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Brexit: Free Movement of Persons

Since the UK referendum on EU membership in June 2016, discussions have intensified on the UK's relationship with the EU, with free movement of persons and immigration being two topics at or near the top of the agenda. According to polling, much of the UK electorate was concerned about the essentially unrestricted nature of EU immigration to the UK. However, the importance to the UK of retaining some level of access to the Single Market for goods and services has also been highlighted. In this context, several EU officials and leaders of other EU countries have asserted that the UK cannot be part of the Single Market without also accepting free movement of persons. This client publication explores the concept of free movement of persons and acquired rights under EU and European Economic Area (EEA) law. We analyse the extent to which migration controls may be reconcilable with the concept of free movement, with a view to enabling a more informed discussion of this highly-sensitive but important issue. This approach may also assist in identifying and informing broader constitutional structures to address the free movement of capital and services for financial institutions and other businesses post-Brexit. We conclude that, although the ultimate path forwards for a new relationship between the UK and EU remains to be determined, it may be legally possible to accept the concept of free movement of workers but nonetheless introduce certain intra-European migration controls. Some such controls were proposed in the pre-Brexit Cameron deal (which would not have required a new treaty for effectiveness) and are in place for Liechtenstein, an EEA member state. Existing European constitutional frameworks which address the free movement of services and passporting issues, including in the EU itself but particularly the EEA, may offer more opportunities for addressing migration questions than has often been assumed.

Introduction

The prospect of the UK retaining access to the Single Market without also accepting free movement of persons was dismissed by European leaders at their first post-Brexit meeting on 27 June 2016, where they asserted that, "*access to the Single Market requires acceptance of all four freedoms.*"¹

Perhaps due to the sensitive nature of migration as a topic, there has thus far been a distinct lack of informed public debate based on what the legal rights on free movement of persons actually are. This client publication discusses the concept of free movement of persons under EU and EEA law, acquired rights for EEA nationals living in the UK (and UK nationals living elsewhere in the EEA), and the extent to which mooted models for UK immigration control might be feasible within the framework of EU and EEA laws. A revised approach to some of

¹ European Council website, Informal meeting on 27 Brussels, 29 June 2016 Statement.

these issues is clearly key to assessing ultimate possible outcomes for the passporting of financial services across the EU and Single Market access, which we have discussed in a separate client publication.²

This client publication is also aimed at assisting employers and employees, including EEA nationals in the UK and UK nationals in the EEA, in better understanding their own rights and the consequences of EU and EEA membership.

The Four Fundamental Freedoms

There are four so-called “fundamental freedoms,” free movement of: (i) goods; (ii) services; (iii) capital; and (iv) persons. These freedoms are enshrined in EU law under the Treaty on the Functioning of the European Union (TFEU).

The four fundamental freedoms are also a feature of EEA law under the EEA Agreement. The EU member states and the three European Free Trade Association states that are part of the EEA (EFTA EEA states)—Iceland, Liechtenstein and Norway—are contracting parties to the EEA Agreement.

Free Movement of Workers Under the TFEU and EEA Agreement

The provisions on “free movement of persons” within the EU are set out in Article 45 of the TFEU. This article refers to “free movement of workers” within the EU, a more limited category of free movement than is implied by “free movement of persons.” The EEA Agreement uses the same language; Article 28 of the EEA Agreement sets out provisions on free movement of workers in the EEA.

Rights of Workers

Both Article 45 of the TFEU and Article 28 of the EEA Agreement prohibit discrimination based on nationality for workers in EU member states and EFTA EEA states with respect to employment, remuneration and other conditions of work and employment.

Additionally, the TFEU and the EEA Agreement both establish the rights of individuals to:

- accept offers of employment actually made;
- move freely within the territory of EU member states and EFTA EEA states for this purpose;
- stay in an EU member state or EFTA EEA state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action; and
- remain in that EU member state or an EFTA EEA state after having been employed there.

These rights are subject to limitations justified on grounds of public policy, public security or public health.

The EU case of *Antonissen*³ states that the above rights are not exhaustive and that, in the context of free movement of workers, freedom entails rights of job seekers to move freely and stay for the purposes of seeking employment.⁴

² See “Brexit: Issues for Financial Business,” 24 June 2016, available [here](#).

³ Case C292/89 R. v *Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745.

⁴ *Ibid.*, 13.

What Is a “Worker?”

EU case law indicates that the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another in return for remuneration.⁵ There is no requirement for the work to be full-time or in return for any minimum level of remuneration, provided that the employment activities are effective and genuine and not on such a small scale as to be regarded as purely marginal and ancillary.⁶ A “worker” therefore covers paid and part-time workers but not purely voluntary workers.

The EEA Agreement states that its provisions, including its provisions on free movement of workers, should be interpreted in conformity with judgments of the Court of Justice of the European Union. Case law on the meaning of “worker” would therefore also be relevant in EFTA EEA states and to EEA Agreement-derived rights.

Right to Move and Reside Under the TFEU and EEA Agreement

Public discourse on the UK’s future relationship with the EU often uses terms such as “freedom of movement,” which do not effectively convey the legal distinctions between free movement of workers on the one hand and the right to move and reside on the other. The former derives from the TFEU and the EEA Agreement; the latter rights derive from separate citizenship rights under the TFEU.

Right to Move and Reside Under the TFEU

Under Article 20 of the TFEU, “Union citizenship” is conferred on every person who is a national of an EU member state. Union citizens enjoy rights and are subject to duties provided for under the TFEU and the Treaty on the European Union (TEU) (together, the EU Treaties). These rights include the right to move and reside freely within the territory of any EU member state. Such a right is subject to the limitations and conditions laid down in the EU Treaties and by measures adopted thereunder, including those set out in the Citizens’ Rights Directive.⁷

Right to Move and Reside Under the EEA Agreement

The EEA Agreement does not establish any right on persons to move or reside freely within the EEA. However, the Citizens’ Rights Directive has been incorporated into the EEA Agreement and it is this which confers additional rights on EEA nationals to move and reside freely in the EEA.

The Citizens’ Rights Directive

The Citizens’ Rights Directive consolidated previous EU measures dealing separately with workers, self-employed persons, students and inactive persons, in order to simplify and strengthen the rights of free movement and residence for all Union citizens. It is an EU act in origin but (as discussed below) most of it has been adopted by the EEA.

⁵ Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, 17.

⁶ Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, 16 – 17.

⁷ Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Rights Under the Citizens' Rights Directive

Union citizens have the following rights:

- **Right to enter** – Union citizens have the right to enter EU member states with a valid identity card or passport. A derivative right is conferred on family members (spouse, registered partner, direct descendants under the age of 21 or direct relatives in the ascending line) to enter with a valid passport;
- **Right of residence for up to three months** – Union citizens have the right of residence in another EU member state for a period of up to three months, without any conditions or formalities except a valid identity card or passport. A derivative right is conferred on family members accompanying or joining the Union citizen;
- **Right of residence for more than three months** – Union citizens have the right of residence in another EU member state for longer than three months if any of the following conditions are met:
 - i. they are workers or self-employed persons in the host state;
 - ii. they have sufficient resources for themselves and their family so as not to burden the social assistance system of the host state and they have sickness insurance cover; or
 - iii. they are enrolled at an establishment which is accredited or financed by the host state for the purpose of study and they have comprehensive sickness insurance cover in the host state and can assure the host state (by means of a declaration or equivalent means) that they have sufficient resources for themselves and family members so as not to become a burden to the social assistance system of the host state.

Family members can enjoy the same rights of residence. However, if the Union citizen is residing on the basis of condition (iii), the only family members that can enjoy the same right of residence are spouses, registered partners and dependent children.

- **Right of permanent residence** – Union citizens and their family members who have resided legally for a continuous period of five years in the host member state acquire the right of permanent residence. In certain circumstances, workers or self-employed persons can benefit from permanent residence before completion of the continuous five-year period.
- **Right of equal treatment** – Union citizens and their family members who have right of residence or permanent residence have the right to be treated equally as nationals of the host member state. The exception is that the host member state is not obliged to confer entitlement to social assistance during the first three months of residence or to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The effect of the Citizens' Rights Directive is to extend the scope of the rights set out under the TFEU to family members and to minimise the burden on the state for individuals exercising rights to reside.

Implementation of the Citizens' Rights Directive in the EEA

In order to apply in the EEA, EU acts must be incorporated into the EEA Agreement's Annexes or Protocols. Adaptations to EU acts and the incorporation of the EU act into the EEA Agreement are effected by decisions of the EEA Joint Committee, which consists of representatives from the EU and each EFTA EEA state. When all parties agree, the EEA Joint Committee adopts the decision.

The Citizens' Rights Directive entered into force in the EEA on 1 March 2009 pursuant to an EEA Joint Committee decision in December 2007. The decision did, however, reject and exclude the concept of Union citizenship from incorporation into the EEA Agreement.⁸ The accompanying joint declaration by the EU member states and the EFTA EEA states expressly stated there was no equivalent concept of Union citizenship under the EEA Agreement and that the incorporation of the Citizens' Rights Directive would be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union citizenship.⁹

Despite the EEA's rejection of Union citizenship, no amendments to provisions in the Citizens' Rights Directive on the rights to move and reside were included in the decision, with the effect that these rights still apply in EFTA EEA states. This has been reinforced by EFTA case law. In *Clauder*,¹⁰ the EFTA Court acknowledged that the Citizens' Rights Directive provides EEA nationals with the rights of residence for up to three months, of residence for more than three months and of permanent residence. The right of permanent residence was then interpreted broadly in line with the objectives and context of the Citizens' Rights Directive to promote the right of EEA nationals and family members to move and reside freely within the EEA states, such that the right of permanent residence was regarded as conferring a right of residence on family members.¹¹ In *Gunnarsson*,¹² which concerned whether the Citizens' Rights Directive conferred rights against a home state for a non-economically active moving citizen, the national court of Iceland expressly asked the EFTA Court whether it made any difference that the treaty provisions on Union citizenship in EU law were not paralleled in the EEA.¹³ The EFTA Court held that the absence of the concept of Union citizenship under the EEA Agreement was irrelevant to this question as it does not affect the application of the rights of residence under the Citizens' Rights Directive.¹⁴

Acquired Rights

The effect of the TFEU, EEA Agreement and the implementation of the Citizens' Rights Directive has been that UK nationals living abroad in the EEA and EEA nationals living in the UK are afforded rights to reside in those states, together with attendant benefits. The prospect of the UK exiting the EU raises the challenge of how to address persons already relying on these rights.

The legal concept of "acquired rights" may be important. "Acquired rights" are broadly rights that are already vested in individuals or entities which may withstand changes to laws or treaties, such as those that would give effect to the UK's exit from the EU.

⁸ Decision of the EEA Joint Committee No 158/2007 of 7 December 2007, Recital 8.

⁹ Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement

¹⁰ *Case E-04/11 Arnulf Clauder* [2011] EFTA Court Report, 216.

¹¹ *Ibid.*, 42.

¹² *Case E-26/13, Íslenska ríkið v Atli Gunnarsson* [2014] EFTA Court Report, 254.

¹³ *Ibid.* 29.

¹⁴ *Ibid.* 68.

In terms of analysing acquired rights or providing for a fair arrangement for those already residing in the UK, it is necessary to analyse which rights have been exercised. The relevant rights must also be analysed at the point of leaving the EU or EEA and not before. For example, some people may have exercised their rights:

- a. to reside in an EEA state but will not have achieved sufficient residency to be entitled to claim benefits;
- b. to reside in an EEA state but for insufficient time to have a right permanently to reside;
- c. to reside sufficiently to exercise their right permanently to reside, but will not have formally applied for that right to be recognised by the authorities or may not have applied for a new passport under national laws; or
- d. to study, but wish to stay in an EEA state after their study ends, exercising different rights.

It is unclear whether any of the assertions or policy pronouncements made recently by UK and EU politicians would apply only to protect those rights which have been exercised. Clarity is also needed on whether persons who are not yet entitled to benefits would be able to accrue them on the basis of the rights which were available when their residency commenced. In addition, it has been reported that there are 580,000 citizens of certain EU member states¹⁵ living in the UK without permanent residency rights;¹⁶ it should be clarified whether such persons, who have spent less insufficient time in the UK to achieve permanent residency, should be entitled to stay. In general, acquired rights apply only in respect of those rights which have been achieved already. Other aspects of human rights law, such as the right to family life or judicial review concepts such as legitimate expectations might come into play for forward-looking rights in some situations. However, the position of persons seeking to assert future rights which would have been available to them previously is more uncertain.

Acquired Rights Under EU Law

Under the EU Treaties, there is no reference to acquired rights in the event that a member state leaves the EU. The provisions governing the withdrawal of a member state from the EU in Article 50 of the TEU require the EU to negotiate and conclude an agreement with the exiting member state “setting out the arrangements for its withdrawal” but do not require the withdrawal agreement to make provisions on acquired rights.

Acquired Rights Under EEA Law

The EEA Agreement does refer to acquired rights, but only in the context of a part of the EEA Agreement being suspended due to the EEA Joint Committee failing to take a decision on an amendment to an Annex. In this situation, the rights and obligations which persons have already acquired under the EEA Agreement remain but no protection is afforded to the expectations of persons who have not already acquired those rights or obligations. Although this factual situation is not relevant to the exit of a state from the EEA, it does provide an interesting point of reference whereby existing rights are protected but those which would, over time, have been available in the future, are not.

¹⁵ The EU member states referred to are the 14 EU member states that were members of the EU prior to the 2004 expansion, minus the UK.

¹⁶ Social Market Foundation, “Here to stay? Residency and EU migrants after the referendum,” July 2016, page 4.

Acquired Rights Under International Law

There has been some suggestion that international law could be relied upon to safeguard rights to work, move and reside. Article 70 of the Vienna Convention on the Law of Treaties (VCLT) states that, “1. *Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.* 2. *If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between the State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.*”

It is far from clear that these provisions safeguard rights to work, move and reside exercised by UK and EEA nationals under the TFEU, EEA Agreement and Citizens’ Rights Directive for a number of reasons. One issue that arises from relying on the VCLT is that Article 70 is only effective if there is no agreement between the parties. If there is agreement that certain rights to work, move and reside fall away once the UK leaves the EU but other rights remain, such an agreement will prevail over the VCLT.

Another issue with relying on the VCLT to safeguard rights is that the VCLT applies to parties to the VCLT i.e. the states themselves and not individuals of those states. This is supported by commentary from the International Law Commission (ILC), which prepared identical language to Article 70 in a previous draft of the VCLT. The ILC states that “...*the Commission wished to make it clear that paragraph 1(b) relates only to the right, obligation or legal situation of the States party to the treaties created through execution and is not in any way concerned with the question of “vested interests” of individuals.*”¹⁷ The uncertainties arising from international law highlight the importance of a withdrawal agreement setting out which rights EEA nationals can continue to exercise.

Acquired Rights in the Withdrawal Agreement

The clearest approach to preserving rights to work, move and reside post-Brexit would be for the UK’s withdrawal agreement itself to detail arrangements for such rights. At its most inclusive, the agreement could cover the rights to work and reside as well as health care and social security. It could also identify which rights qualify as acquired rights and the date from which they will be recognised as such, and which rights are subject to transitional arrangements that will be phased out over an appropriate period.

Of course, the content of the withdrawal agreement will depend on the future relationship between the UK and the EU. If the UK becomes an EFTA EEA state or another “new deal” is struck, UK nationals living abroad in the EEA and EEA nationals living in the UK will continue to benefit from rights derived from the EEA Agreement, Citizens’ Rights Directive and EFTA case law (or any other new arrangement). In other circumstances, the withdrawal agreement provisions will be key.

Possible Immigration Controls

The UK’s future relationship with the EU is still to be negotiated. However, additional restrictions on EEA nationals’ rights to work and reside in the UK seem likely. We discuss below five types of immigration controls

¹⁷ ILC, Draft Articles on the Law of Treaties with commentaries (1966), page 265.

that have been the subject of public discussion, and if and how they could be implemented within the existing framework of EU and EEA law:

- **Brake on free movement:** Recent discussions indicate the possibility of an “emergency brake” on free movement.¹⁸ Should the UK become an EFTA EEA state, the legal basis for a brake in free movement could lie in the temporary safeguard measures set out under the EEA Agreement. Article 112 of the EEA Agreement provides that if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, EU member states and EFTA EEA states should take appropriate measures, including finding a commonly acceptable solution. Should the UK ultimately remain part of a reformed EU, a brake on free movement may require amendments to the TFEU and secondary legislation.
- **Brake on benefits:** David Cameron’s settlement with the EU in February 2016 included a seven-year emergency brake limiting full access to in-work benefits by newly arrived EU workers for up to four years when they enter the UK labour market.¹⁹ Should the UK become an EFTA EEA state or remain part of the EU, a similar brake on benefits may be achieved, as was agreed in the Cameron deal, through amendments to secondary legislation, in particular, Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.²⁰
- **Limitations on free movement of non-EU nationals:** Another element of Mr. Cameron’s proposed settlement with the EU was the agreement that non-EU nationals who had no prior lawful residence in an EU member state before marrying an EU citizen or who married an EU citizen after the EU citizen established residence in a host member state would not be covered by EU free movement rights. Such persons would be subject to the host member state’s national immigration laws.²¹ Should the UK become an EFTA EEA state or remain part of the EU, such limitations on free movement of EU nationals could similarly be achieved through amendments to the Citizens’ Rights Directive.
- **Quantitative limitations on free movement:** Quantitative limitations on free movement include quotas or caps on EEA migrants. Should the UK become an EFTA EEA state, it may be possible for the UK to secure quantitative limitations. This is because one EFTA EEA state, Liechtenstein, has achieved this. Liechtenstein secured the application of its own national laws as regards the entry, residence and employment of other EEA nationals and quantitative limitations for new residents, seasonal workers and frontier workers, on an initially temporary basis, until 1 January 1998.²² Quantitative limitations have, however, continued after 1998 pursuant to Annex VIII of the EEA Agreement and remain in force.²³ Should the UK remain part of the EU, quantitative limitations on free movement would probably require amendments to the TFEU as well as to other EU legislation. Such limitations would therefore seem impracticable under any “reformed EU” constitutional model because any TFEU amendments would require referenda or other implementing acts in other EU member states.

¹⁸ The Observer, “Brexit: EU considers migration ‘emergency brake’ for the UK for up to seven years,” 24 July 2016.

¹⁹ HM Government, “The best of both worlds: the United Kingdom’s special status in a reformed European Union,” paragraph 2.102.

²⁰ House of Commons Library, “EU Referendum: summary and analysis of the new Settlement for the UK in the EU,” 26 May 2016, Section 4.2.

²¹ *Ibid.*, Section 3.5.

²² EEA Agreement, Protocol 15, Article 5.

²³ European Commission, “Communication from the Commission to the Council and the European Parliament: Liechtenstein Sectoral Adaptations – Review,” 28 August 2015.

- **Points-based system:** A points-based immigration system currently applies to some classes of non-EEA migrants to the UK. Under this system, points are awarded to persons meeting certain categories, with the highest number of points awarded to those with exceptional talents, entrepreneurs and investors. During the referendum campaign, proponents of Brexit set out plans under which this system would be extended on a non-discriminatory basis to both EU and non-EU nationals, rather than having these stricter controls only for non-EU nationals. Should the UK become an EFTA EEA state, it may be possible to implement such a system to cover EEA nationals, but the UK would have to secure a bespoke exemption from the full application of the EEA Agreement, similar to Liechtenstein's quantitative limitations. Should the UK remain part of a reformed EU, any extension of the points-based system would likely require amendments to the TFEU, so again, this would not seem practicable.

In conclusion, although the ultimate path forwards for a new relationship between the UK and EU remains open for discussion, it would be legally possible for some migration controls to be reconcilable with the concept of free movement of workers and the right to reside (in the Treaty senses of the words). It is also possible that existing constitutional frameworks such as the EEA may offer more opportunities for addressing migration questions than has often been assumed.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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