

# Brexit and Free Movement of People

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*The UK has made Control of Free Movement of People a key objective for a new UK-EU trade agreement.*

*The current indications are that the UK will seek to access and operate within the Single Market, while controlling free movement of people and refusing to apply all Single Market regulations or accepting the jurisdiction of the Court of Justice.*

*The EU meanwhile will not grant full access to the Single Market without the application of the four fundamental freedoms of the Treaty of Rome. This will make it more likely that the future UK-EU trade relationship will be either a more limited bilateral free trade agreement or trade based on WTO tariffs. This would present significant challenges for the Irish Government in respect of North/South relations, the maintenance of the Common Travel Area and free movement for Irish and British citizens on the two islands.*

## Introduction

The UK Foreign Secretary, Boris Johnson, said in an interview with a Czech newspaper on 12 November 2016, in typically colourful language, that it was a myth that free movement of people was a founding principle of the EU. The comment prompted the lead negotiator for the European Parliament in the forthcoming Article 50 negotiations, Guy Verhofstadt MEP, to tweet in response that he was looking forward to negotiating with Boris, so he could read him Article 3 of the Treaty of Rome.

The position outlined by the new Prime Minister, Theresa May, for the UK's future trade relationship with the EU, is that the UK will seek both free trade access and also to be able to operate within the Single Market, while controlling EU immigration and returning sovereignty to the UK Parliament. The Shadow Secretary for Exiting the EU, the Labour MP, Keir Starmer, has also called for changes to free movement of people, saying that fair migration rules must be part of the new relationship with the EU. The UK position poses a fundamental challenge to the structure of the Single Market and the principles on which the EU is founded.

The UK desire to have the trade benefits of the Single Market, while not being bound by its common rules, would negatively impact on the competitiveness of other EU Member States in the Single Market

and there will be no incentive for them to concede this advantage. The UK demand to be exempted from, or alternatively to limit, free movement of people strikes at the heart of the values and principles on which the EU was founded by the Treaty of Rome in 1957. It will pose particular challenges for the Irish Government in managing the implications of Brexit for North-South relations, but it could also raise issues around long-standing rights for Irish and British citizens to travel freely and work and reside anywhere on the two islands.

There is no disputing the fact that control of EU immigration and the sovereignty of the UK Parliament were key factors in the decision of the British people to leave the EU. However, polling evidence also showed that the electorate was not willing to be poorer to achieve these goals, but was persuaded by the Leave campaign that it could have free trade and access to the Single Market, along with control of immigration. The essence of the negotiating strategy now outlined by the May Government is to seek to deliver on these key promises of the Leave campaign.

These are uncertain and worrying times, with the election of Donald Trump as US President, and the rise of populism across the EU, but provided the centre can hold the EU will be determined to uphold the values and principles on which it was founded.

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## The UK, the Common Market and Free Movement: Background

After the war there was a debate in Europe on the structure of future European cooperation, with Churchill in 1946 calling for a United States of Europe, while at the same time stating that the UK should not participate. The post war Labour Government feared that European cooperation could restrict its capacity to engage in national social and economic planning. Both the Labour and Conservative party post war

Governments favoured a European Free Trade Area, and opposed a European Customs Union which it was feared would eventually lead to too deep a level of political integration.

However, free movement of workers did not give

**“...free movement of workers did not give rise to any controversy at the time...”**

rise to any controversy at the time and commitments in respect of it were made by Governments of both parties, as part of the Marshall Plan in 1948 and the failed European free trade negotiations of 1958. The UK stood apart from both the negotiations on the establishment of the Coal and Steel Community (ECSC) in 1950 and in the Spaak Committee of the Six which was established by the Messina Conference in 1955. It did initially send a Board of Trade official to the Spaak Committee, but he withdrew before the preparation of the final report. The Spaak Committee considered and rejected the idea of a European Free Trade Area and opted instead for a Common Market, which is now called the Single Market. It was a deliberate decision to create a continental scale market and single economic space with supranational Institutions which, despite British objections, had the strong support of the US administration.

The Common Market was structured as a customs union involving the harmonisation of some social and economic policies, along with the common rules that were required to be enforced by a supranational European Court. The Treaty of Rome, which was the outcome of the negotiations by the Six ECSC states on the Spaak Committee Report, created this Common Market which had the four fundamental freedoms of movement, for capital, labour, goods and services. This structure was fundamentally different from the European Free Trade Association (EFTA) established, at the initiative of the UK, by the Stockholm Convention in 1960, which did not have the four freedoms and only covered free trade in industrial goods. When the UK and Denmark left EFTA to join the EEC in 1973, the EEC agreed a free trade agreement with EFTA in order to minimise disruption to European trade. When the Community decided, in the 1980s, to complete the Single Market by 1993, by removing administrative obstacles, it invited the EFTA states to join and this extended the Single Market along with the four fundamental freedoms to the EFTA states through the European Economic Area (EEA) agreement. Essentially, the UK's current demand is to return to the 1960s level of commitments which was made in EFTA, but to have all the benefits of the Single Market extended to the UK on an exceptional basis. By any stretch of the imagination, this would have to be considered a heroic expectation, but the abject failure of the UK's post war European strategy shows that conflicted internal politics can lead to serious strategic errors being made by nation states.

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The post war reluctance of the UK to embrace a Common Market with supranational institutions and majority decision making has been reflected in the way its relationship with the Community has developed since it joined in 1973. While issues around the sovereignty of Parliament were always sensitive for the UK, due to its status as a former Imperial power, free movement of workers was not a contentious issue.

Nonetheless, when the Single Market was fully established in 1993 and all customs controls on the movement of goods were removed, the UK still retained passport controls on the movement of people. It did this based on a Declaration which was attached to the Single European Act 1986, at the request of the UK, and which allowed for passport controls to continue to monitor third country nationals legally resident in the Community and in order to combat terrorism.

The UK subsequently secured a permanent opt-out from the abolition of passport controls with the Schengen opt-out in the Amsterdam Treaty of 1997. David Cameron's Bloomberg speech in January 2013, when he launched his ill-fated renegotiation strategy, did not mention immigration and he only added this to his demands later to outflank UKIP for the 2014 and 2015 elections. However, the retention of

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passport controls with the rest of the EEA states, which was unique to the UK and Ireland, while goods could move freely without any controls, certainly sent a signal to the British electorate that the four fundamental freedoms were not all of equal standing. The decision of the Conservative party to promise to reduce immigration to the tens of thousands at the 2010 election, although it did not relate to European free movement, introduced the issue of immigration as a problem for the UK into the public discourse.

Three countries, the UK, Sweden and Ireland did not apply the derogation which was available on free movement of people for up to seven years when the eastern European states joined the EU in 2004. In each case their economies were growing strongly, and in the case of Ireland it involved replacing many non-EU workers on work permits with EU workers. From 2004 to 2012 the number of people from eastern Europe resident in the UK

increased from 125,000 to 1,074,000. The UK already had 1,092,000 EU 14 citizens resident including over 400,000 people born in Ireland and 155,000 from Malta and Cyprus that already had free movement rights as citizens of former UK colonies. There were an estimated 1,400,000 UK citizens resident in other EU Member States, primarily retired persons in Spain and France. In Ireland there was also significant free movement from eastern Europe but it virtually ceased in 2009, after the financial crisis, and only resumed in 2015. In contrast it continued in the UK with an estimate of 180,000 other EU citizens moving to the UK in the year to April 2016. However, compared to other Single Market states the proportion of other EU citizens resident in the UK at 4.1% is lower, while Switzerland has 15.6%, Norway has 6.0% and Iceland has 5.6% of its population who are other EEA nationals. Ireland with its history of emigration has been more accepting of free movement, but if the UK had absorbed the same number as Ireland in proportion

to population between 2004 and 2012, it would have closer to 3 million rather than just over 1 million EU citizens from eastern Europe.

## The Present: Free Movement and Brexit

The ‘Open Britain’ campaign group, which has emerged from the official Remain campaign, is now proposing that the UK should stay in the Single Market but with changes to free movement rights by ‘mending rather than ending’ EU migration. They suggest that free movement of labour should be confined to workers with a job offer and argue that this would be consistent with Article 46(d) of the Treaty on the Functioning of the European Union (TFEU) as well as being allowed under the Article 112 Safeguard Clause of the EEA agreement. The Treaty provisions on the free movement of persons, as distinct from workers, are explicitly set out in Article 3 Treaty on European Union (TEU) and in Articles 26 and 77 TFEU with the essential principle being that the Union does not have internal borders.

Article 46 TFEU set out the mechanisms to give effect to the original free movement rights for workers, contained in Article 45 TFEU, and its purpose was to give practical effect to these rights and not to restrict them. The Safeguard Clause in Article 112 of the EEA agreement is not specific to free movement, and in any event if it is invoked it can attract countervailing measures by other Member States. There are special arrangements for Liechtenstein but these arise purely due to its small size. The transition arrangements in the Swiss- EU agreement on free movement of persons offers more of a prospect of flexibility for the UK but it would only be applicable on a temporary basis. The Swiss-EU agreement commenced in 2002 and allowed an initial five year transition period with a specified number of joint work and residents permits issued depending on whether the duration was less than a year or over a one year. A further transition period of up to seven years also allowed for restrictions, under certain conditions, provided the number permits granted did not go below the original number of permits specified. It was due to expire in June 2014, when a referendum promoted by the populist Swiss People’s Party aimed at restricting future EU immigration into Switzerland was narrowly passed in February 2014.

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The EU introduced restrictions on Swiss participation in the Horizon and Erasmus programmes when the Swiss restricted access for Croatian nationals, because the EU considered that this discriminated against certain EU citizens, and the EU also made it clear that if the Swiss proceeded to restrict free movement it

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would mean the end of Swiss access to the Single Market. The current indications are that Switzerland will not now implement the outcome of the referendum but will instead, with EU agreement, introduce mechanisms to allow job opportunities to be offered first to Swiss residents of all nationalities. This firm line taken by the EU on free movement of people, notwithstanding the Swiss referendum, does not augur well for the UK’s prospects of access to the Single Market while restricting free movement on a permanent basis, though there is likely to be more flexibility around a transition with temporary restrictions. The joint statement from the Presidents of the EU Commission,

Council and Parliament issued on 24 June 2016 made clear that any new relationship must be based on a balance of rights and obligations. Also, many European leaders including President Hollande of France and Chancellor Merkel of Germany have said that the four freedoms in the Treaty are indivisible. It should also be noted that the Court of Justice (CJEU) found that the original draft of the EEA agreement in 1991 was incompatible with the Treaty so any agreement for UK access to the Single Market will have to be compatible with the Treaty.

### An ‘Enhanced’ EEA deal?

The only independent voice which so far has argued in the UK’s favour is in a paper issued by the Brussels-based economic think tank Bruegel, and authored in a personal capacity by its Chairman and four other European experts. It was written under the title of ‘Europe after Brexit: A proposal for a continental partnership’. This paper proposes an EEA type arrangement which would involve enhanced consultation rights for the UK when compared to the existing arrangements, but it also proposes to effectively exclude free movement of workers from the four Treaty freedoms, arguing that this is not essential to a proper functioning Single Market. It did not get a favourable reaction from European political leaders but there were some positive noises from industry quarters, anxious to retain access to the British market. The trade union movement, at both Member State and European level, has always supported free movement rights for workers and will object strongly to any proposal that it should be permanently restricted for the UK or other European Member State. Contrary to the assertion in the Bruegel paper that there is a basis for the exclusion of free movement of workers while free movement of capital, goods and services is allowed, it would in fact undermine the very concept of a Social Europe. It would also facilitate social dumping and restrict workers freedom and bargaining power. In the current uncertain political climate with greater questioning of the merits of globalisation it would be very difficult for EU political leaders whether from social democrat,

christian democrat or liberal parties to agree to deny workers a fundamental freedom which would remain available to capital. It would also interfere with the freedom to provide services across the Single Market, with either the prospect of self-employed workers gaining an advantage over other workers, or an increase in bogus self-employment as a means to get around the restrictions.

The proposal that the UK should get a favourable access to the Single Market along with restrictions on free movement has also now been taken up by many Labour Party MPs, obviously fearful for their seats at the next election. While a majority of Labour party supporters voted to remain in the EU, some 70% of constituencies with Labour MPs voted to leave. A Labour MP, Stephen Kinnock, has proposed, in a Fabian Society paper, that there should be a new pan-European agreement on reducing free movement with a work-permit based system, as a pre-cursor to the UK gaining access to the Single Market. However, Diane Abbott, the Shadow Home Secretary, has said that to remain a part of the Single Market that politicians must be honest with voters and tell them that the only way to achieve this is to accept continued freedom of movement. While the Labour leader Jeremy Corbyn has questioned aspects of the Single Market, such as state aid rules, he has been supportive of free movement.

**“... the exclusion of free movement of workers while free movement of capital, goods and services is allowed, [would] undermine the very concept of a Social Europe.”**

What is notable about the article by Stephen Kinnock MP, and most of the other Labour party contributors to the special Fabian Society publication, is that there is no recognition that free movement of workers was an integral part of the Community, which Britain decided to be a part of, on two separate occasions in the 1970s. It is completely unrealistic to think that the UK, by leaving the EU, can secure general EU restrictions on free movement, which proved impossible to achieve as a Member State. However, these divisions in the Labour party mean that if there is a need for a vote in Parliament to trigger Article 50 that there is likely to be a majority for access to the Single Market, with restrictions on free movement. The Liberal Democrat victory in the Richmond by election shows that the Conservative party is now exposed to seat losses to the Lib Dems in Remain constituencies if it tries to prioritise a hard Brexit. The outcome of the negotiations will have to be approved by Parliament so temporary concessions by the EU on free movement of persons could make it easier for the House of Commons to insist on membership of the Single Market.

## Options for the UK

There are realistically three potential options for a new UK-EU trade relationship, an EEA arrangement, a EU-Canada type bilateral trade agreement or trade based on World Trade Organisation (WTO) tariffs.

The UK's opposition to accepting the rules of the Single Market and the jurisdiction of the Court of Justice (CJEU) will be the main impediment, from a competitiveness perspective, to the UK securing full access because it would put other Member States' industries and services at a disadvantage in the Single Market if the UK had the same access with less regulation and lower costs. The same concerns will not arise for European industry over free movement of persons but the political opposition including from trade unions will be very strong.

**“... it would put other Member States' industries and services at a disadvantage in the Single Market if the UK had the same access with less regulation and lower costs.”**

If the UK could agree a mechanism with the EU to have greater consultation rights on Single Market regulation and agree to judicial oversight, it could probably obtain temporary restrictions on free movement linked to the Swiss transitional arrangements and the fact that the UK did not benefit from the original derogation in 2004. This could be linked to a UK Migrant Impact Fund and other special measures to address the effect of free movement on the availability of public services for UK citizens in areas particularly affected. If the UK Government decides that it is not willing to accept Single Market rules and judicial oversight as the price for access to the Single Market, and this currently looks the more likely position, then the most it can expect to obtain is a free trade agreement for goods and very limited access for services along the lines of the EU-Canada agreement.

The UK Eurosceptics are convinced that the EU's trade surplus with the UK and the mutual benefits of free trade with the disadvantages of tariffs for both parties, gives the UK leverage to secure a favourable outcome. However, they are profoundly mistaken in this belief. The UK sends 44% of its exports to the EU, but in return only 8% of EU exports go to the UK. The Single Market is much more important as an export destination for many EU Member States than it is for the UK, and it is not in their interests to do anything to undermine that market by allowing social dumping by the UK.

On exit the UK will be a large competitor economy with, unlike Canada, a cost advantage of proximity to the Single Market. Any bilateral free trade agreement is also very likely to have clauses that would prevent the UK from gaining a competitive advantage by reducing existing regulations in the areas of social, employment and environmental policy, as is the case with the EU-Canada agreement. The EU would probably also reserve the right to insist on UK acceptance of new standards which the EU introduces in the future as a condition for a continuance of free trade. It is also likely to be required to accept free movement of workers though it would get more flexibility on this than in an EEA agreement because it would only have limited access to the Single Market. If no trade agreement proves possible, and the UK trades with the EU based on WTO tariffs, it will be able to apply whatever controls on free movement it deems appropriate.

## Implications for Northern Ireland

The type of new trade relationship the UK secures with the EU will determine the extent of the challenges which will face the Irish Government in maintaining the status quo in North-South relations as much as possible and continuing with free movement rights between Ireland and the UK. There were potential precedents on free movement rights, established in Protocol 3 of the 1972 EEC Accession Treaty for the UK, Ireland and Denmark in relation to the Crown Dependencies of the Isle of Man and the Channel Islands, which could impact on the UK-EU negotiations.

For residents of the Crown Dependencies, which are in the EU Customs Union, though not in the EU, even though they have British passports, they do not have free movement rights in the EU and their passports are stamped accordingly. For such residents to acquire EU free movement rights they must have an entitlement to a British passport by being born in the UK or through a parent, grandparent from the UK or five years residency there. EU citizens likewise do not have free movement rights to the Crown Dependencies and that includes UK citizens who cannot be given preferential treatment. While both the UK and Ireland have an opt-out from Schengen under Protocol 20 of the Treaties, Ireland's is specifically linked to the continuation of the Common Travel Area (CTA). However, even if the UK decided to end the CTA, because Ireland is not contiguous with the Schengen area, there would be no compelling reason for the EU to insist on Ireland joining.

If an EEA type agreement is the outcome of the UK-EU negotiations, this would offer the best prospect of avoiding a hard border and continuing with unrestricted free movement of Irish and British citizens between the two islands. If this agreement had some restrictions on free movement they could only be transitional and control would most likely be carried out administratively. The EU could insist that all EU citizens are treated on a non-discrimination basis for access to the UK, and the Irish Government would then have to seek a derogation. Under a bilateral free trade agreement the UK might well be able to secure some permanent restrictions on free movement because access to the Single Market would be reduced particularly for services.

This type of agreement would pose significant challenges for the Irish Government and it could prove more difficult to secure an Irish derogation, given that the restrictions would be permanent. It would also require the EU to accept that British citizens would continue to have unrestricted free movement rights to Ireland,

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an EU Member State. While access for British citizens to the rest of the EU could be monitored by Schengen passport controls, Ireland would be a potential backdoor for other EU citizens to access the UK. The UK would probably require passport controls to monitor the entry of EU citizens, other than Irish citizens, not all of whom would have an entitlement to work in the UK. The most practical and most likely solution would be to have the passport controls between ports and airports between the island of Ireland and Great Britain, rather than on the land border and this is what happened when the CTA was suspended between 1940 and 1952.

## **“The only guaranteed method of avoiding a customs presence on the North/South land border is for Northern Ireland to exceptionally remain in the EU Customs Union...”**

A similar ‘backdoor problem’ would arise for the UK, if WTO based trading was the outcome of the negotiations, but both countries would be able to continue free movement between the islands for Irish and British citizens on a bilateral basis. The absence of EU free movement rights for many residents of the Crown Dependencies with British passports could raise a question over whether all holders of Irish passports would automatically have EU free movement rights even though EU free movement did not apply to their place of permanent residence. If the principle of reciprocity and the conditions for EU free movement rights set in Protocol 3 of the Accession Treaty 1972 applied it could disqualify Irish citizens who are resident in the UK unless they, a parent or grandparent was born, adopted, naturalised

or registered in the Republic of Ireland. Given that the right to Irish citizenship for residents of Northern Ireland predates EEC membership in 1973 and that a right to Irish citizenship through great grandparent also differed from the UK at that time it is less likely that it would be strongly challenged. However, past precedents show that these issues are not straightforward and could be raised. The only guaranteed method of avoiding a customs presence on the North/South land border is for Northern Ireland to exceptionally remain in the EU Customs Union, for which the Crown Dependencies offer a precedent. If it was necessary in order to ensure EU free movement rights for all residents of the island of Ireland with an entitlement to Irish citizenship, an option would be to extend EU free movement rights to Northern Ireland on an exceptional basis.

## **Conclusion**

It is difficult to predict the likely outcome of the future UK- EU relationship at this point but the early indications are that the UK is less likely to remain in the Single Market. This would mean that special arrangements will be necessary to avoid a hard border and continue unrestricted free movement between the two islands. The trade aspect of the negotiations will be equally challenging and with a limited amount of political capital that Ireland can realistically deploy some difficult choices may arise.



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