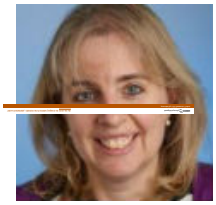
Long read: how to deploy the emergency brake to manage migration



Freedom of movement is one of the 'red lines' that preclude Britain's continuing membership of the Single Market: the PM believes the referendum was a clear rejection of the principle. But could the UK deploy an 'emergency brake' at regional (rather than national) level to help manage EU migration and thereby qualify for European Economic Area membership? ***Catherine Barnard*** *and* ***Sarah Fraser Butlin (University of Cambridge)*** *look at how it might be possible to allay Leavers' fears.*

In two previous blogs (here and here) in this series we began to outline our notion of 'fair movement'. In the first we argued for a clear linkage between the ability to migrate into the UK and undertaking an economic activity. In the second we argued that current restrictions on the principle of equal treatment should be utilised, particularly residence requirements, before allowing access to social security benefits. This final post focuses on the third element of the proposed scheme: the emergency brake provisions. We argue that combining our approach to equal treatment with an emergency brake would achieve a managed but flexible approach to migration.

This approach reflects both the origins of free movement and other existing agreements, including with EEA states. Such an approach based on fair movement may, therefore, be acceptable to the EU in a future trade agreement while at the same time go some way to meeting the concerns of UK voters. As with the previous two blogs, we locate our arguments in the context of the original discussions about the shape of free movement rules to show continuity between what we propose and what the EU has considered in the past.

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Origins of free movement

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Although the question of an emergency brake was a difficult issue during the discussions establishing the Common Market, the need to restrict free movement in certain circumstances was a consistent theme. Thus, a note by the Inter-Governmental Committee (IGC) in November 1955 recognised the need for certain safeguarding clauses in case of an influx of a workforce that would cause a particular risk to certain industries in a particular country. This reflected the concerns of several delegations: the French delegation was worried that migration should be limited according to the capacity of the member state to absorb migrant workers; Luxembourg was concerned about its ability to implement free movement of workers, given its social and demographic structure; and Belgium had concerns about the burden created by possible large scale migration.

The Spaak report of 21 April 1956, which provided the foundations for the negotiations establishing the Common Market, supported earlier proposals for the gradual introduction of free movement by way of a 1% increase in migrant worker numbers each year. However, the report also noted the reluctance of workers to move, even within one country and this indicated that some sort of controlled migration might not in fact be necessary. Ultimately, it seems that this latter view won the day: the final version of Article 48 EEC on free movement of workers (now Article 45 TFEU) included no reference to quotas, nor to a gradual introduction of free movement nor an emergency brake.

Nevertheless, the history of the provision shows that the possible need for an emergency brake of some sort was a concern for many of the delegations, albeit that so little migration occurred between 1957-2004 that any further discussion of an emergency brake on migration proved unnecessary. The world has since changed. While continued free movement would be what the EU would like, political realities indicate change is needed. So we ask: Is there a way of facilitating free movement while meeting the political need to take back some control of migration? We argue there is and existing agreements provide the way.

Existing agreements

Some people have suggested that an emergency brake of some sort can be read into the express derogations of the Treaty. However, we focus on four other agreements which, we argue provide a more secure template for an emergency brake provision.

Firstly, Article 112 of the European Economic Area (EEA) Treaty contains a broad safeguard clause:

> If serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.

Article 112(2) adds that 'Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.' Article 113 EEA prescribes the procedure for triggering the procedure, involving the notification of Contracting Parties and consultation with the EEA Joint Committee. When exceptional circumstances requiring immediate action exclude prior examination, protective measures may be applied. Safeguard measures that are taken must be reviewed every three months with a view to their abolition or to the limitation of their scope of application. A safeguard clause of this kind has been borrowed for the purposes of the Northern Ireland/Ireland Protocol in the draft Withdrawal Agreement.

Secondly, the EEA agreement did contain one specific limitation on free movement of people for the tiny state of Liechtenstein. Before Liechtenstein joined the EEA, the EEA Council recognised that it was vulnerable to excessive migration due to its very small inhabitable area. Upon joining the EEA, temporary measures were put in place allowing Liechtenstein to impose 'quantitative limitations' on immigration until 1 January 1998. Towards the end of the transitional period, no permanent solution had been found and Liechtenstein unilaterally invoked Article 112 EEA. On 17 December 1999 it was decided that the 'specific geographical situation' of Liechtenstein still justified the maintenance of certain conditions on the right to taking up residence. Text was added to the EEA Agreement, providing that EEA citizens may take up residence in Liechtenstein but were required to have a residence permit if they were remaining for more than 3 months of the year or to take up employment or other permanent economic activity. A permit was not required for those providing cross-border services. A quota for residence permits was applied although no permit is required to be able to work in Liechtenstein, only to reside there. These arrangements are reviewed every five years.

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Thirdly, Switzerland has introduced a new provision giving priority for local hires following the Swiss referendum in February 2014. The Swiss electorate had voted to amend the Swiss Constitution to limit immigration through quotas and restrict the rights of foreign nationals to permanent residence, family reunification and access to social benefits. This was incompatible with the bilateral EU Agreement on Free Movement of Persons within the EU and the EU reacted by suspending Switzerland's participation in the EU research and student programmes, Horizon 2020 and Erasmus+.

Lengthy negotiations followed and eventually on 16 December 2016 a new law was adopted, coming into force in the summer of 2018, giving priority to Swiss-based job seekers, that is, both Swiss and foreign nationals registered with Swiss job agencies, in sectors or regions where the unemployment rates are higher than average. 'Higher than average' unemployment has been defined as the 12 month average unemployment rate plus 5 percentage points. During the transitional period, this will rise to being the 12 month average unemployment rate plus 8%. In those sectors or regions, an employer must advertise any role with the central employment agency for five working days. Only after that period, may the job be advertised through all the usual channels and the employer may recruit from abroad. An employer will be fined for non-compliance.

Fourthly, the text of the (now defunct) New Settlement Agreement, negotiated by David Cameron with the EU in February 2016, contained not only provision for an emergency brake on benefits but also a potentially significant provision of a putative emergency brake on the volume of migration:

> Whereas the free movement of workers under Article 45 TFEU entails the abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment, this right may be subject to limitations on grounds of public policy, public security or public health. In addition, if overriding reasons of public interest make it necessary, free movement of workers may be restricted by measures proportionate to the legitimate aim pursued. Encouraging recruitment, reducing unemployment, protecting vulnerable workers and averting the risk of seriously undermining the sustainability of social security systems are reasons of public interest recognised in the jurisprudence of the Court of Justice of the European Union for this purpose, based on a case by case analysis.

So where is the emergency brake? It is buried in the language. According to the orthodoxy, direct discrimination can only be saved by express derogations, indirect discrimination can be saved by a broader range of objective justifications. The striking feature of the Brussels text is that it does not restrict objective justifications (or 'overriding reasons of public interest' as they are referred to) to indirectly discriminatory measures. This might suggest that even directly discriminatory measures could be justified on the grounds of 'encouraging recruitment' and 'reducing unemployment'. This might suggest that there was scope to read into the New Settlement Agreement a means of developing the EU's own emergency brake on the volume of migration.

We therefore argue that there are models for what might become the UK's emergency brake. How might they be applied in the context of a model based on fair movement?

The future?

We would call for the introduction of an emergency brake, not at national level but at regional level, perhaps at the level of devolved administrations or other regional groupings, to take account of the substantial variation in the needs of the regions. At present Scotland is calling for more migration, parts of England less so. Thus, an emergency brake mechanism would need to apply on a regional basis. Relying on both economic data (such as labour market criteria e.g. relative levels of unemployment, demands for unemployment benefits, wage levels), demand for public services (e.g. population growth, population churn, waiting lists) and political experience (e.g. what constituents are saying through the ballot box and in person at surgeries), these regions could make a request to national government to impose restrictions on migration for a time limited period. These restrictions might be sectoral, based on skill levels, or more general and for a defined period of time. The operation of the registration system outlined in blog 1 would be the vehicle for controlling those who could work in a particular area.

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Who might pull the emergency brake? There is clearly a need for both an objective evidence base for its application such as economic data. However, given the highly politicised nature of the issue, the decision of when to pull the emergency brake could not simply be left to a body separate to the Government. Nevertheless, we would suggest that there would also need to be certain safeguard provisions in place requiring minimum objective indicators in the economic data to be met before any subjective political decision might be made. The EU is unlikely to concede on any such mechanism without a dual control by the EU. So a mechanism like the one in Article 113 EEA would also need to be established.

Would such mechanisms satisfy Leave voters or would they regard them as merely window dressing? Much depends on the seriousness with which the mechanism is regarded, the rigorousness of the objective criteria and the willingness of local politicians to engage.

Conclusions

For purists, what we are proposing does serious damage to the principles of free movement of persons. We know that. However, we recognise that, following Brexit, the UK will no longer be in the EU's paradigm of free movement. While universities and other big employers have benefitted from free movement, we recognise that politically free movement is unlikely to be the outcome of the negotiations (except possibly for a short transitional period). The economic benefits of migration are not in doubt but we recognise that the political will for continued free movement is simply not there.

In our scheme, we seek to square that circle and offer some, admittedly crude, options for a way forward. What we propose is a scheme which demonstrates to the British public that the government is taking back control of migration while at the same time offering flexibility for those employers, including farmers and those in the hospitality sector, who argue they need access to EEA workers but without facing the bureaucracy and costs associated with a full blooded visa regime.

Some might argue that our proposed scheme, discussed across the three blogs, is not so different from the current free movement rules as applied in the UK. We disagree. First, our proposal for fair movement introduces a registration scheme and requires those registering generally to be engaged in economic activity. Second, we have argued that economic activity must be accompanied by a meaningful salary threshold or have a relatively high skill level. Third, our scheme would allow restrictions on access to social security benefits. Fourth, we argue that there should be an emergency brake which is not currently available under EU law.

We recognise that a scheme which is neither free movement nor highly restrictive access risk pleasing no-one but at the moment there is little else on the table. We also recognise that concerns about migration are many and varied and that they interconnect with concerns about other policy choices: cutbacks in public services, the failure of the planning system to deliver sufficient and affordable housing to meet local needs, and the failure of the enforcement agencies (where they exist) to ensure that EU workers' employment rights are enforced.

The system we propose would show that the UK is responding to the basic calls to take back control of immigration, while giving the government time to tackle the deeper seated, more intractable problems concerning lack of skills and training in the UK and the need to provide proper funding for public services.

This post represents the views of the authors and not those of the Brexit blog, not the LSE. It first appeared at EU Law Analysis.

Catherine Barnard is Professor of European Union Law at the University of Cambridge.

Sarah Fraser Butlin is an affiliated lecturer at the Faculty of Law, University of Cambridge and a practising barrister at Cloisters Chambers, London.

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