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Author: *Zuzanna Bobowiec*

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Brexit and Free Movement of People: The Frameworks and Legal Bases of Possible Migration Control

Zuzanna Bobowiec[1]

Much of the public debate after the Brexit vote has concentrated on the apparent incompatibility of policies limiting migration and the UK's continued access to the single market. Indeed, the principle of the free movement of people has repeatedly been described as a paramount principle within the European four freedoms, and it has been widely accepted that any of the UK's future participation in the single market would be contingent upon its acceptance of all four of them. On the other hand, some of the EU officials have hinted at possible limitations to free movement, even within the current frameworks of

[1] Dickson Poon School of Law, King's College London, Strand, London, WC2R 2LS, email Zuzanna.Bobowiec@kcl.ac.uk

the EU.[2] This, however, has led many to question what forms such migration controls may take. One possibility that has been discussed was putting 'an emergency brake' on the incoming migrants (as opposed to the brake on the social benefits access for arriving migrants as negotiated by David Cameron before the vote). Detailed proposals have been put forward by the Institute for Public Policy Research suggesting that the brake could be applied, for instance, if the influx of EU migration meets a certain quota, if there is clear evidence of downward pressure on wages in particular sectors, or if the proportion of EU migrants in certain areas reaches a specified level.[3]

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[2] https://www.theguardian.com/world/2016/jul/24/brexit-deal-free-movement-exemption-seven-years

[3] See the proposals of the Institute for Public Policy Research available at: http://www.ippr.org/news-and-media/press-releases/ippr-proposes-emergency-brake-on-free-movement-as-it-sets-brexit-options-for-theresa-may

While the analysis of possible new migration policies is to be welcomed, it predominantly tends to focus on their political and economic aspects, ignoring the legal implications of their implementation. The aim of this article is to analyse and clarify legal frameworks within which a country may impose migration restrictions while retaining access to the single market in various forms. First, the current arrangements under the European legislation will be analysed. Next, the EEA 'emergency brake' clause will be reviewed along with the bilateral arrangements currently applicable to the case of Switzerland. The conclusion will be that although imposing any quantitative restrictions would most certainly be impossible while retaining access to the single market, the EEA Agreement and Swiss bilateral arrangements are capable of offering more opportunities for addressing migration questions

that have often been assumed to be irreconcilable with free movement requirements.

Possible Migration Controls Under the European Treaties

The free movement of people within the EU is secured both by the Treaties and secondary legislation. The Treaties provide for a right to move and reside freely, which is supplemented by the principle of non-discrimination on the grounds of nationality.[4] The provisions are further specified for particular groups of citizens to exercise their rights; namely, workers, those who are self-employed, service providers, students and those able to remain self-sustained in secondary legislation (predominantly the Citizens' Rights Directive).[5]

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[4] Art. 3(2) TEU, Art. 21 TFEU

[5] Art. 45 TFEU, Citizens' Rights Directive 2004/38/EC

However, the free movement rights of EU citizens are not absolute. First, Article 21(1) TFEU provides that the rights to move and reside freely within the EU will be "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".[6] Second, these conditions are further spelled out in the Citizens' Rights Directive which stipulates that Member States may restrict the freedom of movement and residence of Union citizens on grounds of public policy, public security and public health.[7] Third, CJEU jurisprudence has offered guidance on the interpretation of public policy and public security as, unlike public health, they are not defined in the Directive.[8] While Member States will essentially retain the necessary discretion in determining the requirements of public policy and

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[6] Art. 21(1) TFEU

[7] Citizens' Rights Directive 2004/38/EC, with the exact same wording found in Art. 45(3) TFEU

[8] *Ibid*. Art. 29

public security in accordance with their national needs, those requirements must be “interpreted strictly”, and “their scope cannot be determined unilaterally by the Member State without any control by the Community institutions”.[9] This, for instance, will mean that the CJEU will require any public policy derogations to be based on conduct that is clearly defined by the Member State as punishable by law or by other repressive or genuine and effective measures applicable to its own nationals[10], and that the derogation on the grounds of public security must apply to “a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population”.[11] Importantly, although the Directive does not specify what forms of measures could be

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[9] Jipa C-33/07 [23]
[10] Adoui and Cornuaille C-115/116/81
[11] P.I. C-348/09 [28]

implemented, Article 27 provides that any derogation will *not* be justified by economic ends, and that measures taken on grounds of public policy and public security shall be based "exclusively on the personal conduct of the individual concerned". Moreover, "justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".[12] In essence, this means that any restriction on the rights to move and reside freely within the EU must be evaluated on a case-by-case basis, and that any quantitative restrictions or 'emergency brake' clauses applicable indiscriminately to the incoming EU citizens would be incompatible with the current EU law provisions.

[12] Art. 27(2) Directive 2004/38/EC

Some commentators have suggested that applying an emergency brake on free movement could be still attainable under similar transitional arrangements like those introduced by some countries after the 2004 and 2007 accessions, which effectively restricted labour market access for migrants arriving from new member States for the period of up to 7 years. However, it is clear that those arrangements were introduced because of the clauses contained in the Treaty of Accession 2003 and 2005, that provided for a transition period before workers from new member States could be employed on equal, non-discriminatory terms, specifically designed for reliance only upon the accession of the new member States. As opposed to Germany and Austria, the UK chose not to introduce any freedom of movement restrictions at that time; instead it relied upon welfare access limitations. Those provisions are clearly no longer

enforceable. The case remains that whatever the strength of the political will on both sides of the negotiations, unless the Treaties are amended or a new Protocol added to them, no quantitative restrictions or 'emergency brake' clauses could be implemented within the EU law framework.

This, however, does *not* mean that other less restrictive measures would not be accepted within the EU law framework. Although they might not constitute direct controls of migration, they are widely believed to be discouraging it, as such measures limit the entitlements of Union citizens exercising their freedom of movement right. In particular, rules relating to the access to State benefits are generally detailed in secondary legislation and are thus amendable by a less onerous procedure. Similarly, other changes could be brought by a shift in the jurisprudence of the CJEU

itself, which, despite tending towards an expanded interpretation of rights secured by the freedom of movement provisions, has in the past taken a less generous view with regard to the free movement rights of convicted criminals and access to welfare benefits by job seekers.[13] Changes in both secondary legislation and CJEU jurisprudence are generally limited in scope, as well as not constituting measures directly limiting free movement of people. However, unless the Treaties are amended, they constitute the only plausible mechanism of possible indirect migration controls that would secure the current access to the single market for the UK.

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[13] M.G. C-400/12, Onuekwere C-378/12, Dano C-333/13

‘The Norwegian Model’ – ‘Emergency Brake’ Clause Provisions and Access to the Single Market

The approach taken by Norway following its 1994 referendum has often been invoked as the least damaging for the British economy, securing almost full access to the single market.[14] Under this model, the UK would re-join the European Economic Area under the EEA Agreement 1994, in effect opting-out from the policies not covered by the Agreement, including agricultural and fisheries policies, as well as the customs union, common trade and security arrangements. The UK would be free to set its own laws in those areas, but would no longer benefit from EU subsidies, notably in the area of agriculture. Crucially, the UK would be obliged to retain legislation relating to the EU’s four fundamental freedoms, including provisions

[14] https://www.ft.com/content/eb8dbe8c-3d0c-11e6-9f2c-36b487ebd80a

regulating the freedom of movement of persons. Although there exist subtle differences regarding the implementation of the Citizens' Rights Directive and the concept of Union citizenship within the EEA, the EEA Agreement essentially mirrors the freedom of movement provisions of the European Treaties.[15] This means that the freedom of movement must not be restricted, and that the contracting parties are precluded from adopting any quantitative limitations that would discriminate against other EEA citizens, unless the EEA Agreement is formally amended.

However, unlike the Treaties, the EEA Agreement does contain an 'emergency brake' safeguard clause embedded in Article 112 of the

[15] Although Art. 28 of the EEA Agreement essentially mirrors TFEU's Art. 45, the concept of the Union citizenship was initially rejected. However, when applying the EEA provisions the EFTA court significantly paralleled the development of rights derived from the concept of citizenship.

Agreement, which provides that in the circumstances of "serious economic, societal or environmental difficulties of a sectorial or regional nature", a contracting party may unilaterally take appropriate "safeguard measures" to restrict the rights in the Agreement. The EEA contracting party must notify and consult with the rest of the EEA, wait for a period of one month before the implementation. Then, the measures implemented are subsequently monitored every three months. Importantly, the agreement makes it clear that the safeguard measures should not, either in scope or duration, exceed what is necessary to remedy the relevant difficulties, and if measures taken create an "imbalance between the rights and obligations under this Agreement" then the other EEA members are entitled to take reciprocal measures.[16] Accordingly, in practice the procedural

[16] Art. 114 of the EEA Agreement. Reciprocal measures may constitute similar restrictions to the single market.

requirements are stringent and reciprocal restrictions can be instituted if the measures taken by an EEA member are not well-justified. It is not clear what sorts of measures would be accepted by the EEA Council and given the precedents discussed below, it would indeed be very challenging for the UK to rely on the clause. However, the point remains that institutionally there exists an example of an 'emergency brake' clause which may serve as a possible guiding point of reference, of even a template, for any future agreements concluded on behalf of the UK.

Liechtenstein has often been invoked as an example of an EEA country that has successfully secured the application of quantitative limitations of new residents, seasonal and frontier workers, as well as the application of its own nationals regulating the entry, residence and employment of

other EEA nationals.[17] Initially on a temporary basis under Article 112, since January 1998, Liechtenstein's opt-out has, however, remained in force after 1998 by reason of Annex VIII of the EEA Agreement which provides that its national provisions will remain in force on a permanent basis, but will be reviewable every five years.[18] However, the reviewable standards have only been applied to Liechtenstein because of its circumstances as an exceptionally small area and distinct geographical location making it particularly vulnerable to high populace inflows, as was repeatedly emphasised by the EEA Council.[19] It is hard to see that similar considerations would be applicable to the UK, as it would be difficult to adduce comparable evidence given the size of its economy. This does not rule out the possibility of

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[17]http://www.theguardian.com/politics/2016/oct/09/liechtenstein-solution-key-to-softer-brexit-tory-mep

[18] Annex VIII to the EEA Agreement

[19] Decision of the EEA Council of March 1995 No 1.95

the UK being able to make use of the EEA's 'safeguard measures' clause, but it does suggest that this will be very challenging. As mentioned above, the clause could be used as a template for any future agreements concluded by the UK outside the EEA, or, potentially, as a clause of a negotiated Protocol to the EEA Agreement applicable to the UK. However, it is safe to assume that the EEA Council would not be particularly willing to renegotiate a well-balanced and tested agreement just to give further concessions on a paramount principle to the UK. As for now, it remains for the future negotiations to show under what circumstances would the UK be allowed to limit the migration while retaining its access to the single market, and therefore whether a modified 'emergency brake' clause would be accepted.

Does the Swiss Model Offer Any Solutions?

The arrangement between Switzerland and the EU, the so-called ‘bilateral model’, consists of a complex system of more than 120 agreements. Free movement is an integral part of those bilateral arrangements and is provided by the Agreement on Free Movement of Persons (AFMP), which entered into force in 2002. It extends the part of the EU’s internal market concerning free movement of natural persons, i.e. free movement of workers, freedom of establishment of natural persons, and partly freedom of services of natural persons to Switzerland. Crucially, the AFMP contains a ‘guillotine mechanism’ which comes into effect with the termination of all other agreements once the AFMP discontinues to be applied.

In the 2014 referendum, the Swiss

population voted in favour of introducing mandatory quotas for foreign residents, including EU citizens. These quotas would have needed to be introduced as amendments to the Swiss Federal Constitution. Such provisions would have been incompatible with the bilateral arrangements with the EU. Hence, in October 2015, the Swiss Parliament sought to reconcile the outcome of the referendum with continued access to the single market by introducing new provisions focused on a staged approach to manage migration, namely by giving recruitment preference to current residents (irrespective of their citizenship) and introducing quotas as the very last resort.[20] In the government's opinion, this approach would safeguard the principle of free movement and therefore satisfy the EU, helping to circumvent the EU's reluctance to

[20] Quotas for EU citizens would be imposed only in cases where immigration reaches levels that are no longer in line with Switzerland's overall interests.

arbitrary quotas. Indeed, after extensive talks about the new provisions, Jean-Claude Juncker, the European Commission's President, has already signalled that the new legislation should satisfy the contractual obligations of both parties.[21] The talks, however, halted after the UK Brexit referendum, and it remains to be seen whether these provisions will be accepted in their current form.

However, that being said, one conclusion that can be drawn from the case of Switzerland is that it may be an available basis for negotiating the balance between freedom of movement and access to the single market for the UK outside the EU. However, the bilateral arrangements between Switzerland constitute a long and complicated patchwork of agreements established over

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21 https://www.theguardian.com/world/2016/sep/22/switzerland-votes-for-compromise-to-preserve-relations-with-eu

extensive periods of diplomatic negotiations, requiring constant reparations and compromises. One example of this might be the suspended negotiations on Swiss access to the liberalised electricity market and its exclusion from the 2020 university research grants that followed as some of the upshots of the referendum vote.[22] The UK will therefore have to evaluate carefully what its position in negotiations with the EU would be as a non-member State, taking into account that any disproportionate non-observance of the EU's fundamental principles might result in reciprocal restrictions to the single market.

A Way Forward?

The aim of this article was to analyse and clarify the legal frameworks within which a country

[22] http://energyandcarbon.com/brexit-impact-switzerland/

may impose migration restrictions whilst retaining different forms of single market access. Clearly, as shown, unless the Treaties are amended, no quantitative restrictions or ‘emergency brake’ clauses could be implemented within the current EU law framework. This, however, does not mean that other less restrictive measures, such as those relating to access to benefits, would not be accepted. Crucially, although imposing any quantitative restrictions would most certainly be impossible while retaining full access to the single market outside the EU, the EEA Agreement and Swiss bilateral arrangements are capable of offering more opportunities for addressing migration questions than has often been assumed. The EEA Agreement does offer an ‘emergency brake’ clause that could be used as a template for future agreements concluded on behalf of the UK. Similarly, the experience of Switzerland proves

that the EU is willing to accept more lenient restrictions. As for now, only future negotiations will show whether the UK will follow a similar, or perhaps even a more open-ended path.

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