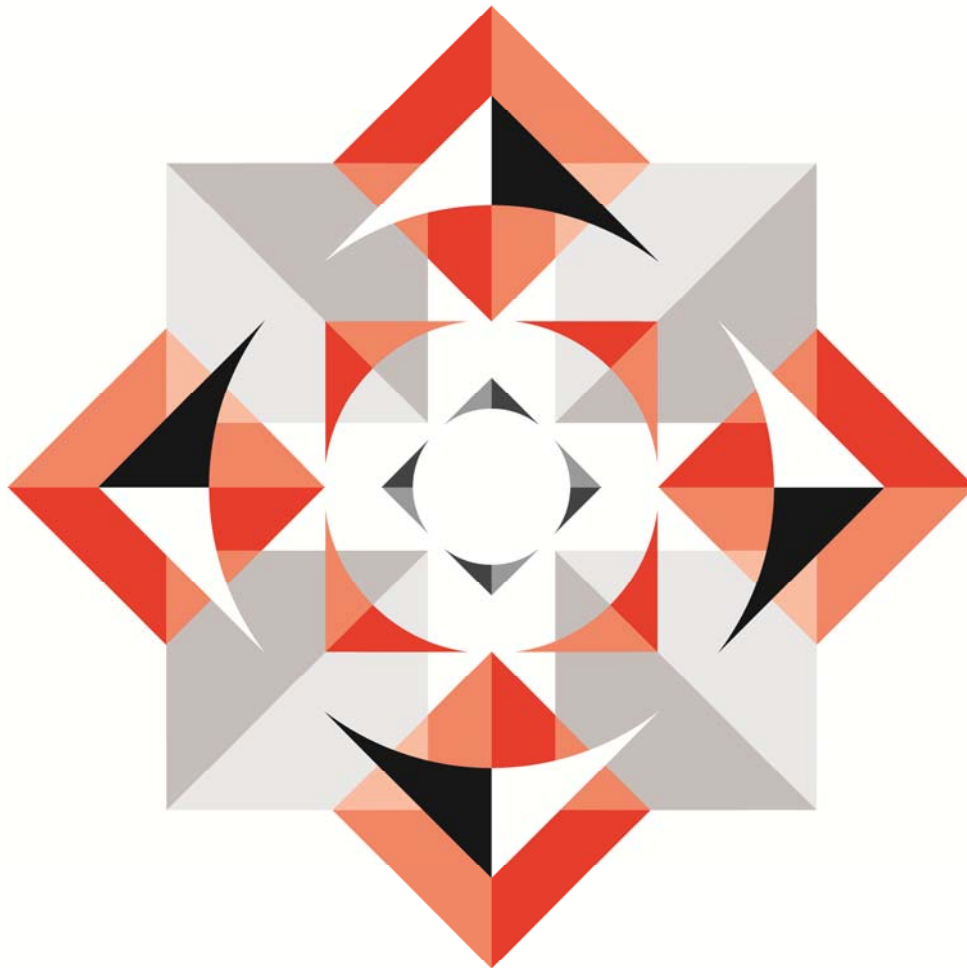


Free trade and controlling free movement – can the UK and the EU square the circle?



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Executive summary

It is axiomatic that the process of the United Kingdom withdrawing from membership of the European Union is highly complex and fraught with potential difficulties, both technical and political. Not least, the terms of any agreement would almost certainly need to be approved by both the EU bodies and all other 27 member states.

There are essentially two possibilities for the UK:

- A so-called “Hard Brexit”, which is generally understood to mean that the UK would not only leave the EU but also the European Single Market and the EU Customs Union. As a result, the UK would no longer have to recognise the principle of free movement (and British citizens would no longer be entitled to benefit from it).
- A “Soft Brexit”, whereby the UK would continue to participate in the Single Market and the Customs Union. This would require the EU and the UK to find a compromise on free movement of persons.

Accordingly, it is increasingly clear that the ability of the EU and the UK to reach this compromise on the issue of free movement of people will be crucial to both sides agreeing on a mutually acceptable and beneficial on-going relationship. This report explores the possible options for “squaring the circle” by achieving such a compromise, thereby averting the UK “falling off the cliff edge” of a Hard Brexit.

This will most probably need to be a two-stage process. It is extremely unlikely that a comprehensive, bespoke agreement on the UK’s future relationship with the EU could be reached during the two-year notice period that will follow the UK triggering Article 50 of the Treaty on the Functioning of the European Union. Some kind of transitional deal will be necessary.

There are various possible options for compromise – whether on permanent or temporary basis – that might enable the UK to continue to participate in the Single Market and the Customs Union while gaining some increased control over EU migration:

- Free movement within existing rules, but with additional administrative hurdles.
- Restriction of free movement to workers who have a job offer in the UK.
- Free movement based on the existing model of the European Economic Area (EEA) agreement, which would potentially enable the UK to take “safeguard measures” on the basis of “serious economic, societal or environmental difficulties of a sectoral or regional nature” (Liechtenstein provides a precedent for triggering such measures).
- Restricting the EU nationals to whom free movement applies. One possibility might be a two-tier system, whereby highly skilled EU migrants would be free of restriction but lower-skilled migrants would require permission to enter the UK. Another model might be bilateral arrangements, whereby the UK could introduce different rules for migrants from different EU countries.
- Restricting the jobs to which free movement applies, either on a geographical basis (by introducing regional visas) or by adopting a sectoral approach.
- An agreed quota for EU migrants to the UK.

There is a separate question, of course, as to how far any of these possible solutions would be politically achievable by either or both sides.

In considering the position of the UK, it is instructive to look at the recent experience of Switzerland, which voted narrowly in favour of imposing quotas for EU migration in a referendum in 2014. Switzerland is not a member of the EU or the EEA, but it has previously negotiated certain preferential

access rights to the Single Market and accepted free movement of people. With the deadline for implementing the referendum fast approaching, it appears the Swiss Government has been unable to reach agreement with the EU on imposing quotas, either generally or on a regional or sectorial basis.

Turning back to the UK, the conclusion of our report is that the existing EEA agreement and the potential “safeguard measures” it contains would provide the most appropriate template for the UK and the EU to reach a *transitional* agreement before the UK’s Article 50 notice expires (i.e. the third option in the list of six outlined above). This has sometimes been referred to as the “Norway model”. A transitional arrangement of this kind would have various advantages:

- The UK Government could justifiably present this as “Brexit”. The UK would no longer be a member of the EU and would no longer be subject to the jurisdiction of the European Court of Justice, even if transitional arrangements might potentially entail the UK remaining within the EEA on a temporary basis,
- The UK would be “taking back control” of its borders, to some extent at least, because it could seek to activate safeguard measures similar to those under the EEA agreement sectorally or regionally.
- For those in favour of a “Soft Brexit”, the Government could present the deal as maintaining, at least for some years, participation in the Single Market and membership of the Customs Union. This is assuming that agreement could be reached with the EU on the latter (Norway and the other non-EU EEA members are outside the Customs Union).
- On the other side of the negotiating table, the EU could present this to other member states as not treating the UK as a special case or setting a precedent for breaking the link between participation in the Single Market and acceptance of the principle of free movement.

While the “Norway model” would not represent an attractive long-term arrangement for the UK, it provides a template for a viable and achievable route to a temporary solution that is potentially of major benefit to all parties.

In the longer term, the UK could seek to negotiate more specific arrangements on EU migration as part of a more complex, bespoke trading agreement with the EU. It is estimated that this process would take between five and ten years, during which period there may be significant changes in the political landscape that impact on the options available to the UK.

Introduction

When two partners in a marriage decide to separate, they often soon realise how closely intertwined their lives have become and how complex untangling them can be. Nonetheless, the benefits of compromise and finding a way through issues such as money and family access can be significant.

In the case of the United Kingdom and the European Union, the process of separation is complicated many times over. Theresa May has famously said that “Brexit means Brexit”, but one then has to distinguish between “Hard Brexit” and “Soft Brexit”.

The UK Government is having to manage the expectations of a British public divided as perhaps never before, as well as opposing camps of parliamentarians split across traditional party lines. The Government must also tackle, on the one hand, a tabloid media prepared viciously to attack any step perceived to be inconsistent with its vision of a “Hard Brexit” and, on the other hand, business leaders and organisations fearful of the consequences of that vision of UK independence.

The Prime Minister Theresa May, in her much anticipated speech on 17 January 2017¹, set out the Government’s negotiating objectives. Superficially, this seemed to add a degree of clarity to matters but, as soon as one scratches beneath the surface, the challenges of the UK seemingly wanting to “have its cake and eat it” become clear.

The EU is understandably concerned about setting a precedent by treating the UK as a special case, thereby merely encouraging movements in other EU states keen on their own version of Brexit. Even if the EU and UK negotiators do reach an agreement, this will almost certainly have to be approved by the other 27 EU member states as well as the various EU bodies and, in Belgium, regional parliaments. We have already seen how difficult that could be, with the Wallonian regional government’s recent temporary veto² of the much simpler Comprehensive Economic & Trade Agreement (CETA) between the EU and Canada.

As a member of the EU, the UK benefits from membership of and full participation in the European Internal or Single Market and the EU Customs Union. The Single Market provides for free movement of goods and services without tariffs or other regulatory barriers. The Customs Union provides for a common external customs tariff on imported goods, enabling the EU to enter into trade agreements on behalf of its members with other countries outside the Customs Union. Norway, for example, is a member of the European Single Market but not the Customs Union. Turkey, on the other hand, is a member of the Customs Union but not the Single Market.

A Hard Brexit is generally regarded as shorthand for not only leaving the EU, but also the Single Market and the Customs Union. Conversely, a Soft Brexit is generally interpreted as leaving the EU but remaining within the Single Market and the Customs Union.

In her speech on 17 January, Theresa May made it clear that her proposals “*cannot mean membership of the Single Market*”, but went on to say that she seeks “*the greatest possible access to [the Single Market] through a new, comprehensive, bold and ambitious free trade agreement.*” In other words, the UK appears to be seeking free movement of goods and services without tariffs or other barriers, but no free movement of persons. Anna Soubry, Conservative MP and co-founder of Open Britain, has described this vision as “*Single Market lite*”³.

The word “*comprehensive*” is important here. Many commentators have spoken about a relationship with the EU where participation in the Single Market is limited to certain sectors. However, the Prime Minister will understand that World Trade Organisation (WTO) rules require any preferential trading agreement to cover all or substantially all trade. Any agreement covering only certain sectors is incompatible with even falling back on WTO rules.

While she was clear about membership of the Single Market, Theresa May's approach to the Customs Union was much more difficult to pin down. She talked about associate membership or remaining a signatory to parts of the Customs Union. It is, however, very difficult to see how this could be compatible with the UK's repeated desire to be able to enter free-trade agreements with other countries. Conservative MP and pro-European, Ken Clarke, has described this approach to the Customs Union as "*incomprehensible*"⁴.

In this report, we refer to Theresa May's vision as "participation in" the Single Market rather than membership of or "access" to it. (All countries have access to the Single Market, albeit often with tariff and other regulatory barriers.)

If the UK is going to agree an on-going relationship with the EU, it seems increasingly clear that this relationship will be determined by the two sides' ability to find a compromise on the issue of free movement of persons. Successive EU leaders have promised no participation in the Single Market without free movement of people, while the UK Government remains unequivocal that any deal must result in the end of unrestricted free movement.

The tabloid press seized upon Theresa May's comment that "*no deal for Britain is better than a bad deal for Britain*", but a glimmer of optimism can be gleaned from her comments that "*there will be give and take*" in the negotiations and "*there will have to be compromises*".

Effectively, the Prime Minister is saying that the Government wants a Soft Brexit, but is prepared for a Hard Brexit.

Squaring the circle

After the referendum last June, the debate quickly moved on from "Can the result be ignored or overturned?" to "What type of relationship should the UK have with the EU post-Brexit?"

A coalition of "Remainers" who recognise the political difficulty in ignoring the referendum result, and "Leavers" who prioritise participation in the Single Market over immigration control, have united to campaign for a "Soft Brexit". They are pitted against the "Hard Brexiteers", a combination of those who regard the referendum result as grounds for repudiating any relationship with the EU and those who prioritise immigration control over participation in the Single Market.

This conflict divides the Cabinet as deeply as the country as a whole. As the fog begins to lift, the UK essentially faces two options: (1) a Hard Brexit and no on-going participation in the Single Market or Customs Union; or (2) a Soft Brexit and compromise (on both sides) over free movement of persons.

Bridging this divide promises huge potential benefits for everyone, but the current rhetoric suggests that both sides are backing themselves into corners where compromise will prove difficult politically. If, however - and that's a big "if" - there is a real willingness to reach agreement, what scope is there for a compromise on free movement that is politically achievable within the UK and throughout the EU?

A transitional agreement

In recent weeks, the prospect of a transitional agreement has received considerable attention. The Government will shortly trigger Article 50 of the Treaty on the Functioning of the European Union (TFEU), thereby technically triggering negotiations on the terms of the UK's exit from the EU (as opposed to the terms of the UK's future relationship with the EU). On 24 January 2017, the Supreme Court ruled that notice under Article 50 cannot lawfully be given by Government ministers without prior authorisation by an Act of Parliament⁵, whereupon the Government immediately promised swiftly to introduce such legislation to enable this to happen.

A transitional agreement, in fact, embraces two different scenarios. In one, an agreement is reached between the UK and the EU before the expiry of the Article 50 notice, but there would be a period before the new arrangements come into force to allow those affected to prepare for their implications. In the other, it is accepted by the negotiating parties that there is no realistic likelihood of reaching a bespoke agreement before the Article 50 notice expires and an interim agreement is reached which governs the parties' relationship while a permanent agreement is negotiated.

In her speech on 17 January, echoing the sentiments of the Chancellor Philip Hammond, Theresa May advocated the former - a phased process of implementation. She rejected "*some form of unlimited transitional status, in which we find ourselves stuck forever in some kind of permanent political purgatory.*"

This does perhaps leave open the possibility of a time-limited transitional status in which to negotiate a bespoke permanent agreement. Arguably, however, the biggest hole in Theresa May's negotiating objectives is her wish to have reached an agreement on the UK's relationship with the EU by the expiry of the two-year Article 50 negotiating period. There are various serious obstacles to this:

- The time period available will, in practice, be much shorter. Michel Barnier, the EU's chief negotiator, has pointed out that six months would be needed for the voting process on any proposed agreement⁶. In addition, elections this year, particularly in Germany in September, have the potential to derail negotiations.
- It is not clear to what extent the EU will even be prepared to negotiate on the terms of an on-going relationship before the terms of the UK's exit are agreed.
- Sir Ivan Rogers, who recently resigned as the UK's ambassador to the EU, has been widely reported as warning the Government that any deal with the EU could take ten years⁷.

The Government has publicly set out an alternative vision of the UK being a low-tax competitor to the EU if no agreement is reached in time. This is a very dangerous game of brinkmanship. While no agreement would undoubtedly harm the EU, failing to reach agreement and "falling off the cliff-edge" would do immeasurable harm to the UK. It could not even fall back easily on WTO trading rules, as its current participation is partly dependent on EU membership and would need to be renegotiated.

Perhaps, Theresa May already recognises both the improbability of an agreement being reached within two years and the dangers of sticking rigidly to such a timetable. In that case, the rhetoric she has used may merely represent her starting point in negotiations. Let us hope so.

In all likelihood there will be two, successive debates. Firstly, there will be a debate about a transitional agreement and secondly one about the long-term relationship.

In light of the limited time available, it seems very unlikely that even a transitional *bespoke* agreement can be reached before the Article 50 notice expires. Any transitional agreement is, therefore, necessarily likely to be based either on the UK's current membership of the EU or on the European Economic Area (EEA) agreement terms - discussed in more detail below - together with probable continued membership of the Customs Union.

Theresa May has made clear that "*we do not seek to adopt a model already enjoyed by other countries*". This is, no doubt, a veiled reference to the "Norway/EEA model" (see further below). As a long-term solution, a bespoke agreement which largely achieves the UK's objectives may prove to be possible. It is, however, difficult to see how adopting some sort of existing model can be avoided in the short term if the UK is not to fall off the cliff-edge.

What is free movement of persons?

There are four fundamental EU freedoms underpinning the Single Market set out in Article 26 of the TFEU - the free movement of goods, persons, services and capital (“the Four Freedoms”).

In the battle leading up to the referendum, the concept of “taking back control” of immigration and restricting free movement of people was arguably the primary ammunition of the Vote Leave campaign. As the smoke cleared following the result, however, many have been left wondering what free movement of people actually means in practice, what potential exists to restrict it and how this could impact the UK.

There are two main elements to consider when discussing this issue: free movement of persons on the one hand; and free movement of workers on the other. Originally, the European Economic Community, the predecessor of the EU, merely provided free movement rights for workers – the employed and the self-employed. This was extended by the 1993 Maastricht Treaty (which established the EU) to the more extensive concept of free movement of persons, although this right is not without certain restrictions.

The free movement of workers’ right is now set out in Article 45 of the TFEU. This is a right to: accept offers of employment; live in an EU member state while working there; and remain in a member state after having been employed there. It is not totally unqualified as it is expressly stated to be “*subject to limitations justified on grounds of public policy, public security or public health*”.

Article 49 sets out a right of establishment, which covers a free movement for the self-employed.

There is then the free movement of persons’ right, one of the Four Freedoms mentioned above. This is tied to “EU citizenship”, a concept underpinned by Articles 20 and 21 of TFEU which give citizens of EU member states and their families the right to move and reside freely (expanded upon in EU Directive 2004/38). These free movement rights can be broken down into four main categories: the right to enter; the extended right of residence; the right to permanent residence; and the right to equal treatment.

Essentially, citizens of the EU can enter the UK for an initial period of three months, after which they can stay if they are a “qualified person” – namely, they are working, studying, self-employed or self-sufficient. After five years of being a qualified person, they can acquire a right of permanent residence.

As well as being a member of the EU, the UK (along with all other EU member states) is a member of the EEA, which also includes three other countries: Norway, Iceland and Liechtenstein: Non-EU EEA citizens as well as Swiss citizens also benefit from free movement of persons’ rights through agreements with the EU.

David Cameron’s concessions

Before the referendum, David Cameron embarked on negotiations with EU leaders to negotiate concessions to enable him to support continued membership at the referendum. He succeeded in getting agreement⁸ for a seven-year brake on EU migrants’ full access to in-work benefits in the UK for the first four years after they arrive in this country. However, this was clearly insufficient to convince enough voters to support continued EU membership.

The promise of such restrictions on benefits for new EU migrants seemingly failed to address the sincerely held belief of many voters that the UK was being “flooded” by migrants from the EU. The rather hyperbolic rhetoric deployed by some Leave campaigners did little to allay such fears, and in hindsight it seems clear that the Remain camp did not take these concerns sufficiently seriously.

Challenges in restricting migration

Pro-Brexit campaigners have linked EU freedom of movement provisions with public concerns about rising immigration numbers and the failure of successive governments to reduce net migration – that is, the difference between the number coming into the country and the number leaving. The present Government’s target is “tens of thousands”, which is generally understood to mean less than 100,000 per year.

Concerns about unrestricted migration range from: migrant labour undercutting and forcing down local wages; increased competition from migrants for local jobs; increased pressure on housing and public services; and even a perception among some people that migration is contributing to unwelcome change to their communities and their lives.

Those opposed to controlling EU migration advance various arguments, including the needs of British business for: top talent (e.g. the world-class designers or researchers); skilled workers to fill gaps (e.g. in the health service); and low-skilled workers to take up work where employers find it difficult to recruit locally (e.g. seasonal agricultural workers). Many also consider that migration contributes to a vibrant, cosmopolitan environment that is valuable and advantageous.

EU migrants occupy both high-skilled and lower-skilled jobs in the UK. For lower-skilled jobs such as agricultural or retail work, the absence of EU migrants would probably increase labour costs because finding enough people from the UK labour force prepared to work at relatively low wages is unlikely to be possible. Indeed, every “rich” nation relies on cheap migrant labour (legal or illegal) to undertake such work.

The UK needs to accept migrant labour - from the EU or elsewhere - to undertake this work. It could, however, once outside the EU, restrict the rights of such migrants to claim state benefits, be accompanied by family members and claim permanent residence. A concern with restricting migration of lower-skilled EU workers is that it would increase employer costs which would make UK producers or manufacturers less competitive at home and abroad. It would also result in increased prices, leading to inflation. This would lead to a decrease in the standard of living for those in the UK.

EU migrants make up a high proportion of the lower-skilled market, particularly in the hospitality, retail, healthcare, construction and horticultural sectors. According to the Office of National Statistics population survey⁹ of 2015, almost a third of workers in the hospitality sector, over a quarter of construction workers and a fifth of those working in support and administrative support services are EU/EEA nationals.

In many areas of skilled labour, there are already significant skills shortages – for example, in engineering, healthcare and the arts - as illustrated by the Home Office’s own list¹⁰ of shortage occupations. Without EU migrant workers, there would quickly be a shortfall in doctors, nurses and dentists: over half a million EU nationals work in the English NHS alone. With the NHS coming under increasing scrutiny, such a skills shortage is likely to cause the Government great concern.

For businesses, there is a further concern about attracting the top talent in a competitive global market. Indeed, Theresa May in her 17 January speech recognised that the UK needs to be “a magnet for international talent and home to the pioneers and innovators who will shape the world ahead”. Any immigration system will inevitably permit entry of the most highly skilled, but the extra cost or bureaucracy of requiring EU nationals to obtain work permission would hamper business. Perhaps more significantly, a climate of hostility in the UK to migrants from the EU and elsewhere is likely to make it a less attractive destination for top talent.

A further argument for continuing high levels of migration, which has received little attention, relates to the need for population growth. The UK’s fertility rate is about 1.8 children per woman¹¹ but it was as

high as nearly three per woman in the mid-60s. While the current fertility rate is higher than many European countries and nations such as Japan, it is insufficient to maintain an even population level.

A country needs around 2.1 children per woman to prevent the population from shrinking. There are obvious and well-documented economic issues that will arise from a shrinking and ageing population, not least the lack of tax revenues from the working-age population to support the retired population. Immigration has been the historic answer to this across the globe as it increases the working-age population (and also often boosts the proportion of working people to retired people).

The latest figures¹² show that out of a workforce of over 31.7 million, 3.49 million are non-UK nationals. The number of EU nationals working in the UK increased fourfold from less than 500,000 in 1998 to 2.23 million in June 2016, mainly due to high levels of inward migration in the first decade of the 21st century from the “Accession Eight” countries of Central and Eastern Europe.

Non-UK nationals make up 10.9% of the working population and EU nationals account for over 7% of workers. In the year to June 2016, net migration to the UK amounted to 335,000 of which net migration of EU nationals totalled 189,000 and net migration of non-EU nationals came to 196,000 (with 49,000 UK nationals leaving the UK).¹³ Unemployment remains relatively low in the UK at 4.8% – the lowest for over ten years and lower than all other major European economies save Germany.

While there is little appetite even amongst arch-Brexiters to deny EU citizens already present in the UK the right to remain, it is apparent from the numbers that any significant reduction in the number of EU migrants coming to work in the UK would place a huge strain on the UK labour market. With or without freedom of movement for EU citizens, a target for net migration in the tens of thousands is therefore probably unrealistic whatever one’s view of its desirability.

Options for compromise

It is interesting to consider what Theresa May actually said about free movement of persons in her carefully worded 17 January speech. As mentioned above, alongside the robust talk of “*no deal for Britain [being] better than a bad deal*”, she did speak of the need for “*compromise*” and “*give and take*”. While she spoke twice of controlling numbers of people coming to the UK from the EU, she did include immigration controls as an example of an aspect of the new arrangements with the EU which might need to be phased in.

The politicians and representatives of the EU have steadfastly and consistently maintained two principles. Firstly, the principle that the Four Freedoms cannot be divided and that to benefit from free movement of goods, services and capital within the EU, the UK must accept free movement of persons. Secondly, the principle that the UK cannot be seen to be better off outside the EU than within.

This raises the interesting question of whether or not free movement of persons is perceived to be a good thing. There are forceful arguments for promoting free movement of persons as being beneficial to the UK and the EU generally. Presumably, the EU is of this view, otherwise why maintain the right? Retaining the other three freedoms, without free movement of persons, could therefore be presented as the UK being worse off than if it were to enjoy the rights and accept the obligations of all Four Freedoms.

Although it is given much less attention in the media than the rights of EU/EEA migrants to move to and study or work in the UK, removing free movement of persons will have a major negative impact on the rights of British citizens to move to or study or work in the rest of the EU/EEA.

In seeking to agree the UK’s on-going relationship with the EU, whether transitional or long-term, the Government will have to decide whether or not it is prepared to agree to treat EU migrants differently from those outside the EU. The signs are that the UK recognises the potential need for this, as

Theresa May repeatedly refused to rule this out when the question was put to her shortly after her speech on 17 January.

The potential consequences of any agreement with the EU to favour its nationals can, however, already be seen from the comments of Alexander Downer, Australia's High Commissioner to the UK: he has said that Australia would want better access for business people working in the UK before reaching a post-Brexit trade deal¹⁴. In addition, the Indian Government has said that the UK's block on Indian students remaining in the UK after study could be a block on any trade deal between the two countries¹⁵. It is not difficult to envisage countries looking at any preferential agreement on migration between the UK and the EU as a precedent for their own trade-deal negotiations.

One can foresee free movement of persons becoming an issue in free-trade negotiations with other nations, as the UK sets off on its stated path of entering into such agreements with a whole host of countries. It would be ironic if Brexit led to the UK losing more control over immigration numbers than it gained.

So, what are the alternative compromises which would include some increased control for the UK over EU migration and what prospect is there that they might be acceptable to the UK and to the EU? The options range from something very similar to the current position on the one hand, to treating EU migrants equally to non-EU migrants on the other.

1. Free movement with added administrative hurdles

At one end of the spectrum of possibilities lies increased control of EU migration within its existing rules. Some EU member states have made free movement less easy in practice than the UK. As Conservative MEP, Vicky Ford has argued¹⁶: *“For example, in Belgium, the home of the EU institutions, it is impossible in practical terms, to move into the country without a well-paid job: one cannot access any local services, or rent or buy a property without a social security card and you cannot get a social security card unless you have an employer paying a social security contribution. Many other EU countries have similar systems.”*

Would this be acceptable to the EU in return for participation in the Single Market?	Almost certainly.
Could Theresa May sell this option to her party and to the UK electorate?	Almost certainly not, either in any transitional or permanent agreement.

2. Restricting free movement to those with a job offer

Another option would be to revert to the original principles of free movement which, as mentioned above, applied when the UK joined the then EEC. This would limit the right to enter to workers with a job offer, representing a clear restriction to EU migrants' current rights. But while this would be a relatively modest departure from current free movement provisions, it is a potential solution that both the UK and EU are likely to find difficult to accept.

This option has in the past received support from key Conservative politicians. In a speech¹⁷ in November 2014, David Cameron stated that EU jobseekers should have a job offer before they come to the UK. At the time of the Conservative leadership election in the aftermath of the Brexit vote, it was widely reported that this option was preferred by Theresa May as well as leading Brexiteers, Michael Gove and Boris Johnson. Mrs May was reported¹⁸ as having said while Home Secretary: *“Reducing net EU migration need not mean undermining the principle of free movement. When it was first enshrined, free movement meant the freedom to move to a job, not the freedom to cross borders*

to look for work or claim benefits. Yet last year, four out of 10 EU migrants, 63,000 people, came here with no definite job offer whatsoever.”

The restriction of rights of free movement to those with job offers would probably need to be accompanied by a prohibition on employers advertising for workers exclusively outside the UK to have any meaningful impact.

Would this be acceptable to the EU in return for participation in the Single Market?	Unlikely. Possible as part of a long-term agreement which included partial participation in the Single Market.
Could Theresa May sell this option to her party and to the UK electorate?	Highly unlikely as a part of a permanent agreement as it does not give the UK “control” over numbers and probably would not result in any significant reduction in EU migration. Unlikely, but not inconceivable, as part of a transitional agreement.

3. Safeguard measures similar to those under the EEA agreement

Initially, in his pre-referendum negotiations, David Cameron lobbied for a temporary restriction on free movement but soon realised that agreement from the EU was unachievable and ended with a more modest set of concessions (see above). Is there, however, a potential solution which might be based on safeguard measures (sometimes, arguably misleadingly, labelled an “emergency brake”)?

The three non-EU EEA member states, Norway, Iceland and Liechtenstein, benefit from free movement of persons with the EU member states by virtue of the Agreement on the European Economic Area. Importantly, these three countries retain a control on free movement which is unavailable to EU member states.

Article 112 of the EEA agreement states:

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

Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation...”

Article 112 has been triggered by Iceland in respect of free movement of capital and by Liechtenstein in respect of free movement of people. Liechtenstein has restricted free movement of EU workers since 1995 while participating fully in the Single Market. It unilaterally triggered the safeguard in 1997 and it is now reviewed every five years. Liechtenstein currently grants 72 migrant visas annually for EEA nationals (extrapolated for the UK’s population, this would amount to 128,000 migrant visas each year).

Of course, Liechtenstein is tiny, with a population the size of Abingdon, and may not be the best comparator for the UK. Indeed, Liechtenstein’s Prime Minister, Adrian Hasler, has rejected¹⁹ this approach as potentially appropriate for the UK.

Further, the text of Article 112 makes reference to “serious” economic, societal or environmental difficulties as a condition of the safeguard. Arguably, the societal difficulties which led to the referendum result could be said to satisfy this requirement, although the provision does make it clear

that these need to be “sectoral” or “regional”. Article 112 goes on to say that the measures should be restricted to what is strictly necessary.

Nonetheless, the case of Liechtenstein does demonstrate that the principle of free movement is not inviolable and, if there was a political will, a precedent for compromise exists. There are, superficially at least, attractions to this solution. From the EU’s perspective, granting the right to take safeguard measures alongside EEA-type trading terms would not mean treating the UK any differently from existing relationships (acknowledging the vast differences between the UK and Liechtenstein). It would also recognise the principle of free movement.

From the UK’s perspective, if it were able to agree a Liechtenstein-style agreement with an annual quota, the objective of controlling numbers would be satisfied, albeit subject to continual review. Theresa May has continually said that she is seeking a bespoke agreement for the UK, but reaching such a bespoke agreement before the Article 50 notice expires seems highly unlikely. The negotiating parties may be attracted by the existence of a ready-made arrangement which, at the very least, could work while the UK seeks to negotiate a permanent and bespoke agreement.

Norway, Iceland and Liechtenstein are all members of the European Free Trade Association (EFTA). As such they come within the surveillance and enforcement regimes of EFTA, including the EFTA Court. The UK could probably not actually join the EEA without joining EFTA (which also includes Switzerland, a non-EEA member – see below).

<p>Would this be acceptable to the EU in return for participation in the Single Market?</p>	<p>Possibly. It does incorporate acceptance of the principle of free movement. The conflict might arise were the UK then to implement the safeguard measures unilaterally, as it would be empowered to do.</p> <p>These safeguard measures may well be more acceptable to the EU if limited sectorally or regionally. The EU’s negotiations with Switzerland (see below) suggest that overall safeguard quotas are unlikely to be acceptable to the EU.</p>
<p>Could Theresa May sell this option to her party and to the UK electorate?</p>	<p>Highly unlikely as a part of a permanent agreement as it does not give the UK “control” over numbers.</p> <p>More likely to be acceptable as part of a transitional arrangement, pending the negotiation of a permanent bespoke agreement. The existence of the safeguard mechanism does satisfy the passing of “control” about numbers to the UK (arguably, whether or not safeguards are actually implemented).</p> <p>Even for a transitional period, joining EFTA and becoming a member of the EEA is unlikely to be attractive. An alternative, more likely scenario might involve a transitional agreement which used the EEA agreement as a template and mirrored its terms, but did not involve the UK actually joining EFTA or the EEA.</p>

4. Restricting the EU nationals to whom free movement applies

Another compromise might be for preferential free movement to apply to some but not all EU nationals. This could be organised by skill set or by nationality.

a. *Two-tier skill set-based system*

One possible solution would be a two-tier system for EU migrants, whereby higher-skilled EU migrants were free of restriction but lower-skilled EU migrants require permission to enter the UK.

i. Higher-skilled: free from restriction

There is much less political pressure in the UK in relation highly-skilled EU migrants and finding a way to enable them to access free movement would, at the same time, alleviate many of business's concerns. Philip Hammond stated²⁰ in Treasury questions on 25 October 2016, that he saw "no likelihood" that the Government would use its powers to control migration from the EU in relation to companies: post-Brexit controls would not apply to "*highly-skilled and highly-paid (EU) workers*." He reiterated that public concern is focused on overseas workers "taking entry-level jobs."

It is not clear how Mr Hammond's assertions would translate into immigration policies. EU nationals could perhaps apply for a document confirming their highly-skilled status. Their current or prospective employer could certify that they are skilled in their industry sector.

UK immigration schemes for non-EEA nationals such as the Highly Skilled Migrant Programme, Tier 1 (General) and the Tier 1 Post Study work routes were disbanded as it was found that many supposedly highly skilled individuals took up lower-skilled jobs. Furthermore, EEA graduates and postgraduates are more likely than non-EEA nationals to work in low-skilled roles. Arguably, unless a highly skilled scheme is restricted to a small number of regulated professions, it may be necessary for a third party, perhaps the Department for Business, Energy and Industrial Strategy or UK Visas and Immigration, to endorse the individual.

If the EU national was self-employed, they might need to obtain an endorsement directly from a third party having produced objectively verifiable evidence of their skill set. This might be relatively easy for a worker in a regulated profession, but it would be less straightforward for a business-person or a senior consultant.

While these measures may seem onerous, they would be less rigid than the current requirements for skilled non-EEA workers, resembling the skilled-worker points system in Australia. Theresa May has, however, argued²¹ that the Australian points-based system is not suitable for the UK as it does not give the Government control over numbers.

ii. Lower skilled: work permits

Even with controls over numbers, the UK would need to admit lower-skilled workers. All developed economies rely on migrant labour to undertake lower-skilled work. Even Japan, a country with traditionally little immigration, has recently announced a relaxation of rules for lower-skilled migrants, following a doubling of foreign workers over the period 2008 to 2015.

The UK could decide to give preferential entry rights for lower-skilled jobs to EU nationals over non-EU nationals. David Metcalfe²², the former Head of the Migration Advisory Committee, has suggested²³ that lower-skilled EU migrants should be subject to a work authorisation scheme. The scheme would be modelled after the time-limited and capped

Seasonal Agricultural Workers' Scheme (SAWS), which closed in 2013. This applied to Romanian and Bulgarian nationals in the period before they benefitted from full free-movement rights under EU law.

Under SAWS, the Home Office contracted with operators through whom workers would apply and be allocated to employers. Employers had to accommodate workers and they could not bring in family members. At the time SAWS closed, the cap was 21,250 migrants per year. The scheme could be tailored to lower-skilled sectors such as retail, construction and food processing, but the cap would need to be significantly increased to meet the UK's needs and an obligation on employers to accommodate workers would seem less appropriate outside of the agriculture sector..

This two-tier solution has been advocated recently by several Labour MPs who advocate free movement for the highly skilled with job offers and sector-based quotas for lower-skilled workers.

Would this be acceptable to the EU in return for participation in the Single Market?	Unlikely. It is possible that it could form part of a long-term agreement which gave partial participation in the Single Market.
Could Theresa May sell this option to her party and to the UK electorate?	Quite likely, though it would still not give "full control" over numbers unless the quotas extended to the highly skilled as well.

b. *Bilateral arrangements*

Arguably, most Brexiteers concerned about free movement are focused on migrants from East and Central Europe. Could the UK introduce different rules for different countries?

There would be nothing to stop the UK post-Brexit from setting different rules for citizens of the more affluent Western European member states than for other EU countries, but it could not expect such favours to be reciprocated. It would seem highly unlikely that the EU would, for example, be happy for France to enter into a bilateral agreement with UK to allow free movement of citizens, without such rules applying throughout the EU. There would also be potential complications with France being a member of the border-free Schengen zone.

One complication for the UK is Ireland. David Davis, the Secretary of State for Exiting the EU, has promised²⁴ that the Common Travel Area between the UK and Ireland, which existed prior to EU membership, and which entitled citizens of each country to work freely in the other, will continue. In her 17 January speech, Theresa May set out maintaining the UK's Common Travel Area with Ireland as one of her key objectives. There appears to be no legal reason why this should not happen.

However, one potential problem in developing an immigration policy which controls EU migration is that EU nationals will continue to have free movement rights into Ireland. Border controls might need to be introduced to control their entry into the UK (and to address the UK's departure from the Customs Union) but any border control between Ireland and Northern Ireland would be politically difficult to introduce.

The alternative would seem to be an increased burden and cost of policing illegal migration being placed on employers.

Would this be acceptable to the EU in return for participation in the Single Market?	Probably for Ireland on a reciprocal basis; unlikely more broadly.
Could Theresa May sell this option to her party and to the UK electorate?	Highly unlikely if rights were not reciprocated for UK nationals wanting to work in countries whose nationals were granted preferential rights of entry to the UK.

5. Restricting the jobs to which free movement applies

Another alternative would be to restrict the jobs to which free movement applied, which could be done by sector or by region.

a. *Regional visas*

There have been calls to introduce regional visas, based on Australian and Canadian models that target migration to regions with low populations and skills gaps.

Regional skills shortages in Australia and Canada, together with the respective sizes of these countries, mean that skilled workers are based in specific regions and do not live and work in different areas. Australia issues permanent residence visas²⁵, which allow visa holders and their family members to live in Australia and work permanently in a particular regional area. (They are not, however, restricted to living in the area in which they work).

The ageing population in Canada has resulted in skills shortages across a wide variety of industries. The Alberta Immigrant Nominee Program (AINP)²⁶, for example, is an economic immigration programme which was designed to attract and retain immigrants to the province. There are options for skilled and semi-skilled workers, who may apply independently or through an employer. Individuals must demonstrate that they are able to and intend to live permanently in Alberta.

There may be practical difficulties in the UK, given that it is much smaller country where people are more likely to live and work in different locations and to travel frequently to different sites. However, examples could potentially include:

i. The London/regional centre visa

The London Chamber of Commerce and Industry has called for London to be a "Targeted Migration Area"²⁷. It has proposed a one-off London visa to grant current EU employees permanent residence and New Capital Work Permit system to control future migrant worker access. (Notably, London voted 60% remain.)

According to the Centre for Economics and Business Research study²⁸, over 770,000 EU nationals are working in London, accounting for 30% of the London workforce in the construction sector and 20% in hospitality and distribution.

A report²⁹ by accountants PwC in October 2016 included proposals for a regional system where regional centres such as Manchester could oversee work visas where workers were obliged to live in the area.

ii. Scotland

In Scotland, an even higher 62% voted remain. In a speech³⁰ on 20 December 2016, Nicola Sturgeon, Scotland's First Minister, proposed that Scotland should remain in the Single Market with control over its own immigration policies, which could promote

unrestricted free movement with the rest of the EU. In her response to Theresa May's speech on 17 January, Nicola Sturgeon she said that the UK leaving the Single Market would "undoubtedly" bring a second Scottish independence referendum closer³¹.

b. *Sectoral free movement*

There are historical precedents for sectoral restrictions on free movement. Back in 2004, the Science and International Graduates Scheme (SEGS) permitted graduates with a degree in a certain subject area to work in the UK after graduation for 12 months. This was replaced by the Tier 1 (Post Study Work) scheme, under which employers are not required to advertise roles for non-EU migrants employed in shortage occupations.

The National Farmers' Union has voiced deep concern³² about inadequate seasonal labour sourcing, citing the need for a further 40,000 seasonal workers a year. It has mooted a new student workers' scheme, open to all international agricultural students.

In the future, it would be possible to confer rights on EU nationals to work in the UK in certain sectors, where those rights would not be available to non-EU nationals.

The EU does seem to prefer the concept of a regional or sectoral basis for interfering with free movement rights, rather than a general right to do so. As mentioned above, Article 112 of the EEA agreement anticipates that the exercise of the safeguard measures allowing restrictions on free movement can apply where a country faces difficulties of a sectoral or regional nature.

Article 46 of the TFEU expands upon the free movement rights in Article 45 (above) and in Article 46(d) refers to the "setting up appropriate machineryto facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries."

<p>Would this be acceptable to the EU in return for participation in the Single Market?</p>	<p>From the EU's perspective, any agreement would probably have to recognise the principle of free movement and then place restrictions as exceptions for limited periods (similar to the EEA safeguards, above).</p> <p>Treating Scotland differently (without Scottish independence) is highly unlikely to be acceptable bearing in mind the precedent which would be set and could be used by other regions such as Catalonia in Spain.</p>
<p>Could Theresa May sell this option to her party and to the UK electorate?</p>	<p>A sectoral or regional approach is more likely to be acceptable to the UK if the starting point was a restriction on free movement, but with exceptions where free movement was permitted in certain sectors or geographical regions at the discretion of the Government. This would accord more with the UK's stated wish to "control" numbers.</p> <p>A policy of devolving immigration control to Scotland is highly unlikely to be acceptable to the UK.</p>

6. Quotas

For the UK to regain full control over immigration numbers, a quota would be necessary.

Liechtenstein's arrangements with the EU (see above) have resulted in an agreed quota for EU migrants, currently set at 56 economically-active migrants and 16 non-economically active migrants each year.

Generally speaking, however, where immigration systems include quotas, they only cover part of the immigration. In the US, for example, quotas are set for some but not all of the immigration categories available to migrants.

Quotas, as mentioned above, could apply in any new scheme to certain: skill levels; sectors; regions; or nationalities. The UK could also, in principle, set annual quotas for EU nationals (including presumably EEA/Swiss nationals) that were separate from quotas for non-EU nationals.

Would this be acceptable to the EU?	Almost certainly not (despite the precedent of Liechtenstein, above).
Could Theresa May sell this option to her party and to the UK electorate?	<p>It would certainly satisfy many Brexiteers to establish a hard quota on numbers. It would, however, be generally unacceptable to British employers to operate a hard quota covering the less contentious groups such as the most highly skilled or inter-group transfers.</p> <p>Indeed, as mentioned above, Theresa May said in her 17 January speech that the UK must remain “a magnet for international talent” and that the UK must “continue to attract the brightest and best to work or study in the UK.”</p>

No agreement – the UK's current system for non-EU migrants

What will happen if the UK finds itself unable to reach a compromise with the EU? Or alternatively, what if it is able to reach an agreement whereby it has unfettered rights to restrict free movement? What sort of system might the UK then apply?

There have been calls from UKIP and Brexit campaigners for a points-based system for all migrants (EU or not), similar to the Australian-style system mentioned above, where nationality would no longer affect the ability to work in the UK. The Australian points-based system only forms part of that country's immigration system, however, as many of Australia's migrant skilled workers fall outside it. The points system does not cover employer-sponsored workers and the Australian government has initiated a review in light of apparent exploitation of temporary skilled workers.

Speaking to journalists in China during the G20 summit, Mrs May stated³³ that a points-based model was “not a silver bullet” and stated that it would not let the Government control arrivals.

The UK's current so-called “points-based system” is a five-tier system, consisting of Tier 1: high-value (investors, entrepreneurs and those with exceptional talent); Tier 2: skilled workers; Tier 3: lower-skilled workers (never implemented); Tier 4: students; and Tier 5: temporary migrants. Each tier has an allocation of points for specific attributes. A migrant's visa application is only successful if the migrant fulfils each of a number of strict criteria. Despite the Home Office awarding points for fulfilling

each requirement, points awarded for meeting one criterion cannot be allocated toward fulfilment of another criterion where the applicant has a shortfall of points. Consequently, the UK's current system is, in reality, a "points-based" one in name only.

In addition, there is currently a quota of 20,700 for Tier 2 (General) company-sponsored workers (those earning less than £155,300) and an annual quota of 1,000 for Tier 1 (exceptional talent) permissions.³⁴

It is arguably impractical to add skilled EU, EEA and Swiss workers to the current Tier 2 of the UK "points-based system", the immigration category used for most sponsored skilled workers. There are over 29,000 companies on the register of sponsors and it is an increasingly under-resourced "one size fits all" system which imposes a heavy administrative and financial burden on employers.

Lower-skilled EU, EEA and Swiss workers could apply under a Tier 3 of the points-based system (see above) if it was activated. This would, however, be costly to implement and it might not be commercially viable for employers to pay high visa and administrative costs to employ lower-skilled workers.

The points-based system replaced the previous work permit arrangements and was designed to streamline immigration categories. We could see a return to something akin to the work-permit regime, although this would place significant administrative burdens on the state and lead to costs that the Government would most likely want to pass on to employers.

Switzerland and the Swiss referendum – lessons for the UK?

While Brexit marks the first time a member state has elected to leave the EU, there will be a sense of déjà vu for the Swiss. In a 2014 referendum, Switzerland voted to impose quotas for EU migration (by a majority of 50.3% to 49.7% - similar to but even narrower than the UK Brexit majority of 51.9% to 48.1%).

Switzerland is not a member of the EU but it is a member of the EFTA (along with the non-EU EEA members – Norway, Iceland and Liechtenstein). The UK was actually a founder member of EFTA, which was originally set up as an alternative trading area to the then EEC. The UK left EFTA in 1973 when it joined the EEC. Switzerland is not a member of the EEA and indeed rejected EEA membership in a 1992 referendum by a slender margin.

Arguably the Swiss model is the closest existing model to Theresa May's vision for the UK. Switzerland has, since 1994 negotiated over 120 bilateral agreements with the EU, many of which relate to matters covered by the Single Market resulting in preferential access rights but not full participation (a sort of "Single Market lite").

In recent years, however, the EU has been looking to institutionalise Switzerland's relationship with the EU unhappy at the absence of any effective method of surveillance or enforcement of Switzerland's obligations.

Swiss nationals benefit from the same free movement rights as EU nationals and vice versa. Continued free movement of persons' rights for EU nationals has come under scrutiny following the 2014 referendum. The deadline for implementing the Swiss referendum (February 2017) is approaching fast and the pressure is on Switzerland to reach an agreement with the EU. While Angela Merkel has insisted³⁵ that the EU should "*conduct these talks with Switzerland as if the Great Britain issue never existed*", the negotiations regarding compromises on free movement will undeniably set a precedent for Brexit talks. What lessons can we learn from these negotiations?

The EU has steadfastly stuck to their position that Switzerland's preferential access to the Single Market is dependent on full acceptance of free movement of persons. It has not waived one iota from this position.

The Swiss President recognised some time ago that a safeguard clause, with a quota on EU immigration when certain limits were reached, had no chance of being acceptable to the EU. He subsequently pondered the prospect of sectoral or regional difficulties justifying action (similar to the EEA safeguards – see above). However, the Swiss seem now to have compromised further³⁶ to an apparently face-saving solution whereby local residents (of whatever nationality) would have first preference over job vacancies in cases of high unemployment. It has been suggested that reduced EU migration into Switzerland since 2014 might be used as an excuse for not putting this compromise forward to a further referendum.

It will be interesting to see whether, if EU migration into the UK begins to fall, the pressure for “control” of numbers diminishes. The first indication will be the next Office for National Statistics quarterly report on migration statistics, due on 23 February 2017, which will cover the quarter immediately after the referendum.

A way forward?

It is abundantly clear from this report that achieving a compromise on free movement of persons will not be easy, but the rewards of doing so would be significant for all concerned. With the EU bodies and all 27 member states (including the Belgian regions) needing to approve the terms of an agreement, this will be challenging to say the least.

In all likelihood, the parties will need to focus on reaching a transitional agreement before the UK’s Article 50 notice expires. It would seem politically unlikely for the UK to agree even a transitional agreement with no additional control on EU migration.

Ideally, the UK would probably wish to have a three-tier system: (1) a sectoral quota for lower-skilled migration (possibly limited to EU migrants); (2) quotas for skills-shortage occupations (which could give preferential rights to EU nationals); and (3) a non-bureaucratic scheme for highly-skilled migrants (which would encourage businesses to base themselves in the UK, confident of being able to attract the best talent from around the world with limited administrative barriers). It is, however, almost inconceivable that the EU will agree to anything like this before the Article 50 notice expires.

As set out above, perhaps the greatest prospect for a transitional agreement, within the tight timeframe available, would be to adopt the terms of an existing relationship so that limited detailed negotiation would be required. The most obvious template would be the EEA agreement, sometimes referred to as the “Norway model”.

As set out above, the UK Government could present this to the Brexiteers as:

- “Brexit” – the UK would no longer be a member of the EU.
- A transitional arrangement pending a more detailed UK-specific deal with looser ties to the EU.
- “Taking back (some) control” – e.g. Norway does not come within the EU’s common VAT rules or agricultural and fisheries policy.
- “Taking back (some) control over borders” – although the UK would subscribe to the principle of free movement, it would benefit from the safeguard procedure (and could express its intention to use this sectorally and regionally, albeit in a limited way).
- The UK would no longer come under the jurisdiction of the European Court of Justice (ECJ). Although Norway’s obligations are policed by the EFTA Court (above) which applies EU laws, it is not the ECJ that is loathed by many Brexiteers. Options for the UK would include: joining EFTA; “docking” to the EFTA Court; or establishing Joint Committees (similar to those which exist in Switzerland, but which are unpopular with the EU as exercising no effective surveillance or enforcement powers)³⁷.

On the other side of the coin, the Government could present a transitional deal of this kind to those advocating a “Soft Brexit” as maintaining, at least for some years, participation in the Single Market and membership of the Customs Union.

If the UK and the EU were to agree transitional arrangements based on Norway’s relationship with the EU, the UK would also need to agree a transitional arrangement to remain part of the Customs Union. As mentioned above, Norway and the other non-EU EEA members are not members of the Customs Union.

If the UK were so minded, it could leave the Customs Union once trading agreements were reached with countries outside the EU. It would not have to wait for any long-term agreement with the EU regulating free movement, access to the Single Market, financial contributions to EU, and adherence to EU laws.

Just as the UK might well be able to present this transitional agreement to appease its Brexiteers, the EU could present this to sceptical member states as:

- Not treating the UK as a special case or allowing it to be better off out than in.
- Not creating a precedent which might break the link between participation in the Single Market and acceptance of the general principle of free movement.

The “Norway model” does not represent an attractive long-term arrangement for the UK, not least because as well as not giving real “control” over EU migrant numbers, non-EU EEA members must comply with most EU laws but have little say and no vote in deciding upon these rules. But if a transitional model could be agreed along the lines discussed above, this would square the circle of restricting free movement but allowing continued participation in the Single Market and Customs Union, albeit only for a transitional period.

A transitional agreement would then give the parties space and time to negotiate a comprehensive agreement involving compromise and give and take.

Further, during the five to ten years which it is estimated that a bespoke trading agreement would take to be negotiated, an awful lot is likely change. The EU might even change radically in a way that would make a return to the fold for the UK politically acceptable. Alternatively, EU migration may fall significantly within the UK as it becomes a less attractive location for EU nationals and/or the political situation changes significantly. The economic consequences of Brexit may become more apparent to those who supported Leave. The options a few years down the line may look very different from how they appear today.

Even if the political climate were not to change, there would be sufficient time to develop a complex arrangement which - with compromise and a willingness to achieve a mutually beneficial agreement - could result in a blueprint for a harmonious long-term relationship between the EU and the UK.

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