



An 'Emergency Brake' on EU Migration?

Summary

1. There is no viable and timely trigger for an emergency brake on EU migration. To be consistent with the outcome of the referendum, a decision to apply such a brake would have to be at the British government's discretion, an outcome that is unlikely to be negotiable. Furthermore, control would be illusory since it would not cut numbers to levels acceptable to the public. An "emergency brake" on EU migration to the UK is therefore neither feasible nor negotiable.

Introduction

2. It has been suggested that, in order to cut EU migration to the UK without sacrificing our present access to the single market, HMG should negotiate "an emergency brake" available to all EU members (The Times Editorial 26.08.16). This paper examines its feasibility and desirability.

Suggested models

3. Broadly, the emergency brake option entails the retention of free movement to the UK with a brake mechanism built in. Advocates include the Institute for Public Policy Research (IPPR) and the Adams Smith Institute. The IPPR suggest that the following would be best for Britain¹:

"We should ask the EU for the right to an emergency brake that is triggered when EU migration is harming wages in particular occupations, sectors or locations. When the brake is triggered, it should result in restrictions only on the number or type of EU migrants permitted to work in the occupation section or location affected"

1 IPPR, URL: <http://www.ippr.org/blog/what-new-deal-should-we-strike-with-the-eu>

4. The Adam Smith Institute claim that the best option for Britain would be to leave the EU and join the EEA as members in our own right, along with Norway. They suggest that those who think joining the EEA entails no change to free movement are wrong because the EEA agreement includes a safeguard mechanism which they describe as a “*permanent emergency brake on the four freedoms including free movement of (people) that they have the full sovereign power to pull*”.²

Precedents for an emergency brake

5. Apart from Liechtenstein, which is too small to be relevant, there are only two relevant precedents:

a. Norway

Norway is a member of the European Economic Area (EEA) and therefore accepts free movement of people. Within the EEA agreement there are ‘safeguard mechanisms’ contained in Articles 112 and 113. The full text is at Annex A. The key points are as follows:

i. The grounds for triggering the mechanism are very broadly drawn:

“If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a contracting party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113”.

This is a very broad brush so it would be difficult to provide evidence of this kind in an economy the size of the UK.

ii. The party which is considering such measures must notify the EEA Joint Committee without delay and enter into consultations with a view to finding a commonly acceptable solution. This suggests that the trigger is not entirely in Norwegian hands.

iii. There must be consultations every three months from the date of adoption with a view to the abolition of the measures.

iv. There is no definition of what measures might be thought appropriate.

This is not, therefore, a mechanism that is unambiguously in the hands of the Norwegian government and it is clearly intended to be temporary for only a matter of months. However, The Norwegians have reportedly never used their safeguard mechanism because they feared it would trigger a retaliatory response from the EU. This is envisaged, at least by implication, in Article 112 which states that safeguard measures shall apply with regard to all contracting parties.

2 Adam Smith Institute, URL: <http://www.adamsmith.org/evolution-not-revolution/>

b) Switzerland

Switzerland is neither a member of the EU nor the EEA however it has signed a series of bilateral agreements with the EU including on the free movement of persons. With each enlargement a protocol has been agreed extending free movement to EU8 and EU2 nationals. The text of the relevant article is at Annex B. Key points to note are as follows:

i. Free movement applies to Switzerland as a result of the agreement. The Swiss government does however continue to issue residence permits to those exercising their treaty rights to live and work as EU citizens. The UK operates no such system.

ii. The treaty was designed to introduce free movement in phases. As such the treaty included a quota on the number of EU citizens who could come to work in Switzerland, although they were quite high in relation to the Swiss population:

- 15,000 a year for residence permits valid for a year or more
- 115,000 for residence permits valid for between four and twelve months

iii. The quota was only valid for five years, after which all numerical limits on the movement of EU nationals had to be lifted.

iv. However, if after five years and for up to 12 years, the number of residence permits granted exceeded by more than 10% the average of the previous three years then a limit could be placed in the following two years equivalent to the average number of permits issued in the previous three years plus 5%. Limits could not be set below the figures in paragraph (ii) above.

v. The Swiss people voted in 2014 to reintroduce quotas on free movement. The treaty is now subject to a renegotiation. If an acceptable solution cannot be found and the Swiss government ends free movement then a guillotine clause contained in the treaties requires that all of the bilateral treaties will cease to apply.

It is apparent that the arrangements in the Swiss treaty are time limited and make no provision for a reduction in numbers.

Questions raised by an emergency brake for the UK

To whom would the brake apply?

6. There would be no need for a brake to apply to students, the self-sufficient or tourists who are good for the UK economy and have a very small impact on net migration. The brake should, however, apply to those EU citizens migrating for work who have accounted for 70% of long term EU migration.

7. Work migrants need to be divided between those who come for more than a year and those who arrive for shorter periods. The former amounted to 180,000 in 2015. The latter are recorded as short term migrants and there were 125,000 such arrivals in the year to mid-2014. This does not equate to 125,000 people since some workers might arrive more than once in a year.

8. If a brake was applied only to long term migrants, employers could well change their business model towards using short term migrants to fill their vacancies. This would create a constant churn of workers and would have an impact on services, housing, wages and community cohesion. The impact on the resident population would therefore be considerable despite a “brake” on long term migrants. It follows that both categories would have to be included if the brake was to be effective.

9. There is a further question as to whether the brake should apply to all EU migrants or only to those in low skilled employment who comprise about 80% of those who are in work and have arrived in the last ten years. An ICM poll taken after the referendum found that 62% of the public wish to see low skilled migration reduced, while 88% want high skilled migration to stay at a similar level or for it to be increased.³ However it is very hard to see how an emergency brake could distinguish between the skill levels of different workers. This could only be done by the introduction of work permits which would require the employer to define the skill level involved.

What might be the trigger for the brake?

10. There are three broad possibilities.

(a) National Insurance Numbers

A limit could be set for the number of National Insurance Numbers (NINOs) issued to EU Nationals on a monthly or national basis. This is the approach favoured by the National Institute for Economic and Social Research (NIESR). However, NINOs are issued not just to workers but also to students, the self-sufficient and those who are not economically active but who need to interact with the benefits system. Any such brake would therefore affect these categories also. It would be possible to add a suffix to the NINOs to indicate whether or not the individual was permitted to work but this would not overcome the problem of distinguishing between skilled and unskilled workers.

Furthermore, a NINO is issued for life so anyone who has had a NINO at any time in the past would be able to return, even once a brake had been applied. The scale of NINO registrations illustrates the problem. Over 630,000 were issued to EU nationals in 2015 and 4.2 million have been issued in the last five years. According to the NIESR, a conservative estimate of the number of EU nationals not residing in the UK who already had some connection with the UK labour market is about 1.5 million. They admit that these individuals would retain, at least in principle, the right to move to the UK in the future.⁴ Not all would do so of course, but it would be unsatisfactory for someone who had picked fruit here for a season or two in the past, to acquire the right to come at any time to the UK in the future (with his or her dependants) and settle here.

(b) Net migration statistics

Another approach would be to base the brake on the scale of net migration. However, these statistics lag by six months and short term migration statistics lag by almost two years. This lack of real time data would pose significant problems for policy makers in deciding whether the brake needed to be applied.

3 ICM Poll Results, July 2016, URL: https://www.icmunlimited.com/wp-content/uploads/2016/07/British-Future_EU-migrants.pdf

4 Jonathan Portes of the NIESR for the IEA, URL: <https://iea.org.uk/blog/ending-free-movement-of-people-in-europe-will-create-a-bureaucratic-nightmare>

(c) Wages

The IPPR has suggested that evidence of downward pressure in particular sectors, locations or occupations should trigger the brake. This would require constant analysis of wage levels at the local level as well as at the sector level across the country. While, in principle, this role could be fulfilled by the Migration Advisory Committee, it would be a significant undertaking.

Furthermore, it can be extremely difficult to detect negative impacts on wages at a statistically significant level. Indeed many studies find that no reliable conclusions can be drawn but that is not to say that migration is having no impact. At the anecdotal level workers have reported falling wages attributed to an oversupply of workers which studies have failed to identify.

Even assuming that the brake was applied on evidence of wage suppression, this approach raises the question of when the brake could subsequently be released. Would it be released when wages had returned to a particular level? This would allow for migration to continue as long as it was not placing further downward pressure on wages thus effectively putting a ceiling on them.

What ultimately makes wages an unsatisfactory measure for the application of a brake is that it cannot respond to other negative impacts that high levels of migration could be causing or contributing towards. For example, high levels of net migration add significantly to population growth which in turn places pressure on housing and public services.

What level would the brake be set at and who decides it?

11. The level at which the brake could be set would have to be decided by the British government, rather than decided at the European level. The referendum was won on a platform of 'taking control' over UK affairs and therefore to allow the European Commission to decide an acceptable level of migration would be counter to the outcome of the referendum.

12. As for the level at which the brake should be activated, it is clear that, in order to satisfy the public who overwhelmingly wish to see net migration reduced, only a cap in the low tens of thousands would be acceptable. This would be consistent with the government's target of tens of thousands for overall net migration but it is very unlikely to be acceptable to the EU.

Who activates the brake?

13. Nothing short of full control over the activation of the brake would be satisfactory to the British public. The notion of Britain having to apply to Brussels to use its emergency brake (and possibly be required to provide evidence of labour market disruption) is contrary to the concept that Britain should exercise sovereign control over her own affairs. This is also unlikely to be acceptable to Brussels.

14. Switzerland is currently seeking to draw up a new approach to EU migration following a referendum in which the public voted in favour of renegotiating their arrangement with the European Union on free movement. It is reported that the Swiss government wishes to introduce a simple numbers based quota with an automatic brake on further movement however the European Union is said to only be considering a more general mechanism which would be decided and policed by the EU.⁵

5 FT, URL: <https://www.ft.com/content/fba39018-a1ac-11e5-8d70-42b68cfae6e4>

Conclusions

15. When the former Prime Minister David Cameron toured EU capitals to garner support for his renegotiation the idea of an emergency brake on migration was ruled out. In the end, he had to settle for an emergency brake on benefits. It is not clear why EU leaders should agree to an emergency brake now that the UK has voted to leave.

16. In any case, an emergency brake is practically flawed and would be politically problematic. The goal must be to achieve a substantial reduction in migration from the EU and that requires a reduction in low skilled migration. An emergency brake is a blunt instrument that cannot distinguish between high and low skilled workers. Practically speaking, the mechanism raises far more questions than it answers. The application of the UK's existing work permit system would achieve a substantial reduction in low skilled migration from the EU without constricting the flow of those highly skilled workers that the UK economy actually needs.

30th August 2016

Annex A – Legal position with regard to Norway and Free Movement of People.

Norway is not a member of the European Union but it is a member of the European Economic Area (EEA). As such Norway is part of the area in which there is free movement of goods, services, capital and people. The EEA agreement however does include 'safeguard measures' allowing the members to take "appropriate measures" in cases of serious "economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising". In an extreme case, such measures may be used to limit EU migration – but such restrictions can only be temporary. Articles 112-113 of the EEA Treaty outline the safeguard measures.

CHAPTER 4 SAFEGUARD MEASURES - Article 112

1. If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.

2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.

3. The safeguard measures shall apply with regard to all Contracting Parties.

Article 113

1. A Contracting Party which is considering taking safeguard measures under Article 112 shall, without delay, notify the other Contracting Parties through the EEA Joint Committee and shall provide all relevant information.

2. The Contracting Parties shall immediately enter into consultations in the EEA Joint Committee with a view to finding a commonly acceptable solution.

3. The Contracting Party concerned may not take safeguard measures until one month has elapsed after the date of notification under paragraph 1, unless the consultation procedure under paragraph 2 has been concluded before the expiration of the stated time limit. When exceptional circumstances requiring immediate action exclude prior examination, the Contracting Party concerned may apply forthwith the protective measures strictly necessary to remedy the situation.

For the Community, the safeguard measures shall be taken by the EC Commission.

4. The Contracting Party concerned shall, without delay, notify the measures taken to the EEA Joint Committee and shall provide all relevant information.

5. The safeguard measures taken shall be the subject of consultations in the EEA Joint Committee every three months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application.

6. Each Contracting Party may at any time request the EEA Joint Committee to review such measures.

Annex B – The Legal position with regard to Switzerland and Free Movement

Switzerland is not a member of the EU or the EEA but rather its relationship is based on ten bilateral treaties, one in particular is concerned with the free movement of people. Article 10 outlines the scope of free movement between the EU and Switzerland. The Article contains time limited quotas which have now expired.

Article 10 - Transitional provisions and development of the Agreement

1. For five years after the entry into force of the Agreement, Switzerland may maintain quantitative limits in respect of access to an economic activity for the following two categories of residence: residence for a period of more than four months and less than one year and residence for a period equal to, or exceeding, one year. There shall be no restriction on residence for less than four months.

From the beginning of the sixth year, all quantitative limits applicable to nationals of the Member States of the European Community shall be abolished.

2. For a maximum period of two years, the Contracting Parties may maintain the controls on the priority of workers integrated into the regular labour market and wage and working conditions applicable to nationals of the other Contracting Party, including the persons providing services referred to in Article 5. Before the end of the first year, the Joint Committee shall consider whether these restrictions need to be maintained. It may curtail the maximum period of two years. The controls on the priority of workers integrated into the regular labour market shall not apply to providers of services liberalised by a specific agreement between the Contracting Parties concerning the provision of services (including the Agreement on certain aspects of government procurement in so far as it covers the provision of services).

3. On entry into force of this Agreement and until the end of the fifth year, each year Switzerland shall reserve, within its overall quotas, for employed and self-employed persons of the European Community at least 15000 new residence permits valid for a period equal to, or exceeding, one year and 115500 valid for more than four months and less than one year.

4. Notwithstanding the provisions of paragraph 3, the Contracting Parties have agreed on the following arrangements: if, after five years and up to 12 years after the entry into force of the Agreement, the number of new residence permits of either of the categories referred to in paragraph 1 issued to employed and self-employed persons of the European Community in a given year exceeds the average for the three preceding years by more than 10 %, Switzerland may, for the following year, unilaterally limit the number of new residence permits of that category for employed and self-employed persons of the European Community to the average of the three preceding years plus 5 %. The following year, the number may be limited to the same level. Notwithstanding the provisions of the previous subparagraph, the number of new residence permits issued to employed and self-employed persons of the European Community may not be limited to fewer than 15000 per year valid for a period equal to, or exceeding, one year and 115500 per year valid for more than four months and less than one year.

5. The transitional provisions of paragraphs 1 to 4, and in particular those of paragraph 2 concerning the priority of workers integrated into the regular labour market and controls on wage and working conditions, shall not apply to employed and self-employed persons who, at the time of this Agreement's entry into force, are authorised to pursue an economic activity in the territory of the Contracting Parties. Such persons shall in particular enjoy occupational and geographical mobility. The holders of residence permits valid for less

than one year shall be entitled to have their permits renewed; the exhaustion of quantitative limits may not be invoked against them. The holders of residence permits valid for a period equal to, or exceeding, one year shall automatically be entitled to have their permits extended. Such employed and self-employed persons shall therefore enjoy the rights to free movement accorded to established persons in the basic provisions of this Agreement, and in particular Article 7 thereof, from its entry into force.

6. Switzerland shall regularly and promptly forward to the Joint Committee any useful statistics and information, including measures implementing paragraph 2. A Contracting Party may request a review of the situation within the Joint Committee.

7. No quantitative limits may be applied to frontier workers.

8. The transitional provisions on social security and the retrocession of unemployment insurance contributions are laid down in the Protocol to Annex II.