

# Implementing Brexit: Immigration



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## About this paper

This is the first in a series of Institute for Government papers on implementing Brexit.

Each paper will look at an area of UK government policy that needs to change as a result of Brexit, and make an assessment of how it might change, what will be required to implement the change and whether or not there is a cliff edge – that is to say policy areas where there will be significant disruption on the day after the UK exits the EU, unless all necessary preparatory measures are in place or a transitional/ phased implementation deal can be reached with the EU.

In each paper we set out the policy options for the Government after exit, noting where those choices are dependent on the outcome of the exit deal and future arrangements with the EU. We look at the task ahead for the Government and what will be required to design and implement a new policy and system, and highlight some key considerations and recommendations.

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## Summary

Brexit means the UK government will regain control of inward migration of citizens from countries within the European Economic Area (the EU plus Iceland, Norway and Liechtenstein), and Swiss nationals.<sup>1</sup> In considering post-Brexit immigration, the Government will need to take into account the rights of EU nationals currently living in the UK, the mechanism for future EU migration, how the new regime will be enforced and any changes to the border.

The political imperative for change in immigration is significant, but so is the administrative challenge of making such a change happen.

The scale of the task makes successful implementation of a new immigration regime by April 2019 unfeasible, not just for government, who will need to design and deliver the regime, but also the employers, landlords and providers of public services who both rely on the system and support its functioning. The Prime Minister has recognised that an 'implementation phase' will be required post-Brexit. For immigration, this will require the continuation of free movement, possibly for several years post-Brexit.

There are an estimated three million EU nationals already resident in the UK, and one million UK citizens living in the EU.<sup>1</sup> Securing the rights and status of these groups, who settled under the free movement of people principle, is a top priority for both sides in the upcoming Brexit negotiations and is expected to be one of the first things discussed. The UK and EU want to provide certainty as soon as possible, but any agreement in negotiations will need to be followed by the administrative task of processing applications and issuing documentation. The UK will need to provide EU nationals with the relevant documentation confirming residency in the UK, and member states will be responsible for doing the same for British citizens in the EU. The challenge for government is processing a possible three million applications with a system designed to manage a fraction of that. The Home Office needs either significant numbers of additional staff or a redesign of the process, or, better still, both.

Government can decide to keep the current immigration regime for a period post-Brexit to make way for a 'phased implementation'. Unlike other areas impacted by Brexit, immigration policy can be dictated by the UK alone – there is no 'cliff edge'. The Government will want an agreement on the rights of British citizens living abroad, but there is no need for a transitional agreement with the EU as there is in trade. After Brexit, the Government will have control over timelines in immigration. But swift action is a priority, and securing the rights of EU nationals living in the UK and control of the UK's borders are likely to be two of any new government's biggest priorities.

This paper considers the administrative task facing government in implementing a new immigration regime, highlighting some key recommendations:

- **Government must clarify the rights and entitlements of EU nationals living in the UK, and provide them with documentation attesting to their status.** Without that there will be confusion for employers, landlords and providers of public services – as well as prolonged uncertainty for citizens.

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<sup>i</sup> References to EU nationals in this paper include those from the European Economic Area and Switzerland.

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- **The Home Office could need up to 5,000 additional staff to process applications** if those looking to remain in the UK post-Brexit are required to apply through the current permanent residency process under existing eligibility rules and levels of scrutiny. **If government's priority is providing these EU nationals with the necessary documentation as quickly and effectively as possible, it must recognise that the current permanent residency process is not fit for purpose and must introduce a streamlined process.**
  - **Government should recognise now that a new immigration regime for post-Brexit EU migrants will not be ready by April 2019**, with time required to consult on plans, to implement the system and for employers to adapt. The length of the implementation period for immigration depends on the extent to which it features in negotiations. A new regime could be in place within a year after Brexit, but if the decision is delayed until talks conclude, implementation is likely to be several years post-Brexit.
  - **Government should avoid making changes until the new regime is ready.** Multiple changes increase the disruption to labour markets and administrative burdens. That means free movement will have to continue post-Brexit until the new regime is ready to go live.
  - **Government should keep changes to the way in which EU nationals are processed at the physical border to a minimum, at least in the short term.** This will support the commitment of both the UK and the EU to maintaining the Common Travel Area with the Republic of Ireland.
  - In order to improve immigration enforcement, **government will need to increase resources in enforcement units across the Home Office and HM Revenue & Customs**, as well as those monitoring compliance with the National Living Wage.
  - Many people see current immigration procedures as complex and burdensome. **Government should use Brexit as an opportunity to design an immigration system that is both effective for enforcement and simpler for the individuals and organisations involved.**

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# 1. What is the current situation?

## Until now, membership of the EU has shaped a large part of UK immigration policy

'Freedom of Movement' is one of the four freedoms enshrined in the Treaty of the European Union, giving citizens of member states the right to move freely within the EU to seek work.<sup>2</sup> Under free movement, EU nationals who work in the UK can largely access public services and benefits in the same way as British citizens, but newly arrived jobseekers cannot access out-of-work benefits during their first three months in the UK.<sup>3</sup> EU citizens can also study in the UK on the same basis as in-country nationals, and they are eligible to vote in local and European elections – but not in national ones.

As a member of the EU, the UK's ability to control immigration from the European Economic Area (EEA) is limited – the British government can only terminate the residence of an EEA national if they are proved to have abused their rights, such as participating in a marriage of convenience or engaging in fraudulent activity. Migration from outside the EEA is controlled by the Home Office through a tier system for different types of migrants, for example, students, entrepreneurs and highly-skilled workers. There is currently no legal mechanism operating to allow medium- and low-skilled labour from outside of the EEA to enter the UK.

The 2015 Conservative Party Manifesto included a commitment to reduce net migration to 'tens of thousands', repeating the pledge made in 2010 by David Cameron. The last time net migration was less than 100,000 was in 1997. In 2015/16 the figure was 336,000, with roughly half entering the UK under free movement from the EU and half from the UK-controlled non-EEA immigration regime.<sup>4</sup>

The Common Travel Area is also an important part of UK immigration policy. It allows British and Irish citizens to travel freely between the UK and the Republic of Ireland without having to pass through immigration controls, and they are not treated as foreign citizens. The Common Travel Area predates both countries' membership of the EU. It is not an international accord, but simply provided for in British and Irish legislation.

## Brexit provides an opportunity to redesign the UK immigration regime – but it comes with challenges too

The Government said that the "Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law".<sup>5</sup>

The Government has also said that it wants to resolve the status of EU citizens in the UK as early as possible in its exit negotiations, provided reciprocal arrangements can be agreed for UK citizens in the EU. It will maintain the Common Travel Area with the Republic of Ireland and Crown Dependencies.<sup>6</sup> The draft EU negotiation guidelines outline similar priorities: the rights of nationals living in the UK and avoiding a border in Ireland.

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This paper assesses the options, implications and implementation challenges facing government in four key areas of immigration:

- **EU nationals** – The rights and status of citizens from EU member states living in the UK (which the Prime Minister has linked to the issue of the rights of UK citizens currently living in other EEA member states. This paper does not look at the process for securing the rights and status of UK citizens in the EU, as that is the responsibility of the relevant member states).
- **Future migrants** – The future visa and work permit regime for EU nationals applying to work or study in the UK.
- **Borders** – How the UK's physical border will change as a result of Brexit in places like airports and ports.
- **Enforcement** – Ensuring compliance with immigration law, preventing abuse and tracking offenders.

Exiting the EU and ending free movement will pose key issues in each of these areas.

### EU nationals

Although there are no official records or registers held by the Home Office for EU nationals, it is estimated that three million of them currently reside in the UK.<sup>7</sup>

An estimated two million have been resident for at least five years; the qualifying period for permanent residence. If they meet the remaining eligibility conditions, they can apply to live permanently in the UK, without being a British citizen. Until the EU referendum vote, relatively few exercised this right as free movement provided the means to settle in the UK. It was only a necessary step for those who wanted to obtain full UK citizenship.

One million current residents have not yet lived in the UK for five years, but some of this group will have acquired the five years' residency by April 2019, when the UK is expected to leave the EU. Others will not, and there is still uncertainty over their future and right to remain in the UK. The European Council's draft guidelines make clear that "agreeing reciprocal guarantees to settle the status and situations at the date of withdrawal of EU and UK citizens, and their families" is a "matter of priority for the negotiations".<sup>8</sup>

EU nationals currently in the UK are entitled to the same benefits as UK citizens, providing they are in work and have been in the country for more than three months. Unemployed migrants are limited in the benefits they can access, and must prove after the three-month period that they are in work, soon to be hired or have enough money not to be a burden on public services.

### Key issues arising from Brexit

1. The Government must clarify the rights and status of EU nationals living in the UK, particularly those who do not yet qualify for permanent residence but have settled under free movement.
2. The Government must ensure that EU nationals who are living in the UK and are entitled to permanent residence, whether through the existing rules or any new policy, are provided with the necessary legal status and documentation.

3. The Government must clarify the rights and entitlements of EU nationals, and whether these will be subject to change in the future.

## Future migrants

Free movement allows EU citizens to move freely across the EU to seek work and access education. Once free movement ends, the Government will need to decide whether simply to extend the existing non-EU immigration regime to EU nationals; whether to have a new, potentially preferential scheme, for EU nationals; or whether to introduce a new scheme covering both EU and non-EU nationals. In doing so, the Government will need to balance the political imperative of controlling immigration with potential labour market disruption caused by new restrictions.

While immigration was cited as a key driver behind the vote to leave the EU, EU nationals make up around 10% of the workforce in some industries.<sup>9</sup> One in 10 NHS doctors are EU nationals, and there are 55,000 EU nationals working in the NHS in total. The figure is more striking when you look at new entrants to the workforce. In 2015/16, EU migrants made up 32% of new joiners to the Nursing and Midwifery Council.<sup>10</sup>

Free movement is the only legal mechanism currently operating that allows migration to the UK from groups not deemed to be 'high-skilled', making the question of how to address the need for low- and medium-skilled labour after the UK's exit from the EU particularly acute. The Home Office designed a visa category for non-EU low- and medium-skilled migration in 2005, but it was not rolled out as migration flows from the EU satisfied the demands of the UK labour market.

As Jonathan Portes, Professor of Economics and Public Policy at King's College London, points out, the current non-EU system is focused towards 'high-skilled' labour; deciding to apply the same rules to EU migrants would limit the UK's ability to access important skills.<sup>11</sup> For example, a salary requirement of at least £30,000, as it is currently set for non-EU migrants, would rule out over 50% of the UK's current physiotherapists, midwives, lab technicians, farmers, butchers, mechanics, plumbers and carpenters.

## Key issues arising from Brexit

1. Agreeing the process through which EU migrants can apply to live and work in the UK, the rights they are entitled to as migrants and the extent to which these will differ from the current system for non-EU nationals.
2. Ensuring the UK labour market can access sufficient labour at all required skill levels.

## Borders

In 2015, there were 123.3 million arrivals in the UK. Of those, 72.4 million were UK citizens, 35.7 million were EU citizens and 15.3 million were non-EU citizens.<sup>12</sup>

Visitors to the UK from the EU are treated in much the same way as British citizens, using the same queues and e-passport gates. Non-EU nationals have a separate process with additional checks and can expect to spend almost twice as long at the border before being cleared for entry.<sup>13</sup>



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### **Key issues arising from Brexit**

1. Any change to the processing of EU nationals, such as subjecting them to the same checks as non-EU nationals, could result in significant queues and delays unless there are changes in technology, staff numbers and possibly physical infrastructure at the border.
2. It would be difficult to justify not applying the same checks at UK ports and airports as on the Irish border, but this would conflict with the Government's stated desire to have a soft border.

### **Enforcement**

The Home Office's Immigration Enforcement directorate ensures compliance with immigration rules, tracks offenders and prevents abuse of the immigration regime, working with partners in government, employers, landlords and public services.

Due to the UK's membership of the EU, the Government's immigration enforcement regime has been focused on non-EU nationals. The end of free movement will mean an extension of enforcement activity to EU nationals, based on the future immigration regime.

Enforcement of immigration rules for non-EU nationals is primarily done once they are inside the country, with checks done by employers, landlords and some public services. Employers and landlords are required to check the eligibility of staff or tenants, or face fines. As such, any major change to immigration rules and their enforcement will require employers and tenants to adapt.

### **Key issues arising from Brexit**

1. The Government will need to ensure that those in wider society that are responsible for enforcing the immigration regime, from employers to public services, are aware of the various statuses of EU nationals and understand how to comply with the new rules.
2. The Government must decide the speed and scale with which it enforces any change of rights for EU migrants, providing employers, landlords and providers of public services with sufficient time to prepare.

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## 2. What are the policy decisions and when will we see legislation?

### **The UK may have taken back control of its borders, but some elements of immigration will be up for negotiation**

Outside the EU, the Government could choose to act unilaterally on all elements of immigration. There is no legal need to wait to reach an agreement with the European Commission. However, the negotiations on both withdrawal and future relationship could have a material impact on some decisions.

The Government has made it clear that any decision on the future rights of EU nationals living and working in the UK is dependent on negotiations and securing a reciprocal arrangement for British citizens in Europe. The EU has similarly indicated that settling the status of EU nationals in the UK will be “a matter of priority” for the negotiations.<sup>14</sup>

The question for those EU nationals who have been in the UK for over five years and are eligible to apply for permanent residence documents is whether the rights they hold currently as EU nationals will be ‘frozen’; and whether they will continue to apply after changes are made to the rights of future EU migrants. For those EU nationals who do not meet the five-year qualification period but arrived before Brexit, the Government must decide whether it will relax the requirements for permanent residence documents, and clarify at what point arrivals will be considered ‘post-Brexit’ and subject to a future immigration regime. Talk of cut-off dates and qualification periods is likely to feature early in negotiations.

The future migration arrangement between the UK and EU may also be up for negotiation, with suggestions of offering preferential access to EU migrants in exchange for similar rights and closer trading ties. International trade deals can include increased visa quotas or other liberalisation of immigration control, and a future UK–EU trading arrangement could have implications for the degree of access offered to EU migrants. The Government will need to balance the desire for change, the importance of making quick policy decisions to enable implementation, and the need to retain flexibility in negotiations.

### **Government must decide whether to change the rights and entitlements of EU migrants**

In addition to these areas, a change in immigration regime will need the Government to make a decision on a number of important policy questions around entitlements to use public services and the welfare system for future migrants, as well as the treatment of students with respect to tuition fees and loans. These questions extend to other areas, such as the rights of family members of EU citizens; whether to apply the same minimum income requirements on individuals wishing to bring a spouse to the UK as apply to non-EU spouses; the right to draw a UK state pension; and the courts through which EU nationals in the UK could challenge the UK Government’s application of those rights. There is a long list of detailed policy questions. On many of them, the Government has provided little indication of its intentions, but they are likely to be up for debate in negotiations.

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## **An immigration white paper will start to set out the Government's thinking**

The first big insight into how the Government plans to approach these more detailed questions will be the immigration white paper, something the Government committed to in *The United Kingdom's Exit From and New Partnership With the European Union* white paper.<sup>15</sup> It is here we will learn how much the UK is planning to act unilaterally, and how much will depend on the outcome of the talks.

The white paper should also give an assessment of costs and form the basis of detailed consultation with business, on key topics such as future immigration regimes and enforcement.

Originally expected before Parliament rises for the summer, it's not yet clear if the General Election will affect the publication of the immigration white paper and the intentions for new immigration legislation.

## **New legislation is unlikely to pass through Parliament before spring 2018**

The role of the Great Repeal Bill is to provide continuity and legal certainty, in essence transferring EU law onto the UK statute books. The changes to law as a result of leaving the EU, and the 'post-Brexit' legal framework, will be shaped by further pieces of primary legislation. Government has already committed to bring forward a bill on immigration, and it is expected to be introduced in the autumn.<sup>16</sup>

The Home Office will have an incentive to keep the immigration bill as narrow in scope as possible, reducing the likelihood of significant amendments and possibly increasing the speed with which it passes through Parliament. A bill that is too limited in scope and size, however, may increase the possibility of further legislation being required over the next two or three years. The legislative task of Brexit already has Parliament managing competing priorities; multiple immigration bills will only exacerbate the problem.

The Government's legislative timetable runs in parallel with negotiations, with potential interdependencies on the outcome of the negotiations. Unless the Government chooses to act unilaterally, before talks with the European Commission are concluded, the legislation will need to retain some flexibility and the scope to adapt to the outcome of negotiations. In some areas, the Government will be faced with the choice of either using broad statutory powers to enable ministers to change legislation without the need for primary legislation (so-called 'Henry VIII powers') or producing further bills as the outcome of the negotiations becomes clearer. With no formal cliff edge to avoid, and with significant long-term policy choices to be made, the Government must ensure that Parliament is not circumvented for the sake of speed.

Current immigration legislation provides the Government with quite expansive powers to change non-EU immigration rules through secondary legislation, meaning significant policy and system change can take place without primary legislation. Replicating this for EU migration may help in providing the Government with the desired flexibility, but immigration is perhaps the most prominent public policy question resulting from Brexit, and any major change should receive appropriate scrutiny from Parliament.

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If the immigration bill is introduced in autumn 2017 as expected, it is likely that it will be passed in the first six months of 2018. But the Home Office can begin spending on the new systems and capacity required once the immigration bill has passed its second reading in the House of Commons, which could be this autumn, leaving closer to 18 months to implement changes before formal exit from the EU in March 2019.<sup>17</sup>

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## 3. What are the main implementation challenges?

### EU nationals

#### **Many EU nationals living in the UK are entitled to permanent residence under existing rules, but for others it is not that simple**

An estimated two million EU nationals living in the UK meet the five-year qualifying period and, if they can satisfy the other criteria, are entitled to permanent residence. But, there are an estimated one million EU nationals living in the UK under free movement who have not lived in the country for long enough to qualify under existing EU and UK law.

The Prime Minister has insisted that she wishes to guarantee the rights of these EU citizens, but not before a reciprocal arrangement is agreed for UK citizens in the EU.<sup>18</sup> Any agreement will need to detail a 'cut-off date' and possibly a revised qualifying period or eligibility requirements. For example, government could grant rights to all those who are resident on 29 March 2019, providing they had arrived in the country prior to 29 March 2017. Any EU national arriving after such a 'cut-off date' will be subjected to new migration rules, and they will need to satisfy a different set of eligibility requirements in order to stay in the UK.

Once these policy decisions have been made, eligible EU nationals will need to be provided with the relevant documentation confirming their permanent residence. In total, government could need to process the permanent residence applications of an estimated three million EU nationals. The system is currently processing a fraction of that – fewer than 135,000 decisions were made on residence applications for EU nationals in 2016, and fewer than 40,000 in 2015.

#### **The current permanent residence process is complex and unable to cope with the dramatic increase in volume of applications**

The current application process for permanent residence documents was not designed for speed or to manage high volumes.

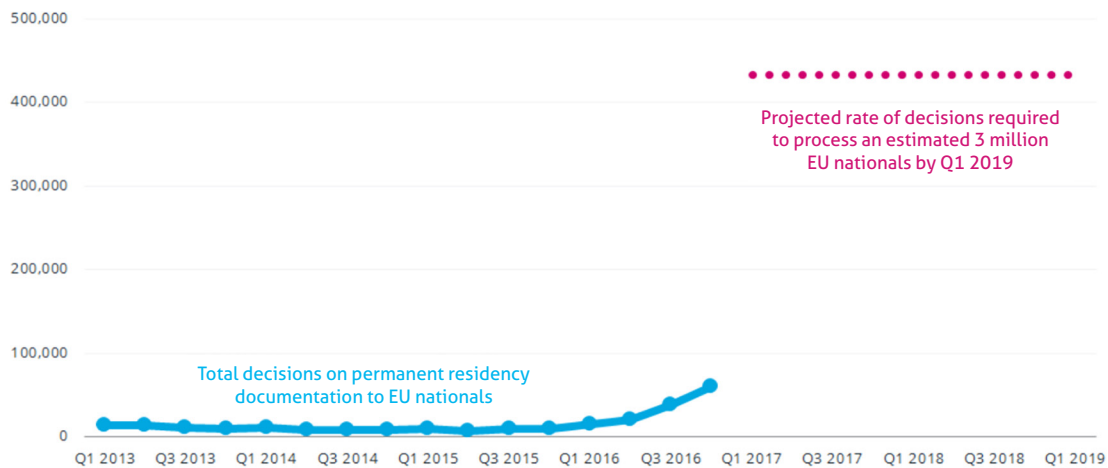
Applicants must account for all welfare benefits received and every time they have left the country, where they went and for how long – for the entire period they have lived in the UK. For some EU nationals this means the last five years, for others the last 30 years.<sup>19</sup> Passports must be submitted, and in some instances it takes six months to process before they are returned. The system was described to the Exiting the EU Committee as a "bureaucratic nightmare of Kafkaesque proportions".<sup>20</sup>

Living in the UK under free movement, many EU nationals were not required to meet, and had no expectation of having to prove, compliance with the eligibility requirements for residence. As a result, some EU nationals are already being reported as falling foul of the 90-day limit on time outside of the UK in a year, or 450 days outside the UK across the five-year period, or they are facing rejection because they did not purchase comprehensive sickness insurance on arrival in the UK.

Meanwhile, the volume of applications is increasingly rapidly. In the final quarter of 2016, the Home Office processed six times more applications than it did in the same period of 2015. Throughput tripled between Q2 and Q4 of 2016 alone.

Despite this huge surge in activity, the process is operating at nowhere near the volume required. To process all EU nationals currently eligible for permanent residence by March 2019, the Home Office would need to make roughly 3,600 decisions per day; it is currently making about 650 decisions per day.

**Figure 1: Total grant and refusal of residence documentation to EU nationals, Q1 2013 to Q4 2016; projected to process an estimated three million EU nationals by Q1 2019**



Source: Institute for Government analysis of Home Office Immigration Statistics, February 2017

The Home Office is already hiring additional staff, with 240 hired in Liverpool to process residency applications.<sup>21</sup> However, based on the operating model used by the Home Office in 2014, trying to process the estimated three million EU nationals in the space of two years would require an additional 5,000 civil servants. The costs of this are not a barrier, with UK Visas & Immigration more than covering the costs through charges to applicants, but the step change in processing speed is unfeasible with the application in its current form. While there are examples of government successfully clearing significant backlogs, such as the Passport Office clearing 537,000 passport applications in 2014, the Home Office’s task is further complicated by the high number of refusals and appeals.

Progress is being made to reduce the complexity of the process. There is now a more user-friendly online form, offering applicants an alternative to the much-criticised 85-page hard-copy form. But this is a long way from a fully digital service. Applicants still have to print off their application for postage and the processing takes place in much the same way.

There is a new digital platform being developed at the Home Office, offering a fully online service. The online service will reduce processing times, making use of HM Revenue & Customs (HMRC) records to prepopulate information; but it is not expected to be ready in time to deal with the bulk of the Brexit-related applications. The Home Office will look to use digital to improve elements of the process where possible, but much of the administrative burden will remain.

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## **There is further pressure on the system as a result of appeals and re-applications from eligible candidates who have been refused permanent residence on minor technicalities**

As well as being labour-intensive, the complexity of the application form results in 30% of applicants being refused documents certifying permanent residence, when the figure is only 5% for those applying for settled status – broadly the equivalent of permanent residency for non-EU nationals.<sup>22</sup> The main reasons for refusals of permanent residence documents are a lack of comprehensive sickness insurance or incomplete evidence, despite many of those refused being eligible in all other respects.

Applicants whose decisions are refused may appeal under certain circumstances, or re-apply. The appeal process costs £80 to £140, which is refunded if the appeal is successful, and the average waiting time is 33 weeks for cases that go to tribunal – up from an average of 18 weeks before the referendum. HM Courts & Tribunals Service has been unable to process cases of EU nationals as quickly as they have been lodged, creating a backlog that needs to be cleared.

### **The system must reflect the policy aim**

The administrative burden for both applicants and the Home Office has resulted in calls for the process to be simplified or the rules relaxed. Strict application of the rules means applicants who have lived and worked in the UK for more than five years fail on technicalities, increasing the likelihood of appeals and number of re-applications, and slowing the process down. The Exiting the EU Committee has called on the Home Office to simplify existing processes or replace the existing system with a more streamlined version.<sup>23</sup>

The Government urgently needs to decide whether it wants to continue with detailed assessments and strict decisions, resulting in a high number of appeals but possibly limiting abuse, or take a more expansive view, granting residence to people who can clearly demonstrate that the UK is their principal country of residence for the relevant period.

### ***Summary: The Government needs to decide its policy objective on EU nationals and then ensure there is a streamlined process in place to support it***

The Government's first task is to confirm its policy objective regarding the status of EU nationals living in the UK under free movement, particularly those who do not yet qualify for permanent residence having not lived in the country for five years.

If it wishes to limit the number of people granted documents proving their permanent residence, by undertaking detailed eligibility assessments and ensuring all those who qualify meet the current set of detailed requirements, it will need to rapidly increase the Home Office resources that are managing the process. It will also need to make clear the options for those who are not granted residence, and the one million who do not yet qualify for it.

If the Government's priority is securing the rights and status of all EU nationals, providing them with the necessary documentation as quickly and inexpensively as possible, it must recognise the current process is not fit for purpose. As David Davis,



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Secretary of State for Exiting the European Union, pointed out, the system was not designed to deal with the current volumes.<sup>24</sup> A streamlined application process could reduce the administrative burden on both the Home Office and applicants, as well as reducing the number of appeals or re-applications.

If the Government intends to secure the rights of many of the estimated one million EU nationals who do not yet qualify for permanent residence, it will only do so after securing reciprocal rights for British citizens. Despite positive declarations from both the UK and EU, this agreement may not come immediately, leaving less time to process applications ahead of Brexit.

The Exiting the EU Committee made suggestions of how to streamline the process, such as the removal of the requirement for comprehensive sickness insurance, the use of HMRC data to prepopulate applicant information and a limit to the information required regarding benefits and travel. By streamlining the process, the Government can work through the applications at a faster rate, increasingly the likelihood that they can be done ahead of the UK's formal exit from the EU.

The Government should ultimately prioritise simplicity. Until the status of EU nationals is resolved, and their status is confirmed, any change to future immigration regimes would be difficult, with a large number of legitimate residents of the UK unable to prove their right to work and access public services in the UK.

## Future migrants

### **The Government must decide on how to treat EU migrants post-Brexit. It could offer EU migrants preferential treatment...**

It's not clear the extent to which the UK's future immigration regime will feature in negotiations with the EU. The Exiting the EU Committee has encouraged the Government to offer the EU preferential treatment in a future immigration regime as part of negotiations.<sup>25</sup> But, others have argued that the negotiations are big and scary enough already, and adding such a complex and contentious topic into the process could be unwise, particularly when there is little to confirm that preferential access is something the EU wants.<sup>26</sup>

This preferential treatment could take the form of 'free movement with a job offer', an option explored by the House of Lords' report on the topic of EU–UK migration.<sup>27</sup> However, a work permit system that runs alongside the existing non-EU system – but with less stringent requirements for EU nationals – is considered more likely. This could even be a preferential system for specific European countries based on bilateral deals, but such deals could be unpopular with the EU (it is, for example, currently considering applying visa requirements to all US citizens because the US will not offer visa-free travel to the citizens of five member states<sup>28</sup>).

### **... or it could treat them like non-EU migrants. But, in that case, it would need to find a route for medium- and low-skilled labour, and avoid imposing large additional burdens on business**

The alternative to a preferential EU regime would be to revise the existing immigration system for non-EU nationals and roll out a new route for medium- and low-skilled labour migration, but the system would need to be reviewed in light of the new



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requirements. The Exiting the EU Committee reported that three-quarters of EU workers currently in the UK would be ineligible under the current non-EU visa rules, including minimum income and English language requirements.

Organisations reliant on medium-skilled migrants, such as the NHS, construction companies, law firms and laboratories, would want to maintain a route for accessing labour. And decisions would need to be made on low-skilled migration, which is important to industries such as agriculture and hospitality.

The non-EU system is seen as a significant burden on business, requiring employers to grapple with 10,000 pages of guidance when applying to sponsor a non-EU national. The Institute of Directors has claimed that, as a result of this complexity, organisations without 'large HR divisions' find it very difficult to recruit from overseas.<sup>29</sup>

### **Sectoral and regional visas would be harder to administer and more expensive to enforce, but additional specificity around sectors in medium- and low-skilled migration can support specific industries at risk from change**

Discussion has also focused on the ability to tailor any new regime, with regional and sectoral visas often cited as possibilities. Sectoral visas, like the now defunct Seasonal Agricultural Workers Scheme, can support industries that are dependent on medium- and low-skilled workers from abroad, and also give clarity to the wider public on the role migrants are playing in the economy.<sup>30</sup>

The **Seasonal Agricultural Workers Scheme (SAWS)** was a sector-specific scheme for the horticulture sector, in operation under various titles since the Second World War. In 2005, the Home Office announced its intention to phase out low-skilled quotas, as the need for low-skilled labour could be met from the expanded EU labour market following the accession of the A8 countries in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia).<sup>31</sup>

Following the accession of Bulgaria and Romania, the SAWS was closed to non-EU nationals. It was capped at 21,250 workers per year from 2008, and open to Bulgarian and Romanian nationals after their countries acceded to the EU but before transitional controls were lifted at the end of 2013.<sup>32</sup>

Government's experience of operating such a sector-specific scheme might make it easier to create a similar scheme after Brexit. However, the National Farmers Union estimates that the agricultural sector currently needs 80,000 seasonal workers a year, and expects this to rise to 95,000 by 2021.<sup>33</sup> If each sector advocates for its own work permit scheme, the Home Office will find it difficult to control overall migration targets.

The Scottish Affairs Committee is calling for a Scotland-specific visa regime, and similar proposals of regional visas have been put forward by the City of London Corporation and by Mayor of London Sadiq Khan.<sup>34</sup> This would allow specific areas of the UK to have greater control of immigration based on their needs.

Introducing sectoral and/or regional visas adds complexity to the administration and enforcement of the immigration regime.<sup>35</sup> While such tailoring occurs in other

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countries, Home Secretary Amber Rudd has cited analysis by the Migration Advisory Committee arguing that regional visas would be difficult to administer.<sup>36</sup>

The more tailored a regime is, the more complex and costly it will be to manage, and sectoral quotas open the Government up to lobbying from industries. The Government would need to decide which sectors could access migrants and how many. It would require a centralised system in Whitehall for conducting analysis and planning, demanding additional capacity and capability.

### **A new immigration regime cannot be implemented by April 2019**

Implementing and enforcing a new post-Brexit work permit or visa regime for EU migrants requires those EU nationals already in the country and entitled to stay to be provided with documentation attesting to their right to remain and work. Otherwise, EU nationals resident in the UK for a number of years would not have the necessary documentation to access work or public services, while new arrivals would.

Elements of the new immigration regime may also be determined by any future UK–EU deal. Many international trade deals include elements of labour and migration, and a future UK–EU trade arrangement could have implications for the degree of access offered to EU migrants. Preferential access for EU nationals and their rights when in the UK – for example access to healthcare – could be a topic for discussion in Brussels, as could intra-company transfers and family/spousal entitlements. As a result, the final details of the regime may not be finalised until negotiations with the European Commission have concluded.

Even if government begins implementation in parallel to discussions in Brussels, unilaterally deciding the details of the future regime, it would not be in place for April 2019. The current system for non-EU migrants was first designed in 2005, and was then rolled out over the space of a year in 2008/09 through a series of Statements of Changes to the Immigration Rules. These changes, however, sought to bring together and unify largely pre-existing features of the UK immigration regime.<sup>37</sup> Removing free movement and conducting a wholesale redesign of the immigration regime would be a much bigger task. With a white paper and consultation due this summer, and legislation timetabled to take a year to pass, there is not enough time to design and implement the new regime before the end of the two-year Article 50 period.

The length of any ‘implementation period’ post-Brexit will be determined by both the complexity of the new system and the extent to which it is affected by negotiations. If the Government chooses to act unilaterally on policy decisions, the new system could be in place in the months after Brexit, but if immigration features heavily in negotiations, it will be a matter of years.

Any implementation period will bring its own transition challenges. Those EU nationals who have entered the country before or during the implementation period but who are not eligible for permanent residency, under any new ‘cut-off’ date and qualifying period, will need to have their status confirmed. Some of this group will be eligible for visas under the new regime, but some may not meet all the requirements and the Government will need to decide whether they are offered certain exemptions or asked to leave.

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## **The UK has not needed to understand medium- and low-skilled labour migration in depth over recent years, and will need to improve data if it is to manage it effectively in the future**

A key challenge in designing a new immigration regime for EU nationals will be agreeing the approach to medium- and low-skilled labour. The UK has relied on EU free movement as the sole route for medium- and low-skilled labour migration in recent years. Government needs to establish a detailed understanding of the sectoral requirements, migration flows and possible quotas for medium- and low-skilled labour. This is the case whether there is a preferential regime for the EU or whether the existing system for non-EU nationals is universally applied.

The Migration Observatory has argued that there is insufficient evidence or data to understand the potential impacts of changes to medium- and low-skilled labour migration,<sup>38</sup> and similarly incomplete data was cited as an important constraint when the UK failed to predict the changes in immigration following A8 accession in 2004.<sup>39</sup> After leaving the EU, exit check data – which is currently not used due to EU data protection rules – could be linked to HMRC data to build a better picture of EU migrants arriving in the UK, and what activities they are engaged in while they are in the UK. This could support a better evidenced-based migration policy, allowing government to see where there are skills shortages and how migrants can add value to the UK economy.

## **Government must engage employers early in the design of a new regime, provide clear forward guidance on new rules and make a single, swift change to minimise the administrative burden**

The data is reliable enough to identify a number of parts of the UK economy that are dependent on EU migration. Changes will impact organisations across the country, making detailed consultation on the design of a new regime essential. Many small- or medium-sized organisations rely on EU migration but often avoid employing non-EU migrants due to the administrative requirements around visas.

Once a new system is agreed, business will also need time to prepare for the additional administrative burden of obtaining sponsorship licences and managing the relevant paperwork.<sup>40</sup> Preparations for a new immigration regime are not restricted to government, and implementation timelines should clearly factor this in. Any major change would need to be communicated clearly and organisations would need time to adapt. 'Interim' arrangements should be avoided as this only increases the uncertainty and scale of change for organisations.

Previous major changes for employers have been phased in, for example the introduction of automatic pension enrolment, which was phased in over five years, and employers were given between one and six years to prepare for the changes, depending on the size of their business.<sup>41</sup> Similarly, the Apprenticeship Levy was announced in the Summer Budget 2015 and only came into force in April 2017.<sup>42</sup> HMRC's Making Tax Digital programme has been delayed as a result of difficulties in ensuring small businesses and landlords are prepared for implementation. Any change in immigration will face the same risk.

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**Summary: Government cannot implement a new immigration regime in time for April 2019, but there is no 'cliff edge' and free movement can continue to facilitate a 'phased implementation'**

Government can continue with free movement for EU citizens unilaterally for a period, if required. While politically there is a clear imperative for change, exiting the EU does not mean there is a cliff edge beyond which the UK has no choice but to change its immigration regime.

In this context, and with a requirement to process EU nationals already resident in the UK, to retain some flexibility to support negotiations and to ensure the UK economy and businesses have access to critical labour, the UK Government should pursue a phased implementation for its future immigration regime.

The Government's Brexit white paper recognised the need for such a period to allow "businesses and individuals to plan and prepare".<sup>43</sup> Delivery of a new regime by April 2019 is infeasible, so the Government should be clear and realistic with its plan to deliver a new immigration regime in the months and years following exit, and undertake extensive consultation with employers.

Multiple changes should be avoided. This would increase the disruption to individuals and employers, as well as the administrative burden on government. As such, free movement should be continued until any new regime is ready for implementation in the months or years following exit.

In designing the new regime, there is a clear trade-off between tailoring a new regime to sectoral or regional preferences, and developing a simple system that can be implemented more quickly and is cheaper to enforce. Any new system should be supported by greater focus on the collection and analysis of migration data.

## **Borders**

### **Visitors to the UK from EU countries should not require visas**

The Home Secretary Amber Rudd stated that travel visas for EU nationals visiting the UK for tourism or business are "certainly something we would seek to avoid in any discussions".<sup>44</sup> Control of immigration does not happen through tight restriction of travel visas, but primarily at the point where non-nationals come into contact with public services like the welfare system, or when they apply for jobs or housing.

Visa-free travel for EU nationals would have little overall impact on the enforcement of immigration, but would reduce friction at the border. This is particularly important for Ireland, where both the UK and the EU are committed to a 'soft' border and protecting the Common Travel Area, which maintains free movement between the Republic of Ireland and the UK for British and Irish citizens.

The UK offers visa-free travel to citizens of 50 countries, including Canada and Australia. These citizens, do, however, face additional checks on arrival to the UK, including them having to fill out a landing card, and they face longer queues at the border. Border Force aims to process all non-EU nationals within 45 minutes, compared with just 25 minutes for UK and EU citizens.

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## But there is still the question of what happens when passing through airports and ports

It is less clear whether the Government plans to make material changes to the treatment of EU nationals at the border in respect to checks, and whether the queue currently used for UK and EU passport holders will be restricted to British citizens.

The border is, for many individuals, the visual representation of immigration. If the Government wants to demonstrate change as a result of the EU exit, the border would be the most striking opportunity to do so.

However, any changes to the checks for EU nationals at the border would potentially require a significant programme of work, touching on infrastructure, staffing levels and technology.

## The Home Office's e-Borders programme has shown how difficult changes at the border can be – the Government needs to be realistic about what it can do by April 2019

If EU citizens were to face the same questioning and screening as non-EU citizens do currently, there would be a significant increase in the workload of Border Force at major ports and airports, with around 50 million visitors passing through a system that has been designed for 15 million visitors per year. To manage this and avoid delays at the border, arrival halls in airports may need to be adjusted, additional staff hired and/or new technology implemented. A dramatic increase in screening would be a particular challenge for Border Force, where only 41% of staff feel their current workload is acceptable; 14 points below the Home Office average.<sup>45</sup>

The Home Office's **e-Borders** programme was launched in 2007 and was delivered in 2011 at an estimated cost of £600 million. It aimed to collect advance passenger information and compare it with warnings indexes to identify passengers requiring further questioning at the border. Following the termination of its original contract with Raytheon in 2010, the Home Office has struggled with staff turnover and wider organisational changes, as the UK Border Agency's services were brought back into the Home Office.<sup>46</sup> Its successor programme – Digital Services at the Border – is scheduled to be delivered in March 2019, eight years later and at a total cost of over £1 billion. In its most recent assessment, the Infrastructure and Projects Authority rated Digital Services at the Border as amber/red, meaning "Successful delivery of the project is in doubt, with major risks or issues apparent in a number of key areas".

The Public Accounts Committee (PAC) has noted its concern that the successor programmes will also fail to be delivered on time.<sup>47</sup> The impact of Brexit on the Home Office's ability to deliver its ambitious IT projects is unknown.

The Home Office claims to have improved planning processes and programme management in the wake of National Audit Office and PAC reports, and the relatively successful implementation of exit checks received praise from the PAC. But it remains unclear if outstanding IT projects will be able to deliver by April 2019, or if they require major changes in the light of Brexit, which will delay delivery further.

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## **If there is a need for increased checks, this could be done electronically and away from the physical border**

To minimise impact at the border, the UK could develop an online pre-screening process, similar to the US Electronic System for Travel Authorization (ESTA) or the proposed European Travel and Information Authorisation System (ETIAS), which will require an online application costing €5, valid for five years if granted. This would allow security screening to take place before visitors arrive at the border, making processing them at entry points to the UK faster. There is a precedent for this in the UK, with the Registered Traveller service. This is available to citizens of 25 countries and territories who have a UK visa or have visited the UK four times in the last 24 months, and allows them to use the UK and EU channels at passport control, and, if their passports are chipped, to use electronic passport (e-passport) gates.<sup>48</sup>

The Independent Chief Inspector of Borders and Immigration has supported the use of e-passport gates to manage queues and improve processing times.<sup>49</sup> If the 35 million EU nationals who cross the UK border each year continue to be permitted to use e-passport gates, a great deal of the pressure on Border Force could be alleviated, avoiding lengthy queues and delays for passengers.

## **Security and counter terrorism are not done by bulk checks, and major changes at the border hinder, not help, in managing threats**

Counter terrorism and the monitoring/management of individuals deemed to be national security threats do not take place through border checks. There is a detailed system of intelligence and specialised teams responsible for preventing incidents and stopping individuals gaining access to the UK. In comparison to tens of millions of annual visitors, the numbers receiving this detailed attention is far smaller.

Applying more detailed checks to the 'bulk' of travellers would not necessarily be of significant benefit to national security teams. Major change or disruption at the border could, instead, act as a distraction and possibly limit the effectiveness of current security processes.

## ***Summary: Government should minimise change to the way EU nationals are treated at the border in the short term to avoid disruption***

With EU nationals making up one in four of all UK border crossings a year, any change in their treatment could significantly affect the way borders, such as airport arrivals, are run. Major change could cause disruption or significant cost, when enforcement against immigration is done primarily inside the country.

Enhancing pre-arrival checks on EU nationals could take the form of online pre-screening, as run by the US and other countries.

If the Government is to make substantial changes to the way EU nationals are processed at the border, it may need to be done over a much longer time frame in the years following Brexit.

Minimising changes in the treatment of EU nationals would not encourage an increase in abuse of the UK's immigration regime. Immigration enforcement does not take place at the border, but at the point at which visitors to the UK try to settle here – when renting property, applying for a National Insurance number, or accessing public services.



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## Enforcement

### **Much of the current immigration enforcement activity is carried out by employers, landlords and public services**

The end of free movement means that the rights and entitlements of EU nationals in the UK will change. As such, the UK will need to adapt its enforcement to prevent abuses of these rights and entitlements, as well as preventing abuse of migrants by employers, particularly in low-skilled labour.

Currently, much of the enforcement of immigration rules on non-EU nationals takes place via employers, landlords and public services. Much of this is complex, with 13 Acts of Parliament governing the UK system for non-EU migration and employers facing an application which typically comprises 100 questions and 85 pages for a visa.<sup>50</sup> The Institute of Directors has complained that the checks and rules have become increasingly difficult to understand, particularly for small businesses without a dedicated human resources team.<sup>51</sup>

The Home Office's role is to monitor compliance, particularly of employers and landlords. Immigration Enforcement can conduct visits to homes and businesses to investigate abuse and make arrests or serve fines. These enforcement teams must be appropriately scaled up to ensure they can police an EU immigration regime on top of the non-EU activity.

### **If government wants to limit abuse, it needs to improve enforcement of the wider labour market and the National Living Wage**

The referendum debate highlighted concerns that wages are being undercut as a result of abuse of the immigration system by both migrants and employers. Managing this concern will require government to put renewed emphasis on the enforcement of the labour market regulations more widely, for example through schemes such as the National Living Wage.

There are, at present, three key labour market enforcement units: HMRC, the Gangmasters Licensing and Labour Abuse Authority, and the Employment Standards Agency Inspectorate. With a combined staff of less than 350, there is an equivalent of one enforcement officer for every 20,000 working-age migrants.<sup>52</sup>

The National Living Wage is enforced by HMRC, but analysis from the Migration Advisory Committee in 2014 highlighted that, on average, employers can expect a visit from HMRC once every 250 years; while the average for prosecutions is once in a million years.<sup>53</sup>

### **Enforcement requires the Home Office to work in partnership with others – it needs to consult with those partners and allow them to adapt**

While government needs to provide the resources to effectively enforce immigration rules, it also relies heavily on wider society. Consultation on the new immigration regime will need to cover the responsibilities of those outside government, who manage the day-to-day enforcement of immigration. With current processes seen as a significant burden and the enforcement of EU migration likely to significantly add to that, Brexit is a big opportunity to clarify and, where possible, simplify roles and responsibilities.

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With enforcement depending on the work of such a large part of society, there must be sufficient communication and forward guidance offered to those outside of government who will be required to adapt to, and enforce, the new regime. There is a risk that smaller, regional firms, without dedicated human resources or government affairs teams, will be slower to react to the new rules.

In recognition of the challenge facing employers, landlords and public services, government may use a period of 'grace' following the implementation of the new immigration regime. Such a period would allow organisations to adapt without the risk of unintentional breaches of compliance and fines as a result.

In-country enforcement of immigration with respect to overstays, criminality or other abuse of migration policy is done at the discretion of the UK Government. As such, any period of grace the Government wishes to offer before enforcing new rules for EU nationals is a decision that can be made unilaterally, and done to ensure UK Immigration Enforcement has sufficient time to scale up – recruiting and training new staff.

***Summary: Government should use the opportunity of Brexit to improve the current enforcement system***

As enforcement of a new immigration regime can only come into practice after the establishment of such a regime, a phased implementation of a new enforcement policy and practices may be necessary.

Government is likely to continue to place the onus of day-to-day enforcement on employers, landlords and providers of public services, but it can use Brexit as an opportunity to develop rules and processes that simplify their role. Extensive consultation is required to develop a system that does not replicate the current level of complexity for employers wishing to hire a non-EU national.

Organisations, whether they are private employers or public services, will need time to prepare for the new scale of enforcement, regardless of their role. If government intends to quickly implement a new immigration regime, it may require a longer period of grace to allow organisations to adapt to the new rules. Details of such a period should be clearly agreed during consultation on the new regime.

While a period of grace before full enforcement would work, government should seek to avoid confusion by phasing in parts of the new system over time. Businesses find it easier to change their systems and processes once, rather than a number of times over a period of several years.



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## Acknowledgements

This paper would not have been possible without those who agreed to contribute or be interviewed as part of the process. Special thanks go to Euan McCarthy, who helped to shape the Implementing Brexit series. Without him, this paper would not have happened.

As always, thanks go to colleagues at the Institute for Government – Matthew Batchelor, Bronwen Maddox, Jill Rutter and Nicole Valentinuzzi – for their comments and publication support. Any errors or omissions are those of the authors.

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May 2017

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