

The Brexit and EU freedom of movement: legal uncertainty on both sides of the 'border'

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What is the state of the EU policy?

Freedom of movement for persons and workers is a founding EU principle safeguarded by EU primary and secondary law (Art. 21, 45 TFEU; Directive 2004/38/EC). Next to the freedoms defined for capital, goods, and services, person mobility is considered to be a core driver for EU integration (Haas 1958: 12). Over six decades, since the 1950s, the rights of mobile Europeans have been constantly expanding. With the establishment of EU citizenship in the Maastricht Treaty (1992), any European, economically active or not, was given the right to reside in any other EU Member State. The legitimacy of EU freedom of movement rests on the assumption that mobility is beneficial for both the single market (Favell and Hansen 2002) and for the support of EU citizens for European integration (Favell and Recchi 2009). Most importantly, though, is the fact that the actual mobility of EU citizens signifies changes to state sovereignty; the EU policy limits the state's control over the people that are residing on the territory.

Claims for changes to EU person and worker mobility question core Treaty provisions, such as the right to freedom and residence in the EU (Art. 21 TFEU) and the fundamental principle of non-discrimination (Art. 45 TFEU). As these freedoms and rights are linked to EU integration, any revisions need to be based on unanimity among member states. Therefore, serious restrictions to EU migration are unlikely to find consensus among member states. Changes to secondary EU law, such as the citizenship directive or social security coordination call for a qualified majority, and are more likely to be achieved among member states. I discuss here how British demands for re-assessing social rights of EU citizens could actually be met by changes to secondary EU law. However, a crucial change to the principle of freedom of movement, by re-imposing control on EU citizens entry and residence in other member states, would be hard to achieve, even outside EU Treaty obligations.

What is the UK's role/interest in Freedom of Movement?

At first glance, the UK's call for restrictions on freedom of movement is puzzling. The British labour government of the 2000s embraced one of the most liberal positions

By bundling the manifold policy expertise of the researchers of the Institute for European Studies (IES), this paper forms part of a series of analyses investigating the potential implications of a 'Brexit' scenario for different EU policies. All papers ask the same three questions: 1) What is the state of the EU policy in focus? 2) What is the UK's role/interest in this policy field? 3) What are the potential implications of a 'Brexit' scenario at the policy-level?

After Claire Dupont and Florian Trauner [introduce the project](#), Richard Lewis sets [the historical and cultural context](#) and explains how the UK and the EU have come to such a low-point in their relations. Next, five policy fields are analysed: [justice and home affairs](#); free movement policies; [EU external representation](#); [the \(digital\) single market](#); and [environmental policy](#).

towards the mobility rights of citizens from the new Eastern European member states. Together with Sweden and Ireland, the British government decided to open its labour market for worker and person mobility from these countries. In contrast, ten years later, the conservative UK Prime Minister David Cameron considers the liberal policy towards accession countries a mistake (Gostynska-Jakubowska 2015: 12). The other ten EU-15 member states made use of transitional arrangements allowing for restrictions of worker mobility for up to seven years (Kraleva 2013). As a consequence of openness, net-migration from the EU to the UK quadrupled in 2004 (15,000 to 87,000). Between 2004 and 2010, more than 600,000 EU citizens had moved to the UK (ONS 2014). In addition to the liberal policy towards EU accession countries the financial crisis that severely hit many

southern European member states incentivised migration to the UK. During the crisis years (2008-2012), EU migration to the UK slowed down but was still significantly positive, with 362,000 net arrivals (ONS 2014).

However, with 2.2 million EU migrants, the UK is not the EU Member State in which most EU migrants reside. Germany (3.7 million), Spain (2.3 million), and France (2.4 million) have a larger share in EU mobility. At the same time, Britain also sends 1.4 million of its citizens to other EU countries. Spain, Ireland, France and Germany are popular destinations for British citizens in Europe (Vargas-Silva 2012: 4-5). The data show that the UK not only previously held liberal positions towards immigration from Eastern Europe but it is also a major sending and receiving country of intra-EU mobility. Against this backdrop we must question why EU freedom of movement is one major justification for the UK to leave the EU.

The policy debate on an 'migration control crisis' began parallel to the financial crisis and the change in government from Labour to Tory in 2010. Since then, free movement of EU citizens to the UK has become one of the most politicised issues in the UK. The actors critical of EU freedom of movement include populist and conservative parties such as the Tories and the UK Independence Party and the media (Bruzelius et al. 2014). The issue that raised most concern in the British public and political debate was the assumption of 'welfare tourism' – i.e. EU citizens moving to the UK because of easy access to non-contributory benefits. The claim was hardly supported by empirical evidence. In fact, EU migrants contributed positively to public finances and their employment rate was higher than that of British nationals (Dustmann & Frattini 2013). Despite a lack of evidence, the connection between EU migrants and 'welfare tourism' epitomised a widely shared unease about immigration in the UK. Actual problems could be observed with regard to rising prices in the housing market and immigration to semi-urban and rural areas that were not used to or equipped for accommodating larger numbers of newcomers (Vargas-Silva 2014: 126). Most important to the debate in the UK was the fact that EU migration, although for decades smaller in size than immigration from third countries, could not be restricted. The inability to restrict EU admission resulted in a debate discussing a 'migration control crisis' in relation to the country's EU membership (Paul 2016).

In the run-up to the British referendum on a possible Brexit, UK Prime Minister David Cameron proposed a list of reforms to the European Council. A settlement on these demands was a pre-requisite that he would campaign to keep the UK in the EU. Among other issues of British concern with the EU, immigration featured prominently on the list of demands for re-negotiation. Calls for restrictions focus on issues of abuse of EU rights and welfare state access of EU citizens in the UK. Cameron assumes that high levels of immigration in the UK are connected to the

'draw that [the British] welfare system can exert across Europe' (UK Government 2015). In order to discourage 'migration for welfare', he claimed a four-year qualification period before EU migrants can claim in-work benefits such as income top-ups and housing benefits. In addition, out of work benefits such as child allowance should not be paid to children living abroad.

After months of British diplomacy with EU member states and EU institutions in 2015, the Commission and Council signalled room for policy change (European Council 2016a). In a two-day marathon meeting on 18 and 19 February 2016, the European Council agreed that child benefits could be indexed to the conditions of the Member State where the child resides (European Council 2016b: 22, see also Policy brief 2016/5). The proposed changes to social security coordination rules (Regulation 883/2004) became possible because Denmark, Germany, Belgium, and the Netherlands were also critical of having to pay child benefit allowances to children living abroad. However, withholding in-work benefits from EU workers in Britain directly infringes EU non-discrimination principles. Thus, the Council suggested a 'safeguard mechanism to respond to exceptional situations of inflow of workers from other Member States' (European Council 2016a). That way, the general commitment towards freedom of movement and non-discrimination remained untouched and restrictions were justified on the basis of emergency. The Council Presidency and the Commission acknowledged an exceptionally high inflow of workers into the UK in recent years. The so-called 'emergency brake' allows for denial of benefits to newly arrived workers for four years within a seven year time period. The safeguard mechanism functions as an amendment to Regulation 492/2011 and only denies benefits to newly arriving EU workers (European Council 2016b: 34). Apparently, some Eastern European member states had given up their principled opposition to a qualification period for full access to the welfare state (Taylor et al. 2016). Immediately after the European Council agreed on the 'new settlement for the United Kingdom within the European Union', Cameron kept his promise and announced to campaign for Britain to remain in the EU.

However, this EU-UK settlement will be difficult to defend factually and politically. Concerning the facts, a waiting period for in-work benefits will probably not decrease the numbers of EU migrants in the UK. Cameron's emphasis on benefits in the re-negotiation is somehow puzzling since his government already adopted some restrictions targeting the access of EU migrants to benefits. The UK's open and growing economy attracts EU migrants rather than its in-work welfare benefits or child allowance. The networks established between Europeans in the UK and those still in the home countries are strong and perpetuate movements. Push factors for moving to the UK remain as long as economic and labour market conditions in southern and eastern Europe are grim (Galgósci et al. 2012: 10-12). Therefore, it is fair to assume

that a decrease in the numbers of EU migrants can only be achieved outside of EU freedom of movement policy. Politically, the suggested settlement was hardly considered as a 'better deal' by Eurosceptics in Cameron's own party. Influential conservative politicians such as Chris Grayling, Leader of the House of Commons, and Ian Duncan Smith, work and pensions secretary, and others were quick in denying the success of Cameron's re-negotiation efforts (Watt & Traynor 2016). Eurosceptics among Tories or elsewhere will not be convinced by any re-negotiation that does not lead to a Brexit. Decisive for the success of the 'Britain stronger in Europe campaign' ('Bremain') is the media and its influence on the general public's attitude. Major newspapers, including The Guardian, The Times, the Daily Mail and Daily Telegraph, received the 'settlement' with mixed reviews. A critical public, unconvinced by the settlement, can well shift the balance towards Britain leaving the UK.

What are potential implications of a 'Brexit' scenario?

The likelihood of a Brexit motivates hypotheses on what might happen to free movement and movers in the UK and the rest of the EU. Answers to the following questions were sought:

1. What are the alternatives to free movement allowing the UK control over EU migration?
2. What happens to the status of EU citizens in the UK?
3. What happens to the status of UK citizens in the EU?
4. What could be the unintended consequences of re-introducing immigration control for EU citizens in the UK?

A possible alternative to full UK membership in the EU is becoming part of the European Free Trade Association (EFTA), joined by Iceland, Liechtenstein, Norway and Switzerland. The caveat is that EU-EFTA relations defined in the agreement on the European Economic Area (EEA) include an obligation for the free movement of workers (Art. 28 EEA). Switzerland, an EFTA country, is not a signatory to the EEA but has signed a separate bilateral agreement on freedom of movement with the EU (OJ L114/6). The Swiss government's attempt to introduce quota regulations for EU citizens moving to the country proved to be a great challenge in changing the agreement. As a consequence of a nationalist backlash and referendum in 2014, Switzerland aims at decreasing immigration, including labour migration from European neighbours.

In early 2016, negotiations with the EU Commission were deadlocked. Swiss politicians indicated that no settlement on the issue of free movement would make the suspension of all bilateral agreements with the EU a likely option (Euractiv 2015). The struggle over terminating free worker mobility between the

EU and Switzerland once again shows how indivisible freedom of movement is from the internal market and other economic freedoms. The Swiss case exemplifies that withdrawing from free movement questions further agreements on free trade. Therefore, after a Brexit, the re-introduction of national quotas or other control measures establishing a 'free movement light' does not seem to be an acceptable option for the EU. Since the UK highly values access to the internal market, it might be possible that it prioritises economic freedom over immigration control. The UK could join EFTA, and freedom of movement could be referred to as an issue that remains 'unresolved'. This seems to be a likely scenario in the light of the consequences that EU as well as British nationals face: they would become third-country nationals for the purpose of entry and residence.

The re-introduction of immigration control would have serious consequences for the status of 2.2 million EU citizens as well as 1.4 million UK citizens exercising their free movement rights. If immigration controls were enforced retroactively and not only on new arrivals, insecurity with regard to residency in a member state would probably lead to an increase in citizenship requests. Scholars observed this development during the economic crisis. Compared to pre-crisis data, it was more likely that EU migrants from crisis-struck southern European countries would acquire citizenship of their northern European country of residence (Graeber 2016). EU migrants in precarious employment situations, unsure about the availability of employment visas, would likely opt for this alternative.

For the 400,000 British pensioners that reside in the south of Europe, in France, Spain or other member states, Brexit would put serious constraints on their free or state-subsidised access to health care (The Economist 2014). Within the equal treatment provisions of the treaty and the citizenship directive (2004/38/EU), British retirees enjoy the same rights as other national pensioners. Withdrawing these rights would probably jeopardise the budgets of many retirees living abroad. Return migration to Britain could be an effect, putting additional pressure on an already tense housing market. In the current economic situation, a low-level resale in Spain would leave many of the British retirees dependent on social housing in UK.

UK workers in the EU would have the option to acquire a residence status within EU immigration legislation. Long-term resident status would be a viable option for those already living in a EU country for more than five years. British citizens, however, may have to pass integration and language tests to qualify for the status (see also Policy brief 2015/6). British workers looking for first admission may use the EU Blue Card system, aimed at attracting highly-skilled third country nationals. The respective earnings threshold that can be applied

by member states could make it difficult to attain the status. Next to national schemes for labour migration, EU legislation on seasonal employment as well as intra-corporate transferees offers short-term access to the EU labour market. Ordinary workers already working in a EU country can rely on the rights defined in the single permit safeguarding access to social rights (Roos 2015). Additional options for entry are the students' and researcher directive. However, EU and national law regulating immigration of third country nationals are less generous in terms of rights and entry requirements than provisions regulating EU freedom of movement (Peers 2014).

The reciprocal re-introduction of immigration control could lead to unintended consequences. Visa overstaying or irregular immigration of EU citizens to the UK and vice versa might well be the result of quotas and visas. As a consequence, deportation of EU or UK citizens would become more likely. Aside from the burden created for the EU or UK migrants, the administrative and legal costs would be extraordinary. New documents would have to be issued, procedures changed and public authority would have to deal with the legal appeals of tens if not hundreds of thousands of people.

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