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# Brexit and Freedom of Movement in the EU: A legal primer

Federico Fabbrini

**Brexit negotiations are in full swing. A main point of contention involves the freedom of movement of EU citizens. To explore the legal basis and limitations of a key EU right, we interviewed Federico Fabbrini, Professor of European Law.**

The decision of the United Kingdom to leave the European Union has once more propelled the freedom of movement of people to the forefront of discussions. Against the backdrop of the ongoing Brexit negotiations, we take a closer look at the legal basis of one of the cornerstones of EU integration. What does the concept of freedom of movement imply? Who benefits from it? What legal and practical options are there to control the movement of people across EU borders? And what does Brexit mean in this context?

## Legal basis of the freedom of movement

***What is the legal basis for the freedom of movement in the EU? And what does it say?***

The right to free movement of individuals in the European Union finds it legal basis in the EU Treaties, which have been implemented through EU legislation. Article 45 TFEU recognizes a specific right to free movement for workers, while Article 21 TFEU more generally proclaims that every citizen of the Union shall have the right to move and reside freely within the territory of the member states – subject to the limitations and conditions defined by EU legislation. These limitations and conditions have been set by the so-called European Citizenship Directive (Directive 2004/38/EC). According to this directive, EU citizens have an unlimited right to move to another member state and reside there for up to 90 days. If they want to reside in another member state for longer than 90 days EU citizens must register with the local

authorities and have sufficient resources not to become a burden on the social assistance system of the host state. This includes having comprehensive health insurance. However, if an EU citizen moves to another member state as a worker, special rules apply that are codified in a specific regulation on the freedom of movement of workers (Regulation EU/492/2011).

***So there are effectively different rules depending on whether you move as a citizen or as a worker?***

EU law effectively establishes two regimes for free movement: A more specific and more permissive one for workers; and a more generic, but more restrictive one for EU citizens. This is the result of the historical evolution of the right to free movement of persons in EU law. Initially, the Treaties of Rome in 1957 recognized only a right of free movement for workers. This right reflected a market-driven logic to promote the free circulation of labour, in conjunction with the free movement of the other factors of production: goods, services and capital. Over time, however, the European Court of Justice (ECJ) extended the list of beneficiaries of the right to free movement through its case law – including students, job seekers and self-employed individuals. The ECJ's removal of obstacles to free movement prompted legislative action to regulate the issue. With the Treaty of Maastricht of 1992 and the creation of European citizenship – a major step towards a federal EU – free movement was transformed from simple market logic into a right belonging to every citizen of the EU, even if subject to certain restrictions as described above.

***Apart from legal aspects, there are practical barriers to free movement, for example the portability of benefits. What proposals to reduce them are currently on the table?***

There are a number of factors – such as language barriers – that certainly render free movement across states more complicated in the EU than, say, in the United States. Nevertheless, obstacles toward free movement are produced also by uncertainties regarding the portability of benefits and pensions. After almost a decade of deliberation the European Parliament and the Council agreed in 2014 on the revised text of a Commission proposal for a directive on the portability of pension rights (Directive 2014/50/EU) to improve workers' mobility across the Union as a whole. Member states have until May 2018 to implement the directive within their domestic legal systems. It remains to be seen how national administrations involved in managing pension systems will ultimately change their practices to make it easier to transfer benefits from one EU country to another.

## The role of the ECJ in shaping free movement…

***The ECJ has played a vital role in the evolution of freedom of movement. What landmark decisions have shaped this right in the past?***

The ECJ has played a major role in protecting the right to free movement of persons within the EU. Beginning in the 1960s, the ECJ started extending the list of persons that could benefit from the right to free movement of workers set out in the treaties. Moreover, since the creation of the concept of "European citizenship" in the 1990s, the ECJ has endeavoured to give meaning to the concept by proclaiming in the *Grzelczyk* case of 1999 that "European citizenship is destined to become the fundamental status of nationals of the member states". To that end, the ECJ has, for example, ruled in *Martinez Sala* (1998) that EU law empowers an EU citizen residing in another member state to obtain child care benefits without having to show a residence permit; it has banned in *Garcia Avello* (2003) national legislation that prevents an EU citizen from using a double surname when moving to another member state; and it has held in *Zambrano* (2011) that EU citizenship entails a substance of rights that cannot be violated – a situation that would arise if, say, the third-country national father of an EU citizen were to be expelled from the EU.

***All this suggests that the ECJ has been an unequivocal force in promoting freedom of movement. Is that true?***

The ECJ has been an important player in the field of free movement. Nevertheless, the role of the ECJ must be qualified in two ways.

First, the ECJ has not acted alone in promoting free movement of persons. It has rather operated in concert with the other EU institutions and member states. After all, it was the member states who introduced EU citizenship as an additional status attaching to "every person holding the nationality of a member state" and the right to free movement in principle for all EU citizens in the Treaties. In addition, rules designed to promote the free movement of persons such as those on coordinating member states' social security systems (specifically Regulation EC/883/2004) have been established by EU laws that were adopted by the Council and the European Parliament, following the normal democratic legislative process – and not by judicial fiat.

Second, the case law of the ECJ on free movement of persons has not been linear and consistent in promoting free movement. In recent times the ECJ has in fact significantly restricted its approach to freedom of movement, allowing member states to limit the ability of EU citizens to move. In particular, departing from precedents like *Martinez Sala*, the ECJ held in *Dano* (2014) and *Alimanovic* (2015) that member states may refuse to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely so as to obtain another member state's welfare benefits although they do not have sufficient resources to claim a right of residence. Moreover, less than ten days before the Brexit referendum in June 2016, the ECJ explicitly ruled in *Commission v United Kingdom* that "there is nothing in EU law to prevent the granting of social benefits to EU citizens who are not economically active being made subject to the substantive condition that those citizens meet the necessary requirements for possessing a right to reside lawfully in the host state." In other words, member states can effectively exclude EU citizens who are illegally present on their territory from accessing social benefits.

## … and what EU member states make of it

***Current EU legislation already allows national governments to limit movement of people in the EU. To what extent do countries make use of this right?***

Here we face a paradox. The EU is often criticized – particularly in the United Kingdom – for undermining member states' sovereignty in the field of immigration and promoting welfare tourism. The reality is different: EU legislation actually allows member states to restrict free movement of persons, and the ECJ has been fairly permissive as of late in granting member states more leeway in these matters. The existence of a border-free Schengen zone certainly complicates the ability of national governments to monitor the movement of EU citizens. However, the UK did not join the Schengen area.

Moreover, it should not be forgotten that national governments often encourage free movement, and take advantage of it. The UK is a case in point: Following the enlargement of the EU to Central and Eastern European countries, it – unlike other older EU member states – decided not to apply temporary restrictions on the free movement of persons, which the 2003 Accession Protocol of Poland, Hungary, the Czech Republic, Slovakia, the Baltics, Slovenia, Malta and Cyprus (and later the Accession Protocol of Bulgaria and Romania) permitted for a transitional period of up to seven years.

***Why have governments encouraged freedom of movement of people in the past?***

The decision of the British government was at that time mainly motivated by economic reasons, as the UK economy was expanding but facing a labour shortage. Nevertheless UK's policy can also be seen in terms of fairness: free movement of persons cannot be disjoined from free movement of goods, services and capital since the combination is a constitutional compromise. Because of the varieties of capitalism in Europe, older EU member states, with their advanced economies, are able to take advantage of an expanding EU common market, because they can export their goods and services to new member states that have less competitive and technologically advanced production processes. In this context, it seems only fair that older member states open at least their labour markets to the workforce of the new member states. Any higher social welfare cost this may entail for them should be more than made up for by the higher economic benefits – and consequential

tax revenues – they obtain precisely from their ability to make use of a larger common market.

***Even though the economic benefits of intra-EU migration have been documented time and again, political support for the freedom of movement seems to have faded in some countries. How did this happen?***

The matter has been highly contentious and has influenced outcomes of elections and referenda. The fear of the “Polish plumber” spelt doom for the European Constitution in the French 2005 referendum. And the willingness to prevent wage competition has recently renewed calls in Paris to revise the so-called Posted Workers Directive (Directive 97/71/EC). This piece of legislation allows companies established in any EU member state to post employees to work in other EU member states under the labour regulations set in the home state. In practical terms, the directive has empowered companies in newer member states across Central and Eastern Europe to take advantage of their cheaper labour costs when offering services in the older member states. For the former, the Posted Workers Directive is seen as a fair instrument to allow newcomers to capitalize on their business model, while for the latter it is often considered an instrument for social dumping, ultimately undermining the work guarantees set in national laws and collective agreements. In 2016, the European Commission indicated its intention to revise the directive, but it remains unclear how far the member states may agree on this.

## Brexit and the freedom of movement

***Freedom of movement was one of the most hotly debated issues in the Brexit campaign. What concessions did the “better deal” between the EU and the UK in the run-up to the referendum entail?***

Control of immigration was one of the four items – together with sovereignty, competitiveness and the protection of the interests of non-Eurozone member states – that British Prime Minister David Cameron put on his wish-list for renegotiating the UK’s status within the EU. The European Council went out of its way to accommodate the British demands. In the “New Settlement for the UK within the EU” reached in February 2016, the heads of state and government compromised on important principles of EU law: among other things, they granted the UK exemption from participating in the process of an “ever closer union”. In the field of migration, in particular, the European Council committed to introduce an alert and safeguard mechanism into EU law – the so-called “emergency brake” – that would have allowed a member state to restrict free movement of persons for up to seven years in the event of an exceptional inflow of workers from other EU member states. Moreover, the European Commission already indicated in a declaration annexed to the New Settlement that the conditions for invoking the emergency brake were fulfilled by the UK. On top of this, the Commission also pre-committed itself to propose new EU legislation that would have allowed member states to index child benefits for migrant workers to the standard of living of their home state, and that would have further restricted the possibility of third country nationals married to EU citizens to move and reside freely in another EU member state.

***Why did the deal that the EU and Prime Minister David Cameron negotiated fail?***

In the end, these concessions did not work. As is well known, on 23 June 2016 the UK voted to leave the EU. As a result, the settlement between the UK and the EU became null and void. It is unclear whether the special deal that Prime Minister Cameron had obtained from its European partners really played a role in the Brexit referendum campaign. Although the concessions that the UK government received, particularly in the field of free movement, were rather substantial, the referendum campaign was hijacked by populist slogans. Moreover, decades of “Brussels bashing” by all UK political parties and the media arguably could not reverse the long-standing anti-EU criticism in just a few weeks of campaigning. Be that as it may, the burial of the New Settlement should be welcome, as that deal would have significantly weakened the foundations of the EU legal order. In fact, the European Council seems now to have come to its senses again. Following the decision of the

UK to leave the EU, the European Council President Donald Tusk has stated that the UK as a non-member cannot have the same benefits as an EU member state. Moreover, the European Council made clear in its April 2017 guidelines for the withdrawal negotiations that the four freedoms of the single market are indivisible and there cannot be any cherry picking by the UK. This means that a possible free trade deal between the UK and the EU covering free movement of goods, capital and services would also have to include free movement of persons. Ironically, therefore, Brexit may have reinforced the commitment of the remaining EU-27 toward free movement of persons.

## Post-Brexit scenarios for free movement in the EU

***As the UK and the EU negotiate over Brexit, different scenarios have been discussed. What legal options are there for freedom of movement under the different scenarios?***

First of all, it will not be easy for the two parties to strike a deal: Judging from the European Council's April 2017 Guidelines for the withdrawal negotiations and the UK governments' statements (notably the February 2017 White Paper on the UK's exit from and new partnership with the EU), their positions lie far apart. On the one hand, the European Council has been explicit in affirming that the four freedoms are indivisible and there can be no compromise on free movement of persons. On the other hand, the British Prime Minister Theresa May has interpreted Brexit as mostly a sovereigntist call to "take back control" and therefore asserted the UK plan to restore full autonomy in the field of migration, getting rid of the jurisdiction of the ECJ. If these positions are maintained, the scenario of a so-called "hard Brexit" with no deal between the UK and the EU becomes a serious possibility. Should this happen, post-Brexit relations between the UK and the EU would be regulated by World Trade Organization (WTO) rules. While EU tariffs under the WTO schedule are on average fairly low, WTO rules cover almost only trade in goods, which would significantly reduce the ability of the UK to import labour and export services.

***Why did the UK government advance a proposed model of close association for a time-limited interim period?***

Given the risks of a hard Brexit, particularly after the June 2017 snap British general election that deprived the Conservative Party of its majority in the House of Commons, calls have grown louder for the UK to embrace a more accommodating position vis-à-vis the EU. In particular, while the UK government has reaffirmed its intention to conclude a new deep and special partnership with the EU, in August 2017 it indicated that the UK could opt for a model of close association with the EU for a time-limited transitional period of an indeterminate few years required to untangle itself from the EU. Such a solution echoes in some respects the calls for the UK to join the European Economic Area (EEA) after Brexit. Under EEA rules the UK would maintain access to the EU single market under the same conditions as EU member states, but in exchange it would have to contribute to the EU budget and permit free movement of persons, under the oversight of the ECJ. While neither of these conditions seems to accommodate the demands of the Brexit supporters, the EEA solution would certainly minimize the economic costs of Brexit. Moreover, it may offer the transitional framework in which the UK and the EU can negotiate a free trade deal – a process which experience has shown may take up to a decade.

***What is the current state of debate on freedom of movement in the UK and in the ongoing Brexit negotiations?***

Much will depend on how the negotiations between the UK and the EU unfold over the coming weeks and months. During the summer of 2017, Michel Barnier, the European Commission Chief Negotiator, and David Davis, the UK Secretary of State for Exiting the EU, started talks to settle the issues connected to withdrawal. The two negotiating parties have so far focused on the question of citizens' rights, the border between Ireland and Northern Ireland, and the UK financial settlement. Yet, owing to political uncertainties following the UK snap election, negotiations have been slow and the two parties have been unable to make much progress – even on non-contentious issues like

the protection of the rights of EU citizens residing in the UK and UK citizens living in the EU. The European Council has affirmed that progress on the withdrawal issues is a pre-condition for starting a preliminary discussion on the future relations between the UK and the EU. Any delays in the divorce negotiations will therefore inevitably postpone or undermine the chances of a post-Brexit free trade agreement or even a more comprehensive political partnership between the EU and the UK. In this regard, the question of free movement of citizens will remain one of the key issues to be settled.

***What are the implications for freedom of movement in the remaining EU-27 after the UK has left the EU? Will it be possible to uphold the four freedoms in the future?***

Even after the UK's withdrawal the issue of the free movement of people will remain controversial in the EU. On the one hand, Brexit has united the remaining EU-27 in affirming the indivisibility of the four freedoms. On the other hand, however, important differences exist among the EU member states on the scope that free movement should have – for instance with regard to the posting of workers, or access to social benefits. In these areas, the interests of old and new EU member states are mainly at odds. It is therefore likely that the issue of free movement will become part and parcel of a broader discussion on the future of Europe. One post-Brexit option for the EU foresees advanced forms of enhanced cooperation through a core group of member states – possibly the Eurozone countries. If the EU proceeded on such lines, the regulation of the free movement of persons would be a crucial aspect of any future relations between the core countries and those EU members unwilling to move toward some kind of Political Union.

## About the author

**Federico Fabbrini** is Professor of European Law at the School of Law & Government of Dublin City University (DCU) and the Director of the DCU Brexit Institute (www.dcubrexitinstitute.eu). He is the editor of *The Law & Politics of Brexit* (Oxford University Press, 2017).

The interview was conducted by **Anna auf dem Brinke**, Research Fellow at the Jacques Delors Institut – Berlin, and **Katharina Gnath**, Senior Project Manager at the Bertelsmann Stiftung.

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**Address | Contact**
Dr. Katharina Gnath
Senior Project Manager
Programme "Europe's Future"
Bertelsmann Stiftung
Telephone +49 5241 81-81183
Fax +49 5241 81-681183
katharina.gnath@bertelsmann-stiftung.de
www.bertelsmann-stiftung.de