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What free movement means to Europe and why it matters for Britain

By Camino Mortera-Martinez and Christian Odendahl

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- ★ Britain and the EU view EU migration differently. While EU free movement rules have been a toxic political issue in Britain for years, many on the Continent consider them a core achievement of the EU. Continental Europeans do worry about migration, but mostly about migration from outside the EU.
- ★ Britain voted to leave the EU largely because of the unpopularity of unrestricted EU migration. Negative views of free movement have been fuelled by misleading media stories and a perceived mismatch between the British labour market and social security system, and those of most other member-states.
- ★ Britain and Europe's different perceptions of EU migration will complicate the Brexit talks. European leaders believe that compromising on free movement would endanger the EU project. They fear that making concessions on free movement would embolden governments to call for a dilution of other single market rules.
- ★ In her 'Brexit speech', Theresa May said that Britain would not be seeking access to the single market because London understands that for the EU, the 'four freedoms' are indivisible, and because Britain seeks control of migration.
- ★ Britain and the EU will still need to agree on the rights of existing EU migrants, which May vowed to protect, and on migration rights as part of a future free trade agreement. In negotiating the latter, the EU may well insist on at least preferential access of EU workers to the British labour market, if not more.
- ★ If they want to get a good deal, Brussels and London should move away from pre-conceived, emotional notions of EU migration. For that, Britain and the EU should walk into Brexit negotiations with a clear idea of what migration means for the other – both legally and politically. Britain should accept that for the EU-27, the idea of free movement is not just political posturing, but an essential part of the single market.
- ★ Free movement is a founding principle of the EU, enshrined in the treaties in 1957. But it is not an unconditional right. To be lawfully resident in another member-state, EU citizens need to be working, studying, or able to prove that they are self-sufficient.
- ★ The ECJ had an important role in turning the abstract principle of free movement into practical case law. Until recently, the ECJ was stretching its mandate to the limit and extending the right of free movement beyond what member-state governments had intended.
- ★ With the rise of populism and the EU's sagging popularity, the era of extending free movement rights has come to an end – just as the UK is leaving the EU. For example, recent rulings by the ECJ have set tougher limits on EU citizens' access to social benefits when living in another member-state.

- ★ Basic economic theory suggests that the single market could work without free movement of labour. If goods, services and capital are free to move across borders, there would be no additional economic benefit from allowing workers to relocate.
- ★ This simple theory excludes other aspects of international trade. Exporters and importers need detailed knowledge about the country they are trading with. Migrants have been shown to be effective economic bridges to other countries, facilitating trade and investment, especially in services. Workers can also gain skills and experience if there is a broader set of jobs to choose from. And firms can more easily address shortages of skilled labour if the pool of candidates is larger.
- ★ The EU is unlikely to agree on major changes to free movement rules in the next few years. The main point of contention is access to benefits by non-working EU migrants, but the ECJ has recently confirmed the right of EU countries to restrict it. There is little appetite to review the rules now, at a time when the EU-27 needs to offer a united front vis-à-vis the UK.
- ★ However, once the Brexit deal is done, Brussels should get serious about addressing the perceived unfairness of free movement rules. For that, the EU should try to close the gap between the rhetoric of free movement and the much less impressive reality. The European Commission may want to look at ways to make it easier for EU citizens to work in other member-states, for example by making sure that professional qualifications are recognised elsewhere.
- ★ The EU should also consider some modest reforms to free movement, to avoid further stoking populist hostility to EU migration. These reforms could include a revision of who can access benefits; some reforms on child benefit rules; and slight amendments to the rules on non-EU partners of EU citizens.

For years, Britons have faced a torrent of misleading media stories and statements from politicians about EU migration, portraying free movement as an absolute right giving rise to all sorts of abuses. Some of these stories were errors born of ignorance. Others were downright lies. But all of them contributed to Britain's vote to leave the EU.

The UK's open labour market and its system of universal benefits make it an attractive place for people to live and work. But these characteristics have also contributed to many Britons' frustration with the principle of free movement: they believe that their country offers more opportunities to EU migrants than it does to them. Some in Britain blamed the EU for stubbornly defending free movement – while doing little to ensure that other EU countries offered the same opportunities as the UK, for example, by making sure employers recognise qualifications earned elsewhere in the EU.

David Cameron and some of his ministers tried to bridge this gap but failed, partially because they started off by not being fully aware of some of the facts about how EU migration works. Before the UK referendum, Cameron shifted from trying to impose quotas on EU citizens coming to work in the UK to ending migrants' access to in-work benefits. It was only during his attempt to renegotiate the terms of Britain's EU membership that he learned his European partners were not ready to water down free movement rules to keep Britain in.

In the EU, Brexit caught many by surprise. Few people in Brussels or national capitals understand the UK's neurotic relationship with EU migration. For most Europeans, free movement has been one of the EU's main achievements,

and they struggle to understand why a country would leave the EU because of it.

In her speech on January 17th, May said that she wanted an early agreement on the rights of the 3.3 million EU migrants living in the UK and of the 1.2 million UK nationals living in the rest of the EU. If others agree, that will take one potentially difficult issue off the agenda of the withdrawal negotiations. But it will not deal with the equally tricky issue of migration between Britain and the EU-27 after Britain leaves the EU and (according to May's plans) enters a transition period toward a potential free trade agreement

Brussels' and London's differing perceptions of what EU migration entails will complicate these talks. British politicians may be too confident of their ability to convince the EU to give them a 'special deal' in a future free trade agreement. For their part, the EU's institutions and member-states will most probably demand a mild form of free movement as part of what May calls a 'comprehensive, bold and ambitious' free trade deal, such as preferential access for EU workers to the UK labour market. To get a deal that is good for both parties, the EU-27 and London should walk into Brexit negotiations with an open mind, and a clear idea of what migration really means for the other – both legally and politically.

This policy brief looks at what free movement means for Europe, and why this matters for Britain. It tries to debunk some of the myths that were spread during the EU referendum campaign in the UK. Finally, the policy brief

looks at ways the EU could reform some free movement rules, if it wants to avoid further hostility to intra-EU migration in the future.

One: Free movement is a founding principle of the EU...

In November 2016, Boris Johnson, Britain's foreign minister and a leading Brexiter, denied that free movement was a founding principle of the European Union, calling the notion a "myth", even "bollocks".¹ He went on to add that free movement was merely a construction of the ECJ and that it was not a fundamental right of EU citizens. Johnson was both right and wrong.

It is true that no EU citizen has a fundamental, unlimited right to move freely across the EU. To be lawfully resident in another member-state, EU citizens need to be working, studying, or able to prove that they are self-sufficient. Otherwise, they can be kicked out. It is also true that free movement of persons was introduced after the free movement of goods, capital and services. But free movement was not an afterthought: in 1957, the treaty establishing the European Economic Community (EEC) said that "workers" should be free to move anywhere within the then six EEC countries (Belgium, France, Italy, Luxembourg, the Netherlands and West Germany).

However, enforcing the single market's four freedoms of goods, services, capital and labour was more difficult than it seemed. Soon after the treaty's ratification, attempts by EEC institutions to create European laws to remove market barriers and obstacles to free movement of labour broke down, after the French withdrew from the Council of Ministers in 1965. To bring France back to the table, the EEC member-states signed the 'Luxembourg compromise', which provided a de facto veto power to national governments over EEC legislation. As a consequence, it became very difficult to pass European laws.

...but it is partially a construction of the ECJ

Enter the ECJ. To help unblock the single market, the court ruled in its landmark case *Van Gend en Loos*,² in 1962, that in the absence of specific legislation, individuals could rely directly on the EEC treaty to enforce all their single market rights. Over the next 30 years, member-states could rarely agree on laws regulating goods, services, or workers' rights. As a result, the ECJ produced a body of case law on free movement that filled the vacuum, expanding the rights of EU citizens in the process. In 1992, the Maastricht treaty created an 'EU citizenship', which extended the right to move freely from workers to all EU citizens, provided

they fulfilled certain conditions. Consequently, the ECJ had to decide cases involving the rights of people other than workers, like students or job-seekers.

Emboldened by its success in helping to make the single market a reality, the ECJ has tried to extend the concept of free movement beyond what is strictly necessary for the functioning of the internal market. In some cases, the judges in Luxembourg exceeded what was expected of them and interpreted the law in ways which infuriated national governments. In a string of cases between 1998 and 2002,³ the ECJ took a bold approach: because EU citizenship went well beyond the free movement of workers, EU migrants should be free to access benefits under the same conditions as nationals of the host member-state, even if they were not working.

"The ECJ has extended free movement beyond what is strictly necessary for the functioning of the internal market."

The rulings ruffled feathers in many EU capitals, and the court has in recent years reflected this shift in thinking by changing the way it looks at benefits. In cases such as *Brey* (2012), *Dano* (2014), *Alimanovic* (2015), *Garcia-Nieto* (2016) or *Commission v. UK* (2016, delivered a week before the British referendum), the ECJ has confirmed the right of member-states to refuse supplementary pensions, unemployment benefits and child credits to non-working EU migrants.

So Johnson was right and wrong. Free movement is not a fundamental right but it is a founding principle of the EU. And the ECJ did interpret free movement rules in a maximalist way. However, it has changed course in recent years, and in the future is likely to remain fairly conservative. The EU is moving towards less, not more, access to benefits for EU migrants, precisely at the time when Britain is leaving. That may be prudent policy if the Union does not want to give further impetus to the populist, anti-immigrant forces which are threatening the European project.

1: Ashley Cowburn, 'Free movement of people as a founding principle of EU is "a total myth" says Foreign Secretary Boris Johnson', *The Independent*, 15th November 2016.

2: Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*. The Court later upheld this decision in *Alfons Lütticke* (Case 48/65), and *Salgoil* (Case 13/68).

3: In *Martinez Sala* (1998, Case C-85/96), the ECJ said that Germany had to pay child benefits to a long-term unemployed Spanish national. In *Grzelczyk* (2001, Case C-184/99), the judges in Luxembourg ruled that Belgium had to pay a minimum income to a French student so that he could pay for his last year of university. Likewise, the ECJ granted a minimum income to a French citizen living in Belgium who had very intermittent jobs as a volunteer for the Salvation Army (*Trojani*, 2002, Case C-456/02).

Two: The single market works better with free movement of labour...

Before May's 'Brexit speech', one of the main points of contention had been whether or not the UK could retain full access to the EU's single market while opting out of free movement of labour. Many British politicians (and some analysts, like Jean Pisani-Ferry, former senior adviser to the French government, and former Bank of England deputy governor Paul Tucker) thought that free movement of labour could be detached from the other three 'freedoms' (the free movement of goods, capital and services) underpinning the single market.⁴ They argued that, economically, it does make sense for Britain to retain access to Europe's single market without having to accept free movement in return. Among political leaders in Paris, Berlin and Brussels, however, this is unthinkable: when it comes to the single market, it is all or nothing. Theresa May and her government have accepted the indivisibility of the 'four freedoms'. But the next question is what the EU-27 will demand in return for a "comprehensive, bold and ambitious free trade agreement" (as May put it in her speech).

Basic economic theory suggests that, indeed, a single market does not need free movement of labour. If goods and services as well as capital can freely move across borders, there would be no additional economic benefit from allowing workers to relocate, too.⁵

But this simple theory excludes three important aspects of international trade. First, the provision of a service works better if workers can (temporarily) relocate to other countries. Take construction companies from Central Europe. Countries like Poland have a comparative advantage in construction, but cannot ship buildings to, say, Germany. To create trade in this 'non-tradable' services sector, Poland needs to be able to 'ship' services in the shape of construction workers.

The counter-argument, derived from the simple model above, is that Polish construction workers could re-train as workers in tradable goods or services sectors such as manufacturing, while German manufacturing workers could move into construction. However, such re-training

does not take place as seamlessly as simple economic theory would suggest.⁶ Both Poland and Germany would lose out economically if free movement were restricted in a way that prevented Polish construction companies providing services in Germany.

“A key driver of economic growth is moving workers to sectors where they can be most productive.”

Second, exporters and importers require knowledge about the countries that they are trading with if they are to navigate the complex waters of cross-border trade: they need to understand local businesses and investment opportunities, local preferences and the cultural background of the way the economy works, as well as political, business and legal institutions. One way to gain such knowledge is through migration. And indeed, there is plenty of evidence that the presence of immigrants in a country raises trade with the country of origin of these immigrants. One study, using the 'natural experiment' of German reunification, finds that regions of West Germany that had more social ties to the former East were better able to exploit the sudden economic opportunities provided by unification. A recent study from the UK shows that the social ties of immigrants may be particularly important in boosting trade in services.⁷

Third, a key driver of economic growth is moving workers to sectors and firms where they can be most productive, and gain additional skills and experience. For example, local shortages of qualified staff are a major problem in countries such as the UK. When asked recently what most limits their ability to expand, one in five surveyed firms named labour shortages as the main factor (see Chart 1). Barriers to labour mobility, even within countries in the form of expensive housing, hit economic growth and limit career opportunities for workers.⁸

4: Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram Wolff, 'Europe after Brexit: A proposal for a continental partnership', Bruegel, 29th August 2016.

5: Economists call this the 'factor price equalisation' result of international trade, independently described by Paul Samuelson and Abba Lerner. In its original form, this result holds even if capital is not able to move across borders because the model is static (considering just one point in time) and not dynamic (considering saving and investment decisions over time). Once saving and investment are included, movement of capital does matter.

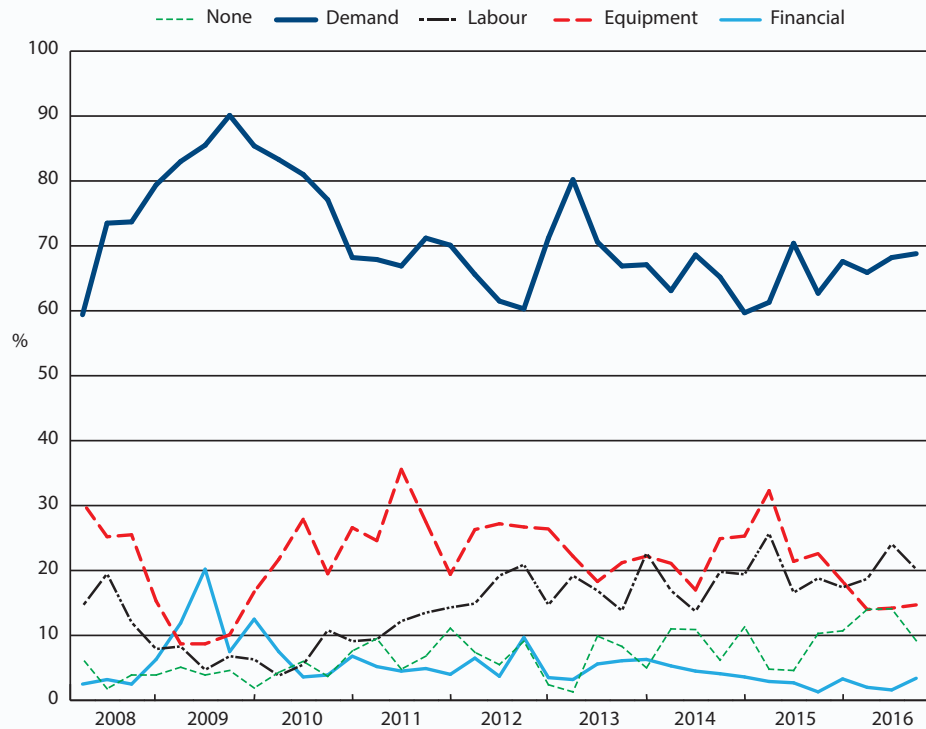
6: US trade with China is an example: workers had to move into new sectors in response to increasing competition from Chinese companies, but that took a long time, leaving workers with less secure employment and lower wages in the process. See David Autor, David Dorn and Gordon Hanson, 'The China shock: Learning from labor market adjustment to large changes in trade', NBER working paper, January 2016.

7: Konrad Burchardi and Tarek Hassan, 'The economic impact of social ties: Evidence from German Reunification' Quarterly Journal of Economics, 2013; Gianmarco Ottaviano, Giovanni Peri, Greg Wright, 'Immigration, trade and productivity in services: Evidence from UK firms', CEP Discussion Paper, June 2016.

8: Margaret McMillan and Dani Rodrik, 'Globalization, structural change and productivity growth', NBER Working Paper, June 2011; Raven Saks, 'Job creation and housing construction: Constraints on metropolitan area employment growth', Federal Reserve, September 2005.

Chart 1:
Factors that limit UK firms' current production (responses in per cent)

Source:
Haver, European Commission business and consumer surveys.



A more nuanced view of trade policy also needs to take the distributional consequences of free trade into account. Not every region in Europe was or is equally well equipped to use free trade to its advantage. There are two main ways of compensating weaker regions: investment funds, paid for by the stronger regions to foster economic development; and allowing labour to move to more productive regions. Free movement of labour in Europe thus allows more people to participate in the gains of free European trade.

In the eurozone, there is an additional aspect to consider. Since euro countries have given up the ability to adjust their interest rates or their exchange rate, which both serve as tools to absorb the ups and downs of the business cycle, they need other ways to adjust to changes in the strength of economic activity. One mechanism is to allow workers in economically struggling regions and countries to move to economically stronger ones. How much labour mobility really helps the home country in an economic downturn is controversial.⁹ But being able to move and escape long spells of unemployment certainly helps individual workers.

Free movement of labour in the European Union thus helps to further integrate the single market, making it more efficient and fairer at the same time.

...and no country can have full access to the single market without agreeing to free movement

Continental Europeans are very attached to the single market, imperfect as it is. The latest Eurobarometer poll shows that 56 per cent of Europeans think that the free movement of people, goods and services is the best thing the EU has to offer (peace comes second, at 55 per cent). And a whopping 79 per cent of EU citizens support free movement of persons within the EU. Support for free movement is above the EU average in all Central and Eastern European (CEE) member-states, except for Poland: Poland has the lowest approval rate at 76 per cent, while 95 per cent of Latvian citizens support the freedom to move anywhere in Europe. Even in Britain, a majority of people (63 per cent) support the principle of free movement.

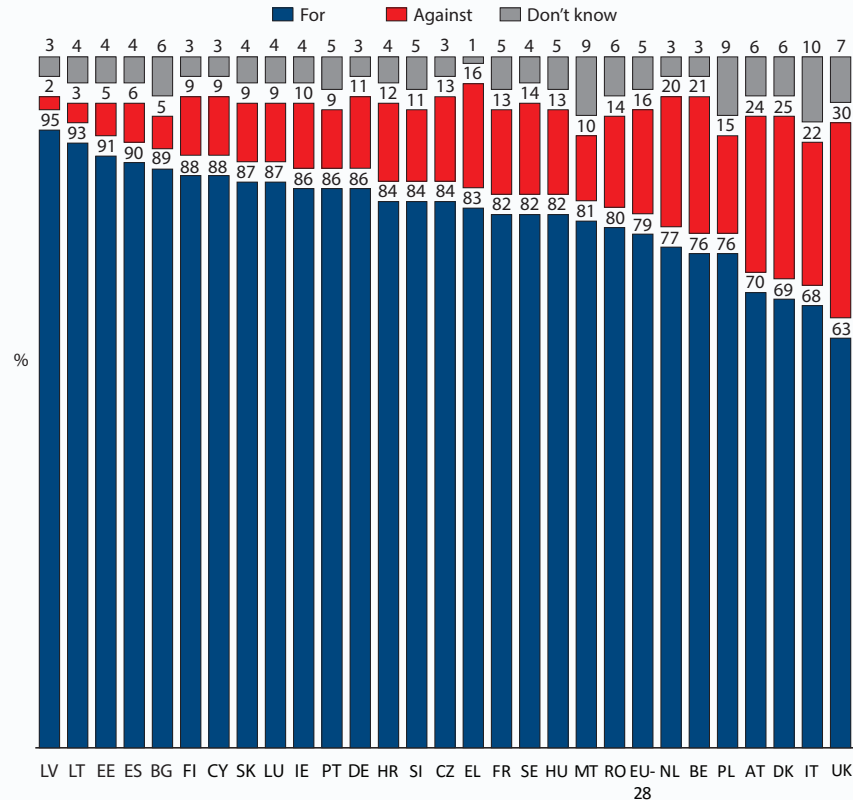
At a time when public support for the EU is dwindling, Britain's EU partners have little incentive to meddle with an EU policy that most Europeans value. EU leaders know that kicking Britain out of the single market will damage their economies, but they are much more interested in preserving the EU's integrity.¹⁰ In her speech, May conceded that Britain needs to leave the single market because the EU will keep the 'four freedoms' intact.

⁹: Emmanuel Farhi and Iván Werning, 'Labor mobility within currency unions', NBER Working Paper, May 2014.

¹⁰: Charles Grant, 'Brussels prepares for a hard Brexit', CER insight, November 21st 2016.

Chart 2:
Support for
free movement
in the EU-28
(responses in
per cent)

Source:
European
Commission,
Standard
Eurobarometer
May 2015.



Nor does the EU want to treat European non-member-states differently. There are a few non-EU European countries that have access to the EU's single market: Iceland, Liechtenstein and Norway, which belong to the European Economic Area (EEA), and Switzerland, which is neither an EEA nor an EU country but has access to parts of the single market.¹¹ Of these, only Liechtenstein is allowed to impose restrictions on the free movement of EU/EEA citizens (in the form of quotas) but only because it is a tiny country in which over a third of the population is already foreign-born.¹²

Norway and Iceland are not allowed to cap migration from the EU. Nor can they discriminate against EU workers. The EEA agreement does provide for an 'emergency brake', albeit a very limited one. Article 112 of the agreement allows parties to "take appropriate measures" to control migration, but only in exceptional circumstances which should be duly justified. In principle, Norway could impose temporary restrictions on, say, Spanish workers if there was a sudden surge that the Norwegian labour market could not absorb. But Oslo would need to show figures justifying the claim that the Norwegian labour market could not cope. And, because the measure would create an "imbalance between the rights and obligations under the EEA agreement" (Article

114), Spain (or any other EEA country) would be allowed to respond by taking "proportional rebalancing measures". These retaliatory measures could, for example, restrict the freedom of Norwegian companies to operate in the EU.

Even the Swiss, who have only partial access to the single market, have to abide by free movement rules. In 2014, the Swiss voted in a referendum to impose quotas on EU migration, but Brussels has since made it clear that it would not accept a quota system. The EU has Switzerland over a barrel: the many bilateral agreements regulating EU-Swiss economic relations are tied together by a 'guillotine clause', so that the EU could cease all other agreements if Switzerland refused to accept free movement of people. Brussels has already fired a shot: as Switzerland voted to end free movement, the EU denied grants awarded under the EU's Horizon programme to Swiss scientists.¹³ In December 2016, the Swiss parliament passed a law allowing Swiss firms to inform local job centres about job vacancies first, in times of economic hardship. The new system assumes that Swiss nationals are more likely than EU/EEA nationals to be registered in local job centres, so, by posting vacancies there first, Swiss citizens would have a better chance to get a job than EU/EEA migrants – who are also allowed to apply. The law is a far cry from the quotas voters had demanded in the 2014

11: Turkey is part of the EU customs union, but not of the single market; and Canada has signed a free trade agreement with the EU, which eliminates most, but not all, tariffs. The EU-Canada agreement is still not in force.

12: For the UK, the corresponding figure is 13.3 per cent, and the EU average is 10 per cent. Principality of Liechtenstein (data from 2015), Office for national statistics (2015) and Eurostat (2011).

13: John Springford, 'When you join the EU you make a deal – Switzerland needs to remember that', *The Guardian*, January 19th 2015.

referendum, and was welcomed in Brussels – although the European Commission has warned it would monitor its implementation to ensure that there is no blanket discrimination against EU citizens.

The EU has been clear and consistent with all non-EU countries in Europe: if you want access to the single market, you need to accept free movement of persons. It is very likely that in the course of the negotiations on a free trade agreement, the EU-27 will insist on preferential access for EU workers to the British

labour market. The precise form of the EU proposal is uncertain. In responding, the British government will have to decide whether its key concern is to reduce the economic burden of non-working migrants, or simply to reduce numbers. If the former, it might end up with an arrangement that mimics free movement for those who are working, studying or self-sufficient; if the latter, it might insist on quotas, even if they were set at a fairly high level to ensure the EU agrees to a free trade deal. If the UK insists on stricter controls on migration, trade negotiations may well break down.

Three: The EU-27 do not want a major reform of free movement...

When David Cameron set out his renegotiation demands, he focused on controlling what he called “unsustainable” flows of citizens from elsewhere in the EU to the UK. He wanted to limit free movement for new member-states until their income levels had converged with those of richer member-states, and aimed to end an alleged abuse of welfare benefits by EU nationals.

But his implicit assumption that there was a coalition of countries willing to reform freedom of movement turned out to be wrong. What he went home with – some minor concessions, mainly on in-work benefits – was as much as the EU-27 were prepared to give. Many of Cameron’s demands (like a blanket restriction on in-work benefits for EU workers or deporting job-seekers *en masse*) would have required treaty change, and other EU countries did not agree to them. EU leaders consented to some (mainly cosmetic) changes to the citizens’ directive almost at gunpoint: many saw it as the lesser evil if the alternative was to lose a member-state. But most were never convinced of the deal’s merits. The proof is that, once Britain voted to leave, the EU-27 dropped the deal like a “hot potato”, in the words of an EU official.

British politicians still seem to think that other member-states resent EU migration in the way the UK does. It is true that almost half of Europeans think migration is the most important issue facing the EU right now, according to the latest Eurobarometer poll. But at the same time, support for free movement of EU citizens runs high in the EU, with the UK’s traditional allies, Germany and the Netherlands, boasting 86 per cent and 77 per cent support rates, respectively.

That may seem like a contradiction to British eyes, but it is not: Continental Europeans do not generally use the term ‘migration’ when referring to EU citizens. For the EU-27, it is non-EU citizens who migrate; EU citizens simply ‘move’, as is their right under EU law. It is comparable to British papers using the term ‘expats’ for their own

citizens abroad, while using the term ‘migrants’ for those coming in.¹⁴ In fact, it is impossible to find references to ‘EU migration’ in official Commission documents. There is another telling fact: the Commission’s directorate general (DG) for migration only deals with non-EU citizens. The rights of EU migrants fall within the competences of the Commission’s departments in charge of the internal market, justice and employment.

“For the EU-27, it is non-EU citizens who migrate; EU citizens simply ‘move’ as is their right.”

This is not semantic pedantry. It is important for the negotiations to come: Europeans may worry about migration, but that does not mean that their governments would make any concessions on free movement, simply because, for them, these are two different things.

There is no appetite in Brussels for a new treaty, at least in the years to come. And EU leaders have no incentive to re-open the citizens’ directive, the negotiation of which was, according to one EU official, a “nightmare”. The only parts of EU law that member-states like France or the Netherlands want to revise now are access to benefits and the posted workers directive.¹⁵

...but free movement may need some modest reforms to contain populism

Once Brexit is off its plate, the EU may need to consider some modest reforms of free movement rules. Brussels should learn from the British vote, and understand that part of Britain’s negative views of EU migration has to do with a perceived unfairness of the free movement rules. If it wants to make sure that citizens continue to support free movement, and that EU migration cannot be easily exploited by populists elsewhere in Europe, Brussels

14: Steven Swinford, ‘Angela Merkel says nein to Theresa May’s calls for early deal on rights of EU migrants and British ex-pats’, *The Telegraph*, 29th November 2016.

15: The 1996 posted workers directive regulates the rights and obligations of workers sent abroad by their companies to work for a limited period of time. In 2016, the Commission published a proposal to review it.

should agree to some modest reforms. The EU should focus on two things: making free movement a reality for all EU citizens; and finding ways to reform unfair free movement rules. This would send a strong message to EU capitals that Brussels is not closed to improving the rules, if they are perceived as unreasonable.

At the moment, free movement remains fairly aspirational. It is difficult for some people to move and work in other member-states. Over-regulation of services in some countries like Germany or Austria makes it hard for EU citizens to enter the market. For example, corset-makers need special diplomas in Austria.¹⁶ And electricians and plumbers need to pass several accreditations in Germany. The EU should look at ways to remove those barriers to make the single market work better, and ensure every EU citizen can move under the same conditions.

The EU has already started looking at reforming some free movement rules, albeit timidly. In December 2016, the Commission published a proposal to review access to benefits. This proposal had been in the works for over three years, so it had little to do with Brexit. Although it was clearly a response to growing national concerns over access to benefits, the proposal was not the major overhaul of EU rules on access to benefits that some wanted to see. It would simply clarify the law to reflect existing rules in member-states, and the latest case law of the ECJ.

The proposed law (which still needs to be agreed by member-states and the European Parliament) looks at four different things: access to benefits for EU citizens who are not, and have not been, working in the country to which they moved; so-called long-term care benefits (like cash to support the handicapped); unemployment benefits; and benefits intended to help parents care for their children if they lose some or all of their income. Most of the suggested new rules are simply technical addendums to existing laws, so as to clarify the system. For example, the Commission suggests some new ways to calculate the period necessary to claim unemployment benefits when an EU citizen moves from one country to another. On benefits for those who do not work (a major issue in Britain during the run-up to the EU referendum), the Commission simply confirms the rights of member-states to deny them to EU citizens who have no history of work in their new country, something the ECJ has consistently said in recent years. None of the suggested new rules would require changes to either the citizens' directive or the EU treaties.

If it wants to keep populists at bay, the EU should go further in its efforts to reform free movement.

Even though Cameron's deal is dead, the reforms he got in February could inspire some future changes of

free movement rules. During its renegotiation with the EU, Britain won three small victories: the right to index child benefits given to EU citizens whose children live in a different member-state, to adapt them to the living standards of the children's country of residence; an 'emergency brake' to cut in-work benefits paid to future EU migrants temporarily; and a change in the rules on the non-EU spouses of EU citizens, clarifying that they cannot move within the EU unless they are already lawfully resident in a member-state.

“If it wants to keep populists at bay, the EU should go further in reforming free movements.”

For many member-states, the indexation of child benefits does not, on its own, justify a legal reform. The numbers are so small that they are not worth the political fight of re-negotiating the rules. Moreover, it may spark a discussion about indexing other benefits such as pensions, a topic many rich and ageing countries would like to avoid. And Eastern European countries would not be happy with such a change to child benefits: not only would it reduce the money that some of their nationals receive, but they might also end up having to pay very large sums to some families in cases where, for example, a parent works in Poland but the children live in Luxembourg. To ensure that child benefits are solely used for the correct purposes, member-states could consider setting up monitoring systems. This could be done, for example, by issuing vouchers and conducting random inspections. But the costs of doing this would outweigh the benefits: in 2013, only 0.26 per cent of all UK benefit claims were paid to children living elsewhere in the EU, and these figures are similar across the EU.¹⁷

In-work benefits, a type of non-contributory benefit, are rare outside Britain, so naturally there will be little interest in changing EU rules once the UK leaves the EU. But the question of non-contributory benefits in general will most probably come up when, and if, member-states decide to re-open the citizens' directive and the two regulations governing free movement. Non-contributory benefits for EU citizens are contentious in the EU-27, as they are not linked to how long, or how much, an EU migrant has contributed to the public purse.

Following the ECJ's recent case law, member-states may want to look at limits to accessing non-contributory benefits in future reforms. EU countries could, for example, establish some sort of 'emergency brake' on benefits, similar to that offered to Cameron. If so, it would be important to ensure that this brake could only be used in clearly defined circumstances, such as where

16: Charlemagne, 'Single-market blues', *The Economist*, July 16th 2016.

17: Uuriintuya Batsaikhan, 'Child benefits for EU migrants in the UK', *Bruegel*, February 18th 2016.

the government can prove that EU migrants' access to non-contributory benefits is damaging the public purse (a close advisor to David Cameron admitted that the UK government had no evidence to justify pulling the brake that he won in February).¹⁸ And the European Parliament should have to approve a triggering of the brake; such a mechanism, if left unsupervised, would risk breaching the EU's principle of non-discrimination, so it would need to be properly monitored, with the involvement of all the main EU institutions.

EU countries could also clarify the rules on non-European citizens living in the EU, so that there was even less room for fraud. For example, they could copy the deal struck

with Cameron and insist that third country nationals be lawfully resident in one member-state before permitting them to move to another to join family members who are EU citizens. This would require a change to the EU's citizens' directive. Other changes could be considered too, so that nationals of a country do not end up worse off than other EU citizens in the same situation. These could include, for example, allowing member-states to ask third-country nationals joining their EU spouses to fulfil some conditions (like taking a language test). Or requiring EU citizens coming back home from another member-state with their non-EU partner to prove that they have not just moved abroad to escape stricter national immigration rules.¹⁹

Conclusion: A nasty divorce?

The road to Brexit was paved with myths about free movement. They helped Brexiters convince a majority of Britons to vote to leave the EU and contributed to the failure of Cameron's renegotiation strategy in the winter of 2015. Theresa May has understood that the EU-27 do not intend to compromise on free movement. But she may still be in for a disappointment in the upcoming negotiations on a free trade agreement, if the EU-27, as seems likely, insist on a mild form of free movement in return, such as preferential access of EU workers to the UK labour market. The deeper the access of the UK economy to the EU single market, the more the EU-27 is going to demand on migration.

For the EU, the indivisibility of the four freedoms is not political posturing but at the heart of the EU. And the EU-27 have a greater interest in leaving free movement provisions as they are than in changing them. Migration fears in the rest of the EU are more related to non-EU migrants and refugees than they are to EU citizens.

The EU institutions, and particularly the ECJ, have in the past been too generous in extending the definition of the free movement of persons, allowing some undeserving individuals to benefit from more generous welfare systems than exist in their home member-state. Savvy populists and the press in Britain turned these perceived abuses into a political campaign against free movement, preparing the ground for Brexit.

In the long run, the EU-27 should find ways of making free movement a better reality, and agree to some small reforms, mainly to how non-contributory benefits are paid, and how non-EU spouses can relocate within the EU.

But the principle of free movement is not in doubt. The EU-27 will try to maintain a united front in their talks with Britain. Given that many leaders, including Angela Merkel, have deemed free movement sacrosanct, the EU-27 will not question the principle.

“For the EU, the indivisibility of the four freedoms is not political posturing aimed at exacting revenge.”

Could populist parties in France, the Netherlands, Italy or elsewhere call for a reform of the EU's principles, if they won their respective elections? If Le Pen, Wilders or Grillo come to power, we would be looking at a very different European Union – one in which the principle of free movement would be called into question by the very same countries who are now its staunchest defenders. But this is unlikely to happen. Populist parties will most probably win more seats in the French, Dutch and Italian parliaments, but it is improbable they will end up in government.

However, if mainstream governments are pressured by powerful populist oppositions, access to benefits for EU migrants and the rights of posted workers will receive more attention. Germany and others could then agree to some modest reforms, in order to protect what matters most to most EU governments, that the EU countries stand together, and not only in talks with Britain. But none of this would help Britain in its Brexit talks: the EU would not offer Britain more than it would offer its own member-states.

¹⁸: Daniel Korski, 'Why we lost the Brexit vote', *Politico*, 20th October 2016.

¹⁹: Currently, a British citizen who has moved to France and then returned home can bring his Indian partner into the UK unconditionally, because EU rules apply. But British citizens who have not moved need to follow national immigration rules and comply with very stringent conditions if they wish to bring a non-EU spouse home. This has led to abuse in certain cases, with EU citizens moving briefly to another member-state solely to escape national migration rules.

For its part, the British government needs to accept that its EU partners have a different view on EU migration; and that free movement is as much a political project and core achievement for most Europeans as it is an economic idea to complete the single market. The reaction of some Brexiters to the stance of the 27 – blaming them for their alleged stubbornness – is unhelpful and will only harden their stance. The best thing for the British would be to lower expectations about what the May government can achieve in the trade negotiations to come, and hope that Britain’s immigration debate can become more nuanced and empirical. That could help to make Brexit less hard than it would otherwise be.

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