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WALES AND THE EU

FREE MOVEMENT OF PERSONS



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This report is one of a series examining the implications of EU membership for Wales, and the legal and policy considerations presented by the EU referendum vote. The full set can be found at <http://sites.cardiff.ac.uk/wgc/eu/>

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FREE MOVEMENT OF PERSONS

In the referendum on membership of the EU on 23rd June 2016 the UK voted to leave the European Union. This paper, produced by Cardiff University School of Law and Politics, outlines the specific implications for Wales of the change in the UK's relationship with the EU in the area of Free Movement of Persons. It explains what the EU's powers are in this area, those of the UK Government and of authorities in Wales. It will establish where those powers and responsibilities could return to on Brexit and under alternative models for a UK-EU relationship, providing an impartial overview of the issues from a Welsh perspective.

IN BRIEF

- The principle of free movement of people is a key element of the internal market that ensures all EU citizens have the right to work, live and study in any of the 28 Member States, the European Economic Area (EEA) states and Switzerland. It has evolved from an economic (i.e. applying to workers' rights only) to increasingly social or human-rights-based approach.
- Economically active people and their families are granted the broadest set of rights under the free movement provisions. However, some level of mobility and non-discrimination rights apply to all EU citizens and their family members; these rights have gradually increased over time with the creation of EU citizenship and the strengthening of the principle of non-discrimination.
- There are limitations to free movement and non-discrimination rights based upon nationality and where justified on the base of public policy, public health or public security reasons.
- The UK is able to, and has chosen to, opt-out of other areas of EU immigration policy and legislation such as border control and immigration of non-EU nationals and asylum. **The UK retains full control of its own borders.**

- **The UK Government is responsible for securing the UK border and controlling immigration, considering applications to enter and stay in the UK and issuing passports and visas.** Immigration is not a devolved competence and Welsh Government has no powers in this area.
- The EU and Member States share competence in the *coordination* of social security schemes. **The design, organization and funding of the social security schemes is however Member State competence.** Wales has no competence in this area.
- Since the economic downturn in 2008 more international migrants have been leaving Wales than arriving.¹ The benefits and costs of immigration in the UK are not evenly distributed and have led to discussions as to whether a devolved immigration policy could allow different parts of the country or different sectors to act in accordance with different interests.²
- EEA immigrants had made a fiscal contribution to the UK of £4.4bn between 1995 and 2011 and contributed £20bn to the economy between 2001 and 2011. Access to non-UK labour is considered crucial for some sectors of the UK economy, and any abrupt reduction is likely to cause disruption in those sectors.³
- Leaving the EU could allow the UK to adopt a more selective immigration policy and exercise additional control over entry into the UK. However, this is dependent upon the future UK-EU relationship that is negotiated. Member States of the European Economic Area (EEA) are subject to Free Movement principles to the same degree as EU Member States, in exchange for access to the Single Market. In the Brexit negotiations, future access to the single market will need to be clearly balanced against the requirement to respond to the public's concern over free movement and immigration.
- The real driver for EU migration is the open and successful nature of the UK economy and wage differentials between the UK and other EU Member States. Any impact on levels of migration is likely to be slow, partial, uncertain and indirect. Developments are likely to play out however against a backdrop of falling in-migration resulting from Brexit and its economic consequences.

¹ <http://gov.wales/statistics-and-research/migration-statistics/?lang=en>

² <http://www.newstatesman.com/politics/staggers/2016/10/how-devolved-immigration-policy-could-work-brexit-britain>

³ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

WHAT DOES THE EU DO IN THIS AREA?

The principle of free movement of people ensures that ***nationals of all countries participating in the single market*** are able to work, live and study in any of the 28 EU Member States, the European Economic Area (EEA) states and Switzerland. It is a key facet of the internal market that aims to ensure optimum mobility and location of the factors of production, including labour. It has evolved, since the Maastricht Treaty, from an economic principle that concerned the free movement of labour, or workers, to a more social or human-rights based approach to ensuring equal treatment of all EU citizens. People who are not economically active in their own right are largely not provided for under the original Treaty provisions. They have gradually come to be covered through the creation of EU citizenship in 1993 and under secondary legislation, such as the 2004 Citizens' Rights Directive (2004/58/EC). Nevertheless, the right to free movement is not absolute and limitations apply.

The Treaty aims to attain an internal market (Article 26 TFEU) - 'an area without internal frontiers in which the **free movement of goods, persons, services and capital** is ensured'. Article 3.2 TEU states that the Union will 'offer its citizens ... an area without internal frontiers in which free movement of persons is ensured'.

The right to free movement given to European citizens is also contained in the Charter of Fundamental Rights which since the 2009 Lisbon Treaty is legally binding. Its preamble states that the Union "places the individual at the heart of its actions by introducing Union citizenship and by creating a space of freedom, security and justice."

WORKERS

The main Treaty provision on the **free movement of workers** is Article 45 TFEU which provides for workers to move freely to other Member States to accept employment offers and to remain there during *and following* their working life.

The concept of worker is determined by EU, not national, law.⁴ CJEU case law⁵ establishes that the associated rights are dependent upon the person:

- being engaged in or moving to fulfil an economic need and undertake economic activity that is *effective and genuine* rather than *marginal and ancillary*, and
- holding nationality of one of the Member States.

⁴ Case 75/63 Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten

⁵ Case C-197/87 Steymann, Case 53/81 Levin v Straatssecretaris van Justitie, Case 66/85 Laurie-Blum v Land Baden-Wurttemberg

The determination of the latter is a matter for national law and Member States retain sovereignty in relation to their own nationality.⁶

EU national temporary workers, frontier workers and seasonal workers all fall within the scope of the Treaty provisions on free movement of workers. **Self-employment** and the provision of services in other Member States are covered under Article 49 and 56 of the TFEU respectively. The provisions on workers and on the self-employed are subject to parallel interpretation⁷ and hence the legal distinction does not tend to have practical implications. **Retirees** can retain their legal status and rights as a 'worker' in the territory of a Member State where they have been employed (additional requirements apply to those who move to another Member State for retirement).⁸ **Jobseekers** come within the scope of rules on free movement of workers although Member States have the right under certain conditions to offer reduced access to social advantages (e.g. benefits and allowances) compared with workers and their families.

The **mutual recognition of professional qualifications** is governed by Directive 2013/55/EC and the European Professional Card, both of which promotes automatic recognition of professional experience across the EU enabling the free movement of professional workers.⁹

NON-ECONOMICALLY ACTIVE

The rights of **family members** to move with and join an EU worker exercising their free movement rights was established early on in secondary legislation, with the most extensive rights granted to the spouse/partner, children and elderly dependent relatives.¹⁰ These provisions cover both EU citizens and Third Country Nationals (those without EU citizenship).

In relation to EU citizens the rights accorded to family members have become less important as the mobility and residence rights accorded to non-economically active EU citizens has gradually widened. Legislation in the 1990s saw free movement rights

⁶ The declaration of nationality attached to the TEU states: "wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned".

⁷ C-363/89 (1992) Roux v the Belgian State

⁸ Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity was repealed and bought under the Citizens' Rights Directive 2004/58/EC.

⁹ https://ec.europa.eu/growth/single-market/services/free-movement-professionals/european-professional-card_en

¹⁰ REGULATION (EEC) No 1612/68 OF THE COUNCIL of 15 October 1968 on freedom of movement for workers within the Community

extended to cover **students**¹¹ and **people of independent means, including retired people**.

Since the Maastricht Treaty **citizenship rights** have been included in the Treaties (Articles 20 TFEU) and subsequently in the Citizens' Rights Directive (Directive 2004/58).¹² All individuals who hold the nationality of one of the Member States are citizens of the Union. These provisions can be read in conjunction with the **non-discrimination rights** in Articles 18 and 19 TFEU which have been strengthened from the original Treaty provisions and influenced the development and consolidation of EU secondary legislation around the free movement of persons.¹³ The rights of movement, residence and non-discrimination have been expanded and strengthened with economic status of increasingly less significance. However, there are still areas where the economic status of the individual matters, and, in most cases, the rights introduced by EU citizenship are *supplementary to* rather than substituting or superseding rights.¹⁴

THIRD COUNTRY NATIONALS

Whilst the rights of Third Country Nationals (TCN) to enter and reside in EU Member States is mostly determined by national immigration law, EU law increasingly encroaches upon this domain, albeit subject to derogations and opt-outs from certain Member States. **The UK participates selectively in EU policy on asylum and immigration which means that whilst it is not obliged to take on EU commitments it can opt in to measures that affect it. The level of non-European Economic Area (EEA) migration into the UK is controlled by the UK and governed by UK domestic law.**

TCNs do not enjoy free movement rights between Member States in most cases and have no right of admission or protection from expulsion under EU law. Enjoyment of any EU right is dependent upon a Member State's decision on admission, residence and employment of a TCN in its territory.

The exceptions are:

¹¹ Council Directive 90/366/EEC on the right of residence for students, bought under the Citizens Rights Directive

¹² see also Regulation (EU) 492/11 and the Enforcement Directive 2014/54/EC

¹³ The Free Movement Directive is the key piece of secondary legislation in this area – Directive 2004/38/EC. It is implemented in the UK via the Immigration (EEA) Regulations 2006.

¹⁴ Craig, P and De Burca, G EU Law, Text, cases and Materials

- TCN who are family members of EU citizens who derive mobility and non-discrimination rights from EU law.¹⁵
- Third Country Nationals who hold the nationality of a Member State are treated in other Member States as Union citizens, or if economically active, as workers or self-employed persons.
- Third Country nationals lawfully present in one Member State may be posted to work in another Member State by their employer.
- Students and researchers.
- **Blue Card Holders.** The EU Blue Card is Europe's equivalent to the US Green Card and is a work and residence permit for skilled non-EU/EEA nationals with a binding job offer. It is demand-driven and provides for equal treatment, free movement within Schengen, entitlement to socio-economic rights and right to accrue permanent residence. **The UK (Denmark and Ireland) do not participate in the Blue Card scheme.**¹⁶

Other relevant legal provisions to TCN relate to **long term residence status** and **seasonal workers**. Directive 2003/109 sets out the terms and conditions for granting — and withdrawing — long-term residence status to TCN living legally in a European Union (EU) country for at least 5 years. In order to obtain this status, and equal rights to nationals in most cases, the TCN must prove they have: sufficient resources to live without recourse to the social assistance system and sickness insurance for themselves and any family members. A second Member State is not able to refuse residence and associated rights to the long-term resident TCN except on the basis of an actual threat to public security, public policy and public health. In response to the need for flexibility in immigration policy to meet certain specific labour demands, Directive 2014/36 establishes the conditions of entry and stay of TCNs as seasonal workers i.e. a stay in a Member State ‘to carry out an activity dependent on the passing of the seasons’, under one or more fixed-term work contracts. **The UK has also not opted in to either of these two immigration directives.**

¹⁵ Article 7.2 of Regulation 492/2011 and Article 3.2 of the Citizens Rights Directive. However, they may still be required to obtain a visa if so required under the Visas Regulation (539/2001) or national law, although these will be granted free of charge as soon as possible and through an accelerated procedure.

¹⁶ Council Directive 2009/50/EC: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A14573>.

The revision of the scheme was proposed in 2016. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160607/factsheet_revision_eu_blue_card_en.pdf

The EU has a number of international agreements with third-countries that give rights to their nationals although generally they do not cover an entitlement to enter a country or access its labour market. The most extensive agreement is with the European Economic Area (EEA), others include agreements with countries such as Morocco, Algeria and Turkey on migrant workers and social security that grant certain rights after residency for a prescribed period of time.

Illegal immigration and human trafficking are managed through a common EU-wide Return action programme.

THE SCOPE OF FREE MOVEMENT RIGHTS

i) Right to entry and residence

All EU citizens and EEA nationals (and their family members) have the **'right to move and reside freely within the territory of the Member States' unconditionally across the EEA for a period of up to 3 months** on the production of a travel document (Article 6, Citizens Directive 2004/58). There are limitations to equal treatment and access to benefits in that period however, with the host State not obliged under EU law to grant social assistance to economically inactive people or students during the first three months of their stay.¹⁷

The rights of free movement and residence are focused on those who are economically active or self-sufficient - to enjoy residence beyond three months the individual must be either:

- a worker,
- a self-employed person,
- an economically self-sufficient person with comprehensive sickness insurance,
- a student with sufficient resources and comprehensive sickness insurance,
- a job seeker with a genuine chance of being engaged.

ii) Right to work

Under the provisions of the Treaty and the Citizens Directive, EU nationals (and their family members) have the right to access employment on a non-discriminatory basis as a worker, a self-employed person or as the provider of services.

iii) The right to bring family members

¹⁷ <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/82.pdf>

The right of free movement includes the right to bring family members, irrespective of the nationality of those family members or their level of income. The family members also have the right to work.

iv) The right to equal treatment

Freedom of movement rights are underpinned, in both the Treaty rules and secondary legislation, by the principle of non-discrimination on the grounds of nationality – migrants and their family members must enjoy the same treatment as nationals in a comparable situation. The right to equal treatment covers access to employment, working conditions and pay, social and tax advantages and access to housing. Access to health systems includes emergency treatment for short-term temporary visits on the same basis that it is provided by the host state to its own residents under the European Health Insurance Card (EHIC) system. EU/EEA countries are also required to reimburse the cost of healthcare which is provided to categories of people for whom they are responsible when residing in another EEA country, e.g. UK state pensioners and their dependents who reside elsewhere in the EEA. In both cases, costs are reimbursed by the home Member State's social security system.¹⁸

a. Social security coordination

Since the 1957 Treaty of Rome there has been a Treaty reference to social security intended to complement the provisions on free movement¹⁹ and negate varying national social security rules acting as a barrier or disincentive to free movement of workers. The aim is to protect social security entitlements as if they were accrued in the same Member State over the course of the life of an individual exercising their right to free movement.

National systems and legislation are not harmonised across the EU; the EU and Member States share competence only in the *coordination* of social security schemes. **The design, organization and funding of the social security schemes is Member State competence** - Member States are free to determine the details of their own systems i.e. what benefits they will provide, entitlement and what level of contribution.²⁰ Whilst they cannot discriminate, directly or indirectly, against EU citizens exercising their rights of free movement, **free movement rights do not**

¹⁸ In 2012/13 the UK paid a net £805 million to other EEA countries to cover healthcare costs of UK citizens. The NHS has the ability to seek reimbursement for the cost of health care provided to EEA citizens.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224715/2901083_EU-Health_acc.pdf

¹⁹ now Article 48 TFEU

²⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarket_Free_MovementPersons.pdf

equate to unrestricted access to benefits in the host country. Commentators consider recent CJEU judgements such as *Dano* and *Alimanovic* as having taken a stance against ‘benefit tourism’ or ‘welfare tourism’²¹ and to mean that Member States do not have to ensure that *economically inactive* EU citizens enjoy the same rights or ‘social assistance’ enjoyed by other citizens.²²

An ‘emergency brake’ procedure was also created under the Lisbon Treaty (Art.48 TFEU) where a Member State can claim that a draft (i.e. new) piece of legislation affects its social security system or ‘financial balance’. The matter is referred to the Council and the legislation is suspended whilst the Council decides what action should be taken.

v) Right to accrue permanent residence

Following five years of lawful residence in the host Member State an EU citizen or family member can achieve the status of permanent residency.

vi) Limitations

There are important limitations to the free movement of persons’ provisions. A recent House of Commons report shows a rejection rate of nearly 30% for applications from EU nationals for permanent residence.²³

Firstly, the Treaty provisions do not allow for a general unrestricted right to reside and claim benefits but rather protect against individuals being an unreasonable burden upon the host Member State.

Secondly, Article 45 TFEU limits the scope of the rights ‘on **the grounds of public policy, public security or public health**’ where justified, and **in regard to the public service** (i.e. the ‘exercise of official authority’). However, restrictions ‘shall not be invoked to service economic ends’²⁴, must meet the requirement of **proportionality** in relation to the objective pursued, and cannot be incompatible with the freedoms conferred by the Treaties.²⁵

²¹ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.VrY8C1mWGOw>;
<http://europeanlawblog.eu/?p=2913#sthash.xZ1tOMBs.dpuf>

²² It is the social security aspect that was addressed in David Cameron’s EU renegotiation package although in relation to the *economically active* through the proposal to restrict in-work benefits to EEA migrants. The deal agreed, is in fact considered to be the first time EU free movement law has been reversed rather than extended. <http://openeurope.org.uk/today/blog/4259/>

²³ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

²⁴ Article 27 Citizens Directive

²⁵ A national rule is considered justified when it is non-discriminatory on its face, where there is an overriding ground of public interest, capable of achieving the goal pursued, proportionate and respect the general principles of EU law. (Case C-325/08 *Olympique Lyonnais*)

Thirdly, third country nationals (non-EU citizens) do not have free movement rights unless they have a family relationship with an EU citizen²⁶ or fall under the Long-Term Residents Directive 2003/109. Even then EU freedoms cannot be used in a way as to perpetrate fraud or evade the application of national immigration law e.g. in the case of marriages of convenience.²⁷

Finally, the European Court of Justice (CJEU) has ruled that the 'internal market' does not require the abolition of border controls by Member States²⁸ meaning that the UK has been able to opt-out of certain Treaty provisions in the field of immigration policy.

SCHENGEN

The **Schengen agreement** abolishes internal border controls and creates a borderless travel zone.²⁹ The UK participates in the policing and security aspects of Schengen³⁰ but has an opt-out regarding the abolition of border controls; its position is reflected in a special Protocol to the EU Treaties.³¹ **The UK retains its border controls on movement from within the EU and the right to check passengers' travel documents. However, the UK but cannot refuse entry to EU citizens and their family members unless there is an indication they are wanted or travelling with fake/stolen documents.**³² Norway, Iceland, Switzerland and Liechtenstein have associate Schengen status and their free movement rights are comparable to EU Member States.³³

The 1986 Single European Act changed Member State voting requirements in relation to most Single Market measures from unanimity of all national governments to a qualified majority in Council, to avoid blocking Member State vetoes which had previously stalled cooperation in this area. The European Parliament also became a

²⁶ A spouse, partner (depending on legislation of the host state), children and other descendents who are dependent or under 21, and parents or other ascendants who are dependent.

²⁷ Case C370/90 Singh

²⁸ Case C378/97 Wijsenbeek

²⁹ Initially only signed by 5 of the original 6 founding members of the EU, the Schengen acquis became part of the Treaties in 1999. Since the EU enlargement of 2004 new Member States are no longer able to opt out of the protocol; Ireland, the UK and Denmark previously negotiated selective 'opt-outs' from Schengen and are not full members.

³⁰ Council Decision 2000/365/EC

³¹ Article 4 to Protocol (No 19) to the TEU and TFEU provides that the UK may request to take part in some or all provisions of the Schengen acquis. Article 5 of the Protocol provides that the UK is deemed to be in any measures building on those it already participates in unless, within three months of the publication of the proposal or initiative, it "opt-outs".

³² <http://www.migrationobservatory.ox.ac.uk/resources/primers/the-uk-the-common-european-asylum-system-and-eu-immigration-law/>; <http://ukandeu.ac.uk/the-uk-and-the-schengen-system/>

³³ As a result of the free movement principle UK rules for labour migration for European Economic Area (EEA) and non-EEA nationals differ. EEA (and Swiss) nationals are entitled to work in the UK without seeking permission; economic migrants from outside EEA and Switzerland who want to work in the UK need approval under a Points Based System.

co-legislator with the Council i.e. it must also agree to the law if it is to enter into force. However, citizenship rights and the harmonization of national legislation in the field of social security and protection remain subject to **unanimity** in the Council.³⁴

WHAT POWERS DOES THE UK AND WALES HAVE IN THIS AREA?

Free movement of persons / the internal market is an area of ‘shared competence’ – both the EU and Member States have the power to act but where the EU has enacted legislation the Member States must act in accordance with that legislation. Any legislation adopted by the Welsh Assembly /action taken by Welsh ministers and UK Government must comply with EU law obligations,³⁵ and it may be set aside if it conflicts with the free movement obligations.

The UK Government is responsible for securing the UK border and controlling immigration, considering applications to enter and stay in the UK and issuing passports and visas. As it is the Member State that determines nationality, it is the Member States, rather than the EU, that are the gatekeepers to Union citizenship and free movement rights.³⁶

The UK is not subject to other areas of EU immigration policy and legislation on border control and immigration of non-EU nationals and asylum. The UK **retains full control of its own borders**, it is not part of the internal border-free Schengen Area, Schengen visas and border controls law. On immigration of non-EU nationals and asylum, the UK is not automatically bound but participates in measures selectively, deciding on a case by case basis whether to opt in³⁷ OpenEurope explain states that ‘the issue of ‘border control’ is a red herring as .. the UK can apply controls at its border’.³⁸ The UK has always been able to adjust its immigration policy in response to national circumstances. At EU level it looks to *co-operate* with partners rather than enforce legislative solutions.³⁹

Immigration is not a devolved competence and Welsh Government has no powers in this area. Wales also has no legislative competence in social security and benefits -

³⁴ Article 153 TFEU

³⁵ Given effect in UK legislation by the Immigration (EEA) Regulations, 2016.

³⁶ Barnard, C, 2016, The Substantive Law of the EU, The Four Freedoms.

³⁷ For example, the UK has not opted in to measures facilitating legal migration of third country (non-EU) migrants <http://www.parliament.uk/briefing-papers/RP13-42.pdf>

³⁸ <http://openeurope.org.uk/today/blog/4259/>

³⁹ <http://www.parliament.uk/briefing-papers/RP13-42.pdf>

under schedule 7.15 of GOWA they are specifically excluded. However, Welsh Government does have responsibility to migrants in Wales however under devolved matters such as housing, health and education. Options for migrants are likely to depend upon their immigration status and associated legal rights as well as their finances. For example, the majority of migrants to the UK have restricted access to social housing; where they may be considered eligible for housing assistance they have to qualify in line with a local authority's housing allocation scheme, or meet the criteria under which a statutory duty arises to households that are homeless.⁴⁰

WHERE COULD POWER AND RESPONSIBILITY RETURN TO ON BREXIT?

The UK government would therefore regain any, and all, competences in this area on a UK withdrawal from the EU. Changes to the immigration system will be required following Brexit and **Wales is likely to have limited opportunity to feed into the development of a new UK immigration bill although a shared, intergovernmental approach would be recommended.** However, some parts of the UK have posited the option of differential regional or sectoral immigration arrangements in order to meet local needs and so a geographically differentiated solution could be possible within the wider UK framework. An all-party parliamentary group has called for parts of immigration policy to be devolved, enabling Wales to set its own visa and migrant quotas.⁴¹

The details of future immigration policy will be mitigated by the relationship established with the EU and depend on what is negotiated. Immigration with the EU and wider would have to be regulated somehow and it is unclear whether the new relationships would be based on current models such as the EEA or whether a different form of relationship would be negotiated.

There is no legal requirement for free movement rights to be protected once the UK leaves the EU. Any agreement to protect EU free movement rights could be expected to require reciprocal arrangements for UK citizens in other EU Member States. The current UK process by which EU nationals may apply for permanent residence is

⁴⁰ <http://www.wsmp.org.uk/documents/wsmp/WSMP%20Info/Migration%20and%20Health%20in%20Wales%20English%20Final.pdf>

⁴¹ <http://www.bbc.co.uk/news/uk-wales-politics-38507803>

considered disproportionately burdensome by the House of Commons Exiting the EU Committee and not fit for purpose for clarifying the status of more than 3 million EU migrants residing in the UK.⁴²

ISSUES FOR WALES IN RELATION TO REMAINING OR LEAVING THE EU

In the run-up to the referendum it was clear that the UK public perceived immigration to the UK as among the most important issues facing the country. In August 2015, this was true of half (50%) of the public surveyed in the Economist/ Ipsos MORI Issues poll, whilst a third (32%) thought it was the single most important issue facing the country – the highest level of concern ever recorded.⁴³ Other sources claimed more than three-quarters of the UK population wanted to see a reduction in immigration and that these concerns became increasingly linked to the UK's membership of the EU.⁴⁴

MIGRATION STATISTICS

In terms of numbers, people migrating to and from the UK were roughly in balance for much of the twentieth century. From the 1960s to the early 1990s the number of emigrants was often greater than the number of immigrants, then in 1994 this pattern was reversed. Since 1998 immigrants to the UK have exceeded emigrants by more than 100,000 every year. House of Commons research shows that in 2014, 13% of people migrating to the UK were British nationals, 32% were nationals of other EU countries, and 45% were nationals of non-EU countries, meaning that less than half of migrants entering the UK were subject to immigration control.⁴⁵ The UK is the second of three EU28 countries with net inward migration of foreign nationals in the hundreds of thousands and in terms of the number of foreign-national residents (in both cases, after Germany and just ahead of Italy). It is also second to Germany of the EU28 countries in terms of the number of foreign-born residents. However, when measured as a proportion of the total population, foreign nationals were 7.8% of the UK population and foreign-born people were 12.5% of the UK population which places the UK 11th among the 28 EU countries on both these measures.⁴⁶ According to the

⁴² <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

⁴³ <https://www.ipsos-mori.com/researchpublications/researcharchive/3614/EconomistIpsos-MORI-August-2015-Issues-Index.aspx>

⁴⁴ <http://www.centreonconstitutionalchange.ac.uk/publications/e-books/britains-decision>

⁴⁵ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077>

⁴⁶ Ibid.

Migration Observatory at Oxford University, roughly 8 million foreign-born migrants live in the UK of which almost 3 million are EU citizens.

Prior to 2004, enlargement or accession of new Member States to the EU had not seen substantial movement of people; it would be following the accession of the eight Central and Eastern European (the A-8) countries in 2004 that movement into the UK became more significant. Despite the possibility for EU Member States to restrict labour market access to new acceding members for up to 7 years, the UK (and Ireland and Sweden) would decide not to on the basis of the potential benefits of labour migration. Immigration increased from 45,000 in 2004 to over 100,000 by 2007/8 from A8 countries. When Bulgaria and Romania joined in 2007, none of the EU Member States fully opened their labour markets to citizens of the two new members. Temporary restrictions were lifted however in January 2014 meaning citizens from both these countries were also able to enjoy free movement rights.⁴⁷ EU immigration to the UK currently stands at roughly 250,000 individuals per year although roughly 70,000 leave each year giving a net figure of 180,000.⁴⁸ Overall levels of immigration are higher than ever recorded despite the Conservative government's pledge (rescinded under PM Theresa May) to reduce immigration to only tens of thousands.⁴⁹

In terms of **EU migration to Wales**, ONS figures show that Wales has one of the lowest regional percentages of its population born abroad (roughly 170,000 people - 5.9% of the total), second only to the North East of England.⁵⁰ The largest numbers are from Poland, India, Germany, Ireland and the Philippines, with a concentration of central and eastern European migrant workers in Carmarthenshire (Llanelli), Cardiff, Newport and Wrexham.⁵¹ In line with UK migration patterns, the Welsh Migration Partnership (WMP) notes that there has only been a net inflow of international migrants to Wales since 1994 but that since the economic downturn in 2008 more international migrants have been leaving Wales than arriving. From mid-1998 to 2011 there was an average net inflow of just over 9 thousand people per year; in 2011 there was a net outflow of international migrants for the first time since 1993, with those leaving exceeding those moving to Wales by around 1500 persons.⁵²

⁴⁷ <http://www.bbc.co.uk/news/world-europe-25237742>

⁴⁸ <http://www.centreonconstitutionalchange.ac.uk/publications/e-books/britains-decision>

⁴⁹ <http://www.bbc.co.uk/news/uk-34456622>

⁵⁰ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077>

⁵¹ <http://gov.wales/statistics-and-research/migration-statistics/?lang=en>

⁵² Ibid.

IMPACT OF MIGRATION

The majority of research on the impact of the high levels of migration from Eastern Europe following the 2004 EU enlargement in fact tend to show positive impacts from intra-EU mobility. At EU level, the effect of intra-EU migration following EU enlargement was a gain of 0.3% of GDP, equivalent to an income gain of around €30 billion. A European Commission paper concludes that ‘the overall impact of post-enlargement mobility flows has been positive, with any negative effects for individual countries or for specific skill groups generally being both small in magnitude and time limited’.⁵³

A Home Office Review of the impact of migration on UK native employment after the 2004 enlargement found little evidence of a statistically significant impact from EU migration on UK native employment, and that where any displacement effect occurred from a particular cohort of migrants, it was likely to dissipate or decline over time. Access to non-UK labour is, in fact, considered crucial for certain sectors. In 2014 there were 34,000 non UK-born workers employed in the agriculture sector and this figure excludes significant numbers of seasonal workers.⁵⁴ The *Economist* identifies (skilled) construction and food businesses as additional sectors of the UK economy that are reliant on a supply of migrant labour to meet demand.⁵⁵

A University College London (UCL) report on the fiscal effects of immigration to the UK concluded that EEA immigrants had made a fiscal contribution of £4.4bn between 1995 and 2011 and contributed £20bn to the economy between 2001 and 2011. EEA migrants since 2000 were 43% less likely than British people to receive state benefits or tax credits and contributed 34% more in taxes than they received in benefits between 2001-2011⁵⁶. On the other hand, MigrationWatch UK, a pressure group that believes present immigration is neither sustainable nor well managed, claim that EU and non-EU immigrants have cost the taxpayer more than £22 million a day since the mid-1990s or a total of more than £140 billion. The organisation claims the cost to the UK economy in 2011 was equivalent to £3,000 per migrant⁵⁷ and that leaving the EU could reduce net migration by 100,000 people a year. House of Commons Research outlines that the UK's benefit system does not record nationality and hence “there is

⁵³ http://ec.europa.eu/economy_finance/publications/publication13389_en.pdf

⁵⁴ <http://www.nfuonline.com/news/eu-referendum/qa-the-eu/>

⁵⁵ <http://www.economist.com/news/britain/21652356-even-if-britain-votes-leave-eu-its-european-migrants-may-stick-around-what-will-become>

⁵⁶ <http://www.bbc.co.uk/news/business-29910497>

<http://www.economist.com/news/britain/21631076-rather-lot-according-new-piece-research-what-have-immigrants-ever-done-us>

⁵⁷ <http://www.migrationwatchuk.org/briefing-paper/329>

no complete picture of the number of migrants to the UK or foreign nationals in the UK who receive UK social security benefits and tax credits, or the cost of this”⁵⁸.

The Government’s Balance of Competences Review on the Free Movement of People found that “none of the evidence [...] was able to point to specific research or analysis on the importance of access to social security benefits in the decision to migrate”⁵⁹. It has been suggested that the real driver for migration is the open and successful nature of the UK economy and wage differentials between the UK and other EU member states, rather than any eligibility for in-work benefits.⁶⁰

Research on EU migrants to Wales shows no associated increase in unemployment of UK nationals, with newcomers tending to work in sectors and regions with a high level of hard-to-fill vacancies.⁶¹ PPIW identify the public services in Wales as particularly vulnerable to any reduction in EU migrants resulting from Brexit. About a third of the non-UK born people in Wales work in the public sector, some parts of which (the NHS and social care) are reliant upon overseas workers to fill staffing vacancies.⁶² International students are a huge boost to the Welsh economy, generating £530 million of export earnings in 2014, creating 7600 jobs and generating £400 million of GVA.⁶³ There were 5,460 EU students at Welsh universities in 2015/16, around 3.7% of the total.⁶⁴ The White Paper ‘Securing Wales’ future’ identified c.1360 EU national academic staff in Welsh Universities and the impact of any restriction of free movement of people on Wales’ ability to attract academic talent.⁶⁵ The paper recognized the dependence of a number of economic sectors in Wales upon EU migrants and their skills, specifically, life sciences and pharmaceuticals, construction, food and drink, veterinary surgery, health and social care and tourism.

⁵⁸ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7445>

⁵⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf#page=38

⁶⁰ <http://www.economist.com/news/britain/21679814-prime-ministers-raising-stakes-other-eu-governments-over-migrants-benefits>; <http://www.economist.com/news/europe/21679839-eu-faces-many-crises-one-them-unlike-all-rest-battling-britain>; <http://www.bbc.co.uk/news/world-europe-33655318>;

<http://www.independent.co.uk/news/uk/politics/eu-referendum-migrants-in-uk-say-david-camerons-plan-to-curb-benefits-will-not-affect-immigration-a6851621.html>

⁶¹ Wales Migration Partnership, 2013, Migration and Employment in Wales, Centre for Migration Policy Research (CMPR), Swansea University.

⁶² <http://ppiwi.org.uk/what-will-brexite-mean-for-wales/>

⁶³ https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%20B9%20Future_ENGLISH_WEB.pdf

⁶⁴ <http://www.bbc.co.uk/news/uk-wales-politics-39259690>

⁶⁵ https://beta.gov.wales/sites/default/files/2017-02/31139%20Securing%20Wales%20B9%20Future_Version%202_WEB.pdf

POST-BREXIT SCENARIOS

The impact on migration would depend on what type of future relationship was negotiated between the UK and EU and also a variety of different potential knock-on effects⁶⁶. Leaving the EU could have significant implications for the rights of *UK citizens* to travel to and live in EU Member States - figures for UK migrants in other EU countries, for example, show roughly the same number of Brits abroad (2.2 million) as EU migrants in the UK (2.4 million). Brexit and consequent repatriating migratory movement could lead to a simple balancing out of the numbers.⁶⁷ It is likely that EEA migrants already exercising their freedom of movement rights and economically active in the UK would be permitted to remain while they continue to exercise those rights, with the prospect of obtaining permanent residence or indefinite leave.⁶⁸ However existing laws do not guarantee permanent residence for this group: their **future status will depend on policy decisions by the UK government**. A recent House of Lords select committee report on the acquired rights of EU citizens in relation to Brexit concluded: “we recommend that the Government should change its policy and give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK post-Brexit. The overwhelming weight of the evidence we received points to this as morally the right thing to do. It would also have the advantage of striking a much-needed positive note for the start of the negotiations.”⁶⁹ This recommendation regarding a “unilateral decision to safeguard the rights of EU nationals living in the UK” was reiterated in a recent House of Commons committee report⁷⁰, as well as in the White Paper ‘Securing Wales’ Future’.

In the Brexit negotiations, future access to the single market will need to be clearly balanced against the requirement to respond to the public’s concern over free movement and immigration.⁷¹ Early statements by UK Government ministers signaled that ‘taking back control’ of immigration was one of the top four goals in the Brexit negotiations. For the UK to retain access to the Single Market following Brexit the UK would need to accept freedom of movement with EU leaders continuing to stress there will be no ‘Europe a la carte’ for the UK.⁷² The Visegrad or V4 countries (Hungary, Poland, the Czech Republic and Slovakia) have threatened to veto any UK-EU

⁶⁶ <https://fullfact.org/immigration/net-migration-fall-100000-uk-left-eu/>

⁶⁷ <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140204w0001.htm>;

<http://www.newstatesman.com/politics/2015/03/eu-explainer-easily-bored-cost-uk>

⁶⁸ <http://eulawanalysis.blogspot.co.uk/2014/07/what-would-happen-to-eu-nationals.html>

⁶⁹ http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/8203.htm#_idTextAnchor004

⁷⁰ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

⁷¹ <http://www.regents.ac.uk/media/1460304/SEE-Background-paper-final-Feb-2015.pdf>

⁷² <http://www.theguardian.com/politics/2016/jun/29/eu-leaders-begin-summit-talks-without-uk-for-first-time>

agreement that threatens the principle of free movement or undermines the position of their citizens living and working in the UK.⁷³

In January 2017, Theresa May's speech on the 12 guiding principles of Brexit included 'control of immigration' and specifically the number of people coming from the EU, and as a result taking the UK out of the Single Market.⁷⁴ The Government White Paper in February 2017 clarifies that the 'Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law, although there 'may be a phased process of implementation to prepare for the new arrangements'.⁷⁵

First Minister Carwyn Jones originally supported continued 'free movement of people' but this reference has since been dropped with emphasis placed on ensuring Welsh access to the single market for goods and services. Mark Drakeford outlined the 'preservation of as much free movement of people as possible to safeguard its value to such things as the NHS and higher education' in his ten points on Wales' position on Brexit.⁷⁶ The recent White Paper 'Securing Wales' Future' suggests a future UK system for reciprocal freedom of movement of people with the EU/EEA which, where not linked to studies or relating to persons of independent means, is linked to employment i.e involving the prior offer of a job or the ability to secure an offer within a short time of arrival in the country. The proposed system is broadly in line with current legal requirements under EU law.⁷⁷

ALTERNATIVE MODELS

Wales has no competence in external affairs and would therefore be able to participate in negotiations on future UK-EU relationships through internal channels such as the Joint Ministerial Committee (JMC).

In terms of alternative models for a UK-EU relationship, the possibilities are those of membership of the European Free Trade Association (EFTA) and then the European Economic Area (like Norway) or through a series of bilateral agreements (like Switzerland) or through a customs union approach (like Turkey). Member States of the European Economic Area (EEA) are subject to Free Movement principles to the

⁷³ <https://www.theguardian.com/politics/2016/sep/17/eastern-bloc-countries-will-uphold-citizens-rights-to-live-in-uk>

⁷⁴ <http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexite-speech-global-britain-eu-european-union-latest-a7531361.html>

⁷⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588948/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

⁷⁶ <http://www.iwa.wales/click/2016/11/priorities-democratic-dilemmas-brexite-looms/>

⁷⁷ https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf

same degree as EU Member States, in exchange for access to the Single Market. In an EEA scenario, access to the single market on current terms is therefore unlikely; realistically the UK could be *expected* to lose opt-outs such as that of the Schengen passport-free area in any future EEA/EFTA type relationship. Free movement of persons under the EEA Agreement however does not involve EU citizenship rights, is more limited in its operation, for example, immigration from other non-EU countries is outside the scope of the Agreement.⁷⁸ The EEA Agreement also includes ‘safeguard measures’ allowing the parties to take “appropriate measures” if serious “economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising” which arguably could be invoked to limit EU migration.⁷⁹ Liechtenstein has secured the right to impose quantitative limits on EU migration, but due to its size is unlikely to be considered a relevant model for Brexit negotiations. At the other end of the scale, Norway was the destination of twice as many EU migrants per head as the UK in 2013.

In terms of Switzerland, the Swiss Government is in the process of renegotiating their relationship with the EU within the context of a 2014 referendum in which the electorate voted to restrict immigration.⁸⁰ In July 2016, Switzerland was firmly advised by the European Commission that their single market access relies on their agreement to free movement of people and that their attempt to introduce EU worker quotas would lead to exclusion from the single market. In December 2016, the Swiss parliament voted for new restrictions on EU residents in the labour market but without the establishment of quotas.⁸¹ Switzerland currently has fewer protections against free movement of persons than the UK due to the opt-outs negotiated by the UK in an area which it considers sensitive to national sovereignty, as well as has far higher immigration figures per head of population than the UK. The Swiss model includes a ‘safeguard clause’ – the free movement of persons can be revisited in the event of ‘serious economic or social difficulties’, however this has never been invoked.⁸²

Alternative proposals such as a bilateral trade agreement with the EU along the lines of Canada could leave the UK with some access to the single market but without any immigration requirements. CEPS consider Deep and Comprehensive Free Trade

⁷⁸ A parallel to Article 79 TFEU on rights of non-EU citizens and related secondary legislation does not exist in the EEA Agreement. Articles 20-25 of the TFEU relating to EU citizenship have no parallel in the EEA agreement. <http://eulawanalysis.blogspot.co.uk/2016/07/free-movement-of-persons-in-european.html>

⁷⁹ <http://openeurope.org.uk/intelligence/immigration-and-justice/norway-and-switzerland/>

⁸⁰ <https://www.theguardian.com/world/2016/jul/03/eu-swiss-single-market-access-no-free-movement-citizens>; <https://www.theguardian.com/world/2016/sep/22/switzerland-votes-for-compromise-to-preserve-relations-with-eu>

⁸¹ <http://www.politico.eu/article/switzerland-retreats-from-migration-quotas-in-lesson-for-brexite/>

⁸² <https://www.ceps.eu/system/files/SR147%20ME%20Which%20model%20for%20Brexit.pdf>

Agreements such as that between the EU and Ukraine to offer the optimal model for the future UK-EU relationship. The Association Agreement allows for close integration on three internal market freedoms (goods, services, capital) but not for the fourth – free movement of people.⁸³ Where no agreement is reached regulating the UK-EU's future relationship or where the relationship reverts to WTO rules, UK immigration law alone would apply.⁸⁴

Jonathan Portes outlines an “EEA-minus” model which would involve “a bit more immigration control and a bit less single market.” In terms of free movement of persons this could involve limiting the number of EEA nationals who could legally work in the UK – through either the National Insurance number, the requirement for a visa or an existing job offer for example. A visa regime for EEA nationals is widely seen as being hugely disruptive for trade, tourism and travel, in all likelihood leading to reciprocal requirements on UK citizens' travel as well as imposing harsher requirements on European neighbours than those in place for US and Australian citizens.⁸⁵

Vote Leave argued for an immigration system with equal treatment of EU and non-EU nationals under an Australian points style, permitting work-related migration on the basis of skills, education and profession. This is similar to the Canadian model which rewards education, fluency in English and French and work experience and also the UK system in place for non-EU migrants. Whilst these models also enable a more employer and skills-needs led approach both systems have led to an increase in immigration, with Canada having the highest foreign-born population amongst the G8 countries.⁸⁶ Nevertheless, the Canadian regional approach is generally considered good practice in terms of integration, with immigrants more evenly spread across the country as regional governments are able to set region-specific requirements for immigration.

Scotland has argued for a ‘differentiated solution’ that would enable it to remain in the Single Market and continue to apply the four free movement principles, including that of free movement of persons.⁸⁷ London interests have also called for EU nationals working in the capital to be subject to a different entry/visa regime to ensure that post-Brexit economic decline is avoided and to recognise regional skills deficits and sector based strategies.⁸⁸ Both sets of proposals have tended to be considered unfeasible,

⁸³ Ibid.

⁸⁴ <http://www.ilpa.org.uk/data/resources/32123/16.05.10-ILPA-EU-referredum-position-paper-2-Free-movement-of-persons-and-the-single-market.pdf>

⁸⁵ <http://journals.sagepub.com/doi/full/10.1177/002795011623800111>

⁸⁶ <http://www.economist.com/news/americas/21638191-canada-used-prize-immigrants-who-would-make-good-citizens-now-people-job-offers-have>

⁸⁷ <http://www.gov.scot/Resource/0051/00512073.pdf>

⁸⁸ http://www.londonchamber.co.uk/lcc_public/article.asp?id=0&did=47&aid=8122&st=&oaid=-1

for legal, technical and political reasons and have met with strong opposition from EU Member States with regional nationalisms.⁸⁹ Questions have been raised in terms of how the system would be managed in relation to migrants switching region or employment or living and working on alternate sides of a UK internal border. In late 2016 the UK Government suggested it would not consider a regionally differentiated approach, arguing that different immigration laws would complicate the system and cause difficulties for employers operating in more than one part of the UK.⁹⁰ Nevertheless an all-party parliamentary group has since called for some devolution under immigration policy and Plaid Cymru have been quick to suggest a Welsh visa system that would enable Wales to set its own visas and migration quotas in order to continue to attract high-skilled workers from around the world.⁹¹ The House of Commons Exiting the EU Committee recommended the UK Government should respond to the proposals from the devolved governments and from London for a geographic element to future immigration policy as speedily and fully as possible.⁹²

Generally, most observers recognize any impact on levels of migration is likely to be slow, partial, uncertain and indirect⁹³. Restricting access of EEA migrants moving forwards is likely to be problematic especially in the transition period when the UK will need to determine the status of EU migrants currently and previously resident in the country. Developments are likely to play out however against a backdrop of falling in-migration simply as a result of Brexit and its economic consequences.⁹⁴ The drop in the value of sterling since the referendum means earnings in the UK compared with those at home are no longer so lucrative for potential EU migrants,⁹⁵ whilst Brexit-related uncertainty leads to legal and psychological reasons for reduced in-migration.⁹⁶

More realistic inroads may occur as a result of limiting the broader rights of immigrants such as rights to access welfare benefits and public services on an equal basis to citizens and the rights of non-working spouses and family members. David Cameron in his renegotiations won a four-year delay in granting in-work benefits to EU migrants but with the leave vote the provisions fell.

⁸⁹ <http://www.telegraph.co.uk/news/2016/12/22/spain-rejects-nicola-sturgeon-brexit-plan-scotland-seemingly/>

⁹⁰ <http://www2.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2016/10/28/government-rules-out-post-brexit-regional-visa-schemes.aspx>

⁹¹ http://www.jillevans.net/jill_evans_mep_brexit_briefing_06_170113.pdf

⁹² <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

⁹³ <http://ukandeu.ac.uk/the-eea-minus-option-amending-not-ending-free-movement/>

⁹⁴ <http://ukandeu.ac.uk/respecting-the-will-of-the-british-people-immigration-policy-after-leave/>

⁹⁵ The value of the UK minimum wage, expressed in zlotys, has fallen by almost 15 per cent.

⁹⁶ <http://journals.sagepub.com/doi/full/10.1177/002795011623800111>

In relation to wider immigration and border issues, there has been some concern that France would consider scrapping the Le Touquet treaty that places the Anglo-French border in Calais. French politicians have hinted at this since the UK vote to leave the EU, but the Treaty is in fact a bilateral one and not linked to Britain's EU membership.⁹⁷ Meanwhile the Schengen agreement has looked increasingly vulnerable due to the unprecedented influx of refugees and migrants into the EU that prompted a number of Member States to temporarily reintroduce border controls. This challenge has been exacerbated by the terrorist threat with attacks on the continent by individuals travelling through the Schengen area. This becomes relevant if the UK seeks membership of the EEA/EFTA which have the same Schengen and free movement requirements as EU Member States.

⁹⁷ <http://www.economist.com/news/britain/21695958-hostility-large-scale-european-union-migration-could-decide-referendum-let-them-not-come>