

# Chapter 6

## Governance of the Free Movement of Workers and Persons at the European Level



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### 6.1 Introduction

A Brussels correspondent allegedly described the general impression of the EU as ‘an animal that lives in Brussels’. Given that most EU regulations are implemented at national and subnational levels of government, it may be tempting to discard the metaphor as a misconception. But it is not entirely false. Governance, in the sense of negotiations and decisions guiding implementation, does take place in the corridors and conference rooms in Brussels. This chapter describes and analyses governance processes at the EU level in matters that relate to the free movement of workers and persons (hereafter free movement).

During the past 10 years, the European Union<sup>1</sup> has introduced open and flexible modes of governance that diverge from the more traditional top-down steering. More than any other idea, the term multilevel governance has come to represent that change. Overall, there seems to be an emerging consensus about the desirability of multilevel governance and increased partnership in EU policy making (e.g. van den Brande 2014).

Prima facie, to increase cooperation may seem like a straightforward strategy to facilitate member state collaboration where legislation is neither possible nor desired. Yet the institutional structure of the EU suggests the opposite. Inclusive multilevel governance is set out to take place in those policy areas where the EU does not enjoy full competence. At the same time, the shared competence is in itself the result of explicit member state and/ or EC preferences. Among the reasons for wanting to keep a policy area under national competence may be specific national interests or a general preference for customised solutions.

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<sup>1</sup>The terms ‘the European Union’ and ‘the EU’ will be used interchangeably throughout the chapter.

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To summarise, competence is more likely to be shared in policy areas where member states, for one reason or another, perceive the stakes to be high. Issues relating to the free movement of labour and persons across the EU are prime examples of such matters. This is particularly so after the accession of countries in Central and Eastern Europe (CEE).

Before the first Eastern accession in 2004, statements about the need to protect national welfare systems came thick and fast in the western and northern parts of the EU (Council of the European Union 2015; Doyle et al. 2006; EC 2016; European Commission 2014b). At the same time, the Eastern and Central European member states were eager to join the inner market. The enlargements generated new labour mobility patterns within the EU, predominantly running from East to West (European Committee of the Regions 2015a). As a result, regions and cities in host member states faced a series of social and economic consequences (Reeger and Enengel 2015). In parallel to diverging perspectives at the European and national levels about, for example, labour market standards and wage levels, insufficient political and socio-economic institutions obstruct a satisfactory compliance of the free movement regulatory regime (European Commission 2010; Svetlozar 2009). Nevertheless, the free movement of persons is a European reality. In 2013, more than 7 million European citizens lived and worked in another member state and over one million European citizens crossed the border to work in a neighbouring country every day (Your Europe 2015).

The free movement of workers and people relates to policy areas of exclusive EU competence and policy areas that are dominated by an outspoken ideal of multi-level, non-hierarchical governance. The combination creates a multifaceted arena for governance solutions at the European level. In addition, several policy areas are of a politically delicate nature. Potential gains and losses for the involved parties are likely to influence governance outcomes.

This chapter provides a picture of how governance of this free movement is constructed, managed and negotiated at the European level. The aim is to supplement the previous chapters focusing on governance in European urban regions. A first section presents the data collection and methodology applied. Then follows a presentation of the primary tool of analysis (a modified version of the typology used in Chap. 5) and the foundational theoretical assumptions. The empirical results are analysed in two sections. The first categorises governance structures from what emerged in the data as major thematic areas. A subordinate, second empirical part zooms in on the formal and informal interactions taking place *within* governance structures. This part investigates the working methods of the European Commission,<sup>2</sup> the Permanent Representations of host member states (PR) and to some extent, the Committee of the Regions (CoR). A final paragraph summarises the main results and discusses the present and future role of the EU level in free movement governance.

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<sup>2</sup>The terms the European Commission, the Commission and the EC will be used interchangeably throughout the chapter.

**Table 6.1** In-depth interview respondents<sup>a</sup>

Permanent Representations to the EU (PR)	European Commission
Permanent Representation of Austria to the EU (1)	DG Internal Market and Services (1)
Permanent Representation of the Netherlands to the EU (1)	DG Internal Market and Services (2)
Permanent Representation of Sweden to the EU (1)	DG Employment, Social Affairs and Inclusion (1)
Permanent Representation of Sweden to the EU (1)	DG Employment, Social Affairs and Inclusion (2)
	DG Justice and Consumers (2)

<sup>a</sup>The number within () refers to the number of respondents present during the interview

### 6.1.1 Methodology and Data

The chapter uses the term *free movement governance at the EU level*. The concept refers to the general exercise of authority within the multilevel institutional structure of the European Union, namely taking place in the relations and regulations within which institutions, public, private or both, operate (based on Lynn 2012).

The data analysed consist of ten in-depth interviews and written materials. Interview respondents were officials at the EU level working either in the European Commission or at national permanent representations. The selection of member state representations includes countries that have experienced a significant inflow of mobile EU citizens since 2004. In that capacity these member states are considered central to governance relating to the urban implications of free movement. The interviews took place during 2015 and were subsequently recorded and transcribed. Table 6.1 provides an overview of expert respondents:

The actors included in the analysis were chosen on the basis of their position in the formal structures of free movement governance. Member states have a formalised position in the legislative structure of the EU, namely via Comité des représentants permanents (COREPER). In addition, the permanent representations are thought to function as the extension of national governments into the corridors of Brussels. The European Commission in turn is expected to use the permanent representations as channels to national administrations. In addition to the interviewees, two other actors were also included. European Regional and local governments are primarily represented through the Committee of the Regions (CoR), while the European Parliament is the voice of the EU's citizens. Indisputably, each one of those actors has a strong interest in the processes relating to free movement. However, depending on whether one takes a neo-functional or more intergovernmentalist approach to European integration, the relative power of the involved parties varies.

Further data sources consist of official documents from the EU institutions themselves: e.g. legislative acts, press releases, reports and opinions. The data also include the program declarations and mission letters of the two most recent Presidents of the European Commission, as well as open letters to the Commission from member states with regards to the free movement under discussion.

## 6.2 Governance Modes at the EU Level

This first empirical section (categorisation) is structured using a typology of governance modes. The typology departs from the one introduced in Chap. 5, being moderated to suit the European focus of this chapter.

The point of departure is an institutional setting comprising of four possible governance levels: the EU, national, regional and local. The actors may be public (e.g. governments or administrative bodies), ‘civil’ (e.g. parties, NGOs, interest groups, social partners, media, knowledge actors, etcetera) and private (e.g. businesses). The typology distinguishes between four governance modes: (1) Horizontal governance, (2) Top-down governance, (3) Multiple level governance and (4) Multi-level governance. Theoretically, all four might or might not involve actors at the EU level. Since this chapter specifically centres on the EU level, the typology presented in Table 6.2 is slightly different compared to that used in project reports and Chap. 5.

*Horizontal governance* is characterised by engagement and participation among actors at *one single institutional level*. In this chapter, this translates as a formal and/or informal engagement by actors at the EU level. *Top-down governance* is characterised by a hierarchical relationship in which the highest level involved (in this case the EU level) controls the actions of actors on other involved levels. A governance setting is only to be regarded as top-down governance if the EU level can impose solutions on the lower levels involved. In *multiple-level governance* the EU and actors on other levels enjoy a close to equal relationship. As shown by Table 6.2, no more than three levels can be involved in this third type. If all four levels are involved, the governance is a case of *multi-level governance*. In multilevel

**Table 6.2** Modes of EU governance of intra EU mobility (Source: Modified version of typology in Chap. 5)

<b>1. Horizontal governance</b>							EU	EU	EU	EU	
<b>2. Top-down governance</b>							<b>3. Multiple level governance</b>				
							EU				National
EU	EU	EU	EU	EU	EU	EU	EU		Regional		
National	National	National	National	Regional	Regional	Local	EU		Local		
	Regional	Local	Regional	Local				EU	National	Regional	
			Local				EU	Regional	Local		
<b>4. Multilevel governance</b>				EU	National	Regional	Local	EU	National	Local	

governance, there is a more or less equal engagement, participation and prerogative among all four governance levels. The data collection and analysis include formal as well as informal processes of governance.

### **6.2.1 Results**

Formal EU institutions, member states, organised interests as well as EU citizens participate in governance of free movement at the European level. At a rough estimate, these processes involve about 33,000 employees in the European Commission, almost as many lobbyists, diplomats at 28 permanent representations and a staff of approximately 8000 in the European Parliament (European Commission 2015f; Traynor 2014). The involvement of various institutions and players also varies throughout the process.

To begin with, the European Commission has the prerogative of formulating the political priorities of the EU. Independently of whether one considers the European Commission to be simply at the service of the member states or able to pursue its own agenda, the EC indisputably has an important role in the management and enforcement of EU law (for a comprehensive discussion see Chap. 9 by Balch). When taking office, the new President-elect of the Commission presents the priorities for the years to come and provides each Commissioner with a mission letter. The political priorities of the two most recent Commissions constitute a point of departure for the forthcoming analysis. These, as the priorities of the Commission, form the overarching setting within which European bureaucrats and diplomats operate.<sup>3</sup>

Similar themes have dominated the free movement agenda under the two recent European Commissions: the need for increased intra-EU mobility of workers, regulated professions and students, the social and economic implications of that mobility and the implementation of the Posted Workers Directive.

The second Barroso Commission took office in 2009. The free movement of persons was evoked under the wider goals of ‘Developing new sources of sustainable growth and social cohesion’ and ‘Advancing a people’s Europe’. The first mainly referred to facilitating consumers, but mentions social progress and solidarity. The second area, including efforts to advance a people’s Europe, establishes that: ‘Citizens today should not find that they still face obstacles when they move across borders within the EU’ and adds that mobility for young people is a special priority. Barroso also called for ‘a new, much stronger focus on the social dimension in Europe, at all levels of government’ (Barroso 2009). In the portfolio specific mission statements, Barroso is more concrete and identifies a number of priorities.

The subsequent European Commission took office in 2014, headed by President Juncker. Free movement was discussed within the political priorities presented to the EP under the headline ‘An Agenda for Jobs, Growth, Fairness and Democratic

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<sup>3</sup>Since 2009, the year of the second Barroso Commission.

Change'. A specific section of the statement was dedicated to 'A Deeper and Fairer Internal Market with a Strengthened Industrial Base' and the free movement of workers explicitly mentioned. Juncker also promised to 'ensure that the Posting of Workers Directive is strictly implemented and I will initiate a targeted review of this Directive to ensure that social dumping has no place in the European Union'. The right of national governments to fight fraud was also acknowledged in the speech (Juncker 2014).

There are some noteworthy differences. President Juncker's political programme explicitly mentions the free movement of citizens and workers as well as fair labour markets. Unlike Barroso, Juncker's agenda highlights the right of member states to fight abuse and fraud in welfare systems and labour markets. The Juncker Commission further announced an upcoming 'Mobility package' in 2015. The package consisted of a communication on labour mobility, a targeted revision of the posted workers directive and a revision of regulations on social security coordination (European Commission 2015a).

The various issues evoked by the European Commission are managed cooperatively within the institutional structure of the EU. Depending on the character of the issue at hand, different tools and mechanisms are available. This empirical section has described selected governance modes available to stakeholders. The following section goes on to categorise governance relating to the free movement of persons, by form and theme.

## **6.2.2 By Governance Form**

### **6.2.2.1 Primary and Secondary Law**

EU law provides the legislative structure of the European project, divided into 'primary' and 'secondary' law. Primary law refers in particular to the Treaties and is the basis for all EU action. Secondary law derives from the Treaties and includes regulations, directives and decisions. The most common way to legislate in the EU is via the so called 'ordinary decision-making procedure', a legislative process where the European Parliament approves EU legislation together with the Council of the European Union (Europa.eu 2015). All of these measures can rather straightforwardly be classified as top-down governance. The criteria for top-down governance set out earlier are fulfilled in the implementation of both primary and secondary law. The EU has the ultimate responsibility and authority to enforce the measures decided. It is equally true that the formulation of legislative acts includes elements of multiple level governance too, namely through the co-legislative role of the Council of Ministers, representing the member states. Although we will see later that there are relationships between the local and the European level, the law primarily concerns the EU institutions and national governments (who in turn might communicate with lower institutional levels). This is illustrated in Table 6.3.

**Table 6.3** EU primary and secondary law

Implementation <i>Top - down governance</i>	Legislative process <i>Multiple level governance</i>
EU	EU
National	National

The diagram consists of a table with two columns: 'Implementation' and 'Legislative process'. The first column is labeled 'Top - down governance' and shows a downward arrow from 'EU' to 'National'. The second column is labeled 'Multiple level governance' and shows a double-headed vertical arrow between 'EU' and 'National'.

**Table 6.4** EU ‘soft law’

<i>Multiple level governance</i>	
EU	↕
National	

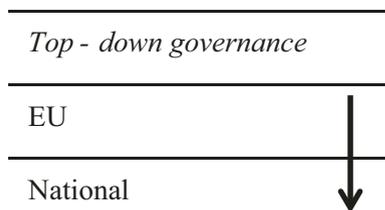
The diagram shows a table with one column and two rows. The header is 'Multiple level governance'. The rows are 'EU' and 'National'. A double-headed vertical arrow is positioned to the right of the two rows, indicating interaction between them.

**6.2.2.2 Soft Law**

In contrast, so called ‘soft law’ is based on the mutual trust between member states. The Social Dialogue and Open method of Coordination are both examples of such soft law mechanisms. The Open method of Coordination (OMC) is a form of inter-governmental policy-making that does not result in binding EU legislative measures and it does not require EU countries to introduce or amend their laws (EUR-Lex 2015). As expressed in the White paper on governance from 2001, the OMC is ‘a way of encouraging cooperation, the exchange of best practice and adding value at a European level where there is little scope for legislative solutions’ (European Commission 2001). The Social Dialogue was developed as a way of ensuring that the single market would have a ‘social dimension’ and brings together EU institutions and the social partners (European Commission 2015h). Two advisory policy committees are linked to the soft law cooperation: the Social protection committee (SPC) and the Employment committee (EMCO) (European Commission 2015b, i). These modes of steering are best classified as multiple level governance, as shown in Table 6.4.

**6.2.2.3 EU Pilot**

Another mechanism used to solve issues without formal court procedures is EU Pilot. Based on a website, the Commission and Member States may share information on particular cases and in this way give member states a chance to comply voluntarily (European Commission 2015c). The first step in a formal process is a letter of formal notice, followed by a reasoned opinion. As a last resort, the Commission initiates an action against the member state before the court (Interview with DG Internal Market and Services, 2015). The resolution rate is 75% (cases closed, following national governments’ satisfactory responses, as a percentage of all cases). Issues relating to the Internal Market make up 12 per cent of all errands

**Table 6.5** EU Pilot

(European Commission 2015c). EU Pilot is interesting in terms of governance typologies. The sharing of information and the focus on non-judiciary conflict solutions hints at regarding this as a multiple governance mode. However, the fact that the EU level owns the initiative, as well as the power to play the trump card of going to court, means that it technically qualifies as a top-down mode of governance (Table 6.5).

### 6.2.3 By Governance Theme

There now follows a categorisation of governance in areas that respondents highlighted as important themes within free movement governance: free movement of persons and workers, posting of workers and social security coordination.

#### 6.2.3.1 Free Movement of Persons and Workers

Within the Commission, labour mobility is primarily handled within the portfolio of employment and social security coordination, monitoring the application of EU law in member states. As put by one of the respondents, the problem facing a well-functioning free movement of labour is not so much inefficient regulations, as the matter of implementation (Interview with DG Employment, Social Affairs and Inclusion, 2015). Respondents from the Commission, as well as diplomats at the permanent representations, stressed the need to address implementation gaps, rather than circumvent free movement:

...we see it (free movement) as a core value; we see also, however, that there are issues concerning abuse and with social systems and we want them to be discussed. We really want no taboos here, but to have an open exchange and ask that problems are addressed as far as possible

Interview with Permanent Representation, 2015

The legislation confers every EU citizen with the right to go to another member state for work purposes, to stay in this member state, to stay after the end of the work relationship, to bring his or her family with him or her and to have equal access to social tax and balances. A recent alteration to the free movement framework came into being in 2014 and addressed information deficits in the labour mar-

**Table 6.6** Governance modes of free movement of persons and workers

Secondary Law (Directive 2004/28/EC)		European Citizens' Initiative	Statutory committees
<i>Top-down governance</i>	<i>Multiple level governance</i>	<i>Top-Down governance</i>	<i>Multiple level governance</i>
EU	EU	EU	EU
National	National	European Public	National level

The diagram shows four governance modes in a 2x2 grid. The top row represents 'EU' level and the bottom row represents 'National' level. The left column is 'Secondary Law (Directive 2004/28/EC)', the middle column is 'European Citizens' Initiative', and the right column is 'Statutory committees'. Arrows indicate the following relationships:
 

- Secondary Law: Downward arrow from EU to National.
- European Citizens' Initiative: Downward arrow from EU to European Public.
- Statutory committees: Downward arrow from EU to National level.
- Multiple level governance: Upward arrow from National to EU.

ket. The reality is that employers, public authorities and sometimes also EU workers themselves, are simply not aware of the content of EU laws.

There are two statutory committees under Regulation 492/2011: the Advisory Committee and the Technical Committee. The Advisory Committee on Free Movement of Workers is made up of representatives of member states and social partners, while the Technical Committee includes representatives from the member states. These committees meet approximately twice a year. In addition, DG JUST operates an expert group in which people from competent ministries, i.e. those dealing with free movement, meet regularly in Brussels, 3–4 times a year. This group is not written into the treaties but emerged in response to the court ruling of *Metock* (Interview with DG Justice and Consumers: Union Citizenship Rights and Free movement, 2015; European Commission 2014a).

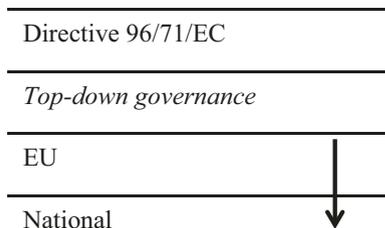
Since the Treaty of Lisbon came into force, it is also possible for citizens to mobilise in order to raise awareness about a specific issue at the European level by means of the European Citizens' Initiative. As of the time of the data collection, an example relating to the free movement of labour was entitled, Fair Transport Europe – equal treatment for all transport workers. As the title suggests, the initiative demands action to guarantee equal working conditions in the transport sector, a business exposed to intra-EU competition (Fair Transport Europe 2015).

On the practical, operational level of free movement of workers, EURES is important. EURES is a free of charge online portal providing information on living and working conditions in all participating countries in 25 languages, and registers 4 million visits per month (Becker 2015) (Table 6.6).

### 6.2.3.2 Posting of Workers

In the interviews, respondents working with postings within the EU repeatedly brought up Directive 96/71/EC concerning the posting of workers in the framework of the provision of services as the central piece of legislation. The directive specifies

**Table 6.7** Posting of workers



which employment conditions apply to workers temporarily posted in a member state other than the one where they are residing. The Court of Justice of the European Union (CJEU) has interpreted the directive in four rulings, known as ‘the Laval quartet’. Together, the cases have set the European framework for the practice of collective bargaining. In a briefing about the consequences of the Laval quartet, the European Parliament summarises the judgements as follows: (1) Collective action may be a restriction of economic freedoms. (2) Collective action is a fundamental right. (3) The Posting of Workers Directive is a ceiling (not a minimum) (Malmberg 2010). The directive has been discussed since 2004 but has become even more salient since the Juncker Commission announced a planned revision. Member states have since mobilised to influence the work of the Commission. During the course of 2015, the Commission received two letters concerning the posting of workers in the internal market. The groups of signatures represented both receiving member states and sending member states (Table 6.7).

In what might be seen as a reaction to the lack of sensitive ear that traditional top-down governance signals, member states organised to make the European Commission listen to their objections. In June 2015, seven countries (Sweden, Netherlands, Germany, Austria, France, Luxemburg and Belgium) addressed Commissioner Thyssen with regards to the planned review of the posted workers directive. The aim was to ‘to stop the race to the bottom in social protection for workers’ (Hundstoffer et al. 2015). The Dutch government initiated the call and declared fair worker mobility one of the political priorities during the presidency in 2016 (Ministry of Social Affairs and Employment 2015). Also in 2015, a group of new member states (Latvia, Romania, Poland, Slovak Republic, Lithuania, Hungary, Estonia, Bulgaria and the Czech Republic) in the CEE region also wrote to the Commissioner. They expressed their concerns about the attempts to alter the free movement regime:

It is important to emphasise that pay rate differences existing among Member States do not constitute an unfair competition where the freedom to provide services is concerned and there should be no obstacle for service providers to profit from a competitive advantage resulting from the differences between the national rates of pay, an advantage which was safeguarded so far by EU law, including especially case law developed by the Court of Justice of the European Union.

Letter to Commissioner Thyssen from Kalfin et al. 2015

During the interviews, it became clear that the posting of workers was a political priority of the permanent representations, most explicitly so for Sweden and the Netherlands.

To be active on the EU level and push for good working conditions in the internal market is a priority for the current government in particular. (...) I mean, that is a very clear priority: to avoid social dumping.

Interview with Permanent Representation, 2015

### 6.2.3.3 Social Security Coordination

Social security coordination within the EU is a rather complex matter, as social security systems remain a national competence and vary widely across the EU. To manage the coordination, member states have agreed on four basic principles to guide implementation:

- 1) EU citizens are covered by the legislation of one country at a time and national authorities decide which one.
- 2) The principle of equal treatment or non-discrimination applies, meaning that EU citizens have the same rights and obligations as the nationals of the country in which they are covered.
- 3) Previous periods of insurance, work or residence in other countries are taken into account when claiming a benefit.
- 4) A ‘principle of exportability’ guarantees that cash benefits from one country can be received also by beneficiaries living abroad (European Commission 2015d).

The Juncker ‘mobility package’ includes a revision of the existing regulations on social security coordination and the outcome of that revision is not yet known. What we do know is that social security coordination is a politically delicate issue. As put by one of the national bureaucrats:

This issue of social tourism always..., it’s always there, smouldering under the surface.

Interview with Permanent Representation, 2015

The Administrative Commission for the Coordination of Social Security Systems gathers member state representatives, to meet a number of times per year. The Commission is responsible for dealing with administrative matters, questions of interpretation arising from the provisions of regulations on social security coordination and for promoting and developing collaboration between EU countries (Interview with DG Employment, Social Affairs, and Inclusion, 2015; European Commission 2015e). There is FreSsco (Free movement of workers and Social security coordination) – a network of independent experts funded by the European Commission and a third group of statistical experts working to improve the available data on stocks and flows of EU citizens residing and/or working in another EU Member State/EFTA country (European Commission 2015g) (Table 6.8).

The categorisation of governance modes per form and theme indicates a pattern. Areas where the EU enjoys formal competence are mostly managed by means of

**Table 6.8** Social security coordination

Administrative Commission	FreSsco	Expert group on statistics
<i>Multiple level governance</i>	<i>Horizontal governance</i>	<i>Horizontal governance</i>
EU	EU ↔ EU	EU ↔
National	↕	

top-down governance, whereas multiple and horizontal level governance dominate in policy areas where the EU lacks such formal competence. Several modes of governance thus coexist in free movement management at the EU level. The next step in the analysis takes a close-up look at the interactions taking place within the existing governance structures.

### 6.2.4 Governance Interactions

The interaction between the Commission and member states looks different depending on which issue is being discussed. Some matters are solved by means of soft law, some through SOLVIT, while others might generate a legislative initiative. This section describes the interactions taking place within the three modes of governance identified in the previous section.

Member states and European institutions interact at the European level within horizontal and multiple models of governance. Interaction also takes place within top-down governance. A hierarchical structure does not exclude interaction between levels. It simply implies an unequal distribution of power.

The interviews revealed how preferences and agendas varied between governance stakeholders. Respondents within the European Commission expressed an overarching ambition to ‘make the free movement work’. Representatives of national, regional and local governments in Brussels worked with the explicit aim to influence developments in the preferred direction of their principals. As a result, the EC and representatives of national, regional and local governments operate in a context of shifting alliances. Agendas would sometimes conflict, and sometimes coincide.

#### 6.2.4.1 Regions and Municipalities at the EU Level

Free movement in general and labour mobility in particular, have been increasingly salient in national and European debates about the long-term sustainability of intra-EU mobility. Member states impatient for reform have repeatedly turned directly to

the European Commission to insist on certain measures instead of following standard procedures within the Council structures. Several respondents mentioned ‘the letter’ during the interviews. This referred to an open letter from the Ministers of the Interior in Austria, Germany, Netherlands and the UK, sent to the president of the European Council for Justice and Home Affairs, Mr. Shatter (IE). The governments called for increased attention to the local consequences of free movement (Interview with DG Justice and Consumers: Union Citizenship Rights and Free movement, 2015; Interview with Permanent Representation, 2015). In response, the Commission published several reports to address the issues raised, and also organised the ‘Conference of mayors on the impact of intra-EU mobility of EU citizens at local level’ together with the Committee of the Regions (CoR). Over 200 participants attended the conference, where local and regional authorities were invited to make their concerns heard and discuss possible solutions (e.g. European Committee of the Regions 2014). The CoR has stressed the role of local and regional authorities in the everyday governance of free movement and practical implementation of EU citizenship on several occasions (Centre for Strategy and Evaluation Services (CSES) 2012). The overarching legal framework of free movement has not been altered as a consequence of the protests. However, the horizontal relations engendered have resulted in some improvements in the communication between the European Commission, member states and local authorities regarding the implementation of existing rules. In addition to arranging the conference, the Commission has issued handbooks and encouraged intensified exchange of information in general (Interview with Permanent Representation, 2015). Commission respondents acknowledged such initiatives were necessary, as intra-EU mobility often has more tangible implications at the local rather than at the national level:

It’s not really the member states that are being confronted with urban problems, it is the cities. So, we show them that we take interest in what the people on the ground actually do and try to see how we can accommodate them, rather than those complaining member states, you know, who are not the real persons taking care of the problems on the ground.

Interview with DG Justice and Consumers: Union Citizenship Rights and Free Movement 2015.

Another strategy was to participate in the ‘Open Days’; an annual four-day conference hosted by the CoR. In 2015, the Commission experienced high interest in and positive feedback to a workshop on inclusion of mobile EU citizens and the EU funds that can be used for those purposes (Interview DG Justice and Consumers: Union Citizenship Rights and Free movement, 2015; European Committee of the Regions 2015b).

According to the Commission, it is sometimes hard to find the optimal way of interaction between the European and local level. Nevertheless, the European Commission meets regularly with the Committee of the Regions at desk officer level. Recently, the Committee communicated its position to the Commission in the process leading up to the launching of the labour mobility package (European Committee of the Regions 2015a). Within the CoR, the Commission coordinates the work relating to the movement for Social Policy, Education, Employment, Research and Culture (SEDEC).

In terms of governance modes, the CoR operates at the European level, while at the same time representing lower levels of government, insinuating a multiple level component. However, as the organisation is active on the European level and cannot be assigned to a single specific local or regional context, the governance mode is better thought of as horizontal.

#### **6.2.4.2 The Role of Permanent Representations to the EU**

Interview respondents representing the European Commission and the permanent representations (PR) are in regular contact with each other. Both clusters differentiated between formal and informal relations between member state representations and the EC.

The formal relationships include various expert committees organised by the Commission and formal questions from the Commission regarding implementation of EU law. Various forms of informal interactions overlap and complement these formal platforms. Interactions between the permanent representations and the European Commission (EC) served one or several of the following purposes.

- To get information from the EC
- To pass on information about the preferences and positions of their own member state to the EC
- To circumvent initiation of a formal infringement procedure, i.e. by informing about practices or planned reforms.
- To form alliances with like-minded member states

Three of these relate to communication between the European Commission and the PRs. The fourth purpose concerns instead bilateral relations between like-minded member states.

Retrieval of information from the European Commission emerged as the dominant task of PRs. The quote below describes this:

The most common game in Brussels is trying to figure out what the Commission will do and when.

Interview with Permanent Representation, 2015

At the other end of the relationship, EU bureaucrats explained that they are in touch with member states on a daily basis and regularly receive e-mails from national representatives (Interview with DG Internal Market and Services, 2015). The task of keeping up communication seems to be more central to permanent representations than to the Commission. Most officials within the Commission mentioned other Directorate Generals (DGs) as their main point of contact. Nevertheless, information flows in both directions as explained by one member state representative:

(...) the Commission is interested in listening to our input in order for their proposals to be well received, they don't want to present a proposal that no one wants on the table.

Interview with Permanent Representation, 2015

Another interview respondent said it was very much up to the PRs to keep themselves informed about what the European Commission is doing (Interview with Permanent Representation, 2015). There were many ways of doing so, and these varied from individual to individual. Personal networks were considered an advantage. As an example, some respondents mentioned how former experience in the Commission could be a way to get access to information.

As a [nationality of respondent] in the Commission, after a while I felt that I was expected to, like, be the link to [member state of origin] and provide [member state of origin] with information from the Commission. In a similar way, I am now expected to kind of use [staff of same nationality] or whoever it might be to provide me and, in the long run the Ministry back home, with information.

Interview with Permanent Representation, 2015

The informality of those relations contributes to making information access unpredictable. The informal nature also contributes to the perception that the kind of information accessible is rather ad hoc. The two quotes below illustrate this view:

Yes. I mean, I could definitely call them, or if there are questions I will write them an e-mail and ask 'Could you tell me?'. Of course, that depends if there are any new developments within the Commission, ... if these are not yet decided, then they probably wouldn't tell me, (It depends) if it's still part of discussions and if they are, anyway, open issues.

Interview with Permanent Representation, 2015

It is not obvious that they [the Commission] are happy to share proposals and these things before they have passed through their hierarchy and it [the hierarchy] is after all rather strict. (...) with sharing drafts and these things, but the Commission also has an interest in presenting things that the member states want.

Interview with Permanent Representation, 2015.

Another factor mentioned as influencing access to information is the length of EU membership. Member states with longer experience in Brussels were considered better at extracting information from the Commission. One respondent said that:

I still think we [member state] have more to learn from those member states that really always know what is going to come, [that] are at the forefront.

Interview with Permanent Representation, 2015

A second objective of the interaction between the European Commission and the national embassies is to communicate national priorities regarding specific matters to the EC. This is considered particularly important in the consultation phase leading up to a proposal from the Commission. At the time of the interviews (2015), the announced Juncker mobility package was in that phase. One respondent used it to exemplify how the permanent representations might go about their work during the phase of consultation:

When it [the announcement of the mobility package] is approaching we will try to meet with the Commission and say 'these are the things we have in mind' and so on. And meet with other member states we know have the same agenda.

Interview with Permanent Representation, 2015

Similar to interactions designed to retrieve information, interactions aiming to convene national preference are characterised by informality. The quotes below confirm that both sides share that view:

It's really very easy, very informal. They [ministry in capital of MS] might call me and say 'Hey, could you ask either the Commission, or could you probably ask other member states how they are doing different things?'

Interview with Permanent Representation, 2015

Then member states, individually of course, approach the Commission on different levels. There is the Commissioner, the presidents and then the services, to discuss these issues in more detail. And yes, there are some member states, of course, where this is a more pressing issue, which require more meetings, more information and which send us more comments.

Interview with DG Employment, Social Affairs, and Inclusion, 2015

Several respondents mentioned how the European Commission is not always open to absorb information about member state preferences. Although invited to comment on the agenda of an expert committee for example, permanent representations perceive that the possibility of them influencing the outcome is limited. This was explained by reference to the diverging interests of PRs and the EC. Issues relating to the implementation of the free movement directive are likely to be highly relevant for member states. On such issues, member states naturally ask for access and influence. At the same time, as one respondent said, the Commission has little interest in acknowledging problems relating to implementation:

If you are the player watching over the treaties, as the Commission is; the motor of integration and everything, of course you try to keep it low key, while the others will ask to put these issues on the agenda more often and to discuss them. So, it's always of course, a pool of negotiation and a bit of strategy as well. It's natural.

Interview with Permanent Representation, 2015

This disinterest naturally causes frustration on behalf of member states. Sometimes, it even seemed to trigger more proactive behaviour vis-à-vis the EC. Both the European Commission respondents and the national diplomats mentioned an open letter signed by five member states that was sent to the Commission in 2013. The letter was a consequence of a situation where the Commission was perceived as ignoring member state preferences for too long. As one respondent said, the letter was sent after years of raising concerns about the local consequences of free movement:

(...) the letter then raised huge political concerns and, you know, caused many reactions by the media and the press that went probably much further than the intention of the letter. Because the intention of the letter was simply to say "Look, we have issues and we want to address them, we want to talk about them and it's definitely not directed against any specific groups, it's not directed against free movement".

Interview with Permanent Representation 7, 2015

European Commission respondents also brought up the aforementioned letter when asked if member states actively try to influence the actions and priorities of the EC:

Like the letter. It can happen. It was a blunt way to do it. But of course, you get lobbied by member states for this or that but it's not our day to day experience.

Interview with DG Justice and Consumers: Union Citizenship Rights and Free movement, 2015

A third type of interaction between national representations to the EU and the European Commission is contact designed to circumvent the initiation of a formal infringement procedure against individual member states. Permanent representations do so by, for example, informing Commissioners about practices and planned reforms in the domestic arena. Notably, there was a shared preference across institutions for solving problems informally, or at least, outside formal infringement procedures.

The preference for avoiding costly court proceedings has been institutionalised in the mechanism of SOLVIT. SOLVIT is managed from within the Commission and operated via an online database with national centres in each of the member states. The overarching purpose is to help 'people who move around Europe for work, study, business, etc. and encounter problems with public authorities which may not apply EU legislation correctly' (European Commission 2015j). SOLVIT works on the basis of mutual trust and the common willingness to solve problems resulting from cross border activity. Consequently, SOLVIT experts provide advice and mediate between parties that are willing to solve the matter without initiating a formal infringement procedure. As explained below, there are cases where such common ground is missing and a mechanism like SOLVIT reaches its limits:

When something is politically sensitive, then it also starts to become much more difficult to have an informal solution. (...) For example, we had a Danish- Dutch case; it was on sailing licenses in the sea and was already at the level of Ambassadors talking to each other. The Ambassador in Denmark and the Ambassador in the Netherlands would go to the ministries, so the ministers would already have discussed it. The complainant also complained to SOLVIT, but the thing was already in the newspapers etcetera and then the SOLVIT centre just said 'I can't do anything here, because it's already at such a high level'. And then the authority will only change if he gets the instruction from the minister or whatever.

Interview with DG Internal Market and Services, 2015.

Other, less institutionalised ways of solving problems outside the court room were also mentioned. Similar to the respondent quoted, several respondents discussed this:

Before you get a formal notice, normally you have informal proceedings (...) Sometimes you also meet and ... It depends. In some areas, also sometimes some commission representative would ask you as well, also at my level, they would come and say 'How is it done?' and 'Are you sure this completely corresponds?' But there is always this before [a formal notice].

Interview with Permanent Representation, 2015

Both the European Commission and PRs used informal contacts to avoid formal infringement processes. They do so either by explaining the reason for a specific practice or informing the Commission about upcoming changes in a criticised practice. This kind of contact could emerge as a response to a direct question from the Commission or as a proactive response on behalf of the PRs.

The Commission might have raised an issue about the implementation of a Directive in [member state] and indicated that this might come up and become an infringement procedure, but then you try to solve a lot by explaining how this is done and what is in the pipeline within the [national] legislative process to see whether this really has to become an infringement procedure.

Interview with Permanent Representation, 2015

In some areas, also sometimes some Commission representative would ask you as well, also at my level, they would come and say 'How is it done?' and 'Are you sure this completely corresponds?'. And then you become aware that there might be some internal investigation or whatever. But there is always this before.

Interview with Permanent Representation, 2015

Prior to [an EU pilot] it is in our interest to provide the Commission with as much information as possible ... 'all this work is coming up in [member state] and might change the legislation, making the issue that you are raising a non-issue in a years' time, is it then really relevant to initiate an infringement procedure that will require a lot of work and resources? ...'

Interview with Permanent Representation, 2015

Respondents within the European Commission also confirmed that this could be the purpose of information exchanges between themselves and member states:

So first we ask them to explain their system and then we show the problems. We ask them also to change it.

Interview with DG Internal Market and Services, 2015

I mean, if there is a practical problem, we do not act. If we have 50 cases which concern the same aspect, we could ask the member state 'what are you doing?'

Interview with DG Employment, Social Affairs and Inclusion, 2015

Fourth, the permanent representations emphasised the strategic benefit of meeting with like-minded member states before meeting in consultative bodies or in the Council working groups. They explained that while constellations may shift between issues they remained quite stable once established. As an example, the UK and Sweden were known to often represent opposite positions in aspects relating to the exportability of social benefits but shared the same position in discussions about how to facilitate the mobility of regulated professions (Interview with DG Internal Market and Services, 2015; Interview with Permanent Representation, 2015) According to one of the respondents:

I think it's an interesting development anyway at the EU level, that you have these kinds of like-minded member states meeting, like-minded groups (...). I think during my time, it has become probably more frequent, more regular, in a way.

Interview with Permanent Representation, 2015

Connections with individual members of the European Parliament (MEP) may also serve as a way to channel national preferences. In addition to revising legislation and authoring reports, individual parliamentarians (MEPs), have the opportunity to ask the President of the European Council, the Council, the Commission or the Vice-President of the Commission /High Representative of the Union for Foreign Affairs and Security Policy written or oral questions. Each Member may submit a

maximum of five questions per month (European Parliament, 2015). Among the Commission staff, parliamentary questions appeared as the most frequent form of interaction with the European parliament (e.g. interview with DG Employment, Social Affairs and Inclusion, 2015). The permanent representations stated that they had more regular contact with MEPs of their own member state than with other parliamentarians. Sweden has a way of keeping in touch with Swedish MEPs by means of regular, organised breakfast meetings with the objective of mutual exchange of information between Swedes working with EU affairs in Brussels (Interview with Permanent Representation, 2015). Rather than being central, influencing via individual MEPs is considered a complement to other ways of communicating national preferences.

In conclusion, the everyday governance of Brussels stakeholders seems dominated by horizontal and multiple level governance. In the context of the EU, the distinction between the two types is sometimes difficult to discern. The most clear-cut example of horizontal governance is when European institutions, for example, the European Parliament and the European Commission work together. When the Committee of the Regions, permanent representations and social partner organisations are involved, the distinction between the multiple and horizontal governance modes gets blurred. More specifically, this is the case when organisations representing various sub-European levels work together with EU institutions at the European level. The Committee of the Regions and the Permanent Representations are both examples of such hybrids.

Within governance structures stakeholders interact by means of formal and informal communication. Respondents emphasised informal interactions as being extremely important. It also became evident that the European Commission has an informational advantage vis-à-vis the permanent representations. The PRs have to influence or get access to the European Commission through informal relations, rather than the other way around. The European Commission relies more on formal means to pass on information, for example through the Council working groups.

### 6.3 Conclusion

Within the IMAGINATION project, results show that while CEE migration has the potential to involve governance actions at all administrative and political levels, the EU level is often absent on the ground. The areas of prevention of human trafficking, crime and to some extent employment and labour mobility via EURES were noteworthy exceptions (See project report Zelano et al. 2016). The findings presented in this chapter substantiate those claims. Free movement governance is primarily an affair of top-down, multiple level and horizontal modes of governance. The top-down mode of governance has been challenged by member states, most dramatically when frustrated member states have let their discontent be known by means of open letters to the Commission. This rather unconventional way of protest

signals a bottom-up demand for more inclusive governance. This was also something that respondents within the European Commission openly acknowledged.

Overall, the European Commission was aware of the importance of acknowledging and addressing the needs of local and regional stakeholders in order to safeguard the functioning of the free movement of labour and people. The IMAGINATION case studies however, indicate that this awareness does not trickle down to the local and regional levels.

According to European Commission respondents, there are few established ways of working directly with lower levels of government. The EC tries to address this gap by edited handbooks or interactive databases. But such initiatives alone cannot solve the multitude of implications resulting from intra-EU mobility.

Theoretically, the Committee of the Regions (CoR) is the primary tool for interaction between local and regional governments and the European Commission. The CoR was mentioned in this respect by stakeholders at the national level as well as higher ranked bureaucrats in the urban regions. In contrast, barely any street level bureaucrats, for example, outreach social workers, mentioned the CoR as an actor with a potential role in solving the challenges at hand. This indicates the distance between the local level bureaucrat and the CoR offices in Brussels negotiations.

The results reveal the gap between European and local levels in free movement governance. The gap should theoretically be addressed and minimised by the representative mechanism of the CoR. This does not seem to be the case empirically. Instead, complementary, direct links are emerging between the local level and the European Commission. Similarly, the work by the national representations does not seem to trickle down to the local level back home. The interactions between the national and the European level in Brussels seem to be well established and effective, as does the reporting back to national governments. However, the information flow appears to stop there and does not result in any domestic ripples at sub-national levels of government.

Provided that the EU wants to encourage multilevel governance, cooperation and the exchange of best practice, there are reasons for the European Commission to continue on the path chosen, more specifically to develop tools and platforms for interaction and cooperation with local and regional levels of governance. Such initiatives should exist alongside existing structures and serve as a complement rather than a substitute. Such complementary interaction may possibly have a better chance of addressing urgent matters relating to, for example, practical implementation and interpretation of specific paragraphs in EU law. By the same token, it is recommendable that the European Commission open up ways in which regional and local levels may interact directly with them. To some extent such mechanisms are already in place through European Social Fund (ESF) project grants and conferences at the EU level. However, this could be developed through more long-term interactions with local stakeholders and improved information exchange. Such a strategy would also offer a way for regional and local entities to move forward in cases where their preferences and political priorities differs or even clash with those at the national level.

## 6.4 Final Remarks

The findings in this chapter offer theoretical as well as empirical insights. Theoretically, the data may be used to inform the typology of governance modes. To start with, *multilevel governance* is unlikely in a governance setting as complex and diverse as the EU of today. In some areas, such as the inner market, conflicting interests seem to have generated top-down modes of governance out of necessity. In other cases, where politicisation is high or where member states share competence with the EC, multiple level governance seems to be more common. The involvement of multiple levels takes place in Brussels, at the European level. This intertwined and overlapping system, where, as an example, local governments are represented in the Committee of the Regions, makes it hard to discern a strict line between multiple level and horizontal governance.

The results also offer empirical insight. Political, legislative and bureaucratic processes run parallel in the governance of free movement. Focus and measures at the European level are influenced by increasing political concerns in local and national contexts. These, in turn, are predominantly communicated via the national permanent representations to the EC. The European Parliament, individual MEPs, the European Committee of the Regions and social partners also serve as channels for information to the EU level. To some extent, member states and local authorities have been successful in their efforts to make the European Commission address gaps in free movement governance. The announced revisions in the areas of posting and social security coordination, as well as the innovative formats developed, for example, e-learning tools, databases, facilitating information exchange and grants, indicates that the European Commission realises the need for all levels to strive towards the same goal.

The results give free movement advocates some reason for optimism. Both the member states and other key actors seem to be in favour of the free movement of people, at least in theory. The challenge for those convinced that the advantages of free movement surpass the downsides is to turn that support into well-functioning practices on the ground.

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