



Brexit Advocacy Series

Approaches to Employment Migration

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Introduction

The Government has made it clear that free movement of EU citizens to the UK will end after Brexit. Many UK employers rely on EU workers so a new employment migration policy will be needed.

The new policy will have to take into account potentially conflicting objectives. The Government has made a commitment to reduce net migration to below 100,000. At the same time it needs to protect the UK economy. Employers want to be able to recruit overseas workers for jobs which they cannot fill from the resident labour force. The Government wants employers to train more British workers. Tailoring the system to the needs of particular industries and regions adds complexity, but the Government wants to simplify the rules and make the system more user-friendly for applicants. Any agreement on EU migration to the UK is likely to be reciprocal, so restrictions on EU citizens coming to work in the UK will affect British citizens who wish to work in the EU.

Restrictions on free movement will affect not only EU citizens, but also nationals of other European Economic Area member states (Norway, Iceland and Liechtenstein), Swiss nationals, and the family members of all of these people.

The Government could use Brexit to completely rewrite the current rules on employment migration. The Migration Observatory at the University of Oxford has published a paper which sets out the different models which could be used (<http://www.migrationobservatory.ox.ac.uk/resources/reports/labour-immigration-brexit-trade-offs-questions-policy-design/>). In this paper we describe three potential approaches to employment migration following Brexit and the likely eventual end of full EU free movement.

The first is to introduce a new Australian-style points-based system. The Government has already ruled out this option.

The second is to extend the UK's current system (which is called the Points-Based System but is unlike the Australian system) to EU citizens. We explain why this approach will require significant changes, for instance in relation to low-skilled workers.

The third approach is to retain the current Points-Based System for non-EU nationals while giving EU citizens preferential access to the UK labour market, for instance under a scheme similar to the worker authorisation scheme which the UK used for Bulgarian and Romanian nationals after those countries joined the EU.

We argue that the third approach is the most appropriate one. We also discuss options for entrepreneurs, the self-employed and service providers.

Introducing an Australian-style points-based system

Before the EU referendum in June 2016, the Vote Leave campaign argued for a 'genuine Australian-style points based immigration system' which would cover both EU and non-EU nationals who wished to move to the UK.

http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html).

The points-based element of Australia's system – the Skilled Independent Visa – is for people who are not sponsored by an employer but score sufficient points across a range of factors, including age, English language ability, work experience and qualifications. Canada's Federal Skilled Worker programme is similar. The UK used to offer a points-based visa for non-sponsored workers. Originally called the Highly Skilled Migrant Programme and then the Tier 1 (General) visa, it was abolished in 2011.

The purpose of a points-based system like this is to attract skilled workers to the country, including those without a job offer. The Prime Minister has ruled it out because she does not believe that it gives the Government sufficient control over who comes in and what they do once they are in the UK. Given that she herself abolished the Tier 1 (General) visa when she was Home Secretary, it is unlikely that her government will reintroduce it or that anything resembling it will be put in place after Brexit.

Extending the existing UK system to EU citizens

The main alternative to a points-based system is a work permit system. The UK already has a type of work permit system for non-EU nationals in the form of the Tier 2 visa category.

Tier 2 is part of what is misleadingly called the Points-Based System. This a points-based system in name only, because there are fixed criteria for each visa type. It is not possible to make up for a shortfall of points in one area by scoring more points in another.

After Brexit, one option will be to extend Tier 2 and the rest of the existing Points-Based System to EU citizens. If this happens, EU citizens wishing to move to the UK for work will be treated in much the same way that non-EU nationals such as US citizens are now. They will need to be sponsored by an employer with a sponsor licence and then apply for a Tier 2 visa. The job will need to be recognised as a degree level occupation equivalent to NQF Level 6, with a salary of £30,000 or more, depending on the occupation. Unless the employee has at least 12 months' experience with an overseas branch of the company and is being transferred to the UK under the Intra Company Transfer category, the employer will have to show that the job has been advertised and that there are no suitable resident UK workers available (the 'resident labour market test').

Tier 5 of the Points-Based System covers a number of other short term work categories, including two year Youth Mobility visas, short term Creative and Sporting visas and those coming on exchanges or for work experience under the third party sponsored International Agreements route.

This option sounds straightforward but would be unworkable without significant changes to the system.

At the political level, refusing to give preferential treatment to EU citizens will make negotiations with the EU extremely difficult, not only in relation to immigration but also on access to the Single Market. It would also be unpopular with British voters who want the ability for themselves and their children to work in the EU – because if the UK imposes tough restrictions on EU citizens working in the UK, the EU will do the same.

If the existing system were extended to EU citizens in its current form, there would be no route for low-paid, low-skilled migration to the UK. This would cause problems for the social care, agricultural and food processing sectors in particular. In the social care sector it would be possible to attract more resident workers by paying higher wages, which would ultimately have to be funded by British taxpayers. But it seems unlikely that British consumers would be willing to pay for higher wages in the agricultural and food processing sectors, so the likely result would be a shrinking of those industries and more reliance on imported food. Even higher wages might not attract British workers because of the scarcity of housing in many rural areas. If the Government wished to avoid this it would have to open up Tier 3 of the Points-Based System, which was originally intended to provide a route for low-skilled migration but never introduced, because there was felt to be a sufficient supply of labour from EU citizens exercising free movement rights. Employers wishing to use this route would need to become Tier 3 sponsors and would be subject to the extensive compliance and immigration enforcement regime which currently applies to sponsors of non-EU nationals.

Many British employers rely on highly-skilled EU workers – doctors, engineers, bankers and so on. If these people were forced to apply for Tier 2 visas under the current system there would be huge pressure on the annual quota of 20,700 Tier 2 (General) certificates of sponsorship. The quota would have to be increased substantially:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333083/MA

[C-Migrants in low-skilled work Full report 2014.pdf](#)). There would also be significant additional costs as the sponsorship, visa and related fees (Immigration Health Surcharge and Skills Charge) would need to be paid by employers.

Finally, the current system is based around individuals being sponsored and applying for visas abroad before coming to the UK. The UK has significantly reduced its visa operations across the EU and it is likely that additional visa application centres would have to be opened to deal with the increase in such applications.

Giving EU citizens preferential access to the UK labour market

The third option is to give preferential treatment to EU citizens wishing to work in the UK by allowing them to do so without the need to obtain a visa, provided they meet certain requirements. Apart from specific visa types (Working holidaymaker/Youth Mobility Scheme and the Seasonal Agricultural Workers Scheme) the UK has generally not applied different immigration requirements to different nationalities coming to work in the UK.

For skilled workers, there could be a system similar to the worker authorisation scheme which applied to Bulgarian and Romanian workers for seven years after those countries joined the EU in January 2007. A similar scheme still operates for Croatian nationals wishing to work in the UK.

In this scenario, an EU citizen wishing to work in a skilled occupation in the UK will first have to find a job with an employer willing to sponsor them. The provisions on what constitutes skilled work is determined by reference to the relevant Tier 2 skills thresholds, so there is scope for allowing lower skilled occupations (for example by applying the same rules that currently apply to Croats who can undertake roles at NQF Level 4). The employer might have to meet the requirements which currently apply to Tier 2 sponsorship for non-EU nationals – or there could be more generous provisions for skilled EU workers, such as an exemption from the usual resident labour market test. A separate quota for restricted certificates of sponsorship for EU citizens could be introduced.

Having been sponsored, the EU worker will then need to apply to the Home Office for a worker authorisation document. After 12 months, the EU worker will no longer require authorisation and will be free to work in any job.

For EU citizens wishing to work in low-skilled occupations, for instance in agriculture and food processing, the Government could re-introduce a system similar to the Seasonal Agricultural Workers Scheme, which in its most recent form allowed 21,250 Bulgarian and Romanian workers to come to the UK for up to six months each year. Successful applicants were issued with a card giving them permission to work for a named employer. The scheme was abolished when transitional labour market controls on Bulgarian and Romanian workers ended in January 2014. A new scheme could allow for quota-based admission in different sectors, with those quotas being generous at the outset and gradually being reduced with the aim of giving

employers a reasonable time to engage and train local workers in the relevant sector or replacing labour with new technologies.

The UK could also look at introducing a Youth Mobility type visa for EU citizens, which would allow EU citizens aged 18 to 30 to come to the UK for a limited period of one to two years. This would be relatively easily to translate into a reciprocal scheme allowing British citizens to work in the EU for a similar period.

Proposing to let EU citizens to work visa-free in the UK – albeit with certain restrictions – will give the Government a stronger hand in other areas of its negotiations with the EU. It will increase the chance of reaching a compromise which is broadly acceptable to the British public, including people who want restrictions on EU migration as well as those whose priority is to maintain a close relationship with the EU.

Service providers

The area of service provision is one which has little coverage in the current debate on the terms on which the UK will leave the EU. Currently EU citizens can come to the UK as service providers for temporary periods. The right of service provision also extends to EU companies wishing to send staff to the UK for temporary periods, including established non-EU staff who are lawfully resident in the EU and employed by the EU service provider. The concept of service provision covers not only contractual service suppliers and independent professionals (i.e. self-employed individuals) who do not have a subsidiary or business in the state where the service is being provided, but also key personnel being transferred between subsidiaries on an intra-company transfer basis. In this section, we will not discuss key personnel, as they generally fall within the Tier 2 (Intra Company Transfer) (see above).

The EU remains the largest destination for the export of UK services, totalling almost £60 billion in 2015. Because the UK economy is predominantly a service economy, and many UK businesses send staff to other EU member states to provide those services, it is essential for the UK to achieve a good deal which will preserve these rights as far as possible. It will be damaging to British companies if employees who are sent into EU countries for short periods become subject to the national immigration laws of each EU country and limited to a stay of 90 days out of every 180 days (the Schengen rules which apply to all non-EU visitors).

The following solutions are available:

- **Retain free movement of EU service providers.** It may be possible to retain free movement of EU service providers to cover both employees of EU businesses and independent professionals coming to provide services. This would require additional mechanisms, such as a greater number of labour and work site inspections, to ensure that service providers do remain based and paid in an EU country, that the service is temporary, that the EU citizens are not joining the UK labour market and that there is no “social dumping”. There would need to be clear definition of what services can be

provided. Imposing visa requirements on these service providers would lead to significant bureaucratic obstacles and delays. A simple online notification procedure (similar to the Limosa notification system in Belgium: https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html) could be introduced instead to provide some reassurance that there is an element of control in these movements.

- **Introduce a GATS/WTO + Service Provision visa.** This option would provide for temporary movement of EU citizens for a limited period (initially up to 12 months) and would cover contractual service providers and independent professionals. Simplified visa procedures should apply. In terms of who would be covered, provisions similar to (but more generous than) those in Article 10.8 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) could be applied.
- **Subject EU companies and citizens to the Tier 5 (Temporary Worker – International Agreement) GATS visa requirements** which would cover overseas contractual service providers with no corporate presence in the UK. In this scenario, a UK sponsor would be required to take on sponsorship responsibilities for each service provider. This visa category has been underused simply because service recipients (i.e. UK clients) have been unwilling to act as sponsors in these circumstances. For this reason the Tier 5 option would not, in our view, be appropriate.

Entrepreneurs and Self-employment

EU citizens currently benefit from the right of establishment contained in articles 49 to 56 of the Treaty on the Functioning of the European Union (TFEU). That right extends both to individuals wishing to establish businesses in the UK as sole traders or through companies and to EU companies wishing to set up branches and subsidiaries in the UK and where necessary transfer staff to those branches.

The current UK rules on the self-employed are extremely restrictive and are essentially limited to entrepreneurs with significant investment and to those (mainly in the creative and technology sectors where self-employment is most common) coming under Tier 1 (Exceptional Talent) category. The Tier 5 (Temporary Worker – Creative and sporting) route and the Permitted Paid Engagements Visitor route also permits temporary work for the self-employed under specific conditions.

Accession agreements with new EU countries have never placed restrictions on the self-employed – transitional provisions restricting access have always been directed at workers wishing to join the labour market. Indeed, self-employment under the right of establishment was seen as a way for pre-accession countries to achieve greater economic integration prior to joining the EU (see for example the Europe Agreements). So would continued access of self-employed EU citizens to the UK be a significant issue requiring new restrictions to be imposed?

The prospect of applying the current UK rules to self-employed EU citizens would be unwelcome. The current rules requires a significant financial investment which bears no relevance to the type of business being set up and the rates of refusal (over 60% globally) indicate that the scheme is failing to attract suitable candidates. It is also likely that the route will undergo significant change following the Migration Advisory Committee's recommendations in 2015. While no new proposals have yet been published, it would be sensible for any scheme to also cover EU citizens.

So what alternatives are there? Realistically, there is little scope for arguing that full free movement of the self-employed could be retained. This is partly because many of the lower skilled or technical roles which have such a central part of the immigration debate (for example in construction) are undertaken by EU citizens who are self-employed. In addition, the growth of the "gig economy" has led to greater blurring of the boundaries between employed and self-employed and there is a risk that self-employment could be seen as a back door to the UK labour market.

Any new scheme for EU nationals should be at least as generous as the best on offer to non-EU citizens wishing to be self-employed in the EU. The UK could draw on existing or historical examples including:

- **Europe Agreements** (association agreements between the EU and the Central and Eastern European countries which joined in 2004 and 2007) – an approach modelled on these agreements would provide a right of establishment identical to that under the TFEU but would enable the UK to subject EU citizens to prior visa requirements.
- **EC-Turkey Association Agreement (ECAA)** – this allows Turkish nationals to set up as self-employed under fairly generous historical national rules (by virtue of the standstill clause on freedom of establishment in the agreement).
- **Agreements between individual EU member states and non-EU countries** – examples include the simplified and more generous provisions on self-employment for US and Japanese nationals under the Netherlands "friendship" treaties.

The scheme should have no or minimal capital requirements but could require a business plan and include provisions for ensuring that EU citizens are genuinely self-employed. It should offer the possibility of acquiring permanent residence or settlement. The scheme should not be overly prescriptive, as is the case with ECAA and Tier 1 (Entrepreneur) applications which have discretionary and subjective criteria such as "genuine entrepreneur" and "viable business". A generous reciprocal scheme would also ensure that British citizens wishing to establish themselves in the EU would not be in a worse position than other non-EU nationals.

Conclusion

Ending free movement means rethinking employment migration policy. The best approach will be one which gives EU citizens preferential access to the UK labour market – and the same for British citizens wishing to work in the EU. New schemes will also be needed for the self-employed and service providers.

The key question is when such new schemes would take effect. The EU may not want to start negotiations on a trade deal (which would typically include a chapter on free movement and service provision for both UK and EU citizens) until after the UK leaves the EU. It may be that free movement will have to continue until a deal is struck. If so, there will need to be a transition roadmap setting out when restrictions are expected to be introduced.

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