BREXIT AND CITIZENS' RIGHTS

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Immigration was a major point of debate and disagreement in the United Kingdom (UK) during the 2016 Brexit referendum. Following three years of negotiations, the European Union (EU) and the UK came to an agreement – though not yet in force – on the protection of citizens' rights post-Brexit. This, however, covers only those EU nationals who come to the UK (and vice versa) before the UK's withdrawal from the EU. The future mobility framework is yet to be determined. This article discusses the citizens' rights negotiated by the parties and the possible mobility regimes for the future EU-UK relationship. It suggests that whatever future policy is chosen, it will, as the UK government insists, be far removed from the free movement notion under EU law. This is particularly the case in a no-deal Brexit scenario.

Keywords: Brexit, European Union, withdrawal agreement, free movement of persons, mobility, citizens' rights, no-deal Brexit, GATS, Mode 4 mobility, Settlement Scheme

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I. INTRODUCTION

The European Union (EU) has insisted that withdrawal from membership of the EU under Article 50 of the Treaty on European Union (TEU), like the process of accession to the EU, should follow a phased approach.[1] The EU made clear that the Parties could not advance to the next phase of negotiations until the European Council had concluded that sufficient progress had been made in the previous phase. Ensuring citizens' rights – namely the rights of EU citizens already resident in the UK and UK citizens in the EU – was one of the three main issues for first phase of negotiations, the other two being the so-called Brexit bill and the Northern Ireland border.[2]

While immigration was a major point of debate and disagreement in the UK during the campaign leading up to the 2016 referendum, reaching a consensus

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1 See Jones in this issue.

2 European Council, 'Guidelines following the United Kingdom's notification under Article 50' (29 April 2017) EUCO XT 20004/17.

with the EU on citizens' rights in fact proved easier than might have been expected. However, Phase I of the negotiations – which ultimately led to the 25 November 2018 Withdrawal Agreement (WA) – were limited to the protection of the rights already acquired by EU citizens prior to withdrawal and, potentially, also those during the transition period (also called the 'implementation period' by the UK government). Importantly, the WA (or any other withdrawal agreement, should the Parties decide to re-negotiate) does not provide for 'onward' free movement rights, that is, rights applicable to UK nationals living in one EU state who, after the transition period or after the withdrawal date, want to move to another EU State. This is considered to be an issue to be dealt with under any future trade negotiations and thus a separate agreement on the future relationship[3] which is covered by Phase II of the negotiations. A 'future mobility framework' is due to be negotiated as part of a future relationship agreement.

This article addresses citizens' rights both under the November 2018 Withdrawal Agreement (Section II) and, more speculatively, under a future mobility framework (Section III). The implications of a no-deal Brexit for citizens' rights will also be discussed. Finally, Section IV will look into international mobility rights, specifically the default position as provided by the General Agreement on Trade in Services (GATS) provisions of the World Trade Organization (WTO). It will be argued that while the rights of EU citizens already in the UK (and vice versa) are fairly generously protected under the WA, a no-deal Brexit threatens that security, particularly for UK nationals in the EU. It will also be argued that even with a future trade agreement, the future mobility framework will, intentionally, be far removed from any notion of free movement as it is currently understood. In the event of a no-deal Brexit, reliance on GATS as the vehicle for future mobility for UK nationals into the EU for work purposes will be very limiting and will necessitate a very different approach to migration from the current one.

We begin by looking at mobility rights under the Withdrawal Agreement (WA), noting that at the time of writing the WA has not passed through the

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3 Section II of this article will nevertheless address the future mobility framework envisioned by UK policy makers.

UK parliament, despite three attempts.[4] The third meaningful vote, which took place in the House of Commons on 23 March 2019, resulted in a rejection of the UK Government's motion to approve the WA by 344 votes to 286 and led to the extension of the Article 50 negotiating period until 31 October 2019. If the UK Parliament fails to approve the WA (or a renegotiated version of the WA), the Article 50 process will result in a no-deal Brexit. The discussion below reflects the content of the WA, bearing in mind that at present the WA is not a binding commitment in the form of an international treaty.

II. Citizens' Rights under the Withdrawal Agreement

In its 29 April 2017 Guidelines, the European Council said:

> Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations.[5]

Citizens' rights were the subject of an early agreement in principle between the parties during Phase I of the negotiations under Article 50 TEU, the results of which were first laid out in the 8 December 2017 Joint Report[6] and then translated into a legal text, the Withdrawal Agreement. The agreement on citizens' rights can be found in Part II of the WA.

The governing principle of the Joint Report and the WA is the reciprocal protection of residence rights for those citizens of the EU Member States in

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4 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', as agreed at negotiators' level on 25 November 2018 <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf> accessed 30 August 2019.The UK Parliament has rejected the agreement on three occasions, and it is therefore unclear whether it will be adopted.

5 European Council Guidelines (n 2), para 8, p 5.

6 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during the Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union of 8 December 2017', European Commission <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> accessed 30 August 2019.

the UK and UK citizens in the EU who have exercised free movement rights by the specified exit date. This section addresses whose rights are protected (subsection 1), the content of citizens' rights (subsection 2), and the relevant institutional framework (subsection 3). Subsection 4 concludes with a brief discussion of what might happen in the event of a no-deal Brexit.

1. The Scope of Application of Citizens' Rights

The UK and the EU have agreed to preserve residence rights acquired before the UK's withdrawal from the Union. Citizens who, in accordance with Union law, legally reside in the UK, and UK nationals who, in accordance with Union law, legally reside in one of the EU27 Member States, as well as their family members, fall within the scope of protection. The UK Government's White Paper on immigration[7] indicates that during the transition period, the Government will implement the EU Settlement Scheme. This scheme is in fact already being rolled out.[8] The aim of the scheme is to ensure a post-Brexit continuation of the residence rights of EU citizens already resident in the UK and of those who arrive in the UK during the transition period. Similar arrangements will be negotiated with EFTA states (Norway, Iceland, Liechtenstein and Switzerland).

As of March 2019,[9] the UK has opened up the EU Settlement Scheme[10] not just for EU nationals but also for EEA nationals and Swiss citizens, who must

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7 'The UK's Future Skills-based Immigration System' (December 2018), Cm 9722 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf> accessed 30 August 2019.

8 'A Call to Apply for the EU Settlement Scheme' <https://www.gov.uk/settled-status-eu-citizens-families> accessed 30 August 2019.

9 Prior to that there had been testing of the scheme on certain employers in certain geographic areas: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752872/181031_PB1_Report_Final.pdf> accessed 30 August 2019. On the roll out, see https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-20/HCWS1226/> accessed 30 August 2019.

10 See the Statement of Intent <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 30 August 209 and then the changes to the immigration rules: <https://assets.publishing.service.gov.uk/government/

apply by 30 June 2021 if they wish to continue living in the UK after that date (those who have Irish nationality or have indefinite leave to remain do not need to apply). The scheme will be open until six months after the end of transition period. The EU Settlement Scheme is in line with the WA which states that Union citizens and UK nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of five years or for the period specified in Article 17 of Directive 2004/38/EC,[11] shall have the right to reside permanently in the host State.[12] It is important to emphasise that the scheme is subject to the conclusion of the WA with the EU which would provide for a transition period. A policy paper published by the UK Government, however, says that the UK will continue to run the EU Settlement Scheme for those residing in the UK by exit day in a 'no-deal' scenario.[13]

While the Joint Report does not specify the end date for acquiring residence rights, the WA sets out a transition period[14] during which free movement applies.[15] If concluded by both parties, the WA may extend free movement of persons to the end of 2020, with a possible extension up to the end of

uploads/system/uploads/attachment_data/file/784060/CCS207_CCS0319710302-002_HC_1919_Immigration_Rules__EXPLANATORY_MEMO__PRINT_.pdf > accessed 30 August 2019. The website is: <https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status>.

11 Art 17 of the Directive 2004/38/EC lists cases when the right of permanent residence in the host Member State may be enjoyed before completion of a continuous period of five years of residence (e.g. incapacity to work, retirement and other).

12 Art 15(1) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 25 November 2018 <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> accessed 30 August 2019.

13 'Citizens' Rights – EU citizens in the UK and UK nationals in the EU', Department for Exiting the European Union <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 30 August 2019.

14 See Armstrong in this issue.

15 For details: Immigration (European Economic Area) Regulations 2016 <http://www.legislation.gov.uk/uksi/2016/1052/made> accessed 30 August 2019.

2022.[16] In such a case, residence rights of citizens who moved before that point,[17] and family members,[18] as well as those whose entry was facilitated[19] would retain such rights after the transition period. Those who, on the specified date, are working as frontier workers also fall within the scope of protection.[20]

Those protected as family members must already be resident or already be a family member or have been born or adopted by someone already qualifying as a family member.[21] EU and UK citizens and their family members will retain their residence rights as provided for under the EU treaties and the Citizens' Rights Directive 2004/38.[22] Under the WA, those with permanent residence will acquire 'settled status' under the same rules as those under Directive 2004/38/EC.[23] That status can be lost after five years' departure (as compared with two years under the Directive 2004/38/EC).[24] Those without five years of residence will enjoy 'accumulation of periods' under Article 16 of the WA which essentially means that these individuals will acquire 'pre-settled status' prior to acquiring settled status. In that period prior to five years, individuals can change their status, for example, from being a worker to a student.[25]

In addition to family members who are already resident, the WA also discusses the rights of certain categories of family members, irrespective of their nationality, who were not residing in the EU/UK before the specified date (i.e. the end of the transition period under the WA, if adopted) to join a

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16 Art 132(2) of the WA.

17 Art 10(1)(a)-(d) of the WA.

18 Art 10(1)(e)-(f) of the WA.

19 Art 10(2)-(3) of the WA, which refer to Art 3(2) of Directive 2004/38/EC. Facilitation concerns those family members who do not have a right of entry and residence but who fall under the discretionary list of those whose entry the host Member State should facilitate.

20 Art 10(1)(c) of the WA, para 15, p 2 of the Joint Report.

21 Art 10(1)(e) of the WA.

22 Art 13 of the WA.

23 Art 15(1) and (2) of the WA.

24 Art 15(3) of the WA.

25 Art 17 of the WA.

Union citizen or UK national.[26] Such family members may include family members as referred to in Article 2 of the Directive 2004/38/EC[27] and children born or legally adopted.

The acquisition of residence rights and of the right of permanent residence before the end of the transition period (again, only if the EU and the UK conclude the WA which provides for a transition period) is subject to conditions under EU law. The Joint Report states that the conditions for acquiring the right of residence under the WA are those set out in Articles 6 and 7 of Directive 2004/38/EC. The Directive distinguishes different conditions depending on whether the length of stay is three months (Article 6) or longer (Article 7). EU and UK nationals, and their family members, will continue to have the reciprocal right of residence for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. A stay exceeding three months is limited to:

- workers or the self-employed (Article 7(1)(a))
- those with sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State (Article 7(1)(b))
- those enrolled at a private or public establishment for the principle purpose of study or have comprehensive sickness insurance cover in the host State (Article 7(1)(c))
- family members joining a Union citizen who falls under one of above categories (Article 7(1)(d))

As for the acquisition of the right of permanent residence, the conditions listed in the Directive 2004/38/EC apply. Article 16 states the general rule which requires residence for a continuous period of five years. Continuity of residence shall not be affected by temporary absences not exceeding a total

[26] Art 9(a) of the WA, para 12, p 2 of the Joint Report.

[27] Under Art 2 of the Directive 2004/38/EC family members include: the spouse, a registered partner, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, the dependent direct relatives in the ascending line and those of the spouse or partner.

of six months in a given year. Article 17 lists exemptions from this general rule for people who may acquire permanent residence rights before completion of a continuous period of five years of residence. Such people include, for example, workers or the self-employed who at the time they stop working become entitled to an old-age pension.[28]

According to the Joint Report, the EU and the UK can require persons concerned to apply to obtain a residence status and be issued with a residence document attesting to the existence of that right.[29] The WA contains a lot of detail on the practicalities of attaining these new statuses. It requires that the relevant administrative procedures be 'smooth, transparent and simple' and that unnecessary administrative burdens be avoided.[30] Application forms must be short, simple, and user-friendly; applications by families must be considered together.[31] Applications must be free of charge or for a fee not exceeding that imposed on nationals.[32] Those already with the right of permanent residence can simply swap the documentation subject to criminality and ID check.[33] What is different about the new procedures is that criminality and security checks are carried out systematically.[34] There must, however, be judicial and administrative redress for those affected by the State's decisions.[35] Protection is for life,[36] unless the individual leaves the country for five years.

It can thus be concluded that the scope of application of citizens' rights as negotiated during Phase I is limited and only partially reflects the extent of

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28 Art 17(1)(a) of the Directive 2004/38/EC.

29 Para 16, p 3 of the Joint Report.

30 Art 18(1)(e) of the WA, para 17, p 3 of the Joint Report. See also a technical note prepared by the UK Government which sets out proposed procedures under its national law, which it will continue to develop over the coming months: <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk> accessed 30 August 2019.

31 Art 18(1)(f) of the WA, para 17(c) of the Joint Report.

32 Art 18(1)(g) of the WA, para 17(e) of the Joint Report (the UK has in act waived the fee).

33 Art 18(1)(i) of the WA.

34 Art 18(1)(p) of the WA, para 24 of the Joint Report.

35 Art 18(1)(r) of the WA, para 18 of the Joint Report.

36 Art 39 of the WA.

free movement rights under EU law. The latter applies to all EU citizens who have already moved or *will* move to another Member State in the future, whereas citizens' rights under the WA are applicable only to those who exercise(d) their free movement rights within a limited period of time. In effect, only Britons who move(d) to one of the EU Member States and EU citizens who move(d) to the UK before the end of transition/withdrawal date will enjoy rights currently offered under EU law. Such rights will not be offered to those who move post-exit/transition date. This 'beat the clock' policy did not result in increased migration flows to the UK. On the contrary, EU net migration has fallen sharply since the Brexit referendum to a level last seen in 2013.[37] Future uncertainty about immigration status may well be one cause of this.[38] Neither does the number of those who have applied to the EU Settlement Scheme indicate a great hurry to ensure their right to remain in the UK post-Brexit, with only approximately 30 per cent of EU/EEA and Swiss nationals (excluding Irish nationals) living in the UK having registered under the Scheme so far.[39] The number of applications to the EU Settlement Scheme is, however, gradually increasing, possibly as a result of the Brexit deadline.[40]

2. The Content of Citizens' Rights

During Phase I of negotiations, the EU and the UK agreed to commit to the principle of non-discrimination with respect to the treatment of citizens, the cornerstone principle of the free movement framework under EU law. The

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37 'Migration Statistics Quarterly Report: February 2019', Office for National Statistics <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2019> accessed 30 August 2019.

38 Jonathan Portes, 'When It Comes to Immigration, the UK is Already in a Post-Brexit Era' (UK and EU, 30 May 2019) <https://ukandeu.ac.uk/when-it-comes-to-immigration-the-uk-is-already-in-a-post-brexit-era/> accessed 30 August 2019.

39 'The Progress of the EU Settlement Scheme So Far', the House of Commons Library <https://commonslibrary.parliament.uk/home-affairs/immigration/the-progress-of-the-eu-settlement-scheme-so-far/> accessed 30 August 2019. The source indicates that the data is based on the number of EU, EEA or Swiss nationals living in the UK (3.35 million), estimated using surveys since there is no centralized record of the number of EU citizens living in the UK.

40 Ibid.

principle of non-discrimination and full reciprocity with respect to the *future* mobility framework has also been set out in paragraph 51 of the non-binding Political Declaration annexed to the WA, which is discussed in Section III below.

The WA says that any discrimination on grounds of nationality will be prohibited in the host State and the State of work in respect of Union citizens and UK nationals, as well as their respective family members covered by the agreement.[41] Family members will continue to have access to employment;[42] equal treatment continues to apply for EU/UK nationals and their family members.[43] The differences apply in respect of criminal matters. Criminal behaviour will be assessed by EU standards if it occurs before the end of the transition period,[44] but by (stricter) national standards afterwards.[45] However, the rights of appeal in EU legislation will still apply.[46] Recognition of qualifications will also continue.[47]

The EU and the UK have agreed that social security coordination rules will apply.[48] Those citizens covered by the social coordination scheme will continue to be eligible for healthcare reimbursement, including under the European Health Insurance Card (EHIC) scheme,[49] as long as they stay, reside or continue treatment in the host State. While access to social security for Union citizens was one of the key points of contention during the debates leading up to the 2016 referendum, the right to equal treatment with respect to social security for those citizens who have acquired residence rights before the end of transition period (or the date of withdrawal in case of a no-deal Brexit) will continue to apply within the limits established under EU law.[50]

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41 Art 12 of the WA.

42 Art 22 of the WA.

43 Art 23 of the WA.

44 Art 20(1) of the WA.

45 Art 20(2) of the WA

46 Art 21 of the WA.

47 Arts 27-9 of the WA.

48 Art 31 of the WA, para 28, p 4 of the Joint Report. Social security coordination rules set out in Regulations (EC) No 883/2004 and (EC) No 987/2009 will apply.

49 The European Health Insurance Card scheme will be governed by the Regulation (EC) No 883/2004.

50 Art 23 of the WA, para 31, p 5 of the Joint Report.

It is important to re-emphasise that while key principles of EU law, such as equal treatment, have been reaffirmed by the parties during Phase I of negotiations, they will apply only to a small group of people, namely those citizens who move to the EU/UK before the end of transition period/withdrawal. In effect, the parties have agreed on an exceptional extension of personal and territorial scope of EU citizenship to a limited category of people: British nationals who move to the EU before the end of the transition period will continue to enjoy some of the significant rights under EU law while no longer being citizens of the EU; EU nationals who move to the UK will enjoy those rights in the territory of a state which is no longer a member of the EU.

3. The Institutional Framework

The WA provides for a dual institutional framework for the implementation and application of the citizens' rights. The European Commission will be a designated institution on the Union's side, whereas the UK will have to set up an Independent Authority – with similar powers to those of the European Commission – to assist EU27 citizens in the UK.[51] The latter will have the power to conduct enquiries on its own initiative concerning breaches of citizens' rights by the administrative authorities of UK. It will also receive complaints from EU citizens as to how they are treated. The European Commission will be able to submit observations in UK cases.[52] The scope and functions of the Independent Authority, including its role in acting on citizens' complaints, will be discussed between the parties in the next phase of the negotiations and reflected in the WA. There should be regular exchange of information between the UK Government and the Commission.

The role of the Court of Justice of the EU ('the Court'), a highly contentious issue during the 2016 referendum debates, was also addressed during Phase I of the negotiations. The Court, which is the ultimate authority for the interpretation of Union law, will retain its interpretative authority in the context of the application or interpretation of citizens' rights.[53] Accordingly,

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[51] Art 159 of the WA, para 40, p 6 of the Joint Report.

[52] Art 162 of the WA.

[53] Para 38, p 6 of the Joint Report.

the UK courts will have due regard to relevant decisions of the Court.[54] UK courts and tribunals can (but are under no obligation to) refer cases to the Court; the Court's rulings will have the same effects as a preliminary reference under Article 267 TFEU in national law.[55] This mechanism should be available for litigation brought within eight years from the date of application of the citizens' rights.[56]

4. Implications of a No-Deal Brexit

Protection of citizens' rights as negotiated during Phase I is subject to the conclusion of a WA.[57] At the time of writing the WA has not been approved by the UK parliament (in the form of the Withdrawal and Implementation Bill) nor has it been approved by the European Parliament. This suggests that the UK is heading towards a no-deal Brexit, albeit subject to the delay envisaged by the Hillary Benn Act, the EU (Withdrawal) (No.6) Act, which entails that there should be no no-deal Brexit until the end of January 2020 unless Parliament says otherwise. A no-deal Brexit would mean a separation without any agreed arrangements between the UK and the EU. Without a binding agreement, Part II of the WA cannot be enforced by the parties. In the event of a no-deal Brexit, the UK Government has committed itself to continue running the EU Settlement Scheme for those EU nationals resident in the UK by exit day.[58] The basis for qualifying for status under the scheme will remain the same as proposed in a 'deal' scenario and will be focused on residence in the UK. This means that any EU citizen living in the UK by exit day will be eligible to apply to this scheme, securing their status under UK law. Those resident on exit day will have until 31 December 2020 to apply for the settled status under the scheme. Until then, EU citizens will continue to be able to rely on their passport (as a British citizen may) or national identity

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54 Art 4(5) of the WA.

55 Art 158(2) of the WA.

56 Art 158(1) of the WA.

57 Para 5, p 1 of the Joint Report.

58 'Citizens' Rights - EU citizens in the UK and UK nationals in the EU', Department for Exiting the European Union <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 30 August 2019.

card if they are asked to provide evidence of their right to reside in the UK when, for example, applying for a job.

However, as the UK points out,[59] in a 'no-deal' scenario there will be some significant differences as compared to the position under the WA. Firstly, as there would be no agreed transition period, the settled status guarantee would apply only to EU citizens who are resident in the UK by exit day. Second, judicial remedies before the EU Courts will no longer be available. Due to the unilateral nature of the protection of citizens' rights, EU citizens would have the right to challenge a refusal of UK immigration status under the EU Settlement Scheme only by way of administrative review and judicial review under UK law; there would be no preliminary reference procedure to the Court of Justice of the EU. The EU deportation threshold would continue to apply to crimes committed before the exit day. However, the UK would apply the UK deportation threshold to crimes committed after that date.

For UK nationals living in the EU, the position is much less clear. Some may be able to acquire the nationality of the host State under national law and thereby retain the right to reside. Others may benefit from the Long-term Residents Directive 2003/109[60] which contains some protection for third-country nationals including limited onward free movement rights. Those not covered will be dependent on any bilateral arrangements concluded between the UK and the EU Member States.[61] A number of Member States have, however, put in place some contingency arrangements.[62]

As for those EU nationals wishing to come to the UK after exit day, in the event of a no deal, the position is more complicated. When Boris Johnson became Prime Minister, his new Home Secretary, Priti Patel, announced that

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59 Ibid.

60 [2003] OJ L16/44. See further Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019), ch 10.

61 For example, see for Spain: <https://www.lamoncloa.gob.es/lang/en/brexit/howtoprepare/Paginas/190109socialsecurity.aspx>. There is also draft UK legislation: The Healthcare (International Arrangements) Bill 2017.

62 https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en#spain.

free movement would end immediately on exit day.[63] Legally, this would be true because, under the operation of Article 50 TEU, the EU Treaties would cease to apply to the UK. However, there are no mechanisms to distinguish between EU nationals already resident in the UK on exit day, but who have not yet acquired settled status, and those arriving after exit day. This problem had already been recognised by Patel's predecessor, Sajid Javid, who had outlined the following unilateral no-deal arrangements:

> If Britain leaves the EU without agreeing a deal, the Government will seek to end free movement as soon as possible and has introduced an Immigration Bill to achieve this. For a transitional period only, EEA citizens and their family members, including Swiss citizens, will still be able to come to the UK for visits, work or study and they will be able to enter the UK as they do now. However, to stay longer than 3 months they will need to apply for permission and receive European Temporary Leave to Remain [Euro TLR], which is valid for a further 3 years.[64]

Patel was eventually persuaded that her predecessor's plans made sense and she changed her position.[65] Successful applicants to the Euro TLR scheme will be granted a period of 36 months' leave to remain in the UK, running from the date the leave is granted. They will then have to apply under the new points-based immigration system, due to be introduced from January 2021, to secure their status.[66] The following section addresses this new scheme in more detail.

In conclusion, with or without a withdrawal agreement, free movement of persons will end once the UK leaves the EU. Even if the parties conclude the Withdrawal Agreement, citizens' rights under EU law, such as the right to

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63 <https://www.politicshome.com/news/uk/home-affairs/immigration/news/105979/priti-patel-wants-eu-free-movement-end-31-october-under>; https://www.civilserviceworld.com/articles/news/home-office-officials-study-singapore-priti-patel-%E2%80%98seeks-immediate-end-eu-free.

64 Press release on 28 January 2019 <https://www.gov.uk/government/news/government-outlines-no-deal-arrangements-for-eu-citizens> accessed 30 August 2019.

65 <https://www.gov.uk/government/publications/no-deal-immigration-arrangements-for-eu-citizens-moving-to-the-uk-after-brexit/no-deal-immigration-arrangements-for-eu-citizens-arriving-after-brexit>.

66 Ibid.

residence and access to social security, will apply only to a small portion of the population, that is, only those who have/will acquire their rights before the end of the transition period. A no-deal scenario will bring an end to free movement, leaving many people, including UK nationals in the EU, without the security they have enjoyed for almost five decades.

III. The Future Mobility Framework

Unlike the citizens' rights provisions which were negotiated during Phase I for EU citizens living in the UK and UK citizens in the EU, the future mobility regime will be negotiated as part of the framework for the future relationship between the UK and the EU. The agreement for the future relationship falls outside the scope of the WA under Article 50 TEU. The WA must only 'take account' of the framework for the future relationship.[67] The non-binding Political Declaration[68] on the future relationship annexed to the WA provides brief indicators of the future mobility framework. Its content reflects the UK's decision to end free movement of persons between the Union and the UK.[69] The document calls for visa-free travel for short-term visits.[70] It also states that the parties agree to consider conditions for entry and stay for purposes such as research, study, training and youth exchanges, in addition to temporary stays for business purposes.[71] The parties further agree to consider addressing social security coordination in the light of future movement of persons.[72]

On the UK side, the Government published its vision of its future immigration regime, not just for EU nationals but those from the rest of the world, in the December 2018 White Paper on immigration ('the White

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67 Art 50(2) TEU.

68 'Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom', 22 November 2018, XT 21095/18 <https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf> accessed 30 August 2019.

69 Ibid. para 50.

70 Ibid. para 52.

71 Ibid. para 53.

72 Ibid. para 54.

Paper').[73] The White Paper follows almost all of the recommendations of the Migration Advisory Committee's (MAC) 18 September 2018 Report on Migration ('MAC Report').[74] Both documents largely reflect the UK Government's position on future immigration laid out in the so-called Chequers Plan published in July 2018.[75]

The UK Government's proposals are built on two assumptions. Firstly, the White Paper is based on the premise that UK immigration policy is not included in an agreement on the future EU-UK relationship. The central principle of immigration policy proposed in the White Paper is to grant EU citizens no more favourable treatment than citizens from non-EU States. However, while the UK, upon its withdrawal from the EU, will be able to decide unilaterally on its immigration policy, its policies will nevertheless be subject to the conclusion of negotiations between the EU and the UK on their future relationship. The Chequers Plan of July 2018, the first coherent attempt by the UK to set out what it wanted out of the future relationship between the UK and the EU,[76] while otherwise largely in line with the White Paper, focuses on the need to obtain reciprocal immigration arrangements with the EU and does not mention that EU citizens and non-EU nationals will be treated alike. That is, unlike the White Paper, which focuses on the single regime for all nationalities, the Chequers Plan is based on a plan to agree a new and deep trade deal with the EU without obliging the

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73 The UK's future skills-based immigration system, December 2018, Cm 9722 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf> accessed 30 August 2019.

74 Migration Advisory Committee, 'EEA Migration in the UK: Final Report' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF> accessed 30 August 2019.

75 'The Future Relationship between the United Kingdom and the European Union', July 2018, Cm 9593 <https://static.rasset.ie/documents/news/2018/07/the-future-relationship-between-the-united-kingdom-and-the-european-union-web-version.pdf> accessed 30 August 2019.

76 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf>.

Government to establish a single immigration regime for EU and third-country nationals.

Secondly, some elements of the new regime are based on the assumption that there will be a transition period.[77] Specifically, the White Paper lays out the EU Settlement Scheme discussed above, which will be implemented during the transition period. According to the White Paper, the new immigration system will start to operate from the end of this transition period.[78] While in case of a no-deal Brexit the UK Government has committed itself to continue running the EU Settlement Scheme for those resident in the UK by exit day, and the EuroTLR scheme for new arrivals from the EU, EEA and Switzerland, it is likely that a points-based, skills-based immigration system will be adopted in the event of a no-deal Brexit.[79]

Keeping these two assumptions in mind, we now address the content of the post-Brexit immigration system as proposed in the White Paper.

1. The Post-Brexit Immigration System: Introduction

The cornerstone of the new UK immigration system proposed in the White Paper is that, following the transition period (if any), during which the status quo will remain, free movement of persons – a fundamental freedom under EU law – will end. Following the transition period, non-nationals coming to the UK, including EU citizens, who intend to work, study or join family will need permission to do so, normally in the form of an electronic status which must be obtained before coming to the UK. The same holds true for British citizens entering an EU Member State as a non-EU national (though this is subject to EU rules).[80] These UK reforms will not apply to citizens of the Republic of Ireland, who are covered by arrangements made between Ireland

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77 See Armstrong in this issue.

78 The White Paper 9.

79 <https://www.gov.uk/government/publications/home-secretary-tasks-mac-on-australian-style-points-based-immigration-system>.

80 Regulation (EU) 2019 /592 of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union.

and the UK under the Common Travel Area (CTA) before the UK's accession to the EU.

As we have seen, the essential feature of the immigration policy under the White Paper is the replacement of a two-tier immigration system for (i) non-EU nationals and (ii) EU citizens with a single immigration regime. The policy is consistent with the post-2016 referendum pledge, so often expressed by the then Prime Minister Theresa May, to introduce a controlled migration regime.[81] The perception was that the almost unrestricted migration from the EU was pushing up numbers of immigrants to the UK to unsustainable levels and thereby preventing the UK delivering on the Conservative Party's election manifesto pledge of reducing immigration to the tens of thousands.[82] In practice, however, non-EU migration, over which the UK Government has always had full control, has been higher than EU migration. Long-term EU immigration has fallen since 2016 and is at its lowest since 2013.[83] Long-term non-EU immigration has gradually increased over the last five years to similar levels as those seen in 2011.[84] As the Office for National Statistics points out,

> long-term international net migration data show that migrants continued to add to the UK population as an estimated 258,000 more people moved to the UK with an intention to stay 12 months or more than left in the year ending December 2018. Over the year, 602,000 people moved to the UK (immigration) and 343,000 people left the UK (emigration).[85]

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[81] For example, in her Lancaster House speech of 17 January 2017, then-Prime Minister Theresa May stated 'As Home Secretary for six years, I know that you cannot control immigration overall when there is free movement to Britain from Europe' (full text of the speech available at: https://static.rasset.ie/documents/news/theresa-may-speech.pdf, accessed 30 August 2019).

[82] The Conservative Party, 'The Conservative Manifesto 2017', 54 <https://www.conservatives.com/manifesto> accessed 30 August 2019.

[83] Office of National Statistics, 'Migration Statistics Quarterly Report: February 2019' <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2019#non-eu-net-migration-has-increased-while-eu-net-migration-has-decreased> accessed 30 August 2019.

[84] Ibid.

[85] Office of National Statistics, 'Migration Statistics Quarterly Report: May 2019', <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigrati

The current two-tier system allows only highly skilled workers from outside the EU to be admitted to the UK, while workers of all skill levels can be admitted from the EU. This regime will be replaced with a single route which gives access to highly skilled workers from all countries. Those EU citizens arriving in the UK after the new UK regime has been introduced will be subject to the single immigration policy applicable to persons of all nationalities. Highly skilled workers will be allowed to bring dependents, to extend their stay and switch to other immigration routes (e.g. specialist route, such as scientific researchers), and, in some cases, to settle permanently. The proposed scheme establishes different regimes for (i) visitors, (ii) workers, and (iii) others (students, self-employed, pensioners).

2. Visitors

There will be no visa requirement for EU citizens coming to the UK as visitors.[86] This includes, for example, tourists and those coming to see their friends and family. The White Paper anticipates a reciprocal arrangement from the EU. The proposals concerning visitors laid out in the White Paper therefore reflect the guidelines suggested in the July 2018 Chequers Plan, which calls for a reciprocal visa-free regime for short-term visitors. Most visitors will be able to stay in the UK for up to six months. Visitors may not study for more than 30 days, work or access public funds.

The visitors category also covers short-term business activity, such as coming to the UK for meetings to negotiate and sign business contracts, presentation of research, collaboration, collaboration with UK colleagues on specific projects, working with companies who have bought goods from a foreign manufacturer or where a UK company is supplying a company overseas, coming to UK to investigate and secure funding, etc. Save for some exceptions, paid activity is not generally permitted.

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on/internationalmigration/bulletins/migrationstatisticsquarterlyreport/may2019> accessed 30 August 2019.

86 The White Paper, para 11, p 12.

3. Workers

Those seeking to stay permanently in the UK to work will be required to get prior permission. The White Paper envisages two new work routes:

1. One for skilled workers entitled to stay for longer periods, to bring dependents and in some cases to settle permanently, who will mainly[87] need to be sponsored by an employer – this will be open to migrants of all nationalities.

2. Another for temporary short-term workers at all skill levels, not sponsored, but subject to strictly defined conditions. This will be a transitional route and will only be open to migrants from specified low-risk countries.

A. Skilled workers

Currently, skilled workers mainly come to the UK on a Tier 2 visa. This is a bureaucratic and expensive process.[88] As it currently stands, organisations wishing to employ non-EEA nationals must hold a Tier 2 sponsor licence. The application fee for the licence varies depending on whether an organisation is considered to be a small company (£536) or a medium/large company (£1,476). Once an organisation has a sponsor licence, it will then need to issue a Certificate of Sponsorship to any individuals who are to be sponsored, the cost of which is £199. In addition, in 2017, the Immigration Skills Charge was introduced. The charge (£1,000 per year in the case of large companies and £364 per year for small companies) applies in the majority of other circumstances.[89] In addition, there is a health surcharge (£400 per person per year[90]) as well as the visa charge itself (£1220 per person).

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87 There will be some exceptions from the requirement for skilled workers to be sponsored by their employer, such as in relation to innovative industries. For example, supernumerary researchers who come to the UK under the skilled work route may be supported by Awards and Fellowships and members of established research teams may be sponsored by UK Higher Education Institutions and the Research Councils, see the White Paper, para 6.7, p 45.

88 See further Kern Alexander, Catherine Barnard, Eilís Ferran, Andrew Lang and Niamh Moloney, *Brexit and Financial Services* (Hart Publishing 2018) ch 2.

89 The charge is not payable in relation to those who are switching from the Tier 4 to Tier 2 category.

90 <https://www.gov.uk/healthcare-immigration-application/how-much-pay>.

Employers must also satisfy the 'resident labour market test' (RLMT), advertising the job for 28 days and considering applications from resident workers before offering it to a non-resident person. The individual must also have the requisite level of skill and pay (see below).[91] These financial and procedural burdens may provide a disincentive to organisations to employ foreign workers. Once a single immigration regime is introduced, EEA nationals will be subject to the same Tier 2 visa requirements as non-EEA nationals. However, the White Paper proposes eliminating a number of significant restrictions currently in place.

Firstly, the White Paper suggests a significant change as to the volume of immigration: the current cap of 20,700 places a year for skilled workers is to be eliminated and a no-limit system is to be introduced. Secondly, the White Paper considers abolishing the resident labour market test (RLMT) to reduce the administrative burdens on employers currently using the non-EEA system. The document implies that the RLMT does not offer effective protection against employers seeking migrant labour when domestic alternatives are available.[92] Instead, according to the Migration Advisory Committee (MAC), the best way to protect against employers under-cutting UK-born workers is a 'robust approach to salary thresholds and the Immigration Skills Charge'.[93] Thirdly, the White Paper suggests lowering the points-based skills threshold to cover current workers with intermediate skills. Under the current system, non-EU workers with intermediate skills are unable to come to UK on the high-skilled route (Tier 2), which is limited to occupations at Regulated Qualification Framework (RQF) 6 and above (i.e. graduate and postgraduate level jobs). The White Paper proposes to open the skilled workers route to workers from RQF 3 upwards. In its report, MAC recommended maintaining the minimum salary threshold of £30,000 for those with intermediate skills if the skilled route is expanded to include intermediate skills, although this proposal is now being reviewed.[94] The

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91 <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-j-codes-of-practice-for-skilled-work>.

92 The White Paper, 143.

93 MAC Report, para 7.34.

94 'Sajid Javid orders review into £30,000 salary threshold for immigrants post-Brexit' (PoliticsHome, 24 June 2019) <https://www.politicshome.com/news/uk/politics/

£30,000 minimum salary requirement is currently met by 40 per cent of existing jobs in the UK. How this number would correlate with post-Brexit statistics is yet to be seen. The White Paper leaves the question of the salary threshold open.

Skilled workers will have a range of entitlements (e.g. to bring their dependants). They will be allowed to settle in the UK after a period of five years.

B. Workers at All Skills Levels

The White Paper does not suggest opening an immigration route for unskilled labour, thus maintaining the current policy for non-EU citizens, except possibly for seasonal agricultural workers. There will be no general use of schemes tailored to particular industries. There will, however, be flexibility for short-term workers.

The White Paper suggests that during the transitional period, there should be a new route for temporary short-term workers from specified countries (e.g. low-risk countries)[95] at any skill level to come to work in the UK. This route will be narrow: it will not only be subject to visa requirements, but there will also be restrictions on nationalities (e.g. only nationals of low risk countries with which the UK negotiates migration commitments and mobility proposals) and duration.[96] The temporal scope will also be limited to a maximum of twelve months, to be followed by a cooling-off period of a further twelve months to prevent long-term working. This means that a short-term worker who has worked in the UK for 12 months will not be able to return to work during the following 12 months. The possible need to extend a route for temporary workers post-transition period will be considered by 2025.[97]

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news/104817/sajid-javid-orders-review-%C2%A330000-salary-threshold-immigrants-post> accessed 30 August 2019.

95 The White Paper does not indicate whether EU Member States will fall under the category of low-risk countries. The current list of low-risk countries is available here: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-h-tier-4-documentary-requirements> accessed 30 August 2019.

96 The White Paper, paras 26-32, pp 16-17.

97 Ibid. para 31, p 17.

4. Other

The new immigration regime will not affect the number of EU students coming to study in the UK. As per the current situation, the White paper foresees no limit on the number of international students coming to study in the UK. However, EU students will be subject to the same arrangements as students from the rest of the world, including the requirement to be sponsored by the institution at which they are studying.[98] Upon graduating with an undergraduate degree from a UK university, students will be able to remain in the UK for six months after completing their studies.[99]

The White Paper states that self-employed persons coming from EEA countries may be able to come to the UK through a variety of routes such as the entrepreneur route (if they meet the eligibility criteria, including a requirement to have access to at least £50,000 in investment funds).[100] In addition, the self-employed may be able to use the new skilled worker route, under temporary work routes, or enter as service suppliers through Mode 4 arrangements (see below).

The White Paper notes that 'leaving the EU means that for the first time in generations we can take control of the social security system we apply to EU citizens'.[101] Under the new regime, social benefits will only be available once a person has made significant contributions to the UK economy. Accordingly, only EU pensioners with settled status or pre-settled status will be able to access healthcare, pensions, and other benefits and services in the UK. Depending on reciprocal agreement with the EU, pensioners should retain the option to export their state pension.[102]

For those seeking controls on migration, the new immigration regime is clearly beneficial; for those who lament the demise of free movement, the new regime will disappoint. It seems the latter group is growing. While the government's policy is responding to the concerns raised in 2016, the state of affairs is starting to change: EU immigration numbers continue to fall and

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98 Ibid. para 7.7, p 63.

99 Ibid. para 7.13, p 64.

100 Ibid. 148.

101 Ibid. para 14.7, p 96.

102 Ibid. para 14.8, p 96.

public attitudes towards migration are not the same as they were at the time of the referendum. An Ipsos Mori online survey has revealed a positive shift in the attitudes to immigration in the years following the Brexit referendum. In 2015, around 35 per cent of Britons saw immigration as positive; that number has risen to 45 per cent since 2016.[103] The trend is reversed with respect to those who see immigration as negative for UK: around 41 per cent in 2015 and 31 per cent in 2018.[104] Immigration is, of course, different from free movement. Nevertheless, while the majority of Britons are still in favour of reduced migration[105], there is now more recognition of how much immigrants contribute to the UK, with 51 per cent noting that the discussions over the past few years have highlighted this point.[106] Another recent study found that there is a generational difference in the shift of attitudes towards migration between 2002 and 2017.[107] According to this study, those born between approximately 1920 and 1960 are among the most negative about immigration, whereas there is a small but significant shift towards more positive attitudes among the younger generations.

In summary, the framework for the new immigration system laid out in the government's White Paper has nothing in common with free movement enjoyed under EU law. Instead of allowing unrestricted immigration from the EU, the new regime places EU nationals in the general customs queue with travellers from other third countries. While the discussed regime was published under Theresa May's administration, there has so far been no indication that the new Prime Minister Boris Johnson would offer EU citizens any greater privileges. It is yet to be seen what reciprocal system will

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[103] Ipsos MORI, 'Attitudes towards immigration: Survey conducted on behalf of IMiX' <https://www.ipsos.com/ipsos-mori/en-uk/britons-are-more-positive-negative-about-immigrations-impact-britain> accessed 1 September 2019.

[104] Ibid.

[105] The Migration Observatory, 'UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' <https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/> accessed 1 September 2019.

[106] Ibid.

[107] Lauren McLaren, Anja Neundorf and Ian Paterson, 'Diversity and Perceptions of Immigration: How the Past Influences the Present' NICEP Working Paper:2019-01 <https://nicep.nottingham.ac.uk/wp-content/uploads/2019/07/2019-01-Mclaren-Neundorf-Paterson.pdf> accessed 1 September 2019.

be adopted by the EU, but it is highly unlikely that it will offer Britons anything close to free movement either.

IV. International Mobility

We have so far focused on the UK's planned immigration regime. However, as we have seen, this regime does not take into account what might be agreed in a future trade agreement with the EU, which is subject to Phase II of any negotiations. While we are still waiting for the second phase of negotiations to start, the following section will look at international mobility rules and the EU's dealings with third countries in order to explore the possible future EU-UK arrangement. In this section we look at the international context, namely Mode 4 mobility under the General Agreement on Trade in Services (GATS) and Free Trade Agreements (FTAs) negotiated by the EU with third countries, before addressing UK's Mode 4 access post-Brexit (subsection 1). Subsection 2 will briefly address another cornerstone international rule of mobility – the most-favoured-nation clause (MFN) – and its implications for a future FTA between the UK and the EU. It will be suggested that neither Mode 4 mobility nor mobility under the EU's association agreements (AAs) is anywhere near the notion of free movement as currently understood.

1. Mobility under Mode 4

The basis of any international regime on economic mobility of nationals from other countries lies in the GATS under the WTO regime.[108] Labour was excluded from the WTO framework for a long time. However, during the Uruguay Round negotiations in the 1990s, labour was included in the WTO regime through GATS commitments. GATS access covers four modes:

- cross-border supply ('Mode 1'): services supplied from one country to another (e.g. GATS Article I:2(a)
- consumption abroad ('Mode 2'): consumers or firms making use of a service in another country such as tourism (GATS Article I:2(b)

[108] See Sacerdoti and Mariani in this issue.

- commercial presence ('Mode 3'): a foreign company setting up subsidiaries or branches to provide services in another country (GATS Article I:2(c)
- presence of natural persons ('Mode 4'): individuals travelling from their own country to supply services in another (GATS Article I:2(d)

The term 'Mode 4' therefore refers to one of the four ways through which services can be supplied internationally.[109] The fourth mode signifies trade in services through presence of natural persons, i.e. natural persons who are either service suppliers themselves or who work for a service supplier and who travel from one state to another to provide a service. Mode 4 does not cover persons seeking access to employment in the host state; it is restricted to temporary entry for business purposes. Mode 4 access is of particular relevance to this article. What is noteworthy is that it is about *temporary* provision of services only, not permanent immigration which makes it essentially different to the free movement regime enjoyed by EU nationals in the EU Member States.

A. Mode 4 Access under GATS

Calls have been made to expand Mode 4 access under the WTO framework, most notably in the Hong Kong Ministerial Conference in December 2005.[110] However, liberalisation under GATS Mode 4 remains rather limited. In most cases, Member States of the WTO did not initially bind themselves to Mode 4 access and then qualified this general exemption by granting admission to selected categories of service providers, primarily persons linked to a commercial presence (e.g. intra-corporate transferees) and highly skilled persons (managers, executives and specialists). This is often referred to as a 'positive listing' method: sectors where access is granted are expressly listed and commitments do not apply unless the sector and/or specific sub-sector is inscribed in the schedule. For example, France, Belgium, the Netherlands, Spain and Italy are not committed to GATS Mode 4 for legal

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[109] Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases, Materials* (2nd edn, Cambridge University Press 2012) 486.

[110] See Annex C to Ministerial Declaration: Annexes, Adopted on 18 December 2005 <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm> accessed 30 August 2019.

services. Therefore, falling back exclusively on GATS mobility provisions in the post-Brexit UK-EU trade relations would pose a significant risk for the UK's services sector: on the one hand, this would increase the risk of skilled labour shortage in the UK; on the other hand this would limit the scope of UK services being exported to the EU. This could have serious consequences given that the EU is the single largest destination for UK service providers.

While trade in services under Mode 4 remains a very small part of overall trade in services (around 1-2 per cent)[111], the reasons for limited access under Mode 4 include political concerns (lack of control over immigration), regulatory concerns (how to check on the qualifications and skill levels of those proposing to come to the host country), concerns of temporary entry leading to permanent entry, and fears that national labour markets might be undermined by lower-wage foreign services suppliers (so-called 'social dumping').[112]

In the absence of any special arrangement, such as a free trade agreement, Mode 4 access under GATS, where agreed, is the default position under international law and will be the applicable legal regime for UK nationals wishing to provide their labour in EU Member States. Due to its temporary nature and limited sectoral scope, Mode 4 is far removed from the free movement concept. Accordingly, in case of a no-deal Brexit, access to the UK/EU would be highly restricted.

B. Mode 4 Access under Free Trade Agreements

In addition to the basic WTO framework, somewhat more generous temporary movement provisions may be negotiated in broader trade or association agreements (AAs). In this section, we look briefly at the mobility clauses in a selection of FTAs to see if they provide a template for the future EU-UK relationship. Some of the agreements provide for full liberalisation of labour mobility, such as the EU, the European Free Trade Association, and

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[111] World Trade Organization, 'Movement of natural persons' <https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm> accessed 6 October 2019.

[112] 'Mode 4 of the GATS - An Overview', Ministry of Foreign Affairs of Japan <https://www.mofa.go.jp/policy/economy/event/symp0301-6.pdf> accessed 6 October 2019.

the Australia–New Zealand Closer Economic Relations Trade Agreement. A number of other trade agreements, while not establishing the full free movement of workers, nevertheless go beyond the GATS rules. For example, the US–Jordan agreement covers a broadened range of service providers (e.g. independent traders).[113] Similarly, the EUROMED EU-Tunisia AA covers the movement of all workers, not just service suppliers,[114] while the ASEAN Framework Agreement[115] commits members to liberalising trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the GATS. A similarly forward-looking approach is taken in the CARICOM Revised Treaty, which seeks to achieve full labour mobility through phased implementation for different skill categories.[116]

Mode 4 access is also typically provided for in the new-generation FTAs. The UK, as an EU Member State, is currently bound under the EU's FTAs with non-EU countries, such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which entered into force provisionally in September 2017.[117]

FTAs focus primarily on trade in goods and services as well as investment promotion, which is facilitated by some form of movement of persons (e.g. service providers and investors travelling for business purposes). The White Paper, addressed in the previous section, as well as its predecessor MAC

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113 Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area <https://ustr.gov/sites/default/files/Jordan%20FTA.pdf> accessed 30 August 2019.

114 Article 64, Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Republic of Tunisia, of the Other Part <https://library.euneighbours.eu/content/eu-tunisia-association-agreement> accessed 30 August 2019.

115 Article 1(c), ASEAN Framework Agreement on Services <https://asean.org/?static_post=asean-framework-agreement-on-services> accessed 30 August 2019.

116 Articles 32(1), 33(1), 36(1), 37(1), Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy <https://caricom.org/documents/4906-revised_treaty-text.pdf> accessed 30 August 2019.

117 The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-article-by-article/> accessed 30 August 2019.

Report, reflect mobility rights typically included under the new-generation FTAs, such as CETA.

Mode 4 access is broader under CETA than under GATS. Unlike GATS, which mainly applies a positive listing method for Mode 4 access, CETA applies a combination of positive and negative listing. Negative listing means that all service sectors are liberalised by default and a party must list any sectors or sub-sectors it wishes to limit or exclude from the commitments. This results in a broader liberalisation overall, at least *de jure*, under CETA. This does not mean, of course, that CETA provides for access anywhere near comparable to free movement provisions under EU law; it contains a number of broad explicit carve-outs, such as services supplied in the exercise of government authority, most air services, and audio-visual services.

With respect to the time limits for stay, the principle of a minimal-duration stay, according to which workers stay for no longer than the time period required to complete a specific engagement, applies. The time periods differ depending on the categories of persons described above. For example, under CETA intra-corporate transferees (ICT), senior personnel and specialists are allowed to stay in the contracting state for up to three years, whereas graduate trainees cannot stay longer than one year.

Other FTAs provide similar mobility rights, save for some variation in the categories of covered individuals. For example, under the EU-Japan FTA, short-term business visitors, business visitors for establishment purposes (in CETA, business visitors for investment purposes), ICTs and investors, as well as contractual service suppliers and independent professionals are granted entry and temporary stay.[118] Similar provisions are provided in the EU's association agreements (AA), typically under the heading 'temporary presence of natural persons for business purposes'. For example, the EU-Ukraine AA provides for entry and temporary stay of key personnel, graduate trainees, business service sellers, independent professionals, and contractual service providers. The agreement states that the parties reaffirm their respective obligations arising from their commitments under the GATS as

[118] Annex 8-B III, para 6, EU-Japan Economic Partnership Agreement <http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157233.pdf#page=203> accessed 30 August 2019.

regards entry and temporary stay of contractual services suppliers.[119] Almost identical categories are provided in the EU-Moldova AA.[120]

The EU-Ukraine AA sets identical time limits for stay to those established under CETA, with an exception for the contractual services and independent professionals category (CETA permits stays up to 12 months, whereas the EU-Ukraine AA sets a six-month limit).

Mobility under existing FTAs or under EU's association agreements are far removed from the concept of free movement offered by EU membership. While the scope of Mode 4 is broader under a number of FTAs, in comparison to that under GATS, access under FTAs is nevertheless limited to mobility of service providers. And while AAs, such as the EU-Ukraine AA, typically contain provisions on mobility of workers and movement of persons, these too are in no way comparable to free movement of persons under EU law. With respect to mobility of workers, the EU-Ukraine AA merely upholds existing access to employment for Ukrainian workers accorded by EU Member States under bilateral agreements and creates only a very general obligation to examine the granting of other more favourable provisions in additional areas (Article 18 of the EU-Ukraine AA). Article 15 of the EU-Moldova AA provides an analogous obligation to take gradual steps towards the shared objective of a visa-free regime in due course.

As for the application of national immigration laws, the EU's partners under AAs retain the right to regulate the entry of natural persons into, or their temporary stay in, their respective territories, including those measures necessary to protect the integrity of natural persons, to the extent not covered by the AAs' rules on temporary stay of persons (e.g. Article 85 of the EU-Ukraine AA). The right to maintain national immigration rules is not

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[119] Article 101, Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf> accessed 30 August 2019.

[120] Article 217, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and the Republic of Moldova, of the Other Part <http://www.3dcftas.eu/system/tdf/EU-Moldova%20AA_0.pdf?file=1&type=node&id=70&force=> accessed 30 August 2018.

affected by the full liberalisation of establishment rights. The EU-Ukraine AA provides that, subject to the gradual transition of Ukraine to full regulatory approximation, there are to be no restrictions on the freedom of establishment of juridical persons of the EU or Ukraine in either territory, as well as no restrictions on the freedom to provide services by a juridical person. However, such treatment does not include the right to take up and pursue activities as self-employed persons and shall not prevent Ukraine from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders (Article 4 of Annex XVII).

Furthermore, as a general rule, regulatory approximation under the EU AAs is directed by the EU: the EU maintains its right to adopt new legislation or amend its existing legislation in the sectors concerned by regulatory approximation, whereas Ukraine has an obligation to transpose and implement the legislation into its domestic legal system (Article 5 of Annex XVII). Therefore, the EU's partners under association agreements are rule-takers, which is hardly in line with the famous Leave Campaign Brexit slogan 'Take Back Control'.

In sum, neither Mode 4 access under the currently existing FTAs nor mobility under the EU's association agreements can offer free movement similar to that enjoyed by EU Member States. Mobility under FTAs, though broader in scope in comparison to that under GATS, is nevertheless highly restricted. And while access to employment is available under, for example, the EU-Ukraine AA, it comes at the price of losing a degree of sovereignty over national legislation. Future mobility negotiations may thus be limited to two alternatives: almost no mobility or some free movement in exchange of regulatory approximation. As will be discussed below, the UK Government seems to tend towards the first option.

C. UK's Mode 4 Access post-Brexit

The White Paper envisages Mode 4 access as part of the post-Brexit immigration system:

> We are also willing to expand, on a reciprocal basis, our current range of "GATS Mode 4" commitments which we have taken as part of EU trade deals.[121]

Exactly how this is to be done, the White Paper does not make clear. Due to CETA's negative listing method, 'GATS+' mobility can be seen as mobility under CETA. It is thus possible that the drafters of the White Paper had in mind CETA Mode 4 access with a negative listing method (at least in part).

Before addressing the similarities between the system proposed in the White Paper and CETA, it is important to re-emphasise a significant difference. Labour mobility rights under CETA (like under any other typical FTA and like GATS Mode 4 access) do not cover routes which lead to *permanent* employment, nor do they regulate rights to residence or social rights. As mentioned before, the White Paper does establish a route for skilled workers to come to the UK for longer periods which may lead to settlement. CETA, like other FTAs, provides only for short-term business access. CETA 'carves out' temporary business visits from the general visa regime under the EU's Schengen Agreement, but the general visa-regime remains (e.g. for workers).

While the White Paper does not provide detailed categories of post-Brexit Mode 4 access (these will be subject to negotiations for reciprocal rights), it does indicate that future access *may* cover independent professionals, contractual service suppliers, intra company transfers and business visitors – that is, the categories designated under CETA for Mode 4 rights. According to the White Paper:

> By agreeing 'Mode 4' commitments in future free trade agreements, trading partners can provide service industries with greater certainty as to their ability to move key personnel across borders to supply services and fulfil contracts.[122]

As for how long persons have access under CETA mobility rights, that depends on the category of persons. For example, as noted above, senior personnel intra-corporate transferees are allowed to stay in the contracting state up to three years, whereas graduate trainees cannot stay longer than one year.

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[121] The White Paper, para 5, p 12.

[122] Ibid. para 6.75.

The White Paper sets a general visitors' stay period of a maximum of six months. It is estimated that over 95 per cent of business visits from EEA nationals are for less than 15 days, which is an indication that the vast majority of business visits will likely be unaffected by a maximum six-month duration for visits. However, the White Paper leaves open the possibility of changing the current policy in relation to EEA nationals in line with economic needs.

The Mode 4 access laid out in the White Paper largely reflects the government's proposals stated in the July 2018 Chequers Plan. This document refers to a visa-free regime for short-term business visitors and intra-corporate transferees and states that the 'UK will also discuss how to facilitate temporary mobility of scientists and researchers, self-employed professionals, employees providing services, as well as investors'.[123] The guiding principle is that of reciprocity; the UK will 'seek reciprocal mobility arrangements with the EU, building on current WTO GATS commitments'.[124]

2. Most-Favoured-Nation Clause

Lastly, an important feature of FTAs (e.g. CETA, the EU-South Korea FTA, and others) is the 'most-favoured-nation' (MFN) clause. An MFN clause is a non-discrimination requirement.[125] It means that if you provide some favourable treatment to one trading partner, you have to give it to all partners who benefit from an MFN clause. Thus, any commitments which parties to the CETA afford under other agreements must also be extended under CETA. An MFN clause also largely applies to provisions on temporary entry and stay of natural persons. Article 9.5 of CETA states that the MFN obligation applies to trade in services, except if a measure provides for, among

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123 The 2018 July Chequers Brexit plan, para 81, p 33.

124 Ibid. para 76, p 33.

125 Art 1(1) of the General Agreement on Tariffs and Trade 1994 entitled 'General Most-Favoured-Nation Treatment' states that 'any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.

other things, 'recognition' (i.e. acceptance of each other's standards, such as professional qualifications, as sufficient).

MFN exemptions are listed separately and primarily arise due to preferential agreements outside the WTO framework. This may explain why, for example, the EU reserves the right to discriminate in favour of Switzerland in a number of areas. The EU may be 'grandfathering' (e.g. carving out from its GATS commitments) sectoral deals with Switzerland that existed before 1994. It is as yet unclear whether the UK and EU will want to 'grandfather' preferences post-Brexit. This will depend on whether the EU and UK will agree on a preferential treatment for labour mobility.

It is also unclear what impact an MFN clause under the UK's free trade agreements will have on the future EU-UK agreement. As noted above, the White Paper emphasises that the dual immigration policy will be replaced by a single policy which treats EU and non-EU nationals alike. Even if the UK were to decide to change its red lines and afford EU nationals rights reflecting those currently enjoyed under the free movement provisions, an MFN clause under CETA should not be a barrier since Annex II of CETA establishes additional reservations applicable in the EU, one of which states that the EU reserves the right to adopt an agreement with a third country which creates an internal market in services and investment. Even if no such reservations existed, it is questionable whether the EU's trading partners would find it practical to challenge larger benefits under a future EU-UK deal. As it currently stands, however, an MFN clause will probably not be relevant with respect to the future UK-EU mobility agreement, given the emphasis placed in the White Paper on a 'single policy for all' approach.

To conclude, international mobility rules are far removed from the free movement concept under EU law. Mode 4 access under GATS is about temporary provision of services within a limited list of services and while Mode 4 under FTAs typically covers more services, it too is restrictive in nature. Mobility under association agreements may offer broader routes for access, but comes with the requirement to abide by EU's rules and regulations. Leaving the EU but being obliged to follow its rules is hardly the result that would appeal to either Leave or Remain proponents. It is therefore unsurprising that the current position of the UK government (at least as developed under Theresa May's administration), is to fall back on

Mode 4 access in its future relationship with the EU. This option, however, will greatly disappoint those who see value in free movement.

V. Conclusions

The future UK immigration regime is a multi-dimensional puzzle. Despite the announcement of a single regime for all immigrants post-Brexit, the reality will be quite different. There will be differences in the applicable regime depending on when a given EU/EEA/Swiss national arrived in the UK. Firstly, there will be those EU/EEA/Swiss nationals (and their family members) who arrived before exit day and/or by the end of the transition period, who will have settled or pre-settled status which broadly resembles the right to permanent residence under EU law. Secondly, there will be those EU/EEA/Swiss nationals arriving after exit day and/or the end of the transition period but before the new regime applies with Euro TLR. A third category will be those to whom this new regime will apply. While the White Paper has mapped out the shape of that regime, it is contingent on what happens in any future EU-UK trade negotiations, assuming they happen at all. The current position of the UK government suggests that Brexit will lead to an end of free movement. Whether a highly restricted Mode 4-type access or mobility under some form of association with the EU is chosen for the future relationship, it will not offer *free* movement accompanied by the right to equal treatment. That is the benefit of EU membership.

An end to free movement is a significant change from a legal, practical, and human rights perspective. EU citizens will no longer have unlimited access to the job market in the UK and will have to compete with other third-country nationals. Even if they are accepted in the UK, they will no longer benefit from equal treatment, including in the area of social protection. The EU citizenship rights of approximately one million British nationals living in the EU will also be taken away, since Brexit entails the loss of their EU citizenship. Overall, Brexit will diminish the rights of around half a billion people. For those who voted for Brexit, this is clearly good; 'Remainers' might not agree. Meanwhile in the complexity of individual people's lives, Brexit will create uncertainty and, inevitably, litigation.