

Immigration and the UK's Referendum Vote – EU attitudes are more fluid, but barriers to change remain substantial

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*In his second blogpost about the UK government's renegotiation strategy, **Frank Vibert** looks at the minefields surrounding British efforts to restrict the free movement of EU citizens into the UK under the Single Market provisions. Although EU all member states are now looking again at immigration and border controls, and the salience of these issues is now very high across the continent, Treaty constraints on the UK's demands are still restrictive.*

With one recent poll showing a narrow UK majority for leaving the EU, there is no doubt that in raw political terms the need to 'do something' about immigration from within the EU is the number one priority for Cameron and Osborne. Economists debate the costs and benefits of immigration – with different answers of course. But what makes immigration so salient is politics, not economics. It is probably the single most important issue for motivating voters who favour exit.

David Cameron's letter to the President of the European Council refers to estimates that the UK is on track to become the most populous country in the EU by 2050. This means that, even when the present period of budget 'austerity' comes to an end, there will be ever-continuing pressure on future budgets to help fund critical infrastructure, schools, health services, other social services, housing and transport. Public concern about immigration may be emotive in many aspects of how it is expressed – but it is not irrational.

The debate about immigration in the EU is changing fast in reaction to the Syrian refugee crisis and terrorism. Moreover it is not simply about security at the external borders of the EU. The issue is also concerns the movement of immigrants within the Schengen group of EU member states, who have been experimenting with 'borderless' travel. UK government demands to be able to control the flow of immigrants into the UK, and to make the Britain a less attractive destination by denying access to welfare benefits, are thus being pitched into a fluid debate where all the EU's member states realize that they have a problem. Every country is now equally aware that failure to respond to the problem will further stimulate a very negative political and public opinion response.

Maintaining Treaty Principles

Despite the newly increased fluidity and urgency of the issue, the British government still faces an uphill battle in negotiating restrictions on flows of EU citizens (and refugees) into the UK. The reason is that the problem from Britain's perspective is not mainly about immigration from outside the EU, it is about immigrant flows within – from Poland, Romania, Bulgaria and, in the more distant future, from prospective new member states such as Serbia, or Albania, or Ukraine.



And here the UK government runs up against those provisions in the EU Treaty base on the Single Market that establish the principles of

- non-discrimination on grounds of nationality (TFEU Article 18)
- the right to move and reside (TFEU Articles 20 and 21) and
- the freedom of movement provisions of TFEU Article 26.

Of similar importance to the general principles of non-discrimination and free movement are those Treaty articles referring specifically to

- the freedom of movement of workers and
- non discrimination against workers from other EU member states (TFEU Article 46).

In addition there is the further stipulation (in TFEU Article 48) that EU measures in the field of social security should provide for freedom of movement for workers.

Notwithstanding the many current stresses in the Schengen area, other EU member states have made clear that they wish to maintain the freedom of movement principles of the Single Market. The UK government thus has to show that the restrictions it is demanding can take a form that will leave these general principles still intact.

Derogations

The treaty base of the EU offers a time-honoured way for squaring these kinds of circles. It takes the form of *derogations*, that is, exceptions to whatever the general principle lays down. For example, TFEU Article 48 on the provision of social security benefits to workers from other EU states already refers to a special procedure relating to any EU measures in the field that would impact the social security budget of a member state and would affect 'important aspects of its social security system, including its scope, cost or financial structure'. (TFEU Article 48 paragraph (b)).

Another kind of derogation, relating to the different principle of the freedom of movement of capital, is the '*step-back*' procedure. In this particular example, the Council is able to take a step backwards in Union law from the general principle regarding the liberalization of the movement of capital to or from third countries. (TFEU Article 64 paragraph 3).

So the UK government will have some precedents that it can cite, either in looking for ways to restrict claims on social security by workers coming from other EU member states, or possibly, to 'step back' from the freedom of movement and right of abode provisions more generally.

Legal challenge and Human Rights

In thinking about the legal protections the UK might win, there is a further dimension that distinguishes the negotiations over immigration from other aspects of the negotiation – such as the relationship between Euro Ins and Euro Outs (discussed in [my earlier article](#)). In the case of any economic or financial disputes with the Eurozone any quarrel lies between governments – or possibly with official institutions such as the ECB. In the case of immigration the possible challenges to any protections gained by the UK may come not only from other member states (for example, the Polish or Romanian government) but also from individual workers pursuing legal cases, or from NGOs or lawyers representing them.

If such legal challenges do emerge from non-governmental sources they make take the form of cases brought under the Charter of Fundamental Rights of the EU (agreed in 2000 and adapted in 2007). According to the Treaty (TEU Article 6) these provisions have the same legal value as the Treaties. The Charter does not create new rights not already in the Treaties. It does however reaffirm the freedom of movement and right of abode provisions of the Treaty (in Article 45), the right to engage in work (Article 15) and the right to social security benefits (Article 34).

Under a special Protocol agreed under the Treaty of Lisbon, the UK (and Poland) negotiated an exemption to the application of the Charter 'except in so far as Poland or the UK has provided for such rights in its national law'. (Protocol Article 1, paragraph 2). However, The UK's Human Rights Act prohibits discrimination based on national origin (Article 14). Thus, the Protocol itself, and the exception it provides, both open up potentially fertile avenues for legal challenges. In negotiating derogations or 'step-back' procedures the UK government will therefore have to take a further look at the Protocol, and at its own human rights legislation.

The danger for the UK government is that it may negotiate derogation or step-back procedures that appear to provide it with protection from immigrant flows into the UK from other EU states – only to find that these protections then come under immediate challenge from the EU Charter of Fundamental Rights. Such a confused outcome will only add to the incentives for those groups who want Britain to vote for exit.

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