



The Centre for
Cross Border Studies

EU Referendum Briefing Papers

Briefing Paper 4

The UK Referendum on Membership of the EU: Citizen Mobility



Introduction

The decision that citizens in all parts of the United Kingdom will make on the 23rd of June will determine whether the border between Ireland and Northern Ireland remains an internal European Union border, or whether it becomes an external border between an EU Member State and a UK that has voted to leave. While the ultimate impact would depend on the shape and detail of any new relationship negotiated between the UK and the EU, Brexit has the potential to affect significant aspects of North-South and East-West relations, as well as our relations with the nations of the European Union in continental Europe.

In the run-up to the referendum, the Centre for Cross Border Studies and Co-operation Ireland are publishing a series of briefing papers which aim to inform debate by exploring the potential impacts on Northern Ireland and North-South relations. The first paper in this series provided an overview of the potential consequences of a 'leave' vote for future co-operation and peace building across the island.¹ The second focused in greater depth on possible constitutional and political impacts, particularly what implications a UK departure from the EU may have for key political and legal instruments underlying the Northern Ireland peace settlement,² whilst the third examined the EU's role in supporting cross-border cooperation and how Brexit may affect such cooperation.³

This fourth paper in the series considers the issue of the free movement of citizens within the EU and how a UK withdrawal from the European Union may impact on the ability of people to move across the border between Northern Ireland and the Republic of Ireland.⁴ It will begin by outlining the rights currently enjoyed by EU citizens – including those from the UK – in relation to free movement, as set out in the relevant EU treaties, and how these relate to arrangements agreed between the UK and the Republic of Ireland that predate their accession to the EU. We will also assess the potential impacts of a Brexit on people currently commuting to work across the only land border between the UK and another EU Member State, before highlighting the negotiations undertaken by the UK Prime Minister and the EU on the matter of immigration.

The EU and Free Movement of People

Alongside goods, capital and services, the free movement of people is one of the core principles articulated and developed in successive European Union treaties to which the United Kingdom is a signatory. Article 2 of the Treaty of Lisbon declares that the European Union “shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of

¹ Centre for Cross Border Studies and Co-operation Ireland, 2016. The UK Referendum on Membership of the EU: What does it mean for us? EU Referendum Briefing Paper 1. Available at <http://crossborder.ie/eu-referendum-briefing-paper-series/>

² Centre for Cross Border Studies and Co-operation Ireland, 2016. The UK Referendum on Membership of the EU: Potential Constitutional Consequences. EU Referendum Briefing Paper 2. <http://crossborder.ie/site2015/wp-content/uploads/2016/03/EU-Referendum-Briefing-Paper-2.pdf>

³ Centre for Cross Border Studies and Co-operation Ireland, 2016. The UK Referendum on Membership of the EU: Cross-Border Cooperation, Peace-Building and Regional Development. <http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-Cooperation-Ireland-EU-Referendum-Briefing-Paper-3.pdf>.

⁴ This Briefing Paper is closely informed by the Centre for Cross Border Studies' "Border People" project's *Border People Briefing* no.5, "The Referendum on UK Membership of the EU: Freedom of Movement of People" (May 2016), <http://borderpeople.info/a-z/briefing-paper-eu-referendum-free-movement-of-people.html>. For more on the Border People project, visit www.borderpeople.info.

persons is ensured”,⁵ whilst Article 26 of the Treaty on the Functioning of the European Union defines the internal market (commonly referred to as the Single Market) as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”.⁶ The first paragraph of Article 45 of the same Treaty also states that the “Freedom of movement for workers shall be secured within the Union”, with subsequent paragraphs setting out:

- “the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”;
- the right “to accept offers of employment”, “to move freely within the territory of Member States for this purpose”, “to stay in a Member State for the purpose of employment”, and “to remain in the territory of a Member State after having been employed in that State”.

However, it should be noted that the same Article states that the rights set out above are “subject to limitations justified on grounds of public policy, public security or public health”. The issue of limitations to free movement is one we will return to later in the context of the negotiations undertaken by the UK Prime Minister, the European Commission and the other Member States on immigration.

As well as establishing free movement of persons as a cornerstone of the internal market, the EU has also moved to establish protections for EU citizens moving between Member States for the purposes of employment. Thus, for example, Regulation 883/2004 sets out rules on the coordination of social security systems between Member States in order to – among other things – ensure that movement for the purposes of employment does not affect the payment of social security due to citizens as they move between Member States.⁷ Directive 2004/38/EC, meanwhile, establishes that the right of free movement of EU citizens “be also granted to their family members, irrespective of nationality”.⁸

Alongside such regulations on free movement, the EU has also developed a range of measures to create an environment conducive to citizen mobility. These include the European Health Insurance Card,⁹ the directive safeguarding patients’ rights in cross-border healthcare,¹⁰ and the recognition of professional qualifications.¹¹

This regulatory framework, therefore, allows for the free movement of EU citizens from other Member States to the United Kingdom and to both jurisdictions on the island of Ireland. As a result, according to the 2011 Census, 2.5% of the usually resident population in Northern Ireland were originally born in EU Member States other than the Republic of Ireland.¹² The 2011 Census in Ireland,

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF>.

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>.

⁹ For more details see <http://ec.europa.eu/social/main.jsp?catId=509&langId=en>.

¹⁰ Directive 2011/24/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0024&from=EN>.

¹¹ Directive 2005/36/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0036&from=EN>.

¹² Northern Ireland Statistics and Research Agency, <http://www.nisra.gov.uk/archive/census/2011/results/key-statistics/summary-report.pdf>.

on the other hand, showed that there were almost 275,000 non-UK EU citizens resident in the jurisdiction.¹³

The same principle allowing for the movement of EU citizens to work, study, retire or for leisure between Member States, however, has also been exercised by UK citizens. A House of Commons Library Briefing Paper on the issue of migration and published in May 2016 notes that “the most recent available estimates of British migrants in the Eurostat database produces an estimated **963,000** people born in Britain and **849,000** people with British nationality living in other EU countries”.¹⁴

If, therefore, the UK were to leave the European Union and did not retain access to the Single Market, the principle and the ability of free movement would no longer apply, with the result that neither would EU citizens be able to move to the UK as they do currently, nor would UK citizens be able to move to EU countries as is now the case. Alternatively, if the UK left the EU but negotiated to retain access to the Single Market – as is the case with Norway for example, which is not within the EU but is a member of the European Economic Area (EEA) – it would have to continue to apply the principle of free movement.¹⁵ However, the situation of free movement between the UK and Ireland needs to be considered separately.

The Common Travel Area: Freedom of Movement between the UK and the Republic of Ireland

Citizens of the UK and the Republic of Ireland have enjoyed freedom of movement between their respective jurisdictions since 1923 with the creation of the Common Travel Area – predating both the founding of the European Union and both countries’ accession to the EU. The more formal establishment under UK law of the Common Travel Area, which also encompasses the Channel Islands and the Isle of Man, is set out in the Immigration Act 1971, which states:

“Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as ‘the common travel area’”.¹⁶

¹³ Central Statistics Office,
http://www.cso.ie/en/media/csoie/census/documents/census2011profile6/Profile_6_Migration_and_Diversity_Tables_and_Appendices.pdf.

¹⁴ House of Commons Library, Briefing Paper, Migration Statistics (26 May 2016), p.23,
<file://server/Folder%20Redirection/AnthonySoares/Downloads/SN06077.pdf>. However, this Briefing Paper also notes that “this can only be regarded as an incomplete estimate of the total number of British migrants living in the rest of the EU, which is likely to be lower than the true figure”.

¹⁵ For an insight into Norway’s relationship with the EU, see the 2013 report by the Norwegian Ministry of Foreign Affairs, “The EEA Agreement and Norway’s other agreements with the EU”,
https://www.regjeringen.no/globalassets/upload/ud/vedlegg/europa/nou/meldst5_ud_eng.pdf.

¹⁶ <http://www.legislation.gov.uk/ukpga/1971/77>.

The Common Travel Area is also referred to in the British Nationality Act 1981.¹⁷ The same Act also explicitly places Irish citizens outside the definition of “alien”, stating: “‘alien’ means a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland”. This special status for citizens from the Republic of Ireland under UK law is not offered to any other nationality, and alongside the Republic of Ireland’s inclusion within the Common Travel Area means they are treated as being habitually resident for some social welfare benefits as they have spent the required period within the Area to become eligible automatically.

When the UK and the Republic of Ireland joined the then European Community (EC) in 1973 the existence and operation of the Common Travel Area (CTA) were unaffected, although the distinct relationship of the Isle of Man and the Channel Islands to the UK is noted in the 1972 Treaty of Accession to the EC.¹⁸ In reality, the CTA becomes a system of free movement of Irish and UK citizens between their two jurisdictions operating within a larger European Community system of free movement of people between Member States. **The important distinction between them is that the CTA is an arrangement restricted to citizens of the UK, Ireland, the Channel Islands and the Isle of Man, whereas the EC/EU system encompasses all EC/EU citizens, including those from the UK and Ireland.**

However, although the CTA continues to remain unaffected, the development of the European Community into the European Union and the creation of the Schengen Area mark certain points of separation between the territories that make up the CTA and the changing EU. Essentially, these points of separation are the fact that the Isle of Man and the Channel Islands do not become part of the European Union, and that both the UK and the Republic of Ireland opted out from central elements of the Schengen Agreement that became part of the Treaty of Amsterdam and are outside the Schengen Area.

The relationship of the Channel Islands and the Isle of Man with the EU is formalised in Article 355 (5) (c) of the EU Treaties.¹⁹ It means that these territories are part of the Customs Union and within the EU’s Single Market for the purposes of the trade in goods, but are outside the EU for all other purposes.²⁰ Currently EU citizens are allowed visa-free entry to the Channel Islands and the Isle of Man, but do not have an automatic right to work – a right that is not automatic for British citizens either.

¹⁷ http://www.legislation.gov.uk/ukpga/1981/61/pdfs/ukpga_19810061_en.pdf.

¹⁸ European Community, “Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community”, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11972B/TXT&from=EN>. Both the Channel Islands and the Isle of Man are not part of the United Kingdom, and instead the Channel Islands are divided into two British Crown Dependencies with their own independent administrations, while the Isle of Man is a possession of the British Crown, also with its own independent administration.

¹⁹ See Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

²⁰ For the Channel Islands see <http://www.channelislands.eu/eu-and-the-channel-islands/>, and for the Isle of Man see <https://www.gov.im/media/624101/protocol3relationshipwiththeeu.pdf>.

Meanwhile, in a Protocol attached to the Treaty of Amsterdam,²¹ it was agreed that both the UK and the Republic of Ireland would continue to exercise controls at their borders, whilst the citizens of the Member States within the Schengen Area would be able to cross internal borders without being subjected to border checks.²² Crucially, this does not grant the UK or Ireland the right to deny entry of EU citizens, but simply to impose border checks on them. The same Protocol also gives formal recognition of the free movement arrangements already in place between the UK and Ireland, stating: “The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (‘the Common Travel Area’).”²³

Securing the integrity of the Common Travel Area has relied on cooperation and coordination between the agencies responsible for border and immigration controls in the UK and Republic of Ireland. Reinforcement of such cooperation through a strategic approach was most recently evident in the launch of a joint programme of work by the Irish Minister Justice and Equality, and the UK’s Immigration Minister in December 2011.²⁴ That programme of work included identifying ways of improving cooperation in relation to visas, data sharing and the development of an electronic border management system. As a result, for example, the two Governments have implemented joint recognition of visas issued to Indian and Chinese citizens, allowing those granted a visa by either the UK or Ireland to travel throughout the Common Travel Area.

Brexit and the Common Travel Area

If the UK votes to leave the EU the continuation of the Common Travel Area in its current form should not be assumed as guaranteed. The land border between the UK and Ireland that is currently an internal border of the EU would, in the event of a Brexit, become an external border separating an EU Member-State from a non-EU country. The UK’s departure from the EU would place into question the status of Protocol 20 of the Treaty on the Functioning of the European Union, which functioned to give EU recognition of the CTA as a legitimate arrangement between two Member States subject to the principle of free movement of EU citizens.²⁵

A Brexit would mean that of the two sovereign states responsible for the CTA only Ireland would remain a signatory to the EU Treaties and, therefore, the CTA’s continuation would become a matter for renegotiation involving the UK, Ireland and the EU. Crucially, the post-Brexit future of

²¹ Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf.

²² It is important to note that the Schengen Area also includes non-EU countries: Iceland, Liechtenstein, Norway and Switzerland.

²³ The UK and Ireland’s opt-outs from Schengen are further codified in Protocol 19 of the Treaty on the Functioning of the European Union, while Protocol 20 of the same Treaty codifies the continuation of the Common Travel Area.

²⁴ “Joint Statement by Mr. Damian Green, Minister of State for Immigration, the United Kingdom’s Home Department and Mr. Alan Shatter, Minister for Justice and Equality, Ireland’s Department of Justice and Equality, regarding co-operation on measures to secure the external Common Travel Area border”, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf.

²⁵ Although, as we have noted, the CTA already includes territories that are not within the EU, the Channel Islands and the Isle of Man are not sovereign states, and it is the UK Government that represents them at EU level and in all external foreign policy matters.

the CTA is not dependent on negotiations between the UK and Ireland – retention of at least some of the benefits of the CTA would be dependent on EU agreement.

Weighing on any post-Brexit negotiations regarding the status of the CTA, apart from Ireland's own interests and ability to influence its continuation,²⁶ is whether the UK would seek to retain access to the Single Market. If the UK's future relationship with the EU included access to the Single Market then – like Norway, for example – it would have to continue to accept the principle of free movement of EU citizens. In this case, and with EU citizens still able to move freely to the UK, there would be no obvious reasons for the EU to oppose the retention of the CTA. **However, given that one of the primary issues driving the arguments for the UK to leave the EU is immigration, it is unlikely that post-Brexit the UK will seek to retain access to the Single Market. This will influence the EU's position regarding negotiations on the retention of the CTA.**

Another factor influencing the EU's approach to the post-Brexit status of the CTA will be the effect its discontinuation would have on North-South relations in the context of the 1998 Belfast/Good Friday Agreement. **Given its role in supporting the peace and reconciliation process in Northern Ireland, the EU and its constituent Member States may be reluctant to be seen as contributing to a hardening of the border with the Republic of Ireland by blocking the retention of the CTA.²⁷ Instead the EU may opt not to obstruct Ireland, as one of its Member States, in continuing to participate in the CTA, and leave the responsibility of seeking to revise the current arrangements to the UK.**

If post-Brexit the UK were not within the Single Market, the reasons that may drive it to review the CTA are highlighted in a House of Commons Library Briefing Paper:

“As an EU Member State, Ireland could not restrict the entry of EU citizens, so if the UK wanted to increase controls on EU citizens entering the UK through the Republic, it might reconsider the operation of the CTA. Any such reconsideration would have to be undertaken within the new context created by the Belfast (Good Friday) Agreement”.²⁸

The key issue here is how a post-Brexit UK would impose control of its borders in order to restrict entry of EU citizens within the CTA. Since the Republic of Ireland cannot restrict EU citizens entering its territory, for the UK to do so in relation to its own would mean either imposing border controls

²⁶ That interest is expressed, for example, by the Houses of the Oireachtas Joint Committee on European Affairs' report, “UK/EU Future Relationship: Implications for Ireland” (June 2015): “in the context of a reformed UK/EU relationship, that a key objective for Ireland should include the retention of the Common Travel Area (CTA) between Ireland and the UK” (p.19), http://www.oireachtas.ie/parliament/media/committees/euaffairs/Agreed-Report-UK-EU-Future-Relations_Updated.pdf.

²⁷ A significant example of how restricting the freedom of movement across the Ireland-Northern Ireland border would impact on the functioning of the 1998 Belfast/Good Friday Agreement is the question of citizenship. As co-guarantors of the Agreement, the UK and Irish Governments “recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments”; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

²⁸ House of Commons Library, Briefing Paper, “Exiting the EU: impact in key UK policy areas (June 2015), p.136; <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213>.

on the Ireland-Northern Ireland border, or between the island of Ireland and Great Britain.²⁹ The latter option would result in UK citizens from Northern Ireland being required to go through border controls in order to enter another part of the UK, and both options would signify the end of the Common Travel Area in its current form.

An alternative, suggested by some arguing for the UK to leave the EU, would involve placing no restrictions on EU nationals entering the UK from the Republic of Ireland but removing their right to remain and their access to the labour market. In this scenario, the entry provisions of the CTA would be unaffected with no border controls either at the Irish border or between the island of Ireland and Great Britain. The CTA would be affected, however, if border controls were introduced between the island of Ireland and GB, but not at the Ireland-Northern Ireland border. In this case EU citizens would be able to enter Northern Ireland through the Republic of Ireland, but would not be able to enter GB without going through border controls.

Cross-Border Workers under Brexit

Whilst there are no definitive data on the number of commuters who cross the Ireland-Northern Ireland border to work, based on the available estimates the Centre for Cross Border Studies' Border People project suggests between 23,000 and 30,000 people are cross-border workers.³⁰ A UK exit from the EU – particularly if the UK were not to retain access to the Single Market – could have significant impacts on the situation of these cross-border workers. Moreover, amongst these cross-border workers are some who are neither UK nor Irish citizens, and are instead citizens of other EU countries, and their situation in a post-Brexit context would be uncertain.³¹

A post-Brexit UK outside of the Single Market and therefore not bound to abide by the EU principle of the free movement of workers could potentially, nevertheless, unilaterally allow the continuation of entry into Northern Ireland by citizens of the Republic of Ireland for employment purposes. However, as a Member State the ability of the Republic of Ireland to reciprocate would be subject to the EU's sanctioning of a policy conceding privileges to non-EU citizens to cross an external EU border to work within the EU.

Even if there is agreement on allowing UK and Irish citizens to cross the Ireland-Northern Ireland border to work, the UK would no longer be bound by Article 45 of the Treaty on the Functioning of the European Union and other EU directives and regulations that offer protections to cross-border workers, as discussed earlier. As noted by the Centre for Cross Border Studies' Border People project in relation to the current status of cross-border workers in the EU context:

“Cross-border workers know they have a **right to work**, and **to be treated equally** to residents of the

²⁹ It is important to stress that we are focusing here exclusively on the movement of people, and not the movement of goods and the question of customs controls.

³⁰ For an overview of the available estimates, see *Border People Briefing* no.5, “The Referendum on UK Membership of the EU: Freedom of Movement of People” (May 2016), <http://borderpeople.info/a-z/briefing-paper-eu-referendum-free-movement-of-people.html>.

³¹ Recent research undertaken by the Centre for Cross Border Studies on the agri-food sector in four border counties, for example, confirmed the existence of non-UK and non-Irish EU citizens as cross-border workers. See “A Study of Cross-Border Flows within the Agri-Food Sector: a snapshot of four border counties” (2016), <http://crossborder.ie/a-study-of-cross-border-flows-within-the-agri-food-sector-a-snapshot-of-four-border-counties/>.

other jurisdiction. Confident that their social insurance contributions can be aggregated to help qualify for illness benefits, unemployment benefits and pensions. They know that they can access healthcare in the jurisdiction where they work and that certain benefits can be exported when necessary.”³²

Leaving aside the possibility of the introduction of border controls at the Ireland-Northern Ireland border that would represent an obstacle to cross-border commuters, a UK exit from the EU would remove some of the fundamental certainties in relation to the rights that cross-border workers have under EU legislation and regulations. Whereas the Republic of Ireland would follow common EU regulations in relation to cross-border workers, Northern Ireland would be complying with regulations formulated in the United Kingdom. There is, therefore, the potential for a divergence in policy and regulatory frameworks affecting cross-border workers between the EU and the UK, resulting in additional obstacles and uncertainties for such workers.

Free Movement and the UK in the EU

As was highlighted in the first of this series of EU Referendum Briefing Papers, the question of immigration was one of the core issues the UK Prime Minister sought to address in his negotiations over reforms of the UK’s membership of the EU. In his December 2015 letter to the President of the European Council,³³ on the issue of immigration David Cameron proposed that “people coming to Britain from the EU must live here and contribute for four years before they qualify for in-work benefits or social housing”, and that the “practice of sending child benefit overseas” should be ended. He also proposed that the principle of free movement would not apply to any new EU members “until their economies have converged much more closely with existing Member States”, “tougher and longer re-entry bans for fraudsters and people who collude in sham marriages”, and “addressing the fact that it is easier for an EU citizen to bring a non-EU spouse to Britain than it is for a British citizen to do the same”.

As a result of the UK Prime Minister’s negotiations with the EU institutions and its Member States, the Heads of State or Government of the EU’s Member States issued a draft decision at the European Council in February 2016 in relation the UK’s proposed reforms. What was agreed at the European Council by the Member States was based on the UK voting to remain in the EU in the June 23rd referendum.

In terms of matters related to immigration, the following are some of the principal draft decisions reached:³⁴

³² *Border People Briefing* no.5, “The Referendum on UK Membership of the EU: Freedom of Movement of People”.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf.

³⁴ European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union (2 February 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/>. These are draft decisions not only because they would only come into effect if the UK votes to remain in the EU, but also because some of its contents will need to be approved by the European Parliament, for example.

1. “If overriding reasons of public interest, such as encouraging recruitment, reducing unemployment, protecting vulnerable workers, averting the risk of seriously undermining the sustainability of social security systems, make it necessary, free movement of workers may be restricted by measures proportionate to the legitimate aim pursued”;
2. “Based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim pursued, conditions may be imposed in relation to certain benefits”;
3. “The right of economically non active persons to reside in the host Member State depends under EU law on such persons having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance”;
4. “Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement solely in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence”;
5. “Amend Regulation 883/2004 on the coordination of social security systems in order to give Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits to the standard of living in the Member State where the child resides”;
6. “in order to take account of a pull factor arising from a Member State's in-work benefits regime, a proposal to amend Regulation (EC) No 492/2011 on freedom of movement for workers within the Union which will provide for an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time”;
7. “On a proposal from the Commission having examined the notification, the Council could, by means of an implementing act, authorise the Member State concerned to restrict access to in-work welfare benefits to the extent necessary. The implementing act would authorise the Member State to limit the access of Union workers newly entering its labour market to in-work benefits for a total period of up to four years from the commencement of employment”.

Although some of these decisions merely seek to reinforce and clarify measures already available in the existing EU Treaties in relation to free movement, perhaps the most significant is the decision to provide an “alert and safeguard mechanism” – or what has become more popularly known as the “emergency brake” system. Where this system is employed following a request to the European Commission and approval from the other Member States in the European Council, EU citizens moving to another Member State for the purposes of employment would not have access to in-work benefits for up to four years.

Another significant decision addressing the UK Government’s concerns is to amend an existing regulation to allow a Member State to index child benefits payable to workers from other Member States to the standard of living in their own countries.

However, it is important to stress that the changes suggested by these draft decisions and the mechanisms that they make available would be applicable to all Member States, and not just the UK. In other words, the “emergency brake” system, for example, would not only be at the disposal of the UK but of all Member States. Importantly though, the European Council also made it clear that the

European Commission saw the UK already having the conditions necessary to implement the “emergency brake”:

“The European Commission considers that the kind of information provided to it by the United Kingdom shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today. Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval”.³⁵

These changes, as is stated in the European Council decision, are not aimed at ending the principle of free movement itself: “Free movement of workers within the Union is an integral part of the internal market which entails, among others, the right for workers of the Member States to accept offers of employment anywhere within the Union”. Nevertheless, in its decision the European Council also accepted that some Member States – including the UK – may have been placed under strain due to significant flows of workers from other Member States: “It is legitimate to take this situation into account and to provide, both at Union and at national level, and without creating unjustified direct or indirect discrimination, for measures avoiding or limiting flows of workers of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination”.

In conclusion, while the principle of free movement of people may not have been abandoned as a result of the UK’s proposals for reform, if the UK were to vote to remain within the EU on the 23rd of June the operation of that principle may no longer resemble its current form.

³⁵ European Council, Draft declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union (2 February 2016); <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/>.