

## **Progress on the UK's exit from, and future relationship with, the European Union? The Draft Withdrawal Agreement and Citizens' Rights**

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The [Draft Withdrawal Agreement](#) between the United Kingdom (UK) and the European Union (EU) was published on Wednesday 14<sup>th</sup> November after almost two years of lengthy negotiations. The withdrawal agreement is the legal text managing the UK's exit from the EU and it is accompanied by a short political declaration outlining the framework for a future UK-EU relationship, which will be negotiated after the UK's exit on 29 March 2019. The withdrawal agreement covers issues relating to the UK and EU's separation, including providing for a transition/implementation period until December 2020 (with a possible extension), and addresses the three priority areas outlined at the start of the negotiations: avoiding a hard border in Northern Ireland; agreeing the so-called 'divorce' bill between the UK and the EU; and protecting UK and EU citizens' rights.

There is ongoing intense political debate about, and scrutiny of, the content and viability of the withdrawal agreement (a good summary is available [here](#) and a commentary [here](#)) – which runs to almost 600 pages – and it is not clear, at this stage, whether the withdrawal agreement will pass a vote in the House of Commons. Most of the focus has hitherto been on the withdrawal agreement's proposed solution to the first priority area, namely avoiding a hard border in Northern Ireland. This blog post will focus on the withdrawal agreement's provisions on citizens' rights.

The provisions on citizens' rights are principally contained in Part Two of the withdrawal agreement and remain largely unchanged from the [initial draft](#) of the agreement published in March 2018. The provisions contained in Part Two are directly effective which means that the provisions should prevail over incompatible national legislation and that UK courts have to take into account future jurisprudence of the Court of Justice of the EU (CJEU) on the interpretation of EU citizenship. The rights contained in the withdrawal agreement will also be

incorporated into UK law through domestic legislation. If the UK Parliament decides in the future to repeal the legislation giving effect to EU citizens' rights in UK law, this repeal would violate the withdrawal agreement, and would trigger consequences set out in the agreement itself (contained in Part Six, Title III on Dispute Settlement). The underlying aim of Part Two is preservation of existing rights as far as that is possible post-Brexit.

The provisions apply to EU citizens and their family members resident in the UK, and UK nationals and their family members resident in another Member State, in accordance with EU law before the end of the transition period (article 10). The requirements for lawful residence prior to the end of the transition period and the scope of who is included as a family member derive from the [Citizens' Rights Directive](#). Thus, EU citizens in the UK and UK citizens in the EU (and their respective family members) will be granted permanent residence after five years' lawful residence. Permanent residence, once achieved, will only be lost after absence from the host State for a period exceeding five consecutive years (article 15(3)). Article 12 of the withdrawal agreement provides a general prohibition on discrimination on grounds of nationality and article 23 contains an equal treatment provision for citizens and their family members. EU citizens and their family members resident in the UK before the end of the transition period will therefore be able to continue to reside in the UK and will retain their rights as EU citizens (for example, in respect of preferential visa arrangements for third country national family members who may join the EU citizen in the UK post-Brexit). They may be required to register (and the UK has made plans for a new [EU Settlement Scheme](#) to come into force in March 2019 – an overview of the Scheme can be found [here](#)) but the withdrawal agreement places restrictions on the scope of the registration scheme. Brexit cannot be used as an opportunity to introduce stricter immigration controls on EU citizens already resident in the UK than those permitted under EU law. The purpose of any registration scheme can therefore only be to verify that an applicant has the right to reside and any registration procedure must be smooth, transparent and simple (article 18). Although the withdrawal agreement seeks to preserve the status quo for citizens, it does not guarantee onward movement rights (the right to freely move to other EU member states) for UK citizens currently living in the EU (although specific provisions are made for frontier workers).

Ensuring uniform interpretation of the citizens' rights provisions is provided for in Part Six of the withdrawal agreement. The CJEU can continue to receive references from UK courts or tribunals concerning the interpretation of Part Two of the withdrawal agreement in cases that

have commenced within eight years from the end of the transition period (article 158). So if a case were to begin at first instance in the UK in December 2028 concerning an EU citizen's rights, the CJEU could be asked to provide a preliminary ruling in this case, with which the UK will be required to comply, at any point during the appeals process which could last well into the 2030s. The monitoring of the implementation and application of citizens' rights will be undertaken by the European Commission in respect of UK citizens in the EU and, for EU citizens in the UK, by a newly-created independent authority in the UK (article 159). That authority should have extensive powers to conduct inquiries, receive complaints from EU citizens and their family members, and to bring legal action in order to ensure appropriate enforcement of EU citizens' rights. Both the Commission and the authority will report annually to a newly-established specialised Joint Committee on citizens' rights (article 165) which has the power to make legally-binding decisions in relation to the implementation of Part Two.

Overall, the articles on citizens' rights in the withdrawal agreement largely replicate existing provisions in EU law but are complemented by robust and novel enforcement mechanisms. EU citizens and their family members who are resident in the UK before the end of the transition period will therefore be in a privileged position compared to other non-nationals bearing in mind that the rights which they retain under the terms of the withdrawal agreement will be life-long rights. The legacy of EU citizenship rights will therefore be felt in the UK for decades to come. UK citizens living in other Member States will not be as fortunate; although their rights will be preserved they will, inevitably and due to the very nature of EU citizenship being contingent on Member State nationality, lose their right to free movement.

Post-Brexit, UK citizens will no longer be EU citizens and free movement of persons to and from the UK will end. The political declaration annexed to the withdrawal agreement contains some indication that a future trade agreement will provide for labour mobility but this is likely to be confined to short-term stays and temporary movement for business purposes. Of course, the provisions safeguarding citizens' rights in the withdrawal agreement will only take effect if the draft agreement enters into force. In the case of a 'no deal' Brexit EU citizens in the UK and UK citizens across the EU Member States may yet find themselves in legal limbo.