

# Brexit: What now for Study Mobility between the UK and the EU?

Cherry James

*Senior Lecturer, Law Division, London South Bank University*

*In the referendum held on 23 June 2016 the UK voted to leave the EU. This momentous change is unlikely to come to pass for some time, but has significant implications for study mobility between the UK and the EU. The article considers the legal position of UK national degree mobile students studying in EU member states and EU national degree mobile students studying in the UK, and how EU law developed to encompass and facilitate such mobility. Different ways in which the current position may change are then considered, depending on whether the UK does or does not remain in the EEA or adopts a Swiss style relationship with the EU. The focus then turns to credit mobility and in particular, credit mobility under the aegis of the Erasmus Programme. The development and operation of the Erasmus Programme is explained and again the prospects for the UK's continued participation in the Erasmus Programme are considered on the basis of differing potential post-Brexit relationships between the UK and the EU.*

*Keywords: Brexit – study mobility – degree mobility – credit mobility – Erasmus Programme – EEA – EFTA – Swiss FMP Agreement*

## 1. Introduction

The vote on 23 June 2016 by the United Kingdom to leave the European Union ('Brexit') was, to most people, a very considerable surprise and shock. The implications, for the UK, Europe, and probably the world, are profound and wide-ranging, and may resound for many years. At the time of writing (August-September 2016), they are still largely unclear, and are likely to be so for some while yet. The eventual new relationship between the UK and the EU will have many strands to it. Higher education, and in particular, the UK's participation in the Erasmus Programme, will be one of those strands, but inevitably will not be negotiated in a vacuum and will be influenced by other aspects of the overall package deal which emerges.

Universities in the UK are already very exercised about the future funding of research projects which involve collaboration between UK universities and those elsewhere in the EU. There is also anxiety about the labour mobility of academic staff between the UK and the EU. Significantly, there is considerable concern about the implications at what might be called the entry level into higher education: that is to say, the implications for students. There are two strands to this: first, potential changes to the rights of UK students wishing to study for their whole degrees in universities in EU countries, and the parallel rights of EU national students wishing to study for their whole degrees in the UK (so called 'degree mobile' students), who currently make up around 5.5% of students in UK

universities (about 125,000 students),<sup>1</sup> and second, potential changes to the UK's membership of the Erasmus Programme, often been referred to as the EU's 'flagship' study mobility programme,<sup>2</sup> whereby, broadly speaking, students studying for their degrees at universities in Europe (whether or not EU nationals) can study for one or two semesters at universities elsewhere in Europe, within an administrative framework which provides considerable assistance, convenience, and financial advantage. Students who move to a different university to study there for part of their degree are termed, in the literature on study mobility, 'credit mobile' students.

The consequences of Brexit for higher education are causing particular concern and distress because the voting pattern of those involved in UK higher education was so different from the overall result: it is thought that over 90% of those working in higher education in the UK who were eligible to vote (15% of UK higher education staff being EU nationals, who were not eligible to vote in the referendum)<sup>3</sup> voted for the UK to remain in the EU.<sup>4</sup> Furthermore, 81% of those still in full time education (the vast majority of whom will be in higher education) voted to remain as did 57% of those across all age groups with a university degree, and 64% of everyone with a higher degree (master's level or above).<sup>5</sup> University vice-chancellors and academics made their pro-EU views public.<sup>6</sup> A YouTube video by Professor Michael Dougan of Liverpool University in which he explained clearly and presciently the difficulties which the UK would face if they had to negotiate Brexit, received over seven million views.<sup>7</sup> The Minister for Universities and Science, Jo Johnson (brother of the most famous or notorious Leave campaigner of all) also encouraged a vote to remain as staunchly as he could,<sup>8</sup> as did 14 of his predecessors in the post.<sup>9</sup> Arguably most poignantly, given that the young are the people who expect to have longest to live with the decision to leave the EU, three quarters, 75%, of all those aged 18-24 voted to remain in the EU, a statistic which has left many younger UK voters feeling very bitter towards their elders, the proportion of whom voted to leave increased with age.<sup>10</sup> Much ink has already been spilt on this, many tears shed, and numerous families nurse deep intergenerational wounds: it is perhaps the issue concerning the referendum which has engendered the most lingering bitterness in the UK, apart only from the widely held view that the Leave campaign bolstered its support with the help of powerful and enticing untruths.

<sup>1</sup> M Boxall: *What will Universities Mean for Brexit?* available from <http://www.paconsulting.com/newsroom/expert-opinion/he-what-will-universities-mean-for-brexit-26-june-2016/> (21 August 2016).

<sup>2</sup> For example, L Ritto: *The Erasmus Programme – An EU Success Story*, available from: <http://ispdnetwork.org/2013/05/the-erasmus-programme-an-eu-success-story/> (22 August 2016). There are many other instances of the use of this phrase.

<sup>3</sup> A Corbett: *Brexit was a Huge Shock for Universities. Now We Must Regroup and Deepen our European Links*, available from: <http://blogs.lse.ac.uk/impactofsocialsciences/2016/07/08/brexit-was-a-huge-shock-for-universities-now-we-must-regroup-and-deepen-our-european-links/> (18 August 2016).

<sup>4</sup> H Hotson: *The Stars Are Still Aligned*, Times Higher Education (London, 7 July 2016).

<sup>5</sup> M Ashcroft: *How the United Kingdom Voted on Thursday...and Why*, 24 June 2016, available from: <http://lordashcrofthpolls.com/2016/06/how-the-united-kingdom-voted-and-why/> (15 August 2016).

<sup>6</sup> University Vice-Chancellors: *EU Referendum: An Open Letter to UK Voters from the Leaders of 103 British Universities*, The Independent, 20 June 2016, available from: <http://www.independent.co.uk/news/uk/politics/eu-referendum-an-open-letter-to-uk-voters-from-leaders-of-96-british-universities-a7092511.html> (23 August 2016).

<sup>7</sup> P Yeung: *Brexit Campaign was 'Criminally Irresponsible', says legal academic*, The Independent, 2 July 2016, available from: <http://www.independent.co.uk/news/uk/home-news/brexit-eu-referendum-michael-dougan-leave-campaign-latest-a7115316.html> (20 August 2016). The YouTube video referred to can be viewed at: <https://www.youtube.com/watch?v=USTypBKEd8Y>.

<sup>8</sup> J Johnson: *Students, Remember: Your EU Vote Will Affect Your Life Chances for Years to Come*, The Guardian 20 June 2016, available from: <https://www.theguardian.com/education/2016/jun/20/students-eu-vote-universities-funding-jo-johnson> (17 August 2016).

<sup>9</sup> A Corbett (n3).

<sup>10</sup> H Goulard: *Britain's Youth Voted Remain*, available from: <http://www.politico.eu/article/britains-youth-voted-remain-leave-eu-brexit-referendum-stats/> (24 August 2016).

Against this backdrop, this article will focus on the changes to the arrangements governing study mobility of UK students in the EU and EU students to the UK which may arise as a consequence of Brexit. The consequences for degree mobility and for credit mobility will be explored separately. It should be noted that Jo Johnson, the UK Minister for Universities and Science mentioned above, has confirmed that there will be no changes to the current position for UK students studying abroad on Erasmus, or for EU students studying in the UK, in the academic year 2016-7, and that all EU students eligible for UK student finance currently enrolled on a degree in England who start their degree in the academic year 2016-7 will remain entitled to such finance for the duration of their degree, even if the UK leaves the EU during that time.<sup>11</sup> Similar undertakings have been provided in respect of EU students studying in Scotland and Northern Ireland.<sup>12</sup> As will be well known, there is currently no projected date for the UK to leave the EU as there is expected to be a lengthy negotiation process about the ‘divorce’ between the UK and the EU which will commence once the UK triggers the process by invoking Article 50 of the Treaty on European Union, following which the UK is likely to leave the EU after two years. There will then be further discussions about the future relationship between the EU and the UK. The UK government has already stated that it will not be triggering Article 50 before the end of 2016 (and indeed has given assurances to the UK Supreme Court about this in the context of litigation concerning the appropriate procedure to trigger Article 50) and there has been some speculation in the UK press that Article 50 may well not be triggered until late 2017 or even later.<sup>13</sup>

## 2. Degree Mobile Students

### 2.1. Background and the Current Position

In many ways, universities have always been profoundly international institutions. Many of the best known are older than the nation states in which they are now situated (Bologna, Salamanca, Prague, Heidelberg, Uppsala, St Andrew’s, and many others, were, when founded, in different countries from those in which they are today, the borders and identities of many nation states having come into existence, disappeared, or altered on numerous occasions over the centuries).<sup>14</sup> Student mobility has a long history: it is said that in the twelfth century, approximately 25,000 students at university in Timbuktu in Mali came from elsewhere in Africa.<sup>15</sup> Students and other academics often acquired special privileges which facilitated their travel and study away from home, for example those bestowed on academics by the Holy Roman Emperor Frederick I Barbarossa in the *Privilegium scholasticum* in or around 1155.<sup>16</sup> Hundreds of years later, as nationalism took root in European society, universities often

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<sup>11</sup> Department for Business, Innovation and Skills and Jo Johnson MP, Statement on higher education and research following the EU referendum, 28 June 2016, available from: <https://www.gov.uk/government/news/statement-on-higher-education-and-research-following-the-eu-referendum> (23 August 2016).

<sup>12</sup> Student finance arrangements in England and Wales are different from those in Scotland and Northern Ireland (in Scotland, home and EU students do not pay fees) but similar assurances have been made in respect of EU students and their eligibility for financial support. Student Awards Agency Scotland, ‘EU Nationals and Student Funding in Scotland: the UK EU referendum result,’ available from: [http://www.saas.gov.uk/\\_forms/eu\\_referendum\\_guidance.pdf](http://www.saas.gov.uk/_forms/eu_referendum_guidance.pdf) (8 September 2016); Student Finance Northern Ireland, ‘Students from other EU countries’, available from: <https://www.nidirect.gov.uk/information-and-services/student-finance/students-other-eu-countries> (8 September 2016).

<sup>13</sup> D MacShane: *We Won’t Trigger Article 50 Until After 2017 – and that Means Brexit May Never Happen at all*, The Independent, 19 August 2016, available from: <http://www.independent.co.uk/voices/brexit-article-50-leaving-eu-wont-happen-after-2017-european-elections-france-germany-a7198736.html> (24 August 2016).

<sup>14</sup> H Hotson (n4).

<sup>15</sup> O Olajide: *The Complete Concise History of the Slave Trade* (AuthorHouse 2013) 18.

<sup>16</sup> H Hotson (n4).

became cradles for the development of national citizenship, nurseries for the educating of national citizens in national languages, but even at the height of this period they retained their international outlook and welcomed scholars from abroad.<sup>17</sup>

Today, public universities in Europe are largely financed and administered according to national law, though the organisation of the education they offer has in recent years been considerably affected by the (intergovernmental) Bologna Process, closely intertwined with the EU but normatively outside it. This has encouraged greater compatibility between education systems, manifested by convergence between different countries on degree length, quality assurance systems, and comparability of standards. Freedom of movement as an EU principle has combined with cheap air travel to encourage some of those of student age to decide to undertake university study in a country other than their own. In making this choice, students may be encouraged by the opportunity to enhance their language skills in a more widely spoken language than their mother tongue (particularly English with its global appeal) or by perceptions of the varying levels of prestige which attach to different European universities. The CJEU has taken up the baton for them and over the years has, significantly for this generally impecunious sector of society, divined rights for them to financial support, both with fees where payable, and for living costs.

This is not the place for a full exposition of the development of the rights of students to enter and reside in a different EU country to attend university there, or in respect of their entitlement to financial support either from their own country or the country in which they chose to attend university. There is a considerable literature on this topic.<sup>18</sup> Suffice it to say that the starting point was free movement of workers, and that in the early days of the Community free movement of students, the not yet economically active, was not explicit: indeed, that the Community could act in the area of education at all was not established until 1974 and the case of *Casagrande*,<sup>19</sup> rights to reside in another EU Member State for the purposes of university study not being clarified until the *Gravier*<sup>20</sup> and *Blaizot*<sup>21</sup> cases in the mid 1980s. Relying on the non-discrimination principle, the CJEU fashioned the right for an EU national student wishing to study in a different EU country not to be charged higher fees than nationals of that country, equality of treatment in access to financial assistance, whether in the form of grants or loans, with such fees being the corollary. However, the introduction of EU citizenship in the Maastricht Treaty and the CJEU's imaginative weaving of that landmark concept with the longstanding non-discrimination principle to fashion equal rights to numerous benefits and entitlements proved a watershed. The essentially illogical and politically driven decision that enrolment fees to universities (and national provision for financial support to students to pay such fees) came within the scope of the non-discrimination principle, whereas financial support for maintenance did not, was overturned in the *Bidar* case:<sup>22</sup> this led to the considerable widening of the entitlement of EU citizen students to equality of treatment in respect of financial support for maintenance from the country in which they were studying, on condition only that the students concerned had a 'genuine link' with that country,

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<sup>17</sup> R Anderson: *European Universities from the Enlightenment to 1914* (Oxford University Press 2004), Ch 1.

<sup>18</sup> See, for example, S Garben: *EU Higher Education Law: The Bologna Process and Harmonisation by Stealth* (Walters Kluwer, Alpen aan den Rijn 2011), Ch 4; M Dougan: *Fees, Grants, Loans and Dole Cheques: who covers the costs of migrant education within the EU?* (2005) 42 *Common Market Law Review* 943; M Dougan: *Cross border educational mobility and the exportation of student financial assistance* (2008) 33(5) *European Law Review* pp. 723-738, and many others.

<sup>19</sup> *Casagrande v Landeshauptstadt München* [1974] ECR 00773 (9/74).

<sup>20</sup> *Gravier v Ville de Liège* [1985] ECR 00593 (289/83).

<sup>21</sup> *Blaizot v University of Liège* [1988] ECR 389 (24/86).

<sup>22</sup> *Bidar v London Borough of Ealing* [2005] ECR I-02119 (C-209/03).

subsequently interpreted by the *Förster* case as able to be satisfied by no more than a period of residence in the host country.<sup>23</sup>

The position of the EU student now who wishes to study in another EU country is almost the same as that of a national of the country in which she wants to study ('the host country'), in that she pays the same fees (if any, the charging of fees or not being matter for national governments and outside EU competence) as a national of the host country would have to pay, is entitled to any financial support for those fees offered by the host country on the same basis as nationals of the host country (*ie.* is entitled to the same grants or loans on the same terms) and may well be entitled also to grants or loans for her maintenance, provided only that she has lived in that country for a few years. Further case law makes clear that some degree mobile EU students may in addition be entitled to financial support from their home country.<sup>24</sup> The EU has had a remarkable impact on the practical ability of EU students to study in other EU Member States given how limited its formal power is in the field of education, even after the limited competence to support and supplement the action of the Member States bestowed on it in the Maastricht Treaty (then Article 126 EEC, now 165 TFEU). In truth, this new Treaty article was a recognition and acceptance of the 'competence creep' whereby the CJEU used its magic in the cases mentioned above and others, to conjure up rights in the sphere of education where it could just as easily have decreed that the EU had no power to act.

The significance of the position of EU national students wishing to study for a degree in another EU country is therefore that it is highly advantageous when compared with the position of non-EU students wishing to study for a degree in an EU country. Not being within the scope of the EU non-discrimination principle, non-EU national degree mobile students may be, and often are, charged much higher fees than home or EU national students for the same course at the same university, and are not usually entitled to financial support, in the form of loans or grants, from the EU country in which they are studying, for those fees or for maintenance. Since EU law does not require that non-EU students be treated in this regard equally with EU students, the question of whether non-EU students are therefore entitled to such finance is a matter of policy for national governments to decide. Studying in an EU country for a non-EU national is therefore generally a considerably more expensive proposition than for an EU national. The UK's position is that non-EU students studying in the UK are not entitled to access the loans for fees and maintenance which are available to UK and EU nationals, UK universities are permitted to charge higher fees from non-EU national degree mobile students; many UK universities utilise this freedom enthusiastically to enhance their income.

So what will be the impact on this of Brexit? How will the position of EU students studying in other EU countries, so privileged compared with that of non-EU students studying in EU countries, and which currently benefits UK students studying in EU countries and EU students studying in the UK, be changed when the UK leaves the EU? The answer is that it depends. It depends largely on the relationship between the UK and the EU once it leaves the EU, something about which there has so far been considerable speculation and, at the time of writing, virtually no clarity. The following section therefore considers three possible relationships which might pertain between the EU and the UK after Brexit, and the likely position of UK and EU degree mobile students under each of them. Of course, it is possible that the relationship eventually negotiated between the EU and the UK will be entirely bespoke and not in line with any of the arrangements hypothesised here.

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<sup>23</sup> *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-08507 (C-108/07).

<sup>24</sup> See joined cases *Morgan v Bezirksregierung Köln* and *Bucher v Landrat des Kreises Düren* (C-11/06 and C-12/06).

## 2.2. Possible Relationships between the EU and the UK after Brexit

### 2.2.1. If the UK Remains in the Single Market after Brexit, as an EEA member

The UK might negotiate with the EU to remain a member of the EU Single Market, even though no longer an EU Member State. There are essentially two ways in which this could happen. First, the UK could remain inside the European Economic Area (EEA). The EEA brings together all<sup>25</sup> EU Member States and three of the states which belong to the European Free Trade Association (EFTA): Norway, Iceland and Liechtenstein (the EEA EFTA states). The EEA Agreement<sup>26</sup> is an international agreement which provides that the EEA EFTA states participate fully in the Single Market, integrating all EU legislation relevant to the Single Market, with the result that there is uniform application of such law throughout the EEA and all EU Member States and EEA EFTA states can participate fully in the Single Market. The four freedoms, free movement of goods, capital, services and persons, are the cornerstones of the agreement, but the EEA Agreement also provides for co-operation in various policy areas, including education (Article 1(2)(f) and Article 78).<sup>27</sup>

The second way in which the UK could remain a member of the Single Market would be to follow the approach taken by Switzerland. Switzerland is also an EFTA state, but whilst part of the Single Market for most of its industries, is not part of the EEA, having chosen a different relationship with the EU. This is addressed below (2.2.3).

If the UK were to remain a member of the EU Single Market by virtue of entering into the EEA Agreement and thereby continuing its membership of the EEA, then along with the EEA EFTA states, UK nationals would enjoy essentially the same free movement rights throughout the EU as EU citizens. Significantly for degree mobile students, the right of residence in other EU Member States for EU citizen students granted by the Citizens' Directive 2004/38 (CD) Article 7(1)(c) is granted to EEA national students by virtue of the extension (with certain adaptations) of the CD to EEA EFTA states by EEA Joint Committee Decision 158/2007.<sup>28</sup> As explained above (2.1), CJEU case law provides that this combines with the right to equal treatment in Article 24 CD to entitle EEA nationals to parity of treatment with EU citizens as students, with the result that EEA EFTA state nationals have the same right to move to and reside in other EEA or EU countries for the purposes of study as do EU nationals, must only be charged the home/EU student fee rate and not any 'international' rates charged to non-EU students, and are entitled to access any financial support (whether grants or loans) for fees, and for students who satisfy the genuine link/residence requirements, for maintenance support, provided by the country in which they are studying in the same way as nationals of that country or EU nationals are entitled to financial support from their host country.

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<sup>25</sup> Art. 28 of the EEA Agreement (see n26) provides that when a state becomes a member of the EU, it shall also apply to become party to the EEA Agreement.

<sup>26</sup> Agreement on the European Economic Area, OJ No L1, 3.1.94 and EFTA states' official gazettes, as amended.

<sup>27</sup> This enables the EEA EFTA states to participate in a number of EU programmes (Art 80), such participation being based on seven year commitments which include agreement on the contributions to be made by the EEA EFTA states to the EU's Multiannual Financial Framework, of which the current version covers 2014-2020. The EEA EFTA states do not all participate in all of the available EU programmes; for example, only Iceland and Norway participate in Horizon 2020 and Creative Europe, but all three of them participate in Erasmus+, prospects for the UK's future membership of which are considered later in this article.

<sup>28</sup> Directive 2004/38 of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, OJ L 158; EEA Joint Committee Decision 58/2007, 2008 OJ L124/20.

It follows that if after Brexit the UK were to continue to participate fully in the Single Market on the basis of joining first EFTA, and then the EEA, the position of UK students wishing to study for their degrees in universities in other EU member states or in any of the EEA EFTA states, and the position of EU and EEA EFTA state nationals wishing to study in the UK, would be unchanged.

However, after Brexit, the UK will no longer be an EU Member State. To remain a member of the EEA, the UK would need to become a member of EFTA. The UK was one of the original members of EFTA but left EFTA on joining the EEC in 1973. It is by no means a certainty that the current EFTA members (the three EEA EFTA states and Switzerland) would be prepared to allow this. Any one of them would have a veto, and might choose to exercise it, on account of the considerable shift in dynamics which UK membership would entail: Norway recently suggested that it might well veto an application for EFTA membership by the UK.<sup>29</sup>

If however this hurdle could be overcome, and the UK were to be permitted to become an EFTA member state once again, to participate fully in the Single Market it is to be expected that the UK would also have to join the EEA by signing the EEA Agreement. This would require the agreement of all of the EU Member States and of the EEA EFTA states. Finally, and perhaps most significantly, continued UK membership of the Single Market as an EEA member further presupposes that it would be acceptable to the 17 million members of the UK electorate who voted to leave the EU to be party to an arrangement which essentially entails paying into the EU budget and implementing much EU legislation with minimal input into it, these arrangements being at the heart of the EEA Agreement. This is hardly in line with one of the most popular 'Leave' campaign slogans, 'Take Back Control'. Furthermore, given that the EEA Agreement entails freedom of movement of workers and self-employed persons (Arts 28 and 30), membership of the EEA as it stands would fly in the face of 'Leave' voters, given that curtailing freedom of movement between the UK and the EU was, according to many analyses, a potent reason for their voting to leave the EU: over one third of Leave voters said that their main reason for voting Leave was so that the UK would regain control over immigration.<sup>30</sup> Whilst it is possible for EEA states to impose some restriction on free movement if 'serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising',<sup>31</sup> decisions to invoke this power are subject to review by the EEA Joint Committee,<sup>32</sup> and the indeterminate and limited control over immigration permitted by this Article would be unlikely to satisfy Leave voters; as such it is unlikely that the UK government would think it the appropriate means of controlling migration of EU nationals to the UK. It follows that it seems unlikely that the UK government will wish to sign up to the EEA Agreement.

Therefore, whilst full continued membership of the Single Market would be much the most acceptable Brexit option for Remain voters, at the time of writing, it seems unlikely that this outcome will come to pass.

### 2.2.2. If the UK does not Remain in the Single Market after Brexit

Let us suppose that after Brexit the UK does not remain in the Single Market. Under this scenario, UK students wishing to study for their degree in an EU Member State, and EU national students wishing to

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<sup>29</sup> P Wintour: *Norway May Block UK Return to European Free Trade Association*, The Guardian, 9 August 2016, available from: <https://www.theguardian.com/world/2016/aug/09/norway-may-block-uk-return-to-european-free-trade-association> (3 September 2016).

<sup>30</sup> M Ashcroft (n5).

<sup>31</sup> EEA Agreement (n26) Art. 112.

<sup>32</sup> EEA Agreement (n26) Art. 113.

study in the UK, would probably be subject to the same regime as students from non-EU Member States. That is to say, they might have to obtain visas for study, depending on the national immigration law of the host state, and could be charged higher fees than EU national students, as they would no longer be protected by the EU non-discrimination principle. They would not have any right under EU law to entitlement to financial support for fees or maintenance from their host state.

Since EU law would not cover this situation, it would, in theory, be open to EU Member States to choose to treat UK students wishing to study at universities in their countries in the same way as they treat their own nationals and (by virtue of EU law) have to treat EU national students, and similarly possible for the UK to choose to treat EU national students as it does UK national students. In the absence either of a reciprocal agreement between the EU and the UK to this effect, or of bilateral agreements between the UK and individual EU Member States, this cannot be relied on.

### 2.2.3. If the UK's Relationship with the EU after Brexit is similar to the EU's relationship with Switzerland

Switzerland is an EFTA member, but it is not an EEA member. Instead, its relationship with the EU is governed by a series of over 120 sector specific bilateral agreements which give it access to the Single Market for most but not all of its industries. One of these agreements comprises a comprehensive regime for free movement of persons between the EU and Switzerland which is essentially similar to the arrangement between the EEA EFTA states and the EU (the EU Swiss FMP Agreement).<sup>33</sup> This Agreement extends to persons not exercising an economic activity, such as students.<sup>34</sup> Therefore, the position of EU national students wishing to study in Switzerland, and Swiss students wishing to study in EU Member States, is, at the time of writing, in broad terms fairly similar to the position regarding that applying throughout the EU. Since the EU Swiss FMP Agreement extends to nationals of EEA EFTA states, the position is similar throughout the EEA and Switzerland. It follows that if after Brexit the UK were to enter into a relationship with the EU similar to Switzerland's relationship with the EU, and included in this relationship was a sectoral agreement covering free movement of persons including students, the position of EU, EEA and Swiss students wishing to study for their degrees in the UK, and UK students wishing to study for their degrees in the EU, the EEA or Switzerland, would remain largely as it is at the current time.

However, it is well known that the EU Swiss FMP Agreement is currently under strain, following a Swiss referendum in 2014 on 'mass immigration', aiming to limit immigration by imposing quotas, which prevented the Swiss government from signing a protocol (the Croatia protocol) to the EU Swiss FMP Agreement to extend unrestricted free movement rights to Croatian nationals following the accession of Croatia to the EU on 1 July 2013. The Swiss government is constitutionally obliged to implement the referendum result by 9 February 2017. Significantly, the various agreements between Switzerland and the EU are co-dependent. The EU has reacted angrily, and made it clear that if Switzerland does indeed pass legislation to implement the referendum result, it will trigger the 'guillotine' mechanism in the EU Swiss FMP Agreement<sup>35</sup> which will terminate a package of agreements between the EU and Switzerland. In the meantime, the EU has suspended Switzerland's membership of Erasmus + and reduced Switzerland's participation in the EU's Horizon 2020 research

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<sup>33</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, [2002] OJ L 114.

<sup>34</sup> EU Swiss FMP Agreement Art 6 and Annex 1, Art. 24(4).

<sup>35</sup> *Ibid.* Art. 25.

programme to ‘partially associated country status’, with the prospect of complete ejection from that programme also if the Croatia protocol is not ratified.<sup>36</sup>

The lesson of the Swiss free movement referendum saga for the UK is that if, as seems likely, the UK wishes to make gaining control over immigration a very high priority after Brexit, the prospects for a relationship with the EU along similar lines to that enjoyed by Switzerland would seem to be remote as the EU would probably insist on compliance with the principle of free movement of persons between the EU and the UK.

### 3. Credit Mobile Students

#### 3.1. Background

As stated above, there are two basic forms of study mobility. So far, consideration has been given to the position of ‘degree mobile’ students. ‘Credit mobile’ students are students who study for their degree in a university in but who study in a university in a different country for part of their degree, ideally earning credit towards their home degree when they do so: hence the term ‘credit mobile’. The university in which they are registered for their degree and where they study for most of this time is generally their home country, but need not be: it follows that it is possible for degree mobile students to become, in addition, credit mobile students for a period of time. Many students do not want to go abroad for the whole of their studies, or indeed they may positively want to study for their degrees in their home country, but appreciate, or can be persuaded of, the advantages to them in studying for what may psychologically seem a more manageable period of time. For many students, it is just too big a step to go abroad for three or four years; they may still be quite young, they may have ties which make it hard for them to be abroad for that long. Going abroad for just a few months may be an easier prospect for them to cope with, and they may still enjoy many of the benefits of studying abroad – seeing a different way of life, experiencing a different style of study, improving foreign language skills, enhancing intercultural competences.<sup>37</sup>

Credit mobility comes in various forms: some universities will have interinstitutional agreements with universities in other countries whereby they each agree to accept a certain number of students from each other for a semester or a year, often with fee waivers, and sometimes supported by scholarships to assist with travel or living costs. Some organisations offer scholarships to enable such study mobility.<sup>38</sup> Sometimes students themselves organise semesters abroad: so called ‘study abroad’ students, whose liability to pay fees in countries where they are charged makes them an increasingly wooded group and whose mobility may be promoted by agents.<sup>39</sup> However, there is obvious convenience in an established programme which undertakes much of the organisation and offers a framework within which to operate.

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<sup>36</sup> M Hengartner: *Horizon 2020: Not Without Switzerland?* International Innovation, 7 June 2016, available from: <http://www.internationalinnovation.com/horizon-2020-not-without-switzerland/> (4 September 2016).

<sup>37</sup> There is a huge literature on this topic: see, for example, E Murphy-Lejeune: *Student Mobility and Narrative in Europe*, Routledge, Abingdon 2002; M Byram & F Dervin (eds): *Students, Staff and Academic Mobility in Higher Education*, Cambridge Scholars Publishing, Newcastle 2008; B Feyen & E Krzaklewska (eds): *The Erasmus Phenomenon – Symbol of a New European Generation?* Peter Lang GmbH, Frankfurt 2013; though there are many other examples.

<sup>38</sup> See, for example, for UK students, *Funding Your Studies*, British Council 2016, available from: <https://www.britishcouncil.org/study-work-create/practicalities/funding-studies> (4 September 2016).

<sup>39</sup> See, for example, *The Use of Overseas Agents to Recruit Students*, European Association for International Education blog post, available from: <http://www.eaie.org/blog/the-use-of-agents/> (4 September 2016).

## 3.2. Credit Mobility EU Style: The Erasmus Programme

### 3.2.1. The History of the Erasmus Programme

The genesis of the Erasmus Programme is well known and there is a large literature setting this out in detail.<sup>40</sup> The following is only a short summary of its early history. In the mid 1970s, the Community initiated 'Joint Study Programmes' which promoted short periods of university study in a different country. Also in the 1970s, Community politicians began to discuss the desirability of a 'European identity', partly to address what was seen as a deficit in the democratic accountability of the Community. Student mobility was seen as one of the potentially fruitful seedbeds of this project, and the Joint Study Programmes one of the initiatives intended to make these aspirations a reality.

The 1980s saw a period of what was termed 'Eurosclerosis'. The idea of a European identity seemed a distant mirage. European Parliamentary elections in 1984 had a truly dismal turn out and it was decided that since democracy in that form was apparently ineffective in galvanising people in Europe into perceiving themselves as a European People, there needed to be other means. The Committee on a People's Europe was therefore established, known as the Adonnino Committee, under the chairmanship of MEP Pietro Adonnino. This committee reported in 1985 with a raft of recommendations, one of which was to build on the Joint Study Programmes by encouraging students to pursue part of their studies in other countries.<sup>41</sup> The focus of this project shifted as the Community became over the next year or two much more directed towards the completion of the Single Market, and what was to become the Erasmus Programme was refocused as part of this project: 'helping young people, in whose hands the future of the Community's economy lies, to think in European terms'. The process: some sort of European identity or consciousness, the vessels for change: the educated youth, the outcome: economic advancement.

The programme was named Erasmus after Desiderius Erasmus, the fifteenth century Dutch philosopher and scholar who studied in many countries; 'Erasmus' is an acronym for EuROpean Community Action Scheme for the Mobility of University Students. A complex legal battle preceded the establishment of the Erasmus Programme in 1987, concerning the proper Treaty base for the Decision by which it was established.<sup>42</sup>

### 3.2.2. Operation of the Erasmus Programme

The beauty of the Erasmus Programme, as is well known, is that it provides a comprehensive framework within which credit mobile students can operate. Under the Erasmus Programme, students registered in a university in one of the Erasmus Programme countries, study abroad in another European university for one or two semesters, remaining entitled to any financial support they would be if at their home university, but also entitled to a non-means tested, non-repayable Erasmus grant to assist partially with

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<sup>40</sup> See, for example, S Garben (n18); A Curaj and others (eds): *European Higher Education at the Crossroads. Part 1*, Springer, Dordrecht 2012; J Field: *European Dimensions. Education, Training and the European Union*, Jessica Kingsley Publishers, London 1998; F Maiworm & W Steube & U Teichler: *Learning in Europe: The ERASMUS Experience*, Jessica Kingsley Publishers, London 1991; again, there are many other examples.

<sup>41</sup> Report to the European Council 29 and 30 March 1985 from the ad hoc Committee on a People's Europe, Offprint from the Bulletin of the EC 3-1985, available from: <http://ec.europa.eu/dorie/fileDownload.do> (4 September 2016).

<sup>42</sup> Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), OJ L166 25 June 1987.

the costs of living abroad, with additional funds payable to disadvantaged students.<sup>43</sup> Erasmus students do not pay fees to their host university. Their host university commits in their Erasmus Charter to supporting them in finding accommodation.<sup>44</sup> Whilst abroad, students are meant to earn credits for their studies there which count towards their home university degree by virtue of the European Credit Transfer System (ECTS). This was set up in the context of Erasmus to facilitate the transfer of credit for modules studied abroad on the basis that Erasmus students study modules which their home university is happy to accept towards their degree, though in practice this is not always the case and the ECTS credits earned during an Erasmus study period are not always accepted by the returning student's home university.

All EU Member States are full members of the Erasmus Programme, known as Programme countries. However, whilst there are currently 28 EU Member States, there are in fact 33 countries which participate fully as Programme countries in the Erasmus Programme in its current manifestation, Erasmus+, which runs from 2014-2020: the 28 EU Member States; the EEA EFTA states, Norway, Iceland, Liechtenstein; and Turkey and the Former Yugoslav Republic of Macedonia. Switzerland's membership of the Erasmus Programme is currently suspended for the reasons explained in 2.2.3 above. Students registered at a university in any of these 33 countries can, with the agreement of their home university, study under the Erasmus Programme for one or two semesters at a university in another Erasmus Programme country, provided their home university has an interinstitutional Erasmus agreement with the university abroad. The student does not have to be a national of the country in which he/she is studying. By 2013, 3,000,000 university students had participated in the Erasmus Programme since its inception, and in 2014 alone over 300,000 students enjoyed an Erasmus study period.<sup>45</sup>

### 3.2.3. The UK's Participation in the Erasmus Programme

The UK, as an EU Member State, is currently a fully participating Erasmus Programme country, and universities in the UK send and receive Erasmus students. The UK is a net recipient of Erasmus students, being a popular destination owing to the global prestige of its universities and the fact that English, in which its courses are taught, is the most common second language in the world.<sup>46</sup> UK students have historically been reticent about studying abroad on Erasmus, partly because English bachelor's degrees generally only last three years so there is less time to incorporate a study mobility period, and partly because of the well-known weakness of UK nationals with foreign languages: the corollary of speaking a globally widespread language. British Erasmus students are overwhelmingly comprised of students studying modern languages at UK universities.<sup>47</sup> The reticence of UK students is ironic given that the genesis of Erasmus owes much to a British diplomat to the EEC in Brussels, Dr Hywel Ceri Jones, who

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<sup>43</sup> Higher education study or work abroad grant rates 2016-7 rates, available from: <https://www.erasmusplus.org.uk/higher-education-study-or-work-abroad-grant-rates-2016-17> (4 September 2016). This sets out the rates payable to Erasmus students registered at a UK university, such payments being administered by the UK Erasmus National Agency, the British Council, which receives funding for this purpose from the Commission. However, rates payable by different countries can vary considerably.

<sup>44</sup> Erasmus Charter for Higher Education 2014-2020, available from: [https://ec.europa.eu/education/opportunities/higher-education/doc/he-charter\\_en.pdf](https://ec.europa.eu/education/opportunities/higher-education/doc/he-charter_en.pdf) (4 September 2016).

<sup>45</sup> European Commission: *Who is the 3,000,000<sup>th</sup> Erasmus Student?* available from: [https://ec.europa.eu/education/tools/erasmus-3-million\\_en.htm](https://ec.europa.eu/education/tools/erasmus-3-million_en.htm) accessed 5/9/16; Erasmus statistics from 2013-4, available from: [https://ec.europa.eu/education/tools/statistics\\_en.htm](https://ec.europa.eu/education/tools/statistics_en.htm) (5 September 2016).

<sup>46</sup> M Holloway: *Second Languages Around the World*, 8 September 2014, available from: <http://www.movehub.com/blog/global-second-languages> (5 September 2016).

<sup>47</sup> British Council, *Record Number of UK Students Go in Europe with Erasmus* 16 November 2012, available from: <https://www.britishcouncil.org/organisation/press/record-number-uk-students-go-europe-erasmus> (5 September 2016).

went on to become Director-General for Education at the Commission. However, there has been an increase in British students studying abroad under Erasmus over recent years: between 2007 and 2013 the number of British Erasmus students doubled from 7500 to 15000.<sup>48</sup>

### 3.2.4. Participation of the EEA EFTA States and of EU Candidate Countries in the Erasmus Programme

Given that there are currently 33 Programme countries which participate fully in Erasmus, the inclusion of five countries which are not EU Member States raises the question as to whether the UK could after Brexit continue to participate in the Erasmus Programme. Universities in the UK are very keen it should.<sup>49</sup> The inclusion of the EEA EFTA states suggests that if the UK were to re-join the EFTA and thereby remain a member of the EEA, its position would probably be unchanged and it would continue to be a full Programme member of Erasmus. As already noted (2.2.1), the EEA Agreement provides for co-operation in various policies, including education. This enables the EEA EFTA states to participate in a number of EU programmes, such participation being based on seven year commitments which include agreement on the contributions to be made by the EEA EFTA states to the EU's Multiannual Financial Framework. For 2014-2020 these include Erasmus+. This means that if after Brexit the UK were to become an EEA EFTA state, it is to be expected that it would continue to participate in the Erasmus Programme as before. This would include having to contribute to it as set out in Article 82 of the EEA Agreement.

However, it is evident from the fact that the Erasmus+ Programme has 33 full Programme members, that full participation in the Erasmus Programme is not confined to EU Member States and EEA EFTA states. The 33 Programme members, which participate fully in Erasmus, include Turkey and the FYR of Macedonia. These countries are neither EU Member States nor members of the EEA, nor of EFTA. So how is it that they are participating in the Erasmus+ Programme? And might it provide a glimmer of hope that the UK might be able to continue to participate in Erasmus after Brexit, even if the UK does not become an EEA EFTA state?

To understand this, it needs to be noted that there are in fact two levels of participation in the Erasmus+ Programme. Those countries which participate fully in all parts of the programme are termed Programme countries. However, many countries in the world can participate in some parts of the programme or in more restricted ways, and these are termed Partner countries.<sup>50</sup> Partner countries participate to different extents with the Erasmus Programme, with those geographically closer to the EU and who are candidate countries for EU membership tending to have greater levels of participation. This is key. Turkey and the Former Yugoslav Republic of Macedonia are EU candidate countries and participation in Erasmus+ is expected to 'contribute towards upgrading of the institutional capacities as well as the personal and professional development of all actors in the field of education, training, youth and sport.'<sup>51</sup> In the run up to the commencement of the Erasmus+ Programme from 2014-2020, Turkey

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<sup>48</sup> E Vulliamy: *Erasmus Scheme May Exclude British Students After Brexit*, The Guardian, 24 July 2016, available from: <https://www.theguardian.com/education/2016/jul/23/erasmus-scheme-exclude-british-students-brexite> (5 September 2016).

<sup>49</sup> See, for example, K Burnett: *Life After Brexit – What Next for British Universities?* Times Higher Education, 24 June 2016, available from: <https://www.timeshighereducation.com/blog/life-after-brexite-what-next-british-universities> (5 September 2016).

<sup>50</sup> Erasmus+ website, *Participating Countries*, available from: <https://www.erasmusplus.org.uk/participating-countries> (5 September 2016).

<sup>51</sup> Independent.mk, the Macedonian English language news agency: *Macedonia officially joined the Erasmus Plus Program*, 26 May 2014, available from: <http://www.independent.mk/articles/5439/Macedonia+Officially+Joined+the+Erasmus+Plus+Program> (25 August 2016).

and the Former Yugoslav Republic of Macedonia each had to confirm to the Commission that they had satisfied certain internal legal requirements for participation in the Erasmus+ Agreement, in accordance with Article 5 of the Agreement.<sup>52</sup> Their status as Erasmus+ Programme countries means that they enjoy all the associated rights and duties equally with the EU Member States. Notably, this includes the obligation to contribute to the Erasmus+ budget.<sup>53</sup> The other EU candidate countries (Serbia, Albania, Montenegro) are not blessed with full Programme country status in Erasmus+ Programme but participate as Partner countries.

It follows from this that full participation in the Erasmus+ Programme is not limited either to EU member states, or to EEA EFTA states, but extends to states which are neither. It is therefore possible that after Brexit the UK could continue as a full Erasmus Programme member, which would mean no change in the current position of Erasmus student mobility between the UK and other Erasmus+ Programme countries. Certainly 'no change' is the outcome fervently desired by UK universities, but whether it can be the eventual outcome it is too early to predict, as it will depend on the highly complex negotiations between the UK and the EU which have not even commenced yet.

The UK would, however, clearly not be an EU candidate country, and therefore if after Brexit it does not remain a member of the EEA, continued full membership of the Erasmus Programme would not fit the pattern of other fully participating countries, who if not EU member states, have a formal close relationship with the EU (such as the EEA EFTA states, and such as formerly, Switzerland, but see 3.2.5 below), or are aspiring to become EU member states. But it is not impossible that the UK could continue to be a fully participating Erasmus Programme country. It would have to be considered politically acceptable in the UK to accept the obligation to contribute to the Erasmus budget, but this would be one area where in view of the perceived benefits of membership of the Erasmus Programme, continued payment into the EU coffers by the UK might be regarded as worthwhile.

### 3.2.5. Switzerland and the Erasmus Programme

The particular position of Switzerland, a member of EFTA but not of the EEA, again requires noting. It will be recalled (2.2.3) that following a referendum against 'mass immigration' in February 2014, Switzerland has been suspended from the Erasmus Programme,<sup>54</sup> and that this situation is currently unresolved and likely to remain so unless a solution can be reached, acceptable to both the EU and Switzerland and operating within the framework of the EU Swiss FMP Agreement.<sup>55</sup> Since 2014, the Swiss government has itself financed ingoing and outgoing study mobility which would have been covered by Erasmus+ were it not for Switzerland's suspension.<sup>56</sup> The point of relevance to the possibility of the UK remaining a full Programme member of Erasmus after Brexit is that the EU has made

<sup>52</sup> Turkey signed the Erasmus+ Agreement on 19 May 2014, and the Former Yugoslav Republic of Macedonia on 26 May 2014. It was published in the Official Gazette of 17 June 2014 (ref 2014/6458) and came into force on 18 June 2014.

<sup>53</sup> European Stability Initiative Background Paper: *Turkish Students, Isolation and the Erasmus Challenge*, 24 July 2014, p. 17., available from: [http://www.esiweb.org/pdf/ESI%20-%20Turkish%20Students,%20Isolation%20and%20the%20Erasmus%20Challenge%20\(24%20July%202014\).pdf](http://www.esiweb.org/pdf/ESI%20-%20Turkish%20Students,%20Isolation%20and%20the%20Erasmus%20Challenge%20(24%20July%202014).pdf) (6 September 2016).

<sup>54</sup> Euronews: *EU Suspends Swiss Erasmus Participation for 2014*, 26 February 2014, available from: <http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus-participation-for-2014> (6 September 2016).

<sup>55</sup> S Carrera & E Guild & K Eisele: *No Move Without Free Movement: The EU-Swiss Controversy Over Quotas for Free Movement of Persons*, CEPS Policy Brief, 23 April 2015, available from: <https://www.ceps.eu/publications/no-move-without-free-movement-eu-swiss-controversy-over-quotas-free-movement-persons> (6 September 2016).

<sup>56</sup> PHZH website, *Incoming European Students*, available from: <https://phzh.ch/en/Services/International-Office/Incoming-students/application/Incoming-Erasmus-students/> (6 September 2016).

Switzerland's membership of the Erasmus Programme conditional on its not unilaterally imposing restrictions on free movement of persons. Given that all the signs are the UK intends to restrict free movement of persons from the EU after Brexit, it must be doubtful whether it is realistic to hope that the UK can remain a full participating Erasmus Programme member.

## 4. Conclusion

The UK faces an uncertain future, and even after the terms of its new arrangements with the EU are clarified, it is likely to take some years before the new relationship settles down. In the short term, the UK government has given a commitment both that UK Erasmus students studying abroad in the academic year 2016-7 or 2017-8 will continue to be subject to current arrangements, and that degree mobile EU national students eligible for UK student finance will remain eligible at least for the 2016-7 academic year.<sup>57</sup> Indeed, as it is clear that the UK will not trigger Article 50 before 2017, and therefore that Brexit is unlikely to happen before 2019, EU law will continue to apply to UK/EU relations for at least the next two or three years and therefore the position for EU national degree mobile students wishing to study in the UK, governed as it is by EU law, should not change in that time, and the same goes for UK national students wishing to study in the EU. Thereafter, the landscape could change considerably, and it is far from impossible that degree mobile EU national students wishing to study in the UK might find themselves in the same position as non-EU national students, that is, subject to visa requirements, liable to be charged higher fees than UK national students, and ineligible to access loans to finance their studies. Furthermore, until the UK leaves the EU, it will continue to be a participant in the Erasmus Programme. Thereafter, it will depend on the arrangement forged between the EU and the UK. Given the wider remit of the Erasmus Programme, full participation of the UK in the Erasmus Programme after Brexit is within the bounds of possibility, perhaps even if, as currently seems likely, the UK does not remain a member of the EEA. But the lesson afforded by Switzerland is a salutary one, and if restricting free movement of persons remains one of the UK's most treasured post-Brexit prizes, it is hard to see how the UK could remain a full participant in Erasmus. It is hardly surprising that the man who has been called 'Erasmus's founding father', the UK's Dr Hywel Ceri Jones, has recently said that he feels 'bereaved by Brexit'.<sup>58</sup>

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<sup>57</sup> Department for Business, Innovation and Skills and Jo Johnson MP (n11).

<sup>58</sup> E Vulliamy (n48).