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# Brexit & Free Movement of People: The Issues



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## Introduction

In October 2016, the Prime Minister said that establishing control over immigration was a central aim of the UK in the forthcoming negotiations to leave the EU.<sup>1</sup> This statement reflected the widely-held view that immigration was a central issue during the June 2016 referendum campaign. The Prime Minister's remarks were interpreted as meaning that the UK would not be able to stay in the EU Single Market as it is based upon the four fundamental freedoms of movement of capital, goods, services and people. Indeed, other EU leaders have consistently argued that the UK must accept the principle of free movement of people if it is to be able to remain a member of the Single Market.<sup>2</sup>

This paper examines what is meant by the principle of "free movement of people" in EU law, how that principle is applied in practice and what the free movement issues will be in the negotiations for the UK to leave the EU and in those to establish a new relationship with EU after the UK has left. The paper also looks briefly at wider immigration issues in the UK (except for asylum, which has been the subject of a separate briefing<sup>3</sup>) as part of explaining the context to the current debate about free movement within the EU.

## The principle of free movement

The Treaty of Rome (1957) set out the legal provisions to establish a single market based on the free movement of goods, capital, services and workers within the Community. The use of the term "workers" meant that freedom of movement was for those who were economically active, *i.e.* people in employment or self-employment. The intention was that people should be able to trade and/or work across national boundaries in order to grow the overall European economy and to give citizens better opportunities to find work.<sup>4</sup>

The Treaties contained two important provisions to make a reality of this entitlement to free movement: the principle of non-discrimination; and worker social security protection. The first of these established the principle that a company, worker or service provider in one Member State should not be discriminated against because they were from another. The second ensured that a worker from one Member State working in another should not lose their entitlement to social

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<sup>1</sup> 'Theresa May says Britain must look beyond Europe – as she vows to trigger Article 50 by March', Peter Dominiczak & Michael Wilkinson, *Daily Telegraph*, 3 October 2016; see also: HM Government, 'European Council October 2016: Prime Minister's press statement', 21 October 2016

<sup>2</sup> 'EU states set to veto any Brexit deal threatening free movement', Jon Henley, *The Guardian*, 17 September 2016; 'Brexit talks: No compromise with UK on free movement, Juncker warns', Tamara Cohen, *Sky News*, 26 September 2016; cf. 'Angela Merkel suggests she is willing to compromise on free movement in the wake of Brexit', Peter Dominiczak, *Daily Telegraph*, 15 November 2016

<sup>3</sup> Senior European Experts, *The EU and Asylum*, 21 September 2015

<sup>4</sup> The history of EU free movement law can be found in HM Government's Balance of Competences Review: see *Single Market: Free Movement of Persons*, 22 July 2014, pp. 13-20

security as a consequence. These latter provisions also covered the dependants of migrant workers. These provisions were accepted and ratified by the UK when it acceded in 1973.

In the negotiations for the Single Market Treaty of 1986, it was agreed (with the concurrence of Margaret Thatcher) to change “workers” to “persons” in the Treaties. Subsequently, in 1990 Member States agreed to extend the free movement of workers to people who were self-sufficient, the retired and students, provided they had medical insurance. This change was included in the 1992 Maastricht Treaty (the Treaty on European Union), which gave all EU citizens certain basic rights and provided the basis of current EU law on free movement of people.<sup>5</sup> The categories of those entitled to free movement now includes job seekers. Free movement also applies to citizens of Iceland, Liechtenstein and Norway by virtue of those countries’ membership of the European Economic Area (EEA) and to citizens of Switzerland, which has separate, bilateral, agreements with the EU.

### **Free movement in practice**

“Free movement” now means that a citizen of an EU Member State can (subject to certain conditions):

- travel to another Member State using their passport or identity card without needing a visa or other permission to enter;
- live and work in another Member State without the need for any work permit;
- set up a new business or seek work self-employed in another Member State;
- study in another Member State;
- live in retirement in another Member State; and
- acquire a right to stay permanently in their country of residence after five years.

The free movement rules are set down in the Free Movement Directive of 2004 (also called the Citizens Rights Directive).<sup>6</sup> Member States have implemented this in their own national law with variations between Member States as to the actual operation of the rules.

Free movement of people is not (and has never been) an unconditional right. The Treaty of Rome provided for restrictions on grounds of “public policy, public security or public health”. For example, some public service posts may be restricted to the citizens of the host Member State. Article 3 of the Treaty of Lisbon (2009) made further changes which included adding “the prevention and combatting of crime” to the restrictions.

With regard to the social security rules relating to free movement, each Member State has sole competence over the design and funding of their social security system; for example, they decide the extent to which entitlement is based on contributions or on a means-test. This has led to considerable variations in the application of social security law in Member States. The UK has a system that relies less on contributions and more on means-testing, making it easier for EU migrants to claim. In other Member States entitlement is more restrictive due to (for example) a requirement to pay into the system for a minimum period.

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<sup>5</sup> *Supra* n. 4, p. 14

<sup>6</sup> *Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, 2004 OJ L158/77

**UK immigration policy**

Immigration from outside the EU has always been and remains entirely a matter for national decision. Until 1962 the UK did not have any restriction on immigration from Commonwealth countries. Beginning in that year, legislation was progressively tightened to restrict immigration to the UK. One exception was the Seasonal Agricultural Workers Scheme, which ran from 1945 to 2013, and allowed a limited number of non-EU workers into the UK each year to help with the harvest.<sup>7</sup>

There was a change in non-EU immigration policy however, after the election of the Blair Government in 1997, which led to the removal of some restrictions on family migration to the UK and which actively encouraged both students and skilled workers to come here. In addition, the Government decided in 2004 not to phase in the free movement rights of new EU Member States but (along with Ireland and Sweden) to allow them full access to the UK from 1<sup>st</sup> May 2004. These changes were partly in response to pressure from UK businesses wanting to fill skill gaps and vacancies, notably in sectors unattractive to British-born workers. This also benefited students from other EU Member States.

The result of these changes in policy, combined with changes in UK society and the economy, was an increase in the level of net migration (*i.e.* the number of people left after deducting emigrants from immigrants) to historically high levels. Public concern at this rise led to changes in policy from 2008 onwards. These changes included the introduction of a points-based system designed to restrict the numbers of non-EU migrants, not least because immigration from outside the EU has consistently exceeded that from the EU. Further changes with similar aims were made in 2012 as part of the then Coalition Government's policies. In addition, the Conservative Party adopted a policy of seeking to reduce net migration to "tens of thousands" in any one year; this became formal Government policy in 2015.

It is important to note that the UK has used its points-based migration system in a different way from other countries, for example Australia. That is, the UK has been using it to *restrict* numbers of migrants whereas Australia uses it to *increase* migrant numbers but to target certain skill sets while doing so. It should also be noted that the UK has chosen to include students within its net migration target when most other countries do not do so because students are only temporary residents and cannot sensibly be regarded as economic migrants.

**Free movement issues for the Brexit negotiations**

There are four main issues concerning free movement and migration for the negotiations (there will need to be more than one agreement with the EU, covering first the UK's exit and then our future relationship):

- the position of EU citizens currently resident in the UK and UK citizens resident elsewhere in the EU (in the exit agreement);
- the question of how to handle short-term travel between the EU Member States and the UK; at present this is in theory limited to a period of up to three months;
- future freedom of movement to seek work, to set up self-employed or to establish a business, whether for EU citizens in the UK or UK citizens in the EU; and

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<sup>7</sup> See 'Who picked British fruit and veg before migrant workers?', Caroline Nye, *The Conversation*, 24 August 2016

- how the border within the island of Ireland should be managed as this is currently an open border between two EU countries within the British Isles Common Travel Area.

In addition, the position of the EEA countries and Switzerland on these issues will have to be taken into account as they are part of the free movement of people policy. Switzerland is in a particularly difficult situation, since its referendum of 2014 mandated the introduction (by February 2017) of quotas on immigrant workers from the EU and elsewhere; the EU has taken the position that this would not only breach the EU-Switzerland agreement on free movement but cause all of the Switzerland's bilateral agreements with the EU to lapse.<sup>8</sup>

### Residency of current EU migrants

It is estimated that 3.1 million EU citizens are now living in the UK (this includes some of the 125,000 students from other EU countries).<sup>9</sup> The 3.1 million figure is made up of people who have been resident for more than a year; there will be others who have not been in the UK for that long or who come and go for shorter periods (for example to do seasonal work).

Approximately 1.2 million UK citizens are migrants resident in other EU Member States. The largest populations are in Spain (310,000), Ireland, (250,000) and France (180,000).<sup>10</sup> These figures are from the United Nations and are not directly comparable with the figures for migrants in the UK as other countries count foreign nationals resident in their country in different ways.

The UK Government has repeatedly declined to give an express commitment that all EU citizens currently living in the United Kingdom will be able to remain after the UK leaves the EU. They have instead suggested that it depends on reciprocity by other Member States.<sup>11</sup> The Secretary of State for Exiting the European Union, David Davis MP, has told the House of Commons that:

In terms of the individuals who are European migrants here and British citizens abroad, my intention and the intention of the Government, is to do everything possible to underwrite their position, to guarantee their position, at the same time as we underwrite the similar position of British migrants abroad.<sup>12</sup>

In reality it would not be in the interests of the UK or the other 27 Member States to seek removal of long-term residents, many of whom will in any case have acquired a right to remain in their country of residency due to the length of their stay. There is however likely to be negotiation over on-going rights to health care and other benefits, which could disadvantage UK citizens currently resident in the EU.

### Short-term travel

Travel for less than 90 days within the EU, EEA and Switzerland is generally unrestricted and no work permits are required, even if you are regularly working for periods of less than 90

<sup>8</sup> 'EU tells Swiss no single market access if no free movement of citizens', Patrick Wintour, *The Guardian*, 3 July 2016

<sup>9</sup> Office for National Statistics estimates for country and by birth (2015) cited in Oliver Hawkins, *Migration Statistics*, House of Commons Library Briefing Paper 16/6077, 25 October 2016, p. 17; student numbers from UK Council for International Student Affairs, 'International student statistics: UK higher education', 30 March 2016

<sup>10</sup> United Nations statistics cited in Full Fact, 'Brits abroad: how many people from the UK live in other EU countries?', 29 March 2016

<sup>11</sup> 'Theresa May faces backlash from European leaders over plans to curb migration', Steven Swinford & Henry Samuel, *Daily Telegraph*, 6 October 2016

<sup>12</sup> HC Deb 10 October 2016, vol 615, col 47

days. Continuing this arrangement would make sense for the EU and the UK as to reintroduce visas for holiday or business-related travel would be bureaucratic and economically disruptive. The UK will no doubt want to retain the right of its citizens to benefit from the European Health Insurance Card system but this will have to be negotiated.

### Future free movement

The question of future free movement of people is bound up in the wider question of whether the UK wishes to remain in the Single Market. As a member of the Single Market, the UK operates the four freedoms and also participates in the EU's customs union. The Prime Minister has committed the Government to ending both free movement of people and the jurisdiction of the European Court of Justice in the UK. Since the referendum other Member States have stated that "access to the Single Market requires acceptance of all four freedoms".<sup>13</sup>

It has been suggested that the Association Agreement between the EU and Ukraine could be a model for the UK's future relationship with the EU because that agreement contains free movement for goods, capital and services but not for people.<sup>14</sup> But that example is unhelpful because it is the citizens of Ukraine who want to move to EU countries, rather than the other way around so it was in the interests of EU Member States not to include free movement of people.

As part of the UK's renegotiation of its terms of EU membership in 2015/16 the European Council agreed to a number of changes to EU free movement policy. These included an emergency brake mechanism to enable a host country to restrict access to non-contributory benefits where a Member State had faced an exceptional influx of EU workers. The EU also agreed to amend its laws to deal with abuses of free movement, including where a third country national marries an EU national purely in order to get free movement rights. Changes to make it harder for criminals to exploit free movement rights were also agreed to. These proposed changes were, however, conditional on the UK staying in the EU. They have now been withdrawn. They could only be revived as part of the negotiations for Britain's future relationship with the EU.

The EU could decide to amend the Free Movement Directive, whether because of the UK's departure or for other reasons. Various changes to free movement rules have been suggested, aside from those agreed during the UK renegotiation. These include: toughening the test for an individual to show that they are self-supporting (for example, when moving to retire in another Member State); requiring those who intend to launch a business to have a credible business plan; requiring job seekers to show that they can support themselves for up to six months and enabling them to be deported if they have not found employment at the end of that time; and copying the provision in Article 112 of the European Economic Area agreement, which provides for an emergency brake where there is an unexpectedly high volume of job seekers into a Member State.<sup>15</sup> However, it may well be that the other 27 Member States would not want to go down the road of reforming or tightening current free movement legislation.

Future free movement is a contentious area and the UK's exact position may not be decided before negotiations begin. It is likely that the UK will seek to differentiate among categories of EU citizens wanting to live in the UK with the agreement permitting free movement in certain sectors. For

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<sup>13</sup> European Council, *Informal meeting at 27 Brussels: Statement*, 29 June 2016, p. 2, para 4

<sup>14</sup> See, e.g., Andrew Duff, 'After Brexit: learning to be good neighbours', European Policy Centre, 18 November 2016

<sup>15</sup> See Sir Alan Dashwood QC, *The Elements of a Post-Brexit Settlement*, Henderson Chambers, 10 August 2016

example, free movement for those with essential skills, such as health care workers, would be likely to be retained whereas access to the UK job market for those without a job to go to or who want to work in low-paid sectors is likely to be restricted. Reviving a seasonal workers scheme in agriculture also seems likely as without it British farmers would struggle to bring in the harvest. Free movement of key personnel in financial services is another sector the UK Government is likely to offer. Finally, continuing easy access for EU students to UK universities is also likely, although how many students will wish to come will partly depend on whether EU students are still able to utilise the UK's student loans schemes and on the level of the fees charged.

### Practical implications

Under any potential scenario, the UK authorities would be faced with a major new administrative challenge involving additional controls on employment, identifying the three million EU citizens currently resident in the UK and differentiating them from those not resident, and processing applications from employers wishing to take on staff from the EU.

### **Conclusion**

Immigration was central to the debate about the UK's membership of the EU before the referendum and it represents one of the most difficult problems in the negotiations. The Government has to weigh up the clear economic (and often social) benefits from the Single Market against public pressure to end or drastically curtail free movement of people. It will face considerable criticism whichever direction it chooses to go.

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## Senior European Experts

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