

The London School of Economics and Political Science

**Not Quite White:
The Gap Between EU Rhetoric and the Experience of Poles'
Mobility to the UK**

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DECLARATION

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ABSTRACT

This thesis takes account of east-west power differentials to explore Poles' experience of mobility and their positioning within EU and UK equality frameworks. Through a systematic content analysis of laws and legal discourse related to mobility and equality, I explore how the historical hierarchy positioning the west as superior and the east as unable to be fully 'European' can still be observed today in how EU and UK policies have pushed the eastern region and its nationals to the periphery of Europe and of whiteness. Whereas cleavage between EU ideals and EU citizens' actual experience of its policies has been attributed to the EU's limited competence, I propose that the EU project itself has been founded on and continues to propagate differentiation between the west and the east, at odds with the EU's fundamental rights narratives.

Notably, EU rhetoric has imagined the EU project as a western endeavour. Unequal accession policies and post-accession transitional mobility restrictions had helped to support the creation of a social reality that enables Polish movers' racialisation and inequality, reinforced through the recently increasing willingness of EU institutions to limit workers' access to mobility. EU institutions have tended to overlook mobile Poles' experiences of inequality and exploitation, further naturalising their status as second-class EU citizens. The Racial Equality Directive has not accounted for them in its promulgation or interpretation, and has been especially unfit for protecting their rights. Similarly, movers have been absent from how equality is conceptualised in the UK. The Equality Act's ineffectiveness appears compounded when it comes to protecting the rights of Polish movers, as revealed through my review of employment tribunal cases. Through such othering and omissions, the west's relationship with the east has reproduced markers of coloniality.

My research also suggests that critical race theory and critical whiteness studies frameworks should pay greater attention to contemporary transnational power dynamics and mobility. Only then can the concepts of racism and race begin to more accurately reflect the nuanced picture of micro-level racial and ethnic power relations in today's globalised world.

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LIST OF ACRONYMS & ABBREVIATIONS

A-2	Bulgaria and Romania
A-8	Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia, and Slovakia
A-10	A-8, Cyprus, and Malta
ACAS	Advisory, Conciliation and Arbitration Service
Accession Treaty	Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (2003)
APS	Annual Population Survey
BAILII	British and Irish Legal Information Institute
BAME	Black, Asian, and minority ethnic
CAP	Common Agricultural Policy
CEE	Central and Eastern Europe(an); A-8
CFR	Charter of Fundamental Rights
CLS	critical legal studies
Commission	European Commission
Council	Council (of Ministers) of the European Union
CRE	Commission for Racial Equality
CRT	critical race theory
CWS	critical whiteness studies
Eastern Enlargement	2004 enlargement of the EU
EAT	Employment Appeal Tribunal
EC	European Community
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance

EC Treaty	Treaty Establishing the European Community
EEA	European Economic Area (Member States, Iceland, Liechtenstein, and Norway)
EEAC	East European Advice Centre (London)
EEC	European Economic Community
EEC Treaty	Treaty Establishing the European Economic Community
EE&SC	European Economic and Social Committee
EHRC	Equality and Human Rights Commission
EIB	European Investment Bank
ENAR	European Network Against Racism
Enlargement	Eastern Enlargement of the EU (2004)
EOR	Equal Opportunities Review
EP	European Parliament
EqA2006	Equality Act 2006
EqA2010	Equality Act 2010
ET	Employment Tribunal
EU	European Union
EU-2	Bulgaria and Romania
EU-8	Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia, and Slovakia
EU-10	EU-8, Cyprus, and Malta
EU-14	EU-15 without United Kingdom
EU-15	Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and United Kingdom
EUI	European University Institute
EUMC	European Monitoring Centre on Racism and Xenophobia
EU-MIDIS	European Union Minorities and Discrimination Survey

Europe Agreement	Europe Agreement establishing an association between the European Communities and their Member States, and the Republic of Poland (1991)
FDI	foreign direct investment
FRA	Fundamental Rights Agency
ILO	International Labour Organisation
IMF	International Monetary Fund
LatCrit	Latina/o critical race theory
LFS	Labour Force Survey
Members	EU Member States
Member States	EU Member States
MEP	Member of the European Parliament
OECD	Organisation for Economic Co-operation and Development
ONS	Office for National Statistics
Parliament	European Parliament
PCP	provision, criterion or practice
PHARE	Poland and Hungary Assistance for the Restructuring of the Economy
RRA65	Race Relations Act 1965
RRA68	Race Relations Act 1968
RRA76	Race Relations Act 1976
SLG	Starting Line Group
SNCB	special non-contributory cash benefits
States	EU Member States
TCN	third-country national
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaty(ies)	TEU and TFEU

2018 White Paper

White Paper: The UK's future skills-based immigration system (December 2018)

WRS

Worker Registration Scheme

Chapter 1: Introduction

1. Overview

The EU was explicitly founded on the promise of equality and inclusion. According to the European Commission, it ‘arose from the ashes of World War Two’ (1996: 4), to promote ‘humanitarian and progressive values’ (2014: 5). More specifically, ‘human dignity, freedom, [and] equality’ form the EU’s ‘spiritual and moral heritage’ (CFR, Preamble). That same promise underlay the gradual expansion of the EU. The accession of eight Central and Eastern European (‘CEE’) states¹ in 2004 has been situated within this ‘historic task ... to further the integration of the continent by peaceful means’ (Commission 2003a: 4), ‘transcend ... former divisions and ... forge a common destiny’ (Constitutional Treaty, Preamble). But how effectively has that promise been met? Despite such rhetoric, direct and indirect transitional mobility restrictions were imposed by fourteen² of the EU-15 Member States³ on CEE nationals for up to seven years after the Eastern Enlargement; recent decisions by the European Court of Justice have been facilitating Member State limitations on their access to social benefits; and CEE movers have been targeted by anti-immigrant rhetoric across EU-15 States. Moreover, scholars have documented incidents of disadvantage (e.g., Ciupijus 2012b; Drinkwater et al 2009), racism, hate crimes⁴ (e.g., Fox 2012; Rzepnikowska 2019; Sime et al 2017), and discrimination experienced by Poles and other CEE movers in the UK (e.g., Johns 2013) – long before the spike in public antagonism associated with the Brexit referendum.

To help reconcile this apparent gap between EU rhetoric and the actual experience of mobility, the goal of this thesis is to critically examine how the CEE region and its nationals have been conceptualised and approached by EU and UK equality frameworks and policies that have been critical to the Eastern Enlargement process and the freedom of movement right. To help critique conventional legal norms and ideology in this context, I rely on and explore the limitations of critical race theory (‘CRT’). Despite this framework’s focus on the intersection of law, power, and race, it has been underutilised in the study of contemporary migration, of minority (white) ethnicities, and of transnational power

¹ Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia, and Slovakia.

² All except Sweden.

³ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

⁴ See also <http://www.irr.org.uk/news/eastern-european-workers-under-attack/>.

dynamics. I chose Poles as my study group⁵ because they constitute the largest group of post-04 movers, and the largest group of foreigners in the UK⁶.

2. Background

Racism constitutes part of Europe's heritage. For example, black and ethnic minority groups were targeted as inferior during the colonial era, and their post-war migration and descendants have often been unwelcomed in western countries such as the UK, Germany, France, and the Netherlands. Moreover, internal racisms within Europe had led to attempts to exterminate the Roma, Jews, and Slavs during WWII; the historical racialisation⁷ of the Irish in Britain; violence in the former Yugoslavia; and widespread opposition to the Roma and Muslims today. Within this milieu, CEE nationals have experienced racism within Europe by being positioned as lesser than the imagined European community created by western thinkers (Samaluk 2016). Since the Enlightenment, the CEE region has 'been subjected to the Western gaze founded on a presumed superiority and subordination', and the term 'Eastern' came to suggest inability to be fully 'European' (Ciupijus 2012a: 56-7). The economically driven, imperialist concept of 'Mitteleuropa' was applied to Poland⁸ in the early 1900s to support German plans to impose economic and cultural hegemony over Central Europe (Meyer 1955). Some have noted that this approach permeates modern relations. CEE states are perceived in western discourse as a buffer zone between east and west (Kuus 2006: 230), and as a repository of otherness, not quite part of Europe culturally or politically (Todorova 2003; Jedlicki 2005). During the Eastern Enlargement, the EU—which had been created by western European countries⁹—first admitted Members from the former Eastern Bloc.

Before the Eastern Enlargement, there had been little public or political interest in intra-EU mobility. The movement of German au pairs and Spanish waiters did not raise public concerns in the UK or other western countries. After 2004, however, public debates about immigration in the UK shifted from concerns about asylum seekers to anxieties about

⁵ Throughout this thesis, I rely on some observations pertaining to CEE countries or CEE nationals collectively. However, Poland and Poles constitute my focus – as evidenced, most notably, by my analysis in Chapters 3, 4, and 6.

⁶ Followed by India, Pakistan, and Ireland, in that order. See <https://migrationobservatory.ox.ac.uk/resources/briefings/migrants-in-the-uk-an-overview/>.

⁷ That is, implicit and explicit discourses—from individual to institutional levels—which assume a group's inferiority and affect its outcomes (Rattansi 2005; Kushner 2005; Phillips 2011).

⁸ As well as the Czech Republic, Hungary, and Austria. The term 'Mitteleuropa' still appears in EU discourse (e.g., Council 2011).

⁹ The European Economic Community was founded in 1957 by Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

CEE nationals, incensed by media misinformation about economic ‘migrants’¹⁰ stealing British jobs (Anderson 2017). Just how politicised the issue of CEE mobility had become was perhaps most poignantly illustrated in the context of Brexit. Leavers’ rhetoric concentrated on opposing CEE movers, described as ‘criminals’ (UKIP 2016; Leave.EU 2016) who had been ‘living like animals’ in their home countries (Bienkov 2013). A survey of voters conducted right after they had voted in the referendum indicates that EU mobility was one of the main reasons behind voters’ decision to leave the EU¹¹. Based on their analysis of aggregate level data and individual survey data from the British Election Study, Goodwin and Milazzo (2017) concluded that increases in the rate of immigration at the local level and sentiments regarding control over immigration were key predictors of the vote for Brexit (see also Tammes 2017).

This hostility against CEE nationals’ mobility has been accompanied by empirical evidence of their experience of inequalities¹². In particular, numerous studies have documented Polish movers’ inequalities. For example, in the employment context, Poles have experienced more deskilling, lower incomes, inferior working conditions, and lower upward mobility than British workers or pre-2004 CEE immigrants of comparable skills (Drinkwater et al 2009; Fox et al 2012a). Discrimination cases brought by Polish workers also refer to incidents of verbal abuse and patterns of harassment¹³. Hate crimes against Poles, both before and since the Brexit referendum, have also been documented (Rzepnikowska 2019). Furthermore, both tabloid and broadsheet newspapers in the UK have tended to portray them either as criminal, welfare sponging hordes or as obedient, hardworking, albeit temporary and low-paid labourers, with the stereotype of the ‘Polish plumber’ coming to mind – not culturally acceptable as permanent residents or as non-menial workers (Drzewiecka 2014b; see also Cap 2017). Political discourse, pushed further right by groups like UKIP, has been similarly frequently filled with negative remarks about Polish movers, even years before Brexit (MacShane 2011). Despite such political and media hostility which would not be tolerated against non-whites (O’Cinneide 2014a), UK anti-racist policy initiatives and equality discourse have continued to either overlook them or not adequately address their concerns¹⁴.

¹⁰ EU nationals residing in other EU States are movers, not migrants, despite frequent mislabelling by the western media, the public, and politicians. The misnomer ‘migrant’ has been applied especially to low-skilled, low-class movers on the periphery of whiteness (Anderson 2013).

¹¹ See <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/> (based on a survey of 12,369 voters).

¹² For a summary of key empirical findings, see Appendix 1.

¹³ See cases discussed in Chapter 6.

¹⁴ As discussed in Chapter 6.

It is true that a simple, doctrinal reading of both the Race Equality Directive and the Equality Act indicate that white minority ethnic groups are protected from discrimination - due to their racial or ethnic origin (in the case of the Directive), and their nationality, ethnic origin, or national origin (under the Equality Act)¹⁵. As a critical scholar, however, I look beyond formal equality protections to interrogate their assumptions and politics, and to situate them in the wider socio-cultural context. I acknowledge that statutory anti-discrimination measures and their judicial applications can only do so much to affect racism, inequalities, disadvantage, discrimination, and other race-based wrongs. In fact, widespread prevalence of racism and discrimination can co-exist alongside formal prohibitions against discrimination (Matsuda et al 1993), and inequalities might even be tacitly sanctioned by law (Delgado and Stefancic 2017). Fundamentally, any anti-discrimination law reflects compromises between various political and social groups, and the concept of equality is broader than just making discrimination unlawful. Whatever potential law might hold to fight subordination (Williams 1992), it is never complete, particularly without economic, political, and cultural shifts to support equality law. What I seek to examine in this thesis, however, is whether the EU and UK equality frameworks strive to or are even inherently capable of ensuring substantive equality rights. In addition to presenting such general critique, I also explore whether these equality frameworks might be particularly unfit for protecting the rights of Polish or CEE movers more generally.

3. My Research Questions and Goals

My key research goal is to explore how EU and UK anti-discrimination laws and equality discourses conceptualise and approach discrimination of CEE movers (especially Poles), and how they intersect with policy areas that have been critical to their mobility – the Eastern Enlargement process, the right of free movement, and the UK's employment context. Given my critical theoretical background, some questions important to my study include: How do anti-discrimination laws and the wider equality rhetoric conceptualise equality, discrimination, racism, and whiteness? What goals and assumptions underlie both EU and UK frameworks, especially concerning CEE movers? How do they imagine and attempt to respond to equality concerns of Polish movers, and is that consistent with the inequalities that empirical data indicates? Moreover, are they capable of addressing Poles' inequalities and racialisation? How do the equality frameworks interact with, and are they consistent with, the process of Poland's accession to the EU, and with how the right to

¹⁵ The question of whether racial equality protections apply to white minority ethnic groups has been settled since the 1970s, due to litigation by Irish victims of discrimination.

mobility was afforded to Poles post-accession? Finally, are there any tensions between the Race Equality Directive and how it was transposed into UK law?

In my analysis of pertinent legal frameworks, and of the EU project as a whole, I also study the role of myths – that is, narratives and modes of thinking that underlie political and philosophical imagination, frame social thought, and construct social order, including law. The material quoted at the beginning of this Chapter hints at some myths relied on by EU institutions. As Fitzpatrick (1992) explains, contemporary western law relies heavily on myths, which portray it as universal and progressive, while differentiating it from the otherness of the primitive and the non-western. Hence, to help address some of my research questions, I explore whether western policymakers rely on myths to position the west's legal and political systems as superior to those of the CEE region. Moreover, myths support the inherent tensions of modern law – for example, through narratives of law's being autonomous yet socially contingent, being stable yet historically responsive, and expressing sovereign imperative yet popular spirit (id: ix-xi). Thus, I also look for evidence of tensions within the policies I analyse, and within myths that support them.

My overarching goal is to explore how the concepts of race, racism, discrimination, and equality can better reflect the complexity of today's context-specific differences and power hierarchies, such as between eastern and western Europe. In the process, I also enquire whether critical race based theories can facilitate better understanding of discrimination and equality in the context of intra-EU movers or, more broadly, racialised whites.

4. Literature Review

A. Research on EU Law

Although comprehensive analyses of EU law have tended to be based on black letter law (e.g., Barnard 2013; Chalmers et al 2014; Craig and De Búrca 2015; Foster 2017; Szyszczak and Cygan 2008; Woods et al 2017), since the mid 1990s, critical legal scholars have been devoting more attention to the EU's legal framework. Early notable examples of critical analyses (e.g., Shaw and More 1995; Ward 1996) sought to contextualise EU law within its broader economic, philosophical, historical, and political contexts, and some offered Marxist analysis (e.g., Peebles 1997). The role of mythology in EU law's design and its conceptual opposition to the Orient was also noted (e.g., Fitzpatrick and Bergeron 1998). More recently, the volume by Adams et al (2017) offers a critical perspective on the EU's rule of law. Discrete areas of EU law have also been scrutinised by critical scholars – especially human rights policies (e.g., Williams 2004), and equality law (e.g., Chopin and Niessen 2002; Howard 2009; Schiek et al 2007; Somek 2011).

The Eastern Enlargement has not escaped critical scholars' attention. For example, at the time of the Enlargement, many critiqued the EU project (e.g., Zielonka 2007), and more specifically, its eastern expansion for its imperialist attributes and for inferiorising the CEE region (e.g., Behr 2007; Böröcz and Kovacs 2001; Buchowski 2006; Engel-Di Mauro 2006; Kovacs 2006). Some academics have turned their critique especially to the post-accession mobility derogations (e.g., Adinolfi 2005; Carrera 2005; Dougan 2004; Jileva 2002; Kvist 2004) and their potential lasting impact on the experience of mobility by CEE nationals (e.g., Currie 2008; Engbersen et al 2017).

While firmly situated within such critical analyses of select aspects of the EU project and the Eastern Enlargement process, my thesis seeks to present a more holistic critique of Poland's accession and of Poles' positioning within the EU mobility and equality frameworks (Chapters 2-5), before tracing them to Poles' experience of mobility in the UK (Chapter 6). Moreover, my theoretical contribution lies in applying CRT—and a related, critical whiteness studies ('CWS') framework—to this analysis. The value of both these analytical frames has not been afforded sufficient attention in the analysis of EU law. The few exceptions that exist do not address the treatment of movers. For example, McVeigh (2010) has relied on CWS, and Möschel (2014) on CRT, both in the context of EU policies to exclude (non-white) third-country nationals. Moreover, Solanke (2009) has applied CRT when analysing the treatment of (non-white) racial minority groups under EU law.

B. Research on CEE Nationals' Mobility to the UK

Generally, migration scholarship has been grounded in sociology, anthropology, geography, politics, and cultural studies, and has often been embedded in economic theoretical approaches (O'Reilly 2015). In the last decade, scholars have called for greater attention to the role of inequalities and discrimination in migration studies, and to the need to contextualise migration within global political and social changes (e.g., id; Anderson 2017; Castles 2010) and the study of racialisation (Erel et al 2016: 1354-55; see also Burrell et al 2018). One of my goals is to address these gaps, in the context of my study group.

The post-Enlargement influx of CEE movers to the UK has reshaped Britain's demographics, and has consequently inspired research within various academic disciplines – especially by sociologists, anthropologists (e.g., Fox et al 2012a; Garapich 2016; Moore 2013; Osipovic 2010; Parutis 2011; White 2016), and labour scholars (e.g., Ciupijus 2012a; Drinkwater et al 2009; McDowell et al 2007; Ruhs and Anderson 2010). Most of this research has focused on CEE movers' motivations for migration, their impact on the

British labour market, and their identity and integration (Halej 2014: 11). The oftentimes xenophobic responses¹⁶ by the British media (e.g., Grayson 2013) and through policies restricting EU nationals' access to benefits have also been met with dismay by scholars (e.g., O'Brien 2015b), especially as exhibited in the context of the Brexit referendum (e.g., Barnard and Butlin 2018; Dennison and Geddes 2018; Virdee and McGeever 2018).

Due to their large numbers (exceeding 900,000 by 2017¹⁷) and visibility, Polish movers have featured prominently in this literature. Especially prevalent have been studies of their labour market experiences, evidencing exploitation and deskilling (see Appendix 1¹⁸). Scholars have also discussed discrimination and expressions of racism against Poles (e.g., Fox 2012; Johns 2013; Rzepnikowska 2019), and their negative media portrayals (e.g., Drzewiecka 2014a; Fox 2012; Spigelman 2013). Many have focused on their identity, integration (e.g., Botterill 2011; Erdal and Lewicki 2016; Garapich 2016; Kubal 2012; Lopez Rodrigues 2010; Ryan 2018; White 2016), and mobility strategies (e.g., Coniglio and Brzozowski 2018; Grzymala-Kazłowska 2017; Karolak 2016). Brexit has often featured in recent scholarship, especially in the context of post-referendum violence and racism (e.g., Burnett 2016; Rzepnikowska 2019; Sime et al 2017), and of Poles' responses to it (e.g., Burrell et al 2018; McGhee et al 2017).

My thesis draws on the above research, while situating it more firmly within the UK's legal equality framework. My focus differs from existing legal scholarship, which has tended to analyse discrete aspects of Polish and other CEE movers' experiences in the UK. For example, Kubal (2012) has situated Polish movers' responses to the British legal framework within Polish legal culture. Currie (2007, 2009) has looked closely at post-accession UK regulations affecting CEE movers' employment and access to welfare benefits¹⁹. Moreover, Barnard and Ludlow (2016), and Barnard et al (2018) have addressed CEE workers' experiences before employment tribunals. The former article is based on a quantitative analysis of tribunal filings, and the latter explores why so few CEE nationals file claims. On the other hand, my analysis (in Chapter 6) is based on a close analysis of Poles' claims and adjudicators' decisions, which I situate within the broader UK equality discourse. Furthermore, I employ a theoretical framework which has not been heavily relied on by scholars of UK law. Although UK sociologists have been applying CWS and CRT frameworks (particularly in education research) (e.g., Bonnett 2000; Fox et al 2012a;

¹⁶ And across EU-15 States more generally (e.g., Sobis et al 2016).

¹⁷ Based on country of birth. See <https://migrationobservatory.ox.ac.uk/resources/briefings/migrants-in-the-uk-an-overview/> (citing ONS data).

¹⁸ Summarising key empirical evidence of their inequalities and exploitation in the UK.

¹⁹ I draw heavily on this research in Chapters 4 and 6.

Garner 2012; Hickman et al 2005; Phoenix 2009), legal scholars have not made much use of these tenets.

This thesis is informed by, but does not simply replicate research of the migration and equality experience of other marginalised white groups in the UK. For example, the Irish—who have greatly influenced how the British equality legislation is applied to all whites—differ in significant ways from Polish movers. Notably, they share the same language, and have had a much longer and significant history of migration to the UK, filled with much religious and political strife. Similarly, subtleties of each CEE group's history, migration patterns, stereotypes, and identity demand that the application of my findings to other CEE groups be nuanced. For example, compared to movers from other CEE states, Poles tend to have stronger historical ties²⁰ to the UK, and better established migration networks (Grabowska-Lusińska and Okólski 2008) – traits which might make them more welcomed by native Britons. They are also uniquely subjected to the superficially positive²¹ stereotype about their strong work ethic (MacKenzie and Forde 2009). Recent movers arguably positioned most differently from Poles are Romanians and Bulgarians, who were subjected to especially tight mobility controls (Fox et al 2015), and who lack any historical links to the UK. That being said, my research will shed some light on how other non-western movers—all of whom share some similarities²²—fare under the UK (and EU) equality frameworks.

5. My Theoretical Framework

A. Critical Race Theory

Building on the work of European theorists such as Foucault and Derrida, and American race study pioneer W.E.B. Du Bois, CRT was developed in the 1980s by American legal scholars, as a response to the perceived stalling of the civil rights era progress. CRT scholars seek to address the widespread prevalence of everyday informal microaggression, racist stereotypes, institutional racism, and discrimination against Afro-Americans, all of which continue to exist despite rhetoric of equality and formal equality laws (Matsuda et al 1993).

²⁰ Including Poles who settled in the UK after WWII, and pre-2004 political refugees and clandestine economic migrants.

²¹ Wu (2002) notes how superficially positive stereotypes nevertheless carry stigma.

²² All CEE states experienced similar power imbalances with the west during their accession processes; and EU rhetoric tends to inferiorise and lump CEE states together. All CEE groups are treated alike under formal equality laws, and tend to be racialised (e.g., Cook et al 2011; Fox et al 2015; Kofman et al 2009; Spencer et al 2007) and subjected to political, media, and public hostility (Pasic 2013).

CRT scholars explore how formal legal concepts overlook, silence, or even tacitly sanction inequalities (Delgado and Stefancic 2017). Because those in position of social power create laws to benefit themselves, laws construct and legitimate interests that benefit them (Crenshaw and Peller 1995). Moreover, the dominant group employs the rule of law and legal ideology to obscure law's weaknesses and hidden politics (Delgado and Stefancic 2017). Crenshaw (2011) points out, for example, how by having addressed some overt obstacles to inequality, formal equality law gives the impression that inequality has been erased, thus substantiating equality rhetoric and inhibiting efforts to address milder—even if more pervasive—forms of racism. Consequently, to unpack the function of anti-discrimination law, one must look not only at equality doctrine, but also at what interests it conceals, how it relates to underlying social relations, how it is interpreted and enforced, and how it relates to the broader political and social climate (id).

The role of race in inequality is central to CRT. Unlike some critical legal studies ('CLS') scholars who dismiss the concept of race as overly essentialist, CRT writers focus on how law creates and naturalises the construct of race, which in turn affects experiences (Lopez 2005)²³. Racism and race-based wrongs are ordinary, and prevalent (Williams 1992). The legal system is not equipped to redress most such wrongs because its vocabulary and scope are insufficient (Crenshaw 2011). That being said, CRT scholars value legal rights for their potential to bring about equality (Harris 2013). Because the status quo benefits dominant whites, however, steps to change the legal order are made only when doing so benefits the dominant group, that is, when there is 'interest convergence' between the interests of the dominant and subjugated groups (Bell 1980). For example, the US Supreme Court's *Brown v Board of Education*²⁴ ruling mandating racial desegregation in public schools can be attributed to the white elite's geopolitical motivations (building credibility with other countries, and alleviating the threat of widespread black discontent at home) and economic concerns (facilitating industrialisation in the American South) (id). Although based on black-white relations in the United States, the concept can be expanded to address all dominant groups' self-interest in promoting disadvantaged groups' legal or social advances.

Despite its roots in American legal history, CRT has been noted for its usefulness to the analysis of international law and economic globalisation (Valdes et al 2002: 303-9). 'CRT provokes a critical thinking that is not limited to a historical time and place, but confronts

²³ Moreover, according to the concept of intersectionality, domination is multi-dimensional, and depends also on factors such as gender, class, and sexual orientation (Williams 1992).

²⁴ 347 U.S. 483 (1954).

law's complicity in the violent perpetuation of a racially defined economic and social order' (Douzinas and Gearey 2005: 259). Moreover, according to Heinze (2008), to maintain CRT's credibility, scholars should apply it more to non-US laws²⁵. Although postcolonial scholars have been relying on CRT themes—without necessarily acknowledging them as such—in studies of European colonialism (e.g., Eze 2007; Fanon 1988), the potential of CRT to analyses of non-American law has been underutilised so far. The few exceptions that exist either focus on the global North versus the global South (e.g., Valdes et al 2002) or, if looking at Europe, do not address intra-EU mobility (e.g., Goldberg 2006; Möschel 2014; Solanke 2009; Tuitt 2004). My work expands CRT's application to EU and UK legal frameworks.

Some CRT scholars have begun to explore how immigrants are racialised (e.g., Garcia 2017). This has been especially notable among Latina/o CRT ('LatCrit')²⁶ scholars, who focus on both the historical and contemporary oppression of Latin American immigrants in the United States (id). Romero (2008) notes the practical benefits of applying CRT to migration studies, to address issues such as anti-immigration sentiment and policies. Although her sociological research focuses on non-Caucasian immigrants to the United States, she emphasises the importance of applying CRT to immigration laws (see also Johnson 2004). Moreover, despite focusing on the experience of Mexicans in the United States, Garcia (2017) notes CRT's usefulness to exploring how law marginalises or excludes certain migrants. This thesis contributes to such migration scholarship that relies on CRT.

i. CRT and CEE Movers

It might not seem obvious at first why the CRT framework, which stems from Afro-Americans' civil rights struggle, might be of use when studying white ethnic minority groups. It is true that, unlike non-white groups, CEE movers' white skin offers them at least partial access to white privilege, and their progeny is likely to become invisible in predominantly white western countries. However, at its core, CRT focuses on unequal access to legal and other power structures, and on how such power differentials reproduce material and social inequalities. Thus, conceptually, this framework is suitable to the study of equality of any group that is not locally privileged. For example, CRT has been applied to the study of inequalities experienced by 'queers' (e.g., Misawa 2012), and poor whites

²⁵ CRT framework appears especially suitable for analysing laws of the UK since it shares with the United States a common-law tradition and race relations embedded in civil rights concerns.

²⁶ In addition to LatCrits, CRT has given rise to other offshoots, each dedicated to the study of its respective ground of subjugation – including ClassCrits, QueerCrits, and AsianCrits (Delgado and Stefancic 2017).

(e.g., Pruitt 2015). Moreover, demonstrating CRT tenets' usefulness to analyses of groups and contexts to which it has not been traditionally applied—such as in my study—will test and expand this theory, making it more robust.

An initial discomfort with applying CRT and, more generally, with studying racialisation and discrimination of CEE movers might also be prompted by an incorrect assumption that it somehow devalues BAME²⁷ groups' experiences of racism or discrimination. It does not. I do not ignore the fact that even those at the bottom of the hierarchy of whiteness benefit from being phenotypically white (Garner 2006). Moreover, the use of the term 'racialisation' should not promote false equivalency with the concept of blackness or with non-whites' experience of inequalities. Similarly to Hartigan (1999: 13), I acknowledge that whites and blacks are racialised differently, and that the social and political ramifications of those racialisations are vastly different.

I suspect that resistance to applying CRT to white groups might also be prompted by an unease with acknowledging that some whites are less privileged than others, and that some face discrimination. There is a long-standing argument, propagated in public debates, that opposing or stigmatising CEE movers does not constitute racism, because they are white (Anderson 2017) and hence privileged²⁸. This outlook is also internalised by some CEE movers, who have difficulty conceptualising apparent racism against them as such (Fox et al 2015; Haley 2014: 153). Such views, of course, reflect how naturalised white privilege is, rendering whiteness invisible. This reinforces the need to explore fractures within whiteness.

Notably, CEE movers' race rarely gets addressed by the dominant group. For example, white Britons in Moore's (2013: 212) study never explicitly mentioned CEE movers' race when differentiating them. Instead, they focused on movers' social class, respectability, appearance, language, living conditions, poverty, and low-skill employment. The fact that whiteness as a racial identity tends to be invisible does not render it irrelevant. If anything, it points to how naturalised it is as a concept, and makes it more important for researchers to address. Race, including whiteness, always operates culturally and structurally, and through unconscious everyday practices and discourses. Notably, 'race has not only to do with colour, but with tying culture to bodies in a hierarchical way', so that there is no neat line between white and non-white (Garner 2009: 48). White skin does not shield CEE movers from processes of racialisation and the effects of racism (e.g., Fox et al 2012a;

²⁷ Black, Asian, and Minority Ethnic.

²⁸ Moreover, political correctness norms constrain the expression of negative attitudes towards non-whites (Lewis 2005).

Garner 2009, 2012). Whiteness in the UK has been ‘fashioned through and against other versions of whiteness’ (Nayak 2002: 243), such as of the Irish historically and of ‘chavs’ today, through a process which delineates those who are considered ‘white’ from those not ‘white enough’ and those excluded from whiteness altogether (id: 258). Similarly, Fox et al (2012a: 681) argue that ‘racialisation does not require putative phenotypical or biological difference’. Instead, racism can also rely on cultural traits as a basis of differentiation (Barker 1981), and racialisation occurs whenever the ‘category of “race” is invoked and evoked in discursive and institutional practices to interpret, order, and indeed structure social relations’ (Fox et al 2012a). Notably, white Britons’ comments racialising CEE workers as inferior in both Halej’s (2014: 111) and Moore’s (2013: 303) studies showed some parallels to racist discourses used to stigmatise black and postcolonial populations in the UK. Therefore, the concept of race is relevant to any study of how dominant whites’ position is constructed by excluding less privileged white groups.

ii. Responding to Critiques of CRT

CRT scholars have sometimes been critiqued for relying too heavily on the black/white binary, attributing inequalities exclusively to (non-white) race, and using personal anecdotes rather than methodologically rigorous studies²⁹ (Crenshaw and Peller 1995).

One of my aims is to look beyond the black/white binary, by exploring how migration and ethnicity affect the experience of inequalities, discrimination, and privilege. I also guard against methodological weaknesses through my empirically rigorous research design, as described below.

B. Critical Whiteness Studies

The study of white privilege constitutes an essential component of CRT³⁰. Often traced to the work of 19th-century African-American scholars who illuminated how white privilege deprives people of colour of access to material and social resources (Twine and Gallagher 2008: 7-10), critical whiteness studies (‘CWS’) focus on how whiteness is construed at both institutional and everyday levels. CWS scholars explore how privilege accrues to the dominant whites (McIntosh 1988³¹) through racism against and racialisation of inferiorised

²⁹ In response, CRT scholars have begun to rely more heavily on rigorous quantitative and qualitative research methods (e.g., Foster 2014; Oei and Ring 2015; Paul-Emilie 2015), including systematic content analyses of hard laws (e.g., Clarke 2014).

³⁰ Not surprisingly, some have combined CWS and CRT in their studies (e.g., Fredericks 2009; Gillborn 2005).

³¹ McIntosh (1988) listed some poignant examples of white privilege, such as: being able to shop anywhere without being harassed; being surrounded by other whites in daily contexts, on television, and in newspapers; having one’s national heritage and the concept of civilisation attributed to whites; being surrounded by products and traditions that reflect white culture; and being treated as an individual rather than a representative of one’s race.

groups (Frankenberg 1993; Roediger 1991). All whites benefit from whiteness economically, politically, legally, socially, and culturally (Frankenberg 1993; Garner 2007b). Whiteness has traditionally been unmarked and unquestioned, and thus normalised as the position of power (Bonnett 2000). Both CWS and CRT scholars have disrupted that image, by revealing and problematising the construction of white privilege — through laws, discourse, economics, politics, and culture (Lopez 2005).

Whiteness has been deeply embedded within European history. McVeigh (2010) has traced the significance of whiteness to the construction of the Roman Empire and of the Holy Roman Empire (in opposition to barbarians); hostility towards Saracens, Jews, and Gypsies; and antagonism towards non-white colonial subjects. Contemporary debates about whiteness can be observed in the concept of Fortress Europe³² to keep (mostly non-white, non-Christian) third-country nationals out of the EU, and in widespread opposition to the potential accession of Turkey (id).

Not only people of colour get excluded from the concept of whiteness. Instead, it is a relational concept, constructed by positioning others at its borders or by dismissing them altogether as inferior (Said 1978). There are degrees of whiteness that differentiate between dominant whites and non-dominant Caucasian groups (Hartigan 1999: 14). Moreover, whiteness has permeable and shifting boundaries (Linke 1999), constructed through local, national, and global relations, past and present (Frankenberg 1993). Thus, Slavs, Celts, and Latins had been ranked as less white than Anglo-Saxons as far back as the Enlightenment (Eze 2007). A century ago, the Irish, Jews, Italians, and Slavic immigrants in the United States only came to belong to the dominant white group by increasing their political engagement, assimilating culturally, acquiring wealth, and differentiating themselves from non-whites (Roediger 1991; Jacobson 1998). Likewise, in the UK, Jews and the Irish were initially racialised; as Gypsies and Travellers continue to be to this day (Garner 2007b; Kusher 2005).

Some CWS scholars of contemporary power relations have sought to dismantle the idea that whiteness is a monolithic identity (Twine and Gallagher 2008), by exposing its fractures and how closely circumscribed the locally privileged white norm is (Levine-Rasky 2013). Hartigan (1999: 3) argues that social researchers need to pay more attention to differences within racial groups, and to local settings in which racial identities become articulated. Some phenotypically white people are marginalised due to their class, gender, sexuality, or nationality (e.g., id; Bonnett 2008; Garner 2007b; McDowell 2009; Wray et al

³² Hepple (2004).

2001). For example, the privileged British white norm excludes migrants, perceived as a threat to British values, ethnicity, and health (Garner 2012).

i. Whiteness Studies and CEE Movers

Garner (2006) calls for a more nuanced application of CWS to micro level power relations among white groups, which have come to the foreground due to the arrival of post-communist refugees and of post-2004 CEE movers in western countries. Indeed, CEE movers represent an interesting and timely group for a study of whiteness in the UK. For the first time since the great Irish exodus of the 1800s, white Britons became confronted with a large group of people who share their phenotype and thus a degree of invisibility. These movers' position has been rather ambivalent in that they are considered neither an oppressed minority, nor a part of British society or its colonial heritage, nor immigrant outsiders³³. Notably, they are phenotypically white, but not white enough to belong to the British norm.

Non-legal researchers, especially sociologists and labour scholars, have relied on CWS tenets to explore both the benefits accruing to CEE nationals from their race, and their incomplete access to white privilege. For example, they have addressed British immigration policies' preference for CEE nationals over non-white immigrants – such as for post-war Baltic volunteer workers (McDowell 2005), and for post-04 movers³⁴ (McVeigh 2010). In line with historical labour studies (e.g., Roediger 1991), CEE movers' white skin offers them some advantage in the UK, such as easier access to front desk and home care jobs (e.g., Burrell et al 2018; McDowell 2009; Samaluk 2014). CEE nationals appear aware of such benefits of their whiteness. For example, being white leads CEE movers to expect not to suffer racism³⁵, and to be in a privileged position in the labour market (McDowell et al 2007) and within British power hierarchies (Fox et al 2012a; see also Halej 2014: 153). This sense of privilege might also help to explain CEE movers' racism towards non-white groups (e.g., McDowell et al 2007; Parutis 2011)³⁶. On the other hand, CEE movers have been racialised through the white majority's attribution of 'deprecatory features' to them, focused on their 'alien values', primitivisation, and criminalisation (Halej 2014: 111). They have also been racialised by the UK media and in popular discourse – as cheap, exploitable, criminal, or uncivilised workers (e.g., Fox et al 2012a; Garner 2012). Studies in both urban (e.g., Halej 2014) and rural areas (e.g., Moore

³³ Before Brexit immigration policies become implemented.

³⁴ Before Brexit, that is.

³⁵ In Halej's (2014: 161) study, several CEE respondents insisted that the concept of 'racism' could not apply to them because of their whiteness. They reserved it for BAME individuals.

³⁶ In turn, CEE workers have experienced racism from non-white co-workers (e.g., McDowell et al 2007).

2013) indicate that some white Britons perceive CEE movers as innately inferior, ‘not quite white’³⁷ enough to integrate into English life – largely due to their appearance and perceived lifestyle characteristics³⁸ (Moore 2013: 27), and due to being conflated by some with undocumented migrants (Halej 2014: 119). Notably, this racialisation process often relies on rhetoric resembling that which was applied to oppose non-white, colonial migration to the UK (id: 90). It is also reminiscent of the historical racialisation of Jews, the Irish, and Eastern Europeans. My thesis seeks to contribute to such research, while exploring CWS’s utility to legal analyses of intra-EU power hierarchies.

ii. Responding to Critiques of CWS

The CWS framework has been critiqued for ignoring the importance of the global backdrop of financial relations (Delgado and Stefancic 2017), and for approaching whiteness as a category abstracted and removed from daily race issues (Bonnett 2000). More fundamentally, Arnesen (2001) argues that ‘whiteness’ is a social construct that is impossible to define³⁹, and therefore, is vulnerable to manipulation by researchers seeking to promote their own subjective interpretation. I guard against the danger of infusing subjectivity into this research through my methodological training at the LSE⁴⁰ and through my rigorous research design (described below, and in Chapters 2 and 6). Moreover, my work addresses contextual background factors (economic, historical, political, and cultural) and data (including quantitative studies) on inequalities that embed my discussion of whiteness within a broader, lived context. One of my goals is to infuse CWS with a more global perspective, by considering intra-EU fractures within whiteness. I am also aware of intersectionality issues that affect the experience of equality by CEE movers, and especially the role of class (addressed below and throughout the thesis, as applicable).

Some critics attack CWS for potentially idolising whiteness – or, on the contrary, for demonising whites (Dyer 1997; Kolchin 2002). I do neither. Instead, one of my aims is to expand critical race theories to consider how whiteness is internally fractured, thereby exposing its fabrication. Caucasian scholars who study whiteness to explore its construction have been termed ‘race traitors’ or ‘neo-abolitionists’ because revealing the construction of white privilege and making it visible constitute steps towards abolishing it (Ignatiev 2008). Some note that race traitor scholars have contradictory aims of attempting

³⁷ Three interviewees in Halej’s (2014: 138) study even questioned whether CEE movers are phenotypically white, and described them instead as ‘pale’ or ‘not black’.

³⁸ Such as their clothing, hairstyles, food and alcohol consumption, gender relations, sexuality, employment, perceived poverty, living circumstances, and housing.

³⁹ The same critique can be applied to any socially constructed category (such as gender or sexuality).

⁴⁰ Including modules on Socio-Legal Theory and Practice, and on Qualitative Methodologies.

to abolish all racial constructs, while studying different experiences of each race, thus reifying the concept of separate races (Garner 2007b). As I explore the boundaries of whiteness, I share both these goals, and do not think that the two positions are inconsistent: Race is unfortunately a lived reality, with material effects, steeped in historical, social, economic, and political power relations. As such, before the possibility of change can be conceptualised, pre-existing racial categories must be used to address the position of groups at each race's centre and at racial margins. As US Justice Blackmun had noted in a key affirmative action case, '[i]n order to go beyond racism, we must first take account of race'⁴¹.

C. Other Potentially Relevant Analytical Frameworks

i. The Role of Class

Both CRT and CWS scholars note that not only race, but also class has material and symbolic effects on our experiences. The concept of intersectionality recognises that we are simultaneously members of many groups—such as those based on gender, class, religion, and sexual orientation—and these complex identities shape the specific way in which we access privilege, experience discrimination, and suffer inequalities (Delgado 2011: 1263). Whiteness is mediated by class (Levine-Rasky 2011), as demonstrated through the construction and experiences of 'white trash' in the US (Haylett 2001; Pruitt 2015) and 'chavs' in the UK (Hayward and Yar 2006; Jones 2011), and the marginalisation and criminalisation of 'the white working class' (Webster 2008; Mondon and Winter 2018). More specifically, scholars have noted that CEE nationals' whiteness and racialisation in the west have been affected through their (lower) class - both historically (Roediger 1991) and today (Fox et al 2012a; Halej 2014; McDowell 2009). Within the broad EU backdrop, all CEE nationals are relatively poor in comparison to EU-15 nationals. Not surprisingly, there is little, if any, mention of middle or upper class CEE nationals in today's western discourse. Thus, my study implicitly addresses intersectionality of race and (lower) socio-economic class.

Class differentiation among members of my study group, or among CEE nationals more generally, is not always at the forefront of my thesis, however. This is partly driven by the fact that both EU and UK equality frameworks ignore class⁴². Moreover, the concept of class is not straightforward when applied to CEE movers in the UK. In Halej's (2014: 137)

⁴¹ Regents of the University of California v Bakke, 438 U.S. 265 (1978).

⁴² Of course, policies limiting access to welfare benefits, imposing financial tests to access the right of free movement, or encouraging precarious employment disproportionately affect CEE nationals who are poorer or lower-skilled. Moreover, it is more difficult for poorer claimants to assert their rights before tribunals.

study, although some white British respondents associated CEE movers with the lower class or even 'below' lower class⁴³, others regarded CEE movers as insufficiently integrated to occupy a particular position in the British class hierarchy. Notably, it is not simply CEE nationals' class positioning within the EU or in the UK that appears to provoke anxieties in the west. For example, movers from other poor Member States, such as Greece or Portugal, have not evoked as much concern in the UK⁴⁴ (as explained in Chapter 6) or exclusion through EU discourse (as addressed in Chapter 2) as CEE nationals have. Hence, despite noting the importance of class to the experiences of my study group, I situate my work within a framework based on race instead. In Chapters 6 and 7, I revisit the concept of class and the potential usefulness of class-based analysis to my project.

ii. Postcolonial Analysis

In Europe and the UK, studying whiteness is rooted in ideas of postcoloniality (Ponzanesi and Blaagaard 2013). Postcolonial theory largely emerged in the mid 1900s, as former colonies (such as India and Algeria) struggled for and gained independence. Postcolonial scholars have explored the symbolic, political, economic, and social effects of colonial exploitation on the new postcolonial environments, and on westerners' views not only of their former colonial subjects but also of themselves (e.g., Fanon 1988; Said 1978; Kerner 2018). For example, postcolonial scholars often note how white Britons define their whiteness in opposition to their former colonial subjects, and formulate it around the values of Christianity and proper English middle class behaviour (e.g., Bonnett 2000; Garland and Chakraborti 2006; Lopez 2005). Contemporary postcolonial theorists explore the voices of former colonial subjects, which have been historically disparaged and excluded by the west (e.g., Spivak 1988). Some also address modern colonisation processes, such as in the Middle East (e.g., Gregory 2004), and due to North–South economic power asymmetries (e.g., Kerner 2018). More generally, Fitzpatrick (2001) argues that today's globalism, fuelled by neoliberal economics, can be approached as a continuance of western imperialism, albeit without actual colonies. There are some obvious intersections between postcolonial theory and CRT. Both emerged out of, and represent an intellectual challenge to racial oppression. Borrowing heavily from one another, both expose that race and racism are intricate parts of social history and social systems. Both seek to create more racially just societies.

⁴³ Due to movers' ignorance of workers' rights, and poor language skills.

⁴⁴ Although historically, Mediterranean immigrants did provoke opposition in the UK (Panayi 2010).

In the context of CEE movers, most applications of postcolonial theory have focused either on the CEE region's decolonisation from the Soviet Union or on the west's ongoing role in economic neo-colonialism of the CEE region (e.g., Böröcz and Kovacs 2001; Buchowski 2006; Hipfl and Gronold, 2011; Samaluk 2014, 2016a; Stenning and Hörschelmann 2008). Böröcz (2001) argues that both the 'Europeanisation'⁴⁵ process and the Eastern Enlargement were characterised by neo-colonial export of governmentality and economic control by western governments and companies, which approached the CEE region as in need of modernising. This gaze of western superiority has been reinforced by the UK media and public, which in turn helps employers to legitimise their exploitation of CEE workers (Samaluk 2016). The success of the EU's eastern 'colonialism' has been facilitated by the local elites' embrace of western discourse (Behr 2012)⁴⁶. Scholars have also argued that this outlook has been internalised by the CEE public. That is, their imagination of the west is informed by the postcolonial logic of western economic, political, and cultural superiority (Kiossev 1995). This 'self-colonial logic' guides CEE workers' decisions to take up low-skill, low-paid employment in the west – tradeoffs they are willing to make to be able to partake of western culture (Samaluk 2016a).

Postcolonial theory is relevant to my research questions because the east-west power differentials are at the core of my study, as is western ideology othering the CEE region. I consider postcolonial approaches to studying the CEE region, and cite postcolonial scholars throughout the thesis as appropriate. But the postcolonial framework is of lesser utility to my purpose than CRT/CWS framework because postcolonial theory is less concerned with fractures within whiteness. Moreover, one of my goals in this thesis is to critique and test CRT and CWS frameworks as applied to my research questions. Hence, I rely on those theoretical approaches, without discounting the relevance of postcolonial theory to my study. I revisit these issues in Chapter 7.

6. My Methods

In their analytical approaches, both CRT and CWS scholars re-examine historical and legal records to focus on the underlying interests that they further, and replace majoritarian interpretations with those in line with the experience of minorities (Harris 2013). Both question the underlying definitions and foundations of the current legal order - including equality theory, legal reasoning, and the apparent neutrality of law (Delgado and Stefancic

⁴⁵ A misnomer. In this context especially, it would be more accurate to call the process 'westernisation'.

⁴⁶ Of course, the recent pushback by the Polish Government against some EU policies might be indicative of the gradual evolution of Polish consciousness away from western norms.

2017). To expose various forms of subjugation, they tend to rely on qualitative research methods (e.g., Crenshaw 2011; Harris 2013; Levine-Rasky 2013; Matsuda et al 1993; Williams 1992). Rather than adhering to a particular method, however, CRT scholars focus on producing knowledge that will make a difference to those who are dominated, by naming forms of discrimination that are not addressed by formal legal language and by majoritarian legal discourse (Crenshaw 2011).

A qualitative approach is more appropriate for my research than a quantitative design because my questions are open-ended and I seek an in-depth understanding of complex social processes. Moreover, my critical approach is more in line with interpretivist than positivist studies (Snape and Spencer 2003). Qualitative methods are especially useful for exploring understudied topics, and gaining insights about how legal systems operate (Webley 2010). They are also well-equipped to take account of social contexts and of the complexity of real social phenomena (id). I rely on documentary qualitative analysis because law and legal discourse are highly verbal fields. As Webley (2010) notes, documentary analysis is of great importance to empirical legal studies, and scholars should consider not only hard laws, but also other (currently underutilised) legal documents. Critical scholars view the binary distinctions between hard and soft law as illusory (e.g., Bennouné 2012; Trubek 2006). Close analysis of soft laws is especially important when researching the EU's legal framework, because the EU is 'primarily a textual enterprise, a "print community"' detailing its own development and practices (Williams 2003: 666).

The documents I reviewed and cite in this thesis include: (1) anti-discrimination laws (the Race Equality Directive, the Equality Act 2010, and anti-discrimination cases); (2) all foundational EU treaties; (3) (a) laws and (b) official discourse behind Poland's accession and the right of free movement; (4) legislative histories of all aforementioned laws; and (5) soft law documents related to all of the aforementioned laws⁴⁷. All these sources are relevant, credible, and representative of the common view of the groups that had drafted them (Finnegan 2006). I reviewed all documents relevant to categories (1), (2), (3)(a), 3(b), and (4) listed above. I also reviewed approximately 20% of the more than 100,000 documents responsive to category (5). I chose that sample based on relevance as determined by EUR-Lex search engine⁴⁸. I also made sure that my sampling was

⁴⁷ Moreover, since I consider the significance of my data in the broader institutional, economic, historical, and political contexts, I also researched and cite relevant background information as appropriate.

⁴⁸ See <http://eur-lex.europa.eu>. Managed by the EU Publications Office, this official database is updated daily and includes all EU laws, preparatory documents, agreements, legislative history documents, Parliamentary questions, and other public documents, dating back to 1951.

representative by looking quickly at all the relevant documents that my queries had produced.

I chose content analysis as the most suitable method given my theoretical background, the availability of large numbers of relevant documents, and the complexity of the phenomena that I research. Content analysis is especially useful for highly communicative areas of study (Krippendorff 1989), for mapping out key characteristics of large bodies of legal and policy texts (Webley 2010), and for addressing the complexity of materials being studied (Bryman 2004). Moreover, content analysis allows the researcher to take a theoretical position that frames the development of her research criteria and inferences made from texts (Krippendorff 2003); to analyse texts within their social, cultural, economic, and political contexts (Short 1995); and to consider texts' latent characteristics and any missing parts (Elo et al 2014). When reviewing each document in my data sets, I created categories based on how often certain concepts appeared, and how well they were developed. Where possible, I sought to link the various categories that had emerged by combining them and by creating subcategories. I then compared the various categories that had emerged in each data set, merging categories where possible, and deleting categories that were the least significant within my data sets. Throughout the thesis, I include the main categories that had emerged from my data sets in headings and subheadings, and I refer to the most data-rich sources to illustrate my findings. More detailed descriptions of my methodology are included in Chapters 2 and 6.

Qualitative research is sometimes criticised for subjectivity, limited validity and reliability, and lack of (statistical) generalisability (Webley 2010). I recognise that my Polish ethnicity, my background as a litigator, and my theoretical orientation might have affected my data collection and analysis by predisposing me to feel biased towards Poles, and thus prone to perceive inequalities, discrimination, or injustice where they do not exist. To help address these challenges, I was mindful at each step of my research about the effect my political, cultural, and personal values and assumptions might have had on my research design, data collection, data interpretation, and data presentation. I designed and carried out my research with transparency, and with methodological appropriateness - by generating and analysing my data with integrity, in a systematic and rigorous way, documenting all my research steps, carefully developing and revising coding categories, and discussing this with my supervisors. I acknowledged contradictory data where it exists, and paid attention to diverse views in scholarship. Moreover, I situated my data interpretation within pertinent

quantitative evidence about migration flows and labour market outcomes⁴⁹, and within methodologically rigorous studies of racialisation and inequalities. To address ethical implications of my work, I was careful throughout my study about not producing or enabling theories or arguments that might be construed as racist.

7. Roadmap

The thesis proceeds as follows: Chapter 2 sets the background to the way in which the EU equality regime, the enlargement project, and Poles' mobility have been embedded in a certain set of values and ideologies. It closely examines foundational fundamental rights mythology and some of its derivative myths, seeking to uncover hidden goals and assumptions within such myths. My aim is to explore whether EU rhetoric reveals a conceptual hierarchy of Europeanness or whiteness. Chapter 3 takes a close look at Poland's accession process, and situates it within EU narratives. Specifically, I examine how Poland's economic and political challenges after the fall of Communism might have been reinforced through specific pre-accession policies imposed by western financial institutions and the EU, prompting Poland to enter the accession process on an unequal footing. I also consider the dynamics of the accession process, and analyse some key aspects of the *acquis* that have been particularly disadvantageous to Poland. Chapter 4 seeks to trace EU myths and inequalities built into the enlargement process to direct and indirect limits on CEE nationals' ability to reside and work in the EU. I explain pre-04 EU immigration policies, and the context leading to the imposition of post-accession mobility derogations. I also address how the UK and other EU-15 States had applied transitional measures, before exploring how the mobility framework has been evolving over the last decade. Finally, I take a broad look at mobile Polish workers' experiences and their mobility's effects. In Chapter 5, I explore how the right to equality under EU law, which has been intimately linked to the right of free movement, has been conceptualised in the context of CEE movers. Specifically, I consider whether CEE movers have been included in the Race Equality Directive's legislative history, and whether the Directive's text and ECJ interpretations are fit to address their equality concerns. I also address the Directive's transposition process in EU-15 States, and discuss how CEE nationals have been approached by the EU's equality discourse.

The UK becomes the focus of my thesis in Chapter 6. I explore CEE nationals' experience of discrimination, disadvantage, and racialisation in the UK, and their position within the British equality framework. After presenting a historical analysis of the British race

⁴⁹ For a summary of labour market outcomes studies, see Appendix 1.

relations framework, I offer a close critique of key provisions of Equality Act 2010. I then review recent employment tribunal claims brought by Poles, exploring whether their frequent racialisation is taken into account by the tribunals. More generally, I ask whether the current equality framework is capable of responding to Poles' experience of inequality. Finally, Chapter 7 situates my findings within the long-standing western othering of the east, and draws out my study's theoretical and policy implications (including in the context of Brexit). I also explore links between how the CEE region and CEE nationals have been approached by the EU and British legal regimes, before noting some limitations of my study, and suggesting areas for further research.

Chapter 2: EU Narratives

1. Introduction

As mentioned in the Introductory Chapter, western intellectuals have relied on discursive practices to imagine the east as inherently different from, and lesser than, the west - politically, socially, ideologically, scientifically, and artistically (e.g., Said 1978) – beginning during the Enlightenment (Wolff 1994), and gathering force in the early 1900s (Meyer 1955). Some scholars have argued that this conceptual approach has continued since the fall of Communism, with the CEE region still being imagined as an embodiment of inferiority and otherness within Europe (Todorova 2003), inherently unable to be fully ‘European’ (Ciupijus 2012b), and hence in need of western tutelage (Brubaker 1998).

In this Chapter, I seek to address whether such perspectives underlie EU discourse. That is, my goal is to explore whether the Eastern Enlargement, and CEE nationals’ mobility have been embedded in ideologies that similarly other, exclude, or silence the CEE region or its nationals. Specifically, I pay close attention to whether legal narratives construct a hierarchy of whiteness or ‘Europeanness’ within the EU. I seek to illuminate what interests are emphasised and served by EU discourse, which ones are ignored or silenced, and whether EU narratives are internally consistent. These topics are necessary to explore as I move towards my discussion in later Chapters of whether the EU’s equality framework is internally consistent, and of how it interacts with key EU policies.

Critical race scholars have noted the importance of legal ideology, communicated through texts and symbols, in producing a social reality, which reflects and reinforces existing power relations (Delgado and Stefancic 2017: 8-10). The dominant group employs not only formal laws, but also legal rhetoric to obscure, excuse, and deny racism (id: 77), distancing itself from potential criticism. It creates and employs legal myths—predominantly contained in soft law instruments—to also affect what becomes think-able and do-able (Della Sala 2013). By presenting the current system as basically fair and inevitable, while obstructing the real assumptions and goals behind laws, legal rhetoric also reduces policy efforts aimed at addressing inequalities (Crenshaw 2011). Moreover, the dominant group employs rhetoric to create a sense of commonality among members of that group, while differentiating, othering, and racialising all others (Rodriguez 1999). Below, I test whether these tenets can be applied to help explore the questions I pose in this Chapter.

I begin with a brief discussion of my methods and sources. Next, I address the dissemination process of EU mythologies, the EU’s foundational fundamental rights

mythology, and some key derivative myths that support it. I then explore the concept of integration and continuing economic imperatives within such myths. Next, I address the role of western heritage in EU narratives, and seek to situate the CEE region and the Eastern Enlargement within them. In the conclusion, I summarise how Europeanness is conceptualised within the EU project, and note some theoretical implications of my findings.

A. Methods and Sources

I searched the official EU website (EUR-Lex) for all documents that contained any of my a priori thematic codes (race, racism, equality, ethnicity, xenophobia, white, Caucasian, and discrimination) – each in conjunction with the terms Poland, polish, or east. These searches produced approximately 55,000 documents. After eliminating duplicates, I skimmed the data sets to exclude documents that did not engage with my questions in any meaningful way, were not relevant, or beyond the scope of my topic. This narrowed down my document pool to approximately 10,000⁵⁰. They were comprised predominantly of preparatory documents (that is, staff working documents, reports, resolutions, opinions, communications, impact assessments, and proposals), legal acts (regulations, decisions, and directives), case law, and parliamentary questions⁵¹. I first reviewed approximately 10% of the resulting data sets for each of the searches I had executed, selected due to being ranked as highest in relevance according to the EUR-Lex search engine (as determined by the frequency with which my search terms had appeared). In this initial review, I focused on the content in the proximity of my search terms. I used this to test my a priori thematic codes, and to formulate new data-driven codes. I then reviewed and coded the remainder of my document sets (approximately 9,000 documents), modifying final codes based on my data, and creating subcategories. My final codes included Christian(ity), fundamental rights, freedom, culture, heritage, symbol, peace, diversity, mission, values, education, and integration.

To refine my findings, I then performed additional searches of all documents on EUR-Lex for codes that needed further elaboration, and reviewed approximately 10% of resultant data sets (again, those determined as the most relevant by the EUR-Lex search engine). I also expanded my purposive search for those final category terms to CADMUS (EUI Research Repository)⁵², and the EU's online bookshop⁵³. Moreover, I reviewed all EU

⁵⁰ Upon request, I will submit an Appendix of the approximately 10,000 documents I had reviewed.

⁵¹ Questions posed by Members of the European Parliament to the European Council or the European Commission.

⁵² See <http://cadmus.eui.eu/>.

⁵³ See <https://bookshop.europa.eu/en/home/>.

foundational treaties, and all Jean Monnet Lectures⁵⁴, focusing my analysis on both the a priori thematic codes and the final codes that had emerged from the analysis of my data pool from EUR-Lex. I then looked for relationships between various codes, used the most robust as key themes in this Chapter, and selected the most data-rich texts to cite.

Most of the documents that my search produced and which I cite here consist of soft law instruments, written primarily by EU officials and western politicians. Soft law elaborates hard law, expresses its goals, and affects how hard law is interpreted. Therefore, soft law is essential to legal interpretation (Babić 2007). As Banakar and Travers (2005: 17) note, analysis of non-binding soft law documents is an essential component of legal interpretation. Critical scholars tend to view the binary distinction between ‘hard law’ and ‘soft law’ as illusory (Trubek 2006), and often explore the role of soft law in the roots and persistence of inequalities (e.g., Bennoune 2012). EU soft law is an especially important source of legal knowledge because of the lack of EU-wide media to disseminate legal and political discourse, and because it influences and is influenced by Member States’ discourse and policies. To interpret soft law instruments and other relevant texts in this Chapter, I relied on qualitative content analysis (as explained in the preceding Chapter).

2. The Significance and Dissemination of EU Myths

A. The Role of Myths in EU Law

The rhetoric used to express legal ideology in both hard and soft EU laws which I cite throughout this Chapter frequently takes on attributes of myths. Myths continue to be relevant to modern European law, presenting it not only as coherent, rational, and universal (Fitzpatrick 1992: 10), but also as modern and progressive (id: 101). To help accomplish this, myths differentiate the European legal regime from pre-modern systems, and inferiorise or exclude certain individuals such as women, children, non-citizens, and imperial subjects (id: 75; 107-9). More generally, the idea of modern Europe and its laws is constructed through excluding outsiders, and by rejecting those who are deemed to be the other within Europe (Fitzpatrick and Bergeron 1998: xx).

Moreover, by connecting present practices with the past or with calls to a higher order, legal myths strengthen cultural and national identities, and legitimate and naturalise the status quo (Beetham 2013: 104). As Beetham (id: 171) points out, obtaining the appearance of legitimacy has been of particular importance to the EU - widely acknowledged to suffer from a legitimacy deficit, and thus in need of justification based on

⁵⁴ Twenty-five lectures were organised between 1977 and 2006.

providing beneficial policies and reflecting shared values. Legal myths must be deconstructed to uncover the assumptions behind the current political, social, and economic systems, and to reveal any shortcomings of law (Lin 2015). More specifically, Williams (2003) advocates that for any EU policy to be understood in depth, it must first be placed within its broader EU discourse, through a close examination of both formal and informal institutional narratives, rhetoric, and hidden meanings.

Two types of EU myths have been widely propagated: ‘foundational’ myths, which relate to the EU’s identity and purpose (Jo 2007: 59); and secondary, ‘derivative’ myths, which respond to changing societal concerns (Bouchard 2013: 4). Drawing strength from references to collective memories and actual events (id), foundational myths tend to be vague and elusive (Williams 2004: 63). Although the EU’s role in implementing social policy has always been subsidiary to that of the Member States, the EU’s fundamental-rights rhetoric—the predominant foundational myth today (Smismans 2010)—has been developed through various policies and European Court of Justice (‘ECJ’) case law. Embedded within foundational myths, derivative myths help to explain what the EU does and why, and support discrete political actions and policies (Della Sala 2013). For example, derivative myths pertaining to equality and freedom support and reflect the Race Equality Directive, the four market freedoms, and the Eastern Enlargement.

Despite the importance of myths, rhetoric, and symbols to EU identity and policies, they remain under-studied, especially by critical and legal scholars (Shore 2000: 33). Della Sala (2013) argues that the role of myths in the EU has not been given sufficient attention because the EU is perceived and portrayed as a pragmatic construct that does not rely on myths, unlike nation states. The role of foundational fundamental-rights rhetoric, widely propagated only since the late 1980s⁵⁵ (Smismans 2010), is especially understudied because of its newness. Below, I seek to unpack the fundamental rights myth and its derivative myths, and to begin addressing inconsistencies within such myths, paying close attention to how they imagine and conceptually situate the CEE region.

B. The Dissemination of EU Myths

Since the 1950s, various EU institutions have been producing written materials and supporting academic efforts to preserve their historical memory – especially the European Commission (‘Commission’), the ECJ, the European Parliament (‘Parliament’ or ‘EP’), and their representatives. Despite its merely consultative role, the European Economic and

⁵⁵ After having replaced myths referring to peace, stability, prosperity, and economic integration (Della Sala 2013; Jones 2010).

Social Committee ('EE&SC') has also propagated myths. The EU's various myths have been diffused widely, also through the participation of civil society members, scholars, and the Member States⁵⁶ (Della Sala 2013; Smismans 2010). Legitimation and identity building through myths have also entailed bottom-up discourse (Sassatelli 2009: 71), propagated by grassroots networks, NGOs, and individuals, and with the involvement of various associations and agencies acting as 'European' groups (or being conflated with the EU⁵⁷). By now, at least the key foundational EU myths have become widely self-propagating, with the additional involvement of lesser ranked EU officials and civil society representatives (Smismans 2010).

EU institutions have circulated research devoted specifically to applauding the EU project, 'a success story that is unrivaled globally' (Commission 2014), and to endowing it with mythical attributes. The book *Europe: Giving Shape to an Idea* notes that 'Europe has existed down the centuries as a myth, ... an idea, a source of identity' (Council 2009: 1). This vision took a concrete shape through 'a Union of Member States working together ... in pursuit of a common destiny' (id). The book's cover – shape of the European continent, shrouded in mist and clouds – evokes united Europe's mythical origins and inevitable destiny. It brings to mind the reaction of one of the participants at the 1948 Hague Congress⁵⁸: 'Where am I? In what epoch? In a dream? ... I hear a voice saying ... "We must here and now resolve that a European Assembly be constituted." ... Yes, it is a dream' (Brugmans 1970: 135). Having 'emerged from the dreams of poets and intellectuals ... Europe was born' (EUI 1992). The then-President of the European Council, Herman Van Rompuy noted in his Nobel Peace Prize acceptance speech (on behalf of the EU), that what guides the EU is 'speaking to us from the centuries ... the idea of Europa itself'⁵⁹. In such mythical, nostalgic references, western Member States have served as a synecdoche for all of Europe, thus implicitly othering the east as not fully European. Moreover, such rhetoric forecloses less praiseworthy evaluations of the EU project, including of any inequalities built into the accession process.

Treaties and institutions significant to the EU's evolution have received great attention. For example, on the 40th anniversary of the signing of the Treaty of Rome, it was

⁵⁶ Since their accession, CEE states have occasionally attempted to influence EU narratives. For example, they have been pressuring the EU to condemn Stalinist crimes against CEE states (Littoz-Monnet 2013).

⁵⁷ For example, the Council of Europe—often mistaken for being an EU institution—drafted the 1954 European Cultural Convention, and promoted the adoption of both the EU flag and the EU anthem (Sassatelli 2009: 44).

⁵⁸ The Congress of Europe at The Hague is often considered the first federal moment of modern European history.

⁵⁹ Reminiscent of the use of postcolonial racialised nostalgia to create the UK's cultural identity (Gilroy 2005).

celebrated through the booklet *Building Europe Together 1957-1997 - Treaties of Rome: 40 Years of Peace and Cooperation* (Commission 1997a). To celebrate its 50th anniversary, the Commission (2007a) published *50 Ways Forward – Europe’s Best Successes*, with fifty examples of EU nationals who had benefited from the EU project. In *A Union of Law: from Paris to Lisbon: Tracing the Treaties of the European Union* (Commission 2012), the EU was validated through a narrative of linear progress. Many of the historic images of EU delegates gathered on momentous occasions are labelled ‘family photographs’ (id) to better emphasise the benevolence, permanence and inevitability of the EU mission. The Commission itself, which publishes many such commemorative materials, has been celebrated through historical timelines (e.g., EU 2014).

Many such publications target a general audience, thus serving to increase a sense of EU polity and legitimacy, while shaping what is think-able. EU institutions have sought to disseminate information about their activities to the public, the media, and ‘opinion leaders’ (EP undated). For example, *The European Union Explained* series describes the EU’s accomplishments (e.g., EU 2014); and the Commission’s (1996) booklet *Europe... Questions and Answers, How Does the European Union Work?* explains how the EU benefits its citizens. On the eve of significant events, such as the Eastern Enlargement, efforts to disseminate EU narratives have tended to increase. For example, in 2002, the Commission (2002a) sent *Media Pack: The Enlargement of the European Union* to national, regional and local media, and published a visually engaging booklet *Europlus: Come and Visit the Countries Wishing to Join the European Union!* (Commission 2004a), targeting secondary-school students.

To make the EU’s mission come to life, real-life stories are often used. The Commission (2012b) has praised integration with headlines such as ‘From a small farm to an online business thanks to EU funds’; ‘There are many jobs out there’; ‘Studying abroad, a life-changing experience’; and ‘Saving lives through medical cooperation’. On the tenth anniversary of the Eastern Enlargement, the EE&SC (2014) published a pamphlet with personal anecdotes from CEE nationals:

someone came and waved a “magic wand” over us. ... it was the EU ... of course. ... When I look at Poland ten years after its accession ... I ... feel a sense of pride. ... we have finally managed to join the European family after several decades of troubled history....

In the above, the Polish national’s statement implies that Poland did not belong to proper Europe before having joined the EU. Again, pre-04 EU, composed of only western Member States, stands as a synecdoche for the entire Europe.

Education has always been a part of the EU's efforts to propagate and preserve its narratives, while fostering a sense of common identity among EU academics. For example, the European University Institute ('EUI') was envisioned as early as at the 1948 Hague Conference, and has supported research into the 'joint culture' of Europe (EUI 1977). It houses the EU's Historical Archives, and has been praised for its 'major contribution' to 'the European project' (EUI 2006). Such efforts have been strengthened through EU-funded scholarly journals⁶⁰; the Jean Monnet Programme⁶¹ supporting EU academics; and research devoted specifically to improving methods for the preservation of unpublished EU documentation⁶². Moreover, the EU has created and preserved tangible symbols of collective history - through assigning the European Heritage Label to sites or objects with 'a symbolic European value' (EU 2014b); and establishing The House of European History museum in Brussels. The museum's permanent exhibitions focus on creating a distinct European identity, steeped in 'universal values', such as peace, democracy, and human rights, which are 'a legacy of its Ancient era'⁶³.

3. Fundamental Rights Narratives

Building upon early federalists' grand vision of a united Europe (Della Sala 2013), EU bureaucrats have been propagating an image of the EU as a progressive, benevolent forum created to ensure peace, freedom, and equality. Although EU builders at first equated the project with economic goals⁶⁴, by the 1980s, its initiatives had become firmly situated within the foundational mythology of fundamental rights (Smismans 2010). This was facilitated by situating fundamental rights within 'the cultural, religious and humanist inheritance of Europe' (Lisbon Treaty⁶⁵, Preamble). Having become consolidated as a legal principle, so that even EU critics deem it to be a founding principle (Williams 2004: 157), the fundamental rights myth is actively being constructed to this day through symbols, hard and soft laws, audiovisual means⁶⁶, and academic undertakings.

A. Foundational Fundamental Rights Myth and Derivative Myths

Fundamental rights are a significant component of the *acquis*. Furthermore, EU rhetoric embeds them within myth-like narratives and logic to construct the EU's identity and

⁶⁰ Including the Journal of European Integration, and the Journal of European Integration History.

⁶¹ Called the Erasmus programme since 2014.

⁶² E.g., *EU Grey Literature: Long-term Preservation, Access, and Discovery* (European Centre for the Development of Vocational Training 2012).

⁶³ See <https://historia-europa.ep.eu/en/permanent-exhibition/accolades-and-criticism>.

⁶⁴ Williams (2004: 147-8) argues that founding treaties did not even *foresee* any human rights provisions.

⁶⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed 13 December 2007, OJ C 306, 17.12.2007.

⁶⁶ Such as the films *Jean Monnet: Father of Europe*, *A European Journey*, *The Tree of Europe*, *After Twenty Centuries*, and *A Passion to be Free*.

legitimate its social order, while configuring our imagination of the EU project's political and philosophical underpinnings. Thus, fundamental rights are conceptualised as universal and inalienable, and hence linked with calls to a higher, ideal order. They are portrayed as autonomous and stable, yet at the same time as socially contingent, stemming from the Member States' heritage and being framed as a response to ravages of WWII. While they are linked to the EU's founding and hence its sovereign imperatives, they are also tied to the popular spirit behind the project – as embodied by Member States' histories. Moreover, they are portrayed as a progressive exemplification of western modernity.

For example, various legislative acts have been embedded within, and have propagated, fundamental rights discourse. According to the Preamble of the Single European Act (1986)⁶⁷, promoting democracy based on fundamental rights was to be a central goal of the EU. In the Maastricht Treaty (1992)⁶⁸, Member States confirmed 'their attachment to ... respect for human rights and fundamental freedoms' (Preamble). The Treaty of Amsterdam (1997)⁶⁹ tied the EU's founding to 'respect for human rights and fundamental freedoms' (Article F(1)), and conditioned membership on respect for fundamental rights (Article 49). The proposed European Constitution (2004)⁷⁰ situated fundamental rights within the 'humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person ... and the rule of law' (Preamble). According to the Commission, the EU 'arose from the ashes of World War Two' (1996: 4), in order to promote such 'humanitarian and progressive values' (2014: 5).

The European Parliament has been consolidating fundamental rights as a legal principle. Specific resolutions have been devoted to fundamental rights – for example, the 1977 Joint Declaration on Fundamental Rights⁷¹, the 1993 Resolution on the Respect for Human Rights in the European Community⁷², and the 1995 Resolution on Human Rights in the World in 1993 to 1994 and the Union's Human Rights Policy⁷³. Embedding fundamental rights mythology within a common European heritage, the Parliament (2007a: ¶ 5) has noted that the principles of human rights and fundamental freedoms 'keep alive the memory of European history'. Moreover, a 2009 resolution commended the 'active role played by the European Union in the world as a defender of human rights' (EP 2009: ¶ 3).

⁶⁷ OJ L 169, 29.6.1987.

⁶⁸ Treaty on European Union, signed 7 February 1992, OJ C 191, 29.7.1992 ('Maastricht Treaty').

⁶⁹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed 2 October 1997, OJ C 340, 10.11.1997.

⁷⁰ Treaty establishing a Constitution for Europe, signed 29 October 2004, OJ C 310, 16.12.2004.

⁷¹ OJ C 103, 27.4.77.

⁷² OJ C 115, 26.4.1993.

⁷³ OJ C 126, 22.5.1995.

The ECJ has also propagated fundamental rights, portrayed as derived from values common to the (western) Member States. According to the 1969 *Stauder* case⁷⁴, '[f]undamental rights [are] enshrined in the general principles of Community law and protected by the Court'. In *Internationale Handelsgesellschaft*, the ECJ proclaimed that respect for fundamental rights is 'an integral part of the general principles of Community law', having been 'inspired by the constitutional traditions common to the Member States'⁷⁵. In the 1974 *Nold* case, the Court reiterated how 'draw[ing] inspiration from the constitutional traditions common to the Member States'⁷⁶, it would annul EU measures in conflict with fundamental rights. Williams (2004: 147-8) notes how *Stauder*'s reasoning is mythical rather than legal. Of course, such judicial expressions of values cannot be enforced in the same sense that the *acquis* can, and the ECJ's efforts to treat them as law have been of questionable efficacy (Kochenov 2017). The ECJ's consistent references to such narratives, however, have helped to propagate fundamental rights as a key foundational myth today, making the EU project appear fair and benevolent, and obscuring contrary points of view about the undertaking as a whole or about its discrete policy initiatives.

Democracy, the rule of law, human rights, pluralism, tolerance, justice, and solidarity (Maastricht Treaty, Article 2) are some of the derivative myths stemming from the fundamental rights narratives. Moreover, values such as human dignity, freedom, and equality form Europe's 'spiritual and moral heritage' (Charter of Fundamental Rights⁷⁷, Preamble). Such derivative myths connect the EU's fundamental rights mythology to actual policies. They have tended to be heavily emphasised during periods filled with identity and political anxieties – such as at the time surrounding the Eastern Enlargement (e.g., Commission 2003a, 2003b, 2004a).

B. Integration Goals within Fundamental Rights Rhetoric

Framed as inevitable and humane, enlargement and integration are consistently portrayed by EU institutions as always having been 'an essential part of the European project' (Commission 2006). 'As far as Europe is concerned, change points in one direction only: full political and economic integration' (EUI 1985)⁷⁸. Before the EU was created, men considered its 'founding fathers'—that is, Konrad Adenauer, Joseph Bech, Johan Willem Beyen, Winston Churchill, Alcide De Gasperi, Walter Hallstein, Sicco Mansholt, Jean

⁷⁴ Case 29/69, ECR 419.

⁷⁵ Case 11/70, ECR 1125, ¶ 4.

⁷⁶ Case 4/73, ECR 491, ¶ 13.

⁷⁷ Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

⁷⁸ Speech by Giulio Andreotti (President of the European Council).

Monnet, Robert Schuman, Paul-Henri Spaak, and Altiero Spinelli⁷⁹—had noted that Europe had ‘political, economic and moral responsibilities ... to carry great weight in the world’ (EUI 1983)⁸⁰. EU myths look back far in history to find the seeds of this mission to integrate. For example, *Europe: Giving Shape to an Idea* (2009) notes that

Europe has existed down the centuries as a myth, a geographical area, an idea⁸¹, a source of identity, and much else besides. Recently it has taken more concrete shape in the form of a Union of Member States working together within a unique legal and political framework in pursuit of a common destiny. ... It first appears with Dante ... ambitious vision ... roots which go back deep in history...

Numerous narratives reinforce how, since its creation, the EU has been evolving for the better, following a trajectory inherent to its mission. ‘The European Union is a living organism in a constant process of evolution’ (Commission 2001a: Back Cover). ‘By its very nature’, it is ‘destined to grow’ (Commission 2003b: 3). Enlargement, whatever its terms, has thus been made to appear inevitable and obvious, not to be questioned. More recently, in *Enlargement – Extending European Values and Standards to More Countries*, the Commission (2013: 3) pointed that the EU ‘was created in the 1950s to foster peace, prosperity and European values on the continent,’ and that the ‘EU’s enlargement policy accompanies this process’. Of course, those ‘European values’ from the 1950s were set by only a handful of western states, and such narratives overlook the role played in the Enlargement process by east-west inequalities.

EU integration gets portrayed as exemplary within the history of territorial expansion projects, foreclosing seeing it as a neo-colonial endeavour, as some scholars have argued (e.g., Engel-Di Mauro 2006; Wolff 1994):

The idea of unification ... has sometimes meant an imperial vision of domination ... What we are now attempting to build is a Europe based on consensus and on popular support. This experiment is ... unique in human history... different from the experience of the great empires of the past ... and also different from that of the United States (EUI 1992).

Despite frequent references to the pre-04 EU as a synecdoche for the entire Europe, in the first few decades of European integration, the project was also portrayed as inclusive⁸². Of course, that was long before the fall of Communism, and long before the potential accession of CEE states could have been anticipated. With strong post-war anti-fascist and

⁷⁹ Commission (2013a).

⁸⁰ Speech by Altiero Spinelli (a founding father).

⁸¹ For a description of *academic* writings regarding how the ‘idea’ of Europe has been incorporated into post-war mythology of the EU’s origins, see Swedberg (1994).

⁸² Narratives of inclusivity have been reinforced by a derivative myth of diverse citizens working together to fulfil the EU’s mission. In 2000, ‘Unity in Diversity’ was adopted as the EU’s official motto.

anti-Soviet sentiments, EU forerunners had depicted European integration as based on a pan-European ideology and pan-European identity (Schimmelfennig 2001). Pursuant to the 1958 EEC Treaty⁸³ establishing the European Economic Community, the six founding Members called for ‘an ever closer union among the peoples of Europe ... who share their ideal’ (Preamble), and accorded ‘any European state’⁸⁴ the right to apply for membership (Article 237). A decade later, Walter Hallstein (1968), the first president of the Commission, referred to a ‘sentiment of pan-European solidarity’.

C. Economic Imperatives within Fundamental Rights Rhetoric

Although fundamental rights have replaced economic integration as the key foundational myth today (Smismans 2010), economic goals continue to be listed alongside fundamental rights imperatives or sometimes get nestled within them. For example, on the eve of the Eastern Enlargement, Europe was envisioned as not only ‘a continent of democracy, freedom, peace and progress’, but also ‘stability and prosperity’ (Commission 2003a: 5). According to the 2007 Lisbon Treaty, ‘Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity’ (Preamble).

Moreover, the EU’s role as a protector of human rights finds expression in and is facilitated through its economic initiatives. ‘Based on four fundamental freedoms, the internal market... is an expression of our values, of the European idea of freedom and responsibility under the rule of law’ (EUI 2006)⁸⁵. Notably, ‘the single market is ... in the interests of Europe’s citizens since it vastly extends their freedom not only as consumers and investors, but also as workers who will have the same dignity and the same rights whatever the country they choose to settle in’ (EUI 1992)⁸⁶. Furthermore, EU-wide economic endeavours serve to advance racial and ethnic equality:

The appalling excesses of racism and xenophobia which were often rooted in economic causes demonstrated a need to structure economic relationships for the future in a new way... The best way to fulfil ... objectives of its founding fathers ... is through a strong multilateral trading system ... to improve international economic cooperation ... (EUI 1995)⁸⁷.

The EU’s economic initiatives are also depicted as taking on attributes of benevolence and as contributing to the EU’s mission. ‘The European Union is the creation of visionaries

⁸³ Treaty establishing the European Economic Community, signed 25 March 1957 (‘Treaty of Rome’).

⁸⁴ According to Article 49 of the TEU, ‘[a]ny European State which respects the values referred to in Article 2’ (pluralism, non-discrimination, tolerance, justice, solidarity, and equality) may apply to become a Member.

⁸⁵ Speech by Jose Manuel Barroso (President of the Commission).

⁸⁶ Speech by Giovanni Agnelli (head of Fiat, and an Italian senator).

⁸⁷ Speech by Peter Sutherland (former member of the Commission, and the first WTO director-general).

and so is its Bank' (EIB 2008). In addition to providing finance and expertise for investment projects, the European Investment Bank is praised for supporting projects that 'contribute to furthering EU policy objectives', and for being 'strongly committed to integrating environmental and social standards into its business activities' (EIB 2011). It is also a 'responsible bank', tied directly to the people because it is owned by the 27 Member States (id). In the context of the 2008 financial crisis, the European Central Bank's 'enlightened management of the Eurozone' (EE&SC 2014: 45) was praised for having 'saved the euro, and ultimately the Union' (id: 50).

Similarly, the euro currency gets applauded for its European essence, and for its role in preserving the EU, thus benefiting all its citizens. In the First Jean Monnet Lecture, in 1977, it was predicted that 'economic welfare in Europe would be improved substantially' due to the euro – by allowing the European economy to function better, creating more jobs, and increasing Europeans' prosperity (EUI 1977)⁸⁸. In addition to its numerous practical benefits, it also carries a symbolic significance. As '[o]ne currency for one Europe ... [b]ringing Europeans together', the euro is considered a tangible symbol 'of the common identity and shared values of Europe, European nations and Europeans themselves' (Commission 2011a). Due to all these functions, in 2002, the euro was awarded the International Charlemagne Prize of the City of Aachen, for promoting European unification⁸⁹.

4. The Role of Shared (Western) Heritage in EU Mythologies

The EU's modern history gets traced to Robert Schuman, who, based on the ideas of Jean Monnet, proposed on 9 May 1950⁹⁰ that France and Germany combine their coal and steel resources in an organisation which other (western) European countries could join. Less than a year later, France and (West) Germany - along with Belgium, Italy, Luxembourg, and the Netherlands - signed the Treaty of Paris⁹¹. Denmark, Ireland, and the UK joined in 1973; Greece in 1981; Spain and Portugal in 1986; Austria, Finland, and Sweden in 1995. Thus, all the EU-15 States had joined by 1995, nine years before the Eastern Enlargement⁹².

After recognising that integration cannot be accomplished through legal and economic institutions alone, the Commission, with the support of the Parliament, has been at the

⁸⁸ Speech by Roy Jenkins (President of the European Commission).

⁸⁹ Past winners of this Prize, awarded since 1950, include five of the EU's founding fathers.

⁹⁰ Commemorated annually as Europe Day.

⁹¹ Treaty establishing the European Coal and Steel Community, signed 18 April 1951.

⁹² Poland and the other CEE countries acceded on 1 May 2004, followed by Bulgaria and Romania in 2007.

lead of developing cultural policies (Shore 2000: 55). Despite the EU's limited competence to act in cultural matters (and only since the 1993 Maastricht Treaty), the EU's forerunners have been developing its foundational narratives since the 1960s based on references to a shared (western) European culture⁹³. Although fundamental or human rights were not referred to in either the Treaty of Paris (1951) or the Treaty of Rome (1957), by the 1960s, the Community began to look to the 'spirit' of Europe, based on its 'common heritage', and extrapolated it into the 'spirit' of its foundational treaties to develop its foundational human rights narratives (Shore 2000: 133). For example, the 1961 Fourth General Report on the Activities of the Community referred to the 'establishment of a European idea ... penetrating more and more deeply into the consciousness of the public' (Commission 1961).

Actively protecting and promoting a sense of shared (western) culture has been on the EU's political agenda since the 1970s – through narratives, rituals (such as the annual Europe Day), symbols (such as common passport design), policy initiatives, and soft law measures (Sassatelli 2009: 39). The Commission began to operate a *de facto* cultural policy after the then-Members signed the Declaration on the European Identity in 1973⁹⁴. This was followed by the Tindemans (1975) Report, which recommended implementing policies to create 'A People's Europe'. The 1983 Solemn Declaration on European Union⁹⁵ affirmed 'European identity', and was followed by the establishment of Committee for a People's Europe (Adonnino Committee) in 1984. Enveloped in long-standing discourse about a common European culture, the 2000 Charter of Fundamental Rights made the intersection between pan-European culture and the fundamental rights myth explicit, noting that 'universal values of human dignity, freedom, [and] equality' form Europe's 'spiritual and moral heritage' (Preamble).

Although scholars have questioned whether such cultural initiatives, steeped in common 'European' values, can affect actual policies (Sassatelli 2009: 195-8), if nothing else, they have embedded EU initiatives in a certain set of ideologies, foreclosing other points of view and making the status quo appear fair and inevitable. Moreover, I contend that references to a long-standing 'European' heritage and 'European' spirit have been creating an 'imagined community' (Anderson 2006: 1-8), and positioning the east at its conceptual periphery. As Shore (2000: 80) notes, efforts to create a shared European cultural heritage

⁹³ Modern references to a shared European heritage are much older, of course. For example, the idea was addressed by (western) thinkers such as Abbé de Saint-Pierre and Rousseau in the 1700s (de Rougemont 1966).

⁹⁴ Bulletin of the European Communities, December 1973, No 12, p 118-122.

⁹⁵ Bulletin of the European Communities, June 1983, No 6, p 24-29.

might ironically promote new forms of xenophobia because the notion of Europeanness tends to be closely circumscribed. Debates in the UK surrounding the Brexit referendum offer a poignant example of this at a Member State level. Leave supporters relied on references to a uniquely British identity to justify excluding EU movers, especially those from the CEE region, from the polity (Virdee and McGeever 2018).

A. The Roots of a Shared Cultural Heritage

The EU's shared 'European' culture and modern institutional heritage often get linked to its founding fathers, described as '[v]isionary leaders' who 'worked tirelessly towards and inspired the European project' with the ideals of peace, unity, and prosperity (Commission 2013). They are often called upon during moments of challenge. For example, after the fall of the Berlin Wall, amid increasing global economic pressures, escalating violent conflicts, and internal enlargement prospects, it was noted that 'Europe needs to ... return ... to the genius of its founding fathers' (EUI 1995)⁹⁶. Jean Monnet, the political economist widely considered the chief architect of European unity, continues to garner special accolades. For example, during the First Monnet Lecture, he was described as 'the great statesman', 'the first honorary citizen of Europe', and 'a great-hearted man' who possessed 'deep wisdom' and 'an iron will' (EUI 1977). Like national heroes, Monnet and the other EU founders get extolled for 'carrying on ... combat' for the EU's mission (EP 1988: 3). The 'genius of the Founding Fathers' was praised again by Barroso in his 2012 speech accepting the Nobel Peace Prize on behalf of the EU⁹⁷. All the founding fathers have been western⁹⁸.

Moreover, references to a common cultural heritage have consistently praised significant western historical locations, moments, and thinkers, stretching back to antiquity. For example, the EUI's location has been commended for its links to Florentine thinkers, such as Amerigo Vespucci, da Vinci, and Galileo (EUI 1996). More generally, Italy gets lauded for having contributed, more than any other country, to the foundations of European cultural identity – through the Roman Empire, Roman Law, and the Renaissance (EUI 1984). Aristotle, Cicero, Tocqueville, Durkheim, Hegel, Marx (EE&SC 1999), Erasmus, Kant, Rousseau, and Voltaire (EUI 1990) get mentioned frequently as the founders of European heritage. Moreover, the Enlightenment's 'Christian humanism' gets linked to 'Europeanism' and integration of this 'favoured continent' (id⁹⁹).

⁹⁶ Speech by Peter Sutherland (member of the Commission, and the first WTO director-general).

⁹⁷ See <https://www.nobelprize.org/prizes/peace/2012/eu/26124-european-union-eu-nobel-lecture-2012/>.

⁹⁸ As well as white and male.

⁹⁹ Speech by Giovanni Spadolini (Italian politician, European federalist, and supporter of the EUI).

At the Monnet Lecture titled ‘European Union: One Character in Search of an Author’, the key speaker, Giulio Andreotti¹⁰⁰, compared the prudence entailed in the drafting of the 1957 Treaty of Rome to that required of Caesar when crossing the Rubicon, and remarked that

A European cultural identity has existed for centuries, not only in literature and in philosophy, but in the consciousness of its peoples ... European civilization ... nourished over the centuries ... is ... irreversible; it ... involves ... a whole way of being (EUI 1985).

Allegedly common values are sustained by ignoring actual history, and relying on ‘invented traditions’ (Hobsbawm and Ranger 1983) – such as embodiments of the Greek myth of *Europa Riding the Bull*¹⁰¹, an exaggeration of historical figures (such as Charlemagne¹⁰²), and newly invented collective symbols¹⁰³. The Dark Ages and the long history of European intolerances and conflicts gets overlooked. Only periods of growth and peace are emphasised, especially the Renaissance and the Enlightenment, which ‘improved the lives of the people ... to an extent unprecedented in the history of mankind’ (EE&SC 2000a: § 3).

B. Othering of the CEE Region

The rhetorical construction of a shared European cultural identity has relied heavily on references to an insider/outsider status. This has often included othering of those located or with roots from beyond the EU’s external borders. For example, communists were excluded from the idea of ‘Europe’ during the Cold War, and third-country nationals (especially Muslims¹⁰⁴) are omitted from it today (Sassatelli 2009: 152; see also Douglas-Scott 1998). More generally, as my analysis indicates, EU narratives have focused on *western* thinkers and *western* states. Notably, othering has also taken place internally within the (enlarged) EU. Thus, in the context of demographic shifts brought about by the Eastern Enlargement, western ‘shared values that hold our societies together ... become more important than ever’ (Commission 2004), as the pre-04 EU encountered a region that apparently presented a threat to western values. This recalls how Enlightenment thinkers

¹⁰⁰ At the time, Italian Minister of Foreign Affairs.

¹⁰¹ Including on various euro coins and bills; and in or near significant EU buildings (such as the Council of Ministers Office in Brussels, the European Parliament offices in Strasbourg, and the Spaak Building that houses the Parliament in Brussels). The EU’s official website is Europa.eu.

¹⁰² One of the EU buildings in Brussels is named after Charlemagne, and the EU has funded several exhibitions devoted to him.

¹⁰³ For example, common passport, driving license, and car number plate designs; the EU motto (‘United in Diversity’), and anthem (Beethoven’s *Ode to Joy*); and the annual Europe Day.

¹⁰⁴ As poignantly illustrated by some Member States’ reactions to the recent refugee crisis, Christianity also determines belonging to the imagined EU community.

emphasised their (white, western) European heritage when exploiting new races of people (Eze 2007). My review of post-Enlargement EU statements¹⁰⁵ indicates that, despite occasional inclusive references at the time of the Enlargement (as discussed below), CEE heritage has not been added to the construction of this imagined EU community, and the CEE region has continued to be othered, as illustrated in Chapter 3, Section 1.

In addition to implicitly excluding the CEE region from narratives about ‘European’ heritage, EU institutions (and EU-15 politicians¹⁰⁶) have at times directly posited the region as un-European. During the accession process, CEE candidates were represented by EU bureaucrats as irrational, and in need of westernisation (Engel-Di Mauro 2006: 21). In Accession Country Regular Reports¹⁰⁷ (1998-2002), for example, the Eastern Enlargement was framed as a civilising mission (Kovacs 2006). Similarly, my review indicates that the EU has been explicitly differentiating the region, as lacking in full Europeanness. According to western bureaucrats, Poland was seeking to join the EU to ‘liquidate social and civilisation backwardness’ (OECD 1998), rather than to reclaim its European heritage. By ‘tak[ing] in’ CEE countries (EP 1996), EU-15 States were ‘opening up to new people’ (Commission 2004), and preparing to ‘embrace widely different peoples ... and cultures’ (Kok 2003: 68). As an impoverished backward other, the CEE region had to be ‘helped’ (Commission 2007: 4) and ‘rescued’ by western Europe, which was to serve as a ‘mentor’ and ‘beacon to guide the applicants’ (Commission 2003b) in their efforts to partake of some of the achievements of proper (western) Europe. Prodi (2000), the then-President of the Commission, deemed ‘civilization’ to be an accomplishment of western Europe only. Through the Eastern Enlargement, western States, as ‘the heirs of a civilization deeply rooted in religious and civic values’, had an opportunity to ‘spread peace, stability and shared values throughout the continent’ (id).

Notably, the 2004/2007 enlargement was the only one to be called ‘eastern’. The immediately preceding enlargement had involved a geographically eastward expansion (to incorporate Austria, Finland, and Sweden in 1995). It was not given a label in EU discourse, and was simply described through references to its date. Moreover, despite fears of post-communist otherness, the absorption of East Germany into West Germany in

¹⁰⁵ Although numerous sites across the CEE region have been recognised with the EU Heritage Label, awarded by the EU to buildings, documents, museums, archives, monuments or events for the role they have played in European history. See https://ec.europa.eu/programmes/creative-europe/actions/heritage-label_en.

¹⁰⁶ For example, fears of ‘substantial’ post-1989 CEE emigration prompted EU-15 States’ concerns about the spread of contagious illnesses (EP Written Questions 29.10.1992).

¹⁰⁷ Commission’s annual reports to evaluate candidates’ progress in meeting membership preparation benchmarks.

1990 was portrayed as ‘re-unification’ (Novotná 2015: 39). Presumably East Germany was deemed as having been sufficiently European prior to the Cold War to deserve such inclusive terminology. On the other hand, the accession of CEE states encompassed eastern reaches of the European polity. According to Böröcz and Kovacs (2001: 6), the term ‘Eastern’ in the Eastern Enlargement implied inferiority or non-Europeanness.

In line with such othering rhetoric, the actual policies facilitating CEE states’ accession privileged western Member States’ interests and western values, as addressed in more detail in the next Chapter. Notably, the Enlargement was to be based on pre-2004 (Commission 2001a), that is, western values¹⁰⁸. The CEE states were to be absorbed *into* the western framework, by undertaking major adjustments to harmonise with pre-existing EU acquis. Their ‘institutional framework and the ground rules ha[d] to be re-constructed’ (Commission, Green Paper 17.11.1993). This entailed ‘necessary adjusting actions’ and ‘a constant process of improvement’ by CEE states (OECD 1998) - due to not only economic, but also ‘social disparities’ between the two groups (e.g., Europe Agreement, Preamble). Both othering rhetoric and disadvantageous policies were especially prevalent in the context of restricting CEE workers’ mobility after accession, as discussed in Chapter 4. In its ‘Agenda 2000’ plan, the Commission (1997) anticipated post-accession mobility restrictions to be helpful in preventing some ‘problems’ that were likely to result from CEE workers’ unrestrained mobility. Since economic predictions indicated only benefits to host States from CEE nationals’ unrestricted mobility (e.g., Jileva 2004)¹⁰⁹, one can only speculate that the Commission was concerned about the social impact of an influx of these othered, new members of the EU polity.

Despite othering discourse and policies, the CEE region has been occasionally included in the grand vision of Europe, especially during the euphoric period soon after the fall of communism - before CEE states’ accession had become a clear political possibility. For example, during the 1990 Monnet Lecture, titled ‘The Crisis of the Societies in the East and the Return to a Common Europe’, Giovanni Spadolini referred to an inclusive notion of ‘Europe as a unifying idea, ... a continent-wide idea’ (EUI 1990). European Council bureaucrats declared at their 1989 Strasbourg summit that the EU’s objective was ‘overcoming the divisions of Europe’ (European Council 1989: 10). Similarly, the Parliament expressed its intention to ‘end ... the division of Europe into two blocs’ (EP 1995: 232). As part of this rhetoric, similarities between the east and the west were

¹⁰⁸ See also Commission (2013: 3) (noting that enlargements have been based on extending the EU’s values, created in the 1950s, to the whole continent).

¹⁰⁹ Discussed more in Chapters 3 and 4.

emphasised. For example, the Commission (1992: ¶ 40) noted that ‘for the new democracies, Europe remains a powerful idea, signifying the fundamental values and aspirations which their peoples kept alive during long years of oppression’. Such early rhetoric likely reflected an ideological rebuff to communism and an attempt to strengthen the legitimacy of the western order, rather than genuinely inclusive attitudes or support for the region’s accession.

Othering of the CEE region also diminished in the run-up to the Eastern Enlargement. For example, the Commission (2003a: 4) situated the Enlargement within the task of integrating ‘the continent’. In his pre-Enlargement report to the Commission, Wim Kok¹¹⁰ (2003: 69) portrayed CEE states as having shared ‘since the Middle Ages in the interplay of cultural influences in continental Europe’, and their Cold War separation as merely ‘a temporary aberration’. Moreover, according to the Preamble of the 2004 Constitutional Treaty, ‘reunited after bitter experiences’, Europe was ‘to transcend ... former divisions and, united ever more closely, to forge a common destiny’. Notably, the Joint Declaration ‘One Europe’, annexed to the 2003 Accession Treaty, emphasised the ‘inclusive’ nature of the Enlargement. Schimmelfennig (2001) argues that the EU had made occasional inclusive statements stretching as far back as the 1950s about EU membership being open to all European states (at a time when that option was open only to western states), which had rhetorically entrapped it. That is, the EU could not backtrack without losing its credibility¹¹¹. I contend that similar inclusive rhetoric at the time of the Enlargement also served a pragmatic purpose – to garner EU-15 States’ support for the Enlargement, while maintaining consistency with the EU’s fundamental rights narratives and with the fact that accession had become a foregone conclusion by that point. Inclusive discourse also served to help obfuscate any inequalities in the actual accession policies (discussed in the next Chapter).

5. Conclusion

In this Chapter, I have set the background to the way in which the EU project, the Eastern Enlargement, and Polish nationals’ mobility have been embedded in a certain set of values and ideologies. Although at first EU builders had equated the EU project with economic goals, it became infused by the late 1970s with an abstract story of a progressive, benevolent, and inevitable integration project based on respect for fundamental rights. By

¹¹⁰ A Dutch politician who had presided over several high-level EU policy groups.

¹¹¹ This ‘entrapment’ was reinforced by CEE politicians’ arguing that they culturally ‘belonged’ to Europe, and that their accession would signify their ‘return’ to Europe after an artificial division during the Cold War (Schimmelfennig 2001).

the 1980s, EU policies had become firmly situated within this foundational narrative. I contend that the fundamental rights rhetoric contains an underlying economic core, with the concepts of freedom, equality, and integration being inextricably tied to economic initiatives. Moreover, my analysis reveals that foundational EU narratives have been based on an assumption—even after the fall of the Iron Curtain, and after the Eastern Enlargement—that only western thinkers, western myths, and western accomplishments embody the imagined community of ‘Europe’. The EU’s legal rhetoric presented in this Chapter—reinforced through concrete symbols and references to actual events, both ancient and new—attempts to create a sense of a collective western ‘European’ identity and shared values, while legitimating and naturalising EU institutions and policies. Excluding outsiders, including the eastern regions of Europe, has helped to support this identity-building project.

I argue that there is a conceptual hierarchy of Europeanness, with EU-15 States having served as a synecdoche for ‘Europe’, and with the CEE region having been pushed to the conceptual periphery of the EU project. CEE states have not been involved in creating EU narratives, and appear in them rarely on equal footing. Given its political foundations, it is not surprising that the EU was at first conceptualised as a western project. Since the Eastern Enlargement, however, EU rhetoric should have become more inclusive, especially in light of the EU’s emphasis on fundamental rights and equality. Why has it not? I contend that remnants of the Cold-War geographical divisions remain - in the continuation of othering or exclusionary discourse, and in policies privileging western interests. According to some scholars, Europe’s idea of itself still depends on (western) imperialist attitudes, fuelled by globalisation and increased migration (Ponzanesi and Blaagaard 2011). Intra-EU east-to-west movement continues to play a role in this process. Moreover, western-centric discourse has been normalised and rendered almost invisible, attesting to the strength of western conceptual dominance within Europe. It is difficult to imagine references to a ‘European’ culture and heritage discussed in this Chapter to have been solely based on cultural accomplishments and practices of the CEE region¹¹². Such discourse would be noticeable to most readers, whereas including only western references is easily overlooked as normal.

My analysis in this Chapter also illustrates the usefulness of CRT tenets to my study. The well-propagated fundamental rights narratives serve to obscure or deny policies or statements that are not in line with them. By presenting the EU project as fair and

¹¹² Or of non-white thinkers.

inevitable, while concealing its anti-east assumptions, myths propagated by western politicians serve to naturalise the status quo. Despite frequent references to equality, freedom, and solidarity, an assumption of western superiority underlies EU discourse. The west fully benefits from white privilege, while the east lacks full access to it. This helps to produce a social reality which reflects and reinforces historical east-west power differentials. EU-15 State representatives had controlled EU institutions until 2004, and have therefore created not only policies but also discourse to legitimate their interests and outlook. The rare occasions when the CEE region has been encompassed by more inclusive ideology—at the time of the fall of Communism, and once the Eastern Enlargement became inevitable—can be attributed to interest convergence. The EU-15 States were reasserting their ideological opposition to the communist rule, thereby confirming the dominance and benevolence of the western order. They were also avoiding undermining their legitimacy by being consistent with their pre-1989 statements.

I now turn my attention to select policies central to my thesis - the Eastern Enlargement process, the free movement of persons, and EU and UK racial equality regimes. Given that the creation of inferior categories of people legitimises unequal policies, and sanctions discrimination and exploitation, I will seek to uncover how othering narratives addressed in this Chapter might reflect, drive, or at least help to explain any inequalities in the Enlargement process and Poles' experience of mobility. Myths of course also contain inherent tensions and the potential to drive beneficial actions (Smismans 2010). Hence, I will also explore any redemptive qualities of the rhetoric presented above - notably, of the CEE region's occasional inclusion in EU narratives.

Chapter 3: Poland's Accession¹¹³ and its Aftermath

1. Introduction

The preceding Chapter set the background to how the EU project has been embedded in a set of values which—despite narratives of fundamental rights and equality—other the CEE region as inferior to the west, and often contain economic goals at their core. In this Chapter, I explore whether discourse and policies behind the Enlargement have been in line with such myths. More specifically, my aim below is to address whether the actual process of Poland's accession and the application of the *acquis* to Poland reveal a hierarchy of Europeanness, silencing of the CEE region, or prioritisation of western goals. I explore what role east-west power differentials might have played in the Enlargement process. This is necessary to address because Poland's accession constituted the first step that enabled Poles' mobility to the UK. The analysis in this Chapter is also helpful to answering my overarching research question about how disadvantages and racialisation experienced by Poles in the UK might be connected to or reflect any power imbalances in Poland's relationship with the EU.

The EU's political elites had disagreed with Polish politicians' post-1989 proclamations that, by joining the EU, Poland would be reclaiming its proper European heritage and thus actively integrating with the EU-15 States as equals (Wagner-Findeisen 1992). Although more inclusive statements permeated EU rhetoric once the Eastern Enlargement became certain¹¹⁴, the CEE region once again became othered by western politicians after the Enlargement. CEE states have been blamed by western politicians for an apparent recent increase in organised crime in western Europe, and accused of 'exporting their crime' (EP Written Questions 18.4.2013). An alleged growth in prostitution in Denmark has been portrayed 'as a result of the EU's expansion eastwards', with 10,000 Poles supposedly being forced into prostitution each year across western Europe (EP Written Questions 14.3.2013: 61). Moreover, the 'mass migratory flows' of CEE nationals have been linked to 'encouraging the free movement of diseases, such as tuberculosis, ... allow[ing] this disease to take hold amongst younger age groups in the [western] population' (EP Written Questions 23.10.2014: 184)¹¹⁵. When responding to such western MEPs'¹¹⁶ comments, EU institutions have not sought to dispel EU-15 politicians' negative assumptions or racist

¹¹³ Although 'accession' and 'enlargement' refer to the same process, the former approaches it from a candidate's point of view, whereas the latter denotes the EU's position.

¹¹⁴ Likely due to strategic reasons, as my discussion in the preceding Chapter shows.

¹¹⁵ Similar rhetoric has been used in the UK – historically, to oppose Commonwealth immigration, and more recently, by the media to demonise CEE movers (e.g., Drzewiecka 2014b).

¹¹⁶ Members of the European Parliament.

stereotypes, but have instead referred to the limits of EU competence in such matters. Moreover, the Commission has continued to conceptualise the CEE region as not belonging to proper Europe. For example, it has noted that ‘advanced countries (the United States, Japan and *Europe*) [had] returned to modest growth’, whereas ‘emerging and transition economies in *eastern Europe* ... have proved more resilient’ to the 2008 economic crisis (Commission 2011: 5, emphases added). As before 2004, the concept of ‘Europe’ in this statement excludes eastern Europe. Although such differentiation might be attributed to some extent to historical differences in institutional and economic structures between EU-15 and CEE states, it nevertheless normalises the continuing discourse of eastern otherness and inferiority.

Such examples of recent rhetoric embed Poland’s accession in a set of othering values, in line with the dominant narratives addressed in the preceding Chapter. My aim below is to explore whether the actual Enlargement process and policies also reflect such inequalities. Western scholars devoted little attention¹¹⁷ after the fall of Communism in 1989 and throughout the 1990s to the topic of Poland’s accession (Schimmelfennig and Sedelmeier 2002). The little pre-04 western scholarship that exists assumed that accession constituted the best method for Poland to catch up economically and politically with the west, and that it encapsulated the ideal to which CEE nationals aspired (id). Preceding the Enlargement, eastern intellectuals also tended to subscribe to the dominant western view of accession as a beneficial, ‘civilising’ mission (Engel-Di Mauro 2006: 23), which was inevitable, necessary, and signified a return to Europe (e.g., Blazycy and Kolkiewicz 1999; Cordell 2000¹¹⁸; Dach 1999; W Kregu 1996). The lack of critique by CEE scholars might be attributed to their preoccupation with the drastic post-communist domestic changes, and to the fact that open intellectual debate had been stymied for more than four decades¹¹⁹. Closer to the time of the Enlargement, Polish scholars continued to devote little attention to pre-accession policies and to the actual terms of accession (e.g., Blazycy and Kolkiewicz 1999). Although many acknowledged that Poland would have to bear some initial adjustment costs, they focused on anticipated long-term economic benefits, without devoting much analysis to the actual details of those costs and benefits (e.g., Cordell 2000).

¹¹⁷ Possibly due to scholars’ doubts that the Eastern Enlargement would in fact occur – an opinion fuelled in no small part by perceptions of the CEE region’s economic and social backwardness (Chwalba 2011).

¹¹⁸ Cordell’s (2000) volume is composed of articles predominantly by Polish scholars.

¹¹⁹ By the mid-1990s, most Polish academics approached the accession as a foregone conclusion (Dach 1999), which might further explain why little academic analysis was devoted to it.

After the Enlargement, many scholars—of both western and eastern backgrounds—continued to express similar uncritical views, praising the Enlargement for having benefited CEE nations economically, politically, and socially (e.g., *Economic Bulletin* 2004; Keereman and Szekely 2009; Sobotka 2005), and even resulting in a ‘virtual miracle’ (Zielonka 2007: 35). They have been nestling such praise within myths of the neutrality and benevolence of EU policies, often embedded in fundamental rights and free market ideology, while helping to obfuscate any hidden inequalities behind the Enlargement. Polish scholars have tended to continue to express positive views of the Enlargement’s economic and political effects (e.g., Belka¹²⁰ 2013; Stankiewicz 2010), and of its symbolic value in confirming Poland’s European identity (e.g., Belka 2013; Błaszczak 2012). In line with CRT tenets, the dominant western discourse appears to have affected how eastern scholars tend to perceive EU integration¹²¹.

Critical scholars (e.g., Behr 2007; Böröcz and Kovacs 2001; Engel-Di Mauro 2006; Jileva 2004) have noted some negative effects on Poland of pre-accession and enlargement policies, but they have tended to take a broad, often abstract view of the enlargement process, focused only on foundational and accession treaties, and framed within international relations analyses. I attempt to take a more holistic look, tracing the Enlargement process to circumstances that prompted Poland to seek accession in the first place (see Section 2 below), and linking it to Poland’s post-accession experiences (see Section 4 below and subsequent Chapters). My contribution also lies in applying CRT tenets to this analysis.

Below, I first examine the political and economic conditions in Poland that made it vulnerable to the influence and pressures of western states and financial institutions. In particular, I consider how those challenges were reinforced through specific pre-accession policies imposed by western financial institutions and the EU¹²², and how they prompted Poland to enter accession negotiations on an unequal footing. Next, I consider in detail the dynamics of the accession process, paying close attention to how power inequalities between Poland and the EU had disadvantaged Poland in its negotiation process, and had contributed to post-accession inequalities. Finally, I analyse some key aspects of the *acquis* that have reflected or reinforced such dynamics of inequality after accession. In the

¹²⁰ Belka has held positions at the World Bank and the IMF, which had guided Poland’s pre-accession policies, as discussed in this Chapter.

¹²¹ Such views might also have been reinforced by the lack of well formulated alternatives to integration, as discussed below.

¹²² Similar policies were employed during the other CEE states’ accessions. Because my study focuses on Poles, however, this Chapter analyses Poland’s accession.

Conclusion, I seek to connect the inequalities addressed in this Chapter to post-04 conditions in Poland and the large-scale movement of Poles to EU-15 States. I address whether hierarchies of disadvantage within the EU are likely to change in the foreseeable future. I also situate the accession process and its apparent goals, as well as the assumptions embedded within discourse surrounding the Enlargement, within broader EU narratives and within my theoretical framework.

2. Pre-Accession Conditions in Poland

A. Poland Before the Fall of Communism

At the outbreak of WWII, both Germany and the Soviet Union invaded Poland¹²³. By the end of the war, the Soviet army compelled German forces to retreat, and, after the 1945 Yalta Conference, Polish government was formed under Soviet auspices. Under Soviet pressure, Poland rejected economic recovery assistance under the Marshall Plan, and living standards deteriorated. Throughout the post-war period, capitalism was eradicated through nationalising industry and redistributing farmland through collectivisation. Economic restructuring plans prioritised the development of heavy industry to service Eastern Bloc military forces. By the 1960s, Poland was plagued by economic stagnation and escalating consumer prices. To revitalise the economy, in 1971, wide-ranging reforms were introduced which involved large-scale foreign borrowing. This strategy initially caused improved access to consumer goods, but within a few years, it contributed to further economic deterioration.

Some scholars argue that political and economic developments in Poland in the 1970s had made it dependent on the west, and thus with little choice but to accede to the EU. Poland was attractive to western investors due to its large deposits of coal—of strategic importance during the 1970s’ oil crisis—and because the west had hoped to weaken Soviet control over the CEE region by investing there (Poznanski 1986). At the same time, Poland’s communist regime started to amass foreign debt by purchasing obsolete western technologies and consumer goods to placate the disgruntled populace, with little thought about long-term repercussions. By 1980, Poland had become the third largest debtor in the world, and the interest alone on the \$24.1b in foreign debt exceeded the value of all Polish exports (Tittenbrun 1993: 66-9). Repayment efforts and structural adjustments imposed by western creditors resulted in a significant strain on the national budget, increased

¹²³ Poland’s official founding is traced to 966, when Mieszko I was baptised and adopted western Christianity. For a detailed discussion of Poland’s early history, see Zamoyski (2009).

consumer prices, decreased welfare and infrastructure spending, and reduced wages (Glasman 1996: 121-2). After martial law was imposed in 1981, Poland stopped making interest payments, yet western regimes continued to extend it credit (Wagner-Findeisen 1992).

B. Poland in the Aftermath of 1989

Poland's economic and political systems were in shambles by the time the Iron Curtain fell in 1989. More than four decades of central planning had left its economy with 'deeply distorted structures, pervasive shortages, misallocation of resources, inefficient companies, and controlled prices' (Belka 2013: 9). By 1990, with an inflation of 250% (id), Poland's economic crisis was the most severe among the CEE states (Poznanski 1986). With no experience of multiparty governance, this period was also politically tumultuous. The first democratic elections for President were held in 1990, and for the Parliament in 1991. Throughout the mid-90s, Poland had more political parties than other CEE states (Ekiert and Kubik 2004: 54). For example, after the first free parliamentary elections, in which more than 100 parties participated, more than fifteen parties gained representation¹²⁴. Between 1989 and 1993, Poland had two presidents and seven prime ministers (two of whom did not even form cabinets), and frequent votes of no confidence (id: 55).

Unable to service its foreign debt, and hence not able to borrow abroad anymore, Poland was pressured by the international financial institutions which had extended it credit – especially the International Monetary Fund ('IMF')¹²⁵, and the World Bank¹²⁶ – to transform into a market-oriented economy, through economic 'shock therapy' (Hofbauer 2006). The IMF had conditioned continued financial support on these reforms, which no western state had ever imposed on itself for fear of detrimental effects on people's livelihoods (Glasman 1996: xiv). In 1987, Poland implemented all of the IMF's recommendations – for example, increasing interest rates, liberalising prices, and increasing privatisations (id: 122). Due to the 1990 Privatisation Act, the most viable Polish enterprises were acquired by western investors – including General Motors, Pepsico, Unilever, and Phillips (id: 123-8). Furthermore, the 1991 Law On Companies with Participation of Foreign Parties, passed at the suggestions of the IMF, permitted foreign-

¹²⁴ See <http://eed.nsd.uib.no/webview/> (tab 'Poland: Parliamentary Elections 1991'). The large number of parties also resulted in contentious Presidential elections. For example, there were thirteen candidates in the 1995 Presidential elections. See id (tab 'Poland: Presidential Election 1995').

¹²⁵ All EU-15 States have been members of the IMF since the 1950s. Poland was readmitted as a member in 1986, having previously been a member between 1946 and 1950.

¹²⁶ The IMF and the World Bank had set out terms of this cooperation in 1989. See <https://www.imf.org/external/pubs/ft/history/2001/ch20.pdf>.

owned companies to repatriate all their profits (after taxation) out of Poland, and exempted them from licensing laws (id). After Poland's trade arrangement with other communist countries¹²⁷ was dissolved in 1991, the IMF pressured Poland to end its trade relations with those states (Frank 2006).

Although the Solidarity movement, workers, conservative scholars, and the Catholic Church¹²⁸ had envisioned either a planned or a mixed economy for post-communist Poland (Hayden 1994: 91), Polish political elites across the political spectrum supported free market capitalist models. Such models were perceived as the only way to guarantee democracy (Szczerbiak 2002), create civil society institutions (Cordell 2000: 38), and ensure security from the Soviet Union (Sharman 2003: 79). Moreover, free market economy offered a symbolic break from the communist past (Ash 1990: 37), and a way to appear more legitimate in western eyes (id: 16). The free market model was also perceived as less risky than developing new economic models (Cirtautas 1997: 216). The rapid privatisation process of the early 1990s, and an increasing share of western ownership of Polish businesses and of the banking system (Hofbauer 2006) soon made non-market options impossible. With no clear alternatives presented by non-governing politicians (splintered into many small parties), legislators approved economic shock therapy within four months of its development (Ash 1990: 16). The reforms, which followed closely the IMF's approach to macroeconomic stabilisation (Blazycy and Rapacki 1991), were criticised heavily in Poland by former communists, non-governing splinters of Solidarity (Ekiert and Kubik 2004: 126), left-wing socialists, workers, and right-wing conservatives (Sanford 1999: 66).

The newly created post-1990 Polish political elite had ties to the EU bureaucracy, and thus tended to embrace not only western-style economic reforms but also accession to the EU, perceived as part of the same process (Szczerbiak 2002). For example, Poland's European Integration Committee, created in 1998, included former and acting Polish Ambassadors to the EU, and a longtime Vice Chancellor of the College d'Europe. Moreover, many Polish administrative employees had been trained by experts from the Commission's Technical Assistance Information Exchange Office or had studied at the European Integration College, which was established in Warsaw in 1992 (OECD 1998). Leading politicians tended to support accession for the same reasons they supported free market

¹²⁷ The Council for Mutual Economic Assistance operated between 1949 and 1991 under the leadership of the USSR to facilitate trade and development among communist states.

¹²⁸ However, Pope John Paul II supported both free market economic reforms and accession, framing them as a reunification of a Christian continent (Cordell 2000).

economic reforms - due to having accepted western norms, in the belief that it would improve the standard of living, and to appeal to pro-west voters (Szczurbiak 2002: 7). This also illustrates how the dominant group imposes its outlook and understanding of the world onto subjugated groups, as noted by both postcolonial (e.g., Fanon 1988: 24) and CRT scholars (e.g., Crenshaw 2011).

The Polish Eurosceptic coalition—composed of the same groups as those who opposed economic reforms—feared that, through accession, the west would exploit Poland economically and impose excessively liberal social values (Motas 2011). The Prawo i Sprawiedliwość ('Law and Justice') party, the right-wing remnant of Solidarity, warned that accession would lead to second-class EU membership (Szczurbiak 2002: 8), as indeed my analysis below and in later Chapters suggests. Other right-wing politicians were concerned that Poland would become a source of cheap labour for EU-15 States and a dumping ground for their second-rate products (Kopenhaskie 2002). Relying on nationalistic, Catholic, and ethnocentric arguments (Jasiewicz 2004)¹²⁹, Eurosceptics appealed mostly to rural, less educated, older, and poorer voters (CBOS 1999).

Before the Enlargement, some Polish politicians did suggest potential alternatives to accession. Most notable proposals included expanding trade with Russia, the former Russian republics, Asia, and the Americas (Moskal 2003), or strengthening ties with other CEE states and Balkan countries (Cordell 2000: 25). Given that free trade was already secured through various WTO agreements, some argued that Poland only needed capital infusions - which might have been obtained from the United States, Poland's long-standing ally (Chodakiewicz et al 2003). Expanding trade with Russia did not hold much voter appeal. It is not clear how beneficial expanding intra-CEE cooperation would have been considering that the other CEE states would be acceding to the EU. Capital infusions from outside the EU were also uncertain, and would have carried similar risks that capital from western EU institutions did. Swiss and Norwegian models of economic policies and relationship with the EU were not feasible for Poland due to its low level of social and economic development (Willa 2014). Poland also did not want to become internationally isolated, akin to Belarus or the Ukraine. Thus, western-driven economic reforms were embraced, with the hope of accession.

Poland's efforts to create a market economy out of a mismanaged state-controlled system constituted the first such attempt in European history (Wagner-Findeisen 1992). They

¹²⁹ Resembling in many ways pro-Brexit rhetoric, addressed in Chapter 6.

resulted in a currency devaluation in 1991 (Belka 2013: 12). By the early 1990s, the annual decline in production output often exceeded that experienced during the Great Depression in the United States, and the GDP was falling by more than 10% annually (Glasman 1996: 126-7). As ‘one of the most daring economic reform programs in history’, and the most radical post-communist economic transformation, Poland’s approach also produced very high social costs - higher than in other CEE states (Ekiert and Kubik 2004: 63). Due to hyperinflation, a drastic decrease in real wages¹³⁰, and deep cuts in social spending, by 1991, 30% of Poles were living in poverty and 15% were unemployed (id: 64).

C. Role of the EU Before 2004

During this time, the EU played a direct role in shaping Poland’s political and economic path. EU bureaucrats strongly encouraged the Polish electorate to support pro-western, pro-capitalist political parties (Hofbauer 2006). In 1989, Poland and the European Community (‘EC’) signed a non-preferential Trade and Commercial and Economic Cooperation Agreement¹³¹ (‘T&C Agreement’), which eliminated or suspended quantitative trade restrictions on Poland’s exports to the EC, *except* for textiles, steel, and coal (Articles 3-12) - goods in which Poland was competitive (Wagner-Findeisen 1992). Although the T&C Agreement merely ‘recogniz[ed] that the Community and Poland desire[d] to establish wider-ranging and closer contractual links that [could] permit further development at a later stage’ (Preamble), it prompted wide-ranging economic and institutional reforms in Poland, instituted in the hope that accession would follow. For example, the 1989 Foreign Exchange Bill introduced internal zloty convertibility, and led to its devaluation to boost cross-border capital transactions (Commission 1997c: 107). Prompted by the Agreement, Poland also liberalised foreign trade, lifted price controls, and legalised private enterprises (OECD 1998).

In 1991, Poland and the EC entered into an association agreement, called the ‘Europe Agreement’¹³². At the time, EU-15 States were not supportive of Poland’s accession, and even opposed calling this document a ‘Europe’ agreement (Saganek 2009). Although early drafts of the agreement did not mention accession as a possibility, the final arrangement was built upon a ‘recogni[tion] that the Community and Poland wish[ed] to ... establish

¹³⁰ Real wages fell more than 25% in the early 1990s, while unemployment rose 16% between 1990 and 1994 (Krok-Paszkowska and Zielonka 2004). Between 1989 and 1991, prices rose by 600% (Myant and Cox 2008: 206).

¹³¹ Council Decision No 99/593, OJL 339/1, Conclusion of Agreement between EC and Polish People’s Republic on trade, commercial, and economic cooperation, 22.11.1989.

¹³² Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Poland, on the other part, dated 16 December 1991. Other CEE states entered into similar agreements.

close and lasting relations, which would allow Poland to take part in the process of European integration' (Preamble). As a 'holding pattern' while the EU evaluated the feasibility of Poland's membership (Böröcz 2001b: 60), the Europe Agreement conditioned any aid or support the EC might provide (without guaranteeing it) on Poland's economic reforms and structural readjustments (Preamble) and on its 'work towards fulfilling the necessary conditions' of pre-accession (Article 1). Notably, without committing itself to Poland's accession, the EC specified a detailed mechanism for Poland's approximation of its laws to the *acquis* in 26 areas of political and economic activity (including banking, customs, competition, financial services, taxation, and environmental protection) (Articles 68 and 69). Moreover, Poland committed itself to 'facilitate the setting up of operations on its territory by Community companies and nationals', affording them 'treatment no less favourable than that accorded to its own nationals and companies' (Article 44)¹³³. To ensure compliance, the Agreement included monitoring provisions (Article 102).

Pursuant to the 1993 Programme of Actions Adjusting the Polish Economy and the Legal System to the European Union Requirements—adopted to implement policies envisioned by the Europe Agreement—the Polish legislature changed 130 statutes by 1994 (OECD 1998). Such legal reforms were aimed at benefitting the functioning of the internal EC market. The resultant Polish legislation committed Poland to the free movement of services (particularly financial services), and of capital from the west – through increased direct investments by western companies already established in Poland, and the establishment of new western companies in Poland (Commission 1997c: 129).

In addition to incentivising greater western-driven economic and political reforms, the Europe Agreement insisted on protectionist trade measures in favour of EU-15 States. Although duties and quotas on manufactured-goods trade between the EC and Poland were to disappear within 5 years of signing the Agreement, the EC facilitated Polish exports of only goods which were not competitive on EU-15 markets (such as computers), while being protectionist where Poland was competitive (such as in textiles, steel, and agriculture) (Protocols 1 and 2). Concessions for the export of Polish agricultural products were the least generous (Annex VII; Chapter 2), despite the great economic significance of the sector to Poland (Nello and Smith 1997). In addition, both parties continued to be subject to GATT's anti-dumping measures (Article 29), thus limiting Poland's ability to sell

¹³³ Although the EU also extended the rights of establishment and of bidding for public contracts to Polish firms, this provision carried little practical significance because Polish firms were not competitive in the west.

its more cheaply manufactured goods in the west at prices below local prices. Arguably, such one-sided provisions are not surprising given that Poland had no voice in Brussels at the time, and was struggling politically and economically.

The overall impact of the Europe Agreement was to offer new export opportunities to western suppliers (Wagner-Findeisen 1992), while western markets were difficult for Polish exporters to penetrate (Zielinska-Glebocka 1995). All EU-15 economies adopted protectionist and anti-dumping measures against Polish imports of products in which Poland had a competitive advantage – such as steel, textiles, clothing, and agricultural products (id). Due to western states' lack of preference for Polish exports, the elimination of subsidies, and the imposition of barriers to such exports (Dach 1999), Poland suffered a significant trade deficit with the EC throughout the 1990s¹³⁴. Because of the collapse of trade with the former communist countries, Poland's only option to eliminate its inventories was to sell them to western states, at any price (Nello and Smith 1997).

To implement the Europe Agreement's provisions, Poland was encouraged to seek financial assistance from the IMF, the European Investment Bank ('EIB'), and western commercial banks (Articles 97 and 101). Any assistance was subject to Poland's satisfaction of IMF requirements, such as restructuring its economy (Article 99). PHARE¹³⁵, the largest of the microeconomic funding measures foreseen (but not guaranteed) by the Europe Agreement (Article 97), was financed by the World Bank, the European Bank for Reconstruction and Development, and the EIB - all international financial institutions with close links to the EC, which had dictated the programme's terms (Wagner-Findeisen 1992). The infusion of foreign capital under PHARE increased the value of the Polish currency, which further lowered the demand for Polish products, decreasing economic growth (Dach 1999). The programme also subsidised traineeships for Polish diplomats, facilitating western influence in the development of civil society and political institutions in Poland.

D. Conditions in Poland in the Run-up to Accession

At its meeting in Copenhagen in 1993, the European Council (1993: 13) concluded that, to join the EU, CEE states would have to demonstrate to the EU's satisfaction that they

¹³⁴ Poland did not achieve a trade surplus with the EU until 2013 (Ministry of Foreign Affairs 2014: 77).

¹³⁵ Poland and Hungary Assistance for the Restructuring of the Economy. See Programme of Community aid to the countries of Central and Eastern Europe, Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, and amending acts. PHARE's stated goals included providing Poland and Hungary with technical, economic, and infrastructural expertise, and with assistance to aid their transformation into market economies.

possessed ‘stability of institutions guaranteeing democracy, the rule of law, ... a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union’. There was ‘no question of modifying’ these Copenhagen criteria (Commission 2001: 6). The ‘to the EU’s satisfaction’ standard was never defined precisely, and thus provided the EU with leeway in dictating pre-accession policies. The EU deemed the adoption of the internal market *acquis* particularly critical (Commission 1997c: 99). After Poland presented its application for EU membership in 1994, formal negotiations commenced in 1997, followed by four years of further adjustment of Polish laws to the *acquis* (OECD 1998). Further economic stabilisation programmes were required by western financial institutions in order for Poland to receive any financial or technical aid during this process (Zielonka 2007: 31).

Driven by Poland’s policy reforms in line with the *acquis*, foreign investment in Poland accelerated (Commission 1997c). Thus, by 1998, the share of Polish companies with foreign investment approached 50% in the manufacturing, trade, and services sectors (Commission, 1998 Regular Report: 19-20). More than 10% of overall equity, and 5% of employment in Poland was attributed to foreign investment (id: 19). Furthermore, more than 30% of company debts in Poland were in foreign currencies (Lommatzsch et al 2004). Facilitated by the new Banking Act of 1998 (adopted in line with the *acquis*), by 2000, most banks operating in Poland had majority foreign equity, approaching 70% of the total assets of the sector (2001 Regular Report: 31). Foreign direct investment (‘FDI’)¹³⁶ constituted most of the capital flow into Poland, nearly half of which was directed towards non-tradeable sectors such as public utilities and financial institutions (Commission, Enlargement Paper 2001b) – and thus would not bring about any immediate economic benefits to Poland. In the tradeable sector, most FDI was prompted by EU-15 States’ desire to increase their market share in Poland, exploit wage differentials, and export human capital intensive products and technologies (id). It is unlikely that Poland would have experienced the same level, type, or pace of FDI had it not anticipated accession, which was driving its post-1989 economic changes.

Although some Polish industries dominated by foreign firms saw an improvement in productivity (Weresa 2008), and some top-500 Polish corporations experienced an increase in wages (Karaszewska 2012), FDI resulted in significant costs for Poland. It created a dependency on western investors and on new western technologies; resulted in losses of

¹³⁶ FDI involves foreign companies establishing operations or acquiring tangible, income generating assets. Unlike the purchase of securities by foreigners, FDI entails foreign control of business operations – its voting shares, technology, crucial skills, or management.

tax income; and pushed some Polish businesses out of the market (Dach 1999). Polish firms were struggling throughout the mid 1990s (Nello and Smith 1997: 12-14). This effect was particularly acute in sensitive sectors, which had constituted some of the largest producers and employers in Poland – agriculture, textiles, clothing, coal, steel, and chemicals (Dach 1999). At the same time, foreign debt continued to increase. By 1995, debt service payments accounted for more than 17% of Poland's budget expenditures (Nello and Smith 1997: 10). As markets and capital became concentrated in the hands of foreign investors and governments, Poland's dependency on EU States deepened again (Böröcz 2001b), further worsened by its sizeable trade imbalances (discussed above). Poland had become 'an economic colony of ... the IMF and the World Bank' (Hofbauer 2006: 60).

While Poland's economic activity continued to decline and unemployment continued to rise (Pautola 1999), the 1998 Accession Partnership¹³⁷ imposed further reforms. This included increasing privatisations, abolishing all barriers to the free movement of goods and capital, removing all restrictions on FDI, and completing steel, agricultural, and coal sectors restructuring. Despite such extensive adjustments, the Partnership limited pre-accession aid to Poland. Poland had to co-finance all investment projects envisioned under its assistance provisions (Article 4), which were conditioned on Poland's progress in 'respecting' all the conditions under the Partnership (Article 5).

By 2000, Poland suffered a \$13b deficit in its trade with the EU (Hofbauer 2006). At the same time, it experienced a substantial economic growth slowdown, currency devaluation, and increasing inflation (Lommatzsch et al 2004). Poland's debt position deteriorated in the early 2000s, as its net borrowing (as part of its GDP) increased from 1.5% in 1999 to 4.2% by 2002 (Commission, Enlargement Paper 2002). Furthermore, implementing IMF- and EU-driven economic and structural reforms caused the state budget to suffer a deficit (Lommatzsch et al 2004), which reduced Poland's ability to benefit from pre-accession funds (all of which required matching Polish funding) (Szczerbiak 2002: 5)¹³⁸. Increased flexibilisation and deregulation of the labour market to attract FDI (Likic-Brboric 2011) resulted in increasing unemployment – on average, of 19% each year between 2001 and 2004, with particularly high rates for young people¹³⁹ and for low-skilled workers (Lommatzsch et al 2004). Due to state budget difficulties, many unemployed Poles

¹³⁷ Council Decision of 30 March 1998 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Poland, 98/260/EC, OJL 121, 23.04.1998.

¹³⁸ Some of the funding was also not utilised due to high costs incurred in providing the required technical documentation (Myant and Cox 2008: 223).

¹³⁹ Thirty-five per cent of those under 25 were unemployed.

received no unemployment benefits (Commission, 2001 Regular Report: 29). With the Soviet era social security system dismantled, and the IMF's and the EU's (id) insistence on diverting social spending towards servicing foreign debt, educational and health systems also suffered (Frank 2006). Rising inequalities in the distribution of income (Brzeziński et al 2011), and increased rates of crime, suicide (Höfer et al 2012), and alcoholism (WHO 2011) plagued Poland. It is no wonder that many Poles desired to move to EU-15 States after the accession, as discussed in the next Chapters.

In line with the occasional EU inclusive rhetoric (discussed in Chapter 2), the names of the above pre-accession agreements implied fairness in western Europe's relationship with Poland, by referring to 'cooperation' and 'association', and finally, by subsuming both Poland and the EU under the 'Europe Agreement'. My analysis, however, indicates a schism between such inclusive labels and the actual substance of pre-accession policies, as addressed above. Notably, the EU's aid and technical assistance to the CEE states at that time was motivated at least in part by its desire to facilitate the region's ability to repay their debts to western institutions, to increase trade with the EU (e.g., Commission, Green Paper 17.11.1993), and to reduce anticipated illegal emigration to EU-15 States, which was predicted to 'pose serious ... problems'¹⁴⁰ (E&SC 1992: 106). Moreover, the 2001 Treaty of Nice preserved EU-15 States' blocking influence over new policies in the enlarged EU, and the 2002 Council in Brussels introduced new limits on EU expenditures until 2006 (Jovanovic 2004). Thus, the EU and western financial institutions had opportunistically taken advantage of the east-west power differentials, while reinforcing Poland's economic difficulties. Concurrently, the Polish elite's reiterating western discourse had obscured the fact that western-driven policies were in the service of EU-15 States. Leading up to accession, the west's approach towards Poland had naturalised it as a second-class future Member, while reinforcing pre-existing east-west inequalities.

3. The Accession Process

In 2003, Poland (and the other EU-10 States) signed the Accession Treaty ('Accession Treaty')¹⁴¹. All financial commitments by the EU under PHARE, ISPA¹⁴², and SAPARD¹⁴³

¹⁴⁰ Western States' anxiety about CEE migrants is consistent with the west's historical approach towards the region as not belonging to proper Europe, and with the imposition of transitional mobility derogations (addressed in the next Chapter).

¹⁴¹ Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ L 236, 23.9.2003. The Treaty contains separate Appendices and Annexes for each CEE state.

¹⁴² Instrument for Structural Policies for Pre-Accession (for environmental and transport infrastructure).

¹⁴³ Special Accession Programme for Agriculture and Rural Development (facilitating structural adjustment in CEE states' agricultural sectors and their implementation of the Common Agricultural Policy).

were to cease at the time of accession (Article 32). Poland was also unable to take advantage of EU aid programmes as they required matching Polish funding (often as much as 50%) – a challenge given Poland’s budgetary struggles. Moreover, the EU had capped regional aid to the new Member States at 4% of their respective GDPs (Kok 2003). The EU’s post-accession structural aid to Poland was heavily offset by Poland’s contributions to the EU budget, especially in the first few years after accession. For example, in 2004, the EU provided Poland with €2.42b in structural aid, and Poland contributed €1.31b to the EU budget; in 2005, those amounts were €4.01b and €2.38b; and in 2006, €5.05b and €2.55b (Kundera 2014: 388)¹⁴⁴.

A. The EU’s Overall Approach

The EU’s motivations for permitting the Eastern Enlargement have been attributed to several strategic goals – such as regularising a potential influx of undocumented migrants (mentioned above), increasing trade and access to cheap labour, strengthening the EU’s security and political structures, as well as expanding the EU’s political clout (Sweeney 2005; Trzeciak 2012; Zielonka 2007). Although Sweeney (2005: 210-13) has also pointed to a sense of moral obligation on the part of western politicians, Trzeciak (2012: 38) and Schimmelfennig (2001) argue that the EU had become merely rhetorically entrapped, wanting to preserve its legitimacy by implementing policies consistent with some inclusive statements made over the years.

According to EU statements, the EU and EU-15 States were driven primarily by a desire to expand trade (Commission, Green Paper 17.11.1993: 49-54). The Enlargement served the EU’s 2000 Lisbon Strategy goals of achieving global competitiveness and freedom of capital¹⁴⁵ (Likic-Brboric 2011). At the 1997 Luxembourg Summit, western European leaders had already determined that CEE states’ accessions would be a better alternative for EU-15 States than the economic policy reforms they had been contemplating to reinvigorate their economies (id). Their acceptance of the Enlargement was likely reinforced by the fact that the overall economic costs for the old Member States were predicted to be vastly exceeded by potential benefits (Trzeciak 2012: 10). It appears that the EU and western Member States allowed the CEE region to accede to derive economic and political benefits themselves, rather than to help or save the east, as the occasional EU rhetoric (discussed in Chapter 2) had claimed. As Bell (1980) points out, the dominant

¹⁴⁴ All CEE states were expected to make significant contributions to the EU, especially in the first few years after accession (e.g., Zielonka 2007: 61).

¹⁴⁵ Aided by deregulation of the labour markets, and the growth and decreased regulation of the finance sector, at the expense of the rest of the economy.

group adopts policies that might benefit a subjugated group only if they benefit the former's own interests, that is, if the interests of the two groups converge.

Although the EU would often refer to the entire accession process as 'negotiations', based on 'cooperation' (e.g., Commission, Green Paper 17.11.1993), it was based on non-negotiable, one-way adjustments. Some scholars have likened the process to an 'extension of club membership' (Jileva 2004: 13) or 'a takeover' (Hofbauer 2006: 65). The Polish government was not ensured a clear understanding of the *acquis*, which had not been fully translated by EU institutions¹⁴⁶ into Polish¹⁴⁷ by the day of accession¹⁴⁸, unlike during prior enlargements (Bobek 2007). Being unequal to the EU, Poland was not even fully informed of what it was acceding to. This further disadvantaged Polish legislators, who already lacked appropriate expertise to form well-educated opinions on the wide range of EU legislation (Sadurski 2002). Poland's voice was silenced, while new laws were being imposed by the west.

The EU imposed its norms and rules, through a take-it-or-leave-it approach which was more extensive, inflexible, and intrusive than in prior enlargements (Trzeciak 2012: 50). The EU employed conditionality – first in trade relations and in regulatory alignment supporting operations of the single market (addressed above), and then in shaping domestic policies¹⁴⁹ (Jileva 2004: 13). Unlike in all prior enlargements, CEE states were not given an option to permanently derogate or opt out from any parts of the *acquis*¹⁵⁰. Furthermore, the EU conditionality package was highly ambiguous (Zielonka 2007: 58-9), providing the EU flexibility in defining the conditions of accession. Poland's position in dealing with the EU's demands was also compromised by its lacking foreign policy specialists, and by the political elite's belief that Poland had no other option but to accede. The discrepancy of power between the EU and the candidates—more significant than during prior enlargements—facilitated this aggressive export of EU rules.

¹⁴⁶ The legal duty to translate and publish the translated *acquis* lied with the EU (Bobek 2007: 11). Each institution (Commission, Council, European Parliament, ECJ, EE&SC, Committee of the Regions, and Court of Auditors) has its own translation service, which is responsible for translating documents issued by that institution.

¹⁴⁷ Or other CEE languages.

¹⁴⁸ Less than one third of it had been translated into CEE languages by 2000 (Commission, 2000 Regular Report). This violates the Act of Accession, pursuant to which all binding legislation had to be published in the languages of the new Member States (Article 58). The entire *acquis* was translated and published in the Official Journal of the European Union only in March 2006 (Bobek 2007).

¹⁴⁹ Of course, Poles did benefit from some of these legal changes – for example, through the introduction of EU equality directives, more advanced than Polish anti-discrimination provisions.

¹⁵⁰ For example, the UK and Denmark had been allowed to derogate from the Justice and Home Affairs *acquis*. Moreover, several EU-15 States had opted out from Schengen, and from the economic and monetary union.

The EU's unilateral imposition of its laws and policies was accompanied by ongoing monitoring by Brussels. This was comprised of verbal and written instructions, regular written reviews, visits to Warsaw by EU representatives (Commission, 2002 Towards the Enlarged Union), and sending EU experts for extended periods to specific Polish ministries to oversee reforms (Zielonka 2007: 56). Frequent expert reports were used to pressure Poland to swiftly and diligently follow the EU's demands, and to compete with other CEE states in doing so (Trzeciak 2012: 49-61). In hindsight, the Commission noted that the '2004 enlargement was the best prepared in the history of the EU. ... the EU defined precise accession criteria¹⁵¹... [and] closely monitored the efforts of the candidate countries against the conditions' (Commission 2006, Enlargement Myths and Facts: 4). The unprecedented intrusiveness and wide-ranging policy effects (Schimmelfennig and Sedelmeier 2004) of these monitoring and evaluation procedures has been compared to imperial preoccupation with recording, standardising, and classifying (Behr 2007: 249). Moreover, through the publication of official reviews, EU experts were also constructing and controlling the dominant discourse - about the accession process being benevolent, and exemplary of western civilisation (Sher 2001: 241).

B. The Safeguard Clauses

The EU used safeguard provisions more extensively during the Eastern Enlargement than in any previous enlargements (De Witte et al 2017: 149-53). All enlargements¹⁵² except for the accession of Austria, Finland, and Sweden in 1995 have included a general economic internal market safeguard clause, to address adjustment difficulties in either the old or new Member States due to sudden competitive pressures of expanding the market. Thus, for example, if Poland had not met its accession commitments regarding the internal market¹⁵³ or if there were a serious breach of the functioning of the internal market (or an imminent risk of such a breach), the Commission - upon its own initiative or upon a request of any Member State - could implement protectionist measures (Article 37, Act of Accession). Unlike in previous enlargements, during which this economic safeguard clause was of limited duration, it could be applied in the aftermath of the 2004 Enlargement for as long as the situation were not remedied.

¹⁵¹ As addressed above, the Copenhagen criteria were anything but precise.

¹⁵² See Table 1 in Chapter 4.

¹⁵³ Including in energy, transport, telecommunications, agriculture, and consumer and health protection sectors.

Moreover, during the 2004 Enlargement¹⁵⁴, two new safeguard provisions were included in the accession treaty. The justice and home affairs safeguard clause (Article 38) could be applied in cases of serious or imminent risks of serious shortcomings in the transposition or implementation of EU rules relating to mutual recognition in criminal law or civil matters. This safeguard could be initiated until 2007 (and applied for as long as the situation were not remedied), by temporarily suspending any rights under the *acquis* which were deemed directly related to the triggering conditions. In addition, under the postponement clause (Article 39), if the Commission had found clear evidence that the state of preparations for the implementation of the *acquis* had been insufficient in ‘a number of important areas’, the Council could postpone accession by one year. These clauses were ambiguously defined, leaving the Commission with power to limit Poland’s ability to benefit from membership rights in the aftermath of the Enlargement, while still requiring it to fulfil its membership obligations immediately upon accession. In effect, despite the costs entailed in adopting the *acquis* and related accession policies, Poland was not even guaranteed all the potential benefits of membership on the day of accession.

Notably, in the run-up to accession, several Commission representatives had announced that they intended to use the safeguard provisions, exerting additional pressure on Poland and the other CEE states to fulfil all the accession requirements to the EU’s satisfaction. For example, EU Enlargement Commissioner Guenter Verheugen emphasised the Commission’s zero-tolerance policy regarding new Members’ correct implementation of the *acquis*, and noted that the EU would not hesitate to use safeguard clauses (Week in Europe 2004). In particular, he predicted that ‘the safeguard measures are ... likely to be invoked concerning food safety. Slaughterhouses and dairy producers could thus be barred from exporting’ (id). Similarly, the Director-General for Enlargement, Eneko Landaburu, warned that if Poland did not implement the *acquis* and introduce EU standards by November 2003 (when the Commission was to present its final report on the applicants’ readiness to accede), then the ‘introduction of the so-called protective clauses would be inevitable’ (EU Observer 2003). David Byrne, the Commissioner for Health and Consumer Protection, pointed less than a year before accession that ‘[m]any problems need to be resolved and significant improvements need to be made between now and accession ... If deficiencies remain, safeguard measures can be triggered to ensure that

¹⁵⁴ The accession of Bulgaria and Romania in 2007 also included an additional accession postponement clause, pursuant to which the EU could delay accession for one year if the candidate states were deemed not to have sufficiently implemented their membership obligations (Article 39, Accession Treaty with Bulgaria and Romania). Croatia’s accession in 2013 added yet another safeguard provision – a pre-accession monitoring clause, endowing the Council to take ‘all appropriate measures if issues of concern are identified during the monitoring process’ (Article 36, Accession Treaty with Croatia).

standards are maintained' (Byrne 2003). In its final monitoring report, half a year before accession, the Commission discussed all the available safeguard measures at length, and noted 39 areas of serious concern to the single market (such as Polish fisheries) against which it considered applying the internal market safeguard clause (Commission 2003c). None of the safeguard clauses were ultimately applied to CEE states¹⁵⁵.

Despite the EU's use of conditionality, Poland managed to obtain some concessions. For one, higher Common Agricultural Policy¹⁵⁶ ('CAP') subsidies were agreed to than the EU had offered initially. As Trzeciak (2012: 10) points, however, this merely involved moving already secured EU structural funds to direct payments. Notably, while politically advantageous for the Polish negotiators, changing the use of structural funds in this manner was disadvantageous for Poland's economy. Apart from increasing Poland's budgetary deficit (since co-financing would have to be covered from the national budget), the new arrangement turned funds normally used to help modernise regional economies into subsidies for land ownership (Kawecka-Wykrzykowska 2004). Furthermore, Poland negotiated twelve- and seven-year¹⁵⁷ transition periods for foreign investors purchasing real estate there. Any leeway, however, that the EU had exhibited was in areas of little practical importance to the EU. More generally, any concessions made by the EU to CEE states were not due to benevolence, but constituted tactical moves - to reduce potential post-Enlargement political repercussions of a resentful CEE voting bloc (Smith 1999: 15-16). The overall outcome of the negotiation process was very distant from Poland's initial demands (such as to protect its agricultural sector, and to allow mobility immediately upon accession), and heavily in the EU's favour (Trzeciak 2012: 9-10). This is partly due to the fact that the EU had used whatever small concessions it had been willing to make to prevent Poland's seeking more meaningful concessions (id).

C. Poland's Perspective

The Polish government's campaign to increase voter support for accession¹⁵⁸ focused on its economic benefits, which was an issue of great importance to Poles (Prazmowska 2010:

¹⁵⁵ A safeguard clause was applied, however, to Romania - due to the influx of its nationals to Spain, as discussed in the next Chapter.

¹⁵⁶ Mandated by Article 3 of EEC Treaty, the CAP was created in the 1960s (to reflect the needs of western states, especially France), and by the 1990s had become the EU's most expensive program (Wagner-Findeisen 1992).

¹⁵⁷ Depending on the geographical region of Poland.

¹⁵⁸ Moreover, the Commission allocated €10m per year for campaigns in candidate states (Krok-Paszkowska 2003: 13).

244)¹⁵⁹. The campaign also relied on return-to-Europe rhetoric (Pluta 2010: 316), and references to shared European values (Trzeciak 2012: 38-40)¹⁶⁰. The Enlargement was presented as an end to the Cold War division of Europe, and as rejoining of western civilisation (Sanford 1999: 87). Polish media—which tends to support mainstream political parties—continued to repeat such views, and to ignore substantive details of the accession process (e.g., *Gazeta Współczesna* 2003; *Gazeta Wyborcza* 2002). Poles felt poorly informed about the actual details of accession: on the eve of the accession referendum, 40% of those polled felt that they were not very well informed, and 4% not informed at all (Eurobarometer 2003b). Moreover, lacking trust in national politicians and with only poorly developed political preferences, post-communist Poles were vulnerable to symbolic and emotive rhetoric (Ekiert and Kubik 2004). Thus, with a poorly informed public, it was the pro-EU political elite¹⁶¹ that was in control of the process (Trzeciak 2012: 160).

The Polish government took affirmative steps to ensure that the accession referendum would be successful. Notably, voting was expanded from the typical one to two days. Moreover, if accession were not approved through the public referendum, pursuant to a newly adopted law, legislators (through a 2/3 majority vote) were empowered to call a new public referendum or to authorise the President to ratify the Accession Treaty¹⁶². Thus, even if the referendum had failed, Poland would have most likely acceded. A 2/3 majority vote of the parliament would likely have been obtained given that the Polish political elite had supported integration, and that Poland had already expended substantial costs in adjusting its policies to EU requirements.

Polish voters had tended to be supportive of accession. In 1998, for example, 45% supported accession, 19% opposed it, and the remainder had no opinion on this matter (Eurobarometer 1998). In 2002, 52% of respondents thought that EU membership would be a 'good thing' for Poland (Eurobarometer 2003a). Interestingly, some respondents who did not support accession nevertheless planned to vote in support of it. Hence, 63% of those polled in 1998 (Eurobarometer 1998) and 61% of those polled in 2002 (Eurobarometer 2003a) planned to vote for it. Apparently, some voters might have been

¹⁵⁹ Starting with access to some western imports in the 1970s, Poles developed western lifestyle aspirations (Sanford 1999: 66-80), which made some desire to join the west.

¹⁶⁰ Polish politicians had also earlier emphasised the return-to-Europe rhetoric, to pressure the EU to invite Poland to accede (Schimmelfennig 2001), and likely to garner support of pro-western Polish voters.

¹⁶¹ On the other hand, Eurosceptics were not well organised, lacked media access, and were torn between recommending abstention from voting and voting against accession (Jasiewicz 2004). They also failed to present a well-formulated alternative to accession (Szczerbiak 2003).

¹⁶² If either fewer than 50% of eligible voters had voted or fewer than 50% of those voting had approved accession. See http://referendum2003.pkw.gov.pl/akty_prawne/Uch103.pdf.

motivated by public perception that accession was a foregone conclusion¹⁶³ or that Poland did not have any viable alternatives. During the referendum, held in June 2003, 58% of eligible voters participated, and 77% of them voted for accession, resulting in 45% mandate strength¹⁶⁴.

Notably, Poles at the time had higher esteem for EU citizens and institutions than for Polish ones (Roguska 2003). Such sentiments, of course, are in line with pro-western rhetoric disseminated by EU and Polish politicians. I wonder whether this might not only have reflected disillusionment with domestic politicians and voters' western consumer aspirations, but also been prompted by some Poles' internalised western othering of the east. Thus, accession represented an attempt to become more 'European', while breaking away from Russian influence. Everyday Poles' and mainstream Polish politicians' propagation of pro-west rhetoric is reminiscent of how colonised subjects attempt to elevate themselves by assimilating and reproducing their oppressor's language and ideology (Fanon 1988; Spivak 1988). Combined with the post-communist cultural distress and social challenges (discussed earlier), this 'self-colonisation' caused Poles to be especially vulnerable to emotional and rhetorical manipulation, such as politicians' appeals for a 'return to Europe'.

4. Aspects of the Acquis Most Damaging to Poland

The Enlargement entailed Poland's transposition of the acquis—composed of more than 10,000 documents, arranged into 31 accession chapters¹⁶⁵—which became effective immediately upon accession. At the time of accession, some negative post-accession impact of the acquis was anticipated in vital sectors of the Polish economy, such as agriculture, heavy industry, and banking (Szczerbiak 2002). Moreover, in anticipation of the Enlargement, the EU adopted some new policies to increase its benefits to EU-15 States (Inglis 2004) – for example, Agenda 2000 and CAP reforms, discussed below. Behr (2012: 13) labels it 'an epitome of structural violence'.

¹⁶³ In a May 2003 poll, most Poles did in fact assume that Poland would join the EU regardless of the result of the referendum (The Economist 2003).

¹⁶⁴ See <http://referendum2003.pk.gov.pl/sww/kraj/indexA.html>.

¹⁶⁵ On Free Movement of Goods; Free Movement of People; Freedom to Provide Services; Free Movement of Capital; Company Law; Competition Policy; Agriculture; Fisheries; Transport Policy; Taxation; EMU; Statistics; Social; Energy; Industrial Policy; Small and Medium Enterprises; Science and Research; Education and Training; Telecommunications and Information; Culture and Audiovisual Policy; Regional Policy and Co-ordination; Environment; Consumers and Health Protection; Justice and Home Affairs; Customs Union; External Relations; Common Foreign and Security Policy; Financial Control; Finance and Budgetary Provisions; Institutions; and Miscellaneous.

It is true that accession benefited Poland in certain ways. It gained access to EU markets and structural funds. Moreover, after the expiration of transitional measures, its nationals obtained the right to mobility. Polish government's economists estimate that not joining the EU would have resulted in slower economic growth, lower GDP, and higher unemployment (e.g., MSZ 2014). Over the last two decades, Poland has experienced the most stable economic growth in the EU, with an average rate of 3.7% per year (Aldaz-Carroll et al 2018). Kolodziejczyk (2016: 13) attributes this growth primarily to Poland's exports to the EU. Based on Eurostat data, Horridge and Rokicki (2018: 505) concluded that, among Visegrád countries¹⁶⁶, Poland would have suffered the most economically without accession. They predicted that without accession, Poland would have experienced regional growth rate reductions of between 8% and 17% (id: 509).

Of course, it is very difficult to directly link Poland's current economic conditions to the effects of accession, as opposed to purely domestic factors or to geopolitical forces beyond the EU. Moreover, any economic benefits have not been distributed evenly across Poland, with large urban areas having benefited the most (Kundera 2014). The accession's impact on individual Poles has also been uneven, depending on their age, education, and socio-economic class (Hardy and Fitzgerald 2008: 5-6). Notably, since 2004, Poland has experienced increasing inequalities, escalating prices, and an increase in precarious and illegal work¹⁶⁷. Not surprisingly, this has resulted in more than 2 million Poles moving to EU-15 States between 2004 and 2014, leading to a brain drain¹⁶⁸ (Willa 2014). This exodus, composed mostly of workers, has been linked to depressing Polish GDP between 0.16% and 0.31% annually in the first ten years after accession – despite the considerable remittances being sent back to Poland¹⁶⁹ (Kundera 2014).

EU regulations have also been increasing the cost of living in Poland. The 2011 VAT regulation¹⁷⁰ changed the standard VAT rate for Poland from 8% to 23%¹⁷¹. This has increased, for example, the cost of children's clothing, and has been speculated to

¹⁶⁶ Czech Republic, Hungary, Poland, and Slovakia.

¹⁶⁷ Along with Latvia, Poland has experienced the highest rates of informal and illegal employment among CEE states, which has further motivated many Poles' emigration (Hardy and Fitzgerald 2008: 6-7).

¹⁶⁸ By 2016, Poland ranked second in the world (after India) in outflow of qualified personnel (with the UK being their second most attractive destination, after the USA). See World Bank (2016). It remains to be seen whether Brexit will affect these numbers or will merely impact migrants' destinations.

¹⁶⁹ For example, between 2004 and 2011, Poland received more than €26b in remittances (Kundera 2014: 387).

¹⁷⁰ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

¹⁷¹ Pursuant to EU law, VAT rates differ among the Members, with the highest (27%) applied in Hungary, and the lowest (17%) in Luxembourg. See https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf.

contribute to Poland's declining birth rate (EP Written Questions 1.8.13). Even though 'medical care' is exempt from VAT under EU rules, the Commission referred Poland to the ECJ in 2014 for failing to apply the new rates to fifteen medical equipment and pharmaceutical products. Applying the new rate to such products would have increased the costs of medical care in Poland – especially because hospitals and other healthcare providers are unable to deduct VAT under Polish rules (EP Written Questions 19.3.2014: 198). The ECJ ruled against the Commission regarding most of the products in question because the Commission was unable to prove that most of the items at issue did not fall within the scope of items specified under EU rules as exempt from the increased VAT rate¹⁷². Thus, Poland's partial success in this case can be attributed to the lack of definitional specificity under EU rules, and the fact that the burden of proof falls on the Commission in infringement cases¹⁷³. Notably, the ECJ made it clear that social concerns had no place in the imposition of VAT rules. Poland had put forth a moral argument, that a reduced rate of VAT should be applied to all goods used for health purposes, even if they do not fall within exempted products under EU law, in order to make them more affordable to all persons. In response, the ECJ pointed that '[w]ith regard to social considerations raised by the Republic of Poland, ... it suffices to state that the arguments of socio-political nature cannot justify a Member State's breach of the [VAT] provisions'.¹⁷⁴

A. Agriculture

Due to its significance to the Polish economy¹⁷⁵, agriculture presents an especially significant example of damaging, or at least unequal, EU policies. Although this was one sector in which Poland could have benefited greatly from open trade with the EU, trade in agricultural products was closely regulated during a seven-year transitional period, driven by EU-15 States' fear of competitive pressures (Dach 1999). EU-15 States, however, have been permitted to freely export their agricultural product surpluses to Poland since the time of accession. Moreover, the EU had imposed limits on all Members' production of dairy and wheat, Poland's key agricultural products, until 2015 (id). Thus, Polish farmers' profits were reduced, and some were forced to incur costs associated with changing their operations in order to survive.

¹⁷² Case C-678/13 *Commission v Poland*, 4 June 2015.

¹⁷³ More generally, such infringement cases are difficult for the Commission to prove because it must demonstrate a constant and consistent VAT practice by national administrators, which is often difficult to document and might be contrary to national law (in conformity with EU law).

¹⁷⁴ Case C-678/13 *Commission v Poland*, ¶ 51.

¹⁷⁵ For example, in 1999, almost 20% of Poles listed agriculture as their main employment (Commission, *Enlargement Paper 2001b*: 53).

In anticipation of the Enlargement, the CAP underwent its most far-reaching reforms since its inception in the 1960s (Sweeney 2005). Agenda 2000 included overall cuts to its funding, and redirected funding away from production towards protection of the environment¹⁷⁶. At the time of accession, the Commission had opposed providing much direct aid to Polish farmers because it feared redirecting resources away from EU-15 farmers (Kundera 2014: 390). CEE agriculture was excluded from many EU agricultural policies (such as equalising grants, subsidising agricultural exports, and guaranteeing minimum prices). Agricultural subsidies to Poland and other CEE states were significantly lower than those for pre-existing Member States or those that had been offered during prior enlargements¹⁷⁷. Direct payments to CEE farmers started in 2004 at 25% of what EU-15 farmers were receiving, to be slowly increased over a period of 10 years (Zielonka 2007: 61). Inequality in these payments between EU-15 and CEE farmers has continued under the 2014-2020 programming period, to be equalised by 2019¹⁷⁸.

Despite being excluded from full access to subsidies and payments under the CAP, Poland was required to meet quality, production, processing, and hygiene standards of its agricultural products from the day of accession. Adopting all the CAP rules resulted in increased production costs – especially due to VAT increases on agricultural machinery and supplies, and the requirements to modernise operations and ensure environmental protection (Kundera 2014: 392-3). At the time of accession, such outlays amounted to over €1.7b (id: 393). EU compensation was not sufficient to reimburse Polish farmers for the costs they had to incur (Ziolkowska 2007: 10). Moreover, no reimbursements for agri-environmental measures were available at all between 2004 and 2006, and farming lots smaller than 1 hectare were never eligible for such EU or Polish funding (id: 8). Within two years of accession, 1.5 million Polish farms had to be liquidated due to the application of these agricultural policies (Zielonka 2007: 80).

B. Other Sectors

EU policies have also been causing significant trade imbalances in other industries, by constraining Polish exports both before and since the accession. For example, Poland was permitted to supply EU-15 States with raw and minimally-processed materials rather than manufactured goods, which inhibited its ability to modernise its economy and to profit

¹⁷⁶ Agri-environmental policy is mandatory under EU Regulation 1257/99 on support for rural development from the European Agricultural Guidance and Guarantee Fund. There were no similar policies in Poland before PHARE was implemented in 2000.

¹⁷⁷ For example, CEE states were offered €137 per person in regional policy support, compared to €231 that had been offered during the Southern Enlargement (of Greece in 1981, and Spain and Portugal in 1986).

¹⁷⁸ See <https://www.consilium.europa.eu/en/policies/cap-reform/>.

from its low manufacturing costs (Dach 1999). Since 2006, the Commission has imposed limits on the production of sugar in Poland, and requires that any sugar shortage be offset by imports from other States, such as Germany (EP Written Questions 17.07.2013: 231). As a result, in 2013, the price of sugar in Poland was 60% higher than in Germany (id). As of 2014, a new regulation¹⁷⁹ has reduced permissible levels of tarry substances in smoked meats. Poland produces and exports the largest volume of traditional food products in the EU - many made using wood-fired smoking ovens (EP Written Questions 22.08.14: 94-5). When using such ovens, it is extremely difficult to meet EU norms (id). Notably, the EU regulation is less restrictive for tarry content of smoked fish, mussels, and processed foods based on cereals and cocoa, which tend to be produced in EU-15 States. Since it is difficult for small traditional food producers to change their production technologies, many will likely be forced to scale down or even close.

Pursuant to Agenda 2000, Poland and other CEE states were required to incur high facilities spending in numerous sectors, including education, technical research, transport networks, and environmental protection (Commission 1997c). Notably, Poland was expected to invest in renewable energy resources and ecological standards, while reducing big mining and industrial plants deemed by the EU to be high polluters. The EU's carbon dioxide emission limits have increased production costs in coal, construction, chemical, and steel industries, cutting production and jobs (EP Written Questions 7.8.13: 181). Emission limits became even more stringent pursuant to the EU's 2013-2020 plan¹⁸⁰. At the same time, the Commission has not taken any steps, such as applying customs duties, to protect the coal mining industry against competition from third countries. These policies will likely result in a significant decline of the coal industry, on which Poland had depended historically. Although Poland used to be the biggest coal producer in Europe, by 2014, it became an importer of approximately 17,000,000 tons of coal annually (EP Written Questions 17.7.14: 14).

C. Effects on the West

In addition to gaining sources of cheap materials and cheap labour¹⁸¹, and new investment opportunities, western States' economic benefits from the Enlargement have been carefully orchestrated¹⁸². For example, in the pre-accession period, Poland bore the impact

¹⁷⁹ Commission regulation (EU) No 10/2011 of 14 January 2011 on plastic materials and articles intended to come into contact with food.

¹⁸⁰ EU Emissions Trading System, https://ec.europa.eu/clima/policies/ets_en.

¹⁸¹ The economic benefits of CEE workers' mobility to EU-15 States are addressed in the following Chapter.

¹⁸² Ost (1992: 221) argues that the Cold War itself was a key contributor of western Europe's post-war prosperity.

of any future inflation and output stabilisations, whereas western States and businesses benefited from reduced risk premia, increased FDI, and incentives for technological innovation (Ca'Zorzi and De Santis 2004; Nello and Smith 1997: 37). By 2014, Poland made more than €33b in direct contributions and more than €143m as loan repayments to the common budget (Ministerstwo Finansow 2014). Moreover, since the Enlargement, the European Social Fund—intended to enhance skills of unemployed workers and of employees at small and medium enterprises—has been used mainly by large multinationals in Poland, including ING, Unilever, Philips, Mercedes Benz, BMW, Renault, Nestlé, and Deutsche Bank (EP Written Questions 21.11.13: 583). By 2013, around €7m from the Fund was spent by multinationals to provide training for their own employees (EP Written Questions 28.11.2013: 337). Meanwhile, multinational corporations in Poland have tended to transfer profits between their subsidiaries as to avoid paying taxes in Poland (EP Written Questions 12.02.14: 356–57). Given pre-accession policies and the imposition of the *acquis*, Poland has had little power to stop such exploitation. Frank (2006: 102) argues that the west had intentionally sought to turn CEE states into economic ‘Third-World colonies’.

5. Conclusion

As if attempting to pre-empt potential criticism, the Commission noted on the 25th anniversary of the fall of the Iron Curtain that, in evaluating the Enlargement, it is important ‘to avoid pitfalls of an “imperialist” categorization’ (Commission 2014, 25 Years After: 13). The EU’s pre-accession policies, the accession process, and many aspects of the *acquis*, however, suggest that such categorisation might be apt. The legal, political, and economic frameworks behind Poland’s accession and its membership have served the interests of western financial institutions and EU-15 States - before the Enlargement and since. While Poland’s alternatives to accession were either not fully satisfactory or not investigated at length, western EU States misused their bargaining power stemming from east-west power differentials, and approached the negotiation process and specific accession policies in a self-serving fashion. Poland’s voice and interests were at least partially overlooked, and at times actively silenced. It is true that historically, more powerful countries have often approached weaker ones in an opportunistic fashion. However, the EU’s self-interested actions towards Poland have taken place in the context of the EU project’s promises of equality between all Member States and between all Europeans.

My analysis indicates significant tensions between (1) the benevolent fundamental-rights foundational myth (presented in the preceding Chapter) and derivate myths about the Enlargement as a ‘re-unification’ of Europe, and (2) the actual enlargement process and policies, in line with the rhetorical positioning of Poland as an eastern other. While the former serve to obscure inequalities, and distance the EU from a potential criticism of its approach towards Poland, the latter have helped to support the creation of a social reality that enables post-accession racialisation and inequalities experienced by Poles, reinforcing a hierarchy of Europeanness and whiteness - to be explored in more detail in the rest of this thesis¹⁸³. At the same time, the economic core of the EU’s fundamental rights myths which I had exposed in the preceding Chapter is also visible in the Enlargement policies, which have been structured largely to benefit EU-15 States’ economies, and which have been reproducing hierarchies of power within the EU. The privileged position of EU-15 States has been strengthened via Enlargement policies, which had been created by EU-15 politicians to benefit western interests, while overlooking or even sanctioning ongoing inequalities between Poland and the west. Any benefits accrued by Poland appear only ancillary, and are more aptly attributable to interest convergence rather than benevolent intentions on the part of the pre-04 EU.

Poland has remained on the periphery of the dominant (western) EU group. Its ability to benefit more from its accession or to gain an equal footing with western Members appears unlikely in the foreseeable future. Poland lacks much clout within the EU, despite having the sixth largest¹⁸⁴ population among its Members. Although the Polish government has argued—likely due to electoral pressures—that Poland had become a ‘significant player’ and a ‘strong and influential member state’ (Ministry of Foreign Affairs 2014: 7, 11), scholars dispute this assertion. For example, Copsey and Pomorska’s (2010) analysis of the EU’s policy towards its eastern neighbours—an issue of key strategic importance to Poland—indicated that Poland’s influence on EU policies has been low. This is likely due to Polish politicians’ inexperience at alliance building, Poland’s low administrative capacity, and other Members’ lack of receptiveness towards Poland’s concerns (id; see also Szczerbiak 2012)¹⁸⁵. Presumably, with time, Poland’s political competencies might grow,

¹⁸³ One wonders whether without a long history of western othering of the east, and without inequalities in the accession process, David Cameron (2013; 2014) would have felt at liberty to explicitly target Polish movers as the face of immigrants’ alleged exploitation of the UK’s social welfare system or Jack Straw (2013) would have called his Government’s decision to allow unlimited immigration from ‘states like Poland’ a ‘spectacular mistake’.

¹⁸⁴ After Germany, France, the UK, Italy, and Spain.

¹⁸⁵ Moreover, Polish business interest groups have had only a limited influence on the EU’s decisions (Cianciara 2013).

but it is debatable whether other Member States (other than the Visegrád group¹⁸⁶) will become responsive to its interests. Poland's priorities have frequently diverged from those of the EU-15 States – especially regarding climate, migration, and defence (Buras 2017). The Eurosceptic Prawo i Sprawiedliwość ('PiS')¹⁸⁷ party, governing since 2015, has come into direct conflict with the Commission on several occasions: most notably, due to PiS's refusal to accept refugees under the EU relocation scheme; its support for logging in an ancient Polish forest; and its refashioning of Poland's media and the judiciary. Its clash with the EU intensified in 2016, after the EU sought to monitor the rule of law in Poland. Moreover, Poland was the only Member openly advocating Lisbon Treaty reforms in 2016 (to shift power from the Commission to the Member States, and calling for Juncker's and Tusk's resignations) (EU Observer 2016). Such conflicts have undermined Poland's trustworthiness in the eyes of not only the Commission, but also EU-15 States (id).

Although Poland has played a significant role within the EU by bridging differences between the Big Three (France, Germany, and the UK) (Parkes 2013), that impact does not amount to having a direct effect on EU policies. Moreover, it is uncertain how Brexit will reshape these dynamics. Furthermore, Donald Tusk's¹⁸⁸ tenure (2014-2019) as President of the European Council has not helped Poland's agency within the EU. Instead, it has only exposed political strife within the Polish government, unlikely to help its image. For example, the Polish government has accused Tusk of 'attacking' Poland after he voiced criticism of some of its domestic policies¹⁸⁹, which are arguably in contravention of EU laws. Moreover, Poland's opposition to his re-election as Council President in 2017 had left Poland isolated from the other Members, all of which had backed his second term (Rankin 2017). It remains to be seen if Brexit will affect Poland's influence within the EU. On one hand, Poland's ally in the EU will depart. On the other, Poland will become the fifth largest State, with a greater share of MEPs in the Parliament. Hence, its support will become more critical if legislative proposals are to be approved by the Parliament¹⁹⁰. Moreover, its economy is predicted to keep growing¹⁹¹, possibly increasing its clout.

¹⁸⁶ In the past few years, however, internal divisions have appeared within the group, with Hungary remaining Poland's only consistent ally (Nič 2016).

¹⁸⁷ PiS was founded in 2001 as a nationalistic, conservative, Christian party.

¹⁸⁸ A strong supporter of free market economy and integration, and a former Prime Minister of Poland, Tusk was also President of the Council of the EU in 2011.

¹⁸⁹ See <https://www.bbc.com/news/world-europe-42049973>.

¹⁹⁰ European Parliament decisions are reached through majority voting - simple majority, absolute majority (half plus one), or qualified majority (a specific majority, such as two-thirds), depending on the type of decision and the subject of the vote. The current number of MEPs is 751 (to be reduced to 705 after Brexit), with Poland having 51 seats (due to representing more than 7% of the EU's population).

¹⁹¹ See <https://www.worldbank.org/en/country/poland/overview#3>. Poland is the first CEE country to be considered a developed economy (as of 2018) according to the Russell Index. See https://www.ftserussell.com/sites/default/files/poland---the-journey-to-developed-market-status_final.pdf.

One should also be cautious not to mistake Poles' post-accession support for EU membership—which has been higher than in other CEE states (e.g., Eurobarometer 2007; CBOS 2017)—as indicative of fairness or equality in Poland's relations with the west. As discussed above, some Poles considered the EU to be their only option during the upheavals of the post-communist period, and might still harbour such attitudes. For example, in 2014, Poles' security concerns over instability in the Ukraine were linked to an all-time high (89%) support for accession (CBOS 2014b)¹⁹². Being part of not only NATO but also the EU certainly has provided Poland with security benefits. Moreover, a higher number of Poles than of nationals from other CEE states have taken advantage of the free movement right, which—despite some shortcomings and challenges discussed in later Chapters—has been of central importance to Poles in supporting EU membership. Arguably, many also feel proud at finally being considered 'European' – a sentiment reinforced through self-colonisation (addressed earlier). Any positive attitudes about accession should also not be conflated with its economic repercussions. Since 2000, Poles have continued to be consistently negative about the functioning of the market economy in Poland, with around half of those polled in 2014 disagreeing with the assertion that capitalist economy has been the best option for Poland (CBOS 2014a). Moreover, even if its economy is healthy according to international financial benchmarks, this does not necessarily have an impact on Poles' lives. Indeed, many have felt compelled to better their lives by relying on the right of free movement, to which I turn next.

¹⁹² Notably, however, Poles' *trust* in EU institutions was not high at around that time, at only 41% (Eurobarometer 2015).

Chapter 4: The Right to Free Movement, and Poles' Mobility

1. Introduction

The last Chapter explored how western-driven pre-accession policies, the Enlargement process, and select aspects of the *acquis* have taken advantage of and reinforced Poland's unequal position to the west. More generally, Kukovec (2015) has argued how EU laws and discourse have ignored the concerns of 'peripheral'¹⁹³ EU countries, their workers, and their companies, and hence reproduced the existing power hierarchies between dominant and peripheral EU countries. For example, while the dominant Member States' arguments against social dumping (of cheaper CEE workers in the west) have been honoured under EU law¹⁹⁴, peripheral States' concerns with western goods and services dumping¹⁹⁵ have been unchallenged by EU competition rules (*id.*). Moreover, increasing free markets and competition have worked to the detriment of peripheral States' companies, which are structurally disadvantaged compared to companies in the dominant States (*id.*). This Chapter zooms in on a key policy area that stems from the Enlargement, and seeks to situate it within such power hierarchies: Poles' access to the freedom of movement right. This right constitutes the backbone of my thesis.

Often portrayed as 'labour migrants' in western popular and political discourse¹⁹⁶, Poles' mobility has been implicitly not free. This erroneous label unfortunately appears in line with reality, given that Poles' mobility has been predominantly economically-driven¹⁹⁷ (Ciupijus 2011), and often marred by exploitation and racism in the receiving States, as discussed below. My aim is to explore whether the west's unequal pre-accession approach towards Poland, reinforced through othering discourse, has shaped Poles' access to mobility. I focus particularly on how the right to free movement has been conceptualised, applied to, and experienced by Poles who are workers¹⁹⁸, as that is by far the largest group

¹⁹³ Defined by Kukovec (2015) as Member States with lower GDPs; less prestigious products, services, and institutions; smaller investments in research and development; less ingoing and outgoing FDI; lower wages; and lower life expectancy than in the States belonging to the centre. This peripheral region includes all CEE states, Portugal, Greece, and Cyprus (*id.*).

¹⁹⁴ For example, in both *Viking* and *Laval* cases (n 377), ECJ and scholarly debates overlooked CEE workers' concerns. Instead, they framed the factual circumstances as a conflict between (all) workers' rights versus (all) companies' right to free movement of services (in *Laval*) or right to relocate (in *Viking*), not differentiating between the interests of CEE as opposed to western companies and workers. Notably, in *Laval*, the ECJ condemned social dumping of cheaper CEE workers in the west.

¹⁹⁵ Western exports to the peripheral region at prices below those charged on the domestic markets, a practice which ultimately benefits companies of the centre and disadvantage companies of the periphery (due to lost capacities, lost investment, and contraction or elimination of whole industries) (Kukovec 2015).

¹⁹⁶ Unlike western 'expats' and 'movers'.

¹⁹⁷ Although some young CEE nationals' mobility has been driven by a sense of adventure.

¹⁹⁸ I do not address highly-skilled professionals because they have comprised a minority of mobile Poles, and are often governed by specific regulations (such as those applying to nurses, doctors, or lawyers).

of Poles who have been mobile since 2004¹⁹⁹. Moreover, it is the influx of CEE workers that had provoked stern opposition in EU-15 States at the time of accession and since then, most poignantly in the debates surrounding Brexit.

A. The Significance of the Free Movement Right

As one of the four freedoms²⁰⁰ forming the bedrock of the EU, the freedom of movement of persons was included in Spaak's 1956 blueprint for the establishment of the European Common Market²⁰¹. Enshrined as a fundamental EU principle in TFEU Article 45, and developed through secondary legislation and ECJ case law, this right entitles each EU citizen to seek employment and to work in other Member States, and to reside there for that purpose, while enjoying equal treatment with the receiving State's nationals in the employment context and access to social and tax advantages. As a prerequisite for the exercise of most other EU rights²⁰² (including the right to equality) and a tangible symbol of integration, the right carries great social, economic, and political importance (Mortera-Martinez and Odendahl 2017: 3-5). The free movement right has become widely regarded—by politicians and scholars alike—to constitute a central aspect of the European integration project (Johns 2013b).

In line with the fundamental rights rhetoric addressed in Chapter 2, mobility has been proclaimed by the Commission (e.g., 2008b), the Parliament (e.g., 2013), the ECJ²⁰³, and key EU representatives (e.g., Reding 2014) to constitute a fundamental right, a founding principle, and a core right of EU citizenship. The freedom of movement right is considered 'one of the most important objectives of the Community', 'one of the most concrete expressions of the concept of Union citizenship' (EE&SC 2001: § 1.1), and of 'paramount economic importance and great symbolic value' (EE&SC 1991: ¶ 4.14)²⁰⁴. The EU public also deems it to be one of the most prized EU achievements. For example, in 1986, 74% of EU nationals polled supported an unlimited right to reside in other Member

¹⁹⁹ I do not analyse the Employment Equality Framework Directive 2000/78 (to combat discrimination of workers on grounds of disability, sexual orientation, religion, and age) because the focus of my thesis is on discrimination due to racial or ethnic origin. Hence, the Race Equality Directive 2000/43 is more relevant to my questions, as discussed in the next Chapter.

²⁰⁰ Along with the freedom of movement of goods, services, and capital.

²⁰¹ Drafted by a Committee headed by Paul-Henri Spaak, the Brussels Report on the General Common Market eventually led to the signing of the Treaty of Rome.

²⁰² Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v Uecker*, and *Jacquet v Land Nordrhein-Westfalen*, ECLI:EU:C:1997:285.

²⁰³ E.g., Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, ECLI:EU:C:2002:493.

²⁰⁴ Historically, of course, unrestricted mobility was the norm. It was only in the late 1700s that national passports were introduced in most European countries. The first modern immigration border control laws were promulgated only in the last two centuries – for example, the 1905 Aliens Act in the UK, and the 1882 Chinese Exclusion Law in the US. For a discussion of the history of mobility and of modern immigration controls, see Dowty (1987).

States (Eurobarometer 1986). More recently, almost 90% of EU citizens surveyed considered mobility to be a fundamental right of their EU citizenship (Special Eurobarometer 2011). The majority deems it to be the main EU right (Flash Eurobarometer 2013), and the most positive achievement of the EU (Eurobarometer 2013). In the context of the Eastern Enlargement, moreover, the right to mobility served as ‘a key symbol of the “return to Europe” that EU accession represent[ed]’, especially poignant to CEE nationals given the restrictions they had experienced behind the Iron Curtain (Maas 2002: 2). Moreover, as discussed in Chapter 2, both the Enlargement process and the freedom of movement right have been framed by EU institutions as fundamental to the re-unification of Europe and to liberating CEE nationals.

By the mid 1980s, approximately 2 million workers (that is, 0.5% of the total EC population)²⁰⁵ were relying on the freedom of movement right (Hantrais 2007: 217-18). In 2000, approximately 6 million EU-15 nationals (1.6% of the total population) resided in other EU-15 States (Koikkalainen 2011). In the last decade, intra-EU mobility has increased. By 2013, 3.1% of EU citizens were mobile (Canetta et al 2014: 1). Due to employment opportunities and gaps in earnings (Barslund and Busse 2014: 116-17), post-2004 mobility has been predominantly from the CEE region to EU-15 States²⁰⁶. Most of this influx occurred between 2005 and 2007, before overall mobility began to diminish due to the economic downturn (Commission 2008e).

As the largest group of movers, Poles have constituted more than 20% of annual intra-EU mobility since 2004 (OECD 2012: 174-6). By 2009, approximately 2.3 million Poles (more than 6.6%²⁰⁷ of Poland’s population) were living in other EU States (Barslund and Busse 2014: 129)²⁰⁸. The UK has been Poles’ top post-04 destination²⁰⁹. Between 2006 and 2015, more than 30% of Polish mobility each year has been to the UK²¹⁰. By 2016, more than 900,000 Poles were residing in the UK²¹¹. A substantial portion of this mobility has been temporary in nature – likely due to reduced post-recession employment opportunities in the UK, improving living standards in Poland, Polish government’s reintegration

²⁰⁵ And 5.5 million family members.

²⁰⁶ Third-country nationals (‘TCN’) have continued to constitute the largest group of immigrants to EU-15 States, however. For example, in 2010, 23% of migrants in the EU were EU citizens, 77% were TCNs (Eurostat 2012).

²⁰⁷ The second highest percentage, after Romanians.

²⁰⁸ Counting those staying abroad for more than three months.

²⁰⁹ Followed by Ireland, and Germany, in that order (OECD 2012).

²¹⁰ See <http://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-emigracji-z-polski-w-latach-2004-2015,2,9.html>.

²¹¹ See <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/2016>.

campaigns, and homesickness (Filimonau and Mika 2017). The Brexit referendum also appears to be responsible for some return migration (*id*). According to the Commission (2010a), mobility has always been hindered by some obstacles that are difficult to overcome – such as Member States’ incorrect applications of EU law, and hurdles in recognising educational and professional qualifications. One of my goals in this Chapter is to explore whether CEE workers’ mobility might face such or any additional impediments.

Before the Eastern Enlargement, intra-EU labour mobility did not pose a threat (either real or imagined) to host States’ welfare regimes, labour markets, or social cohesion (Engbersen et al 2017). Hence, the right to free movement was not politicised. It became one of the most contested topics during the CEE accession process, however, and very unpopular among EU-15 citizenry (Currie 2008: 11). Responding to public anxieties, and allegedly fearing welfare tourism (although studies indicated that such concerns were not warranted, as addressed below), most EU-15 States resisted CEE nationals’ post-accession access to free movement and to social benefits (Kubal 2012: 74-6). All CEE governments had opposed mobility restrictions (Jileva 2002). They argued that such restrictions would diminish the concept of equality, and degrade the scope of their EU membership and of their belonging to the European community (Barnard 2000). With the largest population among CEE states, a strong culture of emigration, and a greater number of its nationals residing in EU-15 States pre-accession than from other CEE states, Poland would be particularly affected by mobility restrictions, symbolically and practically. The Polish accession negotiator critiqued transitional restrictions for introducing inequalities among Members, and for portraying CEE states as not properly ‘European’ (Jileva 2002). Despite this, seven-year restrictions on workers’ mobility were included in the 2004 accession treaty²¹².

B. Westerners’ Opposition to CEE Mobility

Despite greatly valuing their own mobility (as mentioned above), the western public has exhibited anxieties about the presence of CEE movers in their States. In the run-up to the Enlargement, various surveys taken between 2000 and 2003 indicated that about 40% of EU-15 nationals opposed granting civil rights to lawful migrants, and 20% favoured their repatriation (Erel 2007: 2). Eurosceptic populist discourse across EU-15 States²¹³—fuelled by the 2008 economic crisis and the refugee crisis—has condemned intra-EU mobility, and has been incorrectly labelling CEE movers as ‘migrants’ and ‘foreigners’

²¹² Similarly, mobility from Bulgaria and Romania, which acceded in 2007, was restricted for seven years.

²¹³ Right-wing, anti-foreigner populist discourse has also been observed in CEE states – after the collapse of communism (Wallace 1998) and more recently against refugees, especially Muslims (Bachman 2016).

(Kostakopoulou 2014: 5). Sobis et al (2016) note that Poles and Romanians have been especially targeted by xenophobic language in the media, and by both extreme-right and mainstream politicians. When transitional limitations were coming to an end, renewed popular and political debates about ‘benefit tourism’ and ‘poverty immigration’ spread across EU-15 States (Poptcheva 2014: 3). In a 2011 survey, majority of nationals in every EU-15 State other than Sweden and Luxembourg agreed with the statement that the internal market had ‘flooded’ their country with ‘cheap labour’ (Special Eurobarometer 2011a: 20). A survey conducted in 2013 showed that a substantial majority of respondents in the UK (83%), Germany (73%), France (72%), Italy (66%), and Spain (60%) felt that their governments should be able to restrict EU movers’ access to benefits (Seeleib-Kaiser 2018). In a 2013 letter to the President of the European Council for Justice and Home Affairs, Ministers representing Austria, Germany, the Netherlands, and the United Kingdom called for limitations on the mobility of intra-EU ‘immigrants’, due to CEE movers’ alleged abuse of and strain on the social systems of ‘benefit magnet’ States (Mikl-Leitner et al 2013). Cameron’s renegotiation of the UK’s membership in the EU sought to decrease mobility into the UK, or at least EU citizens’ welfare access, even by economically active movers (Barnard and Butlin 2018). In 2017, 33% of respondents disagreed and 12% strongly disagreed with the statement that immigration is a good thing for their country (Eurobarometer 2018: 9).

Survey data suggests that Britons have been especially apprehensive about mobility, and about migration more generally. A review of Eurobarometer Public Opinion polls and Ipsos MORI Issues Index findings between 2003 and 2013 indicates that UK nationals have tended to express more concern than other Europeans about immigration (Duffy and Frere-Smith 2014: 10). For example, two months before the Enlargement, 41% of Britons (compared to the EU-15 average of 16%) regarded immigration as the most important issue facing the UK; and 62% deemed immigration as the most important issue for the upcoming European Parliament elections (Eurobarometer 2004). The importance of migration to the British public reached a peak in 2007 and 2008—when CEE mobility was at its highest (Drinkwater and Garapicz 2013: 1). For example, more than 40% of those polled by Ipsos MORI during each month between September 2007 and April 2008 considered race and immigration among the most important issues facing Britain, ahead of concerns about the economy or crime²¹⁴. According to 2014 surveys, 52% Britons

²¹⁴ See <https://www.ipsos.com/ipsos-mori/en-uk/issues-index-2007-onwards>. This is much higher than in the years preceding the Enlargement (Duffy and Frere-Smith 2014). For example, in both 1985 and 2000, only 18% of respondents named immigration and race relations as one of the top issues facing the UK (id).

exhibited negative attitudes towards EU movers, which was the highest percentage among all EU respondents (Seeleib-Kaiser 2018). Since the Brexit referendum in June 2016, however, Ipsos MORI surveys indicate that immigration has been receding as the most salient issue, falling from 48% of respondents in June 2016 to 21% in December 2017 (Blinder and Richards 2018). YouGov polls also show a slight decrease in Britons' opposition towards immigration since 2016, although many respondents continue to express concern about it (Wells 2018). In April 2018, for example, 63% of those polled felt that immigration into Britain in the last ten years had been too high (39% 'much too high', and 24% 'a little too high') (id).

CEE nationals have consistently constituted a highly disfavoured group in the UK, even long before the Brexit referendum. For example, British Social Attitudes Surveys between 1983 and 1996 revealed that white Britons were prejudiced not only against non-white groups, but also against Eastern Europeans (more than against all the other white groups measured²¹⁵) (Ford 2011: 1026-7). Although Britons' attitudes towards some non-white immigrant groups appear to have improved since then, a hierarchy among whites has continued. For example, according to a 2007 immigration survey, 34% of Britons felt that EU-14 nationals should be given priority to immigrate to the UK; whereas 27% supported that approach towards Australians, New Zealanders, and Canadians; 9% for Americans; 1% for those from the Indian Subcontinent and African Commonwealth countries; and 0% for CEE nationals (Ipsos MORI 2007)²¹⁶.

Both Brexit Leavers and Remainers showed higher preference for non-CEE white immigrants than for Poles. For example, according to calculations by the Migration Observatory, 61% of Remainers and 25% of Leavers would allow 'some' or 'many' Poles to come and live in the UK; 70% Remainers and 35% Leavers would allow French immigrants; and 72% Remainers and 57% Leavers would allow those from Australia (Blinder and Richards 2018). As whiteness scholars have noted, whiteness is often most contested at its edges (Garner 2007b: 101-2). Unlike other Caucasian groups frequently measured, CEE movers do not share a colonial history with the UK or its language; come from much poorer regions; and undertake lower-skilled employment. Furthermore, unlike EU-14 nationals, who have been trickling into the UK for decades, CEE movers' sudden influx likely helped to fuel opposition to them. On the other hand, Poles were preferred by

²¹⁵ Including EU-14 nationals, Americans, Canadians, Latin Americans, South Africans, Australians, and New Zealanders.

²¹⁶ Bulgarians and Romanians fare particularly poorly in this survey – with 8% of those polled stating that they should not be allowed to enter the UK at all, which is higher than for any other white group measured.

both Leavers and Remainers to some other groups, notably Romanians, Pakistanis, and Nigerians (Blinder and Richards 2018). Thus, Poles' whiteness (and their Christian religion) appear to bestow some privilege on them. The erroneous public association of Romanians with the Roma might help to explain Britons' preference for Poles over them.

Perhaps most poignantly, public opposition to CEE nationals' mobility featured prominently in Brexit debates (Engbersen et al 2017), and in the referendum outcome (Dennison and Geddes 2018; Thielemann and Schade 2016). While renegotiating the UK's EU membership, David Cameron (2013) condemned Labour for giving CEE nationals access to the UK's labour market in 2004, and referred to Poles to illustrate immigrants' alleged exploitation of the UK's social welfare system (Allen 2016: 14). Right-wing groups were less measured in their opposition to mobility, especially by CEE nationals. Free movement was criticised as an 'unrestricted right of movement to criminals' (UKIP 2016) and a 'free-for-all that doesn't even stop convicted murderers from coming into the country' (Vote Leave 2016; see also Leave.EU 2016). According to Farage, Romanians and Bulgarians had been 'living like animals', and so it would be expected of them to desire to live in a 'civilised country' like the UK (Bienkov 2013; see also UKIP undated). Such statements are in line with the historical anti-eastern western discourse and with institutional othering addressed in the preceding Chapters. Those who supported Brexit cited immigration as their most important worry, and were guided by identity and ethnicity concerns more than by economic ones (Kaufmann 2016). Notably, post-referendum studies have shown that voters' support for Brexit was inversely related to EU movers' presence in their communities (Sampson 2017), and hence likely motivated by negative attitudes rather than by practical concerns or negative experiences. While directing anxieties against non-white groups (other than Muslims) is perceived as socially unacceptable, it appears less condemnable against white minority ethnic groups²¹⁷.

Of course, anti-CEE Brexit climate appears to have emboldened public antipathy against all groups that are perceived as outsiders. There was a rise in reported hate crimes in the immediate aftermath of the referendum (Home Office 2017), with some well-publicised incidents committed against Poles (e.g., Dearden 2016) and against BAME individuals (UN OHCHR 2018)²¹⁸. Although hate crimes are difficult to measure²¹⁹, the

²¹⁷ Notably, Gypsies and Travellers tend to be especially stigmatised.

²¹⁸ Anti-migrant, anti-foreigner rhetoric developed around the Brexit campaign became widespread and 'normalised' in the UK, even among some high-ranking officials (UN OHCHR 2018).

²¹⁹ Hate crimes are often not reported by victims (HMICFRS 2018: 4). On the other hand, data collection has been benefiting from recent improvements in crime recording (Home Office 2018: 10).

police recorded a spike in hate crimes after the referendum (Home Office 2017: 5-6)²²⁰. Hate crimes gradually increased after the referendum campaign had begun, in April 2016, to reach a peak in the week after the 24th June referendum, before falling again in August, albeit remaining at a level higher than before the referendum (id). Similar spikes were recorded following terrorist attacks in London and Manchester in 2017²²¹ (Home Office 2018: 13-14).

C. Existing Scholarship and Roadmap

Academic analyses of the right to free movement have traditionally focused on black letter law at specific moments in time (e.g., Barnard 2013; Chalmers 2014; Craig and De Búrca 2015; dal Pozzo 2013; Foster 2017; Szyszczak and Cygan 2008; Woods 2017). Some authors note that the right to free movement has always been limited (e.g., Barnard and Butlin 2018; Doherty 2016), especially due to ECJ decisions decreasing movers' entitlements to social benefits (e.g., Zahn 2015) and tolerating Member States' discretion in doing so as well²²² (e.g., Dougan 2013; O'Brien 2015b). Moreover, many have noted the economic core of this right - including its continued focus on workers' economic activities (e.g., Cook 2011; Peebles 1997; Tryfonidou 2009), and its links to the western capitalist appetite for cheap production sites and for an exploitable workforce (e.g., Dale and El-Enany 2013).

Scholarship specifically addressing CEE nationals' mobility rights has tended to explain black letter law at the time of the Enlargement (e.g., van Elsuwege 2005), and the effects of mobility on both sending and host States (e.g., Dustmann and Preston 2018; Kahanec and Pytliková 2017; Recchi and Favell 2009) as well as on mobile CEE nationals (e.g., Botterill 2011; Ciupijus 2010). Dominant research considers the freedom of movement right as purely benefiting CEE workers (e.g., Budnik 2012). Critical scholars have acknowledged CEE workers' exploitation in EU-15 States, but have tended to focus on quantitative studies of economic and migration trends (e.g., Favell 2008) or on interview-based analyses of movers' perceptions (e.g., Botterill 2011; Ciupijus 2010). Some scholars have also critiqued post-accession transitional mobility limitations for undermining the concepts of equality and EU citizenship, and have questioned their validity under EU law -

²²⁰ On account of all measured grounds (race, religion, sexual orientation, disability, and transgender).

²²¹ At Westminster Bridge in March; Manchester Arena in May; and London Bridge in June (Home Office 2018: 13-14).

²²² Member States have been increasingly treating even movers who are economically active as inactive, placing heavy burdens on workers to prove their entitlement to worker status, and designating work as 'marginal and ancillary' simply due to being based on temporary contracts (O'Brien et al 2015: 8-11).

including TEU Article 18²²³ (e.g., Currie 2008), Article 15(2) of the Charter of Fundamental Rights²²⁴ (e.g., Kochenov 2003), and ECJ case law forbidding nationality discrimination of movers²²⁵ (e.g., Carrera 2005; Stalford 2003). Currie (2008: 201) argues that transitional derogations endowed CEE nationals with ‘second-class citizenship’, while responding to western needs for flexible labourers. According to Böröcz (2001: 27), they had transformed CEE states into ‘restricted-exit homelands or reservations’.

I hope to add to such analyses by situating Poles’ mobility within the historical development of the freedom of movement right by various EU branches, and by seeking to connect it to pre-accession policies and discourse, and to data of the actual experiences of mobility. Below, I first provide an overview of the right to free movement and of ancillary regulations supporting it. I then describe pre-04 policies, and the context leading to the imposition of post-accession mobility derogations. Next, I address how EU-15 States have directly and indirectly applied transitional measures, before explaining how the legal framework has been evolving over the last decade. Finally, I analyse mobile CEE workers’ experiences and their mobility’s effects, and contextualise them within my theoretical framework. In the conclusion, I explore connections between my findings in this Chapter, othering rhetoric discussed in the preceding Chapters, and inequalities experienced by Poland in the context of its accession, addressed in Chapter 3. Throughout the Chapter, in line with CRT tenets (as explained in Chapter 1), my aim is to explore how the conceptualisation and application of the law on free movement—steeped in myths of neutrality, liberty, and equality—might be perpetuating existing power differentials between east and west.

2. Overview of the Right to Free Movement

From the beginnings of the integration project, EU institutions recognised that, to facilitate the creation of the common market, workers had to be protected against nationality-based discrimination. Both the 1951 Paris Treaty (Article 69) and the 1957 Treaty of Rome (Articles 7 and 48) prohibited discrimination in employment between domestic workers and movers²²⁶. The 1993 Maastricht Treaty extended the right of entry and residence without discrimination to all EU citizens, reiterated by the Free Movement

²²³Prohibiting, ‘within the scope of application of the Treaties, ... any discrimination on grounds of nationality’.

²²⁴ ‘Every citizen of the Union has the freedom to seek employment, to work ... in any Member State’.

²²⁵ Joined Cases C-502/01 and C-31/02, *Silke Gaumain-Cerri v Kaufmännische Krankenkasse—Pflegekasse*, and *Maria Barth v Landesversicherungsanstalt Rheinprovinz*.

²²⁶ The right may be limited directly, however, for reasons of public security, public policy, or public health, and in the context of employment in the public sector (EC Treaty, Article 39(3)).

Directive 2004/38²²⁷. The ECJ defines movers' equality rights broadly - to include 'all rights or benefits which in any way impact on the ability ... to exercise the right to move and reside' in other Member States²²⁸. Prohibitions pertain to not only direct discrimination (being treated less favourably than another due to nationality)²²⁹, but also indirect discrimination²³⁰. Thus, even criteria applicable irrespective of nationality can be found impermissibly discriminatory (unless they satisfy the proportionality test) if they are liable to place workers at a 'particular disadvantage'²³¹. For example, a language requirement disproportionate in relation to the job's requirements, which is more easily satisfied by host country's nationals than by movers, has been found impermissible²³².

EU institutions' prohibition of discrimination against mobile workers appears to have been guided by broad economic goals, rather than by concerns with improving workers' wellbeing. For example, while strengthening the links between EU citizenship and movers' equality, the ECJ has often referred to arguments about labour needs in EU-15 States²³³. Moreover, the Commission has explicitly noted that its support for anti-discrimination measures is not grounded in human rights, but rather, was intended to reduce employers' use of worker exploitation as 'an instrument of competition', which would inhibit the EU's economic success²³⁴ (Commission 1993: 69). This is in line with Bell's (1980) observation that steps to promote equality tend to be taken when they benefit the dominant group.

The freedom of movement right is inherently linked to the right to reside abroad, and to having equal access to social and tax advantages (Commission undated b). After all, one is less likely to move if her residence rights and access to social benefits in a host State are not secure. EC Treaty mandates that all mobile EU citizens are entitled to equal treatment with respect to all benefits (which includes social and tax advantages) falling within the scope of EU law (Article 17). Consistently supported and expanded through ECJ

²²⁷ Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L 158/77.

²²⁸ Case C-135/99, *Elsen v Bundesversicherungsanstalt für Angestellte* [2000] ECR I-10409.

²²⁹ E.g., Case-42/02, *Lindman* [2003] ECR I-13519.

²³⁰ Case C-152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost*.

²³¹ Case C-237/94, *John O'Fynn v Adjudication Officer*.

²³² Case C-379/87, *Groener v Minister for Education and the City of Dublin Vocational Educational Committee*.

²³³ E.g., Case C-86/96, *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-274/96, *Criminal proceedings against H O Bickel and U Franz* [1998] ECR I-7637; Case C-184/99, *Rudy Grzelczyk v le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-224/98, *Marie-Nathalie D'Hoop v Office national d'emploi* [2002] ECR I-1691; Case C-413/99, *Baumbast*.

²³⁴ Similarly, scholars have argued that the EU has supported gender equality to promote employers' economic interests (e.g., Debusscher 2015).

decisions²³⁵, these rights have been reaffirmed through several market-enabling legislations, pertaining to:

- *Coordination of social security benefits*: Regulation 1408/71²³⁶ (replaced by Regulation 883/2004²³⁷) facilitates coordination of movers' social security benefits.
- *Social and tax advantages*: Regulation 1612/68²³⁸ (amended by Directive 2004/38, and replaced by Regulation 492/2011) mandates equality of mobile workers and jobseekers in access to training, housing, social and tax advantages (Articles 7-9), and access to jobseekers' assistance (Article 5).
- *Residence rights*: Directive 360/68²³⁹ required receiving States to recognise movers' right of residence (Article 4(1)). It was replaced by Directive 2004/38, which provides all EU citizens with the right of free movement and residence across the EU, as long as they have comprehensive sickness insurance (Article 7(1)) and do not pose an 'unreasonable burden' on the host's social welfare system (Article 14(1)). The right to reside for longer than three months, however, is granted only to workers, legitimate jobseekers²⁴⁰, and those with 'sufficient resources' not to become a burden on the social assistance system of the receiving State (Article 7).

Despite strengthening the free movement right, Directive 2004/38 endowed Member States with greater discretion than had been available previously to limit movers' access to residence rights. For example, States now have discretion not to confer any social assistance benefits during movers' first three months of residence, even if they are workers (Article 24). Moreover, determining 'sufficient resources' is a fact-intensive individualised process, to be made at the host State's discretion (Article 8). A State may also expel movers who have not become permanent residents yet (status available after five years of residence (Article 16)) if

²³⁵ E.g., Case C-237/94, O'Flynn; Case C-337/97, Meeusen v Hoofddirectie van de Informatie Beheer Groep [1999]; Case C-212/05, Hartmann v Freistaat Bayern [2007]; Case C-527/06, Renneberg v Staatssecretaris van Financiën [2008].

²³⁶ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

²³⁷ Regulation 883/2004 of the European Parliament and Council of 29 April 2004 on the coordination of social security systems mandates the coordination of social security benefits systems, without harmonising them, so that States decide on the types and amounts of benefits to be granted. It pertains to social security (contributory) benefits, and special non-contributory cash benefits ('SNCB') only.

²³⁸ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

²³⁹ Council Directive 360/68, Abolition of Restrictions on Movement and Residence, OJ L 257.

²⁴⁰ Those who can demonstrate a genuine chance of getting engaged (as defined per ECJ case law).

they become an ‘unreasonable burden’ on the host’s social assistance system (Article 14). The ECJ has increasingly interpreted ‘sufficient resources’ and ‘unreasonable burden’ provisions as to endow host States with greater discretion to impede mobility²⁴¹. As intra-EU mobility has been mostly from east to west, all these discretionary provisions have served primarily to protect EU-15 States. Moreover, provisions tied to ‘sufficient resources’ have likely served as a greater impediment to CEE than EU-15 movers, due to CEE states’ lower GDPs (as discussed below).

3. The Context Leading to the Imposition of Transitional Derogations

A. Poles’ Access to EU States Before 2004

Before the Enlargement, Poles’ right to work or reside in EU Member States was severely limited. In addition to an essential ban under Communism on Poles’ ability to leave²⁴², they were required until 2001 to obtain a visa to enter Schengen countries²⁴³ (Düvell 2004). The 1989 Agreement on Trade and Commercial and Economic Cooperation entered into by the EEC, existing Member States, and Poland²⁴⁴, focused on just that—trade, commercial, and economic cooperation—with no mention of mobility. The 1991 Europe Agreement approached Polish workers akin to TCNs and did not provide them with any degree of mobility. Despite the Agreement’s liberalisation of the movement of capital, goods, and services, its section on the ‘Movement of Workers, Establishment, Supply of Services’ did not even mention free movement of persons (Title IV). Instead, Member States were permitted to continue applying their domestic immigration rules to Poles, although they were not permitted to make them more demanding than they had been at the time of signing the Europe Agreement (Article 41).

Thus, Poles lawfully residing in EU-15 States before 2004 were there pursuant to a few national regimes and ad hoc bilateral agreements that permitted temporary-worker schemes and responded to specific employer needs²⁴⁵, as refugees, or as family members of EU nationals. Data regarding their numbers is not precise. For example, Poland’s Central

²⁴¹ See discussion of cases such as Brey, Dano, Alimanovic, and Garcia-Nieto in Section 5 below.

²⁴² Despite prohibitions on leaving, however, more than two million Poles left clandestinely between 1950 and 1992 (Dustmann et al 2012).

²⁴³ All EU countries other than the UK and Ireland.

²⁴⁴ Agreement between the European Economic Community and the Polish People’s Republic on trade and commercial and economic cooperation, 22.11.1989, OJEU L 339. Other CEE states entered into similar agreements.

²⁴⁵ For example, since the early 1990s, Poland had agreements with Germany for trainees and posted workers, and a special regime for border regions – all tied to German labour market needs, and permitting small quotas of temporary workers.

Statistics Office registered more than 125,000 Poles as official emigrants²⁴⁶ to the EU between 1991 and 2000 (Grabowska-Lusinska 2008: 248-9), and 451,000 Poles as either temporary²⁴⁷ or long-term migrants to the EU in 2002 (Okólski and Salt 2014). Such statistics, of course, do not adequately capture all short-term migrants, and overlook undocumented migrants. This restricted pre-accession entry regime resulted in Polish migrants in the EU being largely undocumented, mostly male, often exploited, and heavily engaged in temporary migration²⁴⁸ (Ciupijus 2011; see also Gozdziaik and Pawlak 2016).

Poles who managed to lawfully reside in EU States prior to 2004 had their equality rights protected by EU institutions. Under the Europe Agreement (Article 37(1)), those lawfully employed in Member States in accordance with domestic immigration laws²⁴⁹ were entitled to protection from nationality-based discrimination in the employment context, and could be joined by their families. According to *Pokrzeptowicz-Meyer*, this provision had a direct effect, so Polish workers could rely on it before national courts²⁵⁰. Moreover, its scope was deemed identical to equality rights conferred on EU-15 nationals under EU law²⁵¹. Hence, the ECJ struck down a German regulation allowing positions for foreign-language assistants to be filled through fixed-term contracts, whereas for other teaching staff, recourse to such contracts had to be individually justified²⁵². In *Kolpak*²⁵³, the Court concluded that a German sports federation rule authorising clubs to field only a limited number of players from among TCNs could not be applied to lawfully employed CEE athletes. Despite the ECJ's broad application of Europe Agreements' non-discrimination clauses, they were of little practical impact, however, because the Agreements applied to so few categories of CEE nationals. They did not apply to economically inactive persons, jobseekers, or posted workers²⁵⁴. They also did not apply to those engaged in informal work arrangements, which has been popular among Poles (Kubal 2012: 52-6; Ciupijus 2011)²⁵⁵.

²⁴⁶ This includes only those who cancel their Polish domicile prior to departure, a requirement rarely complied with.

²⁴⁷ Those who have been staying in a foreign country (at the time of measurement) for at least three months, yet retain their official domicile in Poland.

²⁴⁸ With the exception of post-war Polish military personnel settled in the UK, as mentioned in Chapter 6.

²⁴⁹ Case C-162/00, *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer*, ECLI:EU:C:2002:57.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Case C-438/00, *Deutscher Handballbund eV v Kolpak*, ECLI:EU:C:2003:255.

²⁵⁴ Posted workers have been governed by a separate legal regime.

²⁵⁵ Self-employed Poles relied on non-discrimination provisions under Europe Agreement's establishment clause (Title IV), but only if they could demonstrate sufficient financial resources. Case C-37/98, *The Queen v Secretary of State for the Home Department*, ECLI:EU:C:2000:224.

None of the Europe Agreements with CEE states addressed social benefits, other than coordinating social security systems for workers²⁵⁶. As TCNs, CEE migrants were not endowed with access to social benefits in EU-15 States. The only TCNs to whom Regulations 1408/71 and 1612/68 applied were family members of EU citizens²⁵⁷. During the 1990s, the Commission had made several proposals to extend social security protections to TCNs lawfully employed in the EU (e.g., Commission 1991, 1997d), but none garnered sufficient support to come to fruition.

While CEE nationals had little access to lawful migration to the EU, mobility rights for both workers²⁵⁸ and economically inactive²⁵⁹ individuals from EU-15 States were getting expanded through regulations and ECJ decisions. EU-15 nationals' access to social benefits was also receiving progressively more expansive treatment²⁶⁰. The ECJ would often draw on Treaty provisions regarding non-discrimination and, post-Maastricht, on the concept of EU citizenship to sidestep some of the limitations on mobility imposed by secondary legislation²⁶¹.

B. EU Institutions' Approach Towards Poles' Mobility

Although EU institutions did not give the possibility of Poles' mobility much thought when formalising Polish-EU relations soon after the fall of Communism in 1989, they did not support transitional mobility derogations. Notably, this approach was justified by economic and pragmatic, as opposed to human rights, considerations. By the late 1990s, the Commission had deemed any post-accession mobility restrictions to be unnecessary to

²⁵⁶ For example, Article 38 of the Europe Agreement with Poland.

²⁵⁷ And refugees under Regulation 1408/71.

²⁵⁸ E.g., Regulation 1612/68; Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Case 48/75, Royer, ECLI:EU:C:1976:57; Case 53/81, Levin v Staatssecretaris van Justitie, ECLI:EU:C:1982:105; Case 66/85, Lawrie-Blum v Land Baden-Württemberg, ECLI:EU:C:1986:284; Case 139/85, Kempf v Staatssecretaris van Justitie, ECLI:EU:C:1986:223; Case 196/87, Steymann v Staatssecretaris van Justitie, ECLI:EU:C:1988:475; Case C-344/95, Commission v Belgium, ECLI:EU:C:1997:81; Case C-86/96, Martínez Sala; Case C-212/97, Centros Ltd v Erhvervs-og Selskabsstyrelsen, ECLI:EU:C:1999:126; Case C-337/97, Meeusen; Case C-413/99 Baumbast; Case C-413/01, Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst, ECLI:EU:C:2003:600.

²⁵⁹ E.g., Directive 68/360; Directive 90/364/EEC of 28 June 1990 on the right of residence; Directive 93/96/EEC of 29 October 1993 on the right of residence for students; Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity; Case 48/75, Royer; Case C-292/89, Antonissen, ECLI:EU:C:1991:80; Case C-224/98, D'Hoop; Case C-184/99, Grzelczyk; Case C-413/99, Baumbast.

²⁶⁰ See, e.g., Regulation 1612/68; Case 249/83, Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, ECLI:EU:C:1985:139; Case 137/84, Mutsch, ECLI:EU:C:1985:335; Case C-175/88, Biehl v Administration des contributions du grand-duché de Luxembourg, ECLI:EU:C:1990:186; Case C-237/94, O'Flynn; Case C-86/96, Martínez Sala; Case C-337/97, Meeusen; Case C-184/99, Grzelczyk; Case C-209/03, R (Bidar) v London Borough of Ealing, ECLI:EU:C:2005:169.

²⁶¹ E.g., Case C-184/99, Grzelczyk; Case C-413/99, Baumbast; Case C-224/98, D'Hoop.

protect EU-15 States' economic interests due to predictions of low²⁶², mostly temporary (Morawska 2000) mobility of well-educated CEE workers (Byrska 2004: 3). Moreover, as discussed in the preceding Chapter, EU institutions might have felt entrapped into endowing CEE nationals with mobility due to their occasionally inclusive rhetoric (Schimmelfennig 2001).

Leading up to the Enlargement, various studies predicted that EU-15 States would benefit economically from CEE workers' mobility, which was anticipated to alleviate bottlenecks in the labour market, boost demand for goods, lower wage inflation, and address labour needs of ageing populations (Boeri and Brücker 2005; Jileva 2002; Stalford 2003). In fact, scholars predicted that States with the greatest influx of CEE movers would reap the greatest economic benefits (e.g., Heuser 2001). Some even argued that an influx of CEE workers was necessary for continued western economic growth (Stalford 2003). CEE workers were predicted to only pose a potential labour threat to TCNs, and forecasts that they might disadvantage unskilled EU-15 workers were uncertain (e.g., Boeri and Brücker 2005). Even western labour organisations – including the Association of the German Chambers of Industry and Commerce (Jileva 2002: 692), the European Trade Union Confederation, and the Union of Industrial and Employer's Confederations of Europe (EP 2006: 232) - supported unrestrained CEE mobility due to its anticipated benefits to EU-15 labour markets²⁶³.

One of the earliest indications by the Commission that post-accession derogations might be employed came in its 1995 report to the Madrid European Council. The Commission (1997c: 71), however, recommended that any such restrictions be limited in scope and duration. Notably, although the Commission continued to question mobility derogations until a few years before the Enlargement, it never acknowledged any conceptual difficulties with withholding this right from CEE nationals. Instead, it focused on economic and pragmatic reasons only: expecting transitional arrangements to be ineffective (Commission, European Report 2001; Commission 2000) and difficult to negotiate with the CEE states, and forecasting CEE mobility to benefit EU-15 economies (Commission, Info Note 2001).

²⁶² Despite some inconsistencies (Byrska 2004; Kvist 2004) - attributable to differing methodologies - almost all studies predicted low migration flows without mobility restrictions: of between 41,000 and 335,000 CEE movers per year in the first few years following the Enlargement, and long-term movement of no more than 2 or 4 million (e.g., Alvarez-Plata et al 2003; Commission 2002b; Commission, Info Note 2001). This was lower than the expected post-04 inflows of TCNs and EU-15 movers (Lang 2007).

²⁶³ Discrimination of workers constitutes an economic market distortion as employers overlook certain groups' skills, leading to an inefficient use of human capital, wage distortions, and depressed wages (Milgrom and Oster 1987).

In addition to responding to public fears in EU-15 States (addressed below), social and identity concerns might help to explain the Commission's eventual support of transitional restrictions. According to Dougan (2004), the Commission perceived CEE mobility as a threat to (western) civil solidarity. Both the western public's and EU institutions' anxieties might have been driven at least in part by the fact that the population of CEE states²⁶⁴ on the eve of their accession amounted to 74 million, close to 19% of the EU's pre-04 population. Apprehensions about this potential influx were likely stoked by westerners' increasing perceptions that their dominant ethnicities' privileged status and identity have been under threat due to globalisation and an economic slow-down (Kaufmann 2004: 1-12). Similar anxieties appear to have fuelled Brexit supporters' opposition to CEE movers (Kaufmann 2016), and the rise of right-wing, anti-immigrant parties throughout western Europe in recent years²⁶⁵.

After the Enlargement, the Commission continued to question the imposition of transitional derogations, but again, its critique was dominated by economic concerns – that is, the beneficial impact of CEE workers on western economies (e.g., Commission 2006c; 2008b). Whereas the Commission's critique of transitional measures tended to privilege EU-15 States' economic priorities, the European Parliament had at times looked beyond the western gaze. For example, it noted that mobility restrictions not only contradicted the principle of solidarity between western and CEE states, but also constituted 'a major contributory factor' to CEE movers' frequently illicit employment, and experience of exploitation and discrimination (EP 2006: 5-6)²⁶⁶. Such EU acknowledgements have been rare, however. Generally, EU institutions have tended to oppose mobility derogations due to interest convergence between CEE workers' mobility and the economic growth of EU-15 States.

In addition to generally not finding legal or conceptual difficulties with mobility restrictions, EU institutions have at times justified them as benevolent and helpful to CEE states and their nationals. For example, despite having supported the inclusion of the freedom of movement right in the Europe Agreements (EE&SC 1991), the Economic and Social Committee opposed post-accession CEE workers' mobility because it feared xenophobic reactions in EU-15 States against CEE nationals (EE&SC 2001: § 1.1). The

²⁶⁴ Restrictions on the mobility of those from Malta and Cyprus (which had replaced Bulgaria and Romania in the 2004 accession negotiations) were never considered, likely due to their small populations and high GDPs (Maas 2013: 96-7).

²⁶⁵ Including Dutch Freedom Party, Danish People's Party, National Democratic Party of Germany, National Front in France, Freedom Party in Austria, and UKIP.

²⁶⁶ The Parliament did not explain how it drew this link.

Commission also emphasised that mobility restrictions would help to prevent labour shortages and brain drain in CEE states (Dougan 2004). In line with CRT tenets, EU institutions demonstrated how vacuous legal norms can be, and how they might in fact perpetuate inequalities.

C. EU-15 States' Approach Towards Poles' Mobility

Whereas EU institutions, motivated by economic goals, have tended to support the extension of the free movement right to CEE workers, western citizenry has opposed it (as discussed earlier). This is perhaps not surprising given that it is on the national, rather than the supranational, level that politics come into contact with migrants. Western fears of CEE migration were voiced as soon as the Berlin Wall fell in 1989 (Currie 2008: 13), crumbling the physical and ideological barriers between east and west. In 1991, 63% of EU citizens polled wished to restrict CEE migration, and 20% desired to ban it altogether (Eurobarometer 1991). By the late 1990s, the western public (particularly in Germany, and Austria²⁶⁷) began to express concerns about an 'invasion' by CEE criminals and prostitutes (Haynes 1998). For example, the chief of the German police union proclaimed that the lifting of border controls with Poland was 'an invitation to criminals' (Johnstone 2007). Kvist (2004) argues that westerners feared CEE nationals' negative effects on EU-15 States' cultures and identities. Nearing the time of the Enlargement, 76% of EU-15 nationals surveyed who expected a 'considerable' influx of post-accession movers regarded it as a 'negative' development (Eurobarometer 2002). Moreover, almost half of EU-15 nationals surveyed did expect such a 'considerable' influx (id). The assumption that CEE nationals would naturally prefer to move to western States was likely reinforced by perceptions of western superiority. Such attitudes have also been linked to anti-CEE prejudices (e.g., Byrska 2004: 4).

Likely driven by these electoral pressures, many EU-15 politicians came to oppose post-accession CEE mobility, notwithstanding western labour shortages at the time. In 1998, the German ambassador to the Commission noted that EU-15 States would oppose Poles' mobility (Haynes 1998). By 2000, German Chancellor Schröder proposed a seven-year transitional period (Jileva 2002: 694). This is despite the fact that Germany was expected to receive approximately 45,000 CEE workers annually during the first few years after accession²⁶⁸, while it required an annual inflow of more than 300,000 workers to keep a stable working-age population (Commission, Info Note 2001). Western politicians'

²⁶⁷ Likely fuelled in part by their geographical proximity to the CEE region.

²⁶⁸ Considerably exceeded by annual inflows of ethnic Germans, asylees, and TCNs (Oezcan 2004).

opposition to CEE mobility is also in line with their use of migration as a scapegoat for the failures of the political market and of neoliberal economic policies, which have been driving the rise of right-wing populism across Europe (Malone 2014). On the other hand, UK politicians tended to support CEE nationals' mobility. This was likely driven by the significant labour gaps in the UK at the time (Currie 2007: 106). I contend that the UK's geographical distance from the CEE region might have also played a part.

Leading up to the Enlargement, public opposition to CEE mobility increased across western States. Many trade unions, the press, and the public focused on unsubstantiated fears of benefit tourism and social dumping²⁶⁹ (Byrska 2004). In response, western governments intensified their support of derogations (Dogan 2004) to provisions pertaining to mobility and to social and tax advantages (Kubal 2012: 74-6). Notably, some western politicians also argued that limiting labour market access would benefit CEE nationals themselves, by protecting them from employer exploitation in EU-15 States (Morawska 2000). This is reminiscent of the Economic and Social Committee's support of mobility restrictions to avoid xenophobic reactions in EU-15 States, as mentioned above. Through such attitudes, western leaders acknowledged—without condemning—the likelihood of racism against CEE movers. Shared race did not protect CEE nationals from such exclusion. Whiteness scholars (e.g., Garner 2007b; Levine-Rasky 2013) have noted the need for a more nuanced look at fractures and hierarchies within whiteness. Widespread western opposition to CEE movers, both before the Enlargement and since, illustrates just how closely circumscribed the privileged subgroup of whites can be, composed of only the ethnic group in power at a given time and place.

D. Transitional Mobility Derogations

Although EU citizenship has always been differentiated, workers have traditionally been privileged over those who are economically inactive. The Eastern Enlargement temporarily reversed that hierarchy in the context of CEE nationals. The 2003 Accession Treaty provisions pertaining to each of the CEE states expressly blocked²⁷⁰ the application of EC Treaty Article 39(2), which had abolished discrimination against movers in the context of employment. Member States could derogate for up to seven years from Articles 1 through 6 of Regulation 1612/68 (pertaining to workers' mobility), and from provisions of Directive 68/360 (pertaining to mobile workers' residence rights)²⁷¹. Transitional

²⁶⁹ Moving employer sites to the east or relying heavily on CEE workers, thus leading to worsening working conditions for all workers.

²⁷⁰ E.g., Accession Treaty, Annex XII, ¶ 2(1).

²⁷¹ E.g., *id.*, ¶ 2(2).

restrictions also limited workers' families' access to EU-15 labour markets²⁷². The Accession Treaty (and its legislative history) were silent about residence and citizenship rights, and did not offer any justification for these derogations. In effect, these restrictions reinforced a sense of commonality among EU-15 nationals, while differentiating those from the CEE region. Since, among CEE states, Poland had the largest population and the greatest number of its nationals living unlawfully²⁷³ in EU-15 States pre-accession, and a strong culture of emigration, mobility restrictions posed especially significant practical and symbolic effects for Poland.

As Currie (2008: 31) notes, these transitional derogations 'by their very nature [were] designed to protect the interests of the older Member States'. This approach is in line with the accession process, addressed in the preceding Chapter. EU-15 States were provided wide discretion in restricting CEE workers' mobility during the seven-year transitional period. For the first two years after accession, EU-15 States could continue to apply their pre-accession national measures, as long as they were not more restrictive than those in force on the day of signing the Accession Treaty²⁷⁴, and as long as employers gave priority to EU workers (including CEE workers) over TCNs²⁷⁵. EU-15 States were free to make their national measures more restrictive up to that date – and many in fact did, as discussed below. The requirement that employers prefer EU over TCN workers had limited practical implications because it could be satisfied by favouring only EU-14 applicants over TCNs.

Before the end of the initial two-year phase, the Council was to 'review' the functioning of Member States' transitional arrangements. This process was not explained in the Acts of Accession. It had no binding effect, however, and the Council did not have the power to terminate national policies (Byrska 2004: 10-12). In practice, Member States could decide unilaterally to continue imposing their national measures during the second (three-year) phase, after simply notifying the Commission once the Council had completed its review²⁷⁶. Thereafter, States that had been applying restrictive measures had the discretion to continue applying them for two additional years 'in case of serious disturbances' of their labour markets or merely in response to 'a threat thereof', after notifying the

²⁷² This treatment was likely in conflict with ECJ ruling that mobility restrictions in an accession treaty must be interpreted restrictively. See Case C-77/82, *Peskeloglou v Bundesanstalt für Arbeit*, ECLI:EU:C:1983:92.

²⁷³ The status of CEE nationals residing unlawfully in EU-15 States became regularised upon accession.

²⁷⁴ E.g., Accession Treaty, Annex XII, ¶ 14.

²⁷⁵ E.g., *id.*, ¶ 2.

²⁷⁶ E.g., *id.*, ¶ 3.

Commission²⁷⁷. No prior authorisation by any EU body was required, and neither the Commission's role nor the concept of 'serious disturbances' was ever clarified (Adinolfi 2005: 493). It was not even clear whether a 'serious disturbance' should have been directly related to an actual or just an expected increase in immigration (Fic et al 2011: 69).

In addition, any Member State that had not initially applied transitional restrictions could request, at any point before the end of the seven-year period, that the Commission authorise mobility restrictions. This provision applied if a Member State had experienced labour market disturbances or could simply foresee them, if such disturbances 'could seriously threaten the standard of living or the level of employment in a given region or occupation'²⁷⁸. Any restrictions authorised under this provision could be in place until the situation was restored to 'normal'²⁷⁹. Again, none of the key terms were defined. Moreover, in 'urgent and exceptional' cases, Member States could unilaterally suspend the application of the free movement acquis at any point before the end of the seven-year period²⁸⁰. In the end, none of these provisions were applied in the aftermath of the 2004 Enlargement²⁸¹, but they indicated how much leeway EU institutions were willing to provide to EU-15 States in undermining CEE nationals' right of free movement.

Transitional mobility restrictions are not challengeable under EU law. Article 18 of the EC Treaty allows the adoption of measures limiting the free movement right²⁸². Moreover, the ECJ did not have jurisdiction to challenge derogations' legality because they were an integral part of the Accession Treaty, which constitutes primary law²⁸³. Of course, since provisions limiting the freedom of movement right must be interpreted strictly²⁸⁴, the Commission could have brought infringement procedures against any Member for imposing overly broad direct mobility restrictions. No such procedures were initiated.

Mobility derogations applied only to workers²⁸⁵ and jobseekers. However, access to mobility of other types of CEE nationals was severely impeded. For example,

²⁷⁷ E.g., id., ¶ 5.

²⁷⁸ E.g., id., ¶ 7.

²⁷⁹ E.g., id.

²⁸⁰ E.g., id.

²⁸¹ Spain relied on the 'serious disturbance' clause to impose restrictions in July 2011 on Romanian nationals due to Spain's unemployment rate of 21%. The decision was subsequently legitimated by the Commission.

²⁸² 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

²⁸³ See Cases C-31/86 and 35/86, *Levantina Agricola Industrial SA v Council*, ECLI:EU:C:1988:211.

²⁸⁴ Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

²⁸⁵ Except posted workers. They are beyond the scope of my discussion, however, since they rely on the freedom of movement of services and do not directly enter host States' labour markets.

economically inactive individuals, retirees, and students had to demonstrate financial self-sufficiency and sickness insurance to access mobility. Since the concept of self-sufficiency is tied to the living standard in the host State, it would have been inherently difficult for CEE nationals to satisfy this test, given the economic and wage differentials between CEE and western States. Mobility derogations also did not apply to self-employed persons. Although legally not a very onerous standard to meet, as discussed below, becoming self-employed requires financial resources and familiarity with local markets. These hurdles would have been difficult for CEE nationals to overcome, due to economic reasons and their limited ability to reside in EU-15 States before 2004. Transitional measures also did not apply to CEE nationals who had been working lawfully in EU-15 States for an uninterrupted period of at least twelve months prior to accession, as long as they did not move to another Member State within the first twelve months after accession²⁸⁶. The rights of such workers, however, could be limited at the discretion of the host State²⁸⁷. Moreover, this provision carried little practical significance given how few CEE nationals had access to lawful employment opportunities before the Enlargement. Moreover, their propensity to engage in short-term migration (Stalford 2003: 4) and informal employment (Kubal 2012: 121-5) likely caused many of them to lack an uninterrupted twelve-month period of work. Thus, in comparison to workers and jobseekers, the types of CEE nationals to whom transitional derogations did not apply constituted a small number of potential movers, were less eligible for public benefits, and were less likely to remain permanently in the receiving States. Hence, they likely provoked fewer concerns among western publics and western politicians.

On the basis of reciprocity, CEE states were permitted to limit labour market access to EU-15 nationals²⁸⁸, via equivalent measures that EU-15 States had imposed on their nationals²⁸⁹. The practical effect of this measure would have been negligible, however, as it is doubtful that EU-15 nationals would have had much interest in moving to Poland in search of work, particularly given its lower wages and high unemployment rate in the run-up to accession, as addressed in the preceding Chapter. As Dougan (2004) notes, giving such a reciprocal right was merely a strategic move on the part of the EU, to enhance the perception that CEE states were equal partners during the accession process – which had

²⁸⁶ E.g., Accession Treaty, Annex XII, ¶ 2.

²⁸⁷ For example, pursuant to the UK's Worker Registration Scheme, CEE movers would lose their right to residence if they did not maintain continuous registered employment for twelve months after their arrival, as addressed in Section 4(E) below.

²⁸⁸ CEE states could also impose restrictions against labour movement from any other CEE state against which any EU-15 State had imposed restrictions. None applied this provision.

²⁸⁹ E.g., Accession Treaty, Annex XII, ¶ 10.

been anything but equal, as my discussion in the preceding Chapter indicates. Only Slovenia, Hungary, and Poland imposed reciprocal measures, on all EU-15 States that had applied transitional measures to them²⁹⁰. Since there were very few EU-15 workers interested in employment in CEE states, all three renounced such measures two years after accession (Lang 2007).

E. Comparison to Mobility Restrictions During Earlier Enlargements

During prior enlargements, the freedom of movement right did not provoke much controversy, particularly since mobility had been low historically. The first enlargement incorporated Denmark, Ireland and the United Kingdom in 1973, adding 64 million people to the pre-existing 209 million, the highest ever relative increase (31%) of the EU's population (see Table 1, below). Despite economic concerns caused by the oil crisis, and Dutch and French worries about disruptions to their labour markets, no mobility restrictions were imposed. Of course, the pre-Maastricht scope of the free movement right was much narrower than it was in 2004. During the 1995 enlargement that included Austria, Sweden, and Finland, free-movement rules were already applicable to the acceding states before accession²⁹¹, despite adding 29 million new EU citizens, an increase of 8% (id).

Although every accession had produced some economic concerns in the pre-existing Member States, transitional mobility restrictions had been imposed only once before 2004. During the Southern Enlargement, mobility derogations were applied for six years to Greek nationals (in 1981), and for seven years²⁹² to those from Spain and Portugal (in 1986). At the time, there were no labour shortages in the old Member States (Boeri et al 2002), so it is understandable why they were hesitant to open their doors to 58 million new citizens (an increase of the EU by 21%).

The mobility derogations imposed during the Eastern Enlargement appear less warranted and more restrictive than during the Southern Enlargement. Although CEE states acceding in 2004 added 74 million new citizens to the EU, and thus expanded its population by 19% (and the 2007 wave added another 29 million, a further 6% population increase) (see Table 1), EU-15 States were experiencing labour shortages at the time.

²⁹⁰ Thus, Poland allowed British, Swedish, and Irish nationals to work freely in Poland, but imposed work-permit restrictions on all other EU-15 nationals.

²⁹¹ Pursuant to the European Economic Area Agreement.

²⁹² Movers from Spain and Portugal were required to first obtain work permits from host States. During each year of the transitional period, approximately 1,000 Spanish and 6,000 Portuguese workers obtained such permits. The transitional period was shortened to six years after Council review concluded that free movement was not likely to cause labour market disruptions.

Moreover, mobility restrictions after the Eastern Enlargement are at odds with the post-Maastricht expansion of EU citizenship and of free-movement rights²⁹³, and with the borderless Schengen Area created through the 1999 Amsterdam Treaty. In addition, predictions about unrestricted mobility's economic benefits to the receiving States and about the lack of effectiveness of transitional measures were well substantiated during this Enlargement, unlike during the Southern accession (Boeri et al 2002: 49-54). Accession of countries from the east appears to have been particularly problematic to the western European psyche. Notably, at the insistence of EU-15 States, they were given the flexibility to apply unique domestic restrictions, unlike during the Southern Enlargement, when all but one²⁹⁴ of the Member States adopted identical transitional policies (Kvist 2004: 311). This might be indicative of just how much anxiety CEE mobility had provoked among western publics and politicians.

Table 1: Comparison of Enlargements and Free Movement Restrictions

	<i>Acceding Countries</i>	<i>Population of New Members</i>	<i>Pre-Enlargement EU Population (and Number of Members)</i>	<i>Increase in the EU's Population</i>	<i>Post-Accession Mobility Restrictions</i>
Founding Members (1957)	Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany	167m	n/a	n/a	n/a
First Enlargement (1973)	Denmark, Ireland, and UK	64m	209m (6 Members)	31%	none
Southern Enlargement (first wave: 1981)	Greece	10m	277m (9 Members)	4%	up to 6 years; imposed by 7 Members
Southern Enlargement (second wave: 1986)	Spain and Portugal	48m	290m (10 Members)	17%	up to 7 years; imposed by 7 Members

²⁹³ Maastricht Treaty (Article 8) established EU citizenship. Available to all nationals of all the Member States, it encompasses the freedom of movement and residence rights.

²⁹⁴ Luxembourg applied more restrictive rules – likely due to its small size and a high pre-81 proportion of foreign workers.

1995 Enlargement	Austria, Finland, Sweden	29m	349m (12 Members)	8%	none
Eastern Enlargement (first wave: 2004)	Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta and Cyprus	74m	380m (15 Members)	19%	up to 7 years; imposed by 12 Members (see Section 4 below)
Eastern Enlargement (second wave: 2007)	Bulgaria and Romania	29m	493m (25 Members)	6%	up to 7 years; imposed by 17 Members (fourteen EU-15 States, Hungary, Cyprus, and Malta)
2013 Enlargement	Croatia	4m	505m (27 Members)	1%	up to 7 years; imposed by 13 Members (ten EU-15 States, Cyprus, Malta, and Slovenia)

Sources: Eurostat (2018); author's calculations.

4. Mobility During the Transitional Period

A. EU-15 Workers' Mobility Rights

While mobility rights of CEE workers were restricted between 2004 and 2011, they were getting expanded for EU-15 nationals. Existing regulations and case law pertaining to mobility and residence rights were consolidated and replaced by Directive 2004/38 (the 'Free Movement Directive'), which was adopted two days before the 2004 Enlargement. The Directive strengthened substantive and procedural safeguards available to movers, and expanded the right to reside in other Member States to all EU citizens for up to three months without any formalities or conditions (Article 6). Moreover, the Directive

extended the right to be joined by family members to all mobile EU citizens (Article 3), and granted a new right of permanent residence after five years of lawful residence (Articles 16-17).

Under Directive 2004/38, workers (including self-employed individuals) have an automatic right to reside in other Member States for longer than three months, without any conditions (Article 7(1)). The ECJ has defined the concept of a ‘worker’ broadly²⁹⁵, as engaging in any ‘effective’ and ‘genuine’ employment activity, which is more than purely marginal and ancillary²⁹⁶. The ECJ does not require minimum working hours or wages²⁹⁷, and does not expect workers to be self-supporting without any public assistance²⁹⁸. Thus, those employed under fixed-term or training contracts or in part-time work can qualify as workers. Relying on the host State’s social security system to supplement insufficient income does not prevent such individuals from qualifying as workers – even if their main aim of securing work in a host State was to obtain access to its public assistance²⁹⁹. From day one of qualifying as a worker, equal access to the host State’s social security benefits³⁰⁰ (Regulation 883/2004, Article 3), social and tax advantages³⁰¹ (Regulation 1612/68, Article 7(2)), and social assistance (Directive 2004/38, Article 24(2)) follows. The ECJ has supported workers’ receipt of all these benefits³⁰².

Like all economically non-active groups, those who enter another Member State to seek employment must demonstrate being self-sufficient and having sickness insurance (Directive 2004/38, Article 7(1)). Article 14(4)(b) prohibits first-time jobseekers’ expulsion, however, as long as they are deemed to have a ‘genuine chance’ of finding employment – that is, demonstrate some prospects of finding employment, even after having been seeking employment for more than six months³⁰³. This protection from expulsion has been interpreted by the ECJ as providing first-time jobseekers with the right to reside in other Member States without having to prove self-sufficiency³⁰⁴. The ECJ supports this

²⁹⁵ Case C-456/02, *Trojani v Centre public d’aide sociale de Bruxelles*, ECLI:EU:C: 2004:488.

²⁹⁶ Case C-53/81, *Levin*; Case C-413/01, *Ninni-Orasche*.

²⁹⁷ Even fewer than 5.5 hours per week have been found sufficient. Case C-14/09, *Genc*, 4 February 2010.

²⁹⁸ Case C-139/85, *Kempf*.

²⁹⁹ Such actions do not constitute fraud or abuse under Article 35 of Directive 2004/38. See C-413/01, *Ninni-Orasche*.

³⁰⁰ These are contributory benefits (including old-age pensions, survivor’s pensions, disability benefits, sickness benefits, birth grants, unemployment benefits, family allowances, and healthcare benefits), and special non-contributory cash benefits (such as income support or jobseeker’s allowance) (Regulation 883/2004, Article 3). Non-contributory benefits fall outside the scope of EU law.

³⁰¹ Such as benefits associated with improving professional qualifications (e.g., study maintenance grants).

³⁰² Case C-456/02, *Trojani*.

³⁰³ Case C-292/89, *Antonissen*.

³⁰⁴ Case C-138/02, *Collins v Secretary of State for Work and Pensions*, 23.03.2004, ¶ 18; Case C-258/04, *Ioannidis*, 15.09.2005, ¶ 38.

approach as necessary to encouraging mobility³⁰⁵. By facilitating the movement of those lacking prior job experience and without secured positions, it also responds better to employers' needs, and is likely to result in movers' undertaking flexible labour arrangements.

Even though Directive 2004/38 does not distinguish between different types of economically inactive movers in terms of their access to benefits, the ECJ appears to have privileged jobseekers among such movers. For example, under Article 24(2), States may deny access to social assistance to movers during their first three months of residence, and in the case of jobseekers, for as long as they remain in that status. The ECJ has limited the scope of that provision, however, by ruling that it does not apply to social benefits 'intended to facilitate access to the labour market' (such as jobseeker's allowance), which must be granted whenever a jobseeker can demonstrate a 'real link' with the host country's labour market. To demonstrate this, a jobseeker must have merely genuinely sought work (as demonstrated, for example, by being invited to job interviews, registering as a jobseeker with employment agencies, and participating in events organised by such agencies) for a reasonable period, even without ever having worked³⁰⁶.

B. Polish Workers' Rights

Six³⁰⁷ of the EU-15 States had declared from early on in the accession process that they planned to apply tight restrictions on CEE workers' (and jobseekers') mobility. Likely due to their geographical proximity to CEE states, Austria and Germany spearheaded such efforts. Once they had voiced their plans, five other States implemented a variety of direct measures - including work permits³⁰⁸, annual quotas, bilateral agreements, seasonal permits, sector-specific permits, and residence permits - in a 'race to the bottom' (Boeri and Brücker 2005: 632-39). Despite healthy economies in most EU-15 States, and labour shortages in some (including the UK) (id), during the first phase of the transitional period, fourteen EU-15 States applied direct or indirect barriers to CEE nationals' mobility (see Table 2, below). The UK and Ireland did not apply direct barriers to mobility, but adopted registration requirements and limited movers' access to some social benefits (as discussed below, in Section 4E, in the case of the UK). Although most EU-15 States—with the notable exceptions of Germany, Austria, Belgium, and Denmark—began to ease their restrictions after 2006, they did not do so immediately after it had become evident that

³⁰⁵ Case C-292/89, Antonissen.

³⁰⁶ Case C-367/11, Déborah Prete, 25.10.2012.

³⁰⁷ Austria, Belgium, Finland, France, Germany, and Luxembourg.

³⁰⁸ Typically issued only in exceptional circumstances (when no local workers could be found).

CEE mobility did not threaten their labour markets or economies. At the end of the second phase, in 2009, direct mobility derogations were abolished by all EU-15 States other than Austria and Germany. Ireland and the UK continued their indirect measures restricting CEE workers' access to social benefits until the end of the transitional period in April 2011.

Table 2: Direct and Indirect Restrictions on CEE Workers' Mobility (2004-2011)

<i>EU-15 State</i>	<i>Phase 1 (2004-06)</i>	<i>Phase 2 (06-09)</i>	<i>Phase 3 (09-11)</i>	<i>Number of Poles residing³⁰⁹ in 2004</i>	<i>Number of Poles residing in 2011</i>
Austria	Direct (quotas for specific sectors only) and indirect	(same as phase 1)	(same as phase 1)	15,000	25,000
Belgium	Direct (akin to restrictions for TCNs) and indirect	(same as phase 1)	open	13,000	47,000
Denmark	Direct (under collective agreements, with 1-year work permits) and indirect ³¹⁰	(same as phase 1, until 2008)	open	10,000	21,000
Finland	Direct (akin to restrictions for TCNs)	open	open	400	2,000
France	Direct (akin to restrictions for TCNs) and indirect	(same as phase 1, until 2008)	open	30,000	62,000
Germany	Direct (akin to restrictions for TCNs, with exceptions for highly-skilled and cross-border commuters) and indirect	(same as phase 1, with increased mobility for highly-skilled)	(same as phase 2)	385,000	470,000
Greece	Direct (akin to restrictions for TCNs) and indirect	open	open	13,000	15,000

³⁰⁹ Remaining longer than three months in a EU-15 State.

³¹⁰ Residence and work permits withdrawn if unemployed.

Ireland	Open (with registration requirements) and indirect	(same as phase 1)	(same as phase 1)	15,000	120,000
Italy	Direct (quotas) and indirect	open	open	59,000	94,000
Luxembourg	Direct (akin to restrictions for TCNs) and indirect	(same as phase 1, until 2007)	open	1,000	1,800
Netherlands	Direct (quotas)	(same as phase 1, until 2007)	open	23,000	95,000
Portugal	Direct (quotas) and indirect	open	open	500	1,000
Spain	Direct (akin to restrictions for TCNs) and indirect	open	open	26,000	40,000
Sweden	Open	open	open	11,000	36,000
UK	Open (with registration requirement) and indirect	(same as phase 1)	(same as phase 1)	150,000 (of 167,000 CEE nationals)	740,000 (of 1m CEE nationals)
<i>Total Numbers:</i>				750,000 (of 1.2m CEE nationals)	1,770,000 (of 3.5m CEE nationals)

Sources: Commission (2006b); Commission (2008c); Fihel et al (2015); Lang (2007); ONS data; author's calculations.

Nothing in the Accession Treaty had provided Member States the right to impose restrictions falling outside of direct labour market access limitations. For example, as explicitly stated in Annex XII, derogations to the free movement acquis in Poland's case pertained only to Articles 1 through 6 of Regulation 1612/68 (regarding 'eligibility for employment'). Anything not expressly excluded by the Treaty was subject to the general equality principles of the EC Treaty – specifically, Article 12 (prohibiting discrimination on grounds of nationality), and Article 39 (prohibiting nationality discrimination in employment). Thus, although Member States were permitted to limit CEE workers' access to their labour markets (and to jobseekers' assistance), once that access was granted, host

States were not allowed to restrict access to any benefits that accrue from worker status. Notably, pursuant to the remaining provisions of Regulation 1612/68, mobile EU workers and jobseekers were entitled to equal treatment with host States' nationals in the context of employment conditions, access to social and tax advantages (Article 7), and access to housing (Article 9), from the moment they qualified for that status. 'Social advantages' have been interpreted broadly³¹¹ by the ECJ – to include discretionary benefits³¹², benefits granted after employment is terminated³¹³, and at least some benefits not directly linked to employment (such as the right to be accompanied by a partner when relying on the free movement right³¹⁴). Furthermore, Polish movers were also automatically entitled to protections of Regulation 1408/71, explicitly mentioned in the Accession Treaty (Annex II, ¶ 13³¹⁵), which guaranteed equality of treatment in respect to social security, both non-contributory and contributory.

As indicated in Table 2 above, however, all EU-15 States other than Sweden adopted restrictions on post-2004 EU workers' access to either social assistance or social security benefits. These new restrictions took various forms – for example, by defining 'worker' status more narrowly than under EU law, imposing additional entry or residence requirements, or expanding the State's power to expel movers reliant on benefits (Boeri and Brücker 2005: 637-8). Such indirect constraints on mobility were implemented notwithstanding the lack of empirical evidence to suggest that Member States with liberal welfare benefits policies would become magnets for an influx of welfare migrants (Kvist 2004: 307-9).

C. Polish Self-Employed Movers' Rights

Transitional mobility derogations did not apply to self-employed CEE nationals, so from the day of accession, they had the same rights as mobile self-employed workers from EU-15 States. Under EU law, self-employed movers have the same rights as workers. The ECJ has defined self-employment status broadly - as working for oneself, and being solely responsible for one's own business failures or successes³¹⁶. A self-employed mover merely needs to abide by applicable national laws, such as those pertaining to registering as self-employed, keeping records, and paying income taxes. It is the host State's responsibility to demonstrate sham self-employment³¹⁷. Although legally not an onerous standard to satisfy,

³¹¹ Case C-207/78, *Even* [1979] ECR 2019.

³¹² Case C-65/81, *Reina* [1982] ECR I-33.

³¹³ Case C-57/96, *Meints* [1997] ECR I-6689.

³¹⁴ Case C-59/85, *Netherlands v Reed* [1986] ECR 1283.

³¹⁵ With an exception for Austria.

³¹⁶ Case C-212/97, *Centros*, 9 March 1999.

³¹⁷ *Id.*

becoming self-employed would have been difficult for CEE nationals to accomplish financially and due to historical restrictions on their travel, as already mentioned.

Nevertheless, some Poles did rely on this status during the transitional period. It is difficult to estimate their numbers because Member States did not consistently record them, and any estimates included some incidents of sham employment. In the UK, for example, self-employed workers were not required to register under the Worker Registration Scheme. Some estimates, based on Labour Force Survey data, indicate that 14% of Poles working in the UK during the transitional period were self-employed (Okólski and Salt 2014: 16), amounting to approximately 75,000-100,000 persons over the course of 2004-11. This percentage varied considerably by sector, with as many as half of construction workers engaging in self-employment (id).

D. Polish Economically Inactive Movers' Rights

Economically inactive CEE nationals (such as students, pensioners, and the unemployed) also gained access to post-accession mobility. Thus, pursuant to Directive 2004/38, they could reside in other Member States if they possessed sickness insurance and sufficient resources so as not to become a burden on the host State (Article 14(2)). Member States were not allowed to specify a fixed amount necessary to demonstrate sufficiency, and were not allowed to require resources exceeding the threshold under which their own nationals became eligible for social assistance (Article 8(4)). According to the ECJ, determination of sufficiency is to be individualised and holistic, based on all the resources that might be available to a mover, including from third parties³¹⁸. Being heavily fact-specific, this calculation provided host States with much discretion. Moreover, CEE nationals have tended to be less wealthy than those from EU-15 States. For example, in 2003, CEE countries' GDPs (in terms of purchasing power) ranged from 42% (Latvia) to 77% (Slovenia) of the EU-25 average, with Poland's GDP being 46% of the EU-25 average (Eurostat 2004). Hence, it would have been more difficult for CEE nationals than for EU-15 citizens to satisfy the sufficiency test.

The ECJ has been instrumental in protecting access to social benefits of economically inactive movers³¹⁹. Their access stems from demonstrating a 'real link' to the host State

³¹⁸ C-413/99, Baumbast.

³¹⁹ Although those rights can be limited in some cases, as long as those limits are proportionate to legitimate State goals. See Case C-413/99, Baumbast. More generally, any limits on fundamental freedoms (such as the right of free movement) must be narrowly interpreted, applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable for securing the attainment of their objective, and may not go beyond what is necessary to attain those objectives. Case C-55/94, Gebhard, 30 November 1995.

society, based on a holistic determination of factors such as the duration of stay on the host country, intentions, and family situation³²⁰. Pursuant to the ECJ, the test is to be broad and flexible, and is not satisfied only when it is inconceivable that a real link exists³²¹. The test may even be met by recently unemployed movers since they do not lose worker status for at least six months following involuntary unemployment (Directive 2004/38, Article 7(3))³²². However, several EU-15 States (including the UK, as discussed below) sought to limit economically inactive movers' access to social security, and to special non-contributory cash benefits ('SNCB'), by implementing residency tests that had to be satisfied in addition to the habitual residence test under Regulation 883/2004, and thereby, also limiting their ability to demonstrate a 'real link' to their host States.

Member States are endowed with discretion to deny economically inactive movers' access to social assistance (means-tested, and non-contributory benefits) during the first three months of residence (Directive 2004/38, Article 24(2)). After that period, however, economically inactive movers' access is to be the same as that of host State nationals, albeit movers must also demonstrate self-sufficiency so that they do not lose their right to reside (id).

E. The UK's Approach to Polish Movers During 2004-2011

From the beginning of accession negotiations, the UK had expressed its intention to apply the free-movement *acquis* immediately after accession. At the time, the UK was experiencing a substantial need for foreign labour (Editorial Board 2014). Moreover, studies commissioned by the Home Office had predicted low post-Enlargement mobility to the UK (of between 5,000 and 13,000 per year in the first six years following the Enlargement) (e.g., Dustmann et al 2003: 57).

i. The Worker Registration Scheme

The UK imposed the Worker Registration Scheme ('WRS') on CEE workers and jobseekers entering its labour market during the transitional period. CEE workers were required to pay a £60 fee³²³, and to provide confirmation of employment within 30 days of starting employment. They also had to re-register within 30 days after changing

³²⁰ Case C-90/97, Swaddling, 25.02.1999.

³²¹ Case C-258/04, Ioannidis.

³²² Expiration of a fixed-term contract can amount to involuntary unemployment. Case C-413/01, Ninni-Orasche.

³²³ Later increased to £90. According to the Commission, 'if an old Member State is applying full free movement of workers ..., it may issue work permits to nationals from the new Member States for monitoring purposes ... however, these work permits must be issued automatically' (Commission Guide undated: 3). No institution had addressed whether the UK's imposition of the registration fee was permissible.

employment during their first twelve months in the UK. If they failed to do so, they would forfeit the already-worked months for the purposes of satisfying the residence test. This is notwithstanding the fact that under EU law, a six-month period of unemployment was permitted for retaining residence rights³²⁴. Until CEE workers had engaged in registered employment for twelve consecutive months, they had no right to reside, and thus no full access to non-contributory welfare benefits (such as jobseeker's allowance) or to contributory social benefits (such as unemployment), even though during that time they might have qualified for worker status under EU law.

The WRS programme benefited the British purse and British employers while disadvantaging CEE workers. By the end of the transitional period in 2011, more than 1.1 million CEE workers had registered under the WRS, including more than 740,000 Poles³²⁵. While the WRS limited their access to benefits, they were adding to the public purse through their national insurance and tax contributions. Moreover, British employers were not prosecuted for hiring workers who did not comply with the WRS. Some employers and employment agencies even encouraged CEE workers not to register (apparently to avoid bureaucratic and financial repercussions of lawfully employing them), thus further limiting CEE workers' access to residence rights and social benefits during the transitional period (Currie 2008: 37). More generally, given Poles' propensity to be employed in precarious, temporary, and part-time arrangements³²⁶ (BIA 2007: 16; Drinkwater and Garapich 2015: 1911), it would have been difficult for them to meet the twelve-month consecutive employment test and the 30-day re-registration deadlines to be eligible for benefits³²⁷. Furthermore, by exerting pressure on CEE workers to find employment as quickly as possible and to hold onto it, the 30-day registration requirement might have contributed to CEE workers' deskilling, and their prevalence in low-paid jobs and the informal economy (Currie 2007: 92-4). Ciupijus (2011) also argues that the WRS reinforced British employers' and government officials' view that CEE nationals are suitable as temporary labour migrants only, akin to TCNs.

In effect, the UK's 'half-open and half-closed approach' (Kubal 2012: 49) exemplifies just how broad Member States' discretion was during the transitional period to limit movers'

³²⁴ Directive 2004/38, Article 7(3).

³²⁵ These numbers likely underestimated actual arrivals by up to 40% as many movers elected not to register (Okólski and Salt 2014: 16).

³²⁶ For example, 52% of CEE workers who had registered under the WRS between September 2006 and September 2007 were in temporary employment (BIA 2007: 16).

³²⁷ Moreover, the WRS system was complicated, and the application form and explanatory notes were provided in English and online only (Currie 2008: 45).

access to EU rights. In *Zalewska v Department of Social Development*³²⁸, the House of Lords upheld the Court of Appeal decision to apply the twelve-month WRS registration requirement rigidly, and to deny income support to a Polish mover who had engaged in registered employment for six months and thereafter in unregistered employment for more than six additional months. Firstly, the House of Lords ruled that limits on access to ‘social advantages’ under the WRS were permissible under EU law because Article 7(2) of Regulation 1612/68 (mandating equality in the provision of social advantages) depended on workers’ compliance with all the national measures determining their eligibility for accessing the labour market (such as satisfying the WRS). Moreover, the House of Lords found WRS limitations on access to social advantages to meet the proportionality test³²⁹, by being a necessary method to attain the legitimate goals of monitoring movers during the transitional period and of protecting the public purse³³⁰. Currie (2009: 53-4) has questioned whether it was proportionate to expect CEE nationals to re-register under the WRS following employment changes, and to deny access to social welfare to those like Ms Zalewska (who had worked for more than twelve months, albeit not registered the entire time). More generally, the House of Lords ignored the fact that the Accession Treaty referred to transitional derogations from Articles 1–6 only (regarding entering host labour markets).

ii. The ‘Right to Reside’ Test

In addition to the WRS, the UK adopted Social Security (Habitual Residence) Amendment Regulation 2004³³¹ on the day of the Enlargement, as a response to concerns about CEE movers’ impact on the public purse (Kennedy 2011: 3). This governed newly arriving EU movers’ access to most social benefits (including social security benefits under Regulation 883/2004, and social advantages under Regulation 492/2011), including income support, jobseeker’s allowance, pension credit, housing benefit, housing assistance, council tax benefit, child benefit, and child tax credit. EU movers were now required to be both habitually resident under EU law³³², and ‘lawfully resident’ under UK law to obtain these benefits. Unlike EU-14 nationals (who were deemed resident in the UK under different regulations³³³), CEE nationals who were unemployed, seeking work, or were within the

³²⁸ [2008] UKHL 67.

³²⁹ According to EC Treaty (Article 18), movers’ right to reside in other States must be provided without nationality discrimination, and may only be limited if a host State regulation satisfies the proportionality test. E.g., Case C-413/99, Baumbast.

³³⁰ The Court did not refer to any statistics indicating CEE workers’ reliance on public benefits.

³³¹ SI 2004/1232.

³³² Based on a fact-intensive assessment of one’s link to the host State, including where her current interests are focused and where she intends to remain for the foreseeable future.

³³³ EU-14 jobseekers and former workers who had become unemployed had a right of legal residence under Immigration (EEA) Regulation 2000 SI 2000/2326, and Immigration (EEA) Regulation 2006 SI 2006/1003.

first twelve months of registered employment under the WRS were not eligible for these benefits. Unlike EU law³³⁴, the UK test did not differentiate between first-time jobseekers and those who had lost a job and were seeking employment. Thus, CEE nationals could not retain worker status if they stopped working unless they had completed twelve months of continuous registered employment.

Echoing its stance in *Zalewska*, the Supreme Court ruled in *Patmalniece v Secretary of State for Work and Pensions* that these restrictions were not indirectly discriminatory³³⁵ against CEE movers, and that even if they were, they met the proportionality test because they were justified by the need to combat benefit tourism³³⁶. The Commission, however, disagreed with the right-to-reside test's lawfulness under EU law, and argued that only the EU habitual residence test should be applied to determine eligibility for social security benefits. The Commission found the application of the UK test particularly objectionable when used to deny access to jobseeker's allowance to those who had worked in the UK and had become unemployed (and hence still retained worker status under EU law). When the Commission commenced its infringement proceedings in 2011, it argued that the EU habitual residence test's criteria were strict enough to ensure that certain social security benefits³³⁷ were only granted to those genuinely residing in the UK. However, the eventual ECJ proceedings³³⁸ were confined to child benefit and child tax credits only because the ECJ's decision in *Brey*³³⁹ had limited access of economically inactive movers to means-tested SNCB benefits (classifying them as 'social assistance'), as discussed below.

The ECJ dismissed the infringement proceedings in 2016, after finding that the UK test was a proportionate measure (based on an individual review of each claimant's situation) that served a legitimate need (of protecting UK finances). This ruling is in line with its 2004 conclusion in *Collins*³⁴⁰ that EU law does not preclude conditioning entitlement to jobseeker's allowance on a national residence requirement, in so far as it is justified by objective considerations proportionate to a legitimate aim (such as protecting host State's

³³⁴ Case C-138/02, *Collins*.

³³⁵ As discussed further in Chapters 5 and 6, indirect discrimination occurs when an apparently neutral provision, criterion or practice ('PCP') would put persons protected by the general prohibition against discrimination at a particular disadvantage compared with other persons, unless that PCP satisfies the proportionality test.

³³⁶ [2011] UKSC 11.

³³⁷ State pension credit, income-based jobseeker's allowance, child benefit, and child tax credit.

³³⁸ Case C-308/14, *Commission v United Kingdom of Great Britain and Northern Ireland*.

³³⁹ Case C-140/12, *Brey*.

³⁴⁰ Case C-138/02, *Collins*.

finances). This line of cases constitutes one of the earliest indications of EU institutions' succumbing to EU-15 States' allegations of benefit tourism by CEE movers.

5. Post-2011 Freedom of Movement Laws

Directive 2004/38 continues to be in force today. In the last few years, however, EU institutions have imposed or approved Member States' increasing limitations on the mobility of both economically active and inactive EU citizens.

A. Workers

Recent laws have expanded the EU's conceptual approach towards workers' mobility. Regulation 492/2011³⁴¹ defines workers' right to free movement broadly, as including 'all matters relating to the actual pursuit of activities as employed persons', and 'conditions for the integration of the worker's family'³⁴². Directive 2014/54³⁴³ denounces any 'unjustified restrictions and obstacles' to mobility. Moreover, the ECJ has continued to define 'worker' status broadly. For example, in *Saint-Prix*, the Court extended worker status to a woman who had stopped working due to complications from pregnancy and childbirth, as long as she were to return to work within a 'reasonable' time (to be determined based on specific factual circumstances)³⁴⁴. The ECJ has also ruled that motivations for undertaking work in another Member State are irrelevant to the definition of 'worker'. Thus, the Court extended worker status to a full-time student who had entered the host State with the intention to study and was employed part-time³⁴⁵. Furthermore, as stated in the Conclusions of the 2016 European Council summit, the ECJ opposes restricting workers' right to social assistance (European Council 2016). For example, Ms Saint-Prix was entitled to income support (a type of SNCB)³⁴⁶. Moreover, in *Gusa*³⁴⁷, the Court ruled that self-employed movers can retain their worker status and hence their right to reside under Directive 2004/38 (and thus be eligible for social benefits such as jobseeker's allowance).

The economic core of the right of free movement has come to the foreground in recent jurisprudence. Notably, the *Gusa* decision focused on how the claimant was deserving of access to social benefits due to having worked and paid taxes in the host State for four years and having relied on his family (rather than the public purse) for financial support

³⁴¹ Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union.

³⁴² *Id.*, Recital (6).

³⁴³ Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, Article 3.

³⁴⁴ Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*, ECLI:EU:C:2014:2007.

³⁴⁵ Case C-46/12, *L N v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, ECLI:EU:C:2013:97.

³⁴⁶ See Case C-507/12, *Jessy Saint Prix*.

³⁴⁷ Case C-442/16, *Florea Gusa v Minister for Social Protection, Ireland*, ECLI:EU:C:2017:1004.

upon his arrival in the host State. Unlike in its older decisions, the Court did not refer to Treaty rights, and instead focused on market citizenship. Coutts (2018) notes how the *Gusa* decision places the responsibility for integration on movers themselves, and equates it with economic participation. Moreover, the decision adds a qualitative test to determining whether economic activity is sufficient to warrant access to EU rights (id). This, of course, not only departs from statutory provisions, but also introduces a subjective, individualised approach to judicial interpretation.

Moreover, the European Council and the Commission have recently become more explicitly responsive to western States' initiatives to limit movers' access to social benefits, even by workers. This became especially evident during David Cameron's renegotiation of the UK's membership in the EU. Essentially, Cameron was seeking to extend the application of ECJ decisions limiting economically inactive movers' access to benefits³⁴⁸ to workers. Under the 'New Settlement'³⁴⁹, EU workers would have been restricted from access to in-work benefits and social housing for the first four years of residence in the UK. Moreover, the amount of any child benefit EU movers could receive would be indexed to the standard of living in the child's country of residence (typically lower than in the UK). In acquiescing to this proposal, the Council noted that it was warranted by 'conditions of necessity' brought about by the large influx of movers into the UK, and that, more generally, 'Member States have the right to define the fundamental principles of their social security systems and enjoy a broad margin of discretion to define and implement their social and employment policy' (European Council 2016, Section D, Annex I: 19).

Notably, to facilitate granting Member States greater discretion in this area, the Council declared its intention to submit proposals to amend: (1) Regulation 883/2004 (on the coordination of social security systems) so that child benefits claims could be indexed by host States to benefits levels in the place of child's residence; and (2) Regulation 492/2011, to provide an 'alert and safeguard mechanism that responds to situations of inflow of *workers* from other Member States of an exceptional magnitude over an extended period of time, including as a result of past policies following previous EU enlargements' (id: 23). The only limitation on these new restrictions would be that EU workers must not be treated less favourably than TCN workers (id). The Commission was in support of these proposals (id: 33-4). Although these plans were not adopted, they nevertheless indicate EU

³⁴⁸ Including *Dano*, and *Alimanovic*, discussed below.

³⁴⁹ Ultimately scrapped due to Brexit.

institutions' openness to prioritising EU-15 States' concerns by limiting even mobile workers' access to benefits.

It is not clear what evidence the UK had presented to warrant such Conclusions, which are incompatible with the free movement, and anti-discrimination acquis. The Commission simply declared that 'the kind of information provided' by the UK indicated that 'the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today' (Commission 2016b). This is despite the findings of a study commissioned by the Commission in 2013 which indicated mobility's economic benefits to the UK (and to other receiving States) and no evidence of benefit tourism across the EU (ICF GHK 2013). It seems that the Commission might have been simply accepting the UK's arguments at face value, perhaps especially motivated to do so due to the upcoming Brexit referendum.

In addition, EU institutions have been silent regarding recent initiatives in several EU-15 States to reduce mobile workers' access to benefits. For example, the UK adopted legislation in 2013 and 2014 to limit EU workers' access to social benefits³⁵⁰. In 2017, Denmark began to require parents to have worked for six years (instead of two) to receive full child benefits (Commission 2018: 7). In Germany, 2016 proposals sought to prevent movers' access to benefits during first five years of residence, and to restrict eligibility to only those who had worked full time for at least one year. Such national measures depart from Treaty principles because they seek to reduce mobility. Moreover, they perpetuate a 'xenosceptic' legal and administrative culture (O'Brien 2015b: 124), and implicitly signal that lower-waged EU workers do not belong in richer host States.

B. Economically Inactive Movers (Including Jobseekers)

Whereas in the late 1990s and early 2000s the ECJ had provided—by expansively interpreting Treaty provisions—economically inactive movers with access to some social benefits not available to them under secondary EU legislation, the Court has been retracting on this approach in the last few years and instead, has been narrowly reading secondary legislation. The *Brey* holding suggested that an economically inactive mover's entitlement to a means-tested SNCB (such as compensatory supplement benefit) *could* be an indication of not having sufficient resources³⁵¹, thus calling into question the right to

³⁵⁰ Including three-month residence rule for jobseeker's allowance; new 'compelling evidence of genuine prospects of work' test and three-month cut-off for jobseeker's allowance, child benefit, and child tax credit; jobseekers' ineligibility for housing allowance; and new minimum earnings threshold requirements to be classified as a 'worker'.

³⁵¹ Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, ECLI:EU:C:2013:337.

reside for longer than three months. Pursuant to the subsequent ruling in *Dano*, however, economically inactive movers' application for social assistance benefits automatically causes them to lose their right to reside, without the need for an individual assessment³⁵². Moreover, Member States do not have to provide access to SNCBs to economically inactive EU citizens - at least to those who, like Ms Dano, had never been employed in the receiving State, and were not searching for work. Thus, despite fundamental EU citizenship rights, in practice, Member States may attach conditions of residence from Directive 2004/38 to the provision of SNCBs with a social assistance component, thus limiting access to them even if they are available under Regulation 883/2004. Notably, similarly to its decision in *Gusa* (discussed earlier), the Court in *Dano* engaged in a subjective discussion of the claimant's personal circumstances which were not relevant to the legal question before it³⁵³. For example, it mentioned how the claimant had been receiving public support for her child 'whose father's identity is not known'³⁵⁴, lacked any educational certificates or professional training, could not write in the host State's language, had never worked, and had not provided evidence of having looked for work³⁵⁵. Thereby, the ECJ created the impression of someone who does not deserve protections of EU law.

In *Commission v United Kingdom*, the ECJ extended *Dano*'s exclusion of SNCBs to all social security benefits (including family benefits), not just those with a social assistance element³⁵⁶. The Court imported *Dano*'s approach of not requiring an individual assessment and *Brey*'s principle of permitting Member States to impose conditions (such as the UK's right-to-reside test) on economically inactive movers' access to SNCBs into Article 4 of Regulation 883/2004 (regarding social security benefits, such as child benefits and child tax credits). Moreover, the Court reversed its prior approach regarding the burden of proof, so that Member States are now presumed to be acting in a lawful non-discriminatory manner when denying access to social benefits if they justify their actions as meant to protect their public finances.

The ECJ also lessened the scope of fundamental Treaty principles by narrowly applying secondary EU legislation in *Alimanovic*³⁵⁷, an even stricter application of Directive 2004/38

³⁵² Case C-333/13, *Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

³⁵³ Such details would have been relevant to proportionality analysis, not applicable in *Dano*.

³⁵⁴ *Dano*, ¶ 38.

³⁵⁵ *Id.*, ¶ 39.

³⁵⁶ Case C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2016:436.

³⁵⁷ Case C-67/14, *Jobcenter Berlin Neukölln v Alimanovic*, ECLI:EU:C:2015:597. The petitioner did not retain worker status under Article 7(3)(c) only due to a technicality, having become a jobseeker after working

than *Dano*. Despite research evidence to the contrary, the Court accepted EU-15 States' welfare-magnet argument, and concluded that even if individual social assistance claims did not place an unreasonable burden on national social security systems, host States could argue that accumulated claims would do so. Thus, States are entitled to prevent mobile jobseekers' access to certain SNCBs which constitute social assistance under Directive 2004/38 (but are not intended to facilitate access to the labour market). Moreover, although Article 7(3) of Directive 2004/38 allows former workers to retain their worker status for six months after becoming unemployed, the ECJ concluded that after that period, they are eligible for social assistance only if their right of residence is based on more than the non-expulsion provision of Article 14(4) (for former workers continuing to seek employment).

The Court in *Alimanovic* also narrowly construed the 'intended to facilitate access to the labour market' test, so that only benefits that are *necessary* to jobseekers' ability to access the labour market fall outside the scope of Article 24(2), and thus cannot be withheld during the first three months of residence or to first-time jobseekers. Moreover, the Court ruled that expulsion decisions due to presenting an unreasonable burden on a national social assistance system do not require an individual assessment. This stance was reiterated in *Garcia-Nieto*, in which the ECJ held that jobseekers are never eligible for unemployment benefits, even if such benefits facilitate access to the labour market, because they contain a social assistance element – that is, their primary aim is the preservation of dignity, rather than facilitation of access to the labour market³⁵⁸. Consequently, jobseekers can be automatically excluded from access to social assistance, even in the first three months of residence.

C. CEE Nationals

The above laws have fully applied to CEE nationals since transitional mobility restrictions had come to an end. Given that CEE nationals' mobility has been primarily motivated by employment opportunities in EU-15 States, measures decreasing workers' and jobseekers' rights have been especially detrimental to their movement. The EU's increasing responsiveness to EU-15 measures to combat alleged welfare tourism has generally had more impact on movers who are poor or not employable as highly-skilled workers in the receiving States. Limitations on jobseekers' access to social benefits are especially prone to negatively impact CEE nationals since they have access to fewer financial resources than

for eleven rather than twelve months, and having just passed the six-month period for retaining worker status.

³⁵⁸ Case C-299/14, *García-Nieto*.

EU-15 nationals, and tend to be employed in temporary, flexible, and semi-legal arrangements (Kubal 2012: 98-100). Now that western labour shortages have been filled, and the western public has become vociferously opposed to CEE movers once again, their right to mobility has been shrinking. As with post-accession mobility derogations, western preferences have become prioritised once again, reproducing social, economic, and political power that EU-15 States wield.

6. CEE Nationals' Experience of Mobility and its Effects

A. Effects of CEE Mobility on UK and Other EU-15 States

i. The Impact of CEE Mobility on EU-15 States

Generally, intra-EU mobility has benefited the receiving States, by increasing their economic outputs and public finances (Barslund and Busse 2014). For example, during 2004-15, mover households have been a larger fiscal asset than native households in all EU-15 States (Nyman and Ahlskog 2018: i). East-to-west mobility has been the driving force behind this positive economic impact. As shown by independent studies (Fic et al 2011), and noted by EU institutions, the combined GDP of EU-15 States between 2004 and 2009 increased by between 0.3% and 1% due to post-2004 mobility (Commission, Five Actions 2013). More recent studies have confirmed CEE movers' positive impact on EU-15 economies. For example, Kahanec and Pytliková (2017) concluded that CEE workers have had positive effects on EU-15 States' collective GDP, GDP per capita, and employment rate; and a negative effect on output per worker. They calculated that a 10% increase in the number of CEE movers per destination population increased the destination's GDP per capita by 0.3% (id: 427). Moreover, CEE movers—especially Poles—have been shown to contribute more to host States' welfare systems than what they use in public services, and to not disproportionately crowd out native workers or lower their wages (Barslund and Busse 2014; see also Commission, Five Actions 2013). The greatest overall positive economic effects of CEE mobility have been observed in States with the greatest numbers of CEE workers - that is, the UK, Ireland, and Germany (OECD 2012).

ii. The Impact of CEE Mobility on the UK

Empirical evidence indicates that the UK has benefited economically from EU mobility, especially in recent years³⁵⁹. Dustmann and Frattini (2014) concluded that immigrants from the European Economic Area ('EEA')³⁶⁰—and especially those arriving since 2000—have made a positive fiscal contribution in each of the years analysed (1995 to 2011), even during periods when the UK was running budget deficits. EEA movers have been generally less likely than Britons to receive public benefits or tax credits, and less likely to live in social housing (id). In 2013-14, EEA nationals received £0.56b in tax credits and child benefit, but paid £3.11b in income taxes and national insurance contributions (HMRC 2016b: 6). Moreover, between 1995 and 2011, EEA movers had endowed the UK labour market with human capital that would have cost the British education system £14b to produce (Dustmann and Frattini 2014: 595).

Unlike TCNs³⁶¹, EU movers have not had significant negative effects on employment rates or wages of even low-skilled British workers, and even in geographical areas that had experienced large increases in EU migration (Wadsworth 2017). Instead, decreases in wages in the UK since 2008 are associated with the global financial crisis (id). There is also little evidence that movers have had negative effects on crime, education, health, or social housing (id). On the other hand, there is evidence of UK workers being pushed into more managerial and supervisory positions due to migrant workers' taking on low-skill jobs (Vargas-Silva et al 2016: 10-11).

Among EU movers, CEE nationals have been especially responsible for such economic benefits to the UK. For example, post-04 CEE mobility has been directly linked to an increase in British economic output of nearly 1.5% by 2010 (Fic at al 2011), and a long-term increase in GDP of up to 0.6% (Commission 2008e). Between 2001 and 2011, CEE movers' net fiscal contributions amounted to almost £5b (Dustmann and Frattini 2014: 595). CEE nationals have been 6% less likely than natives to live in social housing (id: 616). That being said, Coulter (2018) argues that CEE movers' frequent employment in low-cost manufacturing and services industries has undermined firms' incentives to invest in training, and thus intensified cleavages between high-paid/high-cost and low-paid/low-cost sectors. This had likely increased discontent felt by low-paid British workers, and thus contributed to social divisions that helped to bring about Brexit (id).

³⁵⁹ See <http://cep.lse.ac.uk/pubs/download/brexit05.pdf>.

³⁶⁰ EU Member States, Norway, Iceland, Switzerland, and Liechtenstein.

³⁶¹ TCN migration slightly lowers low-skill wages in the UK (Vargas-Silva et al 2016), and results in negative fiscal contributions (Dustmann and Frattini 2014).

iii. Causes Behind CEE Workers' Economic Benefits to EU-15 States

CEE mobility's economic benefits to host States have been attributed to their high employment rates (higher than those of host country nationals³⁶²) (Barslund and Busse 2014; Wadsworth 2017) and their willingness to participate in flexible labour markets (e.g., Tamas and Munz 2006). Transitional mobility restrictions likely facilitated demand-driven CEE mobility to the west: EU-15 States were given discretion to choose the numbers and types of CEE workers suitable to their needs, and national restrictions on residence rights and access to social benefits incentivised CEE movers to take on any jobs available.

EU institutions have praised CEE workers' flexibility. The Commission has lauded their responsiveness to the increasingly flexible western labour markets as an effective adjustment mechanism (e.g., Commission 2006, 2012c). Despite acknowledging that increasing labour market flexibility, which relies heavily on precarious jobs³⁶³, has resulted in poor working conditions and inadequate social protections for workers, the Commission has supported it (e.g., Commission 2006). Similarly, the European Parliament has resolved that, to address unemployment and labour shortages across the EU, 'it is essential to take steps to provide greater flexibility ..., increase mobility, and make the markets more adaptable' (EP 2006). Such neo-liberal economic approach has long been advocated by EU and western State politicians (Dogan 2004), for being responsive to changing labour needs and posing little burden on hosts' welfare systems (Favell and Hansen 2002).

Despite CEE workers' economic contributions, their mobility has continued to be met with public, political, and media opposition across EU-15 States – perhaps most poignantly in the Brexit context. Of course, the public might not be aware of economic studies. Indeed, attitude surveys indicate Britons' opposition to immigration as driven by their concerns about the loss of their cultural homogeneity and about social tensions (Dustmann and Preston 2018: 42). Thus, objections to mobility are likely due to cultural opposition by the privileged group which perceives its position of power threatened by foreigners. Unfortunately, after Brexit, Britons' economic position of power is likely to

³⁶² Estimates of CEE movers' employment rates in EU-15 States have hovered at around 78%-80%, more than 10% higher than the employment rates of native workers in EU-15 host States (Commission 2008e; Dustmann and Frattini 2014: 613). Poles have tended to have the highest rates of employment among CEE movers, of up to 90% (Barslund and Busse 2014; Wadsworth 2017).

³⁶³ Including fixed-term, part-time, on-call, zero-hour, and freelance contracts, and temporary arrangements through employment agencies (Commission 2006).

deteriorate, as living standards are predicted to fall in direct relation to decreases in EU immigration (Wadsworth 2017: 14).

B. Impact of Poles' Mobility on Poland

Out of the total population of 38 million, approximately 1.8 million Poles were residing in EU-15 States ten years after accession (Kolodziejczyk 2016: 37). Due to its size, emigration has had significant economic and social effects. For example, it resulted in a temporary drop in unemployment, and the ongoing receipt of remittances (of more than 4% of the annual GDP since 2006) (Chmielewska 2015; see also Horridge and Rokicki 2018). Those emigrating have been younger, better skilled, and more educated than those who remain (Dustmann et al 2012: 2). Hence, their departure has increased wages of intermediate-level skill workers remaining in Poland, but slightly decreased wages of lower-skill workers. Moreover, Poles' mobility has been linked to long-term labour shortages³⁶⁴, a decrease in social security contributions, brain drain, youth drain, brain waste, significant skills mismatches, decrease in productivity, long-term unemployment, and breakups of family units (including the rise of 'Euro-orphans'³⁶⁵). This has been documented through both EU-sponsored (e.g., Commission 2008c, 2009b; Fic at al 2011), and independent studies (e.g., Budnik 2012; Drinkwater et al 2007; Horridge and Rokicki 2018; Kolodziejczyk 2016; Lang 2007; OECD 2012; Traser 2007).

Of course, it is difficult to estimate the exact degree to which some of these negative developments in Poland have been directly caused by workers' mobility – as opposed to by domestic factors or policies implemented due to accession. What has been clear, however, is EU institutions' tendency to minimise any causative link between Poles' mobility and these developments. For example, the Commission has attempted to attribute brain drain and labour shortages in CEE states to domestic factors (such as strong economic growth, relatively low labour market participation, and low internal mobility), without referring to any research supporting this conclusion (Commission 2008c: 13-14). It has also sought to minimise the significance of any negative effects - emphasising that labour shortages are mostly sector-specific, that some workers are likely to return, and that increasing enrolment rates in tertiary education in CEE states will likely compensate for the outflow of skilled labour (id; see also Commission 2008).

³⁶⁴ This has led to greater reliance in Poland on foreign labour, especially of TCN seasonal workers (OECD 2012).

³⁶⁵ Children raised by their extended families in Poland, while their parents work in EU-15 States.

C. CEE Movers' Experiences in EU-15 States

i. Migration Before and During the Transitional Period

Poles' restricted access to western labour markets before 2004 resulted in Polish pre-accession migrants in the EU often being irregular, and heavily engaged in temporary and circular migration (Gozdziak and Pawlak 2016: 109, 115). Although many regularised at the time of the Enlargement, their pre-04 experiences might have had repercussions for how Poles continue to perceive their labour market position in western States, and for how western employers approach them.

At the time of the Enlargement, some scholars had expressed concerns that mobility restrictions would push CEE workers into irregular employment during the transitional period (e.g., Adinolfi 2005: 497), which carries higher risks of underpayment, abuse, and disadvantage. Those predictions might have come true. The European Parliament acknowledged that mobility restrictions had resulted in 'more illegal work, the promotion of the black economy and worker exploitation' (EP 2006: 231), as well as discrimination against CEE workers (id: 232). Similarly, the Commission has noted that transitional measures had pushed many CEE workers into undeclared work, leading to negative social consequences (Commission 2008e: 120) and their experience of inequalities in EU-15 States (Commission, European Report 2006: 47). Interestingly, the Commission's observation that many CEE movers were engaging in unlawful employment appears motivated not by a concern for their wellbeing, but by the Commission's preference for legal migration because it is 'easier to control' by the receiving States (Commission 2006: 8). Again, western States' interests have been privileged over those of CEE movers.

Scholars have also noted that mobility restrictions might have produced negative long-term effects on CEE movers, even after the expiration of transitional measures. For example, Kubal (2012: 108-20) has argued that the UK's WRS made Poles more accepting of semi-lawful, deskilled, and exploitative arrangements (due to the 30-day registration and twelve-month continuous employment requirements). In addition, the burden and cost of registering appear to have prompted some movers to work without complying with the WRS, in unlawful, precarious arrangements (id). The WRS also increased reliance on employment agencies, which have been frequently exploitative, as CEE movers sought to secure employment before arriving in the UK (Ward et al 2005). Moreover, scholars have speculated that the WRS, combined with CEE workers' frequently precarious positions, likely prompted UK employers to perceive CEE workers as not entirely lawful, and especially suitable for low-wage, exploitative arrangements (Ciupijus 2011: 546). Due to

such factors, Sirkeci et al (2018) suspect that the WRS contributed to CEE movers' high concentration in low-pay, low-skill jobs today.

ii. Incidents of Exploitation, Deskilling, and Discrimination

Although it is difficult to determine with certainty a causative relationship between transitional restrictions and CEE movers' experiences after 2011, what has been documented is frequent incidents of prejudice and exploitation that CEE workers (and especially Poles) have been experiencing in EU-15 States. Low-paid, deskilled employment, often in the secondary labour market has been common for CEE movers across EU-15 States³⁶⁶ (e.g., Engbersen et al 2017; McCollum and Findlay 2015; Sirkeci et al 2018; Verwiebe et al 2014), with very limited opportunities for upward mobility (e.g., Fox et al 2015; Voitchovsky 2014). Although CEE movers have increasingly also included those employed in high-skilled positions and those settling long-term in their host States, most have continued to fill low-skilled, temporary positions (Engbersen et al 2017). A majority of employment discrimination complaints across EU-15 States between 2010 and 2013 were brought by CEE workers (EP Note 2014b: 48). Across EU-15 States, national occupational health and safety authorities have been reporting greater numbers of discrimination incidents against CEE than EU-15 movers (Groenendijk et al 2013: 8-9).

Based on a review of statistical data, Kofman et al (2009: xi) concluded that, while all foreign groups experience difficulties in the UK, CEE workers appear especially prone to unfair treatment, harassment, and discrimination, in both the workplace and in daily interactions (id: xv). As further discussed in Chapter 6 (see also Appendix 1), CEE movers to the UK have tended to concentrate in the secondary labour market, and receive lower pay for comparable positions than British and EU-14 workers (Johnston et al 2015). Notably, although migrants' deskilling is typically transitory and dissipates once they improve their linguistic ability and gain local experience (Sirkeci et al 2018: 908), CEE workers continue to be deskilled and suffer wage penalties when compared to BAME, EU-14, and white British workers, even after having been working in the UK for ten or more years (id: 919). French (2012) notes that employers' reluctance to train CEE movers contributes to barriers in improving their human capital. This, of course, might be due to not only employers' prejudices, but also the fact that CEE movers have tended to engage in circular migration and temporary jobs.

³⁶⁶ EU reports addressed in Subsection iv below also refer to similar findings.

Among CEE movers to the UK, Poles have had the worst economic and social outcomes in some respects (see Appendix 1). Poles became the most deskilled among CEE movers shortly after accession (Drinkwater et al 2009: 180). Their rate of return in grade and salary to education has continued to be among the lowest in the British labour market (Barslund and Busse 2014: 133-4). This is partly because 20% of Polish workers in the UK have college education - a rate higher than for TCNs, and at par with EU-14 movers³⁶⁷. Moreover, their frequent overqualification might be linked to post-accession economic challenges and increasing inequalities in Poland, which had limited job options for educated workers (as addressed in the preceding Chapter). Poles have also been over-represented among CEE movers in temporary mobility, with half of those who had left Poland after 2004 returning within four years (OECD 2012), and approximately 10% returning within one year (Zaiceva and Zimmermann 2016: 399). One of the factors to which scholars have attributed circular migration is a mismatch between skills and employment opportunities abroad (Drinkwater and Garapich 2013: 3). Thus, the temporariness of their mobility might be motivated by their experiences of exclusion, disadvantage, and deskilling. In addition, Poles have been subjected to media (e.g., Cap 2017: 67-79), popular, and political othering and attacks in the UK (e.g., Fox 2012), including hate crimes, both before and since the Brexit referendum (e.g., Rzepnikowska 2019).

Such experiences might be connected to the EU's conceptualisation of CEE mobility as responsive to western employers' needs in a climate of increasingly flexible labour markets (mentioned above). More broadly, I contend that these findings should be situated within the long-standing western approach towards the CEE region as unequal, which has had repercussions for the Eastern Enlargement process, and which might have shaped or at least normalised the unequal experience of mobility by CEE nationals.

iii. Benefits of Mobility to CEE Nationals

Of course, Polish and other CEE workers have also benefited economically and socially from mobility, and have not been completely devoid of agency. For example, even Poles who experience skill degradation in the UK improve their labour market potential upon their return to Poland (Gorny and Fihel 2013: 70-1). Moreover, Polish movers have exhibited agency, by straddling two cultures and modifying their migration strategies in

³⁶⁷ Polish movers to the UK have been more highly educated than Polish emigrants to other EU-15 destinations. For example, during 2011-13, 49% of 19-24 year old Polish movers had obtained higher education before arriving in the UK (Okólski and Salt 2014: 26-7).

response to changing circumstances³⁶⁸ (Drinkwater and Garapich 2015). They have been electing to settle in the UK in greater numbers since 2010 (Erdal and Lewicki 2016), and many have modified their plans by applying for naturalisation or leaving the UK after the Brexit referendum (McGhee et al 2017).

Since all whites benefit from whiteness (McIntosh 1988), Poles and other CEE movers have also profited from their skin colour. Being relational, whiteness must be placed within local hierarchies of power relations (Garner 2007b), and take account of intersectionality among multiple axes of differentiation within each race (Levine-Rasky 2011). For example, CEE movers are at times able to pass in public as members of the dominant groups in EU-15 States. Their whiteness likely facilitates their second generations' ability to join the dominant groups. It also appears to be an advantage in front-end jobs and the home care sector that require interacting with customers (Drinkwater et al 2007). More fundamentally, CEE states' accession might have been facilitated by their whiteness, as the western public preferred replacing non-white workers—excluded through increasing EU and national restrictions on asylum and immigration—with CEE workers (McVeigh 2010). The theoretical implications of this will be addressed in more detail in Chapter 7.

iv. EU Institutions' Perspectives on CEE Movers' Experiences

CEE movers' skin colour (and religion) might also explain why EU institutions tend to overlook evidence of their exploitation or discrimination, and why EU support for integration measures only targets TCNs, the Roma, Muslims, and non-white minority groups³⁶⁹. Members of the European Parliament ('MEPs') have brought examples of exploitation and discrimination faced by CEE movers to EU institutions' attention – including of institutionalised, 'blatant witch-hunt' by western politicians (EP 2014: 172), work conditions resembling 'modern-day slavery'³⁷⁰ (EP 2014b: 327), and EU-15 proposals to curb CEE nationals' mobility and access to social benefits (e.g., EP 2014d: 106, 261; EP 2014i: 557). In responding, EU institutions have failed to condemn such incidents as violations of fundamental rights. In addition to emphasising the EU's lack of competence over domestic issues, they have critiqued any such discrimination only for reducing the potential economic benefits of mobility to the receiving States (e.g., EP 2014: 173; EP

³⁶⁸ Those having children born in the UK have been more likely to settle here (Drinkwater and Garapich 2013).

³⁶⁹ E.g., <https://ec.europa.eu/migrant-integration/the-eu-and-integration/eu-actions-to-make-integration-work>.

³⁷⁰ Ciupijus (2012c) and Traser (2007: 5) reached similar conclusions regarding some CEE workers' experiences in, respectively, the UK and Italy.

2014d: 261). As addressed in the preceding Chapter, the Commission has similarly overlooked racist statements made by some EU-15 representatives, implicitly tolerating them. Such responses have likely served to foreclose the view that mobility might have produced negative consequences for CEE nationals, and that racism and discrimination against them are as unlawful and as reprehensible as against any other group. Even if EU competence is lacking in such matters, EU institutions have the power to shape equality discourse, which has the potential to affect policies and attitudes. By failing to take advantage of this capability, they have helped to propagate EU-15 States' privilege, while naturalising east/west inequalities and the pro-western core of the freedom of movement law.

Some EU reports have noted that CEE movers' experience in EU-15 States has been often marked by deskilled employment, poor living conditions, poverty, poor educational outcomes, and challenges in accessing housing, health care and other social services (e.g., Commission 2008e, 2008c). Yet the Commission has not recommended policy initiatives to address such findings. Currie (2007: 91) notes that the Commission almost appears to tacitly approve CEE movers' deskilling because it has noted in the same report (Commission 2006b: 12-13) that (1) CEE movers tend to be highly qualified, and that (2) they are relieving labour shortages in low-skill sectors, such as construction, domestic services, and catering. Similarly, drawing on statistical data from the ILO and the OECD, the European Parliament concluded that CEE movers experience lesser rates of lawful full-time employment and greater concentration in the low-skilled sector than all other foreign-born workers (EP Note 2014b: 10). It did not, however, make any recommendations that such apparent inequalities be addressed through specific policies.

EU institutions have also not devoted much attention to incidents of discrimination, racism, or hate crimes experienced by CEE movers. In its first post-Enlargement annual report on racism, the European Monitoring Centre on Racism and Xenophobia³⁷¹ noted that several western States had experienced increased rates of recorded racist violence and crimes in 2005, as compared to 2000 (EUMC 2006: 98-102). Although the report did not reveal victims' demographics³⁷², this increased hostility likely had affected the experience of all groups that do not belong to the domestic majorities, including CEE movers. The report, however, focused only on the Roma, Muslims, Travellers, Jews, and TCNs (id: 103; see also ENAR 2009). It did not even contemplate the possibility that CEE movers—who

³⁷¹ An EU agency, succeeded by the Fundamental Rights Agency in 2007.

³⁷² Some of this might also be attributable to greater reporting and improved recording.

had, after all, faced much negative western public opinion at the time of accession—might constitute some of the victims of this increased racism. Notably, looking back on worker mobility during 2011-12, the Commission concluded that most victims of prejudice and discrimination in EU-15 States have been CEE movers, yet it failed to acknowledge a need for greater EU and national policy efforts to protect them (Commission, European Report 2013: 60-2).

Given the rising intolerance against CEE nationals across EU-15 States, the Commission (2013b: 5) has, however, supported the adoption of a new directive to encourage mobility, although its practical effects have been limited. Directive 2014/54³⁷³ explicitly condemns nationality discrimination and any unjustified restrictions on workers' mobility (Preamble), and instructs Member States to ensure that recourse is available to workers experiencing such impediments (Article 3). Despite its symbolic value, the Directive did not create new substantive mobility or equality rights. Although it prompted some Member States to amend their existing laws³⁷⁴, six EU-15 States (including the UK) deemed their existing legislations sufficient and did not implement any changes (Commission 2018b: 2).

Although it is still early, the Commission (id: 9-10) has acknowledged that the Directive's practical impact has been limited. Moreover, in its recent report on fundamental rights, the Commission (2018c) has not mentioned CEE movers, despite the apparent increase in racist speech and hate crimes against them in the UK in the context of Brexit (as discussed earlier). Similarly, in a recent report on EU citizens' rights, the Parliament (2017: 13) did not mention Brexit or CEE movers when acknowledging the recent 'rise in xenophobia and racism in the EU'.

In line with the EU's approach, whereas all EU-15 States have mandatory nationwide integration measures for TCNs, they lack such measures for EU movers (Commission, European Report 2013: 103). Some national integration measures even explicitly exclude EU citizens - such as in Austria, Germany, Netherlands, and the UK (Groenendijk et al 2014: 130-2). In the UK, although some local programmes provide advice to CEE movers, national integration measures only target New Commonwealth migrants and their descendants, refugees, and TCNs (Spencer 2011).

³⁷³ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128.

³⁷⁴ Often through non-legislative measures to improve the functioning of equality bodies or access to information.

Arguably, CEE movers' whiteness makes it more difficult for (predominantly white) EU politicians to see them as victims of racism. I suggest that the long-standing western discourse positioning the east on the periphery of proper Europe and the inequalities built into the accession process (addressed in Chapters 2-3) might also help to explain why EU institutions and EU-15 States have not taken a firmer stance against CEE movers' experiences of inequalities.

7. Conclusion

As discussed in the preceding Chapter, inequalities built into the accession process reinforced Poland's economic and political struggles at the time of the Enlargement, leaving many Poles with little choice but to seek employment in EU-15 States. Although Poles have benefited in many ways from their post-accession mobility, the above discussion reveals that the historical divisions between east and west continue to exist in the EU, as illustrated through the imposition of transitional mobility derogations, CEE workers' frequent experiences of deskilling and exploitation, and the western public's ongoing opposition to CEE movers. EU institutions have, for the most part, tolerated or facilitated (through the adoption of more restrictive legal doctrine) such chipping away of the right to free movement. In fact, on occasion, EU institutions have perceived CEE mobility as a threat to (western) civil solidarity.

Both the Enlargement process and the west's approach towards Poles' mobility have been at odds with the abstract portrayals of mobility as a fundamental right and a key symbol of a 're-unification' and a 'return' of the CEE region to 'Europe'. Both have been in line, however, with discourse othering the east, and with the economic, pro-western core of EU mythologies, which I had exposed in Chapter 2. Rhetoric about free mobility, provided equally to benefit all EU citizens, has served to obfuscate the pro-western economic core of the right to free movement, and to hide the role of both the EU and EU-15 States in directly and indirectly limiting CEE nationals' mobility. I argue that economic interests and public preferences of EU-15 States have been prioritised in both mobility discourse and policies, while reinforcing and naturalising CEE nationals' second-class EU citizenship. As discussed in this and subsequent Chapters, EU citizenship and formal rights to freedom of movement and to non-discrimination have in fact not ensured CEE nationals' freedom to move and reside in the west as equal EU citizens. '[F]ormal right to move is not sufficient to establish a real freedom to move' (Carens 2013: 6), in line with CRT scholars' observation about the coexistence of formal rights with inequalities and discrimination (Matsuda et al 1993). It remains to be seen whether the adoption of the new Pillar of

Social Rights, despite being a soft law instrument, indicates the EU's interest in taking a stronger stance on these issues.

Contemporary capitalism relies on a transnational reserve of workers³⁷⁵ (Foster et al 2011). The new intra-EU precarious class of movers can be understood as a reconfiguration of Marx's concept of a 'reserve army' of workers (Fine and Saad-Filho 2010: 83-4)³⁷⁶. Despite the EU project's promises and equality acquis, the Eastern Enlargement resulted in the creation of a mobile, flexible labour force willing to perform jobs that native western workers do not tolerate (Woolfson 2017). More generally, the EU project has facilitated the growth of this precarious class, by prioritising the three freedoms (of establishment, services, and mobility) over local collective bargaining agreements³⁷⁷. As mentioned above, the Commission has shown its long-standing support for an American-style, flexible, mobile labour market, composed of human capital which is 'infinitely "malleable"' and adaptable to changing production systems across the EU (Commission 1993: 32). This has been in line with initiatives in several EU-15 States—including Germany, France, and the UK—to weaken trade unions, deregulate businesses, and rely more on precarious labour. Meanwhile, incentivised by EU-15 trade and investment in the aftermath of their accession, CEE states—and especially Poland—had weakened their worker protections, pushing workers to undertake informal employment and to seek work in EU-15 States (Schumann and Simantke 2018). As discussed in the next two Chapters, this transnational landscape of inequality has been overlooked by both EU and UK equality frameworks - in line with CRT scholars' observation of how the legal system ignores the actual economic and social inequalities faced by minorities (Delgado and Stefancic 2017).

CEE movers in western Member States have perceived that 'an East-West divide along the line of the Iron Curtain still exists' to differentiate them from western Europeans and affect their experiences (Siklodi 2014: 140). As addressed in this Chapter, Poles and other CEE movers have indeed straddled belonging and exclusion from the bundle of rights that accrue from EU citizenship, even after transitional mobility derogations had expired. Although many migrant groups and minorities tend to experience social and institutional prejudices, and inequalities in the EU labour market³⁷⁸, the Eastern Enlargement and its

³⁷⁵ Regulated through migration controls, themselves invented by capitalist democracies.

³⁷⁶ For example, 'floating' male workers, women, and children (many in casual and sub-contracted work), and Irish migrant labourers in the UK during the Industrial Revolution (Foster et al 2011).

³⁷⁷ E.g., Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line, 11 December 2007; Case C-341/05, Laval v Svenska Byggnadsarbetareförbundet, 18 December 2007.

³⁷⁸ As indicated by lower levels of employment, lower wages, and being over-represented in the least desirable jobs (EUMC 2005).

resultant mobility have been uniquely framed as egalitarian undertakings, as part of the larger benevolent EU project. Moreover, CEE movers are arguably the only Christian, white group to have faced such difficulties despite having had access to citizenship rights even before arriving in host Member States³⁷⁹. Citizenship, of course, does not encompass all socio-cultural or economic privileges, even when combined with whiteness (Jacobson 1998). Today's CEE movers have been bestowed EU citizenship due to western economic needs (and political concerns), but have not had an immediate access to all its benefits. TH Marshall (1950) had noted that the modern notion of citizenship – composed of civil, political, and social aspects – might not only coexist alongside social and economic inequalities, but might even create and legitimate them. Notably, citizenship scholarship has become problematised in this context: CEE movers are endowed with supranational citizenship, while their experience of the civil and social aspects of that status is lived at the Member State level. The distance between the often-abstract EU citizenship rights and the actual experience of mobility creates space for CEE movers' marginalisation and racialisation. Given how hollow at times the formal right of EU citizenship has been, perhaps it is not surprising that the Accession Treaty is silent regarding this concept. Similarly, EU officials and western politicians did not address it during the process leading up to the Enlargement (e.g., Kok 2003). Notably, neither CEE politicians nor CEE scholars invoked the concept of citizenship during accession negotiations (Kochenov 2003: 73), arguably being resigned to their incomplete access to EU citizenship rights.

My discussion in this Chapter confirms the ongoing existence of multiple, intersecting forms of differentiation within whiteness—whether political, cultural, economic, subjective, or experiential—which operate in each historical context to reflect and affect identity and access to resources (Levine-Rasky 2011). Historically, whiteness has been most often questioned due to the immigration of Southern and Eastern Europeans. For example, a century ago, Slavic³⁸⁰ and Italian migrants were perceived by native-born whites as not quite white, and lacked full access to the privileges of the dominant group - in the United States (King 2002; Roediger 2005) and Australia (Shiells 2010). In the UK, the first law to limit immigration, the Aliens Act 1905, was an attempt to limit migration of Eastern European Jews, perceived as a threat to English blood (Gainer 1972). The role of ethnicity still matters today, at the EU level. Similarly, the significance of the dominant white

³⁷⁹ Other than colonial citizens before restrictive UK immigration legislation was implemented in the 1960s.

³⁸⁰ From Central, Eastern and Southeastern Europe, and Russia.

ethnicity³⁸¹ had come to the foreground during the Brexit campaign, filled with concerns about CEE movers' un-British culture, class, and ethnicity. Members of the privileged white group at a given time and place endow only those who are like themselves culturally and ideologically with all the structural political, cultural, and economic advantages of whiteness (Frankenberg 1997). As noted in Chapter 1, the arrival of CEE movers had disrupted white native-born Britons' image of Britishness, even before Brexit was on the horizon. Britons conflate belonging with whiteness, but only of the sufficiently British kind – which depends on unaccented speech, British cultural practices, and visible markers of stereotypical British appearance and behaviour (Samaluk 2014)³⁸².

Interestingly, while promoting European mobility back in the 1960s, Robert Schuman, one of the EU's founding fathers, acknowledged that it 'is not a question of eliminating ethnic and political borders' as they are 'a historical given' (cited in Maas 2013: 15). Instead, his modest aim was to 'take away from borders their rigidity and ... intransigent hostility' (id). Similarly, the 1956 Spaak Report predicted that prejudices would likely impede workers' mobility (Editorial Board 2014). This Chapter revealed how such borders still exist within the EU, impeding Poles' access to mobility. In the next Chapter, I ask whether the right to equality, which has been intimately linked to the right of free movement, might also be removed from the EU's foundational fundamental rights narratives when it comes to CEE movers.

³⁸¹ Fractures can also be observed within ethnicities. For example, post-war Polish immigrants in the UK (mostly military personnel and political refugees) have opposed post-04 Polish 'economic migrants', due to class and ideological differences.

³⁸² Lately, there has been a revival of a specifically English identity, even more closely circumscribed than Britishness (Virdee and McGeever 2018).

Chapter 5: The Race Equality Directive

1. Introduction

My discussion in the preceding Chapters illustrates how EU institutions and western Member States have approached the CEE region and its nationals unequally, through discourse and policies, especially those pertaining to accession and mobility. This has been in line with the long-standing western view of the CEE region as lesser in the hierarchy of Europeanness than the west. In this Chapter, I explore if similar othering permeates equality law and discourse. I analyse the apparent incidence of discrimination across the EU, what goals and assumptions underlie the adoption and application of the Race Equality Directive 2000/43³⁸³, and how CEE movers have been positioned in this context. More generally, I seek to address whether the Directive is consistent, in letter or in spirit, with the Eastern Enlargement process and the application of the right of free movement to CEE nationals. Analysing the EU's anti-discrimination regime is important to my thesis because the right to equality is inextricably linked to mobility and the experience thereof.

Cemented through ECJ case law³⁸⁴, the Charter of Fundamental Rights, and institutional rhetoric (see Chapter 2), equality has been recognised for more than four decades as a fundamental right, and thus part of the foundations of the EU's legal order. It applies not only to all EU policies, but also to Member State laws within the scope of EU law (Howard 2009a). EU institutions have long recognised that, to facilitate worker mobility and reap its benefit to the aggregate EU economy, the freedom of movement right must be supported by measures against nationality discrimination. Nationality anti-discrimination protections, however, are insufficient to account for discrimination due to race or ethnicity. For one, nationality and racial groupings do not always overlap, and there are inter-group racial and ethnic differences between individuals belonging to the same nationality³⁸⁵. More critically, perhaps, nationality non-discrimination protections do not have a horizontal effect, thus formalistically implying that nationality discrimination committed by individuals does not exist (or is unworthy of EU laws' protection)³⁸⁶. The Race Equality Directive expanded the principle of equal treatment to encompass racial and

³⁸³ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁸⁴ E.g., Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125; Case C-149/77, Defrenne v Sabena no 3 [1978] ECR 1365; Case C-292/97, Kjell Karlsson v Jordbruksverket [2000] ECR I-2737; Case C-144/04, Mangold v Helm [2005] ECR I-9981.

³⁸⁵ The ECJ appears to have taken account of this, by defining 'ethnic origin' under the Race Equality Directive to include nationality (of EU citizens, not TCNs). See Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia.

³⁸⁶ Nationality protections also do not apply to TCNs, although that is beyond the scope of my discussion.

ethnic origin. Specifically, the Directive prohibits direct discrimination, indirect discrimination, harassment, and victimisation in various contexts, including employment, training, education, social protection, social advantages, and access to goods and services (including housing). Adopted in 2000, the Directive was to be implemented in EU-15 States by 2003, and in the CEE Member States at the time of their accession in 2004. It has been interpreted by the ECJ to have a direct horizontal effect in disputes between individuals or private entities (as addressed below).

EU institutions have repeatedly praised the Race Equality Directive as a stellar achievement of the EU's long-standing efforts to protect fundamental rights. For example, according to the Commission, the Directive constitutes one of 'the most advanced legal [equality] frameworks' (Commission 2004: 6), and 'the most comprehensive and far-reaching anti-discrimination legislation to be found anywhere in the world' (Commission 2005: 2). Such grand narratives make it more challenging to question its objectives and effectiveness. As discussed in Chapter 1, CRT scholars have noted that myths—such as the widely-accepted rhetoric of equal opportunity, and narratives of fundamental rights—obscure other ways of seeing, and shut out the voices of those not involved in law's creation. Furthermore, formal equality law provides the impression that inequality has been mostly erased, thus giving even more credence to the equality rhetoric, and inhibiting efforts to address racism (Crenshaw 2011). This shortcoming of formal anti-discrimination law can be particularly observed when law is not accompanied by local mobilisation and grassroots organisations pressing for equality policies (Ben-Tovim 1986). Thus, to fully understand the meaning and impact of the Directive, I not only consider the obvious fact that CEE states were not involved in the Directive's adoption as it preceded their accession, but also look at what interests and social power structures the equality doctrine might conceal or overlook, and analyse any limitations of its application - especially in the context of CEE or Polish movers.

General critiques of EU equality law have focused on its basis in promoting economic competition, with little regard to the actual experience of inequalities (e.g., Mason 2010; Somek 2011; Stychin 2003: 78-9), leading some to call it 'empty rhetorical gestures' (Frantziou 2014). This, of course, is in line with CRT view of equality law as being promulgated only when the interests of the dominant and the subjugated groups converge (Bell 1980). Some scholars have questioned whether the Race Equality Directive has had much practical effect (Hepple 2004). For example, Howard (2004; 2009) suggests that it constitutes merely a symbolic gesture to support formal equality, promulgated to improve the EU's image (in the eyes of both its Members and external polities) and to appease

those calling for greater equality protections. The Directive has been critiqued for having failed to confront racism and discrimination against long-existing subordinated groups in the EU, and against newly created disadvantaged groups (Jefferys 2015: 20). It has also been condemned for failing to address racial inequalities' underlying causes (e.g., Mason 2010), such as EU-wide market-driven power relations (e.g., Erel 2007; Jefferys 2015). Of course, such recognition would be particularly problematic given the EU project's foundations and continuing market goals. Most commentators, however, had welcomed the Directive with optimism, and praised it for heralding the start of a new era of post-Maastricht social law (e.g., Bell 2002; Fredman 2001). Such an outlook is in line with the EU's fundamental rights narratives, addressed in Chapter 2. I hope to enrich such views with a more holistic analysis of how CEE movers have been situated in the EU equality regime—including the Directive's legislative history, and the broader equality discourse—and by contextualising my findings within the accession process and the right to free movement.

I begin with a brief background discussion of the incidence and public perceptions about racist attitudes and discriminatory behaviours in the EU. I then consider whether CEE movers were included in the Directive's legislative history, which was drafted once the Eastern Enlargement had become a clear possibility and adopted only four years before the Enlargement. In analysing the Directive's text and its ECJ interpretation, I pay close attention to whether the Directive is fit to address CEE movers' equality concerns. Next, I turn my attention to the Directive's transposition process in EU-15 States, seeking to better understand its impact on domestic laws and its ability to address discrimination. Finally, I discuss how CEE nationals have been approached by the EU's broader equality discourse. In the process, I explore whether there are any disconnects between the rhetoric of fundamental rights, equality law as adopted and written, and law as interpreted and applied. Throughout this Chapter, I also note any instances of tension among EU institutions, as well as between EU institutions and EU-15 States.

My overall aim is to evaluate the Directive's foundations and implementation, particularly in the context of my study group, keeping in mind that groups most in need of equality protections tend to be excluded from legislative and judicial processes, formal laws, and legal ideology, which legitimate interests of the group in power. Although the dominant group employs the rule of law and legal narratives to obscure law's construction and hidden politics (Delgado and Stefancic 2017), EU law is particularly open to a legal realist analysis because of its visible political character (Möschel 2014: 86). In line with CRT and

CWS scholars, who re-examine historical and legal records to question the underlying interests and foundations of the current legal order (Harris 2013), I seek to replace majoritarian interpretations of EU equality law with those in line with the position and experiences of CEE movers.

2. Attitudes, Perceptions, and Incidence of Discrimination

According to Eurobarometer polls and other studies, racist attitudes have been prevalent for decades across the EU. For example, in 1988, more than 30% of EU citizens surveyed believed that there were too many people of another race or nationality in their country (Commission 1989: 5). In 1997, 33% of EU nationals considered themselves to be ‘very’ or ‘quite’ racist against immigrants (Eurobarometer 1997: 2). Similar attitudes have been recorded since the Directive had been transposed. For example, 42% of EU nationals polled in 2006 considered the presence of people from other ethnic groups as ‘a cause of insecurity’, and 45% felt this way in 2009 (Eurobarometer 2010a: 54). By 2012, 54% of those polled stated that policies promoting equality should receive less funding and should be assigned less importance, an increase from 49% in 2009 (Eurobarometer 2012: 12-13). Although such polls indicate attitudes towards not just movers or foreigners, and post-2004 surveys include respondents in both EU-15 and CEE states, they nevertheless shed light on a general racist sentiment prevalent across the EU.

In line with such attitude polls, many EU citizens perceive racial discrimination to be an ordinary part of life and the most widespread form of discrimination in the EU, particularly in the context of employment. For example, 64% of EU nationals surveyed in 2007 reported that racial or ethnic discrimination is widespread in their country, a higher percentage than for any other ground measured (for example, 53% felt that discrimination due to disability is widespread, and 40% due to gender) (Eurobarometer 2007a: 9). Almost half of the respondents felt that racial or ethnic discrimination was more common in 2007 than it had been in 2002 (id: 10). Sixty-two percent felt that having a different ethnic origin than the national majority is a disadvantage in their society - trailing only behind being disabled (79%), being Roma (77%), and being aged over 50 (69%)³⁸⁷ (id: 14). Forty-five percent felt that a job candidate’s belonging to racial or ethnic minority would put her ‘at a disadvantage’ - after poor appearance (51%), disability (49%), and age (49%), but above gender (22%) (id: 16). Similar results had been reported in 2008 and 2009 (Eurobarometer 2008a; Eurobarometer 2009). More recent data continues to be in line with such findings. For example, ethnic discrimination was viewed as ‘widespread’ by 56% of the 26,600

³⁸⁷ Thirty-three percent felt that being a woman presents such disadvantages (Eurobarometer 2007a: 14).

persons surveyed across the EU in 2012 – approximately 10% more than those considering discrimination on the grounds of disability, sexual orientation, gender identity or age to be widespread (Eurobarometer 2012: 28). According to the most recent Eurobarometer survey on this topic, ethnic discrimination continues to be regarded as the most widespread form of discrimination in the EU (by 64% of respondents), followed by discrimination due to sexual orientation (58%), gender identity (56%), religion (50%), disability (50%), old age (42%) and gender (37%) (Eurobarometer 2015a: 14). Age, appearance, racial or ethnic origin, and (female) gender are the criteria deemed to put job applicants at the greatest disadvantage (according to 56%, 52%, 46%, and 27% of respondents, respectively) (id: 79).

Surveys of ethnic minorities and migrant groups reveal similar findings. For example, according to the 2008 European Union Minorities and Discrimination Survey ('EU-MIDIS')³⁸⁸, 30% of the 23,000 immigrant and ethnic minority group members polled believed that they had experienced³⁸⁹ racial discrimination in the past year (FRA 2009: 37-8) - including 11% of Poles in the UK, and 26% Poles in Ireland. The lower-than-average perception of discrimination by Polish respondents might be attributable to their whiteness - which does confer them with some degree of invisibility and advantage, and also might make it more difficult for them to perceive their disadvantages as discrimination (Fox et al 2015). The lower perception of discrimination in the UK than in Ireland might reflect lower incidence of overt or obvious racism in the UK or the effectiveness of the UK's anti-discrimination legislation, which will be addressed in the next Chapter.

Migrants perceive being discriminated against due to their race or ethnicity in various settings. Overall, EU-MIDIS respondents reported discriminatory experiences to have occurred most often at work, when searching for work, or when searching for housing (FRA 2009: 118). Among Polish movers in the UK who were surveyed, 35% perceived that ethnic or national-origin discrimination in the UK was 'very' or 'fairly widespread', more than due to other protected grounds (id: 113); 70% considered their ethnicity to be a barrier to workplace advancement (id: 114); and 20% avoided certain places due to fearing discrimination (id: 126). The Commission (2006e: 4) had noted (without citing specific data) that statistics provided by national governments and equality bodies in 2006

³⁸⁸ The second EU-MIDIS survey, conducted in 2017, did not consider CEE movers, without explaining why this change was implemented since the first survey (FRA 2017).

³⁸⁹ According to survey administrators, perceptions were generally confirmed by the respondents' detailed recollections of discriminatory incidents.

confirmed that most complaints of racial discrimination before national courts and/or equality bodies involve employment, followed by the provision of goods, services and housing. EU reports do not provide a specific breakdown of complaints, in part because EU equality legislation does not require Member States to collect such data. Based on his knowledge of actual incidents of discrimination, however, the president of the European Network Against Racism³⁹⁰ considered ethnic origin to be the most frequent cause of discrimination in Europe (Hamman and Frank 2015).

According to outcome studies, the employment setting appears to be the most common context in which ethnic discrimination occurs (Jefferys 2015: 18). Not belonging to the local majority has been shown to affect workers' employability, the sectors in which they are employed, and chances of promotion (id; Heath and Cheung 2006). Studies relying on migrant testers conducted by the ILO in several EU-15 States³⁹¹ consistently indicate that discrimination in recruitment is experienced by more than 30% of migrants (Makkonen 2012: 55). Compared to natives, foreigners' experiences in EU-15 States have been marked by deskilled employment; challenges in accessing housing, health care and other social services; poor living conditions; high risk of poverty; and poor educational outcomes for their children (e.g., Commission 2008e, 2008c). Empirical data indicates that CEE movers, and Poles especially, experience deskilling, low wages, and exploitation at work (see Appendix 1). According to the Commission (2013b: 12), EU movers 'are still perceived in most of the EU as holding a status closer to that of third-country nationals than to that of national workers'.

In addition to the fact that discrimination tends to be underreported³⁹², it is likely that the types of evidence discussed above do not fully capture the extent of today's racial discrimination, particularly in the context of my study group. In the last few decades, race-based inequalities across the EU have moved from being direct and conspicuous to being more furtive (Zschirnt and Ruedin 2016), and more concealed within appeals to patriotism, culture, and class (Erel 2007; Anderson 2013: 2). As Erel (2007: 12) notes, new migrations, including of CEE nationals to EU-15 States, have influenced the articulation of contemporary forms of racism in Europe. While distinctions between whites and non-whites have become less publicly acceptable, salient boundaries have become more

³⁹⁰ Set up in 1998, ENAR is the only pan-European network of NGOs from all Member States. With financial support from the Commission, it advocates racial equality.

³⁹¹ Belgium, France, Germany, Italy, the Netherlands, Spain, and Sweden.

³⁹² Although statistics are difficult to obtain, in some Member States, fewer than 2% of discrimination victims take any legal action (FRA 2007: 19-39; FRA 2009: 50-52; Bell et al 2007).

prominent between white EU movers and white host State populations (McGinnity and Merove 2016).

Prejudices and discrimination faced by white movers—termed by some scholars ‘racialisation’ (Fox et al 2012a; Rzepnikowska 2019)—have been exhibited across EU-15 States, not only through impediments to mobility (as discussed in the preceding Chapter), but also through exclusion from full participation in the economy, politics, and society of their host States. Samaluk (2014) has attributed CEE movers’ social, economic, and political disadvantages in EU-15 States to their incomplete whiteness, that is, their partial access to white privilege. Full access to white privilege in the west is limited to the dominant, middle (or upper) class, western white ethnicities (id) – and especially to those who are Christian, able-bodied, thin, heterosexual, and male (Lorde 1995; Tatum 2003: 13). Below, I address whether the Race Equality Directive and the broader equality discourse appear responsive to the findings addressed in this Section.

3. The Race Equality Directive

A. Legislative History

Discrimination has tended to be perceived by EU bodies as problematic mostly to the extent that it distorts the functioning of the common economic market. Hence, the EU’s early equality initiatives had focused on socio-economic equality only, while failing to address other roots of social disadvantage (Marshall 1950). Somek (2011: 65-7) argues that the core of all EU equality policies continues to stem from a desire to facilitate the functioning of the neoliberal economic market, whereas social justice issues have been delegated to national agendas. This brings to mind Bell’s (1980) interest convergence theory. Given that early mobility involved only western, mostly white workers, nationality and gender discrimination were addressed first. By the 1980s, EU institutions began acknowledging racial discrimination more – likely due to increasing migration from outside the EU, rising racial tensions in several EU-15 States with colonial legacies, and the increasing appeal of populist, right-wing political parties (Guiraudon 2009).

i. The Beginning

Since the mid-1980s, various EU institutions would issue reports and resolutions to express their concern about the apparent rise in racist and xenophobic attitudes in the EU (Commission 1997e). EU statements connected this to the increasing presence of right-wing parties in several States and in the European Parliament³⁹³. After extreme right-wing

³⁹³ Especially during the 1979, 1984, and 1994 elections.

parties recorded considerable successes in the 1984 national elections in several States, most especially in France, the Parliament established a Committee of Inquiry into the rise of racism and fascism in Europe (EP 1985). The resultant Evrigenis Report concluded that xenophobia was increasing, and recommended EU-level action (id). In response, the Commission, Council, and the Parliament signed the Joint Declaration Against Racism and Xenophobia in June 1986. Stating, in general terms, the EU's support for equality³⁹⁴, the Declaration constituted the first official acknowledgement that racism was an issue of concern for the EU. Activists were also pressuring EU institutions for the creation of measures to combat racial discrimination (Solanke 2009: 169-80) against non-European, non-Christian minorities (such as Turkish and Moroccan guest workers) (Bell 2002b: 68-72). Both national and EU leaders acted with increased urgency after attacks were perpetrated in several Member States in the early 1990s against migrants of Jewish, Muslim, African, and South Asian backgrounds (Dummett 1994; Kahn et al 1995: 4). Despite the Parliament's advocacy for EU-level racial equality legislation, however, the EU lacked competence³⁹⁵ to act in this field. Instead, it had to wait for the Commission's decision to place such a proposal before the Council of Ministers, the EU's main legislative body.

Both the Commission and the Council were more hesitant to act than the Parliament was. After the 1986 Joint Declaration was signed, the Parliament requested the adoption of EU-level anti-discrimination legislation (EP 1989), but the Commission rejected it due to lacking competence (Commission 1988). Instead, the Commission issued a proposal for a non-binding resolution on racism, and urged Member States to adopt and/or enhance domestic racial equality laws (id). The Council (composed of Member States' ministers) also questioned EU competence in this field (Bell 2002b: 61). The Parliament then established a second Committee of Inquiry in 1990, which culminated in the Ford Report, reiterating the need for EU action due to rising racism and electoral successes of the extreme right-wing (EP 1991). The Parliament commissioned another study in 1993, which resulted in the Piccoli Report (EP 1997). Again, however, the Commission and the Council stressed that the EU lacked competence to act (id).

In addition to being framed in the context of the rise of right-wing politicians across western Europe, EU debates at the time continued to focus on the protection of non-

³⁹⁴ OJ 1986 C 158, 25.6.1986.

³⁹⁵ The EU may legislate and coordinate State policies only in areas of competence explicitly conferred on it by the Member States pursuant to Treaties. Furthermore, even in areas where it has competence, EU action may not go beyond what is necessary to achieve Treaty objectives. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0020>.

European TCNs (Bell 2002b: 66-72). Despite CEE states' accession process being well underway at that time, the potential impact of the movement of CEE nationals to western States was overlooked³⁹⁶ in EU discourse. It is not clear whether this silence was due to a mere oversight. It is possible that (predominantly white) EU officials could not foresee or conceptualise any potential xenophobia against Caucasian intra-EU movers as racism. Such is the naturalised, homogenising power of white privilege. This silence might also have been due to a less benevolent motive: an unwillingness to acknowledge any potential discrimination against CEE nationals as deserving of anti-discrimination protections. After all, as addressed in Chapter 3, EU-15 States and EU institutions were clearly aware of east/west power differences in the context of the Enlargement and of inequalities built into the accession process. EU institutions also knew that EU-15 States sternly opposed CEE nationals' mobility, and had acknowledged on several occasions that such mobility was likely to lead to experiences of prejudice and inequalities (see Chapter 4). However, the EU was silent on these points when contemplating adopting a racial equality measure.

ii. The Starting Line Group

The Parliament's efforts were strengthened in 1991 with the creation of the Commission-funded Starting Line Group ('SLG'), which became the strongest EU-level advocate in bringing about the passage of the Race Equality Directive. Composed of more than 300 (western) Member State and EU-level NGOs and legal experts, the SLG was dominated by Dutch and British legal and political activists³⁹⁷, including the UK's Commission for Racial Equality (Evans and Givens 2010). The migrant rights organisations encompassed under its umbrella – including the Migration Policy Group, the Churches' Committee for Migrants in Europe, Caritas Europa, and the Migrants' Forum – were concerned with protecting the rights of refugees³⁹⁸ and migrants from outside of Europe (Dummett 1994). The most organised of the migrant groups, the Commission-sponsored Migrants' Forum³⁹⁹, sought to strengthen citizenship rights of Turks and Moroccans in France and Germany (Geddes 2004). The SLG also included groups devoted to advocating Jewish and Roma causes, such as the European Jewish Information Network, Struggle Against Racism, and the European Roma Rights Centre (id).

The SLG's aims did not encompass CEE nationals' treatment in western Member States. Most of the SLG's constituent groups had been long-standing, and hence engaged in

³⁹⁶ As was the presence of post-1989 CEE migrants.

³⁹⁷ With some from Belgium, France, Germany, and Italy (Dummett 1994).

³⁹⁸ At that time, mostly from the former USSR, the former Yugoslavia, and outside of Europe.

³⁹⁹ Created in 1992 as an EU consultative body.

addressing historical domestic equality causes. Concerns over the treatment of white European movers were not on domestic agendas at the time, especially given their low numbers (as mentioned in the preceding Chapter). Moreover, migrant-advocacy groups comprising the SLG had failed to create EU-wide action to increase migrant inclusion, and instead, had settled on supporting (non-white) race-based equality (Chalmers 2001: 207). More generally, as Bell (2002b: 58) points out, due to their relatively small proportion of host State populations, migrants have tended to lack political power in the EU. Their weak position has been compounded by their diverse origins and interests, which makes it difficult to form a common platform (Geddes 2004: 341).

To increase the political persuasiveness of their arguments, the SLG drew on market-integration arguments, noting that the lack of racial and ethnic equality protections presented a barrier to workers' mobility (Geddes 2004), their economic integration, and the success of the single market (Guiraudon 2009). It is possible, of course, that this was merely a strategic move, and that SLG activists' real motives stemmed from fundamental rights concerns. Regardless, the SLG's recommendations and legislative drafts were steeped in market discourse - in line with the core of the EU's equality and fundamental rights rhetoric, as discussed in Chapter 2 and below.

iii. The Drafting Process

Although the Commission indicated its increasing interest in anti-discrimination measures by establishing the Consultative Commission on Racism and Xenophobia in 1994 (EP 1993), it opposed the SLG's first draft of the Directive, attributing its position to lacking competence. The Commission only came to embrace the SLG's efforts after the release of the Kahn Report in 1995. Even with the support of the Parliament and of the Commission, however, the SLG's proposals faced opposition from national politicians. Member States had many prior opportunities to amend the EC Treaty to endow the EU with competence in this field – including through the 1986 Single European Act, and the 1992 Maastricht Treaty – but they had expressed no interest in doing so.

The drafting process exposed fractures between EU institutions' and EU-15 politicians' preferences, consistent with tensions revealed during the Eastern Enlargement process and in the debates on free movement (discussed in Chapters 3 and 4). EU-15 politicians⁴⁰⁰

⁴⁰⁰ Furthermore, EU-15 States disagreed with one another – especially regarding the use of statistical evidence, protections beyond the scope of employment, and the exception for genuine and determining occupational requirement (Fella and Ruzza 2013: 209-40). Such tensions reflected Member States' unique pre-existing approaches to equality, local manifestations of discrimination, and domestic public attitudes (id: 1-2).

effectively pressured the Parliament and the Commission to weaken some of the SLG's draft proposals. For example, due to western politicians' pressure, proposals endowing NGOs with standing to sue independently, permitting class actions, and enabling the Directive to have a direct effect⁴⁰¹ were scrapped (Evans and Givens 2010; Tyson 2001). In other instances, however, EU bodies did resist EU-15 demands to dilute strength of the Directive's drafts. For example, despite EU-15 opposition (Evans and Givens 2010: 226), the Directive requires the establishment of national equality bodies, and extends in scope to include access to goods, services, and education. Although EU institutions can be commended for withstanding to a certain degree EU-15 politicians' insistence on weakening the Directive, it should be remembered that it was the SLG that was responsible for drafting the most innovative provisions which moved beyond the EU's pre-existing anti-discrimination regime - such as increasing victims' access to courts, and providing institutional support for litigants. It was also the SLG that had first proposed amending the EC Treaty to provide the EU with competence to regulate in this field (EP 1993).

The Directive's drafting process also revealed some differences of opinion among different EU bodies. In line with my findings in earlier Chapters, the Parliament—the only EU institution elected through universal suffrage—was more receptive than other EU institutions to concerns about protecting fundamental rights. Composed of ministers of EU-15 States, the Council was especially inclined to lessen the Directive's strength to reduce transposition costs on the Member States. For example, the Commission favoured making the burden of proof in indirect discrimination claims not dependent on statistical evidence - a position supported by most Member States, as most do not collect racial or ethnicity data (Tyson 2001: 203). The Council, however, sought to reduce transposition burdens on the Member States by allowing them the flexibility to require such evidence (id). Furthermore, whereas the Commission favoured requiring Member States to establish equality bodies, the Council opposed this (id: 204). The Council also resisted the Parliament's proposal to extend the scope of the Directive to the exercise of official functions by any public body (including the police, and immigration, criminal, and civil justice authorities) (id). The Council only succumbed to extending EU competence in this field due to the negative effects of cross-border racism on the internal market, and due to the increasing EU coordination of external immigration policies (Bell 2002b: 63-72). Still, the Council's opposition can be considered somewhat unexpected given that, by then, all

⁴⁰¹ Although the ECJ has endowed the Directive with a direct horizontal effect, as discussed below.

EU-15 States had already subscribed to international anti-discrimination instruments⁴⁰², and EU soft law measures had already induced equality law harmonisation efforts among some EU-15 States (EP 1997). For example, the UK had well-developed racial equality legislation since the 1970s, as addressed in the next Chapter. France, the Netherlands, and Germany were already being influenced by common-law equality provisions, and were developing sophisticated equality measures – including adding the concept of indirect discrimination, expanding personal scope of anti-discrimination law, and encompassing more protected characteristics (Fredman 2011). Thus, it is possible that at least some EU-15 ministers opposed robust Directive provisions due to their sovereignty worries rather than due to pragmatic concerns.

By the mid-90s, EU institutions had begun to contextualise racial equality as not merely an economic issue, but a fundamental rights question. Strengthened by increasing reliance on fundamental rights rhetoric, both the Parliament (1995a) and the Commission (1995) publicly announced their support for amending the EC Treaty to provide EU competence in this field. It is debatable, however, whether the EU was driven by a commitment to fundamental rights or by strategic imperatives. As Solanke (2009: 186) notes, placing racial equality initiatives within fundamental rights rhetoric was a tactical move by the EU to support its competence. As noted in Chapter 2, by that time, fundamental rights rhetoric had become well-propagated as the key foundational myth. Moreover, in a 1996 report, the Commission had noted that passing new equality legislation would serve a strategic purpose, by providing ‘excellent publicity’ for the EU, especially useful before upcoming Parliament elections (Commission 1996c: 20). Thus, the EU’s support for competence in this field appears not solely driven by fundamental rights concerns.

The 1997 Treaty of Amsterdam amended the EC Treaty to create EU competence in the field of anti-discrimination law beyond the already protected grounds of sex and nationality. Article 13⁴⁰³ endowed ‘the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament’, with discretionary power to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. Notably, the wording of this provision left much power to the Member States. A single Member could prevent unanimous Council action. Furthermore, contrary to the SLG’s recommendations, Article

⁴⁰² Including the Universal Declaration of Human Rights; European Convention of Human Rights; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the UN Declaration of Human Rights.

⁴⁰³ Today, Article 19 TFEU.

13 did not possess a direct effect⁴⁰⁴. Notably, it declared that the EU should aim to combat racism—thus admitting the existence of racial discrimination—but did nothing to address it directly. The listed ground of ‘racial or ethnic origin’ is also more narrowly phrased than race-based grounds under several international human rights instruments⁴⁰⁵.

After the amendment of the EC Treaty, some Member States continued to oppose EU legislation in this field. France and Germany were especially concerned about any requirements to collect racial and ethnic data, which were domestically unpopular (due to, respectively, the concept of *laïcité*⁴⁰⁶, and Nazi atrocities) (Geddes 2004: 339). Some Member States also found EU legislation in this field superfluous or encroaching on their sovereignty (id: 343). Largely due to those two reasons, the UK was the strongest opponent of EU legislation in this field (Bell 2002b: 72). The change of British leadership in 1997, however, resulted in the new centre-left Government’s support for the Directive – to be consistent with domestic debates about integrating Muslims and asylees, and with the post-Stephen Lawrence⁴⁰⁷ political commitment to address institutional inequalities (Geddes 2004: 343-4). The prospect of the Eastern Enlargement and the potential arrival of CEE movers in the UK does not appear to have impacted the new Government’s position, despite the UK’s historical experience of recognising another form of anti-white racism, that against the Irish.

The Commission proposed the Race Equality Directive in December 1999. It was adopted by the Council in June 2000 - at record speed for a directive that would require substantial changes to some Member States’ legislative frameworks (Tyson 2001: 201). This quick pace was likely to serve as a symbolic gesture against the rise of extreme right-wing parties across EU-15 States⁴⁰⁸ - in particular, the inclusion of Freedom Party representatives in Austria’s coalition government (Geddes 2004: 346-7)⁴⁰⁹. Notably, at least in part due to the hurried speed of the adoption process, national bureaucrats were not consulted by their

⁴⁰⁴ Unlike, for example, the direct effect of Article 119 (requiring equal pay between women and men).

⁴⁰⁵ E.g., UN International Covenant on Civil and Political Rights (‘any ground such as race, colour, ... language, ... national or social origin, ... birth or other status’); UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (‘any kind such as to ... race, colour, language, ... national, ethnic or social origin, nationality, ... birth or other status’); European Convention on Human Rights (‘any ground such as ... race, colour, language, ... national or social origin, association with a national minority, ... birth or other status’).

⁴⁰⁶ Developed during the French Revolution, this principle of secularism in public affairs is aimed at fostering a post-religious, colour-blind society.

⁴⁰⁷ Discussed in the next Chapter.

⁴⁰⁸ Given the recent rise in right-wing extremism and increasing intolerances across the EU, the Commission has been active once again in promoting equality measures (especially to combat antisemitism, Afro-phobia, and discrimination against Muslims and the Roma) (Commission 2019).

⁴⁰⁹ The remaining fourteen Member States declared that they would not accept any official contact with the Austrian government if it included Freedom Party members (Geddes 2004).

EU representatives (Guiraudon 2009: 533). Negotiators simply phoned their respective domestic interlocutors for approval (id), instead of the usual practice of having proposals translated and sent back to all the relevant national bureaucracies for examination. EU-15 governments' lack of thorough analysis of the Directive might help to explain some of the difficulties during the Directive's transposition process, as discussed below.

Although EU institutions' and EU-15 States' motives for the Directive's adoption do not appear to have always been consistent, one thing is certain: none of the key EU institutions or pan-European advocacy groups considered the treatment of white movers when drafting or adopting the Directive. EU-15 State politicians, also silent regarding intra-EU movers, appear to have been even less inspired than the EU by human rights rhetoric.

B. The Law

i. The Text of the Directive

The Race Equality Directive (see Appendix 2) converges labour market and fundamental rights justifications for prohibiting discrimination. It is framed within the EU's respect for fundamental rights (Recital 1) and the universal right to equality (Recital 3). It recognises, however, that racial and ethnic equality is crucial to the EU's economic objectives, such as achieving a high level of employment (Recital 9). Composed of nineteen articles spanning three pages⁴¹⁰, the Directive provides 'a framework for combating discrimination on the grounds of racial or ethnic origin, with a view of putting into effect in the Member States the principle of equal treatment' (Article 1). Although States may implement broader anti-discrimination provisions than those specified in the Directive, they are not allowed to reduce their pre-existing protections (Article 6).

The Directive mandates that 'there shall be no direct or indirect discrimination based on racial or ethnic origin' (Article 2(1)). Direct discrimination is defined, in line with the EU's approach in other equality contexts, as being 'treated less favourably than another [person] is, has been or would be treated in a comparable situation' (Article 2(2)(a)). Indirect discrimination occurs when 'an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons' (unless such a provision meets the proportionality test) (Article 2(2)(b)). However, a genuine and determining occupational requirement might justify discrimination (if it satisfies the proportionality test) (Article 4). Moreover, Member States

⁴¹⁰ Together with a Preamble containing 28 Recitals, spanning two pages.

may elect to implement positive action, that is, ‘specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin’ (Article 5). Article 2(3) prohibits harassment, that is, ‘unwanted conduct related to racial or ethnic origin’ which is undertaken ‘with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. Instructions to discriminate (Article 2(4)) are also prohibited. Member States are also required to introduce measures to protect individuals from victimisation (Article 9). In the context of direct and indirect discrimination, the Directive follows gender equality law’s shifting of the burden of proof⁴¹¹ to the respondent once the claimant presents sufficient evidence to establish a presumption of discrimination (Article 8).

All these prohibitions apply to both private and public sectors, including public bodies - in the context of both (1) the labour market (access to employment, promotion, vocational training, working conditions, dismissal, pay, and involvement in trade organisations), and (2) social protections (social security and healthcare, social advantages, education, and access to and supply of goods and services that are publicly available, such as housing) (Article 3(1)). The Directive does not apply to nationality discrimination, to the entry and residence rights of TCNs (Article 3(2))⁴¹², or to migration status. The law is not settled on whether it covers language or accent discrimination.

The Directive’s most significant provisions are the ones that went beyond the EU’s pre-existing equality regime, which was developed in the context of gender⁴¹³. Most importantly, the Directive expanded the scope of legal protections - to include not only private, but also public sectors and public bodies⁴¹⁴, and to encompass contexts beyond employment (Article 3(1)). Notably, its material scope is broader than that under the other Article 13 directive adopted at the same time, Directive 2000/78⁴¹⁵. This difference in scope seems to indicate the importance attached to racial equality. Another one of its novel features is its definition of indirect discrimination (Article 2(2)(b)), which combines elements of the pre-existing definition under sex discrimination law⁴¹⁶ with the ECJ’s case

⁴¹¹ Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998.

⁴¹² The Directive does not apply to TCNs’ nationality discrimination (although it does apply to their racial discrimination). See Joint Cases C-22/08, C-23/08, *Vatsouras and Koupatantze v Arbeitsgemeinschaft* [2009] OJ C 180. Thus, in some cases, nationality discrimination might be a proxy for race discrimination, yet escape the reach of EU law.

⁴¹³ Beginning with the Treaty of Rome.

⁴¹⁴ Albeit what constitutes ‘public sectors’ or ‘public bodies’ is not defined.

⁴¹⁵ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation prohibits discrimination on the grounds of religion, disability, age, and sexual orientation.

⁴¹⁶ An ‘apparently neutral provision, criterion or practice [which] disadvantages a substantially higher proportion of the members of one sex’, unless it is appropriate and necessary and could be justified by objective factors unrelated to sex. Directive 97/80, Article 2(2).

law on nationality discrimination⁴¹⁷ (which does not depend on statistical evidence). According to Recital 15, Member States may, but are not obliged to, require that complainants establish indirect discrimination through statistical evidence. Since, unlike for gender, some States and employers do not collect data broken down by racial and ethnic origins, the Commission chose a definition of indirect discrimination which did not rely on the test of disproportion. Furthermore, for the first time, the EU mandated that Member States designate bodies for the promotion of equal treatment, to provide independent aid to victims and to publish independent research (Article 13).

ii. Critique of the Directive⁴¹⁸

a. Individual Enforcement

Arguably, the Directive's greatest inherent weakness is that its enforcement mechanism is based on individual litigation, akin to the British equality law's model from the 1970s. Private litigation based on past individual incidents of discrimination, with no possibility of class actions, is inefficient at addressing structural or institutional discrimination, and does little for disadvantaged groups' inclusion or political empowerment. As Chalmers (2001: 225) notes, the Directive overlooks pre-existing disadvantages faced by some groups. Moreover, focusing on individual wrongdoings ignores the underlying social conditions that contribute to disadvantage (Barnes 2016; Freeman 1978). It also encourages adjudicators to devalue evidence going beyond just the individual dispute before them, and to rely more on their own values and forms of understanding (Fitzpatrick 1987). The complex power relations between different ethnic groups are better appreciated through class actions. In the context of my study group, individual litigation does little to address circumstances when Poles as a group tend to be treated poorly collectively by employers and are disadvantaged collectively in the labour market (as addressed in the next Chapter). It also does not take into account negative public and media discourse, and the broader western discourse of othering the CEE region that embeds their experiences of disadvantage within a specific ideology of inequality, and which had permeated the Eastern Enlargement process and how mobility was afforded to CEE nationals.

Moreover, individual claims place the entire burden (of initiating claims, obtaining advice, and paying filing fees) on individual claimants. This disadvantages Polish victims of discrimination since they tend to be poor, overworked (see Appendix 1), engaged in

⁴¹⁷ Notably, Case C-237/94, O'Flynn.

⁴¹⁸ In this Section (and the next Chapter), I rely heavily on examples from the employment context because that is where discrimination often manifests itself, and because CEE nationals' mobility has been largely motivated by employment opportunities.

precarious employment, and lacking access to well-organised advocacy groups or free legal representatives (Barnard et al 2018). Although the Directive endowed organisations with legal standing to support claimants or to sue on their behalf (Article 7(2)), my review of UK employment tribunal cases (in Chapter 6) did not reveal a single incidence of this. Finally, a remedial framework based on individual cases likely fails to serve as a meaningful deterrent to employers, and fails to provide a remedy to the whole group affected by discrimination (that is, to claimants' CEE or Polish co-workers, who often tend to be exploited collectively in their places of employment).

Conceptually, reliance on individual claims to address discrimination also implies that racist attitudes and actions are merely aberrations, and thus naturalises the status quo as basically fair. Racism and discrimination, however, are ordinary and prevalent (e.g., Essed 1991; Freeman 1978; Williams 1992), as also illustrated through survey data discussed at the beginning of this Chapter.

b. The Lack of Definitional Specificity

The Directive leaves many key terms⁴¹⁹, legal tests⁴²⁰, and Member State obligations⁴²¹ vague or undefined, placing much discretion in the hands of national lawmakers. Some of this vagueness stems from the function of directives. Unlike regulations, directives merely specify results to be attained, without dictating specific means to be employed. Moreover, had the Directive's terms been more exacting, Member States might not have adopted it due to concerns over sovereignty and transposition burdens. Chalmers (2001: 208) also attributes the Directive's vague terms to the fact that it had to accommodate diverse domestic political, economic, and social priorities.

As very few cases under the Directive have been referred to the ECJ, the interpretation of many crucial provisions has been left largely within the ambit of national powers. In addition to giving little legal guidance, such lack of detail makes it more difficult for EU institutions to monitor the Directive's effectiveness as transposed into national laws. Moreover, although the lack of definitional specificity might allow national equality regimes to better respond to their unique historical and contemporary circumstances, not all of which could have been taken into account when drafting the Directive, it also poses

⁴¹⁹ Including racial origin, ethnic origin, indirect discrimination, legitimate aims, and proportionate aims.

⁴²⁰ Including what facts may be used to establish direct and indirect discrimination, and how to evaluate them (Recital 15); and how to interpret genuine and determining occupational exception (Article 4).

⁴²¹ Including the enforcement of obligations under the Directive (Article 7); dissemination of information to victims (Article 10); promotion of social dialogue (Articles 11 and 12); and designation of equality bodies (Article 13).

risks. The general danger remains that national legislators are less likely than EU institutions to protect the rights of politically powerless groups which are unpopular with domestic voters. After all, compared to EU institutions—which have tended to suffer from accountability challenges (Brandsma et al 2016)—domestic policymakers tend to be more responsive to the interests of their electorates, and are guided by majoritarian values and experiences. This tendency is likely further reinforced by the fact that lawmakers tend to belong to ethnic majorities. They are subject to more political and social pressure than EU officials or ECJ judges might be, and thus more likely to be swayed by negative public opinion of immigrants and movers, which has been prevalent in today’s western discourse. National lawmakers have little to gain, yet much to lose, by seeking to protect outsider groups, especially those not widely recognised by domestic policy regimes as victims of racism. Thus, they are likely to pay little attention to movers’ rights. Even the UK’s equality legislation—which had served as the basis of some of the Directive’s provisions, and has been applauded as the most developed equality framework in Europe—includes some fundamental weaknesses when it comes to protecting rights of CEE movers (see Chapter 6).

c. Racial and Ethnic Origin Grounds

The protected grounds of ‘racial or ethnic origin’, not defined by the Directive, might be too limited in practice in the context of migrants and movers. The reality of today’s racisms has been complicated through globalisation and increasing mobility. On the face of it, the concept of racial or ethnic origin might overlook cultural racism, migration status, and language or accent discrimination⁴²². Adding those factors to the Directive’s explicit coverage would have made it more responsive to movers’ equality needs. Moreover, simply being ‘foreign’ (as opposed to having a specific foreign nationality) often leads to disadvantage, discrimination, and prejudice (Equality and Diversity Forum 2011: 3). Being ‘foreign’ is not protected under the Directive. Although in theory, victims could argue that ‘foreignness’ can be brought under the ‘ethnic origin’ category, my review of UK case law in the next Chapter indicates that such arguments have not been relied on by claimants or by judges, even where there was an opportunity to do so.

Finally, the Directive does not sufficiently acknowledge that the experience of inequality often stems not from a victim’s race or ethnicity alone, but rather, from an intersection of factors – such as class, gender, religion, and sexual orientation. This is problematic for

⁴²² Although the ECJ has interpreted ‘racial or ethnic origin’ broadly in a recent case (see Section 3(B)iii below).

CEE movers (as well as other migrants), whose exploitation appears often facilitated by their ethnicity and low socio-economic status. The only mention of intersectionality in the Directive is in the context of gender, urging the promotion of gender equality (Recital 14).

d. The Use of Comparators

Constituting a substantial proportion or even the majority of some employers' low-skill workforces (Ciupijus 2012c; MacKenzie and Forde 2009; EHRC 2010; Other Stakeholders 2018)⁴²³ might also make the use of comparators more difficult for Poles. As discussed in Chapter 6, Poles' practice of congregating at specific employer sites has been facilitated by Polish staffing agencies⁴²⁴, and reinforced by labour market segregation and some employers' preference for Poles. Thus, it might be difficult to find an actual comparator in some cases. It is true that adjudicators have the flexibility to use hypothetical comparators. However, that approach presents risks, especially given that rigorous methodologies for creating hypothetical comparators require a long line of case law, not existent for post-04 CEE movers. As my discussion in the next Chapter reveals, UK employment tribunals have indeed struggled with using correct comparators, especially hypothetical ones, when it comes to Polish claimants. UK adjudicators often appear not well versed in the unique experiences of Polish movers, and not familiar with the broader socio-cultural contexts that affect them. This is likely facilitated due to only recent academic attention to CEE movers' experiences of disadvantage and discrimination, lack of advocacy initiatives on their behalf, and few ECJ cases addressing their experiences.

If judges look at all migrant groups, all white migrants, all EU movers, or all CEE movers as the standard, their comparison might not reflect the specific prejudices that Polish workers appear to face in EU-15 States' labour markets. For example, white immigrants from English-speaking countries and from (at least some) EU-15 States are privileged economically and culturally over CEE movers. Moreover, among CEE movers, Poles have faced especially high rates of deskilling in the labour market, employers' stereotypes about their good work ethic (which often supports their exploitation), and widespread negative portrayals in media, political, and popular discourse. On the other hand, if the comparator trait is too limited, facts pertaining to intersectionality of Polish workers' discrimination might become obscured. For example, a Polish female worker might suffer discrimination due to her ethnic origin, national origin, migration status, language skills, gender, and

⁴²³ See also cases discussed in the next Chapter.

⁴²⁴ E.g., <http://polish-workers.co.uk/>; <http://www.easypoland.co.uk/>; <http://zeitmann.co.uk/>. Some recruitment agencies channel only Polish workers to specific local industries (e.g., Peacock 2009).

socio-economic status. Focusing solely on her ethnic origin is likely to overlook all the other intersecting grounds of disadvantage. More generally, the use of comparators supports a formal notion of equality, ignoring any existing inequalities or social disadvantages, and allowing for levelling down since the law is complied with as long as two like persons are treated alike, even if equally badly.

e. Indirect Discrimination

Half of the definition of indirect discrimination under the Directive explains when the prohibition does *not* apply. The definition of indirect discrimination, despite being broader than under previous EU (gender) equality legislation, might also be inadequate in the context of my study group. The ‘objective justification’ exception is not defined, and thus might be problematic in practice, given national policymakers’ accountability to domestic majorities (as addressed above). Moreover, national lawmakers are permitted not to require statistical evidence to establish indirect discrimination (Recital 15), and presumably may discourage the use of such evidence or discount its value. Although obtaining statistical data is often cumbersome and expensive for claimants, it often constitutes potentially key evidence to prove their claims. Moreover, institutional⁴²⁵ discrimination is more difficult to prove without statistical evidence. Since today’s expressions of racism have become less overt and, in the case of CEE movers, often cloaked in calls to nationalism or a common culture, not requiring the use of statistics might disadvantage claimants.

f. Harassment

Demonstrating harassment, which requires evidence of both conduct and environment elements⁴²⁶, might also be problematic for Polish workers. The concept seems to overlook sporadic or less overt forms of racism. Since isolated incidents are not prohibited, employers might even avoid liability if perpetrating only one incident per employee, against multiple Polish employees, as long as such individual incidents would not create a generally degrading environment for all Polish workers⁴²⁷. Since Poles often work alongside many other Poles in low-skill places of employment, an employer’s harassment

⁴²⁵ For example, higher refusal rates to members of a specific group when providing public services.

⁴²⁶ ‘[U]nwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’ (Article 2(3)).

⁴²⁷ Although the ECJ has not yet explained the ‘hostile environment’ element under the Directive, an Advocate General opinion indicates that it refers to ongoing, long-term, collective measures from which all members of a certain ethnic group suffer. See Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, Opinion of AG Kokott, 12 March 2015, ECLI:EU:C:2015:170, ¶¶ 1, 60, 133. This is in line with how the ‘hostile environment’ element has been interpreted in the context of gender equality, as ongoing working culture and working conditions which negatively impact women.

of each Pole individually can be a widespread practice, yet not necessarily actionable. Also, the Directive does not mention employers' liability for harassment initiated by their employees or by third parties. Vicarious liability would have encouraged employers to try to prevent or address such incidents of harassment. Given how strong anti-immigrant and especially anti-CEE mover sentiment has been in some EU-15 States, notably the UK, it is not unlikely that employees or third parties may harass CEE workers, with impunity.

g. Conceptualisation of Equality

More fundamentally, ensuring substantive equality, and one that goes beyond economic rationales, is especially crucial to protecting groups which are small, disadvantaged, and not politically organised - such as Polish movers. It is uncertain, however, what type of equality the Directive envisions. Its scope and its Preamble for the first time added social inclusion goals to EU anti-discrimination legislation. However, labour market imperatives are also mentioned in its Preamble, and constitute half of its material scope (Article 3(1)).

Moreover, both the Directive's discourse and its legally enforceable provisions straddle protecting formal and ensuring substantive equality goals. By its very nature, anti-discrimination law offers limited causes of action, and thus prefers formal to substantive equality (Freeman 1978). Formal equality is evident in the Directive's title ('implementing the principle of equal treatment'), its stated purpose ('putting into effect in the Member States the principle of equal treatment') (Article 1), and its definition of direct discrimination (being treated less favourably than another). In fact, the Directive itself implicitly recognises that its provisions are not sufficient to ensure 'full equality in practice' (Article 5). Allowing justifications to unlawful discrimination (Article 4) takes away from the Directive's ability to attain substantive equality. Moreover, despite permitting them to do so, the Directive does not require Member States to take any positive action, which, as a derogation from the equality principle, would have to be interpreted strictly (satisfying the proportionality test)⁴²⁸.

On the other hand, some of the Directive's provisions go beyond notions of just formal equality. For example, States are permitted to implement positive action 'with a view of ensuring full equality in practice' (Article 5). Moreover, its definition of harassment is based on unwanted conduct with the purpose *or effect* of violating a person's dignity (Article 2(3)). Its definition of indirect discrimination is broader than it has been before (Article 2(2)(b)), and considers unequal effects of neutral practices, that is, the results of

⁴²⁸ Case 222/84, Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.

equal treatment. On the balance, however, the Directive is not unequivocal in its approach, which detracts from its symbolic and practical strengths.

One wonders whether the Directive's uncertain stance and weaknesses in some of its provisions stem not only from the practical constraints involved in its adoption (discussed above), but also from the complicated western approach towards curbing racism.

Fitzpatrick (1987) has noted that racism is fundamental to the creation of European identity and of western liberal equality notions. After all, the roots of anti-discrimination law in the west stem from inequalities experienced by non-white colonial subjects, perceived as inherently lesser than white (western) Europeans. Hence, racism has been integral to the creation of modern anti-discrimination law, which, in order to operate and gain its legitimacy, requires some groups to be excluded by the polity. If anti-discrimination law were to more earnestly eliminate racism, its liberal aspirations would lose some of their imperative. Thus, the Directive imposes limits on private and public ability to engage in racist behaviour, but does not prohibit it altogether, even if the complete elimination of racism were in the service of fundamental rights or an efficient labour market, its two stated goals.

Despite such limitations of the Directive, I am not prepared to adopt a critical legal studies ('CLS') outlook on rights (Kennedy 2014; Tushnet 2011; Unger 1983). It is true that, in addition to several other shortcomings (addressed above), the Directive's focus on individual incidents of discrimination tends to be ineffectual, and does not create space for coalition building that class actions facilitate. Several of its provisions seem especially ill suited for protecting the rights of small, poorly-organised groups lacking political power, such as CEE movers. However, the Directive does hold some hope – notably, by moving beyond just the employment field and the private sector, and by including indirect discrimination. Moreover, its oftentimes vague definitions create space for national policymakers to offer better protections than what the Directive's terms provide. Although some CLS theorists see vagueness as debilitating, my analysis in the next Chapter of how the transposed Directive has been applied in the UK indicates that it has some potential for improving the protection of rights of marginalised groups. Albeit that potential might not always get utilised by national adjudicators, the Directive offers a starting point. Notably, the Directive does not dismiss the concept of race as essentialist, as CLS adherents tend to do. Instead, it merely dismisses the notion of separate human races (Recital 6). Furthermore, one should keep in mind that the Directive constitutes the EU's first effort at addressing racial and ethnic equality. As the evolutions of domestic race equality measures (such as in the UK) and of the EU's own equality laws (such as in the

context of gender) illustrate, there is only space for improvement. In line with CRT scholars, I see the Directive's transformative potential, especially given that it prompted some Member States to adopt racial equality protections for the very first time. Ultimately, however, law alone cannot bring about change in this area. Instead, equality directives need to be accompanied by a western cultural shift and a transformation in westerners' attitudes⁴²⁹, so that the CEE region and its nationals are no longer positioned as inferior.

iii. ECJ Interpretation

National courts have not referred many cases pertaining to the Directive to the ECJ. This is possibly due to well-developed equality legislation in some States, or due to a desire to preserve national sovereignty in this area. As of this date, there have been too few ECJ cases to thoroughly evaluate the Court's approach towards the Directive's provisions⁴³⁰. For example, the ECJ has not yet had the opportunity to address its clauses regarding harassment, positive action, or victimisation⁴³¹. More generally, the ECJ has not heard as many equality cases as proceedings in other fields. For example, only 23 out of 173 cases heard by the ECJ between 2004 and 2012 had addressed equality rights (Schiek 2012: 116). This leaves some questions unanswered as of this date, and necessitates that my analysis relies more heavily on the Directive's legislative history, its text, and the broader EU equality discourse. Given that the Directive's legislative history (discussed above) and the EU's equality discourse (discussed below) focus on the protection of long-standing national minorities and non-European migrants, it seems unlikely that the ECJ will interpret the Directive to robustly protect the rights of post-04 CEE movers.

Although in the last decade, the ECJ has begun to give more weight to social rights, and more value to substantive equality discourse (Schiek 2012: 211), the Court has traditionally favoured economic freedoms over equality or human rights⁴³². The Directive itself does little to advance substantive equality, as addressed above. So far, the ECJ has not mentioned whether it envisions the Directive as advancing equal opportunities or substantive equality. Of course, it is debatable whether equality of opportunity (as opposed to of results) can ever ensure substantive equality, given that it does not provide market

⁴²⁹ Change can be brought about only through the confluence of law, cultural attitudes, and self-transformation (Chimni 2013).

⁴³⁰ As of April 2019, there have been 6 ECJ judgments pertaining to the Race Equality Directive. Similarly, the ECJ's opportunity to interpret Directive 2000/78 has been limited so far, except for age discrimination.

⁴³¹ The only case so far that mentions victimisation under the Directive does not engage with it substantively. See Joined Cases F-106/13 and F-25/14, DD v FRA, ECLI:EU:F:2015:118.

⁴³² As illustrated, for example, by its decisions in the context of the right to free movement, discussed in the preceding Chapter.

corrections (such as access to adequate housing or good education), but instead simply seeks to equalise access to hierarchical distinctions (Somek 2011: 189; see also Marshall 1950). Due to the EU's limited competence, its equality laws cannot be expected to provide market corrections, which remain within Member States' scope of responsibility⁴³³. Furthermore, ECJ interpretations of both the Race Equality Directive and its companion legislation, Employment Equality Directive 2000/78, have drawn heavily on gender equality law (O'Cinneide 2012: 6), which has had strong roots in promoting economic competition.

So far, the ECJ's limited jurisprudence in this field has been mixed. On some occasions, the Court has drawn on fundamental rights narratives to provide broad interpretation to the Directive and its companion legislation, Directive 2000/78. As discussed in Chapter 2, such narratives situate EU equality rights as derived from international human rights law, and from the constitutional traditions of the Member States⁴³⁴. In *CHEZ Razpredelenie Bulgaria*⁴³⁵, the Court ruled that the Directive has a direct horizontal effect⁴³⁶, due to racial equality's being a general EU principle under the Charter of Fundamental Rights⁴³⁷ (which was incorporated into EU law in 2009, pursuant to the Lisbon Treaty). Moreover, its decisions indicate that the Directive should not be read in a narrow or excessively formalistic manner. For example, in *Firma Feryn*⁴³⁸, the ECJ deemed an employer's public statement that it will not recruit 'immigrants' sufficient to create a presumption of direct discrimination. The absence of an identifiable complainant (the suit was brought by a Belgian equality NGO) was not an obstacle to the finding of discrimination. Notably, although it was possible to interpret the statement at issue as nationality discrimination (excluded from the Directive's scope), the ECJ included it within its understanding of 'racial origin'. Similarly, in *CHEZ Razpredelenie Bulgaria*, the Court defined 'ethnic origin' under the Directive broadly – to include shared nationality⁴³⁹, language, culture, or

⁴³³ Thus, in the next Chapter, I consider whether the UK has made any attempts to achieve substantive equality.

⁴³⁴ E.g., Case C-144/04, *Mangold v Helm* [2005] ECR I-9981; Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

⁴³⁵ Case C- 83/14, EU:C 2015:480.

⁴³⁶ Although EU directives do not have a horizontal effect, the ECJ has endowed them with this effect in the equality field, starting with the grounds of sex (C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1986:84; Case 43-75, *Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56), and age (C-144/04, *Mangold*; C-555/07 *Kücükdeveci*).

⁴³⁷ 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited' (CFR, Art 21(1)).

⁴³⁸ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

⁴³⁹ But this does not apply to TCNs.

background⁴⁴⁰. This is in line with modern forms of racism⁴⁴¹, which have increasingly relied on markers such as different cultural practices or language. Finally, in *Meister*⁴⁴², the Court drew an inference unfavourable to the respondent, which is not specified by the Directive's text. Despite satisfactory qualifications, Ms Meister was not invited for a job interview. The employer refused to provide her the file of the person who was appointed to that position. Although the Court ruled that, because of the reversal of the burden of proof, the claimant was not entitled to this information, it also held that an adverse inference may be made against a respondent who refuses to make such disclosure (in either direct or indirect discrimination claims). Of course, CRT scholars argue that judicial application of anti-discrimination law occasionally offers a sense of resolution to make law appear effective, thereby legitimating existing unequal social conditions (e.g., Delgado and Stefancic 2017).

That view might hold some credence given that other ECJ interpretations have narrowed the Directive's ability to protect victims of discrimination. For example, in *Runevič-Vardyn*⁴⁴³, the ECJ limited the Directive's application to public bodies, by holding that it did not cover the performance of public functions which do not involve the provision of a 'service'. Entering names on civil status certificates was found not to constitute access to or supply of service available to the public, and hence beyond the Directive's scope. Furthermore, in *Bulicke*⁴⁴⁴, the Court specified a rather low threshold for national discrimination sanctions to be considered sufficiently 'effective, proportionate and dissuasive', in compliance with Article 15 of the Directive. Sanctions must simply fulfil the principles of: equivalence (may not be less favourable than those governing similar domestic actions); effectiveness (must not render the exercise of EU rights 'practically impossible or excessively difficult'); and non-regression (in relation to national measures which existed before the Directive's transposition).

The ECJ's interpretation of indirect discrimination under the Race Equality Directive and Directive 2000/78 has been mixed in terms of expanding or narrowing the scope of equality rights. For example, in *CHEZ Razpredelenie Bulgaria*, the Court defined 'particular disadvantage' broadly, to include not only 'serious, obvious or particularly significant cases

⁴⁴⁰ Case C- 83/14, *CHEZ Razpredelenie Bulgaria*.

⁴⁴¹ The ECJ has also noted that discrimination due to one's ethnic origin constitutes 'racial' discrimination, implying that one is not less condemnable or unlawful than the other. Case C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, 1 Dec 2016.

⁴⁴² Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*, 19 April 2012.

⁴⁴³ *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* [2011] ECR I- 3787.

⁴⁴⁴ Case C-246/09, *Bulicke v Deutsche Büro Service GmbH*, 8 July 2010.

of inequality’, but also practices where ‘it is particularly persons of a given racial or ethnic origin who are at a disadvantage’⁴⁴⁵. Thus, indirect discrimination might be found when a national measure, albeit formulated in neutral terms, ‘works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it’⁴⁴⁶. In *Tyrolean Airways*, however, the ECJ limited actionable terms in a collective agreement to only those which are either ‘inextricably’ or ‘indirectly’ linked to a protected ground. Terms that merely might disadvantage some members of a protected group were found insufficient to support a claim of indirect discrimination⁴⁴⁷. Instead, a difference in treatment must affect a particular protected group or clearly differentiate such a group based on a protected ground. Moreover, according to *Jyske Finans*, to determine whether a claimant had suffered ‘unfavourable treatment’, it is necessary to perform not merely a general abstract comparison, but ‘a specific concrete comparison, in the light of the favourable treatment in question’⁴⁴⁸. Hence, the Court found permissible a lender’s practice which required a customer whose driving licence listed a non-EU country of birth to produce additional identification⁴⁴⁹. Similarly, in *Maniero*, the Court found no indirect discrimination based on racial or ethnic origin where a national private foundation granted scholarships to promote legal research or study abroad only to applicants who had passed a legal examination in that State⁴⁵⁰.

Some other ECJ interpretations of Directive 2000/78⁴⁵¹ might also be instructive. Notably, ECJ applications of Directive 2000/78 in age-discrimination cases have extended victims’ rights. In *Petersen*⁴⁵², for example, the Court ruled that a national law imposing a mandatory retirement age of 68 on public health-care system dentists was not proportionate to the goal of protecting patients from incompetent dentists because it did not apply to dentists in the private sector. On the other hand, if its aim were to preserve public finances, it might pass the proportionality test (although that remained for national courts to determine). In *Prigge*⁴⁵³, the ECJ ruled that a collective agreement provision mandating

⁴⁴⁵ Case C-83/14, *CHEZ Razpredelenie Bulgaria*, ¶¶ 99-100.

⁴⁴⁶ *Id.*, ¶ 101.

⁴⁴⁷ Case C-132/11, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, 7 June 2012.

⁴⁴⁸ Case C-668/15, *Jyske Finans*, 6 April 2017, ¶ 32.

⁴⁴⁹ *Id.*

⁴⁵⁰ Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes e. V.*, ECLI:EU:C:2018:912.

⁴⁵¹ Both Directive 2000/78 and the Race Equality Directive were adopted at the same time, both pursuant to the new Article 13, both include similar language, and both tend to be addressed collectively in EU legal discourse.

⁴⁵² Case C-341/09, *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

⁴⁵³ Case C-447/09, *Prigge v Deutsche Lufthansa AG*, 13 Sept 2011.

pilots' retirement at 60 (allegedly to avoid accidents) constituted discrimination. More specifically, the Court noted that, although the possession of a particular physical trait could constitute a 'genuine and determining occupational requirement', this age limit was not necessary, given that national and international regulations tended to set pilots' mandatory retirement age at 65.

4. Transposition of the Directive by EU-15 States

A. Problem Areas

The Directive's transposition process produced confusion and delays in EU-15 States. In addition to the typical transposition challenges stemming from the inherent ambiguities of directives' shell structures and from sovereignty issues, delays were caused by the pre-existence of national equality legislations in most Member States. Divergent national equality models reflected domestic race relations (Guiraudon 2009: 529). In fact, to this day, there is no consensus among politicians or scholars from various Member States as to what racial equality means in principle or in practice (Lefranc 2009: 1854). Furthermore, the Directive's material scope was much wider than that of most pre-existing national measures - even when compared to the UK (as discussed in the next Chapter), which had the most well-developed equality law in the EU, and which had influenced the drafting of the Race Equality Directive (Solanke 2009: 164-90). Not surprisingly, provisions that had presented the most transposition difficulty were the ones that introduced legal concepts (such as indirect discrimination), and applied legal tools (such as shifting burden of proof) which had not been part of all national legal frameworks (Guiraudon 2009). Moreover, the Directive's rushed adoption process, many ambiguous terms, and its delegation of much discretion to the Member States (discussed above) left States with little transposition guidance. In fact, a decade after its transposition, some Member States have continued to express concerns about the lack of clarity regarding some of the Directive's terms, such as those pertaining to indirect discrimination and to the burden of proof (Commission 2014c: 8-9).

Due to such challenges and the fact that the Directive's transposition was not an important item on the political agendas of most EU-15 States (Howard 2004: 151), only the UK and two other Member States transposed it on time, by July 2003. The Commission was active in pushing along the transposition process. It invoked infringement procedures in 2004, which resulted in non-compliance cases against Austria, Finland, Germany, Greece, and Luxembourg being referred to the ECJ. The Court found

them all in breach of their Treaty obligations for not having transposed the Directive fully (Commission 2006e: 4).

Additional problems were encountered after transposition. Member States tended to fall into two camps in their transposition approach: those that questioned the Directive's provisions and had lengthy national debates (especially in France and Germany), and those that quickly copied and pasted its provisions (such as Italy and Spain) to avoid political confrontation (Guiraudon 2009: 536). Both methods resulted in errors in defining the Directive's key terms and scope⁴⁵⁴. This led the Commission to launch infringement proceedings in 2005-07 against 25 Member States⁴⁵⁵ (Commission 2014c: 3). In 2007—when all EU-15 States had finally transposed the Directive—the Commission sent reasoned opinions (second stage of infringement procedures⁴⁵⁶) to fourteen States, including the UK and seven other EU-15 States (Commission 2009d: 7). The most common errors in national legislations included: limiting the scope to employment only; incorrectly defining indirect discrimination, and harassment; and narrowing the provisions to help victims (such as on shifting the burden of proof, and associations' ability to engage in legal proceedings) (id: 18). Ultimately, all Member States modified their legislations in accordance with the Directive.

Despite instituting these infringement actions, the Commission has praised the overall transposition process, attributing any transposition difficulties to 'the novelty' of the Directive (Commission 2006e: 2) rather than to any shortcomings by the Member States. After closing all its infringement proceedings, the Commission also applauded Member States for their 'unprecedented commitment' to prioritising anti-discrimination measures (Commission 2009d: 3). More recently, although the Commission did acknowledge that the transposed national legislations had not produced a significant increase in court proceedings, it tried to minimise finding fault with national equality laws, and instead, attributed this to generic issues with underreporting and accessing justice (Commission 2014c: 5). The Commission's consistent praise of Member States' implementation of the

⁴⁵⁴ Most frequent errors included: incorrect definitions of direct, indirect discrimination, or harassment; excessively wide exceptions; cumbersome enforcement mechanisms (Commission 2006e); narrow scope; and limiting equality associations' power to help victims (Commission Press Release 2007).

⁴⁵⁵ All except Luxembourg, Bulgaria, and Croatia.

⁴⁵⁶ When the Commission uncovers that a Member State had failed to correctly transpose a directive on time, it launches a formal infringement procedure (TFEU, Articles 258-260). First, the Commission sends a formal notice to request an explanation. Next, it issues a reasoned opinion, asking the State to revise national law. If the Member State does not respond within specified time, the Commission refers the matter to the ECJ. Upon finding infringement of EU law, the Court orders the State to comply with its ruling, a process overseen by the Commission. If the State does not comply, the Commission may refer the case back to the ECJ, typically asking the Court to impose financial penalties (id., Article 260(2)). See https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

Directive is in line with its overall fundamental rights rhetoric. The European Parliament has been more critical, however. It noted ‘with concern, the unsatisfactory state of implementation’ of the Directive, particularly in terms of Member States’ failures to provide adequate information to potential victims and training to judges and lawyers (EP 2005: ¶ 11). This is in line with the EU institutions’ approach during the drafting process (discussed above) - with the Commission being more accommodating than the Parliament of Member States’ concerns. Unfortunately, the lack of consistent institutional pressure by EU bodies is likely to reduce the potential of the Directive to improve domestic equality laws.

B. The Directive’s Impact on EU-15 States’ Equality Frameworks

All the Member States, including even those with well-developed pre-existing equality laws, had to change their national laws to comply with the Directive. Some even implemented whole new legislative acts (Commission 2006e: 3). In addition, several States amended their legislation to provide greater protections than under the Directive (FRA 2013: 5). Even in the UK, where the pre-existing equality framework was looked upon for inspiration when drafting the Directive, definitions of indirect discrimination and harassment had to be amended, as did burden of proof provisions (as discussed in the next Chapter). Although some scholars (e.g., Guiraudon 2009) caution against drawing a causal relationship between the Directive and domestic equality regime changes, if nothing else, the Directive provided symbolic value, promoted domestic policy discussions, and discouraged regression.

Moreover, the ECJ’s interpretations of the Race Equality Directive (and of Directive 2000/78) have had an influence on national equality frameworks – through national courts’ direct application of ECJ jurisprudence, by affecting national understandings of the equality framework, and by shaping equality discourse. In Germany, for example, the ECJ’s jurisprudence in this field has generated a large amount of academic and political controversy regarding the Court’s authority⁴⁵⁷. This has resulted in a higher volume of

⁴⁵⁷ Especially the ECJ’s power to order national legislation to be set aside in disputes between private parties, and its ability to rely on general equality principles (as opposed to specific directive provisions) to set aside national laws.

referrals to the ECJ than from other States⁴⁵⁸, and in ongoing substantial revisions to German legislation⁴⁵⁹ (O’Cinneide 2012: 7-8).

More broadly, the ECJ’s equality jurisprudence has been influencing the evolution of national policies, even if national legislators do not always explicitly acknowledge this when introducing reforms. For example, after *Mangold*, the Belgian Minister for Labour prompted social partners to remove references to age in collective agreements. Similarly, in the UK, after *Coleman* included ‘associative discrimination’⁴⁶⁰ within the prohibition of direct discrimination (under Directive 2000/78), the Equality Act 2010 (Sections 13 and 26) was amended to reflect this across all grounds protected under Directives 2000/43 and 2000/78. As more cases become referred to the ECJ, it is likely that the influence of its Article 13 jurisprudence will expand.

Despite such apparent influence of the Directive and ECJ jurisprudence on national equality frameworks, it is not clear how much impact EU equality law has had on actual incidents of discrimination. According to the Fundamental Rights Agency (‘FRA’), the EU body specifically tasked with collecting and analysing data on fundamental rights, the Directive has brought about little improvement in tackling racial discrimination. This has been attributed to transposition errors, victims’ lack of awareness, high costs of bringing claims, insufficient remedies, and fear of victimisation (FRA 2010; FRA 2012). FRA’s review of the Directive a decade after its transposition concluded that ‘discrimination remains part of the daily experience of too many Europeans’ (FRA 2013: 3).

The apparent lack of the Directive’s effectiveness has been especially noticeable in the employment context. Research conducted in Belgium, Bulgaria, France, Italy, and the UK within the first two years after its transposition found that discrimination at work against ethnic and national minorities was widespread, and that trade unions tended not to rely on transposed Directive provisions to challenge it⁴⁶¹ (Jefferys 2007). More generally, a recent meta-analysis of 43 studies concluded that EU anti-discrimination directives do not appear to have decreased discriminatory practices in employment (Zschirnt and Ruedin 2016).

⁴⁵⁸ E.g., Case C-341/09 Petersen; Case C-246/09, Bulicke; Case C-147/08, Römer v Freie und Hansestadt Hamburg, 10 May 2011; C-447/09, Prigge; Case C-297/10, Hennigs v Eisenbahn-Bundesamt/ Land Berlin v Mai, 8 September 2011; Case C-415/10, Meister. Most of these address age discrimination.

⁴⁵⁹ For example, in *Mangold*, the ECJ found German law endowing older fixed-term workers with fewer protections than younger ones to constitute age discrimination, contrary to Directive 2000/78. This resulted in changes to the German Labour Code.

⁴⁶⁰ Against an individual who lacks protected characteristics, because of his association with another person who has a protected characteristic.

⁴⁶¹ Largely due to lack of awareness and their focus on more traditional labour issues such as pay and pensions.

Some of the surveys mentioned at the beginning of this Chapter, and in the next Chapter, similarly indicate that racism and discrimination are still prevalent. As I have addressed earlier, law can only do so much. But the Directive offers a step in the right direction, and creates opportunities for national adjudicators to improve marginalised groups' access to equality. Of course, forms of discrimination that are made unlawful might give advocates and commentators false comfort that discrimination is being tackled. Thus, it becomes more difficult to recognise forms of disadvantage or inequality which do not fit the closely delineated causes of action (Crenshaw and Peller 1995), further complicated by the fact that racist attitudes and behaviours are often covert and difficult to identify.

In addition to the fact that some of the Directive's provisions are unfit for protecting white movers (as discussed earlier), CEE movers' whiteness might impede the effectiveness of racial equality provisions when applied to them. Some western civil society members assume that racial anti-discrimination laws apply to non-whites and non-Christians only, and that whites cannot be victims of racism⁴⁶². This outlook dilutes equality policies' deterrent value. This erroneous view has even been adopted by some white victims of racism and discrimination (Fox et al 2015), likely decreasing their reliance on equality law. The oversight of CEE movers in the Directive's legislative history (discussed above), and in the broader EU equality discourse (addressed below) might have only served to reinforce this climate. As Frankenberg (1997) theorised, members of the privileged (white) group assume that whiteness is homogeneous, making anti-white discrimination more difficult to perceive and acknowledge. Some more recent CRT scholarship, however, has begun to recognise fractures within whiteness (Levine-Rasky 2013), and prejudices and discrimination faced by whites not belonging to the norm – for example, those of lower socio-economic status⁴⁶³ (e.g., Pruitt 2015). CEE movers' experiences of discrimination, and the tendency of both discourse and theory to overlook their disadvantage call for the need to study additional fractures within whiteness – for example, differences based on migration status or foreignness, as placed within transnational economic and political power differentials. The fact that CEE movers are white and have access to EU citizenship does not mean that they 'cannot be in need of special measures of social inclusion and social protection' (Henrard 2011: 77).

⁴⁶² E.g., <https://inews.co.uk/opinion/columnists/theres-no-thing-racism-white-people/>; https://www.vice.com/en_uk/article/dear-white-people-please-stop-pretending-reverse-racism-is-real.

⁴⁶³ Class, however, tends to be excluded from western equality protections.

5. Equality Discourse

A. Discourse at the Time of the Enlargement

As discussed above, the Directive's legislative history had overlooked equality rights of CEE nationals already present in EU-15 States, and had ignored their anticipated post-accession mobility. During the Enlargement process, no mention was made about their human rights. Soon after the Enlargement, EU institutions had continued to overlook new EU citizens' equality rights, and instead emphasised that anti-discrimination measures in an enlarged EU should focus on long-standing national minorities, non-Christians, TCNs, and stateless persons.

For example, in its 2005 Resolution on the Protection of Minorities and Anti-Discrimination Policies in an Enlarged Europe, the Parliament mentioned CEE movers in only three out of 63 paragraphs, noting that, like all foreign groups, they should be integrated into host communities (EP 2005 ¶¶ 41-43). When addressing discrimination against 'recent immigrants', the Parliament referred only to TCNs (id: ¶ 43). Similarly, in a section of its 2004 Green Paper: Equality and Non-Discrimination in an Enlarged European Union, titled 'Dealing with issues linked to the enlargement of the EU', the Commission only addressed the need to protect long-standing national minorities, the Roma, Jews, and Muslims in CEE states (Commission 2004). In its 2005 'Non-Discrimination and Equal Opportunities for All' strategy, despite acknowledging that the 2000 equality directives are insufficient to address 'multifaceted and deep-rooted patterns of inequality', the Commission (2005: 2) only mentioned the Roma and long-standing national minorities, and was silent about CEE movers. This is despite the fact that, in the first year after the Enlargement, significant numbers of CEE nationals had already moved to EU-15 States, including more than a million Poles (Krywult-Albańska 2012: 74). As with the Racial Equality Directive's legislative history, it is not clear if this absence reflects (predominantly white) EU officials' inability to recognise degrees of whiteness and racism against Caucasians or their unwillingness to deem any potential discrimination against CEE nationals as deserving of anti-discrimination protections. The latter explanation would be in line with the inferiorising and othering discourse discussed in the preceding Chapters.

Furthermore, despite frequently noting that equality is an essential component of the EU's respect for fundamental rights (discussed in Chapter 2) and mentioning non-economic goals in the Directive, in the context of the Eastern Enlargement, EU institutions had linked equality measures to economic imperatives only. For example, in the Green Paper:

Equality and Non-Discrimination in an Enlarged European Union, the Commission noted the significance of anti-discrimination policies to the EU's long-term economic growth (Commission 2004: 11) and to the integration of migrants in the labour market (id: 12). This echoes the EU's economic goals behind the Enlargement, and its 2000 Lisbon Agenda⁴⁶⁴.

Of course, attributing discourse to EU politicians' actual motivations is not a straightforward task. EU discourse connecting equality measures to economic benefits might have been in part strategic - to make equality initiatives more appealing to some Member States. It is possible that some EU politicians might have been driven by human rights rationales when pushing the EU's equality agenda. Nevertheless, embedding equality measures within discourse focused on market imperatives, while overlooking CEE movers, likely has had long-term repercussions on my study group's access to equality rights and on their experience of mobility.

B. Recent EU Reports

Recent EU reports have continued to reinforce EU discourse that overlooks the experience of CEE movers, and of white outsider groups more generally (except for long-standing minorities in CEE states). In its reports monitoring the implementation of the Race Equality Directive, the Commission has continued to emphasise the need to protect rights of the Roma (e.g., Commission 2009d, 2014c). When addressing migration and anti-discrimination measures more broadly, both the Commission and the European Parliament have focused on protecting TCNs and long-standing national minorities (especially Jews, Muslims, and the Roma) (e.g., Commission 2008a; EP 2005). Even after the Brexit referendum and the associated spike in violence against CEE movers in the UK, EU institutions have continued to emphasise racism directed against TCNs and the Roma only (e.g., Commission 2016c). Notably, on the rare occasion when acknowledging that intra-EU movers, and especially CEE workers, are prone to suffer discrimination in employment, access to social benefits, and access to housing, the Commission (2013b: 98-99) has not tied this observation to the need for more detailed studies of movers' experiences or for equality programmes to target them. The most recent reports (e.g., Commission 2017, 2018a, 2018d, 2019) have continued to focus on equality initiatives for refugees, the Roma, Jews, Muslims, Africans, and vulnerable groups (children, the disabled, and women), with no mention of intra-EU movers.

⁴⁶⁴ See <http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24270/20110718ATT24270EN.pdf>. Subsequently incorporated into Europe 2020 Agenda.

Reports by EU agencies and EU-sponsored groups have similarly continued to ignore CEE movers, despite noting that migrants are particularly susceptible to discrimination (e.g., FRA 2012, 2013, 2014, 2018b). Notably, the FRA's 2016 report focused on the refugee crisis (FRA 2016) and did not mention CEE movers, despite challenges they had faced in the context of the Brexit referendum. The FRA's 2018 report devoted to EU citizen's rights noted that EU movers experience discrimination in accessing employment, housing, banking services, and education (FRA 2018: 50), but did not mention the need for their greater equality protections. Similarly, the most recent annual report by the largest pan-European anti-racism NGO, ENAR (2017), has ignored intra-EU movers, focusing instead on antisemitism, islamophobia, anti-gypsyism, and Afro-phobia.

6. Conclusion

The Race Equality Directive was drafted by pre-2004 EU institutions, and reflects EU-15 States' economic and political concerns. Although it moved beyond pre-existing EU equality doctrine, several of the Directive's provisions tend to be weak. In addition to having failed to consider power relations among mobile workers (Erel 2007), the Directive appears especially unfit for protecting the rights of CEE movers. As transposed into EU-15 laws, the Directive has widened the scope of anti-discrimination laws across the EU, but appears to have had little impact on addressing discrimination, despite the continuing prevalence of racism and discrimination across the EU. Although, given the function of framework directives and the scope of EU's competence⁴⁶⁵, the Directive arguably could not have accomplished much more than it has, the EU could be taking greater account of CEE movers' racialisation and experience of discrimination through its equality discourse.

CEE movers' interests have been overlooked or silenced, however - in the Directive's legislative history, broader EU equality discourse, and soft law measures. This is consistent with how western and EU politicians have approached the CEE region through othering rhetoric, disadvantageous Enlargement policies, and unequal access to the free movement right, discussed in the preceding Chapters. In the process, CEE movers' status as second-class EU citizens has been naturalised, entrenching inequalities and fractures within whiteness. Overall, the right to equality—like the right to free movement, to which it has been intimately linked—has been limited in practice, and indicates a schism between EU ideals and actual policies. The EU's fundamental rights rhetoric and derivative equality

⁴⁶⁵ More generally, EU governance is more akin to administrative than constitutional rule; the EU has limited methods for ensuring Member State compliance; and it cannot enforce values (Adams et al 2017).

myths (addressed in Chapter 2) might prompt us to more easily overlook this schism. Such mythologies, however, have also had a beneficial effect, as EU institutions relied on them when pushing through the adoption of this Directive.

As noted by CRT scholars, widespread prevalence of racism and discrimination can exist despite formal prohibitions against discrimination (Bell 1992; Matsuda et al 1993). In fact, formal law can even tacitly sanction certain types of inequalities by ignoring them (Delgado and Stefancic 2017). Overlooking CEE movers' experiences of discrimination in the Directive's legislative history and discourse might facilitate such silencing. It remains to be seen, however, how the ECJ jurisprudence continues to develop in this area.

Despite such shortcomings in the Directive's provisions and in the EU's equality discourse, in the next Chapter, I explore how it has been transposed and actually applied in the context of my study group in the UK. Due to the EU's historical competence limitations in this field, and the Directive's having left much discretion to the Member States, it is up to them to protect movers. In line with CRT scholars who value the potential of legal rights to bring about equality (Harris 2013), I next look to whether the transposed equality doctrine can in fact make at least some of the Directive's proclamations less hollow.

Chapter 6: Poles and Equality in the UK

1. Introduction

As my analysis in the previous Chapter indicated, the Race Equality Directive and the broader EU equality discourse have tended to overlook CEE nationals' concerns, and have disregarded east-west power differentials in such movers' experience of inequality. In this Chapter, I focus on the equality regime in the UK, trying to situate CEE workers within it, to get a sense of what their experience of mobility has meant in terms of their access to domestic equality rights.

The UK has been considered a leader in anti-discrimination law development in Europe (Fella and Ruzza 2013: 1-31), including in prohibiting racial discrimination (Wintemute 2016). The current anti-discrimination legislation, the Equality Act 2010 ('EqA2010') has been deemed 'a major landmark in the long struggle for equal rights' – in large part due to extending and harmonising the UK's prior concepts of discrimination, and extending positive duties on public authorities (Hepple 2014: 1). Moreover, more research regarding discrimination has been conducted in the UK than in other EU-15 States (Wrench and Solomos 1993). However, racism and discrimination are still prevalent in the UK, and the British public has consistently opposed immigration (see Chapter 4, Section 1B). For example, according to the 2013 British Social Attitudes survey⁴⁶⁶, 77% of respondents preferred immigration to be reduced (either 'a little' or 'a lot'); 40% felt that the UK's cultural life is undermined by migrants; and 55% felt that they damage the economy. Notably, 55% of those who felt that migrants enrich the UK's economy or cultural life nevertheless desired a reduction in immigration⁴⁶⁷. Since the Brexit referendum, public attitudes appear to have become slightly less negative towards migrants, although the majority of the public still expresses concerns about immigration. According to a recent survey, 19% of UK respondents would feel uncomfortable if an immigrant lived next door to them; and 34% felt negative towards immigrants⁴⁶⁸ (EHRC 2018: 30).

My aim below is to explore how Polish movers in the UK experience discrimination and how anti-discrimination law responds to it, which has become further complicated due to the Brexit referendum and the anticipated post-Brexit immigration regime. This is important to address not only due to ethical concerns, but also given the continuing significance of east-to-west migration within the EU. Although scholars have addressed

⁴⁶⁶ See <http://www.bsa.natcen.ac.uk/media/38108/immigration-bsa31.pdf>, 1, 5.

⁴⁶⁷ Id., 3, 5.

⁴⁶⁸ Behind negative attitudes only towards LGBT individuals.

incidents of disadvantage (e.g., Ciupijus 2012c; Drinkwater et al 2009), employment exploitation (see Appendix 1), racism (e.g., Fox et al 2012a; Rzepnikowska 2019; Sime et al 2017), and discrimination (e.g., Johns 2013) experienced by Poles in the UK, and how Poles have approached the British legal system (e.g. Kubal 2012; Griffiths 2017), few have noted how anti-discrimination law addresses discrimination against Poles. Barnard (2014), Barnard and Ludlow (2016), and Barnard et al (2018) have discussed statistical data about CEE nationals' claims before the employment tribunals and explored why so few CEE movers enforce their rights, but have not closely analysed specific tribunal decisions regarding claims brought by Poles. Moreover, critical scholars have noted traces of postcolonial and imperialist attitudes in today's xeno-racist approach towards new immigrants, based on cultural and economic differences (Rattansi 2007), but have not situated Poles, or CEE movers more generally, within the UK's equality regime.

Voices of CRT scholars have been notably absent from discussions about white migrants. This framework has much to offer to my study, however. In line with CRT analytical approaches, I focus on the underlying interests and benefits that are being served by the existing legal regimes (Harris 2013), seeking to replace majoritarian interpretations with those in line with the perceptions and experience of my study group. Moreover, I question the underlying definitions and foundations of the current equality framework and legal reasoning (Delgado and Stefancic 2017) when it comes to discrimination against Poles. To fully understand the meaning and impact of anti-discrimination law, one must also look at how it relates to underlying social relations and the broader political climate, and how it is interpreted and enforced (Crenshaw 2011).

Below, I begin with some historical background on the UK's conceptual approach towards race relations and migration. Next, I address Poles' migration to the UK, noting their reception and positioning in the labour market, and seek to situate them within the UK's equality regime. After explaining the Race Equality Directive's transposition in the UK, I look closely at the EqA2010, including its legislative history, substantive and procedural provisions, and notable weaknesses, before moving onto an analysis of some recent racial discrimination claims brought by Poles in the employment context. I focus on the employment field due to its importance to Poles⁴⁶⁹, because discrimination often manifests itself in the labour market, and because labour market outcomes are closely connected to equality in other fields and constitute a significant method of assessing minorities'

⁴⁶⁹ Moreover, the freedom of movement right continues to be tied to movers' economic activity (as discussed in Chapter 4).

integration. I note any challenges that might be unique to Polish workers when relying on anti-discrimination legislation. More broadly, I consider whether the UK's equality regime is capable of taking into account Polish movers' position as racialised whites, and if so, whether it does do so. In the conclusion, I reflect on the implications of my analysis for the post-Brexit UK, for the continuation of the EU project, and for the right of free movement. I also explore what role whiteness might play in my findings, as I seek to determine whether CRT and CWS frameworks can accommodate Polish movers' experiences.

2. The UK's Historical Approach to Race Relations and Migration

The 2013 Home Office 'Go Home' Campaign naturalised informal exclusion of all immigrants and other groups deemed to be outsiders to the British polity. This sentiment was further exhibited during the Brexit campaign and the referendum's aftermath. But the ongoing tensions between migration and racism have a long history in the UK. Driven by labour needs, each wave of immigration revealed that the UK public was antagonistic towards immigrants. In the 1950s, public and political debates about (non-white) immigration and about 'race relations' became inextricably linked (Solomos 1989: 70-3). Whenever each wave of post-war labour migration reached sufficiently large numbers (especially during economic downturns) to provoke public concerns over their alleged threat to the UK's welfare system, labour market, and social cohesion, racist political parties would gain popularity, and policies would be adopted to curb (non-white) immigration (Panayi 2010: 308-19; see also Erel et al 2016). To address existing⁴⁷⁰ and to prevent⁴⁷¹ further violent responses—by both disgruntled white Britons, and newcomers frustrated by their exclusion⁴⁷²—equality⁴⁷³ and integration measures would also be adopted (Solomos 2003: 80-1). Both the Conservative and Labour parties have historically supported this approach (Solomos 1989a).

For example, as New Commonwealth migration began to increase substantially after 1948⁴⁷⁴, lobby groups⁴⁷⁵ formed to advocate for their protection from overt discrimination. After several unsuccessful bills and the 1958 race riots, the restrictive Commonwealth Immigrants Act was adopted in 1962⁴⁷⁶, and the Government committed to legislate

⁴⁷⁰ Racial riots had triggered RRA1965 and the 2000 equality legislation (Solanke 2009).

⁴⁷¹ Akin to racial tensions and violence that had erupted in the United States in the 1960s.

⁴⁷² Especially well-documented in housing, employment, and education (Brown 1984; MacEwen 1995b).

⁴⁷³ British common law did not provide effective protections against racial discrimination.

⁴⁷⁴ Amounting to approximately 1 million by 1965.

⁴⁷⁵ Including Campaign Against Racial Discrimination, and Movement for Colonial Freedom.

⁴⁷⁶ Which had imposed limitations on Caribbean and Indian immigrants' entry.

against racial discrimination in public places (Labour Party 1964), and to combine equality measures with increased immigration controls (Home Office 1965). Meant to protect public order (Hepple 1969: 249), Race Relations Act 1965 ('RRA65') outlawed discrimination on the grounds of 'colour, race, or ethnic or national origin' in places of 'public resort' (such as public houses, theatres, and restaurants) (Section 1). It also prohibited race-based restrictions on the transfer of tenancies (Section 5), and incitement to racial hatred (Section 6). RRA65 created the Race Relations Board, with a conciliatory role (Section 2), and imposed fines and criminal penalties (Section 6). It suffered from numerous weaknesses, however. Notably, it did not apply to many places commonly considered to be places of public resort, and did not apply to the Crown and its employees. Victims lacked direct access to redress, and instead required the Board's referral of claims to the Attorney General, who could then institute civil actions (Section 3). Also during this period, the goal of integration⁴⁷⁷ became part of race relations discourse, reflecting the official recognition that the New Commonwealth migrants had settled in the UK permanently and should be incorporated into the UK's employment, education, health, and political spheres (Hamman and Frank 2015).

Overall, RRA65 proved ineffective (Hepple 1969: 50-1). The same year that the National Front was founded, Political and Economic Planning's (1967) survey revealed that racial discrimination was widespread against New Commonwealth migrants and their children. The Commonwealth Immigrants Act 1968⁴⁷⁸ was accompanied by the passage of Race Relations Act 1968 ('RRA68'), which forbade discrimination on account of colour, race, ethnic origin, and national origin (Section 1(1)) in employment, housing, the provision of goods or facilities, and public services (Sections 2-5). This constituted the earliest prohibition of racial discrimination in employment among EU-15 States (Bell 2002b: 158). The Act also created the Community Relations Commission to improve relations between people of different colour (Section 25). Like the Race Relations Board, it was tasked with promoting equality of opportunity⁴⁷⁹ for BAME groups. Although the Act addressed some

⁴⁷⁷ The effectiveness of integration measures, especially immigrant-specific ones (Saggar and Somerville 2012), has often been questioned (e.g., Craig 2015).

⁴⁷⁸ Denying citizenship rights and restricting entry of black and Asian Commonwealth citizens, while largely allowing white migration.

⁴⁷⁹ The adoption of gender equality legislation helped to move the legal framework towards equality of opportunity – for example, by including the concept of indirect discrimination, and permitting positive action. See, e.g., Equal Pay Act 1970; the Sex Discrimination Act 1975. The phrase 'equal opportunity' gained prominence in the 1970s. For example, the Sex Discrimination Act 1975 had set up the Equal Opportunities Commission. It is not clear, of course, how useful the concept of equal opportunity is in practice. Although scholars have infused it with some strength, to encompass both procedural and substantive components (e.g. Fredman and Spencer 2003: 46; see also Equalities Review 2007: 5; Hepple 2014: 29), it has not been defined by legislators. The non-binding guidance provided by the CRE's 2005 Code of Practice (CRE 2005) and by the EHRC's (2011) Employment Statutory Code of Practice simply

of the shortcomings of RRA65, it still left much to be desired, and focused only on formal equality and integration. For example, its definition of discrimination prohibited segregation (Section 1(2)), and hence made any positive action difficult. Due to business and trade union pressures (Hepple 1969), the Act included a defence employers could assert when accused of discrimination - that employee selection in hiring and work assignments was based on preserving or securing a reasonable balance of persons of different racial groups (Section 8(2)). Moreover, the Act did not apply to private live-in landlords, home owners selling their property without using estate agents, and places of employment with up to 25 employees (Section 8(1)(a)). According to Sivanandan (1976), RRA68 did not seek 'to chastise the wicked or to effect justice for the blacks', but to change attitudes and thus facilitate integration of New Commonwealth immigrants and their progeny.

Further immigration limitations followed in 1969 and 1971⁴⁸⁰. Reports by the Political Economic Planning think-tank highlighted that discrimination continued to be widespread and that the number of successful race discrimination complaints was consistently low (Anwar et al 2000: 6). The early 1970s were also plagued by worsening relations between the police and immigrants (Dale and Cole 1999). By the mid-70s, the Home Office acknowledged that the Government needed to play a greater role in addressing accumulated disadvantage experienced by former colonial subjects. Thereafter, several policy initiatives were premised on providing equal access to employment, housing, education, and social services for BAME groups (as well as women) (Solomos 1989a). The 1975 White Paper on Racial Discrimination called for strengthened equality legislation to protect New Commonwealth immigrants settled in the UK (Home Office 1975: 31), combined with curbing their future influx - in order to 'deal with the problems of race relations' (id: 1). Moreover, the Government's desire to harmonise racial and sex anti-discrimination laws (Sooben 1990) prompted the passage of Race Relations Act 1976 ('RRA76'), which, for the first time, prohibited indirect discrimination (Section 1(1)(b)),

reiterate statutory provisions, making the concept appear more symbolic than practical. Although some direct forms of discrimination have decreased over time, empirical studies of the impact of equal opportunity policies have consistently indicated their low levels of effectiveness - attributed to factors such as lack of awareness, vestiges of historical discrimination, and BAME communities' continued underrepresentation among political leadership (e.g., Ouseley 1984; Solomos 1989a; Wrench and Madood 2000). This had lead some scholars to conclude that equal opportunities policies are 'virtually irrelevant for those ethnic minorities who are found in the lowest paid, least protected and most precarious sectors of employment' (Wrench and Madood 2000: 2). More generally, Crenshaw (2011) has argued that, like formal equality law, rhetoric of equal opportunity gives the false impression that inequality has been erased, thus inhibiting efforts to address racism.

⁴⁸⁰ Nationality rules became more restrictive, eventually providing the right to reside only to holders of British passports issued in the UK (MacEwen 1995b).

victimisation, and the facilitation of discrimination (Section 2), and provided victims with the ability to seek direct redress (before industrial tribunals and courts) (Part VIII). Compensation for indirect discrimination, however, could be awarded only if an intentional act was proven (Section 57(3)). Moreover, only a requirement or condition could give rise to indirect discrimination (Section 1(1)(b)); a preference could not. RRA76 also expanded the scope of anti-discrimination law to include both public and private sectors in the context of education, housing, employment, and the provision of goods, services, and facilities (Parts II and III).

Notably, prompted by *Ealing London Borough Council v Race Relations Board*, the first anti-discrimination case to have reached the High Court, RRA76 added ‘nationality’ to the definition of ‘race’ (Section 3(1)). Ealing Council had twice refused housing eligibility to a Pole who had resided in the UK for more than two decades because he was not a British national. Following procedural requirements under RRA68, the Race Relations Board filed a complaint on his behalf. The Queen’s Bench Division⁴⁸¹ found that he had suffered discrimination due to his ‘national origin’⁴⁸² (protected under RRA68). The House of Lords⁴⁸³ disagreed, linking his treatment to his ‘nationality’⁴⁸⁴ (not recognised as ‘race’ under RRA68). This straightforward linguistic analysis prompted widespread academic criticism for ignoring substantive equality (e.g., Hucker 1975; Lustgarten 1979). Indeed, the decision had left considerable protection loopholes. For example, a respondent could argue that her unequal treatment of a black immigrant was not due to his race, but rather, due to his foreign citizenship. To address this, RRA76 added ‘nationality’ to the definition of ‘race’.

RRA76 also combined the functions of the Race Relations Board and the Community Relations Commission into the Commission for Racial Equality (‘CRE’), which was to provide free support to victims, promote equality of opportunity, investigate patterns of discrimination, and issue non-discrimination notices (Part VII). The CRE was active in the late 1970s and early 1980s in investigating employment discrimination of BAME workers. Its power was curbed by the courts⁴⁸⁵, however, which were concerned with protecting employers’ rather than workers’ rights (Dickens 2007). By the late 1980s, the CRE began moving away from enforcement and towards promulgating and advising about best practices (Solomos 2003: 86-7). As the Government’s inquiry into the 1981 Brixton riots

⁴⁸¹ [1971] 1 QB 309.

⁴⁸² An ineradicable trait received at birth, due to ancestry.

⁴⁸³ [1971] UKHL 3.

⁴⁸⁴ Commonly equated with citizenship.

⁴⁸⁵ E.g., *Re Prestige Group plc* [1984] IRLR 166.

revealed, RRA76 had failed to produce a significant impact on racial discrimination (Brown 2018: 8).

Prompted by the 1999 Macpherson inquiry into the murder of Stephen Lawrence, the 2000 Race Relations Amendment Act sought to address institutional discrimination faced by second-generation non-white immigrants, and included (albeit, limited) initiatives for increasing their social inclusion. It extended the ban on discrimination to public authorities (Section 1), and imposed a positive duty on specified public authorities⁴⁸⁶ (Section 2), signalling a step towards a more pre-emptive and transformative equality (Hepple 2010: 13).

Each set of these equality and immigration measures served to legitimate white privilege, by seeking to reduce disadvantaged groups' (potentially violent) discontent, while responding to (predominantly white) native Britons' desire to reduce immigration and its potentially negative economic and social repercussions. Moreover, the British race relations approach has been privileging business interests: immigration controls have been tied to labour needs, and anti-discrimination law has afforded workers only limited protections from exploitation, while facilitating free-market competition⁴⁸⁷. Notably, RRA68 was praised for decreasing the 'economic waste' of BAME workers' potential economic contributions (Home Office 1975: 2). This approach fits perfectly with Derrick Bell's (1980) interest convergence theory, which postulates that policies to improve the lives of disadvantaged groups are adopted only when they serve the interests of the privileged elite.

3. Poles in the UK

The first significant Polish immigration to the UK took place during and after WWII, accompanied by the establishment of Polish government-in-exile in London. Under the 1947 Polish Resettlement Act, some 200,000 Polish soldiers received assistance in settling in the UK (Parutis 2011a). Moreover, between 1947 and 1950, displaced Poles, Latvians, and Ukrainians who had been in labour camps arrived under the UK's European Voluntary Workers scheme, created to cover labour shortages in low-paid, unskilled work (McDowell 2009). Some Poles also entered as post-war refugees (Lebedeva 2000). The 1951 census recorded 152,000 Poles (Okólski and Salt 2014: 12).

⁴⁸⁶ To consider the need to eliminate discrimination, while promoting equality of opportunity and good relations in carrying out their functions.

⁴⁸⁷ Arguably, the origins of all equality measures in western Europe fall at the intersection of post-war human rights concerns and free market agendas (Hepple 2014: 23).

Emigration was severely curtailed under Communism, albeit small numbers managed to escape Poland, some settling in the UK. The 1981 census recorded 88,000⁴⁸⁸ individuals born in Poland (id: 12). Prompted by the imposition of martial law in Poland in 1981, several thousand asylum applicants trickled into the UK – mostly well-educated political dissidents (Düvell 2004). The fall of Communism in 1989 ended restrictions on Poles' ability to leave Poland, although entry to the EU (including the UK) was controlled through visa requirements. Hence, Polish migration to the UK at that time included significant numbers of visa over-stayers and undocumented migrants (Jordan and Düvell 2002: 41-2). Poles also entered pursuant to the 1991 Europe Agreement, which permitted them to establish businesses in the EU. By 2004, approximately 100,000 documented Polish-born persons lived in the UK, and an unknown number of undocumented Poles (Gilpin et al 2006).

Poles' pre-04 presence seems to have gone largely unnoticed, and garnered little public, media, or political attention. My research did not uncover any scholarly or media reports (in English or Polish) on disadvantage, racism, or discrimination encountered by Poles in the UK before the Enlargement. Although not methodologically rigorous, my review of pre-04 UK cases mentioning 'polish' or 'Poland' and 'discrimination' produced only a handful of results, all regarding denied asylum applications (mostly by Polish Roma). Although throughout the UK's history, even white migrants have faced some hostility (Panayi 2010), pre-04 Polish migrants appear to have escaped much antagonism. This is likely because they arrived in insignificant numbers, sought to integrate⁴⁸⁹, did not concentrate heavily in lower-skilled employment (Drinkwater et al 2009), and tended to settle in multicultural urban areas.

A. CEE Movers' Reception in the UK

After the Eastern Enlargement, Poles began to move to the UK in larger numbers. By 2016, the approximately 900,000 Poles in the UK resulted in Polish becoming the most common language after English⁴⁹⁰. They have dispersed widely throughout the UK, and have tended to undertake deskilled employment (as addressed below). Many have not expressed much interest in integrating – arguably in part due to their large numbers⁴⁹¹, and due to their frequently circular migration (enabled by the freedom of movement right and cheap transportation). Their social relations have been challenging. Some studies indicate

⁴⁸⁸ Presumably, some of the post-war arrivals had passed away since the 1951 census.

⁴⁸⁹ In part because going back to Communist Poland would have resulted in being prosecuted for defecting.

⁴⁹⁰ Followed by Punjabi, Urdu, Bengali, Gujarati, Arabic, French, Chinese, and Portuguese (ONS 2013).

⁴⁹¹ Prompting the establishment of Polish enclaves.

that these newcomers have not been accepted by the post-war Polish community due to being perceived as low-class (e.g., Garapich 2012). They have also been engaged in economic competition among themselves (id), and have faced racism and discrimination by Britons (as discussed below).

Recent CEE movers have been subjected to racialisation. The British media, and public and political discourses have ascribed negative ethnic-based identities to CEE movers, perhaps most noticeably in the context of the Brexit referendum. Although the concept of racialisation emerged in the context of New Commonwealth labour immigration (Miles and Brow 1989: 99-101), scholars (e.g., Jackson 1992; Solomos 1989) have extended it to the general arena of culturally constructed difference, including of CEE movers (e.g., Fox et al 2012a). According to Gilroy (2006), EU movers are automatically racialised and approached through the category of race in the UK simply because they are foreign.

Racialisation of some white groups goes hand in hand with reinforcing white privilege of the dominant group. As CRT scholars have pointed out, the benefits of white privilege accrue most fully to those who represent the norm at a given time and place (e.g., Tatum 2003). In the UK, the (white) British norm is closely circumscribed. For some white Britons, the word 'immigrant' conjures up images of unwelcomed spongers diluting British stock, including CEE movers (Garner 2007b: 160; see also Halej 2014; Levine-Rasky 2013: 31; Lewis 2005). The dominant white group in the UK actively constructs and reproduces its white privilege while excluding CEE movers - through everyday discourse, politics, economy, and culture. This of course serves as a contemporary example of how, as a time- and place-specific malleable construct, white privilege has not been available historically to all phenotypical whites, as addressed in Chapter 1.

CEE movers' racialisation has been accompanied by overt expressions of racism against them. Although much media attention has been devoted to racial hatred directed towards Poles in the aftermath of the June 2016 Brexit referendum (e.g., Travis 2017), everyday racism preceded the referendum – including hateful graffiti, threats, bullying, assaults, refusals to provide services, and property destruction (e.g., Johns 2014: 102; McDevitt 2014)⁴⁹². Moreover, various qualitative studies indicate that CEE movers had been experiencing discrimination in everyday interactions (Lopez Rodriguez 2010; Johns 2013c; Rzepnikowska 2019; Sime et al 2017), the labour market (e.g., Parutis 2011: 270–72; Appendix 1), and the housing market (e.g., Kofman et al 2009: 93-106), long before the

⁴⁹² See also <http://www.irr.org.uk/news/eastern-european-workers-under-attack/>.

referendum. Rzepnikowska (2019) argues that the racism observed after the referendum builds upon hostilities CEE nationals have been facing in the UK since the Enlargement.

In the weeks following the referendum vote, there was a significant rise in hate crimes⁴⁹³ - including several fatal assaults (Rzepnikowska 2019). Although all EU nationals as well as BAME members were targeted as outsiders (Travis 2017; Virdee and McGeever 2018), CEE movers (and especially Poles) appear to have been the primary victims (Weaver and Laville 2016). Expressions of racism against Poles and other CEE nationals have continued since then. For example, in 2017, an Oxfordshire fishery had put up a sign warning 'NO Polish or Eastern Bloc Fishermen Allowed. No Children or Dogs' (Kentish 2017) – reminiscent of the post-war 'No Irish. No Blacks. No Dogs' signs. Incidentally, a law firm specialising in representing CEE movers has noted that 'Many Eastern-European people are suffering the same pattern of discrimination that was suffered by many Black people ... after the Second World War'⁴⁹⁴. Although it is not possible to compare CEE movers' experiences to the historical (and contemporary⁴⁹⁵) positioning of Blacks, the statement nevertheless attests to the fact that CEE movers' experiences have been far removed from the EU's promises of equality.

B. The Government's Approach Towards CEE Movers

It is true that the Government had largely left CEE immigration to be shaped by market forces⁴⁹⁶ and by migrants' agency. To the extent that the UK's hands were not tied by EU membership, however, its policies have negatively targeted CEE movers, more so than other immigrants. As addressed in Chapter 4, the UK did impose indirect transitional restrictions on CEE nationals' right to mobility. Currie (2007, 2008) had speculated that these restrictions might produce negative long-term consequences for CEE workers - by encouraging them to take on low-skill, precarious jobs, and by prompting employers to perceive them as not entirely lawful and hence exploitable. The transitional period might indeed have had a lasting impact on CEE workers. Recent studies (see Appendix 1) indicate their poor labour market outcomes and experiences of exploitation. Employers continue to be uncertain about Bulgarian and Romanian workers' right to work in the UK. For example, Oxford's personnel website has a special tab explaining that restrictions no

⁴⁹³ Reported hate crimes rose by 57% in the four days following the referendum. National Police Chiefs' Council data indicated a 49% rise during the final week of July, when compared with the previous year. See also discussion in Section 1(B), Chapter 4.

⁴⁹⁴ See <http://net-solicitors.co.uk/employment-law/help-for-employees/discrimination/discrimination-against-eastern-european-people/>.

⁴⁹⁵ E.g., Wood et al 2009.

⁴⁹⁶ For example, half of CEE workers who arrived in 2004 had left by 2009 (Sumption and Somerville 2010: 18), at least some due to the economic recession.

longer apply to them⁴⁹⁷. In addition, employment agencies and the broader migration industry that procured CEE workers during the WRS period likely continue to approach them in the same way as they did before, as flexible workers desperate to secure employment. Some British employers expect them to tolerate deskilled jobs and poor working conditions (Ruhs and Anderson 2010; Parutis 2011). Moreover, even though the WRS for CEE nationals had ended in 2011 (and in 2014 for Bulgarians and Romanians), its effects have continued because past noncompliance with the scheme can be used to justify refusal of residence right in the UK⁴⁹⁸.

In addition to the negative effects of the WRS, other policies have been implemented against CEE movers. For example, the police, immigration authorities, and other governmental agencies have unlawfully detained and attempted to remove homeless CEE movers⁴⁹⁹ (even if they were employed or had permanent residency rights) (Burnett 2016)⁵⁰⁰. More generally, limitations on EU movers' access to welfare benefits were imposed in 2013 and 2014 (see n 350). And, of course, post-Brexit immigration policy will reduce the rights of most EU nationals, according to the December 2018 White Paper on 'The UK's future skills-based immigration system' ('2018 White Paper') (HM Gov't 2018).

But the Government's role in facilitating antagonism towards CEE nationals goes beyond its official policies⁵⁰¹. The broader political rhetoric has situated EU movers—and CEE nationals especially—as unwanted outsiders. Although prior waves of immigrants had faced public and right-wing opposition in the UK (Winder 2005), Burnett (2016) argues that today's antagonism towards movers has been widespread even within mainstream political culture. Since at least the early 2000s, integration arguments—touted not only by the far right, but also embraced by the liberal left—have targeted new immigrants from the CEE region (e.g., Kundnani 2004) as threatening to British identity (Phillips 2004).

Mainstream political figures, including some from the left, have blamed CEE movers for the UK's current social and economic problems. For example, in 2010, Labour Minister Ed Balls stated that post-04 CEE workers had negatively impacted Britons' wages and

⁴⁹⁷ See <https://www.admin.ox.ac.uk/personnel/permits/employbrn/>.

⁴⁹⁸ See <https://gcnchambers.co.uk/worker-registration-scheme-found-unlawful/>. In 2017, the Court of Appeal found the WRS's extension from 2009 until 2011 to have been disproportionate and contrary to EU law. See *Secretary of State for Work and Pensions v Gubeladze* [2017] EWCA Civ 1751. The Supreme Court's decision is pending.

⁴⁹⁹ This practice was ruled to constitute an unlawful impediment to the free movement right. See *Case CO/1440/2017, R (On the Application of Gureckis and others) v Secretary of State for the Home Department* [2017] EWHC 3298.

⁵⁰⁰ Some long-term residents and UK citizens of New Commonwealth background have recently faced similarly hostile treatment, as the Windrush scandal revealed.

⁵⁰¹ Further reinforced by the media's propagation of racist attitudes towards CEE movers (e.g., Drzewiecka 2014; Grzymalska-Kazłowska 2017: 257; Spigelman 2013).

employment conditions (Balls 2010), an assertion contradicted by empirical studies (e.g., Wadsworth et al 2016). Former MP Phil Woolas had bemoaned the ‘disruptive effects’ of the Eastern Enlargement on British public services (Daily Telegraph 2009). Following Tony Blair’s (2004) earlier example, David Cameron (2014) specifically pointed to Poles as the reason for his 2013 proposals to curb EU movers’ access to welfare benefits⁵⁰². When such limitations were imposed in 2014, no MP spoke out against them.

More generally, the Government has been propagating anti-immigrant ideology and policies, likely creating a climate where all those with traces of foreignness⁵⁰³ can be demonised. Government policy statements since 2010 have encouraged various agencies to profile all foreigners’ backgrounds and immigration status (Burnett 2016: 89-90). Moreover, provisions under the Asylum and Immigration Acts 1996 (Section 8) and 2006 (Section 15) encourage employers to check all job applicants’ eligibility for employment in the UK. This likely negatively impacts all migrants’ employment (Kofman et al 2009), by embedding antagonism towards immigrants within ‘common sense racism’, propagated through a political consensus (Grayson 2013). This approach continues to be in force today⁵⁰⁴, as do the 2014 provisions that landlords must check prospective tenants’ immigration status⁵⁰⁵. Violating either provisions results in substantial fines (up to £10,000) for employers or landlords. Of course, EU nationals do not have paper proof of employment eligibility or of their official immigration status (unless they already possess permanent residency). More generally, the 2013 Home Office ‘Go Home’ campaign, officially meant to target undocumented immigrants, contributed to the creation of a racist political culture where all immigrants became scapegoats for public discontent (Grayson 2013). Rzepnikowska (2019) attributes post-referendum racism against Poles to such long-standing policies positioning all migrants as outsiders and parasites.

It is popularly assumed that racist incidents stem from an inherent racism of poor white Britons or from middle-class antagonism (Garner 2012), while the role of political elites in this process has been given less attention (Rzepnikowska 2019: 70). My discussion above indicates that the Government has had a role to play in propagating a climate of

⁵⁰² ‘It’s wrong that someone from Poland, who comes here, who works hard and I am absolutely all in favour of that — but I don’t think we should be paying child benefit’.

⁵⁰³ The British public rarely differentiates between refugees, migrants, and movers (McKay and Winkelmann-Gleed 2005). Thus, policies and discourse targeting one group likely contribute to a negative climate against all foreigners.

⁵⁰⁴ See <https://www.gov.uk/employee-immigration-employment-status>.

⁵⁰⁵ See <https://www.gov.uk/landlord-immigration-check>. ACAS (2012) recommends that ‘employers ... make sure that all applicants provide adequate documentation that they are allowed to work in the UK ... regardless of where they come from’.

antagonism against CEE workers. Sivanandan (2001) has argued that the State is at the root of modern British racism. To divert attention from this fact, Government statements condemning post-referendum racist incidents and incendiary media reports have consistently placed the blame on individual perpetrators (Burnett 2016). This is in line with CRT scholars' observation of how racism is portrayed as individual aberrations, while the role of the political elite remains concealed (Delgado and Stefancic 2017).

Several MPs have brought post-Brexit incidents targeting Poles to the attention of Parliament. For example, they have reported Poles' being stopped at the border when entering the UK, being incorrectly denied naturalisation applications, and being bullied and attacked⁵⁰⁶. After pressure from Labour ministers and the EU citizens' rights campaign 'the3million', the Equalities Office announced in September 2017 that it would examine discrimination against CEE and other EU citizens in the UK. This is the first Government initiative to look specifically at racism and discrimination directed at EU movers. As CRT scholars have pointed out, incidents of racism and discrimination easily coexist with formal anti-discrimination protections (Crenshaw 2011). It has taken the Government many years to acknowledge this in the context of movers.

C. Polish Movers' Positioning in the Labour Market

The employment context presents an especially rich setting to study Poles' disadvantage and discrimination. Ethnic discrimination in Europe happens most commonly in access to and treatment at work (Jefferys 2015). Labour market outcomes are key measures of integration with majority society, and have been used to gauge disadvantage through exclusion. Employment is critical to promoting equality: an unequal ability to benefit from the labour market has automatic consequences for social, educational, and health inequalities. Employment has served as the main pull factor for Polish movers to the UK (Drinkwater et al 2009; Düvell 2004a). Poles have had the highest employment rates in the UK, higher than of white Britons and of other immigrant groups (ONS 2014, 2018). High rates of access to employment, however, are not synonymous with equality or integration. Rather, it is the quality of employment and the ability to equally benefit from work that are better indicators of inclusion. Notably, all the post-04 cases of CEE nationals' discrimination that my research uncovered pertain to the employment context (discussed below).

⁵⁰⁶ Anglo-Polish Relations, Hansard vol 627, House of Commons Debate, 18 July 2017, <https://hansard.parliament.uk/Commons/2017-07-18/debates/AA08DAFE-E3CF-4AD2-B714-19EF56FEBFB5/Anglo-PolishRelations>.

Although studies of CEE migrants' experiences in the UK labour market before 2004 have been generally lacking⁵⁰⁷, significant scholarly attention has been devoted to documenting their outcomes since the Enlargement (see Appendix 1)⁵⁰⁸. An analysis of various large-scale data sets revealed that, whereas non-EU migrants and EU-14 movers have had employment patterns resembling those of British workers, post-04 CEE workers have tended to take up low-skill jobs (especially in manufacturing, distribution, construction, and hospitality) (Drinkwater et al 2009; ONS 2016; Sumption and Somerville 2010). Employers providing 3D (dirty, dangerous, and dull) jobs have been especially keen to employ them (Favell 2008). Annual Population Survey data indicates that CEE movers have experienced significantly higher deskilling in the UK labour market and lower returns on their education than other immigrants (Sirkeci et al 2018; Sumption and Somerville 2010). Moreover, this deskilling effect has not been just temporary, unlike for other migrant groups, as CEE movers have tended to stay in low-skill jobs (Sirkeci et al 2018). They appear to suffer a wage penalty not only when compared to British workers, but also when compared to other migrants⁵⁰⁹, even in studies controlling for human capital differences (including education, experience, and language) (e.g., Drinkwater et al 2006: 16), and for the poor transferability of foreign educational credentials (e.g., Cook et al 2010). For example, during 2004-09, CEE movers earned 12.5% less than Britons, while the average non-EU immigrants and EU-14 workers earned more than British workers (Sumption and Somerville 2010: 16). Among CEE workers, Poles have fared particularly poorly under some of these indicators (e.g., Drinkwater et al 2009; Eade et al 2007).

Qualitative research similarly indicates CEE movers' disadvantaged position in the labour market. In a study of more than 30 CEE workers in a northern British city, Cook et al (2010) documented widespread deskilling, with employers unwilling to recognise their qualifications and experience from countries of origin. Moreover, supervisors (none of whom were of CEE background⁵¹⁰) tended to ignore CEE workers' complaints (id). A review of research evidence undertaken by Kofman et al (2009: 75-92) concluded that CEE movers frequently face racial harassment by supervisors and co-workers, and experience exploitation (including lower wages, advance fees to secure jobs, lack of contracts, and illegal deductions by gangmasters). Surveys and interviews with CEE workers have revealed similar findings (e.g., Anderson et al 2008; Ciupijus 2012b),

⁵⁰⁷ But see Anderson et al (2006) (finding frequent deskilling and exploitation of CEE migrants already working in the UK on the eve of the Enlargement).

⁵⁰⁸ See also Section 6(C)(ii) in Chapter 4.

⁵⁰⁹ Post-04 Polish movers' labour outcomes have also been worse than those of pre-04 Polish immigrants – in terms of earnings (Drinkwater et al 2009) and returns from education (Eade et al 2007).

⁵¹⁰ Managerial positions tend to be dominated by Britons and white western immigrants (Parutis 2011).

especially after the 2008 economic downturn (e.g., EEAC 2013; Johns 2013). Their vulnerability is often increased through housing tied to their employment (Phillimore et al 2008⁵¹¹; see also Anderson et al 2008). Some CEE nationals have even been trafficked into the UK, put into debt bondage and forced labour, in circumstances considered modern-day slavery (Lawrence, 2012; K Harris 2013). Such treatment prompted a predominantly Polish workforce at a repackaging plant in northern England to liken their place of employment to a ‘labour camp’ (Ciupijus 2012c). Although analogies to Nazi atrocities are an exaggeration, labour exploitation of recent CEE workers appears somewhat common, especially in low-skill jobs. Interviews with the Labour Exploitation Advisory Group representatives working with vulnerable workers suggest that post-referendum uncertainties and an increase in anti-immigrant hostility are likely to have amplified all migrant workers’ exploitation (France 2017). The post-Brexit regime will likely further increase inequalities and exploitation experienced by at least some groups of immigrants (as discussed below).

D. How CEE Movers Differ from Other Migrants

It is true that many foreign-born groups tend to experience racism, inequalities, exploitation, and discrimination in the UK (e.g., Kofman et al 2009; EHRC 2016), especially those who are low-skilled or employed via employment agencies or gangmasters (CAB 2005; EHRC 2010, 2012). This has likely been further fostered by the media and right-wing politicians, and the British public’s anti-foreign sentiment. CEE workers, however, appear to experience some unique challenges when compared to other disadvantaged groups (see generally Appendix 1). They have been overrepresented in agency workforces compared to other immigrant groups (French 2012; Sumption and Sommerville 2010: 18-19)⁵¹², with approximately half of CEE workers obtaining employment through agencies during 2004-09 (Jones 2014). Agency employment has been associated with greater rates of exploitation – such as being paid below statutory wage rates, physical and verbal abuse, unlawful pay deductions, denial of statutory breaks and access to toilets, lack of health and safety protections, and sexual harassment (EHRC 2010; Kofman et al 2009). At least some employment agencies have been documented to treat CEE workers more poorly than other workers, and to encourage employers to do the same (Pemberton and Stevens 2010). Moreover, an exploitative migration industry has

⁵¹¹ Including in caravans, sheds, and greenhouses.

⁵¹² A significant number of non-EU workers rely on work visas, tied to specific employers in skilled occupations, and hence do not use agencies.

developed to especially target Poles (Garapich 2008; Jones 2014)⁵¹³. Such problems are likely amplified in rural areas, due to the lack of support services and many employment options.

Moreover, CEE workers have been increasingly preferred by at least some UK employers to fill shortages in low-skill jobs. While the Equality Acts 2006 and 2010 were being adopted, greater immigration controls were implemented, including the points system that in effect prevents low-skill immigrants from outside the EU⁵¹⁴. Encouraged by employment agencies' marketing of CEE, and especially Polish, workers as willing to accept any work arrangements, for less pay than others (Jones 2014), some British employers have indicated a preference for them over other migrants⁵¹⁵ (e.g., MacKenzie and Forde 2009a). A survey of its members led the British Chambers of Commerce to praise CEE workers' good work 'attitude' (Senior European Experts Group 2013).

As Wu (2003) had observed, in the context of the 'model minority' stereotype of far-east Asians in the United States, superficially positive stereotypes can mask disadvantage and justify inequalities. Indeed, some British employers praise CEE movers as more tolerant of poor employment conditions, more productive and flexible, more compliant (MacKenzie and Forde 2009a; McKay 2009; Parutis 2011; Ruhs and Anderson 2010; Wills et al 2009: 95-9), and more amenable to working in isolated rural areas than other workers (Sumption and Somerville 2010: 24). MacKenzie and Forde's (2009a) case study of a Yorkshire glass packaging plant employing large numbers of Polish (as well as Baltic) workers indicates how some employers seek them as part of a hiring strategy to target exploitable, vulnerable workers with low labour market power. Ciupijus (2012a: 59) concluded that 'it is not work ethic but lower wages, the ease of firing, and [lower] social capital' that make CEE movers appealing to employers as 'good' workers. This view of CEE workers is likely facilitated by and reinforces their media, political, and public racialisation as cheap, temporary menial labourers. This broader employment context, aided by contemporary transnational market forces (addressed in Chapter 4), has been overlooked by UK adjudicators and the British equality discourse (as explained below) - in line with CRT scholars' observation of how the

⁵¹³ In addition, some Poles have been targeted by fraudsters posing as employment agents (Republic of Poland 2012).

⁵¹⁴ It privileges skilled, wealthy, entrepreneurial, and temporary workers. A migration cap was also imposed limiting non-EU workers to those with specific skills. By 2013, non-EU workers had to have graduate-level education to be able to work in the UK. See <https://www.gov.uk/browse/visas-immigration/work-visas>; Home Office (2006).

⁵¹⁵ In the 1970s and 80s, 3D employers similarly appreciated Asian workers (Jackson 1992), and more recently, those from the former Yugoslavia and Albanians (e.g., MacKenzie and Forde 2009a).

legal system does not consider the actual economic and social inequalities faced by minority groups (Delgado and Stefancic 2017).

i. The Role of Whiteness

CEE movers' whiteness has complicated their experiences of disadvantage and racism. Historically, whiteness has not protected them from racialisation and racism in the UK. For example, in the 1910s, Edward Troup, Undersecretary of State, asserted that 'aliens from Eastern Europe' were lowering British workers' wages, and that 'their habits had a demoralising effect' (Cohen 2006: 71). In 1924, his successor, John Pedder, discriminated against naturalisation applications filed by 'Slavs ... and other races from Central and Eastern parts of Europe'⁵¹⁶. Perceived as fundamentally 'different from the British people', those from the CEE region were contrasted with 'the Latin, Teuton and Scandinavian races', who share 'a certain kinship with British races ... with the life and habits of this country and are easily assimilated'⁵¹⁷. Dyer (1997: 41-80) has noted inherent distinctions between the whiteness of the English, Anglo-Saxons and North Europeans, and that of Southern and Eastern Europeans. According to Anderson (2013: 45), CEE movers present a 'degenerate' whiteness, 'contingent and degraded'. This type of whiteness does not exempt them from the effects of racism (Fox et al 2012a: 681).

Of course, their whiteness has bestowed some advantages on CEE movers. Poles can go unnoticed in public spaces due to the lack of phenotypical differences with white Britons. Griffiths (2017) attributes 'civilised' interactions she had observed between Poles and Britons in a small English town at least in part to Poles' skin colour. Of course, their invisibility dissipates once they speak or exhibit markers of Polishness, such as shopping at Polish shops, using Polish satellite dishes, or having Polish car registration plates. Their whiteness can also make them more employable. For example, after WWII, displaced CEE persons benefited from the UK immigration policy preferences to fill domestic and unskilled posts (Fox 2013; McDowell 2009). Today, employers also sometimes prefer CEE nationals due to their whiteness (Parutis 2011) - especially as care workers⁵¹⁸ or where they interact with British customers⁵¹⁹ (Ciupijus 2012a; Pemberton and Stevens 2010). But once again, CEE movers have been used to populate predominantly 3D and low-skill jobs, especially since the 2006 managed migration strategy has been phasing out non-EU low-

⁵¹⁶ Minute by Sir John Pedder, 28 May 1924, HO 45/24765/432156/17.

⁵¹⁷ Id.

⁵¹⁸ CEE and other migrant care workers often face racism and discrimination at work (Stevens et al 2012).

⁵¹⁹ More generally, Favell (2008) argues that the European public is more comfortable with CEE than non-white or non-Christian labour migrants.

skill workers (Home Office 2006). Since under the proposed post-Brexit immigration policies (to be likely in effect until a review in 2025), temporary, low-skill EU workers will have access to the UK's labour market without needing to secure employment beforehand, it is not unlikely that CEE nationals will continue populating such positions. After Brexit, however, they will also likely be competing with non-EU nationals⁵²⁰, which will likely drive all low-skill migrants' wages down and increase their vulnerabilities.

Poles' whiteness can also make racism or discrimination against them go unacknowledged. It can stand as a barrier to official and public recognition of race-based harassment and violence perpetrated against them. At least some white Britons appear more comfortable directing explicit criticism against white than non-white migrants (Lewis 2005); and some members of the public assume that the concepts of racism and discrimination only apply to non-white victims (Tan 2014). For example, a jury had found that an assault against a Polish mover that caused him severe head injuries did not constitute a hate crime, despite the fact that the perpetrator had used phrases such as 'Polish bastard' (Scotsman 2007). Some police officers have questioned whether CEE movers deserve the same protections as visible minorities (Johns 2014: 101). Poles appear aware of this mistaken assumption, or perhaps even subscribe to it themselves. For example, a Polish participant in a qualitative study of 89 CEE movers' experiences in a northern English city remarked that 'English people are scared of black people. Black people can take you to court and say that you are racist. You don't have this problem with Poles, so Polish people are now on the end' (Cook et al 2010: 62).

More generally, CEE movers have been absent from public debates, political discourse, and conceptual approaches towards equality and discrimination (as addressed below). Racism against them is also often attributed to cultural, xeno-based antagonism (e.g., Sivanandan 2001), implying that it is somehow less condemnable than phenotype-based racism. According to Rattansi (2007: 95-8), pretending that antagonism towards these new immigrants is not proper racism makes it more dangerous than the older, overt forms of racism. Furthermore, while law and legal discourse have addressed the more violent and more obvious forms of race-based wrongs, they tend to lack the vocabulary to tackle wrongs that appear culturally-based (Delgado and Stefancic 2017).

Post-04 CEE movers' degenerate whiteness has also pointed to new fractures within racial hierarchies. Albeit not always based on correct premises, Poles perceive being

⁵²⁰ It is not yet clear which non-EU countries will be designated as 'low-risk' and hence eligible for this entry route.

disadvantaged in comparison to both white British and BAME workers (Cook et al 2010). For example, a Polish participant in a study concluded that ‘it would have been better if I was black, I mean, if I was from Africa, because people would stop treating me as an intruder ..., and they feel guilty about those from Africa because of the history, because they have to make it up to them’ (Rzepnikowska 2019: 72). Such views have been accompanied by Poles’ emphasis on their whiteness (and Europeanness) to improve their positioning within the UK’s racial hierarchy (Fox et al 2015). This approach is reminiscent of how certain Caucasian immigrants⁵²¹ to the United States a century ago asserted their whiteness, and expressed antipathy towards non-whites to move up on the scale of racial hierarchy (Ignatiev 2008; Roediger 2002). Such attitudes also reflect Poles’ own racism: they expect their whiteness to automatically protect them from disadvantage suffered by BAME groups. At the same time, Poles are resented by other Caucasian groups. In Cook et al’s (2010) study, Slovak and Roma workers felt disadvantaged compared to Poles due to the latter’s large presence and the availability of service providers catering to them. My review of cases (described below) confirmed such tensions between racial and ethnic groups. As Samaluk (2014) has noted, there is need for a more nuanced look at CEE movers’ positioning within the UK’s hierarchy of privilege, looking beyond the traditional black-white paradigm.

E. Situating CEE Movers Within the UK’s Equality Framework

Despite their documented disadvantage and experiences of racism, CEE movers have been absent from official equality and race relations discourse. For example, the Equality and Human Rights Commission’s⁵²² (‘EHRC’) most recent, 300-page long Employment Statutory Code of Practice mentioned white migrants only once, in an illustrative example of employer’s indirect discrimination of seasonal workers (EHRC 2011a). My review indicates that publications posted between 2008 and 2017 on the equality policy tab of the official UK Government website (www.gov.uk) made no mention of migrants or white ethnic groups. The lengthy publication presented by the Equalities Office (2008b) to the Parliament during the Equality Act 2010’s consultation period made no mention of immigrants, despite being drafted after consulting two migrant groups⁵²³. Moreover, by noting that ‘if you are from an ethnic minority you are a fifth less likely to find work than if you are white’ (Equalities Office 2008a: 18), the Equalities Office approached ‘ethnic

⁵²¹ Including the Irish, and Eastern and Southern Europeans.

⁵²² As with CRE’s Codes of Practice, its Codes and other pronouncements are not legally binding, although adjudicators may refer to them.

⁵²³ The Migrants’ Rights Network (working for a rights-based approach to migration), and the Joint Council for the Welfare of Immigrants (campaigning for justice in immigration, nationality, and refugee policies).

minority' and white groups as mutually exclusive, thus implicitly overlooking whites' heterogeneity⁵²⁴. The final report of the Equalities Review (2007: 5) did acknowledge that equality policies should target groups not traditionally emphasised by anti-discrimination measures, but only referred to British working-class whites. The 170+ page report did not devote any attention to CEE movers. After the Equality Act 2010 was passed, its 200+ page Explanatory Notes (2010) did not mention migrants, movers, or non-UK nationals. This is likely reinforced by, and reflected in the fact that empirical studies of economic outcomes and markers of social inclusion tend to lump all whites together⁵²⁵.

Government-sponsored advice groups have only taken minimal notice of CEE workers' discrimination. None of the resources available on the Equality Advisory and Support Service⁵²⁶ website refer to discrimination suffered by white ethnic minorities, migrants, or foreigners. Among all the information posted on the ACAS website⁵²⁷, only one mentions CEE workers. A short 'workplace snippet' for those employing migrants notes that employers should treat them the same as British workers, and should protect them from 'exploitation, discrimination and harassment' (ACAS 2012a). This acknowledgement is likely due to the fact that, as an employment claims conciliation service, ACAS is exposed to many reports of CEE workers' discrimination.

Moreover, (white) EU movers have been ignored by integration and equal opportunities discourse and measures. No national integration measures have addressed white groups' needs⁵²⁸. What national and local integration measures⁵²⁹ do exist have been overlooking recent immigrants⁵³⁰, and have instead focused on the treatment of long-standing minorities in public services and private markets (Saggar and Somerville 2012: 2) - especially blacks and Asians (e.g., Cantle 2001; Commission on Integration and Cohesion 2007⁵³¹; London Councils 2017; Social Integration Commission 2014). In its newest

⁵²⁴ Even if white migrants do not appear disadvantaged in their *access* to employment (as discussed earlier).

⁵²⁵ Similarly, the Irish have traditionally been overlooked in race discrimination studies. For example, Hood's (1992) seminal study of the role of race in sentencing considered only Asian, Black, and White racial categories.

⁵²⁶ See <http://www.equalityadvisoryservice.com/app/answers/list>.

⁵²⁷ See <http://www.acas.org.uk/index.aspx?articleid=608>.

⁵²⁸ Although there have been some discussions about integrating (typically UK-born) Gypsies and Travellers. E.g., Gypsy and Traveller Communities (Housing, Planning and Education) Bill 2017-19 (failed to progress through the House of Lords).

⁵²⁹ Typically focused on strengthening a sense of British identity, improving outcomes in education and employment, and increasing community cohesion (Saggar and Somerville 2012).

⁵³⁰ Except for refugees. See Home Office (2005).

⁵³¹ Notably, the Commission on Integration and Cohesion report focused on native Britons' integration issues, concerns which 'sit *alongside* the flow of EU citizens from Eastern Europe' (¶ 1.5, emphasis added), and pointed how CEE nationals tend to see the UK 'as an attractive place to visit and work but perhaps not always a new "home"' (¶ 1.6). Thus, CEE movers were portrayed as short-term workers, not part of the

pronouncement on integration, the Government focused on integrating BAME groups and women, and on countering extremism, through mostly local initiatives (Home Office 2018a). It also noted that, rather than relying on policy measures, recent immigrants should take it upon themselves to integrate into British society (id: 35-42⁵³²). Similarly, CEE movers have not featured in the UK's equal opportunities framework. Governmental data collection also tends to overlook them. CEE movers' exclusion from such discourses and policies (whatever their level of effectiveness) normalises their experience of inequalities.

This oversight has been critiqued by scholars. For example, after noting that new migrants are commonly not considered to be 'racial groups' for purposes of policies mandated by the Equality Act and under CRE guidance notes, the Institute for Public Policy Research recommended that race relations encompass CEE movers (Rutter and Latorre 2009: 45-6). Similarly, an independent report prepared for the EHRC, after its 2009 migration summit, did point to inequalities experienced by CEE movers, and recommended that their (and their children's) access to equality be better supported (Sumption and Somerville 2010: 45-6). Since then, however, there has been little change in equality, integration, or equal opportunities discourse or policies.

CEE movers' absence from equality discourse and policies is likely due, at least in part, to a much shorter history of disadvantage and discrimination in the UK than BAME individuals and women. I contend that this absence might also be attributable to the fact that their arrival does not fit the UK's historical race relations paradigm (discussed above). Unlike some earlier migration waves, CEE movers have often engaged in temporary migration, are privileged in some ways due to whiteness, and have been largely ignored by migrant advocacy organisations. Moreover, whereas New Commonwealth migrants and the Irish have at times engaged in violent conflict (often as a response to violent racism against them), CEE movers have not done so. It is also possible that the Government has felt a lesser sense of responsibility towards all EU movers – due to their relatively privileged position among migrants (as white EU citizens), and now, due to their status being in flux after the Brexit referendum.

Unfortunately, race-based wrongs cannot be effectively addressed if they are absent from legal discourse (Crenshaw 2011). Groups that are absent from discourse might be more

British polity. Moreover, the report noted CEE movers' otherness by suggesting that recent EU migrants be provided welcome packs 'that cover behaviours, norms etc' (¶ 5.24).

⁵³² This resembles the ECJ's reasoning in *Gusa* (see Chapter 4, Section 5(A)).

easily overlooked when adjudicators apply anti-discrimination provisions (even if they are included under a simple, doctrinal reading of such measures). In today's British equality discourse, whiteness typically⁵³³ appears homogeneous and invisible, normalised as privileged⁵³⁴. This reproduces white privilege accruing to those who fit the white British norm, while silencing marginalised and racialised whites, and legitimising existing social structures and class relations.

It remains to be seen how the post-Brexit nature of CEE nationals' settlement and migration will affect the equality framework's approach towards them. According to the 2018 White Paper, the post-Brexit immigration regime (in effect until at least 2025) will create three routes for lawful presence in the UK: (1) settled EU nationals, (2) highly-skilled workers (uncapped) tied to specific employer sponsors, and (3) low-skill, temporary labourers⁵³⁵ (uncapped) who may enter as jobseekers on twelve-month visas, with a cooling-off period of a further twelve months, and no eligibility for public benefits. It is possible that those who will lawfully settle (or at least their progeny) will eventually become incorporated into the British norm and hence less in need of equality protections. It is not clear if the UK will continue being an appealing destination for CEE nationals after Brexit - especially since they will continue having access to employment throughout the EU, and will have to compete with non-EU migrants in the UK (whose entry will likely be facilitated by post-Brexit policies). For those CEE workers who will arrive after Brexit, it will be more likely as temporary labourers rather than as skilled workers, due to the greater ease of gaining entry under the former category. Some temporary labourers might also remain unlawfully after their twelve-month visas expire. Thus, a significant portion of post-Brexit CEE workers is likely to be engaged as temporary (some possibly undocumented) low-skill workers, groups lacking political power and typically not eliciting much Governmental protection. Highly-skilled EU workers will likely comprise too small and too privileged a group to be encompassed by equality discourse.

Although CEE movers' presence does not fit the UK's historical equality paradigm, it appears to follow the traditional British approach to migration control. As with New Commonwealth migrants, the entry of CEE workers has been driven by British employers'

⁵³³ With the notable exception of the progressive socio-economic duty, intended to respond to the disadvantage of the white British working class (discussed below).

⁵³⁴ Unless fractured by protected characteristics such as gender, sexual orientation, or disability.

⁵³⁵ This category was created because '[e]mployers have to some extent become reliant on lower skilled workers from the EU for certain jobs' (HM Gov't 2018 ¶ 25), especially in construction and social care (¶ 26), fields often populated by Poles and other CEE workers. This route will be available to persons from 'low-risk' countries – including the EU (summary point 6; ¶5.1), and beyond.

demand for flexible, fungible, low-paid workers. For a decade after the Eastern Enlargement, the UK did not need to impose direct immigration limitations on their entry since it was directly responsive to employment opportunities. Due to their low reliance on the public purse (reinforced through policies curbing their access to benefits) and high rates of employment, CEE movers have been contributing to the UK's economy. The Government has not needed to ensure their equality rights to reap these economic contributions. If anything, their exploitation at work and insufficient protections by the anti-discrimination framework (as addressed below) have reduced business costs.

As with post-war New Commonwealth migration, however, CEE movers' presence had reached a point prompting public and political outcry, and bringing about increased immigration controls (or at least the UK's ability to do so⁵³⁶) through withdrawing from the EU. The post-Brexit immigration policy proposal, however, differs from policies restricting New Commonwealth immigration in the 1960s and 1970s. The 2018 White Paper seems to encourage (uncapped) temporary low-skill migration, much of which will likely be from the CEE region. Thus, the new immigration framework continues to cater to business needs for an exploitable, revolving reserve army of cheap labour (see n 535). Whereas by the 1970s, large numbers of New Commonwealth migrants had settled in the UK, it is uncertain how many CEE movers will rely on the settlement scheme. Hence, employers are in need (at least for the time being) of a continued entry route for low-skill workers. Notably, unlike New Commonwealth migrants, post-Brexit low-skill workers will be unable to settle in the UK and unable to access most social benefits.

4. Post-04 Equality Laws

Today's racial equality legislation is the seventh such statute in five decades. Although frequent changes might indicate legislative initiative and hold promise of improvement, they also suggest the continued prevalence of discrimination and racial exclusion. Moreover, the constant need to improve legislation indicates that previous measures have been ineffective. All the equality laws discussed below were introduced by the Labour Party.

A. Transposition of the Race Equality Directive

The Directive's transposition, required by July 2003 in EU-15 States, was met with little opposition within British political and legal spheres (O'Cinneide 2012). By then, the UK

⁵³⁶ The 2018 White Paper does not immediately seek to curb immigration, at least not until a policy review in 2025.

already had a well-developed anti-discrimination framework⁵³⁷. The business establishment did express some concerns, however. In response, the Government emphasised that equality protections would increase productivity (Cabinet Office 2001: iii) and would not impose ‘unnecessary burdens’ on businesses (id: vi).

The Race Relations Act 1976 (Amendment) Regulations 2003 implemented the Directive by making changes to RRA76. Thus, the UK avoided a much lengthier—and likely more controversial—transposition through comprehensive reforms. In line with the Directive, the UK provided new definitions of indirect discrimination and harassment; and shifted the burden of proof to make it easier for victims to prove discrimination. In its 2007 reasoned opinion, however, the European Commission found fault with the UK’s definition of indirect discrimination and its lack of transparency regarding remedies available to victims (Commission 2009d). By the end of 2007, those sections were revised, and the Commission concluded its infringement procedure. Although UK policymakers and judges rarely explicitly refer to the Directive⁵³⁸, its transposition also prevented any regression in the UK’s equality regime (Meer 2017).

B. The Equality Act 2006

The Directive, along with other EU anti-discrimination measures, also prompted the adoption of a single UK equality act (Meer 2010). After more than a decade of calls for consolidating all UK anti-discrimination legislation into one act (id), the Equality Act 2006 (‘EqA2006’) was implemented to prohibit discrimination due to age, disability, gender, gender reassignment, race, and sexual orientation (Section 10(2)). It also added a new protected ground of religion or belief (Part 2), and imposed a duty on public authorities to promote equality of opportunity between women and men (Section 84). Moreover, it was accompanied by the creation of the EHRC (Part 1), one of Europe’s largest human rights bodies, which combined three pre-existing equality bodies⁵³⁹. At the same time, greater immigration controls were being imposed (on non-EU migrants), including the points system (mentioned earlier)

⁵³⁷ Moreover, the UK assumed that the ECJ would interpret the Directive similarly to its analysis of gender equality legislation, so the UK transposed it in line with how it had transposed gender equality laws (O’Cinneide 2012).

⁵³⁸ Possibly because they perceive UK policies as the most advanced in Europe (Fella and Ruzza 2013).

⁵³⁹ CRE; Equal Opportunities Commission; and Disability Rights Commission.

C. The Equality Act 2010

i. Background and Legislative History

In 2005, Tony Blair commissioned the most extensive UK review of equality since the 1970s (Discrimination Law Review 2007). The independent Equalities Review was to conduct a wide-ranging examination of inequalities in the UK and of the role of social policy. Moreover, the Discrimination Law Review was to undertake a review of all existing discrimination legislation, and to bring forward proposals for a more effective equality framework. Both Reviews reported in 2007, followed by a year-long consultation process.

Harriet Harman, the then Minister for Women and Equalities, presented the Equality Bill in 2009. After much scrutiny by the Parliament, the Bill became law in April 2010. Although one of the last measures under the Labour government, it had ultimately received cross-party support. Implemented in stages, the new law consolidated and clarified nine major pieces of anti-discrimination legislation⁵⁴⁰, close to 100 statutory instruments, and more than 2,500 pages of guidance and codes of practice developed over more than four decades (Equalities Office 2008a). Composed of 218 Sections, the EqA2010 is more detailed than previous equality legislations⁵⁴¹. Notably, it increased protections by allowing limited positive action and limited collective remedies in employment claims, permitting reliance on hypothetical comparators, and prohibiting associative and perceived discriminations. The Act's most innovative provisions, however, were not brought into force by the Conservatives, due to being too cumbersome for business, as addressed below.

The adoption of the EqA2010 followed thirteen years⁵⁴² of lobbying by human rights and equality groups (Hepple 2014: 11-16). During this process, migrant voices were not heard. There were no lobbying efforts by migrant or white ethnic minority groups during the adoption of the EqA2010 (or of preceding anti-discrimination laws) (Bell 2015). My review of all Commons and Lords debates surrounding the EqA2010 revealed that migrants (or movers) were never mentioned. Moreover, they were also not mentioned in any Parliamentary discussions between 2004 and 2010 that referred to the concepts of

⁵⁴⁰ Equal Pay Act 1970; Sex Discrimination Act 1975; RRA76; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; EqA2006, Part 2; Equality Act (Sexual Orientation) Regulations 2007.

⁵⁴¹ For example, EqA2006 was composed of 95 Sections.

⁵⁴² The delay is also attributable to waiting for TEU Article 13 Directives to be adopted, and for the EHRC to become well-established (Hepple 2014: 5).

‘discrimination’ or ‘inequality’. Instead, Parliamentary deliberations had focused on BAME groups, and had tended to lump whites into one (allegedly privileged) group⁵⁴³.

ii. Socio-economic Duty

The Government’s recognition of the relationship between inequalities and socio-economic class was brought to the foreground in its 1999 White Paper ‘Opportunity for All: Tackling Poverty and Social Exclusion’ (DSS 1999). The Department of Social Security concluded that the Government should address poverty, consider its role in creating and perpetuating inequalities, and provide all persons with equal opportunities regardless of their economic or social background (id). Moreover, during the adoption of the EqA2010, the Equalities Review’s final report (2007: 5) acknowledged that equality policies should target groups not traditionally emphasised by anti-discrimination measures, such as poor whites. Poverty had been documented to facilitate a ‘cascade of disadvantage’ (id: 47). Notably, interactions between poverty and inequalities in housing, education, employment, and healthcare were well documented by that time (e.g., Hills et al 2009: 11). Furthermore, it was well known that economic inequalities between different ethnic groups, and between different social classes⁵⁴⁴ had been increasing over time in the UK (National Equality Panel 2010: 38-40).

Having been introduced by Labour’s Harriet Harman⁵⁴⁵, and passed by both Houses of Parliament, Section 1 of the Bill that became the EqA2010 sought to ‘reduce the gap between rich and poor’, and to ensure ‘that public bodies systematically and strategically take account of people who are poor and clearly disadvantaged’⁵⁴⁶. In addition to its symbolically progressive value, the provision required specified public bodies⁵⁴⁷ to have due regard in their decision-making to ‘reduc[ing] the inequalities of outcome which result from socio-economic disadvantage’ (Section 1(1)). Thus, public policies were to seek to reduce inequalities in education, health, and housing stemming from socio-economic disadvantage (Explanatory Notes 2010). This duty applied to all groups regardless of

⁵⁴³ E.g., <https://hansard.parliament.uk/Lords/2016-05-03/debates/A35A0488-48AB-4FDC-B766-AE34FB86FDE6/BlackAndMinorityEthnicPeopleWorkplaceIssues?highlight=%22equality%20act%22#contribution-5C0FE236-E383-4A6D-AF5E-5F71B337B749>.

⁵⁴⁴ As well as between women and men.

⁵⁴⁵ Hence, it was commonly known as ‘Harman law’.

⁵⁴⁶ House of Lords Debates, 15 December 2009, col 1407.

⁵⁴⁷ Including Minister of the Crown; most Government departments; county, district, and borough councils; health and social care authorities; and police and crime commissioner.

race⁵⁴⁸. In supporting this provision, Labour emphasised that socio-economic legislation is a key to promoting fairness⁵⁴⁹.

The Conservative Party⁵⁵⁰ had opposed this part of the Bill from the time of its introduction, arguing that discrimination remedies are fundamentally different from solutions to socio-economic disadvantage⁵⁵¹. Similarly, the Conservatives-led Coalition Government which came to power in 2010 adamantly resisted it. Conservative politicians had called this provision ‘political window dressing’⁵⁵², ‘left-wing tosh’⁵⁵³, ‘gesture politics’ inherently incapable of solving inequality⁵⁵⁴, and ‘socialism in one clause’⁵⁵⁵. Labour dismissed such criticisms as motivated by ‘ideology, politics and prejudice’⁵⁵⁶. The Coalition Government ultimately scrapped the socio-economic duty in 2013 - driven by its goals to cut down public expenditures, lessen administrative burdens on businesses (Hepple 2014: 227-8; Meer 2017), and support the free market by reducing worker protections⁵⁵⁷.

My research indicates that political debates surrounding the socio-economic duty ignored migrants (and movers), likely facilitated by the lack of migrant lobbying efforts. The 1999 White Paper referred to immigrants only once, in the context of providing second-generation students with extra language support (DSS 1999: 53). In advocating for the imposition of the socio-economic duty, Labour politicians drew attention to inequalities experienced by poor white Britons and well-established BAME groups (including Muslims, Travellers, Jews, Dalit⁵⁵⁸, and Afro-Caribbeans)⁵⁵⁹. New migrants and Christian white ethnic groups were ignored. This oversight occurred despite the fact that the National Equality Panel (2010: 132), established by Labour Government in 2008, had noted that migration status plays a role in disadvantage, even for EU movers.

⁵⁴⁸ Thus, it would also likely diminish white Britons’ criticism that anti-discrimination law favours BAME groups.

⁵⁴⁹ Fiona Mactaggart, Hansard Report, 18 Nov 2010, vol 518.

⁵⁵⁰ Including Theresa May (at the time, the Home Secretary, and Minister for Women and Equalities).

⁵⁵¹ Public Bill Committee (Equality Bill), 5th sitting, 11 June 2009, col 129.

⁵⁵² Lord Lester of Herne Hill, Hansard Report, House of Lords 18 Nov 2010, vol 722.

⁵⁵³ Peter Bone (Wellingborough), Hansard Report, 18 Nov 2010, vol 518.

⁵⁵⁴ Baroness Verma, Hansard Report, House of Lords 18 Nov 2010, vol 722.

⁵⁵⁵ Baroness Royall of Blaisdon, Hansard Report, House of Lords 18 Nov 2010, vol 722.

⁵⁵⁶ Id.

⁵⁵⁷ The Coalition Government also supported deregulation through Enterprise and Regulatory Reform Act 2013, Section 65 (deleting from the EqA2010 employers’ duty to prevent harassment by third parties); introducing fees for filing employment claims, and disempowering EHRC to its core functions.

⁵⁵⁸ The lowest Indian caste.

⁵⁵⁹ E.g., Baroness Thornton, Hansard Report, House of Lords 18 Nov 2010, vol 722.

The socio-economic duty proposal had recognised the role of (lower) class in resulting from and reinforcing the experience of disadvantage and discrimination. Including poor (British) whites in such debates indicated a rare acknowledgment by those in power that some whites have incomplete access to white privilege. Albeit stemming from the American context, Pruitt (2015a) has noted nuanced intersections between white-skin privilege and socio-economic disadvantage. According to Sivanandan (2001: 2), ‘poverty is the new Black’. That is, low socio-economic status rather than skin colour per se serves as a marker of disadvantage and racism. Thus, Sivanandan drew attention to racism against ‘impoverished strangers even if they are white’, such as CEE asylum seekers before the fall of Communism (Fekete 2009: 20). Moreover, Fekete (2001) argues that, in post-Cold War Europe, it is the CEE region’s poverty that has enabled western racism against CEE nationals to become naturalised.

In the UK, post-04 CEE movers have been concentrated in low-paid employment and have experienced racism, disadvantage, and discrimination. They have also been subjected by some white Britons to class-inspired discourse about physical appearance, lifestyle, type of work, poverty, and cultural practices (Moore 2013a). Through such class-based racialisation, recent CEE workers have been positioned as not white enough to be accepted into the (white) British way of life⁵⁶⁰ (id; Fox et al 2012a; Lewis 2005). Aware of their precarious status within British class and race hierarchies, Polish workers themselves have emphasised both their whiteness and their alleged middle-class status, to position themselves higher on the British hierarchies of privilege (Fox et al 2015). Unfortunately, scrapping of the socio-economic duty provision overlooks such nuances in the experience of inequality, and legitimates existing social and class structures.

That being said, one should not get distracted by race-versus-class debates — regarding which is more implicated in social injustices (Pruitt 2015a). Instead, it is the various intersecting fractures within whiteness (or other colours) and within class that affect the experience of equality. All CEE movers have been affected by anti-CEE sentiment, and some middle-class CEE movers (such as the medical doctor claimant in *Michalak*, discussed below) have been victims of discrimination. Ultimately, it is poor Britons’ and CEE movers’ lack of voice in the promulgation of laws and in legal discourse that entrenches their disadvantage. During debates on the socio-economic duty, one Labour MP had remarked that all ‘honourable Members [of Parliament] are in a position of immense privilege, and it is generally the case that laws and regulations are made by the

⁵⁶⁰ Especially in rural areas, considered quintessentially British.

privileged and imposed on the disadvantaged. Therefore, how can the Minister argue against a requirement to consider the interests of those in our society who do not have a voice?⁵⁶¹ This reflects CRT scholars' view that those in power use laws to propagate their own privilege, while continuing to disadvantage all others (Delgado and Stefancic 2017). Notably, the MP making this observation was of Nigerian heritage, reinforcing CRT scholars' emphasis on the need for coalition building among all disempowered groups.

iii. Key Provisions of the Equality Act 2010

The Equality Act 2010 continues to apply the definition of 'race' as initially formulated under RRA76, to encompass 'colour, nationality, and ethnic⁵⁶² or national origin' (Section 9(1)). Poles (and other CEE national groups) fall under these protected grounds. 'Colour' includes, for example, 'being black or white' (Explanatory Notes 2010: 16). Movers retain their nationalities⁵⁶³ from their countries of origin, which also typically determines their 'national origin'⁵⁶⁴. Whites' protection due to their specific national origins has been recognised since the Irish became widely acknowledged in the UK as having a vulnerable national origin.

In the context of employment, discrimination is prohibited in hiring, employment terms, promotions, transfers, training opportunities, and dismissal (Section 39). Hence, in theory at least, persons of all races are to be integrated into the labour market and provided equal opportunities once hired. To function as a comparator, an employee must be employed by the same employer (at the same or different location) and under the same terms as the claimant (Section 79). Contract workers are also protected (Section 41), as are jobseekers relying on employment agencies (Section 55). Those provisions benefit recent CEE movers since many of them are employed by agencies. The extent to which the EqA2010 protects self-employed persons is uncertain, however⁵⁶⁵, following a 2011 Supreme Court decision⁵⁶⁶. The scope of the Act extends beyond the employment field, to also include the provision of goods, facilities and services (including public services).

⁵⁶¹ Chi Onwurah (Newcastle upon Tyne Central), Hansard Report, 18 Nov 2010, vol 518.

⁵⁶² Ethnic origin refers to groups with shared history and culture, which perceive themselves and are perceived by others as separate communities, such as Sikhs or Irish Travellers (EHRC 2011a: 37-38).

⁵⁶³ Citizenship or membership in a nation, through birth or naturalisation (id).

⁵⁶⁴ Connection to a nation through birth or ancestry (id).

⁵⁶⁵ Except for those expressly covered by the legislation (for example, partners in firms or barristers).

⁵⁶⁶ *Jivraj v Hashwani* [2011] UKSC 40.

a. Direct Discrimination

‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’ (Section 13(1)). This definition is closely in line with the definition under the Race Equality Directive (Article 2(2)(a)). Race need not have been the main cause, as long as it was ‘an effective cause’ of the conduct complained of⁵⁶⁷. There must be no material differences between claimant’s and comparators’ circumstances (Section 23). The respondent’s motive for discriminating is not relevant⁵⁶⁸. Thus, even discriminating due to an unconscious prejudice is unlawful. The fact that the respondent might share the same race as the victim is also not relevant (Section 24). Although an inference of discrimination cannot be drawn from the mere fact that an employer has treated an employee who has a protected characteristic unfairly or unreasonably⁵⁶⁹, courts must scrutinise particularly carefully situations in which only the claimant was affected by such treatment⁵⁷⁰. To infer discrimination, adjudicators must consider each allegation before them individually, and also adopt a holistic approach⁵⁷¹. Direct discrimination can be based on respondent’s perception, however incorrect, that the victim had a protected trait⁵⁷². This might protect workers if their employers do not accurately differentiate between their specific ethnicities yet discriminate against them, as illustrated by some of the cases discussed below. There is no defence to direct discrimination based on race.

b. Indirect Discrimination

‘A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice [(‘PCP’)] which is discriminatory in relation to a relevant protected characteristic of B’s’ (Section 19(1)). Courts have traditionally interpreted the concept of PCP broadly⁵⁷³. A PCP is discriminatory if

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and

⁵⁶⁷ *Wreczycka v Care In Style Limited*, ET East London, Case 3200984/2017, 7 March 2018.

⁵⁶⁸ *R (E) v Governing Body of JFS* [2010] 2 AC 728, Supreme Court.

⁵⁶⁹ *Glasgow City Council v Zafar* [1998] ICR 120.

⁵⁷⁰ *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust*, EAT, Case 0269/15.

⁵⁷¹ *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913.

⁵⁷² *Law Society v Bahl* [2004] EWCA Civ 1070.

⁵⁷³ Including, for example, subjective decisions, vague recruitment criteria, and word-of-mouth recruitment. See *British Airways plc v Starmar* [2005] IRLR 862, EAT.

(d) A cannot show it to be a proportionate means of achieving a legitimate aim (Section 19(2)).

Unlike direct discrimination, indirect discrimination does not require a causal link between the victim's race and the disadvantageous treatment, but it does require a causal link between the PCP and the disadvantage suffered⁵⁷⁴. In determining a 'particular disadvantage', a pool of hypothetical comparators may be used (Section 19(2)(b)). National, regional, or employer-specific statistics may be used as evidence (EHRC 2011a: 62-5), but are not required, and do not constitute conclusive proof by themselves (McColgan 2017: 38-9). Strict scrutiny⁵⁷⁵ is applied when evaluating the justification defence (Section 19(2)(d)), that is, the respondent must prove that it had considered other, less discriminatory means when formulating the PCP at issue.

This formulation of indirect discrimination under the EqA2010 has been praised for attempting 'to level the playing field' by allowing adjudicators to scrutinise facially neutral actions which in practice disadvantage people with protected characteristics⁵⁷⁶. However, it has lesser potential to achieve substantive equality than the Directive's definition of indirect discrimination. Whereas under EU law, indirect discrimination may be found when only one person was put at a disadvantage⁵⁷⁷, the EqA2010 requires evidence that the PCP disadvantages the group sharing the claimant's protected characteristic (Section 19(2)(b); see also McColgan 2011: 36-7). Moreover, the UK's definition of justification refers to 'a proportionate means' of achieving a legitimate aim (Section 19(2)(d)), whereas under the Directive, the means must be both 'appropriate and necessary' (Article 2(2)(b)).

Both the Directive and the EqA2010 rely on comparator groups, which supports a formal approach to equality (that likes should be treated alike), allowing for levelling down and ignoring social inequalities. Moreover, appropriate use of hypothetical comparators requires taking account of societal inequalities, and a long line of cases to develop rigorous methodology. This appears problematic for CEE movers, whose widespread racialisation has been normalised in the UK, and who have not been addressed by a long line of jurisprudence. Although the requirement that the group to which the claimant belongs suffer disadvantage (Section 19(2)(b)) appears to create space for adjudicators to consider

⁵⁷⁴ *Naeem v Secretary of State for Justice* [2017] UKSC 27.

⁵⁷⁵ *R (On the Application of Elias) v Secretary of State for Defence* [2006] IRLR 934, Court of Appeal.

⁵⁷⁶ *Homer v Chief Constable of West Yorkshire Police* [2012] EqLR 594, ¶ 17 (Lady Hale).

⁵⁷⁷ Under the Directive, indirect discrimination occurs 'where an apparently neutral' PCP 'would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons,' unless that PCP 'is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 2(2)(b)).

broader power relations and specific groups' racialisation, the lack of relevant national and regional statistics makes such analysis challenging in the context of non-BAME groups. Moreover, in line with popular and political discourse (discussed above), adjudicators might lack sufficient sensitivity to acknowledge Poles' widespread racialisation, experiences of disadvantage, lack of integration, and lack of access to equal opportunities - factors which might support Poles' arguments about their group's 'particular disadvantage'. My review of more than two hundred Polish claimants' cases revealed only one successful claim of indirect discrimination⁵⁷⁸, out of only five such claims asserted.

c. Language Rules

The Equality Act makes no mention of language or accent discrimination. Case law, however, has been developed to determine when English-only rules in the workplace are discriminatory. Such rules are likely unlawful if applied to casual conversations between employees, in social areas, or during break times (EHRC 2012). If a blanket English-only rule operates during the performance of work duties, however, it might be lawful if it constitutes a proportionate method for achieving a legitimate aim – such as to ensure good work performance or good work relations (by not making others feel excluded) (EHRC 2012), or to fulfil health and safety obligations (EHRC 2011a: 251). However, even in such situations, an occasional comment by one employee to another in a different language will likely be permitted (and therefore a complete ban may be disproportionate) (CIPD 2013: 22). A co-worker's complaint about feeling excluded by others' private conversations in a different language might constitute a sufficient reason to forbid such conversations, especially if they appear to have been intended to exclude or to create a hostile environment⁵⁷⁹. Given the widespread antipathy towards Poles in the UK—by some Britons, and by some non-Polish CEE workers (Garapich 2012)—it is possible that some workers might be overly sensitive to feeling excluded by Polish speakers, especially if Poles constitute the majority of their co-workers (Anderson et al 2008; Ciupijus 2012c; EHRC 2010; Jiang 2013; MacKenzie and Forde 2009a). English-only rules that are unlawful typically constitute indirect discrimination⁵⁸⁰.

⁵⁷⁸ Kosik v Montgomery Transport, discussed below.

⁵⁷⁹ Griffin v Hyder Brothers Ltd, ET Case 2406224/2011, 25 April 2012.

⁵⁸⁰ Moreover, targeting specific foreign-language speakers or only specific languages might constitute direct discrimination or harassment.

d. Harassment

‘A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (Section 26(1)). ‘Conduct’ has been interpreted broadly, to include written, oral, and physical actions (such as gestures or images)⁵⁸¹. A single act may be significant enough to create a hostile environment⁵⁸² if its effects are of longer duration⁵⁸³. No comparator is needed, and the unwanted conduct does not have to be directed at the claimant. In determining whether the conduct at issue had the purpose or effect of violating claimant’s dignity or creating an intimidating or hostile environment, each of the following must be taken into account: (a) the claimant’s perceptions; (b) all the facts of the case; and (c) whether it is reasonable for the conduct to have had that effect (Section 26(4)). It appears that an adjudicator would be more inclined to find for Polish claimants based on this test if the broader context of Poles’ racialisation in the UK were taken into account. Given how normalised their racialisation has become in public and political discourse, however, that appears unlikely in practice. Moreover, the Employment Appeal Tribunal (‘EAT’) has warned against encouraging ‘a culture of hypersensitivity’, noting that ‘not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity’, especially if they are unintended⁵⁸⁴ or cause only ‘minor upsets’⁵⁸⁵.

Although it does not encompass employer’s liability for acts committed by co-workers or by third parties, harassment constitutes a broader offense under the EqA2010 than under the Directive, which requires both a violation of dignity and the creation of a hostile environment (Article 2(3)). The breadth of this provision under the EqA2010 can likely be attributed to the fact that British pre-transposition judicial interpretations of harassment (stemming from gender equality laws) had been wide, and the UK was afraid of violating the Directive’s non-regression clause (Hepple 2014: 98).

⁵⁸¹ See <https://www.citizensadvice.org.uk/law-and-courts/discrimination/what-are-the-different-types-of-discrimination/harassment/>.

⁵⁸² *Weeks v Newham College of Further Education* [2012] UKEAT/0630/11/ZT.

⁵⁸³ *Quality Solicitors*, UKEAT/0105/14/RN.

⁵⁸⁴ *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT/0458/08, ¶ 22.

⁵⁸⁵ *Grant v HM Land Registry & EHRC* [2011] EWCA Civ 769, ¶ 47.

e. Victimisation

‘A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act⁵⁸⁶’ (Section 27(1)). A treatment amounts to a detriment if a reasonable worker would or might take the view that, in all the circumstances, it was to her or his detriment⁵⁸⁷. As with the test for harassment, it is not clear whether the ‘reasonable person’ standard accounts for the wider climate of Poles’ disadvantage and racialisation. There is no need to show a less favourable treatment. Doing the protected act need not be the only cause, but must be a significant cause, of the detrimental treatment⁵⁸⁸. The Directive’s definition of victimisation is vague, but appears more limited, as it instructs national regimes to protect ‘individuals from any adverse treatment or adverse consequence’ due to a protected act (Article 9).

f. Burden of Proof

In line with the Directive’s burden of proof provisions (Article 8), the EqA2010 extended reversal of the burden of proof to all discrimination claims, including race-based⁵⁸⁹. Thus, if the claimant presents facts from which a court could conclude that the respondent had contravened a provision of the EqA2010, and if the respondent fails to offer a non-discriminatory explanation, the court must conclude that the alleged contravention occurred (Section 136). First, the claimant must prove, on the balance of probabilities, facts from which a reasonable court *could* properly conclude, based on all the evidence (including the respondent’s explanation) that the respondent had committed a proscribed act⁵⁹⁰. The court must carefully link any findings of discrimination to specific facts⁵⁹¹. If the claimant satisfies this stage, the burden shifts to the respondent to prove, on the balance of probabilities, that the treatment ‘was in no sense whatsoever’ due to race. Courts expect ‘cogent evidence’ (Hepple 2014: 204) that race was ‘not any part’ of the reason for the treatment⁵⁹². This two-stage test need not be applied in a mechanical way⁵⁹³ (especially when dealing with hypothetical comparators), as long as the court focuses on determining why the respondent treated the claimant as she did. This provides adjudicators some flexibility to make the burden more or less challenging.

⁵⁸⁶ Bringing proceedings, providing information related to proceedings, or alleging a violation (in good faith) under the Act (Section 27(2)).

⁵⁸⁷ *Shamoon v Chief Constable of the RUC* [2013] ICR 337 (House of Lords).

⁵⁸⁸ *Nagarajan v London Regional Transport* [2000] 1 AC 501, ¶¶ 19 and 34.

⁵⁸⁹ Under previous legislation, burden of proof was not reversed in race discrimination or victimisation cases.

⁵⁹⁰ *Madarassy v Nomura International Plc* [2007] EWCA Civ 33.

⁵⁹¹ *Efobi v Royal Mail Group Ltd*, UKEAT/0203/16.

⁵⁹² *Prasil v Orchard House Foods*, 3400534/2014, ET Cambridge, 12 April 2018.

⁵⁹³ *Khan v Home Office* [2008] All ER (D) 323, Court of Appeal.

Whatever contribution successive anti-discrimination laws have made, discrimination claims continue to be challenging for the victims to prove, even when claimants are represented. Complaints of race discrimination appear to be the least likely to succeed of all discrimination claims (McColgan 2017: 70-2). For example, of the race discrimination claims brought under the EqA2010 in 2011-12, 3% were successful at full hearing, 6% dismissed at preliminary hearings, 17% unsuccessful at full hearing, and 74% settled or withdrawn (Ministry of Justice 2013). In 2015-16, 5% of race discrimination claims were successful at full hearing, 23% dismissed at preliminary hearings, 18% unsuccessful at full hearing, 21% withdrawn and 33% settled (McColgan 2017: 72). These statistics are consistent with outcomes under the EqA2006⁵⁹⁴.

Although there are no ethnicity-specific statistics, CEE movers as a group file significantly fewer ET claims than would be expected based on their relative numbers in the UK⁵⁹⁵ (Barnard and Ludlow 2016). Based on a sample of 46 ET claims filed by CEE workers between 2010 and 2012, CEE claimants appear as likely to fail altogether as to succeed (in whole or partially) (id: 19)⁵⁹⁶. Of the 13 race discrimination claims (id: 12), only one was successful (id: 20). This success rate, of approximately 8%, is higher than average, although due to the small sample size, it is difficult to make a meaningful comparison.

Remedies under the EqA2010 appear driven by economic concerns, rather than by integration or equal opportunities goals. Enforcement mechanisms remain focused on aggrieved individuals, and no class actions are permitted⁵⁹⁷. The introduction of representative actions was considered by an advisory body (Equalities Office 2008a)⁵⁹⁸. It was opposed by business interests, however, due to allegedly increasing legal costs for companies, an assessment with which the Discrimination Law Review (2007: 122) had agreed.

⁵⁹⁴ In 2009-10, for example, 3% were successful at full hearing, 5% dismissed at preliminary hearings, 15% unsuccessful at full hearing 30% withdrawn, and 38% formally settled (McColgan 2011: 144).

⁵⁹⁵ For example, during 2010-12, they filed 1,548 ET claims, whereas they would have been expected to file approximately 12,000 claims based on their population (Barnard and Ludlow 2016).

⁵⁹⁶ This of course overlooks how claimants might have benefited from settled or withdrawn cases.

⁵⁹⁷ Although the EHRC may investigate potential violations and issue non-binding compliance notices (specifying actions required to ensure conformity with the legislation).

⁵⁹⁸ And was recommended by the European Commission in 2013.

The main remedy available under the EqA2010 is monetary damages. This includes compensation for financial loss (typically, loss of earnings)⁵⁹⁹, damages for injury to feelings⁶⁰⁰ (which may be awarded even if no other damages are awarded), and aggravated or exemplary damages⁶⁰¹ (Section 119). In indirect discrimination claims, if the respondent proves that discrimination was unintentional, damages may only be awarded if the court considers it ‘just and equitable’ to do so (EHRC 2011a: 67). Since it is easier for the respondent to prove lack of her intent rather than for the claimant to prove the existence of such intent, this approach benefits respondents. There is no upper limit on the amount of damages that can be awarded⁶⁰², but in practice they typically range between £1,500 and £10,000. In 2010-13, for example, the median award by Employment Tribunals (‘ET’) was less than £10,000 (with race discrimination awards being a little bit below this amount) (EOR 2010: 11, 16). In 2015-16, the median award in race discrimination claims was £13,760 (McColgan 2017: 76). Most successful discrimination cases appear to result in at least an award for injury to feelings.

Courts lack the power to order victims’ hiring or reinstatement in employment discrimination cases⁶⁰³. Non-financial remedies include declarations (clarifying claimant’s and respondent’s rights and responsibilities), and recommendations (requiring respondent to take certain actions to reduce the adverse effects of discrimination on the claimant) (Sections 116 and 124). Both have been rarely used⁶⁰⁴. To lessen alleged burdens on businesses, Deregulation Act 2015 repealed the ET’s initial ability to make wider recommendations aimed at reducing the effects of discrimination not only on the claimant, but also on other employees of the respondent. Wider recommendations would have greatly benefited exploited and racialised workers, such as Polish low-skill workers, who tend to work alongside many other exploited CEE workers.

⁵⁹⁹ In *Michalak v The Mid Yorkshire Hospitals NHS Trust* (2011), the ET awarded a record-breaking £4.5m (of which over £1m was for loss of earnings, and £666,000 for loss of pension) in a sex and race discrimination claim. The award was based on unusual circumstances, however: a hospital’s concerted campaign to dismiss a consultant physician, causing her psychiatric illness which made it impossible for her to work again as a doctor.

⁶⁰⁰ Courts have set Vento bands for guidance in awarding damages for injury to feelings. The lowest band spans £800-£8,400, with higher bands for more serious cases. During 2010-13, the median award for injury to feelings was £5,000 (with racial discrimination claims falling at £4,000-£4,500) (EOR 2014: Tbl 2).

⁶⁰¹ When the respondent has behaved in a malicious or oppressive manner. They are rarely awarded.

⁶⁰² *Marshall v Southampton and South West Area Health Authority* (No 2) [1993] IRLR 445.

⁶⁰³ Unlike in unfair dismissal cases.

⁶⁰⁴ For example, in 2013, ETs made recommendations in 30 cases (8 of which related to individual claimants only) (EOR 2014: 11). If the employer fails to comply with a recommendation, the ET may award additional compensation (Section 124(7)).

D. General Critique of the Equality Act

Scholars have praised the EqA2010 for increasing anti-discrimination protections (e.g., Connolly 2011) and elevating the equality principle as a fundamental human right (Hepple 2014: 229). Specifically, Hepple (2010: 21) argues that streamlining, public-sector duty, and permissible positive action provisions represent the core of the new approach to transformative equality. Substantive equality goals are reflected in the Act's definitions of harassment, which includes conduct with the purpose *or effect* of violating dignity (Section 26(1)), and indirect discrimination, which considers unequal *results* of neutral practices (Section 19(2)(b)). Its text also mentions advancing equality of opportunity (Preamble; Section 149). Moreover, the Explanatory Notes (2010) emphasise that positive action is to advance equality of opportunity, and my review of MP statements at the time of the Act's adoption indicates legislators' concern with both equal treatment and equal opportunity. Moreover, despite opposing the imposition of the socio-economic duty, the Coalition Government described the concept of equality as inherently connected to real opportunities⁶⁰⁵. Likewise, Labour politicians consider the core of equality to comprise both equal treatment and equal opportunity⁶⁰⁶.

However, the EqA2010 fails to step beyond some of the key weaknesses of the Directive and in some provisions merely follows its minimum requirements. Although the EqA2010 is an improvement over previous UK legislation, it has not transformed the equality field. The Act mentions neither human nor fundamental rights. Although it refers to equal opportunities, that concept has not been clearly defined by anti-discrimination law. The public-sector duty contains exceptions, such as in the exercise of immigration and nationality functions (Schedule 18), and does not give rise to enforceable private rights. Formal equality is evident in the Act's definition of direct discrimination, which focuses on equal treatment (Section 13(1)), and in allowing justification to indirect discrimination (Section 19(1)(d)). Notably, the Act did not implement proposals made by the Cambridge Review and by many activists that every employer with more than ten employees should be required to conduct periodic employment and pay-equity reviews to determine whether members of disadvantaged groups have access to fair participation and equal pay. Overall, many of the Act's provisions offer formal protections—divorced from equal opportunities or integration goals—that do not accurately reflect the reality of discrimination, especially when it comes to migrants or poor claimants, such as many CEE movers.

⁶⁰⁵ E.g., Baroness Verma, Hansard Report, House of Lords 18 Nov 2010, vol 722; Lord Lester of Herne Hill, Hansard Report, id.

⁶⁰⁶ E.g., Baroness Royall of Blaisdon, Hansard Report, id.

More fundamentally, the British anti-discrimination framework is not capable of ensuring substantive equality because it overlooks intersectionality, does not impose positive duties, and provides for individual remedies only. Notably, it conceals economic prerogatives. MP statements at the time of the adoption of the EqA2010 mentioned its anticipated economic benefits⁶⁰⁷. During the Act's consultation process, the Equalities Office (2008a) pointed out the overarching economic core of the UK's equalities framework. Even concepts that sound far removed from economic goals are nevertheless intertwined with economic concerns. For example, the notion of equal opportunities has been premised on eliminating barriers to free competition between individuals (Solomos 1989a), and the first proposal for the imposition of socio-economic duty noted that injustice and poverty are 'economically foolish' (DSS 1999: vii). At the same time, the widespread rhetoric of equal opportunity serves to conceal such economic interests behind equality law, obscuring law's politics in the service of capitalism and the economically privileged class.

i. Individual Enforcement

The agency enforcement model, initiated with the creation of the CRE pursuant to RRA76, acknowledged the need to address structural or institutional discrimination where no individual victims may be in a position to bring a complaint, and highlighted the role that the State should perform in tackling discrimination⁶⁰⁸. The current legislation, however, contains no provision permitting organisations to engage in proceedings on behalf of complainants. Although the Work and Pensions Committee (2009) had recommended allowing representative actions by bodies such as trade unions or the EHRC, the proposal never came to fruition due to business lobby pressure. Moreover, current legislation removed the EHRC's ability under the EqA2006 to apply for injunctions even if no identifiable victims had been identified.

For anti-discrimination law to approach protecting substantive equality, it needs to provide collective rights and collective remedies (Lacey 1998). Redress based on individual claims has many drawbacks. It is difficult for low-paid employees to have access to sufficient resources to pursue claims (especially with legal representation). Workers such as many Polish movers are especially disadvantaged due to frequently engaging in precarious employment (McDowell et al 2009; Parutis 2011a), with long working hours, and irregular shifts with little advance scheduling notice (MacKenzie and Forde 2009a; Bernard et al

⁶⁰⁷ Baroness Garden of Frognal, Hansard Report, House of Lords, 26 Apr 2011, col WA39.

⁶⁰⁸ In practice, however, enforcement under pre-2010 legislation was mainly undertaken by individual victims (Dickens 2007).

2018; see also Appendix 1). CEE workers also tend to lack access to advocacy groups or free legal representatives (Bernard et al 2018). Moreover, the amount of damages awarded through individual claims is unlikely to have a deterrent effect on larger employers, even if they repeatedly⁶⁰⁹ exploit and discriminate against many CEE movers. With no class actions, and no penalty for organisations found to repeatedly discriminate, the EqA2010 prioritises employer interests rather than penalising or deterring discrimination against workers. It illustrates interest convergence, by being consistent with market capitalism and protecting the elite's economic privilege.

Conceptually, individual-based approach does not fit the reality of inequality by failing to acknowledge that racism has been a normalised part of many groups' conditions of employment. Evidence that goes beyond individual claims—such as of Poles' widespread disadvantage and racialisation—is infrequently used and given only little weight under this approach. As Freeman (1978) argued in the context of US Supreme Court anti-discrimination cases, equality law is inherently ineffective due to approaching inequality from the perpetrator's perspective. Although at the time of his analysis, victims had to prove perpetrator's intention to discriminate, many of his observations still apply today in the Anglo-American context⁶¹⁰. Fundamentally, the EqA2010 only takes account of what specific respondents have done to individual claimants, and only if the allegations happen to fall within the small number of closely delineated causes of action. Discrimination is divorced from its social context and framed as rare incidents of individual aberration only, which is far from reality. The law overlooks pre-existing disadvantages faced by some groups, and ignores the underlying social conditions that contribute to that disadvantage⁶¹¹. Moreover, focusing on the facts of individual disputes encourages adjudicators to rely more on their own values and forms of conceptualising social relations (Fitzpatrick 1987), thus preserving the status quo.

ii. Other Procedural Hurdles

Claims under the EqA2010 must be brought before courts within six months (Section 118), and before ETs within three months (Section 123) of occurrence of the relevant act⁶¹². Such short time limits likely have a significant impact on anyone who is not familiar

⁶⁰⁹ Certain organisations have been repeatedly subject to discrimination proceedings (McColgan 2011: 153).

⁶¹⁰ In fact, later scholarship, by Freeman (1990) himself and others (e.g., Barnes 2016), notes that these shortcomings of anti-discrimination law have continued.

⁶¹¹ The solution Freeman (1978) proposed was to address the social conditions implicated in discrimination, such as poverty. Unfortunately, underlying conditions related to inequalities have not been successfully addressed in the UK in the context of BAME groups, and are even more unlikely to be addressed in the context of CEE movers given their transient nature and uncertain post-Brexit status.

⁶¹² In their discretion, courts may allow late claims if to do so would be 'just and equitable'.

with the legal system or has poor language skills. But they appear especially detrimental to migrants such as Poles, who often engage in circular, temporary migration. My analysis of cases brought by Poles indicates that some had failed to timely prosecute their claims due to traveling back to Poland or due to changing their temporary employment or housing options. Furthermore, Polish movers tend to work longer hours than other groups, and some rely on employer-provided accommodations far removed from their employment sites (Pawlak 2012; Ciupijus 2012b; Appendix 1), which further complicates their ability to meet short deadlines.

Moreover, claimant fees were introduced in July 2013 in employment cases (£1,200 for filing a claim, and £1,600 for appeals). This resulted in a reduction in filings of approximately 75%, without producing a change in claimants' success rates⁶¹³ (McColgan 2017: 10). This hurdle would have more heavily impacted poorer workers, and particularly those who had little incentive to assert their rights (such as those taking on temporary jobs or engaging in circular migration). The imposition of these fees was ruled unlawful in 2017⁶¹⁴.

iii. Overlooking Intersectionality

A significant weakness of the UK's equality law stems from its single-axis model of discrimination⁶¹⁵ which overlooks intersectionality. The concept of intersectionality stems from black feminists' work demonstrating that black women's experience of structural subjugation cannot be captured accurately by looking at race or gender dimensions separately (e.g., Crenshaw 1989; hooks 1982; Lourde 1983). Instead, various axes of differentiation and marginalisation intersect through interlocking systems of power (Brah and Phoenix 2004: 76). Although intersectionality has most frequently been applied to characteristics such as gender, (non-white) race, religion, and class, recent scholarship has expanded it to additional axes of subjugation (e.g., Viruell-Fuentes et al 2012). Notably, Levine-Rasky (2011) points out the importance of being foreign, immigrant, or of non-majoritarian ethnic origin in the experience of disadvantage, when intersecting with whiteness or middle classness.

Some British adjudicators appear aware of the importance of intersectionality. In *Hewage v Grampian Health Board*, the Supreme Court accepted ET findings of direct discrimination

⁶¹³ Indicating that many of the claims which were not filed had merit.

⁶¹⁴ R (UNISON) v Lord Chancellor [2017] UKSC 51. Claimants get fees paid between 2013 and 2017 refunded.

⁶¹⁵ Likely reinforced by advocacy groups' tendency to focus on single protected characteristics.

on grounds of sex and race, without requiring it to identify separate facts to support each claim⁶¹⁶. Thus, the two grounds were approached as combined. Moreover, the EAT has upheld⁶¹⁷ a finding of indirect discrimination based on combined sex and national origin discrimination when a foreign-born soldier who was a single mother was disciplined for absences due to childcare difficulties. The EAT noted that ‘the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories’. A few tribunal decisions under predecessor equality legislation also recognised intersectional discrimination (based on gender and race)⁶¹⁸, although higher courts were less open to such arguments⁶¹⁹.

The EqA2010, however, does not account for the role of socio-economic status (as discussed above) or for intersectionality of various protected characteristics in the experience of discrimination. For example, direct discrimination is based on unfavourable treatment due to ‘a protected characteristic’ (Section 13(1), emphasis added). Although some bill proposals had included combining multiple grounds (Equalities Office 2008a), and academics supported an intersectional approach, the Discrimination Law Review (2007: 123) and the business lobby opposed it due to being too burdensome for businesses (Meer 2017). Thus, the limited ‘combined discrimination’ provision was included in the final bill. Claims could be brought on the grounds of two protected characteristics, each of which had to be proven separately (Section 14(3))⁶²⁰. The provision applied only to direct discrimination, and a claim of direct discrimination could not be combined with a claim of indirect discrimination. The Government attributed this narrow scope to avoiding ‘unnecessarily complicating’ the law (Equalities Office 2009: ¶ 4.6). This provision was ultimately not implemented by the Coalition Government, which deemed it too costly (Osborne 2011).

Law’s failure to address intersectional discrimination makes it more difficult, and sometimes impossible, for victims to obtain remedy (Equalities Office 2009). Without recognising intersectionality, equality law makes it easier for respondents to avoid liability⁶²¹. By forcing complainants to choose only one form of discrimination to pursue, it might also create a hierarchy of discrimination grounds. Critically, it does not reflect the

⁶¹⁶ [2012] UKSC 37, 25 July 2012.

⁶¹⁷ *Ministry of Defence v DeBique* [2010] IRLR 471, EAT, 12 October 2009.

⁶¹⁸ E.g., *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co* [2004] ET/1806128/03; *Bahl v Law Society*, ET Watford, 4 July 2001.

⁶¹⁹ E.g., *Law Society v Bahl* [2003] UKEAT 1056_01_3107; *Bahl v Law Society* [2004] EWCA Civ 1070.

⁶²⁰ Thus, failing to account for ‘the synergy inherent in intersectionality’ (Solanke 2011: 336).

⁶²¹ For example, an employer might avoid liability when being sued by a black female applicant, by presenting evidence that he hires both black people and women.

lived experience of discrimination. For example, discrimination experienced by Poles who happen to have additional protected traits (such as being disabled or female) is unlikely to be captured. For many CEE workers, their exploitation and discrimination stems from an intersection of ethnicity and low socio-economic status. Moreover, other characteristics that impact the experience of inequality—such as lacking social and cultural capital, and lacking political power—get overlooked entirely by law. After post-Brexit immigration policies will become implemented, it is likely that intersectionality will continue to play a significant role in CEE migrants' experience of inequality, especially in terms of their education, socio-economic class, and migration status.

iv. Limited Scope

The legal system is not equipped to redress many race-based wrongs because it does not have the vocabulary to do so (Crenshaw 2011). The material scope of the EqA2010 tolerates racism in most of the private sphere. Fundamentally, anti-discrimination law implies that only racism covered by the legislation is unacceptable enough to warrant political intervention⁶²² (Fitzpatrick 1987). This, of course, is problematic in societies where racism is prevalent. It is also troublesome for Poles (and CEE movers more generally), given how widespread their exploitation and racialisation have been.

Moreover, although 'race' encompasses ethnic origin, national origin, and nationality, and thus begins to reflect the fact that colour-based groups are not homogeneous, this definition of 'race' might not always suffice to reflect migrants' complicated experience of racism and disadvantage. Although all immigrants fall under one or more of these protected race characteristics, the discrimination they suffer is not always tied specifically to such categories. Notably, the EqA2010 does not protect having migrant (or mover) status, or being a foreigner, and the law is not settled on how it applies to language or accent discrimination. Poor treatment due to birth abroad (without a specific national origin being mentioned) does not constitute discrimination. The Act also overlooks cultural racism. Thus, respondents' poor treatment of CEE claimants due to their general foreignness or immigrant background, without specifying their national origin or nationality, might not be covered by anti-discrimination legislation, especially if adjudicators apply the concept of 'race' in an inflexible way. The EHRC (2016a) has noted that these gaps leave migrant workers vulnerable to discrimination.

⁶²² Praises of anti-discrimination law's effectiveness further undermine the reprehensibility of forms of racism not prohibited by law.

Notably, EAT decisions reached in the context of non-Polish claimants indicate that the protected grounds under the EqA2010 might not be sufficient to address exploited migrants' discrimination. For example, in *Nikolova v M & P Enterprises London Ltd*⁶²³, the EAT attributed a Bulgarian claimant's exploitation as a full-time cleaner at a budget hotel to her economic vulnerability rather than her race. All other full-time cleaners were also Bulgarian, and all were similarly exploited. The ET had ignored the claimant's suggestion to rely on a hypothetical British comparator, and instead referred to exploited part-time receptionists of BAME backgrounds. Notably, the ET expounded that:

many other nationalities seeking work in the UK have poor English, and many from Eastern Europe ... will ... accept low waged work which is still better than can be found at home. The fact that the respondent mainly employed Bulgarians is likely to result from word of mouth recruitment, rather than selecting Bulgarians because of their economic vulnerability ... Economically rational employers ... tak[e] advantage of whomever they can find who will accept less than the minimum wage rate, or poor safety standards ... This may include people with race as a protected characteristic, but also many without. Further, there may be many non-English nationals, or those for whom English is not a first language, who are not in the group prepared to take low paid work in poor conditions (¶ 87).

The EAT dismissed the claimant's appeal on the grounds that the ET had focused on irrelevant facts (the respondent's recruitment practices and lack of intention) and had relied on materially different actual comparators. Her appeal was allowed, however, because the ET had failed to address whether a hypothetical comparator would have been subjected to the same treatment, and failed to apply the correct burden of proof. After acknowledging that the ET had made comparator observations implicitly and 'en passant', and that its reasoning (in the above quoted paragraph) was 'somewhat discursive' and 'elliptical', the EAT nevertheless found it sufficiently detailed. The EAT sought to bolster its decision by itself relying on irrelevant facts - that this respondent was willing to exploit any vulnerable employees (including two British receptionists⁶²⁴, and a Greek cleaner hired to replace the claimant).

The outcome in *Nikolova* indicates that discrimination might be more difficult for claimants to prove if an exploitative employer predominantly recruits workers of one national origin or similarly exploits workers of various national backgrounds, both of which might be taken as evidence of a lack of ill will. Moreover, the spurious analysis—based on irrelevant facts, and a poor application of the comparator standard—indicates

⁶²³ UKEAT/0293/15/DM, 4 February 2016.

⁶²⁴ These were not correct comparators because they worked on Sundays only, performed cleaning duties only in addition to their receptionist duties, and there is no indication that they were exploited like full-time Bulgarian cleaners.

not only liberties that adjudicators can take with legal reasoning, but also the inadequacy of anti-discrimination protections. It points to the fact that intersectionality and/or socio-economic duty provisions would have been helpful in making anti-discrimination law more in tune with the reality of discrimination.

Nikolova also suggests that equality law could be strengthened by adding more protected grounds, such as foreignness, migration status, or economic vulnerability. Two recent Supreme Court cases heard together, *Taiwo v Olaigbe and Onu v Akwinnu*⁶²⁵ also illustrate this point. Both claimants were Nigerian, in the UK pursuant to domestic worker visas which tied their residence to their abusive employers. The ET dismissed their race discrimination claims upon finding that their mistreatment was due to their ‘vulnerable migrant worker’ status, rather than their nationality. The Court of Appeal similarly noted that ‘immigration status’ should not be equated with ‘nationality’ for the purposes of the EqA2010. The Supreme Court agreed, ruling that their abuse was not due to their nationality, but rather due to their ‘vulnerability as a particular kind of migrant worker’. Resembling the reasoning in *Nikolova*, the Supreme Court also noted that many other non-British workers are not vulnerable and would not have been abused the same way. Of course, such persons are not comparators, so it is difficult to understand the utility of this observation. In *Taiwo and Onu*, claimants were even more vulnerable than in *Nikolova* since they did not have access to the British (and EU) labour markets.

As both *Nikolova* and *Taiwo and Onu* indicate, exploitation sometimes stems from migration status or from associated economic vulnerability, which are not covered under the definition of ‘race’. Hepple (2014: 217) has critiqued the EqA2010 for not including additional characteristics that are addressed by international human rights instruments, such as social origin, language, being born abroad, being an immigrant, or being foreign. Such expanded grounds might become especially important once CEE nationals’ migration status becomes more splintered by post-Brexit legislation. It remains to be seen if post Brexit, vulnerabilities of EU workers who engage in either (1) high-skilled employment tied to specific sponsors or (2) low-skill, temporary employment will be taken into account by the legal regime.

5. Poles’ Discrimination Claims in the Employment Context

There are no official statistics on employment claims brought by CEE nationals. Moreover, the limited research that exists indicates that CEE nationals file fewer

⁶²⁵ [2016] UKSC 31, 22 June 2016.

employment cases, but more race discrimination claims than would be expected based on their population. Barnard's (2014) search of EAT judgments between 2005 and 2012 identified only 13 appeals brought by CEE claimants (mostly Poles). Barnard's and Ludlow's (2016) manual search of ET judgments between 2010 and 2013 also indicated low levels of enforcement by CEE claimants (mostly Poles). During that time, CEE nationals filed approximately 200 cases (0.06% of all cases filed), which is 85% less than would be expected based on their population size⁶²⁶. Barnard et al (2018: 236-41) attribute these low levels of enforcement to their migration motivations (typically temporary, focused on maximising income), their home legal cultures (with a weak sense of workers' rights, and avoidance of authorities), and practical obstacles (frequent precarious employment⁶²⁷, and little access to information or free legal advice). The most frequent claims brought by CEE employees were for unpaid wages, unfair dismissal, race discrimination, and notice pay, in that order (id). Claimants tended to speak little English and work in low-skill jobs (id). The most overrepresented claims, compared to nation-wide data, were for race discrimination (11% of CEE workers' claims, compared to 2% by all claimants), and minimum wage (1.7% of CEE claims, compared to 0.2% by all claimants) (id). Only 10% of CEE claimants in their study had legal representation (compared to the national average of 60%), and none were represented by trade unions⁶²⁸ (id).

Based on the available studies, it is difficult to determine how well CEE claimants fare compared to other types of ET claimants. Of the 46 ET cases filed by CEE claimants during 2010-12 which were analysed by Barnard and Ludlow (2016: 19), 28% lost all their claims, 20% won all their claims, and 20% succeeded partially. It is not clear whether these relatively high success rates are attributable to the fact that CEE claimants decide to bring claims only if they are relatively strong, they experience actionable discrimination often, or adjudicators are sympathetic to their claims. Barnard and Ludlow (id: 22-4) concluded that ETs tend to express sympathy towards CEE claimants, sometimes even exercising discretion in their favour when they speak little or no English. Out of the thirteen race-discrimination claims in their study, however, only one was successful⁶²⁹ (id: 20). Thus, proving race discrimination claims appears especially challenging for CEE nationals. Although their pool of cases is too small to make a meaningful comparison, this low

⁶²⁶ Similarly, Poles tend not to report being crime victims - in part due to language difficulties and fear of reprisal (Griffiths 2017). Kubal (2012) found that Poles generally avoid interacting with the authorities, in part due to their experience of governmental corruption under Communism. It remains to be seen whether the post-referendum climate of mistrust has further increased this reluctance.

⁶²⁷ Precarious CEE workers often erroneously think that they cannot sue their employers, fear reprisal from employment agencies, and fear losing employer-provided housing (Barnard et al 2018: 241-3).

⁶²⁸ CEE movers tend to work in industries with few trade unions.

⁶²⁹ The most successful claims were for unpaid wages, and unpaid holiday pay.

success rate is in line with the low success rates of race discrimination claims generally (e.g., Department for Business, Innovation and Skills 2014, Table 5.2).

Unlike the above studies, I wanted to focus on only race discrimination claims, particularly by Polish claimants, and to perform a close qualitative analysis of such tribunal decisions⁶³⁰. All reported Supreme Court, Court of Appeal, and EAT decisions are available on Lexis. I searched Lexis for all cases mentioning ‘Equality Act’ (or its predecessor legislation) and ‘polish’ or ‘Poland’⁶³¹, which produced 140 cases, all in the employment context. I then searched the Government’s website dedicated to EAT decisions⁶³² (covering cases since December 2015) containing ‘polish’ (20 decisions), or ‘Poland’ (9 decisions, with some overlap between the two sets). I also reviewed all EAT decisions available on the British and Irish Legal Information Institute’s (‘BAILII’) website (listing post-1976 cases)⁶³³ that mentioned ‘polish race discrimination’ (30 decisions), or ‘Poland race discrimination’ (14 decisions, with some overlap between the two sets).

To account for EAT decisions where claimants’ Polish national origin might not have been mentioned, I then reviewed the following: (1) all EAT decisions on Lexis that mention ‘race discrimination’ (90 results); (2) all cases under the category of ‘race discrimination’ on the Government’s dedicated EAT website⁶³⁴ (68 decisions); and (3) all 728 EAT decisions classified under ‘race discrimination’ on the Judiciary’s website for EAT decisions⁶³⁵ (which includes decisions since 1999). When reviewing all these decisions, I was able to identify most, if not all, Polish claimants because Polish names are unique and I am a native Polish speaker. These searches did not produce any cases additional to the ones I had found by including ‘polish’ or ‘Poland’ in my search terms. This is not surprising given that adjudicators refer to national origins when deciding racial discrimination claims at hearings.

The relatively small number of EAT decisions I located is attributable to the fact that the EAT hears appeals only on points of law⁶³⁶, and therefore intervenes only if an ET had failed to apply the correct legal test or to address all relevant facts, or had considered irrelevant facts⁶³⁷.

⁶³⁰ All case law searches described in this Section are current as of April 2019.

⁶³¹ I also performed identical searches for the remaining CEE states. Each produced a few cases at most.

⁶³² See <https://www.gov.uk/employment-appeal-tribunal-decisions>.

⁶³³ See <http://www.bailii.org/uk/cases/UKLAT/>.

⁶³⁴ See <https://www.gov.uk/employment-appeal-tribunal-decisions>.

⁶³⁵ See <http://employmentappeals.decisions.tribunals.gov.uk/Public/Search.aspx>.

⁶³⁶ Employment Tribunals Act 1996, Section 21(1).

⁶³⁷ *Gbidi v Edwards*, UKEAT/0024/18/OO, 25 September 2018, ¶ 26.

Unlike EAT decisions, ET rulings are not binding. However, they are important to legal research because they apply anti-discrimination law in a highly predictable way - due to the ET's specialised training and its large number of decisions (Discrimination Law Review 2007: 120). Moreover, ET decisions tend to engage in detailed factual analysis, much more so than EAT decisions. Thus, they help to highlight the types of claims being brought by Poles and their factual circumstances, and indicate how ETs approach specific legal or factual issues prevalent in the context of Polish claimants.

Public access to ET cases is not comprehensive. Most ET claims get disposed without a hearing⁶³⁸. Of the cases that get heard, ET decisions are not systematically reported, and are not included in Industrial Case Reports or Industrial Relations Law Reports. BAILII reports ET cases from 2011-13 and since 2015⁶³⁹. I skimmed all 1337 'race discrimination' cases on BAILII, and identified 61 as likely brought by Polish claimants. (Notably, 30 of those were withdrawn by claimants⁶⁴⁰, some of which might have been settled privately.) ET decisions published since February 2017 are also available on a dedicated Government website⁶⁴¹. I searched that repository for all cases classified under race discrimination, which mentioned 'polish' (61 decisions), or 'Poland' (30 decisions, with some overlap)⁶⁴². I was able to identify a few additional cases, despite some overlap with the BAILII repository. Furthermore, by searching online for news reports about discrimination against Poles, I identified a few more significant ET cases relevant to my analysis which were not reported. I found some of those decisions posted online by private websites.

For some of the cases on which I rely in this Chapter, I was able to find EAT decisions, but not the related ET decisions. Some of the decisions I found were formulaic and short (especially when claims were being withdrawn), while others addressed only procedural issues or did not mention relevant facts. Hence, they were of little use to my qualitative analysis.

⁶³⁸ In 2011-12, for example, out of 4,800 race discrimination claims filed with ETs, 1,400 were withdrawn, 1,700 successfully conciliated by ACAS pursuant to the Enterprise and Regulatory Reform Act 2013 (and hence not reported), and 400 struck out at hearing (Ministry of Justice 2013). An analysis of all ET claims disposed of during 1981-2010 indicates that as many as 80% were dismissed on technical grounds, withdrawn, or settled (Latreille 2017: 7).

⁶³⁹ See <http://www.bailii.org/uk/cases/UKET/>.

⁶⁴⁰ This appears to constitute a relatively high proportion of claims when compared to some nationwide statistics. For example, 16% of all ET claims were withdrawn by claimants in the first quarter of 2018 (Ministry of Justice 2018: 8). The small sample size, however, impedes drawing a meaningful comparison.

⁶⁴¹ See <https://www.gov.uk/employment-tribunal-decisions>.

⁶⁴² Searching for all decisions under the 'race discrimination' category produced more than 2,500 results.

Of course, the cases I found might not be representative of all racial discrimination claims brought by Poles in the employment context. My data set is under-inclusive⁶⁴³. I did not have access to all post-04 ET decisions⁶⁴⁴. Moreover, I might have missed cases where claimants' Polish origin was not mentioned⁶⁴⁵ yet their surnames were not stereotypically Polish or had been changed (for example, after marriage). Thus, the results of my analysis below are not generalisable. They are useful, however, in carrying out an exploratory analysis of issues critical to my research questions, which have so far remained greatly under-researched - such as identifying any unique challenges Polish claimants might face, and exploring the discourse on which adjudicators rely in their context.

A. Direct Discrimination Claims

All four EAT decisions in direct-discrimination claims brought by Poles which I found were reached in favour of claimants, because the ET had made errors of law. For example, in *Mirek v Graysons Automotive Services*⁶⁴⁶, the ET had struck out four of the claimant's six allegations which he had argued were part of a continuous act. The EAT remitted the case, after finding that the ET had applied an incorrect legal test (the higher burden of proof for findings of fact, rather than the lower burden applicable at preliminary hearings⁶⁴⁷). In *Stefanko v Maritime Hotel Ltd*⁶⁴⁸, the EAT ruled that the ET had made numerous errors in dismissing the discrimination claim – including failing to set out or apply burden of proof and direct discrimination provisions, and to address all potentially relevant allegations. In both *Szmidt v AC Produce Imports Limited*⁶⁴⁹ and *Gbidi v Edwards*⁶⁵⁰, the EAT remitted claims in favour of the claimants regarding their applications for extensions of time, after concluding that the ET had failed to address all the key elements of the 'just and equitable' test. Notably, in three of the above four cases (all other than *Szmidt*), the EAT recommended that the case be remitted before a different ET adjudicator, to ensure fairness in the proceedings. Based on this small sample, although it is difficult to decipher

⁶⁴³ It is unlikely that my data set is over-inclusive by including cases by second- or later generation Poles (not part of my study group) because adjudicators tend to refer to claimants' migration status and language skills when issuing decisions after hearings.

⁶⁴⁴ Cases decided between 2008 and 2010 which are reported are only available through a physical search at the ET register located in Bury St Edmunds. Pre-2008 decisions are archived and not available to the public.

⁶⁴⁵ Although this appears to be the case only with short decisions, such as dismissals after claims get withdrawn.

⁶⁴⁶ UKEAT/0198/18/RN, 22 November 2018.

⁶⁴⁷ Allegations are struck out only if directly contradicted by undisputed evidence provided by respondent.

⁶⁴⁸ UKEAT/0024/18/OO, 25 September 2018.

⁶⁴⁹ UKEAT/0291/14/MC, 9 January 2015.

⁶⁵⁰ UKEAT/0146/14/DM, 22 August 2014.

how the EAT would address the underlying factual allegations⁶⁵¹, the EAT appears to enforce scrupulous application of relevant legal tests.

My review of ET decisions indicates that it is easier for Poles' direct discrimination claims to succeed if they are (1) employed in skilled or managerial positions, (2) do not have CEE co-workers (especially comparable ones), and (3) successfully assert additional claims or present evidence of a pattern of mistreatment. Pro-claimant decisions also tend to result from the ET's correct application of the two-step burden of proof and correct use of comparators (often hypothetical). Both these tests often appear clumsily or even incorrectly applied. Not surprisingly, being represented by counsel is also helpful (although not necessary). Given these observations, asserting successful direct discrimination claims appears difficult for all poor and migrant workers. Recent Polish movers likely find it especially challenging because they concentrate in low-skill positions, and are often surrounded by predominantly other Polish (or CEE) workers (as addressed earlier). Since adjudicators also appear to apply the burden of proof provisions inconsistently, the outcomes of Poles' cases might also depend on subjective factors - whether individual adjudicators support the anti-Polish political climate or feel sympathy towards them.

For example, in *Krupa v B&M Retail Ltd*⁶⁵², witnesses confirmed that a Polish warehouse cleaner's British line manager urinated on the toilet floor right after he had asked her to clean it (which was not part of her duties). The manager did not offer an explanation, but instead blankly denied claimant's allegations. He also argued that he could not be liable because he knew that the claimant was somewhere from the CEE region, but had not realised that she was Polish. The ET found direct discrimination (in addition to harassment and victimisation, based on additional facts) because the manager would not have treated non-Polish employees, especially British ones, this way. The ET inferred a causal link between his actions and the claimant's race based on a holistic fact analysis – specifically, because it was not the claimant's duty to clean toilets, they had been cleaned an hour earlier, and the manager dirtied the floor immediately after she had finished cleaning.

Similarly, in finding for the claimant in *Besz v Multi Packaging Solutions Limited*⁶⁵³, the ET relied on an appropriate hypothetical comparator and found the respondent liable for

⁶⁵¹ Given the EAT's jurisdiction, it tends not to engage at length with claimants' discrimination allegations, unless multiple factual errors form the basis of an appeal.

⁶⁵² No 2400660/2016, ET Liverpool, 28 March 2017.

⁶⁵³ No 2602118/2016, ET Nottingham, 26 September 2017.

another infraction (harassment). Moreover, the Polish warehouse worker's arguments were strengthened by the fact that he could demonstrate a pattern of racially-based mistreatment by his British line manager, who had made three derogatory statements to the claimant⁶⁵⁴ and one to his co-worker⁶⁵⁵. The ET concluded that, although personal animus might have motivated this treatment, it had an underlying racial element because the respondent provided no explanation to show that the treatment had nothing to do with the claimant's race, and because he would not have treated a British worker this way. Moreover, the ET correctly rejected as irrelevant the respondent's argument that he did not treat all Polish or CEE workers in an equally hostile manner⁶⁵⁶.

*Nazarczyk v T J Morris Limited*⁶⁵⁷ illustrates that, when ETs apply the hypothetical comparator test correctly, even a single comment can support direct discrimination claims. In response to a Polish warehouse worker's request that his daughter's shift coincide with his so that he could walk her home at night, an English supervisor responded along the lines of 'If you do not like it pack yourself and your family up and go back to Poland'. The respondent argued that he would have treated a hypothetical British worker the same - for example, suggesting that his daughter go back to Bath if she were from there and did not feel safe in Liverpool. The ET dismissed that proposed comparator scenario because it did not have the same racial connotation. Instead, a comparable situation would have been to say something like 'if you do not like it here go back to Poland' to a hypothetical British worker. This illustrates how challenging it sometimes is to determine the correct comparator in racial claims based on national origin or nationality. Of course, adjudicators have the option not to use comparators, and instead focus on the question of why a claimant was subjected to the treatment at issue.

A finding of direct discrimination can also be based on a long-standing pattern of less overtly negative treatment, especially when combined with an inference of discriminatory attitudes among those in managerial and disciplinary positions. In *Michalak v The Mid Yorkshire Hospitals NHS Trust*⁶⁵⁸, a Polish medical consultant provided evidence of a secret campaign by the management team, which spanned six years and included 22 instances of harassment and false allegations, culminating in her unwarranted dismissal. As a result, she was diagnosed with a chronic personality change, making it unlikely that she would work

⁶⁵⁴ Including, 'after Brexit I will vote to send you back to Poland'.

⁶⁵⁵ 'I hope it's a one way ticket', while the claimant was in Poland.

⁶⁵⁶ Some ETs, however, consider such arguments in finding against claimants (for example, in *Grzyb v Lidl*, and *Kozakiewicz v Futon Ltd*, addressed below).

⁶⁵⁷ No 2401275/2017, ET Liverpool, 10 August 2017.

⁶⁵⁸ No 1808465/2007, ET Leeds, 14 June 2010.

again as a doctor. In secret meetings, her managers had referred to her Polish origin, and had questioned her competence due to her Polish medical training. The respondents did not offer any satisfactory explanations and failed to show that their behaviour was in no way tainted by race (although the predominant cause of discrimination was determined to have been her gender). Without relying on a comparator, the ET found the respondents liable for direct discrimination (as well as sex discrimination, and unfair dismissal). The ET inferred that senior managers held discriminatory attitudes because they were all white Britons, despite the fact that half of the consultant body had BAME backgrounds. Such reasoning illustrates tribunals' flexibility in inferring discriminatory attitudes. Although the same inference could have been drawn in many of the cases which I had reviewed, this is the only decision in which I observed it. Perhaps this is attributable to the fact that Ms Michalak was highly skilled, which would suggest the importance of claimants' class to ET outcomes.

Other ET cases I reviewed similarly indicate that it is easier for Poles to support their direct discrimination claims if they are employed in semi- or highly-skilled positions, not populated by other Polish or CEE workers. For example, in *Procek v Oakford Farms Ltd*⁶⁵⁹, unlike all the other farm managers (all British, serving as actual comparators), the Polish claimant was not paid at the same rate, was not given the correct job title or recognition, and had his qualifications questioned. Although not based on very strong evidence, the ET inferred a causal link between this treatment and his race because he was not permitted to attend English classes and was forced to cancel holidays on short notice. The respondent could not provide an adequate explanation that this treatment was in no sense due to his race. Similarly, in *Ruda v TEi Ltd*⁶⁶⁰, the ET found direct discrimination where a Polish quality assurance engineer was repeatedly called 'Borat' over a period of four weeks. Other employees (none of whom were from the CEE region) had been given nicknames associated with their personal characteristics rather than with their national origins. As in *Nazarczyk* (mentioned above), *Ruda* illustrates complications that might arise when using even a hypothetical comparator in cases of verbal discrimination. The ET reasoned that somebody who shared all of the claimant's other characteristics but who was not from Poland or the CEE region would not have been called 'Borat'. Of course, since the

⁶⁵⁹ ET Liverpool, 2009. Although this case was decided under EqA2006, I included it in my analysis because direct discrimination law has not changed significantly since then. See also <https://www.cheshire-live.co.uk/news/chester-cheshire-news/egg-suppliers-oakford-farms-ltd-5221456>.

⁶⁶⁰ No 1807582/10, ET Leeds, 23 August 2011.

satirical character of Borat⁶⁶¹ is based on an amalgamation of CEE and Balkan traits and languages, it would have been nonsensical to call a Dane that, for example.

My review of cases indicates that it is common for Polish claimants to have numerous Polish co-workers, especially when employed in low-skill positions. In such circumstances, they appear to have higher rates of success if they can prove a pattern of very poor treatment, and if they are represented by counsel. In *Obieglo v David Leslie Fruits*⁶⁶², for example, two Polish seasonal strawberry pickers won their direct discrimination claim after the ET found that the respondent would not have treated (hypothetical) Scottish workers the same way. Its 200 farm workers (mostly Poles, Czechs, and Slovaks) were all underpaid and housed on site in converted metal containers with no running water, and with access to only 12 showers⁶⁶³. After the claimants complained about this treatment to their manager, they were escorted off the premises by the police. The analysis in *Obieglo* is not in line with EAT decision in *Nikolova*⁶⁶⁴. After all, *Obieglo* claimants made no allegations about any race-based statements, and could have easily been found to be simply ‘economically vulnerable’ in accordance with *Nikolova*. Adjudicators clearly have much flexibility when inferring causal links between adverse treatment and race, and their decisions are not consistent. Of course, since ET decisions are not binding, any leniency or goodwill ETs might exhibit towards Polish workers has little impact beyond the individual claimants concerned.

On the other hand, Polish workers tend to lose their direct discrimination claims when they are not aided by legal representatives, and when ETs do not strictly follow applicable legal tests – especially when their reasoning hinges on incorrect analyses of actual comparators or on the (irrelevant) fact that other Polish workers appear to have good relations with respondents. For example, in *Prasil v Orchard House Foods*⁶⁶⁵, Polish and Slovakian food production operatives, both with excellent work records, were dismissed for taking unauthorised breaks. Most of their co-workers were Polish; one-third British; and the rest from other CEE states. Claimants proposed several actual comparators, all Britons who had not been dismissed following incidents of gross misconduct, but the ET deemed them all too dissimilar. This indicates how difficult it might be for Polish

⁶⁶¹ Created and performed by the British comedian Sacha Baron Cohen since the 1990s.

⁶⁶² ET Dundee, 2010. See also http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/8605038.stm.

⁶⁶³ Following a newspaper investigation, David Leslie Fruits Ltd became the first company in Scotland prosecuted under the Gangmasters (Licensing) Act, and was fined £500 for using an unlicensed gangmaster. (It is questionable whether a fine in that amount can serve as a deterrent for large companies.)

⁶⁶⁴ See Section 4(D)(iv) above.

⁶⁶⁵ No 3400534/2014, ET Cambridge, 12 April 2018.

claimants to use actual comparators given that their co-workers (especially in low-skill occupations) tend to be Polish or from other CEE states.

To justify finding against Polish claimants, some ETs point to their Polish co-workers who appear to be treated decently. For example, in *Skrzydło v CRC Recruitment Ltd*⁶⁶⁶, when a Polish warehouse worker informed her employment agency that she was pregnant, she stopped being offered work consistently. After finding the actual British comparator proposed by the claimant too dissimilar, the ET relied on an incorrect actual comparator (another Polish worker who continued working for the same agency while pregnant, albeit under materially different circumstances - employed at another client's, and under different conditions). The ET improperly reasoned that this indicated that nationality played no part in the claimant's treatment. Similarly, in *Grzyb v Lidl*⁶⁶⁷, where a Polish cashier was suspended by a manager for failing to scan one of his co-worker's purchases, the ET noted that there had been no complaints against that manager from the many other Polish employees he had supervised⁶⁶⁸. The ET also dismissed the claimant's proposed actual comparators, both black, after deeming their circumstances materially different than the claimant's.

Working for respondents who employ mostly non-British workers can make proving direct discrimination more difficult. For example, in *Matuzewicz v 2 Sisters Food Group Ltd*⁶⁶⁹, a Polish food production worker complained of being subjected to poor treatment and verbal abuse. The ET dismissed her concerns, with little factual or legal analysis. For example, the ET mentioned the element of detriment only once, and did not address less favourable treatment. The ET also pointed out that the respondent employed 'a multi racial workforce which get along well, have a joke with each other and swear in each other's languages', overlooking the fact that similar swear words carry different connotations in different languages. Finally, the ET determined that had the claimant's allegations been even partly accurate, her co-workers would have contacted the employer's third-party whistle blowing line. This is not only legally irrelevant, but also insensitive to the reality of exploited migrant workers' circumstances. Many are hesitant to complain, even by using what appear to be anonymous methods. Similarly, in *Kozakiewicz v Futon Ltd*⁶⁷⁰, in finding for respondents, the ET noted their 'nationally and racially diverse

⁶⁶⁶ No 3400728/2016, ET Cambridge, 3 April 2018.

⁶⁶⁷ No 2600945/2016, ET Leicester, November 2017.

⁶⁶⁸ See also *Bouzir v Country Style Foods Ltd* [2011] EWCA Civ 1519, 8 December 2011, where the hiring of several Latvians while the Latvian claimant was declined a job offer prompted the ET to dismiss her discrimination claim.

⁶⁶⁹ No 2500043/17, ET North Shields, 10 August 2017.

⁶⁷⁰ No 2600264/2017, ET Nottingham, 12 December 2017.

workforce’, which included many Poles (some as managers at other locations). Hence, the ET found it unproblematic that a British manager had refused to recruit additional Poles because she did not want to turn the establishment into an ‘all-Polish’ store. Likewise, in dismissing direct-discrimination claims in *Juszczyk v Kettle Produce Ltd*⁶⁷¹ and *Dzierżanowski v Cranswick Country Foods Plc*⁶⁷², the ETs noted that the respective respondents’ workforces included 45% CEE nationals and 55% Polish nationals, although this is not legally relevant.

In line with such ET patterns of reasoning, respondents appear to emphasise the fact that they employ many non-British workers. For example, in *Bujna v Sandfields Farms Ltd*⁶⁷³, when a Polish produce packer alleged that she and her Polish colleagues were treated less favourably than Lithuanian workers, the respondent pointed that it had a good reputation with employees of various nationalities, and that it treated all its employees similarly. Thus, an exploitative employer’s poor treatment of all its workers, of various racial backgrounds, can make it more difficult for claimants to prove discrimination. Unfortunately, it is not uncommon for Poles to work for such employers.

The cases discussed above illustrate how difficult it is to support direct discrimination claims, in part due to ET inconsistency and discretion when inferring causation between poor treatment and race, and when addressing comparators. Those without resources and foresight to hire legal representatives seem to struggle more in asserting their claims. This of course impacts poor workers and immigrants especially. Having many Polish co-workers is a double-edged sword for Polish claimants: some ETs incorrectly rely on this as evidence of a lack of discrimination (especially when others do not complain of mistreatment), while other ETs apply levelling-down and incorrectly rely on other exploited Polish workers as comparators. It is also possible for respondents to simply argue that their approach towards Polish claimants is motivated not by race but by their ‘economic vulnerability’ – a common condition given how many Poles are deskilled and employed in low-paid, temporary positions.

Notably, at least some ETs (mentioned above) that rule in favour of Polish claimants approach all CEE workers as fundamentally similarly poorly treated. For example, in *Besz*, the ET noted in passing that the respondent may not have treated all workers ‘of either

⁶⁷¹ No S/4103971/2016, ET Dundee, 2 March 2017, ¶ 42.

⁶⁷² No 1808685/2018, ET Hull, 22 March 2019, ¶¶ 32, 50.

⁶⁷³ ET Birmingham, 2014. See also <https://www.redditchadvertiser.co.uk/news/11660379.polish-produce-packer-loses-race-discrimination-and-harassment-claim/>.

Polish or eastern European origin in an equally hostile manner'; and in *Ruda*, the ET reasoned that a hypothetical comparator 'who was neither from Poland nor perceived of Eastern European origin' would not have been treated the same way as the claimant. In *Mirek*, employer's incorrect assumption that a Polish claimant was Romanian was sufficient to support a direct discrimination claim. This might indicate some adjudicators' awareness that all post-04 CEE groups are prone to exploitation and racialisation in the UK.

B. Indirect Discrimination Claims

Indirect discrimination claims have been generally more difficult to prove than direct discrimination claims, even before the Supreme Court's 2017 imposition of an additional element for claimants to prove (the reason why the specific PCP had disadvantaged them). This difficulty likely stems in no small part from the fact that employers can assert a defence, and that claimants must present evidence of not only their own, but also their group's disadvantage.

My research uncovered only one successful indirect discrimination claim (among fifteen), *Kosik v Montgomery Transport*⁶⁷⁴. The claimant, whose lorry had tipped over during a delivery, argued that all Polish workers at the haulage company⁶⁷⁵ were treated more poorly than their British co-workers, by being given older, more accident-prone vehicles. The ET agreed. The claimant was represented by counsel, with the support of his trade union. Many low-skill Polish workers are likely in a weaker position than Mr Kosik since they tend to be employed alongside predominantly other Polish or CEE workers (Ciupijus 2012c; MacKenzie and Forde 2009; EHRC 2010; Other Stakeholders 2018)⁶⁷⁶, in non-unionised industries, by employers who similarly exploit all workers (Barnard 2014). Moreover, it might be difficult for Polish claimants to provide evidence of their group's disadvantage at the hands of specific employers since many Polish employees are temporary, and some appear unwilling to provide statements or share information to support claimants - presumably due to fear of employer reprisals or due to co-ethnic economic competition. The lack of relevant data collection also complicates this.

⁶⁷⁴ ET Manchester, 2015. See also <https://www.lep.co.uk/news/crime/lorry-driver-awarded-15-000-after-discrimination-case-upheld-1-7178302>.

⁶⁷⁵ Employing mostly British and Polish workers.

⁶⁷⁶ E.g., *Prasil v Orchard House Foods Ltd* (discussed earlier) - 50% Polish employees; 25% Latvian.

C. Language-Bar Claims

In the language-bar cases I found, English-only rules⁶⁷⁷ have been rare. Instead, Polish claimants tend to get singled out for speaking Polish, and hence are often able to assert direct discrimination or harassment claims. As indicated by the cases discussed below—and in line with EHRC (2012) research—their claims appear more likely to succeed where such prohibitions extend to casual conversations not part of work duties or where other foreign-born workers are permitted to speak their native language at work.

*Dziedziatek v Future Electronics Ltd*⁶⁷⁸ represents the first time that a language bar was found to support a claim of direct, as opposed to indirect, discrimination. After a non-Polish colleague complained that she felt distracted by a Polish asset manager's work-related conversation in Polish, a supervisor instructed her not to speak 'in her own language'. The employer had no general English-only policy. Other foreign-language speakers who had not been reprimanded for using their native language served as actual comparators. The respondent offered no explanation. In finding for the claimant, the ET ruled that being forbidden from speaking one's own language was intrinsically linked to one's nationality.

Direct discrimination claims tend to be challenging to prove in the language context, however. Notably, in *Dziedziatek*, the ET pointed that the claim would have failed had the claimant been told specifically not to speak Polish (presumably because this could apply to non-Poles who speak Polish⁶⁷⁹) or to speak only English (since that would apply to workers of any race). Either of such statements would have lacked the necessary causal link to her race. Thus, *Dziedziatek* illustrates how a simple rephrasing of the respondent's instruction would have offered an easy way to avoid liability for direct discrimination.

Of course, instructions not to speak a specific language might constitute harassment. For example, in *Exec Catering Ltd v Kaczynska*⁶⁸⁰, the ET found harassment when a Polish café worker was told by her manager not to speak Polish to her Polish co-workers. The employer did not have a general language rule. The EAT agreed with this finding⁶⁸¹.

⁶⁷⁷ Which might support indirect discrimination claims.

⁶⁷⁸ UKEAT/0270/11/ZT, 28 February 2012 (EAT upheld the finding of discrimination because the employer failed to offer a non-discriminatory explanation).

⁶⁷⁹ I am not convinced by this reasoning. When a Pole is instructed not to speak Polish, that is intrinsically tied to her nationality. Moreover, there is a great difference between instructing a Pole not to speak Polish and similarly prohibiting a non-Pole for whom Polish is a second language to which she lacks any emotional attachment.

⁶⁸⁰ UKEAT/0182/13/JOJ, 31 January 2014.

⁶⁸¹ Although the EAT remitted the case back to the ET for reconsideration because it had failed to explicitly address whether the act of harassment had continued even after the claimant had remained as the only

Similarly, in *Jurga v Lavendale Montessori Ltd*⁶⁸², a Polish teacher and other Polish staff were repeatedly told by a supervisor not to speak Polish, even outside work duties, after another teacher had complained about feeling excluded. Italian workers were not given comparable instructions. The ET considered this harassment because, although the respondent had a blanket rule that only English should be spoken in a formal work setting, the claimant and other Poles were singled out, reprimanded individually, and instructed not to speak Polish even during break times.

Some employers appear to have learned from such cases to limit the scope within which they impose language rules. For example, a warning to Polish workers at a Lidl shop that they would be dismissed for speaking Polish (even during break times or to customers who only speak Polish) prompted press criticism and threats of litigation. Lidl then revised its policy, permitting the use of foreign languages with customers who do not speak English and during break times, as long as others are not excluded⁶⁸³. Of course, given the widespread public antipathy towards Poles (by both Britons and other CEE workers), it is not unfathomable that non-Polish co-workers might be especially prone to feeling excluded by conversations in Polish.

D. Harassment Claims

Harassment claims brought by Polish workers indicate that the ET tends to be more supportive of such claims than the EAT is. Both, however, display much latitude when applying statutory test elements (especially in determining a causal connection to race, and the reasonable person standard).

In *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust*⁶⁸⁴, the EAT agreed with the ET's findings against the claimant, a Polish neurologist (represented by a QC). After the respondent received some complaints from patients and registrars about the claimant, her responsibilities were reduced. In a personnel report, her supervisor then questioned her training in Poland. In dismissing her claim, the ET emphasised that 'any stereotypical assumption in the report was about the quality of Polish training, not about Poles themselves'. The tribunal's reasoning focused on the fact that these comments would not have been made had the claimant trained in Britain, but would have been made had a British doctor been trained in Poland. Although this reasoning is not entirely

Polish-speaking employee for five months before her resignation. This was relevant to whether the complaint was timely.

⁶⁸² No 3302379/2012, ET Watford, 30 September 2013.

⁶⁸³ See <https://www.fifetoday.co.uk/news/lidl-polish-gate-inquiry-1-3602954>.

⁶⁸⁴ UKEAT/0269/15/JOJ, 21 January 2016.

convincing and is irrelevant to the legal test for harassment, the EAT concluded that the ET had performed sufficient factual analysis and dismissed her appeal.

In *Quality Solicitors v Tunstall*⁶⁸⁵, the ET similarly failed to apply the statutory test for harassment, albeit finding for the claimant, a Polish paralegal who had overheard her boss telling a potential client that ‘she is Polish but very nice’. The respondent claimed that he had stated ‘she is Polish *and* very nice’. The ET concluded that, regardless of the exact phrase used, her race should have been irrelevant to her introduction to a client, and its mention was patronising. The EAT ruled that the ET had failed to perform statutory harassment analysis. Notably, instead of remitting the case to the ET, as is the usual practice, the EAT set aside the finding of harassment because it was based on a single remark, made in the context of ‘encouraging’ a client to be assisted by this paralegal. The EAT overlooked the fact that this ‘encouragement’ is exactly what had made the remark patronising, based on an assumption that the client would not want the claimant working on his case due to some prejudice against Poles.

In the above two cases, the EAT’s approach to statutory analysis has been inconsistent. In *Quality Solicitors*, the ET did not explicitly address the reasonableness of the claimant’s reaction, and had combined two separate elements of the statutory test, to conclude that the comment had made the claimant feel humiliated and degraded (rather than stating whether the effect of respondent’s conduct (1) violated her dignity or (2) created a degrading or humiliating environment). This error was sufficient for the EAT to set aside the ET’s findings. On the other hand, in *Kowalewska-Zietek*, where the ET did not apply facts to the statutory test at all, the EAT did not find its analysis inadequate. In both cases, of course, the result was the same: claimants were unsuccessful. One wonders whether the EAT’s fickle approach towards legal analysis in these two cases was driven by its views about the substance of the claims, its subjective opinions, or a poor grasp of the applicable legal doctrine.

ET decisions also appear inconsistent. They appear to find harassment more readily if they correctly and diligently apply statutory provisions. One wonders whether the rigour of their analysis depends on a sympathetic predisposition towards specific claimants or on the underlying claims’ strength. Successful harassment claims have also tended to include additional successful claims, such as in *Besz* and *Krupa* (discussed above). On the other hand, when dismissing a harassment claim in *Matuzewicz* (also discussed above), the ET did

⁶⁸⁵ UKEAT/0105/14/RN, 28 July 2014.

not apply statutory elements of harassment. Instead, the ET attributed the claimant's poor treatment to her being too sensitive, 'obstinate and opinionated'. It is difficult to imagine such unnecessary descriptions to be applied to claimants (especially males) of other races.

E. Victimisation Claims

Despite containing straightforward statutory elements, victimisation claims do not appear asserted often by Poles. In my review, I found only one successful victimisation claim, among only a handful of such claims being asserted. In *Krupa* (discussed above), the ET found the respondent liable for victimisation when dismissing a warehouse cleaner after she had sent three emails to the company's CEO to complain about management's breaches of their legal obligations, including its poor treatment of Polish workers. The respondent argued that the claimant had been dismissed due to her poor skill set, being costly (as an agency employee), and being 'obstructive' and 'annoying' (¶ 55.4). The ET noted that there was no evidence of her poor skill set, and no explanation as to why she, as opposed to other agency employees, was too costly. After applying all elements of the statutory test, the ET inferred that her protected disclosures had a material effect on her dismissal because the respondent had found her 'annoying' and a 'nuisance' at least in part due to her grievances. In *Matużewicz* (discussed earlier), on the other hand, the ET found that the claimant had not been subjected to a detriment when she was asked once by her supervisor whether she had already resigned (after she had stated that she would be doing so).

The low number of victimisation claims that I found is somewhat surprising given that my review of all ET decisions available on Gov.uk⁶⁸⁶ indicates that, among more than 2,500 decisions classified under 'race discrimination' published since February 2017, over 400 included a mention of victimisation (compared to 500 decisions mentioning direct discrimination, 100 indirect discrimination, and 500 harassment). It is possible that Poles (at least the ones without legal representation) are not as familiar with the concept of victimisation as with other race-based claims, especially since it does not constitute a separate claim under Polish equality law⁶⁸⁷. Moreover, my review of cases indicated that many Poles tend not to complain about their poor treatment until the time when they resign or get dismissed. Thus, if they sever all ties with their employer at that point, they might not be subsequently placed at a detriment⁶⁸⁸.

⁶⁸⁶ See <https://www.gov.uk/employment-tribunal-decisions>.

⁶⁸⁷ See <https://www.legislationline.org/documents/id/18569>.

⁶⁸⁸ An example of a post-termination detriment, however, would be respondent's refusal to provide a reference letter for the employee.

F. Procedural and Practical Hurdles

Discrimination claims are generally not easy to prove, especially given that discrimination law has been becoming more complex. Respondents possess most of the evidence, and typically have better access to legal representation. All claimants who are poor, not familiar with the British legal system, or not proficient at English are especially disadvantaged. Moreover, many victims of race discrimination hesitate to seek legal redress – due to doubting that they will be believed or fearing retaliation (McColgan 2017: 69).

Such hurdles are likely exacerbated in Polish workers' cases. They are often employed in temporary and precarious arrangements (McDowell et al 2009; Parutis 2011a), which generally tend to be associated with exploitation and discrimination (Dickens and Meardi 2017). In five of the nineteen ET cases discussed at length above, the claimants⁶⁸⁹ engaged in precarious employment: Obieglo and his co-claimant were seasonal fruit pickers; Skrzydlo and Matuzewicz were employed through agencies; Grzyb had a 10-hour contract; and Kaczynska worked variable hours. Generally, those employed in low-skill jobs tend to be overworked and focused on their day-to-day survival. Moreover, Polish and other CEE movers have often engaged in circular migration (White 2016a). A sense of being transient can make the burden of racist subjugation easier to bear. All this has likely made Poles less invested in asserting their rights – further complicated because employment discrimination claims do not get resolved quickly⁶⁹⁰. Poles' tendency to mistrust the authorities (Kubal 2012) and be submissive as employees (Parutis 2011) likely facilitates their hesitance to file claims. Of course, those who work semi-lawfully avoid making any complaints.

Of the more than two hundred discrimination cases brought by Polish claimants that I had reviewed, about a quarter were dismissed because they were out of time. Some were untimely due to claimants' having received incorrect advice of the Polish migration industry or of Polish friends. Polish movers have been documented to rely for advice on the migration industry rather than on traditional sources such as churches, voluntary groups, and advocacy networks (Garapich 2008). Comprised of largely unregulated immigration, financial, travel, and recruitment agents and advisors, communication businesses, ethnic media, and ethnic food shops (id), this migration industry is profit driven⁶⁹¹, and not always well informed about the legal regime. Furthermore, Polish

⁶⁸⁹ Additional claimants in the cases I address in this Chapter might also have engaged in flexible employment, although this determination cannot be made due to insufficient information in the ET record.

⁶⁹⁰ For example, in 2012-13, it took an average of 30 weeks (the longest of any ET claims) for race discrimination claimants to receive a final decision (Courts and Tribunals Service 2014: 3).

⁶⁹¹ Sometimes operated by organised crime groups.

workers' tendency to work surrounded by other Poles, whom they tend to mistrust⁶⁹² (Garapich 2008), likely does little to facilitate their knowledge of worker rights or ET procedures.

Some ETs have shown leniency towards Polish claimants by extending filing deadlines in the interest of justice. For example, in *Grzondziela v St Barnabus and St Paul COE School*⁶⁹³, missing a filing deadline by one week was excused by the ET due to the claimant's language difficulties and absences from the UK. In *Ruda* (discussed above), the ET went as far as to permit a three-year delay in filing claims. The ET attributed this leniency to the claimant's unfamiliarity and 'degree of vulnerability' with respect to British working practices. Given that the claimant was an engineering supervisor and knew English, one wonders whether the ET's tolerance represents an outlier or was caused by the strength of the claimant's underlying arguments⁶⁹⁴, or perhaps by the adjudicator's partiality. It is possible that some adjudicators are sympathetic towards all exploited workers, or that some consider—if only informally—the broader societal racialisation and disadvantage that Polish movers have faced as a group. Moreover, adjudicators' efforts to at least occasionally offer the illusion of resolution and fairness legitimate existing social conditions and the legal status quo (Freeman 1978), facilitating this transnational reserve army of workers supporting British capitalism. In most of the cases I reviewed, however, the ETs were less sympathetic to Polish claimants. The EAT appears to simply demand that the ET applies the correct legal standard (just and equitable) to Polish claimants' requests for extension of time, as indicated in *Gbidi* and *Szmidt* (discussed above).

Overall, Polish claimants do not appear to fare well when asserting discrimination claims. Notably, it is difficult to imagine that tribunals would so easily dismiss some of the treatment experienced by unsuccessful Polish claimants—such as in *Kozakiewicz*⁶⁹⁵ or *Quality Solicitors*⁶⁹⁶ (discussed above)—had it been directed against BAME workers⁶⁹⁷.

⁶⁹² Garapich (2008: 747) argues that the (indirect) transitional mobility restrictions and the consequent illegality of many Polish workers contributed to their insecurity, and increased their mistrust of other Poles. For example, they are known to report each other to immigration officials and to sell fictitious employment leads.

⁶⁹³ No 2401724/2016, ET Manchester, 23 November 2017.

⁶⁹⁴ Successful harassment and direct discrimination claims based on Borat comments.

⁶⁹⁵ Refusing to recruit additional Poles to avoid turning an establishment into an 'all-Polish' store.

⁶⁹⁶ 'She is Polish but very nice'.

⁶⁹⁷ It is difficult to make direct comparisons of ET claims brought by Poles with claims brought by BAME claimants. My data includes gaps (addressed earlier). Moreover, some national statistical measurements rely on information provided by claimants themselves (Barnard and Ludlow 2016); a high number of claims are settled or withdrawn (for example, 43% were settled through ACAS, 15% privately settled, and 20% withdrawn in 2012 (Department for Business, Innovation and Skills 2014, Table 5.2)); and it is difficult to compare such factually-intensive claims. What the available data does indicate, however, is that Blacks are overrepresented among ET claimants compared to their population size. For example, in 2012, Blacks constituted 2% of the population of the UK, yet 7% of ET claimants (id: Table 8.3). Moreover, Blacks'

Moreover, in all eleven of the cases discussed at length in this Chapter in which claimants were issued compensation, ETs have tended to make below-average awards. With the exception of *Michalak*, where the record-breaking £4.5m award⁶⁹⁸ could be attributed to the unusual factual circumstances (discussed earlier), the highest amount awarded was close to £15,000 in *Kosik* (indirect discrimination), followed by £7,000 in *Jurga* (harassment and victimisation). The awards in all the other cases were between £1,500 and £4,500 – far below the 2010-13 median of approximately £10,000, and the 2015-16 median exceeding £13,000 in race discrimination cases (discussed earlier). Since ETs have much discretion in awarding damages, especially for injury to feelings, it is not clear why these awards appear relatively low. One wonders if it is because of Polish claimants' low-paid, deskilled positions, their frequent lack of legal representation, or the ET's belief that they are somehow not deserving of more.

6. Conclusion

Labour needs two decades ago prompted the UK to support CEE states' accession and their nationals' immigration⁶⁹⁹. As CEE nationals, and especially Poles, became more and more visible here, they provoked opposition, leading to incidents of racism, and eventually, contributing to the outcome of the Brexit referendum. Moreover, they are embedded within anti-Polish (and anti-CEE) public, media, and political rhetoric, and within the Government's general anti-immigrant discourse. As my analysis in this Chapter reveals, their experiences of discrimination, disadvantage, and racialisation, and their unique positioning in the British hierarchies of privilege have been overlooked by equality discourse, and inadequately addressed by statutory anti-discrimination provisions, in line

success rate before the ET appears somewhat lower than of whites or Asians. For example, in 2012, Blacks comprised 5% of all claimants successful before the ET (id: Table 8.2), while constituting 7% of all claimants (id: Table 8.3); whites comprised 84% of all successful claimants (id: Table 8.2), while constituting 82% of claimants (id: Table 8.3); and Asians comprised 8% of all successful claimants (id: Table 8.2), while constituting 7% of claimants (id: Table 8.3). Notably, while 69% of white claimants in 2012 perceived that the ET had given each party a fair chance to make their case, only 46% of Black and 59% of Asian claimants felt that way (id: Table 7.10). At the same time, 37% of Black, 28% of Asian, and 20% of white claimants felt that the ET was favourable to employers (id).

When looking specifically at race discrimination claims before the ET, 10% were successful in 2012 (id, Table 5.2), whereas Barnard and Ludlow's (2016) study indicated CEE claimants' 8% success rate during 2010-12. Their study, however, was based on only 13 race discrimination claims (which included only one successful claim), so a meaningful comparison is difficult to make. Blacks appear proportionally overrepresented in race discrimination claims. For example, in 2012, 73% of claimants in race discrimination cases were white, 11% were Asian, and 12% were Black (Department for Business, Innovation and Skills 2014, Table 8.1), contrasted with their share of the UK population of 90%, 6%, and 2%, respectively (id, Table 8.3).

⁶⁹⁸ Close to half of this amount was due to a tax gross up. The actual award comprised mostly of lost past and future income and pension (more than £1.8m), £30,000 for injury to feelings, and £4,000 in exemplary damages.

⁶⁹⁹ Albeit temporarily indirectly restricted, as addressed in Chapter 4.

with how they have been overlooked by the EU equality framework (discussed in the preceding Chapter).

Some scholars have argued that any Member State that desires to make real progress in combating discrimination must go beyond the requirements of the Directive⁷⁰⁰ (e.g., Makkonen 2012). Although it is an improvement over earlier legislations, the British racial equality framework has not gone much beyond the Directive's protections, however, and does little to advance substantive equality. Notably, the statutory definition of 'racial or ethnic origin' under the EqA2010 is not always sufficient in practice when it comes to protecting the rights of migrants or movers. It is true that 'race' under the Act includes both nationality and national origin, and white movers are covered by these protections. Often, however, the reason for discrimination is due to a victim's being migrant, being foreign, or—in the case of my study group—having generic Eastern European origin (as opposed to specifically Polish origin). If courts define 'race' in an inflexible way, such cases might be beyond the grasp of equality law.

Moreover, shortcomings of anti-discrimination measures appear compounded when adjudicators apply legal provisions in the context of Polish claimants. This is in part due to adjudicators' unpredictable and inconsistent grasp of the legal doctrine, facilitated by some statutory elements' not being well defined. Interpretive leeway, of course, also permits adjudicators to be flexible in their application of the law to benefit claimants, but ET and EAT adjudicators do not appear to have frequently taken advantage of this in the context of Polish claimants. Although I have not found consistent evidence of their preferring employers' over Polish workers' interests, their unfavourable decisions often rely on a careless application of statutory provisions, especially at the ET level. It is not clear whether this reflects their poor grasp of the doctrine or their majoritarian values and experiences. Moreover, Polish low-skill movers' tendency to often work with many, if not predominantly, Polish and CEE workers for exploitative employers presents some unique challenges in asserting their equality rights, which are not shared by all migrants or all socio-economically disadvantaged groups. Specifically, this makes it more difficult to find comparators who are treated more favourably, and some adjudicators appear to consider having many Polish co-workers as evidence of employers' lack of discrimination.

This inadequate attention of the British equality law and discourse to the experiences of my study group might be attributable to the fact that Polish movers do not fit the UK's

⁷⁰⁰ Due to some of the weaknesses of the Directive discussed in the previous Chapter.

traditional approach towards race relations and migration. Historically, increasing racism against immigrants and their permanent⁷⁰¹ settlement had prompted both immigration restrictions and greater equality protections. CEE movers have complicated this dynamic. Although the Brexit referendum promised to curb their numbers (a promise which appears abandoned—at least in the near future—according to the 2018 White Paper), no attention has been devoted to the equality framework’s responsiveness to their experiences. Notably, protecting white movers’ equality has not had much to contribute to the dominant group’s interests, especially since they have not engaged in overt conflict with other groups, many have been temporary, they have made significant economic contributions despite (or due to) inadequate equality protections, and their influx has been decreasing since the referendum⁷⁰².

It remains to be seen how the legal regime will protect their rights after Brexit, and whether post-Brexit CEE migration will affect the British definition of whiteness. Those who will rely on the settled scheme will likely be more prone to integrating and eventually joining the British polity. Since they will likely be incorporated into the white norm, it is likely that policymakers will overlook their equality needs. The incorporation of CEE immigrants into the dominant group in the United States a century ago (Roediger 1991) did not prompt greater attention to protecting their equality rights. High-skilled CEE migrants will likely constitute a small group, and their education and socio-economic status might alleviate their racialisation to a certain degree, although as some of the cases discussed above indicate, even high-skilled CEE movers have been subjected to discrimination. The largest group of post-Brexit immigrants will likely be low-skill, temporary workers (from the EU and other countries to be designated as ‘low-risk’). It is unlikely that British policymakers will have much interest in securing their rights. The labour market will rely on a churn of these temporary workers with few rights (much fewer than EU movers have had)⁷⁰³, who will likely be concentrated in exploitative, precarious employment. Without specific policies devoted to their equality, integration, and equal opportunities, employers will be able to reap greater economic benefits from their presence. Thus, whereas the post-Brexit equality regime⁷⁰⁴ is unlikely to become more

⁷⁰¹ Although at first after their mass immigration, BAME groups were also overlooked by equality discourse and policies.

⁷⁰² E.g., <https://www.theguardian.com/uk-news/2017/may/25/surge-in-poles-leaving-uk-since-brexit-vote-fuels-net-migration-drop> (relying on ONS data).

⁷⁰³ They will not be able to bring dependants, access public benefits, extend their visas beyond the one-year period, or transition to other visa types.

⁷⁰⁴ Although after Brexit, the Government will have the power to repeal equality laws transposing the Race Equality Directive, it is unlikely that British equality laws will change much given how well-developed they

responsive to CEE nationals' needs, their racialisation might change. This will likely depend on whether the current climate of anti-CEE antagonism—steeped in long-standing western European discourse (addressed in Chapter 2) and in policies naturalising inequalities between east and west (addressed in Chapters 3 and 4)—will continue or diminish after Brexit. This will in part depend on whether low-skill CEE migrants will continue having a noticeable presence in the UK. It is also possible that the likely post-Brexit influx of non-white (low-skill and high-skill) workers will provide the British public with a new target for antagonism. Of course, different outlets of racism are not necessarily mutually exclusive.

Although I subscribe to CRT scholars' belief in the potential of law to fight subordination (Williams 1992), that potential is never complete – either through statutory law or its judicial application. Any anti-discrimination law reflects compromises between various political and social groups, and the concept of equality is broader than just making discrimination unlawful. The socio-economic duty and its removal had acknowledged as much. I am not prepared, however, to adopt some CLS scholars' view that law lacks any utility⁷⁰⁵. After all, some Polish claimants are successful before the ET. Moreover, the current framework's potential in the context of my study group could be improved through some simple reforms. To start with, policymakers and adjudicators should take account of CEE movers' experiences. Equality policy initiatives need to be supported by more detailed studies of such groups' experience of inequality, disadvantage, and discrimination in various interconnected fields (including housing, education, criminal justice, and access to health care and social services), and by better monitoring. There is a general lack of detailed data collection about migrants (EHRC 2016), especially white ones. The UK's approach to ethnic monitoring, developed in the 1970s and 1980s, has tended to overlook non-BAME groups (Kofman et al 2009: ix), at best separating non-British whites into Irish, Gypsy/Traveller, and 'other whites' groupings⁷⁰⁶. For example, the British Crime Survey categorises victims only as Asian, Black, Mixed, White, or Other. Even the 2009 CRE proposals to expand equality monitoring subsumed all whites into one category (id: 62).

were before the Directive. Moreover, after the UK leaves the EU, discrimination will still be challengeable under the Human Rights Act 1998, and in the European Court of Human Rights.

⁷⁰⁵ Such nihilistic approach to rights is also internally inconsistent with the CLS argument that law is powerful enough to sustain the oppressive status quo.

⁷⁰⁶ E.g., ONS (2011). Asians, on the other hand, are split into Indian, Pakistani, Bangladeshi, Chinese, and Other Asian categories (id).

My analysis here illustrates the malleability and usefulness of CWS and CRT frameworks to the study of marginalised whites such as intra-EU movers from poorer to richer Member States. Although CRT scholarship has tended to overlook non-racial causes of inequalities, fractures within whiteness, and the global backdrop of mobility and transnational capitalism, CRT tenets can accommodate the position of Polish movers and racialised whites more generally. In line with CRT tenets (e.g., Crenshaw and Peller 1995; Delgado and Stefancic 2017; Matsuda et al 1993; Williams 1992), the discussion of my study group confirms how prevalent and naturalised racism is, and how some inequalities are overlooked or tacitly sanctioned by formal concepts of equality, which support the interests of those in the position of power.

The study of the position of Polish and CEE movers within host State equality frameworks also has implications for the EU project. Freedom of movement is not free without better national responses to movers' racialisation and discrimination. Having enabled CEE workers' mobility and enacted the Race Equality Directive, the EU has stepped back from paying attention to what happens to the actual movers in host States. Although its competence in affecting equality of outcomes is very limited, the EU does have the power to shape discourse, monitor inequalities, implement initiatives to support movers' equality, and point out shortcomings in how national equality regimes have approached movers. It has largely remained silent⁷⁰⁷, however, even refraining from condemning post-referendum CEE movers' experiences of racism which have been brought to its attention⁷⁰⁸. The EU should play a greater role in this area, particularly since CEE mobility will continue to EU-14 States, which have also experienced anti-CEE sentiment (as addressed in Chapter 5).

⁷⁰⁷ Unlike EU bodies, the European Commission against Racism and Intolerance (ECRI 2016: 74) has bemoaned Eastern Europeans' low labour market outcomes, condemned scaremongering by UKIP and Conservative MPs for contributing to public xenophobia (id: 17), and recommended that integration measures target CEE movers (id: 35).

⁷⁰⁸ For example, the 2017 Country Report on Non-Discrimination in the UK, prepared by the European Network of Legal Experts in Gender Equality and Non-Discrimination, noted the post-referendum increase in anti-EU migrant hostility (McColgan 2017: 5).

Chapter 7: Conclusions

1. My Findings

The significance of contemporary mobility to notions of race and equality has come to the foreground during the Trump-and-Brexit era, which has exemplified that not only blackness, but also whiteness carries great political, legal, and social importance. Naturalised into invisibility, whiteness embodies historically contingent and evolving power relations, embedded within specific social and geographical locations. Polish movers to the UK provided an opportunity to study how both the EU and the UK equality frameworks delineate grades of whiteness, and how they approach the experience of inequality and discrimination by whites who do not belong to the dominant ethnic group.

On the basis of my research, it is difficult to reconcile the EU's fundamental rights narratives and the UK's emphasis on equal opportunities and integration, with Polish movers' experience of mobility - including the initial freedom of movement derogations; frequent deskilling and exploitation in the labour market; and racialisation by the media, politicians and the public, both before and in the aftermath of the Brexit referendum. Despite the plethora of economic, cultural, and sociological studies of Poles' mobility, explorations of how anti-discrimination law and equality discourse approach them have been rare. Scholars have also not taken a sufficiently holistic look at their mobility, by failing to adequately situate their experiences within the broader context of the EU integration project. Moreover, despite its highly relevant focus on the intersection of law, race, and power, CRT has been greatly underutilised in this context. My thesis begins to address these gaps.

Chapter 2 set the background to the way in which the EU equality regime, the enlargement project, and Poles' mobility have been embedded in a certain set of values and ideologies. Although EU founders had at first equated the EU project with economic goals, it became infused by the late 1970s with an abstract story of a progressive, benevolent, and inevitable integration project based on respect for fundamental rights. I argued that this EU rhetoric contains inherent tensions, often overlooked by scholars: fundamental rights narratives retain an underlying economic core, with economic initiatives being inextricably tied to the concepts of freedom and equality, and to the process of enlargements. Moreover, my study revealed that foundational EU narratives have tended to focus on—even after the fall of the Iron Curtain—Europe's western thinkers, western myths, and accomplishments of its western Member States. With its political foundations in EU-15 States, it is not

surprising that at first the EU had envisioned itself as a western project. Once the Eastern Enlargement was on the horizon, however, and since then, EU rhetoric should have become more inclusive, especially given its emphasis on inclusivity, diversity, and equality. It has not. I argued that this reflects a conceptual hierarchy of Europeanness in EU discourse and institutions, with EU-15 States having served as a synecdoche for the entire 'Europe' and the entire EU, and the CEE region having been pushed to the periphery. In the process, CEE nationals have been othered, reinforcing historical east-west power differentials.

My conclusions about the economic, pro-western core of EU mythologies were in line with my analysis of the Eastern Enlargement process in Chapter 3. I claimed that the EU had misused its bargaining power, starting in the 1980s, to shape the Enlargement policies so as to economically benefit western financial institutions and EU-15 States, while ignoring the interests of the acceding states and facilitating growing economic inequalities in Poland. This political, legal, and economic process was complemented by EU rhetoric which has tended to other the CEE region as being in need of civilising through westernisation. At odds with fundamental rights narratives, both accession policies and discourse have normalised Poland's status as a second-class Member, on the periphery of the dominant (western) EU group.

Chapter 4 traced the inequalities built into the Enlargement process to post-accession mobility derogations and the recently increasing willingness by EU institutions to limit CEE workers' access to mobility, thereby creating hierarchies of EU citizenship and of whiteness within the EU. My research revealed that EU institutions had disapproved of post-accession mobility derogations only for limiting economic benefits to host States, and did not find any conceptual or legal difficulties with transitional arrangements. Similarly, EU institutions have been critiquing incidents of post-enlargement discrimination against CEE workers in EU-15 States primarily because of their negative economic consequences for western States. More generally, I argued that economic interests of EU-15 States have predominated in both mobility discourse and policies. These approaches have been at odds with the abstract portrayals of mobility as a key fundamental right and a key symbol of 'returning' the CEE region back to 'Europe'; yet are in line with the economic, pro-western core of EU mythologies, which I had exposed in Chapter 2.

In Chapter 5, I explored how the right to equality, which has been intimately linked to the right of free movement, reflects western economic and political concerns and is far removed from the EU's fundamental rights narratives. Several of the Race Equality

Directive's key provisions have been weak, and especially unfit for protecting CEE movers' rights. Although, given the function of framework directives and the scope of the EU's competence, the Directive arguably could not have accomplished much more than it has, the EU's conceptualisation and contextualisation of the equality right has been overlooking CEE movers' interests. My research indicated that the Directive's legislative history and the broader equality discourse and soft law measures have been devoid of any concerns about the rights of white intra-EU movers, such as CEE nationals. This helps to naturalise their status as second-class EU citizens, entrenching fractures within whiteness.

In line with what I argue to be the core of the EU's equality law, I contended in Chapter 6 that CEE movers' experiences of discrimination and racialisation⁷⁰⁹, and their unique positioning within the UK's hierarchies of privilege and disadvantage, have been overlooked by the British equality discourse and inadequately addressed by the Equality Act. Although the UK's equality framework is less overtly connected to economic goals than the EU's agenda, the Equality Act has not gone much beyond the Race Equality Directive's protections, and its ineffectiveness appears compounded when it comes to protecting the rights of Polish movers. Moreover, although my review of EAT and ET cases was not comprehensive, it suggests that Polish low-skilled workers might face some challenges in asserting their equality rights due to frequently working with predominantly Polish or other CEE movers. Although, due to the flexibility of some of the Equality Act's provisions, adjudicators are afforded some leeway to take a holistic view of Poles' racialisation and its impact on their work experiences, my review indicated that tribunals have not often taken advantage of this.

As my research revealed, the historical hierarchy (addressed in Chapter 1) positioning the west as superior and the east as unable to be fully 'European' can still be observed today in how the CEE region and its nationals have been approached under EU and UK policies and discourse. Whereas generally, cleavage between EU ideals and the reality of its policies has been attributed to the EU's limited competence and its inability to enforce its values⁷¹⁰ or to ensure Member State compliance (e.g., Kochenov 2017), I propose that the EU project itself has been founded on and propagates a reality that differentiates between the west and the east, benefiting the former. This has had repercussions on inequalities built into the Eastern Enlargement process and on CEE nationals' unequal experience of

⁷⁰⁹ Although incidents of racialisation and discrimination discussed in this thesis might not equally impact all Polish workers in the UK, my findings provide insights into how recent Polish movers as a group have been positioned within the equality regime.

⁷¹⁰ Although the ECJ has attempted to treat some values—such as freedom and equality—as legal rules (Kochenov 2017).

mobility⁷¹¹. By contextualising Poles' mobility within both historical and contemporary transnational power dynamics, I was able to arrive at a more nuanced picture of today's micro-level ethnic power relations which are shaping the boundaries of whiteness. It is true that all migrants face challenges, especially at first, but CEE movers have been unique: the overall EU project has been framed as egalitarian, and, unlike most historical migrant groups⁷¹², movers have been endowed with residence and employment rights. It is also true that the general shortcoming of both the EU and UK equality frameworks are not specific to Polish movers or marginalised whites. However, as discussed in Chapters 5 and 6, the frameworks appear especially unfit for CEE movers, and arguably Poles in particular.

I am not arguing that the Directive or the EqA2010 necessarily stem from bad intentions. However, even if new laws are made in good faith, they are created within the confines of pre-existing discourses and frameworks defined by those in power – unless, of course, they try to radically break away from the past, which neither the Directive nor the EqA2010 did. That being said, even though law can never address all race-based wrongs and individual litigation-focused enforcement model has a limited capacity to address structural disadvantage, both frameworks do offer space to be more inclusive by leaving some flexibility to adjudicators, such as when creating hypothetical comparators or attributing respondent's actions to claimant's race. How can these opportunities actually materialise? Such change would likely need to be prompted by a confluence of political, economic, and cultural shifts, as well as by better organised action by CEE interest groups, to make both adjudicators and the public more critical of inequalities and challenges experienced by CEE movers.

My research also explored the role of legal myths in contemporary EU and UK law. As Fitzpatrick (1992) expounds, the legitimisation of contemporary law relies heavily on myths, which portray it as universal, progressive, and stable yet responsive to changing societal needs. This thesis illuminates how both the EU integration project, and EU and UK equality measures have been in fact embedded in such myths. Notably, Fitzpatrick (id) points to the significant role of othering in the mythology underlying modern law. It is through the otherness of the primitive and non-western that the occident's legal structures are created as modern and praiseworthy (id). Colonialism has been the extreme example of this project, with modern western structures having been applied to redeem those

⁷¹¹ Similarly, the EU's relations with the Global South reveal north-south inequalities.

⁷¹² With the notable exception of New Commonwealth migrants to the UK.

perceived as savages (id). I would argue that the west's ongoing relationship with the CEE region, with many markers of coloniality (addressed below), reflects and reinforces such a construction of western law.

Of course, the relationship between policies and myths is rarely straightforward, as my analysis reveals. Certainly, it appears that at times myths drive policies. For example, the ECJ examines all Commission initiatives for compliance with fundamental rights; and the Eastern Enlargement has been attributed by some scholars to western politicians' rhetorical entrapment after having portrayed the EU as a pan-European undertaking (Schimmelfennig 2001). At other times, policies appear to drive or at least intensify myths. For example, I found that integration myths intensified on the eve of the Eastern Enlargement.

The complex relationship between myths and policies is complicated due to the inconsistencies of both, as my study revealed. For starters, laws can be inconsistent. For example, mobility derogations in the Accession Treaty were at odds with the freedom of movement *acquis*⁷¹³. In the UK, well-developed equality law coexisted with the WRS and the right-to-reside test, and would have been further called into question through Cameron's New Settlement with the EU. Law is less self-contained, universal, autonomous, or coherent than we would like to believe in order to support the legitimacy of the rule of law (Fitzpatrick 1992: 1-12; 2003). Similarly, myths are internally inconsistent. Fitzpatrick (2003) has noted how myths of law's coherence, completeness, and autarky are constantly in tension with the myth that law is responsive to changing social circumstances. In the context of my research, both EU and UK equality narratives contain both types of myths. Moreover, EU fundamental rights and equality narratives coexist with narratives othering the CEE region, sometimes even in the same documents. Finally, there is an obvious gap between myths and policies at times. For example, mobility has been deemed a fundamental right, yet has been limited under both EU and Member State laws. Similarly, British pro-mobility and equality rhetoric were accompanied by the imposition of the WRS and the right-to-reside test to access social benefits. Such inconsistencies complicate the relationship between myths and policies, making it difficult to decipher which causes which. But does the precise relationship between them even matter? Myth continues to be central to modern law (Fitzpatrick 1992). Crucially, what my research illuminated is that myths and legal frameworks appear to work in tandem to affect the social reality of CEE movers' experiences of mobility and equality.

⁷¹³ And hence of questionable lawfulness under EU law.

2. Theoretical Implications

A. Critical Race Theory

As discussed in Chapter 1, although CRT began as a progressive movement in American legal scholarship, scholars have noted its applicability to analyses of international law (e.g., Douzinas and Gearey 2005; Goldberg 2006; Tuitt 2004; Valdes et al 2002) and EU law⁷¹⁴ (Möschel 2014; Solanke 2009). Moreover, Heinze (2008) argues that, in order to maintain CRT's credibility, it should be applied more to both international and non-US domestic laws⁷¹⁵. CRT's great contribution to analyses of non-US laws stems from its potential to (1) offer a new critique of the actual norms and practices involved in drafting and applying such laws, and (2) illuminate (and eventually redress) inequalities experienced by disadvantaged groups beyond the US, as I have attempted to do in this thesis. The CRT framework is particularly applicable to the EU, due to EU law's inherently political nature. That is, its core purpose has been to service the common market, and a plethora of political texts exists to justify its policies. Both these factors make EU law very amenable to CRT analysis, which seeks to uncover hidden assumption and power hierarchies behind laws and legal discourse. Notably, there is some overlap between the EU equality framework and CRT outlook - for example, both broadly condemn all practices of discrimination and segregation; and both oppose the notion of distinct races. Furthermore, a big advantage of applying CRT to EU law stems from the fact that such critique has the potential to illuminate and affect the experience of equality by persons in many Member States.

My analysis demonstrates that CRT has much to offer to the study of inequalities and anti-discrimination law in Europe. For example, I argue that both EU and UK equality frameworks emphasise individual rights, overlook structural disadvantages, and perpetuate existing power structures, while obfuscating the State's role in propagating inequalities. My study confirmed that both legal discourse and laws lack the vocabulary to address many race-based wrongs. Myths perpetuate existing power structures and laws' hidden interests - by making laws appear neutral and benevolent, and sufficient to ensure equality. For example, EU institutions employed rhetoric of benevolence to help explain the imposition of mobility restrictions on CEE workers, justifying them as necessary to prevent brain drain and labour shortages in CEE countries. Thus, CRT can still generate new insights

⁷¹⁴ Although legal scholars have not applied it in the context of CEE movers.

⁷¹⁵ Heinze (2008) bemoans CRT scholars' general tendency to either ignore non-US laws or to offer only formalist, approving reading of such laws, which he attributes to the fact that foreign laws do not affect US law.

into how law and society operate in the context of racism and subordination, and provides a flexible framework from which to examine today's racisms and racialisations (Hylton 2009).

Notably, modern axes of disadvantage and inequality in the UK have been splintering and increasing in complexity, calling into question the traditional approaches of CRT and CWS scholars, which have been based on the binary of privileged whites versus disadvantaged non-whites. As a time- and place-specific construct, whiteness has outward and inward fractures (Levine-Rasky 2013), which allows for a variety of experiences of oppression (Garner 2007b). For example, tensions have been observed between New Commonwealth and CEE nationals (Namusoke 2016). As indicated in the context of Brexit and studies cited at the beginning of Chapter 6, white Britons have opposed CEE nationals⁷¹⁶. Moreover, my review of discrimination cases filed by Poles also revealed additional inter- and intra-group tensions, in need of greater scholarly attention. On some occasions, Poles appear racist towards non-white co-workers⁷¹⁷, which is reminiscent of how Slavic workers a century ago in the United States sided with the capitalist local class to oppose black workers, in order to partake more fully of white privilege (Roediger 1991). Moreover, some respondents in the cases I found were Polish or CEE nationals⁷¹⁸. This is in line with Barnard and Ludlow's (2016) study which revealed a high number of ET claims brought by CEE claimants against CEE respondents. Such contestation likely reflects intra-CEE competition for work, exacerbated by the increasingly precarious employment environment in the UK, which will likely become even more challenging for low-skill migrant workers after Brexit.

Understanding the role of whiteness in equality, racism, and power structures has always been a component of CRT (see Chapter 1). CWS scholars have noted the increasing significance of fractures and fluidity within whiteness (e.g., Bonnett 1998; Levine-Rasky 2013), exemplified for example through the racialisation of and inequalities experienced by CEE nationals in EU-15 States (e.g., Fox et al 2012a; Garner 2006). As my analysis confirmed, a more nuanced application of CWS in Europe can be very helpful to legal analyses of EU and UK law in the context of contemporary mobility. Whiteness of the

⁷¹⁶ Ironically, Britons' opposition to immigration of all races – whether from outside the EU or from the CEE region – has been used by some researchers as evidence of Britons' colour blindness (Burnett 2014), as if absolving them of racist tendencies.

⁷¹⁷ E.g., *Paulose v Synergy Health UK Ltd*, No 2401298/2016, ET Manchester, 1 March 2017; *Tesfaye v Tower Transit Ltd*, No 3200766/2016, ET London East, 20 July 2017.

⁷¹⁸ E.g., *Warda v Familijny Continental Food Ltd*, No 3324202/2016, ET Reading, 7 February 2017; *Zieba v Polish Shop 4 U Ltd*, No 2403415/2017, ET Liverpool, 13 November 2017; *Swierczynska v Kaprys Polish Deli*, No 3400199/2017, ET Bury St Edmunds, 21 February 2018.

(western) dominant group has been actively constructed and reproduced by excluding and racialising white CEE movers through discourse, laws, and economic, political, and cultural structures. Reproducing the black/white binary, the term ‘white privilege’ incorrectly implies that all whites are privileged, and overlooks the role of class and ethnicity, not only within countries but also transnationally. By exposing internal divisions within the white race and deconstructing the concept of white privilege, my work also helps to subvert it, taking a step towards undermining racism.

According to Said’s (1983) traveling theory concept⁷¹⁹, theories and ideas can be invigorated by new contexts in which they are applied. By testing the limitations of CRT and CWS in the context of my study group, I hope to strengthen both these theoretical frameworks. Ultimately, I seek to expand critical approaches to the study of anti-discrimination law, especially in the context of groups that do not fall into the black/white binary. According to Grosfoguel et al (2015: 636), the definition of racism should be broadened to include ‘global hierarchy of human superiority and inferiority’ produced politically, culturally and economically. My discussion has also illustrated the continuing salience of historical practices and discourses in contemporary power hierarchies and the experience of racism.

B. Postcolonial Theory

Throughout this thesis, my analysis has also drawn upon postcolonial theory. There is certainly much conceptual overlap between CRT and postcolonial theory. Both mistrust the dominant language of law and legal discourse; resist exploited and racialised groups’ subjugation; and are committed to a contextual analysis of law which rejects liberal legalism and notions of legal objectivity and neutrality (Delgado 2007)⁷²⁰. In fact, although his focus has been on domestic minorities in the United States, Delgado argues that postcolonial theory can reinvigorate CRT analyses of subordination (id). Moreover, Mahmud (1999: 1246) has encouraged CRT scholars to draw specifically upon postcolonial analyses of how race has been historically constructed in Europe. Moreover, CRT-like themes have been applied in postcolonial analyses (e.g., Eze 2007; Fanon 1988; Fitzpatrick 1987), and whiteness studies in Europe have been rooted in ideas of postcoloniality (e.g., Nayak 2007; Ponzanesi and Blaagaard 2013).

⁷¹⁹ CRT scholars have applied traveling theory when expanding CRT to non-legal disciplines in the United States (e.g., Carbado 2011), and to analyses in continental Europe (e.g., Knapp 2005; Möschel 2014).

⁷²⁰ These goals are also shared with other critical legal approaches, including feminist legal theory.

Much postcolonial critique, including that by TWAIL⁷²¹ scholars (e.g., Anghie 2007; Chimni 2013), has been devoted to the west's historical subjugation (legal, economic, political) of large parts of the world deemed as pre-modern and uncivilised (e.g., Chakrabarty 2000; Fanon 1988; Said 1983; Spivak 1999), and to the effect this has had on western colonisers' cultures (e.g., Jonsson and Hansen 2018). Such analyses have tended to focus on colonial discourses and practices of subjugation, and on their contemporary legacies of subordination. Although much attention has been devoted to the Global North's and West's imperialism of the Global South and the far East, historical intra-European relations have also been subjected to postcolonial critique - such as English colonialism of Celts, German assertions of hegemony over Central Europe, and Spanish colonialism in the eastern Mediterranean (Mahmud 2007). Today's globalism, fuelled by neoliberal economics, can be seen as a continuance of western imperialism, albeit without actual colonies (Fitzpatrick 2001). Most notably for the purposes of my thesis, scholars have pointed out that colonialism is still a part of Europe internally⁷²² – through the west's imposition of the *acquis* and the othering discourse employed during the Eastern Enlargement process (Böröcz and Kovacs 2001; Engel-Di Mauro 2006), and the ongoing western political antagonism towards CEE workers and their labour market exploitation (Kinnvall 2016).

In line with postcolonial methods, I have sought to position myself with the outlook and experiences of a subjugated group⁷²³, while interrogating western practices that other and inferiorise them. My analysis revealed that links can be drawn between the colonial-like EU integration project and the disadvantage and racialisation experienced by CEE movers. For example, the CEE region has been silenced and differentiated through EU myths, unequal accession policies, transitional mobility restrictions, and recent ECJ case law which diminishes access to mobility of workers from poorer parts of the EU. I have argued in this thesis that such colonial processes—embedded within the long-standing western approach of othering the east—have shaped, at least in part, post-accession dynamics of inequality and racialisation of mobile Poles in EU-15 States. Since one of the goals of this thesis has been to critique CRT, however, I have more consistently relied on the CRT framework, without discounting the relevance of postcolonial theory to my study.

⁷²¹ 'Third World Approaches to International Law' scholars critique international law for facilitating the continuing subordination of the non-western world.

⁷²² Non-western states have been noted to practice a 'poor people's colonialism', directed against minorities therein, such as Iraq's treatment of Kurds (Vanly 1993).

⁷²³ Facilitated by my own Polish upbringing.

3. A Path Forward

A. Future Research

Although parts of my examination focused on Poland and Poles only, some of my findings have broader implications for and pose questions about how legal rules and institutional discourse define equality and the reality of race when it comes to marginalised whites. In particular, critical qualitative and quantitative analyses⁷²⁴ should be performed regarding how other CEE movers in the UK—especially Bulgarians and Romanians⁷²⁵—fare in the context of equality discourse and policies. Moreover, intra-EU white movers have been the targets of recent anti-immigrant rhetoric across western Member States, not just in the UK (Bell 2015). Hence, the experience of equality by Poles and other CEE movers in EU-14 States needs to be addressed in more detail. This is imperative given that freedom of movement to those States will not cease, and might even intensify, after Brexit.

My research also raises questions, mentioned in Chapter 6, about how the post-Brexit splintering of CEE migration into three statuses will affect the British equality regime and the definition of whiteness. Notably, the low-skill, short-term route is intended to facilitate employers' continued reliance on (predominantly white) EU workers (HM Gov't 2018: 25-6)⁷²⁶. Both future UK equality policies and the public racialisation of CEE nationals will likely depend in part on whether the current climate of anti-CEE antagonism—steeped in long-standing western European discourse and policies naturalising inequalities between east and west—continues or diminishes after Brexit. Post-Brexit immigration and equality policies will pose these, and many additional interesting questions.

Some issues that arose during my research complicate my findings, and demand further study. I do not discount the importance of the material and economic foundations of race and power relations, and have noted them throughout this dissertation. For one thing, Poles' experience of inequalities related to the accession process, mobility, and employment in the UK has also been affected by Poland's and Poles' relative economic disadvantage as compared to EU-15 States and nationals. Certainly, racism and the

⁷²⁴ And audit studies, to ascertain any inequalities in access to employment (Banerjee and Duflo 2017; Wood et al 2009).

⁷²⁵ EU-2 nationals have been understudied despite appearing especially racialised and disadvantaged among recent intra-EU movers (e.g., Appendix 1; Datta 2011; Fox et al 2015; Genova 2017; Sobis et al 2016; Wemyss and Cassidy 2017; see also survey findings mentioned in Chapter 4, Section 1B). Although some studies have lumped Bulgaria and Romania together, in part because they acceded to the EU at the same time, I acknowledge their distinct histories and experiences, including the frequent media and public conflation of Romanians with the Roma.

⁷²⁶ Reminiscent of the post-war European Voluntary Workers scheme, created to cover labour shortages in low-paid, unskilled work (McDowell 2009).

concept of race cannot be fully addressed without also paying attention to the role of capitalism and economic exploitation, class, and other forms of oppression (Valdes et al 2002). CRT scholars' attention to intersectionality acknowledges the role of class in racial subjugation (Möschel 2014: 116). In fact, CRT scholars have called for greater attention to theorising class and other factors behind subordination (e.g., Carbado 2011; Delgado and Stefancic 2017; Guinier 2002; Harris 1990), further developed by ClassCrit theorists⁷²⁷ (e.g., Grahn-Farley 2008; Mutua 2008). Both the policies and discourse that I have analysed in this thesis, however, overlook the role of class and of intersectionality, thus reducing the ability of the legal framework to protect equality rights.

As my findings indicate, Poles' mobility experience might be best understood through the intersection of (1) their group's economic status within EU-wide hierarchies, and (2) the western conceptualisation of the CEE region as somehow ethnically not belonging to 'Europe' and not being properly white. It is not their class alone, however, that can explain their experience of inequalities. Notably, other poor non-CEE Member States—such as Portugal or Greece—and their nationals do not appear to have elicited as much opposition or exclusionary discourse, historically or today. Moreover, as my review of employment discrimination claims filed by Poles indicated, even high-skill, middle-class Polish workers can be targets of racial discrimination due to being perceived as inherently lesser because of their Polishness. Thus, it is the various intersecting fractures within whiteness and within class that affect the experience of inequality and discrimination. Future research, as well as legal instruments, should take account of this.

B. Policy Consequences

CRT analytical framework's ultimate goal is to transform and redeem law to fight subordination (Williams 1992). Western laws, legal myths, and legal discourse (Fitzpatrick 2013; Fowler 1996; Sorel 2004; Tuitt 2004; Unger 1983) contain resistant elements on which excluded groups can draw in order to resist the existing power structures and to facilitate their equality and inclusion. For example, both the Race Equality Directive and the Equality Act do provide some flexibility to address a variety of manifestations of discrimination. And EU rhetoric did occasionally include references to the Eastern Enlargement as a 're-unification' of Europe, while both EU and UK equality discourses focus on meritocracy, integration, and equal opportunities. Poles have begun to rely on such resistant elements. For example, they have been pressuring EU institutions to include in EU discourse references to Stalinist crimes against the CEE region (Littoz-Monne

⁷²⁷ Albeit ClassCrits have tended to focus on the class position of Afro-Americans only.

2013). In 2015, Poles protested in front of Westminster to draw attention to incidents of their discrimination, and wrote a letter to Theresa May in 2018 to promote their post-Brexit rights⁷²⁸. But they need to demonstrate more agency—for example, by bringing more cases before employment tribunals—to better fulfil any redemptive qualities that the existing legal frameworks contain.

To better reflect the nature of discrimination and racism, both formal laws and related policies need to take account of contemporary demographic changes, transnational contexts, and intersectionality. Adjudicators should situate individual claimants' experiences within employers' patterns of exploiting CEE workers and within their widespread racialisation⁷²⁹. Legislators also have a role to play – by setting a more responsive framework for courts to follow, and contributing to a more inclusive equality discourse. More nuanced data collection, indicating national origins of claimants enforcing EqA2010 provisions, would help to support such efforts. Moreover, the media and educators should engage in more responsible debates about migration and equality, especially now that those issues are in a state of flux due to the Brexit process. Only then can legal discourse and equality policies become more responsive to all members of the polity, and thus be better able to facilitate meaningful democracies and fulfil the promise of the EU project.

What role should, or even can, the EU play in making the experience of EU citizenship more meaningful for CEE movers in EU-14 States? EU governance, of course, is limited and more akin to administrative than constitutional rule, which defines the parameters of what integration can achieve and its legal character (Lindseth 2017). Despite the fact that its equality laws are mere frameworks, however, the EU does create equality discourse and EU-level anti-racism initiatives, and monitors Member States' application of equality law. Moreover, ECJ case law affects Member States' interpretations of equality law. Although its centrist provisions refer to business goals, the new Pillar of Social Rights and its anticipated legislative measures do hold some promise in increasing the EU's role in this field. Thus, there is certainly space for EU institutions to get more involved in addressing racism and inequality experienced by CEE movers. But is there an argument to be made that, despite its limited competence and Member State sovereignty in the context of social policies, the EU *should* be more involved in protecting movers' rights? Arguably, the EU

⁷²⁸ See <https://www.theguardian.com/politics/2018/aug/07/peles-in-the-uk-urge-may-to-protect-them-from-a-no-deal-brexit>.

⁷²⁹ I am not discounting politically-driven problems of social inequality or economic exploitation, which affect the experience of all non-privileged groups, and which need to be addressed through policy initiatives.

has some moral responsibility here, having endowed movers with EU citizenship and having enabled their mobility. However, what would the EU's greater involvement in protecting movers' equality rights in host States imply for the EU project? And how could it be accomplished without redefining its relationship with its Member States and its core values, recently further complicated due to Brexit? Researchers should tackle these questions. More generally, critical scholars should devote greater attention to the impact on CEE nationals of EU policies and ECJ cases pertaining to mobility and equality, especially in light of recent Member States' restrictions on movers' access to social rights.

Even if law is incapable of addressing many race-based wrongs and legal discourse is unenforceable, the promise of the EU project as well as a moral compulsion dictate that we try to make both laws and discourse more inclusive and responsive to contemporary varieties of racism - imperative more than ever in today's Brexit era. Only then will the EU endeavour become more meaningful, and anti-discrimination law's potential be better realised.

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<i>Study and Findings</i>	<i>Methodology</i>
(A) CEE Movers Collectively	
<p>Anderson et al (2008):</p> <p><u>occupational attainment</u>: manufacturing (32%, especially in food processing and packaging), hospitality (24%), transportation, storage and communication (11%), and health and social work (10%, especially as care assistants)</p> <p><u>employment agencies</u>: 21% working for an agency (including 51% of workers in manufacturing, 20% in transport, and 10% in hospitality)</p> <p><u>working with co-ethnics</u>: 25% estimated 10-25% of their co-workers to be of their nationality; 24% estimated it to be 26%-50%; those working for agencies more likely to report that more than 50% of their co-workers were co-nationals; working with more than 50% co-nationals most prevalent in agriculture, transport, and manufacturing</p> <p><u>earnings</u>: majority working for very low wages; 3% earning over £10 an hour; 12% earning below the minimum wage</p> <p><u>exploitation at work</u>: 24% had no written contract (including 32% of agency workers); good written terms often not honoured (e.g., worse pay, unpaid breaks, and overcrowded overpriced accommodation); some dismissed when they asked for a written contract; 26% reported pay issues (e.g., not being paid for the hours worked, not being paid at all for overtime, errors in calculations, discrepancies between pay and timesheets, unauthorised deductions, lateness of pay, and being asked to pay advance fees to secure jobs); 8% reported problems with working conditions (e.g., poor working conditions, high intensity of work, aggression, bullying, harassment)</p> <p><u>tied accommodation</u>⁷³⁰: 31% living in accommodation found or provided by employer (some forced into it); particularly prevalent in agriculture, hospitality, manufacturing (especially food processing), and health and social work; 40% of those working 48-60 hours a</p>	<p>mail survey of Polish and Lithuanian WRS applicants in 2005-6:</p> <p>463 Polish and 45 Lithuanian respondents</p> <p>data analysed using SPSS⁷³¹</p>

⁷³⁰ Provided or arranged by employer, and available only while employed by that particular employer.

⁷³¹ Statistical Package for the Social Sciences.

<p>week living in employer accommodation; often overpriced, and in poor condition; appears to be a link between tied accommodation, below minimum wage pay, and excessive work hours</p>	
<p>Barslund and Busse (2014):</p> <p><u>overqualification</u>: CEE and A-2 workers' rate of return in grade and salary to education among the lowest in the labour market; in 2010, UK and EU-14 nationals employed mainly as white-collar workers (56% and 64%), while 82% of CEE and 79% of A-2 nationals as blue-collar workers; 64% of CEE workers with tertiary education in blue-collar jobs</p> <p><u>earnings</u>: in 2013, EU-14 nationals earned £618 per week; CEE nationals £367</p> <p><u>occupational attainment</u>: 41% of EU-14 and 9% of CEE workers in 2013 in the two highest occupational categories (managers, directors and senior officials, and professional occupations)</p>	<p>Labour Force Survey ('LFS') 2010, 2013</p> <p>comparison groups: CEE; A-2; EU-14; UK</p>
<p>Ciupijus (2012c); Ciupijus (2012b):</p> <p><u>respondents' description of their employer</u>: 'labour camp'; management's attitude towards workers 'inhuman'; treats people 'like dogs' (Ciupijus 2012c)</p> <p><u>exploitation at work</u>: long work hours (many leaving home at 4am and returning at 8pm, and working during weekends); frequent commands from managers to work faster; being assigned shifts without prior consultation (including at plants in Germany and Belgium); abusive language and insults by supervisors; retaliation when speaking up (e.g., dismissal, and ceasing overtime or holiday pay); no written contracts; pitting non-EU migrants against Polish workers; extortion (demanding cash payments in return for job offers or promotions)</p>	<p>Ciupijus 2012c: in-depth biographical interviews of 6 CEE workers (Polish, Estonian, and Latvian) employed at a glass repackaging company⁷³² in a medium sized city in Yorkshire (2009-10)</p> <p>Ciupijus 2012b: qualitative ethnographic fieldwork in 2009-10 in three cities in Yorkshire:</p> <ul style="list-style-type: none"> (1) 18 biographic interviews with movers from Poland, Latvia, and Slovakia; (2) focus groups with 24 participants from Poland and Estonia, and 6 from Asia, Africa, and Latin America; (3) semi-structured interviews with representatives of social support agencies and trade unions; and (4) non-participant observations in CEE

⁷³² Employing mostly Polish, other CEE, and non-EU migrants.

	community centres, CEE grocery shops, and a Catholic Church
<p>Cook et al (2010):</p> <p><u>deskilling</u>: majority of CEE participants employed significantly below their skill levels and abilities; concentrated in largely unskilled sectors and doing unpopular low-paid work (routinely populated by CEE movers and/or workers from BAME communities)</p> <p><u>career prospects</u>: despite their interest in improving their language skills, CEE workers' ability to attend classes severely constrained due to their need to work long shifts and overtime (given their low wages); employers' unwillingness to recognise qualifications and work experience attained in CEE countries; employers' attitude that CEE workers should remain in unskilled, low-paid jobs</p>	<p>qualitative study in a major northern English city in 2008:</p> <p>(1) group interviews of 31 CEE movers (including 17 Poles);</p> <p>(2) interviews with 10 key informants (who recruited, employed or acted as community support workers for CEE migrants);</p> <p>(3) 4 focus groups with members of established West Indian, Pakistani, and white British local communities; and</p> <p>(4) 3 focus groups with agencies involved in the provision and/or administration of local public services (City Council services, primary care trusts, housing providers, and schools)</p>
<p>Drinkwater et al (2009):</p> <p><u>occupational attainment</u>: during 2004-06, CEE workers predominantly took up low-skill jobs (unlike non-EU and EU-14 workers, who had patterns similar to British workers); 33% of CEE workers employed in business, management and administration sectors, 20% in hospitality and catering, 10% in agriculture, and 25% in process operatives; 75% of CEE workers in semi-routine and routine occupations; 63% of workers from English Speaking Countries in professional/ managerial jobs, compared to 42% of EU-14, and 10% of CEE workers</p> <p><u>comparison to pre-04 arrivals</u>: larger proportion from earlier CEE cohorts (2000-03) in high or intermediate occupations; CEE workers arriving after 2004 earn 24% less than those arriving before 1980; CEE migrants arriving immediately prior to enlargement have similar characteristics and labour market outcomes as those after 2004</p> <p><u>earnings</u>: in 2004-06, CEE movers earned £6 an hour, which is 30% less than EU-14 and British workers, 32% less than those from English Speaking Countries, and</p>	<p>LFS (2001-06); WRS (2004-6)</p> <p>quantitative: equations for earnings and return to education</p> <p>comparison groups: Polish; other CEE; Other Europeans (EU-14); English Speaking Countries (South Africa, USA, Australia, Canada, New Zealand, and the Caribbean); Other Countries (including India, Pakistan, and Zimbabwe); British (all ethnicities)</p>

17% less than migrants from the rest of the world; when controlling for industry and other employment characteristics, CEE workers earned 21% less than EU-14 workers, and 28% less than those from English Speaking Countries	
<p>Eade et al (2007):</p> <p><u>earnings</u>: CEE movers earn on average £6 an hour, EU-14 workers £10.52</p> <p><u>occupational attainment</u>: 75% of CEE movers employed in semi-routine and routine jobs; 68% of English Speaking Countries, 42% EU-14, and 10% CEE workers had professional/managerial jobs; higher proportions of pre-2000 CEE cohorts than post-04 CEE movers in high level or intermediate/skilled occupations</p>	<p>mixed methods:</p> <p>(1) quantitative: LFS 2004-06, Census 2001-06, WRS 2004-06 (analysed using standard labour economics techniques, including wage equations); and</p> <p>(2) qualitative: 50 in-depth interviews and participant observations of Poles in London (analysed using Envivo)</p> <p>comparison groups: Polish; CEE; EU-14; British; English Speaking Countries</p>
<p>EEAC (2013):</p> <p><u>housing</u>: 70% of those renting privately expressed concerns (e.g., poor quality, lack of necessary repairs, overcrowding, and non-return of deposit)</p> <p><u>exploitation at work</u>: 40% faced serious work-related issues - especially exploitation (21%), withholding of wages (11%), abuse in the workplace (7%), and unfair dismissal (5%); 50% reported other (less serious) issues; 30% put up with work issues, and 27% felt unable to take any action other than leaving</p> <p><u>earnings</u>: 20% 'struggling' or 'really struggling' on their current income; 30% have faced a financial crisis since they have been in the UK (that is, lacked money for food, medicines, bills, and other essentials)</p>	<p>qualitative study in 2013 in London:</p> <p>(1) peer-led survey of 455 CEE nationals; and</p> <p>(2) 57 CEE participants in focus groups and individual consultations</p>
<p>French (2012):</p> <p><u>occupational attainment</u>: most CEE workers in low-skill, low-wage jobs, which do not match their relatively high qualification levels</p> <p><u>employment agencies</u>: most CEE workers secure jobs through employment agencies</p>	<p>mixed methods:</p> <p>(1) labour market data - Nomis⁷³³ (2009), LFS and WRS (2004-09);</p> <p>(2) survey of 103 CEE and A-2 respondents (83% Polish⁷³⁴) in 2009-10; and</p>

⁷³³ ONS service, which compiles labour market statistics from official sources. See: <http://www.nomisweb.co.uk>.

⁷³⁴ Followed by Latvians (7.8%), with the other participants being Czech, Slovakian, Slovenian, Hungarian, Romanian, Bulgarian, and Russian, in that order.

<p><u>career prospects</u>: although CEE workers desire to improve their socio-economic position through further study (including language classes) and by seeking better jobs, many are constrained from doing so - due to long working hours; lacking awareness of career opportunities; unavailability of further education; lack of recognition or accreditation of existing skills; employers' and employment agencies' assumptions about suitable 'migrant jobs'; and employers' failure to assess their training needs and to provide them with training</p>	<p>(3) semi-structured interviews with 15 CEE respondents (14 Poles, 1 Latvian) in 2009-10</p> <p>all data from Derby and East Staffordshire</p> <p>quantitative survey analysis: aggregate data; statistical (chi-square) tests</p>
<p>Johnston et al (2015):</p> <p><u>occupational attainment</u>: CEE+A-2 men and women concentrated in skilled trades, routine industrial roles, and elementary occupations, more so than EU-14 workers and white Britons; EU-14 males five times more likely than CEE+A-2 males in managerial or professional jobs; CEE+A-2 females more than twice as likely than EU-14 and British females in personal service or elementary occupations</p> <p><u>overqualification</u>: CEE+A-2 workers suffer much greater overqualification penalty than EU-14 workers and white Britons; 30% CEE+A-2 males overqualified, compared to 20% of EU-14 and 25% white British men; 45% of CEE+A-2 women overqualified, compared to 22% of EU-14 females</p> <p><u>earnings</u>: EU-14 workers paid significantly more than Britons, whereas CEE+A-2 paid significantly less; EU-14 males earned more than twice as much as CEE+A-2 men, and £3.50 per hour more than white British men; same ordering for women (EU-14 women earned most, and CEE+A-2 least)⁷³⁵</p>	<p>LFS 2002-13</p> <p>comparison groups: white British; EU-14; CEE+A-2</p> <p>overall sample size: 448,584 individuals</p> <p>quantitative: equations to measure overqualification and earnings; regression analysis</p>
<p>Kofman et al (2009):</p> <p><u>occupational attainment</u>: in 2006, 28% of UK nationals in managerial and professional groups, compared to 21% of Bangladeshis, 9% of Poles, 12% of Portuguese, and no Somalis; 28% of UK nationals in process, plant and machine operating jobs or elementary occupations, compared to 5% of Australians, 33% of Bangladeshis, 56% of Poles, 54% of Portuguese, and 52% of Somalis</p>	<p>review of:</p> <p>(1) statistical data (including Census, APS⁷³⁷, LFS, IPS⁷³⁸, NiNo⁷³⁹, WRS, work permits, English House Condition Survey, CORE⁷⁴⁰, and local authorities' data on housing and crime); and</p>

⁷³⁵ Although differences less substantial for women than men.

⁷³⁷ APS combines data from the LFS and national boosts from the English Local Labour Force Survey, The Welsh Labour Force Survey, and the Scottish Labour Force Survey.

⁷³⁸ International Passenger Survey.

⁷³⁹ National Insurance numbers.

⁷⁴⁰ Continuous Recording System on Social Housing.

<p><u>exploitation at work</u>: considerable evidence of CEE workers' facing poor conditions, unfair treatment, and workplace harassment (e.g., lower wages than other groups, required payments to secure jobs, illegal or excessive deductions by gangmasters, name-calling and racial harassment by supervisors and co-workers); those employed by agencies (especially common in cleaning, health, hospitality and manufacturing) exploited even more</p> <p><u>housing</u>: much anecdotal evidence of widespread discrimination against CEE housing applicants (e.g., being turned away by local housing authorities; poor treatment and discrimination by estate agents; excessive rent levels; and poor quality of accommodation); in 2004-07, 35% of CEE nationals' applications to local authorities for homelessness assistance accepted, compared to 47% of all applications nationally</p> <p><u>overqualification</u>: in 2006, 40% of CEE workers at NVQ levels 4 or 5⁷³⁶, compared to 25% of UK workers; local studies in 2007 found that 70% of CEE workers were not making use of their skills, and that highly educated Poles were more likely than those with vocational qualifications to be working in elementary occupations (such as cleaning)</p> <p><u>harassment and violence</u>: mounting evidence of racial harassment against all new migrants, but especially against CEE movers; the public often does not distinguish between refugees, asylum seekers, and migrant workers</p> <p><u>earnings</u>: in 2005-6, Americans (£17.10), Canadians (£15.60) and Australians (£15.20) earned the most, UK-born population earned £11.10, and those born in the Philippines (£8.30), Turkey (£8.20), Portugal (£8.10), Somalia (£7.90), and Poland (£7.30) the least</p>	<p>(2) more than 100 qualitative and quantitative studies</p> <p>most data from 2004-08, although some stretching back to 1980s</p> <p>comparison groups: British and varied migrant groups, depending on the source</p>
<p>MacKenzie and Forde (2009); MacKenzie and Forde (2009a):</p> <p><u>exploitation at work</u>: 52% reported unauthorised deductions from wages for uniform; 17% unauthorised deductions for employer-provided travel coach; 4% difficulties getting paid; 4% poor treatment from supervisors; 80% employees sent to work off-site at client or other sites</p>	<p>mixed-methods case study of a Yorkshire glass packaging plant employing large numbers of Polish (as well as Baltic) workers⁷⁴¹, in 2005-6:</p> <p>(1) interviews with managing director, general manager, training manager,</p>

⁷³⁶ National Vocational Qualification Level 4 includes certificate of higher education, and advanced professional awards, certificates or diplomas. NVQ Level 5 includes postgraduate and fellowship diplomas, and master's and doctorate degrees.

⁷⁴¹ At the time of research, 90% of the 200+ employees were migrants, the majority from CEE States (mostly from Poland).

<p><u>deskilling</u>: many had extensive experience in semi-skilled and skilled occupations in their home countries</p> <p><u>earnings</u>: 78% paid minimum wage, and 6% paid less than the minimum wage, with no opportunity for progression</p> <p><u>work hours</u>: 40% worked more than 48 hours per week</p> <p><u>employer's attitudes</u>: CEE workers praised for strong 'work ethic' (willingness to work hard and 24/7, and to follow instructions and last-minute scheduling without complaining) and for their willingness to work at a low pay rate; contacted employment agencies in CEE states to establish a regular supply of labour</p>	<p>10 employees (from Poland, Lithuania, Latvia, Estonia, Albania, and Portugal), and trade union representatives; and</p> <p>(2) 38 survey questionnaire responses from employees</p>
<p>ONS (2016):</p> <p><u>occupational attainment</u>: highest proportion of CEE nationals worked in the wholesale and retail trade, hotels and restaurants sector (26%), and in manufacturing sector (22%); British, EU-14, and non-EU nationals most likely to work in professional occupations (21%, 30% and 26%); CEE nationals most likely to work in lower-skilled occupations, with 51% employed in the process, plant and machine operatives or elementary occupations; the lowest proportion of CEE and EU-2 nationals worked as managers, directors and senior officials (3% and 4%); 37% of EU-14 nationals and 8% of CEE nationals employed in high-skill jobs; 69% of CEE nationals and 61% of EU-2 nationals employed in low- or lower-middle skilled jobs, compared to 50% of workers from the UK, EU-14, and non-EU countries</p> <p><u>overqualification</u>: 15% of UK nationals employed in jobs they were overeducated for, compared to 37% of EU-14, EU-2, and non-EU nationals, and 40% of CEE nationals</p> <p><u>work hours</u>: 50% of CEE nationals and 61% of EU-2 nationals work more than 40 hours per week, compared to 32% of UK nationals</p> <p><u>earnings</u>: compared to the national median earnings (£11.30 per hour), EU-14 nationals earned the most (£12.59), whereas CEE and EU-2 the least (£8.33); UK nationals earned £11.53, non-EU nationals £10.97, and nationals from Cyprus, Malta, and Croatia £9.35</p>	<p>LFS 2016</p> <p>comparison groups: CEE; British; EU-14; EU-2; non-EU; EU Other (Cyprus, Malta, and Croatia)</p>

<p>Pemberton and Stevens (2010):</p> <p><u>employers' attitudes</u>: believe that CEE workers and those from countries that were not part of the Commonwealth do not understand cultural practices and social norms associated with the care sector; view CEE workers as flexible (e.g., willing to work unpopular shifts); do not try to retain or promote CEE workers because assume that are short-term only (especially if overqualified)</p> <p><u>employment agencies</u>: some encourage employers to adopt poor practices in respect of CEE employees (e.g., deduction from wages for tied housing; working 60-70 hrs per week; and lower pay than other staff); many make false promises to CEE workers, to a significantly greater extent than to non-EU workers (especially about free accommodation; choosing work hours; and matching jobs with skills and experiences)</p>	<p>case study of adult social care sector⁷⁴² in the North West of England in 2008:</p> <p>(1) 14 in-depth, face-to-face structured interviews with employers;</p> <p>(2) 45 semi-structured interviews with employers; and</p> <p>(3) 11 semi-structured in-depth interviews with CEE workers (10 Poles, 1 Lithuanian)</p>
<p>Sime et al (2017):</p> <p><u>racism</u>: most had experienced or witnessed racist incidents since the Brexit referendum; 49% had seen 'more racism' since the referendum, while 23.5% had seen 'about the same amount'; 77% reported that they had experienced racism because of their nationality, accent or the way they look; for 19%, racist experiences happen 'often' or 'very often'; incidents ranged from 'everyday racism' (e.g., name calling; jokes) to physical attacks and damage to homes or property, and included online and face-to-face attacks (at schools, public transport, parks, and shops)</p>	<p>online survey across England and Scotland in urban and rural areas in 2016-7:</p> <p>- 1120 CEE youth (aged 12-18) who migrated after 2004 and have lived in the UK for at least 3 years (respondents - 56% Polish, 10% Romanian, 9% Lithuanian)</p>
<p>Sirkeci et al (2018):</p> <p><u>occupational attainment</u>: on average (during 2005-12), 10% of white Britons in elementary occupations, compared to 40% of CEE workers, and 18% of Bangladeshis, and Black African and other black workers; 30% of white Britons at the top occupational level (managers, senior officials and professional occupations), compared to 8% of CEE; 5% of CEE workers at associate professional and technical occupations, compared to the average for all ethnic groups three times higher</p> <p><u>overqualification</u>: during all years 2005-12, CEE workers consistently overqualified compared to white Britons and other migrant and minority groups (indicates long-term patterns of overqualification); CEE, and Black African and other black groups more likely significantly</p>	<p>APS 2005-12</p> <p>comparison groups: white British; CEE; white EU-14; mixed; Black Caribbean; Indian; Pakistani; Bangladeshi; Black African and other black; Other</p> <p>sample size per year: between 78,000 (including 636 CEE) in 2011, and 179,000 (including 2,095 CEE) in 2008</p> <p>quantitative: same equation formulas as Johnston et al 2015; regression analysis</p>

⁷⁴² Domiciliary care, community-based support services and nursing, and residential and care homes.

<p>overqualified compared to white Britons; Pakistanis and Bangladeshis also more likely overqualified than white Britons (albeit Pakistani men only in 2012, and Bangladeshi women only in 2007 and 2012); Indians not overqualified compared to white Britons; CEE workers suffered greater disadvantages than other minority groups (surpassed only by Bangladeshis in 2007 and 2011, and by Black African and other black in 2005-11)</p>	
<p>Sumption and Sommerville (2010):</p> <p><u>occupational attainment</u>: CEE movers work in less skilled occupations than other immigrant groups; in 2008, more than 50% of CEE workers in unskilled occupations⁷⁴³, compared to 20% of other immigrants⁷⁴⁴ and 18% of Britons</p> <p><u>earnings</u>: when controlling for individual characteristics including education, recent CEE movers earn the least of any immigrant group; during 2004-09, CEE movers earned 12.5% less than Britons, while non-EU immigrants and EU-14 workers earned more than British workers; in 2007, 89% of CEE and A-2 workers earned less than £400 per week, compared to 57% of Britons; recent Pakistani immigrants have wages similar to British workers</p> <p><u>return on education</u>: CEE workers have lower return on education than other immigrants, with less differentiation in wages between those with more education and those with less; while Britons earn 10% more if they complete one additional year of education, CEE workers gain 1.1%, Australasians gain 4.9%, Americans and Canadians gain 2.8%, and immigrants from Africa gain 1.5%</p> <p><u>recruitment agencies</u>: CEE workers substantially more likely to use private employment agencies than other immigrants or British workers; in 2004-08, half of WRS registrants were working for staffing agencies; for some large food-processing employers, agencies are the only route into employment; 26% of CEE workers recruited in 2005-6 and 16% of CEE workers recruited in 2007-8 found their jobs through agencies</p> <p><u>exploitation at work</u>: widespread evidence, typically qualitative, of CEE workers' exploitation (especially failure to pay wages; failure to pay the minimum wage; disproportionate wage deductions for employer-provided housing; and dangerous or unhealthy working conditions)</p>	<p>review of: (1) LFS, WRS, other government data; and (2) related literature, including qualitative data</p> <p>2004-09</p> <p>comparison groups: British and varied migrant groups, depending on the source</p>

⁷⁴³ Including process, plant and machine operatives; assemblers; construction workers; transport and machine drivers; other labourers; porters; bar and restaurant staff; and cleaners.

⁷⁴⁴ Based on countries of origin as reported in the LFS.

<p><u>career prospects</u>: very limited for CEE workers (due to lack of support networks; lack of access to information; being overrepresented in jobs with limited career prospects; high reliance on social contacts to find work; and tending to work alongside fellow co-ethnics)</p> <p><u>housing</u>: many CEE movers live in overcrowded temporary accommodation, at high rents, and/or in poor conditions; substantial numbers live in employer-provided housing (especially in agriculture), which magnifies risks associated with unstable employment; homeless agencies have noted an increase in rough sleeping among CEE nationals</p>	
<p align="center">(B) Polish Movers</p>	
<p>Drinkwater et al (2009):</p> <p><u>return on education</u>: Poles left full-time education at much higher age than other CEE movers, hence have lowest returns on education among CEE workers</p> <p><u>overqualification</u>: Poles primarily employed in low paying jobs, and typically have lower rates of return to their human capital than other recent migrants (after controlling for personal and job-related characteristics)</p> <p><u>occupational attainment</u>: 25% of Poles employed in hospitality (retail/hotels/catering), which is the highest % of any CEE group</p> <p><u>work hours</u>: recent arrivals from English Speaking Countries and Poland work the longest hours</p> <p><u>wages</u>: Polish movers earn 28% less than EU-14 movers, 58% less than migrants from English Speaking Countries, and 8% less than workers from Other Countries (including India, Pakistan, and Zimbabwe)</p>	See above
<p>Eade et al (2007):</p> <p><u>return on education</u>: although Polish movers have similar levels of education as other CEE movers, they benefit the least from their education and experience; Polish movers also benefit less from their education and experience than pre-04 Polish migrants</p> <p><u>occupational attainment</u>: lower proportion of Poles in London in managerial/professional jobs in 2001 than in 1991, and even lower in 2003</p>	See above

<p>Jones (2014):</p> <p><u>employment agencies</u>: marketed Poles to potential employers as ‘hard-working’ (willing to work for less pay) and as having ‘superior work ethic’ and being ‘flexible’ (less inclined to complain and less likely to be unionised); often recruited directly from Poland⁷⁴⁵</p>	<p>qualitative analysis in 2008-12:</p> <p>(1) in-depth interviews and follow-up email discussions and telephone calls of:</p> <p>a) senior representatives of 18 employment agencies (10 in the UK, 8 in Poland) which had recruited Polish workers in 2004-08, and</p> <p>b) 35 experts in Poland and the UK (including government officials, regulators, and trade union and civil society representatives); and</p> <p>(2) content analysis of agency promotional materials, websites, and media reports</p>
<p>Rzepnikowska (2019):</p> <p><u>racism before the referendum</u>: commonly perpetrated by both (white) British youth and adults; e.g., cars with Polish registration plates being kicked and having windows broken; daily physical and emotional harassment by neighbours (including being hit with a shoe and stones, being called ‘Polish cunt’, having rubbish bins and home doors kicked, and being flashed); being hospitalised after an attack in a bar by a British man</p> <p><u>racism after the referendum</u>: same types as before; in addition, being ignored by a British neighbour who used to be friendly, and having (white) British co-workers shout ‘No more Polish vermin’ and telling Polish workers to go back to Poland</p>	<p>narrative interviews with 21 Polish women in Manchester in 2012-13 and 2017-18</p>

⁷⁴⁵ Hence bypassing prohibitions on discriminatory advertising for a particular nationality of workers.

COUNCIL DIRECTIVE 2000/43/EC**of 29 June 2000****implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Having regard to the opinion of the Committee of the Regions ⁽⁴⁾,

Whereas:

- (1) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.
- (2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.
- (3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.
- (4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protec-

tion of private and family life and transactions carried out in this context.

- (5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.
- (6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.
- (7) The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.
- (8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.
- (9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.
- (10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.
- (11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia ⁽⁵⁾ under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.
- (12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and health-care, social advantages and access to and supply of goods and services.

⁽¹⁾ Not yet published in the Official Journal.

⁽²⁾ Opinion delivered on 18.5.2000 (not yet published in the Official Journal).

⁽³⁾ Opinion delivered on 12.4.2000 (not yet published in the Official Journal).

⁽⁴⁾ Opinion delivered on 31.5.2000 (not yet published in the Official Journal).

⁽⁵⁾ OJ L 185, 24.7.1996, p. 5.

- (13) To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.
- (14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
- (15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.
- (16) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.
- (17) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.
- (18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.
- (19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
- (21) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.
- (22) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.
- (23) Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.
- (24) Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.
- (25) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- (26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
- (27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.
- (28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5

Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 14

Compliance

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a

position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17

Report

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 18

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council

The President

M. ARCANJO