FREE MOVEMENT AFTER BREXIT: POLICY OPTIONS

The UK in a Changing Europe

Summary

This paper examines whether it would be possible to modify the operation of free movement of persons between the UK and the European Economic Area in ways that would allow the UK to remain in the Single Market after Brexit, temporarily or permanently. It concludes that such modifications are practical and feasible; they would preserve the principle that EEA citizens could move to the UK to look for and take up work, while giving the UK public greater assurance that migration from the rest of the EEA was monitored and, where appropriate, controlled. In particular, the introduction of a "Swiss-style" system of temporary and targeted region and/or occupation specific controls on the employment of new EEA migrants would be feasible.

There would however be significant challenges: the EU would have to accept some modifications to the legal framework, the UK would have to implement major administrative and systems changes, and there would be inevitable tradeoffs between increased burdens on business and individuals and the degree of extra "control" afforded by such system. The negotiability of such changes will depend crucially on the political context and on political will both here and in the EU27, but it should not be concluded ex ante that they are impossible.

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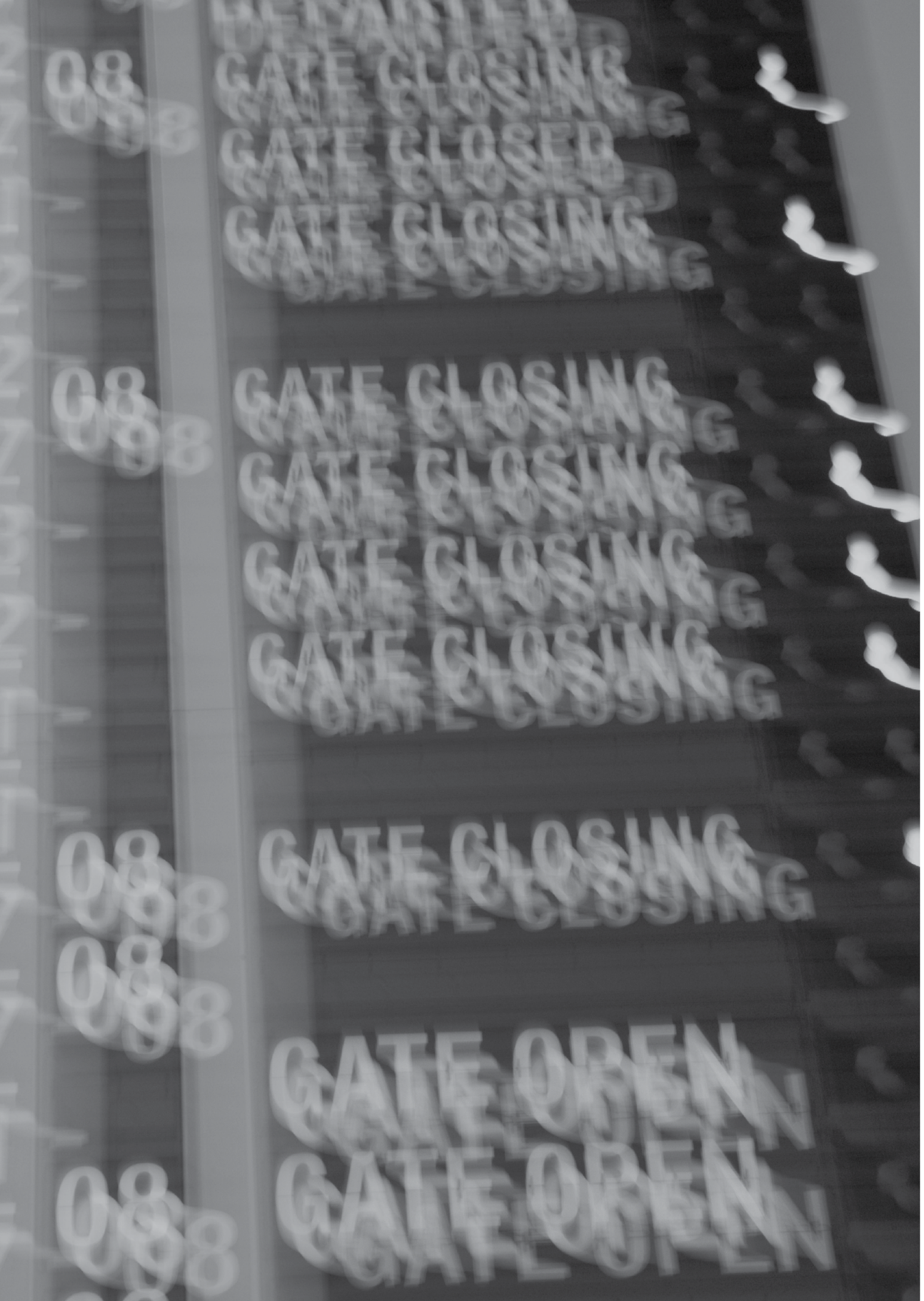

FREE MOVEMENT AFTER BREXIT: POLICY OPTIONS

Jonathan Portes[1]

Introduction

The purpose of this paper is to explore options for the modification of free movement of persons that would provide the UK government with an additional measure of control over migrants from elsewhere in the EEA for work purposes, while still being consistent with an integrated European labour market and hence with the broader operation of the Single Market. They are intended as a possible basis for negotiations between the UK and the EU, should the UK seek an arrangement which allowed it to remain wholly or largely within the Single Market, either permanently or for an extended transitional period.

We assume that the objectives of such modifications would be three-fold:

- To increase the – real and perceived – degree of control of the UK government and Parliament over migration for work purposes from the EEA. In particular, to ensure as far as possible that people who move to the UK from the EU do so either because they have a job or the realistic prospect of securing one; and to allow the UK government to take measures to ensure that work-related migration does not have negative consequences for the operation of the UK labour market;
- To maintain the economic advantages of free movement of persons to the UK, and to minimise any additional administrative burdens on individuals, employers and government;
- To allow the UK government to offer, in the context of negotiations with the EU27 on the future relationship between the UK and the EU27, a meaningful commitment to the principle of free movement – albeit not in its current form - that would facilitate wider negotiations on the UK's continued membership of the Single Market.

Note that reducing immigration levels is not included as one of the objectives above. This is for two reasons: first, we take as read the clear consensus among economists and labour market analysts that overall immigration in general, and EU migration resulting from free movement in particular, has benefited the UK economy (see, e.g. Portes (2017) for a review). Nor has it had any large-scale negative impacts on the employment or wages of native workers. The case for seeking to reduce EU migration significantly at a national level is therefore, from any sort of economic perspective,

1 Professor of Economics and Public Policy, King's College London; and UK in a Changing Europe: jonathan.portes@kcl.ac.uk. Funding for this research was provided by the ESRC under its Brexit priority grant programme. I am very grateful for constructive and helpful comments from my colleagues Catherine Barnard and Anand Menon, Joseph Owen (Institute for Government), Marley Morris (IPPR) and participants in a roundtable for MPs at Portcullis House. All opinions expressed herein are mine alone, and not that of the ESRC or UK in a Changing Europe, and I am responsible for any errors or omissions.

exceptionally weak. We do not repeat those arguments here. Second, because the available evidence suggests that although some of the measures described below might have some impact on numbers, these would be relatively modest in quantitative terms, and certainly small compared to the impact of broader economic and labour market trends on migration flows. In other words, if the overriding objective - regardless of the economic impacts and the implications for the UK's future relationship with the EU – is to reduce migration, as opposed to addressing concerns about its management and local impacts, then this will not be the answer.

Context

In the run-up to the UK's referendum, David Cameron attempted to negotiate a number of changes to the operation of free movement. In the end, agreement was reached at the European Council on provisions that would have – had the UK voted to Remain - allowed several restrictions on the rights of EEA nationals in the UK to claim benefits.[2] However, these provisions would not have affected the rights of EEA nationals to move to the UK for the purpose of looking for and taking up employment.

It is therefore often argued that suggesting any significant changes to the operation of free movement itself is doomed to failure ex ante – "Cameron tried that and failed." However, the context is now different. The UK has voted to leave the European Union. Outside the EU, but seeking to maintain as far as possible the current levels of economic integration between the UK and the remaining EU, it may be possible for the UK to make more fundamental modifications to the operation of free movement. As noted below, Switzerland, outside the EU but largely within the Single Market, has negotiated some (admittedly modest and contentious) changes.

We assume that any new provisions would be "bespoke" – that is, they would be negotiated directly between the UK and the EU27. They would therefore not necessarily mirror current provisions relating to the operation of free movement, either within the EU, or between EEA countries (and Switzerland) and the EU. We are **not** claiming any or all of these proposals would necessarily be negotiable in practice: that would depend on the wider political context and the broader objectives of both the UK and the EU in shaping their future economic relationship. We do, however, argue that they represent modifications, rather than complete abandonment, of the principle of free movement of persons, and that the EU27 should therefore not rule them out entirely ex ante. Equally, we argue that the UK public debate should not assume that the choice is, as the Prime Minister has claimed, simply between free movement exactly as now, and complete exclusion from the Single Market and Customs Union. What may or may not be possible and negotiable, politically and legally, can only be established if the UK makes a serious and good-faith attempt to negotiate, and the EU27 reciprocate.

2 Subject to further detailed discussion and approval by the Council and the European Parliament; the latter might well have been problematic.

The current position

Free movement of persons is, of course, not only, or indeed primarily, about "movement". In its current form it covers (broadly) four areas (see Barnard and Peers, 2017, chapters 12-14, for a more detailed discussion):

(i) *The right to enter the country*. EEA and Swiss nationals have the right to enter the UK. This right is not unqualified – entry can be denied on certain limited grounds relating to public protection (public policy, public security and public health). The entry of EEA nationals, like UK nationals, is controlled at the UK's borders, through the UK's normal system of passport controls, since the UK is not a member of the Schengen area.

(ii) *The right to reside*. EEA nationals (and their close family members, regardless of nationality) have the right to reside in the UK if they are working, seeking work, self-employed, studying, or self-supporting ('persons of independent means'). This means that those who do not meet these conditions – in particular those who are judged to have no realistic prospect of finding work – can in principle be removed under some circumstances. In practice, removals on these grounds are thought to be rare (no data is collected) unless EEA nationals come to the attention of the UK authorities for other reasons (for example, begging). Homeless EEA nationals can and have been removed.

(iii) *The right to work*. EEA nationals are entitled to work in the UK on the same basis as UK nationals, except for a small number of specified public sector occupations;

(iv) *The right to equal treatment, and in particular to access benefits and services*. EEA nationals who are resident in the UK (not visitors) are broadly entitled to access benefits and public services on the same basis as UK nationals, although they cannot claim unemployment-related benefits in their first three months in the country; and, after a further three months claiming such benefits are subject to the "genuine prospect of work" test (see below). As noted above, the agreement negotiated by Prime Minister Cameron would have imposed several further restrictions, had the UK voted to Remain in the EU, but this is now moot.

We focus here on the right to work; this is the most original and most fundamental component of "free movement of persons", and other rights are to some extent derived from it, either legally or politically. We discuss later possible restrictions to other rights.

Non-EEA nationals

In order to identify how any changes to the right to work for EEA nationals might be operationalised, it is helpful to examine the current system for non-EEA nationals (see Portes, 2016a, and Welsh Government, 2017, for further discussion of the implications for EEA nationals of replicating the system for non-EEA nationals, in whole or in part). Entry to the UK is controlled separately from the entitlement to seek and take up employment. Nationals from some countries (e.g. India, Nigeria)

require a visa to enter the UK, which may be for a short-term visit (tourism, family, business) or longer-term (student or work). However, nationals of other countries (e.g. Brazil, US) do not require a visa for a short-term visit; they fill in a landing card and are simply given leave to remain, normally for a period of 3 months. It follows therefore that simply being legally in the country doesn't imply – for a non-EEA national – anything about the right to work legally.

Employment is controlled primarily inside the country, and via the employer: that is, there is a legal responsibility on employers to verify that their employees meet the requirements to be entitled to work in the UK. In the case of non-EEA nationals this is generally via the "work permit" system. That is, an employer identifies a non-EEA national who they wish to employ, and applies to the Home Office for a "certificate of sponsorship", or work permit, which requires the employer to demonstrate that the job and/or the individual pass certain tests. These tests may relate to the specific occupation in question, the skill level required, or the salary to be paid; and sometimes the employer will have to show that there is no UK or EEA national suitable for the post (the "resident labour market test", RLMT). These conditions are quite restrictive; at most, 1 in 5 jobs in the UK would qualify, even before taking account of the RLMT.

However, non-EEA nationals may also be permitted to work (and employer permitted to employ them) if they are here, on a long-term basis, for other reasons; for example, as the dependent of a UK citizen or of someone who holds a work permit in his or her own right. Given the number of different categories into which non-EEA citizens may fall – some of which give almost unrestricted rights to work, some of which give no right to work, and some of which give conditional rights – the system is complex, and many employers, especially SMEs, find it difficult and expensive to navigate.

Depending on which specific type of permit is applied for, a non-EEA national may or may not be in the country already (under an existing permit, as a dependent or spouse, or a student visa, for example). However, it would not normally be permissible to apply for a job and take up employment when simply visiting the UK (either on a tourist visa, or as a non-visa national entering without a visa).

How could some version of "free movement" be made compatible with such a system? In what follows, we identify two broad options, as well as intermediate positions:

- Free movement with a prior job offer
- Free movement to look for work

"Prior job offer"

Under the first option, the system would operate more or less as described above for non-EEA nationals, except that in contrast to the restrictive conditions under which employers can obtain a certificate of sponsorship for a non-EEA national, this would be effectively automatic for an employer wishing to employ an EEA national. That is, the employer would make a job offer to a specific EEA national and obtain a work permit; this would permit the EEA national to obtain a work visa to come to the UK and to lawfully take up employment. It could be subject to criminal record checks, checks

against previous breaches of UK immigration or social security law, and so on, but there would be no skills, qualifications or RLMT would be required. As with non-EEA nationals, some EEA nationals would be entitled to take up employment without a work permit, if they qualified on other grounds.

The conditions of entry and residence would be similar to those for non-EEA nationals under the current system. That is, the certificate of sponsorship would be valid for a specific employer and a specific job, and would be time-limited; however, under certain conditions, the employee could transfer to a new employer. It could also be extended (leading eventually to permanent residence, after which no restrictions on work rights apply).

The key advantage of this system would be that it would be (and could be presented as) a variant of a broader post-Brexit migration system. Individuals would still be checked, issued with certificates of sponsorship and visas, subject to immigration control and so on.

The disadvantages are that this would still impose a significant bureaucratic hurdle, relative to the current position. Employers would have to apply for a licence to sponsor workers and obtain certificates of sponsorship for each worker; this would impose significant costs in terms of time and money, particularly for SMEs. Current requirements for work permits for non-EU nationals are generally regarded, even by large employers, as bureaucratic, burdensome and costly, both directly and indirectly; as a consequence, most small employers choose not to use the current system at all.

There would need to be provisions for EEA nationals who were already legally resident in the UK for non-work-related reasons (students, spouses) either they would have to leave the country and apply for a job from their home country, or a further special scheme would be required. There would also be significant enforcement issues; someone could come here, look for work, be offered a job, and then return home to apply for a work visa. There is also some risk that, particularly for low-skilled workers, intermediaries (employment agencies) would set up purely to offer jobs to EEA nationals to secure permits; once arrived, the EEA nationals would then be hired out to employers. This could potentially facilitate abuse and/or reduce public confidence; and prohibiting or restricting such practices would add a further bureaucratic barrier.

Free movement to seek work

The "prior job offer" system would be relatively liberal, but clearly would not be "free movement" in anything like its current form. An alternative, approximating much more closely to free movement as it currently operates, would be to allow employers to hire EEA nationals as now, so that EEA nationals would be free to move to the UK to look for, and then take up, work; but to impose some restrictions on how long EEA nationals were permitted to remain in the UK if they did not succeed in finding a job. As noted above, the existing free movement provisions already allow EEA nationals who do not find work within 6 months and are judged to have no realistic prospect of so doing to be denied benefits and, in some circumstances, removed. Note that DWP already apply this test to EEA nationals claiming some benefits (in particular Jobseekers' Allowance) (DWP, 2017); in 2016-17, the test was applied to about 15,000 claimants, and in about 90% of cases benefit was denied or stopped.

One issue here is that, as noted above, non-visa nationals – like US citizens and Canadians now – can currently enter the UK without a work visa, but are not entitled normally to seek or take up employment: they will complete a landing card stating that they are coming for tourism, a family visit, or similar, and will normally be given leave to enter on that basis, for a period of (usually) three months. If they seek to take up employment, they and/or their employer will be breaching the law.

So, if we wished to allow EEA nationals to seek and take up employment as now, there would be two options:

- There could be a special visa and/or permission to enter – it could in principle be as simple as a box on the landing card, or electronic equivalent – which would be granted automatically or quasi-automatically, and would grant entitlement to look for and take up work, presumably for three months.
- The default permission to enter (which, as above, covers tourism, family visits, etc.) would also allow an EEA national to look for and take up work. In other words, an EEA national entering the UK would not have to declare whether s/he was here for general tourism or to look for a job (and indeed s/he could subsequently change his/her mind).

The key advantages of a system along these lines are the following:

- It would effectively replicate free movement as it exists now in respect of work, except that it would be somewhat easier to deny entry to people considered "undesirable" for whatever reason.
- If the provisions were actually enforced (but see below) it would demonstrate both that free movement was related to the UK's actual labour market needs and conditions, and that the UK government remained in control of the movement of those coming here without a job and who could not demonstrate, by finding a job, their economic utility to the UK.
- From the point of view of the EU, this system would almost certainly go beyond what is permissible under current law, where registration requirements and time limits are allowed, but only under quite limited conditions. However, such a system would clearly represent an incremental modification of existing provisions under which free movement can be (legitimately) constrained, rather than an entirely new system.

Meanwhile, it would be possible to deny access to (at least some) benefits and public services, as is the case with non-EEA nationals without permanent residence. To the extent that (perceived) benefit tourism or pressure on public services underlies public dissatisfaction with free movement as it currently operates, this might alleviate some concerns, while preserving the key economic and labour market benefits. Detailed work would be required to determine which of the rights currently associated with free movement would remain, and which would be removed or restricted.

However, this system would still mean that EEA migration remained, effectively, "uncontrolled", in the sense that there would be no upper limit, and even monitoring the volume of inflows, let alone controlling them, would, as now be difficult to do on a timely basis. Moreover, enforcement would

be an issue. While it might be possible legally and in principle to limit the time during which an EEA national could look for work to three months from date of entry (as recorded on the passport and Home Office landing card records), employers might find this difficult to check. With approximately 35 million crossings a year, there would be significant resource implications for any new system that required significant changes to border controls for EEA nationals. And – without a fairly complex system of qualifying periods and required absences from the UK, which in turn would require record keeping – there would be nothing stopping EEA nationals leaving the UK briefly and then returning. Moreover, it is not clear what would happen when EEA nationals switch jobs.

All this would mean that the time limit to find a job might, as now, remain largely symbolic. It is not clear that this would be a particularly serious issue from an economic or labour market standpoint – there would (as now) be no benefit entitlements for jobseekers, and (again as now, in theory) those who became destitute or dependent on public funds could be removed. But it might undermine public confidence.

Intermediate options

In principle, it would be possible to construct intermediate options between the two set out above. For example, potential migrants could be required to declare on arrival that they already had a job offer from a specific company and were entering the country to work; they would be issued with an entry permit or equivalent entitling to them to take up employment, but only with that company. This would be a less bureaucratic version of the first system.

Alternatively, anyone wishing to seek employment could be required to register first (perhaps at a Jobcentre or online, in conjunction with National Insurance number issuance) and would be issued with time-limited permission to seek work. This would be a version of the second system that might enable the time limit to be better enforced in practice; it could also be seen as a version of the Worker Registration Scheme that applied to migrants from the new Member States after 2004 (and to nationals of Bulgaria and Romania), which did not attempt to control free movement, but to enable its impacts to be monitored, and was, of course, permitted under EU law for a temporary period.

Again, a registration scheme of this type, combined with a time limit, would probably require some modifications to the current legal framework for free movement – registration requirements on arrival are something of a legal grey area, since the Commission argues that they should in principle be voluntary for EU citizens exercising Treaty rights. But, as with the second option above, it could in principle be presented as consistent with the principles underlying free movement, and not dissimilar in kind to the types of restrictions and requirements imposed by other EU member states, for example in Denmark.

Moving towards "smarter" use of the National Insurance Number system (in particular, by allowing employers to check online whether a NINo was associated with an individual with valid permission to work in the UK) would have a number of additional advantages both to employers and government. In principle, such a system would enable the UK government to monitor not just overall inflows (as

it can do now) but sectoral and regional trends in considerably more detail and in real time. This would make it easier to identify any potentially adverse impacts (either on the labour market or more broadly on public services or local infrastructure). The recent leaked Home Office paper on immigration control after Brexit clearly envisages the development of such a system over the medium term.

Self employment and intermittent employment

Further complications arise when considering the position of self-employed people and people moving in and out of work (or between employment and self-employment). A rules-based framework would have to be established to determine what constitutes employment for free movement purposes, and how long a break between spells of employment would be permissible. Again, smarter use of the NI system should in principle be able to address these issues (note that self-employed people are required to register as self-employed and to pay NICs, although not necessarily on as timely a basis, so are not invisible to the system). This would represent an inevitable, but not insuperable, further layer of complexity.

Enforcement issues

Assuming that a reasonably user-friendly system can be developed that allows employers to check eligibility to work, then enforcement would be – very much as it is now for non-EEA nationals – primarily at the employer level. An employer who employed someone who was not entitled to work would be committing an offence, and this would be enforced through random and intelligence-led inspections, as now. Inevitably this would require a significant increase in resources compared to the status quo, and would mean substantially more employers were subject to such checks, but there is nothing infeasible about it.

A separate issue would be whether there was any serious attempt to remove people who were not working but who were still in the UK without any other legal right to remain. The UK does currently remove a significant number of EEA nationals in this category – about 5,000 over the last year - although usually only if they come to the attention of the authorities for some other reason (crime, homelessness or vagrancy). The policy issue here would be whether to extend the various measures that fall under the "hostile environment" policy (landlord and NHS checks, use of school census data) to EEA nationals. In principle, it would be difficult to justify **not** doing so, although this would represent a further radical extension of the use of public service staff as an arm of immigration enforcement.

Finally, it should be noted that these enforcement issues will arise to an equal, if not greater extent if free movement is removed entirely; the only way to avoid them is to continue with the current system. More broadly, both increasing the government's capacity and willingness to enforce existing labour law and, where necessary, strengthening the regulatory framework are likely to be a precondition to reducing abuse: this will remain the case whatever happens to immigration policy.

The "emergency brake" and the Swiss system

One proposal that attracted much attention during the UK's renegotiation was that the UK could have recourse to an "emergency brake" on EU migration – originally proposed by David Cameron in 2014, and then dropped when Angela Merkel made clear that it was incompatible with EU membership. It is not, however, necessarily incompatible with membership of the Single Market, since the possibility of applying such a brake - "safeguard measures"- is provided for in the EEA agreement. Norway and Iceland have not sought to use this provision: the tiny state of Liechtenstein (half the size of the Isle of Wight), however, has (after long and painful negotiations) an annual quota on new residents of EU origin. In a recent article, Nick Clegg argued:

> "With goodwill and a little imagination, EU governments could agree an "emergency brake" on the free movement of EU citizens, allowing governments to impose quotas and work permits in response to unusually high levels of EU immigration (similar to the trigger in the Cameron package)"

Similarly, Redgrave (2017), argues

> "On the other hand, the European Commission has only recently acknowledged the principle that there have been very high levels of migration to the UK (see above) so it is not impossible to envisage a scenario whereby the UK would be able to justify invoking safeguard measures."

And indeed, the Cameron renegotiation package did include the following text, not as a new provision, but rather as a statement of the view of the Council on what is already provided for under EU law:

> "If overriding reasons of public interest make it necessary, free movement of workers may be restricted by measures proportionate to the legitimate aim pursued. Encouraging recruitment, reducing unemployment, protecting vulnerable workers and averting the risk of seriously undermining the sustainability of social security systems are reasons of public interest recognised in the jurisprudence of the Court of Justice of the European Union.

Despite this, it is far from obvious that the "emergency brake" idea is either practical or sufficient at a national level. Given the wealth of research on the economic impacts of EU migration to the UK, which overwhelming concludes that such migration benefits the UK economy and labour market overall, with minimal negative impacts on native workers, it would be highly questionable whether the tests above could be plausibly shown to be met in any objective sense. Invoking this provision would therefore be seen by other Member States as simply the UK choosing to end free movement by the back door, and imposing an overall quota on EEA migration, which would almost certainly be unacceptable (see Portes, 2016b, for a more detailed discussion). Any negotiation that granted the UK membership of the Single Market and Customs Union, while at the same time permitting the UK government to impose a quota on the number of EEA nationals moving to the UK for work purposes, would clearly be regarded as "cherry-picking."

This illustrates the broader problem with the concept of a "brake" from the UK perspective - it was designed to be a temporary measure to deal with sudden surges in migration that destabilised labour markets in the destination country. This means that is either "on", when such a surge happens, or "off", in normal times. But whatever the issue with EU migration to the UK, it is not a sudden destabilising surge, but rather a continuous flow. So to make a meaningful impact, it would have to be "on" all or most of the time, in which case it would simply act like a long-term quota, which is clearly not consistent with the basic principle of freedom of movement of persons; or it would be "off" all or almost all of the time, in which case it would be a largely symbolic backstop (as has been the case for Norway). The latter arrangement might be useful as a supplement to the proposals described above, but seems unlikely to be sufficient in itself.

However, it might in principle be possible to combine one of the options above, in particular any scheme which required EEA nationals to register and which allowed the government to monitor which sector and region they were working in, with a more targeted version of an "emergency brake", along the lines of the system recently agreed between Switzerland and the EU

Switzerland voted in a 2014 referendum to impose quotas on migrant workers. However, implementing this would have required Switzerland to modify the terms of its bilateral agreement with the EU on freedom of movement; and the terms of this agreement mean that the EU would in turn have been able to suspend or cancel the other bilateral agreements which underpin Switzerland's membership of the Single Market. Indeed, the EU's response to the referendum was to restrict Switzerland's access to some EU programmes (Horizon 2020 and Erasmus).

Protracted negotiations between the EU and Switzerland – in which the EU made clear that quotas or other measures which fundamentally undermined the principle of freedom of movement were unacceptable - eventually resulted in a compromise. This will require employers to give preference to Swiss residents registered with the Swiss public employment circumstances, in some limited circumstances, relating in particular to levels of unemployment in specific occupations or localities).

Does such a system provide a potential model for the UK? Note that it is not an "emergency brake" on the EEA model – and indeed describing it as such would be likely to make it much harder to negotiate. In particular, it is determined by reference to objective measures of labour market pressures, which are determined in advance, and can be independently observed and monitored. In the UK context, it would be – for example – possible to state that in sectors and/or regions where unemployment was high, or significantly above the national average, or where wages were low and/or falling, employers would be required to recruit via Jobcentres, and to give initial preference to those claiming unemployment-related or disability benefits. This would by definition exclude recent arrivals from elsewhere in the EU (although not longer-term non-UK residents).

It is possible to imagine such a system being under the control of the independent Migration Advisory Committee, which already monitors wage and employment data by occupation. It could be implemented and enforced via the employer's use of NI system and local Jobcentres. This would, at least in part, help to depoliticise any such restrictions, and ensure that they were reversible.

Would such a system be acceptable to the EU? The negotiations with Switzerland were difficult and painful and the EU is certainly not in any hurry to repeat them; on the other hand, the Swiss deal provides a template and precedent for what might be possible outside the EU, but (largely) within the Single Market. It would indirectly discriminate against EU nationals, and thus constitute an impediment to free movement in a pure sense, but arguably would be entirely consistent with the European Council text quoted above: that is, it would be targeted, proportional and based on objective criteria. What does seem clear is that such a system would both be more acceptable to the EU than a generalised "emergency brake" that in practice acted as an overall quota, and better attuned to local labour market conditions in the UK.

There would obviously be very significant design issues for such a system:

- The appropriate geographical definition: regions, local authorities, or some other definition of local labour markets. There will be trade-offs and boundary issues with any definition;
- Given any such definition, how to enforce it. Employers would be required to identify the "normal place of work" for new employees (following the existing HMRC definition), so that different rules could be applied in areas where the "brake" was in force). There is already some geographical variation in the immigration system (some occupations are on the shortage occupation list in Scotland, but not elsewhere). A geographically differentiated system would add a degree of administrative complexity, but is certainly feasible (Sumption, 2017).
- Whether the brake should be related solely to labour market conditions (unemployment, wage rates, etc) or to large or increasing migration flows (somehow defined) or both. If the former, the system might not pick up pressure on public services, housing, etc; but given that migration flows are highest in London, where concern is lower, this might not identify areas where concerns are greatest.

Other restrictions on freedom of movement of persons

As noted above, freedom to work in the UK is the most important, but not the only, aspect of freedom of movement. However, despite the overheated rhetoric about "restoring control of our borders" during the referendum, it does not seem likely or feasible that we would restrict EEA nationals' right to enter the UK without a visa, given that we do not do so for most other developed countries.[3] A fully-fledged visa regime for EEA nationals would be hugely disruptive to trade, travel and tourism, even leaving aside the obvious point that this would mean UK nationals would require visas to travel to continental Europe. Moreover, it would mean that they were treated materially worse than, for example, Americans or Australians, who do not need a visa to enter the UK.

Meanwhile, it would certainly be feasible legally – even within the current legal framework– for the UK to enforce much more strictly the removal of EEA nationals who are judged to have no realistic

3 Although it is possible that some sort of electronic pre-entry system, like ESTA in the US, will eventually be introduced for movements to and from the remaining EU. This does not, however, constitute a visa system.

prospect of finding employment. However, this would be administratively complex, expensive, would affect relatively small numbers, and would not necessarily do much to address public concerns. To have a meaningful impact, restrictions on the right to reside would have to be allied to enforcement of a time-limited right to work, on the lines discussed above.

More realistic would be a renegotiation and extension of David Cameron's now lapsed agreement to restrict benefit entitlements. However, without changes to employment rights there is no reason to suggest that this would be any more politically credible than the first version. Pretending that a clampdown on the (largely mythical) "benefit tourism" will have any meaningful impact on migration flows is unlikely to be a more successful strategy the second time around, unless implemented in conjunction with changes to free movement to work.

Conclusion

"Free movement of persons" – like the other "fundamental freedoms" of the EU is not one single, absolute right, but rather a set of interlocking rights, which are already qualified to a limited extent. That does not mean, as has already been made abundantly clear, that the UK is free to "cherry-pick" precisely which parts of "free movement of persons" and the other freedoms it wants to keep. It does, however, mean that if the UK commits itself in principle to the object of maintaining all four freedoms, there may be scope – particularly outside the EU – for the UK to remain in the Single Market, temporarily or permanently, while negotiating modifications to the current operation of free movement.

This paper illustrates that, from an administrative and practical perspective, such options do exist, although they will not be cost-free – there will be important tradeoffs. If the rules are relatively restrictive, then they will be difficult to enforce without a significant increase in resources for enforcement and/or burdens on business; and if they are relatively liberal, they may be easy to circumvent and may not represent a very significant change.

Tentatively, our conclusion is that the most plausible option that would satisfy the objectives set out above (in particular, demonstrating UK control over the system while representing modifications to rather than a wholesale rejection of free movement would be the following: :

- EEA nationals who wished to remain in the UK for more than 90 days would be required to register for a National Insurance number on arrival; they would be entitled to seek and to take up employment during those 90 days
- employers would, as now, be obliged to check passports and NI numbers; online verification would allow them to determine whether individuals were indeed entitled to work;
- Any EEA national who remained in the country after 90 days and had not taken up employment would be required to demonstrate that they were legally resident under one of the alternative routes (self-supporting, dependent, etc). Anyone who could not do so would be liable to removal, as with non-EEA nationals now, although in practice enforcement would be targeted.
- The numbers of EEA nationals taking up employment in specific sectors and regions would be monitored. The government could, if necessary, introduce transparent and objective criteria for imposing certain targeted restrictions, on the lines of the Swiss system, obliging employers to give preference to local residents (not necessarily British).

A prerequisite for such changes is clearly development of the system for issuing and monitoring NI numbers, as well as some form of user-friendly online access for employers. While IT developments of this sort within government are never trivial, it does not seem unrealistic to suggest that a system which already contains very detailed records of individual contributions going back for decades (which individuals can already access) should also incorporate, and make accessible, additional information on entitlement to work. Note that the recent draft Home Office paper on immigration controls after

Brexit recognises the likely impact on employers, and assumes that such a system will be in place over the longer term,

Would such options be regarded by the EU27 and/or the Commission as a useful basis for discussion? The absolutist EU position has, from one perspective, been helpful in clarifying the debate, and making clear that the Boris Johnson solution of having our cake and eating it simply does not exist. However, this basic position has also been exaggerated and distorted by some on both sides of the Remain/Leave divide, and on both sides of the Channel, who want to make the UK's choice as binary as possible, while in fact reality is more nuanced. The proposals above – aimed at monitoring, managing and, in some circumstances, controlling migration on the basis of objective criteria – are not qualitatively different from others already possible or in use elsewhere in the Single Market area, so it would be unfortunate and unjustified if they were to be dismissed out of hand. In particular, the Swiss system provides a useful model and precedent.

That does not mean that an agreement on these lines will be remotely easy to negotiate, politically or legally, given the various players involved, from the countries of Central and Eastern Europe to the European Parliament. And would they meet the concerns of the majority of British voters who recognise the wider economic benefits both of the Single Market and of work-related migration, but are sceptical about the current operation of free movement of persons? One thing is certain - unless our negotiators try, we'll never know.

Jonathan Portes

Professor of Economics and Public Policy, King's College London
Senior Fellow, UK in a Changing Europe
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The **UK** in a
Changing Europe

Email: ukandeu@kcl.ac.uk

Website: www.ukandeu.ac.uk

@UKandEU