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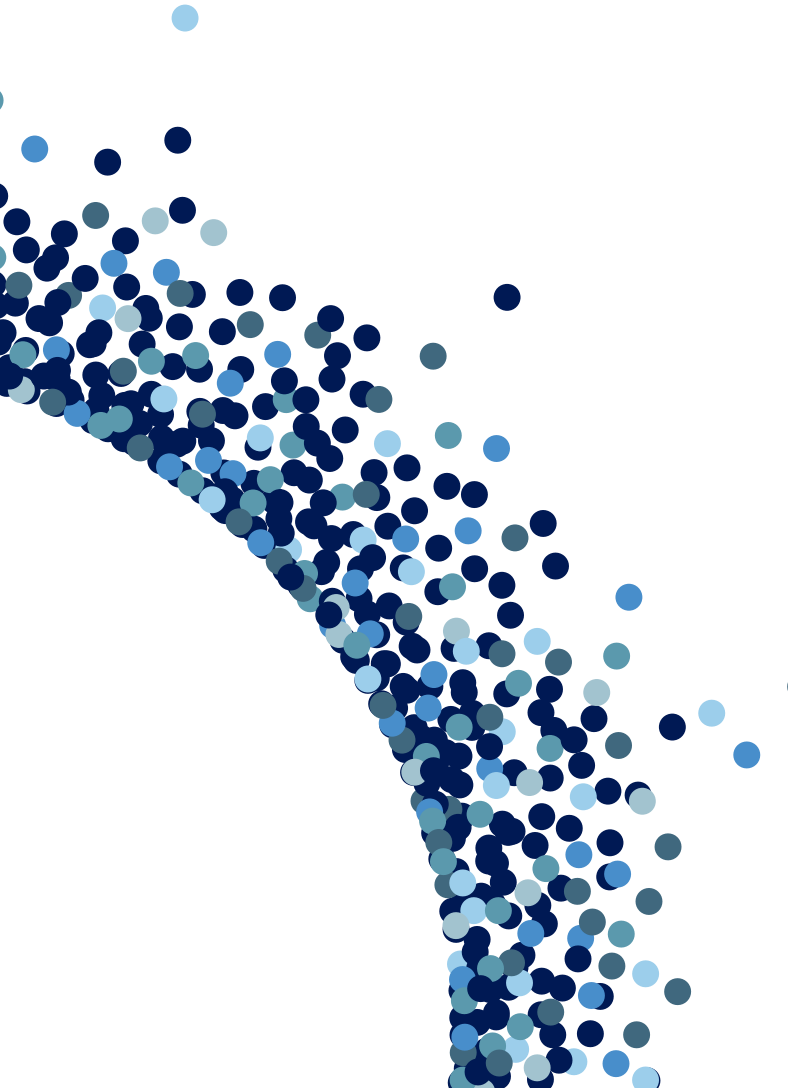
POLICY PRIMER

The UK, EU Citizenship and Free Movement of Persons



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This policy primer discusses how EU membership shapes UK migration policy.

How does EU membership determine who may live and work in the UK?

To understand how EU membership shapes UK migration policy, one must distinguish between two distinct areas of EU law and policy. This policy primer examines EU citizenship and free movement of persons as part of the common market. Another policy primer examines how the UK participates selectively in the Common European Asylum System and EU Immigration Law as regards immigration of so-called 'Third Country Nationals' (TCNs), that is, those who do not hold the nationality of the Member States.

At the core of the EU project remains a common market, which involves reciprocal commitments so that not only products (goods and services) but also the factors of production (labour and capital) can circulate freely. Free movement for workers and others exercising economic freedoms (e.g. service providers and recipients) has now largely been subsumed into the status of citizenship of the Union. As explored in the next section, movement and residence in all Member States for EU nationals remains a defining feature of EU citizenship, so that UK nationals may in principle live anywhere they choose within the EU, and vice versa. Citizenship of the Union and the internal market freedoms mainly confer rights on EU citizens (i.e. those holding the nationality of the Member States). These provisions also create some derivative rights for TCNs, such as TCN family members of EU citizens and TCN workers 'posted' from one Member State to another to as part of an intra-EU provision of services.

While the UK's commitments on EU citizenship and the internal market are part and parcel of its EU membership, the UK (together with Ireland, with which it shares a land border and a common travel area) has always maintained a distinctive position on borders and visas, as manifest in its opt-out of the Schengen arrangements. As explored below, the UK's distinctive opt-out from Schengen has been legally controversial, yet it remains a defining feature of its EU relations.

Who enjoys rights to move and reside in the UK as a result of EU citizenship and the internal market

In 1992, the Maastricht Treaty introduced the formal status of citizenship of the Union, building on previous rights to free movement, residence and non-discrimination for workers, service-providers and service recipients (interpreted to include students since 1985 in Case 293/83 Gravier [1985] ECR 593), and others entitled to free movement under various Directives. The Court of Justice of the European Union in Luxembourg (CJEU), together with national courts, has been a key actor in the development of EU citizenship, with EU legislation reflecting many precepts initially developed by the judiciary (Citizenship Directive 2004). Citizenship of the Union now extends rights of movement and residence to the non-economically active (retirees for instance), although they usually need to have health insurance and sufficient resources so as not to become an 'unreasonable burden' on the host state. The extent to which EU citizens are entitled to equal treatment depends on their economic activity, their degree of integration in the host state and the nature of the benefit claimed. The precise scope of entitlement is subject to intense debate, as explored below.

EU citizenship entails directly effective rights, that is rights which are enforceable in national courts. These rights, in particular residence rights, may only be restricted subject to the principle of proportionality (Case C-413/99 *Baumbast* [2002] ECR I-7091). Security of residence is an intrinsic feature of EU citizenship, increasing over time. Once the pre-conditions for residence rights are fulfilled, EU law only permits refusal of admittance or deportation of EU citizens representing a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Only individually assessed risks to public policy, public health and public security are permissible grounds, and EU citizens with a permanent right of residence may only be expelled on serious grounds of public policy or public security. (However, some concern has been expressed that some recent EU cases have not properly applied the 2004 Citizenship Directive in this context (Case C-145/09 *Tsakouridis* [2010] ECR

I-11979; Case C-348/09 *P.I.* Judgment of the Court (Grand Chamber), 22 May 2012 nyr. See also Kochenov and Pirker 2013). The greater the degree of integration within the host Member State ought to lead to greater security of residence (although periods in prison do not count as periods of residence (Case C-400/12 *MG* and Case C-378/12 *Onuekwere*. Judgments of the Court, 16 January 2014 nyr).

Current UK practices seem to be in tension with some of these fundamentals. The UK has relied on a lack of self-sufficiency to deport a number of homeless EU citizens, arguing they do not have a right to reside under EU law. While that may be permissible in some cases, each individual case must be scrutinised carefully (Horsley and Reynolds 2014). While residence rights for the non-economically active are conditional on sufficient resources and health insurance, deportation must still comply with the principle of proportionality.

Who determines who is a citizen of the Union?

EU citizenship is attributed only to those holding the nationality of a Member State. It is for each Member State to regulate the acquisition and loss of nationality, subject to the proviso that they have 'due regard' for EU law (Case C-369/90 *Micheletti* [1992] ECR I-04239). The extent to which EU law may shape Member State nationality remains unclear. The CJEU previously declined to scrutinize the UK's definition of its own nationals for the purposes of EU law (Case C-192/99 *Kaur* [2001] ECR I-1237). However, it has examined deprivation of nationality: When withdrawing nationality, Member States must have 'due regard' for rights conferred and protected by the legal order of the Union and exercise the competence in accordance with the principle of proportionality (Case C-135/08 *Rottmann* [2010] ECR I-01449).

Given that there are proposals in the UK to enhance governmental power to deprive British citizens of their nationality, the implications of EU law will no doubt need to be explored. The UK courts have previously rejected arguments that deprivation of British citizenship, as it entails loss of EU citizenship, must have due regard for EU law unless the applicant has previously exercised their EU free-movement rights (*G1 v Secretary of State* [2012] EWCA Civ 867). This is a restrictive interpretation of EU law. In light of the Rottmann decision, the proportionality of deprivation of nationality is a matter of EU law under many circumstances. If passed, the provision would grant the Home Secretary the power to make a person stateless if their conduct is deemed seriously prejudicial to the UK's vital interests. The CJEU has not yet recognized the right to a nationality, although the obligation to avoid statelessness is recognized in international law. The implications of EU law in this context will have to be explored (Kochenov 2011).

There have been other tensions between Member State laws granting nationality and EU citizenship. Following a decision of the CJEU granting residence rights to TCN parents deemed to be 'primary caregivers' of young children holding EU citizenship (Case C-200/02 *Chen* [2004] ECR I-9925), Ireland held a constitutional referendum to amend the nationality provisions of its Constitution and nationality law. Nationality is no longer granted to all born on the island of Ireland. EU citizenship was invoked to rationalise the restrictive change in nationality law (Mullally 2010).

Recently, controversy surrounding proposals to make Maltese (and hence EU) citizenship available to investors (a practice many state engage in in some form) brought the question of the EU's role in relation to nationality to the fore. Malta's Individual Investor Programme originally planned to offer citizenship to wealthy individuals in exchange for investing in Malta without any prior residence requirements. Arguments that this might be contrary to EU law, based on the duty of loyal or sincere cooperation in Article 4(3) TEU, seem somewhat tenuous (Shaw 2014). Nonetheless, the EU institutions voiced their concerns about the practice, and the Maltese Citizenship Act will now require effective residence in Malta for at least twelve months (Malta & the European Commission 2014).

EU enlargement: Transitional provisions

As new countries join the EU, new EU citizens are created. Provisions phasing in free movement rights were initially introduced in response to fears of mass immigration to other Member States, following the accession of Greece (1981) and Portugal and Spain (1986) (Maas 2007). Transitional provisions now appear a feature of accession treaties, at least for some

states. They were implemented as regards eight of the ten Member States that joined the EU in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia or Slovenia – the so-called 'A8 countries'; but not Cyprus and Malta); in 2007 (Bulgaria and Romania – 'A2 countries'); and for the 2013 accession of Croatia.

Only the UK, Ireland and Sweden decided not to apply restrictions on A8 nationals from the outset thereby allowing them immediate access to the UK labour market, albeit subject to a registration requirement (the Workers Registration Scheme) and limitations on access to benefits. While that scheme is no longer in force, it is noteworthy that it seems to have created a 'sense of illegality' for some EU citizens, making them vulnerable to labour exploitation and, in some instances, forced labour (Dwyer et al 2011).

The opening of the UK labour market in this way resulted in larger than anticipated numbers of labour migrants coming to the UK (Ruhs 2012). Some of that migration has been temporary. The transitional measures in all EU Member States on A8 nationals have now expired, although Labour Market Statistics demonstrate that employment levels for A8 nationals in the UK are still rising. (See further our briefing "Migration Flows of A8 and other EU Migrants to and from the UK").

The UK opted to apply stronger transitional measures, requiring a work permit for workers, but permitting freedom of establishment and service provision for the subsequent accessions of Bulgaria, Romania and Croatia. The transitional period for A2 nationals ended on 1 January 2014, however, precise level of migration since remains to be seen as of this writing. Given that nine other EU Member States (Belgium, Germany, Ireland, France, Italy, Luxembourg, Netherlands, Austria and Malta) opened their labour markets at the same time, a sharp increase in migration as with A8 nationals may be less likely (see our commentary "Jumping the gun: Waiting for the facts before estimating Romanian and Bulgarian migration"). Some have argued that the political debate surrounding migration from Bulgaria and Romania to the UK has contributed to a xenophobic climate (Kostadinova 2014).

It is important to note that transitional arrangements only apply to workers, not to service providers or those establishing businesses, allowing the latter full access to social welfare provisions. This appears to have incentivised A2 migrants to register as self employed: in 2013 59% of A2 workers were registered as self-employed compared with 13.9% of British workers (see our commentary "Costs and 'Benefits': Benefits tourism, what does it mean?"). Another possible explanation is sham self-employment, which may suggest that employers are complicit in breaches of domestic labour law (Bogg and Novitz 2014).

Transitional provisions for Croatia may remain in place until 2020.

TCNs, EU citizenship and internal market freedoms

EU citizenship and internal market guarantees confer rights mainly on those holding the nationality of the EU Member States. However, under the EEA Agreement, these free movement rights are also conferred on EEA nationals, so along with EU citizens, nationals of Norway, Iceland, Liechtenstein and Switzerland enjoy free movement rights into the UK. The EEA Agreement goes further than other agreements between the EU and third countries, in granting free movement rights to EEA nationals. In contrast, the Association Agreements between the EU and (then) candidate Central and Eastern European Countries provided rights only for those wishing to establish businesses, while the EU's Agreement with Turkey provides some rights for Turkish workers who are already resident in the EU.

The position of Swiss nationals may change in light of the Swiss referendum of 9 February 2014. The population voted narrowly in favour of a new constitutional provision introducing quotas for foreign nationals able to live and work inside Switzerland, including EU citizens. Switzerland has a specific international agreement with the EU on free movement of persons. The constitutional amendment also places an obligation on the government to renegotiate any international treaty contravening the new provision. Any analogy with between the Swiss and British positions is legally inapt. The Swiss relationship with the EU is regulated by a raft of treaties, some of which deal with migration. For the UK, in contrast, free movement forms an inherent part of EU membership. Placing restrictions on the core commitment of free movement (beyond those permitted by EU law itself) would either be in

breach of EU law (with legal consequences that British and EU Courts would be obliged to impose), or require amendment to the EU Treaties, which would normally require agreement of all the other EU Member States.

TCNs are also able to derive rights, irrespective of their nationality, as family members of EU citizens. In practice, this means that migrant EU citizens have a right to family reunification, which may prevail over domestic immigration restrictions. The right may be invoked by EU citizens living in other EU Member States, or against their home states under some circumstances: These circumstances include first, where an EU citizen returns to her Member State of nationality after exercising their right to work or establishment in another Member State (Case C-370/90 *Surinder Singh* [1992] ECR I-04265). In March 2014, the CJEU clarified that the EU rights of residence of family members were applicable only 'where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State' (Case C-456/12 O & B and Case C-457/12 *S and G*. Judgments of 12 March 2014 nyr). The current UK rules seem to take a more restrictive view of when these principles are applicable, and so may be in tension with that ruling.

Secondly, EU law is applicable where an EU citizen might otherwise be forced to leave the territory of the EU, if her TCN family members are not granted rights to live and work in the EU (Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177). The central scenario concerns EU citizen children who are dependent on a TCN 'primary caregiver', or another family member. In order to vindicate the residence rights of the EU ctizens, a derivative right of residence is extended, under EU law, to the TCN family member. Later EU cases have refined the Zambrano ruling (see Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375; Case C-256/11 *Dereci* [2011] ECR I-11315). The UK has taken a particularly narrow reading of this caselaw, leading to much domestic litigation (see, for instance, *HC v Secretary of State for Work and Pensions and others* [2013] EWHC 3874 (Admin) pending permission to appeal).

TCN family members of EU citizens have, under these circumstances, EU rights of residence, which other Member States are obliged to recognise. However, a case before the CJEU (as of this writing) concerning the legality of the UK's imposition of additional requirements on TCN family members of EU citizens when travelling back to the UK (Case C-202/13 *McCarthy* [2013] OJ C189/6, pending before CJEU). Again, the UK government has taken a particularly restrictive approach to EU rights clearly set out in the 2004 Citizenship Directive.

Finally, TCNs are able to derive rights from internal market freedoms also include a right for companies providing services to bring their TCN workforce with them temporarily. Posted workers may be EU citizens, or TCN who are authorised to live and work in the home Member State. As is discussed further below, posted workers are an exception to the normal rule that EU workers should be treated like nationals in the workplace.

To what extent do non-EU citizens benefit from EU citizenship and the internal market?

The general principle is that migrant EU citizens should be treated equally with national citizens in most fields, but not all.

As regards political rights, for example, EU citizens are entitled to vote in local and European elections, but not general elections (although some EU citizens, such as Irish citizens, enjoy that right under UK law.)

As regards labour rights, EU citizens working in the UK are subject to British labour law. Indeed, there are entitled, as of EU right, to equal treatment with national workers in the workplace. Nonetheless, there is growing evidence of serious labour exploitation of EU citizens in the UK. It has been suggested that some of this exploitation amounts to forced labour, a breach of human rights (including under Article 4 ECHR) and criminal offense under UK law (EHRC 2010; Dwyer et al 2011)). It has been suggested that there is a serious enforcement deficit, in particular as regards EU-8 workers, in that although there is evidence of breaches of labour rights, the normal enforcement mechanisms available to all workers in the UK have not been used (Barnard 2014).

The labour rights of posted workers raise different issues. Posting workers has been legally and politically controversial, for example leading to industrial strife at the Lindsey Oil Refinery in the UK in 2009 (Barnard 2009; Ryan 2011). The controversy arises as posted workers are treated as adjuncts of EU transborder service provision. When employers provide services in other EU Member States, they are allowed to 'post' workers temporarily. For the most part, they remain subject to the terms and conditions stipulated by the laws of the home Member State. Host states may only apply their labour laws to the extent permitted by EU law. The Posted Workers Directive requires Member States to ensure that posted workers are guaranteed basic labour rights, including on hours of work, holidays, minimum wages, agency work, health and safety, pregnancy and equal treatment. However, the CJEU interpreted that Directive as only permitting the law of the host state to be extended in these fields (Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767. See Davies 2008).

The extent to which EU citizens are entitled to equal treatment as regards social benefits depends on their economic activity, their degree of integration in the host state and the nature of the benefit claimed. While the precise scope of equal treatment is subject to intense debate and litigation, there is no general entitlement to equal treatment as regards social benefits from the outset of residence in the UK (European Commission 2013). Nevertheless, the UK has still attempted to interpret EU provisions on social security narrowly. Furthermore, the UK has challenged a number of EU rules extending social benefits to certain third countries nationals. So far it has lost the first two cases. The CJEU confirmed that the provisions of the EU Treaty on social security allow the rules in question to be adopted, so there is no need to have recourse to the procedures for EU immigration policy (where the UK has an opt-out) (see Case C-431/11 *UK v Council*, judgment of 26 September 2013 nyr; Case C-656/11 UK v Council, judgment of 27 February 2014 nyr).

The status as a worker remains important for securing access to benefits within the EU. The CJEU has formulated an autonomous definition of who is a worker. Taking a purposive approach to the status of worker, the CJEU has been reluctant to accept national thresholds on hours or earnings; work need only be 'effective and genuine' and not 'purely marginal and ancillary' (Case 53/81 *Levin* [1982] ECR 1035). In 2014 the UK announced its intention to introduce a more rigid test to determine who was a 'worker' for these purposes given that it allows more generous access to a number of in and out-of-work benefits. If a rigid income based requirement is imposed, this would be difficult to square with EU law.

The UK also imposes an extra hurdle for nationals from other EU Member States to access to a number of social advantages (including Income Support; Jobseeker's Allowance; Housing Benefit; Council Tax Benefit; and State Pension Credit). EU citizens must demonstrate they have a 'right to reside' under EU law as well as satisfying the 'habitual residence' test. The legality of this extra requirement has been questioned. The UK Supreme Court held the policy to be indirectly discriminatory, but justified as a legitimate means of protecting public money (Patmalneice [2011] UKSC 11). The European Commission took a different view and commenced infringement proceeding against the UK (following the decision in Case C-140/12 *Brey*, judgment of 19 September 2013 nyr.) The government response has confirmed it "will not only fight this action but press ahead with plans to strengthen Britain's benefits system to ensure it cannot be abused" (Department for Work and Pensions, the government's response to the European Commission's announcement on access to benefits by migrants 2013).

On 1 January 2014, new rules entered into force in the UK to restrict access to benefits further for EU citizens. All EU job seekers will have to wait three months before they can receive Jobseekers Allowance. This may be contrary to EU law since job seekers cannot be excluded from financial benefits intended to facilitate access to employment in the labour market (Guild 2013). Furthermore, unemployed EU citizens will be unable to claim social benefits after six months if they cannot demonstrate a genuine chance of finding work. This may be permissible, but again much will depend on how the rules are applied in practice (See Case C-292/89 *Antonissen* [1991] ECR I-00745). For EU citizens who find themselves unemployed, EU law requires consideration of links to the labour

market and the burden on that Member State's social assistance system as a whole (Guild 2013). From April 2014 migrant jobseekers will be unable to claim Housing Benefit (Housing Benefit (Habitual Residence) Amendment Regulations 2014). Any restrictions on the rights of EU citizens lawfully resident in the UK will have to be carefully scrutinised, and their necessity and proportionality demonstrated.

Why has the UK not become a full member of the Schengen system?

Although the UK has long been committed to an internal market, it has not become a member of the Schengen system for the abolition of internal border controls on intra-EU movement.

When the UK joined the (then) EEC in 1972, it committed to the common market project. The movement of persons within the EU took on additional salience with the internal market project of the 1980s, with some Member States taking the view that internal free movement of persons required the abolition of border controls within the EU. The Treaty definition of the internal market provides that it comprises 'an area without internal frontiers in which the free movement of goods, persons, capital and services is ensured.' The UK position was reflected in a special Protocol to the EU Treaties, which stipulates that notwithstanding the internal market, the UK maintains its right to keep border controls on movement from within the EU.

In part due to UK resistance, other Member States set up the Schengen system (the Schengen Agreement [1985] and its implementing convention [1990]) in order to facilitate internal free movement and establish several 'flanking policies' on immigration, asylum and visas. In one view, internal free movement requires common, restrictive policies on internal security, borders, immigration and asylum. However, this compensatory measures rationale is shaky; Bigo goes so far as to describe the compensatory measures rationale, and the account of the security deficit created by the opening of the internal borders as 'one of the strongest myths of EU self-presentation' (Bigo 2003).

The Treaty of Amsterdam fully integrated the Schengen system into the EU framework, although the UK opted to preserve autonomous border controls and visa policy under the Schengen Protocol. The UK's position on Schengen is officially explained as frontier controls which 'match both the geography and traditions of the country and have ensured a high degree of personal freedom within the UK', whereas on the continent 'because of the difficulty of policing long land frontiers, there is greater dependence on internal controls, such as identity checks.' (Home Office White Paper 1998). This official explanation is open to question, and seems to rest as a caricature of the continental systems (Wiener 1999). However, it is firmly established and has been reinforced by successive governments' assertions that the UK's maintenance of its own border controls is required, as the UK is simply better at protecting its own borders than the Schengen states are at protecting theirs, pointing in particular to the weaknesses of the EU's eastern land borders. The empirical premise may be open to question, but nevertheless the current policy position is that: "it is of fundamental importance that the UK maintains control of its own border security." (Government's Response to the House of Lords EU Committee's 8th Report of Session 2012-2013).

The Schengen Area aims to be without internal border controls. It comprises 26 countries (22 EU Member States – Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden – plus the four associated countries Norway, Iceland, Liechtenstein and Switzerland). Cyprus, Bulgaria, Romania and Croatia are all obliged to join at some point. In 2011, unilateral action by some EU Member States reinstating internal border controls prompted proposals for reform. Concerns of deficiencies in external border controls led to the amendment of the Schengen Borders Code in 2013 to allow for the reintroduction of internal borders where there is a threat to public policy or internal security.

As is discussed further in the policy primer on the UK's selective participation in the Common European Asylum System and EU Immigration Policy, although the UK remains outside of the Schengen border free area, its existence has had an impact on UK border practices. In particular, the UK's establishment of so-called juxtaposed border controls in France is seen as a response to the internal free movement across the continent (Ryan 2004).

Conclusions

EU citizenship and free movement of persons have become more controversial in the UK of late. They are framed as part of the immigration debate, although they are based in long-standing commitments at the core of the EU project to facilitate movement of persons across the EU and make the status of EU citizenship meaningful. Repeatedly, this primer identifies areas where UK law and practice are in tension with EU commitments, which leads to costly litigation both in the UK and at EU level.

Some problematic issues in this primer are purely about UK law and practice, for instance the enforcement deficit that seems to expose EU citizens in the UK to labour exploitation. The UK has much discretion as to how to deal with this issue. Some aspects of EU law are amenable to change under normal EU legislative procedures. For instance, if sufficient agreement is forthcoming at the EU level, the Posted Workers Directive could be amended to ensure that posted workers are covered by the labour law of the host state more comprehensively. This matter is currently being examined at EU level.

In contrast, the basic EU commitment to free movement and EU citizens are integral to EU membership, and are effectively constitutionalised in the EU Treaties. Some of the UK's current proposals and practices are difficult to square with these commitments, which will inevitably lead to costly litigation before British and EU Courts.

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Related material

- This primer updates and expands the Migration Observatory policy primer - UK Migration Policy and EU Law www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK%20Migration%20Policy%20and%20EU%20Law.pdf
- Migration Observatory policy primer - The UK, the Common European Asylum System and EU Immigration Law www.migrationobservatory.ox.ac.uk/policy-primers/uk-common-european-asylum-system-and-eu-immigration-law
- Migration Observatory briefing - Migration Flows of A8 and other EU Migrants to and from the UK www.migrationobservatory.ox.ac.uk/briefings/migration-flows-a8-and-other-eu-migrants-and-uk
- European Commission - Freedom to provide services/ Freedom of establishment http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm
- Migration Observatory commentary - Jumping the gun: Waiting for the facts before estimating Romanian and Bulgarian migration www.migrationobservatory.ox.ac.uk/commentary/jumping-gun-wait-facts-estimating-romanian-and-bulgarian-migration
- Migration Observatory commentary - Costs and 'Benefits': Benefits tourism, what does it mean? www.migrationobservatory.ox.ac.uk/commentary/costs-and-%E2%80%98benefits%E2%80%99-benefits-tourism-what-does-it-mean

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EU Legislation

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Posted Workers

- Posted Workers Directive: Council Directive (EC) 96/71 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) [1997] OJ L18/1

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The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

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