

Update of the study on The impact of Brexit in Relation to the right to petition and on the competences, responsibilities and activities of the Committee on Petitions



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IN-DEPTH ANALYSIS

Abstract

This in-depth analysis, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, provides an update to the prior study on the impact of Brexit on EU-27 and UK citizens. In particular, this analysis considers the citizens' part of the Draft Withdrawal Agreement (DWA) which was agreed between the UK and the EU on 19 March 2018 and endorsed by the European Council on 23 March 2018. It highlights those situations that might remain unprotected by the Draft Withdrawal Agreement. The update is limited to examining the right to reside of EU-27 and UK citizens post Brexit.

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LIST OF ABBREVIATIONS

Brexit citizen	EU-27/UK citizen covered by the DWA as main right holder
Brexit status	Status conferred to Brexit citizens and their family members after the end of the transitional period
CHI	Comprehensive Health Insurance
DWA	Draft Withdrawal Agreement
Economically active	Worker or Self-employed pursuant to EU law
Economically independent	Someone who has sufficient resources and comprehensive health insurance pursuant to EU Law
EU Brexit citizen	EU-27 citizen residing in the UK pursuant to the Draft Withdrawal Agreement
Transition period	Period between Brexit (30 th March 2019) and 31 December 2020
UK Brexit citizen	UK citizen residing in the EU-27 pursuant to the Draft Withdrawal Agreement

EXECUTIVE SUMMARY

In March 2018, the UK and the EU reached agreement on most of the rights to be granted to EU-27 and UK citizens residing in the UK and the EU-27 respectively. This update to the previous study looks in particular at the rights of residence of Brexit citizens, focussing on those instances where there is a loss of rights or a risk of exclusion.

In order to gain Brexit status, EU-27/UK citizens must be lawfully resident in the UK/EU-27 pursuant to EU law before the end of the transition period. Residence pursuant to national law is therefore excluded.

In order to gain a Brexit right of residence the Brexit citizen must be either economically active or economically independent, which means that they need to prove sufficient resources and comprehensive health insurance. The rights of pensioners who benefit from the social security co-ordination regime are maintained. Work-seekers and frontier workers are covered, at least in part, by the Withdrawal Agreement, and so are children of workers/self-employed who have left the host State, provided they are in education. The carers of children in education are also partially protected.

UK Brexit citizens only gain rights in relation to the State where they reside; they will therefore lose the right to move across the EU after the end of the transition period.

After 5 years of lawful residence, occurred before or after the end of transition, Brexit citizens acquire the right to reside permanently in the host State. This status can only be terminated following absences of more than 5 years from the host State, or expulsions on public policy/security grounds.

Brexit citizens maintain most of the same rights as they have now. However, there are important differences. In particular, the right of family reunification for returning citizens has not been included. As mentioned above, British Brexit citizens lose the right to free movement across the EU; expulsion on public policy and security grounds for conduct occurred after the end of the transition period is to be assessed having regard to national and not EU law, and systematic criminality checks are allowed when granting the Brexit residence status.

Some citizens, even if they have resided for a long time in the host State (and provided they have not already obtained permanent residence pursuant to national law), are excluded from Brexit status. This is a particular concern for carers who might have interrupted worker status to take on caring responsibilities without however having, or being able to get, comprehensive health insurance.

Some citizens might be at risk of exclusion because of a narrow interpretation of the definition of 'worker' especially in relation to part-time or atypical work. Work-seekers retain an unclear status, and frontier workers have only a limited right to maintain status in case of termination of employment.

Overall the Draft Withdrawal Agreement is a good start. However, it fails to protect all citizens who have moved in good faith and have been caught in the Brexit developments. More can be done to ensure there will be no loss of rights, that the situation of vulnerable citizens is fully protected, and that UK Brexit citizens continue to enjoy their rights across the territory of the EU, rather than just within the Member State of residence.

1. BACKGROUND AND PRELIMINARY REMARKS

The UK and the EU reached an agreement on the preliminary issues of Brexit (the so-called ‘divorce agreement’) on the 8th December 2017. This took the form of a Joint Report from the European Union and UK negotiators which includes agreement on the rights of EU and UK citizens residing in each other’s territory post-Brexit.¹ On 28 February 2018 the European Commission published a Draft Withdrawal Agreement (DWA) which seeks to translate in binding obligations the agreement reached in the Joint Report.² On the 19th of March 2018 the UK agreed, with some amendments, the text of the Draft Withdrawal Agreement insofar as it concerns citizens’ rights.³ Throughout, and unless otherwise specified, reference is made to this latter version, highlighting where appropriate the changes between the Commission’s February draft and the text agreed in March.

In this update, ‘**Brexit citizens**’ refers to the situation of UK citizens resident in the EU-27 and EU-27 citizens resident in the UK who are covered by the agreement in their own right (i.e. not as family members, who will be identified as such).⁴ ‘**UK Brexit citizens**’, refers to UK citizens covered by the agreement (i.e. residing in EU-27 and meeting the conditions therein). ‘**EU Brexit citizens**’ refers to EU citizens covered by the agreement (i.e. living in the UK and meeting the DWA conditions). ‘**Brexit status**’ refers to the special status that will be conferred upon Brexit citizens by the Withdrawal Agreement.

¹ TF50(2017)19, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

² https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf; and for the colour coded text (areas of agreement) see https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf. When the texts differ I will specify which version included what, referring to the former as the February DWA, and to the latter as the March DWA.

³ The UK had previously indicated that it wanted the withdrawal agreement only to apply to citizens who had moved before Brexit, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/684515/2018-02-28_EU_Citizens_in_the_IP_policy_statement_FINAL.pdf. However it has now accepted that citizens who have moved before the end of the transition period (31-12-2020) will be covered by the Withdrawal Agreement and have all the rights provided for therein.

⁴ It should be noted that Irish citizens in the UK and UK citizens in Ireland will benefit from a special regime, which is expressly allowed by the DWA. I will not consider this special status in this report.

2. WHO IS COVERED BY THE AGREEMENT?

KEY FINDINGS

The following are included in the scope of the DWA:

- Economically active citizens (workers and self-employed);
- Frontier workers;
- Work seekers;
- Economically independent citizens, i.e. citizens with sufficient resources and comprehensive health insurance;
- Existing family members, including family members and partners whose entrance and residence had been facilitated or is facilitated by the host State;
- Future children;
- Existing children of migrant workers/self-employed if in education, as well as their carers.

The Draft Withdrawal Agreement, like the Joint Report before it,⁵ refers to Union citizens who 'exercised their right to reside *in accordance with Union law*'⁶ in the UK/EU, before the end of the transition period.

The definition covers *at least* those who reside in the host State and pursue an economic activity as an employed or self-employed person (**economically active**), and those who reside in the host-State having sufficient resources and comprehensive health insurance so as not to be a burden on the host State welfare system (**economically independent**). This latter category includes pensioners and students. Social security co-ordination will be maintained for Brexit citizens, which in practice means that pensioners who reside in a host State at the end of the transition period will be able to continue living in the host country since their pension and health insurance will continue as pre-Brexit.⁷

However, it should be noted that British/EU-27 citizens who reside in the EU-27/UK are not covered by the agreement when their residence is based on national law (for instance in the case of marriage to a citizen of the host State), unless they had already obtained a right to reside permanently in the host State pursuant to national law.⁸ Furthermore, citizens who are present in the host territory, but who do not fulfil the requirements provided by EU law, will not meet the conditions to benefit from Brexit status.

The DWA covers also **frontier workers** and **existing family members**,⁹ as defined in Directive 2004/38, regardless of whether they are resident in the host State at the end of the transition period. The DWA also extends its protection to 'other family members' (dependent family members, also for health reasons, and unregistered partners), as long as the host State has facilitated their entry and residence (according to national law) or as long as they have applied for facilitated entry before the end of the transition period.¹⁰

⁵ Article 9 DWA, and point 10 JR.

⁶ Article 9 DWA, emphasis added.

⁷ See Title III DWA.

⁸ Article 17(h) DWA.

⁹ See Article 2(2) Directive 2004/38 (Spouse, registered partner, children and dependent ascendants).

¹⁰ Thus dependent other family members and unregistered partners are not protected post-transition, unlike existing 'protected' family members.

The original Commission's draft also covered future spouses, but those are no longer included in the later text.¹¹

Unborn children are covered insofar as:

- (i) both parents are Brexit citizens (economically active or economically independent resident in the host country before the end of the transition period); or
- (ii) one parent is a Brexit citizen and the other is a home national; or
- (iii) the Brexit parent has sole or joint custody of the child.

It is very difficult to interpret this latter category: in particular, the DWA refers back to the definition of 'rights of custody' contained in another piece of Union law,¹² which in turn refers to rights of custody acquired by judgment (usually in case of divorce/separation), by operation of law or by an agreement having legal effect. *De facto* this seems to indicate that, normally and bar exceptional circumstances, as long as the unborn child has at least one Brexit parent, then the child will gain Brexit status. This interpretation renders however the two previous categories redundant, unless those previous two categories are intended to cover children of Brexit parents who do not have a right of custody.

The Draft Withdrawal Agreement (both versions) differs from the Joint Report insofar as it covers also:

- **Work seekers** who have been in the host country longer than three months, provided they are still looking for a job and that they have a genuine chance to find one;¹³
- **Children of workers and self-employed** when the worker/self-employed has left the host State and the child is in education in the host State. The child's primary carer gains a right to reside deriving from the child's right to complete her education. The parent/carer right continues until the child reaches the age of majority and after if the child continues to be in education and needs the presence of the primary carer to pursue and complete her education.¹⁴

¹¹ February Draft Withdrawal Agreement (Article 9(1)(e)(ii)).

¹² Article 2(9) Regulation 2201/2003 (Brussels II Regulation).

¹³ Article 12(1) DWA which refers to Article 14 Directive 2004/38, which in its paragraph 4(b) refers to the continued right to reside of work-seekers.

¹⁴ Art. 22(2) and 23 DWA; this is a codification of the case law of the Court interpreting what is now Article 10 Regulation 492/2011; see in particular Case C-480/08 *Teixeira*, EU:C:2010:83 and Case C-529/11 *Alarape and Tijani* EU:C:2013:290, where the Court also clarified that the carer's residence deriving from the child's educational rights does not count towards the 5 years for permanent residence; see also Case C-413/99 *Baumbast and REU*:C:2002:493. It should be noted that pursuant to the *acquis* the worker must not have necessarily left the host State in order for the child and their carer to gain residence rights because of the fact that the child is in education: thus, for instance the worker might simply have lost their status as an economically active migrant, without however being able to meet the CHI and sufficient resources criteria to gain residence rights as an economically independent citizen (*Teixeira*).

Table 1 : Who is covered by the Draft Withdrawal Agreement

	Who is entitled to Brexit status	Risks and Potential Mitigation
Brexit Citizen residing in UK/EU-27 before the end of the transition period	Workers Self-employed	Risk: administrative mal-practice → strict interpretation of definition of workers/self-employed. Mitigation: explanatory memorandum attached to the DWA on definition of workers/self-employed (including exclusion of hours/income thresholds; express inclusion of atypical workers).
	Economically inactive individuals with sufficient resources and comprehensive health insurance (pensioners continue to benefit from social security co-ordination).	Risk: comprehensive health insurance expensive and potentially impossible for individuals with pre-existing conditions. Mitigation: in UK possibility to pay a health surcharge. In EU: very difficult as legal and political problems in devising preferential treatment for former citizens.
	Work seekers	Partially covered by the DWA, but uncertainty on when and how they need to find a job. Mitigation: clear indication of the maximum evidence required to secure work seekers status.
Brexit family member NB no need for family member to already reside in UK/EU-27	Existing Spouse/Civil Partner Existing Children (under 21 or dependant) Parents	Family member (especially spouse) 'locked' in, after end of transition period cannot acquire autonomous Brexit citizen status; particularly punitive for carers.
	Future children if: - in the UK: both parents are EU-27 nationals who are both economically active / independent; - in EU-27: both parents are UK nationals who are both economically active/independent; or - one parent is a EU-27/UK national who is economically active/independent and the other one is a citizen of the host State; Or - the parent is a EU-27/UK national who is economically active/independent and has sole or joint custody of the child.	The norm is very unclear and dependant on national rules on custody. A simpler rule (all children of one Brexit citizen covered) would ensure legal certainty. This would also include cases in which Brexit parent has lost custody of the child which would ensure that the rules are non-discriminatory.

3. OUTLINE OF BREXIT CITIZENS' RIGHTS

KEY FINDINGS

Brexit citizens and Brexit family members will maintain, for their lifetime, the following rights:

- right to reside, provided they continue to meet the requirements of economic activity/Independence;
- right to work without work permits and to travel in and out of the host country without visas;
- right to equal treatment equivalent to pre-Brexit right;
- right to acquire permanent right to reside; procedurally advantageous conditions for gaining the residence status.

Individuals covered by the agreement will continue to have, mostly, the **same rights** as they currently enjoy, except for UK citizens in the EU-27 who will lose the right to move across the EU and to work in Member States other than that of their work/residence.

Brexit citizens and their family members will continue to have the right of **residence** in the host country under the same conditions provided for in EU law for EU citizens (economic activity or economic independence).¹⁵ They will not need work permits or visas,¹⁶ and they will have a right to equal treatment equivalent to what they enjoy now.¹⁷

Brexit citizens will qualify for the right to reside permanently¹⁸ after 5 years of lawful residence pursuant to the Withdrawal Agreement (i.e. equivalent to the current conditions provided by EU law), whether that residence has occurred before or after the end of the transition period.¹⁹ It should be noted that pursuant to the case law of the Court of Justice, in order to count towards the 5 years threshold, residence in the host State must have always fulfilled the conditions of economic activity or independence provided for in Directive 2004/38.²⁰ For instance a person who has lived in the host country for 10 years, but who has interrupted her residence status (e.g. voluntarily leaving work to care for a child or a relative), would have also interrupted continuous residence and would not be eligible for permanent residence.

All administrative formalities are to be kept to a minimum, and so are the costs involved in applying for the Brexit status.²¹ Before acquiring the right to reside permanently, Brexit citizens will be allowed absences from the host State of up to 6 months a year, and longer in specified cases.²² Beside public policy/security expulsions,²³ considered further below, the right to reside permanently pursuant to the

¹⁵ Article 12 DWA.

¹⁶ Article 13 DWA; Brexit status will be demonstrated through the residence document issued pursuant to DWA.

¹⁷ Articles 11 and 21 DWA.

¹⁸ It should be noted that the latest Draft of the Withdrawal Agreement amended Articles 14 and 15 of the February DWA to substitute, in their text, the expression 'permanent residence' (and EU law concept deriving from Directive 2004/38), with 'right to reside permanently'. It is not clear how significant this change is from a substantive viewpoint, since even should the EU Brexit citizens been given indefinite leave to remain, they would still have a special Brexit status, with all the guarantees that that status entails. As explained below though, expulsion for public policy / security reasons for conduct occurred after the end of the transition period are to be assessed pursuant to national not EU law.

¹⁹ Article 14 DWA; in Case C-378/12 *Onuekwere*, EU:C:2014:13 the Court clarified that periods of imprisonment do not count towards the 5 years in order to gain permanent residence..

²⁰ E.g. Case C-325/09 *Dias*, EU:C:2011:498.

²¹ Article 17 DWA.

²² Art 14(2) DWA, which refers to Art 16(3) and 21 Directive 2004/38.

²³ Article 18 DWA.

Withdrawal Agreement is lost only through absences longer than 5 years,²⁴ a more generous regime than that provided by Directive 2004/38 where permanent residence is lost through absences of 2 years or more.²⁵ The reason for this enhanced protection is clear: the loss of permanent residence in the context of EU citizenship is not final: the EU citizen continues to have a right to re-enter the host country, reside there and restart the clock towards a new right to permanent residence. On the other hand, Brexit rights once lost cannot be regained.²⁶

Rather more complex is the situation of frontier workers since they can only retain status in the country where they work pursuant to the provisions of Article 7 (3) Directive 2004/38, i.e. temporary inability to work due to illness/accident, involuntary unemployment duly recorded provided the worker is registered as a job seeker,²⁷ vocational training related to their job - unless the worker is involuntarily unemployed in which case the training can also be unrelated to the previous employment - and interruption in work due to pregnancy and maternity.²⁸ This means that frontier workers who voluntarily resign from their job, for instance to care for a child or a relative, lose their Brexit status.

UK/EU citizens seeking Brexit status might be required to apply for a **new residence** status within 6 months from the end of the transition period.²⁹ Administrative and evidentiary formalities must be kept to a minimum and authorities must help applicants prove their entitlement if needed, and cannot exercise discretion unless in favour of the applicant.³⁰ The Draft Withdrawal Agreement also provides for procedural rights of appeal against decisions denying residence. Expulsion decisions based on a person not meeting the requirements for residence cannot be executed pending appeal.³¹ Interestingly the original DWA (February 2018) provided a duty to ensure that decisions refusing residence rights had to be proportionate,³² whereas the latest text provides that the decision must **not be disproportionate** hence suggesting a lighter duty on the authorities as well as a potential reversal of the burden of proof.³³ Whether this is a departure from the *acquis* is open to debate. On the one hand, in the *Baumbast* case the Court of Justice clarified that Article 21 TFEU, which guarantees free movement of economically inactive Union citizens, required national authorities to apply the principle of proportionality in deciding whether to refuse a request of a citizen who did not fully meet the requirements of comprehensive health insurance.³⁴ As a result, national authorities then would have a duty to assess the personal circumstances of the claimant. On the other hand, in the *Dano* case,³⁵ the Court seemed to exclude, at least in relation to eligibility to welfare benefits, such a duty for claimants who do not meet the requirements of sufficient resources as provided in Directive 2004/38. The obligation imposed on national authorities not to take disproportionate decisions in relation to the residence status of Brexit citizens then situates itself half way: it is less generous than the *Baumbast* requirements, and more generous than the duties imposed by the *Dano* case law.

²⁴ Article 14(3) DWA; this longer term applies also to those who had obtained their permanent residence under the conditions provided for by Directive 2004/38 before the end of the transition period, see Article 10 DWA.

²⁵ Article 16(4) Directive 2004/38.

²⁶ The returning Brexit citizen can gain of course immigration rights through the operation of national immigration rules, but she will no longer be protected by the special status.

²⁷ The status is retained only for 6 months if the worker has become unemployed in the first year of her employment.

²⁸ This latter category is not included in Article 7(3), but is the outcome of Case C-507/12 *Saint-Prix*, EU:C:2014:2007.

²⁹ The DWA February version had provided for a 2 years deadline and was phrased slightly differently, referring to an application for a residence document rather than a 'residence status' as it is now in the latest DWA. The March version of the DWA (Art 17a) also introduces the possibility for States to allow (but not to impose) applications for this document during the transition period.

³⁰ Art 12 (4) DWA.

³¹ Art 17(3) DWA.

³² Article 17(1)(r) DWA (February version).

³³ Article 17(1)(r) DWA (March Version).

³⁴ Case C-413/99 *Baumbast and R v Secretary of State for Home Department*, EU:C:2002:493.

³⁵ Case C-333/13 *Dano*, EU:C:2014:2358 (which can be juxtaposed to C-140/12 *Brey*, EU:C:2013:565, where the Court adopted a more citizen-friendly interpretation⁰; see also Case C-299/14 *Garcia Nieto*, EU:C:2016:114.

The **Charter of Fundamental Rights** continues to apply to decisions taken by the EU-27 in relation to UK-Brexit citizens.³⁶ However, matters are less straightforward in relation to decisions taken by the UK authorities as to the rights of EU-27 Brexit citizens. Here, the Charter will apply to decisions relating to the right to reside taken before or during the transition period, since the Charter is part of the acquis applicable during the transition.³⁷

However, the extent to which the Charter of Fundamental Rights will apply to decisions taken by the UK after the transition period is far from clear (even leaving aside the fact that the future of the Charter has become a political battleground in the UK).³⁸ Here, the Commission's Draft Withdrawal Agreement - in a part which has yet to be agreed to by the UK Government - provides that the case law of the Court of Justice delivered before the end of the transition period continues to be relevant in interpreting and applying Union law concepts contained in the Withdrawal Agreement (and so in interpreting the procedural safeguards provided for in Directive 2004/38).³⁹ Furthermore, UK courts maintain the right to request a preliminary ruling from the Court of Justice for a period up to 8 years after the end of the transition period. If the Charter does not apply to the requests from the UK courts,⁴⁰ then necessarily and in order to avoid differences in interpretation, the general principles of Union law apply. Leaving aside the above-mentioned political disagreement in the UK about the provisions in the EU Withdrawal Bill concerning the Charter, legal clarity (which in matters to be interpreted first and foremost by administrators and lower courts is paramount) demands a clear reference to, at least, the need to respect the right to private life of the claimants.

The Joint Report and the Draft Withdrawal Agreement extend the rights of Union citizens/UK citizens post Brexit for the life-time of those covered (provided they do not interrupt residence/permanent residence as mentioned above, and provided they continue to meet the economic activity/independence criterion before having gained the right to permanent residence).⁴¹

³⁶ Article 51 Charter provides that the Charter applies to the Union institutions, and the Court has clarified that it applies in whatever capacity those institutions act, even when they act outside the scope of EU law (Case C-8/15 *Ledra Advertising*, EU:C:2016:701), and also when they act

³⁷ See Article 2 DWA that clarifies that Union law for the purposes of the Agreement includes the Charter of Fundamental Rights read in conjunction with Article 122(1) that provides that unless otherwise stated Union law shall apply to the UK during the transition period.

³⁸ See for an example of the controversies relating to the exclusion of the Charter from 'retained legislation' in the European Union Withdrawal Bill, see the House of Lords Select Committee on the Constitution Report on the European Union (withdrawal) Bill, <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf>, page 32 and ff (29 January 2018); on the legal complexities arising from one of the versions of the European Union (withdrawal) Bill in relation to fundamental rights see T. Lock "What Future for the Charter of Fundamental Rights in the UK", *European Futures* <http://www.europeanfutures.ed.ac.uk/article-5607>, October 2017.

³⁹ Article 4(4)DWA.

⁴⁰ EU Withdrawal Bill.

⁴¹ See Art 35 DWA which specifies that the life-long protection is provided as long as the Brexit citizen continues to meet the conditions set out in the DWA.

Table 2 : Rights of Residence for Brexit citizens and their family members

	EU LAW	DWA
Right to residence up to three months and work seekers	Unconditional. No right to equal treatment in welfare provision. Will be terminated at the end of the transitional period.	UK citizens in EU-27 will no longer enjoy right to free movement within EU post end of transitional period (bar agreement in future relationship deal).
	Work-seekers can stay longer if they continue looking for a job. and have genuine chance of finding one.	Unclear status if work-seeking continues after end of transitional period.
Right to medium term residence	Economic activity: employment (including part-time employment) or:	Lost through absences of more than 6 months (1 year in exceptional circumstances).
	Sufficient resources and comprehensive insurance.	Risk of loss of status due to change in circumstances (long term unemployment, loss of resources etc.). Risk of broad interpretation of public policy/security under national law after end of transition period (and no Charter for UK).
Permanent residence	After 5 years of residence according to Union law, residence becomes unconditional (i.e. no longer need to satisfy economic activity/independence requirements).	Loss (permanent) if absent for more than 5 years (NB much more generous than regime under 2004/38).
		Risk of broad interpretation of public policy/security under national law after end of transition period (and no Charter for UK).
Children's right to reside	Children of workers/self-employed in education (even university level) continue to have right to reside as long as in education (but not relevant for permanent residence).	Slightly different from <i>acquis</i> (DWA – parent worker/self-employed must have left host State, no such requirement in <i>acquis</i>).
	Parent/carer derives right to stay as long as child needs it.	It does not count towards permanent residence.
Frontier workers	Maintain workers status in limited circumstances but can always restart work in any Member State.	Once they lose worker's status they also lose protection of DWA in country of work.

4. THE BREXIT CITIZEN: RISK OF EXCLUSION AND LOSS OF RIGHTS

KEY FINDINGS

Some citizens are at risk of exclusion and/or of losing existing rights. In particular:

- Economically active citizens might be excluded if the national authorities give a narrow interpretation of the concept of worker/self-employed applying minimum thresholds of income/hours worked in order to recognise economic activity.
- Economically inactive citizens must demonstrate to have comprehensive health insurance, which might be impossible for some citizens (i.e. because of long term health conditions) or too expensive.
- Frontier workers do not maintain Brexit status in case of voluntary withdrawal from the labour market.
- British citizens lose the right to free movement in the EU.
- Brexit citizens can be deported on public policy and security grounds for conduct occurred after the end of the transitional period pursuant to national law, albeit that the procedural rights contained in the DWA will continue to apply.
- Own citizens are excluded from the scope of the DWA. This means that for British citizens the current right to return to the UK with their family, as provided by EU law, will no longer apply and the UK is free to impose its rules.
- Citizens who reside in the host State pursuant to national law (e.g. because of marriage) do not qualify for Brexit status (unless they had already gained right to reside permanently in the host state under national law).
- Brexit family members cannot change status (i.e. from family member to worker) after the end of the transition agreement.

4.1. Work seekers, low income and part-time workers, and economically inactive citizens

In the previous study, the risks for different categories of Union citizens were identified. In particular the fact that many citizens might have difficulties proving their entitlement to reside based on past evidence was highlighted. This would be particularly the case for workers in atypical employment relationships (e.g. zero-hours contracts etc.), for individuals who had been in and out of work, especially if they had not sought to rely on welfare provision, and for economically inactive citizens who might have been unaware, especially in the United Kingdom, of the need to have comprehensive health insurance.

The Draft Withdrawal Agreement seems to address some of those issues, in particular by requiring evidence only of present rather than past status.

Article 9 DWA, which defines the personal scope of application of the protection provided by the Withdrawal Agreement, refers generally to those Union citizens who exercised their right to reside,

before the end of transition, in accordance with Union law.⁴² It is only in Article 12 DWA, which deals with residence rights, that we find a reference to the more detailed conditions provided for in Directive 2004/38.⁴³ Furthermore, Article 17(k)(i) specifies which supporting documents can be requested by the host State when a Brexit citizen applies for their new residence status. Whereas confirmation of engagement, self-employment, sufficient resources and comprehensive health insurance (as the case might be) can be requested, there is no indication that past status is relevant. In other words, and very much because of how the temporal dimension of the Agreement works out, it is sufficient that the Brexit citizen demonstrates *at the time* at which they apply for Brexit status, that they meet the conditions set out in Directive 2004/38 of economic activity or economic independence.⁴⁴ In this case, however, the clock for the 5 years required to gain permanent residence will only start from the date at which the citizen can demonstrate to meet the relevant conditions (economic activity or economic independence).⁴⁵

This, practically, goes a long way in assuaging the fears regarding the difficulty in gathering evidence for past residence, as well as in minimising the problem arising from the fact that many economically inactive migrant citizens, unless they are pensioners, might be lacking comprehensive health insurance.

Yet, some gaps in protection remain. For instance, it was mentioned above that work seekers are protected, at least in theory, by the Draft Withdrawal Agreement. Currently work seekers have a peculiar residence status which derives directly from Article 45 TFEU and is codified in Article 14 Directive 2004/38. Work seekers can travel to look for employment and benefit from 3 months of unconditional residence in the host State (available to everyone). They can then stay beyond that time if they continue to look for a job and have a genuine chance of being engaged. Whereas Article 12 of the DWA includes by reference also work seekers in the category of those who have residence rights, Article 17 on residence documents is silent in regard to work seekers. It remains to be seen then how (and if) work seekers will be able to prove their entitlement to Brexit status. For instance, in the case of a UK/EU-27 national arriving in the EU-27/UK a few months before the end of the transitional period to look for work, finding employment only a few months after the end of the transitional period. Will the authorities be willing to recognise Brexit status even though the work seeker was not yet employed by the end of the transition period? And what evidence will be required to demonstrate that they were indeed actively seeking employment before the end of the transition? And what if they find employment 7 months after the end of the transition deal? Will their status be recognised?

Furthermore, even though both workers and self-employed are protected by the DWA, care should be taken to avoid a restrictive interpretation of existing EU rights and to clarify to administrative authorities that neither hours nor income presumptions are acceptable, but that the fact that a person is pursuing a genuine economic activity must be assessed on its own merit. This is particularly the case for those in atypical work contracts (including zero-hours), part-time work (most of whom are women)

⁴² This is arguably a broader category than those who are covered by the black letter of Directive 2004/38. In particular, it leaves the door open to the possibility that individuals who do not meet the black letter of the Directive can still be lawfully residing in accordance with Union Law by virtue of the Court's interpretation in Case C-413/99 *Baumbast and R*, EU:C:2002:493. However, it could be also argued (and indeed it has been argued) that the ruling in Case C-333/13 *Dano*, EU:C:2014:2358, has overruled the ruling in *Baumbast*. In my opinion however *Dano* only applies to the right to equal treatment for welfare provision and not to the right to reside; see E Spaventa

⁴³ Article 12 also refers to the Treaty free movement provisions, hence leaving the door open to a *Baumbast* application of the requirement, i.e. one that takes into due account the personal circumstances of the individual seeking to establish residence rights.

⁴⁴ With the exception of those applying for status in the 6 months after the end of the transition period who might be asked how they qualified before transition.

⁴⁵ The Court has been clear in this respect that only periods of residence pursuant to Directive 2004/38 are relevant for the purposes of permanent residence, despite no such qualification being present in Article 16 Directive 2004/38 which simply refers to citizens who have resided legally in the host State, see e.g. C-424/10 *Ziolkowski and others*, EU:C:2011:866.

and low income self-employed. In this respect, however, the DWA should also be praised for limiting the discretion of the decision maker, which can only be exercised in favour of the citizen.

Finally, economically inactive citizens are still at risk of being excluded by the Draft Withdrawal Agreement, although admittedly this has more to do with the limited rights granted by EU law than with the Draft Withdrawal Agreement itself. In particular, residence for economically inactive individuals is still conditional upon having sufficient resources and comprehensive health insurance, even if just perspective: this means that at least some economically inactive individuals are potentially unable to gain Brexit status (no matter how long they had been living in the host country). Of those, a particular worry is carers, who tend to be women.⁴⁶

More generally then it should be remembered that the incorporation of the regime provided by Directive 2004/38 is not as straightforward as it might seem, and it will present its own interpretative challenges: the regime for Union citizens is characterised by a high degree of fluidity so that denial of residence is a temporary measure and, bar public policy/security expulsions, the citizen can always return to the host country and establish a new title for residence.⁴⁷ This however is not possible in the Brexit context: the UK/EU-27 citizen who fails to establish Brexit residence will no longer be eligible for Brexit status, with all the consequences that that entails.

4.2. Frontier workers and UK citizens in the EU-27

It was mentioned above that frontier workers are protected under the Draft Withdrawal Agreement. A frontier worker is someone who is resident in one State and works in a different state. Whereas, as was mentioned above, the Draft Withdrawal Agreement focuses predominantly on ensuring residence rights and it also ensures that Brexit status is maintained despite absences from the State of residence (up to 6 months a year, and longer in exceptional circumstances, for medium term residence, and up to 5 years when the Brexit citizen has acquired the right to reside permanently). However, in the case of a frontier worker matters are different: here, the right to work in the host State is retained in narrower circumstances (unemployment, pregnancy/maternity, illness, inability to work, vocational training). In all other circumstances, and especially when the frontier worker decides to take a career break for whatever reason, they will no longer be protected as Brexit citizens in the State where they were previously employed. As a result, should they wish to return to employment in that State after their career break, they would be subjected to normal immigration rules no matter how long they had previously worked in that State. For instance the case of an EU-27 citizen who resides in France and commutes to London for work, and has done so for 10 years. If this frontier worker decides to take a career break for instance to care for a young child beyond maternity leave, he/she will no longer have the right to work in the UK upon returning to work (after the end of the transition period).

The consequences of this gap are even harsher for UK Brexit citizens since they are not conferred any right to free movement post-Brexit. This means that a British frontier worker who, for instance, resides in Belgium but works in the Netherlands, and who then is employed in Germany after the end of

⁴⁶ The UK Government, in its November technical note, has undertaken to adopt a 'pragmatic approach' and not to check if 'health insurance has been held'

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657694/TECHNICAL_NOTE_CITIZENS_RIGHTS_-_ADMINISTRATIVE_PROCEDURES_IN_THE_UK.pdf, point 10 emphasis added. However, it should be noted that the past tense might indicate what is anyway the case in the DWA which is that having lacked insurance in the past is not determinative of the Brexit right to reside as long as insurance is possessed at the time of request of residence. Possibly, and if the technical note has not been superseded by the DWA, this could be important for EU-27 citizens seeking permanent residence. The Spanish Government also undertook to protect UK citizens resident in Spain, although it has not provided further details.

⁴⁷ A stricter regime applies for expulsions justified on public policy and security reasons.

transition, might lose all Brexit rights, since his/her worker status will no longer count towards either his/her residence in Belgium, or his/her new employment in Germany. More generally, the lack of a right to free movement for UK Brexit citizens significantly restricts existing rights, limiting both their work and life choices.

4.3. Expulsions and deportations

Member States (and the UK) can refuse or terminate residence based on public policy and security grounds. However, and as detailed below, the public policy/security derogations are interpreted in a narrow way. The DWA departs from this regime in two ways.

First, when a citizen applies for Brexit status it is open to the host State to carry out systematic criminality checks. This is at present not possible under EU law for EU citizens.

Secondly, the Draft Withdrawal Agreement introduces a double public policy regime. In particular conduct occurred up to the end of the transitional period is to be assessed in relation to Directive 2004/38. This basically means that in order for the State to expel a citizen on public policy or security grounds, the relevant authority has to demonstrate that the conduct of the individual concerned poses a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Since the threat to public policy/security must be present, previous criminal convictions cannot in themselves justify expulsion, and expulsion orders cannot be issued as a 'penalty' or as an automatic consequence of a custodial penalty. Furthermore, the longer the citizen has resided in the host State the more difficult it is to deport them; after 5 years, deportation can only occur if it is justified by 'serious' grounds of public policy or security, and after 10 years only if it is justified on 'imperative grounds' of public security. The bar is therefore very high, especially since, as mentioned above, criminal convictions alone cannot lead to automatic deportation.

On the other hand, after the end of the transitional period the Brexit citizen's conduct will be assessed having regard to national law, albeit subject to the procedural safeguards contained in Directive 2004/38. This basically means that it will be much easier for States to deport Brexit citizens because of unwanted conduct (e.g. potentially even minor criminal offences), that expulsion can be used as a penalty, that there is no enhanced protection based on length of residence (safe for fundamental rights considerations applicable as a matter of EU law in the EU-27 or domestic law in the UK), and that the principle of proportionality applies only insofar as it is provided for in national law. Furthermore, leaving the determination of the conduct to national law also means leaving the individual at the mercy of regulatory changes. It is open to debate whether the Charter would apply in such circumstances. Whereas an argument could be made for the application of the Charter to the EU-27 even in cases in which the national authorities are relying on national law, the same cannot be said in relation to the UK as it, most likely, will no longer be bound by the Charter. This new public policy regime therefore constitutes a significant loss of rights and will make deportations on public policy grounds much easier.

4.4. Those who are 'legally excluded' – own citizens and citizens residing pursuant to domestic law

Two categories of citizens are legally excluded by the Draft Withdrawal Agreement: own citizens and UK/EU-27 citizens whose residence status derives from national rather than European Union law.⁴⁸

The Draft Withdrawal Agreement, much as Directive 2004/38, applies only to 'foreigners' so that own citizens cannot benefit from Brexit status. In the context of the EU, own citizens are however protected by the Treaty free movement provisions upon returning to their own Member State after having exercised their Treaty rights. In particular, in EU law, returning citizens have a right to family reunification equivalent to that of EU migrants so that their spouses gain a right to reside in the home State equivalent to that of spouses of EU migrants.⁴⁹

As mentioned above, the Draft Withdrawal Agreement does not apply to own nationals and this might give rise to consequences for migrant citizens caught up in Brexit. In particular, whereas there is some scope to argue that returning EU-27 citizens are protected under EU law, since at the time they had left they were exercising EU rights, that is not true for returning UK citizens. Hence, British citizens returning to the UK might be subjected to a tighter family reunification regime, for instance one that is dependent upon a minimum earning threshold. As a result, British citizens who for whatever reason do not qualify for Brexit status in the EU-27, might find themselves in a catch 22 situation: unable to remain where they are, and unable to secure residency rights for their family in the UK (which, in the case of Third Country Nationals (TCNs), might also mean the termination of the family's residence rights in the EU altogether).

Furthermore, EU law also protects children who are citizen of the State of residence and who have never moved. Here, the Court has found that the Member State cannot deport the third country national parent of an own citizen child, if to do so would mean that the child has to leave the EU territory.⁵⁰ This protection will no longer be available in the UK, whereas arguably there will be increased protection for British parents of EU-27 children, since the deportation of British parents could force, post-Brexit, the EU-27 child to leave the territory of the EU to relocate to the UK.

The second category of individuals excluded by the DWA are those who reside in the host State by virtue of national rather than EU law, for instance because they are married to a citizen of the host State and are not economically active or independent. Since the status of those individuals is granted by national law, they are not eligible for Brexit status, unless they had already obtained - prior to the end of the transitional period - permanent right to reside pursuant to national law. This might have important consequences, for instance in case of divorce or change in circumstances, and potentially in relation to the right to work and the right not be discriminated against, especially in relation to social and tax advantages. Furthermore, there is a risk that women will be particularly at a disadvantage since caring responsibilities might have prevented them from being able to take on an economic activity and therefore gain autonomous protection.

⁴⁸ Article 17(1)(h) clarifies that those who already have a valid permanent residence document pursuant to Directive 2004/38 or a 'valid domestic immigration document conferring a permanent right to reside in the host State' have the right to exchange that document for a new (Brexit) residence document.

⁴⁹ See recently, Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v B*, EU:C:2014:135; and Case C-457/12 *S v Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v G* EU:C:2014:136.

⁵⁰ Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124; Case C-304/14 *CS*, EU:C:2016:674; Case C-165/14 *Marin*, EU:C:2016:675.

It should also be noted that the new Draft Withdrawal Agreement has amended Article 16 to state that EU-27/UK citizens who at the end of the transitional period obtain a right to reside as a 'family member' of a Brexit citizen will not be able to change their status. In practical terms this means that even when a carer is protected as a family member, they will not be able to regain an autonomous right of residence once they can return to the workforce no longer having caring responsibilities.

Table 3 : Categories of citizens excluded from DWA

	Rights pre-Brexit	Brexit risks
Returning migrants	Right to return to home State after having exercised free movement rights and be treated like a EU migrant in particular in relation to: - Right to bring family; - Right to non-discrimination, including having work experience undertaken abroad be taken into account.	Risk for UK nationals to be 'locked in' the host country if they do not meet income threshold for family reunification. Risk for UK nationals who cannot get residence rights in host country of being separated from family Risk for family members of losing rights to reside in EU and UK.
EU-27/UK citizens residing in host State by virtue of national law	At present fluid situation – EU citizen can change status, e.g. by taking up employment and gain autonomous EU rights to reside.	Not covered by the DWA, so that after transition period ended will bear risk of being under national immigration rules. Might be particularly punitive for carers.
Brexit citizens and deportations	EU citizens can be deported on public policy/security grounds under strict conditions. After 5 and 10 years EU citizens benefits from enhanced protection from deportation so that it is very difficult to deport them. Charter, and especially right to private and family life applies.	After end of transition period, national law applies to conduct of Brexit citizen. Much easier to deport (minor criminal convictions might be sufficient). No Charter for EU-27 citizens in UK, open to debate whether Charter applies to UK citizens in EU-27.

5. CONCLUSIONS AND POLICY RECOMMENDATIONS

The Draft Withdrawal Agreement seeks to provide significant protection for Brexit citizens, and in parts it succeeds in so doing. However, it does not go far enough and many citizens will find themselves vulnerable after the end of the transition period. This is in part due to the limited rights of residence conferred by Union law to economically inactive Union citizens, and in part to policy choices. Yet, it should be remembered that, unlike the case of Union citizens in the EU, denial of Brexit status and expulsions will have permanent consequences.

Furthermore, it should be noted that women might be particularly at risk of exclusion from the Brexit deal. Again this is partially the result of the limits of EU citizenship, but in this case it would have permanent consequences at odds with the EU's obligation to ensure that its actions do not discriminate on grounds of sex.

The following recommendations could therefore be considered:

- Long term unpaid care work should be recognised and protected.
- The new sentence in Article 16 not allowing Brexit family members change of status post-Brexit (particularly punitive for carers) should be deleted.
- Ensure that frontier workers can retain their status in the same way as residents (allowing for 6 months gaps before 5 years, and 5 years gaps afterwards).
- Ensure that Brexit citizens maintain rights to free movement in the EU.
- Maintain the existing public policy/security regime for all conduct, also if occurred after the end of the transition.
- Ensure protection for citizens returning to UK equivalent to what is currently available, especially in relation to family reunification.

ANNEX

Loss of rights DWA Brexit

DWA	Acquis before Brexit	Difference in rights post-Brexit
Brexit UK citizens	Right to move across the EU.	Total loss of right to free movement (bar for frontier worker limited to countries where they already work/are self-employed).
	Protected upon return in the home country after having exercised free movement rights: esp. right not to be penalised for moving in relation to seniority; right to bring back family members as if EU migrant citizen.	No right in DWA, entirely dependent on British law; potential for separation of families if income thresholds imposed on economically inactive / low earners UK citizens who cannot gain residence in host country and cannot bring back family in UK. Potential loss of residence rights in host State also of TCN family members who would find themselves in a limbo.
Economically Inactive Citizens	Acquis unclear:	Decision to deny residence has to be based also on facts and circumstances and not be disproportionate . Possibly a narrower interpretation of the <i>Baumbast</i> case law but broader than <i>Dano</i> case law.
	No right to equal treatment in relation to welfare benefits if no sufficient resources (only one case on comprehensive health insurance – <i>Baumbast</i>).	
	Conflicting case law on whether citizen who fails to meet sufficient resources but does not seek welfare can stay in the host country, One line of case law (<i>Baumbast</i>) suggests decision to deny residence upon not meeting conditions has to be proportionate. Another strand (<i>Dano</i>) suggests conditions must be met to gain rights in EU law.	
Children rights and their parents/carers	TCN right to residence in child's home country if denial of residence would mean child has to leave EU (e.g. TCN Parent of a UK citizen in UK gains a right to reside in UK from EU law if deporting the parent would mean UK child has, practically, to leave territory of EU).	UK children/carers: right lost UK parents of EU27 children: new right to benefit from Ruiz Zambrano case law as returning to UK would mean leaving EU.
Carers without comprehensive health insurance	No rights unless deriving from child/spouse or national immigration law.	No rights unless deriving from child/spouse.
	Possibility to change status (e.g. from carer to economically active).	No possibility to change status – locked in derivative status. NB carers covered by national immigration rules are not conferred Brexit status.

DWA	Acquis before Brexit	Difference in rights post-Brexit
Brexit citizens applying for Brexit status	No systematic criminality check.	Systematic criminality check allowed.
Brexit citizens subject to expulsion decisions on public policy/public security grounds	<p>Currently strict conditions to claim public policy/security limitations to right to reside and right to free movement:</p> <ul style="list-style-type: none"> - Conduct must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. - Previous criminal conduct is not enough and general preventative measures cannot serve as a justification; expulsion cannot be issued as a penalty for unwanted behaviour or as an automatic consequence of a custodial sentence. - Enhanced protection after 5 years (serious grounds of public policy/security) and after 10 years (only imperative grounds of public security). 	<p>Conduct occurred before Brexit – same guarantees apply, no loss of rights beside above-mentioned systematic criminality check.</p> <p>Considerable loss of rights for conduct occurred after Brexit is to be assessed according to national law, this means:</p> <ul style="list-style-type: none"> - Much looser conditions for expulsion, potentially also for relatively minor infringements or as a consequence of a custodial sentence. - Not clear whether enhanced protection for long term residence applies, but most likely not as conduct evaluated according to national not EU law. - Not clear to what extent Charter provisions will apply to Brexit EU citizens. - Not clear if personal circumstances (and proportionality) are to be taken into account as a matter of withdrawal agreement or only as a matter of national law. - Differing protection between UK and each of the EU 27 Member States (although stronger protection for UK Brexit citizens).

NOTES

This in-depth analysis, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, provides an update to the prior study on the impact of Brexit on EU-27 and UK citizens. In particular, this analysis considers the citizens' part of the Draft Withdrawal Agreement (DWA) which was agreed between the UK and the EU on 19 March 2018 and endorsed by the European Council on 23 March 2018. It highlights those situations that might remain unprotected by the Draft Withdrawal Agreement. The update is limited to examining the right to reside of EU-27 and UK citizens post Brexit.

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