



# Free movement of persons within the EU: An update



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## Introduction

In the continuing debate about the UK's relationship with the EU there has been repeated mention of the rules relating to free movement of persons. In particular, there have been questions about the UK's own management of free movement inside the EU; about the interaction between EU free movement policies and the UK's own immigration policies; and about how free movement operates with the European Economic Area (EEA) and with Switzerland.

This paper sets out what action the UK could take within EU law to restrict free movement of persons if it remained a member of the EU. It also looks at the differences which exist between free movement in the EU and free movement with the EEA/Switzerland and the extent to which provisions in the EEA Agreement can be used to restrict free movement of persons.

This paper builds on the SEE briefing, *Free Movement of Persons: What the EU Rules Permit Now*, published in July 2018.

## Migration to the UK: Current trends

The most recent statistics (November 2018) show that net migration to the UK (that is, the difference between the numbers arriving and those leaving) has declined since its peak in 2016. Net migration with the rest of the EU is at its lowest since 2012 but non-EU net migration is at its highest level since 2004.<sup>1</sup> In terms of numbers, net EU migration was 74,000 in 2017/18 (and is on a declining trend), compared to 248,000 for non-EU net migration (which is on a rising trend) over the same period.<sup>2</sup>

The Migration Advisory Committee (MAC), an independent body which reports to the Home Secretary, has examined the impact of EU/EEA migration in the UK. It found that migration from the EU15 (that is, countries already in the EU in 2004) rose after the financial crisis but now seems to be falling. From the EU8 (the Member States that joined in 2004 except Cyprus and Malta<sup>3</sup>), migration rose sharply after 2004 but peaked in 2010 and has been falling since. Migration from Bulgaria and Romania, the two newest EU Member States, may also have peaked. The MAC study suggests that the fall in EU/EEA migration may be due in part to rising levels of wages in Bulgaria, Romania and Poland compared to the UK and also to the fall in the value of sterling.

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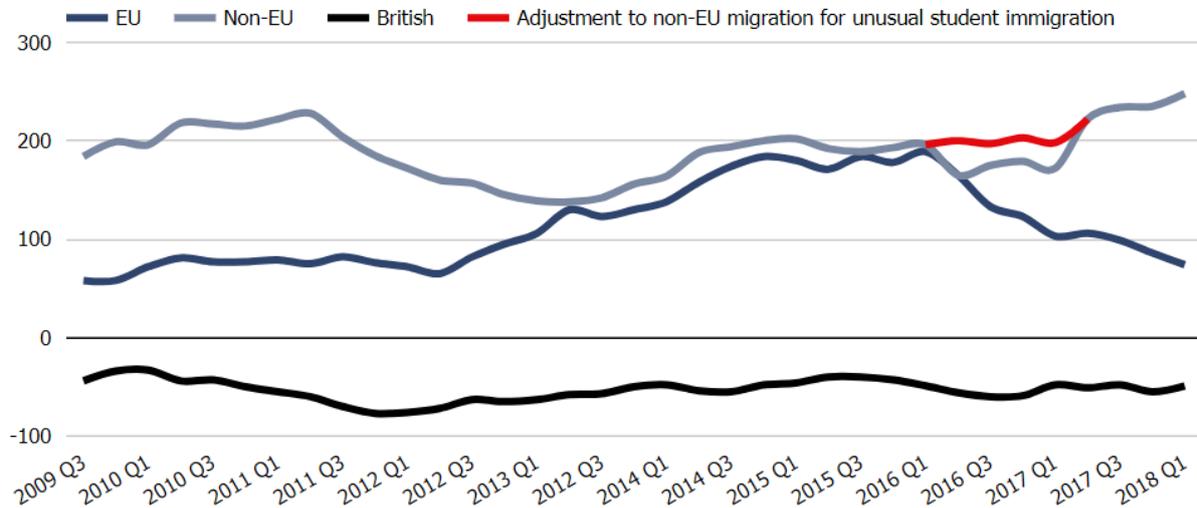
<sup>1</sup> Office for National Statistics, 'Migration Statistics Quarterly Report: November 2018', 29 November 2018

<sup>2</sup> *Ibid.*

<sup>3</sup> Cyprus and Malta are Commonwealth countries whose citizens had greater rights of entry to the UK before they joined the EU in 2004.

The following graph, published by the Office for National Statistics, shows how EU migration has fallen and non-EU migration has risen:

**Net migration by citizenship, UK, year ending June 2008 to year ending June 2018**



Source: Office for National Statistics, 2018

The figures clearly show a fall in EU migration to the UK since the 2016 referendum. The MAC study suggests that this may be partly due to the fall in UK economic growth from amongst the fastest in the G7 leading economies before the referendum to the slowest since.<sup>4</sup> Migrants may be going to other Member States where real wages are higher than in the UK, such as Germany. In addition, the number of people in the new Member States wanting to migrate is limited and there are no large poorer countries waiting to join the EU.<sup>5</sup>

Migration flows are also responsive to exchange rate fluctuations. The sharp fall in the value of sterling since the 2016 referendum has made the UK a less attractive destination for EU migrants, especially those who would have been working in lower-income occupations.<sup>6</sup>

**EU free movement rules**

The EU's free movement rules can be summarised as follows:

- every citizen of an EU Member State has the right to live, work, study or retire in any other Member State, subject to certain rules;
- to meet the rules, after three months, they must either be in employment, self-employment, a job seeker with a serious prospect of finding work, a student or somebody who is self-sufficient (*i.e.* has an income of their own, perhaps a pension);
- this basic right also applies to citizens of Norway, Iceland, Liechtenstein (the EEA countries) and also to Switzerland [see below];<sup>7</sup>

<sup>4</sup> Migration Advisory Committee, *EEA Migration in the UK: Final Report*, 18 September 2018, para. 17

<sup>5</sup> *Ibid.*, paras. 14-17

<sup>6</sup> See Migration Observatory, *Pounded? Currency devaluation and migration to and from the UK*, University of Oxford, 21 April 2017

<sup>7</sup> References to "EEA" hereafter include Switzerland, unless otherwise stated.

- this right is linked to the right of establishment, which enables EU citizens to operate a business in any Member State, and social security rules which ensure that an EU citizen's right to certain benefits (e.g. pensions) are protected whichever Member State they work in;
- the right is also linked to the principle of equal treatment, that is, an EU citizen living in another Member State must be treated as if they are a national of that country in fields such as employment and education;
- there is no automatic right to claim benefits and those who do not comply with the rules, including abiding by the laws of the Member State where they reside, can be deported.

Further details of the current system are set out the July 2018 SEE paper. The EU legislation, the Citizens Rights Directive, was adopted in 2004 and the UK regulations which implement the EU law in the UK date from 2016.<sup>8</sup>

### **The EEA/Switzerland free movement rules**

The three EEA countries and Switzerland also operate free movement of people with the EU as an integral part of their agreements; indeed, the EEA Agreement uses almost exactly the same language on free movement as appears in the EU treaties.<sup>9</sup> The same rights to social security, to work self-employed and to establishment, mean that the EEA/Switzerland free movement provision mirrors that in the EU.

Attention has been drawn in recent months to the safeguard clauses in the EEA Agreement, with the suggestion being made in the UK that such clauses can be used to provide an "emergency brake" to stop free movement. The safeguard clauses in Articles 112-114 of the EEA Agreement are not specifically about free movement of people. Article 112 says that an EEA country can suspend part of the agreement because of "serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist".

This clause has only been used twice and only on one occasion in connection with the free movement of people. That was in 1995 when Liechtenstein invoked the safeguard clause to ensure that an interim agreement with the EEA on restricting free movement to the country could remain in force while discussions continued about a long-term replacement. The EEA did agree to permanent restrictions on free movement of people to Liechtenstein but only because it is a tiny country of 37,000 people, half the size of the Isle of Wight and vulnerable to sudden influxes of people.<sup>10</sup> The EEA Agreement had to be changed to do this because Article 112 says that any suspension of part of the agreement must be for a short duration and be limited in scope to what is necessary to remedy the situation.<sup>11</sup>

<sup>8</sup> See *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 L 158/77

<sup>9</sup> Article 28 of the EEA Agreement governs free movement: *Agreement on the European Economic Area*, 1994 OJ L 1/5, p. 12; in the case of Switzerland, see *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons*, 2002 OJ L 114/6

<sup>10</sup> See Zuzanna Bobowiec, 'Brexit and Free Movement of People: Frameworks and Legal Bases of Possible Migration Controls', *King's Student Journal for Politics, Philosophy and Law*, Issue 1 (2017) pp. 105-129

<sup>11</sup> Discussed in Dominic Webb, Arabella Lang, Matthew Keep et al., *The European Economic Area*, House of Commons Library Briefing Paper CBP-8129, 21 December 2018, p. 10

Switzerland has a separate agreement on free movement with the EU (2002), based on the same principles of free movement in the EU Treaties and in the EEA Agreement. It also contains a clause that means that if Switzerland ends free movement, all of its other agreements (over 100 in total) with the EU automatically fall. In 2014 a referendum in Switzerland resulted in a majority for mandatory migration quotas on foreign citizens, including EU citizens. To have implemented this would have broken the terms of the country's free movement agreement with the EU. In the event, the Swiss Government proposed a more limited change in which job vacancies would have to be advertised locally first before being made available to applicants more widely.<sup>12</sup> The EU and Switzerland reached a new agreement in November 2018 which covers five policy areas including free movement of people; it has not yet been ratified by either party.<sup>13</sup>

### **Policy options for the UK within EU free movement rules**

Since the adoption of the Citizen's Rights Directive in 2004 the UK has chosen not to adopt measures within EU rules that would manage or restrict free movement of people to the UK. The main policy options available to the Government to do so, for example after a second referendum on Brexit should the UK decide to stay in the EU, are already in use in many EU Member States.

In summary they are:

- registration – the UK is one of a minority of Member States that do not require EU citizens intending to stay more than 90 days to register with a public authority (usually the municipality or the police);<sup>14</sup>
- removal of migrants – if the UK had a registration requirement for all its citizens (which in fact applies in the UK to non-EU migrants) this would make it easier to enforce one of the EU's rules: that a citizen who has not found work and cannot support themselves can be deported. Other Member States, including Belgium, are able to deport without difficulty non-working migrants who do not meet the self-sufficiency criteria;
- proof of self-sufficiency – placing a requirement on non-working EU migrants to prove that they are self-sufficient (e.g. a letter from a pension provider and bank statements);
- comprehensive sickness insurance – many EU Member States with contributory systems require this;
- identity cards – the UK is one of only three EU Member States that does not issue identity cards to its citizens; they are often used in other Member States by employers and public service providers to be certain that the person seeking work or benefits, or trying to access a public service, is entitled to do so;
- enforcing minimum wage law – there is evidence that some British employers are paying a lower rate to staff from Eastern and Central Europe than they pay to

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<sup>12</sup> See European Citizen Action Service, 'Switzerland Passes New Immigration Law that Avoids Quotas but Privileges National Workers', 5 January 2017

<sup>13</sup> For an explanation of the current situation, see 'What you need to know about the new draft Swiss-EU deal', George Mills, *The Local*, 13 December 2018

<sup>14</sup> See European Commission, 'Registering your residence abroad', 11 December 2018

British born workers.<sup>15</sup> Not only is this a breach of the EU law (the principle of non-discrimination), it also makes EU migrants more attractive to employers;

- use of employment agencies – some employers in the UK have adopted the practice of advertising vacancies only through agencies located in other Member States. This is so that the employer can bring groups of workers to Britain to fill vacancies at low pay levels without anyone resident in Britain having the opportunity to apply. This would appear to be a breach of EU rules and there seems no reason why the UK could not ban the practice;
- registration for work – the Government could require employers to notify local job centres of all vacancies.<sup>16</sup> This would be accompanied by guarantee that appropriately qualified local applicants would be guaranteed an interview with the employer;
- social security – although EU migrants pay more to the UK exchequer in tax than they receive in welfare payments and public services,<sup>17</sup> the perception that it is easy for migrants to claim benefits could be tackled by adopting a social security system which requires a minimum level of contributions before people can claim benefits; this approach is common in other Member States;
- migration impacts funding – funding for communities heavily impacted by migration has been made available in the past and the current version, the Controlling Migration Fund, which has a round £140 million to spend in England over four years, could be extended in amount and scope.

## **Conclusion**

The fall in migration of the last two years has been accompanied by some decline in public concern about the issue. But it still remains a worry to many and while much of that relates to non-EU migration, there are policies that could be adopted by the UK, if it chose to stay in the UK, which would ensure better management of free movement of people within the EU and the tackling of abuses. Discussion of such policy options would no doubt play a part in any future referendum campaign on the UK's relations with the EU, as will the recent Government White Paper on post-Brexit immigration policy.<sup>18</sup>

**January 2019**

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<sup>15</sup> See Catherine Barnard, Amy Ludlow & Sarah Fraser Butlin, 'What minimum wage? Why enforcement of EU migrants' employment rights matters', LSE Brexit Blog, 11 May 2016

<sup>16</sup> 'Gordon Brown calls for tougher controls on migration', Larry Elliott, *The Guardian*, 5 June 2018

<sup>17</sup> Migration Advisory Committee, *supra* n. 4, para. 4.11

<sup>18</sup> HM Government, *The UK's future skills-based immigration policy*, Cm 9722, 19 December 2018



## Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

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