

Citizens' rights and beyond

Prepared remarks by Jonathan Portes to the European Parliament joint committee hearing, February 1, 2018

The December "sufficient progress" agreement

1. The political agreement reached in December 2017 was broadly along the lines foreseen in my [evidence](#) to the European Parliament in May 2017. That is, it was agreed that all those who have exercised their free movement rights before Brexit Day and wish to continue to reside in their country of residence will have the right (either immediately, or after five years of residence) to apply for settled status. Their existing rights will be "broadly" preserved, including access to healthcare, benefits, etc. This does not, however, mean that all rights will be preserved: in particular, the agreement foresees that EU nationals currently resident in the UK will in future have their rights to be joined by family members significantly restricted. The Withdrawal Agreement, which will incorporate these provisions in legal form, will be written into national law; enforcement will be by national courts, but in practice UK courts are likely largely to follow the jurisprudence of the Court of Justice of the European Union; this may well continue even after the expiry of the eight year period during which they may formally refer questions to the CJEU. The UK has also provided assurances that the system for applying for settled status will be simple, affordable, and will not require the provision of large amounts of documentation.
2. However, this does not mean that the European Parliament should regard these issues as entirely settled. In questions of immigration law, the devil is in the detail; everything needs to be translated into legal text. I would suggest, in particular, that the Parliament should focus in particular on:
 - a. Family rights. The Parliament should press for the continuing family rights of EU citizens (including those of new spouses and children) in the UK to be specified in detail in the Withdrawal Agreement. Moreover, it should ensure that UK authorities are not able to deny family rights on technicalities, nor to demand excessive evidentiary requirements (, for partners and spouses, where it will be necessary to show that the relationship began before a certain date). The UK's record on this is dreadful; there should be as little flexibility as possible
 - b. The administrative procedures for granting "settled status." It will be important to ensure that the UK's commitments on this are meaningful and enforceable. In particular, the presumption (where evidence is unavailable or unclear) in favour of the applicant needs to be built into the system.
 - c. The agreement refers to an "independent national authority" to monitor the implementation of the agreement in the UK. This needs clear legal status; it

needs to be genuinely independent, to represent the views and interests of citizens, and to have real powers. The UK government, particularly in recent years, does not have a good record of responding to legitimate concerns raised by such bodies; there need to be clear safeguards to ensure it cannot be ignored.

- d. Legal clarification needs to be given about those who do not have comprehensive sickness insurance: the UK government has made a commitment that this (disputed) requirement will be waived, but it is not yet in the Withdrawal Agreement.

The transition phase

3. It is the position of the UK government that “free movement will end” after Brexit. However, it has accepted that the “existing framework of rules and regulations” will apply during any transition period. Meanwhile, the position of the Commission and the European Parliament is that the “full application of the acquis” must be in force during any transition period. How are those two positions to be reconciled? It would appear that the UK has accepted that free movement will continue to operate as now – but that those who arrive after Brexit Day will not, after the conclusion of the transition period, be entitled to apply for settled status under the Withdrawal Agreement.
4. The UK position has a clear political and moral basis. Those arriving after Brexit do not have the same claim that they arrived under a specific set of rules, while the UK was a Member State, and are entitled to rely on their ongoing rights under those rules. However, the UK position is also impractical. Taken literally, it would mean that any EU27 citizen arriving during the transition would, at the end of the transition, be in legal limbo – in contrast, for example, to arrivals from outside the EU, who are admitted with a specific, defined status. In theory they would be obliged to apply for permission to remain under whatever the post-Brexit UK system looks like. But this will only become clear much later in the process – possibly not until well after the transition period begins. A position where EU27 citizens considering a move to the UK after Brexit Day – whether for work, family reasons, or any other reason – do not know what their legal status will be less than two years later is unacceptable, both for them, their families, and potential employers. If the UK does not want those arriving after Brexit Day to have the right to apply for settled status, it will have to set out a practical alternative.

The framework for the future relationship

5. Assuming that the December agreement is successfully translated into legal text, and agreement reached on the transition, the negotiations will then move to discussions on the framework for the future relationship. Here both sides will need to take a key decision: is migration and labour mobility on the agenda at all, given the UK’s red line that it does not wish to participate in the Single Market, and in particular rejects free movement. There are arguments on both sides.

6. For both the EU27 and the UK, there are potential economic advantages to including provisions on labour mobility
 - a. trade (especially in services) and migration are complements
 - b. even CETA has some (limited) provisions relating to labour mobility, particularly as it relates to trade
 - c. the evidence from economic research is that there would be clear economic benefits to even limited EU-UK labour mobility

However, there are also practical arguments for excluding immigration from the discussions, wholly or largely:

- a. For both sides, immigration issues are considerably more problematic politically than trade
- b. There are considerable legal complications with incorporating extensive provisions on migration (mostly a Member State competence) into an EU agreement with a third country

It would be sensible for the European Parliament to commission impact assessments to evaluate the economic impact of different options here.

7. As noted above, the current UK government red lines rule out both membership of the Single Market and, in particular, free movement. However, it is far from clear that this position has majority support either in the UK Parliament or in the UK electorate. If, for whatever reason, the UK stance changes, different possibilities for the future relationship may emerge. In particular, an alternative approach might involve an “offer” to the EU on the following lines;
 - a. The UK voted for Brexit & is leaving the EU
 - b. This reflects the fundamental incompatibility of UK with EU political structures
 - c. But the UK wants to preserve closest possible economic relationship with EU
 - d. This includes membership of the Single Market
 - e. The UK accepts that this means accepting freedom of movement..
 - f. ..but the UK would like to explore what forms of “freedom of movement” (recognising that current arrangements differ between the EU27, EEA members, and Switzerland) might be compatible with UK membership of the Single Market, but not wider EU political structures.

To be clear, nothing like this is on the agenda now; but the past two years have shown that politics in the UK can move very fast, and it would be remiss not to have contingency plans. My paper “[Free movement: policy options](#)” sets out some possibilities.

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