

EU and UK positions on citizens' rights First phase of Brexit negotiations

SUMMARY

Negotiations on the arrangements for the United Kingdom's withdrawal from the EU started on 19 June 2017, with citizens' rights being one of the top priorities. However, the EU and the UK positions differ considerably. The EU aims at a withdrawal agreement which safeguards the existing right to residence as well as to equal treatment with nationals, including access to social security, for EU-27 citizens who have moved to the UK and for UK nationals resident in an EU-27 Member State prior to the withdrawal date. By contrast, the UK's intention is to create new rights, detached from EU law, whose conditions will be governed by UK law.

The EU and UK positions also differ regarding the cut-off date which would govern the status of citizens. According to the EU, this should be the date of the UK's actual withdrawal from the EU, whereas the UK has proposed to agree on an earlier date. Differences between the two positions can also be observed with regard to the conditions for family reunification and access to social security benefits.

Furthermore, whilst the EU proposes that the European Commission and the Court of Justice of the EU (CJEU) oversee compliance with the withdrawal arrangements by both the UK and the EU-27 Member States, the UK seeks enforceability of the citizens' rights through the UK judicial system and rejects the jurisdiction of the CJEU.



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The first phase of the Brexit negotiations

Negotiations for the United Kingdom's withdrawal from the European Union started on 19 June 2017. The EU has adopted a phased approach, with the first phase to focus on disentangling the existing relationship with the UK whilst seeking to provide legal certainty and to minimise disruption for citizens and businesses. In a second phase – if the European Council decides 'sufficient progress' has been achieved on the withdrawal deal – preliminary discussions would take place on the framework for the future EU-UK relationship, as well as on possible transitional arrangements. But any agreement on the future relationship would only be finalised once the UK had left the EU.

At the heart of the current negotiations are the rights of EU-27 citizens living in the UK and of UK nationals living in the EU-27, which according to the European Council negotiation [guidelines](#) and the Council [mandate](#) for the European Commission, as well as the European Parliament [resolution](#) adopted shortly after the Article 50 procedure was triggered, will be a top priority for the EU during the negotiations.¹ The EU position on citizens' rights was detailed by the Commission in a [position paper](#) released on 12 June. The [UK position](#) regarding the issue of citizens' rights was published on 26 June. Guy Verhofstadt, who leads the European Parliament's Brexit steering group, has warned that the UK position as currently set out will be [unacceptable to the EP](#).

Citizens' rights under EU or under UK law?

EU: same level of protection under EU law

The EU position paper, entitled 'Essential principles on Citizens' Rights', addresses the main aspects of EU free movement rights: **residence rights**, **equal treatment** with nationals while resident in the host Member State, including, in particular, access to **social benefits** and **health care** in the host Member State, as well as **recognition of professional qualifications** obtained in any EU Member State. The paper does not cover other rights deriving from EU citizenship such as to vote or on consular protection abroad.²

The EU paper envisages a withdrawal agreement safeguarding the status and rights derived from Union law at the withdrawal date. It refers, with regard to the current status of EU free movement rights to the relevant EU Treaty principles and rights, and to EU secondary legislation, as well as to case law of the Court of Justice (CJEU). Essentially, it aims to ensure that citizens – both UK and EU-27 – who availed themselves of their Treaty rights and moved to work, study or retire in another Member State *before* UK exit (the EU's proposed cut-off date), should retain the 'same level of protection' *after* such exit. This should cover, inter alia, their rights of entry and residence, equal treatment, access to benefits and the benefits of the EU social security coordination framework. As EU chief negotiator, Michel Barnier, has put it, the aim is 'to allow citizens to continue living as they do today'.³ Such protection should be for their '**life time**', and should include rights whose enjoyment 'will intervene at a later date' (e.g. rights related to pensions).

UK: transitioning to UK immigration status

The UK position paper acknowledges that the UK continues to be bound by its obligations stemming from EU membership until it has formally withdrawn from the Union, yet it underlines that citizens will not be able to 'carry forward' their EU free movement rights after such withdrawal. Instead, the intention is to 'create **new rights in UK law**' for qualifying EU citizens, so they would *not* retain their EU rights and status, as envisaged by the EU. This implies that all citizens will need to (re)apply for and transfer to a new 'immigration status under UK law'. While the paper stresses the need to ensure

continuity, there is no mention of maintaining the same or equivalent level of protection and, indeed, it is clear that for some such protection would instead diminish (in particular those seeking family reunification and those who have not accrued five years' residence by the end of the 'grace period' following Brexit). Its apparent justification for requiring a new legal status for EU citizens in the UK after withdrawal is that there will then be no (automatic) '**acquired rights**'. However, this could be precisely the role of the withdrawal agreement, in which both parties would be able to establish that citizenship rights are carried over into the post-exit UK legal regime.

The EU paper covers both EU-27 citizens in the UK and UK citizens in the EU-27, but the UK's offer limits itself to residence conditions for EU-27 citizens in the UK, while pleading for reciprocal conditions for UK nationals in the EU. Thus, the UK appears to concede that UK nationals would have a less favourable status in the EU than under current EU rules.

Cut-off date

EU: entry into force of the withdrawal agreement

The UK triggered the withdrawal procedure on 29 March 2017, launching the two-year period set out in Article 50 TEU to reach a withdrawal agreement. Such a withdrawal agreement could set a date for its entry into force earlier or later in time than March 2019. If no agreement is reached, the UK will exit the EU on 29 March 2019, unless the two-year period is prolonged by the European Council acting unanimously, and in agreement with the UK. As a result of the withdrawal, the Treaties will cease to apply to the UK. Until the withdrawal takes effect, either at the end of the two-year period or on the date of entry into force of the withdrawal agreement, the UK remains a Member State of the EU, with all the rights and obligations thereof. There is nothing in Article 50 TEU to indicate that a withdrawing Member State is exempted from some of its obligations during the withdrawal procedure.

Therefore the EU position regarding EU citizens' rights takes the date of entry into force of the withdrawal agreement as the cut-off date for the current status. This means that EU-27 citizens living in the UK cannot be subject to any other rules than those under EU law, including in preparation for new legal provisions under UK law post-Brexit, until the withdrawal takes effect. Furthermore, EU-27 citizens who decide to make use of their free movement rights on 28 March 2019, for instance, would be entitled to do so, even if these rights were to be of no avail the following day. On the other hand, EU-27 citizens who move to the UK after the withdrawal would be treated as any other foreign national under UK immigration law (except for family members joining EU citizens in the UK who would retain the 'old' status), unless an agreement reached between the EU and the UK on their future relationship provided otherwise.

UK: a date between 29 March 2017 and the date of the UK's withdrawal

The UK position paper states that it will seek to agree a cut-off date that is no earlier than the date on which the withdrawal process was launched (29 March 2017) and no later than the UK's actual withdrawal from the EU. The cut-off date could thus fall while the UK is still an EU member. The paper states that EU-27 citizens arriving in the UK after that cut-off date would continue to be able to exercise their free movement rights until the UK's actual withdrawal, in accordance with the UK's obligations under the EU Treaties. An early cut-off date would however affect the future status of EU-27 citizens in the UK, since those arriving after that date would be subject to new rules applying to EU citizens, which may or may not be determined by an EU-UK agreement on the future relationship. The early cut-off date seems to seek to limit the expectations of EU citizens who move to

the UK during the two-year negotiation period. In this sense, the paper makes clear that EU citizens who arrive after the cut-off date will be allowed first to remain in the UK for a temporary period, and might then become eligible to settle permanently, depending on conditions under UK law, but 'this group should have no expectation of guaranteed settled status'. However, the paper is also clear that the cut-off date will be subject to negotiation with the EU and it could finally be agreed as being the actual withdrawal date.

Right to (permanent) residence

EU: maintaining current status

Conditions for residence of EU citizens are governed by [Directive 2004/38](#) (Citizenship Directive) and depend on the category of persons involved (e.g. workers or the self-employed or, for economically inactive persons, having sufficient resources and comprehensive sickness insurance). Persons who 'continuously' and 'legally' reside in a Member State for five years⁴ acquire the right to permanent residence: a right to reside which is no longer subject to conditions (e.g. the requirement of 'sufficient resources') and 'full' equal treatment, including access to all relevant benefits granted to nationals.

According to the EU position, EU citizens should retain their current residence rights, including rights which are '**in the process of being obtained**'. This should include the possibility to acquire such rights (e.g. permanent residence) after the withdrawal date under current conditions. This would entail a person who came to the UK *before* the exit date but has not yet completed the five years' period of residence at the date of withdrawal, continuing to be able to do so post-Brexit, under Directive 2004/38's rules, as could a UK national arriving in EU-27 pre-Brexit. This should, moreover, allow a **change in status** (e.g. become a worker after finishing studies, or change from worker to 'economically inactive' person) while accumulating the necessary periods of residence.

UK: a new 'settled status'

Under the UK position, all EU citizens (except Irish) and their family members will, on the UK's exit, need to obtain a new immigration status under UK law in order to be able to continue to reside there, 'regardless of when they arrived'. Those who arrived *before* the cut-off date (see above) and have accrued five years of continuous residence will be able to obtain – subject to certain eligibility criteria – '**settled status**' under UK law. It remains unclear whether and how much the 'eligibility criteria' will differ from the conditions of Directive 2004/38, except that, in line with the directive, these criteria are likely to include the requirement of five years' residence. The paper also states that, no longer being bound by Directive 2004/38, the UK will 'tailor' the **eligibility criteria**, subject to what is agreed with the EU. However, one essential condition will be 'an assessment of conduct and criminality, including not being considered a threat to the UK' (this may fall short of the current standard of protection against expulsion under Directive 2004/38, see box). The paper states that the criterion of 'comprehensive sickness insurance' will no longer be applied, and it seems likely that other conditions – **still to be specified** – may differ too (e.g. definition of 'worker' and/or minimum earning thresholds). In this context it should be noted that the European Commission has long considered the UK's refusal to accept access to the NHS as 'comprehensive sickness insurance' as a breach of EU free movement law, and in 2012 initiated [infringement proceedings](#) on the matter. Regarding 'settled status' itself (indefinite leave to remain pursuant to the Immigration Act 1971), the paper specifies that such status will enable citizens to reside with 'no immigration conditions', to work or study freely, and have access to benefits and public services. Some have, however, pointed to important [differences](#) between UK indefinite leave to remain

and EU permanent residence, such as broader discretion for refusal or high fees. Those with settled status and at least six years' residence may apply for citizenship. With regard to UK nationals in the EU-27, a status 'equivalent to settled status' is expected, which raises questions as to what exactly such an equivalent status will be and how exactly it compares to permanent residence under EU law. Generally, the differences between rights of 'third-country nationals' and EU rights under the Citizenship Directive are significant.

Those who arrived *before* the cut-off date but have not accrued five years' residence at the date of withdrawal, may still continue to do so until the end of a 'grace period' of up to two years – and could then apply for settled status. Those who will *not* have accumulated five years residence by the end of such a grace period, will have to apply for temporary permission to stay (**leave to remain**) before applying for settled status. The criteria under which such permission will be granted are not specified, yet it seems reasonable to expect that such criteria will differ from those of Directive 2004/38. Those arriving *after* the cut-off date 'may become eligible to settle permanently' but, according to the position paper, should have '**no expectation**' of being able to do so.

Obtaining residence documents

Directive 2004/38 has abolished national residence permits and, currently, national residence documents do not confer rights but merely **attest** to them.⁵ Consequently, a person is able to reside in a Member State as long as they fulfil the underlying conditions for residence, irrespective of whether or not they possess a document proving that right. According to Article 25 of Directive 2004/38, the possession of national residence documents 'may under no circumstances be made a precondition for the exercise of a right', as 'entitlement to rights may be attested by any other means of proof'. While Member States *may* require EU citizens resident for longer than three months to register (most do so), they may not ask for more documentation than that specified in the directive (e.g. confirmation of engagement from an employer for workers).

The EU position is that citizens should be able to continue to 'exercise their rights through smooth and simple administrative procedures'. In line with current provisions, national residence documents should have a **declaratory nature**: UK and EU-27 citizens 'should be considered legally resident even if they do not hold a residence document evidencing that right'. National residence documents should be issued 'either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents'.

By stating that all EU citizens (except Irish) will have to apply for 'permission to stay', the UK approach amounts to a system of residence permits. The paper proposes a '**separate legal scheme in UK law**', different from the current system of certifying the exercise of EU free movement rights. Accordingly, 'documents certifying permanent residence will

Protection against expulsion

Under EU law, right of residence entails protection from expulsion from the host Member State. In principle, Member States may **restrict** freedom of movement and residence on grounds of public policy, public security or public health, including taking expulsion measures. However, any such measure needs to comply with the general principle of **proportionality** and must be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Before taking an expulsion measure, Member States must take into account the personal situation of the individual concerned, including the length of their residence and social integration in the host Member State, their age, health and family situation. In general, the longer a person has resided in the territory of a Member State, the stronger the safeguards against expulsion. According to the EU position, protection against expulsion should be maintained.

not be automatically replaced with a grant of settled status', meaning those who have previously applied for permanent residence documents will have to **reapply** (this triggered a harsh reaction from [the3million](#) group, who suggest that 150 000 citizens will have to apply again). The paper says the application process will be 'as streamlined and user-friendly as possible', including use of existing government data for, inter alia, income records (under EU law, no income records may be required as proof of 'worker' status). It also says fees for obtaining new residence documents will be set 'at a reasonable level.'

Family reunification

EU: maintaining rights of current and future family members

Under EU law, family members,⁶ irrespective of their nationality, have the right to join Union citizens exercising their free movement rights under the Citizenship Directive, without the need to fulfil further conditions (Member States may, however, take measures to fight abuse of rights, including marriages of convenience). The EU position seeks to **maintain** these rights, both for UK and EU-27 citizens: family members should be able to continue to join them after the withdrawal date, including **future** family members, and their rights should be protected 'for life'. This entails that, in cases of, for example, divorce or death of the EU citizen, family members retain their right of residence under certain conditions specified in Citizenship Directive, such as being workers or having sufficient resources themselves.

UK: more restrictive conditions

According to the UK position, family members of EU citizens resident in the UK before withdrawal will be entitled to apply for settled status, subject to the same criteria (yet to be specified). It seems clear, however, that this will entail five years' residence, an assessment of conduct and criminality, and a 'genuine relationship' with the EU citizen 'while resident in the UK'. In contrast to the EU position, *future* family members will be subject to rules applicable to non-EU nationals joining British citizens, which are restrictive (or future arrangements applicable to EU citizens arriving after the cut-off date). Children of EU citizens with settled status will also have to apply for settled status, while children of EU citizens with settled status who are born in the UK will be entitled to automatically acquire British citizenship. It remains to be seen how this would translate into 'reciprocal/equivalent' guarantees for UK nationals in the EU-27.

Social security coordination

EU: equal treatment of EU and national workers, irrespective of time spent in UK

The EU position aims at ensuring that EU citizens who have exercised their free movement rights under EU law do not suffer disadvantages in their social security protection post Brexit. EU coordination measures in the field of social security are based on the principle of equal treatment, and ensure that previous periods of work and contributions made in other Member States are taken into account for the entitlement and calculation of social security benefits (aggregation); that citizens pay contributions only in one Member State, and are covered by the system of one Member State at a time ('one country only'); and that cash benefits (e.g. pensions) can be received in the Member State of residence (exportability). Social security benefits coordinated by EU law include sickness benefits, maternity and paternity benefits, invalidity, old-age, survivors' benefits, benefits in respect of accidents at work and occupational deceases, death grants, unemployment benefits and family allowances. Most of these benefits presuppose a work relationship, such that the beneficiaries are or have been workers or job-seekers. According to EU law, EU citizens working in another Member State are treated, as regards

social security benefits, immediately (not just after a period of time spent there) and equally to nationals, since they have an immediate connection with the host society due to their contribution to its economy. The EU position aims to guarantee equal treatment of EU-27 citizens in the UK and of UK nationals in the EU-27 after the UK's withdrawal.

UK: uncertainties regarding equal treatment of EU and UK workers

According to the UK paper, EU citizens arriving before the cut-off date, who do not have five years' residence at the time of the UK's exit but who remain legally in the UK on a pathway to settled status under UK law, will continue to be able to access the same benefits as they can now. According to the paper, under the current rules, EU workers have only 'broadly' equal access to social security, which will be maintained under the new rules. If these citizens later acquire settled status, they will then be able to access benefits 'on the same terms as comparable UK residents'. The paper does not specify what happens to those EU citizens who arrive in the UK after the 'specified date'. It states that 'the UK intends to continue to apply the rules for determining which country is responsible for deciding entitlement and to aggregate periods of relevant insurance, work or residence within the EU made before exit to help meet the entitlement conditions for UK contributory benefits and state pension even where entitlement to these rights may be exercised after exit', and expects reciprocal treatment from the other Member States.

It should also be noted that EU social security coordination extends to frontier and posted workers too. The UK paper however contains no reference to these groups.

As for the exportability of cash benefits, the paper states that those EU citizens and UK nationals who already export UK benefits to the EU will be able to continue to do so, whilst those not exporting UK benefits at the 'specified date' will be treated on the same basis as UK nationals in future, which means that this possibility would depend on agreement with the EU on the future relationship.

Enforceability of rights and role of the Court of Justice

EU: directly applicable rights enforceable by the Commission and the CJEU

According to the EU position, all citizens' rights set out in the withdrawal agreement would be granted as directly enforceable rights. This means that no transposition into national law would be necessary but that citizens (EU-27 citizens in the UK and UK nationals in the EU-27) will be able to invoke these rights directly vis-à-vis national administrations and courts. Furthermore, the Commission would have full powers for monitoring, and the Court of Justice full jurisdiction, over compliance with the protection of citizens' rights under the withdrawal agreement. This means that the Commission would be able to initiate infringement proceedings against the UK or an EU-27 Member State and bring them before the CJEU for non-compliance with the withdrawal agreement. EU-27 citizens in the UK, and UK nationals in the EU-27, would be able to bring cases concerning violation of their rights under the withdrawal agreement before UK and EU-27 courts. National courts could or, under certain circumstances would be obliged to, refer a question for preliminary ruling to the CJEU (analogous to Article 267 TFEU) on the interpretation of the provisions contained in the withdrawal agreement.

UK: enforceability under UK law and no jurisdiction of the CJEU

According to the UK paper, since the rights that would be granted to EU citizens would not be based on EU law but on UK law, they will be enforceable through the UK judicial system, without the possibility or the obligation for UK courts to call on the CJEU, which would have no jurisdiction. The paper states that the commitments made in the

withdrawal agreement will have the status of international law. It should be noted in this context that the UK is a dualist state, meaning that international law is not automatically applicable domestically but needs to be incorporated into national law by legislation. Until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the government or a private individual.⁷ Despite the proposal that the withdrawal agreement is awarded international law status, the paper does not provide for any international instance to oversee compliance with the withdrawal agreement. A withdrawal agreement, if ratified as an international treaty, could confer jurisdiction on the International Court of Justice (ICJ), but this was not mentioned in the UK paper. However, it should be noted that disputes before the ICJ are disputes between states, with individuals having, in general, no possibility to induce such an action through bringing a case before a national court (as is the case with the preliminary reference procedure under EU law). Other options, such as creating a separate court like the EFTA Court, with a UK judge and judges from the CJEU, is not mentioned in the paper either. Commentators have pointed to the possibility of setting up an arbitration body, but this is not included in the UK's proposal. Besides, it should be noted that, as in the case of the ICJ, individuals have no role in such proceedings.

Main references

A. D'Alfonso, E.-M. Poptcheva, J. McEldowney and L. Tilindyte, [The Brexit negotiations: Issues for the first phase](#), EPRS, June 2017

Endnotes

¹ See on this and the rest of the first-phase priorities, A. D'Alfonso, E.-M. Poptcheva, J. McEldowney and L. Tilindyte, [The Brexit negotiations: Issues for the first phase](#), EPRS, June 2017.

² It should be noted that some of the EU citizenship rights are residence based rather than depending on nationality, so that for instance the right to petition the EP and the right to complain to the European Ombudsman are granted to all persons legally residing on EU territory and not only to EU citizens.

³ EU chief negotiator Michel Barnier in a video message to the [meeting of the Committee on Petitions](#) on 21 June 2017.

⁴ A person shall be considered to have been residing *continuously* if she has not been absent from the host Member State for longer than six months a year or, in certain cases (e.g. compulsory military service, pregnancy and childbirth, serious illness), longer. A person shall be considered residing *legally* if she has been complying with the residence conditions of the Directive 2004/38, joined cases [C-424/10 and 425/10](#), [Ziolkowski & Szeja](#), para 46.

⁵ As also confirmed by the Court of Justice: 'issuance of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State', case [C-215/03](#), [Oulane](#), para 18.

⁶ Defined as spouse, registered partner, children under 21 or dependent children, and dependent direct ascendants.

⁷ House of Commons European Scrutiny Committee, [The EU Bill and Parliamentary Sovereignty](#), 2010.

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eprs@ep.europa.eu

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

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