wrote, "We have...attempted to remove cross-references to the [Reception Conditions and Asylum Procedures] Directives from the Dublin proposal during negotiations and have been successful in removing many, for example those that suggest that Member States must be complying with the Reception Conditions Directive in its entirety or risk having transfers suspended," see *House of Lords, European Union Committee*, Ministerial correspondence from 8 June to 26 October 2011, p5-6, <http://www.parliament.uk/documents/lords-committees/eu-sub-com-ficwm/cwmsubffinaljune11onwards.pdf>

In addition, the UK's 'pick-and-mix' approach to EU immigration and border policy has left it unable to take part in some measures that it wished to take part in. The UK has challenged at the ECJ its legal exclusion from three EU border measures with a security aspect: the creation of Frontex; EU measures on biometric passports; and the decision allowing police services to access data in the EU Visa Information System. In effect, the ECJ ruled that the UK cannot participate in border control/enforcement measures which are framed as 'Schengen-building' without adopting the underlying rules on border crossings first.⁴³

However, as the UK's participation in Frontex operations outlined above shows, the UK is able to cooperate practically with other EU countries in this area without being legally bound by EU law. Nevertheless, successive governments' decision to take a pick-and-mix approach to EU cooperation on external migration and asylum policy illustrates a degree of cross-party consensus on the desirable scale of EU involvement in this area.

⁴³ Dr Cathryn Costello, 'UK migration policy and EU law', *Oxford University Migration Observatory*, p5

3. INTERNAL MIGRATION OF EU NATIONALS UNDER FREEDOM OF MOVEMENT

In the public debate about immigration, internal EU migration is an essential element as the UK Government cannot limit EU/EEA nationals' immigration under EU law. In addition, enlargement of the EU to a poorer bloc of nations in 2004 and 2007 has created incentives and opportunities for nationals from these countries to come to the UK. At the same time, UK citizens also enjoy the rights of free movement across the EU. According to the EU's statistics body Eurostat, almost one million UK citizens were residing in another EU member state in 2010.⁴⁴

3.1 The facts and controversies of free movement

a) What rights do EU nationals have to come to the UK?

Under the EU Treaties, all nationals of EU member states are also 'EU citizens', and "have the right to move and reside freely within the territory of the [EU] member states, subject to the limitations and conditions laid down in the Treaties."⁴⁵ Citizenship of the EU now provides rights of free movement not only for the economically active, but also for job-seekers, students and pensioners. The centrepiece of EU free movement legislation is the Free Movement Directive.⁴⁶

The Directive makes clear that the right to move and reside freely within the EU is not absolute. In fact, a national of an EU member state and his/her family can reside for up to three months in another member state, provided that they do not become an "unreasonable burden" on the social assistance system of the country they move to. After three months, the person will have to prove that he/she has a job in that country, or has "sufficient resources" to keep living there without becoming a burden.⁴⁷ In addition, if a national of an EU member state resides legally in another member state for a continuous period of five years, he/she gains the right of "permanent residence" in that member state.

In theory, nationals of EU member states cannot remain in another EU country for more than three months unless they have a job, are students or have sufficient economic means to extend their stay without becoming a burden on the welfare system of the host member state. However, the Directive provides for a series of exceptions restricting national governments' ability to expel people who do not meet these requirements. For example, a national of an EU member state who moves to the UK to find a job can remain in the UK for more than three months if this person can prove that he/she is continuing to seek employment and has "a genuine chance" of finding work.⁴⁸

This means that, in practice, the Directive largely restricts national governments' rights to refuse entry or expel citizens of other EU member states to reasons of "public policy, public security or public health". Although, again, there are exceptions and conditions to be met before people can be expelled in these cases.⁴⁹

The EU's Free Movement Directive also grants a number of rights to certain family members of EU nationals – regardless of whether they are EU member state nationals themselves.⁵⁰ For example, non-EU family members have the right to obtain entry visas to the EU, where required, through an "accelerated procedure". Once they enter the territory of the host member state, non-EU family members enjoy the same 'right of residence' as the person they are accompanying – provided that they hold a valid passport. The Free Movement Directive extends the right to 'equal treatment' – including access to social assistance – to non-EU family members who have the right of residence or permanent residence in the host member state.⁵¹

44 Eurostat, '6.5% of the EU population are foreigners and 9.4% are born abroad', Statistics in focus No 34/2011, see Figure 4, p3, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF

45 See Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU)

46 Directive 2004/38/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

47 The Directive also establishes that a person who intends to remain in the host EU member state for more than three months may also be required to register with the country's national authorities

48 See Article 14(4b) of Directive 2004/38/EC. Further exceptions are provided under Article 7(3) of the Directive

49 As regards reasons of public policy or public security, Article 28 of Directive 2004/38/EC states that "before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration in the host member states and the extent of his/her links with the country of origin." Further restrictions apply to minors and people who have resided in the host member state for the previous ten years, who can only be expelled "on imperative grounds of public security"

50 The following are considered as 'family members' under Article 2(2) of Directive 2004/38/EC: the spouse; the partner with which a person has contracted a registered partnership, provided that the host member state considers registered partnerships as equivalent to marriage; all the direct descendants of both the person and his/her spouse/partner who are under 21 or are dependants; the dependent direct relatives in the ascending line of both the person and his/her spouse/partner (e.g. parents, grandparents, etc.). Article 3(2) of the Directive establishes that EU member states shall also "facilitate entry and residence" for any other family members who require personal care for serious health reasons, and for the partner with whom the person has "a durable relationship, duly attested"

51 See Article 24(1) of Directive 2004/38/EC

This has proved controversial, being cited as an incentive for ‘sham marriages’ and abuses of member state welfare systems. Crucially, family members who have the right of residence in the host EU member state under the Directive are also entitled to take up employment or self-employment there, “irrespective of nationality”.⁵²

Box 1: France and the repatriation of Roma

In August 2010, France launched a plan to dismantle unauthorised Romany camps and repatriate Roma people who were ‘illegally’ residing in France.⁵³ The French authorities argued that these people were not being ‘expelled’ from France, as they were being paid (€300 per adult and €100 per minor) to take part in a ‘voluntary return’ scheme.⁵⁴

The move put France on a collision course with the European Commission, especially after the French press leaked a letter from the French Interior Ministry instructing the police to target Roma camps “as a priority”.⁵⁵ EU Justice Commissioner Viviane Reding was particularly vocal in her criticism, stating that,

“I personally have been appalled by a situation which gave the impression that people are being removed from a member state of the EU just because they belong to a certain ethnic minority. This is a situation I had thought Europe would not have to witness again after the Second World War.”⁵⁶

What the Commission was questioning in this specific case was not France’s right to maintain public order on its territory, but rather the fact that Roma were being targeted as an ethnic group rather than on an individual case-by-case basis.⁵⁷ Subsequently, France had to give the Commission explicit reassurances that this was not the case, changing its policy to state that illegal camps should be removed “whoever the occupiers.”⁵⁸

However, the Commission continued to argue that France had not transposed ‘procedural safeguards’ under the Free Movement Directive into national law, allowing EU nationals to appeal against their expulsion. France was given one month to comply or face a fully-fledged EU infringement procedure, ultimately decided by the ECJ.

In October 2010, the Commission decided to drop the case, after France made a commitment to amend its immigration laws in order to ensure that the Free Movement Directive was ‘correctly transposed’. However, by the time the dispute was resolved, France had already repatriated over a thousand Roma.⁵⁹

In the end, this case resulted in a political/legal fudge over France’s correct transposition of the EU’s Free Movement Directive. However, the dispute between Paris and the Commission shows that national governments’ room for manoeuvre on this issue is limited and that general caps or mass repatriations of EU migrants are prohibited under the EU Treaties.

b) Free movement and access to welfare benefits

Social benefits are generally divided into two broad categories: ‘social security’ benefits and ‘social assistance’ benefits.⁶⁰ The EU’s Free Movement Directive establishes that EU member states are not obliged to provide “social assistance” (e.g. housing benefit and Council Tax benefit) to nationals of other EU countries during their first three months of residence, or if their only grounds for remaining in the UK for longer than three months is that they are actively looking and have “a genuine chance” of finding work. The premise of the Free Movement Directive being that after three months, foreign EU nationals must be either in work, self-sufficient or they lose their right to stay in the host member state.

Confusingly, social security benefits (e.g. sickness benefits, maternity/paternity benefits, and others) are covered by a separate EU Regulation, which establishes that these benefits must be made available to all nationals of EU member states without discrimination but can only be claimed by people who are ‘habitually resident’ in the member state.⁶¹

However, the exact extent to which EU migrants are entitled to benefits is constantly subject to judicial examination and, as a result, the ECJ and national courts have been key drivers in the development of who

52 See Article 23 of Directive 2004/38/EC

53 *Le Figaro*, ‘Près de 140 Roms devraient quitter Paris vendredi’, 20 August 2010, <http://www.lefigaro.fr/actualite-france/2010/08/19/01016-20100819ARTFIG00328-la-france-renvoie-93-roms-en-roumanie-jeudi.php>

54 *Telegraph*, ‘France begins Roma expulsion’, 19 August 2010, <http://www.telegraph.co.uk/news/worldnews/europe/france/7953528/France-begins-Roma-expulsion.html>

55 The letter is available here, http://www.lecanardsocial.com/upload/illustrations/Libres/Circulaire_du_5ao%C3%BBt_2010.pdf

56 From EU Justice Commissioner Viviane Reding’s ‘Statement on the latest developments on the Roma situation’, 14 September 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/428>

57 *European Commission* press release, ‘European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens’, 29 September 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1207>

58 The revised version of the letter is available here, <http://www.lefigaro.fr/assets/pdf/circulaire-hortefeux.pdf>

59 *EUobserver*, ‘EU drops charges against France on Roma’, 19 October 2010, <http://euobserver.com/24/31074>

60 The main difference between the two categories is that, unlike social security benefits, social assistance benefits “are provided outside of an organised social insurance scheme and are not conditional on previous payments of contributions”, see OECD, ‘Glossary of statistical terms’, <http://stats.oecd.org/glossary/detail.asp?ID=2477>

61 See Regulation (EC) No 883/2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:200:0001:0049:EN:PDF> – Article 4 of the Regulation states, “Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any member state as the nationals thereof”

should be entitled to benefits. For example, the UK's mechanism for deciding who is entitled to benefits is currently the subject of a dispute between the European Commission and the UK Government (see Box 2). Under the EU Treaties, the ECJ has the ultimate decision on how the Free Movement Directive and the rules governing access to welfare benefits are applied, which means that national governments have given up a substantial amount of control over their welfare systems.

Box 2: The UK's 'right to reside' test – a violation of EU free movement rules?

The UK grants certain social benefits (e.g. Child Benefit, Child Tax Credit, State Pensions Credit, and others) only to persons with a 'right to reside' in the UK.⁶² For others, such as contribution-based Jobseekers' allowance, UK and EU nationals do not need to pass the right to reside test. UK and Irish nationals enjoy the 'right to reside' automatically because of their citizenship, while nationals of other EU member states need to satisfy the test, which essentially requires EU nationals to meet the conditions set down in the Free Movement Directive (e.g. people must be economically active or have enough resources to support themselves).⁶³

In September 2011, the European Commission issued the UK with a 'reasoned opinion', arguing that the test violates EU law. The Commission said that the UK "indirectly discriminates" against nationals of other EU member states.⁶⁴

The Commission has argued that, under EU rules on social security coordination, the UK already has the means to grant social benefits only to people who 'habitually reside' in the UK. This EU definition of 'habitual residence' primarily derives from ECJ case law.⁶⁵ The criteria include: the duration and continuity of presence in a specific EU member state; the place where the person habitually works; the place where the person is deemed to reside for taxation purposes; and others.⁶⁶

The Commission appears to suggest that the UK does not, therefore, need its own 'right to reside test' for social security benefits, since the EU's definition of a 'habitual resident' already provides member states with a "powerful tool... to make sure that these social security benefits are only granted to those genuinely residing habitually within their territory."⁶⁷

The Commission also objects to the UK applying the 'right to reside' test to benefits beyond those covered under the Free Movement Directive (where it is allowed to differentiate between UK and other EU nationals) to those covered by the EU Social Security Coordination Regulation (as these are supposed to be covered by the EU-level test).⁶⁸

There is a substantial body of case law on the test. The UK Supreme Court's judgment in the *Patmalniece* case is particularly significant.⁶⁹ In its ruling, the Court ruled that the right to reside test constituted indirect discrimination against non-UK/Irish nationals, since UK/Irish nationals pass the test automatically. However, the Court concluded that this discrimination was "justified" as a "proportionate response to the legitimate aim of protecting the UK public purse."⁷⁰

The Government has suggested that complying with the Commission's demands could add £2bn a year to the benefits bill⁷¹ – although how the figures were reached remains unclear.⁷²

The Commission has cited examples of people who have been denied benefits they should have been entitled to. However, without specific knowledge of the individual cases it is difficult to know which party is on firmer ground. The legal aspects surrounding the dispute are therefore complicated and the final outcome of the dispute unknown, particularly as the Commission's 'reasoned opinion' against the UK is not publicly available.⁷³

The Commission's approach risks a public backlash. A more pragmatic option would be to seek to clarify and reform the existing system, which is confusing and opaque.

62 The 'right to reside' requirement does not apply to claims for all kinds of benefits. For example, it does not cover Statutory Maternity Pay and Statutory Sick Pay, which fall under the social security category of benefits.

63 See, for instance, the page dedicated to the Child Benefit on the *HM Revenue & Customs* website, <http://www.hmrc.gov.uk/childbenefit/start/who-qualifies/new-arrivals-uk.htm>

64 *European Commission* press release, 'Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits', 29 September 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1118&format=HTML&aged=0&language=EN>

65 Particularly in Case C-90/97 Swaddling [1999] ECR I-1075, see paragraph 29, p10-11, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997CJ0090:EN:PDF>

66 See Article 11 of Regulation (EC) No 987/2009 of the European Parliament and the Council, which lays down the procedure for implementing the Social Security Coordination Regulation, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:284:0001:0042:EN:PDF> – The list of criteria provided by this Regulation is not exhaustive

67 *European Commission* press release, 'Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits'

68 Article 1(z) of Regulation (EC) No 883/2004 defines 'family benefits' as "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I"

69 Mrs Patmalniece, a Latvian pensioner, came to the UK in June 2000 (i.e. when Latvia had not yet joined the EU) and managed to remain in the UK despite her asylum request being unsuccessful. After Latvia joined the EU in 2004, Mrs Patmalniece was denied State Pension Credit because she did not have a right to reside in the UK. She appealed against the refusal arguing that she was being directly discriminated because of her nationality. The full judgment is available here, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0177_Judgment.pdf

70 This last conclusion was agreed by majority, with Lord Walker dissenting, see *UK Supreme Court*, 'Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)', [2011] UKSC 11, 16 March 2011, press summary, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0177_PressSummary.pdf

71 See Iain Duncan Smith's op-ed in the *Telegraph*, 'Brussels poses serious threat to our welfare reforms', 30 September 2011, <http://www.telegraph.co.uk/news/uknews/immigration/8798443/Brussels-poses-serious-threat-to-our-welfare-reforms.html>

72 See *Channel 4 News*, 'FactCheck: "Benefit tourism" scare sent packing', 30 September 2011, <http://blogs.channel4.com/factcheck/factcheck-benefit-tourism-scare-sent-packing/8050>

73 A spokesperson for EU Social Affairs Commissioner László Andor told us that the Commission's reasoned opinion is not publicly available at the moment because the infringement procedure is still under way

c) Transitional controls

Box 3: Who are the 'A8' and 'A2' countries?

The 'A8' countries are the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia, which had GDP per capita levels well below average EU levels when they joined the EU in 2004. Cyprus and Malta, which also acceded in 2004, were essentially treated as equivalent to the existing EU15.

The 'A2' countries, Bulgaria and Romania, which joined in 2007, also continue to have lower levels of GDP per capita than other accession states.

Until May 2011, there was a distinction between EU nationals from the older member states (the EU15 minus the UK) and the A8. With the exception of the UK, Ireland and Sweden, all other EU member states imposed temporary labour market restrictions on A8 nationals. These could be imposed for a maximum of seven years. Now that these measures have expired across the EU, A8 migrants can choose to move to geographically closer countries such as Germany or the Netherlands rather than the UK.⁷⁴

The UK applied different, tougher restrictions on Bulgaria and Romania (the 'A2') when they joined the EU in January 2007, limiting Bulgarian and Romanian nationals to "employment that is either skilled or is in sectors where there continues to be a shortage of labour." In 2010, the Government decided to extend these restrictions until the end of 2013, the maximum timeframe allowed under EU rules.⁷⁵

Although the UK granted nationals from the A8 states immediate access to its labour market, some transitional measures and conditions were applied by the UK to these countries' nationals until 2011. In the UK, A8 migrants were allowed to take up work in the UK from May 2004 by registering under the Worker Registration Scheme (WRS), a requirement that ended in May 2011.

The WRS entitled A8 migrants to some basic benefits, such as Housing Benefit, Council Tax Benefit and Tax Credits, whilst in work and provided they were registered. Only after A8 nationals had worked legally for at least a twelve-month period, without a break of more than 30 days, could they claim social security benefits such as Jobseeker's Allowance. Otherwise, A8 nationals who were work-seekers had to be self-sufficient and could be denied certain income-related benefits under the normal rules of the EU's Free Movement Directive.⁷⁶

It has been argued that the abolition of the WRS should not, in itself, lead to a substantial increase in the number of A8 migrants coming to the UK. On the contrary, the number could actually decrease given that A8 nationals now enjoy the full right to move to countries such as Germany and Austria – which, unlike the UK, decided to apply temporary restrictions on A8 migrants' access to their labour markets.

The end of the WRS also means migrants can access some welfare benefits in the UK more quickly. In particular, A8 nationals will now be entitled to a number of benefits (e.g. housing benefits and Council Tax benefits) which used to be conditional on the fact that they had completed at least one year of continuous and registered work in the UK. However, they will still have to prove that they are habitually resident in the UK.⁷⁷

d) Posted workers

A 'posted worker' is a person who is employed in one EU member state but is sent by his employer to carry out his work in another member state. Therefore, 'posted workers' should not be confused with 'migrant workers', who move to another EU state to seek a job and are employed there.⁷⁸ There are a very limited number of posted workers in the UK.

The main purpose of the EU's 1996 Posted Workers Directive⁷⁹ was to prevent so-called 'social dumping', whereby foreign workers from a country with lower labour standards (e.g. pay levels, rest periods, holiday

74 David McCollum and Allan Findlay, 'Trends on A8 migration to the UK during the recession', ONS, Autumn 2011, p2

75 Written Ministerial Statement from Immigration Minister Damian Green, 23 November 2010, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/wms-eu2.pdf>

76 See Article 24 of Directive 2004/38/EC

77 For a broader discussion, see *Oxford University Migration Observatory*, 'Czechs and balances: What will the May 1st changes mean for Eastern European migration to the UK?', 29 April 2011, <http://migrobs.vn.bytemark.co.uk/sites/files/migrobs/Commentary-czechs%20balances.pdf>

78 See the European Commission's website, <http://ec.europa.eu/social/main.jsp?catId=471&langId=en>

79 Directive 96/71/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:018:0001:0006:EN:PDF>

entitlement, etc.) posted to another EU member state could potentially 'undercut' local workers. To achieve this, the Directive establishes that posted workers must be subject to the same minimum terms and conditions the host member state grants to its resident workers.⁸⁰

The Posted Workers Directive came under fierce criticism in the UK in 2009, when strikes broke out after an Italian sub-contractor of oil firm Total temporarily moved more than 300 of its employees to work at the Lindsey Oil Refinery in Lincolnshire after being awarded a £200 million contract.⁸¹ However, an inquiry carried out by ACAS (Advisory, Conciliation and Arbitration Service) concluded that there was "no evidence" that the companies involved had "broken the law in relation to the use of posted workers or entered into unlawful recruitment practices."⁸²

The debate surrounding the UK dispute was largely based on a misunderstanding of ECJ cases relating to the Directive.⁸³ Then Home Secretary Alan Johnson said that the ECJ had "distorted the original intention" of the Directive in its Laval and Viking rulings. More specifically, the Labour Government seemed to suggest that the two rulings might undermine the right of UK trade unions to strike against foreign workers undercutting local wages.⁸⁴

In particular, the December 2007 Laval judgment largely focussed on the specificities of Swedish industrial relations legislation, where, due to local wage bargaining, it was not clear what the host 'minimum standards' were. The ECJ ultimately ruled that the use of collective strike action was unlawful in this instance but also reinforced unions' rights to strike.

However, the significance of the ECJ ruling for the UK is limited, not least because the UK does not have the same labour market model as Sweden, particularly in terms of collective agreements. Instead, the UK has legislated minimum wages in place and this sets the basic level that posted workers cannot undercut.⁸⁵

The Lindsey Oil Refinery dispute was essentially a dispute about EU free movement – the principle that companies are free to employ foreign workers over UK workers, as long as they comply with UK employment law. That being said, the confusion and lack of transparency regarding what conditions the posted workers were working under helped to fuel the dispute.

3.2. What is the scale of EU migration to the UK?

One of the effects of EU free movement and immigration to the UK from other parts of the world is that it is increasingly difficult to record and account for the numbers of people entering or leaving the UK. In 2008, the House of Lords' Economic Affairs Committee noted,

*"There are significant unknowns and uncertainties in the existing data on immigration and immigrants in the UK. There are insufficient data about people leaving the UK and about short-term immigration to the UK. Existing data do not allow for accurate measurement of the stock of immigrants at national, regional and local levels."*⁸⁶

⁸⁰ The Directive does not prevent employers from applying more favourable conditions to their posted workers, see Article 3(7). The Directive also lays down the principle that workers posted by firms based in non-EU countries should not be granted more favourable treatment than workers posted by EU-based undertakings, see Article 1(4)

⁸¹ See *BBC News*, 'Refinery strikes spread across UK', 30 January 2009, <http://news.bbc.co.uk/1/hi/7859968.stm>; for reasons of completeness, it must be said that the Italian firm insisted that it had reached an agreement on working conditions with UK trade unions before starting the project, including a tea break, see *Telegraph*, 'Union agreed working conditions for Italian workers in "British jobs" row', 8 February 2009, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/4549925/Union-agreed-working-conditions-for-Italian-workers-in-British-jobs-row.html>

⁸² ACAS, 'Report of an inquiry into the circumstances surrounding the Lindsey Oil Refinery dispute', 16 February 2009, p9, <http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0>

⁸³ See *ECJ*, 'Laval un Partneri Ltd vs Svenska Byggnadsarbetareförbundet', Case 341-05, <http://curia.europa.eu/juris/showPdf.jsf?docid=71859&pageIndex=0&doclang=EN&mode=&dir=&occ=first&part=1&cid=160511>; and *ECJ*, 'International Transport Workers' Federation and Finnish Seamen's Union vs Viking Line ABP and OÜ Viking Line Eesti', Case C-438/05, <http://curia.europa.eu/juris/showPdf.jsf?docid=72031&pageIndex=0&doclang=EN&mode=&dir=&occ=first&part=1&cid=161193>

⁸⁴ See, for instance, this article in the *Guardian*, 'Agreement ends wildcat strikes over foreign workers', 5 February 2009, <http://www.guardian.co.uk/politics/2009/feb/05/lindsey-strikes-foreign-workers>

⁸⁵ For a broader discussion, see *Open Europe*, 'Strikes over foreign labour: What is really going on?', 4 February 2009, <http://www.openeurope.org.uk/Content/Documents/PDFs/postedworkers.pdf>

⁸⁶ See *House of Lords, Economic Affairs Committee*, 'The economic impact of immigration', First Report of Session 2007-2008, 1 April 2008, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/82/82.pdf>

Nevertheless, estimates on the flow of EU migrants to and from the UK rest on a number of sources, all of which have their limitations and evidence gaps:⁸⁷

- *Long-Term International Migration (LTIM)* estimates from the Office of National Statistics (ONS), which provides data on immigration, emigration and net-immigration *flows* of EU and A8 citizens defined as a long-term migrant as a person who moves to a country for at least a year. The LTIM relies heavily on the International Passenger Survey, which is a voluntary sample survey that needs to be scaled up and relies on people stating their intentions regarding their entry to the UK;
- *Labour Force Survey (LFS) and Annual Population Survey (APS)* data from the ONS, which provides data on the stock of EU and A8 migrants in the UK including the number of migrants in the labour market. The LFS and APS are also voluntary sample surveys and only cover 'households'. Therefore, certain groups are excluded, such as students living in dormitories or people living in temporary accommodation;
- *National Insurance Number allocation (NINo)* statistics from the Department of Work and Pensions (DWP), which provides data on the new NI numbers allocated to EU and A8 workers. NI number allocations do not indicate when someone has left the country and its effectiveness for measuring *inflows* is limited since not all migrants request a NI number.

These qualifications aside, it is possible to make estimates and point to general trends in flows of EU migrants and the stock of EU migrants in the UK.

a) Inflows and net flows of EU migrants

In the period 1991-2003, *inflows* of EU migrants averaged close to 61,000 a year, according to LTIM estimates. After the accession of the A8 countries, along with Malta and Cyprus, in 2004, the average inflow increased to 170,000 a year between 2004 and 2010. EU inflows account for close to 30% of total migration inflows to the UK. Of this, A8 workers accounted for close to 15% of total and 49% of EU migration inflows to the UK in 2010, a share that has decreased since 2007.⁸⁸ This had an impact on the *net flow* (the difference between inflows and outflows) of EU migration – although EU migration still accounted for only 27% of UK net immigration in 2010. Total net immigration to the UK was 243,000. Of this total, 65,000 came from other EU member states – of which 40,000 from A8 countries.⁸⁹

It is clear that the Government underestimated the number of migrants that would come to the UK following EU enlargement. Research commissioned by the Home Office and published in 2003 estimated that net A8 immigration to the UK "after the current enlargement of the EU will be relatively small, at between 5,000 and 13,000 immigrants per year up to 2010".⁹⁰ The report added that even if Germany decided to restrict free movement, which turned out to be the case, net immigration to the UK from the EU accession countries was "not likely to be overly large."⁹¹

However, despite this prediction, immigration from A8 countries led to a marked increase in net EU immigration, which was more or less in balance before the 2004 accession. Average annual net A8 migration between 2004 and 2010 was 42,000,⁹² well above the Home Office range estimate of 5,000-13,000. After a fall during 2008 and 2009, when the effects of financial and economic crisis were felt, net EU migration climbed again in 2010.⁹³

87 See *Oxford University Migration Observatory*, 'Migration flows of A8 and other EU migrants to and from the UK', 17 January 2011, <http://migrationobservatory.ox.ac.uk/sites/files/migobs/Migration%20Flows%20of%20A8%20and%20other%20EU%20Migrants%20v2.pdf>

88 According to LTIM data, see *Oxford University Migration Observatory*, 'Migration flows of A8 and other EU migrants to and from the UK', p4

89 Using ONS estimates, see ONS, 'Migration statistics quarterly report November 2011', 24 November 2011, http://www.ons.gov.uk/ons/dcp171778_242548.pdf

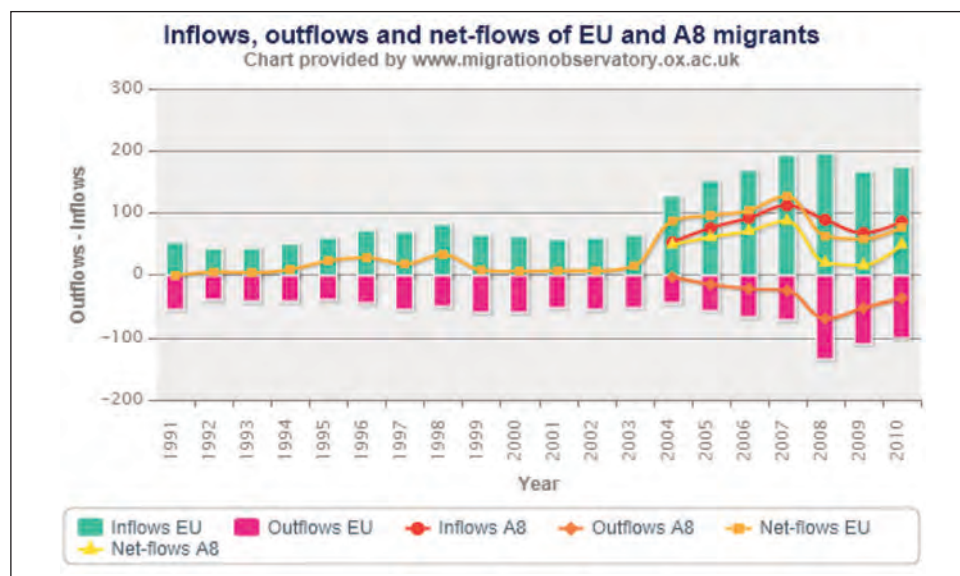
90 Christian Dustmann, Maria Casanova et al, 'The impact of EU enlargement on migration flows', Home Office online report 25/03, 2003, p58

91 Christian Dustmann, Maria Casanova et al, 'The impact of EU enlargement on migration flows', p8

92 ONS, 'Migration statistics quarterly report – November 2011'

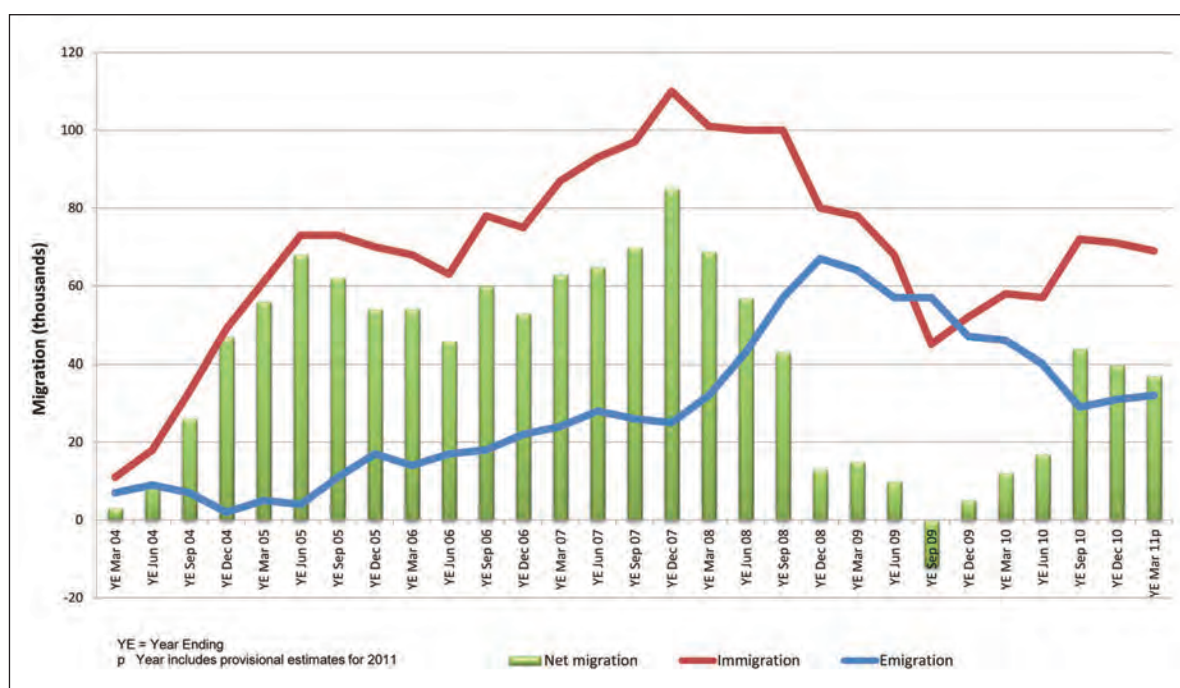
93 ONS, 'Migration statistics quarterly report – November 2011', p10

Graph 1: Flows of EU and A8 migrants to and from the UK



Sources: Office for National Statistics. Long-Term International Migration estimates

Graph 2: International Passenger Survey (IPS) estimates of long-term international migration A8 Citizens (Rolling year)



Source: ONS⁹⁴

b) Stock of EU migrants

According to the latest APS, there were 2,081,000 nationals of other EU member states living in the UK in the year up to March 2011. About 872,000 of them (i.e. 42% of the total) were nationals of A8 countries – which is more or less in line with these countries’ share of total EU migration flows.

ONS estimates from the LFS show that the number of nationals of A8 countries working in the UK consistently increased all the way to the first quarter of 2008 – at which point it stabilised at around 500,000. The number then began to grow again towards the end of 2010. In the third quarter of 2011, the number of A8 nationals (16 years and older) working in the UK was estimated to be 669,000.⁹⁵

94 All estimates include migration between the UK and the Republic of Ireland and all estimates are un-calibrated. There may therefore be small differences from other published estimates, see ONS, ‘Migration statistics quarterly report November 2011’, p10

95 See Oxford University Migration Observatory, ‘Migration flows of A8 and other EU migrants to and from the UK’

c) What drives migration to the UK?

Although immigration is a multi-faceted phenomenon, the main reason why people decide to migrate is usually the belief that the country they are moving to offers better employment prospects and higher living standards. A study from 2007 on the impact of migration from A8 countries on the UK economy showed that there is a correlation between the unemployment rates and the levels of GDP per capita in the different A8 countries, on the one hand, and the number of migrants moving from each of these countries to the UK, on the other.

Table 2: Incentives to migrate to the UK

Country	Unemployment rate (% , 2004)	GDP per capita (€, 2005)	WRS registrations May 2004 – September 2006 (% of home country population)
Czech Republic	8.3	5,200	0.24
Estonia	9.7	4,000	0.42
Hungary	6.1	5,000	0.14
Latvia	10.4	3,100	1.25
Lithuania	11.4	2,500	1.60
Poland	19.0	4,200	0.79
Slovakia	18.2	4,200	0.92
Slovenia	6.3	11,400	0.02

Source: Blanchflower et al, 2007⁹⁶

As the Table and Graph below show, even six years after their accession to the EU, the A8 countries remain well below the average EU and UK levels of GDP and GNI per capita, continuing to act as an incentive to migrate, although these countries appear to be slowly catching up. The reduction in this gap is likely to reduce future A8 migration.

Table 3: EU enlargement countries' GDP per capita as % of EU27

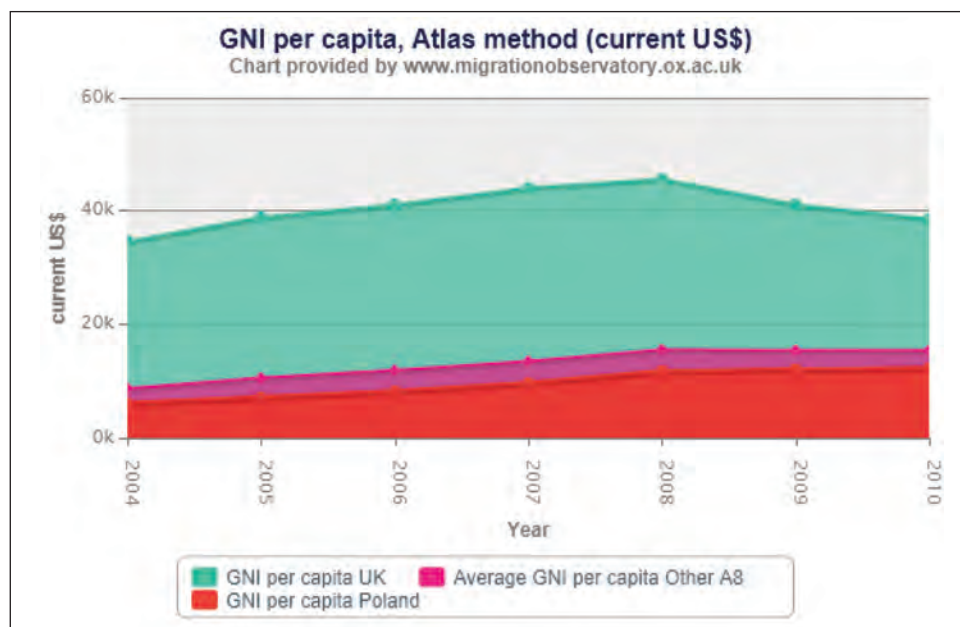
Country	GDP per capita as % of EU27 (2004)	GDP per capita as % of EU27 (2010)
Cyprus	89	99
Malta	78	83
A8		
Czech Republic	78	80
Estonia	57	64
Hungary	63	65
Latvia	46	51
Lithuania	51	57
Poland	51	63
Slovakia	57	74
Slovenia	87	85
A2	GDP per capita (2007)	GDP per capita (2010)
Bulgaria	40	44
Romania	42	46

Source: Eurostat⁹⁷

96 David G. Blanchflower, Jumana Saleheen and Chris Shadforth, 'The impact of the recent migration from Eastern Europe on the UK economy', *Bank of England*, 4 January 2007, <http://www.bankofengland.co.uk/publications/speeches/2007/speech297.pdf> – The views expressed in the paper are the authors' and should not be interpreted as those of the Bank of England

97 Eurostat, GDP per capita in PPS, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tec00114&plugin=1>

Graph 3: UK, A8 and Poland's GNI per capita



Source: World Bank, Open Data Catalog

3.3 The impact of EU free movement

The UK debate on EU immigration has inevitably focused on migration to the UK from the newer, A8 member states.

The traditional economic case for immigration is largely based on three arguments:

- Immigration generates large economic benefits for the UK because it increases economic growth;
- Immigration generates fiscal benefits for the UK;
- Immigrants are needed to fill labour and skills shortages and do the jobs that British workers will not do and therefore complement the UK labour market.⁹⁸

3.3.1. Impact on economic growth and the UK's fiscal position

a) Migration can boost economic dynamism in the EU

There is a strong theoretical argument that economic migration improves the prospects for economic growth because it contributes to a better allocation of production factors, especially human resources. Furthermore, the circulation of skilled migrants enhances know-how transfers, which in turn have indirect beneficial effects on productivity and growth. In practice, this means that workers from around the EU can move freely to the member state where their abilities and qualifications are most needed. Greater dynamism in the EU economy is also beneficial for the UK.

Free movement of labour within the EU also facilitates so-called 'circular migration' – i.e. when people move to another EU member state for short periods to gain study/work experience and then return to their country of origin. In this context, certain countries may face the loss of some of their most talented workers, but, at the same time, they would make gains in terms of human capital through return migration. In addition, skilled unemployed nationals of an EU member state could take up a job in another member state and then return to their native country after they gained work experience and additional skills – which should help them find a job more easily.⁹⁹

⁹⁸ House of Lords, Economic Affairs Committee, 'The economic impact of immigration', p7

⁹⁹ For a broader discussion, with a specific focus on 2004 enlargement EU member states, see Martin Kahanec and Klaus F. Zimmermann, 'Migration in an enlarged EU: A challenging solution?', Economic Paper 363, Directorate General for Economic and Financial Affairs, European Commission, March 2009, http://ec.europa.eu/economy_finance/publications/publication14287_en.pdf – The views expressed are the authors' only

b) Immigration boosts economic growth but not necessarily prosperity

The previous Government tended to focus on the positive impact that migration had on UK economic growth as a case for continued net immigration to the UK. In a 2007 report, the Government noted that,

*“From the start of the economic half-cycle in 2001 Q3 to mid-2006 migration added around 0.5% per annum to the working age population, stimulating growth in total output. Average output growth over this period was around 2.7% per annum and migration is estimated to have contributed around 15-20% of this. On this basis, migration contributed around £6 billion to output growth in 2006.”*¹⁰⁰

However, in its 2008 report on the economic impact of migration, the House of Lords Economic Affairs Committee noted that,

*“Overall GDP, which the Government has persistently emphasised, is an irrelevant and misleading criterion for assessing the economic impacts of immigration on the UK. The total size of an economy is not an index of prosperity. The focus of analysis should rather be on the effects of immigration on income per head of the resident population.”*¹⁰¹

In its submission to the Committee, the Government suggested there was “no quantitative evidence available on the impact of immigration on GDP per head.”¹⁰² However, the National Institute of Economic and Social Research has estimated that, taking 2005 as a baseline, A8 immigration would have a negative impact on GDP per capita in the short run (over the first four years) and a positive but small impact on GDP per capita in the longer run (0.3% higher by 2015).¹⁰³

Although the overall impact on GDP per capita is uncertain, others have pointed to other benefits of migration from the enlargement countries such as increased trade. In a 2008 report, the IPPR stated that the value of the UK’s exports to Poland increased by just under 40% between 2004 and 2007 and the value of exports to the rest of the A8 countries increased by 35%.¹⁰⁴ However, how much this has to do with free movement of people as opposed to these countries’ full entry into the EU’s single market is unclear.

c) EU accession migrants are jobseekers and are unlikely to claim benefits

Despite the uncertain impact on overall prosperity of the native UK population, the overwhelming evidence is that new migrants from the A8 countries are jobseekers and have a high rate of employment. In 2008, the ONS estimated that the employment rate of A8 migrants was over 80%.¹⁰⁵

On a basic level, the fiscal impact of migrants is measured by comparing the taxes they pay with the services and benefits they receive. For example, immigrants who are working in the UK and paying taxes but who have not have been educated in Britain or claimed welfare benefits will produce a net fiscal benefit. A8 migrants are also often characterised as possessing a “positive work ethic.”¹⁰⁶

A 2010 study found that A8 immigrants are “59% less likely than natives to receive state benefits or tax credits and 57% less likely to live in social housing.”¹⁰⁷ The study concluded that in the four fiscal years after 2004, A8 migrants made a positive contribution to the UK’s public finances and that “there is little reason to believe in the long run, A8 immigrants who arrived between 2004 and 2008 will constitute a net burden to the welfare system.”¹⁰⁸ Meanwhile, because A8 migrants have a high participation rate in the labour market, they contribute tax revenues in line with their proportion of the population, despite their lower wages. If these migrants experience wage increases, their future contribution to the UK net fiscal position will increase.¹⁰⁹

100 Home Office and Department for Work and Pensions, ‘The economic and fiscal impact of immigration: A cross-departmental submission to the House of Lords Select Committee on Economic Affairs’, 2007, p11, <http://www.official-documents.gov.uk/document/cm72/7237/7237.pdf>

101 House of Lords, Economic Affairs Committee, ‘The economic impact of immigration’, p5

102 See Home Office and Department for Work and Pensions, ‘The economic and fiscal impact of immigration: A cross-departmental submission to the House of Lords Select Committee on Economic Affairs’, p12

103 Cited in House of Lords, Economic Affairs Committee, ‘The economic impact of immigration’, p25

104 IPPR, ‘Floodgates or turnstiles? Post-EU enlargement migration flows to (and from) the UK’, 30 April 2008, p54, <http://www.ippr.org/publications/55/1637/floodgates-or-turnstilespost-eu-enlargement-migration-flows-to-and-from-the-uk>

105 See House of Lords, Economic Affairs Committee, ‘The economic impact of immigration’, p19

106 ONS, ‘Trends in A8 migration to the UK during the recession’

107 Based on A8 migrants who arrived after EU enlargement in 2004 and who have at least one year of residence, and are therefore legally eligible to claim benefits

108 Christian Dustmann, Tommaso Frattini and Caroline Halls, ‘Assessing the fiscal costs and benefits of A8 migration to the UK’, *Fiscal Studies*, Vol 31 No 1, 2010, p30

109 Madeleine Sumption and Will Somerville, ‘The UK’s new Europeans: Progress and challenges five years after accession’, *Equality and Human Rights Commission*, January 2010

d) The long-term fiscal impact of EU immigration remains uncertain

However, the OECD notes that assessing the longer-term fiscal impact of immigration is a very difficult task, noting,

“Beyond the short-run fiscal impact of immigrants, resulting from the difference between migrants’ tax payments and related public spending, a more comprehensive approach would assess the net present value of the fiscal impact of immigrants over their entire lifetime (possibly including the fiscal impact of future descendants). This latter approach requires anticipating future developments, a questionable exercise by nature.”¹¹⁰

The temptation to use immigration to remedy structural fiscal issues can only be a short-term fix. For example, immigration, particularly of younger workers, is often seen as a way of paying for ageing populations’ taxpayer-funded pension entitlements. In the short run, the entry of relatively young migrants to the UK will tend to decrease the dependency ratio, that is the ratio of those not in the labour force (the dependent) and those in the labour force.

However, when it addressed this question, the House of Lords’ Economic Affairs Committee noted that this argument is “based on the unreasonable assumption of a static retirement age as people live longer and ignore the fact that, in time, immigrants too will grow old and draw pensions. Increasing the retirement age, as the Government has done, is the only viable approach to resolving this issue.”¹¹¹

e) Are the new EU migrants likely to settle in the UK or are they temporary labour migrants?

It is too early to make firm statements about the future flows of EU migration to and from the UK. On the one hand, net EU immigration has declined in keeping with the slowdown in the British economy (see below). In addition, economic growth in the A8 countries and the opening up to A8 workers of other EU countries’ labour markets, most notably Germany and Austria, might also reduce EU net immigration in the coming years.

Research based on the LFS has also found that as much as half of the post-accession migrants may have already left the UK by 2008,¹¹² suggesting a regular churn of A8 migrants, rather than an ever-increasing stock. A University of Surrey survey found that, of workers who registered on the WRS during 2007, 59% intended to stay in the UK for less than three months at the time when they registered. Another survey also highlighted the phenomenon of ‘circular migration’, with around a fifth of Polish migrants that had returned home stating that they intended to come back to the UK for at least three months in the future.¹¹³

However, now that networks of A8 migrants have been established, this is likely to continue to act as an incentive for fellow nationals to come to the UK even if the economic factors that triggered immigration in the first place cease to apply, for example if A8 member states’ GDP per capita converges with the UK’s in the future.

3.3.2. Impact on UK labour market and employment

a) EU migrants are younger and better educated than native UK workers

The academic literature and statistics suggest that new migrants from the EU accession countries tend to be younger and better educated than the native UK population. Around “70% of A8 men and 67% of A8 women are aged between 20 and 35, while only 19% of native men and 18% of native women fall within the same age bracket.”¹¹⁴ A8 migrants also have higher education levels, on average, than the UK-born population.¹¹⁵

110 OECD, ‘Migration in OECD countries: Labour market impact and integration issues’, 2007, Box 2, p8

111 House of Lords, Economic Affairs Committee, ‘The economic impact of immigration’, p6. See also Dr Carlos Vargas-Silva, ‘The fiscal impact of immigration in the UK’, Oxford University Migration Observatory, 20 March 2011, p5, <http://migobs.vm.bytemark.co.uk/sites/files/migobs/briefing%20-%20the%20fiscal%20impact%20of%20immigration%20in%20the%20uk.pdf>

112 World Bank, ‘In focus: An update on labor migration from Poland’, October 2008, <http://siteresources.worldbank.org/ECAEXT/Resources/258598-1225385788249/infocuslaboroct08.pdf>

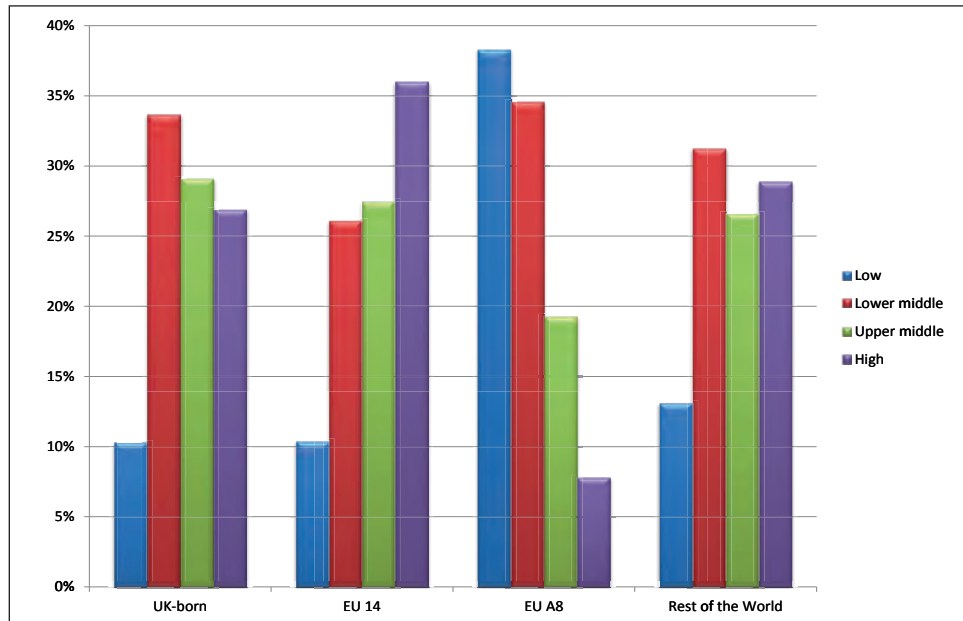
114 Christian Dustmann, Tommaso Frattini and Caroline Halls, ‘Assessing the fiscal costs and benefits of A8 migration to the UK’, p9

115 32% of A8 men and 40% of A8 women are educated beyond 21 years of age compared to 18% and 16% of the native population – although the ONS comes to a slightly different view using a different methodology, see Christian Dustmann, Tommaso Frattini and Caroline Halls, ‘Assessing the fiscal costs and benefits of A8 migration to the UK’

b) Recent EU migrants are concentrated in low-skilled jobs

Despite this, A8 immigrants tend to “downgrade”¹¹⁶ and are more concentrated in low-skilled jobs than UK native workers. In 2008, the ONS estimated that 38% were in elementary occupations and only 13% in higher skilled occupations.¹¹⁷ The proportion of A8 workers in low skilled jobs is far higher than workers from other EU countries and migrants from the rest of the world, partly because the UK can apply skills-linked restrictions on many migrants from outside the EU.

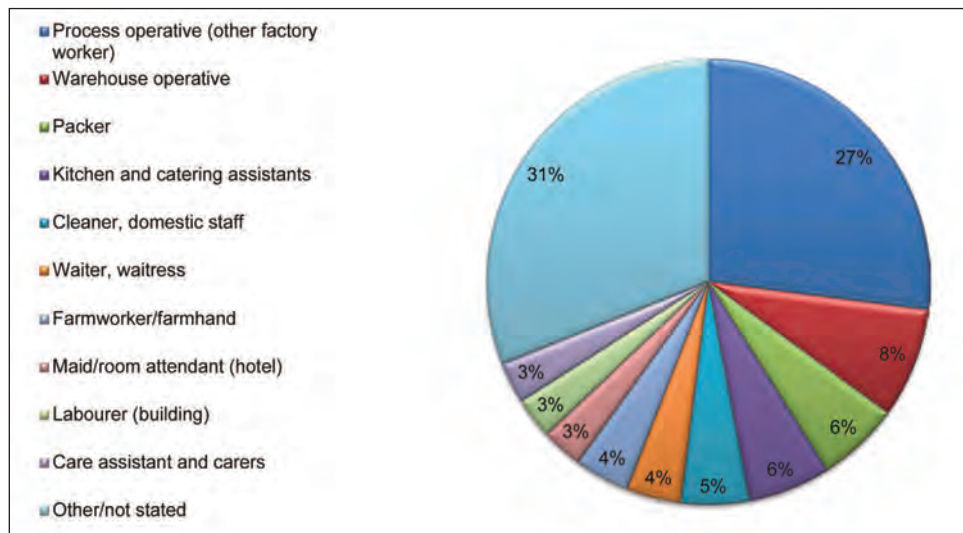
Graph 4: Percentage of workers in each job-skill level by country-of-birth groups



Source: ONS¹¹⁸

In a 2011 study, the ONS described this effect and noted the so-called ‘complementary’ nature of much of the work undertaken by A8 migrants. It stated that, “A growing body of evidence indicates that many migrants accept jobs in the UK that local employers find hard to fill with domestic labour.” For example, “less than 1% of all jobs in UK are in agriculture, yet up to 40% of all employees in this sector in 2010 might have been A8 workers.”¹¹⁹

Graph 5: Top 10 Occupations for A8 registered workers (July 2004 – December 2007)



Source: Border Agency, Worker Registration Scheme Data (July 2004 - December 2007)

As a result of the jobs A8 workers take up, they earn significantly less than UK nationals, with over 70% of A8 nationals earning under £6 per hour, whereas the vast majority of UK-born workers earn over this figure.

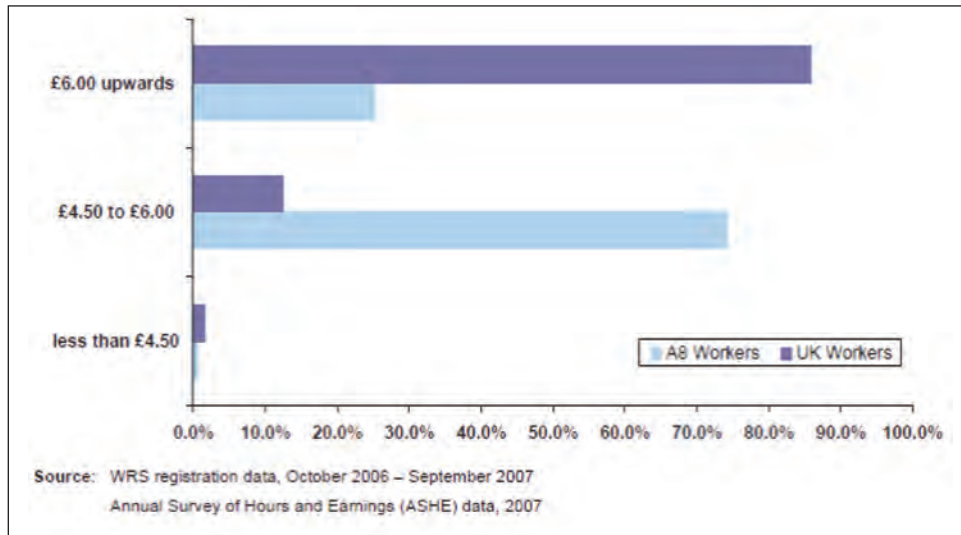
¹¹⁶ Madeleine Sumption and Will Somerville, ‘The UK’s new Europeans: Progress and challenges five years after accession’

¹¹⁷ Cited in *House of Lords, Economic Affairs Committee, ‘The economic impact of immigration’*, p18

¹¹⁸ ONS, ‘Non-UK born workers – 2011’, http://www.ons.gov.uk/ons/dcp171776_234559.pdf

¹¹⁹ ONS, ‘Trends in A8 migration to the UK during the recession’

Graph 6: Gross hourly pay of A8 migrants versus UK workers

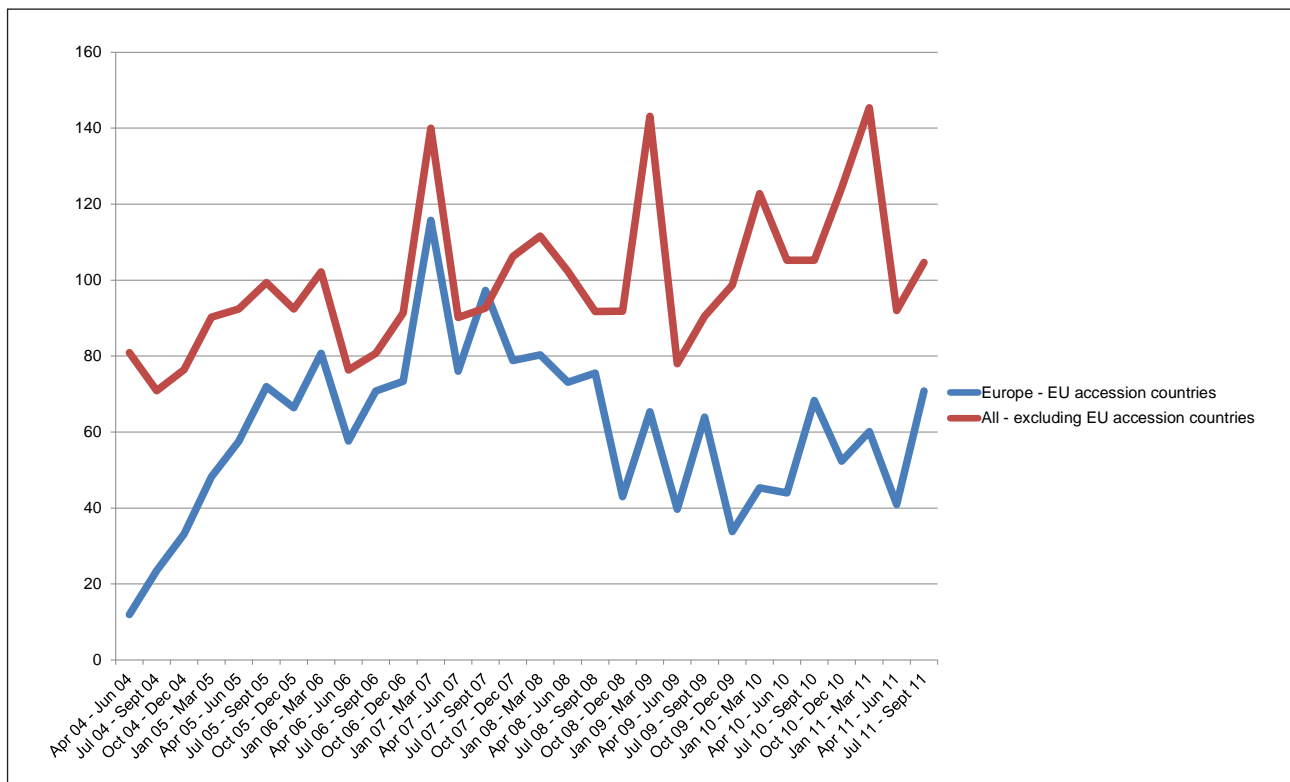


Source: Lemos and Portes, based on DWP figures¹²⁰

c) A8 migration has been responsive to the recession

Graph 7 below, showing the number of National Insurance Numbers issued, demonstrates that immigration from the A8 accession states slowed following the UK’s economic downturn in 2008 as job opportunities decreased.¹²¹ The graph also shows that following the onset of the downturn A8 immigration reduced compared to other immigrant groups. The evidence therefore suggests that potential A8 immigrants have stayed at home whereas other immigrant groups have continued to arrive in search of jobs. It adds further weight to the evidence that A8 migrants’ primary purpose is work related and that, without the prospect of employment, A8 migrants are less likely to come to the UK.

Graph 7: National Insurance Number allocations (thousands, April 2004 – September 2011)



Source: ONS

¹²⁰ Sara Lemos and Jonathan Portes, 'The impact of migration from the new European Union member states on native workers', *Department for Work and Pensions*, Working Paper No 52, June 2008, <http://research.dwp.gov.uk/asd/asd5/wp52.pdf> – The views expressed are the authors’ only

¹²¹ Graphs 1 and 2 show a similar pattern

Similarly, Graph 8 below, based on the Labour Force Survey figures, shows that the number of A8 workers in the workforce increased significantly between 2004 and 2008 before stabilising at the beginning of the downturn. At this point, for the workforce at large, unemployment began to rise sharply. However, Table 4 illustrates that the downturn has affected the UK-born and A8 workforce in different ways. A8 migrants have responded comparatively well to the recent recession with employment levels holding up and unemployment levels remaining low - below that of native UK workers.

This is partly a function of the flexibility inherent in a workforce capable of relocating to their home state. It may also be due to the relative strength of the sectors A8 migrants are employed in compared to sectors where UK natives have recently become unemployed.

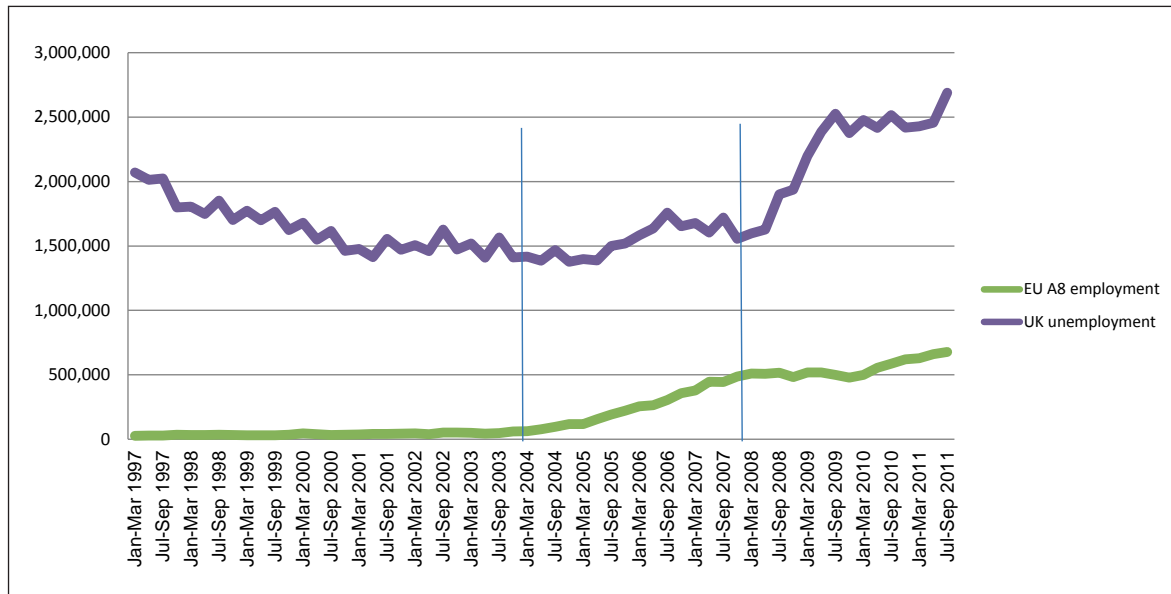
However, A8 experiences have also varied from sector to sector, with migrants' employment in construction, for example, being "particularly sensitive" to the job losses that have occurred in that sector, while the high retention of A8 workers in the agriculture sector, despite the economic downturn, illustrates that there remains a demand for labour in this sector that UK workers are not meeting.¹²²

Table 4: UK-born and A8 employment and unemployment rates

	Employment		Unemployment	
	A8	UK-born	A8	UK-born
2004	73.0	73.9	6.4	4.5
2005	79.6	73.9	7.1	4.6
2006	81.7	73.6	6.5	5.1
2007	82.3	73.5	5.8	5.1
2008	82.8	73.4	4.3	5.5
2009	82.0	71.7	4.8	7.4

Source: LFS, ONS¹²³

Graph 8: Unemployment in the UK (total workforce) and A8 employment



Source: ONS, Labour Force Survey

122 ONS, 'Trends in A8 migration to the UK during the recession', p9

123 ONS, 'Unemployment and inactivity rates by country of birth, 2001-2009', 2009, p23

d) Has A8 immigration created unemployment?

Numerous academic studies have looked at the impact of immigration on economies and employment. One representative study, by the OECD, for instance concluded that,

“An increase in the share of immigrants in the labour force increases unemployment of natives, but this impact is temporary and vanishes between four and nine years after the shock. Beyond this transitory period, the level of the share of immigrants in the labour force does not influence significantly natives’ unemployment.”¹²⁴

While Graph 8 shows that A8 migration cannot be a significant cause of unemployment since 2008, when a rapid spike was registered, it does show a small increase in overall unemployment in the UK shortly after the 2004 accession. However, it is not clear whether there is any causal link to the increased employment of A8 nationals.¹²⁵

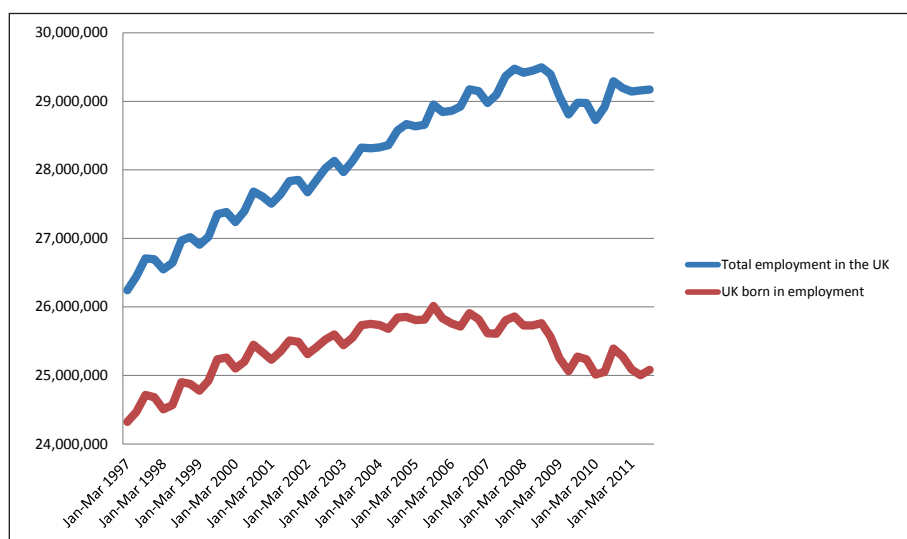
Nevertheless, as A8 migrants are overwhelmingly concentrated in low-skilled sectors, their impact on the native UK population is likely to be concentrated in this section of the labour market. It could be argued that UK natives might have filled these lower skilled jobs following unemployment, had they not already been taken up by A8 employees, or that younger workers have faced greater barriers to entering the labour market.¹²⁶

There has been little research into the impact on youth employment. However, a report examined by the House of Lords in 2008 thought it possible that “native” youngsters may have been losing out in the battle for entry level jobs.¹²⁷ The Lords also found that “although the evidence is limited, there is a clear danger that immigration has some adverse impact on training opportunities and apprenticeships offered to British workers.”¹²⁸

The migration unemployment paradox

It is also clear that even if A8 migration did create unemployment it was not due to a lack of job creation per se, as over a long time frame total UK employment has increased. The UK economy has a good record in creating jobs but they have tended to be filled by EU and non-EU migrants even as the number of UK natives employed decreased. UK-born unemployment has remained stubbornly over one and a half million for most of the last decade, despite at least three million jobs being created.

Graph 9: Total number of UK jobs versus UK-born employed



Source: ONS

¹²⁴ OECD, 'Migration in OECD countries: Labour market impact and integration issues', 2007, p28

¹²⁵ One of the first studies on the impact of A8 migration on UK unemployment concluded that there was "no discernible statistical evidence to suggest that A8 migration has been a contributor to the rise in claimant unemployment in the UK," see Nicola Gilpin et al, 'The impact of free movement of workers from Central and Eastern Europe on the UK labour market', Department for Work and Pensions, Working Paper No 29, <http://research.dwp.gov.uk/asd/asd5/WP29.pdf>. However, the results have been questioned by Professor Rathbone of Cambridge University, who points out that, if the statistical relationship between migration and unemployment was deemed significant, it would mean that "60 or more local workers will become unemployed for each 100 A8 immigrants", see <http://www.regional-studies-assoc.ac.uk/events/2008/dec-cambridge/presentations/Rowthorn.pdf>

¹²⁶ Nicola Gilpin et al, 'The impact of free movement of workers from Central and Eastern Europe on the UK labour market'

¹²⁷ Ernst and Young Item Club, 'Special report on migration', 18 December 2007, as recited in evidence to the House of Lords, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/82/8011514.htm>

¹²⁸ House of Lords, Economic Affairs Committee, 'The economic impact of immigration'

This trend could lead to an employment trap, whereby the UK economy fails to remedy the underlying causes of UK native unemployment.

Chris Grayling, Minister for Employment, argued in 2010 that,

“Before this recession, the UK enjoyed a long period of sustained economic growth. Around 4 million jobs were created during this period – yet the country suffered persistently high structural unemployment, with some 4.5 million people on out of work benefits before this recession even started. In a way, you could argue that immigration filled the economic gap that allowed us as a country to ignore deeper problems within our own society... Businesses brought in people while we ignored the opportunity to motivate our own citizens – many of whom remain stuck in a welfare dependency trap.”¹²⁹

Therefore, immigration should not be viewed as a ‘problem’ in and of itself but rather an issue that has highlighted the fundamental need for the Government to promote greater participation in the labour force amongst UK citizens through its education and welfare policies, improving both the incentives to work and workers’ skill-levels.

e) Has A8 immigration affected UK wages?

Although there is no clear evidence of the impact of A8 immigration on employment, it is probable that A8 migration has had an effect on the wages of lower skilled native UK workers, even if only temporarily. The OECD also notes that “textbook models suggest that the first-order effect of immigration is to lower real wages in the economy”. However, they also argue that immigration creates higher returns to capital and so can “stimulate investment and firm creation,” and that by keeping labour costs lower than they would be without immigrants, immigration can benefit consumers.¹³⁰

Professor David Blanchflower, a former member of the Bank of England’s Monetary Policy Committee, has noted that there was “some evidence” to suggest that A8 workers have lowered wage increases amongst the least skilled “but the effects are not enormous.”¹³¹

Similarly, another study from 2008¹³² found that a 10% increase in the migrant share of the workforce in an occupation reduces average wages overall by 0.4%. The study also found that “a 10% rise in the proportion of immigrants working in semi/unskilled services – that is, in care homes, bars, shops, restaurants, cleaning, for example – leads to a 5.2% reduction in pay.” However, this downward pressure on wages can have the overall economic benefit of increasing UK competitiveness.

3.3.3. Wider social and political impacts

Aside from the economic effects discussed above, the limits to which the UK can control EU free movement can have an impact in various other areas. These range from cross-border crime to increased pressure on local public services. Another recent phenomenon and concern is that the lack of border controls in the Schengen area increases the potential and ease at which illegal immigrants can move through Europe.

¹²⁹ ‘Tackling poverty and social exclusion through a balanced approach to migration’, speech given to the Joseph Rowntree/Praxis/EC/Inclusion Conference, 17 November 2010, <http://www.dwp.gov.uk/newsroom/ministers-speeches/2010/17-11-10.shtml>

¹³⁰ OECD, ‘Migration in OECD countries: Labour market impact and integration issues’, 2007, p9

¹³¹ Cited in *House of Lords, Economic Affairs Committee*, ‘The economic impact of immigration’, p27

¹³² Stephen Nickell and Jumana Salaheen, ‘The impact of immigration on occupational wages: Evidence from Britain’, *Federal Reserve Bank of Boston*, 2008, <http://www.bostonfed.org/economic/wp/wp2008/wp0806.pdf>

Box 4: Greece – The weak link in Schengen?

Greece is reportedly the point of entry for 80% of illegal immigration into the EU. It is possible to travel from Greece across the Schengen area to Calais without a passport whether you are an EU member state national, an illegal immigrant or an asylum seeker. This turns the Greek/Turkish border into an external border as far as the Schengen area is concerned. However, this border is one of the most difficult to police and the recent Greek crisis has led to further deterioration in border controls.

The UK, as a non-Schengen member, has its own border controls but is nevertheless somewhat dependent on the strength of the Schengen external border in order to prevent the pressure of illegal migration building on the UK's border.

The situation with regards to Greece is further complicated by a breakdown in the EU's asylum system. Under the EU's 'Dublin System' (see Section 1), asylum seekers can be returned to their state of entry. This has been complicated by European Court of Human Rights and ECJ rulings that found that Greece's asylum system is in such a bad state that returning people to Greece would undermine their rights, which in turn led to the suspension of removals to Greece.¹³³

These problems have prompted six Schengen countries (Austria, Germany, France, Holland, Belgium and Sweden) along with the UK to demand action, and for senior EU politicians – notably French President Nicolas Sarkozy – to question the resumption of border controls.¹³⁴

a) Public opinion

As we set out above, the evidence on the overall economic impact of new EU migration is inconclusive. However, the likelihood is that it has had an impact on specific groups, the low-skilled and young, by increasing competition and downward pressure on wages. This is certainly the public perception.

In a 2009 study, Professor Blanchflower looked at wages and public perception. He found “tentative evidence that the pay of those most susceptible to competition from workers from the A10 have seen weaker wage inflation.” The cause, he suggested, was that “the fear of unemployment” has risen recently in the UK and that “this is likely to have contained wage pressure” in wage negotiations.¹³⁵

This fear of unemployment is the probable reason why public views on immigration have hardened and why lower-skilled immigration is often singled out. A survey conducted by the Oxford University's Migration Observatory in 2011 shows that, while seven in ten members of the British public (69%) favour cuts in immigration, low-skilled workers were the most popular target for reductions to immigration.¹³⁶ The European Commission's Eurobarometer also shows that 53% of people in the UK believe that the EU has contributed to job losses – a result mirrored in other EU member states.¹³⁷

Furthermore, big migration inflows – especially when they are concentrated in a specific geographic area – can drive housing prices up. This can have a double effect on low-skilled workers already experiencing a downward pressure on wages and a fear of unemployment that now see their disposable income consumed by higher rents and property prices.

b) Public services, schooling, pressure on local councils

The concentration of immigration in some areas, combined with a lack of accurate data, has also led to complaints from local authorities that funding is not been allocated correctly to take into account new spending pressures. The House of Lords Economic Affairs Committee heard the following,

“Councils across the country, but especially in the South of England, claim that the current data on the numbers of immigrants in their areas are significant under-estimates. In their evidence to us, Hammersmith and Fulham Council described the latest ONS revisions as ‘plainly wrong’, while Slough Council declared that the official methodology is ‘not fit for purpose’.”¹³⁸

133 ECHR, 'M.S.S. vs Belgium and Greece', Application No 30696/09, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

134 Le Monde, 'Sarkozy menace de suspendre la participation de la France à Schengen', 11 March 2012, http://www.lemonde.fr/election-presidentielle-2012/article/2012/03/11/suivez-en-direct-le-meeting-de-nicolas-sarkozy-a-villepinte_1656131_1471069.html

135 David G. Blanchflower and Chris Shadford, 'Fear, unemployment and migration', *The Economic Journal*, 29 January 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0297.2008.02224.x/pdf>

136 Oxford University Migration Observatory, 'Thinking behind the numbers: Understanding public opinion on immigration in Britain', 16 October 2011, p14, <http://migrationobservatory.ox.ac.uk/understanding-uk-public-opinion/executive-summary>

137 European Commission, 'Views on European Union enlargement', Flash Eurobarometer 257, February 2009, http://ec.europa.eu/public_opinion/flash/fl_257_en.pdf

138 House of Lords, *Economic Affairs Committee*, 'The economic impact of immigration'

The difficulty poor data creates with planning is a real problem. The Audit Commission cites one example of schools in Peterborough, scheduled for closure, which had to be retained at the last minute due to a sudden surge in pupils linked to migration.¹³⁹ Media reports have claimed that local councils have been affected with extreme pressure on primary schools with, for instance, classes being held in “mobile cabins” in Slough primary school.¹⁴⁰ London has also complained saying that it would need another 70,000 school places and was considering teaching in shifts.¹⁴¹

There can, in addition, be a problem for local authorities in dealing with homelessness among some migrants. In London, for instance, it has been estimated that 26% of homeless were from the A8 countries, adding to pressures on local authorities.¹⁴²

c) Social cohesion and criminal justice

For the majority of A8 workers in accommodation, a sizeable proportion are living in HMOs (Homes in Multiple Occupation) which due to the heavy density of population can create problems in neighbourhoods and increase pressure on services. The House of Commons Local Community Committee heard evidence on this and a separate trend in crime and human trafficking, although evidence given by the Association of Chief Police Officers (ACPO) was nuanced.

With regards to cohesion of society in general, it has to be recognised that many A8 immigrants into the UK are not intending to stay. EU migrants can fall into a language trap, failing to gain language skills to enable them to play a greater role in the workforce. Some of this is reflected in a report which states that there is a danger that “immigrants can also become trapped in lower paid jobs with poor working conditions – the so-called ‘3D jobs’ (dirty, dangerous and difficult), or become isolated in ethnic labour markets where there are few opportunities for social interaction with UK natives or other long-term residents.”¹⁴³

¹³⁹ *House of Commons, Communities and Local Government Committee*, ‘Community cohesion and migration’, Tenth Report of Session 2007-2008, 30 June 2008, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/369/369i.pdf>

¹⁴⁰ See, for instance, the *FT*, ‘Immigration pushes councils to limit’, 15 February 2010, <http://www.ft.com/cms/s/0/e0a5622a-1a74-11df-a2e3-00144feab49a.html#axzz1oSd2IAFE>

¹⁴¹ *Evening Standard*, ‘Schools could teach in shifts to cope with overcrowded classes’, 10 November 2011, <http://www.thisislondon.co.uk/news/schools-could-teach-in-shifts-to-cope-with-overcrowded-classes-6366751.html>

¹⁴² See this speech by Employment Minister Chris Grayling, 17 November 2010, <http://www.dwp.gov.uk/newsroom/ministers-speeches/2010/17-11-10.shtml>

¹⁴³ Eugenia Markova and Richard Black, ‘East European immigration and community cohesion’, *Joseph Rowntree Foundation*, May 2007, <http://www.jrf.org.uk/system/files/2053-immigration-community-cohesion.pdf>

4. CONCLUSIONS AND POLICY OPTIONS

4.1. Asylum and non-EU migration

On the whole, the UK's retention of its own border controls and its discretion to opt in to EU laws in asylum and non-EU immigration law has so far limited the EU's influence over UK asylum and external immigration law.

Successive governments' decisions to opt out of EU legislation on third country economic migration and take a 'pick-and-mix' approach to cooperation in EU asylum policy illustrates that there is now a certain degree of cross-party consensus on the desirable scale of EU involvement in this area. This is largely limited to cooperation in the EU's so-called 'Dublin System', which, in most cases, allows the UK to return asylum seekers to the member states in which they first arrived in the EU.

In addition, as the UK's participation in operations of the EU's border force, Frontex, shows, the UK is able to cooperate practically with EU states in this area without being legally bound by EU law. However, because the UK opt-in is irreversible, individual governments' decisions to sign up to EU laws in this area can bind their successors.

Option 1) Status quo

The UK could decide it was content with the current arrangements on asylum.

Option 2) Reversible opt-in on asylum

Fully restoring national democratic control over this area could entail a 'reversible opt-in' arrangement, whereby future governments could decide to pull out of EU laws that the UK had previously signed up to. This would ensure voters' ability to elect governments that could fully determine the future level of UK cooperation in EU external immigration and asylum policy. However, such an arrangement would require negotiated EU Treaty change and the unanimous agreement of all other 26 member states.

4.2 EU free movement

EU migration accounted for 27% of UK net immigration in 2010. Total net immigration to the UK was 243,000, of which 65,000 came from EU countries. 40,000 of net EU migrants came from the new Eastern European member states, known as the 'A8'.

The overall impact of new post-EU enlargement migration on the UK economy is inconclusive. However, the evidence overwhelmingly suggests that the UK's new migrants from Eastern European countries have come to the UK in search of work rather than to take advantage of the UK's welfare system.

The impact of new EU immigration is most likely to have been felt at the low-skill end of the labour market, increasing competition for jobs amongst low-skilled and younger workers. A8 migrants are likely to have reduced the real wages of those in the low-skill sector in the short term, although this could come with overall benefits to the UK economy by improving competitiveness.

However, even if A8 migration has had a marginal impact on unemployment in the low-skilled sector, the paradox is that, since 1998, at least three million new jobs were created in the UK but they have increasingly been filled by workers from other EU member states or from outside the EU. This is a UK problem, not an EU one, and illustrates the need for domestic policies targeted at improving the incentives for UK citizens to work and improving their skill levels.

Nevertheless, EU free movement limits the UK's control over cross-border crime and increases the potential for larger illegal immigration to flow through the EU's border-free area. In addition, new inflows of migrants can cause unexpected pressures on public services – particularly those funded by local councils – and can have an effect on the price of housing. It is also important that the freedom to move within the EU is not abused and non-UK nationals' access to welfare must be tightly regulated if public and political confidence in free movement is to be maintained.

With public opinion sensitive to immigration, particularly of the low-skilled variety that characterises A8 immigration, it is important that UK policies are equally sensitive to this.

The previous government clearly underestimated the impact that EU enlargement would have on increasing net EU immigration flows. This is likely to have decreased public confidence in EU free movement and is a lesson for future EU enlargements, as most EU candidate states also have a low GNI per capita.

One of the issues that have damaged the UK public’s perception of EU migration is the underestimate of A8 migration following the UK’s decision not to introduce transitional controls in 2004. In 2013, Romania and Bulgaria will also gain access to the UK’s labour market followed by Croatia in 2018. In the future, there remain a number of candidate states, including Turkey, and potential candidates which if given access to the EU’s labour market could, due to their size and relative wealth, have a substantial impact.

Table 5: Population and GNI per capita of potential EU accession states

	Population	GNI per person	GNI per person (% of EU average of €23,046)
Joining in 2013:			
Croatia	4,424,161	€10,506	46%
Official Candidate states:			
Serbia	7,292,574	€4,264	19%
Iceland	317,398	€24,776	108%
Montenegro	631,490	€5,113	22%
Macedonia	2,060,563	€3,462	15%
Turkey	72,752,325	€7,491	33%

Source: World Bank¹⁴⁴

The current legal dispute between the UK Government and the European Commission over the UK’s ‘right to reside’ test on EU nationals’ access to benefits is only likely to fuel public distrust of free movement and therefore seems a public relations own goal for the European Commission.

The problem is that EU law on the access to different kinds of benefits is based on two competing concepts – ‘right of residence’ and ‘habitual residence’ – creating a confusing and logically inconsistent system. This is a complicated legal question, but one that essentially means that, while, under one set of rules, EU nationals can be entitled to some UK benefits because they are ‘habitually resident’ in the UK, access to another set of UK benefits is dependent on EU nationals’ right to reside in the UK. Therefore, in principle, EU law states that some UK benefits should be paid out to EU nationals even if they do not have the ‘right to reside’ in the UK.

Option 1) Status quo

If the UK decided it was content with the current arrangements on free movement, it could still implement measures domestically aimed at alleviating the pressures associated with immigration.

Option 2) Reforms to improve the political management of free movement

This is Open Europe’s preferred option:

- The UK should work with other EU member states and the European Commission for a reformed, more transparent system that gives member states more discretion in enacting safeguards against undue strains on public finances and welfare systems. The Commission should drop its challenge against the UK’s ‘right to reside test’ and instead pursue reform of the current EU system on access to benefits which is both confusing and illogical.

¹⁴⁴ See the World Bank’s website, <http://data.worldbank.org/indicator/SP.POP.TOTL>

- A more effective system of statistics and planning should be put in place in order to avoid sudden strains on public services and improve public debate on immigration. With better and timelier data, the central Government could respond quicker to the problems created by sudden flows evident in places such as Slough, Peterborough and Hammersmith and allow local services to respond quicker.
- For future EU enlargements, tighter transitional controls might be necessary, based on more objective criteria such as relative GDP per capita rather than the arbitrary time-limited controls used up to now.
- Domestic policies targeted at creating incentives for UK citizens to work and improving their skill levels is far more important than bearing down on EU free movement. Since 1998, at least three million new jobs were created in the UK but they have increasingly been filled by workers from other EU member states or from outside the EU. This is a UK problem, not an EU one.

Option 3) Opt-outs or vetoes

The UK could seek to introduce a right to “opt out” of the EU free movement of people and workers, meaning that it would not have to take part in measures that it disagreed with. In theory, if the opt-out applied to both existing (a kind of retroactive opt-out) and new free movement laws, this would allow it to regain full control over its borders and other areas (such as migrants’ access to benefits) by employing the same ‘pick-and-mix’ approach as in EU crime, policing and immigration law. However, as free movement is an absolutely integral part of the EU Treaties, driven by case law rather than a regular flow of new proposal and as it relates to a broad area – access to the labour market – rather than individual laws per se, it is doubtful that this is a serious option.

Similarly, giving the UK the right to veto new laws in this area (which differs from an opt-out) is not a credible alternative as the laws governing free movement are already in place, meaning that there are unlikely to be many new rules that the UK can veto. Both an opt-out and a veto would require substantial changes to the EU Treaties and the approval of all other member states – which, given the embedded nature of free movement in EU law, is unlikely to happen.

Option 4) Leave the EU

In truth, trying to opt out of free movement is essentially the same as trying to leave the EU. After all, freedom of movement for workers and people remains a fundamental part of EU membership and one of the EU’s tenets, dating back to the Treaty of Rome. The question over UK membership of the EU is a gigantic and hugely complicated one. We note in passing that, in addition to the range of trade arrangements that would have to be put in place to replace the current EU structure, the UK would likely need to arrange bilateral deals regarding the almost one million UK citizens currently residing in other EU countries.