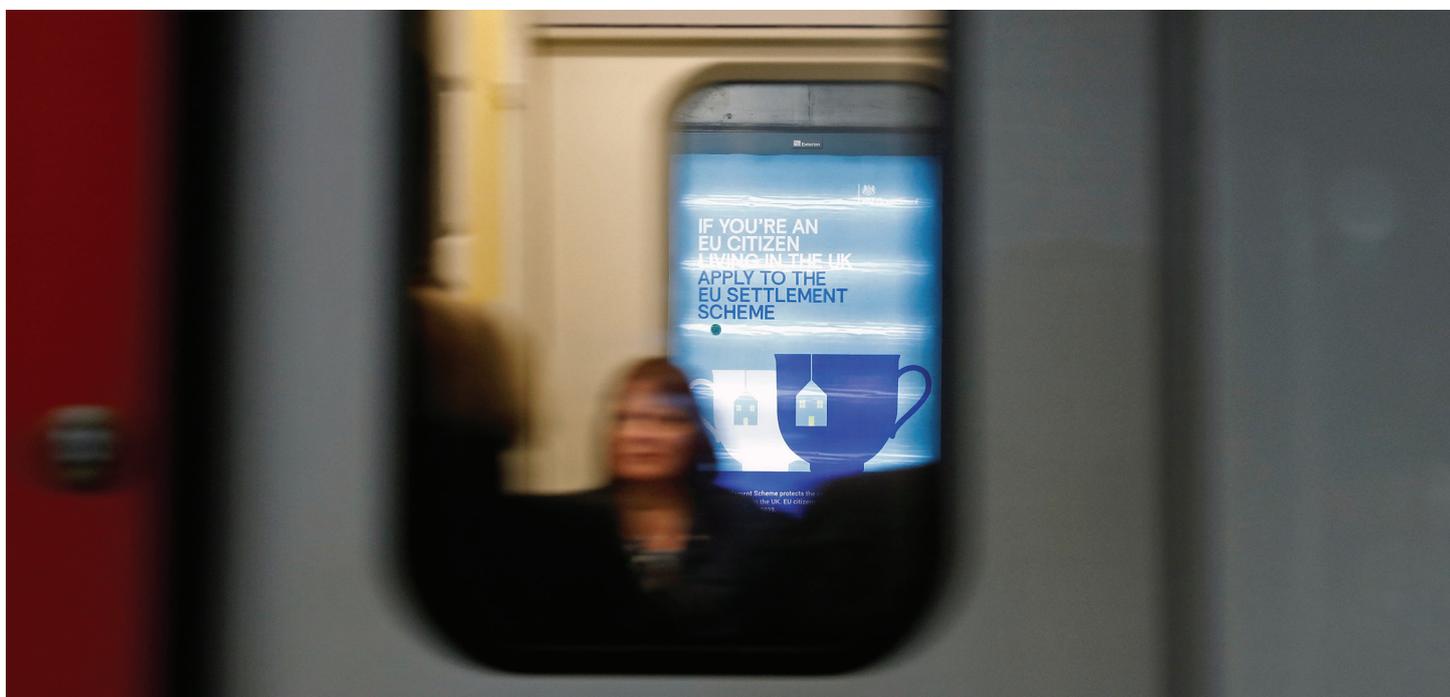


After Brexit: Could bilateral agreements facilitate the free movement of persons?

Diego Acosta



Credit: Adrian DENNIS / AFP

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ABOUT THE AUTHOR



Diego Acosta is Professor of European and Migration Law at the University of Bristol. He has participated in several cases before the Court of Justice of the EU dealing with migration law and EU citizenship and has advised the European Commission and European Parliament, among other international organisations.

ACKNOWLEDGEMENTS/DISCLAIMER

This Discussion Paper was written with the collaboration and research assistance of Ashleigh Guest, Ignacio Odriozola and Sophia Soares. The research for this paper was possible thanks to a grant from the QR Strategic Priorities Fund of the UK Research and Innovation. A similar, [Spanish version](#) of this paper was published by the Barcelona Centre for International Affairs (CIDOB), a Spanish international affairs research centre, in July 2021.

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Executive summary

With the conclusion of the Brexit transition period on 31 December 2020, the free movement of people between the 27 member states of the EU and Norway, Iceland, Liechtenstein and Switzerland; and the UK has come to an end. Some of the millions of EU nationals in the UK and British nationals in the EU are already suffering the consequences of this drastic curtailment of rights.

The present moment is propitious to explore ways to govern and facilitate migration between the two parties. Although an EU-wide agreement with the UK that ensures free movement remains the ideal solution, it is currently unrealistic. This calls for an evaluation of possible alternatives.

Considering the importance of migration flows in both directions, this Discussion Paper investigates the possibility of adopting bilateral agreements on the free movement of people. It analyses various bilateral free movement agreements across Europe to show that their use is not only legal but also habitual. This analysis highlights the flexibility offered by bilateral agreements and the different forms they take when it comes to the rights of entry, residency and work, as well as other important rights (e.g. family reunion, social security, voting rights).

This Discussion Paper considers Spain as the first possible candidate for a post-Brexit bilateral free movement agreement concluded between an EU member state and the UK. Spain is the most important EU destination for British emigrants, and British migrants residing in Spain constitute the latter's third-largest non-national population. In turn, the UK is the most important migrant destination for Spanish nationals worldwide, who represent the fifth-largest migrant group from the EU. The author investigates the present legal statuses of UK nationals in Spain, and Spanish – and EU nationals more generally – in the UK. He then offers suggestions as to what a bilateral treaty between Spain and the UK could include.

Bilateral agreements on the free movement of people are legal from international, EU and domestic law perspectives. Admittedly, there could be political impediments to their adoption, especially if EU institutions or member states pressure individual European governments not to follow this route, even though migration law on this matter is a national competence. Nevertheless, bilateral agreements could mitigate the impact of the loss of free movement rights. Therefore, some member states might be keen to follow this road due to specific social, economic and/or political concerns; and strong migration flows.

Bilateral agreements should be explored and examined as a possible alternative to an EU-wide agreement with the UK to facilitate and govern cross-border mobility. In negotiating bilateral agreements, the UK and EU countries should take the pre-Brexit status quo as the starting point and incorporate a number of provisions on entry, stay, rights during residency, and protection from expulsion. They could then be adapted to the particular needs and interests of the countries at hand. Such bilateral agreements could also be used as a foundation upon which to build an agreement between the EU as a whole and the UK, if not to facilitate the rebuilding of mutual trust.

The following recommendations are targeted at the governments of EU member states that have important reciprocal migration flows with the UK, as well as the UK government. They should be considered to explore the possibility of adopting bilateral agreements on migration between certain EU member states and the UK.

- ▶ Bilateral agreements should be examined as a possible alternative to an EU-wide agreement with the UK to facilitate and govern cross-border mobility between the two parties.
- ▶ The negotiating parties should place the rights and interests of both short-term and long-term British and European nationals residing in each other's territory at the centre stage.
- ▶ In negotiating a possible treaty, both the respective EU member state (e.g. Spain) and the UK should take the pre-Brexit status quo as the departing point.
- ▶ The status of mobile nationals could be improved beyond that enjoyed by EU citizens pre-Brexit. For example, political rights could be extended beyond the municipal level.
- ▶ Certain categories of individuals (e.g. retirees, young workers) could benefit from special provisions which also depart from the pre-Brexit situation.
- ▶ Bilateral agreements should be aimed at gradually rebuilding mutual trust between the EU and the UK. They should be used as a model for a future arrangement with the EU as a whole.

Introduction

On 31 December 2020, the transition period following the UK's withdrawal from the EU elapsed, marking an end to the free movement of people between the two parties. The negative consequences of this sudden curtailment of rights are already evident. For example, UK nationals have been refused entry into EU member states, including the Netherlands, Spain and Germany, on the basis that the UK is no longer exempted from EU-agreed, COVID-19-related travel restrictions. Likewise, so-called 'swallows' – UK nationals who spend winter in Spain and return to the UK in summer – have been prevented from visiting their second homes on a similar basis. In turn, EU jobseekers travelling to the UK for job interviews have been denied entry and, in some cases, even detained for days before being expelled.

A free movement agreement between the EU and the UK would carry some attractive advantages, as it would benefit all EU citizens and allow British nationals to travel and settle anywhere in the Union. However, signing such an EU-wide agreement is currently unrealistic. Indeed, ending free movement was one of the central elements of the Brexit campaign and debate, which presented immigration to the UK as "out of control" and thus pushed the rhetoric that it must "take back control of its borders".¹ In 2020, the UK's National Centre for Social Research found that 62% of UK respondents believed that EU immigrants should have to apply to come to the UK rather than enjoy free movement.²

A free movement agreement between the EU and the UK would carry some attractive advantages. However, signing such an EU-wide agreement is currently unrealistic.

Moreover, Labour leader Keir Starmer made a U-turn in January 2021, declaring that he will not be looking to reinstate free movement rights should he win the next national election, as he had previously promised. Free movement is not a palatable option for the Conservative Party, either. Due to the UK's two-party political system, that the other prominent political groups – the Liberal Democrats, the Scottish National Party, the Green Party – support free movement does not hold much weight. Negotiations on an agreement between the EU as a whole and the UK in the near future are therefore highly unlikely.

This is the opportune moment to discuss alternatives to the regulation of migration between the two parties. One option would be to adopt bilateral free movement

agreements between the UK and individual EU countries, which could mitigate the impact of the loss of mobility rights. In fact, British nationals have seen their work, study and life choices curtailed dramatically, decreasing the value of the British passport significantly.³ In a 2019 European Commission survey, 55% of UK respondents stated that they had benefited from no or minor border controls when travelling abroad.⁴

In the absence of an EU-wide agreement, bilateral ones would make it possible to preserve some core rights for certain EU nationals wishing to move to the UK while also meeting the expectations of the UK public. Moreover, bilateral treaties are not at all uncommon; they are in force in Europe and beyond. This Discussion Paper analyses various accords from across Europe to highlight the flexibility they offer and the different forms they take when it comes to the rights of entry, residency and work, as well as other important rights (e.g. family reunion, social security, voting rights).

Spain should be the first candidate for a post-Brexit bilateral treaty concluded between the UK and an EU member state. Spain is the most important EU destination for British emigrants and the fourth most important globally after Australia, the US and Canada.⁵

As of December 2020, 381,448 British migrants were residing in Spain, making it the third-largest migrant population after Romanian and Moroccan nationals.⁶ According to some estimates, if short-term British migrants are included (e.g. those who only spend a number of months in Spain each year), the total could reach a million.⁷ In turn, the UK is the most important migrant destination globally for Spanish nationals.⁸ Roughly 185,000 Spanish nationals were living in the UK in 2020, making it the fifth-largest migrant group from the EU.⁹ In addition to these numbers, there are many more living between both countries: the aforementioned seasonal UK 'swallows', or Spanish youths working and/or studying for several months in cities like London and Edinburgh and who have been referred to as "transmigrants".¹⁰ Moreover, Spain and the UK have already signed a reciprocal agreement to secure the right of their respective citizens to vote and stand in local elections.

As of December 2020, 381,448 British migrants were residing in Spain, making it the third-largest migrant population after Romanian and Moroccan nationals.

Section 1 of this Discussion Paper assesses the new, post-Brexit immigration system between the EU and the UK. Spain is used as a case study to showcase British nationals' difficulties in obtaining residency in an EU member state. Section 2 analyses several bilateral agreements already adopted in Europe to highlight the diversity in their origins and clauses. This section

also investigates the possibility for Spain and the UK to draw up a bilateral agreement and the provisions it could include. The paper concludes by offering recommendations for the governments of EU member states that have important reciprocal migration flows with the UK, as well as the UK government.

1. The new post-Brexit immigration system between the EU and the UK

1.1. THE LEGAL STATUS OF EU NATIONALS IN THE UK

The free movement of UK nationals to EU member states, barring Ireland, ended on 31 December 2020 with the expiration of the Brexit transition period. A new system was also brought into force for EU immigrants wishing to come to the UK. By June 2020, an estimated 3.45 million EU nationals lived in the UK.¹¹ Their legal status now depends on whether they meet the new criteria under the EU Settlement Scheme, contained in the Appendix EU to the UK's Immigration Rules. Those who entered the UK before the cut-off date of 31 December 2020 are covered by the Withdrawal Agreement and can obtain 'pre-settled' or 'settled' status, depending on their circumstances. The former is granted to EU, European Economic Area (EEA) or Swiss nationals who have lived in the UK for less than five years. This status gives a person the right to live and work in the UK for five years. They can spend up to two years outside of the UK without losing this status. 2,099,200 applicants had been granted pre-settled status as of 28 February 2021.¹²

In turn, settled status can be obtained by EU nationals who have lived in the UK for five continuous years and can prove that they have spent at least six months of each of those years physically in the UK. In addition to all the rights of pre-settled status, they can live and work in the UK indefinitely, bring certain family members if the family relationship began by 31 December 2020,¹³ and live outside of the UK for up to five years in a row without losing their status. 2,553,900 people had been granted settled status as of 28 February 2021.¹⁴

Finally, there is no special treatment for those living between an EU member state and the UK. As mentioned, EU, EEA, and Swiss nationals can only apply for (pre-)settled status if they were in the UK on or before 31 December 2020 and must apply by 30 June 2021.

Those EU, EEA and Swiss nationals arriving in the UK from 1 January 2021 must now follow the standard immigration routes under the new points-based immigration system. They can travel to the UK for holidays and short trips of up to six months with a valid passport and without needing a visa, but do not have the right to work during that period.

Anyone entering the UK to work must obtain a number of points based on certain requirements. To be granted a Skilled Worker visa, the applicant must have a job offer from an approved employer sponsor, speak English and be offered an annual salary of at least £25,600. The applicant may be offered a lower annual salary (but no less than £20,480) if, for example, they hold a job offer from an industry listed as a shortage occupation or hold a PhD degree relevant to the job. In turn, the Global Talent visa scheme allows applicants who have "exceptional talent or exceptional promise" in the fields of science, engineering, humanities, medicine, digital technology, or arts and culture to come to the UK without a job offer.¹⁵ However, an organisation approved by the Home Office must endorse and confirm that the applicant is a (potential future) leader in said field.

In addition to these paths to obtain residency, the student visa route allows a successful applicant to study in the UK if they have already been offered a place on a course, are fluent in English and are financially self-sufficient. Once they conclude their studies, the new graduate immigration route, which opens on 1 July 2021, will allow international students who have completed a degree in the UK to (seek) work in the UK, at any skill level, for up to two years, or three in the case of PhD graduates.

Thus, for the first time in decades, the UK is treating newly arrived EU nationals the same as any other immigrant. The impact of this new points-based system is yet to be seen, as it has so far run concurrently to the global COVID-19 pandemic, which has had its own unprecedented impact on immigration patterns. However, the Institute for Public Policy Research argues that "there is likely to be lower levels of immigration from EU countries under the new immigration system", as "around 63 per cent of EU-born workers currently living in the UK (excluding the self-employed) would not be eligible for the skilled worker route."¹⁶ This is because the occupations covered by the 'skilled worker' route do not generally match the type of jobs that EU nationals are currently performing in the UK.¹⁷ This is likely to put pressure on sectors that are highly reliant on EU workers and lead to a rise in informal employment.¹⁸

1.2. THE LEGAL STATUS OF BRITISH NATIONALS IN THE EU

The situation faced by British nationals wishing to move to an EU country must be considered in order to understand how their legal status has changed post-Brexit. What follows is a specific analysis of the immigration rules that govern UK nationals' position in Spain.

Title II of the EU–UK Withdrawal Agreement set out the legal status of UK nationals and their family members residing in other EU states until the end of the transitional period, namely 31 December 2020.¹⁹ UK nationals residing in Spain before that date could register to obtain a Spanish identity card, the *Tarjeta de Identidad de Extranjero* (TIE), which would confirm their rights under the Withdrawal Agreement. However, those who had already registered their residency before 6 July 2020 would have obtained a Green Residence Certificate in paper format, which proves their rights under the Withdrawal Agreement, and could be exchanged for a TIE if desired. Family members with whom a bond existed before 1 January 2021, whether British or third-country nationals (TCNs) (including any future children), can also obtain residency.

The TIE is valid for five years for those who have not resided in the country for more than five years. Those with a longer residency will have obtained a permanent TIE that is valid for ten years. The former temporary TIE can be upgraded to a permanent one after the five years of residency. The Withdrawal Agreement outlines that the rights of such UK nationals to residency, work, education and social security services in their respective EU host country are retained beyond the transitional period, as per the application of EU law.²⁰

UK nationals and their family members (whether UK or TCNs) who arrive in Spain after 1 January 2021 do not fall under the Withdrawal Agreement. Instead, they are subject to the regular Spanish immigration rules applicable to any TCN by the Law on Foreigners (*Ley de Extranjería*). While no visa is required for short stays, up to 90 days within any 180-day period, a visa must be obtained for all other purposes, including longer stays, residency and work. UK nationals will have to follow the same procedures as any other TCN.

In general, obtaining a work permit in Spain is only possible in certain limited occupations or when no suitable Spaniard, EU national or TCN already residing in Spain is available. Those willing to reside in Spain without exercising any economic activity have, in general, two available paths: prove a monthly income of at least €2,250, or purchase a property worth at least €500,000. There are additional requirements in both cases, such as having health insurance. Family members may also join by fulfilling other conditions.

While Brits and Spaniards will continue to be allowed short-term visits to each other's states under the Withdrawal Agreement, they are no longer entitled to long-term residency, work, retirement, education nor sponsoring of family members. The most recent data shows that 22% of UK nationals living in Spain are working, while 48% are retired and 11% are unemployed. The remainder is made up of those too young to work, students and the economically inactive.²¹

While Brits and Spaniards will continue to be allowed short-term visits to each other's states under the Withdrawal Agreement, they are no longer entitled to long-term residency, work, retirement, education nor sponsoring of family members.

Consequently, in the absence of a bilateral agreement – or an agreement with the EU as a whole –, the lack of mobility opportunities between the EU and the UK demand urgent thinking. Indeed, under the new, post-Brexit rules, thousands of individuals will be affected by, for example, much stricter family reunion rules and the lack of paths for labour mobility. Likewise, industries will find it hard to fill labour shortages, a concern that has already been raised by UK employers in numerous sectors, including hospitality, construction and transport.²²

2. Analysis of current bilateral agreements, and a proposal for a new one

This section analyses the bilateral agreement between the EU and Switzerland, among many others across Europe, examining their specific features and assessing whether they could be used as an alternative model for a relationship between certain EU member states and the UK. Many other countries at the international level have, or have had, bilateral agreements on the free movement of people: the Czech Republic and Slovakia, Russia

and Belarus, Australia and New Zealand, Brazil and Argentina, India and Nepal. Thus, bilateral agreements on the free movement of people are a regular occurrence at the global level and are worth exploring in the present, post-Brexit context.

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2.1. THE REPUBLIC OF IRELAND AND THE UNITED KINGDOM

The Common Travel Area (CTA) is a special travel zone between the Republic of Ireland (Ireland) and the United Kingdom, Isle of Man and Channel Islands (UK), dating back to the establishment of the Irish Free State in 1922. Its adoption resulted from the unsuitability, from the point of view of the UK Home Office, of establishing a passport system between the UK and Ireland, and the preference to maintain the status quo between the two territories.²⁵ Subsequently, Irish and UK nationals had their privileges enshrined in domestic law, which granted them a special status in each other's territories and free movement across the two countries. Ireland is not considered a 'foreign country' for the purpose of UK laws, and Irish nationals are not considered 'aliens'. Similarly, while treated differently from Irish citizens, UK nationals in Ireland are explicitly exempt from restrictions on entry and residency, and the possibility of deportation except in some limited cases.²⁴

Successive governments in both Ireland and the UK have supported the CTA for a number of reasons. First, it is believed to be "impractical for the Irish border to be an immigration frontier" because of the difficulty of policing it.²⁵ Second, the social and economic connections between Ireland and the UK, including their shared use of the English language, as well as a high level of trade, cultural, social and political links, have often been highlighted.²⁶ Third, the free movement of labour is supported consistently by both states and benefits workers moving in both directions.²⁷ According to official statistics, approximately 364,000 Irish nationals lived in the UK in 2020,²⁸ and 103,100 UK nationals in Ireland in 2016.²⁹

In light of Brexit, a 2019 Memorandum of Understanding reaffirmed the status that Irish and UK nationals enjoy in each other's territory and guarantees that there will be no changes to these rights. While it is "not [...] intended to create legally binding obligations",³⁰ it does reflect the mutual commitment towards this arrangement. Under the CTA, Irish and UK nationals are not subject to passport checks when travelling between the two states, although passports may still need to be presented to confirm Irish or UK nationality at air and sea borders. Despite both states maintaining their own visa and immigration policies, there is a great degree of policy coordination and cooperation.

Irish and UK nationals are free to enter and remain in either country without requiring any form of visa, residency or employment permit. The only exception is Irish nationals subject to a deportation order, exclusion decision or international travel ban, and who must apply for permission to enter the UK. Irish and UK nationals are permitted to work in either country, including on a self-employed basis. Both states are committed to ensuring that professional qualifications are recognised across the CTA. Nationals from both states have the right to access all levels of education, as well as qualify for student loans for higher education. Furthermore, they can access social security benefits and entitlements, including pensions, healthcare, social housing and homeless assistance.

In their capacity as Commonwealth citizens, Irish nationals can vote in local and national parliamentary elections and referendums in the UK. UK nationals in Ireland can also vote in local and general elections, but not in national referendums nor European parliamentary elections.

2.2. ANDORRA, SPAIN AND FRANCE; ANDORRA AND PORTUGAL

Other bilateral agreements involve EU member states and microstates, often neighbouring ones. The Principality of Andorra represents an interesting case study of a microstate that has concluded two bilateral agreements on the free movement of persons with three EU countries: France, Spain and Portugal. Monaco and San Marino have, in turn, ratified treaties with France and Italy, respectively.

The agreement between Andorra, Spain and France was concluded in 2000. It is based on the geographical location of Andorra, the historical links between these states and their good neighbourly relations.³¹ Recent immigration figures prove these strong bonds. By 2020, out of the 78,015 residents in Andorra, 19,211 were Spaniards and 3,423 were French.³² In turn, the agreement with Portugal, adopted in 2007, was based on "the desire to maintain the quality of existing relations, favourable to their respective nationals".³³ Portuguese nationals represent the second-largest immigrant community in Andorra, with 2020 figures at 9,083.³⁴

The two agreements are practically identical, with the primary purpose of "facilitating both the movement and the establishment of [their respective] nationals".³⁵ The right to enter and stay for periods not exceeding 90 days is granted upon the presentation of a valid identity card. Beyond this period, the individual must obtain a residency permit in accordance with national law. Those individuals willing to establish residency "without engaging in gainful activities" must provide evidence of sufficient economic means and sickness, maternity and accident insurance cover. This makes the conditions of residency for such individuals slightly stricter than those that apply for EU nationals under the Citizens' Rights Directive 2004/38.³⁶

In terms of rights, Andorrans enjoy a very similar treatment in France, Spain, and Portugal as EU citizens, while French, Spanish and Portuguese nationals are offered a privileged status in Andorra. Moreover, both agreements enshrine some provisions on labour rights, as well as incorporate the right to family reunification.³⁷ Lastly, those individuals “legally residing” in the territory of another State Party may be expelled “only on grounds of public policy, public security or public health, in accordance with the legislation of the host State”.³⁸

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2.3. THE EUROPEAN UNION AND SWITZERLAND

The Swiss Confederation (Switzerland) is not, nor has it ever been, a member of the EU. Switzerland is also not a member of the EEA. However, Switzerland is part of the Schengen Area, which removes passport checks at internal border points while ensuring common safety measures at external borders.

On 20 May 1992, Switzerland applied for EU membership.³⁹ That same year, however, Swiss nationals rejected by referendum the option to join the EEA, thus making EU membership impossible as well.⁴⁰ At that point in time, the urgent need for agreements between the EU and Switzerland became apparent. In fact, the EU appealed for this specifically to secure the rights of many EU nationals living in or commuting daily to Switzerland from neighbouring EU member states.⁴¹

The negotiations that followed resulted in seven agreements, one of which was the Agreement on the Free Movement of Persons (AFMP), which entered into force on 1 June 2002. The AFMP places Swiss nationals on a similar, but not equal, footing with EU nationals in terms of their rights to enter, work, reside (also for the economically inactive), bring family members, have their qualifications recognised and be protected from expulsion.⁴² The negotiations for the agreement’s conclusion were conducted between the EU and Switzerland as two equal partners, as opposed to between several EU countries on the one hand and Switzerland on the other. Every time the EU is enlarged, the agreement is extended to include the new member state through an additional protocol.⁴³ The opposite is equally true, with the UK leaving the EU being a case in point.

2.4. PROSPECTS FOR A BILATERAL AGREEMENT BETWEEN THE UK AND SELECTED EU COUNTRIES

The previous sections show that, although an agreement with the EU as a whole may be possible in specific circumstances, bilateral agreements provide an alternative model and practical solutions to questions relating to mobility between EU countries and the UK. More specifically, these agreements show that it is possible to cover a variety of civil, social, economic and even political rights while simultaneously allowing states to set additional conditions for moving and settling abroad. Indeed, while bilateral agreements can be replicated – as in the case of Andorra –, they can also be unique and include different provisions depending on the migration flows and their characteristics between two states.

Under current domestic and international law, both individual EU member states and the UK can legally conclude bilateral free movement agreements with each other. From an EU law point of view, migration must also be differentiated from trade. While bilateral free trade agreements do fall under the scope of the Union’s common commercial policy, over which the EU has an exclusive mandate, immigration is an area of shared competence in the EU.⁴⁴

A bilateral agreement would therefore only need to respect what is already established in the EU directives that regulate entry and residency of particular TCN categories (e.g. highly skilled workers). Nevertheless, it could also go beyond their provisions – a possibility enshrined in said directives.⁴⁵ The bilateral agreements explored in the previous sections also validate this point. However, the visa policy for Schengen states is regulated at the EU level and requires reciprocity.⁴⁶ Hence, the UK cannot introduce visa requirements for particular EU nationalities and then expect that British nationals can travel visa-free to all EU member states.

Bilateral agreements would also bring some disadvantages. Most obviously, they would benefit nationals of only one EU member state in the UK and not others.

Bilateral agreements would also bring some disadvantages. Most obviously, they would benefit nationals of only one EU member state in the UK and not others. The UK may only be willing, if at all, to sign agreements with countries where a large number of British nationals reside already. These include not just Spain but also France and Portugal, and omit member states like Poland or Romania. Likewise, many EU countries could be uninterested in negotiating such agreements due to the limited migration flows in both directions, such as Austria.

Although the adoption of bilateral agreements would be better for hundreds of thousands of Europeans than no agreement at all, from a political point of view, the situation is more complex. In its recent conclusions from its meeting between 24 and 25 May 2021, the European Council affirmed that “a non-member of the EU cannot enjoy the same benefits as a member and that the relationship must be based on a balance of rights and obligations at all times.” It then followed by calling on the “UK to respect the principle of non-discrimination among Member States.”⁴⁷ With such a statement, the European Council seems to caution individual member states not to be seduced by the possibility of adopting bilateral agreements that would also inevitably lead to a difference in treatment between Union nationals residing in the UK.

Accordingly, some or even most EU countries may be uninterested in engaging in a bilateral negotiation on such a sensitive issue with the UK, taking into account the wider political context of Brexit. However, the example of the agreements with Andorra clearly shows that while it might be politically difficult and/or costly to be the first member state to adopt a treaty with the UK, strictly speaking, there is no legal impediment to take such a step. The EU should therefore respect the division of competences on this sensitive matter. It cannot be forgotten, either, that the EU institutions have not indicated any need for Ireland to withdraw its special relationship with the UK. The same possibility should be open to other member states based on not only their respective migration flows but also other factors, such as the economic consequences of the lack of mobility rules post-Brexit.

Some or even most EU countries may be uninterested in engaging in a bilateral negotiation on such a sensitive issue with the UK, taking into account the wider political context of Brexit. The EU should therefore respect the division of competences on this sensitive matter.

Although bilateral agreements could create frictions between EU and UK institutions, and even among EU member states, the adoption of bilateral treaties should be seen in a different light. With the toxic legacy of the Brexit process, the current political climate in Europe makes it harder to imagine the swift re-establishment of comprehensive mobility rules between the EU and the UK. As such, bilateral agreements could be the first stepping stone to their gradual reintroduction. They could even be the foundation for building a future arrangement with the EU as a whole.

Such progressiveness is not unheard of at the global level. In South America, Argentina signed numerous bilateral agreements on the free movement of people with regional

neighbours in the late 1990s and early 2000s before a multilateral agreement came into place. In our case, a future EU-wide agreement could build on the restored trust contributed to by bilateral relations and even be modelled on the terms of the bilateral agreements. The AFMP could be useful, although, of course, a more modest model could be adopted, at least initially, with only certain categories (e.g. workers) allowed mobility.

Drawing on successful bilateral relations, a future UK government may also be more inclined to reconsider its immigration approach and include exceptions to its new points-based system for at least some categories of EU nationals (e.g. those economically active, in short-term contracts). While there are no obvious paths to follow in the present circumstances, bilateral agreements constitute a useful tool that could become part of the equation to solve the lack of mobility arrangements between the EU and the UK.

2.5. THE SCOPE OF A POSSIBLE FUTURE BILATERAL AGREEMENT

This Discussion Paper advocates that the status quo established in the Withdrawal Agreement represents the departing point for any future bilateral agreement between EU member states and the UK. This would allow for an easier transition from the pre-Brexit situation and reinstatement of the former rights in terms of entry, residency, work and study. Accordingly, an agreement between both Spain and the UK should, first and foremost, provide the same rights to both parties and establish perfect reciprocity. While bilateral agreements that privilege the rights of one party’s nationals do exist in both Europe (e.g. Andorra–Spain) and globally (e.g. Australia–New Zealand),⁴⁸ this would be difficult to accept in the present context. Once this first point is settled, the content can be negotiated with greater flexibility.

The status quo established in the Withdrawal Agreement represents the departing point for any future bilateral agreement between EU member states and the UK.

A Spain–UK bilateral agreement would be mostly concerned with four elements: entry, stay, rights during residency, and protection from expulsion.

When it comes to **entry**, the agreement should offer this right to a large as possible group of individuals. In line with EU law, those posing a threat based on certain established provisos could be denied entry. In that regard, jobseekers should also be offered a sufficiently long period to join the labour market.

Regarding **stay**, this could follow EU norms already in place so that workers, including the self-employed, students and the economically inactive, can be granted residency permits. In line with the Citizens' Rights Directive, there could be more stringent requirements, such as health insurance, for those who enter to study or reside without exercising an economic activity, in line with what is established in the Andorra–Spain agreement. Students could be treated as nationals in each other's territory when it comes to fees, loans and scholarships, as is the case under the CTA between Ireland and the UK. Finally, both countries could establish certain professions that only nationals can access or in which they enjoy a preference.

A flexible approach could also be used to, for example, recognise the high number of UK retirees in Spain by removing the requirement for UK nationals to invest half a million euros to gain residency rights. Similarly, the UK could recognise the significant number of Spanish nationals who move to the UK to work by removing the requirement of employment sponsorship and the general salary threshold.⁴⁹ Considering that British nationals constitute the largest number of foreign property investors in Spain,⁵⁰ provisions adapted to such a reality could be established.

Regarding **rights during residency**, a general clause of equal treatment with nationals that includes certain exceptions could be the departing point. A particularly thorny issue would be the regulation of family reunion.

Before the end of the transition period, UK nationals had to comply with stricter conditions to bring their non-EU family members to the UK than EU, EEA and Swiss citizens living in the UK. It is thus unlikely that a bilateral agreement could offer Spanish nationals the family reunion rights they had before Brexit. Regardless, and in line with the principle of reciprocity advocated for earlier, the conditions for family reunion should be the same in both territories.

To provide certainty, other elements like social security could follow the provisions established in the Withdrawal Agreement. Access to healthcare should be granted under the general clause of equal treatment. Other aspects – such as social housing, which is included in the CTA – could be the subject of discussion and be left out of its scope should no agreement be reached.

With reference to political rights, Spain and the UK already signed a separate reciprocal agreement in 2019 to secure the right of their respective citizens to vote and stand in local elections. The UK government has highlighted the importance of this agreement as a positive step forward in its bilateral relationship with Spain, and similar reciprocal voting agreements have since been concluded with Portugal, Luxembourg and Poland.

Finally, regarding **protection from expulsion**, the agreement could include similar provisions to those already established in the EU–Switzerland agreement.

Conclusion and recommendations

The UK withdrawal from the EU has led to a drastic loss of rights for millions of EU and British citizens, including free movement. This calls for an evaluation of possible alternatives. Although adopting a free movement agreement between the entire EU and the UK – similar to the former's agreement with Switzerland – would be desirable, this option is not politically viable. At least, not in the present context. While also politically difficult in the present scenario, multiple bilateral agreements between the UK and individual member states could offer a more realistic solution to those EU countries with large migration flows to and from the UK.

Although adopting a free movement agreement between the entire EU and the UK – similar to the former's agreement with Switzerland – would be desirable, this option is not politically viable. At least, not in the present context.

European institutions should acknowledge that bilateral agreements on the free movement of people are currently in use, both in Europe and elsewhere, and are aligned with EU law. They should also respect member states' competence on this sensitive matter. In the meantime, bilateral agreements could be used to remodel the former free movement regime between the EU as a whole and the UK, gradually rebuilding trust between the two parts.

Thus, the following recommendations are targeted to the governments of EU member states that have important reciprocal migration flows with the UK, as well as to the government of the UK. They should be considered to explore the possibility of adopting bilateral agreements on migration between certain EU member states and the UK.

- ▶ Bilateral agreements should be examined as a possible alternative to an EU-wide agreement with the UK to facilitate and govern cross-border mobility between the two parties.
- ▶ The negotiating parties should place the rights and interests of both short-term and long-term British and European nationals residing in each other's territory at the centre stage.

- ▶ In negotiating a possible treaty, both the respective EU member state (e.g. Spain) and the UK should take the pre-Brexit status quo as the departing point.
- ▶ The status of mobile nationals could be improved beyond that enjoyed by EU citizens before Brexit. For example, political rights could be extended beyond the municipal level.
- ▶ Certain categories of individuals (e.g. retirees, young workers) could benefit from special provisions which also depart from the pre-Brexit situation.
- ▶ Bilateral agreements should be aimed at rebuilding mutual trust gradually between the EU and the UK. They should be used as a model for a future arrangement with the EU as a whole.

- ¹ See e.g. HM Government (2018), "[EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union](#)"; Goodman, Simon (2017), "[Take Back Control of Our Borders: The Role of Arguments about Controlling Immigration in the Brexit Debate](#)", *Yearbook of the Institute of East-Central Europe*, Volume 15, Number 3, pp.35-53. .
- ² Curtis, John; Ceri Davies; James Fishkin; Robert Ford; and Alice Siu (2020), "[Post-Brexit public policy](#)" in Curtice, John; Nathan Hudson; and Ian Montagu (2020, eds.), *British Social Attitudes: The 37th Report*, London: The National Centre for Social Research, p.2.
- ³ Kochenov, Dimitry (2020), "Citizenship of the European Union and Brexit" in Dimitry Kochenov and Justin Lindeboom (eds.), *Kälén and Kochenov's Quality of Nationality Index: An Objective Ranking of the Nationalities of the World*, Hart Publishing, Ch.46, pp.216-221.
- ⁴ European Commission (2019), [Standard Eurobarometer 91: Public opinion in the European Union](#).
- ⁵ Sturge, Georgina (2021), "[Migration Statistics](#)", House of Commons Library, pp.28-30.
- ⁶ Observatorio Permanente de la Inmigración de la Secretaría General de Inclusión (2021), "[Estadística de Residentes Extranjeros en España](#)", Madrid: Ministerio de Inclusión, Seguridad Social y Migraciones.
- ⁷ O'Reilly, Karen (2020), "[Brexit and the British in Spain](#)", London: Goldsmiths, p.13.
- ⁸ *Instituto Nacional de Estadística*, "[Migraciones Exteriores > Resultados Nacionales > Flujo de emigración con destino al extranjero por año, país de destino y nacionalidad \(española/ extranjera\)](#)" (accessed 01 September 2021).
- ⁹ N.B. this excludes the Republic of Ireland, which for this purpose is covered by the Common Travel Area. Office for National Statistics (2021a), "[Dataset: Population of the UK by country of birth and nationality – July 2019 to June 2020](#)".
- ¹⁰ Rubio Ros, Clara and Carmen Bellet Sanfelui (2018), "[Geografías de la vida cotidiana de jóvenes emigrantes catalanes en Londres](#)", *Migraciones Internacionales*, Volume 9, Number 4, pp.39-70. Cortés, Almudena; Beatriz Moncó and Débora Betrisey (2015), "[Movilidad Transnacional de Jóvenes Españoles y Latinoamericanos: Una comparación en contexto de crisis](#)", El Centro Reina Sofia sobre Adolescencia y Juventud.
- ¹¹ Office for National Statistics (2021a), *op.cit.* However, the University of Oxford's Migration Observatory suggests that the number of applications to the EU Settlement Scheme questions the accuracy of this estimate since over 5.18 million applications have been lodged and 4.81 million already concluded as of 28 February 2021. See Vargas-Silva, Carlos and Peter William Walsh (2020), "[EU Migration to and from the UK](#)", Oxford: Centre on Migration, Policy and Society; *HM Government*, "[EU Settlement Scheme statistics](#)" (accessed 01 September 2021).
- ¹² *HM Government*, "[EU Settlement Scheme statistics](#)" (accessed 01 September 2021).
- ¹³ According to the Appendix EU to the Immigration Rules, eligible family members include spouses, civil partners, unmarried partners (i.e. in a relationship akin to a marriage or civil partnership for at least two years), children or grandchildren aged under 21, dependent children or grandchildren of any age, and dependent parent or grandparents, as long as there is proof that the family relationship began by 31 December 2020.
- ¹⁴ *HM Government*, "[EU Settlement Scheme statistics](#)" (accessed 01 September 2021).
- ¹⁵ *HM Government*, "[Immigration Rules > Immigration Rules Appendix Global Talent](#)" (accessed 01 September 2021).
- ¹⁶ Morris, Marley (2020), "[Building a post-Brexit immigration system for the economic recovery](#)", London: Institute for Public Policy Research, p.19.
- ¹⁷ Morris, Marley; David Wastell; and Robin Harvey (2020), "[Immigration plans analysis: Two thirds of current EU migrants in health and care sector would have been found ineligible](#)", London: Institute for Public Policy Research.
- ¹⁸ Morris (2020), *op.cit.*
- ¹⁹ The Withdrawal Agreement establishes the terms of the UK's orderly withdrawal from the EU, in accordance with Article 50 of the Treaty of the European Union.
- ²⁰ N.B. the Withdrawal Agreement recognises the right of the citizens of both parties to reside in their host country (i.e. Spain). However, if a UK national and/or their family member residing in Spain would like to move to another EU country within the Schengen area, the short-stay rule of three months applies. For stays longer than three months, the national legislation of each EU country applies.
- ²¹ Observatorio Permanente de la Inmigración de la Secretaría General de Inclusión (2021), *op.cit.*
- ²² Partington, Richard, "[UK employers struggle with worst labour shortage since 1997](#)", *The Guardian*, 08 July 2021.
- ²³ Ryan, Bernard (2001), "[The Common Travel Area between Britain and Ireland](#)", *Modern Law Review*, Volume 64, Number 2, p.856.
- ²⁴ *Ibid.*, p.862. Similarly, the UK government has made a commitment not to deport Irish citizens unless there are exceptional circumstances which make it necessary in "the public interest". See Baroness Williams of Trafford, "[Immigration: Islamic State – Question for Home Office](#)", 27 March 2019.
- ²⁵ Ryan, Bernard (2016), "[The implications of UK withdrawal for immigration policy and nationality law: Irish aspects](#)", London: Immigration Law Practitioners' Association EU Referendum Position Papers, p.2.
- ²⁶ Butler, Graham and Gavin Barrett (2018), "[Europe's 'Other' Open-Border Zone: The Common Travel Area under the Shadow of Brexit](#)", *Cambridge Yearbook of European Legal Studies*, Volume 252, p.257.
- ²⁷ Ryan (2016) *op.cit.*, p.2. See also de Mars, Sylvia; Colin R.G. Murray; Aoife O'Donoghue; and Ben T.C. Warwick (2018), "[Discussion Paper on the Common Travel Area](#)", Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission.
- ²⁸ Office for National Statistics (2021b), "[Dataset: Population of the UK by country of birth and nationality: individual country data](#)".
- ²⁹ *Central Statistics Office*, "[Census 2016: Non-Irish Nationalities Living in Ireland > UK](#)" (accessed 01 September 2021). Other research has found approximately 254,800 UK-born people living in Ireland in 2015. See e.g. The Migration Observatory (2016), "[Number of UK born people living in EEA countries, 2015 \(Pre-referendum\)](#)", Oxford: Centre on Migration, Policy and Society.
- ³⁰ "[Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges](#)" (2019), para.17.
- ³¹ See Preamble of the "[Agreement between the Kingdom of Spain, the French Republic and the Principality of Andorra on entry, circulation, residence and establishment between of their nationals](#)" (2000), Brussels.
- ³² *Government of Andorra*, "[Total Population. Population](#)" (accessed 01 September 2021).
- ³³ "[Preamble of the Convention between the Portuguese Republic and the Principality of Andorra on entry, movement, stay and residence of their nationals](#)" (2007), Lisbon.
- ³⁴ *Government of Andorra*, "[Total Population. Population](#)" (accessed 01 September 2021).
- ³⁵ See both Preambles of the Agreements under analysis.
- ³⁶ Art.6 of both Agreements.
- ³⁷ Art.7-8 of both Agreements refer to labour rights, while Art.9 focuses on the right to family reunification. The family members who can be reunited include spouses, descendants who are under 21 years of age or are dependants, and dependent relatives in the ascending line if sufficient means and social coverage are proved. Students can only be reunited with their spouse and descendants.
- ³⁸ Art.11 of both Agreements.
- ³⁹ In 2016, Switzerland officially withdrew its application for EU membership, which it had submitted in 1992 and which was already considered by some to be dormant.
- ⁴⁰ Switzerland signed the European Economic Area Agreement but did not ratify it following the negative referendum.
- ⁴¹ Maresceau, Marc (2011), "[EU-Switzerland, Quo vadis?](#)", *Georgia Journal of International and Comparative Law*, Volume 39, Number 3, p.733.
- ⁴² Peers, Steve (2000), "[The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis](#)", *European Journal of Migration and Law*, Volume 2, pp.127-142; Breitenmoser, Stephan (2003), "[Sectoral agreements between the EC and Switzerland: contents and context](#)", *Common Market Law Review*, Volume 40, Number 5, pp.1137-1186.

- ⁴³ Special transitory measures can apply in certain cases for new EU member states.
- ⁴⁴ Peers, Steve; Elspeth Guild; Diego Acosta Arcarazo; Kees Groenendijk; and Violeta Moreno-Lax (2012, eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Leiden: Martinus Nijhoff Publishers, pp.13-22.
- ⁴⁵ N.B. EU legislation does allow for bilateral agreements with more favourable clauses.
- ⁴⁶ See Alemanno, Alberto and Dimitry Kochenov, "[Mitigating Brexit through Bilateral Free-Movement of Persons](#)", *Verfassungsblog*, 04 January 2021.
- ⁴⁷ European Council (2021), [Special meeting of the European Council \(24 and 25 May 2021\) – Conclusions](#), EUCO 5/21, Brussels, para.17.
- ⁴⁸ Australians have more rights in New Zealand than New Zealanders in Australia. See Spinks, Harriet and Michael Klapdor (2016), "[New Zealanders in Australia: a quick guide](#)", Parliament of Australia (accessed 01 September 2021).
- ⁴⁹ The general salary threshold is currently set at a minimum of £20,480 if the job is in the 'shortage occupation list', and £25,600 if not.
- ⁵⁰ Blázquez, Pilar, "[Los británicos siguen líderes en la compra de vivienda en España](#)", *La Vanguardia*, 11 June 2021.

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