

PAPER: Freedom of Movement

In his fourth Brexit Challenge paper, Nick Clegg sets out the challenges facing the Government on Freedom of Movement.

By [Nick Clegg](#), Nov 16, 2016 10



Immigration was a key factor - perhaps the key factor in the referendum. In Lord Ashcroft's [analysis](#), one third (33%) of Leave voters said the main reason was that leaving "offered the best chance for the UK to regain control over immigration and its own borders."

The free movement of people across borders is one of the defining characteristics of the European Union and its Single Market. Citizens of the UK and other EU Member States are entitled to live and work wherever they choose, or if not working, to live in another Member State subject to some restrictions related to their ability to support themselves. Individual Member States are bound by these common rules and cannot unilaterally erect barriers to immigration from other parts of the Union.

This paper does not dwell on the nature of the link between participation in the Single Market and free movement, nor does it make a value judgement about what the best outcome is from a liberal policy perspective. Instead the aim is to provide a factual and technical analysis of some of the practical questions and obstacles which stand in the way of far-reaching reform of freedom of movement.

Recent trends

In recent years, increasing numbers of EU citizens have chosen to live and work in the UK. Net migration from the EU in the year ending March 2015 was an estimated 180,000, compared to 15,000 in 2003. Numbers increased substantially after the 8 accession countries joined in 2004, dipped after the financial crisis of 2008, and climbed again in 2014 when restrictions on the movement of citizens from Romania and Bulgaria expired.

These trends reflect the attractiveness of the UK as a place to live and work: the relative strength of the economy, the availability of jobs, wage levels which compare favourably with home countries, a tolerant and diverse culture, and the English language, which is the first foreign language for many people. But the UK is certainly **not atypical**: immigrants make up 28% of the Australia population, 22% in New Zealand, 20% in Canada, 13% in Germany, Spain and the US, and 12% in France. Foreign-born citizens make up 12% of the UK population.

The increased flow of migrant labour has suited British businesses which have faced skills and staffing shortages in many sectors. Many firms depend on ready access to labour from across the EU workforce, and are likely to press the government to ensure that any new system is sensitive to their requirements.

Perceptions of immigration

A number of misleading claims have been made about EU workers. Some have argued that they represent a drain on UK public services. In reality they are less likely to be in receipt of benefits, and more likely to **pay higher amounts of tax** on average than UK citizens. Some have argued that immigration drives down wages. In reality the wage impact has consistently been found to be **marginal** (Bank of England **analysis** suggests it is around 1p per hour per year in high immigration sectors), while the increased supply of labour and additional consumer spending immigrants themselves has stimulated growth. Others have claimed that EU nationals are drawn to the UK by our supposedly generous welfare system, when in fact the vast majority **come to work**. EU citizens are on average **younger, better educated, and more likely to be in employment** than their UK-born counterparts.

According to recent **YouGov survey data**, two-thirds of British people want less immigration, including 47 percent of Remainers and over 91 percent of Leave voters. While this is a consistent and undeniable aspect of the UK debate, it is worth noting that opinion may be softer than the numbers imply. 62% of those canvassed in the YouGov research said that while they wanted

immigration to fall, they weren't prepared to make any kind of financial sacrifice to achieve it. Even among those who voted for Brexit, 30% would rather accept current levels of immigration if reducing them meant that it would cost them anything at all.

Nor is it the case that public concern is exclusively about numbers: it is also about integration. In general, the areas of the country reporting the greatest public concern about immigration are also the areas with the **lowest levels of immigration**. The converse is also true, with London and other inner city areas with large established immigrant communities voting to remain in the EU. A small number of areas like Boston, Lincolnshire, appear to buck this trend - **24%** of Boston's population is foreign-born, and the town registered the strongest leave vote in the country (**75.6%**). One explanation for this is that integration, and public acceptance of demographic change, is particularly challenging in areas which have seen large numbers of recent arrivals but have little history of migration.

However, even if we take the Leave campaign's promise to end free movement at face value, and assume that the door can be closed to most EU workers without harming the UK's economic interests, we should remember that non-EU migration is consistently higher than EU migration. In 2014, 13% of people coming to the UK were returning British nationals, 42% were nationals of other EU countries, and 45% were nationals of non-EU countries. **Looking back further** the picture is starker still: since 2000, just over a quarter of net immigration to the UK (1.2 million out of a total of 4.5 million) originated from other EU countries.

We already "control the border" in relation to these non-EU immigration flows, yet the numbers exceed the numbers coming from Europe. Unless the introduction of controls on EU immigration is accompanied by a dramatic tightening of restrictions on those coming from outside the EU, including for family reasons, significant levels of migration are likely to continue and it is not at all clear that public concerns will be allayed. While we acknowledge that the government and the Labour party have set themselves the goal of constraining free movement, it is self-evident that this has not been the sole driver of immigration.

Free movement in the EU Treaties

The principle of free movement of persons has expanded from its origins in the Treaty of Rome (1957) to become one of the four 'fundamental freedoms' of the EU's Single Market, alongside the free movement of capital, goods and

services.

The right to free movement was originally focused on exclusively on workers, i.e. people actively engaged in employment. It was only in 1990 that the then EC introduced a right of movement and residence for the retired, students and those with independent means, provided that they had sufficient resources and medical insurance. The Maastricht Treaty in 1992 went further and introduced the concept of EU “citizenship”.

Provisions were included in the Treaties to ensure that workers and their families could move between Member States without losing their social security entitlements. These provisions grew over time into a detailed system of social security coordination (without however impinging on Member States’ right to design their own systems).

Free movement was also considered an important element of the single currency. In a world where Member States could no longer use their exchange rates as an adjustment mechanism, labour mobility provided a safety valve way to adjust to the ebb and flow of demand in different parts of the market.

Since the referendum, European leaders have reiterated their firm belief that the free movement of persons cannot be separated from the other freedoms, effectively warning the UK not to try to ‘cherry pick’.

Free movement in practice

EU citizens can reside in another Member State for up to 3 months without conditions. After that point, continued residence is allowed if the individual is working, studying, self-sufficient, self-employed, or - with some conditions - actively looking for work.

EU jobseekers have limited access to out of work benefits. Individuals in the UK receive no Jobseeker’s Allowance for the first 3 months of their stay; they are then entitled to a maximum of 90 days’ support. If someone fails to find work within 6 months and continues to be a burden on the welfare system, they can be deported - though the numbers who are removed in this way are **thought to be small**. In practice, EU migrants are **significantly less likely** than UK citizens to be in receipt of out of work benefits, though slightly more likely to be in receipt of tax credits.

Figures from the annual **Labour Force Survey** show that in 2015 there were an estimated 3.18 million people born in other EU countries living in the UK,

amounting to 5% of the total UK population (compared to 8.4% of the population which was born outside the EU). Including the non-EU countries in the EEA plus Switzerland, all of which participate in the free movement rules, the total number is around **3.5 million**. Of these, the largest number were from Poland (831,000), Ireland (382,000) and Germany (286,000).

At the end of June 2016, around 2.2 million non-British EU nationals were working in the UK. The **sectors with the largest number of EU workers** were retail (164,000), pubs, restaurants and other catering (161,000), education (146,000), healthcare (116,000), food manufacturing (113,000), and construction (111,000).

Non-workers

The European Commission **estimates** that that 30% of the EU migrant population in the UK is economically inactive (that is, they are unemployed, caring from children, studying, retired, or too young to work), compared to 43% of rest of the population.

Of these, students are an important category. In 2014-15 there were **125,000 students** from elsewhere in the EU studying at Higher Education institutions in the UK. Despite the fact that the vast majority of students return home after they have finished their course, the government continues to include them in the overall immigration statistics, thereby creating an inflated impression of total immigration flows.

British citizens in the EU

Free movement is a two-way street. It is estimated that at least **1.2 million Britons** live elsewhere in the EU, 75% of whom live in five countries: Spain (309,000), Ireland (255,000), France (185,000), Germany (103,000), and Italy (65,000). Most have not applied for permanent residence in their adoptive countries as they have not needed to under EU law.

The importance of free movement to the UK economy

EU workers are employed in both skilled and low-skilled roles. Overall, EU workers are more likely to be found in low-skilled roles, with workers from the 'A8' countries (the central and eastern European countries that joined the EU in 2004) earning **lower wages** on average than other migrant workers. Nevertheless, many sectors are reliant on access to the pool of skilled European labour. **46%** of EU workers are engaged in high-skilled work, compared to 55% of the general population.

- The **food and drink industry** is more reliant on EU workers than any other sector of the UK economy. Around 29% of the UK's food and drink manufacturing workforce are non-British EU nationals (almost 120,000 workers).
- Nearly 300,000 EU workers are employed in the **logistics industry**. 93,000 EU nationals work in warehousing and other storage jobs, 23% of the total workforce. 31,500 Large Goods Vehicle drivers (10% of the total), 22,500 van drivers (9%), and 20,500 forklift truck drivers (21%) are from elsewhere in the EU. As with the food and drink industry, EU workers are filling the gap left by an undersupply in the domestic labour market. This is partly a reflection of the ageing workforce: 67% of LGV drivers are aged over 45.
- There are approximately 135,000 EU nationals working in **NHS and adult social care** in England. This represents about 5% of the NHS workforce and 6% in adult social care. In 2014, more than 10,000 doctors working in the NHS (6.6% of the UK medical workforce) received their primary medical qualification in another EEA country.
- According to the **Creative Industries Federation**, EU workers currently constitute 25% of all workers in the UK visual effects industry, with non-EU workers accounting for another 12%. Similarly, UK video games companies currently draw 20%-30% of their staff from the EU.
- The UK **higher education sector** employs significant numbers of non-UK EU nationals. Non-UK EU nationals make up 16% of the UK-based academic workforce.
- One in five Small and Medium-Sized Enterprises employ workers from elsewhere in the EU, and only **27% of small businesses** think there are enough skilled workers in the UK to support British SMEs.
- 75% of technology companies surveyed by trade body Tech UK said they employed workers from the EU.

It is, of course, impossible to say how many European citizens would have been working in the UK if the UK had not been a member of the EU. The degree of reliance which British industry has on an international workforce suggests that very substantial immigration from the continent would have existed regardless of free movement rules.

What kind of arrangements can we expect for EU citizens already in the UK?

To date, the government has refused to guarantee the rights of 3 million EU citizens living in the UK to remain here post-Brexit, and has explicitly linked their status to the status of British citizens on the continent. Liam Fox has described them as "**one of our main cards**" in the negotiations.

While this stance has attracted widespread criticism, in reality the symmetry between the two sides on this issue suggests that it may be quickly resolved once talks get under way. The price of a failure to agree is likely to be too high on both sides: neither will seriously contemplate mass deportations, which would be prohibitively expensive and would fundamentally poison the rest of the negotiation. For this reason, a reciprocal deal involving the mutual granting of permanent residence and associated reciprocal rights such as healthcare is a likely outcome. Given this context, it is difficult to understand why the government has not taken advantage of the opportunity to generate goodwill ahead of the talks by making a unilateral offer to this effect.

The fact that a reciprocal deal may be negotiable does not mean, however, that it will be easy to implement in practice, as [Jonathan Portes](#) has set out.

First, a cut-off date has to be established: this could be back-dated to the day of the referendum, or set at the point at which the UK formally leaves the EU (though pre-announcing the latter could incentivise large numbers of people to arrive ahead of the deadline). Next, rules would have to be established to determine whether someone had sufficiently strong ties to the UK to warrant being given permanent status (currently, the rules for EU citizens require 5 years of continuous residence in order to be eligible). Evidence of work over a sustained period would presumably count, while simple tourism would not. The situation rapidly becomes highly complex: how to deal with workers who were out of the country on the day of the referendum? What sort of documentary evidence (utility bills, bank statements, pay slips) would be required? What about dependents, students, the self-sufficient, and the self-employed?

There is no comprehensive pre-existing system of naturalisation for EU citizens. While those exercising their treaty right to work in the UK are entitled to permanent residency after 5 years, EU citizens who have lived in the UK for other reasons are not so entitled. There will be many thousands of such people who are long-term UK residents, and whose situation will need to be taken into account if they are not to be unfairly uprooted.

The biggest problem will be scale: on top of existing challenges, the Home Office will need to process lengthy forms, assorted evidence, and legal challenges for upwards of 3 million people. There is no population register, and no reliable record of who is in the country at any particular time.

At the moment, the Home Office processes around 25,000 permanent residence applications from EEA citizens each year. The relevant form is 85

pages long. Such an application would be necessary in order to be granted permanent residence under UK law, even for those who had acquired 'permanent resident' recognition under EU law after 5 years here, and it is neither an automatic nor necessarily easy process. As the Oxford Migration Observatory [notes](#), if all the EEA and Swiss citizens in the UK were to apply for permanent residence in the same year, it would take the Home Office around 140 years to consider all of them. The stack of paper generated by this exercise would be more than 3 times the height of Mount Everest.

These considerations point to the need for a simpler, light-touch system. The more exhaustively eligibility is scrutinised, the less likely it is the system will be able to function.

A major question will be whether a settlement can be reached on the status of existing migrants in isolation from the challenge of designing a new system for future migration. The scale of the administrative challenge explored here points towards the need for a simple solution which does not depart radically from the current free movement rules. But we also need to consider what kind of system comes next. The challenge of operating not one but two complex new EU immigration systems side by side (the retrospective system for those already in the UK, and the prospective system for the day after Brexit) would be immense. The Home Office's track record of managing complex immigration systems is [not encouraging](#).

A two-tier system is also likely to apply from the EU side: assuming a deal on granting residence rights is more or less symmetrical, then UK citizens living in France, Spain, or any other Member State will be treated more favourably if they arrived before the cut-off date than they will do afterwards, with two entirely parallel systems of identification, visas, work rights, residence permits and welfare benefits depending on the date at which they settled.

What kind of model is realistic for managing EU immigration to the UK post-Brexit?

In the coming negotiations, there will clearly be a trade-off between access to the Single Market for British companies and the rights of EU citizens to live and work in the UK. There are a number of potential off-the-shelf models including membership of EFTA. There is also a wider debate to be had from the EU-27 side as to whether they want to offer the UK a bespoke deal on immigration. This paper makes no assumptions about the course of those negotiations, but focuses instead on the practicalities of a change to freedom of movement.

It is important to recognise that EU citizens are unlikely to be prevented from entering the UK without a work permit, as this would mean the UK treating EU citizens less favourably than US or Australian visitors. Given that the public concerns is around work rather than tourism, the most likely model would be the one which applies to America visitors, with a period of visa-free access for the purposes of tourism, but no right to work in-country without a prior work permit. Anyone who wanted to come to study, to join a family member, or to start a business would have to apply for the relevant visa.

This raises a number of questions:

- How would such a system respond to the needs of employers? The existing non-EU ‘tier 2’ visa regime is highly restrictive, sets a maximum limit on work permits of 20,700 a year, is open only to skilled workers, and imposes very high administrative costs on employers and employees wishing to come to the UK. The Home Affairs Select Committee recently found that the rules were driving employers to recruit from the EU, where no such caps apply. Would the tier 2 cap be raised to accommodate skilled EU workers? If so, by how much?
- The existing non-EU immigration system is highly focused on skilled immigration, yet many employers rely on immigrants to fill less skilled posts as well. The Seasonal Agricultural Workers Scheme was shut down when Romania and Bulgaria joined the EU, and ‘tier 3’, which had been designed as a route for low-skill immigration, was abandoned, having never been implemented. The UK has instead relied almost entirely on low-skilled EU workers to fill gaps in the labour market. Will new sector-specific schemes therefore be reinstated? Or will there be a route by which low-skilled jobseekers can come into the country to seek work?
- Would the system give any preference to EEA workers? Would EEA jobseekers be expected to apply for their work permits from outside the country, or would they be allowed to enter the country to look for work for a period of time, and then apply for a permit in-country?
- If migrant labour-intensive industries are to continue to use EU workers, the bureaucratic burden of proving that there is no UK worker qualified to do the job, verifying every employee’s identity, organising work permits etc will fall on the shoulders of employers. How will small businesses in particular be expected to handle the additional red tape that this will entail?
- The EU has **recently announced** its intention to introduce an **ESTA**-style visa waiver system where non-EU citizens will be required to pay a fee and submit their personal details before travelling. Assuming that UK citizens will have to use this system to visit the continent, will the UK

reciprocate and apply a similar system to EU visitors?

- Would ESTA-style controls and time limits on visits to the UK apply to movement between Ireland and the UK? Would the Common Travel Area rules continue to apply or would Ireland be treated in same way as other EU Member States?
- How would central government meet the additional costs of running such a system?

What will happen if there is no agreement?

The design of the future system EU-UK immigration system will inevitably be part of the Article 50 talks and associated trade negotiations, as both sides will want to agree reciprocal arrangements.

If these talks break down, or the 2-year time limit on Article 50 expires without conclusion and without an agreement to extend it, then the UK would revert to 'third country' status under EU law. UK tourists visiting the EU would be treated like visitors from Morocco or India: entry would be allowed for 90 days out of every 180, with travel authorised in advance via the forthcoming online ESTA system, for which travellers will pay a fee. Students would no longer enjoy free access to EU universities, and would be eligible for differential tuition fees. EU companies wanting to employ a UK citizen would have to demonstrate that there is no EU national who could do the job, then the relevant work and residence permits would need to be obtained before departure from the UK.

A breakdown in talks is a particular worry for UK citizens currently working or living in retirement on the continent. Some have suggested that if talks fail, or a satisfactory agreement cannot be reached to protect the status of British citizens, then the international law doctrine of 'acquired rights' might apply. In other words, the courts might consider that rights of residence and access to public services guaranteed for many years by EU law are so entrenched that it would be unlawful to remove them, for example under the Vienna Convention on the Law of Treaties.

However, this view enjoys little support from legal experts. As [Professor Vaughan Lowe](#) QC recently told the House of Lords EU Justice Sub-Committee: "There is [...] general agreement that the category of 'acquired rights' does not extend beyond property rights and certain contractual rights. Rights to live, work, receive medical care and retire in an EU Member State other than one's own (or for companies, the right of establishment) would not be included within that category".

How would UK businesses respond to the loss of EU workers?

The indications from a number of sectors are that the sudden loss of the EU workforce could be catastrophic for UK business, for the simple reason that these companies know the domestic labour market, have had experience of recruiting locally, and know that it can be extremely challenging to meet their needs, particularly in minimum-wage jobs.

The [Migration Advisory Committee](#) looked at this issue in 2013 as part of a report on the closure of the Season Agricultural Workers Scheme. They found:

"All the operators and growers we spoke to stated that they had tried to recruit (and retain) British workers but without success. The farms are not normally in high unemployment areas; British workers are reluctant to live on (be tied to) the farm; and growers state that British workers either cannot or will not work at the intensity required to earn the agricultural minimum wage"

This raised the question of how employers would attract people to fill these unpopular jobs:

If labour supply from the EU [...] dwindles, it follows that wages will be bid up. But horticulture output is tradable. This raises the key question: would supermarkets pay a premium for British produce and how large might such a premium be?

Research by [NIESR](#) into the likely response of employers in the hospitality, food processing and construction industries confirms that many firms in those sectors would find themselves similarly squeezed between pressure to raise wages and the highly competitive nature of their industries. Alternative strategies for adapting to the loss of the EU workforce were thin on the ground: companies said they expected to struggle to fill vacancies and that there was limited scope for training programmes to fill the gap, even with substantial government support. Many believed the only viable outcome was for free movement of low-skilled EU workers to continue.

Conclusion

It is hard to see how the government can strike a deal with the EU which both delivers on the Leave campaign's premise that control would be re-established over immigration, while also protecting the interests of the British economy. It seems inevitable that one or the other will have to be sacrificed to some degree.

The logical conclusion of granting retrospective settlement to EU citizens resident in the UK and vice versa is the creation of multiple parallel immigration systems, both here and on the continent. The Home Office will have to manage one set of rules for more than 3 million European citizens with a legitimate claim to reside in the UK; a second set of rules for future EU migrants; and a third set of rules for non-EU immigration.

The options for regularising the status of EEA citizens currently resident in the UK are all extremely challenging.

UK population ages. In doing so, they should be conscious that Britain's proud history of openness to migration is part and parcel of our success as a country. Insularity and a refusal to cooperate over migration flows would weaken the UK and the EU, both economically and culturally.

The questions that need to be answered

1. Will the government raise the existing immigration cap, which currently applies only to skilled non-EU workers?
2. How will the government meet the demand for low-skilled migrant workers? Will this be met from the EEA or from outside the EEA?
3. Will the government reinstate the Seasonal Agricultural Workers Scheme or others sector-based schemes?
4. Will employers in sectors which depend on EU workers be expected to meet the cost of additional paperwork and bureaucracy?
5. Does the government intend to further reduce the number of non-EU migrants as well as those arriving from the EU?
6. What support will be offered to companies to help them adjust to the loss of their EU workforce? Will there be additional investment in training and skills for UK workers?
7. Will EU citizens resident in the UK be allowed to stay? According to what criteria?
8. How will the Home Office meet the cost and administrative challenge of regularising 3 million EU citizens, and then running multiple parallel immigration systems?
9. How will the government safeguard key sectors which rely on skilled EU workers, for example UK research and development which excels precisely because of the UK's ability to attract the brightest and best?
10. Will UK pensioners and other citizens living in the EU be allowed to stay post-Brexit? Who will pay the cost of their healthcare and other public services?

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